ANALYSIS OF MEDIATION AND ALTERNATIVE DISPUTE RESOLUTION (ADR) IN THE DIFFERENT COUNTRIES WITH BAR ASSOCIATIONS BELONGING TO THE EUROPEAN BARS FEDERATION (FBE)

One of the main functions of a Lawyer is to intervene, manage and facilitate the resolution of disputes that arise on a daily basis in our society. In this sense, the lawyer plays a fundamental role as a guarantor of peace and coexistence, ensuring respect for and maintenance of social order and the Rule of Law.

Historically, this role has been understood as being limited to the jurisdictional resolution of disputes, which mainly translates into the use of judicial and hetero-compositional mechanisms for the resolution of these controversies.

Notwithstanding this, experience and the development of the profession have shown that the lawyer's actions are and must be comprehensive in terms of strategy and how to approach the conflict, considering all possible solutions and which are the best ways to achieve them. This exercise involves analysing alternative ways of resolving disputes and assessing what is most suitable for the client in each case.

All this, not only from the point of view of the claim and the economic or legal interest involved in the matter, but also assessing those other qualitative, emotional, relational, affective elements, among others, that surround or underlie the dispute. In many cases, this analysis will lead the lawyer to see mediation as the most comprehensive and harmonious way of dealing with the conflict and the possibility of reaching satisfactory agreements for all parties involved.

Along these lines, the European Union, by means of Directive 2008/52/EC, required the Member States to harmonize their legislation and to include mediation as an alternative dispute resolution method.

This has been taken up by the vast majority of States, whose Bar Associations are members of the European Bars Federation, hereinafter indistinctly referred to as "FBE". This harmonisation between the regulation of mediation and domestic legislation has led to the creation of regulatory frameworks for mediation in each State, which, although they have many points of convergence, also have particularities specific to each legislation.

In order to obtain a general and comprehensive overview of mediation and other alternative dispute resolution methods in the countries whose Bar Associations are members of the FBE, the Barcelona Bar Association ("ICAB") prepared a questionnaire addressed to these members. The purpose of the questionnaire was to compile information and statistics on mediation in order to analyse, in general terms, the state of mediation in Europe, its effectiveness, its main characteristics and areas of application, and at the same time to be able to identify the weakest areas and those in which improvement actions should be taken.

The questionnaire is structured in three sections, and was addressed to the different Bar Associations members of the FBE. It is noted that, from the questionnaires sent out, replies were received from Bars in Belgium, Spain, Italy, Germany, Poland, the Netherlands, Switzerland, Czech Republic, Turkey, Romania, Austria, Bulgaria and Portugal. The Bars that replied to the questionnaire are listed below:

- **Bar Association of Frankfurt, Germany.**
- **Bar Association of Hamm, Germany.**
- **Bar Association Nuremberg, Germany.**
- **Bar Association of Sachsen, Germany.**
- **Bar Association of Vienna, Austria.**
- **Bar Association of Antwerp, Belgium.**

- Bar Association of Flemish Brussels, Belgium.
- Ordre des Barreaux Francophons et Germanophons, Belgium.
- High Council of the Bulgarian Bar.
- Bar Association of Barcelona, Spain.
- Bar Association of Girona, Spain.
- Bar Association of the Balearic Islands, Spain.
- Bar Association of Lleida, Spain.
- Bar Association of Madrid, Spain.
- Bar Association of Manresa, Spain.
- Bar Association of Malaga, Spain.
- Bar Association of Mataró, Spain.
- Bar Association of Murcia, Spain.
- Bar Association of Tenerife, Spain.
- Bar Association of Tortosa, Spain.
- Bar Association of Florence, Italy.
- Bar Association of Bologna, Italy.
- Bar Association of Verona, Italy.
- Bar Association of the Order of Hertogenbosh, The Netherlands.
- Bar Association of Gdansk, Poland.
- Bar Association of Kraków, Poland.
- Bar Association of Warsaw, Poland.
- Polish Bar Council, Poland.

- **Bar Council of Portugal.**
- **Bar Association of the Czech Republic.**
- **Bar Association of Cluj, Romania.**
- **Lausanne Bar Association, Switzerland.**
- **Istanbul Bar Association, Turkey.**

Consequently, it should be noted that the data collected and presented in this report does not contain information on all the FBE members consulted, but is limited to the Bar Associations mentioned above.

QUESTIONNAIRE

The first section of the questionnaire addresses, in general terms, the existence of state regulation of ADR in their legislation beyond the figure of mediation.

It should be noted that all of the respondents stated the existence of regulation of alternative dispute resolution methods in their legislation, indicating in each case which ADRs are regulated. The information compiled in this section strongly demonstrates that ADR is institutionalised in the legislations of the members surveyed, and that

they are therefore legally regulated mechanisms and provided for as formalised means of conflict resolution.

The questionnaire also asks about the existence of a specific regulation on mediation implemented as of 2018 due to the Directive, to which approximately 60% of the consulted members answered in the affirmative.

Lastly, we asked about the existence of specific regulations in relation to the training that mediators must have in order to be able to work as mediators. More than 80% of those surveyed agreed that the legislation of their country, state or region requires professional training for mediators, such as the completion of training courses with a minimum number of teaching hours.

The second section of the questionnaire deals with ADR from the perspective of citizens and vulnerable groups. It should be noted that more than 80% of those surveyed stated that they had services to inform citizens free of charge about ADR methods, also indicating the type of entities responsible for providing this information (public administrations, Bar Associations, public or private institutions).

This confirms the intention of the countries, states or regions consulted to disseminate and bring ADR methods closer to citizens and to facilitate their access to them. This is seen as a positive effort that tends to increase the population's knowledge and use of ADR. Similarly, the majority of respondents stated that their legislation provides for the use of mediation for vulnerable groups, particularly consumers and minors.

In this same section, a question was asked about the obligatory nature of the use of some ADR mechanism before initiating legal proceedings, to which approximately 60% of respondents answered in the negative, specifically indicating in which cases a first instance of some type of ADR is necessary before being able to resort to legal proceedings.

It is important to emphasise that, in the case of those who responded in the affirmative, this requirement is only limited to certain cases, procedures or matters, and is not a rule of general application.

It should also be noted that almost 70% of respondents indicated that failure to use the ADR channels provided does not entail the imposition of costs or fees in legal proceedings. It can be seen from this that most legal systems have not wished to attach detrimental

consequences to the non-use of alternative dispute resolution procedures, even in those cases where their use is provided for as a requirement of accessibility to judicial proceedings.

Therefore, we can infer that the underlying intention of the legislator is not to make the use of ADR methods more difficult or expensive, but to encourage users to try alternative routes without being burdened by the fact that these processes are frustrated or do not end up being carried out.

As a result, it would be interesting to assess whether ADR is actually favoured in terms of its effectiveness, as the absence of burdensome consequences could lead users to perceive ADR procedures as superfluous and not very institutionalised, turning them into a mere formality.

On the other hand, it is interesting to note that more than 85% of respondents indicated that, in their legislation, the initiation of an ADR procedure entails the interruption of time limits or calculations, whether in relation to limitation periods, their expiry or the duration of legal proceedings. It can thus be seen that, for the most part, ADR methods generate legal and factual consequences in the jurisdictional sphere, other than financial consequences.

Subsequently, and in relation to this same section of the questionnaire, it should be noted that, of all the respondents, more than 75% stated that there is no information or no knowledge of any information that the use of ADR would lead to a significant reduction in the levels of litigation in their States. On the other hand, of those respondents who acknowledged that they had such statistical data, they acknowledged that ADR had not led to a substantial decrease in litigation. Finally, only 5% of respondents stated that, based on statistical data in their states, ADR has reported a significant decrease in litigation.

The percentages above are particularly vital, as they point to the importance of and the need to further promote alternative dispute resolution (ADR) methods. This, in turn, presents a strong challenge, which consists of developing and implementing actions that tend to strengthen ADR as effective methods for conflict resolution, so that they can complement and even replace, when possible and more appropriate, traditional jurisdictional methods.

Finally, in the third section of the questionnaire, the involvement of the Bar Associations in the application and management of ADR mechanisms was discussed. In this regard, it should be noted that more than 60% of the respondents stated that their respective Bar

Associations have a Mediation Centre or specialised department that manages mediation processes, indicating in each case the other ADRs that these Associations also manage.

Ultimately, the questionnaire concluded by asking about the requirements that mediators must meet in order to register as mediators, to which most of the respondents answered by agreeing that their legislations foresee education and training requirements for mediators, which vary from one legislation to another.

CONCLUSIONS

By virtue of the responses obtained, and to conclude this study, it is argued that alternative dispute resolution methods are enshrined and regulated in all the legal systems of the FBE members consulted. Nevertheless, their effectiveness and applicability differ from one legislation to another, whether in terms of the types of ADR regulated, the matters for which they are expected, the types of procedures in which they are implemented or even their use and effectiveness in general terms.

It should be noted that, in addition to mediation, the ADRs that are contained and regulated in most of the legal systems consulted are

arbitration and conciliation, institutions that seem to be more consolidated in Europe and in the world in general, as alternative means of conflict resolution.

As far as mediation itself is concerned, there is an almost unanimous intention in the legal systems to specialise and professionalise this institution, which is manifested, for example, in the fact that the mediator must be a person educated and trained as such.

In this respect, a large majority of respondents acknowledged that their legislation provides for the mediator to receive official training to enable him or her to act. This shows the need for this person to have specialised skills, which denotes a desire to professionalise mediation and provide it with prepared and qualified personnel for the proper conduct of the processes.

In relation to mediation dissemination mechanisms, a large majority of respondents acknowledged the existence of free channels used for the dissemination of ADR mechanisms as existing and available channels for the resolution of disputes.

Although the existence of such channels varies from one state to another, there is a perceived intention to bring ADR methods closer

to citizens and to present them as plausible ways of resolving disputes beyond traditional jurisdictional methods.

Continuing in the area of dissemination and empowerment of alternative dispute resolution methods, it can be observed that some legal systems have required the use of certain ADR processes as a prior and compulsory step that must be taken before going to court. It is true, however, that it should be borne in mind that in no legislation has this been imposed as a generally applicable admissibility requirement for possible subsequent legal proceedings. Rather, it is only foreseen for specific procedures and matters, with civil and labour law standing out as the areas in which there was most agreement on the part of the respondents.

With regard to the consequences of not using ARD methods, it can be seen that a large majority of the legal systems consulted have opted not to endow this fact with pernicious consequences of a pecuniary nature, in terms of the non-application of costs or fees that could be applied in the face of a judicial procedure. Notwithstanding this, the legislators of the various States in question did endow ADR methods with legal and factual consequences in relation to the interruption of limitation periods and time limits, the expiry of limitation periods and the duration of legal proceedings.

The aforementioned proves that, for the most part, the legislator wanted to establish a consequential link between the use of ADR methods and the judicial process, since the implementation of the former has an impact on the latter, at least in terms of deadlines and time calculations.

With regard to the effectiveness of alternative dispute resolution methods, it can be concluded that there is a general lack of knowledge about the effectiveness of ADR in terms of reducing litigation, due to the fact that, in general, there is no evidence to prove it. Notwithstanding this, some respondents acknowledged that they did have such information, which indicates that only a very small minority of respondents claim that the use of ADR methods has led to a significant decrease in litigation in their jurisdictions.

Finally, it appears that the Bar Associations are quite important actors in the implementation and development of ADR mechanisms, since the vast majority of respondents stated that they have a specialised Mediation Centre or at least a department in charge of handling mediations.

In this sense, it can be appreciated that mediation has been gaining ground, hand in hand with the Bar Associations, which have set out

to be the driving force behind alternative methods of conflict resolution, such as mediation.

From the results obtained, it can be observed that most of the mediation matters dealt with in these centres or units of the Bar Associations are related to civil law and family law. From this we can conclude that there is a more widespread practice of mediation in these areas, in which there would be a greater applicability for these ADR methods.

In conclusion, we would like to thank all the Bar Associations that participated in the questionnaire, as their collaboration was essential and very valuable in the elaboration of this study. With the information gathered, analysed and summarised, this rewarding research on mediation and the use of alternative dispute resolution (ADR) in Europe has been produced.