Chapter 7
Alternative Dispute Resolution in Civil and Commercial Matters in the EU

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ABSTRACT

This chapter seeks to analyze the implementation and integration of alternative means of dispute resolution in the European Union. Thus, from an initial approach to the various alternative means of dispute resolution, with particular emphasis on negotiation, conciliation, mediation and arbitration, will be held a comparative law analysis of the different legislative solutions adopted by the major EU Member States, allowing to determine the degree of implementation and development of alternative means of dispute resolution in those Member States. Finally, there will be an analysis of the main legislative instruments adopted by the European institutions with a view to creating and developing alternative means of dispute resolution in Europe, indicating, in the end, some solutions and recommendations that are adequate having a view to effective implementation of alternative justice in the European Union.

INTRODUCTION

The alternative dispute resolution has assumed a role increasingly important and relevant in the different European legal systems. In fact, courts have proved that are unable to resolve, within a reasonable time, disputes that are brought to their attention. Indeed, the increase in litigation seen over the past few years, particularly in the consumer credit, associated with complex procedural laws, completely blocked the normal functioning of the courts.

Moreover, in certain areas, particularly with regard to consumer relationships, the traditional judicial system proved inadequate to solve practical needs related to such disputes. Sufficient to note that, often the court fee that the parties must support to submit their disputes to the court greatly exceeds the actual value of the dispute at issue.

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It is also noted that, over the years, legal professionals, including lawyers, have always been very resistant to the possibility of disputes being resolved by other alternative means to judicial proceedings. It is exactly in this context that the various European legal systems have been seeking to implement simple and low cost dispute resolution mechanisms – particularly arbitration, conciliation, mediation and justice of peace – which are an alternative, rapid and effective way compared to the common justice, looking, at the same time, draw the attention of legal professionals to the advantages of these means.

However, the uncoordinated adoption by European legal systems of different alternative means of dispute resolution eventually led to the creation of inequalities in protection of nationals, which creates imbalances in the normal functioning of the economic and social systems. As a matter of fact, citizens of several European States do not enjoy equal access to alternative means of dispute resolution.

On the other hand, the successive European integration policies implemented over the past years led to the creation of a single European market, characterized by freedom and ease of movement of people, goods and services, which enhanced the appearance of cross-border disputes, particularly in consumer relationships, work, e-commerce and supply of telecommunications services, energy and transport. Paradoxically, the creation of the single European market and the gradual emergence of cross-border disputes has not been accompanied by the development and implementation, in the European context, of alternative means of dispute resolution by comparison to traditional systems of civil and commercial justice.

This situation eventually lead to conflicts and imbalances between different Member States. In fact, in States where there are higher levels of protection and development in the field of alternative dispute resolution, citizens and businesses feel more confident and likely to establish relations with other Member States of the European Union, reality that does not occur in those States where these mechanisms are not yet installed or where such implementation has revealed to be still very low.

Moreover, the economic crisis that has been felt in recent years by most Member States of the European Union, associated with the crisis of traditional justice systems, reinforced the need to implement mechanisms to stimulate the economy, with particular emphasis on creation and development of alternative means of dispute resolution.

Aware of this reality – that affects the normal functioning of the single market and free competition as a central pillar of the European Union – the European institutions have been implementing several instruments, particularly recommendations and directives, which aim to generalize the adoption of alternative means of dispute resolution in the European market and, in parallel, to harmonize the functioning of these mechanisms in the different Member States of the European Union in order to encourage both the on-trade and e-commerce between individuals, or between consumers and businesses, whether commercial relations between different operators of the European economic market.

In this context, it is particularly relevant the adoption of two recommendations (in 1998 and 2001) by the European Commission, which aimed to define common principles for the implementation of efficient authorities for alternative dispute resolution.

In the field of mediation, the Directive 2008/52/EC of the European Parliament and of the Council, of 21 May 2008, defines certain common rules, to be implemented by the different Member States, in order to facilitate access to alternative resolution disputes and promote the amicable settlement of disputes by encouraging the use of mediation and ensuring a balanced relationship between mediation and judicial proceedings.
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