

Sectoral mediation and digitalization

Aura Esther Vilalta

Senior Lecturer in Civil Law (UOC)

Published in: September 2017

Mediation has permeated wide sectors of human activity and within each one it has developed very distinctive traits that are specific, so that for some fields, we can nowadays talk about specialities. The articles of this monograph are a selection, attempting to offer an early approach to some of them -consumer, business, employment, and sports-. Yet, the phenomena embraces family, parental child abduction, corporations, insurance, industrial and intellectual property, domain names, healthcare, environment, transport, retail, tourism, and so forth. Furthermore, the digitalization of the processes has had such a significant real impact that the Spanish legislator believed it necessary to regulate some specific aspects and even equip the system with a simplified procedure for small claims. At European level, also an electronic platform has been set to boost online dispute resolution for consumer crossborder conflicts.

This special issue of *Revista de Internet Derecho y Política* and the comprising articles are a good illustration of this new situation. It hopes to give an account of the different approaches and methodologies in which mediation is designed to address conflicts and hopes to provide a valuable source of information for academics, students and practitioners.

The monograph begins with some important reflections from Fernando Esteban de la Rosa on the fact that mediation is a legal institution that requires different regulation in each of the settings in which it takes place in order to satisfy the interested parties. It also states that, as regards consumers, it is necessary to fill the existing legal gap in Spain, either by repealing section d) of art. 2 of the Law on Mediation in Civil and Commercial Matters (LMACM) and ensuring, the most significant effect, that the enforceable effect is extended to consumer mediation agreements, or by specifically regulating consumer mediation process during the planned transposition of the Consumer ADR Directive, given that in this field, as duly noted, other specific measures are required that provide it with the necessary effectiveness, such as, for example, the establishment of incentives for voluntary adherence to procedures before consumer ADR entities, among others.

Part II is an approach to business mediation from a conflict management perspective, a consolidated field at United States of America and an area that is currently undergoing significant development because traditional business conflict management models are no longer efficient. The study highlights how, within the context of large organisations, the

resolution of conflicts and the risks associated with business are highly integrated in the company's strategic planning process as its efficient management has a positive impact on the income statement. Mediation saves considerable time and money and it is the method that is preferred and which has become increasingly used in commercial, workplace, environmental, intellectual and industrial property, real estate and construction disputes. As a result, the conflict management dynamic in large listed North American companies has undergone a paradigm shift and the majority of Fortune 1000 companies show a clear preference for business mediation over arbitration due to the loss of control involved in arbitration and litigation.

Part III of the aforementioned monograph focuses on consumer mediation and arbitration, providing a comparative overview of the Portuguese and Spanish models which, addressing conflict from very different perspectives –private/public– and reconciling two opposing methods, achieve unparalleled results in the context of the European Union. Portugal and Spain have implemented an arbitration system for consumer conflicts complemented by the possibility of resolution through mediation. Thus there is a med-arb model in both countries where the main difference lies in the public nature of the Spanish system and the private nature of the arbitration centres in Portugal. However, both models are successful as it is possible to conduct the mediation according to the arbitration method in the event that the parties do not reach an agreement. The Portuguese model surpasses the Spanish model insofar as, in the essential public service sector, obligatory arbitration for the service provider has been introduced. In this way, the employer focuses its efforts on reaching agreements so that the conflict does not escalate and a third party would not end up issuing a binding and enforceable decision. It provides consumers with an effective protection system. The article gives an account of the excessively restrictive and opposing interpretation of this solution by the Spanish Constitutional Court in Ruling no. 174/95 of 23 November concerning land transport. Furthermore, the article examines the online developments seen in this field due to the need to provide tools that reduce the costs of the processes for small claims, particularly when they are cross-border in nature. The ADR Directive and the implementation of the ODR Platform seek to give a fresh boost to these new manifestations.

Part IV provides an approach to mediation in the workplace, an arena where this activity is developed with a different scope from traditional mediation, since part of the mediator's mission is to suggest formal solutions to the parties. As such, for example, the Interconfederal Mediation and Arbitration Service (Servicio Interconfederal de Mediación y Arbitraje, SIMA) –who is a joint state public sector body operating under the auspices of the Ministry of Employment and Social Security and embracing the most representative Business Organisations and Trade Unions– set out in its mediation procedure rules that in the event of mediations held outside SIMA, a legal counsel of such body should attend the meeting via the videoconference. In these cases, the party requesting the procedure (mixed committee) must ensure that in the location proposed for the mediation session there is internet access, a webcam, speakers, a microphone, an email account and printer connected to a computer. Furthermore, the regulatory legislation on workplace mediation introduces an interesting feature that encourages session attendance by ordering the party who fails to attend the mediation to pay the costs of the proceeding whether the final decision of a judge concurs with the applicant's claim. Other features that make it very attractive are that the agreement reached may only be challenged within 30 working days following the date it is adopted and that the resulting agreement is immediately enforceable.

Part V is devoted to sport mediation. Through mediation and coaching, the world of sport has also find very convenient tools for addressing conflicts that arise not only from the sporting relationships, but also from the civil, commercial and employment transactions involved in this field. Accordingly, the guidelines and principles of this speciality have been clearly set out and the *pro-competition* principle ensures that speed in all processes prevails over other interests.

The monograph concludes analyzing a general electronic mediation approach pioneered in Spain through Law 5/2012 on Civil and Commercial Mediation (LMCM) and implemented afterwards through Royal Decree 980/2013 of 13 December which regulates a simplified procedure for small claims. Yet, this initiative, surprisingly, is not including consumers, a situation that can only be explained as a mistake in the transposition of the European Directive 2008/52/CE on Civil and Commercial Mediation. Finally, another point raised by the Law is the scope of online processes.

Recommended citation

VILALTA, Aura Esther (2017). "Presentation". In: "Sectoral mediation and digitalization". *IDP. Revista de Internet, Derecho y Política*. No. 25, pp. 1-3. UOC [Accessed: dd/mm/yy]
<<http://dx.doi.org/10.7238/idp.v0i25.3094>>



The texts published in this journal, unless otherwise indicated, are subject to a Creative Commons Attribution-NoDerivativeWorks 3.0 Spain licence. They may be copied, distributed and broadcast provided that the author, the journal and the institution that publishes them (IDP Revista de Internet, Derecho y Política; UOC) are cited. Derivative works are not permitted. The full licence can be consulted on <http://creativecommons.org/licenses/by-nd/3.0/es/deed.en>.

About the author

Aura Esther Vilalta
avilalta@uoc.edu

Adjunct Lecturer in Civil Law (UOC)
<<http://www.uoc.edu/webs/avilalta/en/curriculum/index.html>>

UOC
Av. Carl Friedrich Gauss, 5
08860 Castelldefels