

Towards a Mandatory Frame of ADR in Divorce Cases: Key Elements from a Comparative Perspective for Belgium

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Abstract : The Belgian legal system is slowly evolving to mandatory mediation to promote ADR. One of the reasons for this evolution is the lack of use of alternative methods in relation to their possible benefits. Especially in divorce cases, ADR can play a beneficial role in resolving disputes, since the emotional component is very much present. When children are involved, a solution provided by the parent may be more adapted to the child's best interest than a court order. In the first part, the lack of use of voluntary ADR and the evolution toward mandatory ADR in Belgium will be indicated by sources of legislation, jurisprudence and social-scientific sources, with special attention to divorce cases. One of the reasons is lack of knowledge on ADR, despite the continuing efforts of the Belgian legislator to promote ADR. One of the last acts of ADR-promotion, was the implementation of an Act in 2018 which gives the judge the possibility to refer parties to mediation if at least one party wants to during the judicial procedure. This referral is subject to some conditions. The parties will be sent to a private mediator, recognized by the Federal Mediation Commission, to try to resolve their conflict. This means that at least one party can be mandated to try mediation (indicated as "semi-mandatory mediation"). The main goal is to establish the factors and elements that Belgium has to take into account in their further development of mandatory ADR, with consideration of the human rights perspective and the EU perspective. Furthermore it is also essential to detect some dangerous pitfalls other systems have encountered with their process design. Therefore, the second part, the comparative component, will discuss the existing framework in California, USA to establish the necessary elements, possible pitfalls and considerations the Belgian legislator can take into account when further developing the framework of mandatory ADR. The contrasting and functional method will be used to create key elements and possible pitfalls, to help Belgium improve its existing framework. The existing mandatory system in California has been in place since 1981 and is still up and running, and can thus provide valuable lessons and considerations for the Belgian system. Thirdly, the key elements from a human rights perspective and from a European Union perspective (e.g. the right to access to a judge, the right to privacy) will be discussed too, since the basic human rights and European legislation and jurisprudence play a significant part in Belgian legislation as well. The main sources for this part will be the international and European treaties, legislation, jurisprudence and soft law. In the last and concluding part, the paper will list the most important elements of a mandatory ADR-system design with special attention to the dangers of these elements (e.g. to include or exclude domestic violence cases in the mandatory ADR-framework and the consequences thereof), and with special attention for the necessary the international and European rights, prohibitions and guidelines.

Keywords : Belgium, divorce, framework, mandatory ADR

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