As one door opens... another closes

Erich Suter sets out the European view of enforced mediation

Advocate General Kokott gave her opinion in *Rosalba Alassini (Environment and consumers:* C-317/08–C-320/08) dealing with Italy's implementation of the Universal Service Directive (a directive on universal service and users' rights relating to electronic communications networks, Directive 2002/22/EC).

For those with an obscure fascination in the dealings of the Italian electronic communications networks this article is likely to come as something of a disappointment. It is concerned purely with the legality of a procedural requirement adopted in Italy restricting the rights of end-users to bring claims against service providers to court. Italy in implementing the Universal Service Directive—which requires an out-of-court settlement procedure—decided to introduce a mandatory requirement that any end-user wishing to bring a claim against a service provider is obliged first to go through an out-of-court disputes process to try to achieve a settlement. If they do not they are barred from presenting a claim to the court. The end-users in these cases were complaining that the courts' refusal to hear their cases, because they had not gone through the out-of-court disputes process, amounted to a breach of Art 6(1) of the European Convention on Human Rights (the Convention) which provides for the right to a fair trial.

The disputes procedure

Italian national law provides that the *autorite per le garanzie nelle comunicazioni* (the authority) is responsible for setting up procedures to deal with disputes between service providers and end-users. Under the authority's procedures there is a time limit of 30 days for the out-of-court settlement procedure to be gone through once it has been started. Once that period has passed the parties may bring court proceedings even if the settlement procedure hasn't been finished. EC Commission Recommendation 2001/310/EC applies to "third party procedures…which facilitate the resolution of consumer disputes by bringing the parties together and assisting them, for example by making informal suggestions on settlement options, in reaching a solution by common consent" (see Recital 9 of the Convention). In other words the recommendation deals with facilitative procedures such as mediation. Under Italian law the bodies which provide the out-of-court disputes procedures between service providers and end-users are required to observe the principles of transparency, fairness and effectiveness referred to in Commission Recommendation 2001/310/EC. The question then for the European Court of Justice (ECJ) was whether or not having this compulsory mediation-type procedure amounted to a breach of Art 6.

Conflicting laws

In the English courts the argument that mediation and other such procedures, if made compulsory, would breach Art 6 of the Convention, is an argument that found favour with Dyson LJ, giving the judgment of the court in *Halsey v Milton Keynes General NHS Trust* ([2004] 1 WLR 3002, CA, [2004] 4 All ER 920). While holding that the courts should encourage alternative dispute resolution (ADR) robustly, Dyson LJ nonetheless held that compulsory court-ordered ADR would breach the right to fair trial as it would amount to an unacceptable constraint on the right of access to the court.

In *Alassini* Advocate General Kokott noted that: "The right to effective judicial protection is not granted unconditionally. ... As the [ECJ] has held in connection with compliance with procedural rules, restrictions must actually correspond to objectives in the general interest and must not be disproportionate with regard to the objective pursued in a way that infringes upon the very substance of the rights guaranteed." This was a reference particularly to the decision in *Dokter v Minister van Landbouw, Natuur en Voedselkwaliteit* ([2006] ECR I-5431) where it was held that "fundamental rights…do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not constitute … a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed". (see para [75])

In *Alassini* the Italian government argued that the aim of the mandatory procedure was to force would-be litigants to attempt to settle the dispute in a way which was quicker and less expensive before turning to the court system. It pointed out that a quicker and less expensive method of settlement was in the interests of the parties and also lightened the burden on the court system. The Italian government also argued that "an agreement which the parties have reached out-of-court is frequently more likely to bring about the long-term resolution of the dispute than a judicial decision with which the parties are dissatisfied". It pointed to the note to this effect in Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters. Although the Directive had no direct application to the *Alassini* case itself; its reference to the greater likelihood of a satisfactory long-term conclusion being

reached by an out-of-court settlement than by an unpopular judicial decision was argued by the Italian government, and considered by the Advocate General, to be relevant to the legality of the out-of-court settlement procedures which the Italian government had adopted. In light of these considerations, Advocate General Kokott concluded that the Italian compulsory out-of-court dispute resolution provisions were pursuing "legitimate objectives in the general interest [ie: a quicker, less expensive method of dispute settlement which also lightened the burden on the court system and was likely to produce a more satisfactory long term solution to the dispute]." (*Alassini* – para [45])

She went on to opine that "introducing a mandatory requirement that an attempt be made to settle the dispute out-of-court is suitable for the attainment of those objectives". In so deciding the Advocate General accepted the Italian government's argument that "an out-of-court dispute resolution procedure that is merely optional is not as efficient as a mandatory one that must be conducted before any legal action can be brought." (para [47])

In addition to these considerations there were also other features of the Italian procedure which the Advocate General thought important; largely concerning the relative brevity of the delay and the protection of consumers' rights surrounding the process. The delay under the Italian provisions is only for 30 days. The limitation period (in terms of the time in which a claim might ultimately be brought to the courts) ceases to run during that 30-day period. And at the end of that 30-day period the claimant can bring a claim before the courts regardless of whether or not the out-of-court settlement stage had been finished. In the circumstances Advocate General Kokott concluded that the "mandatory dispute resolution procedure without which judicial proceedings may not be brought does not constitute a disproportionate infringement upon the right to effective judicial protection. Provisions such as [these] … constitute a minor infringement upon the right to enforcement by the courts that is outweighed by the opportunity to end the dispute quickly and inexpensively."

The "efficient conduct of proceedings in the interests of the sound administration of justice" which the Advocate General considered that the Italian procedure also supported had already been approved as a proper objective to pursue in an earlier European decision (*Gambazzi v Daimler Chrysler Canada Inc* ([2009] ECR I-0000, at para [32]).

It is interesting to note that Lightman J, in a speech given at SJ Berwin on 28 June 2007: "*Mediation: An Approximation to Justice*" in dealing with the suggestion in *Halsey* that compulsory mediation would be a breach of Art 6 noted at that: "[T]he court [in *Halsey*] appears to have been unfamiliar with the mediation process and to have confused an order for mediation with an order for arbitration or some other order which places a permanent stay on proceedings. An order for mediation does not interfere with the right to a trial: at most it merely imposes a short delay to afford an opportunity for settlement and indeed the order for mediation may not even do that, for the order for mediation may require or allow the parties to proceed with preparation for trial."

> **"Mediation does not interfere with the right to a fair trial but simply imposes a short delay on the trial process"**

Sir Anthony Clarke MR, on 8 May 2008, in a speech given to the Civil Mediation Council ((2008) 74 Arbitration 419–423) also considered the suggestion in *Halsey* that compulsory mediation would be in breach of Art 6 of the Convention. He referred with approval to Lightman J's criticisms of this part of the *Halsey* decision that "mediation… does not interfere with the right to fair trial but simply imposes a short delay on the trial process" and went on to note that a number of other jurisdictions have compulsory mediation processes; including some European countries. And now it seems the ECJ too, or at least the Advocate General in *Alassini*, is of the view that compulsory mediation is not, *per se,* a breach of Art 6.

As one door opens …

One of the matters that persuaded Advocate General Kokott that the Italian procedure pursued "legitimate objectives in the general interest" and to go on to conclude that "introducing a mandatory requirement that an attempt be made to settle the dispute out-of-court is suitable for the attainment of those objectives"; was her acceptance of the Italian government's view that "an out-of-court dispute resolution procedure that is merely optional is not as efficient as a mandatory one that must be conducted before any legal action can be brought." (see *Alassini* at paras [45]–[47])

It is perhaps ironic that, at a time when the Advocate General of the ECJ appears to consider that compulsory mediation is to be preferred as more effective than optional mediation, the Jackson Report on costs has decided that mediation should not be made compulsory.

Sir Rupert Jackson's assessment, in terms of judicial encouragement of mediation, is that: "In spite of the considerable benefits which mediation brings in appropriate cases, I do not believe that parties should ever be compelled to mediate." Although his report goes on to say that in appropriate cases courts should: "(a)…encourage mediation and point out its considerable benefits; (b)…direct the parties to meet and/or to discuss mediation; (c)… require an explanation from the party which declines to mediate, such explanation not to be revealed to the court until the conclusion of the case; [ie: an Ungley Order] and (d) … penalise in costs parties which have unreasonably refused to mediate." (Sir Rupert Jackson – *Review of Civil Litigation Costs – Final Report* pp 361–362).

It is perhaps unfortunate that the opportunity afforded by the Jackson report on costs, at least to put in a trial of compulsory mediation has not been taken. Although a number of the submissions on mediation referred to in the report were against compulsory mediation in a number of areas; as the German government pointed out, and the Advocate General accepted, in *Alassini* "experience has shown that even in situations in which one or even both parties refuse to attempt to settle the dispute, the chances are that, during the [mediation] procedure itself, opportunities for achieving a resolution of the problem that the parties did not recognise at the outset become apparent." (para [47]). This perhaps is one of the reasons that in those jurisdictions where compulsory mediation has been adopted, as far as I am aware, none have abandoned it. NLJ

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