WHY ARE BUSINESSES IN THE EU RELUCTANT TO USE MEDIATION?*

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Commercial life has always been in need of a unique approach that could respond positively to the requirements of rapidity and efficiency which characterize business transactions. The classic legal framework and its procedures were not in many cases adequate for this specific sector when it came to resolving the different types of disputes that may arise, especially transnational ones. Mediation as an Alternative Dispute Resolution (ADR) method was considered by many experts as a promising alternative to traditional justice for the mentioned conflicts, based on its flexibility and other features. However, numbers and recent reports in the EU have shown that disputants are in most cases unwilling to use this mechanism, which thus only represents less than 1% of the total number of civil and commercial dispute resolutions (De Palo et al. 2014). These statistics could stimulate scholars and experts to dive deep into potential explanations that might help understand this "paradoxical" situation of a rarely used tool even when seen by many as a future for justice. Therefore, this study will try to answer the question of whether this issue is rooted in the mediation itself and its nature or whether there are other external factors that go beyond mediation. Empirical and normative methods will be used to test and find the most adequate answers to our question based on previous studies and secondary source data.

Keywords
Mediation, EU, Businesses, Low rate, Factors

1. Introduction

The changeable nature of business transactions, even at a local level, has shown that classic and traditional legal structures are in many times unable to react positively and effectively to the requirements of commercial life. Accordingly, one could imagine the scenario in the era of globalization and cross-border commercial contracts, which obviously will be more complicated and harder to deal with. The potential risk of conflicts and misunderstandings is going to be higher than at a domestic level.

The EU, for instance, could be considered as an example, especially when it comes to the free movement principle that took commercial transactions to the next level by removing most of the tariff and non-tariff barriers and so increasing remarkably the number of contracts. Nevertheless, this growth probably will never be immune from the possibility of future tensions related to different misunderstandings and disputes.

Legal reactions and classic judicial solutions have been highly criticized because of their inadequacy to deal with the unique characteristics that might distinguish commercial life. Statistics, as we will analyze in detail later, proved that traditional lengthy procedures are threatening the key factors of any successful business such as

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time, money, and reputation by the lack of innovation and outdated approaches that do not fit the business context.

Mediation as an alternative dispute settlement tool was seen by many experts as the future of justice in the next decades, or the tool that will "bridge the gap between differences" (Sgubini 2006). However, when assessing numbers, it will be obvious that we are facing a "paradoxical" phenomenon of a rarely used mechanism representing only 1% of the total civil and commercial disputes in the EU (De Palo et al. 2014), even with the positive views presented by many scholars concerning its potential features.

This study will attempt to determine possible factors of this controversial situation by posing the question of whether this low rate is caused by issues rooted in the mediation itself and its nature, or whether it has other external explanations that go beyond mediation.

Empirical and analytical methods, like examination of statistics, surveys, interviews, from different secondary sources which were collected by other scholars and organizations, and previous literature, even from anthropology, will be used to determine the strongest and most reasonable factors of this reluctant position from businesses towards mediation. More than that, a normative approach based on the development of the legal framework related to mediation in recent years will be analyzed to see if it might be linked to this "paradoxical" reality.

Through this research, we will also adopt a comparative method of different experiences and characteristics related to different countries from various cultural and legal systems that will be analyzed to strengthen our quantitative method.

As mentioned in the title, we will try to find concrete explanations for the low percentage of businesses using mediation in the EU, by adopting the hypothesis that this situation finds its causes in other external factors of legal and non-legal nature and not in issues originated from the concept of mediation itself.

2. Methods

Our method, as previously mentioned, will be a multidisciplinary and empirical research approach based on the available secondary data and literature in different fields, even from anthropology. We will try to test the adequacy of our hypothesis with the statistics and available literature by analyzing different elements. Doctrinal normative methods are imposed by the fact of the increasing tendencies in regulating mediation at both international and national levels Simultaneously, a comparative approach of different countries' experiences will be used, especially when examining cultural diversity and the different regulatory instruments adopted, to see if it might strengthen our opinion.

3. The framework of the study

The tendency towards trying to find explanations for the low rate of mediation among businesses in the EU trying to settle their disputes is not a new idea in legal studies (Cairns 2005). This continues in recent studies: even those focusing more on the comparison of different experiences in mediation, especially between the US, the UK, Asia, and the EU, still mention at least in an indirect form the reasons behind these low numbers (McFadden 2015). We suppose that the main reason why this debate has not

ended is the developing legal and non-legal background. Many legal texts, studies, and reports containing statistics and new data are available now for scholars in the field to interpret and analyze (Alexander 2008; Alexander 2017; ADR Center 2010; De Palo et al. 2011; De Palo et al. 2014).

3.1. Theoretical context

Our research will essentially focus on the available data to confirm our opinion which consists of linking this low rate among businesses to other external factors – outside of mediation itself – of legal and non-legal nature like the cultural structures and traditions towards alternative methods of dispute settlement. Hence, we will test and categorize the different explanations in the previous two divisions in addition to examining potential other factors or theories that might support our hypothesis from an anthropological perspective (Hofstede & Usunier 2003).

While tackling this issue and considering that mediation is a mechanism for dispute settlement that is not governed by the same logic of courts and judicial procedures, and is oriented more towards problem-solving logic rather than applying the rules of law, this method is like a window for the law to interact with other disciplines like psychology, anthropology, and economy. However, it seems that many jurists, mainly in the EU, are still advocating that doctrine should focus only on legal texts or court decisions while ignoring other disciplines which are not purely legal (Samuel 2009). Such a position, we believe, might have an impact on the will to accept or to enter into mediation because of its heterogenic nature.

Thus, our contribution is simply a direct question: why is the practice of mediation among businesses in the EU characterized by its low rate? The answer will be based on both quantitative and qualitative methods when testing the different possible explanations. We will build on the previously mentioned studies to create more explanatory and updated research that is focusing specifically on the possible reasons in one categorized study.

3.2. Legal context

Since our study is oriented more towards the EU level, it seems vital to mention the general instrument – which is *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters and the different implementations by member states* – when trying to test whether the different legal approaches of member states to harmonize their legislations could be linked to their rates of using mediation or not. The increasing institutionalization of mediation – unlike mediation itself – is an emergent phenomenon (Steffek 2012; Nolan-Haley 2012) that poses the question of adequacy with the will to expand the use of this tool among businesses in member states. On a secondary basis, we might consider looking at other examples of regulations outside the Union like the US, Singapore, and China to assess the differences and identify the factors that are rooted in law and might lead to high rates of mediation in the mentioned countries and low rates inside the EU. Also, the recent Singapore Convention on mediation could be relevant in this context, taking into account that it aims to promote mediation worldwide

by setting up a mechanism to enforce the mediated settlement agreements, and that even though the EU participated in the negotiation process of this treaty, its position is still characterized by a reluctance to sign it (Brink 2021), and thus, considering the commercial scope of this international legal text, this might be one of the legal reasons behind the low rate of businesses using mediation.

3.3. Social context

The social framework that could be relevant to our research when trying to find the explanation for this "paradoxical situation" of the low rate of mediation among businesses in the EU, might find its origins in some historical and cultural tendencies and divergences between different groups in the world and the way they settle their disputes. Some studies proved that, in the EU, several circumstances, even those of a non-legal nature, like the lack of awareness, language diversity, and historical orientations of litigious and non-litigious civilizations can be behind this low rate (ADR Center 2010; Peters 2011; Ecorys & ADR Center 2012; Gonzalez 2021). In other words, statistics and studies have shown that many times, EU companies have many misconceptions linked to the nature or the functioning of mediation (ADR Center 2010) and Western culture in general, with the exception of some countries, tends to be more oriented towards litigation than mediation. Hofstede's cultural dimensions might support these allegations (Uncertainty Avoidance Index/ Power Distance Index). To strengthen the multidisciplinary direction of our study while explaining the low rates of mediation in the EU, we might think about the fact that legal studies are becoming more and more isolated and professional market-oriented rather than interacting with and being positioned alongside other sciences, which was described by Douglas Vick: "Lawyers are bad communicators because they tend to be pushy know-it-alls" (Vick 2004 cited by Samuel 2009). Thus, mediation as a voluntary ADR tool and mediators who might belong to other non-legal disciplines like psychology or economy could be seen as a reflection, an outcome, or even a victim of an excluding approach that dominated the legal education and the professional environment that is focusing more on litigation which is the benchmark for justice while considering mediation as a fragile and unofficial alternative (Irvine 2020).

4. Data and information

In recent years, many researchers are getting more and more skeptical when it comes to the origins of knowledge used as a basis for a reasonable evaluation of mediation in business disputes, and they start to test the credibility of the well-known benefits and needs of commercial mediation by launching empirical studies (Strong 2016). Strong's recommendation, in the end, is that policymakers and scholars are in crucial need of verified data to make rational actions that can take mediation in international business to the next stage.

4.1. Comparison and statistics absolve mediation itself from being the reason behind low rates

Therefore, it seems necessary and justified to mention this title as a starting point for this study. Our approach will be based on the secondary data collected in previous works to test whether or not numbers support the adequacy of mediation for business disputes. First, we must clarify that the debate is not connected to what businesses need, however, it is strongly linked to whether or not mediation is suitable for disputes arising from related transactions. Regarding commercial needs, it seems vital to mention speed, saving costs, and confidentiality which are approximately the most common key concerns for a business at a local or international level. Furthermore, our method will examine and compare mediation with classic options for commercial disputes resolution, namely litigation and arbitration, based on statistics from the European Union (EU) as an example. In this regard, in 2010, a survey data report named "The Cost of Non-ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation", published by ADR Center Global, Europe's largest private mediation provider with the cooperation of the European Company Lawyers Association (ECLA) and the European Association of Craft, Small and Medium-Sized Enterprises (UEAPME), and funded by the EU, contained a large number of data gathered from different sources like practitioners, companies, and researchers in the field (ADR Center 2010).

Regarding time and cost, which are crucial prerequisites for any business, the data mentioned in this report shows a huge difference between the average of each element between member states when comparing mediation to litigation and arbitration. In fact, for a dispute valued at 200.000 Euros, on average, the cost was estimated to be around 25.337 Euros for litigation (13% of the total value of the dispute), 34.385 for arbitration (17,2%) compared to a relatively small amount of 9.488 Euros for mediation (only 4.7%). Other associations like the Irish Commercial Mediation Association (ICMA) confirm the previous estimations, by surveying 3.500 law and accountancy firms and other professionals and thus concluding that disputants could save 70% of costs by using mediation instead of arbitration or litigation (ICMA 2022).

Time concerns were not uncommon, either, as according to the same study, the average time to solve disputes in the EU member states was estimated at 697 days when using litigation and 503 days in arbitration compared to only 87 days when mediating disputes (ADR Center 2010). These numbers were confirmed by other reports oriented directly towards business-to-business conflicts such as the "Study on the use of Alternative Dispute Resolution for Business to Business disputes in the European Union" which was prepared jointly by ECORYS and ADR Center in 2012 for the European Commission. According to this study, for instance, B2B disputes in Poland might take up to 6 years if the parties chose litigation compared to several weeks or even days when mediating (Ecorys & ADR Center 2012).

The mentioned differences related to costs and especially time between mediation and other traditional methods used to solve disputes might be decisive for businesses that need active capital to invest in more activities and payments, requirements which are not fulfilled by most of the European Union courts; at least not in a reasonable time. What is interesting here is that many authors who criticized mediation mentioned the

lack of safeguards that are available in courts or the procedural and substantial structures of the judiciary; however, as a counterargument, we might mention the content of Article 6 of the European Convention on Human Rights (ECHR) which is related to the right to a fair trial and sets as a prerequisite for this right the "reasonable time" of the procedure: obviously, courts in most EU countries are not able to satisfy this condition which is vital and sometimes might even be behind a bankruptcy of some businesses that do not have the managerial and financial capacities to deal with delays and blocked capital while their cases are processed for more than the "reasonable time" (Ecorys & ADR Center 2012).

Experts believe that the situation might worsen in some countries which are facing economic crises, as was the case with Greece, where there was a reduction in the funds allocated to the Ministry of Justice from € 950 mln. in 2009 to € 550 mln. in 2012, as these pressures will increase the inadequacy of the judicial body which is already suffering from lengthy procedures and a lack of resources (Ecorys & ADR Center 2012).

It is obvious from a simple comparison between mediation and litigation in the EU, based on these two elements of time and money, that mediation could be performed with fewer costs and in a remarkably shorter period. The estimated success rate of this tool, when used, confirms the benefits of using it instead of litigation, with a 70% success rate in mandatory mediation and 80% in voluntary mediation (De Palo et al. 2011): as such, this mechanism should be viewed from a new perspective. Therefore, we suppose – particularly in the case of businesses – that the "paradoxical" low rates of using this mechanism may be explained by external factors, factors that do not originate from issues or problems with the concept of mediation itself or its efficiency.

The next chapter will attempt to identify some of the factors that we believe might explain this situation in the EU. We will categorize the reasons stated in previous literature and reports in addition to trying to explore other factors, including those from other fields like anthropology, to strengthen our position.

4.2. Possible external factors of non-legal nature

Contrary to judicial procedures, which most parties are familiar with, the idea that the majority of users and even professionals have about mediation seems to be very limited and erroneous.

4.2.1. Lack of awareness

Having enough correct information about any instrument or procedure is a key element that will shape the way how individuals and companies will act when it comes to using it or not. Mediation is a particularly pertinent example in this sense, as even though this instrument (in its modern form) is not a new concept and it was used since the early 20th century to resolve labor and social cases in the US (Vinther & Reynolds 2021), many businesses still have misconceptions related to its nature and how it functions. This situation was proved by previous studies, as a survey targeting EU companies and lawyers found that almost 67% of the companies surveyed have misconceptions regarding the average duration of a single dispute mediation session, which was 8 hours.

When it comes to lawyers, the problem was less serious as more than half of them responded with a correct answer (ADR Center 2010).

The same study tackled another element which is the success rate of mediation: at first, it estimated this rate to be around 80% which is more or less logical when compared to the same rate in other countries that left the EU recently like the UK, where this rate, according to a survey conducted by the Centre for Effective Dispute Resolution (CEDR) in 2020, increased to reach 93% (CEDR 2020). However, almost half of the corporations within the EU, when surveyed, estimated that mediation success rates are only 50% (ADR Center 2010). This mistaken belief might explain the reluctant position of businesses to start using mediation as they do not have a correct idea about the benefits and the efficiency of this ADR mechanism.

The problem is there even at a domestic level in those countries considered "Pioneers" and leaders of mediation in the EU, such as the case of Austria which had a developed legal framework of mediation even before the directive of 2008: experts there claim that almost 90% of the population have no idea about the existence of mediation or other ADR mechanisms (Ecorys & ADR Center 2012). On the contrary, other countries like Greece have a relatively considerable rate of mediation and amicable mechanisms in general compared to other EU countries, which might be explained by the efforts made by courts and organizations in promoting these ADRs (Ecorys & ADR Center 2012). The previous data can explain, partially at least, this "paradoxical" situation of mediation in the EU, however, other factors might also be significant.

4.2.2. Cultural tendencies: Hofstede's dimensions and the willingness to use mediation

Uncertainty Avoidance Index. The Uncertainty Avoidance Index is one of the cultural dimensions mentioned by the Dutch social psychologist and anthropologist Geert Hofstede in his famous study about the differences between cultures in 1980. This study was done through a large survey oriented to 117,000 employees of IBM, an international company present in different 50 countries, when Hofstede was working there (Hofstede 2011; Lee 2016; Sent & Kroese 2022). The mentioned index shows that cultures might be classified into two types; one with a low uncertainty avoidance index where people generally are risk-taking and tend to try new approaches, for instance, the United States, the United Kingdom, China, and Singapore (Hofstede 2011; Lee 2016; Hofstede Insights 2022).

On the contrary, the type with high uncertainty avoidance index is where people tend to avoid uncertain and ambiguous situations, according to this study: except for the Nordic countries, most of the EU countries are included in this category, like Germany, Greece, Hungary, France, and Italy (Hofstede Insights, 2022; Lee 2016). Countries scoring high on this index usually tend to use many regulations and mechanisms that can control and avoid exposure to risky scenarios (Lee 2016). As explained in Hofstede's study, what is different is considered dangerous and there is an "emotional need for rules even if not obeyed" (Hofstede 2011).

We believe that mediation, even in an indirect way, might be influenced by this dimension because unlike litigation or arbitration, which will produce an enforceable decision or an award, the outcome of mediation is only a contract that needs further

procedures to be enforceable. This situation is significant in our context where EU member states have different styles of homologation (Žukauskaitė 2019), and the EU is still reluctant to sign new legal frameworks that might solve this problem, even partially, like the Singapore Convention on Mediation of 2018 which is seen by many as less uncertain and more clear when it comes to the procedure of enforcement it contains (Eunice 2019).

Therefore, considering that disputant parties may withdraw from the mediation process at any stage, this may create a situation of uncertainty and ambiguity that will probably make EU businesses more or less hesitant to try this tool. This situation and the high uncertainty avoidance score of most EU countries can create a more litigious culture that is oriented to the traditional and classic ways of resolving disputes like litigation (Steffek 2012), as they see this approach as more surrounded by safeguards and regulations that can reduce exposure to risks. Experts from different EU countries like France and Romania confirm our thoughts as they believe that there is a more confrontational culture in their countries, where there is less place for dialogue, and usually, courts and formal procedures are seen as the first option (Ecorys & ADR Center 2012).

Power Distance Index. Under the same study provided by Hofstede, we might mention the Power Distance Index, which could be defined as the extent to which a culture is tolerant of the unequal distribution of power in society (Hofstede 2011). In other words, there is a division between low and high power distance cultures, where high power distance cultures are usually more obedient to the previous hierarchical structures and authority manifestations, while, on the contrary, low power distance cultures are less accepting of this unequal distribution, and thus it is common that they are comfortable with shared authority and participation in decision making (Lee 2016). Antonello Miranda mentioned in one of his articles the question of the negative ideas individuals in some countries might have about the state and the distance and foreign character of authority and how this could lead to a situation of non-confidence in courts (Miranda 2014), that might inspire us to think about the Power Distance dimension in Hofstede's study. The unknown and distant character of power and authority fits perfectly with the cultures scoring high on the dimension of power distance: as we explained, these cultures are more satisfied and comfortable with the hierarchical authority structures, and they are less active in decision-making. We believe that this passive role of individuals might have a connection with the will to start mediation instead of the given solutions (courts) by a distant and unknown authority. High power distance cultures, by their passive role and satisfaction, are more vulnerable to a lack of knowledge, fears, and thus a lack of confidence in courts as a kind of extension to their leaders (authority structures). The alternative or the remedy for this situation could be represented in mediation as a closer process to parties where they will solve their dispute outside courts. China is a perfect example not only because it scores very high in Hofstede's power distance dimension, but also due to the influence of Confucian thoughts on the Chinese culture and legal system (Miranda 2014). The high power distance in China is another extension of a culture that considers harmony in society as the ideal scenario and disputes as something immoral or unethical (Miranda 2014). Litigation, in addition to its distant character, might be considered a failure in respecting the rules guaranteeing

the harmony of relationships in society, as usually it will lead parties to an adversarial win-or-lose process where tensions might be generated. Mediation as an ADR mechanism that is more based on the parties' will and active role could respond positively to the need for harmony that is required by some cultures.

On the contrary, other cultures which score low in power distance index, have a skeptical position toward the unequal distribution of power in a society and thus they are likely to be more active and familiar with the decision-making process. We believe that those cultures' low power distance can play a significant role in increasing their confidence in conventional systems like courts. In other words, they participate in making decisions and rules that govern the litigation process through different mechanisms like elections and the representative democracy in parliaments, therefore the process in courts is no longer distant or foreign according to what they know. Germany, for instance, scores low on Hofstede's power distance dimension and simultaneously, the rate of using litigation is very high compared to using ADR in general and mediation in particular (Ecorys & ADR Center 2012). The high preference for litigation in Germany might be explained by a culture that is less distant from power in a way that the main process offered by the authority (courts) is seen as known and worthy of trust.

This cultural tendency in favor of the more formal options in dispute resolution tools might take us to the other possible explanations entrenched in the legal field and practice.

4.3. Possible external factors from the legal field

4.3.1. The dominance of the voluntary approaches on EU Member States' legislation

When analyzing the different EU Member States' approaches linked to the use of mediation, it seems obvious that the majority adopted a voluntary approach (Ecorys & ADR Center 2012). In a way, the parties have kept their right to choose between courts or mediation to solve their disputes. This tendency of voluntary approach might be justified by Article 6 of ECHR which was the basis for those who are against mandatory mediation as they think that it is a breach of the safeguards related to the right of access to justice included in the mentioned Article (Nolan-Haley 2012), or simply because it may sound contrary to the nature of mediation itself that is centralized on the concept of voluntariness (De Palo et al. 2011). Nevertheless, a few countries like France and Italy opted for a mandatory approach in some disputes in civil and commercial matters.

The debate surrounding the different approaches to mediation and how a mandatory model of mediation might be a violation of access to justice – which is one of the fundamental constitutional rights in all the Member States – should be updated in the light of the lengthy procedures and the problems of litigation as mentioned above. Hence, a more effective approach based on realism is a must, especially in the face of an increasing number of economic crises and the lack of resources needed to make the judicial system's responses to disputes more reasonable.

In 2014, a study requested by the European Parliament's Committee on Legal Affairs titled "Rebooting the Mediation Directive: Assessing the Limited Impact of its

Implementation and Proposing Measures to Increase the Number of Mediations in the EU" surveyed different experts in EU Member States about different issues related mediation and how to promote it inside the EU (De Palo et al. 2014). The best legislative approach to increase mediation was one of the questions, and what is interesting was that almost 242 out of 816 of the responses of experts shows a strong belief that mandatory mediation legislation or at least mandatory attendance of an information session before litigating are the best options that can increase the number of mediations.

In Italy, for instance, mandatory mediation was introduced in 2010, declared unconstitutional in 2012, and then reintroduced in 2013. This mandatory aspect of mediation has taken Italy to reach a rate of mediation that was 6 times higher than the rest of the EU countries (Matteucci 2017). Even if this country does not record a high success rate linked to mediation, possibly because of insufficient training hours (Matteucci 2017), the decrease in the number of mediations from 154.879 proceedings in 2012 to only 41,604 in 2013 when mandatory mediation was declared unconstitutional (Matteucci 2017), may be considered concrete proof of the impact of the legislative role on the rate of mediation. Italy, with its mandatory mediation legislation, is the only country in the EU that reached these numbers of mediation proceedings per year while most of the other countries still have less than 10.000 mediations annually (De Palo et al. 2014).

Therefore, we believe that at least in the European Union's context where the culture is generally dominated by the litigious tendencies and preferences of classic methods like litigation (see previous statistics), there is a serious need for adequate legal instruments that can lead parties to go for mediation or at least try it before litigation. Nadja Alexander, an expert in this field, explained the Regulatory Robustness Rating System (RRRS), where one of the criteria used to measure the favorable context for encouraging mediation in each jurisdiction is the existence of transparent and highly effective regulatory incentives for legal advisers and lawyers to mediate, that might even contain sanctions for non-compliance (Alexander 2017). This legal intervention should not be interpreted as exceeding the achievement of the targeted purposes or going beyond what is necessary to do so: limited and target-oriented regulations are the key tools that might increase the frequency of mediation and at the same time protect its features from being evanesced by a transformation to a new type of arbitration or litigation (Nolan-Haley 2012).

4.3.2. A possible influence of an exclusive doctrinal legal scholarship

In the US, even though legal education is still dominated by doctrinal methodology, there is a new tendency and transition that has started from elite institutions towards a multidisciplinary approach, a direct outcome of the continuous debate between multidisciplinarians and doctrinalists over the nature of legal studies and the adequate methodology (Van Gestel & Micklitz 2014). On the contrary, while European legal scholarship is also dominated by doctrinalism, the debate concerning this topic is not as developed as it is in the US; still, it is in emergence (Van Gestel & Micklitz 2014). This strong presence of doctrinalism in European legal studies, which focus more on the analysis of the rule of law and judicial decisions and how the application of these norms

is done (Douglas 2008), we believe may influence the development of other tools or mechanisms that might be considered less formal or partially social.

Doctrinalists have been accused many times of being inflexible, submissive to the formalism and authority of the rule of law, and disconnected from their external environment and social needs (VanGestel & Micklitz 2014). We believe that doctrinalism and how it focuses primarily on the rule of law and formalism can create an isolated and protectionist approach to legal studies that refuses to interact with other mechanisms that are less formal, less regulated, or require knowledge from other disciplines. Mediation as an ADR mechanism, because of its special nature as a mixture of social, psychological, and legal perspectives, might be seen as a reminder of the necessity of the socio-legal approach in legal studies and thus it can be a victim of the dominance of doctrinalist heritage in the EU.

Many explanations that are used by scholars might limit the interactions of law with other social disciplines and methods; like the lack of knowledge of social methodology (Nkansah & Chimbwanda 2016) or practical concerns like the time needed to apply this interdisciplinary approach, but the result is still the same, which is the exclusion of social dimensions. Hence, this exclusive legal scholarship which is centralized on the rule of law as it exists or the positivist understanding of the law, might neglect the goal or aim of legislation as a social problem-solving tool or what should be (Douglas 2008), and as such, we believe, even in an indirect form, can have an impact on how and why mediation is perceived as a fragile alternative for adjudicative mechanisms.

Some experts assert that doctrinalism is there because of those who have an interest in immunizing law from critics and thus keeping the legal industry as a symbol of power or a field of expertise dominated by doctrinalists (James 2004 cited by Douglas 2008). Mediation, even if it has received attention in recent decades by being surrounded by legal rules on a domestic, regional, and international level, still has a long way to reach the same level of regulatory safeguards as other mechanisms like the judicial system or arbitration. This situation will have an impact on the way how scholars see mediation through the lenses of litigation which is the benchmark for justice and thus, consider it as a "litigation lite" (Sabatino 1998 cited in Irvine 2020), or a deviation from doctrinalism to interdisciplinary approaches in legal scholarship (Douglas 2008) and probably will face resistance or at least underestimation. An underestimation that will be communicated to clients of the legal industry like businesses through the main players, such as lawyers and judges, who have shown – at least in the European context – a loyalty to doctrinalism.

4.3.3. Lawyers' resistance to bringing innovation

Being educated under the dominance of doctrinalist approaches and the belief that mediation is not more than a practice governed by unqualified "lay people" (Irvine 2020), it seems unreasonable or rare to imagine EU lawyers or judges who are not influenced by this methodology and misconceptions while they practice in their professions. As mentioned above, there is a tendency to create "barriers between law and non-law and between lawyers and non-lawyers" (James 2004 cited by Douglas 2008). In other words, lawyers are trying to keep the legal industry under their control without the interference of other players like mediators who might be seen as outsiders

to the purely legal sector. Many excuses are used to justify a lawyer's attitude toward mediation, such as the lack of capacities of non-lawyers to deliver justice, or the less formal and regulated process (Irvine 2020). Many scholars believe this protectionist approach to the legal industry might be erroneous, as even if justice might have some intersections with legality, there is no concrete evidence that it is identical to the latter (Gardner 2018 cited in Irvine 2020).

The influence of professionals on the willingness of businesses to use mediation finds its origins in the preliminary role played by lawyers as the main legal advisers for companies (Ecorys & ADR Center 2012). It seems that especially companies' external lawyers prefer litigation over mediation because of their familiarity with procedures and the amount they can get if they do not have to share with mediators (Ecorys & ADR Center 2012). In the US, for instance, mediation could be considered a threat to lawyers' income, as it reduces the number of hours a usual litigation procedure takes, thus reducing the fees lawyers might be entitled to; however, these economic fears are also there in EU civil law countries, even if lawyers do not use an hourly billing system (Peters 2011).

Furthermore, Professor Don Peters believes that lawyers are not willing to sacrifice the amount of control and dominance they have in adjudicating procedures in many countries to the account of disputant parties and maybe other players like mediators (Peters 2011). Most EU countries are a concrete example of this litigation system, which is centralized on the role of lawyers, especially in cases that require sophisticated legal knowledge. Finland and France may be considered examples when it comes to lawyers' and barristers' opposition to mediation and the conservative mindset they have over the control of procedures (Ecorys & ADR Center 2012).

For all the mentioned points, we think that this attitude from lawyers is capable of destroying innovation in the legal industry by resisting new approaches and mechanisms that might be more adequate for businesses and their specific needs for speed and flexibility.

5. Discussion

Through this work, we tried to find the most reasonable answers to explain the "paradoxical" situation of mediation in the EU from a variety of fields and disciplines. Combining both legal and extralegal approaches while tackling this issue comes from the unique nature of a sociolegal process such as mediation. Even if previous studies focused on the impact of culture on the process of mediation, we noticed that there is still space to analyze the influence of culture on deciding to use or not to use this process, and thus further studies might be launched in this concern. However, it is fair to mention that our position in making this relationship between Hofstede's study and the use of mediation needs more empirical research to test the level of accuracy and validity in a changing and diverse European context. One of the other limits of this paper is the number of literature used from scholars of common-law countries which might be less accurate and adequate in the EU context. Even if it could be controversial, the use of those works can be explained by the developed debate and ADR culture, especially in the US and Australia, and the many common points related to the influence of doctrinalism on legal studies in both the EU and common-law countries.

Also, most of the available data tends to be oriented toward both civil and commercial disputes in a way that reduces its accuracy in a business context. Business-oriented studies might give us more exact results in analyzing this low rate. This paper could incentivize using more multidisciplinary approaches when analyzing mediation due to its heterogenic elements that seem to go beyond the logic of a descriptive normative approach.

6. Conclusion

In conclusion, our question as to why there is a low rate of businesses using mediation in the EU seems to call for deeper answers than simply referring to companies' practices or choice of not using this mechanism. To be honest, the possible explanations for this low rate are not limited to the business sector but they involve mediation in most fields. An underrated mechanism that is facing significant constraints of legal and non-legal nature. Mediation itself, as a process that survived thousands of years in different cultures around the world, we believe is not suffering from internal issues or at least serious ones. Nevertheless, the external environment of mediation seems to be incompatible with the aims of developing this tool; misconceptions, EU cultural tendencies to minimize exposure to risk, the resistance of the legal field and legal practitioners, even the academia might be involved in this paradoxical situation, especially when considering the dominance of doctrinalism in the EU that probably and at least indirectly will create an opposition to less formal mechanisms such as mediation. Mediation, due to its flexible and social nature, might be a victim of these exclusory and protectionist approaches that are based on purely normative visions and structures such as classic adjudicative forms.

We believe that even if elements like cultural orientations seem to be difficult to change and are subject to spontaneous historical developments, other factors, especially those linked to the legal system, might be used to achieve the growth of mediation. However, this should not be interpreted as allowing lawmakers to go beyond what is necessary to achieve the balance between the growth of mediation and the quality of this tool. Therefore, any legal reaction should consider the specific nature of mediation as a compound method of social and legal elements, and thus protect its capacities and abilities to embrace innovation (Alexander 2008).

Last but not least, academia might be a key player as well by educating the new generation of professionals and scholars on mediation and how it could fulfill parties' and especially businesses' need for reasonable and effective justice. Mediation could benefit from the changes and debate that is urging the use of a sociolegal approach in legal studies, a methodology that is less hostile to less formal or heterogenic mechanisms such as mediation.

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