Ius Comparatum – Global Studies in Comparative Law

Carlos Esplugues
Louis Marquis *Editors*

New Developments in Civil and Commercial Mediation

Global Comparative Perspectives

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Carlos Esplugues • Louis Marquis
Editors

New Developments in Civil and Commercial Mediation

Global Comparative Perspectives

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Editors
Carlos Esplugues
Department of International Law
University of Valencia
Valencia, Spain

Louis Marquis
École de Technologie Supérieure
Montreal, QC, Canada

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Preface

A Mediation for All Seasons

Mediation has a long history. It is practiced in many different ways, on every continent, and many different institutions are involved in it. Hence it is a highly familiar phenomenon that spontaneously means something to everyone.

But despite this familiarity, much curiosity is still being shown about mediation in some quarters, because unknown or poorly understood aspects of its identity continue to emerge. There is a tremendous amount to be said about mediation, with its rich past, its dynamic present, and its enviable future. In short, it is a phenomenon that sows, propagates, and engenders in every direction, in all seasons.

This wide-ranging impact of mediation is the focus of this collection of papers by the national rapporteurs who participated in the session on cross-border and judicial mediation at the XIXth International Congress of Comparative Law, held in Vienna from July 20 to 27, 2014. Together these papers present new seeds of mediation, new sources from which it can be propagated, and new elements engendered by its active presence.

These extensive effects of mediation make it priceless. They enable its participants to exchange information and share knowledge about it, to refine the process that characterizes it, and to build networks that will ensure its lasting development. The universal nature of these effects of mediation demonstrate that the fundamental and applied knowledge that it embodies knows no borders.

This collection discusses a number of the key variables that make mediation so effective. Classified under several different themes, these variables are as follows: (1) mediation itself: the concepts of mediation that exist in various countries, the legal systems within which these concepts are applied, and the various doctrinal approaches developed with regard to it; (2) the legal framework: the laws and general principles that apply to mediation, and the branches of public and private law in which it is used; (3) the mediation agreement: the relevant conditions of form and content, the responsibilities of the parties in the event that they violate this agreement, and the effects of this agreement on potential recourse

to the courts or to arbitration, as well as with regard to pending cases; (4) the mediator: appointment or designation, legal and ethical responsibilities, and the role of institutions in mediation; (5) the mediation process: applicable rules and principles, confidentiality, duration, cooperation between the mediator and external judiciary or non-judiciary bodies; (6) failed mediation: the consequences for the parties and the mediator; (7) successful mediation: conditions of form and content to be met, effects of the settlement, conditions required for the settlement to be binding; (8) costs: determining costs of mediation, availability of legal assistance; (9) cross-border mediation: meaning and scope of cross-border mediation in various countries, distinctions between domestic and cross-border mediation; (10) recognition and enforcement of foreign settlements: the legal framework applicable to the recognition and enforcement of a settlement, differences between settlements reached in private mediation processes and those reached in judicial or quasi-judicial ones; (11) cyberjustice: the potential applications of cyberjustice in mediation, most promising area of activity in this regard.

Together, the contributions in this collection add to the existing body of knowledge on mediation. The new knowledge that they provide can be used to improve current practices and to encourage innovation in mediation throughout the world. This knowledge is now ready to use in many different practice settings, not only within the judiciary and public, private, and civil law services but also within organizations. It is also ready to be used as a vehicle for comparative law, to facilitate transfers of law, and to bring about the establishment of common rules.

At the end of the day, this "mediation for all seasons" has the potential to improve the law as we know it. In response to the inadequacies of the legal system as a whole, it promotes better access to justice. In response to the insufficiencies of the law as such, it opens the door to a normative pluralism, and hence to greater creativity in devising solutions. And in response to the symbolic insufficiency of the law, it advances the principle of empowerment—a factor that can help to ensure the sustainability of the commitments reached through the mediation process. Thanks to the authors of the various contributions to this collection, such mediation for all seasons is not just an illusion or a cliché: it is both well grounded in current reality and clearly focused on the opportunities that lie ahead.

Montreal – Valencia
February 2015

Carlos Esplugues
Louis Marquis

Préface

UNE MÉDIATION À TOUT VENT

La médiation est connue. Sa longue histoire, sa pratique diversifiée, sa présence sur tous les continents et les nombreuses institutions qui la développent en font un phénomène qui dit spontanément quelque chose à quiconque.

Cet état de connaissance s'accompagne d'une curiosité manifestée, ici et là, envers la médiation. Pourquoi ? Parce qu'elle révèle encore et encore, des aspects méconnus, voire inconnus de son identité. Il y a beaucoup, énormément, à dire à son sujet. À son riche passé, la médiation ajoute donc un présent dynamique et un futur enviable. En somme, elle sème, diffuse et engendre à tout vent.

Cette triple action de la médiation est le point de mire des contributions réunies dans cet ouvrage. Avec, pour thème central, *la médiation dans une approche transfrontalière et judiciaire*, elles sont le fruit des recherches et des réflexions de rapporteurs nationaux ayant participé au 19è Congrès International de Droit Comparé tenu à Vienne du 20 au 27 juillet 2014. Ces contributions sont autant de semailles de la médiation, de sources de diffusion produites par elle que d'éléments générés par sa présence active.

L'action à tout vent de la médiation est précieuse. Elle permet à ses acteurs d'échanger de l'information et de partager des connaissances au sujet de la médiation, de raffiner le processus qui la caractérise et de créer des réseaux qui assurent son évolution. C'est une action à caractère universel qui démontre que le savoir fondamental et appliqué de la médiation ne connaît aucune frontière.

Le présent ouvrage aborde une série de variables clés de la médiation qui procurent un souffle inédit à son action. Ces variables, regroupées à l'intérieur de thématiques, sont les suivantes : (i) la médiation en elle-même: les notions de la médiation qui existent dans les États; le système juridique dans lequel elles évoluent; les approches doctrinales développées à son sujet; (ii) le cadre juridique applicable : les lois et les principes généraux applicables à la médiation;les domaines du droit privé et du droit public où la médiation est utilisée; (iii) la convention de médiation : les conditions de forme et de fond pertinentes; la responsabilité des parties en

cas de contravention de leur part à la convention de médiation; les effets de la convention sur d'éventuels recours devant les tribunaux ou en arbitrage ainsi qu'à l'égard de causes pendantes; (iv) le médiateur : la nomination ou la désignation; la responsabilité juridique, déontologique et éthique du médiateur; le rôle joué par les institutions en matière de médiation; (v) le processus de médiation : les règles et les principes applicables; la confidentialité; la durée; la collaboration entre le médiateur et les instances externes, judiciaires ou extra-judiciaires; (vi) l'échec de la médiation : les conséquences à l'égard des parties et du médiateur; (vii) la réussite de la médiation : les conditions de forme et de fond à satisfaire; les effets du règlement; les conditions requises afin que le règlement soit exécutoire; (viii) les coûts : la détermination des coûts de la médiation; la disponibilité de l'aide juridique; (ix) la médiation transfrontalière: le sens et la portée de la médiation transfrontalière dans les différents États; les distinctions entre la médiation interne et la médiation transfrontalière; (x) la reconnaissance et exécution des règlements étrangers: le cadre juridique applicable à la reconnaissance et à l'exécution d'un règlement; les différences entre les règlements intervenus dans le contexte de médiations privées et dans celui de médiations judiciaires ou para-judiciaires; (xi) la cyberjustice : les applications potentielles de la cyberjustice en médiation; les secteurs d'activités les plus intéressants à ce sujet.

Il y a là des contributions qui s'ajoutent au savoir déjà existant de la médiation. Le tout crée un réservoir de sens susceptible de parfaire ce qui se fait présentement et de favoriser l'émergence de ce qui ne se fait pas déjà à travers le monde.

Ce réservoir de sens est prêt à servir à tout moment au sein de lieux de pratiques multiples, qui se retrouvent autant du côté de la magistrature, des services juridiques publics, privés et civils, qu'au sein d'organisations. Il est tout aussi prêt à agir puissamment comme un vecteur de droit comparé, de faciliter les transferts de droit et d'entraîner la formation de règles communes.

At the end of the day, la médiation à tout vent possède le potentiel d'améliorer le droit tel qu'on le connaît. En réponse à l'insuffisance du système juridique dans son ensemble, elle favorise une meilleure accessibilité à la justice. Face à l'insuffisance du droit en soi, elle ouvre la porte à un pluralisme normatif, lequel est une source de créativité dans l'élaboration de solutions. Et devant l'insuffisance symbolique du droit, elle met en relief le principe d'auto-détermination des personnes, qui est un facteur apte à garantir la durabilité des engagements pris à l'issue d'une médiation. Grâce aux auteurs des différentes contributions de cet ouvrage, cette médiation à tout vent n'est pas illusion ou cliché : elle est, à la fois, bien ancrée dans la réalité et tournée vers l'horizon!

Nous ne pouvons pas conclure sans exprimer notre remerciement à Mlle. María Aranzazu Gandía Selléns, stagiaire d'investigation FPU au Département de Droit International de l'Universitat de Valencia (Espagne), pour sa collaboration en la gestion et l'élaboration de cette oeuvre. Sans sa dédication et son enthousiasme, cette publication que le lecteur détient entre ses mains, n'aurait pas été possible.

Montreal – Valencia
February 2015

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Abréviations

Abs.	Absatz
ACAM	Association des Centres Africains d'Arbitrage et de Médiation
AchN (ΑχΝ)	Achaiki Nomologia (Achaia Case Law) (Αχαϊκή Νομολογία)
ACMC	Zivilrechts-Mediations-Gesetz (Austrian Code of Mediation in Civil Matters)
ADR	Alternative Dispute Resolution
AfAD (φΑΔ)	Efarmoges Astikou Dikaiou (Implementations of Civil Law) (Εφαρμογές Αστικού Δικαίου)
AG	Amtsgericht (Local Court)
AJC	Alternative Justice Centre
Al	alinéa
All ER (Comm)	All England Law Reports (Commercial Cases)
All SA	All South African Law Reports
AOF	Afrique Occidentale Française
ArbGG	Arbeitsgerichtsgesetz (Labour Court Act)
ArchN (ΑρχΝ)	Archeio Nomologias (Case Law Archive) (Αρχείο Νομολογίας)
Arm (Αρμ)	Armenopoulos (Αρμενόπουλος)
art.	Article
arts.	Articles
AUDCG	Acte uniforme portant sur le droit commercial général de l'OHADA
AUPRSVE	Acte uniforme portant organisation des procédures simplifiées de recouvrement et des voies d'exécution de l'OHADA
BeurkG	Beurkundungsgesetz (Notarisation Act)
BGB	Bürgerliches Gesetzbuch (Civil Code)
BGBl.	Bundesgesetzblatt (Federal Law Gazette)
BGH	Bundesgerichtshof (Federal Court of Justice)
BLLR	Butterworths Labour Law Reports
B.L.R.	Building Law Reports (UK)
BNotO	Bundesnotarordnung (Federal Notary Law)

BORA	Berufsordnung für Rechtsanwälte (Rules on the Professional Practice for Lawyers)
BRAO	Bundesrechtsanwaltsordnung (Federal Attorney Ordinance)
BT-Drucks.	Bundestags-Drucksache (Bundestag printed paper)
CA	Cour d'Appel
CAA	The Chinese Arbitration Association
CAMARB	Câmara de Arbitragem Empresarial – Brasil = Chamber of Corporate Arbitration – Brazil
CAMC	Centre d'arbitrage, de médiation et de conciliation de Dakar
CAM-CCBC	Centro de Arbitragem e Mediação da Câmara de Comércio Brasil – Canadá = Arbitration and Mediation Centre –Chamber of Commerce Brazil-Canada
CAMC-O	Centre d'arbitrage, de médiation et de conciliation de Ouagadougou
CAMeC	Centre d'arbitrage, de médiation et de conciliation
CAMeC-CCIB	Centre d'Arbitrage, de Médiation et de Conciliation de la Chambre de Commerce et d'Industrie du Bénin
Cass. civ. 1ère	Première Chambre civile de la Cour de Cassation française
Cass. civ. 2ème	Deuxième Chambre civile de la Cour de Cassation française
Cass. ch. mixte	Chambre mixte de la Cour de Cassation française
Cc	Civil Code
CCA-AIC	Chambre de Conciliation et d'Arbitrage de l'Association Interprofessionnelle de Coton
CCA-CNOSC	Chambre de conciliation et d'arbitrage du comité national olympique et sportif du Cameroun
CEMAC	Communauté Économique et Monétaire d'Afrique Centrale
CCI	Centre du Commerce International
CCIABML	Chamber of Commerce, Industry and Agriculture of Beirut and Mount Lebanon
CCJA	Cour commune de justice et d'arbitrage de l'OHADA
CCMA	Commission for Conciliation, Mediation and Arbitration
CCP	Lebanese Code of Civil Procedure
C.c.Q.	Code civil du Québec
CEMAC	Communauté Économique et Monétaire des Etats de l'Afrique Centrale
CEUM	EU-Mediationsgesetz (Code of European Union Mediation)
cf.	confer
CfM	Centrale für Mediation
Ch	Chapter [of a legislative act]
ChrID (ΧρΙΔ)	Chronika Idiotikou Dikaiou (Chronicles of Private Law) (Χρονικά Ιδιωτικού Δικαίου)
CIRDI	Centre International pour le Règlement des Différends relatifs aux investissements
Civ	Civil Division (England and Wales)
CMAP	Centre de Médiation et d'Arbitrage de Paris

CNJ	Conselho Nacional de Justiça = National Council of Justice
COC	Lebanese Code of Obligations and Contracts
Code	King Code of Governance Principles
Code of Civil Procedure	Taiwan Code of Civil Procedure
CONIMA	Conselho Nacional das Instituições de Mediação e Arbitragem = National Council for Mediation and Arbitration Institutions
CP	Code des Procedures
CPA	Spanish civil procedure act 1/2000 of January
CPA 1881	Spanish Civil Procedure Act of 1881
CPAM	Centre Permanent d'Arbitrage et de Médiation
CPC	Code of Civil Procedure
C.p.c.	Code de procédure civile du Québec
CPM	Centre Professionnel de Médiation
CPR	Civil Procedure Rules
C.S.	Cour supérieure du Québec
CS	Cour Suprême
COAMF	Comité des organismes accréditeurs en médiation familiale
Code de 2015	Nouveau Code de procédure civile du Québec adopté le 20 février 2014
CTravail	Code du Travail
D (Δ)	Dike (Litigation) (Δίκη)
DEE (ΔΕΕ)	Deltio Epicheiriseon & Etaireion (Business & Companies Bulletin) (Δελτίο Επιχειρήσεων & Εταιρειών)
DFN (ΔΦΝ)	Deltio Forlogikis Nomothesia (Tax Legislation Bulletin) (Δελτίο Φορολογικής Νομοθεσίας)
DIS	Deutsche Institution für Schiedsgerichtsbarkeit (German Institution of Arbitration)
DiSAC	Dispute Settlement Accreditation Council
Draft Law on Mediation or Draft Law	Draft Judicial Law Mediation in 2009 by the Government to the parliament for approval
EC	European Commission
ECHR	The European Convention on Human Rights
ECJ	European Court of Justice
ECOSOC	United Nations Economic and Social Council
ECR	European Court Reports
EDBM	Economic Development Board of Madagascar
EDP (ΕΔΠ)	Epitheorisi Dikaiou Polykatoikias (Review of Law of Block of Flats) (Επιθεώρηση Δικαίου Πολυκατοικίας)
EEmpD (Εεμπδ)	Epitheorisi Emporikou Dikaiou (Commercial Law Review) (Επιθεώρηση Εμπορικού Δικαίου)
EEN	Efimeris Ellinon Nomikon (Greek Jurists Journal) (Εφημερίς Ελλήνων Νομικών)

EEO	European Enforcement Order
e.g.,	*exempli gratia*
EGZPO	Einführungsgesetz zur Zivilprozessordnung
EllDni (Ελλδνη)	Ellini Dikaiosyni (Hellenic Justice) (Ελληνική Δικαιοσύνη)
EpiskED (ΕπισκΕΔ)	Episkopisi Emporikou Dikaiou (Commercial Law Overview) (Επισκόπηση Εμπορικού Δικαίου)
EpistEpetArm (ΕπιστΕπ ετΑρμ)	Epistimoniki Efimerida Armenopoulou (Armenopoulos Scientific Annals) (Επιστημονική Επετηρίδα Αρμενόπουλου)
EPolD (ΕπολΔ)	Epitherorisi Politikis Dikonomias (Civil Pocedure Review) (Επιθεώρηση Πολιτικής Δικονομίας)
ERSUMA	École Régionale Supérieure de l'OHADA
et al.	and others
et seq.	*et sequens*
et seqq.	*et sequentes*
EU	European Union
EWHC Ch	England & Wales High Court (Chancery Division) [Neutral Citation]
EWCA Civ	Court of Appeal (Civil Division) [Neutral Citation]
FamFG	Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (Act on the Procedure in Family Matters and in Matters of Non-contentious Jurisdiction)
FamGKG	Gesetz über Gerichtskosten in Familiensachen (Law on Court Fees in Family Matters)
FamRZ	Zeitschrift für das gesamte Familienrecht (Journal for Family Law)
ff.	Following
FGO	Finanzgerichtsordnung (Code of Fiscal Court Procedure)
FIESP	Federation of Industries of State of Sao Paulo
fn	Footnote
GG	Government Gazette
GKG	Gerichtskostengesetz (Court Fees Law)
GN	Government Notice
GrCC	Greek Civil Code
GrCCP	Greek Code of Civil Procedure
GrMA	Greek Mediation Act
GSJ	South Gauteng High Court, Johannesburg
Guidelines	Guidelines for the Retrieval of Electronic Court Records
GURI	Gazzetta Ufficiale della Repubblica Italiana (Official Journal)
ICT	Information Communication Technologies
i.e.,	id est
IMAB	Instituto de Mediação e Arbitragem do Brasil = Brazilian Mediation and Arbitration Institute

IMAQ	Institut de médiation et d'arbitrage du Québec
infra	below
JAF	Juge des Affaires Familiales
King III	King Code of Governance Principles and the King Report on Governance
k.p.c.	Ustawa z dnia 17 listopada 1964 kodeks postępowania cywilnego (Polish Civil Procedure Code)
KZD	Kwazulu-Natal High Court, Durban
LC	Labour Court
LG	Landgericht (Regional Court)
LIAM-ILAN	Laboratório Interdisciplinar de Arbitragem e Mediação – Interdisciplinary Law Clinic on Arbitration and Mediation in Governmental and Corporate Matters
LINDB	Lei de Introdução às normas do Direito Brasileiro = Introductory Act to Brazilian laws of 1942
LJ	Lord Justice of Appeal
LJN	Landelijk Jurisprudentie nummer (Dutch case law indicator, predecessor of ECLI)
LMC	Lebanese Mediation Center
L. Méd.	Loi sur la médiation (Loi n.º 29/2013, du 19 abril)
LRA	Labour Relations Act 66 of 1995, as amended
LSSA	Law Society of South Africa
MA	Act 5/2012 of 6 July 2012 on Mediation in civil and commercial matters/Mediation Act
MAC	Mexican Arbitration Centre
MC	Mexican Constitution
MCA	Millenium Challenge Account
MCAJC	Mexico City Alternative Justice Centre
MCHC	Alternative Justice Law of the Mexico City High Court of Justice
Mediation Law	The Law of the Republic of Kazakhstan dated 28 January 2011 "On Mediation" (as amended)
Mediation Rules	Draft mediation rules approved by the South African Rules Board
MEDIOS	Centre for Mediation at the Legal Information Centre, the Slovenian Association of Mediation Organisations
MERCOSUL	Mercado Comum do Sul – Southern Common Market
NCOP	National Council of Provinces
NCPC	Nouveau Code de Procédure Civile (Loi n.º 41/2013, du 26 juin)
NEMESC	Núcleo de Estudos sobre Mecanismos de Solução de Conflitos = Study Group on Dispute Resolution Mechanisms
NJW-RR	Neue Juristische Wochenschrift-Rechtsprechungs Report: Zivilrecht
No.	Number

NOMOΣ	Greek legal database
NoV (NoB)	Nomiko Vima (Legal Tribune) (Νομικό Βήμα)
ODR	Online Dispute Resolution
OHADA	Organisation pour l'Harmonisation en Afrique du Droit des Affaires
OJ	Official Journal of the European Union
OLG	Oberlandesgericht (Higher Regional Court)
OMPI	Organisation Mondiale pour la Propriété Intellectuelle
O.T.R.T.	Office Tchadien de Régulation des Télécommunications
OPM	Organe Présidentiel de Médiation
OAB	Ordem dos Advogados do Brasil = Brazilian Bar Association
p.	Page
P./par./para	Paragraph
PeirN (ΠειρN)	Peiraiki Nomlogia (Piraeus Case Law) (Πειραϊκή Νομολογία)
PIL	Private International Law
PILA	Private International Law Act
PoinDni (ΠοινΔνη)	Poiniki Dikaiosyni (Criminal Justice) (Ποινική Δικαιοσύνη)
pp.	Pages
PRC	People's Republic of China
PRD	Prévention et de règlement des différends
PROFECO	Federal Consumer Protection Agency
PV	Procès-verbal
QB	Law Reports, Queen's Bench (3rd Series)
RDG	Rechtsdienstleistungsgesetz (Legal Services Act)
Report	King Report on Governance
RK	The Republic of Kazakhstan
RVG	Rechtsanwaltsvergütungsgesetz (Lawyers' Remuneration Law)
S.	Section
SA	South Africa
SC	Senior Counsel
SCA	Supreme Court of Appeal
Sch	Schedule
SCPA	Small Claims Procedures Act of 1995
Sec	Section [in a normative legal act]
Selection Regulations	Selection Regulations of the Court Mediators
SETA	Skills Education Training Authority
SGG	Sozialgerichtsgesetz (Social Courts Act)
Short Process Court Act	Short Process Court and Mediation in Certain Civil Cases Act
SS.	Sections
STF	Supremo Tribunal Federal = Brazilian Supreme Court – the Highest Court in Brazilian justice system.

STJ	Superior Tribunal de Justiça = Superior Court of Justice – upper court for appeals in civil and commercial matters
TAR	Tribunale Regionale di Giustizia Amministrativa
TC	Tribunal de Conciliation
TCC	Technology and Construction Court (UK)
TGI	Tribunal de Grande Instance
TJAMME	Câmara de Justiça Arbitral e Mediação do MERCOSUL = Chamber of Arbitral Justice and Mediation of MERCOSUL
TJMG	Tribunal de Justiça do Estado de Minas Gerais = Court of Appeals of the State of Minas Gerais
TJRJ	Tribunal de Justiça do Estado do Rio de Janeiro = Court of Appeals of the State of Rio de Janeiro
TJRS	Tribunal de Justiça do Estado do Rio Grande do Sul = Court of Appeals of State of Rio Grande do Sul
TJSP	Tribunal de Justiça do Estado de São Paulo = Court of Appeals of the State of São Paulo
TPI	Tribunal de Première Instance
Trib.	Tribunale (Court)
UEMOA	Union Economique et Monétaire Ouest-Africaine
UK	United Kingdom
UMA	Uniform Mediation Act
UNCITRAL	The United Nations Commission on International Trade Law
US	United States
VV	Vergütungsverzeichnis (List of Applicable Fees)
VwGO	Verwaltungsgerichtsordnung (Code of Administrative Court Procedure)
W.L.R.	Weekly Law Reports (UK)
z.	Zahl: number
ZARSS	Zakon o alternativnem reševanju sodnih sporov (Act on Alternative Dispute Resolution in Judicial Matters)
ZMCGZ	Zakonom o mediaciji v civilnih in gospodarskih zadevah (Mediation in Civil and Commercial Matters Act)
ZKM	Zeitschrift für Konfliktmanagement (Journal for Conflict Management)
ZPO	Zivilprozessordnung (Civil Procedural Code)

List of Participants

General Report: New Developments in Civil and Commercial Mediation – Global Comparative Perspectives

ESPLUGUES, Carlos

Prof. Dr. Carlos Esplugues, LL.M. (Harvard), MSc (Edinburgh), is a Professor of Private International Law at the University of Valencia (Spain). He holds Masters Degrees from Edinburgh University and Harvard Law School. He is admitted to the Bar and serves regularly as an international arbitrator. He is also a registered mediator. Professor Esplugues is a leading Spanish scholar in the field of Private International Law, International Trade Law, and International Dispute Resolution. He has been a member of several official commissions on Private International Law both in Spain and in Brussels, and lectures regularly in Europe, Latin America, and Asia. Professor Esplugues is the President of the Spanish Association of Professors of International Law and International Relations.

Belgium

TAELMAN, Piet

Piet Taelman is a Senior Full Professor at Ghent University Law School (Belgium). He teaches courses on Civil Procedure and has written on a wide variety of topics on civil procedural law in national and international journals and book chapters. He has been admitted to the Ghent Bar in 1982 and has practiced as a lawyer and arbitrator during almost the whole of his academic career. Piet Taelman served as Dean of the Law School from October 2008 till September 2014.

VOET, Stefaan

Stefaan Voet is a Postdoctoral Researcher (Research Foundation Flanders) at Ghent University Law School (Belgium). He wrote his Ph.D. on class actions in Belgium. He was a Visiting Scholar at the Law Center of the University of Houston (2009) and at Stanford Law School (2014). He was a Visiting Lecturer at various US law schools. He wrote extensively on Belgian and European civil procedure in general and complex litigation and litigation costs in particular. From 2001 to 2014, Stefaan was also a lawyer at the Bar of Bruges.

Benin

VODOUNON-DJEGNI, Comlan René

Comlan René Vodounon-Djegni est Titulaire d'un D.E.S.S. en Droit des Affaires (BÉNIN) et d'un D.U. en Contentieux International des Affaires (FRANCE). Ex-Secrétaire administratif et juridique de la Chambre de Conciliation et d'Arbitrage de l'Association Interprofessionnelle de Coton (CCA/AIC). Membre du Comité d'arbitrage du Centre d'Arbitrage, de Médiation et de Conciliation de la Chambre de Commerce et d'Industrie du Bénin (CAMeC-CCIB). Membre du Comité Français d'Arbitrage. Conseiller Juridique de BENIN ACE GIE. Doctorant à l'Université de Nice Sophia Antipolis (FRANCE). Actuellement Assistant Juridique du Directeur Général de l'Office National de Soutien des revenus agricoles (ONS) du Ministère de l'Agriculture, de l'Elevage et de la Pêche (MAEP) du Bénin.

Brazil

BASSO, Maristela

Maristela Basso is an Associate Professor at the International and Comparative Law Department of the Law School of University of Sao Paulo (USP). She received her Post-Ph.D. and JSD in International Law from the University of São Paulo. She is the Head of the Working Group on Arbitration and International Contracts of the Law School of University of Sao Paulo (ABCINT). She is Vice-President of the Arbitration and Mediation Centre of Chamber of Commerce Brazil-Canada (CAM-CCBC) and Arbitrator and Legal Consultant in São Paulo.

PASQUOT POLIDO, Fabrício Bertini

Fabrício Bertini Pasquot Polido is a Professor of Private International Law, International Intellectual Property Law, and International Commercial Arbitration at Law School of Federal University of Minas Gerais (UFMG, Brazil). He received LL.B. (São Paulo/Tübingen), LL.M. (Turin), and JSD in International Law (University of

São Paulo, USP). He is a member of the UFMG Interdisciplinary Law Clinic on Arbitration and Mediation Law in Governmental and Corporate Matters.

China, P.R.

BU, Yuanshi

Professor Dr. Yuanshi Bu, LL.M. (Harvard) was appointed as a University Professor at the Albert-Ludwigs University in Freiburg in 2007 and she leads Chair of International Economic Law with special focus on East Asia since then.

HUO, Xuyang

Xuyang Huo is a Ph.D. Candidate of University of Freiburg. She works as a Research Assistant at the Institute for East Asian Law at the University of Freiburg. She has obtained her LL.B. degree from the Peking University in China and LL.M. degree from the University of Freiburg in Germany.

Czech Republic

PAUKNEROVÁ, Monika

Prof. JUDr. Monika Pauknerová, CSc., DSc. is a Professor of Private International Law and International Commercial Law, Department of Commercial Law, Faculty of Law, Charles University, Prague. She is a member of the European Group for Private International Law and the International Academy of Comparative Law (IACL). She is President of the Czech National Committee of the IACL, member of the UNIDROIT Governing Council, Vice-President of the International Association of Legal Science, and arbitrator at the Arbitration Court in Prague.

PFEIFFER, Magdalena

JUDr. Mgr. Magdalena Pfeiffer, Ph. D. is an Assistant Professor of Private International Law and International Commercial Law, Department of Commercial Law, Faculty of Law, Charles University, Prague.

Espace CEMAC

NGWANZA, Achille

Achille Ngwanza, Docteur en droit, Achille NGWANZA est Chargé d'enseignement dans des universités françaises (Paris II, Paris X, Montpellier, Versailles Saint

Quentin-en-Yvelines) et africaines (Dschang, Ngaoundéré, Yaoundé II). Il assure également des formations professionnelles en qualité d'Enseignant vacataire à l'École Régionale Supérieure de la Magistrature de l'OHADA et d'expert consultant de l'Académie des industries extractives de la CEMAC, du Centre d'excellence pour la gouvernance dans l'industrie extractive en Afrique francophone. Parallèlement à sa charge d'enseignement, Achille NGWANZA est également un praticien des ADR et travaille comme consultant pour divers cabinets internationaux en Europe et en Afrique. Il est aussi Directeur de publication du Journal Africain du Droit des Affaires (JADA). Son domaine d'expertise porte les modes alternatifs de règlement des différends, le droit pétrolier et minier et le droit international des relations monétaires et financières.

Finland

TAIVALKOSKI, Petri

Petri Taivalkoski heads Roschier's Dispute Resolution practice in Finland. His practice includes litigation, arbitration, and alternative dispute resolution. He has extensive experience of disputes relating to energy, product liability, construction projects, joint ventures and shareholders' agreements, agency and distribution relationships, and competition law. Separate areas of focus of his practice are securities market and company law and white collar crime. Petri also represents multinational companies, Boards of Directors, and individuals involved in criminal or regulatory investigations, with an emphasis on corporate and securities law matters. Petri also frequently acts as arbitrator under a variety of arbitration rules as well as in ad hoc arbitration proceedings. Petri is a member of the board of the Finland Chamber of Commerce Arbitration Institute. He frequently lectures on topics relating to dispute resolution at both universities and conferences.

PYNNÄ, Annika

Annika Pynnä is an Associate and a member of Roschier's Dispute Resolution practice. She has graduated from the University of Helsinki and joined Roschier in 2014.

Germany

HESS, Burkhard

Professor Burkhard Hess is the founding and executive director of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law since 2012. He held chairs at the Universities of Tübingen and Heidelberg; acted as

Visiting Professor in Beijing, Paris (Sorbonne), and Georgetown; and served as a part-time judge at the Court of Appeal of Karlsruhe. He serves on a regular basis as an expert and advisor to the European Commission, the European Parliament, the Council of Europe, and national governments.

Lately, he has evaluated the European Insolvency Regulation and the Brussels I Regulation (regarding international insolvency and freedom of circulation of judgments), and has also contributed to the drafting of the proposal for a Regulation creating a European Account Preservation Order. Professor Hess's research areas comprise European and comparative procedural law and dispute settlement. He is the author of various books on German and European civil procedural law as well as co-editor of IPRax and of Kölner Kommentar zum KapMuG.

PELZER, Nils

Nils Pelzer is a Research Fellow at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, working mainly on ADR topics. He studied both law and East Asian studies with a major in Chinese studies at the University of Heidelberg, earning a BA in 2010. In July 2012, he passed his first state examination. In his ongoing Ph.D. project, he examines the operating principles of the mediation system in the People's Republic of China and tries to find conclusions for the regulation of ADR in Western legal systems.

Greece

DIAMANTOPOULOS, Georgios

Georgios Diamantopoulos studied law in Thessaloniki. He is an Associate Professor of civil procedural law at the Law School of the Aristotle University of Thessaloniki. He is also an attorney-at-law, member of the Thessaloniki Bar Association.

KOUMPLI, Vassiliki

Vassiliki Koumpli studied law in Athens (Greece) and London (UK). She is an attorney-at-law, member of the Athens Bar Association, and research associate at the Hellenic Institute of International and Foreign Law. Since 2010, she is an accredited mediator (MCIArb).

Italy

DE LUCA, Alessandra

Alessandra De Luca is currently a Researcher of Comparative Law at the University of Florence School of Law and a Lecturer of Comparative Law at the University

of Florence School of Economics and Management. Her research interests include comparative civil procedure, administration of justice, and access to justice. She is the author of "L'accesso alla giustizia in Inghilterra fra stato e mercato" (Turin, Giappichelli, 2007). E-mail: adeluca@unifi.it.

Japan

KAKIUCHI, Shusuke

Shusuke Kakiuchi is a Professor of Law at the Graduate Schools for Law and Politics of the University of Tokyo. He was born in 1973 in Tokyo, Japan and studied law at the University of Tokyo (1992–1996). He was qualified in State Bar Examination (1995) and became a Research Assistant at the University of Tokyo (1996–1999). He served as an Associate Professor of Law at the Graduate Schools for Law and Politics of the University of Tokyo (1999–2012) and is presently Professor of Law at the Graduate Schools for Law and Politics of the University of Tokyo (2012–). He is an associate member of the Legislative Council of the Ministry of Justice (Working Group on the Foreign State Immunity, 2008–2009; Working Group on the Law of Parental Authorities, 2010–2011). He is also a member of the Executive Board of the Japan Association of the Law of Arbitration and Alternative Dispute Resolution (2010–). His main areas of research are Law of Civil Procedure, Alternative Dispute Resolution, and Insolvency Law.

Kazakhstan

KARAGUSSOV, Farkhad

Prof. Dr. Farkhad Karagussov is Chief scientific associate of the Institute of Private Law of Caspian University (www.kou.kz), Arbitrator of the Kazakhstan International Arbitrage (www.arbitrage.kz), Member of the International Academy of Comparative Law (www.iuscomparatum.org), Almaty, Republic of Kazakhstan (e-mail: aragussovyk.f@mail.ru).

Lebanon

EL-AHDAB, Jalal

Dr. Jalal EL-AHDAB (Jil AHDAB), Ph.D., LL.M., is a lawyer at the Paris, New York, and Beirut bars. He specializes in international business transactions, especially with the Middle East, Arab, and American jurisdictions. He is a recognized

expert in complex, multi-jurisdictional disputes and especially in international arbitration (both commercial and investment): disputes between shareholders, breach of negotiations, bank guarantees, franchises, telecommunications, port concessions, etc. These disputes led him to practice under numerous arbitration rules (CCI, CNUDCI, CIRDI, LCIA, CRCICA, DIAC, TAS, etc.), in Europe, Africa, the Middle East, and Asia. Jil AHDAB is co-author of the treaty *Arbitration with the Arab Countries* (Kluwer 2011). He is also editor-in-chief of the review *International Journal of Arab Arbitration*, which may be consulted on kluweronline.com.

EID, Myriam

Myriam EID is a lawyer at the Beirut Bar Association and a member of the international arbitration team at Ahdab Law Firm. She also assists within the Editorial Board, Jalal El-Ahdab, with regard to the International Journal of Arab Arbitration, its editing and management. She further gives lectures in International Arbitration within the LLM Support Program of the University of London within the Beirut Bar Association. She holds a master's degree (DEA) in Business Law and is currently a Ph.D. Candidate at Université Paris II- Panthéon Assas.

Luxembourg

MENÉTREY, Séverine

Séverine Menétrey est professeur associé en droit judiciaire privé à l'Université du Luxembourg, Docteur en droit (Paris II Panthéon-Assas), LL.D. (Laval). Ses principaux domaines de recherche sont le droit du procès entendu largement (droit judiciaire, arbitrage, modes alternatifs de règlement des différends, droits fondamentaux du procès) et la procéduralisation du droit. Elle est l'auteure d'un manuel de procédure civile et de nombreux articles et contributions sur divers aspects du droit pris dans sa dimension contentieuse.

México

GONZÁLEZ-MARTÍN, Nuria

Nuria González-Martín holds a Ph.D. in Private International Law from Pablo de Olavide University, Seville, Spain. She is a Senior Researcher at the Institute for Legal Research, National Autonomous University of Mexico (UNAM) and a Visiting Scholar and Fellow at Stanford Law School 2012–2015. She is also the external counselor to Mexico's Foreign Affairs Ministry on Private International Law and is a family, civil, and commerce law mediator, certified by Mexico City's Supreme Court. She is the Editor in Chief of "Boletín Mexicano de

Derecho Comparado" and is a member of a wide diversity of associations such as International Academy of Comparative Law (IACL), Mexican Academy of Sciences (AMC), American Association of Private International Law (ASADIP), the Mexican Academy of Private International and Comparative Law (AMEDIP), Spanish Association of International Law and International Relations Professors (AEPDIRI), and the Spanish, Portuguese and American Institute for International Law (IHLADI). She is the author of 17 books, coordinator of 20 books and several published articles and is the winner of UNAM's 2008 Young Scholar Award in Social Studies.

Norway

BERNT, Camilla

Dr. Camilla Bernt (Ph.D. University of Bergen 2010, Master of Legal Science Bergen 2004 and Master of Laws (Dispute Resolution) Bond University Australia 2003) is an Associate Professor at the University of Bergen, Norway. Her main fields of research are civil procedure and dispute resolution. In her doctoral thesis, "Meklerrollen ved mekling i domstolene" (the role of the mediator in in-court-mediation), she analyzed and evaluated the rules and principles governing the role of the mediator in the three existing mediation institutes in the Norwegian court system.

Portugal

CAPELO, Maria José

Maria José de Oliveira Capelo Pinto de Resende (nom complet) – Maîtrise en Droit Processuel (1994) et Doctorat en Droit Processuel (2011) à la Faculté de Droit de l'Université de Coimbra (Portugal); Membre de l'Instituto Juridico de la Faculté de Droit, Université de Coimbra et de l'Instituto Português de Processo Civil (IPPC). Ses principaux centres d'intérêt sont le Droit de la Procédure Civile et de l'Exécution Forcée, le Droit Judiciaire Européen et International et les Modes Alternatifs de Résolution des conflits.

Quebec

GUILLEMARD, Sylvette

Sylvette Guillemard est professeur titulaire à la faculté de droit de l'Université Laval (Québec). Détentrice d'un doctorat en droit de l'Université Laval et d'un

doctorat en droit de l'Université Panthéon-Assas-Paris II, elle est également membre du Barreau du Québec. Elle enseigne principalement le droit international privé, la procédure civile ainsi que le règlement des différends, en matière interne et internationale. Elle a à son actif de nombreuses publications, tant sous forme d'articles que d'ouvrages et est régulièrement invitée à donner des conférences, aussi bien au Québec qu'à l'étranger. Elle est membre de plusieurs associations et sociétés savantes, notamment l'Académie internationale de droit comparé et la Société Française de Psychologie Juridique. Elle est actuellement directrice et rédactrice en chef des Cahiers de droit.

Romania

ŞANDRU, Daniel-Mihail

Daniel-Mihail Şandru mène des activités de recherches en qualité de coordinateur du Centre des études de droit européen dans le cadre de l'Institut des recherches de l'Académie Roumaine et enseigne le droit de l'Union européenne et le droit du commerce international à l'Université Chrétienne Dimitrie Cantemir.

Il est juge ad hoc à la Cour européenne des droits de l'homme et à la Cour d'arbitrage du commerce international auprès de la Chambre de Commerce et d'Industrie de la Roumanie.

En matière des projets éditoriaux, il exerce la fonction de rédacteur en chef de la Revue roumaine de droit européen et fait partie des comités scientifiques de certaines revues renommées en Roumanie ainsi que celle de rapporteur national à la revue European Public Law. Il travaille comme référent de spécialité aux éditions Oxford University Press, C.H. Beck et Universitara.

En ce qui concerne les activités associatives, il exerce la fonction de président de la Société des sciences juridiques et de l'Association roumaine de droit et des affaires européennes (ARDAE) ; il est aussi membre actif dans des associations roumaines et étrangères. Données de contact : mihai.sandru@csde.ro; page web: www.mihaisandru.ro

CĂLIN, Dragoş-Alin

Juge, Cour d'Appel de Bucarest, VIIème Chambre Civile (depuis avril 2009), formateur de l'Institut National de la Magistrature de Bucarest pour la formation professionnelle des magistrats (depuis 2006), chercheur scientifique associé de l'Institut de Recherches Juridiques de l'Académie roumaine – Le Centre d'Études de Droit Européen (depuis mai 2010), directeur de la Revue Le Forum des juges (depuis 2009), membre fondateur de C.I.M.J. (Conférence Internationale de Médiation pour la Justice) octobre 2009, Vice-président (depuis 2012), Vice-président de GEMME – Groupement Européen des Magistrats pour la Médiation (mai 2010–mai 2012), membre fondateur et président de l'Association Le Forum des Juges de Roumanie (depuis 2007), membre de l'Association des Magistrats

Européens pour les Droits de l'Homme (AMEDO) (depuis mai 2011), membre de l'Association Franco-Roumaine de Juristes (depuis 2009), membre de l'Association des Magistrats de l'Union Européenne (depuis 2007), auteur de nombreux livres et articles dans le domaine du droit, publiés en Roumanie, France, Espagne, Allemagne, Grand Bretagne, Portugal, Arménie et Argentine (plus de 100), dont Quelle justice pour la France ? 31 personnalités répondent aux préoccupations des Français, Éditions L'Harmattan, Paris, 2012 et Les arrêts de la CEDH contre la Roumanie – Analyse, conséquences, autorités potentiellement responsables. Conclusions pour la période 1994–2010, Editura Universitara, Bucarest, 2012. Données de contact: dragos.calin@just.ro

Russia

ARGUNOV, Alexey

Alexey Argunov is a candidate of Legal Sciences and Associate Professor of the Civil Procedural Law Department of the Russian Academy of Justice (Moscow) (argunovav@gmail.com).

ARGUNOV, Vsevolod

Vsevolod Argunov is a candidate of Legal Sciences and Associate Professor of the Civil Procedural Law Department of the Moscow State University (named after M.V. Lomonosov) (argunov@mail.ru).

AKHMETBEKOV, Alexander

Alexander Akhmetbekov is a Senior Associate in the Moscow office of Gide Loyrette Nouel. Alexander has a diploma from Moscow State University (MGU). He has been practicing law for more than 13 years, including with leading US and European law firms (alexander.akhmetbekov@gide.com).

Slovenia

KNEZ, Rajko

Prof. Rajko Knez is engaged in teaching and research at the Faculty of Law University of Maribor, where he teaches legal remedies in the EU law. He acts also as the Vice-President of Permanent Arbitration Court of Arbitration at the Chamber of Commerce and Industry of Slovenia, where he acts as an arbitrator. He is also a member of Permanent Court of Arbitration (PCA), an international organization based in The Hague in the Netherlands (from 2011).

WEINGERL, Petra

Petra Weingerl, MJur (Oxon.) is reading for a DPhil in Law at University College, Oxford. She completed Magister Juris at University College, Oxford (2012) with distinction, and holds LL.B. and BSc (Econ.) from the University of Maribor. Before commencing her DPhil, she worked at the Court of Justice of the EU in Luxembourg and at Higher (Appellate) Court in Ljubljana. Her publications include articles and chapters on various topics linked to EU law.

South Africa

BROODRYK, Theo

Mr. Theo Broodryk is a Lecturer in the Department of Private Law at the Faculty of Law, Stellenbosch University, situated in the Western Cape, South Africa. He completed his postgraduate LL.B. degree at the Faculty after which he commenced his articles of clerkship at Edward Nathan Sonnenbergs Inc., where he also practiced as an attorney. He currently lectures in Civil Procedure and Legal Skills and he is also the Coordinator of the Faculty's Writing Strategy. His research interests are alternative dispute resolution and class action litigation.

Spain

AZCÁRRAGA MONZONÍS, Carmen

Dr. Carmen Azcárraga is an Assistant Professor of Private International Law at the University of Valencia (Spain). She obtained her degree in Law and Ph.D. in International Law at the University of Valencia in 2002 and 2007 respectively, as well as a master's degree on International Legal Practice at the University of Murcia in 2006. She is author and co-author of a number of publications on various topics, mainly about International Family Law and Successions, International Procedural Law, and Immigration Law. She has done several research stays at prestigious Institutes and Universities in Europe and the USA and has lectured in European and American Universities. She has developed different activities at The Hague Conference on Private International Law. She founded the international legal network REDCompara in 2010.

QUINZÁ REDONDO, Pablo

Pablo Quinzá Redondo is a Researcher at the University of Valencia (Spain). He is graduated in Law and Business and Management Administration at the University of Valencia (2010), where he also obtained the Master in Company Law (2012). He

has done several research stays (Max Planck Institute for Comparative and Private International Law in Hamburg, University of Utrecht, and Universidad Nacional Autónoma de México) and his main areas of interest are Private International Law, Comparative Law, and Family Law.

Taiwan

SHEN, Kuan-Ling

Prof. Dr. Kuan-Ling Shen focuses her research on civil procedural law, non-contentious civil law, arbitration law, compulsory execution law, and bankruptcy law. She received her Ph.D. degree from Heidelberg University in 1999. After returning to Taiwan, she first joined the faculty at National Chengchi University and then, in August of 2004, transferred to the NTU College of Law. She participates actively in academic conferences. She is also the Director of Foundation of Civil Procedure Law Research and a member of the Family Procedure Law Draft Commission. Professor Shen has published extensive articles, most of which concentrate on Alternative Dispute Resolution (ADR), problems of the new Civil Procedural Law in Taiwan, and comparative studies of German Civil Procedural Law.

Ukraine

FURSA, Svitlana

Prof. Svitlana Fursa is a Doctor of Law, Professor and Chair of the Notarial and Execution Process and Advocacy Department of Taras Shevchenko National University of Kyiv.

General Report: New Developments in Civil and Commercial Mediation – Global Comparative Perspectives

Carlos Esplugues

Abstract Modern societies are very much linked to the idea of litigation. The incessant increase in the level of litigation puts the whole judicial system under pressure because the volume of disputes brought before State courts increases, the proceedings become more and more lengthy and the costs incurred by the parties in such proceedings also greatly increase. This situation can impair the full implementation of the principle of access to justice for citizens.

In an attempt to tackle this phenomenon, support for Alternative Dispute Resolution (ADR) tools has increased in recent decades in many parts of the world. Devices – like mediation – are said not to be any longer an "alternative" to litigation but are increasingly becoming integrated part of national schemes of justice. In fact, a new system of justice understood "in a broad sense" is being developed in many parts of the world.

Nowadays, mediation is said to occupy a very important position within this broad concept. It is firmly established in many legal systems and is growingly accepted in others. It is approached as a flexible and easily tailored way for parties to work out solutions to their disputes in many different fields, favoring the continuance of their relationships at the same time.

Mediation is growingly accepted in many places of the world and it is more and more present on the legal agenda of many States. But at the same time too many important differences exist worldwide not only in relation to the legal framework developed, its scope and solutions provided, but also regarding the commitment to the institution by national governments and its real use by citizens.

C. Esplugues, LLM (Harvard), MSc (Edinburgh) (✉)
Department of International Law, University of Valencia, Valencia, Spain
e-mail: carlos.esplugues@uv.es

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1 Introduction: Mediation and the "New Paradigm of Justice"[1]

Modern societies are very much linked to the idea of litigation. The incessant increase in the level of litigation puts the whole judicial system under pressure because the volume of disputes brought before State courts increases, the proceedings become more and more lengthy and the costs incurred by the parties in such proceedings also greatly increase (European Commission 2012, 7, No. 50). The aim of tackling this situation underpins most of the reforms that modern national procedure laws have suffered in many countries in the last two decades in an effort to make court procedure more efficient and affordable for the parties (CEPEJ 2010, 279 ff).

The increase in litigation rates is now fully ascertainable in many parts of the world (Esplugues 2013a, 305 ff.). This development entails growing concerns over whether the level of quality of the judiciary system can be maintained in the future and the principle of access to justice preserved (Davis and Turku 2011, 48–50). Despite budgetary efforts by national governments in order to improve their justice system, existing figures of litigation worldwide reflect the difficult situation that exists in many countries of the world as regards dispute resolution before State courts, and the cost that to litigate before them implies for the parties (ADR Centre 2010, 49) This hard situation can impair the full implementation of the principle of access to justice for citizens.

In an attempt to tackle this difficult situation, support for Alternative Dispute Resolution (ADR) devices has increased in recent decades in many parts of the world (Barona and Esplugues 2014, 7 ff.; Barona 2012, 29; Hopt 2010, 725 ff). The "spectrum of ADR" (Andrews 2012, 9.1) has steadily received great support in many jurisdictions, to the fact that some ADR devices – like mediation – are said not to be any longer an "alternative" to litigation but are "increasingly becoming a mainstream and integrated part of many legal systems" (Alexander 2010, 733) A system of justice understood "in a broad sense" is being developed in many parts of the world (Barona 2013, 56 ff.).

Nevertheless ADR is not a unitary notion. There are several forms of alternative dispute resolution: arbitration, conciliation, mediation, negotiation, or combined ADR mechanisms like med-arb or mini-trial, among others (Barona and Esplugues 2014, 11–13; Hopt and Steffek 2013, 15–16). And practice shows that many of them may coexist within a single State. The European Union (EU) is a good example of that. Thus, in Poland, mediation and arbitration are regulated, whereas other types of ADR devices, like conciliation or negotiation remain outside the Polish legal system (Jankowski et al. 2014, 3) On the contrary, in France not only mediation and

[1]This Report is elaborated under the auspices of projects MINECO DER 2013–44749, 'Mediacion, arbitraje y jurisdiccion en el actual paradigma de justicia: integracion, 'glocalizacion', Derecho público y ODR como alguno de sus retos I'; PROMETEO II/2014/081 (GV), 'ADR y Justicia: ¿Globalización o glocalización?' and GV-ISIC/2012/017 'DIKE/Justicia Global'.

arbitration, but "transaction", "amiable composition" o "procedure participative" exists (Cousteaux and Poillot-Peruzzetto 2014, 4). In Greece conciliation has traditionally been regarded as the best ADR method (Diamantopoulos and Koumpli 2014, 2). And in Portugal, the new CPC of 2013 admits the conciliation by the judge and, at the same time, the possibility to refer the dispute to mediation (Capelo 2014, 4). Arbitration and binding advice are forms of ADR other than mediation admitted in the Netherlands (Chin-A-Fat 2014, 4). And mediation coexists with conciliation, arbitration and transaction in Luxembourg (Menétrey 2014a, 4). In Italy, too, mediation exists in addition to arbitration, judicial conciliation or other devices like *negoziazione paritetica* (De Luca 2014, 1–2). In Romania mediation, arbitration and conciliation are said to be the main ADR devices (Şandru and Cälin 2014, 4). And conciliation, arbitration, expert opinions, early neutral evaluation and minitrials or consumer mediation schemes, such as ombudsman proceedings are present in Germany (Pelzer 2014, 1–2).

This situation is also found in other areas of the world. In Africa, for instance, arbitration, conciliation and mediation are present in most countries (Vodounon-Djegni 2014, 8) although they coexist with other institutions like -in Madagascar- the expertise or the transaction (Rajaonera and Jakoba 2014, 4). In Senegal arbitration and mediation –in fact, conciliation- come accompanied by the so called "Maisons de Justice"[2] where proximity mediation is used with other ADR and Judicial devices to solve disputes that may have arisen (Samb 2014, 6). In other places of the planet, like Kazakhstan, mediation coexists with other ADR devices like negotiation or arbitration (Karagussov 2014, 2). Also in countries like Taiwan where resource to non-judicial dispute resolution devices is usual, mediation coexists with other ADR tools like settlement, arbitration or quasi-arbitration (Shen 2014, 3) although only court connected mediation is regulated by law. And in the People's Republic of China (PRC) mediation and arbitration exist along with other tools like petition. In fact, mediation is said to be often connected to arbitration and treated as its first step (Bu 2014, 80–81). This situation reproduces in Latinamerica, in countries like Brazil, where arbitration, conciliation and mediation are accepted, although no regulation on mediation exists (Basso and Polido 2014, 8).

Even though all of them share the common goal of solving disputes and are non-judicial means of dispute resolution, the several ADR devices have many differences which are not necessarily easy to distinguish. Further, practice shows that each device has its own level of popularity and differing degree of use in the world (Barona and Esplugues 2014, 13).[3] Nowadays, mediation is said to occupy

[2]Décret n° 2007–1253 modifiant le décret du 17.11.1999 relatif aux maisons de justice, à la médiation et à la conciliation.

[3]A survey of the use of ADR in the EU has been developed by DG SANCO (DG Sanco 2009). The study refers to the existence of some 750 different ADR schemes in the EU involving Arbitration, Conciliation, Mediation or a mixture of any of them (11 ff.). Additionally, a yearly increase in the use of ADR devices in Europe is said to be ascertainable: "The number of ADR cases in the EU has increased throughout the last years. For 2006, about 410,000 cases were reported, for 2007 about 473,000 cases, and the estimated minimum number of individual ADR cases in the EU in

a very important position within this broad concept (Barona 2013, 65). It is firmly established in many legal systems and in fact it is considered to be the "fastest growing form(s) of dispute resolution in the world" (Alexander 2009, 1).

Nevertheless, some countries exist where mediation –not arbitration- remains mostly unknown: i.e. Macau (Silva Antares Pires 2014, 3).[4] Where no regulation on mediation exists: i.e. Lebanon[5] or Ukraine, where the institution is said to be well know but lacks regulation.[6] Or it is subject to certain suspicion: i.e. Russia, where the mediation Act was enacted in 2010, under the auspices of the EU, and some academic opposition to it seems to exist (Argunov et al. 2014, 1–2). On the contrary, and significantly, in other countries where no explicit reference to the term ADR is made, this movement receives a big boost: i.e. Kazakhstan (Karagussov 2014, 2).

Mediation is approached as a flexible and easily tailored way for parties to work out solutions to their disputes in many different fields, favoring the continuance of their relationships at the same time (Alexander 2006, 9 ff.). Nevertheless, despite all its benefits and the support it growingly receives, the use of ADR devices, mainly of mediation, tend to be very scarce in too many places. In the EU, the percentage of business disputes referred to mediation is said to range from 0.5 % to 2 % of the total amount. The situation is deemed even worse in cross-border disputes: mediation is used in less than 0.05 % of European business conflicts. These dramatic figures reach another dimension if we take into account that around 25 % of all commercial disputes in Europe are left unsolved because citizens refuse to litigate (Tilman 2011, 4).

In fact, different approaches towards dispute resolution are shown worldwide: in some countries parties tend to refer their disputes to State courts –i.e. Russia (Argunov et al. 2014, 1)- whereas in some other countries, mainly Asian countries, litigation before national courts is considered perilous and usually avoided –i.e. Taiwan (Shen 2014, 2)- although a growing use of State courts is ascertained. Also in Japan a country where resource to non-judicial tools of dispute resolution is usual, the rate of cases per population is said to have grown from 0.80 cases per 1,000 persons in 1950, to 4.58 per 1,000 persons in 2012. Nevertheless, in absolute terms

2008 was approximately 530,000. This trend is confirmed when analyzing data from large ADR schemes and national decentralized ADR systems for which data is collected at central level." (8).

[4]Conciliation in the framework of a civil procedure is accepted in Arts. 428 & 555(2) CPC.

[5]Only some isolated rules on consumer protection and the Mediator of the Republic, which is not a proper mediator, are designed.

[6]Although 3 different Draft Bill have been registered by the Supreme Court —2010, 2011 and 2012-.

the number of cases lodged in 2012 amounts to less than half of those lodged before Courts in Spain in the same year with the difference of Spain having a third of the population of Japan (Kakiuchi 2014, 2–3).[7]

Usually statistics regarding the use of mediation are limited in scope and lack availability in many occasions: in some cases they do not even exist: i.e. Ukraine (Fursa 2014, 22). At the same time, absence of figures that exist in some countries do not hide the presence of a growingly positive attitude towards mediation in certain countries of the world: i.e. Kazakhstan (Karagussov 2014, 7). And in some other cases well documented statistics must be assessed with certain prevention in so far reference to mediation entails a hidden mention to certain judicial conciliation schemes: i.e. Japan (Kakiuchi 2014, 3).

In Austria, for instance, no statistical evidence is available and a slow increase in the number of mediations is mentioned (Risak 2014, 2). Similar situation is found in Luxembourg (Menétrey 2014a, 5). In Poland, there are 2.470 registered mediators,[8] and a growing number of mediations in the last years. In Croatia, statistics refer solely to court-annexed mediations and show a reduced implementation of the institution: 558 cases were settled in court annexed mediation in 2009, 451 in 2010, 462 in 2011 and 540 in 2012 (Babić 2014a, 6). Curiously in France, where only figures as regards court-annexed mediations exist, mediation is mostly referred to family disputes: 94 % in 2011 or 93 % in 2013 (Cousteaux and Poillot-Peruzzetto 2014, 6). The number of mediations in Greece is much narrower: 16 cases in the Athens Court of First Instance in 2012 and 7 cases in the Thessaloniki Court of First Instance (Diamantopoulos and Koumpli 2014, 9). In Romania, where once again statistics refer only to court-annexed mediation, the Magistrature Superior Council speaks of people being reticent to refer their disputes to mediation. Hence, in 2010 only 258 cases were solved by way of mediation out of 2.916.776 cases pending before State courts (Şandru and Călin 2014, 5).

Outside the EU, Norway only offers statistics regarding the specific mandatory custody mediation and they are partial. In 2012 20,240 mediations took place, but 62 % -12,548- only amounted to the mandatory 1 h session. No information about the rate of success is provided. However court-annexed mediation is said to be much more popular –and successful- than out-of-court mediation (Bernt 2014, 1–2). Mexico is a special case in so far in-court conciliation, and not mediation, has usually been implemented in the country. Statistics provided by the Mexico City Alternative Justice Centre, for 2011–2012 a total of 7,514 cases were attended. Of this number 2,218 (29 %) were sent to mediation –conciliation- and in 1,587 (71 %) a settlement was reached (Gonzalez Martin 2014, 7–9). Also in Brazil a positive

[7] Statistics for Spain are available at: http://www.poderjudicial.es/cgpj/es/Temas/Estadistica_Judicial/Analisis_estadistico/La_Justicia_dato_a_dato/La_justicia_dato_a_dato___ano_2012, accessed 09.07.2014.

[8] "There are circa 2,470 registered mediators, including ca. 470 in juvenile matters, above 800 in civil cases; above 1,100 in criminal cases, ca. 280 in labour cases, ca. 410 in commercial disputes and ca. 560 in family matters .... There exist ca. 50 Mediation Centres" (Jankowski et al. 2014, 3–4).

move in favor of mediation is said to exist, although numbers are still very small (Basso and Polido 2014, 9). And in Quebec, in 2008–2009 more than 1,100 files were open with around 80 % of settlements reached (Guillemard 2014, 13).

In most African countries no statistics are provided. Significantly some information is available in Senegal as regards the special mediation scheme on banking and post. The role played by the *médiateur financier* is said to have increased steadily. In 2012, 117 requests were lodged, in 2011, 104 and in 2010, only 30 (Samb 2014, 5). Similar absence of figures is ascertainable in Russia, but unofficial sources speak of 12.5 million of new civil and commercial cases *per annum* and only 2,000–3,000 mediations every year. That means less than 0.1 % of the civil cases decided by State Courts (Argunov et al. 2014, 1).

Despite all the potential benefits of mediation, legal and social traditions still remain unchanged in many countries worldwide. Thus, until not many years ago "mediator" meant "broker" in Italy (De Luca 2014, 1). And in many countries of Central Africa, because of the influence of the former colonial country –France- mediation tends to be broadly understood as meaning conciliation (Ngwanza 2014, 2; Vodounon-Djegni 2014, 2). Similar attitude is ascertainable in Latinoamerica, where reference to mediation is very seldom and usually mention is made to conciliation: i.e. Bolivia,[9] Peru,[10] Honduras,[11] or Mexico, among many others (Gonzalez Martin 2014, 2–3). Additionally, in this last country, for instance, no general Federal Act on mediation exists, and conciliation has been mainly understood as referring to in-court conciliation: that is, conciliation developed in the courtyard before to or in the course of a civil procedure.[12]

In other countries, reference to mediation entails a reference to a kind of judicial conciliation procedure: i.e. Japan, where they can be linked or independent of Lawsuits (Kakiuchi 2014, 3 ff.) and also to some extent Taiwan (Shen 2014, 11).

A perception of ADR tools being useful for solving disputes arising from the parties' daily life is growing steadily worldwide. The benefits of using of ADR devices are considered to be evident for parties, since it provides them with a bearable, flexible and easily tailored way of solving their disputes (Relis 2009, 65–67). For the judge this means that not only is his or her work-load reduced, but he or she can also better fulfill the obligation of rendering justice to the parties (Kulms 2013, 210). With ADR tools in place, a State can rationalize its investment in the judicial system. And for the system of justice as such, ADR ensures full access to justice to citizens, although some important concerns still remain in this respect (Cousteaux and Poillot-Peruzzetto 2014, 2).

[9]Ley No 708 de Arbitraje y Conciliación of 2015.

[10]Ley de Conciliación (Extrajudicial) 26872 of 1997.

[11]Decree No. 161–2000, Ley de Conciliación y Arbitraje of 2000.

[12]For instance, as regards Mexico DF, note Art. 2(X) Alternative Justice Law of the Mexico City High Court of Justice and the Alternative Justice Law of the Mexico City High Court of Justice, the CPC of the City of Mexico, the CrimPC of the City of Mexico or the Juvenile Justice Law for the City of Mexico.

Supporting ADR would actually appear to be a pledge in favour of a means of settling disputes in a quicker, safer and smoother way than referring the dispute to national courts (Nolan-Haley 2012, 984; Barona 2013, 113 ff.). But some dangers exist. The use of ADR devices should not be understood as a way to drain citizens from national justice that is "hopelessly inefficient" (Trocker and De Luca 2011, viii) but to provide them with an instrument aimed to diversify and enrich the offer of justice by ensuring access to justice developed in many rooms (Galanter 1981, 149 ff.), the famous notion of a multi-door courthouse by Professor F.E.A. Sander (1979, 82–85) made at the Pound Conference in 1976, which now has been adopted in certain countries like Slovenia, where ADR is by law the first choice of dispute resolution method (Knez and Weingerl 2014a, 2). This would directly imply a new understanding of the notions of dispute resolution and of access to justice and the creation of a multi-option civil justice system for citizens.

This being so, in this debate we should focus on the benefits for citizens and not for the State when approaching mediation. Actually, in some countries, authors fear that reference to mediation and other ADR devices may prevent the legislator from adopting the necessary reforms for a quicker civil procedure system (Traest 2012, 48). Despite being very relevant, the fact of disburdening courts[13] and reducing investment in public justice should not be the final reasons to encourage recourse to mediation but, on the contrary, we should stress the need to ensure effectiveness of the principle of access to justice for citizens. This tension, as we will see throughout this report, still underlies the approach to mediation in many countries of the world.

Mistrust and fear as regards institutions that are not well known persist in certain legal groups -judges, the legal profession, notaries, etc.- and this runs against mediation. However, it is also true that a change in society and in people's behaviour is increasingly ascertainable in many countries of the world, and this trend stands in favour of consensus instead of imposition or authority, this may force them to adopt a much more flexible attitude towards the institution (Fricero 2011, 2). Additionally, and unfortunately, budgetary constraints exist and will remain with us for a long time; these may make mediation and any other ADR device highly attractive for the State.

The choice in favour of fostering recourse to ADR – the so-called third wave of the access to justice movement (Cappelleti and Garth 1981, 14 ff.) – is not innocuous. ADR cannot be approached as a panacea for all disputes and it should be referred to on a case-by-case basis (Coimisiún um Athchóiriú/Law Reform Commission 2010, 9–10). No idealisation of mediation is acceptable and the risk of supporting the institution standing basically on economic grounds exists (Barona 2013, 111–112). In fact, in some parts of the world –i.e. Europe- fostering recourse to ADR opens up the debate about the existence of a new understanding of the principle of access to justice and of the consequences eventually arising out it (Nolan-Haley 2012, 984 ff.). Access to justice has traditionally been understood

[13]Some of these arguments are even present in the Explanatory notes of some of the modern Mediation Acts in Europe. For instance, Spain or the Czech Republic.

as access to State court justice. In the future, when State courts will – apparently – increasingly coexist with the resource to ADR tools, would the concept of access to justice as embodied in Article 6 European Convention on Human Rights and in Article 47 of the Charter of Fundamental Rights of the EU perhaps have to be reshaped. In other words, it would not any longer mean solely access to "State courts" justice but it must be understood in a broad sense, embracing both reference to national courts and to ADR devices.[14]

The generalisation of ADR tools, in addition to allowing them to be renamed "Private tools for Dispute Resolutions" (Wagner 2012, 112), would favour the creation of a sort of ADR industry that could give rise to the transformation of the principle of access to justice for citizens not by way of a truly free choice of the parties, but through the conscious limitation by public powers of access to State courts (Mattei 2007, 385). The option in favour of upholding resource to ADR devices as a way to solve disputes of any kind may be seen by some people as opening doors for a certain level of privatisation of justice, which may entail certain risks for the survival of traditional State court justice in times of budgetary constraints. That is, the temptation to foster private justice and, at the same time, to reduce the interest of the State – and, of course, its investment – in maintaining a well-prepared and affordable system of public adjudication.

This could lead to a situation in which private and public adjudication are not approached as the two interrelated faces of the same coin for citizens but as two fully separate realities competing against each other on unequal basis – private and "efficient" justice against public and "inefficient" justice – in an apparently open marketplace of provision of justice services. This discourse is both dangerous and tricky and could eventually affect the quality of national court justice.

Mediation is not a panacea. Mediation is a possibility so far hidden to citizens in many States that should be offered to them so that they themselves can decide to have recourse to it on purely free basis. Insofar many national legislations uphold this scenario they are welcome, even if, as this study shows, it must be approached as a first step on a long road and much work remains to be done in many places worldwide.

2 The Notion of Mediation

Mediation is a legal institution that has historically been present in many legal systems of the world (Steffek 2010, 842–843). In fact, in many African countries, prior to the arrival of the European colonial powers, the paradigm of justice was based on the search for a friendly settlement of controversies (Camara and Ciss

[14]Recital 5 2008 Directive on certain aspects of mediation in civil and commercial matters clearly states that the "objective of ensuring better access to justice, … , should encompass access to judicial as well as extrajudicial dispute resolution methods".

2009, 285 ff.; Vodounon-Djegni 2014, 2). In Senegal, for instance, mediators, called "faiseurs de paix", played a major role in preserving peace and solving disputes that may arise (Samb 2014, 1–2). This situation changed because of the colonization and remained after independence (Ngwanza 2014, 1). Significantly, in some countries where no regulation on mediation exists, this old tradition of referring to a third independent person to solve their disputes still remains. Thus, in Lebanon, the so called "Sheikh el Solh", an old person considered wise enough to solve disputes within the community, still plays a role in rural areas (Ben Hamida 2014, 2).

Also in Asia traditional avoidance of formal legal proceedings before courts is ascertainable: i.e. Japan. In some countries this attitude changed by the influence of the government: i.e. PRC (Bu 2014, 82). Mediation was granted a negative meaning in the last 20 years of the last century and the idea of "judgment instead of mediation" was supported until the beginning of the XXI Century. This situation seems to have now changed and a revival of ADR is said to be under way (Bu 2014, 84).

However, specific solutions embodied, and the extension of their acceptance, vary -and traditionally have varied – from country to country. In Africa, for instance, court-annexed mediation is well established and supported in the several Member State of the Communauté Économique et Monétaire des Etats de l'Afrique Centrale (CEMAC) – Cameroun, Central Africa Republic, Congo, Gabon and Tchad. Whereas out-of-court mediation "évolue dans un désert normative, ce malgré una montée en puissance progressive" (Ngwanza 2014, 3). The same situation is found in Benin, where fully voluntary court-annexed mediation is well established by Article 494 CP and the conciliation courts are empowered to mediate –conciliate- in certain areas of law (Vodounon-Djegni 2014, 8 & 23). And no regulation on out-of-court mediation is said to exist,[15] but in the area of foreign investments.[16]

Similar situation is ascertainable in Taiwan, where in addition to mediation developed within the court, which is governed by the CPC, mediation in town and mediation in the administrative agency are envisaged (Shen 2014, 8). In contrast to this situation, the notion of mediation is subject to controversies in Ukraine, where no legislation on mediation exists, and a common understanding of the institution does not exist and confusion with conciliation is perceived (Fursa 2014, 3). Mediation, in the form of transaction, is said to be accepted by the CPC at any stage of the procedure[17] even at the enforcement stage.[18] Also in South Africa, no general regulation on out-of-court mediation exists –although the institution is accepted in more than 50 pieces of legislation- and court-annexed mediation is not well settled (Broodryk 2014, 19 ff.): a court annexed mediation pilot project was launched for the first time on 1 August 2014.

[15]Reference is made to Art. 1134 Cc as the basis for mediation.

[16]This is done by way of the ratification of the Washington Convention of 18.3.1965.

[17]Arts. 31 & 175(5) CPC.

[18]Art. 372 CPC.

Additionally, in too many cases two situations may be ascertained worldwide when approaching the institution:

1. Some countries develop certain disputes resolution schemes which are called mediation without really being so. Thus, in certain countries, and due to the influence of France, the institution of the *médiateur de la république* has been developed with more or less success: i.e. Tchad, Congo, Gabon (Ngwanza 2014, 7; Boumakani 1999, 309), Benin (Vodounon-Djegni 2014, 2 & 13), Senegal (Samb 2014, 2), Madagascar (Rajaonera and Jakoba 2014, 3) or Lebanon (Ben Hamida 2014, 2). It is an independent administrative authority with broad powers, with refer even to certain political conflicts. Some other institutions named after mediation and which, nevertheless are not properly voluntary mediation schemes, are also found worldwide: e.g. in Benin, the *Organe Présidentiel de Médiation*,[19] la *commission de conciliation du service des impôts et l'organisme de gestion collective* or the *inspecteur du travail* (Vodounon-Djegni 2014, 24–25).

   This situation reproduces in certain other countries: i.e., in Taiwan reference is made to mediation in administrative agencies, which actually is a sort of administrative procedure covering many kinds of disputes, both public and private (Shen 2014, 10). Also in the PRC, court-annexed mediation and out-of-court mediation are accepted. This last notion includes people's mediation, administrative mediation, institutional mediation and industry-based mediation (Bu 2014, 80).
2. Secondly, in many cases mediation is given a general meaning and overlaps both as regards its definition and regulation with other institutions embodied in national legal systems, mainly with "conciliation" and "transaction" (Bühring-Uhle 2006, 176). In fact, the wording of Article 1(3) United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation clearly shows the existing difficulties in relation to the verification of the exact meaning of mediation as opposed to other ADR devices, and the presence of different legal understandings for it.[20]

Difficulties as regards the determination of the notion of mediation were ascertainable in Europe prior to the enactment of Directive 2008/52/EC. Because of that, Article 3(a)(I) of the 2008 EU Directive on mediation in civil and commercial

[19]Décret n° 2006–417 du 25.8.2006 portant création, attributions, organisation et fonctionnement de l'Organe Présidentiel de Médiation.

[20]"1.3. For the purposes of this Law, "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute."

matters[21] now provides a common and functional notion of mediation for all EU Member States stating that mediation must be understood as[22]:

> "a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator."

This notion of mediation – or whatever its name may be- is very much in line with the standard concept of mediation accepted in other jurisdictions worldwide (Hopt and Steffek 2013, 11–13). In accordance with other mediation instruments of diverse origin,[23] mediation is approached as a "facilitative process" tool which stands on the will of the parties.

This option favours its differentiation from "conciliation", which is a clear example of an "advisory process" device. Boundaries between mediation and other devices like "transaction" or "negotiation" are hazy in too many cases (Alexander 2009, 25 ff.; Barona and Esplugues 2014, 43–45). Contrary to "conciliation", where the conciliator plays an active role in finding the solution for the case, or "transaction", where counsellors of each party assume a proactive position, mediation stresses the active role assigned to the parties in reaching a settlement by themselves with the support of a third person called a mediator who, as a matter of principle, is neither responsible for the lack of agreement nor for the content of agreement reached.[24]

In certain countries no definition of mediation –or "conciliation" when both terms are used interchangeably- is provided by the legislator: i.e. Benin (Vodounon-Djegni 2014, 7) or PRC (Bu 2014, 83). South Africa constitutes a special case where no general legislation on out-of-court mediation exists and no general definition is therefore provided by the legislator. But at the same time, the court-annexed Mediation Rules offer a notion of mediation in Rule 73[25] and a broad

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[21] Directive 2008/52/EC of the European Parliament and of the Council of 21.5.2008 on certain aspects of mediation in civil and commercial matters, Official Journal of the European Union (*OJ*) L 136, of 24.5.2008 (2008 Directive).

[22] Art. 3(b) 2008 Directive correlatively states that "mediator" means, "any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation." Art. 3(a)(II) 2008 Directive explicitly accepts judges to act as mediators in those cases they are "not responsible for any judicial proceedings concerning the dispute in question".

[23] I.e.: in USA, S. (2)(1) UMA states that '"Mediation" means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute,' Available at: http://www.mediate.com/articles/umafinalstyled.cfm, accessed 15.07.2014.

[24] S. (2)(2) UMA defines mediator as "... an individual who conducts a mediation."

[25] Rule 73 of the Mediation Rules defines "mediation" as: "the process by which a mediator assists the parties in actual or potential to litigation to resolve the dispute between them by facilitating discussions between the parties, by assisting them in identifying issues, clarifying priorities, exploring areas of compromise and generating options in an attempt to solve the dispute".

doctrinal approach to mediation has been developed in the country and a common understanding of mediation and of its main features exists (Broodryk 2014, 2–6).

Nevertheless, and leaving aside these cases an analysis of the existing legal solutions and doctrine in the world shows a broad support to the voluntary nature of mediation. This voluntary condition is at the very core of the institutions and stands as one of the big benefits arising from mediation. Mediation offers a high level of control to the parties and consequently enhances certainty and legal security (Cover and Lecchi 2008, 122). Exceptions are only made for specific subject areas of law where either a weaker party or a relevant public interest exists. Additionally, some compulsory schemes of mediation, as it will be said later on, are also envisaged.

The existing link between mediation and party autonomy implies that it is for the parties to decide to take their dispute to mediation, to organise the proceeding the way they wish and to be involved in the proceeding, or to withdraw from it whenever they wish, or to reach or not a settlement on the dispute at stake. In these tasks the mediator will of course support them, but it is for the parties solely to decide.

2.1 Mediation and Party Autonomy: General Rule

The voluntary condition of mediation receives a general support worldwide, even in countries where no legislation on mediation exist or some suspicions towards mediation are said to exist: i.e. Russia[26] or Kazakstan.[27] The link between party autonomy and mediation is clearly ascertainable in the EU member States. It is fully recognised in countries like the Netherlands, a pro-mediation State, where despite the traditional absence of legislation, it has unanimously been accepted that it is for the parties to start the mediation and to withdraw from it whenever they want (Van Hoek and Kocken 2012, 502 & 510; Schmiedel 2013, 754 ff.). The same approach is accepted in Austria, another pro-mediation country (Roth and Gherdane 2013, 251), and where an understanding of mediation as a facilitative tool is supported.[28]

This voluntary nature of mediation is also explicitly supported in other EU member States: Bulgaria (Natov et al. 2012, 70; Georgiev and Jessel-Holst 2013, 334–335),[29] Germany,[30] Hungary (Kengyel et al. 2012, 218; Jessel-Holst 2013,

[26] Art. 2 MA.

[27] Art. 2 MA.

[28] §1 Abs. 1 ACMC; §2 Abs. 1 z. 1 CEUM.

[29] Arts. 2, 5 or 10(2) MA.

[30] Art. 1(1) MA. Also the parties are allowed to withdraw from the mediation at any stage of the procedure, in accordance to Art. 2(5) MA.

606), Luxembourg,[31] Croatia,[32] Greece (Kourtis and Sivena 2012, 245), Spain,[33] Finland, as regards out-of-court mediation,[34] Romania,[35] Slovakia[36] or Poland, where the voluntary character of mediation is considered a supreme principle established by the provision of Article 183^1 § 1 k.p.c. (Grzybczyk and Fraczek 2012, 304) although no statutory or case law definition of mediation exists (Morek and Rozdeiczer 2013, 777). Similar relevance of the link between mediation and the will of the parties exists in Sweden.[37] No party may be forced to enter a mediation, to continue it or to conclude an agreement,[38] and consequently the mediator cannot impose on the parties any decision.

This direct link between party autonomy and mediation goes even a step further in Slovenia, where the flexible, informal and voluntary nature of mediation is emphasized (Jovin Hrastnik 2011, 8).[39] Article 5 MA explicitly states that, leaving apart certain limited provisions of the Act regarding its interpretation, conduct of mediation and the agreement, the parties may reach a different agreement upon issues regulated by this Act or exclude the application of an individual provision of the Act (Knez and Weingerl 2014a, 1).

Nevertheless, this apparently unanimous approach which exists in Europe in favor of the voluntary nature of mediation encounters certain qualifications in some countries. Not all European legal systems embody a notion of mediation, clearly stressing this fact. Belgium is a good example of that (Taelman and Voet 2014, 3). The case of Scotland and England and Wales is different. No primary legislation on mediation seems to exist (Scherpe and Marten 2013, 368). However, the voluntary nature of mediation is stressed in both jurisdictions as a matter of principle (Crawford and Carruthers 2012, 520).[40]

A special situation can be also found in Portugal where a clear legal definition of mediation exists in Article 2 of Law n. 29/2013, of 19 April 2013 (Schmidt 2013, 812).[41] Nevertheless, in Portugal, reference to mediation is envisaged not only as

[31] Art. 1251-2(1) NCPC.

[32] Art. 3 MA that reproduces the solution provided by the Directive of 2008, Art. 3(a), Recitals 11 and 12.

[33] Arts 1 & 6(1) MA.

[34] S. 18(1) MA.

[35] Arts. 1, 2 & 60(1) Act 193/2006 on Mediation.

[36] Arts. 2(1) & 7(5) MA.

[37] Art. 3 MA.

[38] Art. 6(3) MA. This idea of voluntariness is stressed by Art. 19(1) MA which establishes that mediation starts with the so called "constitutive session" –"sesión constitutiva"- in which the parties must firstly manifest their wish to "develop a mediation procedure".

[39] Art. 3(1)(a) MA.

[40] As regards Scotland, note The Gill Report (2009b) (Vol. II), Recommendation 96 which actually considers mandatory schemes contrary to "the constitutional right of the citizen to take a dispute to the courts of law".

[41] And in Art. 4 of Law n. 21/2007, of 12.6.2007 concerning Criminal Mediation.

a fully private possibility but also it is integrated into the public system of justice administration where it is available for the parties on purely voluntary basis (Patrão 2012, 329).

Nevertheless, and despite this apparent unanimity, some cases exist where the notion of mediation provided by national legislation varies from the main stream thus, in Italy Article 1(1)(a) Legislative Decree no. 28/2010 provides a definition of mediation in which the role of the mediator goes further than the mere facilitative position awarded to this position in most European States (De Luca 2014, 1).[42]

2.2 *Voluntariness in Practice: The Potential Coexistence of Voluntary and Compulsory Mediation Schemes*

As stated, the voluntary character of mediation is one of the basic principles on which the institution stands. Voluntariness means that it is for the parties to decide whether or not to enter mediation and they must do it on a purely voluntary basis. Also, it is for the parties to organise "their" mediation in the way they wish and to leave it whenever they want with or without a settlement.[43]

The idea of making mediation directly dependent on the will of the parties tends to be subject to two clarifications of different condition:

1. On the one hand, parties may start mediation in order to settle their dispute whenever they wish, either on their own or on the advice of national courts in accordance with the circumstances of the case once court procedures have started or prior to them.[44] Therefore, out-of-court mediation coexists worldwide with court-annexed and court-related mediation. Although under the name of court-related mediation usually reference is truly made to court-related conciliation.
2. Additionally, the voluntary character of mediation does not impede national legislation from setting forth certain compulsory mediation schemes.[45] Such compulsory mediation schemes can either be understood in a general manner, or as regards a number of specific types of disputes or areas of law.

However, a distinction must be made between mandatory pre-trial mediation from mandatory reference of the parties to mediation by the judge once the court

[42]The provision defines mediation as the: "activity, irrespective of how it is denominated, developed by a third impartial person and which finalizes with the object of assisting two or more persons as regards the search of an amicable agreement for a dispute, or by the drafting of a proposal for its solution".

[43]Recital 13, 2008 Directive. Consider that modern communications technologies are available for the parties to organize their procedure (Recital 9, 2008 Directive).

[44]Art. 5(1) 2008 Directive. The court may also invite the parties "*to attend an information sesion on the use of mediation if such sessions are held and are easily available*" (Art. 5(1) *in fine*).

[45]Art. 5(2) & Recital 14, 2008 Directive.

proceeding have been started or prior to it; that is of mandatory out-of-court mediation or mandatory court-annexed or court-related mediation. Their basis and consequences vary from one another. In the former –and in court-related mediation- exigency of referring the dispute to mediation is considered a necessary condition for filing a claim before State courts. In fact, claim before national courts will be rejected, unless parties participated in the mediation process. Whereas in court-annexed mediation a procedure is already pending before national courts and it is stopped because of the mediation to be started.

2.2.1 General Schemes of Compulsory Mediation

Traditionally some very isolated general schemes of compulsory mediation existed in some countries of the world (Nolan-Haley 2012, 985): i.e. Italy,[46] and with certain qualifications Eslovenia.[47]

The existence of such general schemes of compulsory mediation signifies that prospective litigants are not allowed to file a claim in court until they have attempted mediation; otherwise the claim will be rejected. At first sight, the presence of compulsory mediation models may be considered as a sort of perversion of the own nature of mediation which, as stated before, stands on party autonomy. But it has also been argued in favour of compulsory mediation. They are considered to be a means to fully foster the objectives attached to mediation and to protect access to justice for certain particular groups or specific types of disputes. The compulsory nature of mediation must be understand as a way to promote dispute resolutions devices as an alternative to State courts and consequently to assist disputants in the timely resolution of disputes (Relis 2009, 65–67).

In Europe, compulsory mediation as condition for court proceedings raises also the question of its compatibility with Article 6 ECHR and EU law. The English Court of Appeal in *Halsey v. Milton Keynes General NHS Trust and Steel*[48] responded in the negative to this question (Nolan-Haley 2012, 985). An enquiry on this issue has also been made by Italian judges before the ECJ[49] for a preliminary ruling and also before the Italian Constitutional Court[50] for a national ruling to

[46]Note Decree Law of 21.6.2013, no. 69 transposed and amended by the Act of 9.8.2013, no. 98.

[47]Or Slovenia, too, where subject to the decision of the judge a court-annexed compulsory system is adopted.

[48]*Halsey v. Milton Keynes Gen. Hosp.*, [2004] EWCA (Civ) 576, [2004] W.L.R. 3002, [13] (Eng.).

[49]Case C-492/11 Reference for a preliminary ruling from the Giudice di Pace di Mercato San Severino (Italy) lodged on 26.09.2011 — Ciro Di Donna v Società imballaggi metallici Salerno Srl (SIMSA), OJ C 340, of 19.11.2011, 10.

[50]See ordinanza del TAR Lazio, 12.4.2011; Trib. Parma, 1.8. 2011; Trib. Genova, 18.11.2011; Trib. Palermo, 30.12. 2011, in (2011) 39 *Guida al Diritto*, 34.

verify the compatibility of the Italian mediation legislation with EU law and with the Italian Constitution, respectively (Queirolo et al. 2012, 280 ff.).

The Courts came to different conclusions in their judgments: on the one hand, admission of the compatibility of the Italian compulsory system on Telecommunications with EU Law, in the Judgment of the ECJ of 8 March 2010, on the Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Rosalba Alassini and Others v. Telecom Italia SpA and Others*[51] (Cutolo and Shalaby 2010, 135). And, on the other, rejection of the Italian general compulsory mediation scheme by the Italian Constitutional Court in Judgment 272/2012, of 24 October 2012,[52] in relation to the constitutionality, among others, of Article 5(1) of the Legislative Decree n. 28 of 4 March 2010 which had implemented the "Compulsory Mediation" procedure for the resolution of certain disputes (Esplugues 2014, 578 ff.). However, this negative response was not based on the finding that compulsory mediation infringed the Italian Constitution, but on the basis of the violation of constitutional rules on delegation of the legislative power (De Luca 2014, 4).

2.2.2 Special Mediation Schemes

Only a limited number of mandatory mediation schemes are encountered nowadays worldwide and they are envisaged solely for certain disputes or areas of law, or types of persons involved in disputes. Some cases may be encountered in Europe and abroad.

In Austria, in cases of persons with disabilities or neighbours it is obligatory to refer disputes to mediation or any other ADR device, while in disputes on traineeships only the possibility to refer the dispute to mediation exists (Risak 2014, 4). Germany is, too, one of the few countries in Europe in which mandatory pre-trial mediation serves as condition for subsequent litigation.[53] Although this possibility is very limited, both because the kind of issues to be referred to mediation and due to the necessary implementation of legislation by the *Länder*, something that not all of them have so far done.[54]

The Greek law on mediation seems to embody a somewhat cryptic reference to mandatory mediation in Article 3(1)(a) Law 3898/2010 (Kourtis and Sivena

[51] [2010], *ECR* p. I-00213.

[52] *GURI*, No. 49, of 12.12.2012.

[53] §15a EGZPO, referring to certain aspects of small civil law disputes, permits mandatory pre-trial mediation. Only when this mandatory mediation is completed may a dispute be brought before a court. Is this requirement not fulfilled it will be dismissed by the court. In case no agreement is reached, parties may commence a suit before a court.

[54] Currently eleven out of sixteen Länder have made use of this possibility.

2012, 202). Also a somewhat convoluted reference to compulsory mediation is made in Romania and the Law No. 115/2012 of 4 July 2012 which amends the Mediation Act Number (No.) 192/2006 now embodies in Article 2(1) a mandatory reference to an information session on the availability and advantages of mediation preliminary to the commencement of the procedure in a wide range of private law trials: consumer law, possession and property disputes, labor law, family matters, professional liability, civil matters with a dispute under 50,000 Lei but not insolvency procedures.[55]

Malta has historically accepted some specific schemes of compulsory mediation for certain family disputes.[56] And Croatia too sets forth a mandatory mediation scheme for collective labour disputes[57] and, in the field of family law; a specific type of compulsory 'conciliation' exists for divorce.[58]

In addition to the general mandatory court-annexed mediation set forth on general basis by Slovenian law, a special compulsory scheme is also embodied in the Insolvency Act (Knez and Weingerl 2014a, 2–3). Also in Europe, but outside the EU, a mandatory mediation schemes is designed in Norway for parental disputes on custody and visitation.[59] However this mandatory character is limited only to 1 h (Bernt 2014, 2).

But, as stated, some examples of compulsory mediation are found in other areas of the world. In Africa, in some countries belonging to the CEMAC, "conciliation" – not mediation- is considered to be a compulsory step previous to the beginning of the procedure before national courts in disputes related to divorce: i.e. Cameroun,[60] Congo,[61] or Gabon.[62] Or in disputes related to labour,[63] divorce[64] or as regards payment orders,[65] in Benin (Vodounon-Djegni 2014, 21 ff.). Similar mandatory

[55] Art. 60(1)(g) of this rule now embodies a change regarding criminal matters. Mediation is accepted in the case of crimes for which the penal action is set in motion on a prior petition of the injured Party and Parties' reconciliation removes the penal liability, after the petition filing, if the doer is known or was identified, on the condition that the victim expresses his/her consent of participating in the information session together with the doer. Doubts as to whether this preliminary session is compulsory also as regards criminal matters seem to exist.

[56] S. 17(c) MA accepts resource to mediation by the parties "by law".

[57] Arts. 269–273 Labour Act.

[58] Arts. 44–52 Family Act.

[59] SS. 59 & 61 The Children Act.

[60] Art. 238 Cc.

[61] Art. 181 ff. Code de la famille.

[62] Arts. 270–272 Cc.

[63] Art. 243 ff. CTravail.

[64] Arts. 236 & 239 Loi n° 2002–07 portant code des personnes et de la famille.

[65] Art. 12 of the Acte uniforme portant organisation des procédures simplifiées de recouvrement et des voies d'exécution of the Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA).

condition is granted in these States to conciliation as regards private[66] and collective[67] labour disputes. This compulsory conciliation is foreseen in Cameroun prior to arbitration as regards certain disputes in the field of private investments.[68] And as regards disputes in the field of telecommunications –i.e. Tchad[69] or Gabon-,[70] electricity –i.e. Cameroun-[71] or Banking –i.e. Senegal[72]

Also in relation to order for payment, Article 12 of the *Acte uniforme portant organisation des procédures simplifiées de recouvrement et des voies d'exécution (AUPRSVE) de l'OHADA* sets forth that the "juridiction saisie sur opposition procède à une tentative de conciliation" (Ngwanza 2014, 4). The compulsory character of the rule embodied is stressed by national case-law.[73]

The existence of this compulsory mediation schemes cannot be confused with the obligation that –mainly- lawyers and other legal practitioners have to inform their clients of the existence of mediation in certain areas of law. This is the situation existing in South Africa, where the South Gauteng High Court, Johannesburg in *MB v NB*[74] (the Brownlee case) held that legal representatives of the parties to a divorce must advise the parties of the benefits of mediation in appropriate circumstances. This trend has been reinforced by the Supreme Court of Appeal in *S v J and another*,[75] and by Section 33 of the Children's Act (Broodryk 2014, 22).[76]

Compulsory mediation is also ascertainable in some court-related mediation schemes throughout the world: i.e. Taiwan is a good example of that.[77] In accordance with Article 403 CPC some 11 mandatory mediation incidents in very different kinds of disputes are established. Parties are compelled to pass through the court mediation scheme before a suit is actually lodged. Also the Family

[66]Cameroun, Art. 139 CTravail; Centro African Republic, Art. 346 CTravail; Congo, Art. 240 CTravail; Gabon, Art. 314 CTravail; Tchad, Art. 420 CTravail.

[67]Cameroun, Art. 158 CTravail; Centro Africa Republic, Art. 367 CTravail; Congo, Art. 242 CTravail; Gabon, Art. 359 CTravail; Tchad, Art. 443 CTravail.

[68]Art. 26 (1) Loi fixant les incitations à l'investissement privé en République du Cameroun.

[69]Art. 64 Loi n° 009/PR/98 portant sur les télécommunications au Tchad.

[70]Art. 136 Loi n° 005/2001 portant réglementation des télécommunications au Gabon.

[71]Art. 85 Loi n° 2011/22 of 14.12.2011 régissant le secteur de l'électricité au Cameroun.

[72]Arrêté ministériel n° 02256 of 2.3.2009.

[73]Note, Tribunal de grande instance de Ouagadougou, jugement n° 74, 19.2.2003, affaire *Kiemtoré T Hervé c/ L'Entreprise Application Peinture Générale*, available at: www.ohada.com, Ohadata J-04-248 (accessed 07.07.2014).

[74]2010 (3) SA 220 (GSJ), available at: http://www.saflii.org/za/cases/ZAGPJHC/2009/76.html, accessed 08.07.2014.

[75]2011 2 All SA 299 (SCA), available at: http://www.saflii.org/za/cases/ZASCA/2010/139.html, accessed 08.07.2014.

[76]38 of 2005.

[77]Which seems to be not exactly the same as court-annexed mediation in so far mediation takes place at the courtyard buy prior the initiation of a civil procedure.

Proceedings Act 2012 requires all contentious family cases to be taken to court-connected mediation before litigation (Shen 2014, 85–86).

Finally, in Asia too Japan envisages certain sort of semi-mandatory ADR – not properly mediation- services. The Centre for Settlement of Traffic Accident Disputes is one of them (Kakiuchi 2014, 9).

2.3 "Wild" Mediations

Private autonomy is the basis of mediation regulated by law. However, private autonomy taken a step further could theoretically also result to the creation of mediation outside the scope of national legislation. This possibility may raise some questions in case no voluntary fulfillment of the settlement is reached, then settlement reached by the parties will have to gain enforceability through different ways.

Nevertheless, the possibility of 'wild' mediation is discussed in a very small number of States, and no single solution exists. Belgium, Italy or Austria, for instance, are good examples of the existing different approaches.

1. Belgium is very symptomatic as regards this situation. The possibility to start fully private mediations outside the scope of the CPC is accepted. This mediation is called 'wild' mediation and stands on the will of the parties solely (Van Leynseele and Van De Putte 2005, 298). However, according to Belgian law settlements reached in the course of 'wild' mediations are not enforceable when the parties do not voluntarily honour it (Traest 2012, 47).
2. In Italy, administered mediation is designed. The mediator acts within the framework of mediation centres registered with the Ministry of Justice. In case parties refer their disputes to a non-registered mediator, it will be considered to be outside the legal framework on mediation and the prospective settlement will be outside this framework too (De Luca 2014, 6).
3. Austria foresees the possibility of a mediation being conducted by a non-registered mediator; therefore, a mediation outside the scope of the ACMC (Frauenberger-Pfeiler 2012, 8). This mediation is presumed to lack standards of quality ensured by the Act although its enforceability is not excluded from the beginning.

3 The Legal Framework of Mediation

Mediation is an old institution that despite of being present worldwide for a long time has usually been treated rather differently in many countries of the world. The way that conflicts have been tackled across the world has been influenced by the different cultural and historical backgrounds of the specific country where litigation

takes place. They have determined to a great extent the degree of acceptance and practical implementation of mediation and other ADR devices both by the legislator and citizens (Busch 2010, 15).

The European Union provides an example of that. In Europe, a mediation-friendly continent, mediation has traditionally been an institution which received a general acceptance and regulation in some EU Member States prior to the enactment of the 2008 Directive. In Austria, a truly mediation-friendly country, pilot projects on mediation go back to 1994, and the Austrian legislation was enacted in 2003 (Mattl et al. 2006, 65–66; Leon and Rohracher 2012, 11 ff.). Also in Malta and Belgium, regulation on mediation was enacted in 2003 (Sciberras Camilleri 2012, 284) and 2005 (Taelman and Voet 2014, 2 ff.) respectively, well ahead of the 2008 Directive.

Also in England and Wales, prior to the enactment of the 2008 Directive, recourse to mediation was fostered by the legislator and by case law. The Woolf Report of 1996 (at 12) was accompanied by certain pilot projects favouring referral of disputes to ADR schemes, including mediation (Yu 2009, 520; Scherpe and Marten 2013, 368). Today mediation seems to be flourishing in England and Wales with more than 6,000 mediations in 2009, double the number of 2007 (Andrews 2011, 20–21). Costs of litigation, which are extremely high in the country, as Buxton Lord Justice of Appeal (LJ) in the Court of Appeal in *Willis v. Nicolson* admitted in 2007, are one of the main reasons for this blossoming (against Clarke 2008, 420). The long-lasting tradition of high levels of pre-trial settlements also favours this situation (Andrews 2014, 116) to the extent that twenty-first century English court litigation is said to have become the alternative dispute resolution system.

Nevertheless, as previously mentioned, this situation of active presence of mediation in the legal arena, even of clear support for the institution from the legislator and other actors which was ascertainable in certain European countries, has long historically coexisted with Member States in which no broad recourse to mediation existed – Scotland (Crawford and Carruthers 2012, 519), Spain (Iglesias et al. 2012, 436 ff.) or Italy (Queirolo et al. 2012, 247 ff.)- despite the general awareness of the benefits of mediation.[78] What is more relevant, some EU Member States have been characterised by their ignorance of the institution and the absence of any regulation whatsoever on mediation. Cyprus, for instance, is a country where the lack of regulation of the institution of mediation – truly "a rarity" (Emilianides and Xenofontos 2012, 87)- that, with the only exception of labour mediation, persisted until November 2012, when the Law on Certain Aspects of Mediation in Civil Matters No. 159 of 2012 was enacted.

Grounds for this absence of regulation of mediation have historically varied from country to country throughout the EU:

[78]Note The Gill Report (2009a), Vol. I, Chapter 5, paragraph (par). 83 and Chapter 7 paragraphs (pars. 2–8).

1. In certain cases silence was due to the scarce attention paid to the institution by the legislator or the doctrine because of the presence in the legal scenario of other institutions which, as a matter of principle, made it possible to reach similar solutions to mediation, i.e. conciliation or transaction (Spain) (Esplugues 2011, 96 ff.).

   In addition, in some other countries a facilitative atmosphere has traditionally been accepted – i.e. Ireland (Ellger 2013, 631)-[79] and high rates of settlement have been reached but there is no regulation of the institution of mediation. The usual attainment of the desired result by the parties (and the State) – that is, the settlement of the dispute – seems to have avoided the development of legislation in mediation, something that has not impeded resource to the institution in some occasions.[80]
2. Some other EU Member States also shared this absence of regulation of mediation though in this case it was not due to lack of interest – if any – by the legislator but to the peculiarities of the existing political regime. In the former socialist countries, for instance, access to justice was identified solely with access to State courts, and no room was left to ADR, especially to mediation. This was the situation in the three Baltic States – Latvia, Lithuania and Estonia (Nekrošius and Vėbraitė 2012, 29) – as well as in many other former Socialist countries like Bulgaria (Natov et al. 2012, 69) and the Czech Republic (Pauknerová et al. 2012, 99).
3. The very rich European legal tradition also includes a third category of countries where a more or less developed national legal framework regarding mediation has existed but it lacked implementation. The case of Sweden, where the idea of settlement is embedded in society, is considered a good example of that (Ervo and Sippel 2012, 373 & 378).

The picture drawn so far shows the absence of a unified legislative position towards the institution of mediation in Europe an integrated area of law. This situation has in too many cases been accompanied by the absence of a rich practice on ADR – in fact, in some cases of a really poor practice – due in many cases to the lack of awareness of the existence of this and other ADR devices (European Commission 2012, 15–16). In the case of mediation, this fact is stressed further by the absence of a clear understanding on what mediation is and what it implies for the parties and the legal system as a whole. In too many EU countries no clear boundaries between mediation and other institutions like conciliation or transaction

[79] In fact Ireland is approached as having a high rate of litigiousness and the world's highest rate of lawyers *per capita.*

[80] A good example as regards the position of courts in favour of mediation is the case of *Charlton v Kenn* (The High Court Record No. 2006/4266P) as regards a small piece of land next to the house of two neighbours. Another recent case is, *Six Mile Investments [Unlimited] & Ors -V- Companies Acts 1963 to 2001 No. 2012/63 COS* (Referred by Aylmer 2012, 13). Mediation is governed by the general rules on contracts and by the fundamental principles of voluntariness, confidentiality, privilege attaching to without prejudice communications occurring during or in contemplation of litigation, self-determination, neutrality, impartiality and enforceability.

have historically been drawn by the legislator or by case-law: Estonia,[81] Czech Republic (Pauknerová et al. 2012, 100–102) or Greece (Kourtis and Sivena 2012, 194 ff.) are good examples of that.

3.1 National Legal Framework for Mediation and Its Scope

Reference to mediation or any other ADR device in State constitutions seems to be the exception worldwide. In Europe, only Section 25 of the Fundamental Law of Hungary of 2012, which explicitly recognises that justice shall be administered by State courts; however, an Act may authorise other "organs to act" in particular legal disputes (Kengyel et al. 2012, 217). And of Portugal, where Article 202(4) states that, "The law may institutionalise non-judicial instruments and means of settling conflicts" (Patrão 2012, 330).[82] Outside Europe, Articles 17 & 18 of the Mexican Constitution admit the implementation of ADR mechanisms as regards civil, commercial and criminal cases. Also in Brazil, the Preamble of the Constitution of 1988 speaks of the "peaceful settlement of controversies". A special case is found in South Africa where the Constitution expressly refers to mediation, but it is only applicable as regards the relationship between the National Council of Provinces and National Assembly (Broodryk 2014, 7–8).

In addition to these isolated cases of reference to mediation by national constitutions, legislation specifically devoted to mediation is usually embodied in the CPC or set forth in a specific act devoted to it, or in both of them, or collected in several legal texts of different nature. Cases of absence of any legislation are also rather usual. South Africa constitutes once again a special case. No general legislation on out-of-court mediation has been enacted in the country but there are over 50 different Acts on specific topics and areas of law –children, gender equality, companies, services, consumer, electricity, gas, health professions, higher education, income tax, labour relations, local government, land, marriage and divorce . . . - that refer some categories of disputes to mediation. In addition to that, court-annexed mediation is not well established in the country and some regulation – Supreme Court Rule 37 and court-annexed mediation rules (Mediation Rules)- exists (Broodryk 2014, 6–24). A somewhat similar situation is found in Quebec. Judicial mediation is regulated by Arts. 151.14 – 151.23 CPC whereas in relation to out-of-court mediation, only family mediation and small claims are regulated.

In some areas of the world the regulation on mediation is usually embodied in the CPC: the case of countries belonging to the CEMAC where the regulation of out-of-court mediation is still very poor is a good example ofthis last situation: a "legal

[81] Law no 562, of 3.12.2009, on conciliation procedure (*Lepitusseadus*).

[82] Also, Art. 209(2) concerning categories of Courts.

desert" is said to exist (Ngwanza 2014, 5). Some regional texts accepting mediation may also be found in Africa: i.e. l'Acte Uniforme de l'OHADA relatif au droit des sociétés cooperatives.[83]

This absence of general regulation on mediation is also encountered in other very different countries of the world: i.e. Taiwan, Japan, Mexico or Brazil. In this last country, only the attempt of conciliation before a trial[84] is prescribed by law. As regards out-of-court mediation, mediation is considered a purely contractual phenomenon governed by the provisions on contracts of the Brazilian Civil Code (Basso and Polido 2014, 7).

Differences cannot only be found in the type of legal sources that regulate mediation worldwide but also in the scope of the legal framework designed. In this respect, the different national legislations on mediation reflect the different levels of acceptance of mediation in the several nations of the world and different stages of development of mediation as an institution. Focusing on the scope, relevant differences are ascertainable as regards the monistic/dualistic position adopted by the legislator in the legislation enacted and also as to the matters covered by mediation.

3.2 Monistic/Dualistic Approach

A broad number of States worldwide have not implemented any legislation on mediation. Even in case of having done so, no specific rules on cross-border mediation or definition of cross-border mediation are said to exist: i.e. CEMAC countries (Ngwanza 2014, 19), Norway (Bernt 2014, 28), South Africa (Broodryk 2014, 34–35), Kazakhstan (Karagussov 2014, 28), Brazil (Basso and Polido 2014, 31), Mexico (Gonzalez Martin 2014, 25 ff.) or Japan (Kakiuchi 2014, 27). Extrapolation of existing general solutions on mediation –i.e. Kazakhstan (Karagussov 2014, 2) – or on Private International Law (PIL) –i.e. Norway (Bernt 2014, 28), or South Africa, where the notion of cross-border mediation is relatively unknown in the country- (Broodryk 2014, 34–35) are promoted in certain countries as a general rule.

A fully different situation exists in Europe because of the implementation of the 2008 Directive. In the old continent, a broad number of States adopt the so called monistic approach and regulate both, internal and cross-border disputes.

[83] Arts. 117 & 118.

[84] Note Art. 277 CPC as regards courts dealing with small claims –"Juizados Especiais"- consider Law no. 9099/95 and Decree 1572/1995 in relation to labor law related mediation. The Council of National Justice has also enacted Resolution No. 125/1210, in particular Annex III that provides that every National Court will have to offer an adequate structure to make available for the parties the possibility of resort to conciliation previously to entering in judicial litigation. This possibility is said not to have been accomplished yet.

This is the position expressly adopted by Bulgaria,[85] Belgium – where no specific regulation has been implemented following the Directive of 2008 (Traest 2012, 53)-, Croatia (Babić 2014b, 87), Cyprus (Esplugues 2014, 546), France (Guinchard and Boucaron-Nardetto 2012, 146), Germany (Bach and Gruber 2012, 163), Baltic countries (Nekrošius and Vėbraitė 2012, 29 & 31), Luxembourg,[86] Malta (Sciberras Camilleri 2012, 286), Portugal (Patrão 2012, 331), Slovakia,[87] Slovenia (Jovin Hrastnik 2011, 10), Spain (Iglesias et al. 2012, 450) or Sweden (Ervo and Sippel 2012, 384). In some of these countries potential difficulties arising out of having two different applicable legal systems to mediation were emphasised in order to favour the adoption of this monistic approach (Guinchard and Boucaron-Nardetto 2012, 146).

In contrast, in other European States no specific solutions as regards mediation in cross-border disputes are said to exist and the general mediation system is extrapolated and applied to this sort of cases: i.e. Finland is a good example of that taking into account the narrow scope of the MA of 2011 (Ervo and Sippel 2012, 384), or Romania (Şandru and Călin 2014, 7). Further, some countries like Scotland and England and Wales solely enacted legislation on cross-border mediation leaving untouched and fully applicable current legal solutions on internal mediation (Crawford and Carruthers 2012, 523). Also in the Netherlands, the Mediation Act of 15 November 2012 applies only to cross-border mediation (Chin-A-Fat 2014, 2).

However, even this apparent broad trend in favour of a monistic approach that seems to exist in Europe does not completely hide the existence of certain differences through the continent regarding its understanding and practical implementation: In France and other EU Member States upholding the monistic approach, this option is subject to several exceptions (Guinchard and Boucaron-Nardetto 2012, 146). In other countries, like Germany, despite the existence, as a matter of principle, of a general legal framework applicable to all mediations, reference to general rules on contracts and court intervention is required in certain cases. Finally, in Spain, the Mediation Act of 2012 enjoys a general scope and applies to all sorts of mediations on disputes in civil and commercial matters. Nevertheless, this general Act coexists with a significant number of Autonomous Communities' legislations on mediation which apply mostly to family domestic mediation and problems as regards the delimitation of their scope exist.

Additionally, the scope of the legislation enacted governing domestic and cross-border mediation varies from country to country in Europe. In some isolated cases it explicitly covers both EU and non-EU cross-border mediations -this is, for instance, the case in Spain (Esplugues 2013b, 178–179) where in most cases no explicit response to this issue is provided.

[85] MA, Additional Provisions §1.

[86] Art. 1251–4 NCPC.

[87] Note Art. 1(2) *in fine* MA.

3.3 Areas of Law Covered

Another relevant issue regarding the scope of the regulations enacted worldwide refers to the scope granted to the legislation implemented.

As a matter of principle disputes that can be settled through transaction are those suitable for mediation. Historically, the analysis of the existing situation as regards the regulation of mediation shows the institution has been primarily devoted to solving disputes in relation to civil and commercial disputes (Esplugues 2014, 550). Nevertheless, this general statement is significantly qualified by some additional statements.

1. Firstly, mediation is accepted in civil and commercial matters. What the final understanding and scope of these two notions is varies from country to country. In some places, the notion of "civil and commercial" is understood as leaving outside the scope of the law any matters falling outside these two specific notions: i.e. France (Conseil d'Etat 2010, 29 ff.). Whereas in other States a broader interpretation of the notion of "civil and commercial" is favoured: i.e. in Slovakia,[88] Malta,[89] or Croatia[90] or South Africa (Broodryk 2014, 21–24) reference is made to disputes arising from civil law, family law, trade and industrial relations. Also in Macau, where mediation is considered not to be a usual device disputes on contract and civil damage cases, commercial, diplomatic, workplace, community and family matters are considered potentially referable to mediation (Silva Antares Pires 2014, 5)

   However, practice tends to show that despite this plain reference to civil and commercial matters, not much resource to mediation in business has so far been made in many countries of the world.[91] Further, even within the frame of civil disputes, mediation has been mainly used in issues of family law (Esplugues 2014, 550) and to a lesser extent in labour disputes. Cyprus, for instance, is a good example of a country where traditionally mediation has only been used as regards labour disputes (Emilianides and Xenofontos 2012, 87).

[88] Art. 2(1) Act no. 420/2004.

[89] Reference to "social" disputes is also included.

[90] Art. 1(1) MA.

[91] In fact, as previously stated, V. TILMAN clearly states that the percentage of disputes referred to mediation by businesses is said to range from 0,5 % till 2 % of the total amount. The situation as regards cross-border disputes is even worse: mediation stands in these cases for less than 0,05 % of European business conflicts. These dramatic figures reach an additional dimension if we take into account that around 25 % of commercial disputes in Europe are left unsolved because citizens refuse to litigate. (Tilman 2011, 4).

2. Secondly, these disputes to be taken to mediation have to refer to rights available for the parties: i.e. Slovakia,[92] Malta,[93] Croatia,[94] Romania,[95] Slovenia (Knez and Weingerl 2014a, 4), Italy,[96] or Luxembourg.[97] In Portugal, Article 11.° Act No. 29/2013 now makes a general reference to patrimonial and transactionable rights, with the apparent aim of broadening the scope of disputes referable to mediation (Lopes 2014, 313).[98]

   The understanding provided to the availability of rights varies, once again, from countries to countries. For instance, it has already been stated that family law is the field where traditionally mediation has been more broadly used worldwide. However, some countries exist where family law disputes –matrimonial disputes and disputes concerning the relationships between parent and children- are left outside the scope of mediation: i.e. Greece (Diamantopoulos and Koumpli 2014, 8).[99] The same happens in some places as regards labour disputes: i.e. Greece (Kourtis and Sivena 2012, 195). This reproduces in Madagascar, where matters related to capacity and legal status of persons cannot be subject to mediation.[100]
3. Thirdly, the growing support for mediation and other ADR devices is general worldwide. As stated, this support is clearly ascertainable for civil and commercial disputes, but it is also growing in other areas of law where so far ADR has usually had no role to play. This is the case of public law. This trend is ascertainable in the EU: i.e. Belgium (Taelman and Voet 2014, 4), Romania, where a general reference to any area of law is made (Milu and Taus 2012, 354), Croatia (Babić 2014b, 86–87), Hungary (Kengyel et al. 2012, 218 ff.); Austria (Frauenberger-Pfeiler 2012, 5), or Spain (Iglesias et al. 2012, 448). And abroad too, i.e. Benin, where mediation is accepted in several different

[92] Art. 2(1) Act no. 420/2004.

[93] Reference to "social" disputes is also included.

[94] Art. 1(1) MA.

[95] Art. 2(5) Act 192/2006 on Mediation.

[96] Art. 2(1) Legislative Decree n°. 28/2010.

[97] Art. 1251–1 (1) NCPC.

[98] Art. 11.° Act No. 29/2013.

[99] Where disputes relating to rights concerning the protection of personality cannot be referred to mediation either.

[100] Art. 158(1)(2) Loi 2012–013 sur la médiation.

fields: labour,[101] administrative,[102] taxation,[103] copyright,[104] family[105] or civil and commercial disputes, among other areas of law (Vodounon-Djegni 2014, 5 & 15). Or Madagascar where environmental issues,[106] foreign investments[107] or labour[108] disputes are subject to special mediation schemes (Rajaonera and Jakoba 2014, 2–3).

A special situation may be encountered in Ukraine where general legislation on mediation is lacking but some rules on the use of mediation –it is called "compromise"- in the area of criminal law exist (Fursa 2014, 4–5).

Certainly countries, like Luxembourg, exist where mediation is solely referred to civil and commercial disputes involving rights available to the parties. But in many other places, mediation is growingly admitted in areas like criminal law – i.e. in addition to the countries referred to above (Austria, Croatia, Romania, Belgium, Hungary, Spain), criminal mediation is also envisaged and accepted in Finland (Ervo and Sippel 2012, 383), Italy,[109] Poland[110] Portugal (Patrão 2012, 330 ff.), Slovakia,[111] Mexico (Gonzalez Martin 2014, 13), the Netherlands (Chin-A-Fat 2014, 1), or Norway-.[112] Or/and administrative law: i.e. once again, in addition to the countries referred to above (Austria, Croatia, Romania, Belgium, Hungary, Spain), consider Poland (Jankowski et al. 2014, 1), Slovenia (Knez and Weingerl 2014a, 10) or Kazakhstan (Karagussov 2014, 4–5 & 8).

Additionally, this broad scope granted to mediation in many places coexists with the presence of specific mediation schemes in areas like consumer law,

[101] Loi n°98-004 of 27.1.1998 portant Code du travail en République du Bénin and Art. 803 Loi n° 2008–07 of 28.2.2011 portant Code de procédure civile, commerciale, administrative, sociale et des comptes.

[102] Art. 1 Loi n° 2009–22 of 11.8.2009 instituant le Médiateur de la République.

[103] Arts. 86(d), 410–412, 541, 799, 895 Code général des impôts 365 du Code général des impôts.

[104] Art. 86 Loi n° 2005–30 of 5.4.2006 relative à la protection du droit d'auteur et des droits voisins en République du Bénin.

[105] Loi n° 2002–07 of 14.6.2004 portant Code des personnes et de la famille.

[106] Loi GELOSE (Gestion Locale Sécurisée) Loi 96–025 of 30.9.1996.

[107] Art. 9(3) Loi 2007–036 of 14.1.2008 qui prévoit la médiation de l'EDBM (ECONOMIC DEVELOPMENT BOARD OF MADAGASCAR) dans le cadre d'un litige entre Etat et investisseurs étrangers.

[108] Arts. 200–207 Loi 2003–044 of 28.7. 2004 relative au Code du Travail.

[109] Decreto Legislativo of 28.8.2000, no. 274, Disposizioni sulla competenza penale del giudice di pace, a norma dell'articolo 14 della legge 24.11.1999, n. 468.

[110] Act of 6.6.1997 – Code of Criminal Procedure and in 2002 in proceedings concerning juvenile criminals (Act of 26.10.2002 on the Juvenile Delinquency Proceedings). Note also the Ordinance of the Minister of Justice of 13.6.2003 on mediation proceedings in criminal cases.

[111] Criminal mediation is governed by Act n. 550/2003 Coll, on probation and mediation officers as amended.

[112] S. 71a The Criminal Procedure Act.

labour law, family matters, neighbors, Healthcare, Intellectual property rights and copyright, telecommunications or financial services.

4. Everything so far stated is referable to those countries where legislation on mediation –both out-of-court and court-annexed mediation- exists. But as previously mentioned there are some countries where legislation on out-of-court mediation is lacking and reference to the legal regime on transaction or arbitration is made: i.e. CEMAC, where it is usually said that parties cannot refer to mediation disputes related to civil status and capacity of persons. (Ngwanza 2014, 8).

4 The Basis for Mediation: Reference of the Dispute to Mediation

4.1 Out-of-Court Mediation

The dependence of mediation on party autonomy affects every single aspect of the mediation process: its starting, its execution, the selection of the mediator, the obligations of the parties and to reach – or not to reach – an agreement on the dispute at stake. Because of this direct link (leaving aside those special cases of compulsory mediation schemes already mentioned) it is essential to ascertain the existence of a free decision of the parties to submit their dispute to mediation for mediation to be possible, valid and effective. Certainly the parties' free decision may be prior to the rise of the dispute or posterior to it. But in any case this desire of the parties must be ascertainable without any doubt.

Consequently, as general rule mediation begins and can only continue and finish on the basis of a voluntary agreement by the parties involved in the dispute. Standing on this premise it is necessary to verify the valid and undoubted desire of the parties to refer their dispute to mediation instead of taking it to the State court or to any other ADR devices. From a legal standpoint this generates the question of how to determine whether the will of each party exists and how it is actually ascertained and granted efficacy.

As a matter of principle, the parties common desire to submit their dispute to mediation should be documented into a 'mediation agreement' or 'mediation clause' – whatever it is called – which may be included in a previous contract or have the form of an independent agreement before the dispute arises or once it has arisen, an agreement to mediate that receives different denominations in the several States. In many countries the absence of regulation of the mediation clause concluded before the dispute arises is accompanied by a great level of confusion as regards a later agreement entered into by the parties once the dispute exists which is recognised and regulated in some jurisdictions. To clarify, the latter is the agreement to mediate which is reached between the parties and the mediator prior to the commencement of the mediation and after the dispute has arisen.

It is significant to mention that many varying solutions exist in the world for the regulation of the formal requirements of the mediation agreement or the agreement to mediate, and of scope and effects of mediation.

4.1.1 Mediation Clause

Mediation clauses will either be included in a contract – the most common practice -, in a separate document, or they will be agreed on once the dispute has arisen – not very common-. In any case, as with arbitration clauses, they should be considered independent from the contract which embody them and therefore separable.

Practice shows the existence of many types of mediation clauses and different responses as to their formal validity and substantive requirements. But many countries often do not have rules for mediation clauses. This happens in the EU -i.e. Spain,[113] United Kingdom (UK) (Crawford and Carruthers 2012, 528), Luxembourg (Menétrey 2014a, 11), Italy (De Luca 2014, 5), the Netherlands (Chin-A-Fat 2014, 5), Malta (Sciberras Camilleri 2012, 287) or Slovenia-[114] and abroad –i.e. CEMAC countries (Ngwanza 2014, 9), South Africa (Broodryk 2014, 24), Taiwan (Shen 2014, 10), or Japan (Kakiuchi 2014, 16)-. In countries like Lebanon (Ben Hamida 2014, 3), or Brazil (Basso and Polido 2014, 14) where no regulation on out-of-court mediation exists, reference is made to the general contract law.

Also some jurisdictions exist where the lack of regulation favours its assimilation to an arbitration clause and regulation on arbitration is supposed to apply to mediation too: i.e. Quebec.[115]

Additionally other jurisdiction exist where some very basic rules mainly referring to the its written condition are embodied: i.e. Romania (Milu and Taus 2012, 357), Bulgaria,[116] Belgium (Traest 2012, 51), Lithuania (Nekrošius and Vėbraitė 2012, 31), Greece (Kourtis and Sivena 2012, 203), Slovakia,[117] Poland (Grzybczyk and Fraczek 2012, 307; Jankowski et al. 2014, 7–8) one of the countries with a more developed regulation of the clause and where, interestingly, the writing form is not a condition,[118] Norway, as regards mediation developed according Chapter 7 of The Dispute Act[119] or Kazakhstan, where some debate exists as to whether it can be entered in relation to future disputes.[120] Among these last countries, some

[113] Art. 6(2) MA.

[114] Art. 6 MA.

[115] Arts. 2638 – 2642 Cc. These rules will govern its form and content.

[116] Arts. 1251–5 (1) & 1251–8 NCPC.

[117] P. 7(2) MA.

[118] Art. 183^7 k.p.c.

[119] S. 7–1 The Dispute Act. Mediations developed under the rules of this Chapter grant the parties a higher level of rights than those developed outside it.

[120] Art. 2(7) MA.

jurisdictions exist where the lack of written form entails the nullity of the clause: i.e. Portugal (Capelo 2014, 6) or Russia.[121] Also, a general reference to the application of the law on obligations is made in some States: i.e. Austria (Frauenberger-Pfeiler 2012, 10–11), Germany (Bach and Gruber 2012, 164–165).[122]

4.1.2 Agreement to Mediate

The will of the parties habitually expressed through the drafting of a mediation clause is the basis on which any mediation stands. This mediation clause embodied in a contract or in a separate document tends to be accompanied in certain jurisdictions – at a certain point – by the drafting of an agreement to mediate. Whereas the mediation clause is entered into by the parties of the dispute and is embodied in the contract or in a separate document previously to or once the dispute has arisen, the agreement to mediate is usually concluded by the parties and generally also the mediator once the dispute has arisen or just before the effective commencement of the mediation process (Alexander 2009, 173–174). Through the mediation agreement the parties and the mediator set forth the general framework for the mediation to be developed and the route to be followed by the mediation.

The absence of a proper regulation of the mediation clause in many States is also reproduced to some extent as regards the agreement to mediate and its requirements, content and meaning in many countries: i.e. Italy (De Luca 2014, 6), or Taiwan (Shen 2014, 10). In contrast to that, in other places like Luxembourg, where no regulation exists as regards the mediation clause, highly detailed rules in relation to the form and the substance of the agreement to mediate are set forth.[123]

Because of the absence of a clear regulation of both the mediation clause and the agreement to mediate in many States their content often overlaps (Roth and Gherdane 2013, 283). In practice, the agreement to mediate manifests the will of the parties to submit their controversy to mediation. It usually contains all circumstances regarding mediation and organises the proceeding: that is, conditions of the mediation procedure, appointment of the mediator, requirement of confidentiality, venue, language, time-frame, remuneration or cancellation, etc. Moreover, countries

[121] Art. 2 MA.

[122] Under § 145 et seq. BGB, an agreement to mediate is concluded by offer and acceptance.

[123] Art. 1251.9(2) NCPC where the content of the agreement to mediate is clearly stated: "(2) L'accord en vue de la médiation contient: (1) l'accord des parties de recourir à la médiation; (2) le nom et l'adresse des parties et de leurs conseils; (3) le nom, la qualité et l'adresse du médiateur, et le cas échéant, la mention que le médiateur est agréé par le ministre de la Justice; (4) un exposé succinct du différend; (5) les modalités d'organisation et la durée du processus; (6) le rappel du principe de la confidentialité des communications et pièces échangées dans le cours de la médiation; (7) le mode de fixation et le taux des honoraires du médiateur, ainsi que les modalités de leur paiement; (8) la date et le lieu de signature; et (9) la signature des parties et du médiateur."

exist, where the signature of the mediation agreement is considered the effective beginning of the mediation proceedings: i.e., Czech Republic, Portugal, Slovakia or Spain.

An additional question to take always into account when approaching this issue is the presence in several States of two kinds of mediations: those performed by registered mediators, which are governed by the mediation rules of the State entailing specific legal consequences (mainly on enforcement of the settlement reached by the parties) and the mediation conducted by non-registered mediators, which consequently tend to fall outside the scope of national law. In the last case, it is for the parties and the mediator to actually conform all the steps of the mediation as in so far and by the own nature of this type of mediation regulation is scarce. A special situation in this respect exists in Luxembourg where the legislation requires the parties to explicitly manifest in the agreement to mediate whether the mediator is registered or not.[124] However, this does not in principle entail any consequence regarding the enforceability of the settlement reached.[125]

Many countries are silent in relation to the agreement to mediate as in fact they are also on the mediation clause. i.e. Austria (Frauenberger-Pfeiler 2012, 10), the Netherlands (Van Hoek and Kocken 2012, 502), Bulgaria,[126] Croatia,[127] Japan (Kakiuchi 2014, 16), Germany (Risse 2003, § 3 para. 13).[128] Conversely other States throughout the world exist where a minimum set of rules is designed. How detailed this regulation is varies from country to country. Also its voluntary or compulsory character differs. Thus, countries where some more or less developed and encompassing soft law rules are set forth as to its form and/or content -i.e. Greece,[129] Estonia (Nekrošius and Vėbraitė 2012, 33), Cyprus (Esplugues 2014, n. 804), Russia-[130] coexist with others where the agreement to mediate is deemed compulsory when a mediation is envisaged -i.e. Luxembourg,[131] Slovakia,[132] Spain (Iglesias et al. 2012, 473), Belgium –where it is called "mediation protocol" (Traest 2012, 55–56)-, Czech Republic (Pauknerová et al. 2012, 109), Romania, (Milu and Taus 2012, 357), or Portugal, where the parties may refer their disputes to both, public or purely private mediation schemes-. Kazakhstan is a special case in so

[124] Art. 1251–9 (2) (6) NCPC.

[125] Note, Art. 1251–23 NCPC.

[126] Art. 2 MA

[127] The MA only states that should one party receive an invitation to mediate and does not reply to it in the next 15 days, the invitation will be deemed refused (Art. 6 (3)).

[128] Under § § 145 *et seq*. BGB, an agreement to mediate is concluded by offer and acceptance.

[129] Code of Conduct, Art. 3.1. Remember Art. 2MA of the Mediation Act which also states that the agreement must be evidenced in writing.

[130] Art. 8 MA.

[131] Art. 1251-9(2) NCPC.

[132] Art. 14(2) MA.

far Article 21(2)(1) MA is interpreted as allowing the conclusion of a mediation agreement only when the dispute already exists. In addition to that, the rule includes 11 items that must necessarily be included in the agreement. Some of them look rather unrealistic: i.e. Article 21(2)(8) requires the parties to include "grounds and volume of liability of the mediator who participates in the dispute settlement for his/her actions (inaction) which entailed damage to the parties of the mediation" (Karagussov 2014, 11).

In any case, and irrespective of their -optional or compulsory- nature, national laws tend to coincide in setting a minimum content for the agreement to mediate. Thus, it should embody references to the will of the parties to submit their disputes to mediation; to the name and address of the parties and their advisers; to the name, personal condition and address of the mediator and whether he or she is registered or not; a succinct statement as regards the dispute; modalities of organization of the procedure and its duration; some sort of reminder of the duty of confidentiality; the way of establishing the fees of the mediator and the means of payment; the date and place of the signature; signature of the parties and the mediator: i.e. Luxembourg.[133] In cases of absence of national regulations this minimum content is generally set forth by existing mediation institutions: i.e. South Africa (Broodryk 2014, 24).

4.1.3 Effects of the Mediation Clause and/or the Agreement to Mediate

The analysis of the existing regulation of mediation shows that the mediation clause and the agreement to mediate receive a different treatment, approach and regulation in national legislations, provided of course regulation actually exists. In CEMAC countries the mediation clause lacks regulation. The clause is considered a contract between the parties that obliges them to try to reach a settlement: not, actually, to reach it. Breach of the clause is said to amount solely to contractual responsibility.[134]

It should also be highlighted that differences not only exist in requirements such as the written form but in the basic understanding of mediation clauses and agreements to mediate, namely their nature and whether they are considered to be contractual or pre-contractual realities. Across the world mediation clauses and agreements to mediate have different kinds of effects. It also needs to be ascertained to what extent they are really requirable and on what grounds. Because of the special nature of obligations arising from them, mediation clauses (and agreements to mediate) are more difficult to enforce than arbitration or jurisdiction clauses.

[133] Art. 1251-9(2) NCPC.

[134] This solution is said to be reached by way of taking into account the existing French's case law regarding conciliation.

The mediation clause and the agreement to mediate are both entered into by the parties and therefore are binding upon them, but their enforceability is very much dependent on -at least- two factors of different nature:

1. Firstly, the parties are given the right to enter to the mediation or to leave it whenever they want. On these grounds speaking of the enforceability of this kind of the mediation clause/agreement to mediate is rather relative in so far it will directly be dependent on the will of each party to actually start the mediation once the dispute has arisen.
2. Secondly, even when the parties decide to honour their compromise and to refer their dispute to mediation, what this actually entails is conditioned by the fact that they lack any obligation to settle the dispute. The obligation mediation clause and agreement to mediate encompass is rather abstract and could be understood as entering mediation and participating in at least one meeting in good faith (Alexander 2009, 196). Both therefore entail an obligation to participate, not to reach any settlement.

A trend exists to consider them subject to the general rules on contract law, but the fact is that when these clauses only entail an obligation to submit a dispute or a specific type of disputes to mediation their enforceability is rather weak. Their validity should generally be questioned by the court. Even when accepted as valid when accepted as valid they will still be limited in so far as parties can usually abandon mediation when they so wish and without any specific reason. Thus, compulsion to fulfil the mediation clause/agreement to mediate might result in mere formal appearance before the mediator.

A more difficult situation exists in those cases in which the agreement embodies not only an obligation to submit the dispute to mediation but, at the same time, it includes a prohibition to start a procedure or arbitration while the mediation is pending. In this case we would have another contractual obligation whose final enforceability seems to be, at least in principle, easier to ensure.[135]

In any case, depending on the nature granted to the mediation clause and to the agreement to mediate, relationships between the parties themselves and the parties with the mediator may change and the responsibility arising from a potential breach of the mediation clause or of the mediation agreement may vary deeply.

4.1.3.1 Effects Upon the Parties

Unfortunately, awarding a contractual nature to the mediation agreement entered by the parties or by the parties and the mediator does not clarify the extent of the obligations accepted by them. As stated, and contrary to what happens with arbitration clauses obligations arising out of mediation clauses or of the agreement

[135]Croatia is a good example of this situation, note Art. 18 MA in which it is clearly stated that the court or the arbitration shall reject any notion to start or continue a procedure or arbitration.

to mediate do not receive a broad regulation in many States on the one hand, and on the other hand they seem to be not easily enforceable.

Therefore, the central issue to approach with regard to the mediation clause and the agreement to mediate moves from the nature awarded to these instruments to the determination of what this binding condition granted to them actually means for the parties who agreed to submit the dispute to mediation and how their fulfilment may be requested by one party in case of breach of the agreement or inactivity. This must of course also be done taking into account the nature and the function of these two instruments – mediation clause and agreement to mediate – and the voluntary condition which accompanies the institution of mediation. As previously mentioned, they embody duties that cannot always be easily enforceable.

Leaving apart the specific case of Belgium,[136] regulation regarding the nature of the obligations arising from both of them and on their enforceability is limited or inexistent in many countries worldwide and in addition to that varies from country to country in too many cases. Austria (Frauenberger-Pfeiler 2012, 14–15), Germany (Bach and Gruber 2012, 165), or Quebec (Guillemard 2014, 24) grant binding character to these two instruments and the breach of any of them would solely imply a breach of a contract governed by general contract law. And it would entail compensation under certain circumstances, although the future of this claim seems problematic due to the difficult calculation of damages caused to the other party. Similar position seems to be shared in Greece (Diamantopoulos and Koumpli 2014, 12), Luxembourg (Menétrey 2014a, 13–14), or Russia (Argunov et al. 2014, 4). In this last country, the absence of effects of both instruments –in fully out-of-court mediations- on prescription periods leads the legal doctrine to consider that they embody "declarative" obligations for the parties or even "quasi-obligations". Also in Taiwan both instruments are given contractual condition, even when no regulation on these two instruments exists in the country (Shen 2014, 10).

A similar position is sustained in Brazil where no regulation on out-of-court has been developed so far. The mediation clause or the agreement to mediate are said to be governed by general contract law and failure to fulfill them will amount to a breach of contractual obligations governed by Articles 389 – 393 Cc.

Both the mediation clause and the agreement to mediate manifest the will of the parties to submit their disputes to mediation. Consequently, they are binding upon the parties and although their potential enforceability and their exigency before national courts vary from country to country, a widespread difficulty seems to exist whether to impose compensation for a potential breach of contract. The voluntary condition of mediation entails that the parties agree to attempt the mediation in good faith, although the parties are not obliged to remain in the mediation or to reach an agreement: i.e. France (Deckert 2013, 468–469),Czech Republic (Pauknerová

[136] Art. 1731 CPC.

et al. 2012, 117), Spain,[137] Baltic countries (Nekrošius and Vėbraitė 2012, 34), or Bulgaria, where the agreement to mediate obliges the parties to at least attend the first meeting of the mediation.[138]

This position seems to be maintained in England and Wales as well (Scherpe and Marten 2013, 383). Case law concerning mediation clauses stresses their contractual nature and consequently their binding character for the parties to it. The leading case is *Cable & Wireless v. IBM United Kingdom Ltd.* (2002).[139] Conversely, this possibility seems to have received a negative –academic- response in Quebec (Guillemard 2014, 24).

However, in some cases where special interests are involved legislation invalids contracts which purport to prevent parties to refer their disputes to State courts. This is what happened in England and Wales in *Clyde & Co v. Bates van Winkelhof* (2011)[140] where a clause compelling a partner in a law firm to refer his/her disputes to mediation and arbitration was invalidated in so far it prevented the party to take his/her claims to the Employment tribunal as this is explicitly forbidden by Section 120 of the Equality Act 2010 and Section 203 of the Equality Rights Act 1996 (Andrews 2014, 109).

Also South Africa, where general legislation on mediation is lacking, affords contractual nature to the agreement of the parties to submit their dispute to mediation. Some different remedies are considered in case of breach of the agreement: stay of the procedure before national courts, specific performance or award damages for breach of contracts but no legal basis for them actually exist (Broodryk 2014, 26).

In contrast, other countries, i.e. Czech Republic (Pauknerová et al. 2012, 110), Poland,[141] the Netherlands –due to different reasons- do not envisage consequences for breach of the mediation clause/agreement to mediate in so far as mediation is considered to be a fully voluntary device (Van Hoek and Kocken 2012, 449). In the Netherlands, the Supreme Court in its Judgment of 20 January 2006[142] clearly stressed that because of the voluntary nature of mediation, parties are allowed at any time and on any reasons to refrain from entering a mediation proceeding.

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[137] Art. 6(2) MA.

[138] Its breach may render the parties responsible for breach of contract and some penalties are seemingly foreseen (*As per* Art, 17(2) & (3) MA).

[139] [2002] 2 All ER (Comm) 1041, Colman J. N. A somewhat more negative attitude towards the real enforceability of mediation clauses may be found in *SITA v Watson Wyatt: Maxwell Batley* [2002] EWHC Ch 2025 and in *Corenso Ltd v The Burden Group plc.* [2003] EWHC 1805 (QB).

[140] [2011] EWHC 668 (QB), Slade J.

[141] Art. 183[1] § 1 k.p.c. clearly states that "Mediation is voluntary."

[142] LJNAU3724, available (in Dutch) at http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2006:AU3724 (visited 24.06.2014).

4.1.3.2 Effects on the Mediator

Because of the very nature of the mediation clause and of the agreement to mediate consequences for the mediator usually only arise from the last one. According to the regulation in many States the agreement to mediate needs to be entered into by the parties and the mediator before the commencement of the mediation, irrespective of the existence –or not- of a mediation clause. Agreements to mediate tend to encompass more information than mediation clauses. In the mediation clause parties habitually only manifest the parties will to submit their current or prospective dispute to mediation. No reference to the name of the mediator is habitually made in the mediation clause; if at all reference is usually only made to the mediation institution in charge of appointing the mediator or to the number of mediators and their traits. In case of such a reference it will be effective once the mediation begins.

Most States acknowledge a contractual relationship between the mediator and the parties arising out of the agreement to mediate: i.e. Belgium (Traest 2012, 59), or South Africa (Broodryk 2014, 26). It begins either with the appointment of the mediator by the Mediation Center or with the selection of the mediator by the parties prior to the commencement of the mediation proceedings (Hopt and Steffek 2013, 73). Nevertheless, once again difficulties arise when determining the specific nature of the contractual obligation between the parties and the mediator arising from the agreement to mediate. Some countries tend to qualify this relationship as a contract for services or functions (Natov et al. 2012, 73) and others as a contract of assignment (Van Hoek and Kocken 2012, 502). Interestingly, no reference is made as to the possibility of a contract of employment. On the contrary, some States –i.e. Austria (Roth and Gherdane 2013, 284)- consider the relationship created between the mediator and the parties by virtue of the mediation agreement as some sort of a hybrid contract embodying both labour and services elements.

The agreement to mediate clearly establishes obligations for the mediator. As we will see later on,[143] in many jurisdictions first and foremost a general obligation for the mediator exists to conduct the mediation process personally in a direct, conscientious, efficient and neutral manner (Falk and Koren 2005, 136–137). An additional obligation explicitly mentioned by the law of some States is for example confidentiality. However no obligation exists for a successful termination of mediation – the parties reaching a settlement- in so far the mediator solely plays a facilitative role. Accordingly, the breach of the agreement to mediate by the mediator may consequently have consequences for him or her, usually may amount

[143] Note 5.1.4. *infra*.

to contractual liability: i.e. Germany (Bach and Gruber 2012, 166), Portugal,[144] or Malta (Sciberras Camilleri 2012, 288) are examples of this position.

4.2 Court-Annexed Mediation

As a matter of principle, court-annexed mediation is mediation developed in the frame of or in connection with a judicial procedure. Under the general umbrella of court-annexed mediation also court-related mediation tends to be embodied. Although the analysis of existing court-related mediation schemes tends to show that they usually are schemes for judicial conciliation. Thus, in certain countries mediation is developed in a court prior to the prospective lodging of a claim: i.e. in Taiwan the so called in court-connected mediation (Shen 2014, 11), or Japan, where mediation is developed in many occasions at the courtyard independently or prior to the commencement of a civil procedure and they could more accurately being called judicial conciliation procedures (Kakiuchi 2014, 3). In some cases, due to the special nature of the dispute at stake, court-annexed mediation takes the form of judicial mediation. This happens in Norway in accordance with Section 8–4 of The Dispute Act. In this sort of very flexible mediation the mediator usually is a judge (Bernt 2014, 3–4), or in Quebec.[145]

Though the existence of court-annexed mediation is -also- fully dependent on the will of the parties several differences may be encountered as regards some specific issues, such as the appointment of the mediator, the selection of the procedure or its costs.

Overall a mixed attitude towards court-annexed mediation exists in the world (De Roo and Jagtenberg 2005, 182). In Central Asia, court annexed mediation and out-of-court mediation are said to be well established: i.e. Kazakhstan.[146] In countries belonging to the CEMAC, it seems to be very well established that one of the missions of the judge is to favour conciliation between the parties (Ngwanza 2014, 3–4). This is accepted in different ways in Central African Republic,[147] Gabon,[148]

[144] Art. 33.° Law n. 78/2001, 13.7.2001 – a minor change has been operated by Law 54/2013, of 31.7, and Art. 19 Decree of Ministry of Justice n. 1112/2005, of 28.10.2005 (*Justice for the Peace mediation services)*; Art. 9 Decree of Secretary of State of Justice n. 18778/2007, of 13.7.2007 *(family mediation services)*; Art. 5 Agreement between Ministry of Justice, Labour Unions and Industry Associations, of 5.5.2006 *(labour mediation services)*; Art. 12 and 18 Regulation of Criminal Mediation System, approved by Decree of Ministry of Justice n. 68-C/2008, of 22.1.2008 (*criminal mediation services).*

[145] Arts. 151.14 – 151.23 CPC.

[146] Art. 20(2) MA.

[147] Art. 399 CPC.

[148] Art. 9(2) CPC.

Tchad,[149] Congo,[150] or Cameroun.[151] South Africa constitutes a special case in so far no general regulation on out-of-court mediation exists in the country and the only general regulation encountered refers to court-annexed mediation: the Supreme Court Rule 37 that governs the different matters that must be dealt with at a pre-trial conference and recently published court-annexed mediation rules (Mediation Rules). Also the Department of Justice and Correctional Services will be launching court-annexed mediation at pilot site courts across the country on 1 August 2014 (Broodryk 2014, 19–20).[152]

Opposite to this situation, in some –very few- countries court-annexed mediation is not accepted or envisaged at all: i.e.: Austria (Risak 2014, 2) or Hungary until 2012 (Harsági et al. 2014, 208). Leaving aside these isolated cases of rejection of court-annexed mediation, the possibility of developing mediation in relationship with a previously started court procedure is accepted in most countries: i.e. England and Wales (Scherpe and Marten 2013, 372 ff.), Malta,[153] Luxembourg,[154] Cyprus,[155] Romania (Milu and Taus 2012, 368), Poland (Jankowski et al. 2014, 3), Portugal (Patrão 2012, 331), Belgium,[156] Greece,[157] France (Deckert 2013, 463–465), the Netherlands (Van Hoek and Kocken 2012, 510 ff.), Spain (Iglesias et al. 2012, 482), Finland (Ervo and Sippel 2012, 403), Russia,[158] Mexico,[159] or Italy (Queirolo et al. 2012, 262).

Reasons for the judge to refer parties to mediation vary from country to country. Because of the so called "dispositive principle" – the civil process is fully dependent on the will of the parties – parties have a right to refer their dispute to mediation whenever they wish, thus stopping the procedure before the court. On the contrary, the position of the judge as regards mediation -especially once the procedure has started- is much more subtle. The parties have decided on fully free basis to start a procedure before the court and despite this fact the court decides to invite them to submit their dispute to mediation: in the case of Slovenia, to force them to go to mediation (Knez and Weingerl 2014a, 2). This proactive attitude towards mediation is also encountered in Norway where Section 8–1 of The Dispute Act clearly sets

[149] Art. 60 CPC.

[150] Art. 122, Act No. 19–99 portant organizatoin judiciaire au Congo.

[151] Art. 3 CPC.

[152] R. 183 Rules Board for Courts of Law Act (107/1985): Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrate's Courts of South Africa GN R 3.

[153] In accordance with Art. 173(2) of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta).

[154] Arts. 1251-2(1), 1251–8 & 1251-12(1) NCPC.

[155] SS. 15(1), (3) & (6) MA.

[156] Court-annexed is governed by Arts. 1734–1737 CPC.

[157] Art. 214B CPC.

[158] Art. 169 CPC.

[159] i.e. Arts. 55 & 941 CPC of the City of Mexico or Art. 287 Cc of the City of Mexico.

forth the duty for the Court at every stage of the procedure, to invite the parties to reach a total or partial settlement by way of mediation or judicial mediation (Bernt 2014, 3).

This decision should be sound and justified. It tends to be based on different grounds and reasons, although in practice it will very much depend on the judge's discretion taking into account the facts and interests of the dispute and also the level of complexity of the case. And this discretion will come in many occasions modulated by the idea of justice and the role played by the court which exists in each State (Alexander 2009, 150). This freedom that accompanies the judge to refer the parties to mediation –"conciliation"- is well established in African countries belonging to the CEMAC.[160] National Courts have also stressed the power of the judge to appreciate this necessity.[161]

Also, the specific moment in which the court may refer the parties to mediation differs from one country to another, although usually a very flexible position as to this issue tends to exist worldwide: in countries belonging to the CEMAC it is widely considered that this possibility exists "à tout moment" (Ngwanza 2014, 5) either on invitation by the court or on request by the parties to the dispute.

Additionally, and notwithstanding the role played by the judge in referring the parties to mediation, national legislations envisage different positions as regards the resource to mediation by the parties after the invitation was made by the judge. Although in most countries it is up for the parties to accept the invitation of the court, some cases of mandatory referral to mediation without consent of the parties or at least of both parties are envisaged: i.e. Bulgaria,[162] Croatia –where the legislation speaks of invitation to-,[163] or Germany –on some limited grounds- (I Bach and Gruber 2012, 175 ff.). Additionally, a *de facto* compulsory situation exists in some countries, in so far fees to be paid by the party who refused to refer his or her dispute to mediation are increased or no reduction of the costs to be paid is granted: i.e. Baltic countries (Nekrošius and Vėbraitė 2012, 39), Slovenia,[164] Czech Republic (Pauknerová et al. 2012, 123), or Poland[165] are good examples of that.

[160]Cameroun, Art. 3 CPC; Gabon, Art. 425 CPC, Central Africa Republic, Art. 401 CPC.

[161]Cour suprême du Tchad, 3.3.2005, arrêt n° 014/CS/CJ/SC/05, http://www.juricaf.org/arret/TCHAD-COURSUPREME-20050303-014CSCJSC05 (accessed 07.07.14).

[162]In accordance with Art. 140(3) CPC, the judge may direct the parties to mediation or any other procedure for voluntary settlement of their dispute. The same opportunity is given in the field of commercial disputes. Note Art. 374(2) CPC.

[163]Croatia, for instance, in accordance Art. 19(1) MA.

[164]Art. 15(1) ZARSS.

[165]Art. 1383 § 1 k.p.c. However this article relates only to the court's decision referring parties to mediation. The influence of party's refusal on the court costs is regulated in art. 103 k.p.c. Pursuant to art. 103 § 1, notwithstanding the outcome of a case, the court may order a party or an intervenor to reimburse any costs caused by their undue or evidently improper conduct. In the light of art. 103 § 2, this provision shall apply in particular to refusing without due cause to participate in mediation, where the party has previously agreed to such mediation.

Nevertheless, reference to mediation by the court in which a judicial proceeding is pending raises additional questions of different nature: the issue of the form used by the judge to invite the parties to refer their dispute to mediation, which seems very much dependent on the moment in which the judge informs the parties about the existence of mediation or refers them to mediation. Also, the specific procedural moment for the judge to do so. General rules on civil procedure of each State will usually be applicable to answer these questions: i.e. in Poland the court may refer parties to mediation only once in the course of proceedings and always until the end of the first scheduled hearing (Jankowski et al. 2014, 8).

Additionally, the issue of the object of the mediation is controversial: whether the dispute referred to mediation by the court directly or by the parties by invitation of the court must coincide in full or in part with the object of the claim filed before the national court (Alexander 2009, 167). Or whether questions pertinent for the final outcome of the court procedures can be the object of the mediation, something that may be relevant in highly complex disputes. Finally, the extent to what the object of mediation is affected by the possibility of the facts of the dispute being undetermined may be relevant.

4.3 Mediation and Prescription and Limitation Periods

The mediation clause and the agreement to mediate are broadly granted contractual nature across the world and are considered to be binding upon the parties (and the parties and the mediator in the agreement to mediate). In many countries questions arise as to the actual meaning of this binding relationship and the effects arising from it. These are very significant questions which are of particular relevance for the field of procedural law. It is of utmost importance to ascertain, whether a mediation clause or an agreement to mediate produce some procedural effects as for example arbitration clauses and consequently prevent national courts or arbitrators from starting a procedure over the dispute that is submitted to mediation.

This fact places the debate on the effects of the mediation clause or the agreement to mediate on courts or arbitrators in a fully different background to that existing regarding to their effects on the parties or on the mediator. The debate goes beyond the strict contractual sphere and reaches a truly procedural dimension which is basically referred to national courts or arbitration, provided an arbitration clause exists. It is necessary to know the influence of the mediation clause and the agreement to mediate on the principle of access to justice and whether their existence ousts the power of national court -and eventually of arbitrators- to start a procedure. This issue has not yet been dealt with by the European Court of Human Rights, but some case law exists in England and Wales (Alexander 2009, 179–181)- and in the Netherlands (Van Hoek and Kocken 2012, 496).

Differences exist regarding the initiation of purely out-of-court mediations or court-annexed or, even, court-related mediations.

1. In the EU and because of Article 8 of the 2008 Directive, mediation is considered an opportunity for the parties to settle their dispute; but an opportunity that in

no way should undermine their right to refer any dispute arising among them to national courts or arbitration. That means, on the one hand, that they should always be able to refer their dispute to mediation irrespective of the existence of a claim pending before a State court or arbitration. And, conversely parties must also be assured full rights to refer their dispute to national courts or arbitration in case of the failure of mediation.

Consequently, the existence of a mediation clause or an agreement to mediate between the parties to a dispute prevents state courts or arbitration tribunals to start a procedure regarding any dispute covered by it when this is requested by any party bound by them. The protection of the parties' right to refer whenever they wish their dispute to the courts endorses limitation and prescription periods in mediation: i.e. Austria (Roth and Gherdane 2013, 263), Czech Republic,[166] England and Wales (Scherpe and Marten 2013, 384–385), Germany,[167] Belgium,[168] Greece (Kourtis and Sivena 2012, 204), Croatia,[169] Hungary[170] Malta,[171] Luxembourg,[172] Portugal,[173] Poland,[174] France (Guinchard and Boucaron-Nardetto 2012, 142; Deckert 2013, 470–471), Romania (Milu and Taus 2012, 358), Slovenia,[175] Baltic countries (Nekrošius and Vėbraitė 2012, 34), Spain (Iglesias et al. 2012, 463–464), Sweden,[176] Bulgaria (Natov et al. 2012, 76; Georgiev and Jessel-Holst 2013, 343–344), or Scotland (Crawford and Carruthers 2012, 528). With differences as to conditions requested and its duration –1 month in Belgium (Taelman and Voet 2014, 12 ff.) up to 3 months in Romania (Şandru and Cälin 2014, 9), or 6 months in Greece (Diamantopoulos and Koumpli 2014, 17).

Also in Africa, Article 21(2) of the *Acte uniforme portant sur le droit commercial général (AUDCG) de l'OHADA* regulates the effect that the beginning of mediation may have on prescription periods. The provision explicitly states that prescription is «suspendue à compter du jour où, après la survenance d'un

[166] S. 647 Act No. 89/2012 Sb. Cc.

[167] § 282(3) ZPO and BGH, of 19.11.2008 – IV ZR 293/05, NJW-RR 2009, 637; BGH, of 18.11.1998 – VIII ZR 344/97, NJW 1999, 647; BGH, of 4.7.1977 – II ZR 55/7, NJW 1977, 2263 or (dissenting) OLG Frankfurt, of 12.05.2009 – 14 Sch 4/09, NJW-RR 2010, 788 ff or LG Heilbronn, of 10.9.2010 – 4 O 259/09, ZKM 2011, 29, all of them in relation to conciliation –not mediation-clauses.

[168] Art. 1731(4) CPC.

[169] For instance, this possibility is explicitly admitted by the Croatian MA at Art. 5.

[170] S. 31(2) of the Act LV of 2002 on Mediation. Regarding the limitation period, S. 327(1) and (2) Cc shall apply if the mediation process is successful and S. 326(2) Cc shall apply if not.

[171] S. 27A MA.

[172] Art. 1251–5 (2) NCPC.

[173] Art. 273(2) CPC.

[174] Art. 202^1 k.p.c. Morek and Rozdeiczer 2013, 789.

[175] Art. 16 MA.

[176] P. 6 MA.

litige, les parties conviennent de recourir à la médiation ou à la conciliation ou, à défaut d'accord écrit, à compter du jour de la première réunion de médiation ou de conciliation. Le délai de prescription recommence à courir, pour une durée qui ne peut être inférieure à six mois, à compter de la date à laquelle soit l'une des parties ou les deux, soit le médiateur ou le conciliateur déclarent que la médiation ou la conciliation est terminée ».[177]

Some other jurisdictions refer this effect not to the mediation clause or to the agreement to mediate, but to the proceeding of mediation once it has started. This is the case of Portugal,[178] Poland, (Grzybczyk and Fraczek 2012, 308),[179] Romania (Şandru and Cälin 2014, 9), Slovenia,[180] or Spain.[181] Significantly, in some isolated States the initiation of the mediation is considered not to affect judges or arbitrators. The case of the Czech Republic is paradigmatic to this respect (Pauknerová et al. 2012, 111). Russia too explicitly maintains a similar position in so far Articles 4 & 7 MA clearly admit that the existence of any mediation clause or agreement to mediate or the invitation to –out-of-court- mediation proceeding does not restraint the parties from application to the arbitration or to the court, unless otherwise provided by Federal Law (Argunov et al. 2014, 4). Staying of the procedure for 60 days is nevertheless admitted as regards court-annexed mediation by Article 169 CPC. In the same line, Norway accepts that only court-annexed and not out-of-court mediation suspends prescription and limitation periods (Bernt 2014, 7).

2. The suspension of limitation and prescription periods because of mediation has a fully different meaning for court-annexed mediations in so far in this case a claim has been lodged before a State court and a procedure is pending between the parties. Some States deal with the issue of the suspension of the procedure in case the judge refers the parties to mediation and some different conditions are set forth: i.e. Czech Republic,[182] Hungary (Kengyel et al. 2012,

[177] Consider, Cour d'appel de Douala, 29.4.2004, arrêt n° 160/CC, *Société CICAM c/ BDEAC*, (2006) 35 octobre-novembre-décembre, *Revue camerounaise de l'arbitrage*, 7.

[178] Art. 273(2) CPC.

[179] Art. 202^1 k.p.c.

[180] Art. 17 MA.

[181] Art. 10(2)(II) of the Spanish Mediation Act which prevents the parties from lodging a claim as regards the dispute while the mediation is pending. In fact, the written mediation agreement and the commencement of the mediation procedure – but not the mere existence of the mediation clause entered by the parties – prevent courts from hearing the dispute as soon as an interested party invokes the pending mediation.

[182] S. 100(2) CPC.

237), Germany,[183] Malta,[184] Greece (Kourtis and Sivena 2012, 214), Romania,[185] Portugal,[186] Finland (Ervo and Sippel 2012, 404), or England and Wales.[187]

The special situation that exists in Japan where mediation is very much understood as judicial conciliation linked to or independent from a law suit has led to the absence of debate on this topic. A case has been recently reported in which the High Court of Tokyo has considered that the existence of a contractual clause preventing the parties from lodging a claim before a court cannot prevent an action before that court.[188]

5 Participants in the Mediation

Mediation is a structured process, whatever its name may be, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. The description of what mediation is makes reference to the two most relevant personal elements of any mediation: the parties to the dispute and the mediator. Certainly other persons – i.e. lawyers – and institutions – i.e. the mediation institution – are usually linked to the mediation, but despite their potential relevance they still play a secondary role in the process of solving the dispute, with the exception of those countries –e.g. Italy (De Luca 2014, 6)- where an administered mediation has been set forth.

5.1 The Mediator

5.1.1 Selection of the Mediator and Party Autonomy

Mediation rests on the will of the parties. They are free to enter it, to remain within mediation and eventually to reach a settlement of the dispute. In accordance with this principle, they should also be free indirectly – by way of referring to a mediation institution – or directly to choose their mediator for the dispute, the number of mediators and, if they so wish, to fix a general framework or some limits for the mediator's activities. At least in the case of out-of-court mediation; the situation

[183] § 278(a) ZPO.

[184] S. 18 MA.

[185] Art. 62 Act 192/2006 on Mediation.

[186] Art. 273.°(1) CPC.

[187] CPR 3.1(2) (f); CPR 26.4(1)(2).

[188] Tokyo High Court, Judgment of 22.6.2011, Hanrei Jiho, Vol. 2116, p. 64. Quoted and translated (unofficially) by S. KAKIUCHI, 17, fn. 33.

may usually be other as regards court-annexed or court related mediation, where procedural legislation has a big role to play: i.e. in Taiwan, and because out-of-court mediation is not regulated, the legislator has developed a highly detailed system to appoint mediators in those cases of mediations connected with national courts (Shen 2014, 11–15). Also in countries belonging to the Space CEMAC (Ngwanza 2014, 12), or Madagascar[189] some differences are stressed for the appointment of the mediator in out-of-court and court-annexed mediation. However, certain cases exist where the selection of the mediator is for the parties to be done irrespective of the condition –out-of-court or court-annexed- mediation to be undertaken: i.e. Kazakhstan (Karagussov 2014, 15).

Differences are also ascertained as regards certain mediation schemes designed by the legislator in fields like telecommunications or electricity where, despite its denomination as mediation, a public fully structured and rigid system is developed and party autonomy is only given a limited role to play: i.e. Gabon,[190] Tchad[191] or Cameroun.[192]

Objectively, the selection of the mediator is a highly relevant issue in mediation due to the leading role the mediator plays in the process of settlement of the parties' dispute. The mediator is the catalyst. Additionally, the choice of the mediator becomes a decisive step for the mediation because of the facilitative role played by him or her and the necessary trust that he or she must receive from the parties in order to ensure the successful outcome of the mediation. Nevertheless, the regulation of the mediator, of his or her selection, appointment and traits varies a lot from country to country.

In some countries no regulation relating to the appointment of mediators exists: i.e. Baltic countries (Nekrošius and Vėbraitė 2012, 35), the Netherlands (Van Hoek and Kocken 2012, 504), UK (Crawford and Carruthers 2012, 530; Scherpe and Marten 2013, 404 ff.), or Germany (Tochtermann 2013, 552). Because of its Federal condition, in Mexico no general regulation on mediators has been enacted, although some States have implemented specific rules on this issue in certain cases (Gonzalez Martin 2014, 17–20). In others, on the contrary, this absence of regulation is filled by the several mediation institutions grounded in the country in relation to the specific kind of mediation to be undertaken: i.e. Norway (Bernt 2014, 12).

Leaving aside these isolated cases, most States' legislation on mediation refer in greater or lesser detail to the very relevant issue of the selection of the mediator accepting the role played by the parties in selecting the mediator, at least in out-of-court mediations: Luxembourg,[193] Bulgaria (Georgiev and Jessel-Holst 2013,

[189] Art. 158(1) *in fine* Loi 2012–013 sur la mediation states that the appointment of the mediator is something for the judge of first instance to be done. Whereas art. 158(19) Loi 2012–013 sur la médiation grants full power to the parties to select their mediator in case of out-of-court mediation.

[190] Art. 136 loi n° 005/2001 portant réglementation des télécommunications au Gabon.

[191] Art. 64 loi n° 009/PR/98 portant sur les télécommunications au Tchad.

[192] Art. 85 de la loi n° 2011/22 du 14.12.2011 régissant le secteur de l'électricité au Cameroun.

[193] Art. 1251–3 NCPC.

249), Greece (Klamaris and Chronopoulou 2013, 597), Hungary (Jessel-Holst 2013, 616), Czech Republic (Pauknerová et al. 2012, 113), Croatia,[194] Poland (Morek and Rozdeiczer 2013, 790–791), Romania (Şandru and Cälin 2014, 9–11), Slovenia,[195] Russia,[196] or Malta.[197] Also in Portugal, where public and private schemes of mediation coexist party autonomy is accepted depending on the public or private condition of the mediation envisaged (Patrão 2012, 334–335). Once again, South Africa remains a special case in so far no general legislation on out-of-courts mediation exists, but it is well accepted that the parties to the mediation can select the mediator on the basis they wish (Broodryk 2014, 27).

5.1.2 Personal Traits

Although in certain countries the selection made by the parties may be referred to a mediation institution which will be in charge of appointing the mediator to the case, the mediator in civil and commercial matters is usually a natural person who is directly or indirectly selected by the parties: i.e. Spain (Iglesias et al. 2012, 465), Poland (Jankowski et al. 2014, 9–13),[198] Germany,[199] Greece (Kourtis and Sivena 2012, 205), Slovakia,[200] Bulgaria,[201] Belgium (Traest 2012, 48), Romania,[202] Luxembourg,[203] Hungary (Kengyel et al. 2012, 225), Italy (Queirolo et al. 2012, 263), or Kazakhstan.[204] Of course special situations are found in relation to some court-related mediation schemes, like judicial mediation in Quebec, in which the mediator is necessarily a judge, other than the one in charge of the claim. Moreover, in Quebec, even in the out-of-court scheme for family law, mediators cannot be freely chosen by the parties (Guillemard 2014, 10 & 15).

The dependence of mediation on the will of the parties entails their right to select, directly or indirectly, the person they wish to act as mediator and/or to agree beforehand on any special traits or requirements that the mediator must possess. In making their selection the parties will most probably take into account, among other

[194] Art. 7(1) MA.

[195] Art. 7 MA.

[196] Art. 9 MA.

[197] SS. 19 & 20 MA.

[198] Art. 183^2 § 1 k.p.c.

[199] Art. 1(2) MA. In any case, the parties have the right to ask him about his background and experience as mediator (Art. 3(5) MA).

[200] P. 3 MA.

[201] Art. 4 MA. Art. 12(1) MA clearly states the dependence of the selection of the mediator or mediators in charge of conducting the mediation on the will of the parties.

[202] Art. 7 Act 193/2006 on Mediation.

[203] Art. 1251–8 NCPC.

[204] Art. 9 MA.

things, their legal and personal expectations and the characteristics of the specific dispute at stake.

Nevertheless, the direct link between the mediator and the parties does not prevent the State from introducing some specific requirements and conditions of a different nature that must be fulfilled in order to serve as a mediator. Registration, as well as certain specific professional or academic qualifications, may be required. In addition, reference to a certain training background is made in some countries. Finally, several other requirements are directly set out by the parties in the agreement to mediate. In addition, these conditions may be different for out-of-court and court-annexed mediation.

5.1.3 Registered and Non-registered Mediators

Although mediation is directly linked to party autonomy, in certain countries some specific requirements of a different nature are set forth by law as regards conditions to be fulfilled in order to become a mediator. One of these conditions might be that the mediator has to be included in a register of mediators. In fact, in some countries highly different legal regimes also exist for mediators depending on their accredited or non-accredited status. In other words, in some countries a single regime exists as regards mediators, whereas in others, depending on the existence of accreditation or registration of mediators, several legal systems regarding mediators coexist. This difference is relevant for the parties when selecting a mediator insofar as it may affect the mediation to be initiated by them on at least two very relevant issues, the organisation of the mediation process and the enforceability of the settlement potentially reached: Austria (Risak 2014, 5–6), Czech Republic (Pauknerová et al. 2012, 113), Hungary (Kengyel et al. 2012, 226; Jessel-Holst 2013, 622 ff.), Estonia (Nekrošius and Vėbraitė 2012, 35), Italy (Queirolo et al. 2012, 257), Germany (Pelzer 2014, 7–8), Luxembourg (Menétrey 2014a, 15), Bulgaria (Natov et al. 2012, 78–79), or Belgium (Taelman and Voet 2014, 7 ff.) are examples of countries where these two categories of mediators apply. In South Africa a special situation exists. This issue is only generally dealt with as regards court-annexed mediation, and so far only a general rule on the future determination by the Ministry of Justice of standards and qualifications exists.[205] Also in Japan only professional certified mediators are entitled to fees, otherwise their position remain rather unclear as regards this question (Kakiuchi 2014, 20).

Let's take into account that some countries exist where the differentiation is made on different basis, that is, as regards professional and non-professional mediators: i.e. Kazakhstan.[206]

Underlying reference to accredited and non-accredited mediators is a debate over the training of mediators and the quality of mediation, two things which are deeply

[205] Rule 86 Mediation Rules.

[206] Arts. 9 & 22 MA.

connected. Mediation fully rests on party autonomy but as far as it allows parties to solve their disputes it must ensure a certain degree of control by the State in order to satisfy certain standards of quality through the introduction of "training of mediators" schemes and effective quality control mechanisms concerning the provision of mediation services. The person of the mediator is very relevant for the final outcome of the mediation. A skilled and competent mediator may facilitate a successful outcome of the mediation. And it should be kept in mind that if the parties refer their dispute to mediation it is because, at least in principle, they wish or expect to reach a settlement of their dispute. Consequently, the lower the level of exigency or training for the mediator that may exist, the more cautious and thorough the parties must be when selecting a mediator. From this starting point, different conditions and situations for the person to serve as mediator can be found across the world: i.e. Spain,[207] Poland,[208] Croatia (Babić 2014b, 94 ff.), France,[209] Cyprus (Esplugues 2014, 641), or South Africa, where Rule 86 of the court-annexed Mediation Rules states that the Minister of Justice will establish conditions and requirements for mediators in court-annexed mediation, but so far it seems that nothing has been said to this respect (Broodryk 2014, 29–30).

In certain States, who may or may not act as mediator is also made dependent on his or her academic background. Specifically the role played by lawyers, judges and notaries in mediation and, especially, their ability to serve as mediator is at stake. The debate concerns whether they may act as mediator or whether they are prevented from doing so.

Greece is a good example of the first position. In national mediations, Greek law clearly requires that the mediator is an attorney-at-law who has acquired accreditation pursuant to Article 7 of Law 3898/2010.[210] Also in Japan (Kakiuchi 2014, 19) mediators are requested to be attorneys and breach of this requisite may even entail relevant legal consequences (Kakiuchi 2014, 19).

Other countries design "negative rules" regarding certain persons or categories of persons who are prevented from serving as mediators: notaries in Lithuania (Nekrošius and Vėbraitė 2012, 34), judges and persons performing functions of administration of justice in the judicial system –i.e. Bulgaria,[211] Belgium (Traest 2012, 46–47), or Poland.[212] Conversely, some countries accept the participation of judges as mediators in certain occasions and sort of mediations: i.e. Baltic countries (Nekrošius and Vėbraitė 2012, 39), Croatia,[213] Greece (Kourtis and Sivena 2012,

[207] Art. 11(1) MA.

[208] Art. 183^2 § 1 k.p.c.

[209] Art. 1533(1) CPC.

[210] Art. 4(c) MA. The Explanatory Report considers them to be the most suitable to act as mediators.

[211] Art. 4 MA.

[212] Art. 183^2 § 2 k.p.c.

[213] Art. 186.d (3) CPC.

214), Portugal (Patrão 2012, 337), Finland (Ervo and Sippel 2012, 403), Quebec (Guillemard 2014, 10) or Norway (Bernt 2014, 12 ff.).

This debate also generates concern in some countries as regards cases of mediation involving legal issues. Germany, where the question of whether people other than lawyers and notaries may act as mediators in cases where legal questions arise, as solely lawyers[214] and notaries[215] are allowed to provide legal advice in this country (Bach and Gruber 2012, 168).

5.1.4 Mediator's Obligations

Mediators have certain obligations regarding the mediation in general, and to the parties to it in particular (Hopt and Steffek 2013, 57). In some isolated countries, also some rights are granted on them by law: i.e. Kazakhstan.[216] These obligations are independent from each other but remain fully interrelated. They also show the relevant position assigned to the mediator within the mediation proceeding.

Despite the fact that mediation depends on the will of the parties, the final outcome of mediation is directly linked to the person of the mediator. Hence, competent mediators are the best way to ensure a broad reference to the institution by the general public (Alfini et al. 2006, 149). Irrespective of the different ways in which mediation is carried out in the world (Alexander 2009, 118), the mediator is generally considered to be the person in charge of conducting the mediation in an impartial and neutral, as well as in an efficient and proper, manner. As a matter of principle, the mediator must, among other things, create favorable conditions for the parties to settle their dispute, assist the parties to communicate, facilitate the parties' negotiations and encourage settlement (Boulle et al. 2008, 14–17). Certainly the mediator is not responsible for the final outcome of the mediation, which is something that only the parties can achieve. But at the same time the mediator must ensure a smooth development of the procedure for the parties and the creation of an atmosphere among them that favors reaching a settlement (Hopt and Steffek 2013, 74 ff.).[217] This proactive role is made explicit in some countries: i.e. Spain.[218]

Consequently the mediator should be a person trained to direct the mediation leading the parties to reach a settlement by themselves. How this general duty to direct the mediation is actually embodied in the legislation on mediation (where it is in fact done), and what the scope of that duty is, varies from country to country. In some States –i.e. UK (Crawford and Carruthers 2012, 530), or Germany (Tochtermann 2013, 553)- the legislation is silent on this issue, which is instead

[214] See § 3 BRAO.

[215] See § 24 (1) (1) BNotO.

[216] Art. 10 MA.

[217] In some specific kinds of mediation he could also be granted the possibility of assessing the suitability of the dispute and the parties for mediation.

[218] Art. 13(1) & (2) MA.

dependent directly or indirectly on the will of the parties (Scherpe and Marten 2013, 421). In other countries -the Netherlands (Van Hoek and Kocken 2012, 502)- a general obligation of the mediator to act responsibly and in accordance with professional standards exists.

5.1.4.1 General Duty of Conducting the Mediation in a Competent, Impartial and Neutral Way

Most national systems embody rules on the way the mediator acts and his or her obligation to conduct mediation in a professional, neutral, independent, impartial and competent manner and to treat all parties equally, as usual, with different levels of elaboration and amplitude. Some countries, even mediation-friendly countries, set forth only a limited framework for the mediator and his or her duties: i.e. Austria (Roth and Gherdane 2013, 297). Whereas a much more developed approach is found in the legislation on mediation of other countries worldwide: i.e. Slovakia,[219] France (Cousteaux and Poillot-Peruzzetto 2014, 14), Poland (Grzybczyk and Fraczek 2012, 306), Croatia,[220] Luxembourg,[221] Germany,[222] Portugal (Schmidt 2013, 823 ff.), Bulgaria,[223] Romania (Milu and Taus 2012, 360), Slovenia,[224] Italy (Queirolo et al. 2012, 267), Madagascar,[225] Kazakhstan[226] or Japan, as regards in this last case to purely private mediations.[227] In some isolated cases, there are no rules on the exigency of conducting mediation in an impartial and neutral manner: i.e. Finland[228] or Malta.[229]

Additionally to this obligation, as stated the mediator is usually considered not to be responsible for the final outcome of the mediation. However, some differences as regards the interpretation and scope of these general obligations are ascertainable throughout the world. Standing on these common foundations, several approaches to the role played by the mediator, his or her degree of involvement in the settlement reached, and his or her capacity to advise the parties as regards the content of the dispute and the possible settlement to be reached coexist worldwide.

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[219] § 4 MA.

[220] Mediation Act 2011, Art. 9(1).

[221] Art. 1251-2(1) & (2) NCPC.

[222] Art. 2(2) MA.

[223] Art. 9(1) MA.

[224] Art. 8(3) MA.

[225] Arts. 158(5) and 158(24) Loi 2012–013 sur la médiation.

[226] Arts. 10 & 12 MA.

[227] Art. 2 ADR Act.

[228] An exigency of impartiality is embodied as to court-annexed mediations in S. 6 (1) MA.

[229] S. 26 MA does not refer explicitly to these obligations. In addition S. 29 MA obliges the mediator to keep certain documents for a period of 2 years since termination of the mediation.

Thus, in some countries it is explicitly accepted that the mediator is not allowed to make settlement proposals to the parties: i.e. Bulgaria,[230] Latvia (Nekrošius and Vėbraitė 2012, 36), or Czech Republic (Pauknerová et al. 2012, 116). However, the attitude towards the position maintained by the mediator during the mediation procedure can also be subject to certain exceptions. In some countries the mediator may go further than a mere facilitative role and may make some proposals to the parties as regards the dispute: i.e. Finland,[231] Slovenia[232] or Italy (Queirolo et al. 2012, 273–274). Whereas in other countries he or she can only refer the parties to counseling for legal advice: Germany,[233] Austria (Roth and Gherdane 2013, 286), Hungary (Kengyel et al. 2012, 228; Jessel-Holst 2013, 619), or Romania.[234]

5.1.4.2 Duty of Disclosure

The link between mediation and the will of the parties has already been stressed. But at the same time mediation rests to a great extent on the existence of high-quality mediators. They must behave in a competent and professional manner and, at the same time, parties need to feel that they are and that they act accordingly. The duty of disclosure by the mediator towards the parties involved in the mediation is very much linked to this necessity.

The mediator has a continuous obligation to inform the parties about any conflict of interest, bias or fact that may directly or indirectly affect his or her impartiality. Mediation rests on the parties' confidence in the role played by the mediator and this duty of disclosure seems particularly necessary in order to foster this principle. With some isolated cases of countries where no reference is made to it (i.e. Greece[235]) most States accept and endorse the mediator's duty of disclosure, unless released from this obligations by the parties. In some cases this recognition is made by the law –i.e. Bulgaria,[236] Czech Republic (Pauknerová et al. 2012, 110), Croatia,[237] Lithuania,[238] Germany (Bach and Gruber 2012, 169), Hungary,[239]

[230] Art. 10(1) MA.

[231] S. 7(2) MA.

[232] Art. 14(1) MA.

[233] In fact, in accordance to Art. 2 (6) MA, the mediator can advise the parties.

[234] Art. 55 Act 192/2006 on Mediation.

[235] Art. 8(4) MA.

[236] Art. 10 MA.

[237] Art. 9 MA.

[238] Art. 4(4) MA.

[239] S. 25(1) Act LV of 2002 on Mediation.

Malta,[240] Italy, as regards registered mediators,[241] Russia,[242] Spain,[243] Slovenia,[244] Poland (Jankowski et al. 2014, 16), or Romania[245]. Whereas in other countries no legal basis exists for it and it tends to derive from Mediator's Codes of Conduct: i.e. Austria (Frauenberger-Pfeiler 2012, 13). In any case, the way this duty is enunciated, its extent and exigency varies, as usual, from country to country.

5.1.4.3 Confidentiality

One of the major principles on which mediation rests worldwide is that of confidentiality. Mediation must be confidential. The parties should have the opportunity to settle their dispute in an atmosphere of mutual trust and confidence, without fearing that any information provided during the mediation might be made public or used against him or her in a future plea. It is generally accepted as "an essential ingredient in mediation" (Alfini et al. 2006, 205) despite problems and surprises that sometimes arise from its practical implementation.

The principle of confidentiality of mediation proceedings enables the parties to explore a settlement without any additional distress. The fear of undesired use of information or of one's own settlement proposals or any other statements usually inhibits the parties' free expression. Owing to the guarantee of confidentiality, the parties may discuss their matters freely, without fear that their arguments might potentially be made use of in other scenarios.

This duty of confidentiality refers to both out-of-court and court-annexed mediation and to the mediation in progress. And also to future court proceedings or arbitrations if the mediation fails. In any case it tends to be always made dependent on the final will of the parties. The effectiveness of the principle makes it necessary to know clearly when the mediation starts: this is because the confidentiality obligation applies to the future – once the mediation has finished – but not to anything prior to the commencement of the mediation (Alexander 2009, 246, 265, 295).

This principle of confidentiality entails -at least- three major consequences, which are not always very well explained in the national Mediation Acts.

1. Firstly, in order to achieve a settlement of the dispute submitted to mediation, everybody involved in the procedure must be free to express and defend their

[240] S. 21(1) & (2) MA.

[241] Art. 14(2)(b) Legislative Decree no. 28/2010.

[242] Art. 9 MA.

[243] Art. 7 MA.

[244] Art. 7(4) MA.

[245] According to Arts. 29 and 54 (1) Act 192/2006 on Mediation.

position. That necessarily requires that all those who are involved must be silent as regards the mediation and its content and development (that is, as regards the information generated as part of the meditation), both during the mediation and once it has come to an end.

Thus, the real issue as regards mediation is the specification of what the real extension of this very important principle is, that is, what it actually covers and to whom (and how) it refers: parties, mediators, third persons, etc. Additionally, it is important to know to what extent some legal professionals participating in the mediation – i.e. notaries or registrars – may rely on certain legal privileges to circumvent this principle, at least in part.

This is not an easy issue and its understanding and scope tend to vary from country to country: civil law countries seem to take a radical position on confidentiality, whereas this approach seems to be more flexible in common law nations. This difficulty encourages the drafting of confidentiality clauses that set forth the specific meaning of the principle of confidentiality: Ireland (Coimisiún um Athchóiriú/Law Reform Commission 2010, 34), England and Wales,[246] or the Netherlands,[247] are good examples of this approach.

2. Secondly, this raises the issue of the "the competence and compellability of mediators as witnesses in formal legal proceedings" (Andrews 2011, 33) – Indeed, of mediators and also other participants in the mediation process. Mediators can refuse to testify in a future procedure, some case law is said to exist as to this issue in some countries: i.e. the Netherlands.[248]

These two consequences so far stated raise some important questions regarding the relationship between mediation and due justice. The impossibility of using before a national court or arbitration certain relevant information provided during the earlier mediation or the inability to summon the participants in the mediation as witnesses in future judicial or arbitral proceedings may affect the viability of the prospective judicial or arbitral civil proceedings and thus, in an indirect manner, the effectiveness of the principle of access to justice (Alexander 2009, 252 & 282). The good faith of the parties to the mediation, their real desire to settle the dispute by way of the mediation and the avoidance of any fraudulent reference to mediation thus affecting the future outcome of the judicial or arbitral proceeding must be taken into account and, when possible, fostered. For this it is highly relevant to ascertain what the principle of confidentiality means and what sort of documents and information arising in the course of mediation are covered by the principle. Irrespective of the potential for a general action for breach of

[246]Consider the English High Court case in *Cumbria Waste Management Ltd & Lakeland Waste Management Ltd v Baines Wilson* [2008] EWHC 786 (QB) and the English Technology and Construction Court case *Farm Assist Limited (In Liquidation) v The Secretary of State for the Environment Food and Rural Affairs (No. 2)* [2009] EWHC 1102 (TCC); [2009] B.L.R. 399 (TCC).

[247]In accordance with Art. 5(1) and (2) MA of 2012.

[248]Judgment of the Supreme Court of 10.4.2009, BG9470, available (in Dutch) at: http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2009:BG9470 (accessed, 24.6.2014).

confidentiality before national courts –i.e. the Netherlands (Chin-A-Fat 2014, 5)- once again, the agreement to mediate is a good opportunity to tackle this issue, thus minimizing the risk of it arising and effects. It is also an opportunity to relieve the parties, the mediator or third persons of this obligation.

3. Finally, in relation to the capability of the mediator to act afterwards as arbitrator or, in case of court-annexed mediation, as judge, different responses are granted. In certain countries the possibility for the judge to act also as mediator raises this issue and different responses may be encountered (Ngwanza 2014, 14–16).

In any case, the need for confidentiality is clearly stressed by most national legislations. Some counties set forth a very wide rule on mediation –i.e. Baltic countries (Nekrošius and Vėbraitė 2012, 37), Bulgaria,[249] Slovakia,[250] Cyprus,[251] Croatia (Babić 2014a, 13), Luxembourg,[252] Belgium (Taelman and Voet 2014, 9), Italy (Queirolo et al. 2012, 274–275), Germany (Tochtermann 2013, 547–548), Greece (Klamaris and Chronopoulou 2013, 596),[253] Slovenia (Jovin Hrastnik 2011, 14), Poland,[254] Romania,[255] Spain,[256] and, seemingly, Norway (Bernt 2014, 12–13, 19 ff.), Madagascar,[257] Kazakhstan,[258] or Russia.[259] Whereas some other countries seem to take a narrower approach to this duty of confidentiality, either because of the personal or substantive scope granted or the way it is drafted by the law: i.e. France (Guinchard and Boucaron-Nardetto 2012, 150), Czech Republic (Pauknerová et al. 2012, 117), Sweden,[260] Hungary (Kengyel et al. 2012, 222; Jessel-Holst 2013, 614),[261] or Portugal (Capelo 2014, 8).[262] Furthermore, other countries only include a general provision stating that respect for confidentiality is necessary: i.e. Austria (Frauenberger-Pfeiler 2012, 19.) Or because the specific framework provided for mediation, it is indirectly inferred from legislation: i.e. Japan (Kakiuchi 2014, 21).

[249] Art. 7 MA.

[250] § 5 MA.

[251] S. 23 MA.

[252] Arts 1251-6(1) & 1251–7 NCPC.

[253] Art. 10 MA. But the mediator must draw up minutes of failure in case the parties do not reach an agreement.

[254] Art. 183^4 § 1 k.p.c.

[255] Art. 45(d) Act 192/2006 on Mediation.

[256] Art. 9 MA.

[257] Arts. 158(9) and 158(22) Loi 2012–013 sur la médiation.

[258] Art. 8 MA.

[259] Art. 5 MA and Art. 69 CPC.

[260] P. 5 MA.

[261] SS. 26 & 30 Act LV of 2002 on Mediation.

[262] Art. 18.° MA (Law 29/2013, 19.4.2013).

5.1.5 Responsibility of the Mediator

As previously stated, mediation is very much linked to the existence of suitable, well-prepared and trained mediators. The dependence of the success of mediation on mediators raises the question of to what extent the mediator must be responsible for his or her work, and this is not a straightforward question. It is not always easy to assess the responsibility of a person whose only activity is to maintain a facilitative conduct towards the parties. The mediator is obliged to direct the mediation in an impartial and neutral manner and he or she must create an atmosphere which facilitates reaching a settlement. But he or she usually has no obligation to ensure a certain final outcome is reached; this is dependent solely and fully on the will of the parties. Therefore his or her obligation only relates to the performance of his or her work during the mediation and to the potential breach of any of his or her legal, contractual or intrinsic obligations; not as to the conclusion or not of a settlement by the parties: i.e. Madagascar (Rajaonera and Jakoba 2014, 9).

Additionally, if the responsibility of the mediator is at stake, the nature of the responsibility claimed is also relevant; in other words whether legal or purely contractual responsibility can be asked for. The question is also to what extent this responsibility can also be disciplinary, or whether it may entail non-contractual responsibility. These are all relevant issues, the determination of which is not always easy: i.e. Germany (Pelzer 2014, 10). In any case, the possibility for the parties to specify the responsibility of the mediator, its grounds and nature is usually accepted. It is in fact approached as a manifestation of the existing link between the parties and the mediation proceeding (Alexander 2009, 241).

Many States are silent on the issue of mediators' responsibility: i.e. France (Deckert 2013, 499), Bulgaria (Georgiev and Jessel-Holst 2013, 355–356), the Netherlands (Van Hoek and Kocken 2012, 505–506), Poland (Jankowski et al. 2014, 6), Austria (Pruckner 2003, 29), or Norway, where this question is not commonly discussed (Bernt 2014, 14). Legislation in some other States of the world, on the contrary, includes rules on responsibility of the mediator. The responsibility envisaged, and its drafting and scope, differ from country to country, as do the grounds on which it may be claimed: i.e. Slovakia[263] Spain, (Iglesias et al. 2012, 464), Baltic countries (Nekrošius and Vėbraitė 2012, 37), Romania (Milu and Taus 2012, 361), Kazakhstan,[264] or Portugal (Patrão 2012, 339). In Italy, because of the adoption of a system of administered mediation, parties can ask the mediation centre in charge of the mediation for compensation (De Luca 2014, 7).

Russia offers a special situation in so far liability could be contractual or non-contractual and the mediator can even be subject tocriminal liability for disclosure

[263] § 4(3) MA.

[264] Art. 14(7) MA and Art. 8 Cc.

of private confidential information.[265] Also in Quebec, where general legislation on mediation is lacking, general rules on responsibility are applied to the behaviour of the mediator.[266]

The responsibility of mediators may gain a special regime in cases of mediation schemes implemented for special areas like telecommunications or electricity: i.e. CEMAC States (Ngwanza 2014, 13). Despite its name they tend to be considered purely public schemes with a limited role envisaged for party autonomy.

5.1.6 Existence of Codes of Conduct for Mediators

Some countries explicitly compel mediators to adhere to certain codes of conduct for mediators. This is the case, in Europe, as regards the European Code of Conduct for Mediators: i.e. Baltic countries (Nekrošius and Vėbraitė 2012, 35), or Portugal (Capelo 2014, 7). An obligation for mediators to observe a Code of Professional Ethic of Mediators also exists in Kazakhstan,[267] although no such a code has been so far enacted (Karagussov 2014, 17). Also in Brazil, where no general regulation on mediation exists, the Code adopted by the Conselho Nacional das Instituições de Mediação e Arbitragem (Conima)[268] is said to enjoy a wide acceptance (Basso and Polido 2014, 18)

Some cases of specific national codes are also found worldwide: Austria (Frauenberger-Pfeiler 2012, 18), Bulgaria (Natov et al. 2012, 80), Belgium (Traest 2012, 58), Greece (Kourtis and Sivena 2012, 207), Poland (Jankowski et al. 2014, 17–18), Malta,[269] or Romania (Şandru and Călin 2014, 13). A general compromise to foster the enactment of voluntary codes of conduct is also embodied in certain States' legislation in this field: i.e. Spain.[270] No general code of conduct or mediator standards are said to exist in South Africa (Broodryk 2014, 28).

5.1.7 Mediator's Fees: Existence of Financial Support for Mediation

Services provided by mediators are usually not free, at least as regards purely out-of-court mediations. Some special situations exist where fees are to be paid to the mediator in court-annexed mediations too. In South Africa,for instance, Rule 84

[265] Art. 17 MA and Art. 137 CrimC, on breach of private law.

[266] Art. 1457 Cc.

[267] Arts. 10 & 13(6) MA.

[268] http://www.conima.org.br/codigo_etica_med, accessed 10.07.2014.

[269] S. 3 ff. MA.

[270] Art. 12 MA.

of the Mediation Rules clearly establishes that parties to the mediation are equally liable for fees of the mediator, unless services are provided free of charge (Broodryk 2014, 36).

As a general rule, the parties are subject to payment of a fee although it is considered to be for the parties and the mediators or mediation institutions to establish the payment due and to whom: i.e. Bulgaria (Natov et al. 2012, 82), France (Guinchard and Boucaron-Nardetto 2012, 155), Germany (Tochtermann 2013, 542), Hungary (Kengyel et al. 2012, 234; Jessel-Holst 2013, 612), the Czech Republic (Pauknerová et al. 2012, 114), Poland[271] Kazakhstan (Karagussov 2014, 27), or Russia.[272] The right to receive fees is also stressed in some African countries: i.e. Madagascar.[273]

Some countries make a direct reference in their mediation legislation to fees to be paid, usually stating that their payment by the parties is necessary and referring to its calculation: i.e. Baltic countries (Nekrošius and Vėbraitė 2012, 36), Romania,[274] Belgium (Traest 2012, 59), Czech Republic (Pauknerová et al. 2012, 114), Slovenia,[275] Luxembourg,[276] or Greece (Kourtis and Sivena 2012, 213), where a rather especial position is embodied. Other cases exist where rules on fees are set forth in the Code of Conduct for Mediators –i.e. Austria (Frauenberger-Pfeiler 2012, 20).

A special situation exists in Japan because of the existence of two sorts of mediators. Those mediators who engage in mediation on regular basis and require fees must necessarily be attorneys who have to be certified by the Minister of Justice. Otherwise their position in case they receive fees remains uncertain and may lead to responsibility (Kakiuchi 2014, 19–20).

Resource to mediation is increasingly encouraged in the world. It is considered to be an affordable tool for the parties to solve their dispute, and one which is easily tailored to their needs. But mediation, as a tool of private justice, has some costs that depending on the complexity of the issue may be higher than those generated by referring the dispute to national courts. In this scenario, availability of any sort of direct or indirect legal aid may be very important for supporting and enlarging recourse to mediation by the parties This direct link between resource to mediation and public funding is evident even in some clearly pro-mediation countries like Austria where public funding is available for certain specific types of mediation, i.e. family mediation.

As a matter of principle, mediation is a private justice device that entails some costs for those using it. It is not free, as national courts are in some countries. This

[271] Art. 183^5 k.p.c.

[272] Art. 10 MA.

[273] Arts. 158(6)(2) Loi 2012–013 sur la médiation.

[274] Art. 45 Act 192/2006 on Mediation.

[275] Art. 18(1) MA.

[276] Art. 1251-9(1) NCPC.

fact, and the desire of many States to foster resource to mediation, raises the issue of the availability of legal aid for the parties involved in the mediation. The analysis of the existing legal situation worldwide shows that mixed positions exists as regards this possibility. Responses depend on facts like the nature of the mediation –either out-of-court or court-annexed mediation- or the participation of registered or non-registered mediators in the mediation.

In some countries, legal aid is available for parties to both out-of-court and court-annexed mediation: i.e. Belgium (Traest 2012, 64), or Portugal, where public and private schemes of mediation coexist and legal aid is envisaged for public mediations (Capelo 2014, 10). On the contrary, some other countries exist where legal aid schemes are available only for court-annexed mediations: i.e. Luxembourg (Menétrey 2014b, 27), France (Deckert 2013, 472), Baltic countries (Nekrošius and Vėbraitė 2012, 41), or Japan (Kakiuchi 2014, 26). Doubts exist as to the availability of legal aid for parties to out-of-court mediations in many other countries of the world: i.e. Austria (Roth and Gherdane 2013, 271), Germany,[277] or Spain.[278] In Norway legal aid may be available for out-of-court mediation in certain cases and according to the law (Bernt 2014, 27).

In addition to that, in some countries like the Netherlands, legal aid is available for mediation conducted by registered mediators. This legal aid may be for the full cost of the mediation if the dispute is referred to mediation by national courts (Van Hoek and Kocken 2012, 509). Also, in Scotland some schemes for legal aid are envisaged in certain areas of law, mainly family disputes (Crawford and Carruthers 2012, 533). In England and Wales too, public legal aid is provided in certain fields, again generally in family dispute (Scherpe and Marten 2013, 395–396). A similar positive response is found in Hungary (Jessel-Holst 2013, 613).

Finally, some countries make clear that no legal aid at all is available for mediation. This is the case in the Greece (Kourtis and Sivena 2012, 213), Italy (Queirolo et al. 2012, 262 & 280), or South Africa, where some controversies exist as to this issue (Broodryk 2014, 34). Others make no mention of the provision of legal aid for mediation: this is the situation in Cyprus (Esplugues 2014, 687) or the Czech Republic (Pauknerová et al. 2012, 122),

In addition to a plain reference to legal aid, some schemes to encourage the dispute to be taken to mediation and of sanctions for not doing so also may be encountered worldwide (Alexander 2009, 331). Thus, reductions of fees for court-annexed mediation of different levels and with different conditions are available in Hungary (Kengyel et al. 2012, 223), Germany (Tochtermann 2013, 539),

[277] Also Art. 7 MA foresees certain future research on the financing of Mediation to be sent, once finished, to the Government and the Parlament.

[278] Act 1/1996 on Free Legal Assistance. In accordance with Additional Disposition 2 MA.

Slovakia,[279] Poland, (Grzybczyk and Fraczek 2012, 316), Spain,[280] Italy (Queirolo et al. 2012, 258) or Romania (Şandru and Cälin 2014, 23).

Apart from these positive measures, negative measures are also envisaged in some countries for those cases when a party has agreed to submit the dispute to mediation in the course of judicial proceedings but he or she has then refused to participate: i.e. Poland,[281] Romania (Milu and Taus 2012, 365), England and Wales,[282] Malta,[283] or Hungary (Jessel-Holst 2013, 611). These measures may entail a penalty in some countries: i.e. Italy, as regards mandatory mediation (De Luca 2014, 10). This position also exists in Norway.[284]

5.2 The Parties

The link between mediation and the will of the parties is clear and has already been stressed. It is up to them to start the mediation, to withdraw from it or to reach an agreement. Significantly, duties of the parties within the mediation are usually not dealt with by the several national legislations on mediation (Hopt and Steffek 2013, 63). Only general references to their commitments towards the mediation and the other party are usually envisaged. From this premise, two main questions usually arise in practice as to the role played by the parties in the mediation. Firstly, who may become a party to the mediation – private persons, legal persons and/or public law persons – and what obligations and rights they have during the mediation. Secondly, how the parties will be present in the mediation.

Neither of these two issues usually receives a clear response worldwide. Those few countries that explicitly respond the first question tend to accept no restriction on the parties to the mediation. They can be natural persons, legal persons and entities without legal personality: i.e. Poland (Morek and Rozdeiczer 2013, 782),[285]

[279] Art. 7(11) Act 71/1992 Coll. on Court Fees and the Criminal Register Extract Fee as amended later.

[280] Order HAP/2662/2012, of 13.12.2012.

[281] Art. 103 § 2 k.p.c.

[282] Note *McMillan Williams v. Range* [2004] EWCA Civ 294; [2004] 1 W.L.R. 1858, at [29] per Ward LJ. Note also, *Dunnett v. Railtrack plc* (2002), [2002] 1 W.L.R. 2434, CA, *McMillan Williams v. Range* (2004), [2004] EWCA Civ 294; [2004] 1 W.L.R. 1858 or *Halsey v. Milton Keynes General NHS* [2004] EWCA Civ 576; [2006] EWHC 2924 (TCC).

[283] Art. 223(6) of the Code of Organisation and Civil Procedure.

[284] S. 20-2(1) & (2) The Dispute Act.

[285] Where full legal capacity is missing, such persons are represented by their statutory representative.

or Belgium.[286] Additionally, as regards the second question, the parties are usually asked to participate actively, and to do it in good faith and in person[287]: i.e. Spain[288] or Italy.[289]

6 The Mediation Proceeding

The direct link between mediation and the will of the parties has already been stressed many times in this report. This link refers both to out-of-court and court-annexed mediation; as a matter of principle, it is for the parties on fully voluntary basis to get involved in the mediation. However some exceptions to this general rule exist due to the peculiarities encountered in certain national systems. Thus in Taiwan, and because only court-related mediation is regulated, the conduction of the proceeding fixed by law rests on the mediator (Shen 2014, 15 ff.). In Quebec, proceeding rules are determined by the judge in cooperation with the parties.[290] Also in Mexico, where no general legislation on out-of-court mediation exists and mostly court-related mediation –conciliation- is accepted, the proceeding is basically drafted and governed by the law (Gonzalez Martin 2014, 22).

A major reflection of the voluntary condition that accompanies mediation is the parties' capacity to organise mediation the way they wish. This is a common feature in much national legislation worldwide: i.e. in Romania direction of the mediation proceeding rests solely on the parties (Şandru and Cälin 2014, 12) and in Kazakhstan, Article 17 ff. MA also recognize the leading role played by the parties as regards the organization of the proceeding. Additionally, standards set forth by private institutions on mediation are also very relevant in this area, since in many cases it will be for the mediator in the face of the parties' silence to design the mediation proceeding on the basis of these pieces of legislation. This fact, which is objectively relevant, gains further significance in those countries where a limited legal framework on mediation exists and certain mediation institutions also play an importance role in organising and performing mediations: i.e. the Netherlands (Van Hoek and Kocken 2012, 493). Or in those where no general legal framework on mediation exists: i.e. South Africa (Broodryk 2014, 30).

In national legislation, the general reference to party autonomy means that many States' legislation embody only some basic, rudimentary rules on the mediation proceeding, mostly directed at establishing the very basic principles of mediation and to ensure a certain level of information for the potential parties to the mediation.

[286] Where some public entities are also accepted for mediation.

[287] A different position is found in Bulgaria, where Art. 12(2) MA permits the parties to participate in the procedure either personally or by way of a representative selected by them.

[288] Art. 19 MA.

[289] Note Art. 11 Legislative Decree n. 28/2010.

[290] Art. 151.17 CPC.

Under this general rubric of basic principles of mediation, reference to the different procedural steps of the mediation and the procedural principles underlying it and to the obligations and rights of the parties and the mediator during the mediation should be made: i.e. the Russian Act on Mediation recognizes the dependence of the mediation proceeding on party autonomy,[291] but at the same time explicitly states the principles of voluntariness, confidentiality, cooperation and equality of the parties, impartiality and independency of the mediator.[292]

Focusing on this last issue, mention has already been made of the role played by the mediator during the mediation proceeding.[293] From the parties' standpoint, reference to the basic principles of mediation would imply an obligation for the parties to act in a collaborative and faithful manner with the goal of reaching an agreement, although no obligation to reach any settlement actually exists. That collaborative attitude means at least three obligations for the parties: that they are encouraged to disclose all information necessary for reaching the agreement, that they must treat information received confidentially, and that they are prevented from taking any court action during the mediation process (Pruckner 2003, 26). No common rules on this issue usually exist.

6.1 Flexibility of the Mediation Proceeding

National laws maintain in general terms a very flexible attitude towards mediation and the mediation proceedings (Alfini et al. 2006, 113 ff.). As stated, this implies that only some very basic rules or general principles are drafted as to the mediation proceeding. Usually this is something for the parties to deal with given of the voluntary character of mediation, to the extent that some countries do not design rules or legislation for the mediation proceeding: i.e. the Netherlands (Chin-A-Fat 2014, 7) or South Africa (Broodryk 2014, 30). However, this habitually common approach has several exceptions of different scopes in certain countries like Hungary (Kengyel et al. 2012, 222), Greece (Diamantopoulos and Koumpli 2014, 15–16) or Kazakhstan[294] where a somewhat more developed framework is designed (Karagussov 2014, 19). Some other countries exist where the power of the parties to fix the proceeding is limited in certain areas of law: i.e. Labour law disputes.[295]

In any case, the usually very flexible attitude towards mediation and the mediation proceeding leads certain States to avoid any reference to the regulation

[291] Art. 11 MA.

[292] Art. 3 MA.

[293] See 5.1.4. *supra*.

[294] Arts. 4–8 MA.

[295] Note, for instance, the situation in Cameroun, Art. 139(2) CTravail sets forth that « les modalités de convocation et de comparution des parties sont fixées par arrêté du ministre chargé du Travail, pris après avis de la Commission nationale consultative du travail ».

of the mediation proceeding, at least as regards purely out-of-court mediations: i.e. Poland (Morek and Rozdeiczer 2013, 792), Malta,[296] Croatia,[297] Luxembourg (Menétrey 2014a, 20), or Romania (Milu and Taus 2012, 362). Some others make a plain recognition of the right of the parties to organise the procedure the way they wish: i.e. Madagascar.[298] In some additional countries, legal solutions provided for the mediation proceeding are minimal or practice shows a steadily reference to provisions and rules of private mediation institutions: i.e. Finland (Ervo and Sippel 2012, 385 ff.), Germany (Pelzer 2014, 11), or Norway (Bernt 2014, 22). Notwithstanding these particular examples, only very general principles are usually drafted by national laws. This minimum regulation means that only certain basic legal standards tend to be included in the law: i.e. this happens in Austria (Roth and Gherdane 2013, 288 ff.), Luxembourg,[299] Slovenia,[300] Italy (De Luca 2014, 8), Bulgaria,[301] Baltic countries (Nekrošius and Vėbraitė 2012, 36), Spain,[302] Czech Republic (Pauknerová et al. 2012, 115), Portugal (Patrão 2012, 339) or Japan, where reference to the parties entails in many occasions and indirect reference to ADR services providers (Kakiuchi 2014, 22).

Particular qualifications may also be encountered in relation to court-annexed mediation in certain cases. Because of the direct connection between the mediation and an already pending civil procedure some specific additional rules may be set forth in relation to this kind of mediation, although they are usually made finally dependent on the will of the parties. i.e. Poland,[303] or Italy (De Palo et al. 2014, 681).

6.2 Venue

The venue of the mediation is one of the issues to be dealt with by the parties in their mediation clause or by the parties and the mediator in the agreement to mediate entered into by them before the beginning of the mediation proceeding. Different solutions are found worldwide for this issue. In many of them nothing is said on this subject: i.e. Czech Republic (Pauknerová et al. 2012, 117). Other countries provide

[296] S. 26(2), (3) & (4) MA. S. 31 MA states that unless otherwise agreed on by the parties, the language of the mediation will be Maltese.

[297] Art. 9(1) MA.

[298] Art. 158(19) Loi 2012–013 sur la médiation.

[299] Art. 1251–9 and 1251–10 NCPC.

[300] Art. 8(1) MA. In case no agreement is reached, the procedure is for the mediator to be established (Art. 8(2) MA).

[301] Art. 5 MA.

[302] Request (Art. 16 MA), Informative meetings (Art. 17 MA), Constitutive meeting (Art. 19 MA) and so on. Almost of all them are finally dependent on the will of the parties.

[303] Art. 183^{11} k.p.c.

different solutions: for the parties to be done -i.e. Bulgaria (Natov et al. 2012, 81), or Spain-,[304] for the mediator after consultation with the parties –i.e. Cyprus-,[305] of for the parties or the mediator depending on the public or private condition of mediation –i.e. Portugal (Patrão 2012, 349)-.

6.3 Duration of the Mediation

The duration of the mediation is a very important topic. It exceeds the strict contours of mediation and has effects beyond it. The duration of the mediation is relevant for the parties (who want to have their dispute settled as soon as possible), for the mediator (who must ascertain whether it is worthwhile to continue with the mediation), and also for courts and arbitrators insofar as limitation and prescription periods are suspended while mediation is pending, no claim may be lodged by the parties and proceedings must be stayed in the case of court-annexed mediation.

This situation will last until the mediation –out-of-court or court-annexed- is considered to be finished; therefore it is decisive to clearly ascertain when the mediation starts and when it ends. Different solutions regarding the duration of mediation are included in the several legislations throughout the world. Some countries with general legislation on mediation are silent on this relevant issue, accepting that it is something for the parties to specify: i.e. Bulgaria (Natov et al. 2012, 82), Poland (Grzybczyk and Fraczek 2012, 304; Jankowski et al. 2014, 20), UK -in out-of-court mediation- (Crawford and Carruthers 2012, 531–533), Malta (Sciberras Camilleri 2012, 287–288), or Czech Republic.[306]

Additionally, other countries draft some rules for out-of-court and court-annexed mediation or for both of them at the same time: i.e. Austria (Frauenberger-Pfeiler 2012, 19 & 22–23), Slovenia,[307] Spain,[308] Italy (Queirolo et al. 2012, 271), Luxembourg,[309] Baltic countries (Nekrošius and Vėbraitė 2012, 41), or Portugal where, once again, regulation depends on the public or private condition of the mediation scheme chosen by the parties (Patrão 2012, 341). And in certain cases, a dateline is fixed: i.e. 180 days in Russia,[310] no more than 60 calendar days in Kazakhstan[311]

[304] Arts. 16(1) (a) and 19 (1) (g) MA.

[305] S. 19 & 20 MA.

[306] S. 6(2)(b) MA.

[307] Art. 13 MA.

[308] Art. 22(1)(I) MA considers that the mediation is termination once the time-limit agreed on by the parties is elapsed.

[309] Art. 1251-12(3) NCPC.

[310] Art. 15 MA.

[311] Art. 20(9) MA, with a potential extension of no more of 30 days in really complicated cases.

or 30 days in relation to some specific disputes.[312] Also in Madagascar, both court-annexed[313] and out-of-court[314] mediation should last no longer than 6 months. Some others jurisdictions link the duration of court-annexed mediation to the wish of the judge: i.e. Countries CEMAC (Ngwanza 2014, 16). South Africa constitutes a special case in so far no general legislation on mediation exists but it is generally accepted that this is something for the parties to be eventually agreed on (Broodryk 2014, 6–30).

Some places exist where solutions are solely provided for certain specific mediation schemes –i.e. telecommunications[315]- or areas of law –Labour mediation -[316] or a general reference to the quick conclusion of the mediation is included: i.e. Gabon.[317]

6.4 Costs

Reference to costs is not that usually embodied in national legislation on mediation in so far it once again is deemed something for the parties and the mediator to be settled: i.e. the UK (Crawford and Carruthers 2012, 532; Scherpe and Marten 2013, 386 ff.), Bulgaria (Natov et al. 2012, 82), or the Netherlands (Van Hoek and Kocken 2012, 509). In other countries, on the contrary, a precise regulation of costs, at least as regards court-annexed mediation, is included in the Mediation regulation: i.e. Malta (Sciberras Camilleri 2012, 293–294), Slovenia,[318] Poland,[319] Spain (Iglesias et al. 2012, 480), or France (Deckert 2013, 471). The case of Japan is particular due to its special mediation system. Court related mediation costs are covered by the State, whereas the cost of purely private mediations will be usually dependent on the provider of ADR services (Kakiuchi 2014, 26). Also in Quebec, judicial mediation is said to be free for the parties (Guillemard 2014, 9).

[312] Art. 23(1) MA.

[313] Art. 158(2) Loi 2012–013 sur la médiation.

[314] Art. 158(18)(2) Loi 2012–013 sur la médiation.

[315] Art. 64(2) Loi n° 009/PR/98 portant sur les télécommunications au Tchad speaks of 2 months.

[316] Art. 349 CTravail of Central Africa Republic fixes the maximum duration of the mediation: 2 months.

[317] Art. 314(3) CTravail.

[318] Art. 18(2) MA.

[319] Arts. 98 & 98^1 k.p.c.

7 Termination of the Mediation

Any mediation, both out-of-court and court-annexed mediation, may finish in two ways: either successfully, that is, where a settlement is reached by the parties, or unsuccessfully, in those cases where the mediation did not start or no agreement was reached by the parties in the course of the procedure.

Whatever the outcome may be, a general exigency of recording of the development of the mediation seems to exist in many countries throughout the world (Alexander 2009, 324). This exigency creates, once more, some tension for the mediator as regards the principle of confidentiality. What he or she may record and what could entail a breach of the principle is something to be specified on a case-by-case basis.

7.1 Unsuccessful Termination

Unsuccessful termination of the mediation takes place when mediation proceedings end up without an agreement between the parties having been reached. In any case, at a certain point in the proceeding it can be clear for the parties, and mainly for the mediator, that there is no possibility of an agreement. Willingness to reach a settlement is seen in many countries as a condition for continuation of the mediation (Frauenberger-Pfeiler 2012, 23). If it disappears, any participant has the ability to end mediation immediately. There is no sense in prolonging the mediation process against the will of one party who wishes to terminate it. Additionally, an amicable solution to a dispute cannot be reached when the trust between the parties and the mediator is shattered.

As a matter of principle, unsuccessful mediation has no negative consequences for the parties. It does imply that the suspension of limitation and prescription periods ends, as well as the prohibition to bring a claim that exists in mandatory mediation systems –i.e. Italy (De Luca 2014, 10)- and that, consequently, the parties can refer their disputes to State courts or arbitration or, in case of court-annexed mediation, to resume the procedure: i.e. CEMAC countries (Ngwanza 2014, 17), Quebec (Guillemard 2014, 11), or South Africa (Broodryk 2014, 32).

The unsuccessful termination of mediation is treated in different ways in the world (Hopt and Steffek 2013, 48). Many States consider that the termination of the mediation depends on the will of the parties who at any stage of the procedure may manifest their will to withdraw from it or simply because an agreement is not reached: i.e. Austria (Frauenberger-Pfeiler 2012, 22), Germany,[320] Slovenia,[321]

[320] Art. 2(5) MA clearly states that the parties may terminate the mediation at any time.

[321] Art. 14 MA.

or Croatia.[322] In some countries, on the contrary, and despite recognition of the link between the will of the parties and the mediation, a more detailed rule is embodied: i.e. Poland (Jankowski et al. 2014, 21),[323] Belgium (Traest 2012, 61), Czech Republic,[324] Portugal,[325] Russia,[326] Baltic countries (Nekrošius and Vėbraitė 2012, 38), Bulgaria (Natov et al. 2012, 82), Luxembourg (Menétrey 2014a, 23), Hungary,[327] or Romania.[328] And countries exist where a closed list of grounds for termination of the mediation is provided by the law: i.e. Kazakhstan.[329] Finally, other countries exists that link the termination of the mediation to the sole perception of the mediator: i.e. Greece,[330] or Spain (Iglesias et al. 2012, 477–478). Or, in case of court-annexed mediation, of the judge: i.e. CEMAC (Ngwanza 2014, 16).

Some additional countries set forth additional formal obligations for the mediator and/or the parties: usually a document is due to be signed by the parties –i.e. Spain-[331] or an agreement by the parties accepting that the mediation has finished is envisaged –i.e. Russia (Argunov et al. 2014, 6)-.[332]

7.2 Successful Termination

Mediation is considered to be successfully concluded in those cases in which the parties reach an agreement on the dispute referred to mediation. This settlement may be full or partial and, unless otherwise stated by the parties, it should refer to the object of the dispute and not to issues connected with it (Alexander 2009, 190). The settlement reached by the parties ends the dispute and has a direct effect on the duties and obligations of the parties, although as a matter of principle it is generally considered to have a contractual nature and to be binding solely upon the parties. This general condition is made dependent in certain countries on the specifities of their mediation systems: i.e. Taiwan where only court-related mediations are regulated. That means that its condition and treatment will be dependent on the specific mediation scheme within which the settlement is reached

[322] Art. 12 MA.

[323] In accordance with Art. 183^{13} § 1 & § 2 k.p.c.

[324] Art. 6 MA.

[325] Art. 273, n. 4 CPC & Art, 13(3) & (4) MA.

[326] Art. 14 MA.

[327] S. 35 Act LV of 2002 on Mediation.

[328] Art. 43(3) Act 192/2006 on Mediation.

[329] Arts. 22(5) & 26 MA.

[330] Code of Conduct, Art. 3(2).

[331] Art. 22(3)(II) MA.

[332] Art. 14 MA. This "agreement" is considered rather impractical.

(Shen 2014, 19 ff.). A similar situation is found in Japan where a high percentage of mediations are developed at the courtyard –in fact they are a sort of judicial conciliation- and this fact directly affects the nature of the settlement reached and its enforceability (Kakiuchi 2014, 18).

The agreement is negotiated and entered into by the parties and the mediator has no liability in this regard. In fact, as has already been said, the general rule is that the settlement is for the parties to freely reach and that the mediator must maintain a purely neutral and facilitative position to the extent that he or she cannot provide the parties with any advice on its content, although some exceptions exist to this general principle: i.e. Italy, where the mediator plays an active role as regards the content of the settlement (the "*conciliazione*")[333] or, to a minor level, Slovenia, where the MA provides the possibility for the mediator to cooperate in making the written settlement.[334] Also in South Africa, and as regards court-annexed mediation, the mediator is compelled to assist the parties to draft their settlement.[335]

Leaving aside those special situations, the settlement reached by the parties raises certain questions as regards its content and drafting and as to the role played by the mediator in relation to it. It also raises the issue of the law applicable to the dispute, a question that has special relevance in cross-border disputes. And of course there is the issue of its enforceability, one of the most relevant issues for mediation.

7.2.1 Formal Conditions of the Settlement Reached

Though the idea that the content of the settlement rests on party autonomy is almost unanimously shared by States, the formal requirements for the agreement reached to be valid differ from one country to another. Several degrees of formal exigencies exist worldwide. Some countries where – at least in principle – have a very flexible approach to this issue, tend to provide no response to it. The settlement reached is considered to be a contract between the parties and therefore it is subject to general contract law rules. No reference is usually made to the formal condition of the agreement, it is for the parties to draft it and to document it how they wish although it is said to be likely of being in writing: i.e. the Netherlands (Van Hoek and Kocken 2012, 502), UK (Crawford and Carruthers 2012, 532), Austria (Roth and Gherdane 2013, 273), Slovenia,[336] Poland (Grzybczyk and Fraczek 2012, 311 & 312), Germany (Bach and Gruber 2012, 171), Hungary,[337] Bulgaria (Georgiev and Jessel-Holst 2013, 345), or Norway as regards out-of-court mediations (Bernt 2014, 25).

[333] Art. 11(1) Legislative Decree n. 28/2010.

[334] Art. 14(1) MA.

[335] Rule 82 Mediation Rules.

[336] Art. 14(2) MA.

[337] S. 35(1) of the Act LV of 2002 on Mediation.

Other States set forth specific general formal conditions for the agreement reached. Usually these requirements refer to the exigency of signature by the parties –i.e. Lithuania (Nekrošius and Vėbraitė 2012, 38), – or by a conciliation body – i.e. Estonia (*Ibid*. 38) -, of the settlement reached by them. Or to its written form, something that is requested for instance in Malta,[338] Slovakia,[339] Luxembourg,[340] Romania,[341] Belgium (Traest 2012, 62), Czech Republic (Pauknerová et al. 2012, 121), Cyprus,[342] Greece,[343] Spain,[344] Finland[345] Kazakhstan,[346] or Italy.[347] Russia stresses the necessity of written form and signature and also requires the settlement to necessary embody certain information.[348] Highly developed legislation on this issue is said to exist in Mexico City (Gonzalez Martin 2014, 15–16).

7.2.2 The Law Applicable to the Substance of the Dispute

National rules on mediation tend to be silent as regards the law applicable to the substance of the dispute. The final response to this issue will first be dependent on the nature of the dispute. Depending on the specific matter to be dealt with, the solution provided may or may not be based on legal arguments. In the first case, it will be for the parties to decide on the application of any legal provision or of any other legal device (analogy, equity, etc.). In the case of application of legal provisions, there will be two issues referring to two different moments: firstly to know what kind of rules have been applied, and secondly once the settlement is to become enforceable to verify whether it is in accordance with the law and public order of the authority to which homologation has been asked. Most States refer to this issue only at the stage of determining the enforceability of the settlement.

[338] Note S. 17B (1) MA.

[339] P. 15(1) MA.

[340] Art. 1251–10 NCPC.

[341] Art. 58(2) Act 192/2006 on Mediation.

[342] S. 30(1) MA.

[343] Art. 9(2) & (3) Act No. 3898/2010.

[344] Art. 23(2) & (3) (I) MA.

[345] S. 8, 9 &19 MA.

[346] Art. 27 MA.

[347] Art. 11(2) Legislative Decree 28/2010.

[348] Art. 12 MA & 160 Cc.

7.2.3 Enforceability of the Settlement Reached

Enforceability of the settlement constitutes one of the most relevant issues in relation to mediation. It gains even further relevance as regards cross-border mediations, in which the settlement agreed on by the parties is required to circulate across the world.

For mediation to be fully effective, the enforceability of the settlement must be ensured. Certainly, the fact that the parties have entered the agreement in a fully voluntary manner and after realising that it is the best possible solution to their dispute should ensure it a high level of voluntary enforceability. Nevertheless, mediation should not be a sort of second class justice fully dependent on the good will of the parties. It is therefore necessary to ensure the parties to a settlement resulting from mediation that they can have the content of such settlement made fully enforceable (Sussman 2009, 346). This enforcement should be general and it could only be rejected on certain specific and limited grounds. But, at the same time, it needs to be combined with the protection of confidentiality in cases of unclear settlements; unfortunately a situation which is not that unusual (Alfini et al. 2006, 315).

As a matter of principle, the analysis of the several national legal solutions as regards the enforceability of purely domestic agreements reached within a mediation shows the presence of three ideas on which the solution provided to this issue tend to rest.

1. Firstly, differences may be encountered in relation to out-of-court mediations and court-annexed or court-related mediations. In the second case, the settlement reached may either enjoy direct enforceability –i.e. Mexico (Gonzalez Martin 2014, 24) or have the consideration of a transaction subject to homologation by the judge in cases of court-related mediations –i.e. Quebec-.[349]
2. Secondly, in out-of-court mediations the agreement reached is, in general terms, considered to be a contract binding on the parties (Sussman 2009, 347). This is acknowledged even in countries where no general mediation legislation has been enacted. i.e. South Africa (Broodryk 2014, 33), or where the nature of the settlement reached is controversial –i.e. Quebec as regards mediation in family matters- (Guillemard 2014, 18).
3. Thirdly, as a general rule, in almost no place direct enforceability is possible (Hopt and Steffek 2013, 46). For the settlement to be fully enforceable a certain level of homologation by a public authority is required throughout the world. Who will homologate the agreement reached, how will this be done and on what grounds the homologation will be granted varies from country to country.

   This general rule only encounters some isolated exceptions. In Hungary, as regards settlements reached during medical mediation under Act CXVI of 2000 on Mediation in Health Care. Also in Croatia the settlement reached is considered to be directly enforceable in certain limited cases related to consumer credits

[349] Art. 151.22 CPC and Art. 2631 Cc.

mediation,[350] and much more controversially, when the settlement determines a definite obligation on performance which is permitted and if it contains a declaration of the promise that he/she agrees to direct enforcement.[351] In Portugal, too, the reform of the Portuguese legislation on mediation has also created the possibility for mediation settlements reached in Portugal – and also those reached abroad – to be directly enforceable under certain circumstances.[352] In fact, a flexible position towards the enforceability of these documents is said to exist in the country (Lopes 2014, 334 ff.).

These three ideas are habitually present worldwide, although the way they are implemented is different throughout the world. More flexible or broader solutions exist alongside others that can be considered more rigid or narrower. In addition, in many cases the public authority's grounds to refuse to homologate the agreement reached vary throughout the planet.

Hence the analysis of the various national solutions shows the existence of countries where the settlement reached cannot be homologated by any public authority and remains always considered as a contract. Whereas many other countries exist that grant enforceable nature to the settlement reached by way of its homologation by certain public authorities.

1. A good example of this first situation is found in Russia. No devices for enforcement of settlements reached within an out-of-court mediation are envisaged. That means that in case of failure of fulfilment of the settlement reached by any of the parties, the other party will have to refer to the court for the settlement to be enforced (Argunov et al. 2014, 9). A slightly different situation exists as regards court-annexed mediation. In that case the settlement reached can be endorsed by the court as far as it does not run against the law or third parties interests.[353] A similar approach seems to be maintained in Kazakhstan. The settlement reached by the parties in the course of out-of-court mediations is subject to voluntary enforcement by them. In case this does not happen, they can go to the court to ask for its fulfillment (Karagussov 2014, 25–26). On the contrary, settlements reached in the course of court-annexed mediations are subject to approval by the judge considering the case.[354]

   In Japan settlements reached within any of the court related mediation systems envisaged by the law are fully enforceable. A different situation exists as regards settlements reached in the course of a private mediation process which are always considered to be a contract. No homologation procedure is granted and in case any of the parties does not honour the settlement the other party has to file a new

[350] Consumer Credit Agreements Act, 75/2009, 112/2012, Art. 24.

[351] Art. 13(2) & (3) MA.

[352] Art. 46(c) CPC and Art. 9 Act No. 29/2013.

[353] Art. 12 MA & 39 CPC.

[354] In accordance to Arts. 49, 247, 342 & 381(1) CPC.

claim before a court or an arbitrator based on the settlement reached. Several means have been developed in order to soften this situation: the parties may nominate an arbitrator who will render a judgment on the basis of the settlement reached or they can file a petition for settlement with the summary court in accordance with Art. 275 CPC. Also the possibility of embodying the settlement in a notary deed is accepted on limited grounds (Kakiuchi 2014, 24–25).

A mixed position is found in Mexico. As stated, in this country usually in-court mediation –conciliation- is developed. The settlement reached serves as the basis for a future legal action, whereas in some specific cases it is granted *res judicata* and it becomes directly enforceable. This last option is accepted by Article 38 of the Alternative Justice Law of the Mexico City High Court or Article 426 of the CPC of the City of Mexico (Gonzalez Martin 2014, 14–15).

2. Secondly, in many countries the exigency of an authorisation from the court or a public authority, mainly notaries or, where applicable, an arbitrator, in order for the agreement to be fully and directly enforceable exists. In this respect, almost all States require the fulfilment of different conditions in order to grant enforceability to a settlement in writing[355]; the written condition is usually a necessary condition for this enforcement. For instance, in the Netherlands a recent Judgment of the Supreme Court rejected enforcement of a settlement reached by the parties that did not meet the formal requirements for a binding agreement on the basis of the Nederlands Mediation Instituut Rules.[356]

Nevertheless, important differences exist regarding those conditions and also as to the role played by the authority in charge of the homologation of the settlement. In certain cases enforceability is possible only on ratification of the settlement by the court, whereas in other cases the notary is granted an important role to play in turning the agreement into an enforceable title.

1. Some countries in the world link the enforceability of the agreement reached to its acceptance by a competent court: i.e. Poland (Morek and Rozdeiczer 2013, 787), Sweden,[357] Luxembourg,[358] Greece (Kourtis and Sivena 2012, 212), Cyprus,[359] Lithuania (Nekrošius and Vėbraitė 2012, 38), Bulgaria,[360] Portugal,[361] France (Guinchard and Boucaron-Nardetto 2012, 152–153), Finland (Ervo and Sippel 2012, 392), Italy (Queirolo et al. 2012, 275–276), Hungary,[362] or Norway (Bernt 2014, 26). This homologation is also requested in several

[355] Art. 6(1), 2008 Directive.

[356] Judgment of the Supreme Court of 20.12.1013, available (in Dutch) at http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2013:2049 (accessed on 25.6.20149).

[357] Art. 9 MA.

[358] Arts. 1251–15 (3) & 1251–21 NCPC.

[359] S. 32(1), (3) & (5) MA.

[360] Art. 18 MA.

[361] Art. 14.° MA (Law n.° 29/2013, 19.4.2013).

[362] S. 148 CPC.

CEMAC Countries[363] where the cost it entails and the absence of a culture of mediation in these countries are considered to be very negative for the future development of mediation there (Ngwanza 2014, 18–19). Or in South Africa, where for the settlement to be fully enforceable it must turn into a consent order of court (Broodryk 2014, 33).

In some African countries the homologation is necessary because of the consideration as a transaction of the settlement reached: this happens either because the regulation on mediation so states –Madagascar-[364] or due to the lack of regulation of private mediation in the country. In this last case, the absence of a legal framework for mediation leads to the application of the legal regime of some other legal institutions: i.e. transaction.[365] And transactions, like happens in Benin too, requires the homologation by the court in order to be fully enforceable.[366]

Regarding the homologation of the settlement reached by national courts, come countries do not state conditions for it –i.e. Lithuania (Nekrošius and Vėbraitė 2012, 38). However, this is not the general rule and some conditions are usually set forth by national rules on mediation for the settlement reached to be homologated. These conditions vary from country to country and it is accepted that the court can refuse the homologation on several grounds: i.e. in Poland the court controls its legality, and the respect of the principle of contradiction between the parties.[367] In Sweden, the settlement is endorsed if it includes "an obligation of such a nature as to cause enforcement in Sweden".[368] In Luxembourg, it is rejected if its content is against public policy or the interest of minor, or if the object of the dispute is not referable to mediation, or the agreement reached is not capable of being enforced.[369] Also in Greece the settlement will be homologated provided that the agreement refers to a claim capable of being enforceable and it has been filed with the clerk of the one-member district court (Klamaris and Chronopoulou 2013, 595). In Cyprus, the Court can control the viability of the settlement and its legality and, in accordance with them, reject enforcement.[370] In Bulgaria, the court will approve the settlement if it does not contradict the law or morality.[371]

[363]Cameroun, Art. 139(3) CTravail; Central African Republic, Art. 351(3) CTravail; Congo, Art. 226(3) CTravail; Tchad, Art. 420(3) CTravail. Also Art. 33 of the Acte uniforme portant organisation des procédures simplifiées de recouvrement et des voies d'exécution (AUPRSVE) de l'OHADA requires the settlement to be homologated by the judge in order to be fully enforceable.

[364]Art. 158(1)(2) Loi 2012–013 relative à la mediation.

[365]Arts. 2044 & 2052 Cc.

[366]Art. 516 Code des Procedures.

[367]Art. 65 § 2 Cc.

[368]S. 10 MA.

[369]Art. 1251-22(2) NCPC.

[370]S. 32(3) (b) MA.

[371]Art. 18 MA.

In France too, legislation on mediation allows the judge to approve a settlement reached by the parties and to make it enforceable so long as it does not affect rights and obligations which are not at the parties' disposal under the relevant applicable law (Deckert 2013, 473 ff.). The settlement will be rejected in Finland if it is contrary to law or clearly unreasonable or if it violates the rights of a third party.[372]

A special case is found in Italy, where homologation by the judge is necessary, and this can be done by the interested party without the consent of the other. Formal and substantial requirements –one of them is that the mediation centre is a registered one- will be controlled by the court (De Luca 2014, 11).

Outside Europe also conditions are set forth by the law for the settlement to be homologated: i.e. Madagascar grants recognition to the settlement reached by the parties in case it is not contrary to public policy.[373]

2. In other countries the homologation is open also to public authorities other than judges, basically notaries, but it is done on limited grounds or, as happens with Courts, subject to certain conditions: i.e. Slovenia,[374] Czech Republic (Pauknerová et al. 2012, 121), Austria,[375] Estonia (Nekrošius and Vėbraitė 2012, 38), Scotland (Crawford and Carruthers 2012, 532), the Netherlands (Van Hoek and Kocken 2012, 508), Slovakia,[376] Germany (Bach and Gruber 2012, 173), Romania,[377] or Spain (Iglesias et al. 2012, 479). Also this possibility is accepted in some CEMAC Countries (Ngwanza 2014, 18). In Russia, some authors accept this possibility although it lacks legal basis (Argunov et al. 2014, 9).

Grounds for rejection of the homologation of the settlement by the notary tend to be rather similar to those existing in other countries of the world as regards homologation by national courts: i.e. in the Czech Republic, rejection of the settlement reached by the parties is possible when it is against the law, there are decisions on personal status or where mediation was initiated without petition (Pauknerová et al. 2012, 122). But as happens with regards to the homologation by the court, reference to the notary poses the question of his or her ability to control the content of the settlement reached by the parties. This is something that happens in certain countries. In Estonia, the agreement may be documented in a notarial deed and will be fully enforceable if it "prescribes an obligation of the debtor to be subject to immediate compulsory enforcement for the satisfaction of the claim" (Nekrošius and Vėbraitė 2012, 38). Otherwise, the agreement must be referred to the county court for approval. Spain too shares this flexible approach. The agreement reached is considered a contract binding upon the parties (Iglesias

[372] S. 23 MA.

[373] Arts. 158(12) & 158(25)(4) Loi 2012–013 relative à la médiation.

[374] Art. 14 MA. Also the possibility of having the agreement embodied in a court-settlement is envisaged. This is especially suited in case of out-of-court mediation.

[375] § 433a CPC.

[376] Art. 15(2) MA.

[377] Note Arts. 59 and 63 Act 192/2006 on Mediation.

et al. 2012, 479). For the agreement to be fully enforceable it must be notarised, or being recognised by national courts, in accordance with Article 25 MA. Either instrument –i.e. either the notarised settlement or the judicial resolution- will then be fully enforceable in Spain. Article 25(2) MA stresses that for the agreement to be embodied in a notarial deed, the notary must verify that "conditions requested by the Act are fulfilled and that its content is not against the Law".

3. Some other special situations may be ascertained worldwide. For instance, a specific situation exists in relation to settlement reached by the parties with the participation of non-registered mediators. Italy is a good example of that. Settlements reached in a mediation performed by non-registered mediators outside the scope of Legislative Decree no. 28/2010 cannot gain full enforceability. The settlement will be considered a contract between the parties subject to general Italian rules on contracts.[378]

   Also in Belgium, at the stage of gaining enforceability, there are important differences between mediations conducted by a registered mediator and other kind of mediations. As regards the first category, in order for the agreement to be fully enforceable, the agreement reached – whether full or partial – must be homologated by the competent court.[379] The court can only refuse homologation of agreements reached on matters suitable for submission to mediation[380] in two cases, either when the agreement is contrary to public policy or, in mediation on family matters, when the settlement is deemed contrary to the interest of minor children (Traest 2012, 62 ff.). On the contrary, agreements reached in a mediation conducted by a non-registered mediator may either be claimed before a court for enforcement or documented in a notarial deed which will be enforceable.[381]

   Additionally, in other countries like Croatia, the parties may authorise the mediator to issue an award on the settlements agreed on by them acting as a sole arbitrator[382]; the award rendered is then fully enforceable in accordance with the Croatian rules on arbitration.

   The situation in Malta has also some idiosyncrasies insofar as in Malta mediation is based on party autonomy and a scheme of compulsory mediation for certain family law disputes coexist. As regards this last category, when the mediation ends with a settlement, the mediator is bound to transmit a copy of the written settlement to the Family Court (Sciberras Camilleri 2012, 296).

[378] Conversely, those mediations falling within the scope of the Legislative Decree can reach full enforceability in accordance with its Art. 12. Following this Article, the record of the agreement reached will be homologated by the competent court after verifying that it is not contrary to public policy and that formal requirements imposed by law are respected.

[379] Art. 1733 CPC.

[380] Art. 1724 CPC.

[381] An agreement can also be treated as a judicial transaction in accordance with Art. 733 CPC.

[382] Art. 16(2) MA.

8 Cross-Border Mediation in Civil and Commercial Matters

Cross-border litigation has increased steadily in recent years in many parts of the world. That means that promoting the use of mediation in civil and commercial disputes will directly encourage a growing number of settlements to be reached within cross-border mediation. This will be especially in Europe, in accordance with the growing harmonisation of private international law and substantive law in certain strategic areas developed in Europe for the last decades. Ensuring the enforceability of the agreement reached in one State in another entails a greater level of difficulty than in purely domestic situations.

Settlement rates in international business are said to be 85–90 % (Sussman 2009, 343). Voluntary fulfillment of settlements reached is also said to be high. In a purely ideal scenario, no reference to any law or private international law rule should be made insofar as the settlement reached by the parties would be honored on a voluntary basis. Nevertheless, as the number of mediations rises, an increase in the amount of litigation that arises from mediation seems inevitable and multiple different reasons may encourage this situation.

The existence of the 2008 Directive in Europe gives place to the existence of two clearly different set of countries, those belonging to the EU and those outside it. In this last part of our Report we will differentiate these two cases when we approach the several issues to be dealt with.

8.1 The Legal Framework on Cross-Border Mediation

8.1.1 The Situation Existing in the EU

In Europe, most of the EU Member States have upheld the possibility offered by the Directive[383] to develop a common legal system for internal and cross-border mediation. This option has usually been based on different grounds, for example the unreasonable fragmentation of the law on mediation, the unequal treatment to which this fragmentation would lead (Gruber and Bach 2014, 158) or the unjustified restriction of the number of cases which could consequently benefit from mediation (Guinchard 2014, 145). Additionally, some Member States have enacted legislation that deals only with cross-border mediation – England and Wales, Scotland and the Netherlands – and in some isolated cases countries have not implemented legislation on cross-border mediation at all – the Czech Republic. There are also examples of countries which considered it not necessary to implement special legislation, for instance Belgium.

The notion of cross-border mediation is provided by Article 2 2008 Directive. The analysis of all these national legislations shows that irrespective of whether a

[383]Recital 8, 2008 Directive.

monistic or dualistic approach has been supported by the legislator, some Member States now enjoy rules specifically designed to deal with cross-border mediations (the UK or the Netherlands – countries which take a dualistic approach – or Greece, Portugal and Spain, which support a monistic one). On the other hand, other countries that take a monistic approach have not drafted any specific rules on cross-border mediation and they have simply opted to apply the general mediation legal framework enacted with the implementation of the Directive to both internal and cross-border mediations indistinctly – i.e. Bulgaria, Croatia, Cyprus, Czech Republic, France, Italy, Poland, Romania, Slovakia and Slovenia. Further, as in the case of Belgium, this indistinct application may be found even when no proper implementation as such of the Directive has taken place. This somewhat usual absence of rules specifically designed in relation to cross-border mediation forces the application of the general private international law system – assuming that cross-border mediation equates to mediation with a foreign element – which is not always well suited to providing sound, adaptable and flexible solutions to the questions posed.

Moreover, the EU Member States that have rules governing cross-border mediation – irrespective of whether they have been enacted within a monistic or dualistic approach – differ as to the scope provided to the legal framework developed.

In many countries the legislation implementing the Directive is limited to purely EU cross-border mediations, thus referring any other mediation to the pre-existing legal regime on mediation. And this occurs, once again, both in countries which have enacted legislation only devoted to cross-border disputes –i.e. the UK[384] and the Netherlands-[385] and in countries which uphold the monistic approach; that is, the legislation enacted is applicable to internal and cross-border situations: i.e. Luxembourg (Menétrey 2014b, 255–256), Bulgaria (where the MA refers solely to EU cross-border disputes and no legal regime is said to exist as regards fully international mediation, Natov et al. 2014, 57), Italy (Queirolo and Gambino 2014, 222), Romania (Milu and Taus 2014, 347), Finland (Sipel 2014, 362), or Greece (Kourtis 2014, 183) reflect the second position.

Conversely, other countries implementing the Directive have explicitly granted a broader scope of application to the legislation enacted, thus covering both EU and non-EU mediation: i.e. Spain (Iglesias et al. 2014, 421) and Cyprus (Emilianides and Charalampidou 2014, 105). This broader scope has been reached in certain countries even when no specific rules devoted to cross-border mediation have been embodied in the legislation implementing the Directive:

[384]S. 8(b) of the Cross-Border Mediation (EU Directive) Regulations 2011, clearly states that '"cross-border dispute" has the meaning given by article 2 of the Mediation Directive;...'. The same solution is found at S. 2 (1) of the The Cross-Border Mediation (Scotland) Regulations 2011 which states: '"relevant cross-border dispute" means a cross-border dispute to which the Directive applies.'

[385]In the Netherlands, the Mediation Act of November 2012 is focused on purely EU cross-border disputes (excluding Denmark) and purely internal and non-EU mediations are left outside the scope of the new legislation.

i.e. Hungary (Harsági et al. 2014, 201–202), Poland (Zachariasiewicz 2014, 275), Slovenia (Knez and Weingerl 2014b, 399), Estonia or Lithuania (Nekrošius and Vėbraitė 2014, 29–30). A step further is reached in Portugal where no definition of cross-border mediation is provided and the existing legal system as regards both public and private mediation applies to internal and international mediation (Lopes 2014, 309).

8.1.2 The Situation Existing Outside the EU

As previously stated, the lack of regulation of cross-border mediation constitutes the general rule outside the EU. With some isolated exceptions –i.e. Taiwan-[386] no definition of cross-border mediation is usually provided and relevance is mainly given to the foreign origin of the settlement reached in case of its recognition and enforcement in a given country: i.e. CEMAC countries (Ngwanza 2014, 19). Statistics do not usually exist or show the existence of a very marginal phenomenon: i.e. in Taiwan in the period 2000–2012, only two cases of cross-border mediation are reported: only 1.258 % of the total number of mediations undertaken in the country (Shen 2014, 25).

8.2 The Law Applicable to the Mediation Clause or Agreement to Mediate

National legal systems on mediation are habitually silent as regards the law applicable to the mediation clause or the agreement to mediate in cross-border mediation. Even in the EU, where rather well developed legal systems on mediation exist, it is said to be a topic that has not been studied very much in many Member States so far. This lack of explicit response that could lead to unexpected situations is exacerbated by the absence of a unanimous understanding of the nature of the mediation clause and of the agreement to mediate –i.e. Poland (Zachariasiewicz 2014, 321). In some countries, the nature is undetermined by the law and it is considered that it can be affected by the cross-border nature of the dispute to be solved –i.e. Austria (Frauenberger-Pfeiler 2014, 2 & 20) – or subject to academic

[386]"cases that at least one party is a foreign cooperation" (definition provided by the Chinese Arbitration Association).

controversies –i.e. Spain-[387] thus making the applicable law to the mediation clause or agreement to mediate in cross-border disputes not fully clear.

As a matter of principle the mediation clause and the agreement to mediate are broadly considered in the several EU Member States to have a contractual nature; consequently it is accepted that rules on determination of the law applicable to contracts should be applicable to them. That implies a direct reference to Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). The Regulation would be applicable in order to fix the legal regime; it will govern the law applicable to the consent to mediate (Esplugues 2014, 745 fn. 1944), the substantive and formal validity of the settlement or settlements reached (Esplugues 2014, 745 fn. 1945), the contractual responsibility arising out of the lack of fulfilment of the obligations entered into (i.e. the obligation by the parties to submit the dispute to mediation) (Pauknerová et al. 2014, 128–129), and any other aspects of the agreement falling under its material scope of application.

Conversely, that means that all those issues not covered or dealt with by the Regulation will be governed by the existing national private international law rules, whatever their origin – international or domestic – may be: i.e. capacity to enter into a mediation clause or agreement to mediate (Esplugues 2014, 745 fn. 1947) or the regulation of a situation falling outside the scope of the Regulation would be left to be determined by national private international law rules. And this, as in the case of Belgium, may entail certain academic controversies (Traest 2014, 42–43).

8.3 The Law Applicable to the Content of the Settlement Reached

Nothing is said as regards the law applicable to the settlement reached in most national legislations on mediation, in relation to either its existence or content. The law applicable to the agreement reached by the parties will then be determined in accordance with the existing rules of private international law in relation to the merits of the dispute at stake, not those applicable to the mediation (Esplugues 2014, 760 fn. 2065).

In the EU this is broadly understood as meaning that in those cases falling fully or partially within the scope of the Regulation "Rome I", this Regulation will be applicable to those issues to be settled that are covered by it (Esplugues 2014, 760

[387] Mainly as regards the consideration of obligations arising out of the clause as precontractual, and that subjected to Regulation (EC) No 864/2007 of the European Parliament and of Council of 11.7.2007 on the law applicable to non-contractual obligations (Rome II), *OJ* L 199, of 31.7.2007 , although the recent Judgment of the Supreme Court of 8.3.2013 (No. 105/2013, *LA LEY* 97642/2013, upholds the contractual condition of this agreement). Or purely contractual and then subject to Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17.6.2008 on the law applicable to contractual obligations (Rome I).

fn. 2066). Some isolated national case law upholds this possibility.[388] In the case of disputes over family matters or successions, relevant EU instruments on private international law should also be taken into account. Otherwise national private international law rules will apply as regards the determination of the law governing the merits of the settlement, if any such a law exists or is necessary, taking into account the specific settlement reached by the parties. In the case of a settlement embodying a plurality of obligations, this could lead to different private international law rules being referred to and several national systems applied.

Outside the EU some isolated cases exist where application of the general PIL legal framework is supported: i.e. South Africa (Broodryk 2014, 35) or Kazakhstan.[389]

8.4 Enforcement of Foreign Settlements

The settlement reached by the parties is a contract that is expected to be voluntarily honoured by them. In the event of a lack of fulfilment by the parties, the settlement is unanimously considered to be a contract binding on the parties that will have to be ensured through court actions. No direct enforceability is sought as a general rule.

8.4.1 The Situation Existing in the EU

Only settlements that are considered enforceable in the country of origin will be recognised and enforced abroad. The legal regime applicable to this recognition will vary if the enforcement is sought in another EU Member State or outside the EU. And of course, a different situation will exist when recognition of settlements reached outside the EU is sought in a specific EU Member State. Additionally, a different legal regime will exist in relation to those settlements that are finally embodied in an arbitral award.

1. With the only exception of Portugal,[390] in the case of settlements reached in a certain EU Member State enforcement of which is sought in another Member State, the object and content of the settlement will be decisive in making applicable to it any of the existing EU instruments on recognition and enforcement of foreign judgments. The settlement reached by the parties on a topic covered by

[388] In France, note Cour de cassation, Soc., 29.1.2013, n°11-28041 (http://legimobile.fr/fr/jp/j/c/civ/soc/2013/1/29/11-28041/, accessed 18.07.2014).

[389] Art. 1112 Cc.

[390] Where Art. 9(4) of Act 29/2013 recognises direct enforceability – "without the necessity of homologation by the court" – of the settlement reached via a mediation in another EU Member State "which respect letters a) and d) of paragraph 1 of this Article in so far the legal rules of that State grants it enforceability".

the existing EU legal instruments on recognition and enforcement of judgments which is embodied in a judgment, an authentic instrument –i.e. a notarial deed- or a court-settlement, which are enforceable in accordance to the law of the country where these instruments have been rendered will be subject to the flexible system designed by the EU in this area.

These regulations are essentially Regulation 1215/2012 and Regulation 2201/2003, to which the Directive itself refers.[391] But also of relevance are Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims,[392] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations,[393] and even Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.[394] In addition, it is said that any future text to be enacted will be applicable: this reference to the texts to come is relevant insofar as some instruments on the economic aspects of marriage and partnership are in the pipeline in Brussels.

If the settlement fully or partially falls outside the scope of any of the existing EU Regulations, international conventions and national rules on recognition and enforcement of foreign judgments and decrees existing in every EU Member State would be applicable. In most cases not only judgments but also other authentic documents are covered by these provisions; this is the case for example in Austria (Frauenberger-Pfeiler 2014, 2 & 20), Belgium (Traest 2014, 50–51), Bulgaria (Natov et al. 2014, 75 & 79), Croatia (Babić 2014b, 99–101), Germany (Gruber and Bach 2014, 175–176),[395] Hungary (Harsági et al. 2014, 215), Italy (Queirolo and Gambino 2014, 243 ff.), Poland (Zachariasiewicz 2014, 300 ff.), Portugal (Lopes 2014, 335), Slovakia (Chovanková 2014, 394 ff.), Slovenia (Knez and Weingerl 2014b, 413 ff.), and the UK (Crawford and Carruthers 2014, 480).

2. As far as EU Regulations on recognition and enforcement refer solely to judgments, authentic documents and court transactions rendered in an EU Member State, recognition and enforcement of settlements reached outside the EU that fall

[391] Since January 2015, Regulation 44/2001 has been replaced by Regulation 1215/2012 of the European Parliament and of the council of 12.12.2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) OJ L 351, of 20.12.2012.

[392] *OJ* L 143, of 30.4.2004.

[393] *OJ* L 7, of 10.1.2009.

[394] *OJ* L 201, of 27.7.2012.

[395] Only as regards international conventions and not in accordance with German procedure law.

outside the scope of application of the Lugano Convention of 2007,[396] would be governed by the international or national legislation applicable in every Member State in the specific area of law at stake.

3. In those cases the parties want to enforce in one Member State a settlement entered into in another Member State, or indeed outside the EU, that has not been homologated by any public authority and that consequently lacks enforceability. The settlement will have to gain enforceability in the country where enforcement is sought in accordance to the law of that country.
4. Finally, settlements reached within a mediation proceeding may be embodied in an arbitral award. In this case, irrespective of the place where the award has been finally rendered, the New York Convention on the recognition and enforcement of foreign arbitration awards or, in accordance with Article VII of the Convention, any other convention that may be more favourable to the recognition of foreign arbitration awards, will be applicable.

8.4.2 The Situation Existing Outside the EU

The absence of regulation on cross-border mediation in many countries of the world is reflected in the field of recognition and enforcement. No specific legislation on foreign settlements is embodied. Nevertheless, it is broadly accepted that foreign settlements that are homologated by foreign judges or foreign notaries are enforceable instruments that can be subject to the existing Conventions on recognition and enforcement of foreign judgments or, in case no convention is applicable, to national legislation on this issue: CEMAC countries (Ngwanza 2014, 19–20), Norway (Bernt 2014, 28), Kazakhstan,[397] Russia,[398] Brazil (Basso and Polido 2014, 31–32), Quebec (Guillemard 2014, 36 ff.), or Japan (Kakiuchi 2014, 28). However some countries exist where no response is provided: i.e. Lebanon (Ben Hamida 2014, 12–13).

In some cases, national law states that foreign judgments are, as a matter of principle, no directly enforceable in the country and a proceeding *ex novo* must be instituted, that is the case of South Africa (Broodryk 2014, 36).[399]

In case they are granted the exequatur they will fully effective in the country where recognition was seeked.

[396] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30.10.2007, *OJ* L339, of 21.12.2007.

[397] Art. 425 CPC.

[398] Chapter 45 CPC & Chapter 31 Arbitration Procedural Code.

[399] Certain flexibilization of this rule was provided by *Richman v. Ben-Tovim*, 2007 2 All SA 234 (SCA).

9 Final Approach

The analysis of the situation existing as regards civil and commercial mediation in the several jurisdictions analysed generates mixed feelings. Certainly the institution is growingly accepted in many places of the world and it is more and more present on the legal agenda of many States. But at the same time too many important differences exist worldwide not only in relation to the legal framework developed, its scope and solutions provided, but also regarding the commitment to the institution by national governments and its real use by citizens. Thus, important divergences are ascertainable in relation to the scope of the legislation enacted, the specification of the availability of disputes subject to mediation, the role played by the mediator, the nature and effects of mediation clauses and agreements to mediate and their interaction with national courts, or, which is even more important, the enforcement of the settlement reached by the parties. Problems arising from the diversity of responses provided gain further importance when they are projected to cross-border disputes. This absence of a common response is even encountered in integrated areas like the EU.

Mediation is considered nowadays the rising star of ADR. It is growingly known among legal practitioners and citizens worldwide and it has even gained a legal presence that had previously been nonexistent in many countries. Our report states and admits this fact but at the same time poses the question of considering to what extent the existence of a basic set of minimum common rules on key aspects of civil and commercial mediation enacted by international institutions and organizations would foster additional resource to it in the future to come.

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Mediation in Belgium: A Long and Winding Road

Piet Taelman and Stefaan Voet

Abstract This chapter offers a comprehensive overview of mediation in Belgium. The 2005 Belgian Mediation Act is the leitmotif. First, attention is paid to the mediation agreement and the voluntariness of the mediation process. Second, the accreditation of mediators is discussed and the role the Belgian Federal Mediation Commission plays in that regard. Third, the important issue of confidentiality in the mediation process is analysed. Chaps. 5-7 focus on voluntary (or out-of-court) mediation, including the role of ODR (online dispute resolution), and judicial (or court-connected) mediation. Brief attention is paid to the costs of mediation and legal aid (Chap. 8). The chapter ends with some future perspectives on mediation in Belgium.

1 Mediation and Other Out-of-Court Resolution Mechanisms in Belgium

Disputes can be resolved in many ways instead of going to court. The Belgian Judicial Code (hereafter: BJC) deals in its Part VI with *arbitration*, while its most recent Part VII deals with *mediation*. The same Code provides in its Parts I–V (about judicial organization, jurisdiction, judicial proceedings, review proceedings, seizures and enforcement of judgments) a technique to settle a dispute with the help of a judge but without an adjudicative process (*conciliation*).

Other legal provisions have created ADR-like organizations (e.g. ombudsman) for particular disputes concerning public services or entities.[1] The business

[1] Verougstraete 2013, at 95, and his reference to a non-exhaustive list of these organizations.

P. Taelman
Institute for Procedural Law, Ghent University, Ghent, Belgium
e-mail: Piet.Taelman@UGent.be

S. Voet (✉)
Research Foundation Flanders, Institute for Procedural Law, Ghent University, Ghent, Belgium
e-mail: Stefaan.Voet@law.kuleuven.be

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community, sometimes in co-operation with consumer organizations, took the initiative to create a series of commissions dealing with consumer (or consumer-related) issues.[2] Recently, a centralized governmental on-line system (*Belmed*) has been set up in order to guarantee an effective access to this multitude of bodies and organizations.

Besides all these instruments, a wide variety of mediation or mediation-alike bodies exists in a great number of areas (education, neighborhood, etc.).

1.1 Arbitration

Belgian rules on arbitration were amended in 2013,[3] largely inspired by the UNCITRAL Model Law.[4] The structure of Part VI of the BJC has been changed and the order of the articles been shuffled, but the content of the law has not been altered dramatically.[5] As arbitration law merely serves as a roadmap, parties are allowed to a large extent to set up their own arbitration rules or they may use rules drafted by an arbitration institute, such as the Belgian Center for Mediation and Arbitration (CEPANI).[6] Any Belgian or foreign arbitral award needs to be granted exequatur by the president of the court of first instance via an *ex parte* proceeding before it becomes enforceable within the country.[7]

1.2 Conciliation

Conciliation, as a method of settlement in court, necessarily involves a judge acting as a conciliator. This informal and quite often successful way of resolving disputes is governed by Articles 731–734 of the BJC and, according to Verougstraete, by the obligations of fairness.[8]

[2] Verougstraete 2013, at 95 (some of them are subsidized by the Government).

[3] Loi modifiant la sixième partie du Code judiciaire relative à l'arbitrage [Act Amending the Arbitration Act] of 24 June 2013, Moniteur Belge [Official Gazette of Belgium] of 28 June 2013, 41263.

[4] Piers and De Meulemeester 2013 and Philippe 2014.

[5] Piers and De Meulemeester 2014, at 83.

[6] http://www.cepani.be/EN/. Accessed 15 October 2014.

[7] Article 1719–1721 BJC.

[8] Verougstraete 2013, at 110.

It has to be underlined that, in principle,[9] the judge has no adjudicative power in such a case. As a rule,[10] proceedings have not yet been commenced at the moment the judge is asked to conciliate the parties. The BJC provides that before going to court, a party and/or some of them and/or all the parties can voluntarily submit the dispute to the judge exclusively with the view of obtaining a settlement.[11] Parties can simply write a letter to the clerk of the court asking to summon the opposite party or parties. The judge has to draft a procès-verbal of the conciliation session. In practice judges often make use of negotiation or mediation skills in their attempt to bring parties to an agreement. They suggest possible solutions for the dispute and even try to gently nudge the parties into the direction of a settlement. If an agreement is reached, it will be laid down in the procès-verbal of the conciliation session and will be enforceable as a judgement.[12] Under no circumstances, the agreement can be appealed. In case the conciliation fails, the judge will draft a procès-verbal of non-settlement and each party may consider judicial proceedings.

However, some judges behave much more reluctantly by giving the parties a voice and/or putting some question to them, without any formal attempt to reach a settlement. This is particularly the case when an attempt to conciliate is compulsory, e.g. in labor cases.[13] It is quite generally accepted that a judge seized with a case should withdraw from it, at least if he made a formal or active attempt to conciliate the parties which failed. Such attempts of judges compromise their impartiality. According to Verougstraete, mandatory conciliation does not work well and is considered as an expensive nuisance rather than a useful tool. People go through the motions but the exercise is generally unproductive. The same argument has been used by opponents of mandatory mediation.[14]

Conciliation has to be distinguished from mediation. While a conciliator quite often indirectly recommends a solution, a (facilitative)[15] mediator does not give any advice about the resolution of the dispute. The mediator only assists the parties in working towards a self-negotiated settlement.

[9]Except in labor cases, see Article 734 BJC (a judgment in a labor case has to mention that a settlement could not be reached).

[10]Exceptions on that rule are labor cases.

[11]Compare Article 3 a) of the Directive of the European Parliament and of the Council 2008/52 on certain aspects of mediation in civil and commercial matters, 2008 O.J. (L 136) (EC): '[mediation conducted by a judge] excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question'.

[12]Verougstraete 2012. Article 733 BJC.

[13]Pursuant to Article 972 BJC an expert appointed by a court has *inter alia* a duty to encourage a conciliation between the parties.

[14]Verougstraete 2012.

[15]Van Leynseele 2014.

1.3 Mediation

In 2005, the Belgian Mediation Act entered into force.[16] The Act added a new Part VII to the BJC.[17] It broadened the scope of mediation from family cases to mediation in all types of civil, commercial and social cases.[18] The Belgian Mediation Act therefore applies to mediation in all those cases. Since judicial organization in Belgium is governed by federal law, the rules on mediation do not differ depending on the region in which mediation is located or organized.

By integrating mediation in the BJC, the legislator gave the signal that he wanted to put different dispute resolution mechanisms on equal footing. Although some urged for a clear definition of mediation, in order to avoid any confusion with other forms of alternative dispute resolution (and in particular conciliation), the act does not contain such a definition. However, during the legislative process the following working definition was used:

> mediation is a process of voluntary consultation between conflicting parties, that is conducted by an independent person who facilitates the parties communication and assists them to find a solution by themselves.[19]

Since mediation has to be characterized as an informal way of solving disputes, it is of great importance to consider why and to what extent it needs to be regulated. In the field of dispute resolution, one of the functions of the law is to ensure compliance with the fundamental procedural principles, such as confidentiality, transparency, impartiality and fairness.[20] In addition, regulation has the role of promoting and legitimizing mediation, especially when judicial enforcement of mediation clauses and settlements proves to be sporadic or elusive. Regulation may also have a negative effect on the flexibility of mediation, especially if it incorporates strict rules. We do not see the added value of introducing a definition of mediation into the legal rules, because of the inherent risk of precluding some of its manifestations.

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[16]Loi modifiant le Code judiciaire en ce qui concerne la médiation [Mediation Act] of 21 February 2005, Moniteur Belge [Official Gazette of Belgium] of 22 March 2005, 12772. For an analysis see Allemeersch et al. 2005, Allemeersch and Schollen 2005, Allemeersch 2008, Bridoux 2011, Caprasse 2012, De Bauw and Gayse 2009, Gayse 2005, Renson 2010, Thilly 2006, Van Leynseele and Van De Putte 2005 and van Ransbeeck 2008. For an analysis in English see Traest 2012 and Verougstraete 2012.

[17]Article 1724–1737 BJC. For a translation in English see Verougstraete 2013.

[18]Mediation in family cases was introduced in 2001 (Loi relative à la médiation en matière familiale dans le cadre d'une procédure judiciaire [Act on Mediation in Family Cases] of 19 February 2001, Moniteur Belge [Official Gazette of Belgium] of 22 April 2001, 11218).

[19]Chambre des représentants de Belgique, Proposition de Loi modifiant le Code judiciaire modifiant le Code judiciaire en ce qui concerne la médiation [Proposal to Amend the Judicial Code with respect to Mediation], Doc. 327/001, 23 October 2003, available at http://www.dekamer.be/FLWB/PDF/51/0327/51K0327001.pdf (accessed 15 October 2014), p. 6.

[20]Compare Taelman (Bemiddeling: quo vadis?) in Allemeersch, Gayse, Schollen, Taelman and Van Orshoven 2005, 1–7.

The most essential feature of mediation is that a mediator does not impose a solution. Contrary to a judge, a mediator does not decide the dispute, but helps the parties to communicate so they can try to settle the dispute themselves. Mediation leaves the control of the outcome with the parties.

Belgian law distinguishes between voluntary (or out-of-court) mediation and judicial (or court-connected) mediation.[21] Voluntary mediation is freely chosen by the parties before, during or after judicial proceedings,[22] without prompting or other involvement by the judge. Judicial mediation is court-connected mediation: mediation that is ordered, with the consent of the parties, by the judge in the framework of a pending court procedure.[23]

The Belgian High Council of Justice considered this terminology to be confusing.[24] Taken into consideration the voluntary character of *every* mediation, including judicial mediation, the terms 'judicial' and 'voluntary' are badly chosen, since they suggest that judicial mediation without the voluntary consent of the parties is possible, which is actually not the case in Belgium. Under no circumstances, the judge can force parties into mediation.[25] Judicial mediation neither means that the judge mediates.[26] The judge appoints a third person, a mediator, to conduct the mediation.

The Belgian legislator explicitly opted for a privatization of mediation: only private persons (such as lawyers, notaries or social workers) can be mediators within the framework of the BJC. Belgium has no judge-mediators.[27] Parties involved in a dispute are not obliged to try mediation within the legal framework. They can mediate according to their own rules (so-called free or wild mediation). However, as a consequence, their agreement will not be susceptible to homologation by the judge, making it not (directly) enforceable.

Article 1724 BJC deals with the scope of the 2005 Mediation Act. Voluntary or judicial mediation is possible in all disputes that can be settled through a transaction (i.e., a settlement agreement)[28] or disputes related to family matters (e.g. divorce,

[21] Allemeersch and Schollen 2005, at 1481 and Verougstraete 2012, at 153.

[22] Article 1730, §1 BJC.

[23] Verougstraete 2012, at 153.

[24] Chambre des représentants de Belgique, Proposition de Loi modifiant le Code judiciaire modifiant le Code judiciaire en ce qui concerne la médiation. Avis du Conseil Supérieur de la Justice [Proposal to Amend the Judicial Code with respect to Mediation. Advice of the High Council of Justice], Doc. 327/002, 10 February 2004, available at http://www.dekamer.be/FLWB/PDF/51/0327/51K0327002.pdf (accessed 15 October 2014), p. 8.

[25] Allemeersch, Gayse, Schollen, Taelman and Van Orshoven 2005, at 20–21.

[26] Traest 2012, at 46.

[27] Traest 2012, at 47–48 (mentioning a pilot project in Antwerp (in 2000–2003) where the parties could initiate mediation before the Court of Appeal, with a judge acting as mediator). To date, only retired judges or lay judges (e.g., in the commercial courts) can act as mediators (Verougstraete 2012, at 165).

[28] In the sense of the Belgian Civil Code (Article 2044–2058 Belgian Civil Code).

legal cohabitation, maintenance, allowance, etc.[29]). Family matters are considered to implicate public policy, but this does not mean that mediation should be excluded for family disputes. Even disputes with public authorities can be addressed through mediation when it is permitted by law or decree.[30] To date no such law or decree has been released.[31] This restriction, which is quite unusual in other jurisdictions, is widely regretted. It probably has to do with the intention to protect existing ADR schemes offered by public ombudsmen.[32]

In 2008, the European Parliament and the Council adopted the Mediation Directive 2008/52/EC.[33] This Directive was not formally implemented in Belgium.[34] It is considered that no formal implementation is required since the 2005 Mediation Act already implemented the spirit of the Directive, a least to a very large extent. The Belgian Government has given a formal notification to that effect to the European Commission.[35] However, some have voiced the view that it would be useful to introduce the definition of mediation in Article 3 (a) of the Directive[36] into Belgian law.[37] Some even went further and expressed the opinion that the Belgian Mediation Act should be amended, for example to meet Article 6.1 of the Directive regarding the enforceability of agreements resulting from mediation.

Contrary to the Directive, the Belgian Act does not provide a judicial control in light of imperative rules, but only in light of public policy rules.[38] The Federal Mediation Commission has drafted a list of possible amendments to the Belgian Mediation Act in order to meet the European Directive, but the Minister of Justice did not take this into consideration.[39] In any case, the provisions of the Belgian Mediation Act should be consistent with the Directive, and should be interpreted

[29]Thilly 2006, at 529.

[30]Article 1724 BJC. See De Geyter 2006, Lancksweerdt 2006 and Warnez, Vankeersbilck and Vandenhende 2014.

[31]Traest 2012, at 50.

[32]Verougstraete 2012, at 154.

[33]See footnote 11. See Ybarra Bores 2011.

[34]Allemeersch 2008, at 67.

[35]Verougstraete 2012, at 153.

[36]'Mediation means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator'.

[37]Verbist 2010.

[38]Renson 2009. Article 6.1 states: 'Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability'.

[39]Traest 2012, at 53.

in such a way as to make them compatible with the Directive. According to Verougstraete, there are no provisions in the Act that are incompatible with the Directive or that at least could not be interpreted in a way that is incompatible with the Directive.[40]

Finally, it has to be underlined that contrary to the European Mediation Directive that only applies in cross-border disputes,[41] Belgian mediation law does not make a distinction between national and international mediation. The Belgian Mediation Act applies to both types. EU cross-border mediation is not the object of specific regulation in Belgium.[42] In that sense, the Belgian Mediation Act has a broader scope than the European Directive.[43]

2 Mediation Agreement and the Voluntariness of Mediation

Pursuant to Article 1725, §1 BJC any contract may contain a mediation clause.[44] This is an agreement according to which the parties commit themselves to try mediation first to resolve possible disputes regarding the validity, realization, interpretation, enforcement or termination of a contract, before using other forms of dispute resolution.[45]

A mediation clause, which is binding upon the parties to the contract, does not prevent them from seeking provisional or conservatory measures (e.g., the appointment of an expert or a standstill measure[46]), since this does not imply that parties waive mediation.[47] As a matter of public policy, parties should always have their day in court to obtain provisional measures to protect interests that could be seriously imperiled if no judicial relief were available.[48]

Several mediation centers have proposed models of mediation clauses, for example[49]:

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[40] Verougstraete 2012, at 154.

[41] See Articles 1.2 and 2 of the European Mediation Directive (see footnote 11).

[42] Traest 2012, at 54.

[43] Verbist 2010, at 37.

[44] The mediation agreement (or mediation clause) was thoroughly analyzed by Andries (Andries 2007 and Andries 2011).

[45] A mediation clause can also be included in an employment contract. Tribunal de Travail de Gand [Labor Court of Ghent] 24 June 2010. *Tijdschrift voor Gentse Rechtspraak – Tijdschrift voor West-Vlaamse Rechtspraak* 2011, 190.

[46] A standstill measure is one which prevents an action, such as one that orders a person not to sell an asset or close a business, or which halts a shipment (Verougstraete 2012, at 162).

[47] Article 1725, §3 BJC.

[48] Verougstraete 2012, at 162.

[49] Traest 2012, at 51.

> 'should a dispute arise between the parties concerning the validity, the interpretation and/or implementation of this contract, the parties will try to solve it amicably themselves and should they fail, they will try to solve it through mediation' or 'if any dispute arises in connection with this agreement, the parties will attempt to settle the dispute by mediation'.

Every time a judge or an arbitrator decides a case in which a mediation clause applies, one of the parties can invoke, *in limine litis*,[50] the 'mediation exception' or 'mediation plea'. If the clause is valid, the case is suspended until the parties or one of them have informed the clerk of the court or the arbitrator that the mediation process has ended.[51] If the clause appears to be invalid, or the mediation process has already been ended, the judicial proceedings are not suspended. Andries points out that a mediation clause has an autonomous character and that the judge or the arbitrator only has to verify the validity of the clause and not of the entire contract.[52]

Traest puts this in the right perspective, in the sense that a distinction has to be made between the obligation to organize mediation, which is an obligation to produce a certain result (i.e., organizing mediation), and the obligation to take part in the mediation process itself, which is an obligation to perform to the best of one's ability.[53] If one of the parties refuses to respect the mediation clause, the other party can, in principle, enforce it, but this will be pointless since the former will not be cooperative.

This refers to the fundamental rule of Belgian mediation law that each party remains free to end the mediation process without prejudice.[54] Mediation in Belgium remains by and large a voluntary affair. Mandatory mediation is considered foreign to the core idea of mediation. Accordingly, no negative consequences are linked to the decision of a party to refuse or to stop mediation.

Although mediation is a voluntary process, the Belgian legislator nevertheless tries to promote mediation to the full extent in family matters. For example, a recent act introducing a Family and Juvenile Court in Belgium strongly promotes mediation.[55] The act provides that in all cases falling under the jurisdiction of the Family and Juvenile Court, the clerk of the court informs the parties, at the beginning of the procedure, about the possibility of mediation, conciliation and any other form of alternative dispute resolution. He sends them the text of the provisions on voluntary and judicial mediation of the Belgian Mediation Act, a brochure about mediation provided by the Ministry of Justice, a list of all accredited mediators

[50] I.e. at the beginning of the proceedings.

[51] Article 1725, §2 BJC.

[52] Andries 2011, at 321. See also Verougstraete 2012, at 162.

[53] Traest 2012, at 51.

[54] Article 1729 BJC.

[55] Loi portant création d'un tribunal de la famille et de la jeunesse [Act Creating a Family and Juvenile Court] of 30 July 2013, Moniteur Belge [Official Gazette of Belgium] of 27 September 2013, 68429. The Act entered into force on 1 September 2014. See Voet 2014 and Antonini-Cochin 2014.

specialized in family and juvenile cases that are located in the district concerned, and all information about other initiatives in the district focusing on the out-of-court resolution of disputes.[56]

Significant information about mediation, including a brochure, is provided by the Ministry of Justice on the internet, in cooperation with the Federal Mediation Commission.[57,58] Additionally, the High Council of Justice, the Belgian Institute of Judicial Training, the Royal Federation of Belgian Notaries and many courts and bar associations also make information on mediators and mediation organizations available.[59]

3 Accreditation of Mediators by the Federal Mediation Commission

3.1 Federal Mediation Commission

The Mediation Act establishes a (Belgian) Federal Mediation Commission,[60] composed of a General Commission (with decision authority) and three specialized commissions (with advisory authority). The General Commission consists of six members specialized in mediation (three Dutch-speaking and three French-speaking members): two notaries, two lawyers and two representatives of mediators who are not a notary or lawyer.[61] Their term of office runs for 4 years and is renewable. The General Commission appoints a President, vice-President and Secretary among its members.

There are three specialized commissions that advise the General Commission: one for family matters, one for civil and commercial matters and one for social matters. All specialized commissions are composed of specialists and practitioners.[62]

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[56] Article 1253ter/1 BJC.

[57] http://www.mediation-justice.be/nl/. Accessed 15 October 2014.

[58] http://justitie.belgium.be/nl/binaries/Bemiddeling_tcm265-138421.pdf. Accessed 15 October 2014.

[59] De Bauw and Gayse 2012.

[60] Article 1727 BJC. See Asscherickx 2008 and Taelman 2005.

[61] All members are appointed by the Minister of Justice. The notaries are appointed on the recommendation of the Royal Federation of Belgian Notaries. The lawyers are appointed on the recommendation of the Flemish and French and German speaking Bar Council. The two representatives of mediators who are not a notary or lawyer are appointed on the recommendation of the representative organisations for mediators who are not a notary or lawyer.

[62] Just like the General Commission, the specialized commissions are composed of Dutch-speaking and French-speaking notaries, lawyers and representatives of mediators who are not a notary or lawyer.

The Ministry of Justice provides the Federal Mediation Commission with staff and resources.[63]

The General Commission's main mission is to supervise the development and the quality of the mediation procedures and mediators. To this end, it has the following statutory missions[64]:

- accrediting the bodies and the formations and trainings organized by these bodies for mediators;
- determining the accreditation criteria for mediators;
- accrediting mediators;
- temporarily or permanently revoking the accreditation of mediators;
- establishing the procedure to revoke the accreditation of mediators;
- drafting a list of (accredited) mediators and distributing it among the courts;
- drafting a code of conduct which also provides the applicable sanctions in case of misconduct.

3.2 Accreditation of Mediators

A mediator can be accredited by the Federal Mediation Commission. There is no legal obligation to be accredited, but an agreement reached after the mediation process assisted by a non-accredited mediator is not eligible for judicial homologation, making it non-enforceable. If, in other words, the parties want to obtain an enforceable agreement at the end of the mediation, they have to use an accredited mediator. In case of judicial mediation, the mediator appointed by the judge is in principle an accredited mediator.[65]

The law does not determine who can act as a mediator, but states the minimum requirements for accreditation[66]:

- proof of sufficient professional experience;
- according to the circumstances of the case, proof of suitable formation in mediation;
- guarantee of independence and impartiality;
- the absence of a criminal conviction that is not compatible with the function of an accredited mediator;
- the absence of a disciplinary or administrative sanction that is not compatible with the function of an accredited mediator.

[63] Article 1727, §7 BJC.

[64] Article 1727, §6 BJC.

[65] Article 1734, §1 BJC.

[66] Art 1726, §1 BJC. See Traest 2012, at 57.

Besides these minimum accreditation criteria, would-be mediators also have to meet the conditions provided in a Code of Conduct established by the Federal Mediation Commission in October 2007.[67] This Code of Conduct is modest, since it mainly refers to the existing legal provisions. Regarding independence and impartiality, the Code clarifies that the mediator cannot act when he or she has a personal or business relationship with one of the parties, if he or she has a direct or indirect personal interest in the dispute concerned, or if one of his or her collaborators, assistants or partners acted for one of the parties in another capacity as mediator.[68] The Code also pays attention to the mediation process. For example, it enumerates situations in which the mediator can suspend or end the mediation: if mediation is being used for improper purposes, if the behavior of the parties or one of them is irreconcilable with the mediation route, if the parties are or one them is no longer capable of participating in a constructive manner or do/does not show any interest anymore, or if mediation is no longer useful.[69]

The Federal Mediation Commission offers an online search engine to look for an accredited mediator.[70] There are different search criteria: location, profession, discipline and language. Some accreditations have been given to mediators residing in the EU (outside Belgium) who have been trained successfully in Belgium.

Accredited mediators also have to follow a permanent training on the basis of a program recognized by the Federal Mediation Commission.[71]

4 Confidentiality

Mediation stands or falls with confidentiality. Belgian law explicitly deals with this feature.[72] All documents, statements and communications made during and for the benefit of the mediation process are confidential. They cannot be used in judicial, administrative or arbitral procedures or in any other dispute resolution procedure. They are inadmissible as evidence, even as a judicial confession. The Brussels Court of Appeal for example ruled that an affidavit of a marriage mediator submitted during a divorce procedure is confidential and therefore inadmissible.[73]

[67] www.mediation-justice.be/docs/gedragscode.doc. Accessed 15 October 2014.

[68] Article 5 of the Code of Conduct.

[69] Article 23 of the Code of Conduct.

[70] http://request.just.fgov.be/cgi-request/mediation/liste-mediateur.pl?lg=nl. Accessed 15 October 2014.

[71] Article 1726, §2 BJC.

[72] Article 1728 BJC. See Brouwers 2009 and Vanderhaeghen 2009. See also Article 7.1 of the European Mediation Directive.

[73] Cour d'appel de Bruxelles [Court of Appeal of Brussels] 5 December 2005. *Jurisprudence Liège Mons Bruxelles* 2006, 286.

The confidentiality may only be lifted with the consent of the parties or when disclosure to the court of the content of the mediation agreement is necessary to implement or enforce the agreement. Some scholars argue that confidential information may also be revealed when there is unambiguous impropriety (such as an act or threat of violence); there is an issue as to the terms of an agreement reached; there are allegations that a second agreement was obtained by fraud, duress or misrepresentation or; when disclosure to a third party insurer is necessary. Those exceptions should be construed narrowly.[74]

The duty of confidentiality only concerns information obtained during and for the benefit of the mediation process. Information available outside this framework is not confidential and can be submitted in judicial, administrative or arbitral procedures.

When the confidentiality requirement is breached by one of the parties, the judge or the arbitrator is empowered to award damages. This is considered as a tort. Confidential documents communicated or used in violation of the confidentiality requirement shall be removed from the proceedings.

The mediator is bound by a duty of professional secrecy. He or she cannot testify in civil and administrative procedures concerning facts and information he or she acquired during the mediation process. Testifying in criminal procedures is not legally excluded.[75] When a mediator violates his or her professional secrecy, he or she commits a crime and can be prosecuted. Article 458 of the Belgian Penal Code regarding the violation of professional secrecy[76] applies to the mediator. Traest remarks that in accordance with this article there is a right to remain silent for the person concerned if summoned in court to testify, which means that refusing to testify is possible but testifying can be allowed if the person concerned decides to do so. However, the Belgian Mediation Act goes further because it prohibits the mediator to testify in *all* civil or administrative procedures.[77]

Finally, the Belgian Mediation Act allows the mediator, in the framework of his or her mission and with the consent of the parties, to hear third persons who consent thereto, or, when the case is complicated, to call upon an expert. These third persons and experts are also bound by the confidentiality requirement and the (prosecutable) professional secrecy. The same applies for the legal representatives or lawyers of the parties to mediation.

[74] Verougstraete 2012, at 157.

[75] Allemeersch and Schollen 2005, at 1488.

[76] 'Medical practitioners, surgeons, health officers, apothecaries, midwives and all other persons who, by reason of their status or profession, are guardians of secrets entrusted to them and who disclose them except where they are called to give evidence in legal proceedings or where the law requires them to do so, shall be liable to imprisonment of between eight days and six months and a fine ranging from one hundred to five hundred francs'.

[77] Traest 2012, at 60.

According to Verougstraete, the Belgian Mediation Act concerning confidentiality is closer to the UNCITRAL Model Law[78] than to the European Mediation Directive.[79] Articles 8, 9 and 10 (1) of the UNCITRAL Model Law state:

> When the conciliator receives information concerning the dispute from a party, the conciliator may disclose the substance of that information to any other party to the conciliation. However, when a party gives any information to the conciliator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the conciliation.
>
> Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.
>
> A party to the conciliation proceedings, the conciliator and any third person, including those involved in the administration of the conciliation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:
>
> (a) An invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings;
> (b) Views expressed or suggestions made by a party in the conciliation in respect of a possible settlement of the dispute;
> (c) Statements or admissions made by a party in the course of the conciliation proceedings;
> (d) Proposals made by the conciliator;
> (e) The fact that a party had indicated its willingness to accept a proposal for settlement made by the conciliator;
> (f) A document prepared solely for purposes of the conciliation proceedings.

5 Voluntary (or Out-of-Court) Mediation

5.1 Mediation Protocol

Notwithstanding any judicial or arbitral procedure, each party can call upon mediation before, during or after a procedure. If all the parties concerned agree, a mediator has to be appointed by mutual agreement or the parties have to designate a third person or body (e.g., a mediation center) to appoint one.[80] It is important to underline that the parties can decide to voluntarily mediate *during* the proceedings.[81] However, mediation will only be qualified as judicial mediation when a court refers the parties to mediation and appoints a mediator during the proceedings. The parties

[78] UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use, available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf. Accessed 15 October 2014.

[79] Verougstraete 2012, at 156.

[80] Article 1730, §1 BJC.

[81] The parties do not have the duty to inform the judge about this initiative (Allemeersch and Schollen 2005, at 1489).

can also agree upon voluntary mediation after a judicial decision has been granted, for example in the course of appellate proceedings.

If the parties agree to voluntary mediation, a mediation protocol has to be drafted. This forms the mediation framework in which the parties, in consultation with the mediator, mutually determine all the rules about the mediation process, including its duration. The mediation protocol is signed by the parties and the mediator.

The mediation protocol acts as a contract between the parties and the mediator. It should contain the following minimum requirements[82]:

- the name and address of the parties and their lawyers;
- the name, address and qualifications of the mediator, including whether he or she is accredited;
- a reminder that mediation is a voluntary process;
- a summary of the dispute;
- a reminder that the proceedings are confidential;
- the mediator's fee and how it will be paid;
- the date and;
- the signature of the parties and the mediator.

During the parliamentary debate some have argued that these conditions are burdensome and too formalistic, especially since mediation itself is meant to be an informal procedure.[83] Most scholars interpret these provisions in a flexible manner. Allemeersch and Schollen mention that the 'summary of the dispute' can be described in a concise manner.[84] Verougstraete pertinently points out that these requirements act more as a reminder than precise legal obligations.[85] Nevertheless, if the mediation protocol does not contain these requirements an agreement reached by the parties after a successful mediation is not eligible for homologation by a judge.

5.2 Statute of Limitations

A proposal for voluntary mediation made by registered letter initially suspends the statute of limitations for one month beginning from the presumed time of reception of the letter.[86]

[82] Article 1731, §2 BJC.

[83] Traest 2012, at 56.

[84] Allemeersch and Schollen 2005, at 1489. For example 'a dispute concerning lease', 'informatics dispute' or 'dispute between neighbors'.

[85] Verougstraete 2012, at 160.

[86] Article 1730, §2-3 BJC. See also Article 8 of the European Mediation Directive (see footnote 11).

If a mediation proposal is agreed and a mediation protocol is signed by all the parties, the statute of limitations is suspended for the duration of the mediation process.[87] This suspension ends one month after one of the parties or the mediator informs the other party or parties by registered letter of his or her intention to terminate the mediation process, unless the parties agree otherwise.[88]

5.3 Homologation of the Mediation Agreement

A successfully mediation process results in a mediation agreement between the parties. This agreement ends their dispute. It is laid down in a dated document signed by them and the mediator. If such is the case, it mentions the accreditation of the mediator. The agreement contains the precise obligations of all the parties.[89]

The parties or one of them can ask the judge to approve or homologate the mediation agreement,[90] which means that it will become enforceable as a regular judgment. Homologation can only be granted when the parties concluded a mediation protocol and if an accredited mediator was involved in the mediation. Article 1733 BJC reflects the view of the Belgian legislator who does not trust voluntary agreements made without the assistance of an accredited mediator. To protect the parties in mediation, only agreements made under proper assistance and supervision of such a mediator can be the object of judicial homologation.

The homologation procedure is initiated by means of a unilateral petition[91] signed by a lawyer.[92] However, the petition can be signed by the parties themselves if it stems from all the parties involved in the mediation. The mediation protocol has to be attached to the petition, which is filed at the court that would have had jurisdiction if the dispute had been submitted to it without mediation taking place.[93]

First, the judge analyzes the mediation protocol. Homologation can be refused if the protocol does not contain the necessary key provisions. Subsequently, the judge verifies the mediation agreement reached by the parties. In case it has not been made in writing or has not been signed, homologation can be denied. The actual grounds for homologation refusal are limited.[94] A judge will refuse to homologate the mediation agreement if it runs counter to public policy or if the agreement reached in family cases violates the interests of children. These exceptions should

[87] Article 1731, §3 BJC.

[88] Article 1731, §4 BJC.

[89] Article 1732 BJC.

[90] Article 1733 BJC. See Moreau 2008 and Renson 2009.

[91] Article 1025–1034 BJC.

[92] Article 1026, 5° BJC.

[93] Allemeersch 2008, at 54.

[94] For example, the judge cannot check the quality or content of the mediation agreement.

be construed narrowly. Verougstraete clarifies that agreements entailing some form of tax evasion would be considered as violating public policy, while agreements containing provisions that seem to protect only one party (e.g., a tenant or employee) are not.[95]

If the judge homologates the agreement, his decision has the same enforceable effect as a judgment.[96] A homologation decision is not appealable.

As already mentioned, an agreement reached after mediation conducted by a non-accredited mediator, is not susceptible to judicial homologation. However, as Traest points out, it can be enforced indirectly.[97] In case a party does not carry out the agreement, its opponent can go to court and claim the sound performance of the agreement. Likewise any other judgment, the decision of the court granting this claim will be enforceable. Secondly, with the consent of all the parties involved, the agreement can be incorporated in a notarial deed or in a procès-verbal of conciliation, which are authentic and therefore enforceable instruments.

According to the Directive, once a mediation agreement is homologated by a Belgian court, it must be recognized and declared enforceable in all other EU Member States in accordance with existing Union or national law.[98] Under Belgian law there are no specific rules on the recognition and enforcement of foreign orders or judgments.[99]

6 Voluntary Mediation and ODR (*Belmed*)

In 2011, the Federal Public Service Economy, Small and Medium Enterprises, Self-Employed and Energy launched Belmed (an acronym for *Bel*gian *Med*iation), a digital portal or platform on consumer ADR including mediation and ODR (Online Dispute Resolution). Belmed aims to promote those means of dispute resolution and make them more easily accessible by creating one digital portal or access point for the consumer and tradesman.[100] It consists of two pillars: on the one hand offering information on ADR, and on the other hand providing ODR for consumers and enterprises.

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[95] Verougstraete 2012, at 159.

[96] The Mediation Act refers to Article 1043 BJC. This provision stipulates that the parties can ask the judge to incorporate in a judgment an agreement they have reached. This judgment is not appealable.

[97] Traest 2012, at 63.

[98] Article 6 of the European Mediation Directive.

[99] Verougstraete 2012, at 160.

[100] See www.belmed.fgov.be. Accessed 15 October 2014. Belmed is available in Dutch, French, German and English. See Voet 2012. With respect to ODR see also the recent European Regulation on Consumer ODR (Regulation of the European Parliament and of the Council 524/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, 2013 O.J. (L 165) (EU)).

The information part contains a guide on how to settle a dispute in an amicable way.[101] It explains what a formal notice, a consumer dispute, a third party, and alternative dispute resolution are, and offers specific examples of all these notions. On the other hand, the information part gives an overview of all Belgian arbitration, conciliation, mediation, and ombudsmen agencies.[102] All this information is also available per sector (e.g., consumer goods, financial services, energy etc.).

Online applications for arbitration, conciliation or mediation can be made via Belmed. After an application is made, the Belmed system automatically sends it to the competent ADR-entity (e.g., an affiliated mediator). So, the consumer or tradesman does not have to find out in advance which entity is competent to resolve his or her dispute. An application can only be made when the applicant has, to no avail, contacted the other party to report the problem and try to solve it, and when no court proceeding is pending. If so, the applicant receives (very limited) information on how to mediate during a court proceeding.[103] After the application has been sent (automatically) to a competent ADR-entity, it will deal with the case. When this is a mediator, he or she will explain the voluntary mediation process. Belmed only serves as an administrator or serving-hatch. The administrators do not see the identity of the applicant, nor do they read the application, nor do they interfere in the ADR process.

At the end of 2014, 26 entities have signed a protocol to work with this Belmed system, among them multiple public and private ombudsmen but also a handful of private accredited mediators.

7 Judicial (or Court-Connected) Mediation

In every stage of the proceedings (even in summary proceedings), a court may at the request of the parties or *sua sponte* but with the consent of the parties order mediation, as long as the final arguments have not been concluded and the judge has not taken the case in deliberation. This is called judicial (or court-connected) mediation.[104] Only in procedures before the Court of Cassation,[105] Belgium's

[101] http://economie.fgov.be/en/disputes/consumer_disputes/Belmed/what/guide/#.Un5WjJ0VGpo. Accessed 15 October 2014.

[102] For an overview of all Belmed affiliated mediators see http://economie.fgov.be/en/disputes/consumer_disputes/Belmed/what/alternative_settlement_options/mediation/#.Un5d6Z0VGpo. Accessed 15 October 2014.

[103] The applicant will see the text of Article 1730, §1 BJC.

[104] Article 1734, §1 BJC.

[105] The Court of Cassation deals with appeals against judgements rendered in last instance (Article 608 BJC). The review of the Court of Cassation is of a limited nature. It does not decide on the merits of the case but merely examines whether procedural rules and rules of substantive law were complied with. The Court can reject the appeal against the challenged decision or it can quash that

Supreme Court, or the district court,[106] judicial mediation is not possible. Judicial mediation can relate to the entire dispute or part of it.[107]

The parties can ask for mediation in the writ of summons or in the petition initiating judicial proceedings, or during the proceedings by filing a written request thereto at the court's clerk's office, in which case a court hearing is scheduled within 15 days.[108] If the parties jointly ask for mediation all procedural time limits are suspended from the day the request is made.[109] The clerk of the court gives a formal notification of the suspension to the parties and their lawyers.

It is important to underline that if the parties agree to initiate judicial mediation, this does not have any impact on the claims they have brought or will bring before the court, nor does it on the merits of the case. The Court of First Instance in Ghent ruled that when a party agrees to judicial mediation, he or she does not renounce an arbitration clause, nor does a court referral to mediation means that the judge (implicitly) rules that he has jurisdiction.[110] The President of the Court of First Instance in Namur ruled that a contractual or legal clause ordering the parties to try mediation is not a reason to deny jurisdiction.[111]

In case of judicial mediation the parties have to agree on the mediator. As a rule, he or she has to be accredited by the Federal Mediation Commission. As a departure from this rule, the parties can jointly ask the judge to appoint a non-accredited mediator if they can justify that no appropriate accredited mediator is available for the type of dispute concerned. The judge may only refuse the choice of the parties if they have chosen for a mediator who apparently does not meet the minimum accreditation requirements for mediators.[112]

The decision ordering judicial mediation explicitly mentions the agreement of the parties to try mediation and the name, the capacity and the address of the mediator. The decision also states the time frame provided for the parties to reach a solution (this cannot be longer than three months) and the date a court hearing will be held. The day of this court hearing should be the first possible day after the time allotted for mediation has expired.[113] At the hearing, the parties inform the judge of the outcome of the mediation process. If they have not reached an agreement they can

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decision referring the case to a court at the same level as that which rendered the quashed decision in order to obtain a new decision on the merits.

[106] A Belgian district court is a special tribunal serving as an arbitrator in jurisdictional disputes among the court of first instance, the labor court and the commercial court.

[107] Article 1735, §2 BJC.

[108] Article 1734, §4 BJC.

[109] Article 1734, §5 BJC.

[110] Tribunal de Première Instance de Gand [Court of First Instance of Ghent] 31 May 2010, *Nieuw Juridisch Weekblad* 2011, 305.

[111] President du Tribunal de Première Instance de Namur [President of the Court of First Instance of Namur] 4 May 2010, *Journal des Tribunaux* 2011, 13.

[112] Article 1726, §1 BJC.

[113] Article 1734, §2 BJC. For some criticism see Gayse 2005, at 449.

opt for a new term or ask the judge to resume the judicial procedure.[114] In case the parties want an extension of the mediation period, the judge may grant it, but may limit this period in order to avoid an abuse of proceedings.[115] The court's decision to order mediation or to extend or to end it, is not appealable.[116]

Within eight days after the judge ordered mediation, a copy of this judgment is sent to the mediator. Within the following eight days the mediator informs the judge and the parties of when and where the mediation process will commence.[117]

During the (judicial) mediation process, the case technically remains under the management of the court. Any of the parties may ask the court to order provisional measures (e.g., to hear witnesses or to order the production of evidence). At the request of the mediator or one of the parties, the judge can end the mediation even before the end of the allotted term.[118]

In case of judicial mediation, the statute of limitations is automatically tolled because judicial mediation is considered to be part of the judicial proceedings (as the case is still pending before the court during the mediation).[119]

At any point of the mediation, the appointed mediator can be replaced by another accredited mediator, as long as the parties make an agreement to that end. This signed agreement is added to the court's file.[120]

The parties can bring the case back to the judge even before the fixed court hearing by filing a written request thereto at the court's clerk's office, in which case a court hearing is scheduled no later than 15 days.[121]

The course of judicial mediation is similar to voluntary mediation.[122] The parties have to conclude a mediation protocol and, in case of success, a mediation agreement.

At the end of his or her mission, the mediator informs the judge in writing about the outcome of the mediation and whether the parties have reached an agreement. If so, the parties or one of them can initiate a homologation procedure. Again, the judge can only refuse to homologate the mediation agreement if it violates public policy or if the agreement reached in family cases violates the interests of children.

In case the mediation has led to a partial agreement, the judicial procedure will be continued. However, the judge can extend the mission of the mediator if he considers this opportune and as all parties agree.

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[114] Article 1734, §3 BJC.

[115] Verougstraete 2012, at 155.

[116] Article 1737 BJC.

[117] Article 1735, §1 BJC.

[118] Article 1735, §3 BJC.

[119] Verougstraete 2012, at 161.

[120] Article 1735, §4 BJC.

[121] Article 1735, §5 BJC.

[122] Article 1736 BJC.

8 Costs of Mediation and Legal Aid

The mediation protocol, that has to be drafted in case of voluntary and judicial mediation, has to contain the method by which the fees and costs of the mediator are calculated, the fee rate as well as the terms of payment.[123] These fees and costs are equally shared between the parties, unless they agree otherwise.[124]

When the parties have limited means, they can apply for legal aid. The Belgian rules on legal aid are applicable on voluntary and judicial mediation processes,[125] on the condition that the mediator is accredited. The fee to be paid to an accredited mediator in a situation covered by legal aid is 40 Euros an hour for a maximum of 20 h. The costs are distributed evenly between the parties, and the needy party receives half of the 40 Euros. The mediator also receives one fixed amount for costs of 50 Euros.[126] It goes without saying that these fees are very low.

In case of judicial mediation the costs could be considered as a part of the general costs of the legal proceedings. However, this does not mean that the party losing the case has to pay all the costs, since the Mediation Act, as a special rule, stipulates that the mediation costs are in principle equally shared between the parties.[127]

9 Evaluation and Future Perspectives

Though there are no (comprehensive) statistics available on voluntary and judicial mediation in Belgium,[128] one can conclude as follows. Mediation used to be rather uncommon in Belgium. However, due to various initiatives taken at different levels

[123] Article 1731, §2, 6° BJC.

[124] Article 1731, §1 BJC.

[125] Article 665, 5° BJC.

[126] Arrêté royal portant règlement général des frais de justice en matière répressive [Royal Decree Regarding the Legal Costs in Criminal Cases] of 27 April 2007, Moniteur Belge [Official Gazette of Belgium] of 25 May 2007, 28209.

[127] Traest 2012, at 67. Article 1731, §1 *juncto* Article 736 BJC.

[128] Verougstraete gives the following number of conventional mediations in Belgium (Verougstraete 2013, at 94):

	Civil and commercial	Family	Social	Others	Yearly total
2010	3.117	1.166	477	192	4,952
2011	3.228	1.328	494	199	5,249
2012 (first 6 months)	2.171	812	332	134	[6,898] Extrap./Year

In 2012, bMediation, an independent and non-profit Belgian mediation organization, conducted, with the collaboration of the Federal Mediation Commission, a brief survey called

to promote mediation, things are evolving. Voluntary (or out-of-court) mediation is currently in a moderately good state. It is slowly becoming more popular (especially in the field of family law), partially because of the flexible legal framework. Judicial (or court-connected) mediation is not a big success and remains exceptional: most civil and commercial cases still reach trail without having attempted mediation.

However, this does not mean that the judiciary is against or not in favor of an amicable resolution of disputes. Verougstraete correctly points out that:

> 'judges feel it is their duty to favor settlements whenever possible. There is, however, no general principle of the law or of the procedural law stating that the first duty of any judge is to favor a settlement of the parties, but most judges would consider it to be a desirable outcome to obtain an amicable settlement of the dispute. If a judge tries to settle a case and fails, the judge may refer the case to another judge for judgment. This practice explains to a large extent the small number of court-connected mediations. Some judges, however, have a tendency to hang on to cases even if the attempt to settle them fails. No formal legal provisions prohibits this, but it is widely seen as being undesirable'.[129]

Judges are active in settling disputes, because they consider it as one of their main obligations. The underlying fundamental problem seems to be their reluctance to refer cases to an external authority, e.g. a mediator.[130]

One of the reasons for the limited success of judicial mediation could be the surrounding formalism. The comprehensive Mediation Act stipulates all kinds of requirements, *inter alia* the drafting of a mediation protocol that can hinder or impede the mediation process. The question arises whether one needs a lot of formal rules for an informal way of dispute resolution such as mediation.

In general, and with the exception of family cases, Belgian lawyers do not promote voluntary or judicial mediation. They are not familiar with it and sometimes prioritize their own financial interest. Some bar associations have taken initiatives to promote mediation, but the results of these steps are limited. Legal aid is available for mediation but in a rather timid way. Young lawyers in charge of the *pro bono* cases are given much less remuneration for successful mediation than for a case brought to court. It is no suprise that one finds them only exceptionally advocating mediation.

Other financial aspects may not be neglected. In most cases, mediator's fees are based on an hourly rate. So the longer the case takes, the more money the mediator makes. On the other hand, a lot of parties and lawyers look at mediation as an avoidable cost and loss of time.

'Mediation Barometer 2012' (http://www.bmediation.eu/index.php/en/news. Accessed 15 October 2014.) 416 mediators (i.e., about half of the market) were interviewed. 88.5 % was accredited by the Federal Mediation Commission (54.9 % in civil and commercial cases, 17.4 % in social cases and 56 % in family cases). In 2010, the interviewed mediators did 3,117 cases (to compare, in 2010 the Belgian courts dealt with approximately 690,000 cases). In 2011, they did 3,228 cases. 50 % of the interviewed mediators do around 2,500 cases a year (i.e., 65 % of the market). 40 % of them never mediated a case. The success rate in civil and commercial cases is more than 75 %. The survey also concludes that only 13 % of all mediations are judicial mediations.

[129] Verougstraete 2012, at 155.

[130] Verougstraete 2012, at 164.

De Bauw and Gayse make two policy suggestions to promote judicial mediation.[131] They suggest that the State should subsidize the first mediation session and that a so-called 'multidoor court house' should be created where mediators, just like judges, are present and available. Whether these ideas are feasible in times of budgetary cutbacks and other financial constraints remains to be seen.

The solutions suggested by Tallon seem to be more realistic.[132] Emphasizing the cost-reducing consequences of mediation is a logical way to promote it. But to really lower this barrier, it has to be possible for judges to impose mediation 'by persuasion' or 'under soft coercion', which has to be coupled with measures that will serve the purpose of 'pushing judicial mediation':

> 'In the area of mediation incentives, there are almost no direct financial incentives for parties who choose mediation. Accordingly, refusal to continue with mediation that has been started does not influence the payment of court costs in proceedings following the terminated negotiation'.[133]

Belgium does not stand alone with its weak performance on mediation. A recent comprehensive study of the EU Directorate General for Internal Policies (Legal Affairs), upon request of the European Parliament's Committee on Legal Affairs, published under the title '*Rebooting*' *the Mediation Directive*: *Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU*,[134] points out that despite its proven and multiple benefits, mediation in civil and commercial matters is still used in less than 1 % of the cases in the EU.

This study shows that the single regulatory feature likely to produce a significant increase in the use of mediation is the introduction of 'mandatory mediation elements' in the legal system. The responses of the 816 experts on the questionnaire on which the study is based, show that mandatory elements in mediation – something that was regarded by many as a "taboo" – are now acceptable.

Based on the analysis of the answers of the national experts, the authors of the study propose two mitigated forms of mandatory mediation: (1) compulsory attendance at information sessions and (2) mandatory mediation with the ability to opt-out if litigants do not intend to continue with the process. They even recommend to apply those two forms in combination or jointly, as they are both centered on the idea of forcing the litigants to at least sit down together to consider mediation seriously.

The study also reveals that there exists a broad and enthusiastic support for a series of well-defined non-legislative measures focusing on both increasing mediation information and actually leading litigants to experiment with mediation,

[131] De Bauw and Gayse 2012, at 183.

[132] Tallon 2013.

[133] Verougstraete 2012, at 161.

[134] http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf (accessed 14 November 2014).

designed to promote this means of dispute resolution. It conveys the message that the most effective way to put mediation on litigants map is better regulation, i.e. regulation that goes beyond simply inviting civil and commercial litigants to meet with a mediator first.

Brainstorming sessions, recently organized by the Belgian Federal Mediation Commission with all Belgian mediation stakeholders,[135] concluded in the same way. This working group also recommended the teaching of mediation and negotiation skills in schools from an early age and throughout academic institutions.

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La Médiation au Bénin dans une Approche Transfrontalière et Judiciaire

Comlan René Vodounon-Djegni

Abstract Recourse to a third party for the amicable settlement of disputes is a common practice designated by various names : « *arbre à palabres* » (« *Discussion under a tree* » (traduction contextuelle de l'auteur de l'arbre à palabres).), conciliation, mediation, etc.

While pursuing a common goal, these settlement methods differ, however, in their technique, in their approach or in the role of third party in the process. As this role is not always well discerned, it is not unusual to confuse the « *arbre à palabres* » to conciliation or mediation.

In Beninese statute law, recourse to a third party for the amicable settlement of disputes is not known as "mediation" but rather as "reconciliation".

Thus, in some subjects, the law favors the recourse to conciliation. But the absence of a specific law on conciliation does not enable the control of the procedure to ensure the full effectiveness of its mechanism.

In the absence of a clear and effective procedural rule, the integration of informations and communications technologies in the conflict resolution process can be difficult to implement.

1 Introduction

L'histoire de la médiation « *est aussi ancienne que les conflits entre les individus* ».[1] La Bible enseigne que les patriarches tels que Noé, Abraham et Aaron ont servi de médiateurs entre Dieu et le peuple d'Israël et au sein du peuple lui-même.

Membre du Comité d'arbitrage du Centre d'Arbitrage, de Médiation et de Conciliation de la Chambre de Commerce et d'Industrie du Bénin (CAMeC-CCIB) et Membre du Comité Français d'Arbitrage

[1] http://www.espace-mediation.be/3_c_etymologie.html.

C.R. Vodounon-Djegni (✉)
Littoral, Office National de Soutien des Revenus Agricoles (ONS), Cotonou, Littoral, Bénin
e-mail: djegni2001@yahoo.fr

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En Afrique, le rôle des chefs de village, qui aident les parties à trouver une solution à leurs différends, est assimilé à la médiation.

Au Bénin, la médiation est aussi utilisée pour le règlement amiable des conflits à divers niveaux de la stratification sociale.[2] Mais, que faut-il entendre par médiation ? S'il s'agit simplement d'un mode de règlement amiable des conflits par l'interposition d'un tiers, est-on fondé de l'assimiler à la conciliation ?

Après avoir développé les différents types de médiation au Bénin (section 1.1.), il sera ensuite question de la notion de médiation (section 1.2.).

1.1 Les Différents Types de Médiation au Bénin

La recherche de solution amiable par le recours à une tierce personne est une pratique qui s'est tout naturellement développée dans les différents milieux traditionnels du Bénin. La conscience du refus de se faire justice conduit souvent à se référer au plus âgé que soi, aux parents,[3] au chef de village ou de tribu, au chef féticheur ou au roi, en fonction de la nature du conflit. Ce conflit peut se régler sous différentes formes : « *adjrallallassa* »,[4] « *l'arbre à palabres* »,[5] « *les séances de Atchakpodji* »[6] ou « *le père du dehors* ».[7] Il peut aussi se régler devant les structures administratives et juridictionnelles.

Quelle que soit la forme que prend le cadre de règlement de ce conflit, la médiation endogène (section 1.1.1.) présente des caractéristiques différentes de la médiation moderne (section 1.1.2.).

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[2]Cf. Le Médiateur de la République, « Rapport de l'étude sur les techniques endogènes de médiation au Bénin dans les aires culturelles *fon*, *nago* et *dendi* », Sept.-Oct. 2012.

[3]Notamment, le père, la mère, la tante ou l'oncle.

[4]Les « *adjrallallassa* » constituent une pratique, une tribune où se règlent les problèmes de la famille ou de la collectivité. L'audience est souvent publique et les participants peuvent se prononcer en toute quiétude sur le sujet du jour. Source, « Rapport de l'étude sur les techniques endogènes de médiation au Bénin dans les aires culturelles *fon*, *nago* et *dendi* », *op. cit.*

[5]L' « *arbre à palabres* » est un espace public de discussion. Il s'agit d'un débat ouvert, contradictoire et public qui vise à réduire la violence contenue dans un conflit, et, partant, à rétablir la paix troublée dans une communauté donnée. La palabre se tient en un lieu consacré et hautement symbolique (un vieux baobab ou un grand fromager). L'audience est souvent publique et les participants peuvent se prononcer en toute quiétude sur le sujet du jour. Source, « Rapport de l'étude sur les techniques endogènes de médiation au Bénin dans les aires culturelles *fon*, *nago* et *dendi* », *op. cit.*

[6]Les séances de « *Atchakpodji* » sont aussi une forme publique de dénouement des crises familiales et sociales à l'amiable par la médiation, les blagues et surtout la flatterie et la participation collective et les références culturelles à travers des chants, poèmes, slogans, devinettes qui ponctuent de temps en temps ces séances.

[7]Le « *père du dehors* » à Kétou, est une personne n'ayant aucun lien de parenté avec son protégé. Il est choisi en fonction de critères de sagesse, l'estime et l'admiration que le jeune a pour lui.

- *la sagesse et l'ancienneté de celui-ci dans le règlement des conflits ;*
- *le sens de l'écoute, le courage de l'intermédiaire à trancher des affaires sans parti pris, son comportement dans la société ;*
- *la confidentialité, la discrétion et l'affiliation ;*
- *la tolérance, la promptitude dans le règlement des conflits ;*
- *le sérieux dans le parlé, le franc parlé, le comportement et le recul que cette personne prend par rapport aux faits qu'il traite et enfin,*
- *les dispositions fixées par les institutions comme l'église.*

Fig. 1 Critères pour être médiateur en milieu *dendi* (Source : Le Médiateur de la République, « Rapport de l'étude sur les techniques endogènes de médiation au Bénin dans les aires culturelles *fon*, *nago* et *dendi* », le Médiateur de la République, Service de documentation, Sept.-Oct. 2012)

1.1.1 La Médiation Endogène

Dans les milieux traditionnels s'est développé un type de médiation qualifiée d'endogène. Elle est utilisée pour le règlement amiable de divers types de conflits, notamment les conflits fonciers ou domaniaux. Ces conflits sont d'abord soumis aux autorités coutumières que sont : les chefs de famille, les chefs de collectivités familiales et les rois lesquels jouent le rôle de médiateur.

En milieu *dendi,*[8] le médiateur est appelé « *Gossikpè* », c'est-à-dire « celui qui tranche » un différend ou une mésentente. Il est aussi désigné sous le nom de « *Séniféfé* »,[9] ou de « *Sadawokpè* ».[10] Le « *Dia* » désigne un membre influent de la famille ou de la collectivité à qui on peut faire appel pour faire fléchir une position rigide du chef de famille ou du chef de la collectivité.

Dans ce milieu ethnique, les critères[11] souvent mis en exergue pour être médiateur sont (Fig. 1) :

Dans l'aire culturelle *fon,*[12] le médiateur est appelé « Houè-gbo-to », ce qui veut dire « coupe, tranche les plaintes, les litiges ». Il est aussi désigné sous le vocable de « nunagnondoto »,[13] c'est-à-dire celui qui fait en sorte qu'une situation soit bonne.

Pour être médiateur dans cette aire culturelle, il faut (Fig. 2) :

[8]Groupe socio-culturel situé à Parakou au Nord-Est du Bénin.

[9]Signifie « celui qui règle » un problème ou un contentieux entre deux parties. Source, Rapport *op. cit.*

[10]Désigne le réconciliateur (des conjoints par exemple), tout comme « *Harikoussou* ». Cf. Rapport *op. cit.*

[11]Cf. Rapport *op. cit.*

[12]Groupe ethnique situé à Abomey au Centre-ouest du Bénin.

[13]Cf. Félix IROKO, « *Principe et pratique de la médiation à travers l'histoire de l'humanité et dans la culture africaine* » in Colloque sur « *Le rôle et la fonction du Médiateur de la République au*

- *être* ***Gbèto dagbé*** *(quelqu'un de bien, de juste) ;* ***Edo hodjoho noum****è (dire la vérité aux gens) ;* ***Kpon nou déou*** *(regarder ce qu'il y a autour) ;*
- *être rassembleur et intègre et patient ;*
- *être honnête, sérieux et responsable, etc.*

Fig. 2 Critères pour être médiateur dans l'aire culturelle fon (Source : Le Médiateur de la République, « Rapport de l'étude sur les techniques endogènes de médiation au Bénin dans les aires culturelles *fon*, *nago* et *dendi* », le Médiateur de la République, Service de documentation, Sept.-Oct. 2012)

En ce qui concerne l'aire culturelle *nago* situé à Kétou au Centre-est du Bénin,[14] le médiateur est désigné sous le nom de « *Igbimon oba* », c'est-à-dire une institution de règlement des conflits dans le royaume (la cour royale et à sa tête, le Roi). On parle aussi de « *Idjo awon alpha ati imam* » ou bien « *alabéchékélé* », c'est-à-dire le comité directeur ou le comité restreint appelé à trancher les différends.

Dans ce milieu ethnique également, on retrouve pratiquement les mêmes critères pour être médiateur, notamment l'ancienneté, l'expérience, la sagesse, l'intégrité et le bon comportement social. On retrouve en outre des critères traditionnels et coutumiers souvent défendus et valorisés par la consultation de l'oracle (le ***fâ***).

En somme, la médiation endogène privilégie des qualités sociales et éthiques pour être médiateur. Ce dernier ne reçoit pas de formation particulière. Il acquiert la pratique de la médiation « *dans la pratique de tous les jours* »,[15] « *l'expérience et la routine sans oublier la sagesse et le savoir* », ou encore par « *le don de Dieu* ».

La procédure de médiation par les autorités coutumières n'est pas codifiée. Elle se déroule suivant les étapes ci-après (Fig. 3) :

De ce qui précède, la notion de médiation dans les milieux traditionnels ne parait pas différente de celle qui est emprunté au Dictionnaire[16] français, c'est-à-dire la « *procédure de règlement des conflits qui consiste dans l'interposition d'une tierce personne (le médiateur) chargée de proposer une solution de conciliation aux parties en litige* ».

En définitive, pendant la période précoloniale, le Bénin avait déjà une certaine pratique de la médiation. Pendant, la période coloniale, les fonctionsde médiation

service d'une Nation émergente dans une Afrique réconciliée », décembre 2007, cité par le Rapport *op. cit.*

[14]Cf. Rapport *op. cit.*

[15]Cf. Rapport *op. cit.*

[16]Dictionnaire le Petit LAROUSSE illustré, 2009.

- *Plainte verbale par l'une des parties en litige ou intervention (d'office) de l'autorité coutumière ;*
- *Invitation de l'autre partie au litige (cas de plainte) ou fixation de la date de la séance de règlement. L'invitation se fait par messager ;*
- *Tenue de la séance de règlement. Elle consiste à :*
  - *L'écoute de la partie plaignante ou de la partie désignée par l'autorité coutumière ;*
  - *La réplique de l'autre partie ;*
  - *Le commentaire et l'appréciation par les membres de la famille ou collectivité invités ou de la cour royale ;*
  - *En cas de besoin, le déplacement de l'autorité ou du délégué, sur les lieux litigieux ;*
  - *La décision immédiate de l'autorité ou le retrait d'un groupe restreint ou de la cour pour délibération et décision ;*
  - *L'exécution de la décision par le transport sur les lieux litigieux pour les cas de redressement des limites. L'exécution de la décision peut être subordonnée à l'offrande de diverses boissons ou le règlement d'une somme symbolique.*

Fig. 3 Procédure de médiation suivie par les autorités coutumières (Source : MCA Bénin, Etude sur la Politique et l'Administration foncières, 15/01/2009)

des juridictions d'alors étaient reconnues par le colonisateur parallèlement aux rôles des chefs coutumiers dans le règlement amiable des conflits.[17] Cette médiation dite traditionnelle n'a pas disparu avec l'évolution qui a développé un type de médiation dite moderne.

1.1.2 La Médiation Moderne

La médiation est ainsi qualifiée dans le but de la distinguer de la médiation traditionnelle ou endogène laquelle est informelle, non écrite par opposition à celle qu'on pourrait qualifier de formaliste, d'institutionnelle par référence à l'héritage colonial du Bénin.

[17]Cf. Décret du 3 décembre 1931 réorganisant la justice indigène en AOF.

En effet, le Bénin,[18] ancienne colonie française de 1895 à 1960, a hérité du système juridique[19] de droit romano-germanique.[20] Ce système repose sur le droit écrit et comprend un appareil juridictionnel[21] et un appareil non-juridictionnel.[22]

L'appareil juridictionnel béninois exerce le pouvoir judiciaire, lequel « *a pour mission d'assurer la stricte, rigoureuse et égale observation des lois et règlements dans les décisions rendues en matière contentieuse comme en matière gracieuse* ».[23]

Ce pouvoir, indépendant des pouvoirs législatif et exécutif, est exercé par la Cour suprême, les cours et les tribunaux[24] créés conformément à la Constitution.[25]

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[18]Le Bénin est un pays de l'Afrique de l'Ouest, situé dans le Golfe de Guinée, limité au nord par le fleuve Niger qui le sépare de la République du Niger, au nord-ouest par le Burkina-Faso, à l'est par le Nigéria, au sud par l'océan Atlantique et à l'ouest par le Togo. D'une superficie de 114 763 km^2 avec une population estimée en juillet 2013, à 9 877 292 habitants, il forme un couloir vers les pays de l'hinterland, notamment le Burkina-Faso et le Niger. Il entretient de dynamiques relations économiques avec tous ses voisins frontaliers, et surtout avec le Nigéria.

[19]Le système juridique rassemble les structures et modes de fonctionnement des instances reliées à l'application des règles de droit ainsi que les services qui en découlent. Le système juridique comprend ainsi l'appareil juridictionnel, mais aussi l'appareil non-juridictionnel. Cf. site Internet : http://fr.wikipedia.org/wiki/Syst%C3%A8me_juridique.

[20]Les droits de tradition civiliste constituent un système juridique appelé aussi droit romano-germanique, droit romano-civiliste ou droit continental, mais aussi droit civil, plus particulièrement au Québec. Ce système puise ses origines dans le droit romain et constitue un système complet de règles, habituellement codifiées, qui sont appliquées et interprétées par des juges civils. Il provient du mouvement de synthèse du droit romain et des droits coutumiers locaux dont les étapes importantes sont la rédaction à la fin du XVII^{e} siècle des *Lois civiles dans leur ordre naturel* par Jean Domat, puis, à partir du début du XIX^{e} siècle, la codification de certains corps de droits civils nationaux comme le Code Napoléon (ou *Code civil des Français*) et le *Bürgerliches Gesetzbuch*. Néanmoins, les droits écossais et sud-africain ne sont pas codifiés ; les droits nationaux des pays scandinaves restent eux aussi peu codifiés. Cf. site Internet : http://fr.wikipedia.org/wiki/Droits_de_tradition_civiliste.

[21]Organisation et services offerts par des instances exerçant le pouvoir de trancher les litiges qui leur sont soumis et d'appliquer les décisions qui en découlent. Cf. site Internet : http://www.med.univ-rennes1.fr/iidris/index.php?action=contexte&num=575&mode=mu&lg=fr.

[22]Organisation et services offerts par des instances qui ne sont pas liées aux tribunaux d'ordre judiciaire ou administratif, tels que les actes notariés, la médiation, l'arbitrage ou les autres formes d'assistance juridique. Cf. site Internet : http://www.med.univ-rennes1.fr/iidris/index.php?action=contexte&num=578&mode=mu&lg=fr.

[23]Cf. art. 1er Loi n 2001-37 du 27 août 2002 portant organisation judiciaire en République du Bénin.

[24]Tribunaux de première instance et les tribunaux de conciliation. Vingt-huit (28) tribunaux d'instance sont créés au Bénin suivant l'article 36 de la Loi n 2001-37 du 10 juin 2002 portant organisation judiciaire en République du Bénin. Aux termes de l'article 21 de la même loi, un tribunal de conciliation est institué par arrondissement dans les communes à statut particulier et un tribunal de conciliation pour chacune des autres communes.

[25]Art. 125 Constitution du 11 décembre 1990 de la République du Bénin.

L'appareil juridictionnel est favorable au règlement amiable de certaines catégories de conflits. Ainsi, dans les matières prévues par la loi, « *le juge peut procéder à la tentative de conciliation* »[26] des parties.

En ce qui concerne l'appareil non-juridictionnel, il s'agit de l'intervention des autorités administratives, sous tutelle ou autonomes, et des organisations professionnelles dans le règlement amiable des conflits par l'utilisation de la médiation. Cette intervention est ou non encadrée par la loi.

La caractéristique essentielle de ces formes de médiation est que, à l'issue du processus, un procès-verbal est établi et signé des protagonistes.

Malgré son ancienneté dans les pratiques béninoises pour le règlement amiable des conflits, le terme « médiation » n'a été utilisé que récemment lors de l'adoption, en 2006, du décret[27] portant création de l'Organe Présidentiel de Médiation, en sigle OPM, en 2009, de la loi[28] instituant le Médiateur de la République et en 2010, de l'acte uniforme de l'OHADA[29] relatif au droit des sociétés coopératives.

En somme, la médiation moderne au Bénin, bien que formaliste et réglementée, ne répond pas formellement à la question de la notion de la médiation.

1.2 La Notion de Médiation Assimilée à Celle de Conciliation

Si l'on peut retenir une définition de la médiation, au regard des techniques mises en œuvre pour le règlement amiable des conflits, cette notion reste encore imprécise.

[26]Le terme « peut » ne traduit pas que la conciliation serait facultative. Elle est un préalable obligatoire en matière de droit social. Mais, l'article 786 du Code des procédures prescrit à son alinéa 3 que « si dans le délai de deux (2) mois, le dossier n'est pas de retour, le juge peut procéder à la tentative de conciliation et, le cas échéant, au jugement ». Donc, le terme traduit la compétence du juge à procéder à la tentative de conciliation si l'inspecteur du travail n'y parvenait pas dans le délai imparti. C'est une mesure de célérité de la procédure sociale.

[27]Décret n 2006-417 du 25 août 2006 portant création, attributions, organisation et fonctionnement de l'Organe Présidentiel de Médiation. Ce décret est accessible sur internet.

[28]Loi n 2009-22 du 11 août 2009 instituant le Médiateur de la République.

[29]L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires, en cigle OHADA, a été créée par le Traité relatif à l'Harmonisation du Droit des Affaires en Afrique signé à Port-Louis (Île Maurice) le 17 octobre 1993 et révisé à Québec au Canada, le 17 octobre 2008. Aux termes de l'article 10 de ce Traité, « *les actes uniformes sont directement applicables et obligatoires dans les Etats Parties nonobstant toutes dispositions contraire de droit interne, antérieure ou postérieure* ». A cet effet, le Traité OHADA et tous ses actes uniformes sont applicables au Bénin. A la date du présent rapport, l'OHADA compte 17 Etats membres que sont le Bénin, le Burkina-Faso, le Cameroun, la Centrafrique, les Comores, le Congo, la Côte d'Ivoire, le Gabon, la Guinée, la Guinée Bissau, la Guinée Equatoriale, le Mali, le Niger, la République Démocratique du Congo, le Sénégal, le Tchad et le Togo. (source : www.ohada.com).

La notion de médiation est souvent confondue avec certains termes voisins comme la conciliation,[30] la négociation ou l'arbitrage.

Or, il convient de remarquer que l'arbitrage ne vise pas un règlement amiable des conflits, même s'il fait intervenir « *une tierce personne* ». La négociation, quant à elle, ne fait pas intervenir de « *tierce personne* », même si le résultat attendu est le règlement amiable des conflits.

En ce qui concerne la conciliation, elle diffère de la médiation par la technique dont elle est mise en œuvre : « *le médiateur est, en quelque sorte, un conciliateur particulièrement actif, dynamique et directif* ».[31]

Malgré cette différence entre la médiation et la conciliation, il ne ressort pas du droit béninois que le législateur ait voulu distinguer l'une de l'autre.

Cependant, il n'y a point de doute que la médiation et la conciliation consistent à recourir à une tierce personne pour le règlement amiable des différends (section 1.2.2.) permettant ainsi d'établir une similitude entre l'une et l'autre (section 1.2.1.).

1.2.1 La Similitude entre la Médiation et la Conciliation

Aux termes de l'article 9, alinéa 1 de la loi instituant le Médiateur de la République, ce dernier peut « *. . . à la demande du Président de la République ou du Gouvernement, des membres de toute autre institution de la République, participer à toute activité de* ***conciliation*** *(nous soulignons) entre l'administration publique et les forces sociales et/ou professionnelles* ».[32] Cette disposition est un peu confuse en ce que la « conciliation » utilisée dans ce cadre, au sens propre ou figuré, contrarie quelque peu le rôle principal de tierce personne joué par le Médiateur de la République. A moins d'en conclure que le législateur béninois retient l'existence d'une certaine similitude entre la médiation et la conciliation, la participation du Médiateur de la République à une activité de « conciliation » ne permet pas d'établir une frontière entre les deux types de règlement amiable des différends.

Cependant, on constate que le droit OHADA, lequel ne définit pas non plus formellement la notion de médiation, semble distinguer entre les deux termes lorsqu'il prescrit que « *tout litige entre coopérateurs ou entre un ou plusieurs coopérateurs et la société coopérative [. . .] peut également être soumis à la médiation, à la conciliation ou à l'arbitrage* ».[33]

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[30] Accord par lequel deux personnes en litige mettent fin à celui-ci (soit par transaction, soit par abandon unilatéral ou réciproque de toute prétention), la solution du différend résultant non d'une décision de justice (ni même de celle d'un arbitre) mais de l'accord des parties elles-mêmes. Cf. G. CORNU, Association Henri Capitant, Vocabulaire juridique, 9ème édition, Paris, PUF, 2011, v « conciliation ».

[31] P. MEYER, *OHADA – Droit de l'arbitrage*, Bruylant, Bruxelles, 2002, p. 16, point 26.

[32] Art. 9, al. 1, Loi n 2009-22 du 11 août 2009 instituant le Médiateur de la République.

[33] Voy. art. 117 de l'Acte uniforme de l'OHADA relatif au droit des sociétés coopératives adopté le 15 décembre 2010 à Lomé.

En citant la médiation, la conciliation et l'arbitrage comme mécanismes auxquels peut être soumis tout litige entre coopérateurs ou entre un ou plusieurs coopérateurs et la société coopérative, cela ne fait pas de doute que l'OHADA reconnaît la médiation comme un mécanisme autonome distinct de la conciliation et de l'arbitrage.

Mais, la médiation en droit OHADA n'étant pas suivie d'un règlement de procédure, on ne saurait opiner utilement sur le rôle du médiateur afin d'établir une comparaison objective avec la conciliation.

Pourtant, ce même rôle de « tierce personne » se retrouve dans d'autres matières en droit béninois pour le règlement amiable des conflits par voie de conciliation.

En effet, en matières fiscale,[34] administrative,[35] sociale,[36] familiale,[37] de droit d'auteur et des droits voisins,[38] de procédures simplifiées de recouvrement et des voies d'exécution notamment, les textes ont abondamment fait référence à la conciliation. Aussi, peut-on noter les expressions telles que « *les parties viennent de se concilier* »,[39] ou « *le juge ne peut donner au technicien mission de concilier les parties* »,[40] ou bien « *lorsque les parties viennent à se concilier* »,[41] ou « *l'acte exprimant leur accord* »,[42] ou « *arrangement qui met fin à la procédure* »,[43] « *toute convention de résolution amiable* »[44] ou encore « *tentative de conciliation à l'amiable* ».[45]

Ces textes ignorant totalement la notion de médiation, ne définissent pas non plus formellement celle de « conciliation ». Paradoxalement, le code du travail[46]

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[34]En matière fiscale, il est prévu une commission de conciliation (art. 411 du Code général des impôts, version 2012) pour le règlement de certains différends (art. 86, d. et art. 410 du Code général des impôts) entre l'administration fiscale et le contribuable. Ce Code prescrit en son article 412, le mode de citation du contribuable devant la commission de conciliation.

[35]Art. 1er de la loi n 2009-22 du 11 août 2009 instituant le Médiateur de la République, la loi n 98-004 du 27 janvier 1998 portant Code du travail en République du Béninet la loi n 2008-07 du 28 février 2011 portant code de procédure civile, commerciale, administrative, sociale et des comptes. Dans le cadre du présent rapport, l'appellation de ce code sera réduite à « code des procédures » pour faire aussi court que le Professeur J. DJOGBENOU.

[36]Code du travail en République du Bénin et Code des procédures *op. cit.*

[37]La loi n 2002-07 du 14 juin 2004 portant Code des personnes et de la famille.

[38]Une tentative de conciliation est prévue à l'article 86 de la loi n 2005-30 du 05 avril 2006 relative à la protection du droit d'auteur et des droits voisins en République du Bénin.

[39]Cf. art. 349 Code des procédures *op. cit.*

[40]Cf. code des procédures, *op. cit.,* art. 306.

[41]Cf. code des procédures, *op. cit.,* art. 345.

[42]Cf. code des procédures, *op. cit.,* art. 349.

[43]Art. 182, al. 2 de l'acte uniforme portant organisation des procédures simplifiées de recouvrement et des voies d'exécution.

[44]Art. 136, al. 4 de l'acte uniforme relatif au droit commercial général.

[45]Voy. art. 152 loi n 2013-01 du 14 janvier 2013 portant code foncier et domanial en République du Bénin. L'expression « *tentative de conciliation à l'amiable* » est tautologique.

[46]Voy. loi n 98-004 du 27 janvier 1998 portant code du travail en République du Bénin.

qui consacre une double tentative de conciliation des parties,[47] ne contient pas davantage de définition de la notion de conciliation. Mais, l'intervention d'une tierce personne est demeurée le dénominateur commun justifiant que l'on puisse, à certains égards, assimiler la médiation à la conciliation.

1.2.2 Le Recours à un Tiers pour le Règlement Amiable Des Différends

L'historique de la médiation au Bénin révèle que la médiation traditionnelle et la médiation moderne consistent à faire intervenir une tierce personne pour le règlement amiable des conflits.

Cette tierce personne peut être une autorité coutumière, une autorité administrative, un juge ou toute autre personne physique de droit privé choisie de commun accord par les parties litigantes.

Dans le cadre de la loi instituant le Médiateur de la République, ce dernier est « *un organe intercesseur gracieux entre l'administration publique et les administrés* ».[48]

A cet effet, il « *reçoit les griefs des administrés relatifs au fonctionnement des administrations centrales de l'Etat, des collectivités décentralisées, des établissements publics et les étudie afin d'y apporter des solutions équitables* [. . .] ».[49]

Ce rôle du Médiateur de la République s'identifie assez bien avec celui de la « *tierce personne* », rôle qui, parfois, est utilisé comme facteur de distinction entre la conciliation et la médiation.[50]

En matière sociale, le code du travail établit l'inspecteur du travail dans le rôle de conciliateur en vue de tenter un règlement amiable des conflits de travail.

Par ailleurs, en matière judiciaire, les juridictions béninoises sont souvent appelées à jouer le rôle de conciliateur outre les attributions des tribunaux de conciliation.[51]

Donc, la qualité du tiers varie en fonction de la nature des conflits.

En considération de tout ce qui précède, la fonction de conciliateur ou de médiateur est confiée à des personnes remplissant des critères spécifiques pour connaître des conflits bien définis. La médiation est donc un mécanisme de règlement amiable de conflit dont le fonctionnement devra nécessairement être encadré par la loi.

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[47] En matière sociale, la loi précitée portant code du travail fait obligation aux parties liées par un contrat de travail de tenter une conciliation à l'Inspection du travail. En cas d'échec, le juge statuant en matière sociale procède à une nouvelle tentative de conciliation des parties.

[48] Art. 1er de la Loi n 2009-22 du 11 août 2009 instituant le Médiateur de la République.

[49] Art. 8, Loi n 2009-22 du 11 août 2009 instituant le Médiateur de la République.

[50] P. MEYER, *OHADA – Droit de l'arbitrage*, Bruylant, Bruxelles, 2002, p. 16, point 26.

[51] Cf. loi n 2001-37 du 27 août 2002 portant organisation judiciaire en République du Bénin, *op. cit.*

Aussi, convient-il d'abord de développer le cadre juridique de la médiation au Bénin (Partie I) avant de s'interroger sur la pratique de la médiation au Bénin (Partie II).

2 Le Cadre Juridique de la Médiation au Bénin

Les textes applicables à la médiation au Bénin sont de deux sources : sources internes et sources internationales.

Ces textes reflètent les ambitions du législateur béninois à privilégier le règlement amiable des conflits. Il s'agit donc de savoir si ces textes donnent aux parties les chances nécessaires pour rechercher une solution amiable à leur différend.

Il y a lieu de préciser que tous les types de médiation ne sont pas encadrés par la loi. Il en est ainsi de la médiation en milieu traditionnel ou médiation coutumière. Au regard du nombre de plus en plus élevé des rois lettrés, pourquoi ne pas envisager l'introduction dans la médiation coutumière l'établissement d'un procès-verbal comme dans la médiation moderne ?

En ce qui concerne la médiation administrative, il convient de distinguer la médiation effectuée par « *les autorités administratives* »[52] non codifiée, de la médiation instituée au sein d'une administration par la loi.

Donc, l'étude du cadre juridique de la médiation au Bénin ne prendra pas en compte la médiation coutumière et la médiation qualifiée de politico-administrative par opposition à la médiation simplement administrative.

En somme, les textes régissant la médiation au Bénin sont répartis en deux catégories : d'une part, le droit interne (Chapitre 2) et, d'autre part, les textes internationaux (Chapitre 3) régissant la médiation au Bénin.

2.1 Le Droit Interne de la Médiation

Le droit interne de la médiation au Bénin se répartit en droit public[53] (section 2.1.1.) et en droit privé (section 2.1.2.) de la médiation.

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[52]Il s'agit de la médiation effectuée par les autorités locales (chef de village, chef d'arrondissement, maires, préfets, directeurs généraux des structures déconcentrées des ministères) et les autorités nationales (ministères, présidence de la république).

[53]Cf. site Internet : http://fr.wikipedia.org/wiki/Droit_public : dans le cadre du présent rapport, le droit public est entendu comme « *l'ensemble des règles juridiques qui régissent l'organisation et le fonctionnement politique, administratif et financier des personnes morales de droit public entre elles, ainsi que des relations entre les États, entre les organismes internationaux, ainsi que les relations entre les personnes morales de droit public et les personnes privées. Le droit public défend l'intérêt général avec des prérogatives liées à la puissance publique. Il concerne les rapports entre personnes publiques mais également personnes publiques et personnes privées* »

2.1.1 La Médiation en Droit Public

La médiation en droit public est relative à la médiation mise en œuvre pour le règlement amiable des différends opposant l'administration à ses administrés.

Après avoir présenté le champ d'application des textes applicables à ces types de différends (section 2.1.1.1.), une attention particulière sera accordée à son cadre organique (section 2.1.1.2.).

2.1.1.1 Textes Applicables et Champ d'Application

Dans le cadre des relations juridiques avec les personnes morales de droit public, des conflits pourraient naître et conduire à un mauvais fonctionnement des services publics.

Aussi, des dispositions ont-elles été prises afin de donner aux administrés la possibilité de rechercher une solution amiable avec l'administration concernée avant d'entamer, le cas échéant, toute action judiciaire.

Les textes ayant prévu le recours à la médiation sont notamment, le code général des impôts,[54] la loi instituant le Médiateur de la République,[55] le code des marchés publics,[56] la loi portant code minier et fiscalités minières en République du Bénin et le code minier de l'UEMOA.

En ce qui concerne la médiation prévue par le code général des impôts, elle est mise en œuvre dans les cas suivants :

- « *en cas de contestation sur les déclarations* . . . »[57] effectuées à l'occasion d'un « *remboursement total ou partiel sur le montant de leurs actions, parts d'intérêts ou commandites avant leur dissolution ou leur mise en liquidation, doivent en faire la déclaration au service des impôts de leur siège social* »[58] ;
- « *si le prix ou l'évaluation ayant servi de base à la perception du droit proportionnel ou progressif paraît inférieur à la valeur réelle des biens transmis ou énoncés [* . . . *]* »[59] ;
- si le différend relatif au prix ou à l'évaluation ayant servi de base à la perception du droit proportionnel ou progressif porte sur au moins 5 000 000 de francs CFA[60] ;

[54]Le code général des impôts du Bénin, version 2012, mise à jour effectuée par Dr. Raymond Mbadiffo Kouamo.

[55]La loi n 2009-22 du 11 août 2009 instituant le Médiateur de la République au Bénin, op. cit.

[56]La loi n 2009-02 du 07 août 2009 portant code des marchés publics et des délégations de services publics en République du Bénin.

[57]Cf. art. 86 du code général des impôts du Bénin, *op. cit*.

[58]Art. 86, *op. cit.*

[59]Art. 410 al. 1 du code *op. cit*.

[60]Art. 410 al. 2 du code *op. cit*.

- ou en cas de différend portant sur des actes ou déclarations constatant la transmission ou l'énonciation :
  - de la propriété, de l'usufruit ou de la jouissance de biens immeubles, de fonds de commerce y compris les marchandises neuves qui en dépendent, de clientèle, de navires ou de bateaux ;
  - d'un droit à un bail ou du bénéfice d'une promesse de bail portant sur tout ou partie d'un immeuble.

En ce qui concerne le Médiateur de la République, autorité administrative indépendante, il est saisi, aux termes de l'article 8 de la loi l'instituant,[61] des griefs des administrés relatifs au fonctionnement des administrations centrales de l'Etat, des collectivités décentralisées, des établissements publics et les étudie afin d'y apporter des solutions équitables.

Quant au code des marchés publics, il n'a pas expressément prévu un mécanisme de conciliation ou de médiation. Mais, en son article 147, il fait du règlement amiable des différends opposant l'autorité contractante aux titulaires de marchés publics ou de délégations de services publics, un préalable obligatoire avant tout autre recours.

Bien que la médiation n'ait pas été mentionnée formellement, il n'y a cependant pas de doute que la volonté du législateur est de privilégier le règlement amiable dans les différends pouvant opposer l'administration à ses cocontractants.

En ce qui concerne la loi portant code minier et fiscalités minières en République du Bénin, elle a également envisagé un mécanisme de règlement amiable préalable.[62] Elle est d'ailleurs complétée par le code minier communautaire lequel soumet, en son article 37, « *[. . .] les différends nés de l'interprétation ou de l'application d'une convention conclue entre un titulaire de titre minier et un Etat membre conformément aux dispositions du présent Code* » à un règlement amiable.[63]

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[61] Cf. art. 8 de la loi n 2009-22 du 11 août 2009 instituant le Médiateur de la République. L'article 9 de la même loi dispose que : « le Médiateur de la République peut, à la demande du Président de la République ou du Gouvernement, des membres de toute autre institution de la République, participer à toute activité de conciliation entre l'administration publique et les forces sociales et/ou professionnelles. Il peut également être sollicité par le Président de la République pour des missions particulières relatives aux questions de réconciliation et de paix au niveau national, régional ou international ». Mais, il convient de noter que « ne relèvent pas de la compétence du Médiateur de la République : les différends qui peuvent s'élever entre les personnes physiques ou morales privées ; les différends qui peuvent s'élever entre les administrations prévues à l'article 8 et leurs agents ; les procédures engagées devant la justice ou la dénonciation d'une décision judiciaire. Lorsqu'il est saisi d'un recours relatif à l'un des domaines ci-dessus cités, il adresse au réclamant une suite lui indiquant une démarche alternative. (Article 10).

[62] Art. 134 de la loi n 2006–17 du 17 octobre 2006 portant code minier et fiscalités minières en République du Bénin.

[63] UEMOA, Code minier communautaire, Règlement n 18/2003/CM/UEMOA du 23 décembre 2003.

En définitive, l'administration a une haute considération du règlement amiable des conflits pouvant l'opposer aux administrés.

Cependant, la question qui se pose est de savoir si le cadre organique de déroulement de la médiation prévu par ces lois permet d'aboutir effectivement à un règlement amiable ou s'il est adapté au besoin de règlement amiable.

2.1.1.2 Cadre Organique

Le cadre organique de médiation en droit public est différent d'une loi à une autre.

Le code général des impôts a instauré une commission de conciliation[64] dont la compétence est nationale. Cette commission est chargée de recevoir et de traiter les réclamations des contribuables. Composée de près de neuf membres, cette commission se réunit sur convocation de son président ou de son vice-président. Elle délibère valablement à condition qu'il y ait au moins cinq membres présents, y compris le président et le vice-président.[65]

Aux termes de l'article 412 du code, le contribuable est cité par simple avis recommandé ou par voie administrative devant la commission de conciliation. Il convient de préciser que cette citation est interruptive de prescription. Les contribuables intéressés sont invités à se faire entendre ou à faire parvenir leurs observations écrites. Ils peuvent se faire assister par une personne de leur choix ou désigner un mandataire dûment habilité.

En cas d'échec, l'administration et les parties peuvent saisir d'une requête la juridiction civile.

En ce qui concerne le Médiateur de la République, il présente les caractéristiques d'une véritable médiation institutionnelle. Il est saisi,[66] par écrit, par toute personne physique ou morale pour des griefs relatifs au fonctionnement des administrations centrales de l'Etat, des collectivités décentralisées, des établissements publics et les étudie afin d'y apporter des solutions équitables. Il convient de noter que la loi prévoit que la saisine du Médiateur de la République n'exclut pas la possibilité pour le requérant d'exercer un recours juridictionnel. Cette saisine ne suspend donc pas les délais de recours administratif ou juridictionnel. L'intervention du Médiateur de la République comporte trois (section 3) étapes schématisées comme suit (Fig. 4) :

Dans le cadre des différends opposant les titulaires de marchés publics ou de délégations de service public, au sens de l'article 147 du code des marchés publics, c'est l'autorité contractante qui est saisie aux fins de rechercher un règlement amiable aux différends.

Par contre, pour les différends pouvant survenir entre l'Etat et le titulaire d'un permis de recherche ou d'exploitation dans le cadre de la loi portant code minier

[64] Article 411 du code général des impôts, op. cit.

[65] Art. 411, § 6 code général des impôts, op. cit.

[66] Art. 8, 11 et ss. de la loi n 2009-22 du 11 août 2009 instituant le Médiateur de la République.

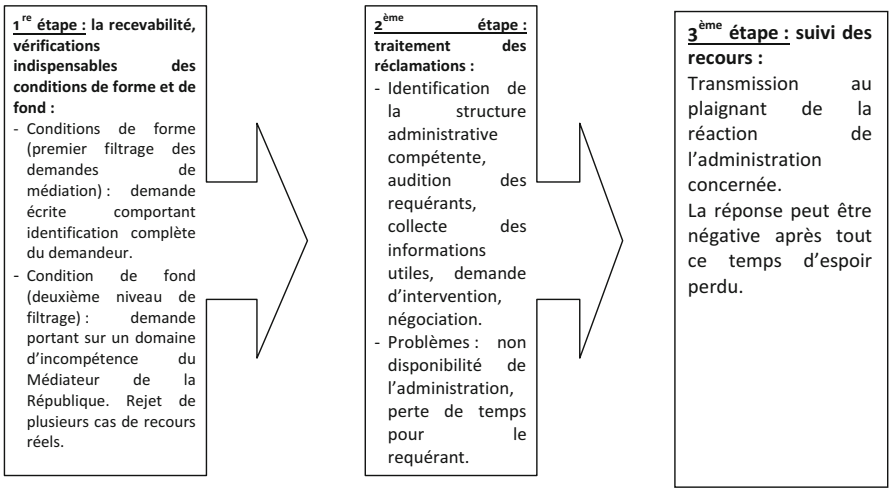

Fig. 4 Intervention du Médiateur de la République en trois étapes (Source : Le Médiateur de la République, « Rapport de l'étude sur les techniques endogènes de médiation au Bénin dans les aires culturelles *fon*, *nago* et *dendi* », le Médiateur de la République, Service de documentation, Sept.-Oct. 2012)

et fiscalités minières en République du Bénin,[67] aucun organe spécifique n'a été identifié pour la recherche de règlement amiable. La question est de savoir comment mettre en œuvre une procédure de médiation dans ce cas. En l'absence d'une loi spécifique sur la médiation, cette procédure a peu de chance de prospérer.

Hormis la loi instituant le Médiateur de la République, les textes régissant la médiation en droit public ne permettent pas d'envisager un fonctionnement efficace de la médiation. Outre les textes instituant des organes chargés de la tentative de conciliation, d'autres textes ont juste énoncé la possibilité d'un règlement amiable avant tout autre recours sans expliciter le déroulement de ladite procédure. Il apparaît donc nécessaire de faire suivre ces textes d'un règlement de procédure.[68]

D'une manière générale, la médiation en droit public est gratuite contrairement à la médiation en droit privé.

[67]Cf. la loi portant code minier, op. cit.

[68]La loi n 2008-07 du 28 février 2011 portant code de procédure civile, commerciale, administrative, sociale et des comptes a prescrit la procédure à suivre en matière de conciliation aux articles 494, 495 et 496. Cette loi qui devrait s'appliquer à toutes les conciliations judiciaires, ne comporte aucune disposition sur les principes notamment d'égalité entre les parties, de neutralité, d'impartialité, d'indépendance et de confidentialité. Elle ne comporte, en outre, aucune disposition sur la possibilité d'une interruption de la prescription ou sur la procédure d'homologation du procès-verbal de conciliation/médiation (en cas de conciliation extrajudiciaire).

2.1.2 La Médiation en Droit Privé

Le droit privé regroupe les règles qui régissent les rapports entre les particuliers, personnes physiques ou morales.

En matière de médiation, il s'agit des règles instituant la médiation pour le règlement amiable des conflits nés des relations juridiques entre particuliers.

Après avoir défini le champ d'application (section 2.1.2.1.) des textes régissant ce type de médiation, il sera abordé son cadre organique (section 2.1.2.2.).

2.1.2.1 Textes Applicables et Champ d'Application

Les conflits qui peuvent opposer les particuliers couvrent divers domaines.

Dans le domaine de la protection du droit d'auteur et des droits voisins, la loi[69] a institué, en son article 86, une tentative de conciliation en cas de contestation qui pourrait survenir des contrats de reproduction, d'édition, de représentation et d'exécution en public des œuvres littéraires, artistiques et des créations protégées par les droits voisins.

Dans le domaine du travail, la loi[70] prévoit, en son article 108, une tentative de conciliation dans les cas suivants :

- les contestations relatives à l'électorat, à l'éligibilité des délégués du personnel ainsi qu'à la régularité des opérations électorales.
- les différends collectifs.[71]
- les différends individuels du travail.[72]

Dans le domaine du foncier, il est également prévu une tentative de conciliation pour les différends liés à l'accès aux terres rurales et aux ressources naturelles y relatives.[73]

[69]Loi n 2005-30 du 05 avril 2006 relative à la protection du droit d'auteur et des droits voisins en République du Bénin.

[70]Loi n 98-004 du 27 janvier 1998 portant Code du travail en République du Bénin ; on peut aussi citer la loi portant code des procédures, op. cit.

[71]C'est-à-dire ceux qui opposent une collectivité de salariés organisées ou non en groupement professionnel à un employeur ou à un groupe d'employeurs (art. 252 code du travail).

[72]C'est-à-dire les litiges individuels du travail opposant, en cours d'emploi ou à l'occasion de la rupture du contrat de travail, un travailleur à son employeur (art. 237 code du travail).

[73]Art. 386, loi n 2013-01 du 14 janvier 2013 portant code foncier et domanial en République du Bénin : « *les différends liés à l'accès aux terres rurales et aux ressources naturelles y relatives sont réglés conformément aux dispositions de la loi portant organisation judiciaire en République du Bénin. Toutefois, la saisine des juridictions doit obligatoirement être précédée, au choix des parties, d'une tentative de conciliation par le tribunal de conciliation compétent ou d'une tentative de règlement amiable* ».

La loi portant code des personnes et de la famille, quant à elle, a aussi prescrit, dans le cadre d'une procédure de divorce, « *une tentative de conciliation* »[74] des parties.

Par ailleurs, l'acte uniforme portant organisation des procédures simplifiées de recouvrement et des voies d'exécution[75] et l'acte uniforme relatif au droit des sociétés coopératives[76] ont aussi, chacun en ce qui le concerne, autorisé le recours à la médiation pour le règlement des conflits entre particuliers, personnes physiques ou morales.

En outre, il existe également des tribunaux de conciliation[77] dont la mission consiste à concilier les parties. Aux termes de l'article 26 de la loi, ces tribunaux « *sont compétents en toutes matières, sauf les exceptions prévues par la loi, notamment en matière civile moderne, pénale, de conflits individuels du travail et d'état des personnes* ». Ils sont surtout compétents en matière des conflits fonciers ou domaniaux.

Enfin, le code civil de 1958, héritage colonial béninois, a fait des conventions librement formées, en son article 1134, la loi des parties contractantes. Cette disposition régit la médiation conventionnelle en permettant aux parties de rechercher une solution amiable en dehors de toute procédure judiciaire.

2.1.2.2 Cadre Organique

La médiation en droit privé est également organisée en fonction des lois la régissant.

La loi relative à la protection du droit d'auteur et des droits voisins a institué un organisme de gestion collective pour la tentative de conciliation des contestations se rapportant aux contrats de reproductions, d'édition, de représentation et d'exécution en public des œuvres littéraires, artistiques et des créations protégées par les droits voisins. Mais, elle ne donne pas la composition de cet organisme, ni son fonctionnement.

En outre, la question est de savoir si la tentative de conciliation est organisée sous l'égide de cet organisme ou si c'est l'organisme même qui fait office de conciliateur.

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[74] Art. 236 et suivants de la loi portant code des personnes et de la famille.

[75] Article 12 de l'acte uniforme portant organisation des procédures simplifiées de recouvrement et des voies d'exécution, en matière d'opposition à la décision d'injonction de payer, dispose que « *la juridiction saisie sur opposition procède à une tentative de conciliation. Si celle-ci aboutit, le président dresse un procès-verbal de conciliation signé par les parties, dont une expédition est revêtue de la formule exécutoire. Si la tentative de conciliation échoue, la juridiction statue immédiatement sur la demande en recouvrement, même en l'absence du débiteur ayant formé opposition, par une décision qui aura les effets d'une décision contradictoire* ».

[76] Articles 117 et 118 de l'acte uniforme relatif au droit des sociétés coopératives prescrivent la soumission à la médiation de « *tout litige entre coopérateurs ou entre un ou plusieurs coopérateurs et la société coopérative . . .* » et, la création des organes de médiation au sein des « *sociétés coopératives, leurs unions, fédérations, confédérations ou réseaux* ».

[77] Cf. loi n 2001-37 du 27 août 2002 portant Organisation judiciaire en République du Bénin.

En cas d'échec de la conciliation, la loi prévoit que les parties ont la faculté de saisir le tribunal compétent soit directement, soit par l'entremise de l'organisme de gestion collective lequel a qualité pour ester en justice. Cependant, l'opérationnalisation de cet organisme nécessite un certain nombre de dispositions dont la prise d'un décret ou d'un arrêté d'application de la loi relative à la protection du droit d'auteur et des droits voisins

Dans le cadre du travail, la loi a institué un double niveau de conciliation. Le premier niveau est celui de l'inspection du travail, un organe administratif permanent. Conformément à la loi, l'inspection du travail doit obligatoirement être saisie en vue d'une tentative de règlement amiable du différend né des relations du travail. En cas de non conciliation, l'inspection du travail saisit le tribunal de première instance statuant en matière sociale du procès-verbal[78] établi à cet effet.

avant toute saisine du tribunal de travail, en l'occurrence, lequel constitue le deuxième niveau de tentative de conciliation.

En ce qui concerne la récente loi portant régime foncier, elle a également prévu une tentative de conciliation pour les différends liés à l'accès aux terres rurales et aux ressources naturelles y relatives.[79]

En somme, la médiation en droit privé est généralement abritée par un organisme public : une administration ou une juridiction. Mais, contrairement à a médiation en droit public, la médiation en droit privé n'implique pas du tout l'administration concernée ni toute autre administration.

Cependant, les règles d'organisation de ce type de médiation sont aussi insuffisantes, sinon inexistantes que dans la médiation en droit public.

2.2 Le Droit International de la Médiation

Il s'agit de faire le point des textes ratifiés par le Bénin en matière de médiation (section 2.2.1.) et d'apprécier l'organisation mise en place pour assurer son fonctionnement (section 2.2.2.)

[78]Le procès-verbal [de conciliation des parties] constitue un acte authentique, un contrat judiciaire ayant force exécutoire. Il comporte un effet novatoire car il substitue une cause juridique nouvelle à la cause primitive. Encourt la cassation le jugement qui se base sur un acte dont les clauses ont été remplacées par celles du procès-verbal de conciliations. (Voy. Arrêt du 04 juillet 1964 chambre judiciaire de la cour suprême du Bénin).

[79]Art. 386, loi n 2013-01 du 14 janvier 2013 portant code foncier et domanial en République du Bénin : « les différends liés à l'accès aux terres rurales et aux ressources naturelles y relatives sont réglés conformément aux dispositions de la loi portant organisation judiciaire en République du Bénin. Toutefois, la saisine des juridictions doit obligatoirement être précédée, au choix des parties, d'une tentative de conciliation par le tribunal de conciliation compétent ou d'une tentative de règlement amiable ».

2.2.1 Champ d'Application de la Médiation Transfrontalière

Le Bénin est partie à des conventions internationales qui prévoient le règlement des différends par voie de médiation.

La Charte des Nations Unies pose le principe en son article 33 : « *les parties à tout différend [. . .] doivent en rechercher la solution, avant tout, par voie [. . .] de médiation, de conciliation, d'arbitrage, [. . .]* ».[80] A cet effet, un règlement type de conciliation des Nations Unies applicable aux différends entre Etats[81] a été adopté.

Il convient de faire remarquer que la Charte s'applique à « *tout différend* ». Néanmoins, dans certains domaines, il a été adopté des conventions spécifiques pour le règlement des différends portant, soit sur l'interprétation ou l'application des conventions (section 2.2.1.1.), soit sur les investissements entre Etats et ressortissants d'autres Etats (section 2.2.1.2.), soit sur les litiges relatifs aux ressources naturelles et/ou à l'environnement (section 2.2.1.3.).

2.2.1.1 Interprétation ou Application des Conventions Internationales

La plupart des instruments internationaux ont prévu le recours à la médiation pour le règlement des différends au sujet de l'interprétation ou de l'application des conventions en cause.

Il en est ainsi notamment, de la Convention-cadre des Nations Unies sur les changements climatiques,[82] la Convention de Rotterdam sur la procédure de consentement préalable en connaissance de cause applicable à certains produits chimiques et pesticides dangereux qui font l'objet d'un commerce international,[83] la Convention des Nations Unies sur la diversité biologique[84] et la Convention des Nations Unies sur la protection et la promotion de la diversité des expressions culturelles.[85]

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[80] Art. 33, 1 de la Charte des Nations Unies : « *Les parties à tout différend dont la prolongation est susceptible de menacer le maintien de la paix et de la sécurité internationales doivent en rechercher la solution, avant tout, par voie de négociation, d'enquête, de médiation, de conciliation, d'arbitrage, de règlement judiciaire, de recours aux organismes ou accords régionaux, ou par d'autres moyens pacifiques de leur choix* ».

[81] Art. 1er, 1 du Règlement type de conciliation des Nations Unies applicables aux différends entre Etats : « le présent Règlement s'applique à la conciliation en cas de différends entre Etats, lorsque lesdits Etats en sont expressément convenus par écrit ».

[82] Art. 14, 1. et 5 de la Convention-cadre des Nations Unies sur les changements climatiques.

[83] Art. 20, 1. et 6. de la Convention de Rotterdam sur la procédure de consentement préalable en connaissance de cause applicable à certains produits chimiques et pesticides dangereux qui font l'objet d'un commerce international.

[84] L'article 27 de la Convention des Nations Unies sur la diversité biologique reconnaît que les différends entre Parties contractantes touchant l'interprétation ou l'application de ladite Convention, pourraient être soumis à la conciliation.

[85] Art. 25, Convention des Nations Unies sur la protection et la promotion de la diversité des expressions culturelles.

Le règlement des différends ci-dessus cités, est régi par un règlement de conciliation qui définit un certain nombre de règles notamment, la mise en place d'une commission de conciliation, le nombre et la nomination des conciliateurs, le caractère confidentiel et la fin de la procédure de médiation. Ces dispositions font défaut dans les textes régissant la médiation interne au Bénin.

Outre l'interprétation ou l'application des conventions, les différends peuvent porter sur les investissements entre Etats et ressortissants d'autres Etats contractants.

2.2.1.2 Différends Relatifs aux Investissements

Dans le cadre des investissements internationaux, le Bénin a ratifié, le 10 septembre 1965, la Convention de Washington du 18 mars 1965 pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats. Cette convention, entrée en vigueur le 14 octobre 1966, a institué le CIRDI[86] pour fournir des services de conciliation et d'arbitrage pour le règlement des différends relatifs aux investissements entre des Etats contractants et des ressortissants d'autres Etats contractants.[87]

Les dispositions de la Convention sont complétées par les Règlements adoptés par le Conseil administratif du Centre appelés Règlements du CIRDI. Ces Règlements comprennent, dans le cas d'espèce, le Règlement administratif et financier, le Règlement de procédure relatif à l'introduction des instances de conciliation et d'arbitrage appelé Règlement d'introduction des instances, et le Règlement de procédure relatif aux instances de conciliation dénommé Règlement de conciliation.

La compétence du Centre s'étend aux différends d'ordre juridique entre un Etat contractant (ou telle collectivité publique ou tel organisme dépendant de lui qu'il désigne au Centre) et le ressortissant d'un autre Etat contractant qui sont en relation directe avec un investissement et que les parties ont consenti par écrit à soumettre au Centre.[88]

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[86]Centre international pour le règlement des différends relatifs aux investissements créé par la Convention de Washington du 18 mars 1965.

[87]Art. 25 (2) : Ressortissant d'un autre Etat contractant signifie : toute personne physique qui possède la nationalité d'un Etat contractant autre que l'Etat partie au différend à la date à laquelle les parties ont consenti à soumettre le différend à la conciliation ou à l'arbitrage ainsi qu'à la date à laquelle la requête a été enregistrée conformément à l'article 28, alinéa (3), ou à l'article 36, alinéa (3), à l'exclusion de toute personne qui, à l'une ou à l'autre de ces dates, possède également la nationalité de l'Etat contractant partie au différend ; (b) toute personne morale qui possède la nationalité d'un Etat contractant autre que l'Etat partie au différend à la date à laquelle les parties ont consenti à soumettre le différend à la conciliation ou à l'arbitrage et toute personne morale qui possède la nationalité de l'Etat contractant partie au différend à la même date et que les parties sont convenues, aux fins de la présente Convention, de considérer comme ressortissant d'un autre Etat contractant en raison du contrôle exercé sur elle par des intérêts étrangers.

[88]Art. 25 (1) Convention de Washington.

Par ailleurs, les Nations Unies encouragent le recours à la médiation pour le règlement des litiges relatifs aux ressources naturelles et/ou à l'investissement.

2.2.1.3 Litiges Relatifs aux Ressources Naturelles et/ou à l'Environnement

Les solutions aux litiges relatifs aux ressources naturelles et/ou à l'investissement peuvent être recherchées par la voie de médiation.

La procédure de médiation est conduite conformément au Règlement facultatif de la Cour Permanente d'Arbitrage pour la conciliation des différends relatifs aux ressources naturelles et/ou à l'investissement. Ce Règlement comporte des règles applicables au début de la procédure de médiation, au nombre et à la nomination des médiateurs, à la présentation de documents au médiateur, à la représentation et à l'assistance, au rôle du médiateur, aux communications entre le médiateur et les parties, à l'accord issu de la médiation, au caractère confidentiel et à la fin de la procédure de médiation.

En outre, les parties doivent s'engager, au cours de la procédure de conciliation, à n'entamer aucune procédure judiciaire ou arbitrale relative à un litige soumis à la procédure de médiation.[89]

Au regard de la présentation sommaire de ces textes, il est aisé d'envisager une gestion efficace de la médiation. Contrairement aux textes internes régissant la médiation, les textes internationaux préservent tant l'efficacité que la transparence de ce mécanisme de règlement amiable des conflits. Ce qui est naturellement indispensable dans une approche transfrontalière.

3 Cadre Organique de la Médiation Transfrontalière

La solution d'un différend entre Etats ou entre un Etat et le ressortissant d'un autre Etat ne relève pas de la compétence d'une commission permanente. Chaque différend à soumettre à la conciliation donne lieu à la création d'une commission *ad hoc* (section 3.1.). La procédure de conciliation est régie par un règlement préétabli permettant ainsi à toutes les parties de garder un contrôle sur son déroulement (section 3.2.)

[89] Au sens de l'article 15 du Règlement facultatif de la Cour Permanente d'Arbitrage pour la conciliation des différends relatifs aux ressources naturelles et/ou à l'investissement : « Les parties s'engagent à n'entamer, au cours de la procédure de conciliation, aucune procédure arbitrale ou judiciaire relative à un litige soumis à la procédure de conciliation, étant entendu toutefois qu'une partie peut entamer une procédure arbitrale ou judiciaire lorsque, à son avis, une telle démarche est nécessaire pour préserver ses droits et/ou pour prendre des mesures provisoires de protection de ses droits ».

3.1 Mise en Place d'une Commission Ad Hoc

La médiation dans les instruments juridiques internationaux auxquels le Bénin est partie a la particularité de se dérouler sous l'égide d'une commission ad hoc.

En effet, une commission de conciliation composée de trois (section 3) ou de cinq (section 5) conciliateurs est créée suite à l'introduction d'une demande de conciliation.

Les différends soumis à la conciliation opposent exclusivement les Etats. Le seul domaine où les différends opposent un Etat et un ressortissant d'un autre Etat est celui des investissements étrangers.

Le dispositif de contrôle du déroulement de la conciliation montre que le mécanisme est institué pour donner aux parties toutes les chances de trouver une solution à l'amiable.

3.2 Contrôle du Déroulement de la Conciliation

Le mécanisme de conciliation est organisé par un règlement de conciliation lequel définit la procédure à suivre. Ce règlement, en ce qui concerne le règlement type de conciliation des Nations Unies applicable aux différends entre Etats, comporte, entre autres, des dispositions relatives :

- au nombre et à la désignation des conciliateurs pour la constitution de la commission de conciliation ;
- aux principes fondamentaux à observer par la commission ;
- à la procédure et aux pouvoirs de la commission ;
- à la conclusion de la procédure de conciliation ;
- au caractère confidentiel des travaux et des documents de la commission ;
- à l'obligation de ne pas agir d'une manière qui pourrait être préjudiciable à la conciliation ;
- à la protection de la position juridique des parties ; et
- aux frais de procédure.

Ce règlement permet ainsi d'assurer le contrôle de la procédure de conciliation et de veiller au respect des principes de transparence et d'équité.

Au terme de cette présentation du cadre juridique de la médiation au Bénin, on note une disparité dans le traitement de la médiation. Alors que les textes internationaux mentionnant le recours à la médiation pour le règlement amiable des différends sont suivis d'un règlement de procédure, les textes internes, à l'exception de la loi instituant le Médiateur de la République, laissent apparaître des insuffisances qui ne favorisent pas le développement de ce mode alternatif de règlement des conflits.

4 La Pratique de la Médiation au Bénin

Plusieurs types de médiation sont pratiqués au Bénin : la médiation traditionnelle dite médiation endogène ou indigène, la médiation moderne ou médiation formelle composée de la médiation juridictionnelle, de la médiation administrative et de la médiation privée ou conventionnelle.

On peut aussi distinguer la médiation institutionnelle de la médiation *ad hoc*, la médiation interne de la médiation transfrontalière.

Mais, la question est de savoir si ces différents types de médiation ont reçu le même accueil des praticiens.

En outre, avec le développement des nouvelles technologies de l'information et de la communication, se développe un nouveau type de médiation appelé «cyberjustice» ; la *cyberjustice* en médiation est encore appelée «*cybermédiation*».[90]

Faire le point de l'état de la pratique de la médiation au Bénin revient donc à faire une classification des offres de médiation de manière à distinguer les offres de médiation provenant des services publics de l'Etat (Chapitre 4), de celles provenant d'initiatives privées (Chapitre 5). A ces différentes pratiques de la médiation, il conviendra d'ajouter la *cyberjustice* en médiation (Chapitre 6).

4.1 Le Service Public de la Médiation

Le service public de la médiation regroupe les services de médiation proposés tant, dans le cadre d'une médiation judiciaire (section 4.1.1.) que dans celui d'une médiation administrative (section 4.1.2.).

4.1.1 La Médiation Judiciaire

La médiation judiciaire distingue la médiation obligatoire (section 4.1.1.1.) de la médiation facultative (section 4.1.1.2.).

4.1.1.1 La Médiation Obligatoire

La médiation est obligatoire dans les matières, notamment, sociale, de divorce pour faute et d'opposition à injonction de payer.

En matière sociale, l'article 246 du code du travail dispose que « *lorsque les parties comparaissent devant le tribunal, il est procédé à une nouvelle conciliation* ».

[90] V. Gautrais, K. Benyekhlef et P. Trudel, « Cybermédiation et cyberarbitrage : l'exemple du cybertribunal, Université de Montréal, Centre de Recherches en Droit Public (CRDP), Computer & telecoms law review, 1998/4.

A cet effet, l'évolution des taux de dossiers vidés en matière sociale pour l'ensemble des tribunaux de première instance (TPI) au titre de l'année 2011–2012 se présente comme suit[91] :

- taux de dossiers vidés (PV de conciliation homologués) : 4,26 % en 2011 ;
- taux de dossiers vidés (PV de non conciliation) : 13,31 % en 2011 et 27,6 % en 2012 ;
- taux de dossiers vidés au fond (PV de non conciliation) : 12,53 % en 2011 et 16,68 % en 2012.

En matière d'état des personnes,[92] l'évolution des taux (%) de dossiers pour l'ensemble des TPI est la suivante :

- taux de dossiers vidés en matière d'état des personnes (divorce, autres et état des personnes) : 20,64 % en 2011 contre 71,78 % en 2012 ;
- taux de dossiers vidés au fond en matière (JAF) en matière d'état des personnes (divorces, autres et état des personnes) : 20,47 % contre 70,05 %.

En matière d'opposition à injonction de payer,[93] la juridiction saisie procède d'abord à une tentative de conciliation. Ce n'est qu'en cas d'échec de cette tentative de conciliation qu'elle statuera sur la demande en recouvrement. Il en est également ainsi des sommes dues à titre de rémunération qui ne peuvent être saisies qu'après une tentative de conciliation.[94]

De façon générale, l'appréciation de la régularité de la procédure de conciliation relève du domaine de la légalité. C'est ce que la Cour Constitutionnelle a décidé

[91]Cf. Tableau sur l'évolution des taux (%) de dossiers vidés en matière (civile) pour l'ensemble des TPI, 2011–2012, *in* Rapport sur l'état de la Justice au Bénin et perception des justiciables, nov. 2013.

[92]Le préliminaire de conciliation est une étape obligatoire en matière d'état de personne. Suivant l'arrêt n 019/CJ-CT du 19 novembre 2004 rendu par la Chambre judiciaire de la Cour suprême aux termes duquel il est fait grief à l'arrêt déféré en cassation d'avoir violé l'article 23 du décret organique du 03 décembre 1931 [d'alors], en ce qu'il ne ressort ni du jugement du 13 décembre 1972 ni de l'arrêt frappé de pourvoi qu'il a été procédé à la tentative de conciliation préalable, il a été jugé ce qui suit : « Attendu qu'il est manifeste en l'espèce que la tentative de conciliation n'a été effectuée ni en première instance ni en cause d'appel ; Qu'il y a lieu d'accueillir ce moyen et de casser l'arrêt sans qu'il soit besoin d'examiner les autres moyens ».

[93]L'article 12 de l'acte uniforme portant organisation des procédures simplifiées de recouvrement et des voies d'exécution prescrit que « *la juridiction saisie sur opposition procède à une tentative de conciliation. Si celle-ci aboutit, le président dresse un procès-verbal de conciliation signé par les parties, dont une expédition est revêtue de la formule exécutoire. Si la tentative de conciliation échoue, la juridiction statue immédiatement sur la demande en recouvrement, même en l'absence du débiteur ayant formé opposition, par une décision qui aura les effets d'une décision contradictoire* ».

[94]Article 174 de l'acte uniforme portant organisation des procédures simplifiées de recouvrement et des voies d'exécution dispose : « *la saisie des sommes dues à titre de rémunération, quel qu'en soit le montant, à toutes les personnes salariées ou travaillant, à quelque titre ou en quelque lieu que ce soit, par un ou plusieurs employeurs, ne peut être pratiquée qu'après une tentative de conciliation devant la juridiction compétente du domicile du débiteur* ».

dans une procédure d'exception d'inconstitutionnalité tendant à voir la Haute juridiction déclarer inconstitutionnelle un procès-verbal de non conciliation pour violation du droit de la défense.[95]

4.1.1.2 La Médiation Facultative

En règle générale, le préliminaire de la conciliation n'est pas obligatoire dans certaines matières, au sens de l'article 494 du code des procédures.

Ainsi, dans les matières civile et commerciale,[96] le juge chargé de la mise en état n'est pas astreint à l'obligation de concilier les parties.

En outre, en matière de litige entre coopérateurs ou entre un ou plusieurs coopérateurs et la société coopérative,[97] la conciliation n'est pas obligatoire non plus.

Par ailleurs, nonobstant la récurrence des conflits fonciers et domaniaux, la saisine des tribunaux de conciliation est facultative.[98]

Aux termes de l'article 26 de la loi, les tribunaux de conciliation couvrent tout le territoire national. Un tribunal de conciliation est créé par arrondissement et par commune. Il est saisi par voie de requête.

En cas de succès, la procédure de conciliation aboutit à un procès-verbal. Ensuite, l'original et les pièces à l'appui sont immédiatement transmis au tribunal de première instance pour homologation. Ce n'est qu'après cette homologation que le procès-verbal de conciliation a la force exécutoire d'un jugement passé en force de chose jugée.

La procédure devant les tribunaux de conciliation suit les étapes ci-après (Fig. 5) :

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[95] Voy. Décision DCC 06-092 du 03 août 2006 de la Cour Constitutionnelle du Bénin.

[96] Aux termes de l'article 754 du code des procédures, le juge chargé de la mise en état peut « convoquer les parties, leurs conseils, leurs représentants ou mandataires aussi souvent qu'il le juge nécessaire, leur faire toutes communications utiles, leur adresser des injonctions, procéder à leur conciliation ... » (nous avons souligné).

[97] Art. 117 Acte uniforme relatif au droit des sociétés coopératives : « tout litige entre coopérateurs ou entre un ou plusieurs coopérateurs et la société coopérative relève de la juridiction compétente. Ce litige peut également être soumis à la médiation, à la conciliation ou à l'arbitrage ». Aux termes de l'article 118 du même Acte uniforme, les sociétés coopératives, leurs unions, fédérations, confédérations ou réseaux soumis aux dispositions du présent Acte uniforme peuvent créer en leur sein des organes d'arbitrage, de conciliation et de médiation, en conformité avec les dispositions de l'Acte uniforme relatif au droit de l'arbitrage et du droit international de l'arbitrage, de la conciliation et de la médiation.

[98] Art. 26 al. 3 de la loi portant organisation judiciaire *op. cit.* Aux termes de l'arrêt n 84-19/CJ/CT du 04 février 2005 rendu par la Chambre judiciaire de la Cour suprême, il ressort ce qui suit : « attendu que si sous l'empire du décret du 3 décembre 1931, la tentative de conciliation était obligatoire, la loi d'organisation judiciaire du 9 décembre 1964 en son article 12 l'a rendue facultative ».

- *requête ou plainte par l'une des parties ;*
- *enregistrement et fixation de la date d'audience ;*
- *convocation des parties ;*
- *tenue de l'audience : débats contradictoires ;*
- *déplacement sur les lieux litigieux en cas de nécessité ;*
- *établissement d'un procès-verbal constatant la fin de la tentative de conciliation :*
  - *procès-verbal de conciliation en cas d'accord des parties ;*
  - *procès-verbal de non conciliation en cas d'échec de la tentative de conciliation.*

Fig. 5 Procédure de médiation devant les tribunaux de conciliation (Source : MCA Bénin, Etude sur la Politique et l'Administration foncières, 15/01/2009)

La durée d'une conciliation devant ce tribunal n'est pas fixée par la loi. Mais, il peut arriver que l'issue de la conciliation soit, de façon unanime, confirmée[99] à toute hauteur de la procédure. C'est la preuve de l'importance du rôle joué par ce tribunal. Ce rôle est d'autant plus important que les déclarations faites devant un tribunal de conciliation peuvent être considérées comme motif de droit[100] pour faire échec à un grief de contradiction de motif.

4.1.2 La Médiation Administrative

Les services de médiation institués par la loi constituent pour certaines administrations, des activités principales (section 4.1.2.1) et pour d'autres, des activités accessoires (section 4.1.2.2.).

[99] Suivant l'arrêt n 95-21/CJ-CT rendu par la Chambre judiciaire de la Cour Suprême du Bénin, le procès-verbal de conciliation établi suit à la requête du 25 janvier 1975 par laquelle le tribunal de conciliation d'Abomey-Calavi a été saisi d'une instance en contestation de droit de propriété portant sur un champ de culture sis à Kpanroun, district rural d'Abomey-Calavi, a été confirmé par le Tribunal de première instance de Cotonou, la Cour d'appel de Cotonou et la Cour suprême du Bénin. Il en est également ainsi dans l'arrêt n 2002-06/CJ/CT du 27 mai 2005 rendu par la Chambre judiciaire de la Cour suprême.

[100] Voy. Arrêt de la Chambre judiciaire de la Cour suprême du Bénin n 93-06/CJ-CT du 01 juin 2007, affaire AZA Sèdonouffo c/AZA ALOUNKOUNTO Mahinou, AZA Emile, VODOUHE Christophe.

4.1.2.1 Service Public Principal

L'expérience du Médiateur de la République constitue une première au Bénin en ce qu'elle consiste à offrir uniquement des services de médiation.

Conformément à son rapport d'activités 2013 présenté à Porto-Novo en février 2014, le Médiateur de la République a été saisi à son siège et à sa délégation à Parakou, au cours de l'année 2013, de 248 recours, traités à hauteur de 86,7 %, soit 215 recours traités sur la période. Ces recours sont relatifs au litige domanial, à la carrière des agents, aux créances des entreprises privées sur l'Etat et à des demandes d'intervention gracieuse du Médiateur de la République.

En ce qui concerne les directions et inspections du travail, elles sont compétentes, aux termes de l'article 108 du code du travail, en cas de « *contestations relatives à l'électorat, à l'éligibilité des délégués du personnel ainsi qu'à la régularité des opérations électorales . . .* ».[101] Elles sont également compétentes pour le règlement amiable des litiges individuels du travail.[102] A cet effet, il ressort des statistiques de 2012 que, sur 1 159 plaintes individuelles enregistrées, 256 procès-verbaux de règlement amiable sont établis et 291 procès-verbaux de non-conciliation.

Les procès-verbaux de conciliation, totale ou partielle, sont immédiatement transmis par l'Inspecteur du travail au président du tribunal des affaires sociales qui y appose la formule exécutoire. L'exécution du procès-verbal est ensuite poursuivie comme celle d'un jugement.

Dans le cas des procès-verbaux de non conciliation signés des parties, sauf défaillance de ces dernières, ils sont transmis au président du tribunal des affaires sociales compétent pour qu'il soit procédé conformément aux dispositions des articles 243 et suivants du code du travail.

Mais, à côté de ces cas d'offre principale de médiation, certaines administrations sont appelées à privilégier le règlement amiable des conflits par voie de médiation.

4.1.2.2 Service Public Accessoire

Certaines administrations offrent accessoirement, des services de médiation. Afin que ces services n'occupent en permanence le personnel, il a été mis en place des comités élargis à d'autres administrations, pour certains.

Il s'agit de la Commission de conciliation de la DGID[103] et l'organisme de gestion collective institué par la loi.[104]

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[101] La loi n 98-004 du 27 janvier 1998 portant code du travail en République du Bénin.

[102] Aux termes de l'article 238, tout litige individuel du travail qui survient au sein de l'entreprise ou de l'établissement [. . .], **est obligatoirement soumis**, avant toute saisine du tribunal de travail, à l'inspecteur du travail pour tentative de règlement amiable.

[103] Direction Générale des Impôts et des Domaines.

[104] Loi n 2005-30 du 05 avril 2006 relative à la protection du droit d'auteur et des droits voisins en République du Bénin.

La commission de conciliation de la DGID, installée courant novembre 2014, est créée par le Code général des impôts[105] pour le règlement amiable des cas de contestation des *déclarations prévues à l'article 86 dudit Code.*

Suivant la procédure prévue à cet effet, le contribuable est cité par simple avis recommandé ou par voie administrative devant la commission de conciliation qui est compétente pour tous les biens situés ou immatriculés au Bénin. Cette citation est interruptive de prescription. Les contribuables intéressés sont convoqués un mois avant la date de la réunion. Aux termes de l'article 412 du code, ils sont invités à se faire entendre ou à faire parvenir leurs observations écrites. Ils peuvent se faire assister par une personne de leur choix ou désigner un mandataire dûment habilité. L'article 413 du même code dispose que « *si l'accord ne peut s'établir entre l'Administration et les parties ou si ces dernières ne comparaissent pas ou ne se sont pas fait représenter ou n'ont pas fait parvenir leurs observations écrites, la commission émet un avis qui est notifié par lettre recommandée ou par voie administrative* ». Dans le délai d'un mois, à compter de la notification de l'avis de la commission instituée par l'article 411, l'Administration et les parties peuvent saisir d'une requête en expertise la juridiction civile dans le ressort de laquelle les biens sont situés.

En ce qui concerne l'organisme de gestion collective instauré par la loi relative à la protection du droit d'auteur et des droits voisins en République du Bénin, il est compétent pour connaître des contestations nées de l'exécution des contrats de reproduction, d'édition, de représentation et d'exécution en public des œuvres littéraires, artistiques et des créations protégées par les droits voisins.

Les statistiques relatives à la pratique de ces types de médiation révèleront le fonctionnement de ces organes.

4.2 L'Offre de Médiation d'Initiative Personnelle

Certains services de médiation ne sont pas régis par la loi. Ces services sont fondés sur le consentement des parties non contraire cependant, à la loi. Ainsi, malgré l'institution des tribunaux de conciliation dans les communes et les arrondissements du Bénin pour le règlement, entre autres, des conflits fonciers et domaniaux, les autorités traditionnelles et administratives ne cessent d'être sollicitées pour faire office de médiateur. Ce type de médiation est légitimé par la position sociale de l'autorité. Un autre type de médiation pour lequel le consentement des parties est nécessaire pour le légitimer relève de l'initiative personnelle de certaines structures de droit privé.

[105]Cf. art. 86, d. du code général des impôts du Bénin dans sa version de 2012 : « *En cas de contestation sur les déclarations prévues aux alinéas précédents, il est procédé à la conciliation prévue par les articles 410 et suivants du présent Code* ».

On constate que le type de médiation pratiqué par les autorités locales et administratives (section 4.2.1.) est différent de celui qui est pratiqué par lesdites structures privées (section 4.2.2.).

4.2.1 La Médiation Effectuée par les Autorités

La médiation effectuée par les autorités administratives se distingue de celle pratiquée par les autorités traditionnelles en raison de son formalisme. Cependant, elles ont en commun de n'être pas codifiées.

Il y a donc lieu de distinguer la médiation effectuée par les autorités traditionnelles (section 4.2.1.1.) de celle dirigée par les autorités administratives (section 4.2.1.2.).

4.2.1.1 Les Autorités Traditionnelles

La pratique de la médiation traditionnelle est caractérisée par la spontanéité du processus et le choix désintéressé des acteurs.

Conformément au rapport de l'étude sur les techniques endogènes de médiation au Bénin,[106] à chaque niveau de la stratification sociale se trouvent des personnes, des dispositions pour intervenir le plus vite possible dans les conflits. Chaque groupe socio professionnel ou chaque "classe" de la communauté est intégré dans un circuit de gestion des conflits à l'amiable et de voie supérieure qui pourrait départager.

Le graphique qui suit décrit le cycle de gestion et de remontée des conflits au sein du royaume (Fig. 6) :

Les étapes de la médiation, telles que décrites par le rapport de l'étude sur les techniques endogènes de médiation au Bénin, se présentent comme suit :

- l'écoute attentive des protagonistes abordés séparément ou de leurs proches pour la compréhension des motifs de conflit et le recueil des desiderata ;
- la confrontation, la concertation et la conciliation des parties ;
- la matérialisation de l'accord retrouvé et enfin, un mécanisme de suivi pour préserver les acquis.

Ce type de médiation, habituellement non formaliste, peut être amélioré de manière à tenir une statistique des conflits.

[106] Le Médiateur de la République, « Rapport de l'étude sur les techniques endogènes de médiation au Bénin dans les aires culturelles *Fon*, *Nago* et *Dendi* », *op. cit.*

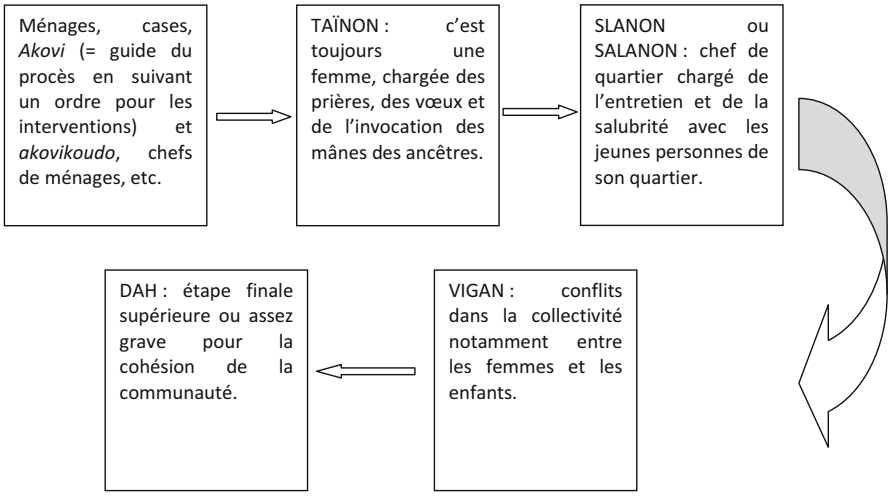

Fig. 6 Cycle de gestion et de remontée des conflits au sein d'un royaume (Source : Le Médiateur de la République, « Rapport de l'étude sur les techniques endogènes de médiation au Bénin dans les aires culturelles *Fon*, *Nago* et *Dendi* », sept.-oct. 2012)

4.2.1.2 Les Autorités Administratives

L'étude sur les techniques endogènes de médiation au Bénin,[107] rapporte qu'en marge de leurs fonctions administratives, les préfets des départements, les maires et les chefs d'arrondissement sont très sollicités pour jouer la médiation pour des agents en difficulté, soit sur le plan professionnel, soit sur le plan familial et même dans le domaine judiciaire.

Plusieurs enquêtes auraient témoigné que « *le maire et les chefs d'arrondissement gèrent beaucoup de conflits à leur niveau. S'il y a un consensus, un engagement est pris en présence du maire et signé par les deux parties* ».

Ladite étude rapporte que ces formes de médiation, non formelle, témoignent d'un besoin crucial de médiation que les tribunaux de conciliation n'ont pas encore comblé. Les gens ne veulent pas ou ne peuvent pas aller devant les tribunaux.

Il convient de noter que, de même que la médiation traditionnelle, la médiation effectuée par certaines autorités administratives permet :

- le dénouement rapide du conflit favorisant la mise en valeur des périmètres concernés ;
- le gain de temps et d'argent ;
- la concorde et la paix sociales entre les parties en litige par la préservation des relations interpersonnelles ;

[107] Le Médiateur de la République, « Rapport de l'étude sur les techniques endogènes de médiation au Bénin dans les aires culturelles *Fon*, *Nago* et *Dendi* », *op. cit.*

- le respect scrupuleux des coutumes puisqu'elles sont directement appliquées à la base et reconnues par tous.

Cependant, ces avantages relevés par l'étude sur la politique et l'administration foncières,[108] sont suivis des faiblesses suivantes :

- l'absence de l'autorité de la chose jugée. Ainsi, les parties peuvent à tout moment, saisir les juridictions compétentes aux mêmes fins que lors de la conciliation ;
- l'inexistence de la force exécutoire des conclusions des organes de conciliation lesquelles demeurent de simples recommandations et d'appels à la sagesse ;
- le consentement et l'obéissance de la partie devant subir l'exécution desdites sentences sont indispensables ; etc.

Néanmoins, le développement des centres privés, créés à l'initiative des associations professionnelles, a permis d'instaurer un mécanisme respectant des principes d'égalité et de transparence.

4.2.2 Les Centres Privés de Médiation

J. Denis Bélisle, Directeur exécutif du CCI,[109] a déclaré : « *Dans les économies en développement et les pays émergents, les centres de médiation et d'arbitrage ont un rôle capital à jouer pour aider leur pays à intégrer l'économie mondiale. Non seulement ils proposent des méthodes pour résoudre les litiges qui surgissent inévitablement lors d'échanges commerciaux mais promeuvent également des moyens de prévenir les différends commerciaux et fournissent un appui direct aux milieux d'affaires au niveau opérationnel* ».

Le Centre du Commerce International (CCI)[110] a initié dans les années 2006, des rencontres biennales des centres d'arbitrage et de médiation dans le but de promouvoir leur développement. Ces rencontres qui se tenaient à Chamonix en France, ont vu la participation de deux centres béninois d'arbitrage et de médiation. Il s'agit du Centre d'Arbitrage, de Médiation et de Conciliation de la Chambre de Commerce et d'Industrie du Bénin (CAMeC-CCIB) et de la Chambre de Conciliation et d'Arbitrage de l'Association Interprofessionnelle du Coton (CCA-AIC).

Ces centres mettent à la disposition des parties litigantes un règlement de procédure dont la mise en œuvre est subordonnée à l'existence d'une convention de médiation préexistante ou négociée après la naissance du conflit.

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[108] MCA Bénin, Etude sur la Politique et l'Administration foncières, *op. cit.*

[109] Centre du Commerce International. Cf. http://www.forumducommerce.org/Premiere-reunion-des-responsables-du-reglement-des-differends-commerciaux/?langtype=1036.

[110] Pour plus d'information, contactez Jean-François Bourque, Conseiller juridique principal du CCI à l'adresse : bourque@intracen.org.

Avant d'aborder les principales dispositions de ce règlement de procédure (section 4.2.2.2), il sera développé le fondement conventionnel de ce type de médiation (section 4.2.2.1).

4.2.2.1 Le Fondement Conventionnel de la Médiation

Les centres privés de médiation sont compétents pour connaître du règlement des conflits par voie de médiation en vertu d'une convention de médiation. Cette convention est libellée de manière à, d'une part, manifester clairement la volonté des parties de recourir à la médiation pour le règlement de leur conflit, et d'autre part, désigner le centre ou l'organe dont le règlement de médiation régira la procédure de médiation.

Mais, ces centres peuvent être différents en fonction de leurs domaines d'intervention. La CCA, par exemple, est compétente pour le règlement des conflits qui pourraient survenir à l'occasion des contrats conclus dans le cadre des activités de la filière coton. Par contre, le CAMeC-CCIB est compétent pour les litiges qui pourraient survenir dans le cadre des affaires et des relations économiques. Le modèle de clause type de médiation du CAMeC-CCIB se présente comme suit :

« *En cas de différend résultant du présent contrat ou s'y rapportant, les parties conviennent de se soumettre au règlement de médiation ou de conciliation du CAMeC-CCIB. Si le différend n'a pas été réglé dans le cadre dudit règlement dans un délai de 45 jours à compter de l'approbation du médiateur ou du conciliateur par les parties, ou dans tout autre délai dont les parties peuvent convenir par écrit, le différend sera définitivement tranché par voie d'arbitrage suivant le règlement d'arbitrage du CAMeC-CCIB par un ou plusieurs arbitres désignés conformément audit règlement* ».

Ainsi, la médiation privée ou conventionnelle tire sa légitimité de la force obligatoire des contrats[111] au sens de l'article 1134 du code civil en l'absence d'une loi spécifique sur la médiation. Ce défaut de loi pose le problème de crédibilité et

[111]Dans la sentence arbitrale du 13 mai 2014 rendue par la Cour Commune de Justice et d'Arbitrage de l'OHADA entre la Société Benin Control SA et l'Etat du Bénin, les parties ont contractuellement prévu une conciliation préalable en cas de différend avant de saisir la juridiction arbitrale du Traité OHADA. Mais, ladite sentence n'a évoqué nulle part que le tribunal arbitral a été saisi après échec de ce préalable de conciliation, de sorte qu'elle ne rapporte même pas que les parties aient pris l'initiative de cette conciliation préalable. Donc, la mention de conciliation préalable ne joue pas de façon automatique. Sur le fondement du principe dispositif, les arbitres, comme les juges étatiques, sont liés par les points qui leur sont soumis par les parties litigantes. Ainsi, la conciliation préalable prévue au contrat n'a de force obligatoire que si les parties l'ont soulevée. Il n'en est pas ainsi en matière sociale ou bien, dans le cas où c'est la loi qui prescrit le préliminaire de conciliation. Dans ce cas, la Chambre judiciaire de la Cour suprême a décidé par un arrêt du 19 juin 1964 ce qui suit : « La décision d'évocation, sous réserve de renvoi devant le premier juge pour accomplissement de la tentative de conciliation, omise en première instance, ne viole pas l'article 127 de la loi du 15 Décembre 1952 portant Code du Travail Outre-Mer, qui exige à peine de nullité le préliminaire de conciliation. En effet la nullité prononcée n'en laisse pas moins subsister les conclusions des parties et le Tribunal d'Appel, en vertu de l'effet évolutif de l'appel, a le devoir de vider le litige ».

de transparence auxquelles les centres de médiation sont confrontés. Alors, outre l'existence d'une convention de médiation mentionnant le choix du centre pour le règlement du conflit, il faut également mettre à la disposition des parties litigantes, un règlement de médiation ou règlement de procédure.

4.2.2.2 L'Importance d'un Règlement de Procédure

Le règlement de procédure permet d'assurer le contrôle de la médiation.

Ainsi, en fonction des règlements, on distingue des règles relatives :

- à la désignation des conciliateurs ;
- aux qualités requises des conciliateurs ;
- à la saisine du conciliateur ;
- à l'instruction de la cause ;
- à la confidentialité ;
- au procès-verbal de conciliation.

Il convient de noter que la procédure de médiation se déroule sous la responsabilité juridique d'un comité.

Contrairement aux textes régissant la médiation ci-dessus étudiés, ces règlements ont pris soin de définir ce qu'il convient d'entendre, dans le cas d'espèce, par « conciliation ».[112]

Malgré ces dispositions communes à tous les centres, ces derniers se distinguent encore par certaines particularités.

En effet, alors qu'à la CCA, la liste des conciliateurs est établie suite à leur élection par les acteurs de ladite filière, celle du CAMeC-CCIB est établie suite à une procédure de sélection sur dossier. Les conciliateurs de ce centre ont une compétence nationale alors que les conciliateurs de la filière coton ont une compétence limitée à leur commune.

Cependant, la pratique de la médiation dans ces centres ne connaît pas encore le développement attendu. Alors que la CCA connaît à peine trois (section 3) dossiers de conciliation par an, le CAMeC-CCIB ne dépasse pas encore cinq (section 5) pour la même période. Pourtant, l'engorgement des juridictions béninoises continue d'être un casse-tête quotidien. Certainement, il faudra un jour penser à disposer d'une loi spécifique sur la médiation. De toute façon, la question n'est pas banalisée au niveau de l'OHADA qui entend doter les Etats Parties d'un acte uniforme portant sur la médiation. Avec le développement de la technologie de l'information et de la communication, ce nouvel acte devra tenir compte des nouvelles pratiques de la médiation en l'occurrence, de la *cyberjustice* en médiation ou de la *cybermédiation*.

[112] Art. 7 Règlement d'arbitrage et de conciliation de la CCA : « *la conciliation est la procédure à laquelle un tiers s'interpose entre deux parties en litige en vue de faciliter, en dehors de toute procédure judiciaire, le règlement amiable des différends d'ordre contractuel [. . .]* ».

5 La Cyberjustice en Médiation

La *cyberjustice* est définie « *comme l'utilisation de la technologie à des fins procédurales et d'administration de la preuve (dépôt électronique, signification électronique, gestion électronique des documents, télé-comparution, etc.). La cyber-justice s'entend donc de l'intégration des technologies de l'information et de la communication dans les processus de résolution des conflits – judiciaire ou extrajudiciaire* ».[113]

Epineuse résume le champ de la *cyberjustice* « *à l'ensemble des solutions technologiques, en particulier informatiques, qui contribuent ou peuvent concourir à l'administration de la justice dans l'espoir d'améliorer la qualité du service rendu au justiciable, quand ce n'est pas plus directement la nécessité de voir baisser son coût* ».[114]

La *cyberjustice* a donc pour objectif principal, l'amélioration de la qualité du service rendu au justiciable par l'utilisation des technologies de l'information et de la communication.

Après avoir exploré les applications potentielles de la *cyberjustice* en médiation au Bénin (section 5.1.), seront abordés ensuite, les secteurs d'activités pouvant intéresser la *cyberjustice* en matière de médiation (section 5.2.) et les questions de compatibilité entre la *cyberjustice* et les principes traditionnels de la médiation (section 5.3.).

5.1 Les Applications Potentielles de la Cyberjustice en Matière de Médiation

La *cyberjustice* est une nouvelle pratique de la médiation pour le règlement amiable des conflits. Elle se distingue des autres types de médiation par l'utilisation des technologies de l'information et de la communication dans la procédure de médiation. L'utilisation de ce type de médiation suppose donc de disposer de solutions technologiques, en particulier informatiques.

Malgré les efforts du Gouvernement en vue d'assurer la couverture Internet du Bénin, le taux de pénétration Internet au Bénin,[115] à juin 2012, est de 4,08 %,

[113] N. VERMEYS, « La cyberjustice et l'OHADA : des outils virtuels pour une avancée réelle », Actes du Forum OHADA Canada publié au JADA, numéro spécial, mars-avril 2013, in F. ONANA ETOUNDI, La cyberjustice au service des opérateurs africains et arabes : état du contentieux civil africain, XXXIIIème Congrès de l'IDEF.

[114] H. Epineuse, Cyberjustice : quand le Canada anticipe le procès du futur, publié le 12 fév. 2012, sur site Internet : http://www.ihej.org/vers-une-cyberjustice-quand-le-canada-anticipe-le-proces-du-futur/.

[115] Cf. site Internet : http://www.agenceecofin.com/gestion-publique/2601-8601-le-benin-veut-devenir-le-quartier-numerique-de-l-afrique-de-l-ouest.

chiffre jugé faible au regard de son ambition[116] d'être le quartier numérique de l'Afrique d'ici à l'an 2015. Cette vision du Gouvernement du Bénin repose sur deux piliers, le *e-gouvernement* et le *e-business*, desquels il ne ressort pas expressément une ambition particulière pour le *e-justice*. Cependant, dans la composante *e-administration*, on pourrait imaginer qu'elle inclut une révolution numérique du secteur de la justice.

Dans cette perspective, en matière de médiation, la *cyberjustice* pourrait être introduite dans les habitudes des acteurs de la justice pour la résolution des problèmes de disponibilité, de déplacement ou de distance.

En effet, le processus de médiation nécessitant la présence des parties et du médiateur, il arrive que des réunions soient avortées pour raisons de disponibilité. Alors, la *cyberjustice* pourrait contribuer à contourner ce genre d'obstacle dans la mesure où aucun des acteurs impliqués dans la résolution du conflit n'aura plus à se déplacer ou bien à faire une longue distance pour participer aux réunions de médiation.

Par ailleurs, la *cyberjustice* pourrait contribuer au développement des différents types de médiation étudiés ci-avant à l'exception de la médiation traditionnelle laquelle tire sa raison d'être des principes traditionnels de règlement amiable des conflits.

5.2 Les Secteurs d'Activités Pouvant Intéresser la Cyberjustice

La médiation a été utilisée pour le règlement des litiges en matière notamment de conflits fonciers ou domaniaux, de conflits individuels de travail, de conflits en matière de divorce pour faute, de conflits commerciaux, de conflits portant sur le coton graine et de conflits opposant les administrés à l'administration.

Ces différents types de conflits ont mis en relation divers secteurs d'activités économiques.

La médiation des litiges portant sur le coton graine oppose parfois les producteurs de coton, du secteur primaire, aux sociétés d'égrenage, du secteur secondaire.

La médiation des litiges commerciaux oppose souvent les opérateurs économiques du secteur tertiaire entre-eux.

Mais, on observe une propension du secteur tertiaire, c'est-à-dire *le service,*[117] sur les autres secteurs.

[116]Document de Politique et de Stratégie du secteur des Télécommunications, des TIC et de la Poste, 2008, p. 12.

[117]Un **service** est une prestation qui consiste en « la mise à disposition d'une capacité technique ou intellectuelle » ou en « la fourniture d'un travail directement utile pour l'usager, sans transformation de matière ». Cf. site : http://fr.wikipedia.org/wiki/Service_(%C3%A9conomie).

Sur le plan économique, il est noté que les perspectives de croissance économique du Bénin « *sont évaluées à 4,9 % en 2014 et à 5,3 % en 2015, grâce à la vigueur du secteur agricole et du secteur portuaire, [. . .]* ».[118]

Le secteur agricole sous-entend le sous-secteur coton auquel appartient la grande partie des industries béninoises. Pourrait-on alors privilégier un secteur d'activités économiques par rapport à un autre ? On note une interdépendance entre les divers secteurs économiques au Bénin dans le cadre de certaines activités économiques, notamment le coton.

Néanmoins, en considération des initiatives endogènes de règlement amiable des conflits portées par le CAMeC-CCIB et la CCA-AIC, la *cyberjustice* pourrait s'intégrer plus facilement aux secteurs primaire et tertiaire.

5.3 Quelques Réflexions sur la Compatibilité entre la Cyberjustice et les Principes Traditionnels de la Médiation

La médiation est régie par des principes dont, notamment, « *la neutralité, l'impartialité, l'indépendance et la confidentialité* ».[119] La question est de savoir si la *cyberjustice* est compatible avec ces principes.

La neutralité, l'impartialité et l'indépendance sont des principes qui s'appliquent uniquement au médiateur qui doit s'assurer de les observer. Mais, la confidentialité implique tant la responsabilité du Médiateur que celle des parties. Ces principes n'ont pas changé en fonction des moyens technologiques employés. Cependant, ils ne sont pas compatibles avec la *cyberjustice*.

En effet, en considérant la médiation en ligne, le médiateur peut-il garantir aux parties qu'elles ont disposé de la même durée de temps pour répondre à une question ? L'impartialité du médiateur peut donc être mise en doute dans le cadre de la *cyberjustice*. On peut en conclure que les principes traditionnels de la médiation ne peuvent être compatibles avec la *cyberjustice* qu'autant que cette dernière permettra aux parties de les contrôler, de vérifier leur application ou leur respect.

6 Conclusion

Le rapport sur la médiation au Bénin dans une approche transfrontalière et judiciaire n'a certainement pas répondu à toutes les préoccupations. Mais, une chose est certaine : un cadre juridique spécifique à la médiation fait défaut au Bénin.

[118] http://www.africaneconomicoutlook.org/fr/pays/afrique-de-louest/benin/.

[119] M. BACQUE, Les cinq étapes incontournables du processus de médiation, in séminaire de formation des formateurs sur la médiation, Ouagadougou, les 27–31 octobre 2008.

La plupart des textes étudiés, à l'exception des instruments juridiques internationaux incitant à la médiation, bien que permettant le recours à la médiation/conciliation pour le règlement amiable des conflits, ne sont pas sous-tendus par un règlement de procédure pour assurer l'efficacité du fonctionnement du mécanisme.

Les législations en matière de médiation ont, à juste titre, réglementé l'introduction de la procédure, le nombre et la nomination des médiateurs, la conduite de la médiation, la communication entre le médiateur et les parties, la confidentialité de la médiation, la recevabilité des éléments de preuve dans une autre procédure, la suspension de la prescription, la fin de la procédure de médiation et la force exécutoire de l'accord issu de la médiation.

En définitive, le développement de la médiation semble encore mitigé en raison de la banalisation de la procédure. Les juridictions étatiques semblent pressées de passer à la formation de jugement du conflit alors que les parties, en médiation extrajudiciaire, doutent de l'efficacité de la médiation.

Si des dispositions ne sont pas prises très rapidement pour réglementer la médiation/conciliation, le passage au numérique, c'est-à-dire, à la *cyberjustice* en matière de médiation peut s'avérer difficile à réaliser.

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Exploring the Emerging Legal Landscape for Crossborder Mediation in Brazil: Where New Horizons Encounter Old Expectations

Maristela Basso and Fabrício Bertini Pasquot Polido

Abstract This chapter analyses general issues dealing with crossborder mediation in Brazil and recent development of mediation as an important extrajudicial mechanism for dispute resolution at domestic level. Amongst the main features, the chapter explores the ongoing legislative trends for the implementation of a specific regulation of mediation in Brazil, modernization of ADRs and the growing role of the mediation as a complementary tool for access to justice and allocation of dispute settlement in civil and commercial matters. The authors describe the existing ADRs and the basis of mediation in Brazil, as well as roles of parties, mediators and procedural matters. The last part of the chapter highlights the current legal patterns for crossborder mediation, its applicable notions and recognition and enforcement related issues.

Fabrício Bertini Pasquot Polido, LL.B. (São Paulo/Tübingen), LL.M. (Turin), JSD in International Law, University of São Paulo - USP. Member of the UFMG Interdisciplinary Law Clinic on Arbitration and Mediation Law in Governmental and Corporate Matters

M. Basso (✉)
International and Comparative Law Department, Law School – University of São Paulo – USP, Sao Paulo, Brazil
e-mail: mbasso@usp.br

F.B.P. Polido
International Law, Department of Public Law, Law School – Federal University of Minas Gerais – UFMG, Belo Horizonte, Minas Gerais, Brazil
e-mail: fpolido@ufmg.br

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1 The Existing Situation of ADRs in Brazil

Brazil is a civil law country, with mainly codified law, but as a result of increasing common law influence, it appears to be gradually moving towards a hybrid system.[1] Brazil is a federal republic. States have their own laws and courts. Civil, commercial and procedural law related matters fall within the reach of the legislative powers of National Congress, thus at federal level. As in several countries in the world, Brazilian state is committed to the protection of interests and fundamental rights of its citizens (nationals and foreigners residing in the country). Its domestic courts are mostly empowered to the settlement of disputes that may arise in the context of societal relations. As experienced along the twentieth century, however, state courts (and the judiciary system as part of the State powers) appear not to have a full structure to handle all lawsuits brought by citizens. Brazilian courts still face several challenges in terms of access to justice, being constantly overloaded and unable to provide parties in dispute with proper assistance in a timely way.[2]

From an operational standpoint, due to the considerable backlog of proceedings in state courts, a first instance state court having jurisdiction over civil or commercial law related disputes may take several years to render a decision on the merits in Brazil. At the end of the proceedings, for instance, parties may feel that the contentious rights and interests at stake simply lose their main significance. In such discouraging scenario, parties may wait years and years, under stressful conditions, in order to obtain an unsatisfactory decision that does not settle their disputes.

In order to guarantee that people have effective and less costly access to justice, governmental and judicial bodies have been making efforts to stimulate extrajudicial or amicable mechanisms for dispute resolution in Brazil. Access to justice is more than the access to courts. It is about effectively ensuring that persons have access

[1] Amongst several examples, the concept of binding precedents has been introduced by the Constitutional Amendment No. 45 of 2004 (known as "Emenda da Reforma do Judiciario", an Amendment establishing the Judiciary Reform in Brazil), which implemented significant structural changes in the domestic justice system. See Theodoro Júnior (2005), Alguns reflexos da Emenda Constitucional n.45, de 08.12.2004, sobre o Processo Civil. *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais*. 47. 75–94.

[2] According to recent research conducted by L.G. Cunha (2013), What Kind of Judiciary Do We Want? The Access to Justice in Brazil. *Direito GV Research Paper Series No. 77*. (August 2, 2013). Available at SSRN: http://ssrn.com/abstract=2335147, Brazilian citizens had a low trust in the Judiciary, considering time consuming proceedings, difficulties to use the system as such, and the claimed absence of fairness and proper skills of the judges. However, the great majority of the citizens interviewed for purposes of her research said that they would go to state courts in case of experiencing conflicts. According to the author, this whole landscape appears to be even more contradictory, since one may consider that only 40 % of the respondents would accept resorting to alternative dispute resolution methods. The majority of them would prefer to have their disputes adjudicated by judges.

to non-adjudicatory dispute resolution systems as well, allowing them to solve their own disputes with the proper assistance and legitimacy.[3]

Even though Brazilian Federal Constitution of 1988 expressly foresees jurisdiction and adjudicatory powers to courts to settle disputes, it does not prevent parties from resorting to other dispute resolution mechanisms, hereinafter referred to as ADRs. This rationale underlying dispute settlement has been also endorsed by the Brazilian Constitution's preamble, which states that "*the Brazilian society is founded on the social harmony and it is committed to the peaceful settlement of controversies*". A proper constitutional approach to resolution of private related disputes may not be only focused on state authorities' adjudication power, but rather on the diversity of societal structures as a whole, amongst which one may remark arbitration and mediation entities, family conciliation committees, judicial networks and further civil society organizations dealing with issues on access to justice.

Despite of the broad spectrum of the existing dispute resolution mechanisms, not all types of disputes can be submitted to ADRs' procedures in Brazil. According to Brazilian law, alternative dispute resolution methods are applicable only in cases where the subject matter encompasses disposable rights. Otherwise, if the dispute falls within the scope of public policy and other legal constraints, such as patrimonial or personal rights with a strong linkage to mandatory rules, parties have no other option than to resort to national courts.

The three main ADRs' mechanisms used in Brazil have been (i) arbitration; (ii) conciliation; and (iii) mediation. This topic deals generally with two existing methods outside judicial courts, namely arbitration and conciliation. Mediation will be further analyzed in subsequent topics.

Arbitration has been a very widespread ADR in Brazil, mostly governed by the Arbitration Act of 1996 (Law no. 9.307/96) and the New York Convention on Recognition and Enforcement of Foreign Awards of 1958.[4] In Brazil, arbitration is regulated so as to allow the parties to resort to such mechanism either when the dispute arises or at the time of the conclusion of a contract entered into by and

[3]This matter has been tackled by several different stakeholders and user groups, such as in the past editions of the meetings of the Conciliation-Mediation Task-Force held under the auspices of the National Council of Justice (CNJ) within the framework of the Access to Justice Movement. http://www.cnj.jus.br/programas-de-a-a-z/acesso-a-justica/conciliacao. Accessed: Nov 27 2014. Other alike initiatives are sponsored by State Courts of Appeals around the country, the Brazilian Arbitration Committee – CBar – and CONIMA. Universities are also leading scholar and clinic law related initiatives, such as the Interdisciplinary Law Clinic on Arbitration and Mediation in Governmental and Corporate Matters – ILAM/LIAM and Programme on Access to Justice of the Federal University of Minas Gerais – UFMG; the Study Group on Dispute Resolution Mechanisms – NEMESC, of the University of Sao Paulo; and Working Group on Arbitration, Mediation and Negotiation of the University of Brasilia.

[4]The 1958 New York Convention was Incorporated into Brazilian legal system by the Decree no. 4,311/2002. One should observe that the recent adoption of the Vienna Convention On Contracts for The International Sale of Goods (1980) – the CISG-further expands a such arbitration friendly environment in Brazil. On March 4th, 2013, Brazil adhered to CISG, which entered into force to Brazil as of April 1, 2014 (see Decree 8,327, as of October 16 2014).

between the parties, through an arbitration agreement. In contrast to mediation and conciliation, arbitration has been characterized as an adjudicatory dispute settlement mechanism in Brazil, resulting in a final and binding award.

According to Brazilian laws, parties are bound by the decision rendered by an arbitrator or arbitral tribunal. However, arbitrators and arbitral tribunals lack coercive powers, since enforcement related matters are of exclusive prerogative of the State. It is worth mentioning that Brazil has been consolidating a solid arbitration system in the last decades. Parties (natural persons and legal entities) may choose an independent arbitrator or a specific arbitration center to submit their disputes.[5]

Another widespread ADR is conciliation. To a certain extent, it is very similar to mediation, since both of them aim at reaching an understanding between the parties by means a dialogical process. However, conciliation has the scope of literally reaching an agreement, while the primary scope of mediation was, according to some Brazilian scholars, to deconstruct a controversy between parties.[6] In addition, in Brazil, conciliation is even component of the adversarial system. Article 227 of Brazilian Civil Procedure Code establishes conciliation as a pre-requisite for the trial.[7] Conciliation appears to be very effective in conflicts where there is no significant relationship in the past or ongoing between the parties, so that they preferably seek a spot or facilitated agreement to settle the dispute.[8]

Conciliation and mediation do not hold a closer relationship to mediation than the judiciary itself. In other words, all of them – arbitration, conciliation and mediation – have been subject to separate legal regimes in Brazil. On one hand, mediation can also be treated as a first step towards a settlement agreement between the parties, being arbitration the second step in case the first one fails, for example. This is frequently the case in commercial arbitration, in which the parties usually insert a multi-tier dispute resolution clause in the contract providing that the parties shall resort to mediation first, and, if it is not satisfactory and the conflict remains, then

[5] An extensive literature on arbitration has been produced in Brazil in the last years. See, for instance, Carmona, C. A. (2009). *Arbitragem e Processo*: *Um Comentário à Lei 9.307/96*, 3rd ed. (p. 35) São Paulo: Atlas; Baptista, L. O. (2011) *Arbitragem Comercial Internacional*. São Paulo: Lex Magister; Basso, M., & Polido, F. B. P. (2013). *Arbitragem Comercial*: *Princípios*, *Instituições e Procedimentos*. Prática no CAM-CCBC. Marcial Pons: Sao Paulo.

[6] Almeida, T. (2009). Mediação e conciliação: dois paradigmas distintos, duas práticas diversas. In P. B. Casella & L. M. Souza (Ed.). *Mediação de conflitos*. (p. 93). Belo Horizonte: Fórum. One should contend, however, that also in mediation, parties should be guided to reach a settlement, as this would be the targeted outcome of the ADR. See item 7 below.

[7] Brazilian Code of Civil Procedure encompasses the duty of judges, where proceedings have been already initiated, to schedule a conciliation hearing. Pursuant to its Art. 277, "*The judge will appoint a Conciliation Hearing to be held within thirty days*, *citing the defendant with at least ten days in advance and under the warning referred to in § 2 of this Art*., *determining the attendance of the parties*. [. . .]"

[8] Braga Neto, A. (2011). A Mediação de Conflitos e as suas diferenças com a Conciliação, p.2.

they shall resort to arbitration.[9] In this modality of clause, mediation can also serve as a preliminary step in which the dispute is settled in an objective manner, saving time and extra costs if an arbitration procedure is needed.

2 The Basis for Mediation in Brazil

Mediation is an ADR mechanism designed to solve conflicts in an amicable way, aiming at settling an existing dispute between parties, so that a previous communication channel is restored and preserved. In other words, the main feature of mediation relies not merely on the absence of decision-making power (or the adjudicatory power) of the mediator (as a third neutral party), but rather on the actual participation of the diverging parties as actors building a mutually based solution for their dispute. In view of that, the mediation's most relevant outcome is the settlement agreement, which can be recognized and enforced by the courts during proceedings or even out of them.

In Brazil, mediation is accepted both outside and within court proceedings handled by state courts. With regard to court-annexed or judicial mediation, it is governed mainly by the Resolution no. 125 of the National Council of Justice (hereinafter referred to as "CNJ") Annex III of Resolution no. 125 provides that every State Court shall offer an adequate structure and a coordinated staff – meaning a list of available mediators – for mediation schemas. The main purpose of the rule is allow parties in a dispute to resort previously to this ADR mechanism before entering into litigation. It is worth mentioning, however, that this policy is still under implementation in Brazil, as Resolution no. 125 dates from November, 2010. Indeed, not all domestic courts in Brazil are able to offer an optimal structure for ensuring a proper environment to judicial mediation.[10] Nonetheless, mediation can be applied not only previously, but also during a court dispute when designated by the judge, in which case the judge himself can act as a mediator or he can assign this task to a certified mediator.[11]

Also, as analyzed in detail in this chapter, mediation is accepted to a very reasonable extent outside the Judiciary Branch. The existing regulations and legal framework for mediation in Brazil provide parties with a certain degree of freedom to choose the mediator or the mediation institution, where basic requirements are fulfilled.

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[9]Rodante, Marcelo V. M. (2012). Cláusula Arbitral Escalonada. http://www.cbar.org.br/PDF/Artigo_2_Clausula_Escalonada_out-2012.pdf. Accessed 17 Out 2014.

[10]Andrighi, Fátima Nancy. (2012). Novas perspectivas para Mediação no Brasil. *Revista de Arbitragem e Mediação*. vol. 34, 289.

[11]*Manual de Mediação Judicial* (2011). 4.ed. Brasilia. Ministry of Justice/CNJ. http://www.cnj.jus.br/images/programas/conciliacao/manual_mediacao_judicial_4ed.pdf. Accessed 27 Nov 2014.

Apart from this initial overview of the conceptual basis of mediation in Brazil, there has been an increase in the demand for this type of ADR within the country. According to a study carried by the Development and Research Board of CONIMA – the National Council of the Mediation and Arbitration Institutions – there was an increase in the number of arbitral proceedings of 62,07 % in 2005, while mediation proceedings increased 60 %, in relation to the years of 2000–2004. Another important observation was the fact that, in the State of São Paulo, where an significant number of arbitration and mediation centers are based, there was an increase of 44,85 % of arbitral proceedings, whilst mediation proceedings increased 111,77 %.[12] Until the year of 2004, there were executed an average of 18 arbitrations and 34 mediations per center in Brazil, whereas in 2005 these numbers increased, respectively, to 29 and 55.

2.1 The Notion of Mediation

Brazilian scholars and practitioners often contend that mediation is conceived as an alternative mechanism for dispute settlement preventing parties from engaging on litigation before courts or allow them to resolve a dispute without the recourse to domestic courts. Through mediation, "*a competent and neutral person*, *the mediator*, *applies particular techniques of listening*, *analysis and definition of interests*, *which helps with the communication between the parties*, *aiming to achieve more flexible positions towards effective solutions options for/by the parties*".[13]

The participation of the mediator during the negotiations is focused on exploring arguments, opinions and ideas expressed by the parties in mediation proceedings and guiding them to a decision accordingly. Therefore, mediators do not exercise any decision-making or adjudicatory powers, differently from judges or arbitrators, for example.

Furthermore, mediation may be based on a set of meetings organized in neutral premises, in which attending parties submit their opinions and arguments. Meetings can be held, if necessary, in private sections, with each party acting on their own behalf or accompanied by their attorneys and in confidentiality.[14] Scripilliti, Marcos S.P. (2004). Aspectos relevantes da Mediação. *Revista de Arbitragem e Mediação*, Vol. 1, 317.

[12]Couto, Jeanlise Velloso. O Mito da Estatística da Arbitragem e da Mediação. http://www.camaraimobiliaria.com.br/artigo131006b.htm. Accessed 27 Nov 2014.

[13]Zapparolli, C.R. (2003). A experiência pacificadora da mediação: uma alternativa contemporânea para a implementação da cidadania e da justiça. In M. E. Muszkat, *Mediação de Conflitos*: *Pacificando e Prevenindo a Violência* (pp. 52–53). São Paulo: Summus.

[14]Zapparolli, C.R. (2003). A experiência pacificadora da mediação: uma alternativa contemporânea para a implementação da cidadania e da justiça. In M. E. Muszkat, *Mediação de Conflitos*: *Pacificando e Prevenindo a Violência* (pp. 52–53). São Paulo: Summus.

In addition, in Brazil, agreements concluded through mediation have the same legal status as a contract signed between parties. Therefore, in case one party does not comply with his obligations, the other one can pursue litigation, even though this is not the goal of mediation. In that case, both parties can resort again to mediation.

In fact, the existing notions of mediation in Brazil are currently applied to the settlement of disputes in several contexts, such as in the fields of commercial law, family law, labor law issues, as well as in consumer relations. As mentioned before, general limits to the freedom of parties to submit a particular controversy to mediation are those generally imposed by mandatory rules, public policy and further legal constraints such as patrimonial rights not disposable by the parties.[15]

Moreover, in Brazil, there are features underlying mediation considered as basic principles, which are listed hereinafter: (i) voluntary character, namely the fact that the parties are not bound or forced to participate, even if mediation is court-mandated during judicial proceedings; (ii) secrecy and confidentiality; and (iii) neutrality and impartiality of the mediator.[16]

Nevertheless, it is worth mentioning that in Brazil, mediation is not a prerequisite or a preliminary procedural step to civil or commercial litigation, even though the national judge can propose it within the course of legal proceedings. Therefore, parties are able to pursue a resolution of the dispute directly by means of adjudicatory mechanisms before Brazilian courts. In most cases, when there is a choice for mediation, it means that the parties are actually looking for an easier, faster and lower-cost solution than those envisaged in litigation before state courts.

2.2 The Existing Legal Basis for Mediation in Brazil

At this point, one could notice that although Brazil lacks a specific legislation for mediation (such as a statute or regulation), this dispute resolution mechanism finds a proper legal framework at domestic level. As prior mentioned, Brazilian Constitution states, in its preamble, that "*the democratic State is committed*, *in municipal and international orders*, *with the peaceful settlement of controversies*". Therefore, it is consistent the idea that mediation, as an alternative dispute resolution method, apart from judicial adjudication, possesses a sound legal basis in the 1988 Constitution, in particular by the general reading of the principle of the peaceful resolution of disputes.

[15]For instance, Art. 3 of the 2014 Draft Bill on Mediation Act expressly excludes from judicial and extrajudicial mediation the following subject-matters eventually in disputes: I- filiation, adoption, parental rights and invalidation of marriage; II- incapacitation; III- bankruptcy and corporate restructuring related proceedings.

[16]Scripilliti 2004. p.317.

As analyzed in item 2, mediation found a very adaptable and friendly environment for institutional development in Brazil. It appears to have encountered its own way for effectiveness and acceptance, without necessarily being subject to a specific statute or regulation. This is particularly true if we rely on the argument based on private autonomy in connection with empowerment of the parties to reach an agreement for settlement of a certain dispute, opposed to the absence of a decision-making power by the mediator himself. Mediators, in turn, cannot impose a decision to the parties in dispute, because the method itself is intended to be dialogic. The principle of legality - set forth in Art. 5, II, of the Brazilian Constitution[17] only requires previous and categorical legal permission for enforcement of any authoritative dispute resolution method. In adjudicatory methods, such as in judicial litigation and arbitration, enforcement issues are addressed by statutory and constitutional law provisions.[18] Mediation and conciliation, however, are based on amicable dispute resolution procedures, as referred to by the International Chamber of Commerce (ICC). These mechanisms are strongly connected with the parties' willingness to reach the settlement. Also, a third party functioning as mediator or conciliator is neutral, having no decision-making power, which lies only in the parties' hands.[19]

As to the current status of Brazilian legal patterns, the only modality of ADR which is prescribed by law is the one that imposes the attempt of conciliation before a trial by courts in small claims proceedings, handled by the so-called "*Juizados Especiais*" (Small Claims Courts). Such courts have been established by Law no. 9,099/95, which is the statute governing Small Claim Procedures for civil and criminal matters in Brazil.[20]

In a broad sense, mediation is governed by the provisions of the Civil Code (CC) concerning Law of Contracts, thus falling with the scope of general private law. A mediation agreement has been considered a contract entered into and by the parties, therefore subject to the basic requirements dealing with existence, validity and efficacy of contractual transactions under Brazilian Law.

In order for a dispute to be subject to contractual mediation, it must comply with three requirements, according to Art. 104 of the Brazilian Civil Code: (i) the parties must be legally capable of contracting; (ii) the object of the dispute or controversy must be lawful, feasible, determined or determinable; and (iii) the agreement must be made/drafted in a prescribed form, where it is required, or in any other form not forbidden by law. For this reason, mediation is also governed by the principles of Law of Contracts in Brazil, mainly party autonomy; the need of consent; *pacta*

[17] Art. 5, II: *No one shall be requested to do or not to do anything except by the law*.

[18] For the basic constitutional framework dealing with powers, jurisdictional and organizational issues of the Brazilian justice system, see Brazilian Constitution, Title IV, Chapter III (Art. 92–135); for arbitration and arbitral institutions, see Law n° 9.307/96 (Brazilian Arbitration Act of 1996).

[19] Assmar, Gabriela. (2009). Legislação Brasileira no que tange a Mediação de Conflitos. http://www.mediare.com.br/08artigos_09legislacaobrasileira.html#_edn15. Accessed 27 Nov 2014.

[20] http://www.planalto.gov.br/ccivil_03/leis/l9099.htm. Accessed 27 Nov 2014.

sunt servanda and *rebus* sic *stantibus*, good faith and the relativity of the contract's effects. Accordingly, the subject matter of the contract must also be capable of being settled by the parties.

From the standpoint of the legislative process, however, there has been a movement amongst representatives in National Congress towards the adoption of a specific statute regulating mediation. Since 1998, sparse bills were proposed by representatives from different parties, with few or null progress in terms of legislative activity.[21] More recently, however, following the trends of modernization of the Arbitration Act of 1996, a new Bill on Mediation Act (the "2014 Draft Bill on Mediation Act") was presented in the Congress aiming at establishing a proper unified statute on mediation in Brazil, including mediation for settlement of disputes involving entities of Public Administration.[22] In addition, the current draft of the Bill of the New Brazilian Code of Civil Procedure[23] devotes specific provisions to settlement mechanisms based on conciliation and mediation.[24]

In addition to those recent law-making related initiatives, several judicial bodies and auxiliary entities have been supporting programmes and actions to stimulate

[21]A first draft bill establishing a "legal regime for mediation as a method of prevention and consensual resolution of disputes", submitted by Ms. Zulaiê Cobra (PL no. 4827 as of 1998), was followed by another substitutive presented by Mr. Pedro Simon to the Brazilian Senate in 2002, with support of the Brazilian Institute of Procedural Law (PLC no. 94/2002). The original 1998 Draft was withhold for more than six years at the Brazilian House of Representatives, with no significant progress. Subsequently, in 2011, another Draft was proposed in the Brazilian Senate, aiming at "establishing and governing the use of mediation as an instrument for prevention and consensual resolution of disputes" (PL no. 517/2011, submitted by Ms. Ricardo Ferraço). Since 2013, two other bills have been under scrutiny of the Senate, namely Bill on Extrajudicial Act (PL no. 405/2013, authored by Mr. Renan Calheiros) and Draft Bill on Mediation (PL no. 434/2013, authored by Mr. Jose Pimentel), but both were stayed in view of the legislative procedure involving the 2011 Draft, currently converted into the 2014 Draft Bill on Mediation Act.

[22]The 2014 Draft Bill on Mediation Act refers to the PL no. 7169/2014 ("Mediation between parties as a alternative method of dispute resolution and settlement of disputes in the field of Public Administration") Available at: http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=606627. Accessed 27 Nov 2014.

[23]PL no. 8.046/2010. Full text in: http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=831805. Accessed 27 Nov 2014.

[24]*Art. 144 – Every court may establish divisions for conciliation and mediation or adopt programs designed to encourage self-settlement of disputes.*

§1 - Conciliation and mediation are underlined by principles of independence, neutrality, autonomy, confidentiality, orality and informality.

§2 - Confidentiality extends to all information gathered during the procedure, which content shall not be used for a purpose different from the one expressly prescribed by the parties.

§3 - Due to duty of confidentiality,inherent to their function, the conciliator, mediator and their team are not authorized to disclose or testify about facts or elements arising from conciliation or mediation.

(...)

Art. 153 – The provisions of this Section do not exclude other forms of extrajudicial conciliation and mediation linked to institutional bodies or held by through independent professionals.

mediation as a dispute settlement mechanism in Brazil, such as the Federal Supreme Court (STF), the National Council of Justice (CNJ) and the Ministry of Justice.[25]

Based on the rationale underlying the goal of access to justice, Brazilian CNJ enacted Resolution no. 125/2010 on the main rationale that it is up to the Justice system to design public policies to properly address the amicable settlement of disputes between Brazilian citizens.[26] Critically to this view, one may observe that access to justice cannot be simply treated as "access to courts". Access to the courts is not simply about parties having the opportunity to submit their claims before state courts, but it is indeed about an effective inclusion of individuals, families, companies and groups to adjudicatory or alternative dispute resolution mechanisms, in a sense that their disputes can be solved through hetero-settlement or self-settlement. Mediation falls justly within the scope of this inclusive rationale.

In sum, the main objectives of CNJ Resolution no. 125/2010 are the following: (i) to disseminate the culture of social pacification and stimulate the quality of self-settlement proceedings; (ii) to encourage state courts to plan and organize broad programmes and initiatives targeting self-settlement; and (iii) to reinforce the role of the CNJ as an authoritative judicial body that may implement public policies connected to the adjudication of disputes and allocation of justice.

Perhaps the major concerns regarding the critical regulatory deficit for mediation in Brazil have been strongly associated to the issue on effectiveness of the mechanism (when compared with arbitration); duties of mediators; interaction between mediation and judicial proceedings and to what extent mediators are bound to neutrality and confidentiality. For these reasons, several specialists, users and stakeholders are supporting the approval of the 2014 Bill on Mediation, currently under scrutiny by the National Congress. It is expected, hence, that this steps will represent further development of ADRs specific regulation in Brazil.

2.3 Areas of the Law Covered by Mediation

In Brazil, mediation has been associated with an amicable or consensual settlement mechanism (both at extrajudicial and judicial level) covering disputes in a range of fields of law – private (civil and commercial) and public matters.

Mediation in civil matters is related to a method in which parties involved in a given conflict, legally represented or not, at any time, agree in naming a third party, impartial, with no adjudicatory power, who assists them to reach an agreement by themselves, without resorting to the national court. Thus, private disputes (contractually formalized or not), which in general have financial interests, may be widely covered by mediation. In such cases, they are known as civil or contractual mediation in Brazil.

[25]Project "Movimento pela Conciliação" headed by the National Council of Justice. http://www.cnj.gov.br. Accessed 27 Nov 2014.

[26]Full text available at: http://www.cnj.jus.br/images/stories/docs_cnj/resolucao/arquivo_integral_republicacao_resolucao_n_125.pdf. Accessed 27 Nov 2014.

Within the scope of mediation in civil law matters, an important type, broadly adopted in Brazil, is family mediation. Through this mechanism, a couple may ask for or accept the confidential intervention of a third person (the mediator), objective and skilled, so parties can reach themselves the basis for a lasting and mutually acceptable agreement. In the field of family law, mediation has a restorative purpose, meaning that parties involved in family relations are capable to seek to reorganize their personal lives when confronted with disputes. In addition, one could contend that family mediation is important to the development of society, since it pursuits social pacification through communicability. Its essence appears to be strongly linked or permeated by human affectivity in parental relationships, among parents, children, husband and wife.[27]

It is important to remark, however, that not all the family law related disputes are subject to mediation (judicial or extrajudicial) in Brazil. Apart from imperative rules dealing with protection of minors and vulnerable, such as those of Civil Code of 2002, the 2014 Draft Bill on Mediation expressly excludes from mediation subject-matters a category of personal rights and family law, namely filiation, parental rights, adoption, invalidation of marriage and incapacitation.[28]

In Brazil, mediation has been also a dispute resolution mechanism adopted for commercial and corporate matters. In the absence of a specific legislation governing mediation in Brazil, even for commercial matters, again the Resolution no. 125 of the CNJ,[29] the Model Rules on Mediation issued by the CONIMA[30] and rules and regulations provided by the mediation centers will be applicable pursuant to the parties' consent. Concerning corporate mediations, thus, it is most likely that the parties will choose a specialized institution, being business companies searching for a technical and financially secure solution for the disputes that may arise. As to 2005 one of the most well known institutions dealing with commercial arbitration and mediation in Brazil, the Arbitration and Mediation Centre of the Chamber of Commerce Brazil-Canada (CAM-CCBC) stated that mediation in the field of business transactions was still incipient and not a usual option among the companies.[31]

Nevertheless, in the last years, commercial mediation has definitely grown. The multi-tier clause (according to which, in case of dispute, parties shall first attempt to resort to mediation and go to arbitration if mediation fails) illustrates a typical use of this mechanism in a business context, since such a clause is widely deemed

[27]Ruiz, I. A. (2005). A mediação e o direito de família. *Revista de Arbitragem e Mediação*. vol. 6. p. 75.

[28]See Art. 3, §3 of the 2014 Draft Bill on Mediation Act.

[29]Note 19 supra.

[30]Regulação Modelo de Mediação. http://www.conima.org.br/regula_modmed. Accessed 17 Nov 2014.

[31]Carvalho, A. L. S. (2005). O Centro de Arbitragem e Mediação da CCBC. http://www.ccbc.org.br/arbitragem.asp?subcategoria=artigos&codnoticia=41. Accessed 17 Nov 2014.

as an economically feasible formula, through a specialized institution dealing with non-judicial dispute settlement mechanism.[32]

There is a clear symbiosis between arbitration and mediation. In some cases, one may consider that mediation simply is quite inefficient for the settlement of certain disputes, given that a good arbitrator will not necessarily be a good mediator.[33] Several alternatives for professional training and capacity building in field of mediation have been encouraged in Brazil. Together with the approval of the Bill on Mediation, said initiatives can be decisive for the development of a more attractive commercial environment for investors and companies. Likewise, those initiatives may bring more certainty both regarding the adequate handling of mediation proceedings as well as enforcement mechanisms.

Mediation does not cover only private and corporate law related matters in Brazil. There are other fields, such like criminal law and labor law in which mediation has been used as settlement mechanism. The so-called "criminal mediation" is associated to the Restorative Justice, a paradigm that emerged around the 1970s.[34] In Brazil this movement pleading for mediation in criminal matters seems to be gradually encouraged after the Reform of the Judiciary Branch in 2004. However, there are still some areas to be developed. Restorative Justice aims at repairing the damage caused to the victims and to society, leaving punishment as secondary. Criminal mediation consists in a flexible and informal process, in which a neutral third party – the mediator – acts with the purpose of solving a conflict created by a crime.[35]

Labour law mediation, in turn, is mainly governed by Decree no. 1,572/1995.[36] The neutral third party can be chosen by the parties in dispute or, in absence of

[32]Carmona, C. A. (2013). The Path to Mediation. In Latin Lawyer. Volume 12, Issue 8. http://latinlawyer.com/features/article/45643/the-path-mediation/. Accessed 17 Nov 2014.

[33]Carmona, C. A. (2013). The Path to Mediation. In Latin Lawyer. Volume 12, Issue 8. http://latinlawyer.com/features/article/45643/the-path-mediation/. Accessed 17 Nov 2014.

[34]We adopt here the idea of restorative justice as one of the contemporary approaches to access to justice movement, focused on the needs of the victims and the offenders, as well as the community of stakeholders in criminal prosecution systems, instead of being a mechanism simply grounded on abstract legal principles or on punishment of offenders. In the context of criminal mediation, victims may take an active role in the process, while offenders are encouraged to take responsibility for their actions, by apologizing, returning stolen money, or offering community service. For this debate in Brazil, see Andre Gomma de Azevedo, O Componente de Mediação Vítima-Ofensor na Justiça Restaurativa: Uma Breve Apresentação de uma Inovação Epistemológica na Autocomposição Penal. In: Slakmon, C., R. De Vitto, e R. Gomes Pinto (ed), *Justiça Restaurativa*. (2005), p. 135. Avaiable at: http://zh.unrol.org/files/Justice_Pub_Restorative%20Justice.pdf#page=135. Accessed 27 Nov 2014.

[35]Felipe, A. P. F., Veloso, L. Mediação Penal – um novo modelo de Justiça. *International Interdisciplinary Congress of Social and Humanity Studies*. Niterói. RJ: ANINTER-SH/ PPGSD-UFF, 3 to 6 Sept. 2012.

[36]Full text avaiable at: http://www.planalto.gov.br/ccivil_03/decreto/1995/D1572.htm. Accessed 17 Nov 2014.

choice, the mediator shall be appointed by the Ministry of Labor.[37] The Ministry of Labour keeps an official list of the professionals who are able to exercise the role of mediator in collective negotiations.

3 The Mediation Agreement/the Agreement to Submit Disputed to Mediation

According to Brazilian practice, parties may resort to mediation as an initial step in certain legal proceedings, in which case the agreement may have validity and will be binding for purposes of the proceedings. On the other hand, if the agreement is reached outside of court proceedings, parties must fulfill it by using their consent expressed in the mediation process, so that, if one party does not comply with the agreement the other can resort to judicial remedies in order to make the non-complying party to perform his/her obligations under the agreement.

As already described above, mediation is subject to the provisions of the Brazilian Civil Code (CC) concerning contracts, since the mediation agreement has the same legal status of a valid contract entered into by the parties. Accordingly, mediation is also bound by the principles of contractual law in Brazil, namely party autonomy, need of consent, *pacta sunt servanda* and *rebus* sic *stantibus*, good faith and the relativity of effects of the contract.

Therefore, if there is an agreement to submit the dispute to mediation, it is reasonable to assume that such agreement reflects the legitimate expectations of the parties to resort to mediation if a dispute arises between them. In light of the aforementioned, a party to a mediation agreement will be requested to take part in mediation, being subject to legal remedies available under Brazilian law to compel the refusing party to initiate the mediation process.

However, having in mind the still modest practice of Brazil in the field of mediation, state courts have not reached a substantive case law on issues related to validity and enforcement of mediation agreements. In fact, it is challenging to find high courts rulings on the effects of a mediation agreement in relation to parties in dispute or dealing with enforceability issues.

In case there is a breach of the agreement, which was concluded by the parties to submit their dispute to mediation, provisions related to the contractual liability set forth in the Brazilian Civil Code of 2002 may be applicable. Provisions concerning the breach of the contracts are set forth in Arts. 389 to 393 of the Brazilian Civil Code. In this regard, the contractual liability arises from a breach of an obligation

[37] Art. 2 of Decree no. 1,572/1995.

provided for in the contract or in the law itself.[38] According to Art. 389 of the CC,[39] the consequence of a breach has to be bourne by the debtor, who is then liable for the damages suffered by the other party – the creditor. Such damages comprise the material damages and the lost profits. However, in case of an act of God ('*caso fortuito*') or *force majeure*, Art. 393 of the CC[40] exempts the debtor from liability for the damages resulting from those events, unless otherwise agreed.[41]

It is noteworthy that, in case of a multi-tier clause providing for mediation prior to arbitration, there is some doctrinal and jurisprudential discussion regarding the consequences of the choice of a party to resort to arbitration even before attempting to mediate. In this sense, one author sustains that it would be an excessive formalism to even raise a nullity claim due to the fact that a party initiated an arbitration proceeding without having previously submitted the dispute to mediation or to another dispute resolution method that was chosen by the parties.[42] That is so because one of the parties may reckon that the relationship with the other party deteriorated up to an irreparable extent, so that mediation would be fruitless and thus justifying the direct recourse to arbitration.

Other author remarks that comparative case law leads towards the understanding that the multi-tier clause has contractual effects,[43], meaning that, if mediation prior to arbitration is simply disregarded, no consequence other than a contractual breach (subject to damages) will arise. Such clauses may also embrace procedural effects. This would prevent arbitrators or national judges from analyzing the dispute and, therefore, parties would have to go for mediation or conciliation prior to arbitral or judicial proceedings. Such aspect would reinforce a procedural related feature of a mediation agreement (e.g. its own admissibility) vis-à-vis the *ex post* development of a adjudicatory proceedings.[44]

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[38] Varela, J. de M. A. (1997). *Direito das Obrigações*. Vol. I. (pp. 473). Coimbra: Ed. Almedina.

[39] Art. 389 of the CC: "*If an obligation is not fulfilled*, *the debtor is liable for the damages*, *plus the interests and the monetary correction in accordance with the official index regularly established*, *and the lawyer's fees*."

[40] Art. 393, caput of the CC: "*The debtor is not liable for the damages resulting from an act of God* ('*caso fortuito*') *or force majeure*, *unless otherwise expressly agreed*."

[41] Apart from the scope of contractual liability rules, the general rule for torts in Brazil is broad enough to cover situations in which one of the parties to the mediation agreement subsequently incurs in a wrongful act towards the other party. This is the case of acts falling within the scope of Arts. 186 and 927 of Brazilian Civil Code (Art. 186 thus reads: "Anyone who, by voluntary action or omission, negligence or recklessness, violates a third party's right or the laws, thereby causing damage, even if only moral, commits an unlawful act").

[42] Carmona, C. A. (2009). *Arbitragem e Processo*: *Um Comentário à Lei 9.307/96*, 3.ed. (p. 35) São Paulo: Atlas.

[43] Lemes, S. M. F. (2005). Clausula escalonada, mediação e arbitragem. *Resultado – Revista de Mediação e Arbitragem Empresarial*, 10, p. 42.

[44] Idem, p.42.

Finally, it is important to highlight that though the parties are bound by their agreement to submit the dispute to mediation, there is no obligation whatsoever to reach an agreement at the end of the mediation proceedings.

3.1 Prescription and the Limitation Periods

In Brazil, as explained above, a mediation agreement has similar effects of a contract between parties and, therefore, falls within the scope of the rules of Law of Contracts as set forth by the Civil Code.

For this reason, when an agreement is concluded between the parties aiming at settling a dispute by extrajudicial mediation, one could consider that the prescription period will be counted normally as from the moment that the subject-matter of the dispute is deemed as opposable right. This is based on the fact that extrajudicial mediation does not have a specific regulation in Brazil, thus leading to the conclusion that general legal regime of the Brazilian Civil Code is applicable to those issues.

However, the 2014 Draft Bill on the Mediation Act (PL no. 7169/2014),[45] currently under scrutiny of the Brazilian House of Representatives, includes a specific provision, on its Art. 17, §3, determining that interruption of prescription shall occur when the Term of Mediation is signed by the parties.

On the other hand, it seems reasonable that for court-annexed mediation, there is no need for a specific provision concerning prescription periods, since the prescription is already stayed during proceedings. Suspension occurs at the time when the lawsuit is brought before the courts.

4 The Mediator

The mediator, according to the CONIMA's Code of Conduct for Mediators, "*is a neutral third party who*, *through a set of specific procedures*, *assists the parties to identify their interests and conflicts at stake*, *building joint alternative solutions aiming at the achievement of consensus and the drafting of an agreement*".[46]

Amongst its many duties, the mediator is responsible for fostering a suitable atmosphere to both parties in order to allow them to present their reasons and explicit their goals in connection with the dispute. In other words, the mediator assists parties to seek a proper solution for the case brought up by the parties themselves.

[45]Full version of the Bill and information on its current legislative status are available at: http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=606627. Accessed 17 Nov 2014.

[46]See the Code of Conduct for Mediators, by CONIMA. Available at: http://www.conima.org.br/codigo_etica_med. Accessed 27 Nov 2014.

The mediator is also responsible for preparing the mediation and for conducting all meetings, in private or with all the parties involved. In the end, he/she is also responsible for the arrangements of the agreement, if the result of mediation was overall satisfactory.

In addition, one should remark that the mediator is subject to a duty of non-disclosure that can be generally inferred from good faith principle entailing every contractual transaction, as provided by Law of Contracts. Likewise, most of the rules on mediation adopted by mediation centers in Brazil and CONIMA Model Rules provisions include clauses imposing the duty of disclosure to the mediator.

In Brazil, any capable, adult and neutral person can serve as mediator. Scholars contend that basic requirements must be fulfilled, such as skill, suitability, perception, benevolence, and self-control.[47] These requirements are also provided by the draft of Bill on Mediation Act.[48]

Furthermore, the Model Rules on Mediation, adopted by CONIMA, also endorse said basic requirements. According to Model Rules, it is sufficient that the mediator does not have a direct relationship with any of the parties and that he does not participate in any type of arbitration procedure or litigation involving the same dispute.[49]

The choice of a mediator, however, is linked to the domain in which the mediation is held; for example, if it is a judicial (court-annexed) mediation or if it is managed by a specialized mediation center.

The mediator or the institution/entity chosen to mediate the conflict, in case of out-of-court mediation, shall be appointed by the parties themselves. If they appoint a mediation center or chamber of a certain institution, parties can choose individuals functioning as mediators from a list of mediators provided by that institution; or, in some cases, the entities themselves can appoint the mediator. This technique is equally is line with the provisions of CONIMA Model Rules on Mediation and the rules on mediation of the further entities dealing with arbitration and mediation in Brazil, such as the CAM-CCBC[50] and FIESP Arbitration and Mediation Center.[51]

[47] Zapparolli, C.R. (2003). A experiência pacificadora da mediação: uma alternativa contemporânea para a implementação da cidadania e da justiça. In M. E. Muszkat, *Mediação de Conflitos*: *Pacificando e Prevenindo a Violência* (pp. 52–53). São Paulo: Summus.

[48] Full text available at http://www.conjur.com.br/dl/anteprojeto-lei-mediacao.pdf. Accessed 17 Nov 2014.

[49] See Arts. 7 and 8. CONIMA Model Rules- Available at: http://www.conima.org.br/regula_modmed. Accessed 17 Out 2014.

[50] See Mediation Regulation, by CCBC. Available at: http://www.ccbc.org.br/default.asp? categoria = 5&id = 39. Accessed 17 Out 2014.

[51] <http://www.fiesp.com.br>

On the other hand, in the case of court-annexed mediation, the judge appoints the mediator or a list of mediators from which the parties must choose, according to the court of the main proceedings, the person serving as mediator.[52]

Furthermore, considering that in accordance with Art. 304 of Brazilian Code of Civil Procedure,[53] in litigation, parties can argue any impediments for the judge, it could be inferred that parties can also argue, at any time, impediments for a mediator siting in court-annexed mediation.[54] Brazilian Arbitration Act of 1996 also has specific provisions dealing with duty of disclosure and impediments, which can be deemed equally applicable to mediation by analogy:

> Art. 14 – Individuals somehow linked to the parties or to the submitted dispute, by any of the relationships resulting in the impediment or suspicion of Court members, are prevented from acting as arbitrators and become subject, as the case may be and to the applicable extent, to the same duties and responsibilities imposed on Court members by the Code of Civil Procedure.
>
> § 1 – An individual appointed to serve as arbitrator, before accepting the case, shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence".

5 The Process of Mediation in Brazil

As remarked above, and having in mind the nature and features of mediation in Brazil, a single statute/act might be desirable in order to unify the foundations of mediation and its principles within Brazilian legal system. In this sense, the adoption of a "mirror-alike" regime for mediation to be established in parallel with the existing regulation for arbitration in Brazil would be consistent with the current international and comparative legal practice in the field of ADRs. In addition, this common feature appears to be sensitive if compared to the arbitration boom in the past decades, especially after the enactment of the Arbitration Act of 1996 and the ratification of the 1958 New York Convention.

Currently, there is no specific statute or legislation regulating mediation in Brazil. As stated above, the 2014 Bill on Mediation Act (PL no. 7169/2014) pending for approval by the National Congress was designed to establish a comprehensive legal framework for mediation in the country, incorporating the existing international and national practices related to this ADR.

On the other hand, court-annexed mediation has been increasingly adopted in Brazil, as it exists on the grounds of main lower courts' regulations/resolutions. In

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[52]CNJ-MJ (2013), *Judicial Mediation Handbook*. 4.ed Brasilia: Ministry of Justice/CNJ. http://www.cnj.jus.br/images/programas/conciliacao/manual_mediacao_judicial_4ed.pdf. Accessed 17 Nov 2014.

[53]Art. 304: *Any of the parties may argue*, *by exception*, *absence of jurisdiction grounds* (*Art. 112*), *impediment* (*Art. 134*) *or suspicion* (*Art. 135*).

[54]This approach is followed by the 2014 Draft Bill on Mediation in Art.5.

the past years, the Courts of Appeals of the State of São Paulo and of Rio de Janeiro issued resolutions concerning court-annexed mediation.[55] In other cases, judicial mediation is also established on a contractual basis and further recognized by courts within civil or commercial proceedings.[56]

As previously mentioned, Resolution no. 125/10 of the CNJ aims at harmonizing the various resolutions adopted by different Courts of Appeals in Brazil concerning mediation and its procedure.[57] Accordingly, Resolution no. 125/10 can be regarded as a binding guideline to judicial mediation within the sphere of Judiciary branch. Therefore, state courts must comply with the relevant provisions of the Resolution.

In addition, there are some important features of mediation schemas. One of the leading Brazilian scholars in the field of ADRs, Kazuo Watanabe,[58] contends that judicial mediation and conciliation, in practice, have almost the same concrete operation and results in Brazil.[59] Conciliation is governed only in part by the Small Claims Procedure Act of 1995 (Law no. 9,099/95) and by the Code of Civil Procedure of 1973. Such provisions did not deal with mediation principles, thus Resolution CNJ no. 125/2010 shall apply also to conciliation.

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[55]For instance, Resolution no. 953/2005 of the Court of Appeals of State of Sao Paulo and Resolution no. 19/2009 of Court of Appeals of Rio de Janeiro. See 7.1 infra.

[56]For a comprehensive analysis on that issue, se Gabbay, D. M. (2011). *Mediação e Judiciário*: *Condições Necessárias para a institucionalização dos meios autocompositivos de solução de conflitos*. (pp. 40 et seq). Doctoral Thesis submitted to the Department of Civil and Criminal Procedure Law of the University of São Paulo. São Paulo: USP, 2011. Available at: www.teses.usp.br. Accessed 27 Nov 2014.

[57]"Resolution 125 of CNJ derived from the necessity of stimulating, supporting and disseminating the systematization and the improvement of the existing practices in the courts." CNJ-MJ (2013). *Handbook of Judicial Mediation*, 4ed. Brasilia: Ministry of Justice and National Council of Justice. Available at: <http://www.cnj.jus.br/images/programas/conciliacao/manual_mediacao_judicial_4ed.pdf>. Accessed 27 Nov 2014.

[58]Kazuo Watanabe is former Justice of the Court of Appeals of State of São Paulo – TJSP- and Associate Professor of the Law School of University of São Paulo (USP). He is considered one of leading specialists in Brazil discussing alternative dispute resolution methods in scholarly circles. Watanabe was also ahead of the implementation of a Programme on Conciliation of the Court of Appeals of State of São Paulo.

[59]"*Scholars contend that the negotiation is distinct from mediation and conciliation, as in negotiation there is no intervention from a third party, both parties seek for the solution of the conflict*; *in mediation and conciliation there is the interposition of a third party. Theoretically, I believe that it is possible to establish the following distinctions*: *in mediation, the third party is neutral and she attempts to forge the necessary conditions so that the parties may find the settlement, but it does not intervene in order to advance any proposition of a resolution*; *in conciliation, this would not happen, that is, the intervention of the third party is expected to interfere a little more in the attempt of obtaining a solution for the conflict, of appeasing the parties and, in that moment, the conciliator may suggest some solutions to the conflict at hand. However, in practice, the mediator offers some suggestion regarding the solution of the conflict. It would be a figure of mediator/conciliator*." Free translation from Watanabe, K. (Watanabe 2003). Modalidades de Mediação. In *Mediação*: *um projeto inovador*. Série Cadernos do CEJ. Vol. 2. Brasília: CJF, p.48-49. Available at: http://daleth.cjf.jus.br/revista/seriecadernos/vol22/artigo04.pdf. Accessed 27 Nov 2014.

In fact, this Resolution has a much broader scope of application, as it establishes public policies on the "adequate handling of a conflict of interests" (meaning generally that main ADR mechanisms coexist with judicial dispute settlement mechanisms). It covers conciliation and mediation, especially on the pre-procedural phase.[60] Despite the absence of a specific statute regulating mediation and its relevant procedure, one could sustain that judicial mediation (with regard to the pre-procedural phase) is evolving successfully in Brazil.[61]

In this sense, Resolution No. 125/2010 lists 8 (eight) principles and guarantees comprised in judicial mediation and conciliation procedures:

I – Confidentiality; **II** – Informed decision; **III** – Competence; **IV** - Impartiality; **V** – Independence and autonomy; **VI** – Respect to public policy and the existing laws; **VII** - Empowerment; **VIII** – Validation.[62]

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[60]It is so broad that the Resolution attempts to cover even criminal conciliation procedures.

Art. 7, § 3° of Resolution 125 states that: In the terms or Art. 73 of Law n° 9.099/95 and arts. 112 and 116 of Law 8.069/90, the so-called Units for Conciliation and Mediation in the Courts are expected to centralize and encourage programs dealing with criminal mediation or any other restorative related actions, provided that the basic principles and restorative alike procedures, such as those established by the Resolution n° 2002/12 of the United Nations Economic and Social Council (ECOSOC), are observed.

[61]To sum up, one should remark that the self-settlement system, as an important component of litigation planning, is evolving independently from a misguided approach that judicial systems only evolve through procedural reforms established by law-making initiatives." Critically, see Ministry of Justice (2013). *Handbook of Judicial Mediation*, 4th ed. Available at: <http://www.cnj.jus.br/images/programas/conciliacao/manual_mediacao_judicial_4ed.pdf>. Accessed 27 Nov 2014.

[62]According to Art. 1 of the Annex III of Resolution 125/2010, these are the fundamental principles governing the procedure of judicial conciliation and mediation: I – Confidentiality – the duty to keep secrecy about all the information obtained in mediation or conciliation session, except for expressed authorization from both parties, violation to public order or to the existing laws, one must not testify on the case, neither act as lawyer of the involved under any circumstance; II – Informed decision – the duty to keep those under one's jurisdiction fully informed about their rights and the factual context in which they are inserted; III – Competence – the duty to bear the proper skills which enable the conciliator/mediator to act before judicial proceedings, subject to training activities under the Resolution, and complying with retraining activities and continuous capacity building; IV – Impartiality – the duty to act with no favouritism, preference or prejudices, ensuring that the personal values and concepts will not interfere with the result of the settlement, encompassing the reality of the ones involved in the conflict and never accepting any sort of favour or gift; V – Independence and autonomy – the duty to act with freedom, without suffering any internal or external pressure, being allowed to refuse, to suspend or to interrupt the session if the conditions necessary for its proper development are absent, neither being forced to draft an illegal or an impracticable agreement; VI – Respect to public policy and to the existing laws – the duty to ensure that the agreement between the parties is not incompatible to public policy, neither contravene the existing laws; VII – Empowerment – the duty to stimulate parties in dispute in learning how they can properly solve future conflicts based on fairness as experienced in self-settlement; VIII – Validation – the duty to stimulate parties in perceiving themselves as human beings deserving attention and respect. See Resolution 125/10 CNJ – Annex III, Art. 1. Available at: http://www.cnj.jus.br/images/stories/docs_cnj/resolucao/arquivo_integral_republicacao_resolucao_n_125.pdf. Accessed 20 Nov 2014.

According to Brazilian laws, courts of appeals have power to enact their own regulations to deal with organizational issues in connection with proceedings over which they exercise jurisdiction. The majority of state courts around the country have not issued regulations establishing guiding principles for judicial mediation, although they have created Units for Conciliation and Mediation, as mandated by Resolution 125/2010 of CNJ. This is the case, for instance, of the court of appeals of the states of São Paulo (TJSP),[63] Minas Gerais (TJMG), Rio Grande do Sul (TJRS) and court of appeal of Distrito Federal (TJDF). Resolution no. 19/2009.[64] of the Court of Appeals of Rio de Janeiro (TJRJ), provides that mediators shall comply with the principles of voluntariness, ethics, good faith, confidentiality and competence[65]

Notwithstanding the various state courts' current practices related to judicial mediation, one may argue that the principles and guarantees established by Annex III of Resolution no. 125/2010 of the CNJ should entail guidelines and parameters for all state courts. Gradually, it is expected that such principles will be incorporated into the practice of all domestic courts when dealing with mediation.

With regard to extrajudicial (institutional or contractual) mediation, CONIMA Guidelines on Mediation[66] states that there are 10 (ten) basic principles underlying the relevant procedure, which are the following:

I – Voluntary character; **II** – Parties' empowerment, in line with the principle of party autonomy, provided that it does not contravene principles of public policy; **III** – Knowledge complementarity; **IV** – Mediator's credibility and impartiality; **V** – Mediator's skills, acquired by proper and permanent training; **VI** – Diligence in handlings; **VII** – Good faith and loyalty to the practices applied; **VIII** – Flexibility, clarity, concision and simplicity, both in the language and in procedures, aiming at the understanding and the needs of the market to which it is directed; **IX** – The possibility of ensuring legal certainty, as opposed

[63]Resolution no. 953/2005, Full text Available at: http://www.tjsp.jus.br/Download/Conciliacao/Apostila_Juizados_Especiais_Civeis.pdfAccessed Nov 27 2014

[64]It is very important to outline that this Resolution was made before the Resolution 125/2010 from CNJ.

[65]Art. 9, §4: When carrying out his or her functions, the mediator is subject to the compliance to the code of ethics, guided by the principles of voluntariness, ethics, good faith, confidentiality and competence, and can be requested to indemnify any eventual damages caused to the parties, being subject to cancellation of his certificate. The mediator is strictly forbidden from advising parties on legal issues, a prerogative that is exclusive to attorneys that eventually assist parties in the dispute. See TJRJ, Resolution 19/2009 - Court of Appeals of State of Rio de Janeiro. Available at: http://portaltj.tjrj.jus.br/documents/10136/7abcbf66-7116-4311-b31e-386c47730c76. Accessed 27 Nov 2014.

[66]See CONIMA - Conselho Nacional das Instituições de Arbitragem e Mediação. http://www.conima.org.br. Accessed 20 Nov 2014.

to disturbance and to losses that the controversies may generate in the social relations; and **X** – The confidentiality of the procedure[67].

5.1 Existing Legal Basis for the Development of the Procedure

Resolution no. 125/10 of the CNJ establishes a very general basis for the development of the mediation procedure. It provides 5 (five) rules guiding mediation procedure, in particular:

I – Information; **II** – Party autonomy; **III** – Absence of an obligation to reach a certain result; **IV** – Disconnection from the primary profession; and **V** – Understanding regarding the conciliation and the mediation.[68]

The Brazilian Code of Civil Procedure, by its turn, briefly touches the basis of the development of the conciliation procedure, such as established by Arts. 125, IV, and 277, § 1° and 331 of the CPC. In short, these provisions entrust Brazilian judges with a power to lead parties to conciliation during the course of the main proceedings.[69] Said provisions are very open, however, and do not go into details on

[67]See CONIMA Model Rules - http://www.conima.org.br/regula_modmed. Accessed 27 Nov 2014.

[68]On the rules dealing with conducts in conciliation/mediation, see Annex III of Resolution No,125/2010, particularly Art. 2. The guiding rules on conciliation refer to rules of conduct to be observed by the conciliators/mediators for the proper development of the procedure itself, allowing the direct participation of the parties until the settlement and also comprising the agreement eventually reached: I – Information – the duty to clarify parties about the working method to be employed, presenting it in a complete, clear and precise form, as well as to inform parties about the deontological principles referred in Chapter I, the rules of conduct and procedural steps; II – Party autonomy – the duty to respect the different opinions, ensuring that parties are able to reach a voluntary decision, and not a coercive one, with full freedom to make their own decisions during or at the end of the procedure, as well as to stay the mediation at any moment; III – Absence of obligation of result– the duty to not impose an agreement neither to make decisions for the parties; IV – Disconnection from the conciliator/mediator's main profession– the duty to clarify the parties that the mediator shall act in a entirely independent manner from its main profession, informing them that, where legal counselling or advice is necessary, a lawyer can be summoned to the session at stake, as long as agreed by the parties; V - Understanding regarding the conciliation and the mediation –duty to ensure that parties involved, when reaching an agreement, may perfectly comprehend its terms and contents, which must be enforceable; this duty encompasses the goal to generate parties' compromise for the fulfilment of the agreement. Full text available at: http://www.cnj.jus.br///images/atos_normativos/resolucao/resolucao_125_29112010_0110201 3185521.pdf. Accessed Nov 20 2014.

[69]In a recent judgment rendered by TJMG, the court held that conciliation may be carried out at any phase of the proceedings. See *Wagner Soares/Banco Santander Brasil S.A.*, Civil Appeal no. 1.0016.12.002945-5/001, 17th Civil Chamber, decision as of December 06, 2012.

how conciliation should be conducted in a given case, neither if they are extensively applicable to mediation.[70]

Also with regard to conciliation, as previously mentioned, Brazilian Small Claims Procedure Act of 1995 establishes some guidance, but not in a comprehensive or detailed fashion. Art. 3 of the Act narrows down the subject matters which are covered by the jurisdiction of specialized courts to claims involving a limited sum. Further provisions of the Small Claims Procedure Act of 1995 establish the steps through which proceedings should be conducted, from the pleading, going through conciliation, until the decision on the merit is rendered by the seized court.[71]

Concerning private mediation, CONIMA Model Rules on Mediation also deal with standard rules for development of the procedure.[72] Other mediation centers, such as CAM-CCBC[73] and FIESP[74] also have rules dealing with the mediation procedure.

As mentioned before, conciliation and mediation have been intrinsically bound in Brazilian judicial practice. With regard to extrajudicial mediation, in particular, the relevant regime appears to have evolved separately, fundamentally based on the existing rules and regulations adopted by dispute resolution centres and on sparse legal provisions. This truncated scenario leads to legal and procedural uncertainties from the point of view of the existing statutory law and does not offer any sound basis for the development of a consistent case law in the field. The 2014 Draft Bill on Mediation Act is, thus, expected to pave the way for a unified legal regime for mediation in Brazil, covering both extrajudicial and judicial mediation.[75]

5.2 Duration of Mediation

With regard to judicial mediation, the issue on duration of meeting or session is not clearly addressed by existing courts' regulations. Furthermore, Resolution no.

[70]The Court of Appeals of São Paulo – TJSP has recently ruled on the discretion of judges to determine conciliation during proceedings vis-à-vis the relevant provisions of the Code of Civil Procedure: "The judge shall assess the adequacy of conciliation in each particular case during the proceedings. It depends solely on the judge's discretion to refer parties to conciliation or not. These legal provisions are not binding." See TJSP, *Josefina Stringassi Ribeiro/Jacy Orlandi*, Interlocutory Appeal no. 2013250–18.2013.8.26.0000, 31st Chamber, decision as of September 10, 2013.

[71]For purposes of this chapter, we are not focusing on the specific rules on conciliation established by the SPCA. The original version in Portuguese is available at: <http://www.planalto.gov.br/ccivil_03/leis/l9099.htm>. Accessed Nov 20 2014.

[72]See: <http://www.conima.org.br/regula_modmed>.Last visited: 17 Oct 2014.

[73]<http://www.ccbc.org.br/download/doc_RegulamentoNovo_CAMCCBC_eng_v5_psk.pdf>. Last visited: 17 Oct 2014.

[74]<http://www.camaradearbitragemsp.com.br/index.php/pt-BR/regulamento>. Last visited: 17 Oct 2014.

[75]Note 20 above.

125/10 of the CNJ does not include any rules regarding time limits for settling disputes by mediation or conciliation. The Judicial Mediation Guidebook (*Manual de Mediação Judicial*) issued by the CNJ establishes that a mediation/conciliation session or meeting should last at least two hours in order to be considered as properly conducted.[76]

Article 16 of the Small Claims Procedure Act of 1995 provides that a conciliation session is to be scheduled within 15 (fifteen) days from the pleading.[77] In a recent ruling, the TJRJ held that the *principle of the reasonable duration of proceedings*[78] does not apply only during the ordinary course of proceedings but also to the conciliation.[79]

Resolution no. 953/2005[80] of the Court of Appeals of São Paulo (TJSP) and Resolution no. 19/2009[81] of the Court of Appeals of Rio de Janeiro (TJRJ) do not specify any time limits during which a mediation proceeding may last.

With regard to extrajudicial mediation, CONIMA's Model Rules on Mediation, leave it for the parties to decide any issues pertaining to schedule or time limits related to mediation proceedings. Art. 6, III, of the Model Rules thus reads: "*The parties*, *convened after the selection of the mediator*, *and upon his or her instructions*, *shall sign a contract* (*a mediation term*) *which will foresee*: (. . .) *III. the rules and the procedure*, *even if subject to a re-schedule that might be agreed at any moment during the procedure*, *that is*: (. . .) - *the estimative of the duration and frequency of the meetings*".

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[76]Ministry of Justice (2013). *Handbook of Judicial Mediation*, 4.ed. Available at: <http://www.cnj.jus.br/images/programas/conciliacao/manual_mediacao_judicial_4ed.pdf>. Accessed Nov 20 2014. By analogy, Arts. 125, IV, 331 and 447 to 449 of the CPC deal with the conciliation hearings. Regarding the pre-trial hearing, Art. 331 states that the hearing shall be scheduled within 30 (thirty) days. It does not provide any time limits for duration of conciliation.

[77]Art. 16. Once the application is filed by one of the parties, irrespectively of the court's distribution and assessment, the Court Secretariat will designate the conciliation session, which is to be held within fifteen days from the filing.

[78]See Art. 5, LXXVIII, of Brazilian Federal Constitution, According to this principle, everyone is ensured "*a reasonable duration of proceedings and the means to guarantee their expeditious course*", both at the judicial and administrative levels.

[79]Summary: "*Interlocutory appeal. Expedite procedure. The adequate time corresponds to the conciliation hearing*, *after the court's assessment of the oral response of the parties. Principles of orality and concentration of the procedural steps in the hearing. Guarantee of effectiveness*, *economy and celerity*, *in addition to the reasonable duration of the proceedings. Constitutional law related nature of the principle of reasonable duration of proceedings. The appellant's claim is to be granted a time for response*, *which clashes with the principle of reasonable duration of proceedings*, *which has been postulated before the court. Claim under appeal is not supported by legal grounds. Case law*, *procedural and constitutional principles and consolidated judicial practices prevent the claim's admissibility. Appeal dismissed pursuant to Art. 557 of CPC - Code of Civil Procedure*" (judgment rendered on May 4, 2013, Docket no. 2013. 0021798–61.2013.8.19.0000).

[80]Full text available at: Accessed Nov 20, 2014.

[81]Full text Available at: http://portaltj.tjrj.jus.br/documents/10136/7abcbf66-7116-4311-b31e-386c47730c76. Accessed Nov 20, 2014.

Art. 4.2 of 2013 The Rules on Mediation of FIESP Arbitration and Mediation Center establishes that mediation proceedings shall not overcome 30 (thirty) days from the date of signature of Term of Mediation, in case parties do not agree differently.[82]

The 2014 Draft Bill on Mediation Act attempts to establish a common rule for duration of mediation, focusing in two different sets of rules. The first deals with the time when mediation is deemed effective. Art. 17 provides that mediation is commenced upon the signature of the Term of Mediation. According to Art.20 of the Draft Bill, mediation proceedings shall be then concluded upon the signature of the final meeting record, which must contain the relevant information about the parties; the summary of the facts and dispute; the description of the agreement, with all rights and obligations of each party or a statement on the absence of an agreed solution; and place, date and signatures. With regard to extrajudicial mediation, parties have full discretion to define a schedule for the meetings and the proceedings. Where there are no specifications concerning the schedule or proceedings, the mediator shall determine how the mediation is to be conducted, having in mind the interests at stake and the need of a expeditious solution to the case.[83]

Further, in connection with judicial mediation, the 2014 Draft Bill appears to tackle the absence of specific regulation in Brazilian Law as to duration of proceedings and time limits for settlement of a dispute. The Draft adopted a sequenced method to define the duration of mediation proceedings. Art. 25 establishes that the judge, once the request for mediation is admissible, shall direct the filing to the judicial mediator, who will be randomly selected upon the list of mediators registered with the court. Parties are then requested to express their agreement to submit the dispute to mediation within 15 (fifteen) days.[84] If they decide to proceed with mediation, the mediator has 30 (thirty) days to schedule the initial meeting.[85] Article 26 of the Draft Bill establishes that mediation proceedings must be concluded no more than 60 (sixty days) from the date of the first session, except in those cases where the parties mutually decided for a prorogation.

6 Failure of the Mediation and its Consequences in Brazil

According to the existing legal framework for mediation in Brazil, it is possible to infer that mediation fails when the parties cannot reach an agreed settlement. In this case, in order to settle the dispute, parties often resort to state courts or to arbitration

[82] http://www.camaradearbitragemsp.com.br/index.php/pt-BR/regulamento/4-principal/principal/128-regulamento-de-mediacao-2013. Accessed: 17 Oct 2014.

[83] Art. 22 of the 2014 Draft Bill on Mediation Act.

[84] Art. 25, §1 of the 2014 Draft Bill on Mediation Act.

[85] Art. 25, §3 of the 2014 Draft Bill on Mediation Act.

(depending, for instance, on the existence of a multi-tier dispute resolution clause in the agreement executed between the parties).

Resolution no. 953/2005 of the Court of Appeals of São Paulo (TJSP) provides that if conciliation does not result in a settlement agreement, parties in the dispute shall be guided to the alternative to seek remedies before State Courts or before the Small Claims' Courts.[86] Furthermore, Regulation no. 953/2005 does not foresee any legal consequences for mediation in case no settlement agreement is reached.

The relevant procedural rules provided by the Small Claims Procedure Act of 1995 (Law no. 9,099/95) set forth that in case parties fail to reach an agreement, a hearing shall be set up to the parties immediately after such failure is verified, in the same day, or at most within 15 (fifteen) days in which a judgment shall be rendered.

The 2014 Draft Bill on Mediation Act solely deals with the consequences deriving from the absence of agreement in case of judicial mediation, immediately to the termination of mediation proceedings. According to Art. 26, §1, of the 2014 Draft, where parties were not able to reach a settlement agreement, the initial and final terms of mediation shall be forwarded to the judge, who shall resume the main proceedings. This solution, thus, automatically returns the dispute to the judge's scrutiny.

When it comes to extrajudicial mediation, arbitration and mediation centers tend to adopt a very broad and flexible guidance with regard to failure of mediation. Section 5.3 of the Mediation Rules of CAM-CCBC establishes that in case parties fail to reach the settlement, the mediator shall record this fact and shall recommend the parties to submit the dispute to arbitration.[87] The same approach is followed by the 2013 Mediation Rules of FIESP Arbitration and Mediation Center.[88]

7 Success of Mediation and Its Consequences

As remarked above, one of the main goals of mediation is to reestablish the communication channel between parties in dispute.[89] From this standpoint, the mediation can be considered effective when the mediator efficiently facilitates the dialogue between the parties, in a way that they may restore their communication in

[86] Art.4, §4 of Resolution no. 953/2005 of TJSP.

[87] Chapter V of the 2012 CAM-CCBC Arbitration Rules. Available at: http://ccbc.org.br/default.asp?categoria=2&subcategoria=Regulamento%202012#16. Accessed 20 Nov 2014.

[88] Available at: http://www.camaradearbitragemsp.com.br/index.php/pt-BR/regulamento/4-principal/principal/128-regulamento-de-mediacao-2013. Accessed 20 Nov 2014.

[89] "Resuming the real communication between the parties is one of the main objectives of mediation, being the agreement a natural consequence of such method of dispute resolution" Sales, L. M. (2003). *Justiça e mediação de conflitos*. (p. 38). Belo Horizonte: Ed. Del Rey.

an adequate fashion, so as to conduct their relationship in a consensual way.[90] The effectiveness is also associated to the parties' ability to reach the settlement, once successfully guided by a mediator. The settlement agreement, as such, is just one of the targeted outcomes of mediation.

A successful mediation also leads to the prevention of conflicts that may arise in the future. It may remedy any latent communication failure between the parties and provide parties with elements enabling them to preserve that original communication channel.[91]

In addition, it is important to clarify the potential that mediation has to satisfy the parties' mutual interests. An expected pacification of the conflict aims at allowing a convergence of the parties' interests; meaning that in mediation there are no winners or losers (substantially differing from litigation before courts or from arbitration). Only the parties have the power to solve their differences, since mediation is only the means, the catalyst for such resolution.[92] This is one of the main reasons why it is not adequate to reduce mediation to a pure formalistic or procedural approach. There are further social, economic, political features comprised in this area.

Thus, mediation is not simply aimed at reaching an agreement by itself; instead, its goal is to foster a cooperative dialogue between the parties in order to satisfy their motivations and interests.[93] Such feature constitutes one of the distinguishing elements between conciliation and mediation, in particular with respect to their methods: conciliation is focused on the agreement by the parties, whereas mediation is directed to resolving the conflict itself by the participation of mediator and communication between the parties; the settlement agreement is merely one of the consequences.[94]

Hence, mediation does not set forth an obligation to reach a certain result, as mediators have the duty not to impose an agreement to the parties, neither decide the dispute on behalf of the involved ones. Art. 2, III, of the Code of Ethics of Judicial Mediators and Conciliators (Annex III - Resolution no. 125 of CNJ) provides that judicial mediators and conciliators must not force an agreement on the parties, and must not take decisions on their behalf. Also, the 2014 Draft on Mediation Act departures from the main rationale that the "mediator shall conduct

[90]Tartuce concludes that: "If the confidence and the sense of commitment between the parties are resumed, they may work together on negotiated answers and start a new phase in their interpersonal relationship" Tartuce, F. (2008). *Mediação nos conflitos civis*. (p. 73). São Paulo: Ed. Método.

[91]Galano, M. H. (2003). Mediação – uma nova mentalidade. In L.M. Sales (Ed.). *Justiça e mediação de conflitos*. (p.29) Belo Horizonte: Ed. Del Rey.

[92]Idem, 29.

[93]Braga Neto, A. (2013). A mediação de Conflitos e suas diferenças com a Conciliação. (p. 3). http://www.cnj.jus.br/images/programas/movimento-pela-conciliacao/arquivos/ARTIGO%20Adolfo_MEDIACAO_CONCILIACAO_FEV_20111.pdf. Accessed 25 Nov 2014.

[94]Cambi, E., Farinelli, A. (2011). Conciliação e Mediação no Novo Código de Processo Civil (PLS 166/2010). *Revista de Processo*. 194, p.277.

the communication process between the parties, seeking to reach understanding and to facilitate the settlement of the dispute".[95]

7.1 Formal Conditions of the Agreement Reached

As to the formalization of the parties' agreement, there are no formal or substantive requirements on this matter. In mediation, if the conflict has been handled and effectively resolved, the agreement of the parties will reflect their free will and their awareness about the consequences of the preexisting dispute. This process, in most cases, may lead to spontaneous compliance by the parties, thus deeming the formalization of the agreement in writing an unnecessary measure.[96]

In some cases, the necessity of formalizing the outcome of the agreement for settlement of the dispute may even restore the distrust between the parties. Therefore, it is up to the mediator to evaluate if it is in fact the case of writing down an agreement consolidating the terms of the settlement. When it is pertinent and in accordance with the Brazilian procedural culture, and aiming at attributing more effectiveness to the mediation outcomes, many mediators have chosen to formalize the agreements that were indeed reached, so that they would have the status of an extrajudicial executive instrument, or even of a judicial executive instrument – in this case, with the subsequent confirmation by a state court (in a procedural act named "*homologação*").[97]

Concerning the participation of lawyers or of public attorneys in mediation proceedings, their assistance in the drafting of the settlement agreement is important to guarantee its enforceability, as well as its adequacy and compatibility to the existing regulations, especially considering the undesirable (though possible) occurrence of a breach of what was previously agreed between the parties.[98]

Notwithstanding the lack of specific regulation dealing with that matter, one may contend that the final agreement should comprise the following elements: *where*, *when*, *how*, *why* and *who* will be responsible for the commitments designated as the result of the interaction between mediator and parties. In this regard, the mediator shall focus his/her attention on the scope of the settlement reached by the parties, making sure that all rights and obligations of the parties are precisely defined in the final document, and, at the same time, arguing the parties about any missing items or matters yet to be clarified.[99]

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[95] Art.4, §1 of the 2014 Draft.

[96] Tartuce, F. (2008). *Mediação nos conflitos civis*. (pp. 215–216). São Paulo: Ed. Método.

[97] Sales, L. M. de M. (2003). *Justiça e mediação de conflitos*. (p. 61). Belo Horizonte: Ed. Del Rey.

[98] Pinho, H. D. B. de. (2010). Mediação: a redescoberta de um velho aliado na solução de conflitos. *Revista da Faculdade de Direito da UERJ*. 13, 245–260.

[99] Braga Neto, A.., & Sampaio, L. R. C. (2007). *O que é Mediação de Conflitos*. 1 Ed. São Paulo: Brasiliense S.A., p.59

Furthermore, mediators must ensure that the choice of words that were used in the final term of mediation (or the final meeting record) are as clear as possible, and that they correspond to the exact expression of the commitments made by each party, provided that they do not contravene any existing laws.[100]

Another initiative that could be highlighted in connection with this topic is the Model - Law on Mediation drafted by CONIMA.[101] Arts. 19 and 20 of the Chapter IX of the Model Rules thus read:

> **Art. 19** – The agreements reached in mediation may be total or partial ones. In case that some of the items of the agenda of the mediation ended with no agreement, the mediator may act in the negotiation targeted to assist parties to elect other extrajudicial or judicial means to solve them.
>
> **Art. 20** – In accordance with parties' will, the agreements reached in mediation may be informal or may constitute extrajudicial executive instruments incorporating the signature of two witnesses, preferably the lawyers of the parties or other(s) nominated by them.
>
> If the parties so desire, the agreement may entail legal language in order to be confirmed before courts. In this case, mediators shall keep themselves available to assist parties to maintain reliability to the original text.

At last, in mediation, it suffices that one of the parties is not interested in proceeding, so that the mediator may declare its termination. Besides, mediation is not subject to a rigid procedure; therefore, mediators shall not be confined to the limits that are laid down in Arts. 128 and 460 of the Brazilian Code of Civil Procedure,[102] which allows them to act more freely to adequately resolve a given conflict.[103]

The 2014 Draft Bill on Mediation, by its turn, does not require any detailed form for the settlement agreement reached by the parties in mediation proceedings. As a part of the final mediation meeting record (Art.20), the agreement must contain minimally the rights and obligation of each party or the statement of the parties expressing the impossibility of reaching the settlement. In addition, this document, in case of settlement, will constitute a extrajudicial enforceable instrument and, where it is confirmed by the court, a judicial enforceable instrument.[104]

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[100] Braga Neto, A. (2011) A mediação de Conflitos e suas diferenças com a Conciliação. P.8 http://www.cnj.jus.br/images/programas/movimento-pela-conciliacao/arquivos/ARTIGO%20Adolfo_MEDIACAO_CONCILIACAO_FEV_20111.pdf. Accessed 25 Nov 2014.

[101] http://www.conima.org.br/regula_modmed. Accessed 25 Nov 2014.

[102] Art. 128 of the CPC: "*The judge will decide the dispute according to the limits in which it was submitted*, *being prevented from hearing claims that were not raised and in relation to which the law requires the initiative of the party*."

Art. 460 of the CPC: "*The judge is prevented from issuing a decision in favour of the claimant*, *of a different nature from that of the claims submitted*, *as well as to decide in favour of the respondent in a superior quantity or in a different subject matter from the one that was requested*. Sole Paragraph – *The ruling shall be certain*, *even if it decides on a conditional legal relationship*."

[103] Cambi, E., Farinelli, A. (2011). Conciliação e Mediação no Novo Código de Processo Civil (PLS 166/2010). *Revista de Processo*. Vol. 194.

[104] Art. 20, §2 of the 2014 Draft Bill.

7.2 Enforcement of the Settlement Reached by the Parties

Brazilian laws does not establish any specific form for settlement agreement reached by parties in mediation. It is up to the mediator and parties to assess, in a given case, if a proper solution would be to draft a comprehensive written instrument, so to contemplate all the parties' rights and obligations in detail. Where applicable and consistent with a Brazilian procedural culture, mediators tend to choose to formalize settlement agreements, aiming to grant them the status of an extrajudicial executive instrument, or even a judicial executive instrument (this case there is confirmation by a state court).

According to a prevailing opinion in the Brazilian Superior Court of Justice (STJ), however, in the event parties reached an extrajudicial settlement agreement and intended to submit it to state courts, there was no obligation to request the homologation of the agreement.[105] The Court's main argument is that the settlement was already an extrajudicial executive instrument. On the other hand, if parties intend to request the settlement's confirmation before courts, an agreement resolving a dispute by extrajudicial/contractual mediation may be converted into a judicial executive instrument (thus, susceptible for direct enforcement before the courts).[106]

The 2014 Draft of the Bill on Mediation, as seen above, also deals with distinct legal effects of settlement agreements reached by the parties in mediation. Due to legal certainty concerns, for instance, a party may request a state court to recognize the agreement reached through mediation. In this case, parties will be provided with a judicial executive instrument that, in case of breach of the settlement agreement, allows one of the parties to request its judicial enforcement. Indeed, from the standpoint of procedural law, this gives few room to challenges during the performance in comparison with an extrajudicial executive instrument.

8 The Costs Related to Mediation in Brazil

Mediation has proven to be an effective dispute resolution mechanism to avoid high costs often associated to litigation before domestic courts.[107] Therefore, when it comes to mediation, one may highlight the effectiveness of the results, the promptness of procedural steps, the confidentiality and the relative low financial costs

[105]STJ, Special Appeal n. 1184151/MS, Opinion of Justice Nancy Andrighi, 3rd Chamber, decision as of December 15, 2011, in DJe 09/02/2012. https://ww2.stj.jus.br/revistaeletronica/Abre_Documento.asp?sSeq=1083622&sReg=201000390286&sData=20120209&formato=PDF. Accessed 27 Nov 2014.

[106]This solution is in line with Art. 475-N, V, of the CPC, as amended by Law no. 11,232/2005. See also Art. 20, §2 of the 2014 Draft Bill.

[107]Scripilliti, Marcos S.P. (2004). Aspectos relevantes da Mediação. *Revista de Arbitragem e Mediação*, Vol. 1.

incurred by parties compared with litigation and arbitration.[108] As remarked above, mediation is not intended to be simply a substitute of or alternative to judicial adjudication, as its use by parties must be invariably subject to a case-by-case assessment.

In Brazil, costs related to mediation fundamentally comprise the mediator's fees and administrative expenses, if any. With regard to corporate mediation, most of the mediation institutions (which are usually arbitration centers as well) already have a table of administrative costs pertaining to the mediation itself (e.g. filing fee and administrative fees) and mediators/arbitrators' fees. For instance, CAM-CCBC provides users with a table of costs and fees available at its website.[109]

In addition, Chapter VII of CONIMA Model Rules on Mediation[110] deals with costs associated to the procedure, pursuant to Arts. 16 and 17:

> Art. 16 – The costs, comprised by the administrative expenses and the Mediator's fees, shall be shared between the parties, unless otherwise agreed. In case of a mediation conducted by an institution or a specialized entity, such costs shall be in accordance with the respective tables of costs.
>
> Art. 17 – The Mediator's fees shall be agreed in advance and may be established on an hourly basis or according to another criterion defined between the parties. When mediation is conducted through institutions or a specialized entities, their respective tables shall be adopted.

As to judicial mediation, the 2014 Draft Bill establishes that mediators shall receive fees as stipulated in by state courts. Requests for gratuity of mediation depend on the acceptance of the mediator, thus, decided on individual basis.[111]

Furthermore, it is important to point out that the participation of lawyers or of public attorneys in mediation proceedings and in the drafting of a mediation agreement has been encouraged to ensure a minimum degree of legal certainty and enforceability, as well as the adequacy of the agreement to the existing regulation. This is a very sensitive issue, especially considering the undesirable (though possible) occurrence of a breach of the settlement agreement concluded by the parties in dispute.[112]

The presence of a lawyer in mediation, however, will not be mandatory. In other words, parties will be able to choose to be represented by a lawyer or not. As a matter of fairness, when solely one party is assisted by a lawyer in mediation, the other can request the appointment of a "ad hoc" attorney.[113]

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[108] C Cambi, E., Farinelli, A. (2011). Conciliação e Mediação no Novo Código de Processo Civil (PLS 166/2010). *Revista de Processo*. Vol. 194.

[109] Available at <http://www.ccbc.org.br/default.asp?categoria=5&id=39#_Toc327201768>. Last visited: Oct. 4, 2013.

[110] http://www.conima.org.br/regula_modmed. Accessed 27 Out 2014.

[111] Art. 11 of the 2014 Draft Bill on Mediation Act.

[112] See Pinho, H. D. B. de. (2008). Mediação: a redescoberta de um velho aliado na solução de conflitos. In Tartuce, F. *Mediação nos conflitos civis*. (p. 216). São Paulo: Ed. Método.

[113] This has been the main criteria adopted by the 2014 Draft Bill in its Art. 16.

In such context, among the rights of the parties taking part in a mediation proceeding, one may highlight, for instance, the right to a mediation free of charge, in case it has already been granted to the party the benefit of free legal aid. On the other hand, one of the duties of the parties is to duly pay the mediator's fees, if it was not the case of a mediation proceeding free of charges.[114]

According to main rationale underlying the 2014 Draft Bill, a principle of legal assistance is harmonized with the main goal of access to justice at domestic level. Informal and free (or at least cheaper) means are obviously more accessible to all parties in dispute, thus better accomplishing a peacemaking related goal of mediation.[115]

Concerning the public defense attorneys' functions, the role of the mediator is included among those functions. Therefore, mediation is materially comprised in the full and free of charge legal assistance which is also part of public attorneys' roles in Brazil.[116]

9 Cross-Border Mediation

9.1 Notion and Main Features

There is no specific legislation or statute dealing with "cross-border mediation" nor a common meaning for this expression in Brazil. For this chapter's purpose, however, it is submitted that cross-border mediation deals with a dispute resolution mechanism in which two or more parties to a cross-border dispute attempt, by themselves, on a voluntary basis and with the assistance of a mediator, to reach an agreement based on the settlement.

In Brazil, the characterization of a cross-border dispute (in line with international civil or commercial litigation) is mainly determined by the connecting factors involved in the case, such as the distinct domiciles or habitual residences of the parties and the subject-matter of the dispute having crossborder effects (e.g. an

[114]Lopes, V. C. (2010). Breves Considerações sobre os Elementos Subjetivos da Mediação: as Partes e o Mediador. *Revista de Arbitragem e Mediação*. vol. 26, p. 85.

[115]Cintra, A. C. de A., Dinamarco, C. R., Grinover, A. P. (2010). *Teoria Geral do Processo*. 26th ed. (pp. 22–32). São Paulo: Ed. Malheiros. According to Brazilian main scholars, social inclusion which should be also ensured in mediation proceedings may be clearly satisfied when it comes to communitarian mediation (which is free for communities located in the outskirts of the cities). This sort of mediation encourages the participation of socially and economically marginalized individuals in the management of their conflicts. Furthermore it raises the awareness regarding their rights and duties.

[116]Lopes, V. C. (2010). Breves Considerações sobre os Elementos Subjetivos da Mediação: as Partes e o Mediador. *Revista de Arbitragem e Mediação*. vol. 26, p. 85.

international contract, issuance of securities abroad, disputes concerning family matters involving parties domiciled abroad; corporate disputes etc.).[117]

9.2 Recognition and Enforcement of Foreign Mediation Settlements

The parties' settlement agreement reached through mediation in a third country may be characterized as an international contract for purpose of Brazilian Law, particularly with regard to private international law rules of the forum. However, if this agreement is submitted with the purpose of a confirmation or homologation before foreign courts, this might result in a foreign judgment in the sense of Brazilian's applicable rules to recognition and enforcement of foreign decisions (such as it occurs with foreign arbitral and judicial decisions).

The same was the case in mediation ordered by a foreign court in the course of international litigation involving one of the parties domiciled in Brazil. In this case, this settlement reached during proceedings before a foreign court would be subject to *exequatur* procedure in Brazil ("homologação") by the Superior Court of Justice – STJ.[118] A settlement reached in a foreign agreement would produce in Brazil the same legal effects that it would produce according to the substantive law applicable, as long as this does not constitute any violation to public policy of the forum.

This must be construed in connection with Art. 17 of the Introductory Act to Brazilian Laws (LINDB),[119] which sets forth that [*any*] *laws*, *acts and decisions of a foreign country*, *as well any transaction shall not be deemed effective in Brazil when offensive to national sovereignty*, *public policy and morality*".

In practice, a Brazilian state court may refuse to order the exequatur of a foreign settlement agreement (or a term of settlement issued by the parties in dispute overseas), if it holds that this agreement is incompatible with public policy in Brazil. This is construed based on the argument that public policy is one of the limits to the application of foreign law or recognition of foreign judgments by national judges.

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[117]Polido, F. B. P. (Polido 2013). *Direito Processual Internacional e o Contencioso Internacional Privado*. (p. 33 et seq). Curitiba: Juruá.

[118]http://www.stj.jus.br. Arts. 216-A *et seq* of Internal Regulations of STJ are applicable to all requests for recognition and enforcement of foreign arbitral awards and judicial decisions.

[119]Decree n. 4.657, September 4, 1942. http://www.planalto.gov.br/ccivil_03/decreto-lei/Del4657.htm. Accessed 27 Nov 2014.

On the other hand, a foreign judgment is not recognized or enforced in Brazil if it manifestly incompatible with public policy or national sovereignty (according to Art. 17 of LINDB), or in the event that the application for recognition ("homologação de sentença estrangeira") before the competent court for the '*exequatur*' in Brazil (the Superior Court of Justice) does not comply with the formal requirements set forth in Brazilian law and applicable regulations.

Concerning the first scenario dealing with foreign mediation settlement agreements, the applicable legal framework comprises fundamentally Arts. 9 and 17 of LINDB. Art. 9 establishes the relevant connecting factors for the law applicable to contractual obligations (e.g. international contracts) in Brazil, such as the law of the country where the agreement was signed (Art. 9, §1, LINDB) and Brazilian law to those contractual obligations to be performed in Brazil and depending on and formal essential requirement (Art. 9, §2, LINDB).[120] With regard to the recognition and enforcement of a foreign mediation settlement, Art. 17 of LINDB would solely preclude the effects of the agreement in case it is incompatible with or offensive to national sovereignty or public policy in Brazil.

In addition, relevant rules on *exequatur* of foreign judgments in Brazil would also apply. In this case, parties shall resort to correspondent rules informing recognition and enforcement of foreign judgments ("homologação de sentença estrangeira"), which procedure is handled by Superior Court of Justice (Art. 105, I, letter "i" of Brazilian Constitution; Art. 12 of LINDB and Resolution no. 9/2005 of the Superior Court of Justice).[121]

10 E-Justice

In Brazil, as remarked above, there are distinctions between judicial mediators and extrajudicial mediators (ie. those acting as "ad hoc" mediators or within the framework of mediation centers, thus, in an institutional fashion). Judicial mediators in general are considered as auxiliary staff of Judiciary branch (pursuant to Art. 7 of the Small Claims Procedure Act of 1995).[122] They are equivalent to public servants

[120]For this issue, see remarks by Dolinger, J. (2013). *Direito Internacional Privado*. (p. 295 et seq). Rio de Janeiro: Forense; Basso, M. *Curso de Direito Internacional Privado*, 3a ed., (p.235 e ss.). São Paulo: Atlas; Basso, M., Polido, F. (2008). Comentários aos Artigos 7 a 19 da Lei de Introdução ao Código Civil de 1942. In Nanni, G.E., Lotufo, R. (Org.). *Teoria Geral do Direito Civil*. (114 et seq). São Paulo: Atlas.

[121]Translation available at: < http://abearb.org/arquivos/138/abearb---stj-res-final.pdf>. Accessed on November 27, 2014.

[122]See Law no. 9.099/1995, Art. 7: "*The conciliators and the non-professional judges are auxiliary staff of the Judiciary*, *recruited*, *the former*, *amongst the bachelors in Law*, *and the latter*, *amongst lawyers having more than five years of practice*.

Sole Paragraph – The non-professional judges are prevented from practicing Law in the Special Courts, *while in the performance of their duties as such*."

but are subject to a different employment career. An extrajudicial mediator, in turn, may be every capable adult possessing a faultless behavior and with a technical background or practical skills which are suitable to the nature of a given dispute This mediator may be selected amongst other professionals than lawyers.

Lawyers having at least three years of effective legal practice, duly selected and registered with the Mediators' Register of the Brazilian Bar Association – OAB's Sectionals can be appointed as judicial mediators. A judicial mediator works under the supervision and the orientation of the judge, and shall try to promote the understanding and the communication between the parties.[123]

There are a growing number of initiatives available on the Internet conceived upon the idea of raising awareness about mediation and other alternative dispute resolution methods in Brazil. The ultimate goal of these initiatives is to stimulate the use of such methods as alternative to state courts. There are both private and public websites and institutions with such purpose; one could mention, for instance, the Mediation and Arbitration Institute of Brazil,[124] the National Council of the Mediation and Arbitration Institutions[125] and the Arbitration and Mediation Centre of Chamber of Commerce Brazil-Canada.[126]

In this regard, it is noteworthy that Resolution no. 125/2010 of the National Council of Justice, in its Art. 15, created the Online Platform of Conciliation and Mediation, currently available at the website of the CNJ.[127] In this platform, which is constantly updated, there are a number of functionalities available related to mediation, such as the publication of guidelines for conciliation and mediation training programmes and of ethic codes; the exchange and sharing of good practices, projects, actions, articles, researches, news and statistics on mediation and conciliation, among other functionalities.

However, the issue whether (e)Justice devices may or may not be used during mediation proceedings, so that the handlings and debates are conducted online, apparently is still pending for further regulation in Brazil.

The adoption of a system to enable parties to resort to an effective and expeditious settlement mechanism such as online mediation was already a topic of some events targeting the Brazilian legal professional community, such as a Seminar hosted in 2008 by the State of Mato Grosso, following previous ones in other provinces, such as the State of Pernambuco.[128] Art. 42 of the 2014 Draft of the Bill on Mediation

[123]Cf. Ministry of Justice (2013). *Handbook of Judicial Mediation*, 4th ed., p. 233–234. Available at: <http://www.cnj.jus.br/images/programas/conciliacao/manual_mediacao_judicial_4ed.pdf>. Accessed 27 Nov 2014.

[124]http://www.imab-br.net/ing/index.html. Accessed 27 Nov 2014.

[125]http://www.conima.org.br/regula_modmed. Accessed 27 Nov 2014.

[126]http://www.ccbc.org.br/default.asp?categoria=5&id=36. Accessed 27 Nov 2014.

[127]http://www.cnj.jus.br/programas-de-a-a-z/acesso-a-justica/conciliacao/conciliador-e-mediador. Accessed 27 Nov 2014.

[128]http://www.cnj.jus.br/evento/96-noticias/5682-mediacao-online-e-apresentada-a-magistrados-em-seminario. Accessed 17 Out 2014.

Act establishes that the mediation may be conducted online, through the Internet, or by other means of communication that do not require the physical presence of the parties in the same place.[129]

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[129]The 2013 Bill was part of the legislative package submitted to Brazilian Congress by a commission of lawyers and ADR's specialists on October 2, 2013, together with the Bill on the Act amending the 1996 Arbitration Act. Both initiatives were aimed at improving the use of the alternative dispute resolution mechanisms in Brazil, but not without criticism. As to the conclusion of this chapter, such proposals are still pending for approval. See http://www.valor.com.br/legislacao/3292010/senado-recebe-nova-proposta-sobre-mediacao. Accessed 27 Out 2014.

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The Revival of ADR in China: The Path to Rule of Law or the Turn Against Law?

Yuanshi Bu and Xuyang Huo

Abstract This Chapter outlines the mediation under the current legal system in PR China. The Chinese term of mediation refers to a process in which the parties voluntarily come to an arrangement about contested rights or obligations under the guidance of a third party. In some perspectives the Chinese term differs from the corresponding term in the western jurisdictions. There are various kinds of mediations available in China. They are governed by several different legal regulations, and thus the applicable legal areas, the requirements for mediation agreements, the specific mediation procedures, the enforceability of the settlement agreements of each type of mediation varies. Generally speaking, the mediation in China follows also the worldwide acknowledged principles such as the principle of confidentiality and voluntariness. Distinguished Principles stipulated in the statutes are the principle of lawful mediation and the principle of distinguishing right and wrong based on the facts. As to the enforceability and legal effect, the settlement agreements are treated as conventional contracts. In the court-annexed mediation, the mediation awards issued by courts based on the content of mediation settlements have the effect of *res judicata*. Settlement agreements reached in most of the other mediation procedures can obtain their enforceability by a judicial ratification. Certain foreign settlement agreements may also be recognized in China.

1 The Concept of Mediation

1.1 The Notion of Mediation

The term mediation (调解) is not defined in a statute in China; thus, it is not easy to provide a precise and generally accepted definition thereof. Moreover, English translations of Chinese laws sometimes translate the Chinese term of mediation as 'conciliation', which results in even more confusion. In a broader sense, it can be said that the Chinese term of mediation stands for a process in which the parties

Y. Bu (✉) • X. Huo
The University of Freiburg, Freiburg, Germany
e-mail: asien@jura.uni-freiburg.de; huoxuyang@gmail.com

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voluntarily come to an arrangement about contested rights or obligations under the guidance of a third party.[1] On the one hand, the element of voluntariness as well as the element of the process not being institutionalised are typical for mediation. On the other hand, in certain areas such as foreign trade or people's mediation, one can observe a high degree of legislative regulation and tightly controlled institutions, which are more typical of arbitration or conciliation. This leads some authors to assume that in China, there is no distinction between 'mediation' and 'conciliation'.[2] Whatever the solution for the linguistic side of the distinction may be, it has to be kept in mind that the Chinese term 'mediation' does not totally correspond to mediation as known in most western jurisdictions.

1.2 Types of Other ADR Instruments

In the Chinese legal setting, ADR is a concept borrowed from foreign law, particularly from US law. The most popular ADR instrument other than mediation is arbitration.

It should be noted that ADR instruments may be divided based on their nature or carrier into subtypes such as non-governmental ADR, specialised ADR, industrial ADR and administrative ADR.[3] Non-governmental ADR refers to ADR conducted by grassroots organisations or other non-governmental institutions such as community autonomy organisations. Specialised ADR describes mediation specialised for a certain type of dispute, such as mediation and arbitration of labour, medical or consumer disputes, traffic accidents as well as disputes over intellectual property. Administrative ADR is just another name for administrative mediation, which is used to handle damages resulting from personal or property damage by the competent administrative authority (*infra* at 1.3.4). To a certain degree, one ADR instrument can fall into more than one category. For instance, labour arbitration is at the same time both a specialised arbitration as well as an administrative arbitration.

1.2.1 Arbitration

The Chinese arbitration system began to evolve in the early 1900s with the opening of the Business Arbitration Office in 1912.[4] It was the first arbitration institution in China and was responsible for the settlement of business disputes. However,

[1] B. Pißler, 'Mediation in China' in Hopt and Steffek (eds.), *Mediation*, Mohr Siebeck, Tübingen 2007, p. 607.

[2] L. Cao, 'Combining Conciliation and Arbitration in China: Overview and Latest Developments' (2006) 9 *International Arbitration Law Review* 85.

[3] Y. Fan, 'Development of ADR in Contemporary China' (2002) *ZZP Int*, 548–549.

[4] J. Tao, *Arbitration Law and Practice in China*, London/New York 2004, p. 1.

settlement agreements were weak as they relied on the consent of both parties to be legally binding.[5] After the founding of the PRC in 1949, China began establishing both domestic and foreign-related systems of arbitration that included labour arbitration, contract arbitration and real estate arbitration.[6] In the 1950 and 1960s, the Chinese government began actively promoting arbitration as the preferred means of economic conflict resolution. It was in these years that the systems of domestic and foreign-related arbitration began drifting apart, mainly because of China developing a mandatory domestic administrative arbitration system for the resolution of economic contract disputes. Starting in the 1980s, under the regime of the Economic Contract Law and further regulations, China began developing specific economic contract arbitration commissions at various levels. These arbitration commissions were each specialised in the arbitration of disputes arising in a specific field, such as contracts, labour or intellectual property. These commissions were strictly hierarchical under the State Administration for Industry and Commerce, and jurisdiction was adopted by way of territorial jurisdiction so that parties could not chose arbitration commissions themselves. Arbitral awards did not have a binding effect on the parties.

All changed with the enactment of the Arbitration Law on 1 September 1995. The Arbitration Law introduced party autonomy, the independence of the arbitration commissions and was overall characterised by the effort of bringing domestic arbitration in line with international practice. Moreover, it stipulated that arbitral awards were now legally binding, with courts not being allowed to accept cases that had already been handled by arbitration commissions. From that point on, the evolution of the Chinese arbitration system was harmonised towards the internationally recognised principles of arbitration.

Following China's accession to the New York Convention in 1987, China's foreign-related system of arbitration received an impetus towards conformity with international standards, which was implemented into national law in provisions of the Civil Procedure Law (1991), the Arbitration Law (1995) and the Rules of China International Economic and Trade Arbitration Commission (CIETAC Rules) (1994, 1995).[7] By then, arbitral awards rendered by international arbitral tribunals could be enforced in China, which encouraged the international business community to submit disputes for arbitration between these institutions.[8] The first enforcement of a Chinese arbitral award in a foreign country following the New York Convention was executed in 1989; and the first application of the New York Convention in China occurred in 1990.[9] In particular, the Supreme People's Court has by way of issuing several judicial interpretations ensured that the development of foreign-related and

[5] L. Kniprath, *Die Schiedsgerichtsbarkeit der CIETAC*, Köln/Berlin, 2004, p. 20.

[6] J. Tao, *supra* n. 4, p. 1.

[7] L. Kniprath, *supra* n. 5, pp. 25 ff.

[8] J. Tao, *supra* n. 4, p. 12.

[9] L. Kniprath, *supra* n. 5, p. 24.

international arbitration in China follows international standards.[10] It can thus be inferred that as regards foreign-related arbitration, Chinese judges see arbitration as a valuable supplement to their own work. Furthermore, as far as domestic arbitration is concerned, courts provide necessary assistance to arbitration, for example deciding on the jurisdiction of an arbitral tribunal if this is disputed (Article 20 Arbitration Law) or preservation of evidence.[11] The most important function of the courts with respect to arbitration, however, is the scrutinising of awards to determine the recognisability and enforceability. In spite of protectionism of some local Chinese courts concerning the enforcement of Chinese arbitral awards, studies have shown that in practice the rejection of arbitral awards by Chinese courts is a rare phenomenon.[12]

As the traditional ADR mechanism in China,[13] mediation is often connected with arbitration and treated as the first step preceding arbitration proceedings, as illustrated by the Law on Labor Dispute Mediation and the Law on Mediation and Arbitration of Rural Land Contract Disputes. In the past, CIETAC combined mediation and arbitration in its practice despite the lack of explicit mediation rules.[14] The combination of mediation and arbitration has now been incorporated into the current CIETAC arbitration rules. The law on arbitration also contains several provisions which allow for mediation in arbitration proceedings. If the parties thereafter reach a consensus via negotiation, the arbitral tribunal can render a so-called conciliation statement which has the same legal effect as a binding arbitral award. Due to this special feature, some authors see mediation in arbitration proceedings as a distinct subcategory of mediation.

1.2.2 Petition

Petition[15] also plays a significant role in addressing grievance,[16] but is not regarded as an ADR instrument in this chapter, because petition offices are only empowered to forward the petitions to the responsible government agencies after they have examined and confirmed the merits of petitioners' submissions, instead of adjudicating or mediating the disputes themselves.

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[10] J. Tao, *supra* n. 4, p. 13.

[11] J. Tao, *supra* n. 4, p. 32.

[12] L. Kniprath, *supra* n. 5, p. 179.

[13] Y. Fan, *supra* n. 3, pp. 533–534.

[14] W. Wang, 'Distinct Features of Arbitration in China – A Historical Perspective' (2006) 23 *Journal of International Arbitration* 74.

[15] Petitioning (also known as letters and calls, correspondence and reception, xinfang or shangfang) is the administrative system for hearing complaints and grievances from individuals in the PRC. Definition in Wikipedia.

[16] For a detailed description of the working mechanism of the petition system in China see: C. Minzer 'Xinfang: An Alternative to Formal Chinese Legal Institutions' (2006) 42 *Stanford Journal of International Law* 103.

1.3 Types of Mediation

Mediation can be divided into court-related mediation and extra-judicial mediation in China. The former refers to court-annexed mediation and preliminary mediation. And the later includes people's mediation, administrative mediation, institutional mediation and industry-based mediation.[17]

1.3.1 Court-Annexed Mediation

Court-annexed mediation refers to mediation by the courts in ongoing litigation. As a part of civil proceedings, it is governed by Articles 93–99 of the Civil Procedure Law. Court-annexed mediation can be initiated in almost all phases during the trial proceedings. The 2012 Amendment of Civil Procedure Law has even advanced mediation prior to the beginning of the trial proceeding (Article 133.2). Court-annexed mediation is the form of mediation that is most similar to mediation in western jurisdictions.

Mediation has long been used by the courts as a preferred form of dispute resolution, as it existed even prior to the founding of the PRC in the areas ruled by the Communist Party.[18] However, in today's China – unlike in western countries generally– mediation is not always considered as an esteemed tradition, but is sometimes characterised by a negative image, in particular in the last 20 years of the twentieth century. In everyday language, mediation settlements are compromises, in which right and wrong are blurred and the innocent party must sacrifice a portion of its right to restore peace with the more demanding party. The concept of 'judgment instead of mediation' characterised the 20-year judicial reform in China, which started in the early 1980s.

In the first PRC Civil Procedure Law, enacted in 1982 as a provisionally implemented statute, the 'priority of mediation over trial' (Article 6) was a principle. This was replaced by the principle of 'voluntariness and lawfulness of mediation' (Article 9) in the 1991 Civil Procedure Law. Moreover, it was established that trial must be commenced or resumed, if the mediation attempt fails. Thus, the practice of continuing futile mediation attempts is supposed to be put to an end. This shift in attitude towards court-annexed mediation in civil proceedings occurred at a time when China experienced a kind of 'access to justice' movement. In the 1990s, new judge positions were created, imposing court houses were built and the jurisdiction of the courts was expanded. The motto of this era was 'every village should build a branch office of the Court'. This was accompanied by the departure of mediating

[17]Cf. W. Wang, 'The Role of Conciliation in Resolving Disputes: A P.R.C. Perspective' (2005) 20 *Ohio State Journal on Dispute Resolution* 421; some authors see mediation in arbitration proceedings as a subcategory of mediation.

[18]J. Liang, 'The Enforcement of Mediation Settlement Agreements in China' (2008) 19 *American Review of International Arbitration* 499.

activities of judges for the sake of the supremacy of law. However, the mediation has experienced a strong revival since the turn of the millennium. There are many reasons for this change, and the crucial one was the new Party line of a 'harmonious society'.[19]

1.3.2 Preliminary Mediation

The 2012-revision of the Civil Procedure Law has adopted the concept of preliminary mediation prescribed in Article 122, which states "Wherever appropriate, conciliation shall be adopted for civil disputes before they are brought to the people's court, unless the parties thereto refuse conciliation". Based on the wording of this provision, no unambiguous conclusion can be drawn whether it requires mediation to be conducted prior to the court's acceptance of a case[20] and/or thereafter.[21] In the past, preliminary mediation used to refer to mediation conducted after a case has been accepted by the court and prior to the first court hearing.[22] From a systematical point of view, it is more persuasive to construe Article 122 to cover only the mediation carried out prior to the acceptance of a case filing, as the mediation thereafter has already been addressed by Article 133. However to avoid impediments to the right to sue, the court must carry out mediation on a consensual basis and register the case within seven days if the parties reject the mediation.

Preliminary mediation is regarded as court-related mediation but not court-annexed mediation for two reasons. Firstly, preliminary mediation may be conducted by judges or other judicial personnel, but it can also be carried out by other mediation organizations which are entrusted by courts. Secondly, even though preliminary mediation may take place in court, the court has not yet accepted the case filing.

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[19]To understand 'harmonious Society' see Kleining, 'In search of harmony', <http://www.kas.de/db_files/dokumente/laenderberichte/7_dokument_dok_pdf_12235_1.pdf> accessed 24.04.2012.

[20]J. Pan, 'Reflection on the Institution of Connecting Litigation and Mediation in the Background of the Civil Procedure Law's Amendment'(2013) 3 *Contemporary Law Review* p. 106; Z. Zhang and J. Xiong, 'On the Construction of Preliminary Mediation in China' (2014) 3 *People's Judicature* p. 62.

[21]G. Tan, 'Comment on the Amendment of Civil Procedure Law' (2012) 11 *Justice of China* 48; J. Xiao, 'Turning from Legislative Perspective to Interpretive Perspective: Pragmatic Response to the Amendment of Civil Procedure Law' (2012) 11 *Journal of Law Application* 43; H. Li, 'Research on the Institution of Preliminary Mediation' (2013) 3 *Jianghai Academic Journal* 139; X. Xi, *Understanding and Application of the Revised Clauses in Civil Procedure Law*, Court Press, Beijing 2012, p. 271; Civil Law Office of the Commission of Legislative Affairs of the NPC Standing Committee, *Understanding the Civil Procedure Law of PRC*, China Legal Publishing House, Beijing 2012, p. 334.

[22]J. Xiao, *supra* n. 21, p. 43.

According to an empirical research led by a local municipal court, preliminary mediation is being operated quite differently.[23] It is not uncommon that the judges in the case-filing chambers[24] or even trial judges[25] conduct the mediation. This practice is subject to the challenge of how to justify the involvement of the judges, when the courts have not yet gained the jurisdiction over the case prior to its registration.[26] In order to deal with this issue, courts have invented the pre-registration institution, according to which courts may register the lawsuits in advance without officially accepting them and then allocate the cases to judges for mediation.[27] However this institution has no solid foundation in statutes.

Courts may also assign the cases to other organizations such as people's mediation office set up in the court, administrative authorities as well as industry and commercial mediation centers.[28] This is usually defined as court-entrusted mediation.[29] A question relating to the nature of court-entrusted mediation arises, namely whether the court-entrusted mediation is to be attributed to mediation performed by the court or it's merely a mixture of non-judicial mediations? While in some situations such other organizations can be seen as agents of the courts who mediate the disputes on behalf of the courts, in other situations the reference to mediation by other organizations is only a nonbinding suggestion of the courts. Thus, it's subject to the parties whether they initiate the mediation or not.[30] This differentiation is essential, since the nature of the mediation will decide the effect of the settlement agreement. Settlement agreement reached in courts is able to be turned into mediation awards with binding effect, while settlement agreement reached in non-judicial proceedings can obtain its enforceability only through ratification procedure. According to the commentators, only in the court-entrusted mediation under Article 95 of Civil Procedure Law, which allows courts to solicit relevant organizations and persons to assist in mediation, such organizations act as agents of the courts.[31] The nature of other court-entrusted mediations always depends on the degree of the courts' intervention in the mediation procedure.[32]

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[23]Research Group of the Yangzhou Municipal Court, 'Status quo of Preliminary Mediation and its Revelation for the Implication of the Preliminary Mediation' (2013) 19 *People's Judicature* pp. 56–57.

[24]H. Li, *supra* n. 21, p. 143.

[25]Research Group of the Yangzhou Municipal Court, *supra* n. 23, p. 57.

[26]H. Li, *supra* n. 21, p. 144.

[27]Research Group of the Yangzhou Municipal Court, *supra* n. 23, p. 57;H. Li, *supra* n. 21, p. 144.

[28]Article 14 and 15 of Several Opinions of the Supreme People's Court on Establishing a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation.

[29]Y. Fan, 'Comparative Research on Court-entrusted Mediation'(2013) 3 *Tsinghua Law Journal* 57.

[30]Y. Fan, *supra* n. 29, pp. 57–58.

[31]Y. Fan, *supra* n. 29, p. 58.

[32]Y. Fan, *supra* n. 29, p. 68.

Preliminary mediation has been introduced in the hope to solve conflicts more promptly at an early stage and to reduce the caseload of the courts; however, besides the theoretical issues discussed above, it results in the practice also in several deficits, such as forced mediation[33] and delay of trial process.[34]

1.3.3 People's Mediation

A unique form of mediation is the so-called people's mediation – the only form of mediation to have found entry into the Chinese constitution in 1982.[35] It evolved from its heritage in Chinese traditional conciliation and was first set up in the 1940s in the areas ruled by the Communist Party. In the period from the foundation of the PRC in 1949 until the beginning of the Cultural Revolution in 1966, people's mediation played an important role in dispute settlement both in rural and urban areas. Although restored in 1978, people's mediation began to decline after reaching its peak between 1986 and 1990.[36] In spite of attempts by government and legislature to revive people's mediation by enacting an impressively great number of guiding policy documents since 2002[37] and ultimately the People's Mediation Law in 2010, people's mediation has not recovered from the trend of marginalisation.[38] In particular, being perceived rather as a political tool and not a professional dispute resolution instrument, people's mediation does not appeal to the younger, affluent and educated generation.[39] The fact that the revival of people's mediation depends to a large extent on state power and not primarily on party preference suggests the declining acceptance of this dispute resolution mechanism in society.[40]

Some commentators have noticed that the tension between the institutionalisation and the flexibility of people's mediation actually curtails its development in

[33] Y. Cai, 'Rethink of the Policy of 'Giving Priority to Mediation' in Civil Case: From the Analysis of 'Mediation First' in Civil Procedure Law' (2013) 5 *Modern Law Science* 134.

[34] Research Report of Pinggu District Court, <http://bjgy.chinacourt.org/article/detail/2014/02/id/1220064.shtml> accessed 24.07.2014.

[35] For a detailed summary of the evolution of people's mediation in China in Chinese see S. Jiang, *Mediation, Rule by Law and Modernization: A Survey on Chinese Mediation Systems*, Chinese Legal Publishing House, Beijing 2001; S. Lubman, *Bird in a Cage: Legal Reform After Mao*, Standford University Press, Palo Alto 1999, pp. 40–71.

[36] For a detailed description of the historical development of people's mediation in China see Y. Fan, *supra* n.3, pp. 537–538.

[37] Y. Fan, *supra* n.3, p. 534.

[38] W. Zhou, 'People's Mediation in Transformation: Three Contradictions – Review On the People's Mediation Law' (2011) 10 *Journal of Social Science* 100–101.

[39] A. Halegua, 'Reforming the People's Mediation in Urban China' (2005) 35 *Hong Kong Law Journal* 715.

[40] W. Zhou, *supra* n. 38, p. 103.

contemporary Chinese society.[41] One advantage of people's mediation is believed to be its flexibility, meaning the mediator may suggest a settlement that better suits the needs of the parties, but is not completely in line with the legal position of the parties according to the law. In this sense, people's mediation is not a right-based mediation, as in Germany, but rather an interest-based mediation. In the past, however, people's mediators were required to mediate according to the law,[42] which significantly confined mediators' room for operation and thereby diminished the attractiveness of people's mediation.[43] This tension has not yet been solved by the People's Mediation Law, which takes an ambiguous attitude by freeing mediators from the strict abidance of the law (Article 22) and at the same time, imposing the duty to stick to principles and to clarify the legal positions of the parties (Articles 3 and 21).

The people's mediation committees are structured to be mass organisations (Article 7). Villagers' committees and residents' committees are required to establish people's mediation committees. Enterprises and public institutions may also choose to establish such mediation committees (Article 8). However, people's mediation committees are subject to the guidance produced by the Ministry of Justice, which results to a certain degree in the much criticised bureaucratisation of people's mediation. Until 2008, a nationwide network existed of more than 800,000 people's mediation organisations employing in total about 4 million people's mediators.[44] People's mediation is generally available to all kinds of civil disputes, with the majority being family, community and non-commercial cases between natural persons, in certain regions also covering disputes between natural persons, legal persons or other social organisations.

The lack of a clear delineation of the scope of application is alleged to be a deficit of the People's Mediation Law. This problem had been recognised in the course of deliberation on the People's Mediation Law, but was ultimately left out in the final legal text for fear of delaying the enactment of this law, which could have caused controversy among the delegates.[45] Currently, it remains to be seen whether some established forms of mediation such as administrative mediation will be merged into people's mediation.[46]

[41] W. Zhou, *supra* n. 38, pp. 103–105.

[42] Article 1 of the Several Provisions on People's Mediation of 2002 and Article 1 of the Ordinance on the Organization of People's Mediation Committees.

[43] W. Zhou, *supra* n. 38, p. 105.

[44] Explanations on the Draft People's Mediation Law dated 1.7.2010, <http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2010-07/01/content_1580323.htm>accessed 17.08.2014.

[45] Y. Fan, 'An Analysis of the People's Mediation Law of the PRC' (2011) 2 *Jurist* 3.

[46] Y. Fan, *supra* n. 45, p. 3.

1.3.4 Administrative Mediation

In the common understanding, administrative mediation does not primarily refer to mediation in public law, but mainly to mediation in certain areas of civil or commercial law conducted by specific government agencies, whereby the administrative authority acts as mediator, witness and enforcement authority at the same time.[47] The legitimacy for government agencies to intervene in civil and commercial disputes is said to be that the civil/commercial disputes subject to administrative mediation frequently involve administrative law at the same time. For example, a defective product does not only give rise to civil quality disputes but may also trigger administrative fines. Due to their special technical expertise, such agencies may allegedly settle these disputes more rapidly and accurately.

Similar to people's mediation, administrative mediation also emerged prior to the foundation of the PRC in the so-called revolution bases of the Communist Party.[48] Administrative mediation usually precedes some form of litigation with the goal of avoiding lawsuits. The result of such administrative mediation is in essence an agreement between the parties. Due to the lack of enforceability of settlement agreements, administrative mediation is often perceived as a waste of time and resources. In this setting, neither parties nor the mediators are genuinely motivated to go through the mediation procedure. The responsible government agencies used to express strong reluctance to continue offering this service. However, the current policy of the central government is unambiguous: administrative mediation is a component of the rule of law and has to be strengthened correspondingly.[49] A national regulation dedicated to this form of mediation has already been put under deliberation by the State Council.

Until the national regulation comes into force, administrative mediation is mainly regulated by local regulations and widely scattered single provisions in national statutes and administrative regulations such as the Marriage Law, the Road Traffic Safety Law, the Law on Public Security Administration and Sanction, the Law on Prevention of Air Pollution, the Regulations on Handling Medical Accidents, and the Implementation Regulations of the Road Traffic Safety Law. The subject matter jurisdiction of administrative mediation covers primarily civil disputes and to a limited extent administrative disputes (*infra* at *2.2.5*). The former includes (a) verification of certain rights such as the right to use ocean territory, rights of ownership and use of forests; (b) ascertainment of women's rights to use land of maritime disputes or liability for compensation; (c) mediation regarding the amount of compensation in medical or traffic accidents or environmental pollution cases or infringement of intellectual property or consumer disputes. In local regulations, the subject matter jurisdiction is extended to almost all civil disputes and administrative

[47] Y. Fan, *supra* n. 3, p. 549.

[48] Y. Fan, *Study on ADR Mechanism*, Renmin University Publishing House, Beijing 2000, p. 76.

[49] Opinions of the State Council on Strengthening the Construction of Rule of Law Governments issued in October 2010.

disputes arising from administrative activities.[50] Currently, administrative mediation has still many deficits to overcome: the existing rules on administrative mediation are too simplistic and vary significantly from city to city,[51] and the professional qualification of the mediators is often not guaranteed.

1.3.5 Institutional Mediation

Institutional mediation refers to mediation conducted by professional mediation centers and is often also called commercial mediation. An example is the Conciliation Center of CCPIT (China Council for the Promotion of International Trade)/CCOIC (China Chamber of Commerce). Several arbitration commissions such as CIETAC and the local arbitration commissions have established specialised mediation centers to handle mediation cases. The mediation center of CIETAC also allows mediation during the process of arbitration, and can convert a mediation settlement into a binding arbitral award. (*supra.* 1.2.1)[52] Most of the disputes solved using this mechanism deal with commercial law.[53]

1.3.6 Industry-Based Mediation

Industry-based mediation refers to mediation conducted by autonomous industrial organisations for industrial professionals in or related to a specific industry such as accountancy, insurance, banking, logistics, medical services, transportation, real estate or the tourism industry. The legal basis for industry-based mediation is the regulation 'Some Provisions Concerning the Work of People's Mediation' issued by the Ministry of Justice in China in September 2002. Some of the industry-based mediation committees have been set up by the relevant industry associations, and others are established by or under the supervision of the relevant government bureaus.

The status of industry-based mediation committees has also been recognised in Article 34 of the People's Mediation Law, according to which 'if it is necessary, social groups or other organisations may establish people's mediation committees to mediate disputes among the people.' The Ministry of Justice issued the 'Opinions of the Ministry of Justice on Strengthening the Building of Industry-based and Profession-based People's Mediation Committees' in May 2011 in an effort to further promote industry-based mediation. The general advantage of industry-based

[50]Z. Zhang and Q. Gu, 'A Study on "Administrative Mediation in Chinese Legal Documents"' (2011) 5 *Jiang Huai Forum* 126–127.

[51]Z. Zhang and Q. Gu, *supra* n. 50, pp. 128–129.

[52]Mediation during Arbitration, <http://cn.cietac.org/Mediation/index.asp> accessed 24.07.2014.

[53]See more details: J. Liang, *supra* n. 18, pp. 502–505.

mediation is that the mediator normally has sufficient professional know-how and experience. On the other hand, as mediators are selected by the industry association, their neutrality is sometimes questionable.

1.4 Grand Mediation

With the adoption of the People's Mediation Law, people's mediation has been given a fresh lease of life. Thus, the new catchword 'grand mediation' was coined with the support of the Supreme People's Court in 2008. 'Grand mediation' (大调解) brings together people's mediation, mediation by administrative bodies and judicial mediation. This is done under the auspices of the Party, the government and the leadership of the Committee of the Party for Politics and Law with the cooperation of the courts, prosecutors, police, petition authorities, real estate supervisory authorities and labour authorities, etc. In concrete terms, people's mediation bodies have been established in courts, petition offices, the traffic police and the labour mediation authorities. One-third of the disputes in Shanghai in 2009 reportedly could be resolved by 'grand mediation' and filtered out of the litigation channel. Despite such potential for success, the superiority of 'grand mediation' has apparently failed to convince all judges and litigants.[54] The advantages and disadvantages of mediation and judgment are often compared and weighed. However, there has been an excessive emphasis on mediation. This is disturbing given that it was introduced on the basis of proposals of some authors as a necessary correction of the supremacy of the law (唯法治论) and the supremacy of legal protection (司法救济至上).[55] If one views the legitimacy of the courts solving disputes by mediation as based on principles of self-determination of the parties,[56] one will be disappointed to realise that forced court settlements are common. Even with respect to judges, a free choice between mediation and judgment is not guaranteed, because the mediation rate is a factor in the evaluation of their working performance.[57]

A problematic special feature of 'grand mediation' is that the mediator lacks neutrality. In some cases, such as expropriation cases, the party liable to pay damages, namely the government, is also the mediator.[58] The court merely plays the

[54]C. Zhang, 'Zivilprozess und Durchsetzung privater Ansprüche', in Y. Bu (ed.), *Recht und Rechtswirklichkeit in Deutschland und China, Mohr Siebeck*, Tübingen 2011. pp. 13–14.

[55]Y. Fan takes that view in *Theory and Practice of Conflict Settlement*, Tsinghua University Publishing House, Beijing 2007, pp. 293–298.

[56]R. Stürner, 'Richterliche Vergleichsverhandlung und richterlicher Vergleich aus juristischer Sicht' in I. Meier, *Recht und Rechtsdurchsetzung: Festschrift für Hans Ulrich Walder zum 65. Geburtstag*, Zürich 1994, p. 280.

[57]For a detailed description compare C. Minzner, 'China's Turn Against the Law' (2011) 59 *American Journal of Comparative Law* 956 ff.

[58]J. Ai, '"Big Mediation" Under the Logic of Social Stabilization and Its Problems' (2011) 1 *Studies in Law and Business* 24.

role of a legally qualified adviser, who fosters a pragmatic solution, both compatible with the legal framework as well as taking social stability into account.[59]

In the overhaul of the Chinese Civil Procedure Law in 2012, a shift of attitude is not in sight. Rather, the coordination between mediation and adjudication shall be optimised and the enforceability of settlement agreements shall be secured.

1.5 Statistic Information and the Existing Trend

Available statistics show that the employment of mediation has kept increasing since 2002, to a certain degree because it was in 2002 that the binding effect of people's mediation settlement was recognized by the Supreme People's Court.[60] Court-annexed mediation has been experiencing also its flourish since then, and civil disputes that were settled at first instance courts by means of mediation have steadily increased.[61] Back to 2003 there were 1,322,200 cases settled by mediation, and it accounted for 29.9 % of all civil cases solved at first instance courts.[62] In 2012 that number of cases has almost tripled with a number of 3,004,979 and its percentage reached 41.7 %.[63]

Some reasons such as traditional legal culture, the influence imposed by foreign law, the court mechanism in China lead to the rapid development of mediation in China. The incumbent political leaders attach great importance to the maintenance of social stability and see the revival of mediation as an effective tool helping to reach this goal. Since in this regard there is no radical change in sight, it can be assumed that the popularity of mediation could last long.

2 Exiting Legal Basis

2.1 Legal Framework

The legal framework governing mediation in China consists of a large number of national statutes, administrative regulations, judicial interpretations and local provisions. Below are the most important ones:

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[59]J. Ai, *supra* n. 58, p. 21.

[60]C. Shi, 'From Judgment to Settlement: the Impact of ADR on Judicial Functions' (2014) 2 *Science of Law (Journal of Northwest University of Political Science and Law)* 5.

[61]C. Shi, *supra* n. 60, p. 6.

[62]C. Shi, *supra* n. 60, p. 6.

[63]Editorial Office, *Law Year Book of China* 2013, Law Year Book of China Press, Beijing 2013, p.1211.

National Statutes

- People's Mediation Law (人民调解法), promulgated on 28 August 2010 and effective on 1 January 2011;
- Law on Mediation and Arbitration of Rural Land Contract Disputes (农村土地承包经营纠纷调解仲裁法), promulgated on 27 June 2009 and effective on 1 January 2010;
- Law on Labor Dispute Mediation and Arbitration (劳动争议调解仲裁法), promulgated on 29 December 2007, effective on 1 May 2008.

Administrative Regulations

- Rules on the Mediation and Arbitration of Rural Land Contract Disputes (农村土地承包经营纠纷调解仲裁工作规范), promulgated by the Ministry of Agriculture on 15 January 2013 and effective on 15 January 2013;
- Provisions on the Negotiation and Mediation of Enterprise Labour Disputes (企业劳动争议协商调解规定), promulgated by the Ministry of Human Resources and Social Security on 30 November 2011 and effective on 1 January 2012;
- Provisions on the Mediation of Electricity Disputes (电力争议纠纷调解规定), promulgated by the State Power Regulatory Commission on 30 September 2011 and effective on 1 January 2012;
- Some Provisions Concerning the Work of People's Mediation (人民调解工作若干规定), promulgated by the Ministry of Justice on 26 September 2002 and effective on 1 November 2002;
- Procedures of Mediation of Disputes about the Rights of Sea Area Use (海域使用权争议调解处理办法), promulgated by the State Oceanic Administration on 28 April 2002 and effective on 28 April 2002;
- Measures on Mediation of Disputes about the Quality of Vehicle Repairs (汽车维修质量纠纷调解办法), promulgated by the Ministry of Communications (dissolved) on 12 June 1998 and effective on 1 September 1998;
- Measures on Administrative Mediation of Contracts Disputes (合同争议行政调解办法), promulgated by the State Administration for Industry and Commerce on 3 November 1997 and effective on 3 November 1997.

Judicial Interpretations

- Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Cases Involving Mediation and Arbitration of Rural Land Contract Disputes (最高人民法院关于审理涉及农村土地承包经营纠纷调解仲裁案件适用法律若干问题的解释), promulgated by the Supreme People's Court on 9 January 2014 and effective on 24 January 2014;
- Several Provisions of the Supreme People's Court on the Judicial Ratification Procedure for the People's Mediation Agreements (最高人民法院关于人民调解协议司法确认程序的若干规定) promulgated by the Supreme People's Court on 23 March 2011 and effective on 30 March 2011;
- Provisions of the Supreme People's Court about Several Issues Concerning the Civil Mediation Work of the People's Court (最高人民法院关于人民法院民事

调解工作若干问题的规定) promulgated by the Supreme People's Court on 16 September 2004 and effective on 1 November 2004;
- Some Provisions of the Supreme People's Court on Trying Civil Cases Involving the People's Conciliation Agreements (最高人民法院关于审理涉及人民调解协议的民事案件的若干规定) promulgated by the Supreme People's Court on 16 September 2002 and effective on 1 November 2002.

2.2 Areas of Laws Covered by Mediation

2.2.1 Civil Law

In the area of family law, mediation is a mandatory proceeding mostly envisaged for divorce cases. According to Article 32 of the Marriage Law 2001, courts are obliged to perform mediation prior to trying the case in a divorce suit. Furthermore, mediation is regulated as the primary legal avenue in cases of domestic violence and abandonment of family members.

Article 15 of the Inheritance Law stipulates that successors shall negotiate a settlement in the spirit of compromise as well as peaceful harmony. If these negotiations fail, the successors can call upon the people's mediation committee for mediation or file a lawsuit with the competent court.

In the area of contract and tort law, mediation may be conducted with respect to certain types of contract disputes such as electricity disputes and disputes about the quality of vehicle repairs or tort liability for medical malpractice or traffic accidents. In this regard, the Ministry of Justice has issued an opinion on 12 May 2011 on Strengthening the Building of Industry-based and Profession-based People's Mediation Committees (*supra 1.3.6*).

2.2.2 Commercial Law

Parties of Chinese-foreign joint ventures are often recommended to hold a number of 'amicable negotiations' before performing an arbitration proceeding or filing a lawsuit. In the field of foreign trade, mediation also plays a key role.

2.2.3 Labour Law

Numerous regulations exist regulating mediation proceedings in labour disputes. Chinese labour law envisages a system with multiple steps – voluntary negotiation, mandatory mediation, arbitration and trial. After voluntary negotiation has failed, mediation is a mandatory proceeding preceding labour arbitration, which in turn must precede a trial before court.

2.2.4 Intellectual Property Law

According to Chap. 3 of the Measures for Administrative Enforcement concerning Patent Issues the patent administration authorities are entitled to mediate the disputes involving patent infringement.

2.2.5 Public Law

In the field of administrative law, mediation is prohibited except for cases concerning government liability. An exception is possible when minor disputes between citizens at the same time constitute administrative offences. In that case, police departments can mediate the dispute between citizens, and in the case of a successful mediation the penalty imposed by administrative law will be dropped. Likewise, mediation is permitted in the area of criminal law in private actions.

2.2.6 Areas of Law Excluding Mediation

The employment of court-annexed mediation is subject to the limitation of Article 2 of the Provisions of the Supreme People's Court about Several Issues Concerning the Civil Mediation Work. It specifies the situations in which disputes are excluded from mediation. In those exceptional cases, usually a special court procedure is designated.

3 Mediation Agreement/Agreement to Submit the Disputes to Mediation

3.1 Agreement und Legal Requirements

Mutual consent is the basic requirement for commencing a mediation proceeding. In the most types of mediations except the institutional mediation, written form of mediation agreement is not required. As to the question whether the consent has to be given expressly or impliedly, the requirement varies depending on the type of mediation. For court-annexed mediation the explanation of the Commission of Legislative Affairs of the NPC Standing Committee suggests that agreement must be expressly declared and an implied consent is insufficient.[64] However in the cases

[64]Civil Law Office of the Commission of Legislative Affairs of the NPC Standing Committee, *supra* n. 21, p. 240.

of preliminary mediation the implied consent is allowed.[65] People's mediation can be initiated by application of one party or be ordered *ex officio* by the people's mediation commission, as long as no party is explicitly against the mediation,[66] which indicates that the implied consent may suffice. In administrative mediation the requirements on the form of the agreement vary from area to area, the application in written form may be required in some circumstances.

On the contrary, institutional mediation follows stricter rules. Usually a mediation agreement in written form is required. According to one commentator, a mediation agreement can be entered into in the following three ways.[67] Firstly, the parties can express their intention to mediate in their contract. When later on disputes arise out of this contract, the mediation clause can serve as a mediation agreement. Secondly, the parties may also reach an agreement to submit the disputes to mediation after the conflict occurs. Lastly one party can submit an application to the mediation center in written form with certain contents, and when the other party agrees, the mediation could be started. Usually the application should include contents such as personal information, basic description of the disputes and the claims.

3.2 Effects of the Agreement

3.2.1 Binding Effects on the Parties

Mediation agreement is deemed as a civil contract, which obligates the both parties to perform their duties arising out of it. However, this contract is not enforceable due to its voluntary nature. One party's absence at the mediation will only lead to failure of the mediation.

3.2.2 Effects on Future Plead

In contrary to arbitration agreement, which constitutes a statutory bar for courts on accepting the case filing, the mediation agreement doesn't prevent the parties from filing a lawsuit before courts. Once a party files an application with a people's

[65] Civil Law Office of the Commission of Legislative Affairs of the NPC Standing Committee, *supra*n. 21, p. 334.

[66] Article 17 of the People's Mediation Law.

[67] H. Gao, 'Mediation with regard to Trade Disputes: Three Ways to Enter into Mediation Agreement' *Cross-Strait Relationship* (2000) 10, p. 46.

mediation commission or other authorities to claim civil rights, the prescription period will be interrupted upon the time the application is made.[68]

3.2.3 Effects on Pending Claims Before Courts

When the parties reach a mediation agreement, it may bring about different results depending on the type of mediation:

In the court-annexed mediation, if the parties agree to start the mediation proceeding, the trial proceeding will be suspended. However, the period of time used for mediation will still be included in the mandatory time limit for trial. Only in certain circumstances, when the mediation has not yet been finished within the permitted time of period but the parties agree on the continuation of mediation, the extended period is allowed to be excluded from the prescribed time limit of trial.[69]

No specific rules govern the effect of a mediation agreement on pending claims in the case of people's mediation or institutional mediation. Since both types of mediation are unable to produce directly binding settlement, it does not matter whether a conflicting result with the court ruling exists. In respect thereof, it can be concluded that both types of mediation will not affect the pending claims. However, if the parties reached a settlement before the court's judgment has been made, and they intend to get the settlement ratified by the court, it may be necessary to withdraw their action, due to the fact that a ratified people's mediation agreement may bring about the equal effect of *res judicata*. (*infra* at 7.3)

In the situation of administrative mediation and industry-based mediation the parties are free to choose either mediation or litigation. Once they have chosen litigation, it may be impossible for them to go back to mediation. For example, in traffic accident disputes the application for mediation from a party who has already brought the case before the court will be rejected. Even when the mediation has begun, the legal action in court will automatically bring the mediation process to a halt.[70] The application for mediation with the Securities Association of China will also be rejected, if the parties have brought the lawsuit before a court.[71] In this regard, litigation excludes the employment of mediation and thus it won't be possible for mediation to have an impact on the pending claims.

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[68] Article 14 of the Provisions of the Supreme People's Court on Several Issues Concerning the Application of Statute of Limitations during the Trial of Civil Cases.

[69] Article 6 of the Provisions of the Supreme People's Court about Several Issues Concerning the Civil Mediation Work of the People's Court.

[70] Article 96 of the Regulation on the Implementation of the Road Traffic Safety Law of the People's Republic of China.

[71] Notice of Security Association of China about Application for Mediation, <http://www.sac.net.cn/hyfw/zqjftj/zxsq/> accessed 17.08.2014.

4 The Mediator

4.1 Suitable Persons as Mediators and Their Appointments

The qualification of mediators varies depending on the type of mediation. In court-annexed mediation it is the trial judges who are in charge of the lawsuit conduct the mediation in the same matter. Upon consensus of the parties, the assistant judges may also conduct the mediation.[72] In preliminary mediation judges of the case filing chamber may also serve as mediators. The judges are allocated by the court. The same as court-annexed mediation, the parties are not allowed to appoint their mediators in administrative mediation, since the responsible staff of the administrative organ lead the mediation.

According to the People's Mediation Law, the members of the people's mediation committee, who are elected and recommended by the villagers' meeting or villagers representatives' meeting (villagers' committee), residents meeting (residents' committee) and employees' assembly or labor union (enterprises' committee) and also the persons that are appointed by the above committees can serve as mediator.[73] In order to be a mediator, they are required to know policy and law and to have basic education. Morally they must be impartial and dedicated to the mediation work.[74] In concrete cases, not only can the parties choose mediators, but also are mediation committees able to appoint mediators.[75] If the parties agree, relatives, neighbors, colleagues, persons with special knowledge or experience as well persons of certain related social organizations can be invited by mediation committees to participate in the mediation procedures.[76]

In institutional and industry-based mediation the mediators are usually experts in the related area, and they may be lawyers, scholars, retired governmental officials and judges or practitioners. Eligible persons are usually registered in the lists of the mediation centers for selection by the parties. However, the parties' choices are usually not restricted by the list.

4.2 Duities and Responsbilities of the Mediators

The main duties of mediators are the clarification of the procedures and the facilitation of the settlement. Before the mediation starts, they are obligated to

[72] Article 11 of Several Opinions of the Supreme People's Court on Further Displaying the Positive Roles of Litigation Mediation in the Building of a Socialist Harmonious Society.

[73] Article 9 and 13 of the People's Mediation Law.

[74] Article 14 of the People's Mediation Law.

[75] Article 19 of the People's Mediation Law.

[76] Article 20 para. 1 of the People's Mediation Law.

inform the parties of the basic procedure, the function of the mediators and any related issues with regard to the expense and remuneration of mediators. During the mediation, mediators are held to respect the party autonomy, bring the parties together and fulfill their wishes and requests. A distinctive feature of court-annexed mediation is that the mediators are not only entitled to support the parties in reaching settlement on their own, but can also propose settlement to the parties.[77] In this respect the court-annexed mediation resembles to a certain degree the conciliation.

Duty of disclosure is another important duty of the mediator, which is stressed in the mediation rules of mediation centers. According to those rules mediators are obligated to disclose any information which may incur reasonable doubt about their fairness and independence. Information such as previous discussion with the parties in relation to the cases before the appointment as mediator, personal interests in the disputing cases, employment relationship or any other personal relationships with the parties belongs to the content of such disclosure. When mediators fail to perform their duties, they will be excluded from the mediator list and be barred from serving as mediators in future cases, depending on the seriousness of the breach of duty.

4.3 Code of Conduct

No unified code of conduct for mediators has so far been released in China. Certain rules regulating the behaviors of mediators scatter in legal regulations or internal rules of the mediation centers. Some of the mediation centers play a leading role in enacting codes of conduct. Those codes of conduct usually obligate mediators to be impartial and fair, to keep all the information obtained during the mediation confidential. Mediators are also banned from obtaining any illegal interests by conducting the mediation.

5 The Procedure of Mediation

5.1 Basic Principles

Voluntariness, equality and neutrality of the mediators and other worldwide accepted principles count also to the existing principles of mediation in China, which are mentioned in the statutes or mediation rules of mediation centers. While those principles are applicable to almost all kinds of mediation, there are still some principles which are only applied to a special kind of mediation. In the following part, it will focus on the distinct mediation principles in China.

[77] Article 8 of the Provisions of the Supreme People's Court about Several Issues Concerning the Civil Mediation Work of the People's Court.

5.1.1 Principle of Confidentiality

In China the principle of confidentiality features two aspects. First of all, the mediators and other persons involved in the mediation such as witnesses or experts are bound to strictly abide by the duty of confidentiality, which forbids them from divulging personal privacies, commercial secrets and any other information in relation to the mediation to other irrelevant persons or to the oppositing party. Secondly, the mediation procedure is not public and no record should be kept. Since there are several kinds of mediation in China, it's difficult to say whether and to which degree the principle of confidentiality is followed. No doubt that institutional mediation has taken the pioneer position in putting this principle into practice, since mediation procedure rules of the mediation centers have usually specified confidentiality in both above mentioned aspects.[78]

While the principle of confidentiality belongs to the primary principles of mediation worldwide, it has not been declared as a statutory principle of court-annexed mediation in China under the Civil Procedure Law. Only the Supreme People's Court has dealt with this issue. Article 7 para. 1 of the Provisions of the Supreme People's Court about Several Issues concerning the Civil Mediation Work of the Peoples' Court in 2004 states that when the parties apply for mediation in a non-public proceeding, the court shall grant its permit. Based on this clause it can be assumed that in court-annexed mediation the non-public mediation is not regarded as a binding principle. Not until 2007 the Supreme People's Court has turned the exceptional confidentiality requirement into a general principle in its Several Opinions on Further Displaying the Positive Roles of Litigation Mediation in the Building of a Socialist Harmonious Society. It stipulated that the judges and other participants must keep all information in relation to the mediation confidential. Article 19 of the in 2009 enacted Several Opinions of the Supreme People's Court on Establishing a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation forbids mediators from testifying and the parties from using of the record of mediation proceeding, concession and commitment of the parties and opinions of the mediators as evidence in the subsequent trial. In this way, this clause intends to further guarantee the confidentiality of the mediation information.[79]

Regarding the mediation record, in contrary to most of the institutional mediation where no record has to be kept, in people' mediation[80] and court-annexed mediation the record of the mediation process and the mediation settlement are required.

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[78]For example, Article 18 the Mediation Rules from Mediation Centre of Beijing Arbitration Commission, <http://www.bjac.org.cn/mediation/shuoming.htm>

[79]J. Xiao and Y. Tang, 'On Confidentiality in Court-annexed Mediation' (2011) 4 *Science of Law (Journal of Northwest University of Political Science and Law)* 139.

[80]Article 20 of the People's Mediation Law.

5.1.2 Principle of Voluntariness

The principle of voluntariness is stipulated in Article 9 of the Civil Procedure Law. In court-annexed mediation it is stressed that voluntariness constitutes the foundation for the mediation.[81] On the one hand, voluntariness means that the mediation procedure must be started and terminated according to the parties' wishes; on the other hand, this principle intends to prevent the courts from compelling the parties to reach certain agreement, therefore the content of mediation settlement should be consistent with the true wish of the parties.[82]

In all other types of mediation voluntariness is also a primary principle. This can be extracted from the wording of the requirement that the mediation can be initiated only when both parties consent, no matter if it is done explicitly or implicitly.

5.1.3 Principle of Lawful Mediation

Article 9 of the Civil Procedure Law and Article 3.2 of the People's Mediation Law articulate the principle of lawful mediation in court-annexed and people's mediation. Lawful mediation requires not only that the mediation procedure should follow the procedural regulations but also that the content of the mediation settlement must be lawful. As to the requirements of lawfulness of the content, it is still controversial. In a strict sense, lawfullness means that the content of mediation settlement must conform to the substantive legal rules and the outcome of mediation has to be in line with the legal position of the parties according to law.[83] In contrast, according to a more accepted interpretation, lawfullness requires only that the content of the mediation settlement does not violate the mandatory legal provisions, infringe the national and public interests as well interests of others. A compliance with the substantive law to the full extent is not necessary.[84] In people's mediation the latter interpretation has been followed.[85] It is almost undisputable that people's mediation is an interest-based mediation, but not a right-based mediation. (*Supra* at 1.3.3) In court-annexed mediation, the commentators also intend to adopt the latter interpretation. Considering that mediation aims at resolving the dispute by mutual consent, rather than defining rights and obligations strictly according to law, it may be meaningful to allow the parties' deviation from substantive law to a certain extent.

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[81]B. Jiang, *Civil Procedure law of the People' Republic of China: A Practical Guide to Understanding and its Application*, Law Press, Beijing 2012, p. 360.

[82]Civil Law Office of the Commission of Legislative Affairs of the NPC Standing Committee, *supra* n.21, p. 240.

[83]S. Qi (eds), *Civil Procedure Law*, Xiamen University Press, Fujian 2007, p.71.

[84]B. Jiang, *supra* n.81, p. 361; X.Xi, *supra* n. 21, p. 246.

[85]H. Li, 'Restatement of the Principle of Ascertaining the Facts and Distinguishing Right and Wrong' (2011) 4 *Chinese Journal of Law* 121.

5.1.4 Principle of Distinguishing Right and Wrong Based on the Facts

According to Article 93 of the Civil Procedure Law, in court-annexed mediation the principle of distinguishing right and wrong based on the facts is to be applied. This principal has its origin in the first civil procedure law of 1982. The judges were required to conduct mediation on the condition that they have ascertained the facts and distinguished right from wrong. The emphasis of this principle was closely associated with the prevalent opinion about the nature of mediation. Since the legislator then considered mediation as another method used by courts in addition to trial to perform its adjudicatory power,[86] judges were also obligated to find out relevant facts during the mediation just as in a trial proceeding.

In the revision of the Civil Procedure Law the text of this principle was slightly changed to the current version, which has ceased to emphasize the court shall ascertain the facts, but only states that the mediation shall be conducted on the basis of clear facts. While scholar construes the wording as abandonment of the obligation to ascertain the facts,[87] most commentators believe there is no substantial change to the content of this principle.[88] Since the wording of Article 93 gives no clear explanation to the issue, both interpretations exist in the practice.

5.2 Duration of Mediation and Time Limits

In court-related mediation, mediation is to be promptly conducted in order to prevent prolonging the parties' litigation process. However, no mandatory time limit of mediation exists in the legal text. The only clause regarding time limit that can be found regulates only the mediation proceeding conducted by the court in the period prior to the expiration of the deadline for submitting defense. In this case, the mediation proceeding is limited to 7 days if the summary procedure is applied or 15 days if the ordinary procedure is applied.[89] This time limit can be extended by the parties.

In people's mediation there is no provision on the duration of mediation either. In administrative mediation the allowed duration varies depending on the individual administrative regulations. In institutional and industry-based mediation, the parties are usually free to determine the duration of mediation. Upon agreement of the both parties, the mediators are also entitled to determine the time limit. If there is no time limit, the mediation shall be finished usually in no more than 30 days, but it may be extended upon the consent of the parties.

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[86]C. Zhou, 'Restatement of the Relationship between Trial and Mediation' (2014) *1 Journal of Comparative Law* 47.

[87]B. Jiang, *supra* n.81, p. 362.

[88]H. Li, *supra* n. 85, p. 123.

[89]Article 6 of the Provisions of the Supreme People's Court about Several Issues Concerning the Civil Mediation Work of the People's Court.

5.3 Relationship Between Mediation and Notary

5.3.1 The Role of Notaries During the Mediation Procedures

Notaries are entitled to conduct mediation in disputes relating to notarized matters.[90] When the parties bring lawsuit concerning a notarized matter before the court, notaries may be entrusted or invited to participate in the mediation. Since during the notary proceedings the notaries have already gathered information and evidence about the disputes, they are in a good position to mediate.

5.3.2 Notarization of Settlement Agreements

According to Article 37 of the Notary Law notarized credit document that deals with payment and records the obligator's acceptance of enforcement is enforceable. Therefore, a settlement agreement which fulfills the above requirements can also obtain its enforceability by notarization. The Supreme People's Court specified that the creditor of a notarised settlement agreement can directly apply to courts for enforcement.[91] Practitioners have suggested that the involvement of notarization in mediation proceeding shall be promoted in order to facilitate the enforceability of settlement agreement.[92]

6 Failure of the Mediation

6.1 Meaning

There is no definition of failure of the mediation. Normally if the mediation procedure is terminated without reaching a mediation settlement, the mediation can be deemed to have failed. Circumstances which lead to a termination include: a party refuses to attend the mediation, the mediator terminates the procedure by written announcement based on his conviction that there is no hope for a settlement, one or both parties declare to abandon the mediation or the time limit is exceeded and the parties object to an extension.

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[90] Article 56 of the Rules of Notary Procedure.

[91] Article 10 of the Some Provisions of the Supreme People's Court on Trying Civil Cases Involving the People's Mediation Agreements and article 12 of Several Opinions of the Supreme People's Court on Establishing a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation.

[92] M. Ma and J. Hao, 'Research on the Involvement of Notary in Mediation relating to Traffic Accidents Disputes' (2014) 4 *Legal System and Society* 121; M. Zhang, 'Incorporate Notarization into People's Mediation in Order to solve Disputes effectively', <http://article.chinalawinfo.com/Article_Detail.asp?ArticleId=76424> accessed 20.08.2014.

6.2 Consequences

The failure of mediation does not affect the substantial rights of the parties. They may further resort to arbitration, litigation, administrative measures and other available methods to claim their rights. Regarding the consequence for mediators, mediation rules of some mediation centers prohibit them from acting as arbitrators or agents of the parties in arbitration or trial proceedings relating the same matter.

7 Success of the Mediation Procedure

7.1 Meaning of Successful Mediation and Requirements for Mediation Settlement

There are no legal rules specifying under which circumstances the mediation procedure may be deemed successful. Normally successful mediation is achieved when the parties reach a mediation settlement. Rules governing the wide range of mediations lay down different requirements for the effectiveness of the settlement agreement.

In court-annexed mediation the parties have to sign the written settlement agreement. Courts have to review the settlement agreement and then attach it to the case files. In order to be legally binding, the settlement agreement should also bear the signatures or seal of the judges and court clerks.[93] After being reviewed by the courts, mediation settlements can be converted into mediation awards, which are enforceable. (*infra* at 7.3.1)

The settlement agreement in people's mediation can be reached either in oral or written form.[94] Upon oral settlement the mediators are bound to document the content of the settlement. The agreement in oral form becomes effective as of the day on which it's reached.[95] In the written settlement the mediators may record the basic information of the parties, principle facts and main issues of the dispute, liabilities of each party, and further the contents of the settlement, manner and term for performing the agreement. The parties and the mediators ought to attach their signatures and the people's mediation committee has to seal on the agreement in order to make it effective.[96]

[93] Article 13 of the Provisions of the Supreme People's Court about Several Issues Concerning the Civil Mediation Work of the People's Court.

[94] Article 28 of the People's Mediation Law.

[95] Article 30 of the People's Mediation Law.

[96] Article 29 para 1 of the People's Mediation Law.

Settlement in administrative mediation is usually recorded in an agreement produced by the administrative authorities. For its effectiveness are also the signatures or seals of the parties and seal of the administrative authorities necessary.[97]

Settlement agreements in institutional and industry-based mediations are also usually kept in written form. A distinctive feature of the settlement agreement reached in the mediation centers attached to arbitration commissions is that, after the agreement is reached, the parties may jointly apply for arbitration, and then the arbitration commission is able to issue a mediation award or an arbitration award based on the content of the settlement agreement.[98]

7.2 Conditions for Enforceability

In principle, settlement agreements made by the parties do not qualify as directly enforceable titles, but as conventional contracts.[99] To give a settlement agreement the effect of direct enforceability, the parties may initiate judicial ratification proceedings before a competent court or have the settlement agreement notarised by a public notary, if it deals with a simple debt. The Parties may also apply for payment order in court.[100]

7.2.1 Enforcement of Settlement Agreements Reached in Court-Annexed Mediation Proceedings

The rapid and voluntary compliance with settlement agreements is praised as an advantage of mediation. The efforts of the Supreme People's Court to make rescission from judicially drafted settlement awards difficult, actually argues against this assumption. According to Article 97 para. 1 of the Civil Procedure Law a mediation award will be made in which the submissions, the facts and the mediation results are documented where both parties reach a settlement agreement. A mediation award becomes final and enforceable upon being served on the parties. Article 99 of the Civil Procedure Law allows each party to with draw from the settlement award made by the court without any objective reason prior to its

[97]For example Article 24 of the Measures for Patent Administrative Law Enforcement, and Article 95 of the Regulation on the Implementation of the Road Traffic Safety Law.

[98]Article 23 para. 1 of the Mediation Rules of the mediation centre attached to Beijing Arbitration Commission. <http://www.bjac.org.cn/mediation/shuoming.htm>accessed 17.08.2014

[99]Articles 8, 9 10 of the Several Opinions of the Supreme People's Court on Establishing a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation and Article 1 of the Some Provisions of the Supreme People's Court on Trying Civil Cases Involving the People's Mediation Agreements.

[100]Article 13 of the Several Opinions of the Supreme People's Court on Establishing a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation.

service. Often one party feels ripped off by the other and refuses to accept the delivery of the settlement award once the peaceful atmosphere generated by the mediation discussion fades and the party gives further thought to the law and facts. This is considered a waste of judicial resources. As a countermeasure, the Supreme People's Court stipulates that the refusal of service does not contradict the enforceability of the settlement award for certain cases, in which a mediation award is not necessary and the parties agree that the settlement agreement should come into effect upon signing by the parties.[101] In those cases the settlement agreement becomes legally effective, as soon as the parties agreed to a settlement, the court confirmed its content and the parties and judges have signed the corresponding court record.[102] That means, once the settlement agreement has been signed, the parties are bound to the declaration. In all other cases, the mediation award can only be binding as from its service.[103]

7.2.2 The Enforcement of Settlement Agreements Reached in People's Mediation Proceedings

The enforcement of settlement agreements has been controversial since the people's mediation system was restored. The Ministry of Justice issued the Measures for Handling Peoples Disputes in 1990 and sought to give compulsory effect to settlement agreements and decisions reached under local governments.[104] However, in 1993 the Supreme People's Court made it clear in the Notice on How to Deal with Civilian Disputes Handled by Township People's Governments that courts may invariably hear disputes covered by people's mediation agreements and are not bound by the mediation results while adjudicating the cases.[105] The legally binding nature of the people's mediation settlements was reaffirmed by the Supreme People's Court in 2002. Again, the 'binding nature' of the settlement agreement only refers to it being 'binding' like any other civil contract, but does not say anything as regards enforceability.

Generally speaking, a distinction is to be made between the enforcement of a settlement agreement itself and a judicially ratified agreement. A plain settlement agreement without judicial ratification is nothing more than a normal contract, which does not qualify as an enforcement order. Therefore, if one party refuses to perform a settlement agreement, the other party has to obtain an executory title either by suing the non-performing party for breach of contract or by filing

[101] Article 151 of the Interpretation of the Supreme People's Court Concerning the Application of the Civil Procedure Law.

[102] Article 13 of the Provisions of the Supreme People's Court about Several Issues Concerning the Civil Mediation Work of the People's Court.

[103] Article 149 of the Interpretation of the Supreme People's Court Concerning the Application of the Civil Procedure Law.

[104] Y. Fan, *supra* n. 3, p. 538.

[105] Y. Fan, *supra* n. 3, p. 539.

a suit with the court for the underlying dispute settled by the settlement agreement. Numerous commentators have tried to confer a plain settlement agreement the effect of direct enforceability, which was rejected by the judiciary due to lack of support in the black letter law and legal theory. The wording of the pertinent provision in the People's Mediation Law actually does not suggest the direct enforceability of people's mediation settlement agreements.[106] In effect, settlement agreements are not enforceable until judicial ratification by the courts has taken place.

Judicial ratification of people's mediation agreements has been officially established by the People's Mediation Law. Previously, several judicial interpretations already introduced and implemented this legal concept. Judicial ratification proceedings are regarded as a declaratory action and deal with non-contentious matters; they are therefore to be classified as special proceedings.[107] In the case of a successful judicial ratification, the ratification certificate, accompanied by the original settlement agreement, constitutes the enforcement title.[108] It is however still subject to discussion whether a judicially ratified settlement agreement is able to bring about the effect of *res judicata*.[109]

In pursuance of Article 33 of the People's Mediation Law, the two parties may jointly apply to the court for ratification within thirty days of the settlement agreement taking effect if they deem it necessary. The lately enacted Interpretation of the Supreme People's Court Concerning the Application of the Civil Procedure Law makes it clear, under which circumstances application for judicial ratification will not be accepted by courts: (1) if the cases do not belong to courts' accepted scope of civil actions; (2) the court which receives the application has no jurisdiction over the case; (3) the party applies for confirmation of the invalidity, validation or termination of the marriage, parenthood, adoption relationship; (4) other special procedures, procedure for public summons, procedure for bankrupt should be applied in the proceedings; or (5) the settlement agreement deals with the confirmation of property rights or intellectual property rights.[110] After the court confirms the validity of the settlement agreement in accordance with the law, the other party may apply to the people's court for enforcement, if one party refuses to perform or fails to properly perform. Where the court determines that the settlement agreement is invalid, the parties may alter the original settlement agreement or reach a new settlement agreement or may also file a lawsuit to the people's court.

Another highly controversial issue is the standard of examination to be applied by courts to judicial review of people's mediation agreements. The Supreme People's

[106] Y. Fan, *supra* n. 45, p. 10. The wording is 'The mediation agreement reached through the mediation of the civil mediation committee shall be legally binding and the parties shall perform in light of the stipulations'.

[107] G. Xiang, 'The Improvement and Development of the Judicial Ratification Proceeding of Mediation Agreement' (2011) 7 *Journal of Law Application* 14.

[108] G. Xiang, *supra* n. 105, p. 15.

[109] G. Xiang, *supra* n. 105, p. 16.

[110] Article 357 of the Interpretation of the Supreme People's Court Concerning the Application of the Civil Procedure Law.

Court has addressed this issue in several judicial interpretations, but each time the approach has been slightly amended.

For example, according to Article 7 of 'Certain Provisions on Procedures for Judicial Ratification of People's Mediation Agreements' issued by the Supreme People's Court on 23 March 2011, the settlement agreement is subject to a substantive review in the judicial ratification proceedings. That means the consulted court is allowed to examine the settlement agreement with a view to its compliance with mandatory statutory provisions, compliance with the interests of the state, the public and third party rights, compliance with public policy and social order as well as the clarity of the contents. This provision deviates from a guideline set out in 'Several Opinions on Establishing and Improving Resolution System in the Disputes in the Link of Litigation and Non-litigation Cases' in that the latter allows the court to even examine whether the mediation is conducted voluntarily and there is no violation of professional ethic rules by the mediator and the mediation organisation. In addition, in contrast to 'Certain Provisions on Procedures for Judicial Ratification of People's Mediation Agreements', the 'Several Opinions on Establishing and Improving Resolution System in the Disputes in the Link of Litigation and Non-litigation Cases' still follow the principle that party autonomy prevails, meaning the court is to ratify the validity of the settlement agreement if the parties are fully aware of the agreement's non-compliance with the above mentioned validity requirements and forfeit the right to challenge the validity. It is safe to assume that this principle has been abandoned since the later issued 'Certain Provisions on Procedures for Judicial Ratification of People's Mediation Agreements' does not contain a comparable provision. The provision in the 'Certain Provisions on Procedures for Judicial Ratification of People's Mediation Agreements' corresponds more to the common understanding of this issue in the judiciary.[111] Being the latest pertaining rule, the Interpretation of the Supreme People's Court concerning the Application of the Civil Procedure Law adds a new item, namely the violation of the voluntariness principle to the review standards set forth in Certain Provisions on Procedures for Judicial Ratification of People's Mediation Agreements.[112] Any violation against those review standards will lead to the rejection of application for judicial ratification.

7.2.3 The Enforcement of Agreements Reached in Administrative Mediation Proceedings

There is no explicit regulation on the enforceability of administrative settlement agreements. Thus, settlement agreements resulting from administrative mediation are not enforceable per se, but rather resemble a civil contract as is the case with

[111] G. Xiang, *supra* n. 105, p. 15.

[112] Article of 360 the Interpretation of the Supreme People's Court concerning the Application of the Civil Procedure Law.

people's mediation. If a party repudiates the settlement agreement, the other party has to seek an enforceable title either by applying for arbitration (as long as there is an arbitration clause) or directly filing a lawsuit.[113] The non-enforceability of administrative mediation has a significant negative impact on the parties and the mediation bodies (*supra*at 1.3.4).

In the 'Several Opinions on Establishing and Improving Resolution System in the Disputes in the Link of Litigation and Non-litigation Cases', the Supreme People's Court opened the possibility of judicial ratification to other forms of mediation such as administrative mediation. However, this document does not qualify as a judicial interpretation and has therefore limited authority.

7.2.4 The Enforcement of Agreements Reached in Institutional and Industry-Based Mediation proceedings

The same as agreements reached in administrative mediation proceedings, agreements from industry-based mediation can also be judicially ratified.[114]

In the institutional mediation there is a distinction between mediation conducted by the mediation centers attached to the arbitration commissions and mediation during the arbitration proceedings by the arbitration commissions. Settlement agreement in the former case is considered as a conventional contract,[115] and thus it can obtain its enforceability by judicial ratification. In contrary, according to Article 51 para. 1 of the Arbitration Law the arbitration commission may issue mediation award or arbitration award based on the content of the settlement agreement reached in arbitration proceedings. Furthermore the mediation award enjoys the same legal effects as arbitration award. In other words, the mediation award made during the arbitration proceedings is also enforceable in China.

7.3 Effects of the Settlement

Depending on the type of mediation and the form of settlement agreement, an effective settlement may bring about different effects.

In court-annexed mediation, courts are empowered to issue mediation award based on the content of the parties' settlement agreement. Pursuant to Article 97 of Civil Procedure Law, effective mediation award is legally binding, which not only means that the mediation award is enforceable, but also can be construed as

[113] J. Liang, *supra* n. 18, pp. 4 ff.

[114] Article 20 of the Several Opinions of the Supreme People's Court on Establishing a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation.

[115] Article 9 of the Several Opinions of the Supreme People's Court on Establishing a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation.

having the effect of *res judicata.*[116] To be specific, the parties are not allowed to bring the lawsuits concerning the same dispute before courts in the future, and there is no possibility of appeal, the only possible way to change the award is to apply for retrial (再审). (Article 124.5)

Regarding the settlement agreement which has been judicially ratified, it's controversial whether it has the effect of *res judicata. Res judicata* refers to two aspects in China. The first one is a negative effect, which prevents parties of an effective judgment from suing once again out of the same dispute; the other one is positive effect, which obligates the judges in other related disputes to stick to the existing judgment.[117] While most of the scholars have denied the both effects of judicial ratified settlement agreement to the full extent,[118] some others acknowledge the negative effect.[119] From a practical and economical perspective, it may be meaningful to accept the negative effect to avoid the waste of judicial resources.

As to the plain settlement agreement, it is only considered as a conventional contract. According to a scholarly opinion the rights and obligations arising from the original legal relationship between the parties can be modified by the settlement agreement.[120] Therefore, as long as a party claims the rights based on the settlement, the court has only to review the validity of the settlement agreement but not the original disputes; only by mutual consent, the both parties can abolish the agreement and bring lawsuit due to the same dispute once again before the court.

8 Costs and Legal Aid

In court-related mediation there is no extra charge besides the case acceptance fee. According to Article 15 of the Measures on Payment for Litigation Costs, if the dispute is resolved by mediation settlement, only half of the provided case acceptance fee will be charged. The proportion to be borne by each party is up to their own negotiation; however the court may make the decision if the consensus is absent.[121] Since the courts may also authorize or assign other social organizations or professional mediation centers to mediate, it makes the costs problem complicated.

[116]C. Zhou, *supra* n. 86, p. 49; D. Hong, 'On Judicial Review of the Validity of Reconciliation Agreement' (2012) 2 *Jurist* 114.

[117]Y. Wang, 'Connection of Mediation and Litigation and the Judicial Ratification of Mediation Settlements' (2010) 6 *Journal of Law Application* 35.

[118]Y. Wang, *supra* n. 113, 35; S. Zhang, 'The Attribution of Judicatory Affirmation of People's Mediation Agreement' (2012) 3 *Science of Law (Journal of Northwest University of Political Science and Law)* 143; D. Hong, *supra* n. 112, p. 115.

[119]H. Shao, 'On the Ratification of People's Mediation Agreement: Effect, Value and Procedure' (2011) 10 *Political Science and Law*, 111; Z. Hao, 'The Effectiveness of Judicial Confirmation on the People's Mediation Agreement' (2013) 2 *Science of Law (Journal of Northwest University of Political Science and Law)* 176.

[120]J. Pan, *supra* n.20, p. 108.

[121]Article 31 of the Measures on Payment for Litigation Costs.

Especially in the situation of institutional mediation, the parties may have to pay both the case acceptance fee to the court and mediation costs to the mediation center.[122]

People's mediation[123] and administrative mediation are free of charge, and industry-based mediation is also usually offered for free.

The costs for institutional mediation vary from mediation center to mediation center, but are usually calculated based on the dispute amount. The costs included the compensation for mediators and management expenses of the mediation centers.

9 Cross-Border Mediation

In the Chinese legal setting the term cross-border mediation does not exist. In the area of family law some courts try to conduct mediation in divorce matter, where one party has his/her domicile in countries other than China. Besides, several people's mediation committees were set up in the border cities adjacent to foreign country in order to mediate trade disputes between residents of both countries.[124] Pursuant to the recently promulgated judicial interpretation of Civil Procedure Law,[125] in the foreign-related mediation, the court is entitled to issue a judgment based on the content of the mediation settlement upon the request of the both parties.

10 Recognition and Enforcement of Foreign Mediation Settlements

10.1 Foreign Mediation Settlements Reached in Court-Annexed Mediation Proceedings

Article 282 of Civil Procedure Law governs the recognition and enforcement of foreign judgments and rulings. If a foreign settlement award reached in court-annexed mediation proceedings can be considered as having the same effect as a judgment, it may be possible to get recognized and enforced in China. For example, a Reply of the Supreme People's Court About the Question Whether Courts Shall Accept the Application for Ratification Proceedings From the Party, Who Hold A Mediation Award Issued by Taiwan Court or Mediation Agreement Issued by Other

[122] Civil Law Office of the Commission of Legislative Affairs of the NPC Standing Committee*n Legislation Background and Point on Civil Procedure Law*, Law Press, Beijing 2012, p. 281.

[123] Article 4 of the People's Mediation Law.

[124] News about the Establishment of Cross-border Mediation Committee,<http://www.gl.chinanews.com/1005_0819/67404.html> accessed 17.08.2014.

[125] Article 530 of Interpretation of the Supreme People's Court concerning the Application of the Civil Procedure Law.

Organizations suggests that the mediation award issued by courts in Taiwan has the same effect as a judgment and can thus be recognized and enforced.[126] Besides, treaties on judicial assistance between China and several countries were signed and ratified. In some of the treaties it is clearly stated that the clauses with regard to recognition and enforcement of judgments in this treaty are also applicable to mediation awards issued by courts.

Disregarding the detail rules in treaties, Articles 281 and 282 of Civil Procedure Law set forth the general procedures and conditions for application. When the prerequisites are fulfilled, which include the award shall not contradict basic principles of Chinese law and the sovereignty, security or public interest of China, the court may grant its permission.

10.2 Foreign Mediation Settlements Reached in out of Court Mediation Proceedings

There are no specific rules regarding the effect of foreign settlement agreement reached in out of court mediation proceedings. Since domestic settlement agreement are only considered as plain contract and it cannot be directly enforced, it is certain that foreign settlement agreement deserve no privilege. No explicit legal rules have mentioned whether those settlement agreements can get recognized in China. However the above Reply of the Supreme People's Court Concerning Settlement Agreement in Taiwan denied the possibility of recognition for Taiwanese settlement agreement reached in out of court mediation proceedings. Based on this reply, it can be assumed that foreign settlement agreement reached in out of court mediation proceedings will not get recognized and thus enforced in China.

11 (e) Justice

(e)Justice devices are also utilized in China. For example during the mediation proceeding with regard to divorce matters, when one party is unable to attend court hearings, video conference is permitted. An online mediate system has even been established in China. It allows the parties to submit mediation applications online, which will be forwarded to the mediation center that participates in the online mediation program and is chosen by the parties.[127]

[126]Reply of the Supreme People's Court about the Question whether Courts shall accept the Application for Ratification Proceedings from the party, who hold a Mediation Award issued by Taiwan Court or Mediation Agreement issued by other Organizations.

[127]Online application procedure, see Website of the online mediation platform <http://www.adr101.com/TjService/tjfw_sl.aspx>accessed 17.08.2014.

Act on Mediation – Significant Step on a Long Way to Make Mediation Work in the Czech Republic

Monika Pauknerová and Magdalena Pfeiffer

Abstract This chapter offers a general overview of legislation on mediation in the Czech Republic. The implementation of Directive 2008/52/EC of the European Parliament and Council on the 21st of May 2008 on certain aspects of mediation in civil and commercial matters has triggered interest in the concept of mediation in the Czech Republic that has no long tradition of mediation in civil and commercial disputes to build on. Since the adoption of Mediation Act in 2012, apart from arbitration, mediation is the only form of ADR that is regulated by special legislation, however the Mediation Act regulates exclusively mediation carried out by mediators that are registered with the Czech Ministry of Justice. Mediation is voluntary, if considered efficient and adequate, it is at the discretion of the court to order the parties to meet with a mediator for a three-hour informative session. Pursuant to the Mediation Act mediation commences upon the execution of Mediation Agreement and if successful, it results in the conclusion of Mediation Accord expressing the will of all the parties that are ready to voluntarily perform their duties under this Accord. Under the Czech Mediation Act, Mediation Accords are not directly enforceable.

1 The Basis for Mediation

1.1 The Concept of Mediation

Until recently hardly any attention was paid to mediation in civil and commercial disputes in the Czech Republic. Family mediation, provided mostly by non-lawyers (professionals such as psychologists, sociologists, teachers etc.) has so far been the

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M. Pauknerová, CSc, DSc (✉) • M. Pfeiffer, PhD
Department of Commercial Law, Faculty of Law, Charles University Prague, Prague, Czech Republic
e-mail: pauknero@prf.cuni.cz; magdalena.pfeiffer@gmail.com

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main form of mediation in the field of private law. Commercial mediation has been perceived as a concept of international law and Czech legal entities have only been confronted with it in rare cases of cross-border mediation. The situation changed with the adoption of Directive 2008/52/EC of the European Parliament and Council on the 21st of May 2008 on certain aspects of mediation in civil and commercial matters (hereinafter 'the Directive')[1] and the obligation of the Czech Republic as a EU Member State to implement it by May 21, 2012. Its implementation became the driving force for preparatory work on the Government Bill on Mediation and has triggered interest in the concept of mediation. Intensive interest has been shown particularly on part of legal practitioners who have seen good prospects for mediation within their legal practice. Unlike some other European countries, there is, however, no long tradition of mediation in civil and commercial disputes in the Czech Republic to build on.

In the field of criminal law, the situation is different. The out-of-court mediation process is regulated by the Act on Probation and Mediation Services adopted in 2000.[2] This Act defines mediation in its Sec. 2 (2) as 'out-of-court intermediation aimed at the resolution of conflicts between the accused and the injured party and an activity directed towards the settlement of the conflict carried out in relation to criminal proceedings. Mediation may be carried out only upon the express agreement of both the accused and the injured.'

In the field of private law the notion of mediation is defined in one of the respected Czech textbooks on civil procedure as a method of dispute settlement, where the resolution of disputes between two parties is mediated by a third impartial party, which may be of a varying nature. The intervention by a third party may be of a different extent and it may consist in finding conditions for the interaction of the parties with any assistance in the course of interaction of the parties, in the provision of an impartial assessment of a particular contractual position, in the formulation of proposals for settling the dispute in the form of a conciliation, or in the issuance of a non-binding unequivocal recommendation – should the recommendation be binding upon parties it would be a matter of arbitration. The terms 'mediation' and 'conciliation' are used as synonyms where conciliation stands for mediation when the intervention of a third party has been justified by the specific nature of an activity, in particular when the third party is a person knowledgeable of law dealing primarily with the legal aspects of the dispute.[3]

Apart from mediation, which is sometimes considered to be equal to conciliation, Alternative Dispute Resolution (ADR) traditionally encompasses negotiation (as bargaining between the parties); intermediation; conciliation; mini-trial; self-executing decisions; technical arbitration; expert opinion; expert consideration; interaction concluded by an enforceable agreement; med-arb (a combination of mediation and arbitration); medaloa (mediation and last offer arbitration); and

[1] [2008] OJ L136/3.

[2] Act No. 257/2000 Coll., on Probation and Mediation Services, as amended.

[3] Winterová (2011)

arbitration.[4] Relatively new is collaborative law, where the parties are represented by lawyers whose role and commitment is to facilitate an amicable solution for the clients, a settlement, without resorting to any form of litigation. Collaborative law uses an interest-based negotiation model where clients and their lawyers work together to resolve a dispute without going to court. The aim is to reach a settlement while minimising costs, delays and stress.

Within the broader concept of ADR, arbitration is considered to be one form of ADR, yet it shows a number of differences, for example their different goals (an arbitral award in case of arbitration versus a settlement in case of other forms of ADR). Arbitration is a widely used form of dispute resolution in the Czech Republic, including arbitration of both international and national disputes. Apart from mediation, arbitration is the only form of ADR that is regulated by special legislation.[5] Czech law also regulates the specialized institution of a financial arbitrator under the Financial Arbitrator Act.[6] A financial arbitrator shall resolve disputes arising from money transfers between persons executing those transfers and their clients, unless the competence to decide such disputes is entrusted with a Czech court. The role of a financial arbitrator is to work out an amicable settlement of the dispute.[7]

There are isolated provisions in other legislation regulating special procedures similar to mediation. The Czech Act on Collective Bargaining,[8] which regulates collective bargaining between trade unions and employers or their organizations, possibly in cooperation with the state, in the process of concluding a collective contract, regulates the role of an intermediary, who is to consider the situation and propose at a fixed date, to the parties what s/he believes to be the optimal alternative of how to resolve the situation. Under the Copyright Act, mediators may be used in order to facilitate the bargaining of collective and multiple agreements, too.[9]

In addition, soft law, such as the Rules of Procedure of institutional arbitration courts may be also applied. In particular, the Rules of the Arbitration Court attached to the Czech-Moravian Commodity Exchange, also regulate mediation within ADR apart from conciliation procedures.[10] The new ICC ADR Rules, the European Code of Conduct for Mediators as well as other rules enabling mediation, to which the parties may refer to in their Mediation Agreement, may apply.

[4] Raban (2004)

[5] Act No. 216/1994 Coll., on the Arbitration and Enforcement of Arbitration Awards, as amended.

[6] Act No. 229/2002 Coll., on Financial Arbitrator.

[7] Sec. 1 of the Financial Arbitrator Act.

[8] See Act No. 2/1991 Coll., on Collective Bargaining, as amended.

[9] Sec. 102 of the Copyright Act No 121/200 Coll., the Copyright Act, as amended.

[10] Rules available on the webpage of the Court: http://www.rozhodcisoud.cz/ Accessed on 6 Nov 2014.

1.2 Existing Legal Bases for Mediation in the Czech Republic

As mentioned above, given the adoption of the Directive, the Czech Republic, as well as other Member States of the EU, was faced with the obligation to implement it into its national legal system. Despite the fact that the Directive regulates mediation of cross-border disputes only, it did not prevent Member States from adopting concise regulations for mediation, including national, local mediation (Recital 8 of the Preamble of the Directive).[11] The Czech Republic belongs to the countries that opted for the adoption of a general legal regulation for mediation. The Government draft of the Bill on Mediation was presented to the Czech Parliament on July 7, 2011 and with various amendments was adopted on May 2, 2012.[12] Due to lengthy parliamentary procedures, the Czech Republic did not quite meet the deadline set by the European Union for the implementation of the Directive. The Czech Mediation Act became effective as of September 1st, 2012.[13] The Explanatory Report to the Bill on Mediation states that the main reason for the introduction of the bill is an attempt to allow everyone to choose an alternative resolution to their conflicts by means of a speedy and cultivated out-of-court settlement. Other reasons include the disburdening of courts, the possibility to avoid litigation in resolving a conflict without having to wait, not having to pay unnecessary fees and avoiding long-lasting stress for both parties. According to the Explanatory Report, the bill also focuses on the interests of a child in cases when the functioning communication between parents in family disputes is of crucial importance and mediation may significantly contribute to their smooth interaction.[14] The Explanatory Report considers mediation to be a fast and sophisticated method of resolving disputes out of court with the assistance of a third neutral party directing the negotiations of the parties towards the conclusion of mutually acceptable agreement. The Act on Mediation regulates only mediation carried out by registered mediators and is restricted to the regulation of basic procedural principles, the commencement and closing of the mediation proceedings. It builds upon the idea that mediation is more of an informal procedure, different from judicial or any other type of proceeding.

The Mediation Act exclusively regulates mediation carried out by mediators that are registered with the Czech Ministry of Justice (so called registered mediators). The mediation process provided by mediators that are not registered with the Ministry of Justice is excluded from the scope of the Mediation Act, but it does not prevent mediators that are not registered with the Ministry of Justice from pursuing their mediation activities in accordance with general Czech legislation. They are

[11] "The provisions of this Directive should apply only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes. "

[12] Bill on Mediation, a Government Draft, published in Czech on the webpage of the Parliament: <http://www.psp.cz/sqw/text/tiskt.sqw?O=6&CT=426&CT1=0>. Accessed on 6 Nov 2014.

[13] Act No. 202/2012 Coll., on Mediation and on Amendments to some other Acts.

[14] Explanatory Report to the Bill on Mediation, p. 21.

allowed to provide mediation as a free trade pursuant to the provisions of the Czech Trade Licensing Act[15] with no special training, evidence of the length of experience or licence required. As a result, the adoption of the Mediation Act led to a legal regime duality in the regulation of mediation in Czech Republic.

This Chapter deals predominantly with the mediation process provided by registered mediators under the Mediation Act.

The material scope of the Mediation Act is stipulated in its Sec. 1: it regulates the mediation procedure and its effects provided by mediators registered with the Czech Ministry of Justice (registered mediators). Sec. 2 letter (a) of the Mediation Act defines mediation for the purpose of the act as "a process, to resolve a dispute, in which one or more mediators take part, encouraging communication among the conflict parties in order to assist them in reaching a settlement by concluding a Mediation Accord". As is apparent from the wording of the legal definition of mediation, the notion of mediation within the Mediation Act is not limited explicitly to civil and commercial matters. The scope of the Czech Mediation Act is rather broad, covering all non-criminal matters. Disputes in matters of civil, family, labour and commercial law can be subject to mediation under the Mediation Act, including, to a limited extent, disputes in matters of administrative law, where the mediation process can be applied in cases of private-law nature, when the administrative body is not exercising public authority but acting as party in terms of private law, all parties being in an equal position.[16]

In connection with the Mediation Act, secondary legislation was adopted in order to guarantee the professional qualities of registered mediators. Decree No. 277/2012 Coll., on the Examinations and Remuneration of a Mediator stipulates in detail the examinations that have to be passed in order to become a registered mediator.

1.3 The Mediation Agreement/Agreement to Submit the Dispute to Mediation

Pursuant to Sec. 4 of the Mediation Act the mediation process is initiated by the conclusion of a Mediation Agreement. Mediation commences upon its execution. The Mediation Act stipulates legal requirements as regards the form and contents of the Mediation Agreement. Pursuant to Sec. 2 letter e) of the Mediation Act this agreement shall be concluded in writing. Pursuant to Sec. 4 letters (a) to (e) it shall include, at a minimum, the following provisions: the names of the parties to the dispute, name(s), surname(s) and place of business of the mediator(s), the definition of the dispute, which is the subject of mediation, the amount of remuneration of the mediator or a provision that mediation will be carried out without any fee for the mediator(s), the period of time over which the mediation process shall last or a provision stipulating that mediation shall be carried out over an indefinite period of time.

[15] Act No. 455/1991 Coll., Trade Licensing Act, as amended.

[16] Doležalová (2013)

The conclusion of a Mediation Agreement and the commencement of the mediation process upon its conclusion do not affect the right of parties to plead before national courts or to go to arbitration. It does not prevent the parties to mediation to seek protection of their rights and legitimate interests in court, i.e. mediation does not constitute *lis pendens*. According to Sec. 3 (4) of the Mediation Act, the mediator has a legal obligation to inform the parties to mediation of the fact that their right to go to court is by no means affected by mediation. Even if there is a pending mediation procedure, the parties to the dispute still may claim their rights in court. The fact that the Mediation Agreement was concluded cannot withhold any of the parties to mediation from initiating court proceedings if they wish to. Even if there is a valid mediation clause concluded by the parties, the court will not, unlike in case of an arbitration clause, decline jurisdiction. At the same time, the litigating parties are not prohibited from initiating mediation while the dispute is pending in court.

One of the effects arising out of the conclusion of Mediation Agreement is the suspension of the prescription and limitation periods. Pursuant to the Sec. 647 of the Civil Code[17] the limitation and prescription periods are suspended during the mediation process. Therefore it is very much advisable for the parties to include the date of the execution of the Mediation Agreement and to precisely define the subject of mediation in the Mediation Agreement to avoid possible disputes in the future. If the subject of mediation changes in the course of mediation, the Mediation Agreement shall be amended in writing accordingly and the respective limitation or prescription periods are suspended upon the conclusion of such an amendment.[18]

As mediation is considered entirely voluntary, there are no consequences arising from breaching the Mediation Agreement for either party to the dispute or the mediator envisaged in the Mediation Act. It is, of course, at the discretion of the parties to stipulate contractual sanctions in case there is a breach of the Mediation Agreement.

1.4 The Mediator

The above stated dual legal regulation of mediation in Czech Republic brings about the existence of two categories of mediators.

In one category there are mediators who are not registered with the Ministry of Justice and who carry out mediation in accordance with the stipulations of the Trade Licensing Act and relevant general legislation. The services of the mediator can be rendered by any natural person with full legal capacity. There are no special legal requirements regarding training, experience or licence. The Czech doctrine generally defines certain minimal principles for the performance of a mediator:

[17] Act No. 89/2012 Coll., the Civil Code.

[18] Doležalová (2013)

(a) respecting the autonomy of the parties: a mediator shall not urge any party to do anything during the procedure; (b) the result shall be an agreement of free will of the parties attained without any external pressure; (c) the mediator shall be impartial; (d) the mediator shall inform the parties of all issues which may constitute a conflict of interests; (d) mediation shall be confidential; (e) the mediator shall maintain a high level of conduct in the procedure, i.e. to preserve justice, diligence and respect for the principle of autonomy of the parties.[19]

In the other category there are mediators who are registered with the Ministry of Justice (registered mediators) and who provide mediation under the Mediation Act. According to Sec. 2 (c) and Sec. 14 of the Mediation Act, only an authorized natural person registered on the list maintained by the Ministry of Justice is allowed to provide the services of a mediator under the Mediation Act and carry the title of registered mediator. If a person that is not listed with the Ministry of Justice uses the title of registered mediator, she/he commits an administrative offence and pursuant to Sec. 26 (1) and (3) of the Mediation Act may be subject to a fine of up to 100,000 CZK (approx. 4,000 EUR).

Pursuant to Sec. 16 of the Mediation Act, the Ministry of Justice that administers the official list of registered mediators, shall, upon request, register anyone who meets the legal requirements for registration. The applicant should have full legal capacity, a clean criminal record, a Master's degree recognised in the Czech Republic (or an equivalent university degree recognised abroad, if an international treaty binding the Czech Republic approves the institution), pass an exam organized by the Ministry of Justice or the Czech Bar Association (with the exception of cases when her/his qualification is recognized under other legislation),[20] and has not been deleted from the official list of registered mediators in the last 5 years. In the case of attorneys, their education and exams in the field of mediation are provided by the Czech Bar Association, pursuant to Sec. 49a of the Legal Profession Act.[21] The Mediation Act also stipulates the requirements for a visiting mediator to temporarily or occasionally provide mediation services in the Czech Republic. A visiting mediator is a person who is a citizen of another EU Member State in which s/he is authorized to pursue activities comparable with those of a mediator. The permission to perform this activity as a visiting mediator in the Czech Republic is subject to a record on the list of registered mediators. For the registration, it is necessary to provide the required documents stipulated in Sec. 19 (2) of the Mediation Act, such as a certified copy of a document confirming that, in accordance with the law of another Member State, the visiting mediator carries on business activities comparable with those of a mediator. The visiting mediator is entitled to provide mediation services under the Mediation Act in the Czech Republic on submission of all documents required by Sec. 19 (2) of the Mediation Act to the Ministry of Justice.

[19] Winterová (2011)

[20] Act No. 18/2004 Coll. On the Recognition of the Professional Qualifications and Other Competences of EU Citizens.

[21] Act No. 85/1996 Coll., the Legal Profession Act, as amended.

The Mediation Act imposes a number of duties on a registered mediator in its Sec. 8 and 9. The fundamental obligations and responsibilities of the mediator resulting from the conclusion of a Mediation Agreement are stipulated in Sec. 8 (1) of the Mediation Act. The mediator is obliged to conduct mediation in person, independently, impartially and with due professional care [letter (a)], to respect the views of the parties to the dispute and create conditions for mutual communication and for finding a solution that respects the interests of both parties [letter (b)], to inform, without undue delay, the parties to the dispute about all the facts which could challenge his/her impartiality [letter (c)], to sign the Mediation Accord that was concluded by the parties to mediation and indicate the date when the Mediation Accord was concluded [letter (d)], to issue upon request a confirmation to the parties that mediation has ended and to record the date when the statement was delivered to them [letter (e)], to issue a certificate that the parties fulfilled their duty to meet with the mediator, if mediation was ordered by a court [letter (f)], to issue upon request a certificate that the parties to the dispute have concluded a Mediation Accord [letter (g)], to deliver to the other party/ies to the dispute a written statement by one of the parties that they will not continue with mediation [letter (h)], to systematically expand his/her knowledge and to deepen the expertise necessary for his or her proper performance of activities as a mediator [letter (i)]. In accordance with Sec. 8 (2), a mediator is not entitled to render legal services in matters that are subject to mediation provided by her/him, even if otherwise authorized to provide them under other legislation. This provision applies primarily to attorneys and notaries. However, a legal opinion of the mediator given during mediation to the parties to the dispute is not considered a legal service.

Sec. 9 of the Mediation Act stipulates the confidentiality duty of the mediator, which is considered to be one of the basic principles of mediation. In compliance with Sec. 9 of the Mediation Act the mediator shall maintain all facts obtained in mediation confidential (even if there is no Mediation Agreement signed) unless all parties to mediation waive this confidentiality requirement. The mediator's duty of confidentiality is broken only in cases stipulated by law. Pursuant to Sec. 9 (3) of the Mediation Act the mediator is not bound by confidentiality if there is litigation between the mediator and the parties regarding mediation, e.g. in case of liability claims. The duty of confidentiality also applies to other persons who assist the mediator during mediation (such as interpreters, assistants, experts). If a mediator violates her/his legal duties specified in Sec. 26 (2) of the Mediation Act, especially the duty of confidentiality, s/he commits an administrative offence and in accordance with Sec. 26 (3) and (4) may be subject to a fine of up to 100,000 CZK (approx. 4.000,- EUR) depending on the nature of the violation. Mediators who are attorneys are supervised by the Czech Bar Association that imposes sanctions of its own on mediators for breaching duties. According to Czech law, the confidentiality duty does not apply to the parties. Parties to mediation are not bound by the Mediation Act to maintain confidentiality. They may agree to do so on a contract basis by including a respective provision on confidentiality stipulating sanctions in the case of a breach into the Mediation Agreement.

The selection of the mediator is left entirely to the discretion of the parties to the dispute with one exception. In the case of court-annexed mediation, pursuant to Sec. 100 (2) of the Czech Civil Procedure Code,[22] if no agreement on mediator is reached by the parties without undue delay, the court shall designate the mediator from the list of registered mediators administered by the Czech Ministry of Justice. In case the mediator selected by the parties has doubts about her/his impartial or unbiased approach, s/he may pursuant to Sec. 5 (1) of the Mediation Act decline an offer by the parties to conclude Mediation Agreement.

1.5 The Procedure of Mediation

Mediation Act does not regulate the procedure of mediation in an extensive detailed manner. Its stipulations regarding procedure are reduced to basic procedural principles; the rest is left to the parties. Pursuant to Sec. 4 of the Mediation Act, the mediation procedure commences upon the execution of the Mediation Agreement. Before initiating the procedure of mediation, pursuant to Sec. 3 (4) of the Mediation Act the mediator shall advise the parties to the dispute of their role in mediation, of the purpose and principles of mediation, of the effects of the Mediation Agreement, of their option to terminate mediation at any time, of the remuneration of the mediator and the costs of mediation. The mediator shall explicitly advise the parties that the commencement of mediation will not affect their right to seek protection of their rights and legitimate interests in court. The mediator shall also advise the parties to the dispute that the parties are responsible for the content of their Mediation Accord, not the mediator. In the case that a mediator was suspended or removed from the list of registered mediators at the Ministry of Justice, s/he shall without delay inform parties to the dispute of that fact. The effects of the commencement of the mediation procedure persist until the parties to the dispute become aware of such a fact, but no longer than 3 months.

One of the most significant principles of mediation is its voluntary nature. However, under the Special Judicial Proceedings Act,[23] in order to protect the interest of the child, the court has discretion to order mediation procedure for the maximum period of 3 months [see Sec. 474(1) of the Act]. According to Sec. 100 (2) of the Czech Civil Procedure Code, in the course of court proceedings, it is at the discretion of the court (if considered efficient and adequate) to order the parties to meet with a mediator only for a 3-h informative session. The court cannot order this session in cases in which an interim measure in matters of protection against domestic violence has been issued. If the parties are not able to agree on who the mediator should be, the mediator shall be designated by the court. The court may stay proceedings for a maximum of 3 months. After 3 months the proceedings are

[22] Act No. 99/1963 Coll., Code of Civil Procedure, as amended.

[23] Act No. 292/2013 Coll., on Special Judicial Proceedings.

resumed. Pursuant to Sec. 503 (1) (a) of the Czech Special Judicial Proceedings Act, the court also has the discretion to order a 3-h session with a mediator in cases of non-compliance with an agreement approved by the court on the custody of minors or with a court's decision on the return of a child.

None of these provisions authorizes the court to order the parties to conclude a Mediation Agreement and subject their dispute to mediation; the court is authorized to order the parties to meet the mediator only for an introductory session, not to mediate. There is no adequate awareness of mediation among the public and the purpose of this provision is to make the parties aware of the possibility to solve their dispute through mediation. The purpose of the first session is purely informative. The parties should get enough information about mediation from the mediator in this three-hour session to be able to decide if they want to commence mediation or not.[24] The parties to litigation can be penalised on costs when they unreasonably refuse to take part in the introductory session with the mediator ordered by the court. Pursuant to Sec. 150 of the Civil Procedure Code courts have discretion not to award to the successful party the costs that it would otherwise be entitled to recover from the unsuccessful party or to reduce them.

There is no provision in the Mediation Act that determines the venue of mediation or a way to determine it. It is at the discretion of the parties to choose the venue.

Sec. 3 (1) of the Mediation Act is another provision referring to mediation procedure. This provision stipulates that if there is a transfer of rights, which are the subject of mediation, during the mediation process, the effects of the commencement of mediation persist. A party to a dispute, which has transferred its rights, is required to notify the other party to the dispute about this fact without delay.

The Mediation Act enables the mediator to decline an offer of the parties to mediate their dispute or to terminate the ongoing mediation process. Pursuant to Sec. 5 (2) and 6 (2) a mediator may refuse to sign the Mediation Agreement or may terminate the mediation process, respectively, if the necessary trust between her/him and either of the parties has been disrupted. Mediator may also terminate the mediation process if a party does not pay the agreed deposit in time.

The Mediation Act does not contain any provision that would restrict the duration of the mediation process. In the Mediation Agreement, the parties shall either specify the time period of their mediation or state that mediation shall be carried out for an indefinite period. Given the effect that the mediation process has on the limitation and prescription periods and to prevent parties from being inactive, Sec. 6 (2) of the Mediation Act stipulates that the mediator shall terminate the mediation if the parties do not meet with her/him for more than one calendar year.

Sec. 6 (2) letters (a) – (h) of the Mediation Act regulates the termination of mediation process. The Mediation is terminated: (a) by the conclusion of the Mediation Accord (settlement); (b) by the delivery of a declaration in writing by

[24] Doležalová (2013)

the mediator that the mediation has been terminated for reasons of lack of her/his impartiality or because of the parties being inactive for more than one calendar year; (c) by the delivery of a party's declaration about abandoning mediation with the other party; (d) by statement of all the parties to the mediation about its termination, signed by the mediator; (e) when the time limit set in the Mediation Agreement expires; (f) when the authorization of the mediator is suspended or when the mediator is removed from the list of registered mediators at the Ministry of Justice; (g) by death of one of the parties to the dispute or (h) by death of the mediator. The limitation and prescription periods only begin to run again once mediation has been terminated.

1.6 The Failure of the Mediation

The Mediation Act does not define the failure of mediation. Logically, the mediation fails if the parties to the dispute do not find an amicable solution, do not reach a settlement and the mediation process ends without a conclusion of a Mediation Accord. Sec. 3 (3) of the Mediation Act explicitly stipulates that only the parties to the dispute, not the mediator, are responsible for the content of the Mediation Accord. The only obligation envisaged by the Mediation Act in regard to the Mediation Accord is that of the mediator to verify that the Mediation Accord has been reached in the process of mediation. The failure to reach a Mediation Accord in the mediation process has no legal consequences either for the mediator or the parties.

1.7 Success of the Mediation Procedure

The Mediation Act does not define the success of mediation either. A successful mediation shall result in the conclusion of a clearly articulated, understandable and practically feasible Mediation Accord expressing the will of all the parties that are ready to voluntarily fulfill the obligations arising from such a Mediation Accord.

The formal requirements for the Mediation Accord are stipulated in Sec. 7 of the Mediation Act. The Mediation Accord shall be concluded by all parties to a dispute. A Mediation Accord is defined in Sec. 2 letter f) of the Mediation Act as, a written agreement between the parties to the dispute, concluded in the framework of mediation, regulating their rights and duties. Pursuant to Sec. 7 of the Mediation Act the Mediation Accord must be signed by all parties to the dispute as well as signed and dated by the mediator on the day of its execution. The signature of the mediator certifies that the Mediation Accord was reached in the process of mediation.

The mediation process is terminated on the day of the execution of the Mediation Accord [Sec. 6 (2) letter (a) of the Mediation Act]. As noted above, the mediator is not responsible for its content, only the parties to the dispute are responsible for the obligations stipulated in the Mediation Accord.

Under Czech legislation, Mediation Accords are not directly enforceable instruments. The Mediation Act does not envisage their direct enforceability. There is no special legal provision regulating the enforcement of settlements reached through mediation. Mediation Accords are agreements in the area of substantive law and are subject to the same legal regime as contracts.

However, parties to a Mediation Accord may take further legal steps to ensure the enforceability of the concluded Mediation Accord. There are provisions in Czech legal system that allow for the enforceability of mediation accords/settlements. The parties have a number of options how to proceed in making the Mediation Agreement enforceable. They can go either to a notary or to an executor. Pursuant to Sec. 71b of the Code of Notary Practice,[25] notaries, on request of the parties, convert an accord/settlement into a public/notary deed designed as an enforcement order (title) and pursuant to Sec. 78 (a) of the Execution Order[26] executors, on the request of the parties, convert an accord/settlement into a deed of execution designed as an enforcement order (title). The Mediation Accord can also be approved by a court either as a praetorian settlement or as a judicial settlement. Pursuant to Sec. 67 (2) of the Civil Procedure Code the court shall approve of the Mediation Accord, concluded under the Mediation Act and presented by the parties, within 30 days. Pursuant to Sec. 9 of the Czech Special Judicial Proceedings Act and Sec. 99 (1) of the Civil Procedure Code the court shall advise the parties in the course of the court proceeding, when appropriate in regard to the matter of the dispute, of the possibility to use mediation in accordance with the Mediation Act. In such a case the Mediation Accord might be concluded parallel to the court proceeding and the parties can submit it to the court with a request for approval.

1.8 Costs

Pursuant to Sec. 10 of the Mediation Act, a mediator is entitled to receive the agreed upon remuneration for mediation performed, and the compensation of agreed cash expenses connected with mediation (such as travel expenses, postage, etc.). The Mediation Act does not stipulate the exact amount of the mediator's fees; the fee is of a contractual nature. In accordance with the Mediation Act, a provision stipulating either the agreed upon remuneration sum or the method of determining it, is an obligatory part of the Mediation Agreement. If not provided otherwise in the Mediation Agreement, the remuneration for the mediation services and the compensation of agreed upon cash expenses shall be equally shared between the parties to the dispute.

In case of the introductory session with a mediator of a maximum of three hours ordered by a court in the course of a court proceeding, if the parties do not agree

[25] Act No. 358/1992 Coll., the Code of Notary Practice, as amended.

[26] Act No. 120/2001 Coll., the Execution Order, as amended.

otherwise with the mediator, there is a fixed remuneration for the mediator set in secondary legislation[27] in the amount of 400 CZK per hour (approx. 16 EUR per hour). Pursuant to Sec. 10 (3) of the Mediation Act this remuneration shall be shared equally between the parties. Pursuant to Sec. 140 (3) of the Civil Procedure Code in case of a party that has been granted a waiver for court fees the respective part of the remuneration of the mediator is paid by the state.

2 Cross-Border Mediation[28]

2.1 The Notion of Cross-Border Mediation

To a Czech lawyer, international or cross-border mediation is yet to become a well-known term. Neither the Mediation Act, nor other Czech legislation distinguishes between domestic and international mediation, EU mediation, European Economic Area mediation and full international mediation. Mediation with an international element is included in the concept of "mediation" under the Mediation Act and no specific provisions are presumed for cross-border mediation. Mediation Act applies to both domestic and cross-border mediation (both EU and non-EU mediations).

Despite the fact that the Directive shall expressly apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law,[29] neither the Czech Mediation Act nor any other regulation of Czech national law defines the term "cross-border mediation"; therefore, no distinction whatsoever is made between domestic and international, or cross-border, mediation.

The content of the notion of "cross-border mediation" must be therefore derived from the Directive itself. It is a well-known fact that Directives also contain interpretation rules for the interpretation of legislation adopted by the Member States to implement the Directives – and, of course, this also applies to Czech law.[30] For the purposes of this Directive a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which: (a) the parties agree to use mediation after the dispute has arisen; (b) mediation is ordered by a court; (c) an obligation to use mediation arises under national law; or (d) an invitation by a court is made to the parties.[31]

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[27] Decree of Ministry of Justice No. 277/2012, on Exams and Remuneration of Mediator, Sec. 15.

[28] This Chapter is based on Pauknerová M, Pfeiffer M. (2014) International Aspects of Mediation (from a Czech Law Perspective). In: Liber Amicorum Spyridon Vrellis. Athens

[29] Art. 1 para. 2 of the Mediation Directive.

[30] Pauknerová (2013)

[31] Art. 2 para. 1 of the Directive.

Czech law does recognize the term "cross-border dispute", defining it in Act No. 624/2004 Coll., on judicial assistance in cross-border disputes within the European Union, which implements Council Directive 2002/8/EC on justice in cross-border disputes.[32] Article 2 of this Directive defines a "cross-border dispute" as a dispute where the party applying for legal aid in the context of this Directive is domiciled or habitually resident in a Member State other than the Member State where the court is sitting or where the decision is to be enforced; however, under the aforementioned Czech Act, a cross-border dispute within the EU under the Act is a dispute arising from civil or commercial relations where a party resides in another EU Member State than the state of the court that resolves the dispute.[33] The Czech legislator, instead of using the terms domicile or habitual residence, uses the term residence as the decisive criterion.

Cross-border mediation is a method of out-of-court resolution of private-law disputes that contain an international element, usually constituted by the fact that the parties are domiciled or habitually resident in different states. However, one cannot rule out situations where the international element will ensue from the fact that the parties will have different nationalities, or where the subject of the dispute itself will have a cross-border dimension. The international aspect may also appear in an entirely national mediation at a later stage when recognition or enforcement of the respective mediation accord is requested on the territory of a state other than the state where the accord was executed. Private-law relations with an international element are governed in the Czech Republic by Act No. 91/2012 Coll., on Private International Law[34] (hereinafter "PIL Act"), which became effective along with the new Civil Code as part of a comprehensive re-codification of Czech private law on January 1, 2014.[35]

To define cross-border relations, and thus cross-border mediation, the most important terms undoubtedly include habitual residence and domicile. Past decisions of Czech courts do include the definition of the term domicile,[36] which is understood as the municipality or, as the case may be, the district where an individual lives with the intention to reside there on a permanent basis. It is, in particular, a place where the individual has her or his apartment, family or, as the case may be, where s/he works if s/he also lives there. The domicile remains unaffected by temporary circumstances: hospitalization, study abroad, military service etc., unless they are accompanied by circumstances that indicate beyond doubt that the individual resides at the originally temporary domicile with the

[32]Council Directive 2002/8/EC of 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, [2003] Official Journal L 26, 31.1.2003; L 32, 7.2.2003, p. 15.

[33]Sec. 1 para. 1 Act No. 629/2004 Coll., on securing legal aid in cross-border disputes within the European Union.

[34]Act No. 91/2012 Coll., on Private International Law.

[35]Act No. 89/2012 Coll., Civil Code.

[36]Decision of the Supreme Court of the Czech Republic, No. 30 Cdo 444/2004.

intention to reside there on a permanent basis. Under a very recent judgment of the Czech Supreme Court, individuals may reside or be domiciled at multiple places.[37] Czech law understands "domicile" as the place of factual residence, combined with the intention to reside there permanently.[38] Therefore, this term corresponds, to a point, to "habitual residence" as interpreted by the Court of Justice of the European Union.[39] To determine domicile, Art. 2 para. 2 of the aforementioned Directive on justice in cross-border disputes refer to Art. 59 of the Council Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter "Brussels I Regulation"), which makes further reference to the definitions or interpretation of "domicile" in the national laws of the individual EU Member States. A similar reference is lacking in the Mediation Directive. The question thus remains whether the determination of domicile for the purposes of the Directive or, as the case may be, in cases of cross-border mediation, may also rely on Art. 62 of the new Brussels I Regulation.[40] With the legal definition of habitual residence lacking in EU and international law, the factual nature of this autonomous term must constitute the starting point for any deliberation, and the establishment of habitual residence must be ascertained at all times with regard to specific circumstances of each particular case.

As hinted above, Czech law, just like many other legal systems, does not make any difference between national and international mediation, be it EU mediation, mediation within the European Economic Area, or full international mediation. So far – and perhaps also because the Czech Republic has not amassed sufficient experience in international mediation – it appears that there are no areas that could be subject only to national mediation but would be excluded from cross-border mediation. As mentioned above, the Mediation Act makes express reference to the European Union only in relation to a "visiting mediator".[41] These provisions also contain the one and only conflict-of-laws rule in the Mediation Act, setting the Czech law as the applicable law for the activities of the visiting mediator.[42] Nevertheless, the fact alone that the mediator has a citizenship other than Czech does not mean that the mediation procedure held thereby would be deemed to constitute international mediation.

Conflict-of-laws issues are not addressed at all, save for the aforementioned conflict-of-laws rule providing for the activity of the visiting mediator. Regarding the effect of the mediation process, the additionally inserted Section 29 of the

[37] Decision of the Supreme Court of the Czech Republic, No. 32 Cdo 1401/2011.

[38] Resolution of the District Court in Cheb 15 C 45/2006 and Pauknerová, *op. cit*., 98.

[39] ECJ Decision C-97/90 Robin Swaddling.

[40] Regulation of the European Parliament and of the Council No. 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast), [2012] Official Journal, EU L351/21, applicable as of January 10, 2015 (hereinafter Brussels I Bis Regulation).

[41] Sec. 19 of the Mediation Act.

[42] Sec. 19 para. 3 of the Mediation Act.

Mediation Act stipulates that both the limitation and prescription periods are suspended during a mediation conducted in another Member State under the legislation of that state.

Except of the two above mentioned cases, the Mediation Act does not contain any other specific provision in regard of cross-border mediation. The rules of national private international law, stipulated in the PIL Act (unless there is an application priority of European law) shall apply. As both the Mediation Agreement and the Mediation Accord are of a purely contractual nature, conflict-of-law rules stipulated in the Rome I Regulation No. 593/2008 of 17th June 2008 on the law applicable to contractual obligations[43] are relevant as they are applicable universally, i.e. irrespective of whether or not the determined applicable law is the law of a Member State. In the case of a Mediation Accord concluded in the area of family law, the Rome I Regulation cannot be applied. Obligations arising out of family relations, including maintenance duties, as well as obligations resulting from property relations between spouses are explicitly exempt from the material scope of Rome I Regulation (Article 1(2) (b)). Questions of applicable law as regards the validity of these Mediation Accords should be subject to the relevant European legislation or to the domestic regulation of private international law.

As for soft law, the initiatives of non-governmental organizations may also be relevant to international mediation. In 1998, the Council of Europe adopted a recommendation for family mediation Rec (98)1E/21 January 1998, and in 2002 a recommendation on civil mediation Rec (2002)10E/18 September 2002. In 2011 the Hague Conference on Private International Law published a draft of the Guide to Good Practice on the use of mediation in the context of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.[44]

2.2 Recognition and Enforcement of Foreign Mediation Settlements

Pursuant to Article 6 (1) of the Directive, Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation to be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.

[43] [2008] OJ L177/6

[44] Draft Guide to Good Practice under the Hague Child Abduction Convention, Part V - Mediation (Prel. Doc. No 5 of May 2011).
<http://www.hcch.net/index_en.php?act=publications.details&pid=5422&zoek=mediation>. Accessed 6 Nov 2014.

Mediation Accords are not directly enforceable in the Czech Republic. Ensuring enforceability of accords resulting from mediation is one of the obligations imposed upon the Member States by the Directive.[45] Therefore, if a Mediation Accord is concluded in the Czech Republic, to become enforceable, it must be approved by court or executed in the form of a notary or execution deed. However, if it were to be made enforceable, it must be concluded in compliance with Czech law. This is also a condition for the Mediation Accord's enforceability in another Member State, as mentioned in Recitals (20) and (21) of the Directive's Preamble. These circumstances contest the parties' freedom to choose the law applicable to a certain conflict in the mediation procedure. The applicable law should be the law of the state on whose territory the request for the content of the Mediation Accord to be made enforceable is submitted.

Foreign Mediation Accords concluded in a Member State of the EU that have been made enforceable in the country of its origin by a court or as an authentic instrument shall be recognized and enforced in Czech Republic in compliance with the respective EU regulations (Brussels I Bis Regulation, Brussels II Bis Regulation, Maintenance Regulation). In terms of international civil procedural law, a certain distinction between EU mediation and international mediation, arising from the provisions of the Brussels I Bis Regulation, Brussels II Bis Regulation, and the Maintenance Regulation, must be observed. In addition, the regime of Regulation No. 805/1994, creating a European Enforcement Order for uncontested claims, can be considered in cases where the preconditions of its application are met. On the other hand, recognition and enforcement provisions of Regulation No 861/2007, establishing a European small claims procedure, and Regulation No 1896/2006, creating a European order for payment procedure, would not apply to enforceable mediation accords at all, as these provisions apply to court decisions awarded within the framework of these regulations only.

A Mediation Accord concluded in Denmark and approved as a judicial settlement, or executed in the form or an authentic instrument, shall be subject, in case it falls within its substantive scope, to the regime of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters concluded in 2005. In matters falling beyond the scope of the subject-matter applicability the of this Agreement, the recognition and enforcement of such Mediation Accord shall be governed by the relevant provisions of Czech private international law (Sections 14–16 PIL Act).

A Mediation Accord concluded within the EEA and approved as a judicial settlement, or executed in the form of an authentic instrument, shall either be subject to the regime of the Lugano Convention of 2007, or, in matters which fall beyond the scope of subject-matter applicability of this international convention, its recognition in the territory of the Czech Republic shall be governed by the relevant provisions of Czech private international law (Sections 14–16 PIL Act). As the case may be,

[45] Art. 6 of the Directive.

such Mediation Accords would not be recognized within the territory of the Czech Republic on the grounds of a conflict with the public order.

Unlike the conflict-of-laws, rules that are based on the principle of the universality of the European private international law, the EU international civil procedure rules are mostly linked to the territories of the Member States. Mediation Accords concluded outside of the Brussels-Lugano regime, which were either approved as a judicial settlement or executed in the form of a notary deed (i.e. in countries that are not members of the EU or the EEA), shall not be recognized and enforced in the Czech Republic under EU legislation; their recognition and enforcement shall be governed by relevant provisions of the PIL Act or the applicable international treaties and conventions. The multilateral international conventions worth mentioning in this context include the Hague Convention on the International Protection of Adults of 2000; the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children of 1996, and the Hague Convention on the Civil Aspects of International Child Abduction of 1980. Foreign Mediation Accords enforced in the Czech Republic shall always be in compliance with the public order of the Czech Republic.

A foreign Meditation Accord of a purely contractual nature, that is directly enforceable in compliance with foreign national legislation, shall not be (in most cases) recognized and enforced in the Czech Republic unless further legal steps are taken. Such a Mediation Accord, if not approved as a judicial settlement, or not made in the form of an authentic instrument would be of the same binding nature as any other legal obligation as in the case of any other private law contract concluded abroad. Foreign, directly enforceable Mediation Accords in the area of family law concluded in a EU Member State in line with the national law within the material scope of the Brussels II Bis Regulation constitute an exception to this rule. In compliance with Art. 46 Brussels II Bis, these private agreements, enforceable in the country of their origin, shall be recognized and declared enforceable under the same terms and conditions as judgments.

The European Commission did consider the inclusion of agreements concluded in the out-of-court dispute resolution, i.e. together with mediation, in the provisions for the enforcement of authentic instruments in the proposal of the European Parliament during the discussions of the draft of the Brussels I Regulation (Art. 55a). However, the Commission has not approved this proposal.[46]

A Mediation Accord that has been concluded abroad and is to be made enforceable in the Czech Republic, either by being approved by court in line with the Czech Civil Procedure Code and receiving the status of a court decision, or by being drafted in the form of notary or execution records and constituting an authentic instrument, shall be in compliance with Czech law. If the parties wish to make a foreign Mediation Accord enforceable in the territory of the Czech Republic, the Mediation Accord, including questions of its validity, shall always correspond

[46]COM (2000) 689 final, p. 6.

to Czech law. A notary shall not write a deed with the consent to enforcement unless the respective agreement is concluded in compliance with Czech law. In the Czech Republic, the parties to the dispute can make a settlement agreement (Mediation Accord) – i.e. a contract in the form of notary deed with consent to direct enforcement – if the subject-matter of contractual performance is a monetary claim.[47] Consequently, also a foreign Mediation Accord could be made in the Czech Republic in the form of a notary deed with direct enforcement, if the requirements under the Notary Code have been met. A foreign Mediation Accord, which is to be made in the Czech Republic in the form of a notary deed with direct enforcement, must be made in the Czech language and in accordance with the Czech legal order. The Mediation Act does not explicitly stipulate that the Mediation Accord must comply with the law, but it follows from the nature of the matter, as well as from the facts, that neither a notary nor an executor will draft or confirm a deed which is contrary to Czech law, nor will a court approve such conciliation. Thus the content of the accord shall correspond to the legal order of the place where such accord has been concluded, or where its enforceability is sought.[48]

3 (e) Justice

3.1 Application of (e) Justice Instruments to Mediation

No (e) justice instruments are currently being applied in connection with the court-annexed mediation.

In accordance with Sec. 24 of Mediation Act the Czech Ministry of Justice maintains a list of registered mediators who meet the requirements of the Mediation Act. This list is available on the website of the Czech Ministry of Justice.[49] The list of registered mediators, who are at the same time members of the Czech Bar Association, is available on the Association's website.[50]

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[47] See Section 71a, Act No 358/1992 Coll., the Notary Code.

[48] Theoretically, the parties could only make a so-called material choice of law, which means that the chosen law must not collide with mandatory rules of law which would be used in the absence of choice. It is, however, hardly conceivable in practice.

[49] http://portal.justice.cz/Justice2/MS/ms.aspx?j=33&o=23&k=5867. Accessed 6 Nov 2014

[50] http://www.cak.cz/scripts/detail.php?id=8402. Accessed 6 Nov 2014

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La Médiation dans l'Espace CEMAC : La Médiation en Droits Camerounais, Centrafricain, Congolais, Gabonais et Tchadien

Achille Ngwanza

Abstract Unlike their peaceful conception of justice, sub-Saharan peoples, including those of the CEMAC zone, adopted the colonial model of justice based on a conflicting paradigm. For all that, the amicable dispute resolution are not unknown in African normative arsenal. Such as expertise, mediation, has a great place in the law of the CEMAC countries. In addition to certain legal proceedings to which it is a prerequisite, mediation is used in a variety of sectors, even in a non-judicial context. Nevertheless, it is striking that the legal regime of mediation is quite heterogeneous. Unlike other mediations, albeit regulated protean manner conventional mediation has not attracted the attention of the CEMAC national legislators, thus weakening the binding force of the agreements that result. There is also a certain silence as for the mediator except conventional mediation rules provide rules for its qualities and powers. However, CEMAC zone mediation does not derogate from the internationally recognized principles, flexibility and confidentiality being erected in Golden Rules. It's the same for the rules related the success or failure of the talks, the latters being consistent with comparative law. As for cross-border mediation, they are governed by international agreements concluded by the CEMAC countries. Regarding the cyber mediation, it remains unknown although it may be useful for the settlement of many disputes.

Résumé Contrairement à leur conception pacifique de la justice, les peuples d'Afrique sub-saharienne, notamment ceux de la zone CEMAC, ont adopté le modèle colonial de justice basé sur un paradigme conflictuel. Pour autant, les modes amiables de règlement des conflits ne sont pas inconnus de l'arsenal normatif africain. Comme l'expertise, la médiation, a des lettres de noblesse dans le droit des pays de la CEMAC. Outre certaines procédures judiciaires pour lesquelles elle est un préalable obligatoire, la médiation est utilisée dans une variété de secteurs, ce même dans un contexte extra judiciaire. Néanmoins, il est frappant de constater que le régime juridique de la médiation est assez hétérogène. A

A. Ngwanza (✉)
Veuillez-nous fournir celui de l'université, Chargé d'enseignement aux Universités Paris 2 panthéon Assas, Paris X Nanterre et Versailles Saint Quentin-en-Yvelines, Paris, France
e-mail: aangwanza@hotmail.com

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l'inverse des autres médiations, certes règlementées de manière protéiforme, la médiation conventionnelle n'a pas retenu l'attention des législateurs nationaux de la CEMAC, fragilisant ainsi la force obligatoire des accords qui en découlent. On note également un certain silence quant au médiateur, excepté les règlements de médiation conventionnelle qui prévoient des règles relatives à ses qualités et attributions. Pour autant, la médiation en zone CEMAC ne déroge pas aux principes internationalement reconnus, la souplesse et la confidentialité étant érigées en règles d'or. Il en va de même des règles relatives à l'échec ou la réussite des pourparlers, celles-ci étant conformes au droit comparé. Quant aux médiations transfrontalières, elles sont régies par les conventions internationales conclues par les pays de la CEMAC. S'agissant de la cyber-médiation, elle reste méconnue bien qu'elle puisse être utile pour le règlement de nombreux litiges.

1 État des Lieux des MARC dans l'Espace CEMAC

Depuis quelques années, il y a eu une extraordinaire multiplication des modes alternatifs de règlement des conflits (MARC),[1] une voix autorisée parlant même d'une diversité source de confusion.[2] Pour autant, tous les MARC ne connaissent pas une évolution similaire, la médiation, à l'image de l'arbitrage, jouit d'une popularité exponentielle, ce pour une gamme assez variée de différends.[3] Toutefois, le développement de la justice amiable n'est pas un phénomène nouveau en Afrique sub-saharienne. En effet, dans le droit précolonial sub-saharien, le paradigme de la justice était celui de la résolution pacifique du conflit, le but ultime du procès étant de permettre aux parties de parvenir à un accord.[4] Avec la colonisation, les peuples africains se sont vus imposés une autre conception du droit qu'ils ont conservée après leurs indépendances. C'est ainsi que le droit civil[5] et la *common law* ont été étendus en terres africaines. Dorénavant, il est pertinent de classer un grand nombre de pays africains dans les traditions juridiques précitées.

Cependant, bien qu'appartenant aux familles juridiques occidentales, le droit des Etats sub-sahariens a connu une évolution différente de celui de leurs anciennes puissances coloniales. Outre les facteurs internes propres à chaque pays, une pluralité de paramètres internationaux a contribué à structurer singulière-

[1] P. Lavigne, « Les MARC et la lutte pour le droit », *Petites Affiches*, 03 décembre 2009 n 241, p. 51.

[2] Ph. Fouchard, « Arbitrage et modes alternatifs de règlement des litiges du commerce international », *in Souveraineté et marchés internationaux à la fin du 20ème siècle. A propos de 30 ans de recherche du CREDIMI. Mélanges en l'honneur de Philippe Kahn*, Litec, 2000, p. 95, sp. n 21–26.

[3] I. Vaugon et M. Dary, « Les modes alternatifs de règlement de conflit : une stratégie gagnante pour les entreprises », *Cahiers de l'arbitrage* 2010-1, p. 65.

[4] F. Kiné Camara et A. Cissé, « Arbitrage et médiation dans les cultures juridiques négro-africaines : entre la prédisposition à dénouer et la mission de trancher », *Revue de l'arbitrage* 2009-2, p. 285.

[5] L.-D. Muka Tshibende, « Les Gaulois, nos ancêtres ? Sur la circulation et l'influence du modèle français en Afrique noire francophone », www.ohada.com, Ohadata D-07-02.

ment la législation des pays d'Afrique sub-saharienne. Dans ce registre, on peut citer le mouvement de régionalisation du droit[6] qui s'est traduit par la création d'organisations internationales à but économique dont la production normative est importante. La naissance de la Communauté Economique et Monétaire des Etats de l'Afrique Centrale (CEMAC) s'inscrit dans cette dynamique.[7] A l'exception de la Guinée équatoriale,[8] l'intégralité des pays de la CEMAC a été sous le giron colonial de la France,[9] héritant par ricochet du droit français.

Les pays de la CEMAC ont également adhéré à l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA),[10] cette dernière ayant été créée pour améliorer le climat des affaires dans les territoires où le droit qu'elle élabore s'applique. Plus que toute autre organisation, l'OHADA a considérablement influencé le droit de ses pays membres en élaborant d'une part, un volume important de textes, et en prévoyant d'autre part, l'application immédiate et la supranationalité de ceux-ci.[11]

Au regard de l'incidence du droit OHADA, de l'héritage colonial et des textes post-coloniaux nationaux, il est évident qu'en zone CEMAC la médiation a pris une dimension singulière. Pour cette raison, une bonne intelligence de la médiation postule un effort de précision (II). Compte tenu de la globalisation des échanges et

[6] J. Issa-Sayegh et J. Lohoues-Oble, *Harmonisation du droit des affaires*, Bruylant, Juriscope, 2002, p. 27.

[7] Créée par le Traité de Ndjamena du 16 Mars 1994, la CEMAC est née des cendres de l'ancienne UDEAC l'Union Douanière et Economique de l'Afrique Centrale (UDEAC), précédée elle même par l'Union Douanière Équatoriale (UDE).

[8] Ayant été colonisée par l'Espagne, la Guinée équatoriale a intégré la tradition juridique civiliste dans sa version espagnole. Malgré les affinités entre les droits français et espagnol, la Guinée équatoriale sera exclue de ce travail en raison du particularisme de son système juridique par rapport aux autres pays de la CEMAC. Pour étude du système judiciaire équato-guinéen, v. S. E. Abeso Tomo, « Organisation judiciaire de la Guinée équatoriale de Guinée équatoriale », *in* J. Issa-Sayegh (dir), *Répertoire quinquennal OHADA 2006–2010*, Unida, 2011, p. 313.

[9] Les Etats francophones de la CEMAC sont : Cameroun, Centrafique, Congo, Gabon, Tchad. Il convient de préciser qu'à la différence des autres Etats francophones de la CEMAC, le Cameroun n'a jamais été une colonie française. Toutefois, 80 % de son territoire a été confié à la France successivement sous mandat de la Société Des Nations (SDN), et sous tutelle de l'Organisation des Nations-Unies (ONU). Le reste du territoire camerounais a été sous l'influence britannique sur la base d'un mandat SDN, et ensuite d'une tutelle ONU.

[10] Outre les pays de la CEMAC, l'OHADA est composée des pays suivants : Bénin, Burkina Faso, Comores, Côte d'ivoire, Guinée, Guinée Bissau, Mali, Niger, République démocratique du Congo, Sénégal, Togo.

[11] Les textes adoptés par l'OHADA en vue de moderniser le droit des affaires porte le nom d'acte uniforme, leur régime juridique s'apparentant à celui des règlements de l'Union Européenne. A cet effet, l'article 10 du Traité OHADA dispose : « *Les actes uniformes sont directement applicables et obligatoires dans les Etats Parties*, *nonobstant toute disposition contraire de droit interne*, *antérieure ou postérieure* ». Pour analyse approfondie de ce texte, v. P. Diedhiou, « L'article 10 du Traité de l'OHADA : quelle portée abrogatoire et supranationale ? », *Revue droit uniforme* 2007-2, p. 265.

de la montée en puissance de la cyberjustice, il faudra également faire un état des lieux des médiations transfrontalières(III) et en ligne (IV).

2 La Médiation

2.1 La Notion de Médiation

Tout d'abord, il importe de souligner que dans la législation des pays de la CEMAC, le terme « conciliation » est préféré à celui de « médiation ».[12] Pour les puristes, ces deux notions renvoient à des réalités différentes, le conciliateur se limitant simplement à rapprocher les parties, tandis que le médiateur a un rôle plus actif qui l'autorise à suggérer une solution.[13] A l'inverse, d'autres auteurs considèrent que la nuance entre la conciliation et la médiation est assez tenue et justifie par conséquent que ces deux notions soient considérées comme des synonymes.[14] Cette dernière position qui a les faveurs de cette étude, brille par sa pertinence puisque la Loi type de la Commission des Nations Unies pour le Droit du Commerce International (CNUDCI) sur la conciliation commerciale internationale va dans un sens identique.[15] C'est donc sans surprise, qu'à l'instar de certains règlements africains de médiation,[16] les termes médiation et conciliation seront utilisés invariablement.

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[12]Bien qu'il ait inspiré le droit des pays de la CEMAC, le Code de procédure civile français consacre séparément la conciliation (articles 127 à 131) et la médiation (article 131-1 à 131-15).

[13]M. Guillaume-Hofnung, *La médiation*, PUF, 5ème édition, 2009, pp. 61–64 ; J.-Cl. Goldsmith, « Les modes de règlement amiable des différends (RAD) », *Revue de droit des affaires internationales* 1996, p. 221 ; G. Cornu, *Vocabulaire juridique*, 9ème édition, Paris, PUF, 2012, v « Médiation » ; I. Vaugon, « La médiation commerciale, une alternative au système judiciaire », *Journal Africain du Droit des Affaires* 2011-1, p. 8. Ayant une position plus nuancée que les auteurs précédents, Ch. Jarrosson (« Les modes alternatifs de règlement des différends », *Revue internationale de droit comparé* 1997, p. 325, sp. n 16) estime que la distinction entre la médiation et la conciliation n'a d'intérêt que dans le cadre judiciaire.

[14]H. Croze, C. Morel et O. Fradin, *Procédure civile. Manuel pédagogique et pratique*, Litec, 4ème édition, 2008, p. 223 et p. 226 ; E. Jolivet, « Chronique de jurisprudence arbitrale de la Chambre de commerce internationale (CCI) : arbitrage CCI et procédure ADR », *Gazette du Palais* 17 novembre 2001, n 321, p. 3 ; B. Oppetit, « Arbitrage, médiation et conciliation », *Revue de l'arbitrage* 1984, p. 307, sp. n 2.

[15]L'article 1 § 3 de la Loi type de la CNUDCI sur la conciliation commerciale internationale dispose : « *Aux fins de la présente Loi, le terme "conciliation" désigne une procédure, qu'elle porte le nom de conciliation, de médiation ou un nom équivalent, dans laquelle les parties demandent à une tierce personne (le "conciliateur") de les aider dans leurs efforts pour parvenir à un règlement amiable d'un litige découlant d'un rapport juridique, contractuel ou autre, ou lié à un tel rapport* » (nous soulignons).

[16]Le préambule de Règlement de médiation du Centre d'arbitrage de Médiation et de Conciliation de Ouagadougou (CAMC-O) et l'article 2 du Règlement de médiation du Centre d'arbitrage de Médiation et de Conciliation (CAMC) de Dakar s'accordent pour soutenir que le terme « *médiation*

Quoi qu'il en soit, qu'on parle de médiation ou de conciliation, il s'agit d'une tentative de régler un litige à l'amiable avec l'aide d'un ou plusieurs tiers. C'est cette approche pacifique qui permet de distinguer la médiation de l'arbitrage, le caractère juridictionnel de ce dernier le rapprochant davantage de la justice étatique. D'ailleurs, à l'opposé de la doctrine anglophone où l'arbitrage est classé dans les modes alternatifs de règlement des conflits (MARC), dans les pays civilistes ces derniers renvoient uniquement « *aux méthodes non juridictionnelles* ».[17] Ceci étant, le caractère consensuel de la médiation n'est pas absolu, la loi imposant celle-ci comme un préalable à toute action contentieuse dans certaines matières.[18] Cette précision notionnelle faite, l'étude de la médiation dans la zone CEMAC se décline aisément à travers son cadre juridique.

2.2 Le Cadre Juridique Applicable

Dans l'espace CEMAC, la médiation occupe un champ tellement vaste qu'il est difficile de la cerner. Néanmoins, en partant de son ambivalence judiciaire et extrajudiciaire, il est possible d'appréhender sa diversité matérielle. A ce propos, il convient de souligner que la médiation judiciaire jouit d'une très grande reconnaissance législative, tandis que celle qui déroule hors la vue du juge est partiellement encadrée.

De manière concordante, dans les pays de la zone CEMAC, il est énoncé qu'il entre dans la mission du juge de concilier les parties.[19] Toutefois, les dispositions relatives à la médiation judiciaire sont rédigées différemment d'un Etat à l'autre. Tandis que les Codes de procédure civile centrafricain,[20] gabonais[21] et tchadien[22] prévoient un pouvoir général de rapprocher les parties, la loi congolaise n 19–99 portant organisation judiciaire évoque la conciliation uniquement dans le cadre des compétences des tribunaux d'instance.[23] Cette spécificité congolaise mérite

signifie conciliation et toute autre appellation dans la mesure où les parties acceptent de se soumettre à ce règlement ».

[17]Ph. Fouchard, « Arbitrage et modes alternatifs de règlement des litiges du commerce international », *op. cit*., p. 96.

[18]V. infra, n 9.

[19]Le droit pénal ne fait pas partie du domaine de la médiation judiciaire, aucun texte des pays de la CEMAC n'y renvoyant pour le contentieux des infractions répressives.

[20]L'article 399 du Code de procédure civile centrafricain dispose qu' « *il entre dans la mission du juge de concilier les parties* ».

[21]L'article 9 alinéa 2 du Code de procédure civile gabonais dispose qu' « *il entre dans sa mission* [*le juge*] *de concilier les parties* ».

[22]Article 60 du Code de procédure civile tchadien.

[23]L'article 122 de la loi n 19–99 portant organisation judiciaire au Congo dispose : « *Le Tribunal d'Instance connaît, en matière civile en conciliation de toutes les actions et aux contentieux de*

d'être relevée car elle traduit un faible engouement pour la médiation, les tribunaux d'instance étant compétents pour des litiges à faible valeur financière.[24] Quant à l'article 3 du Code de procédure civile et commerciale camerounais,[25] malgré sa rédaction qui semble réserver l'initiative de la conciliation aux parties, rien n'interdit au juge de leur suggérer une solution concertée quand cela lui parait indiqué.

Bien qu'en général la conciliation relève du pouvoir discrétionnaire du juge, il est des matières pour lesquelles la recherche d'une solution amiable est une étape obligatoire avant l'ouverture d'un règlement contentieux. C'est notamment le cas pour le divorce,[26] le juge ne pouvant engager la procédure visant à liquider le mariage que s'il n'arrive pas à concilier les époux. Il en est de même en cas d'opposition à une ordonnance d'injonction de payer, l'article 12 de l'Acte uniforme portant organisation des procédures simplifiées de recouvrement et des voies d'exécution (AUPRSVE) de l'OHADA disposant que « *la juridiction saisie sur opposition procède à une tentative de conciliation* ». La jurisprudence[27] a annihilé les hésitations que la lettre de la disposition précitée pouvait faire naitre quant au caractère obligatoire de la conciliation.[28]

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toutes les actions personnelles, mobilières ou immobilières en premier ressort et à charge d'appel jusqu'à la valeur de 1 000 000 de francs CFA en capital et 300 000 Frs en revenus, rente ou prix de bail ».

[24] V. note précédente.

[25] L'article 3 du Code de procédure civile et commerciale camerounais dispose : « *Toutes les instances sont dispensées du préliminaire de conciliation.*

Néanmoins, dans toutes les affaires, les parties peuvent, d'accord, comparaître volontairement aux fins de conciliation devant le Juge compétent. Le demandeur a également la faculté de citer le défendeur en conciliation en observant les délais portés aux articles 14 et 15 ». Contrairement au texte précité, l'article 14 (3) du décret n° 69/DF/544 du 19 décembre 1969 fixant l'organisation judiciaire et la procédure devant les juridictions traditionnelles au Cameroun oriental fixe explicitement le pouvoir de conciliation du juge. A cet effet, il dispose : « *Aucune tentative de conciliation n'est obligatoire. Le demandeur peut cependant, en même temps qu'il introduit l'instance, demander au président de le convoquer en même temps que son adversaire et de tenter de les concilier. Le président peut lui-même, à tout moment de la procédure et jusqu'au jugement sur le fond, chercher à concilier les parties* » (nous soulignons).

[26] Article 238 du Code civil camerounais, articles 181 et suivants du Code de la famille du Congo (http://www.jafbase.fr/docAfrique/Congos/BrazzaCodFam1.pdf), articles 270–272 du Code civil gabonais.

[27] Au regard du principe de l'uniformité d'interprétation du droit OHADA, des décisions rendues par des juridictions de pays non membres de la CEMAC mais faisant partie de l'OHADA seront citées. Toutefois, il importe de préciser que les décisions rendues par les tribunaux et cours nationaux d'un pays ne s'imposent pas aux autres Etats membres de l'OHADA. Seuls les arrêts de la Cour Commune de Justice et d'Arbitrage (CCJA), juridiction de cassation en droit OHADA, ont un caractère obligatoire pour les juridictions internes. Néanmoins, les positions adoptées par ces dernières peuvent être valablement citées, d'une part parce que certaines affaires ne sont pas déférées à la CCJA, et d'autre part parce qu'elles constituent des éléments pertinents d'analyse de l'application du droit OHADA.

[28] Tribunal de grande instance de Ouagadougou, jugement n 74, 19 février 2003, *Kiemtoré T Hervé c/ L'Entreprise Application Peinture Générale*, www.ohada.com, Ohadata J-04-248.

Au-delà de l'opportunité de la tentative de conciliation, le pouvoir d'appréciation du juge porte également sur le moment à partir duquel elle peut être initiée. En effet, il est aisé d'admettre, qu'en début d'instance, le juge puisse envisager de rapprocher les parties au regard de leurs prétentions. En revanche, la question prend un tout autre relief lorsque la procédure est déjà engagée. Par souci de pragmatisme, il est prévu que les magistrats ont la liberté de suggérer une médiation dès lors qu'ils la jugent utile. Aucun texte ne subordonne le déclenchement d'un processus de conciliation au fait que les débats sur le fond ne soient pas ouverts. Au contraire, en dépit de sa variété, la lettre des textes est très claire pour laisser au juge le soin de déterminer le moment idoine pour inviter les parties à chercher un règlement amiable de leur litige.[29] La Cour suprême du Tchad a renforcé le pouvoir d'appréciation du juge en indiquant qu'il « *peut informer le demandeur de se désister d'instance au cas où la demande lui paraît manifestement injustifiée*, *auquel cas il en est dressé procès-verbal et d'autre part*, *s'il y a eu conciliation*, *il est dressé procès-verbal des conditions de l'arrangement* ».[30]

Outre l'initiative du juge, la médiation judiciaire peut également être déclenchée par les parties quand elles en expriment le vœu. Tout comme les magistrats, les justiciables ont la possibilité de manifester leur désir d'être conciliées dès l'acte introductif d'instance, ou en cours de procédure. Néanmoins, les dispositions relatives à la médiation judiciaire initiée par les contradicteurs ne sont pas aussi claires que celles visant le processus initié par un juge. Les textes n'évoquent que les hypothèses de médiation en début d'instance, laissant entière la question des situations où les parties souhaitent parvenir à un accord en cours de procédure.

Cependant, ce silence n'est pas rédhibitoire car, par application du principe dispositif, et de son corollaire relatif à la faculté de clôture de l'instance par les justiciables,[31] il est permis d'inférer que la médiation judiciaire sollicitée par ces derniers peut être ouverte à tout moment. Toute analyse contraire consisterait à forcer des personnes désirant purger pacifiquement leur conflit à recourir à une solution contentieuse. Non seulement cette position serait opposée au désengorgement des juridictions, mais elle contribuerait aussi à transformer le droit à d'accès à la justice en obligation de faire un procès. Etant donné que la médiation est une méthode de résolution rapide et efficace des litiges, l'on voit mal pourquoi il pourrait être interdit aux parties de tenter une médiation en cours de litige, ce même en cours de délibéré. Dès lors que les parties ont le loisir de renoncer à exécuter une décision de justice au bénéfice d'un arrangement plus convenable, par analogie on

[29]Les articles 3 du Code procédure civile et commerciale camerounais et 425 du Code de procédure civil gabonais utilisent l'expression « *en tout état de la procédure* », tandis que l'article 401 du Code de procédure civile centrafricain affirme que « *la conciliation est tentée*, (. . .), *au lieu et au moment que le juge estime favorable* ».

[30]Cour suprême du Tchad, 03 mars 2005, arrêt n 014/CS/CJ/SC/05, http://www.juricaf.org/arret/TCHAD-COURSUPREME-20050303-014CSCJSC05.

[31]H. Croze, C. Morel et O. Fradin, *Procédure civile. Manuel pédagogique et pratique*, *op. cit*., n 424 et s.

doit admettre que la médiation est possible à tout moment.[32] Cette règle n'est que la conséquence de la souplesse consubstantielle de la conciliation, les parties ayant même le loisir de l'engager en dehors d'une instance judiciaire.

En zone CEMAC, la médiation extra judiciaire est polymorphe, elle vise aussi bien celle qui constitue un préalable à une intervention juridictionnelle, l'institution du médiateur de la république ainsi que les médiations sectorielles. Enfin, elle concerne également la médiation conventionnelle. La première donnée frappante entre ces différentes conciliations réside dans leur traitement inégal par les textes. Contrairement aux autres formes médiation, la médiation conventionnelle évolue dans un désert normatif, ce malgré une montée en puissance progressive.

La plus connue des diverses catégories de médiation citées ci-dessus est celle que les parties doivent obligatoirement engager avant de saisir une juridiction.[33] Il s'agit essentiellement de la conciliation en matière sociale pour la résolution des conflits individuels[34] et collectifs.[35] En dépit du fait que le règlement des litiges individuels et collectifs procède de la même logique, l'échec de la médiation ne produit pas la même conséquence quant à la juridiction devant intervenir en phase contentieuse. Pour les conflits individuels, l'affaire est confiée à une juridiction judiciaire,[36] tandis qu'excepté le Congo,[37] les litiges collectifs[38] sont réglés par une procédure improprement appelée arbitrage.[39] Le Gabon a la particularité d'avoir une phase

[32]La jurisprudence (Cour d'appel judiciaire de Libreville, 25 février 2010, *Société Nationale des Bois du Gabon c/ Société Tropical Trading Company*, www.ohada.com, Ohadata J-10-241) a confirmé la faculté de conciliation *ad nutum* en admettant la validité d'un arrangement intervenu en cours d'instance d'appel.

[33]H. Tchantchou (« L'arbitrage en droit africain du travail. Rétrospective et perspectives à la veille de l'Acte uniforme OHADA sur le droit du travail », *Revue camerounaise de l'arbitrage* n 28, Janvier-Février-Mars 2005, p. 3, sp. p. 4) considère le caractère obligatoire de la conciliation telle que prévue dans les législations africaines en matière sociale la démarque de la conception classique du règlement amiable des différends.

[34]Article 139 Code travail camerounais, article 346 Code du travail centrafricain, article 240 Code du travail congolais, article 314 Code du travail gabonais, article 420 Code du travail tchadien.

[35]Article 158 Code travail camerounais, article 367 Code du travail centrafricain, article 242 Code du travail congolais, article 359 Code du travail gabonais, article 443 Code du travail tchadien.

[36]Article 140 Code travail camerounais, article 354 Code du travail centrafricain, article 241 Code du travail congolais, article 314 Code du travail gabonais, article 420 Code du travail tchadien.

[37]L'article 244 du Code du travail congolais dispose : « *L'Inspecteur du Travail et des Lois Sociales ou le fonctionnaire responsable du bureau de contrôle du travail du ressort, est tenu de déférer le différend au Président de la Commission de Recommandation dès la désignation des 2 experts. La Commission est saisie par la seule transmission du procès-verbal de non-conciliation. Elle ne peut statuer sur d'autres objets que ceux déterminés par le procès-verbal de non-conciliation ou ceux qui, résultant d'événements postérieurs à ce procès verbal sont la conséquence directe du différend en cours* ».

[38]Article 160 Code travail camerounais, article 369 Code du travail centrafricain, article 448 Code du travail tchadien.

[39]Comme l'indique Th. Clay (« L'arbitrage en droit du travail : quel avenir après le rapport Barthélémy-Cette ? », *Droit social* septembre-octobre 2010, p. 930, sp. p. 933), « *la qualification*

intermédiaire dénommée abusivement médiation entre l'échec de la conciliation et le déclenchement de la procédure d'arbitrage.[40] Outre la matière sociale, le Cameroun a également prévu une conciliation obligatoire avant l'ouverture d'une procédure arbitrale dans le cadre de certains litiges relatifs aux investissements privés.[41]

S'agissant du médiateur de la république, ses missions excèdent le strict cadre de la résolution amiable des litiges entre les citoyens et les pouvoirs publics.[42] Il intervient aussi dans les conflits politiques. Bien que l'institution du médiateur de la République s'inspire de la France,[43] à l'exception du Gabon,[44] sa consécration dans

d'arbitrage implique la réunion de quatre éléments : *un choix libre de recourir à l'arbitrage*, *un choix libre de l'arbitre*, *une procédure qui respecte les garanties fondamentales de bonne justice et une décision dotée de l'autorité de la chose jugée qui s'impose aux parties* ». Partant de ces critères, il aisé de dire que les arbitrages prévus par les textes camerounais, centrafricain et tchadien pour les différends collectifs sont « *des faux arbitrages* », pour reprendre la formule de l'auteur précédent. Dans chacun des pays évoqués ci-dessus, les membres de la juridiction arbitrale sont désignés ès qualité par la loi, et surtout les parties n'ont pas d'autres choix que ladite juridiction en cas d'échec de la quête d'une solution négociée.

[40]La procédure appelée médiation par les articles 361 à 367 du Code du travail gabonais relève davantage de l'arbitrage. En effet, outre le fait que l'article 361 prévoit que le médiateur est choisi par les parties, l'article 365 dispose que « *le médiateur statue en droit sur les conflits relatifs à l'exécution des lois*, *règlements*, *conventions ou accords collectifs de travail*, *ou autres accords en vigueur*.

Il statue en équité sur les autres conflits ». Les dispositions précédentes confèrent au médiateur un statut identique à l'arbitre, pourtant, seul ce dernier dispose en principe d'un pouvoir juridictionnel. Quant à la procédure d'arbitrage, comme dans les autres Etats, elle ne devrait pas porter ce nom tant en raison de la composition du tribunal en dehors de la volonté des parties (article 369 Code travail gabonais) que de sa gratuité (article 357 Code travail gabonais).

[41]L'article 26 (1) de la loi fixant les incitations à l'investissement privé en République du Cameroun (https://www.prc.cm/fr/actualites/actes/lois/170-loi-n-2013-004-du-18-avril-2013-fixant-les-incitations-a-l-investissement-prive-en-republique-du-cameroun) dispose : « *Les investisseurs bénéficiaires des incitations prévues par la présente loi doivent*, *en cas de différends*, *saisir préalablement le Comité de Contrôle*, *en vue du règlement à l'amiable* ».

[42]Généralement, le médiateur de la république a pour mission une fonction de contrôle (des actes administratifs et du fonctionnement de l'administration) et une fonction de conciliation des litiges entre administrés et administration. Malgré l'existence de constantes, le champ d'action du médiateur de la république a toujours été l'objet de débat. V. dans ce sens, S. Chammas, « Le Médiateur ou "à la recherche d'un sage" », *Hebdo-Info*, *journal hebdomadaire d'informations et d'annonces légales*, n 257-25 juillet 1992. En France, depuis la réforme constitutionnelle de 2008, le médiateur de la république est devenu le défenseur des droits, accroissant ainsi ses attributions. Pour développement sur les mutations du statut juridique du médiateur de la république en France, v. P.-Y. Baudot, « Le médiateur de la république au prisme de la démocratie administrative », *Revue française d'administration publique* 2011/1-2, p. 193 ; « Le défenseur des droits », *Revue française d'administration publique* 2011/3 ; J.-Cl. Zarka, « Le défenseur des droits », *Dalloz* 2011, p. 1027.

[43]Loi n 73-6 du 3 janvier 1973 instituant un Médiateur de la République.

[44]Le Médiateur de la République a été institué au Gabon un à peine après sa consécration en France. Pour autant, ce n'est qu'à la faveur du processus de démocratisation des années 1990, que l'institution du médiateur deviendra effective au Gabon avec le Décret n 1337/PR du 16 juillet 1992 portant création d'un Médiateur de la république.

les pays de la CEMAC est relativement récente. Au Tchad,[45] comme au Congo,[46] la création d'un médiateur de la république est une conséquence des conférences nationales organisées dans la mouvance démocratique des années 1990.[47] Néanmoins, malgré cette similitude, l'institution du médiateur de la république n'a pas connu la même veine dans ces deux Etats, la conjoncture politique interne ayant joué un rôle majeur.[48] Même si sa consécration ne s'inscrit pas dans les suites d'une conférence nationale, l'instauration d'un médiateur de la république en République centrafricaine trouve aussi son origine dans le contexte politique.[49] Pour sa part, le Cameroun est le seul pays à ne pas avoir créé un médiateur de la république.

Toutefois, malgré cette reconnaissance dans la quasi totalité des Etats membres de la CEMAC, le médiateur de la république reste une institution d'effectivité relative. Les citoyens y recourent peu par ignorance, ses missions de réconciliation politique post conflit interne étant davantage médiatisées. Il s'ensuit qu'il n'existe pas de statistiques fiables permettant d'étayer la confiance des citoyens envers ce mode de règlement de conflit. En conséquence, il n'est pas excessif de soutenir que le médiateur de la république occupe une place marginale au sein des modes de règlement des conflits. Cette situation peut aussi s'expliquer par le fait que la voie du recours gracieux préalable en matière administrative, plus ancienne, permet à l'administration de faire droit aux demandes d'un administré sans passer par la phase contentieuse. Pour autant, il ne faut pas perdre de vue que le recours gracieux préalable n'est pas, comme la conciliation, une alternative à une action contentieuse.[50] Au contrarie, sauf exception, il est la phase préalable obligatoire à tout recours pour excès de pouvoir.[51]

A côté du médiateur de la république, il existe d'autres procédures de conciliation impliquant les pouvoirs publics non juridictionnels. Celles-ci ont pour objet de régler les litiges naissant entre les opérateurs de certains secteurs d'activités, ou

[45] http://www.mediaturetchad.com/Historique-de-l-institution_a25.html

[46] B. Boumakani, « Les médiateurs de la République en Afrique noire francophone : Sénégal, Gabon et Burkina Faso », *Revue internationale de droit comparé* 1999-2, p. 307.

[47] B. Guèye, « La démocratie en Afrique : succès et résistances », *Revue Pouvoirs*, n 129, 2009, p. 5.

[48] B. Boumakani, « Les médiateurs de la République en Afrique noire francophone : Sénégal, Gabon et Burkina Faso », *op. cit*., note 7.

[49] A l'image de la Cour Constitutionnelle permanente, le Médiateur national a été créé en Centrafrique à l'issue des élections législatives et présidentielles de mars et mai 2005, ce avec le satisfecit de la communauté internationale. Pour détails v. S. Ndayambaje, *L'implication du PNUD dans le processus de consolidation de la paix en période post conflit en République Centrafricaine*, Mémoire professionnel en Master Stratégie, Défense, Sécurité, Gestion des Conflits et des Catastrophes, Université de Yaoundé II, 2008, p. 22.

[50] A. Ngwanza, « Regards franco-africains sur les étapes de la médiation commerciale », *Journal Africain du Droit des Affaires* 2011-1, p. 36, sp. pp. 37–38.

[51] B.-R. Guimdo Dongmo, « Le droit d'accès à la juridiction administrative au Cameroun. Contribution à l'étude d'un droit fondamental », *Revue de la recherche juridique* n XXXIII-121, 2008-1, p. 469.

entre usagers et professionnels desdits secteurs. On retrouve cette catégorie de conciliation en matière de télécommunication[52] et d'électricité.[53] Elles sont placées sous la houlette de l'agence nationale de régulation du domaine concerné, ce qui prive les parties du droit de choisir un médiateur elles mêmes. Il en découle un tempérament quant au caractère volontaire de la conciliation.[54] De plus, au Tchad la conciliation en matière de télécommunications s'apparente à celles prévues pour les conflits sociaux, la saisine d'une juridiction étant subordonnée à l'échec de la tentative de règlement amiable. A ce niveau, il importe de souligner que l'article 64 alinéa 2 de la loi n 009/PR/98 portant sur les télécommunications au Tchad entretient une confusion quant aux pouvoirs octroyés à l'Office Tchadien de Régulation des Télécommunications (O.T.R.T.). Cette disposition prévoit : *Avant tout recours juridictionnel, l'O.T.R.T. est préalablement saisi par les opérateurs ou par le Ministre d'une demande de conciliation en vue de régler les litiges nés entre les opérateurs.*

L'O.T.R.T. se prononce dans un délai de deux(2) mois après avoir mis les parties à même de présenter leurs observations. Sa décision est motivée et précise les conditions équitables d'ordre technique et financier dans lequel l'interconnexion doit être assurée. Il ressort du texte précédent que l'O.T.R.T. joue un rôle différent de celui habituellement dévolu à un médiateur. Sa mission s'apparente davantage à celle d'un expert dont les conclusions visent à clarifier une divergence technique ou financière.[55] La neutralité de l'expert n'en fait pas un conciliateur,[56] l'O.T.R.T. étant chargé, non pas de rapprocher les parties, mais de donner un point de vue.

Enfin, il convient de souligner que la médiation a également droit de cité en matière sportive. D'après l'article 39 du Règlement de la Chambre de conciliation et d'arbitrage du Comité national olympique et sportif du Cameroun (CCA-CNOSC), « *toute partie qui a intérêt peut choisir de saisir la* [*CCA-CNOSC*] *en vue d'une médiation relative à un conflit d'ordre sportif* ».

[52] Article 136 loi n 005/2001 portant réglementation des télécommunications au Gabon, article 64 loi n 009/PR/98 portant sur les télécommunications au Tchad.

[53] Article 85 de la loi n 2011/22 du 14 décembre 2011 régissant le secteur de l'électricité au Cameroun. (http://www.arsel-cm.org/arsel/donnees/decret.pdf).

[54] H. Tchantchou, « L'arbitrage en droit africain du travail. Rétrospective et perspectives à la veille de l'Acte uniforme OHADA sur le droit du travail », *op. cit*., p. 4.

[55] Pour détails sur les liens entre expertise et conciliation, v. « Conclusion de l'expertise : conciliation ou dépôt du rapport », *Gazette du palais*, recueil juillet 2006, p. 2444.

[56] X. Lagarde, « L'efficacité des clauses de conciliation ou de médiation », *Revue de l'arbitrage* 2000-3, p. 377, sp. p. 382.

2.3 La Convention de Médiation

La médiation conventionnelle suppose un accord préalable des parties et peut se dérouler avec ou sans l'appui d'une institution spécialisée dans les MARC. Bien qu'aucun texte ne s'y réfère, la médiation conventionnelle est pratiquée dans l'espace CEMAC. Cette situation s'explique par le fait que les textes généraux relatifs à la conciliation tirent leur origine dans le droit hérité de la colonisation. Or, l'article 1444-1 du Code de procédure civile français consacrant l'homologation judiciaire des transactions ou des accords de médiation extra judiciaire date de 1998.[57] En conséquence, il n'est pas surprenant que le droit interne des Etats membres de la CEMAC soit silencieux. Ceci étant, dans la droite ligne de la faculté de tenter un règlement pacifique *ad nutum*, rien n'interdit aux parties de s'entendre pour trouver une solution négociée. De plus, la médiation conventionnelle présentant de nombreuses similitudes avec la transaction,[58] il est pertinent de lui appliquer certaines règles régissant cette dernière. Sur cette base, il est possible de considérer que les litiges susceptibles d'être transigés peuvent faire l'objet d'une convention de médiation.[59]

Pour intéressante que soit cette approche, elle n'épuise pas la difficulté car les textes ne sont pas clairs sur la nature des différends pouvant faire l'objet d'une transaction. Tout au plus, on peut soutenir que les parties ne peuvent transiger que sur les droits disponibles tels que définis pour déterminer l'arbitrabilité objective d'un litige.[60] Généralement, il est admis qu'on ne peut compromettre « *sur les questions qui mettent en cause l'état et la capacité des personnes*, *ni sur aucune contestation sujette à communication au Ministère public* ».[61] A rebours du mutisme général des textes sur la médiation conventionnelle, en matière extractive, il est prévu que les parties puissent recourir à un mode règlement amiable des litiges.[62]

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[57] L'article 1444-1 du Code procédure civile français a été introduit par l'article 30 du Décret n 98-1231 du 28 décembre 1998.

[58] V. infra, n 37.

[59] Pour mémoire, l'ancien article 35 du Code de procédure civile, commerciale, administrative et financière congolais va dans ce sens en subordonnant la conciliation au fait qu'il s'agisse d'une matière sur laquelle il est possible de transiger. Il dispose : « *Si la transaction n'est pas interdite en la matière et si la cause ne requiert pas célérité*, *il peut être procédé*, *lorsque les parties sont domiciliées dans le ressort du Tribunal*, *à une tentative de conciliation* ». Il importe de préciser que cette disposition relative aux tribunaux populaires de district ou d'arrondissement a été abrogée, ces derniers ayant été remplacés par les tribunaux d'instance.

[60] L'article 2 de l'Acte uniforme sur l'arbitrage de l'OHADA dispose : « *Toute personne peut recourir à l'arbitrage sur les droits dont elle a la libre disposition* ». Pour développements sur ce texte, v. J.-M. Tchakoua, « L'arbitrabilité des différends dans l'espace OHADA », *Penant* n° 835, 2001, p. 5.

[61] A. Fénéon, *Droit de l'arbitrage. Commentaires de l'Acte uniforme sur l'arbitrage et du règlement de la CCJA*, Edicef, 2000, p. 21.

[62] Article 115 Code pétrolier camerounais, article 113 Code minier camerounais, article 52 alinéa 13 Code minier centrafricain, article 99 Code minier congolais.

En vérité, le silence sur la convention de médiation est de moindre effet car elle n'est qu'une manifestation de la liberté contractuelle. Plus précisément, elle fait partie de ce qu'un auteur averti appelle la justice par le contrat.[63]

Sur la base des développements précédents, il existe dorénavant des institutions qui se chargent de l'administration de la médiation. Sur les cinq pays francophones de la CEMAC, il n'y a qu'au Gabon et au Tchad où il n'y a pas de centre de médiation. Toutefois, la situation n'est pas homogène dans les autres pays, le Cameroun étant le seul Etat où un centre de médiation est déjà actif.[64] Au Congo,[65] comme en République centrafricaine,[66] les activités des centres de médiation n'ont pas encore été lancées. La convention de médiation peut aussi prévoir des tentatives de règlement amiable ad hoc organisées par les contradicteurs eux-mêmes, ce avec le concours d'un ou plusieurs médiateurs. A l'heure actuelle, il n'est pas possible de fournir des statistiques relatives à la pratique de la médiation conventionnelle tant parce que le Centre Permanent d'Arbitrage et de Médiation (CPAM), le seul centre de médiation opérationnel en zone CEMAC, ne les publie pas, et en raison du caractère confidentiel des négociations.

Par ailleurs, la mise en œuvre d'une convention de médiation n'est pas exclusive d'instance juridictionnelle,[67] les parties à un arbitrage pouvant décider de suspendre la procédure conflictuelle pour rechercher une solution négociée. Dans cette optique, l'ouverture des négociations peut être aussi le fait du centre d'arbitrage[68] ou des arbitres si les contradicteurs y consentent. Bien que le démarrage d'une conciliation suppose l'accord des parties, cela n'entraine pas un formalisme particulier. En dépit du silence des textes sur la convention de médiation, il est admis que celle-ci peut se décliner aussi bien d'un acte juridique ou de l'attitude convergente des parties. Comme tout contrat, la convention de médiation oblige ses auteurs, ces derniers n'étant cependant pas contraints de parvenir à une solution amiable, mais

[63]L. Cadiet, « Une justice contractuelle, l'autre », *in Etudes offertes à Jacques Ghestin. Le contrat au début du XXI^ème^ siècle*, LGDJ, 2001, p. 177.

[64]Le lancement officiel des activités du Centre Permanent d'Arbitrage et de Médiation (CPAM) du Centre Africain pour le Droit et le Développement a eu lieu le 02 avril 2012 à Douala.

[65]Sous l'impulsion d'un projet de l'Union Européenne avec le Ministère du commerce, intitulé Projet de renforcement des capacités commerciales et entrepreneuriales, la Conférence des Chambres de commerce, d'agriculture et des métiers du Congo a adopté le 14 octobre 2011 une résolution portant création du Centre de Médiation et d'Arbitrage des Chambres de commerce du Congo (CEMACO). Pour développement sur le CEMACO, v. I. Féliviyé, « Création d'un centre de médiation et d'arbitrage au Congo », *Revue congolaise de droit et des affaires*, n 8, 2012, p. 11.

[66]Le Centre d'Arbitrage, de Médiation et de Conciliation de Centrafrique (CAMC-CA) a été créé le 09 juin 2012. Pour amples informations, v. http://www.ohada.com/imprimer/actualite/1666/creation-du-centre-d-arbitrage-de-mediation-et-de-conciliation-de-centrafrique-camc-ca.html

[67]Il est aussi possible qu'une médiation organisée sous l'égide d'une institution spécialisée puisse être conduite dans le cadre d'un litige pendant devant le juge judiciaire.

[68]L'article 36 1 c) du Règlement de médiation du CPAM prévoit qu'un processus de médiation CPAM peut être ouvert : « *lorsque le Centre, saisi d'une demande d'arbitrage, estime que la médiation peut être plus appropriée au cas d'espèce, et que les parties acceptent formellement d'opter pour cette voie* ».

simplement d'essayer de l'obtenir.[69] La question qui se pose à ce niveau est celle de la sanction prévue lorsqu'un justiciable engage directement une action contentieuse au mépris d'une clause de médiation.

La pratique de la médiation conventionnelle étant récente, sauf erreur de notre part, la jurisprudence des pays de la CEMAC ne s'est pas encore prononcée sur le sort d'un recours engagé en violation d'une stipulation de conciliation préalable. Tout au plus, en partant du postulat que dans le silence des textes et de la jurisprudence, les avocats,[70] les juges,[71] comme les enseignants d'Afrique sub-saharienne francophone s'inspirent du droit français,[72] on peut esquisser une réponse. En France, après moult hésitations,[73] la Cour de cassation a décidé que la violation d'une clause de médiation préalable constitue une fin de non recevoir.[74] En conséquence, l'action engagée devant une juridiction judiciaire ou arbitrale sans passer par la phase de médiation préalable obligatoire est irrecevable.[75] Il est à espérer que si l'OHADA venait à adopter un texte sur la médiation conventionnelle, comme c'est envisagé,[76] la sanction du non respect d'une clause de tentative d'arrangement amiable sera fixée avec clarté.[77] Dans la même lancée, l'on devrait admettre que, comme en matière de médiation judiciaire, l'absence injustifiée d'une

[69]P. Meyer, *OHADA. Droit de l'arbitrage*, Bruylant, Juriscope, 2002, n 26.

[70]V. dans ce sens, CCJA, 10 juin 2010, arrêt n 042/2010, *Recueil de Jurisprudence de la CCJA* n 15, janvier - juin 2010, p. 103.

[71]La Cour suprême du Mali s'illustre particulièrement dans cette pratique, l'arrêt rendu par sa chambre sociale le 12 septembre 2005 est une parfaite illustration de la tendance des juges locaux à s'inspirer du droit français. (http://www.juricaf.org/Juricaf/Consultation.asp?ID_ARRET=149321&Page=21&TaillePage=20&CritereTerme=$bor%E9).

[72]J.-M. Tchakoua, *Introduction générale au droit camerounais*, Presses de l'Université Catholique d'Afrique Centrale, 2008, p. 96.

[73]A. Mourre, « La médiation en droit français : quelques points de repère jurisprudentiels et législatifs récents », *Bulletin de la Cour internationale d'arbitrage de la CCI*, *ADR* : *applications internationales* - supplément spécial 2001, p. 67 ; G. Block, « La sanction attachée au non-respect d'une clause de conciliation ou de médiation obligatoire », *in Liber Amicorum en l'honneur de Raymond Martin*, Bruylant-LGDJ-Université de Nice-Sophia-Antipolis, 2004, p. 70.

[74]Cass. ch. mixte, 14 février 2003, *Poiré c/ Tripier*, *Revue de l'arbitrage* 2003-2, p. 537, note Ch. Jarrosson.

[75]L. Jaeger et C. Lachman, « Interactions entre arbitrage et médiation », *Journal Africain du Droit des Affaires* 2011-1, p. 14, sp. pp. 21–23 ; E. Jolivet, « Chronique de jurisprudence arbitrale de la Chambre de commerce internationale (CCI) : arbitrage CCI et procédure ADR », *op. cit*.

[76]G. Kenfack Douajni, « La conciliation et la médiation dans les pratiques contractuelles », *in Les pratiques contractuelles d'affaires et les processus d'harmonisation dans les espaces régionaux*, ERSUMA, juin 2012, p. 260, sp. p. 266 ; S. Ousmanou, « La médiation commerciale, nouveau champ possible d'harmonisation du droit OHADA », communication présentée lors du colloque sur le thème *OHADA* : *nouveaux défis*, organisé par l'Association du Notariat francophone, le Journal Africain du Droit des Affaires et l'Institut Euro Africain de Droit Economique, les 22 et 23 mai 2013 à Kinshasa à l'occasion du vingtième anniversaire de l'OHADA.

[77]Tel n'est malheureusement pas le cas avec l'article 12 de l'Acte uniforme portant organisation des procédures simplifiées de recouvrement et des voies d'exécution, ce texte se bornant à prévoir que « *la juridiction saisie sur opposition procède à une tentative de conciliation. Si celle-ci aboutit*,

partie à un processus de médiation est un échec de celui-ci.[78] Pour autant, cela ne devrait pas signifier que la personne qui fait preuve d'une mauvaise foi manifeste en engageant une médiation à des fins dilatoires devrait être exonérée de toute responsabilité. Comme nous l'avons soutenu en matière de renégociation pour imprévision,[79] la partie qui fait durer délibérément les négociations, ou qui adopte une attitude déloyale lors des négociations peut être sanctionnée sur le terrain de la responsabilité contractuelle.[80]

En marge de la quasi inexistence de dispositions relatives à la médiation conventionnelle, l'article 21 alinéa 2 de l'Acte uniforme portant sur le droit commercial général (AUDCG) de l'OHADA fixe les effets de celle-ci sur l'écoulement de la prescription. Ce texte dispose que la prescription est « *suspendue à compter du jour où, après la survenance d'un litige, les parties conviennent de recourir à la médiation ou à la conciliation ou, à défaut d'accord écrit, à compter du jour de la première réunion de médiation ou de conciliation. Le délai de prescription recommence à courir, pour une durée qui ne peut être inférieure à six mois, à compter de la date à laquelle soit l'une des parties ou les deux, soit le médiateur ou le conciliateur déclarent que la médiation ou la conciliation est terminée* ». Le défaut de référence à une instance judiciaire par l'article 21 alinéa 2 précité traduit clairement son application à toute forme conciliation survenant dans le domaine commercial. De l'aveu des auteurs de la révision de l'AUDCG,[81] cette rédaction trouve son origine dans la loi française n 2008-561 du 17 juin 2008 portant réforme de la prescription en matière civile.[82] La conciliation suspendant la prescription, elle empêche l'exercice de toute action devant une juridiction pendant toute sa durée.

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le président dresse un procès verbal de conciliation signé par les parties, dont une expédition est revêtue de la formule exécutoire.

Si la tentative de conciliation échoue, la juridiction statue immédiatement sur la demande en recouvrement, même en l'absence du débiteur ayant formé opposition, par une décision qui aura les effets d'une décision contradictoire ». La jurisprudence n'a pas non plus contribué à clarifier le sens de cette disposition, la Cour d'appel d'Abidjan se bornant à affirmer qu' « *il ne ressort pas de l'article 12 de l'Acte uniforme OHADA, que la procédure de la tentative de conciliation est prescrite à peine de nullité du jugement qui doit statuer sur l'opposition* ».

[78]Tribunal de première instance de Cotonou, jugement n 20, 15 juillet 2002, *M. Gilbert Bebol c/ Ecobank Bénin SA*, *op. cit*.

[79]A. Ngwanza, *La favor contractus dans les Principes Unidroit et l'avant-projet d'Acte uniforme sur le droit des contrats en OHADA*, Thèse de doctorat, Université Paris Sud 11, 2011, n° 440.

[80]Sentence CCI 7983/1996 citée par E. Jolivet, « Chronique de jurisprudence arbitrale de la Chambre de commerce internationale (CCI) : arbitrage CCI et procédure ADR », *op. cit*.

[81]D. Tricot, « Prescription », *Droit et patrimoine* n° 201 – mars 2011, Dossier *Un nouveau droit commercial pour la zone OHADA*, p. 70.

[82]L'article 2238 du Code civil français introduit par la loi n 2008-561 du 17 juin 2008 portant réforme de la prescription en matière civile dispose : « *La prescription est suspendue à compter du jour où, après la survenance d'un litige, les parties conviennent de recourir à la médiation ou à la conciliation ou, à défaut d'accord écrit, à compter du jour de la première réunion de médiation ou de conciliation. La prescription est également suspendue à compter de la conclusion d'une convention de procédure participative.*

D'ailleurs, la jurisprudence a retenu à bon droit que la phase de conciliation ne fait pas partie de l'instance conflictuelle, par conséquent les exceptions d'incompétence du juge étatique, fondées notamment sur une clause compromissoire, doivent être soulevées après l'issue infructueuse des négociations.[83] Il s'ensuit que l'ouverture du processus de médiation est donc d'une importance décisive.

2.4 Le Médiateur

Dès lors que les litigants ont choisi la voie amiable, il leur appartient de désigner la ou les personnes qui auront la charge de les aider à rapprocher leurs positions divergentes. Ce principe souffre de tempéraments lorsque la médiation est judiciaire ou obligatoire. En matière judiciaire, les justiciables n'ont aucun rôle à jouer pour le choix du magistrat qui les aidera à trouver un terrain d'entente. Il en est de même pour le médiateur de la république et les conciliations relatives aux conflits du droit du travail, des télécommunications et de l'électricité. Toutefois, il subsiste une controverse quant à l'identité du juge devant concilier les parties en matière d'injonction de payer. Bien que l'article 12 de l'AUPRSVE dispose que « *la juridiction saisie sur opposition procède à une tentative de conciliation* », l'on se demande si c'est un juge distinct de celui saisi du fond de l'affaire qui doit organiser la recherche d'un règlement pacifique du litige.[84]

Contrairement aux autres types de médiation pour lesquelles les tiers sont présumés compétents et impartiaux *intuitu functionis*,[85] il en va autrement en matière de médiation conventionnelle. A l'image de l'arbitrage,[86] le succès d'une tentative de résolution amiable d'un différend est tributaire des qualités de celui ou

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Le délai de prescription recommence à courir, pour une durée qui ne peut être inférieure à six mois, à compter de la date à laquelle soit l'une des parties ou les deux, soit le médiateur ou le conciliateur déclarent que la médiation ou la conciliation est terminée. En cas de convention de procédure participative, le délai de prescription recommence à courir à compter du terme de la convention, pour une durée qui ne peut être inférieure à six mois ». Avant ce texte, la Cour de cassation (Cass. civ. 1ère, 6 mai 2003, *op. cit.*) avait déjà admis l'effet suspensif des clauses de médiation.

[83]Cour d'appel de Douala, 29 avril 2004, arrêt n 160/CC, *Société CICAM c/ BDEAC*, *Revue camerounaise de l'arbitrage* n 35, octobre-novembre-décembre 2006, p. 7, note G. Kenfack Douajni.

[84]Pour sa part, A. Y. Sidibe (« Réflexions sur la pratique malienne en matière d'injonction de payer », *Revue trimestrielle de droit et de jurisprudence des affaires*, n 2, p. 159) estime que la conciliation doit être conduite par un magistrat conciliateur distinct de celui de la mise en état.

[85]Toutefois, il convient de noter qu'un juge peut être récusé quel qu'en soit la procédure, dès lors qu'il existe entre lui et une partie des liens susceptibles d'altérer son indépendance, ou si d'une manière ou d'une autre il a eu connaissance de l'affaire dans des circonstances de nature à affecter sa neutralité.

[86]S. Lazareff (« De la qualité des arbitres », *Gazette du palais* 20 mai 2004, n 141, p. 3) affirmait à juste titre que « *tant vaut l'arbitre*, *tant vaut l'arbitrage* ».

ceux qui doivent assister les parties. Malgré, cette réalité, les textes des pays de la CEMAC sont muets sur le statut du médiateur. Cette situation peut s'expliquer par le fait, qu'excepté la médiation conventionnelle en matière extractive, les dispositions régissant le règlement pacifique des conflits renvoient à des autorités publiques. Ainsi, la médiation judiciaire est automatiquement placée sous la férule du juge, à l'inverse du droit français qui, hormis les procédures de divorce ou de séparation de corps, permet de désigner à un tiers par un juge avec l'accord des parties.[87] En matière sociale, la médiation est généralement confiée à un inspecteur du travail[88] ou à une autorité judiciaire.[89] Quant aux médiations des litiges intervenant dans les secteurs des télécommunications ou de l'électricité, l'agence de régulation du domaine concerné a souvent une compétence exclusive.[90] Il découle de cette situation que les obligations du médiateur ne sont pas définies de manière homogène, elles sont prévues dans les législations relatives aux autorités judiciaires ou administratives investies du pouvoir de concilier les parties.

S'agissant du tiers intervenant dans les médiations conventionnelles, il est choisi par les parties,[91] le centre de médiation se substituant à elles uniquement pour pallier leur éventuel désaccord.[92] Le médiateur choisi est astreint aux règles fondamentales d'impartialité et d'indépendance tels que prévus par les règlements de médiation. Sur ce point, il importe de préciser qu'outre le Règlement de médiation du CPAM,[93] une attention doit être également accordée aux textes internationaux auxquels se réfèrent habituellement les contrats d'Etat conclus par les personnes publiques de l'espace CEMAC. Dans ce sens, le Règlement de Médiation de la CCI[94] et la

[87] Article 129-1 et article 131-1 du Code de procédure civile français.

[88] Articles 139 et 158 du Code du travail camerounais, articles 346 et 367 du Code du travail centrafricain, article 242 alinéa 3 Code du travail congolais, articles 314 et 359 Code du travail gabonais, articles 431 et 434 du Code du travail tchadien.

[89] En vertu de l'article 221 du Code du travail congolais, la conciliation est du ressort du Tribunal du travail pour les litiges individuels. Il convient de préciser que l'article 240 du même texte prévoit une conciliation facultative avant la saisine du Tribunal du travail par l'inspecteur du travail.

[90] Article 136 loi n 005/2001 portant réglementation des télécommunications au Gabon, article 64 loi n 009/PR/98 portant sur les télécommunications au Tchad, article 85 de la loi n 2011/22 du 14 décembre 2011 régissant le secteur de l'électricité au Cameroun.

[91] La liberté des parties n'est pas absolue, l'article 41.1 du Règlement de médiation du CPAM prévoyant par exemple que « *dans tous les cas*, *le médiateur doit relever de la Liste des médiateurs-certifiés du CPAM* ».

[92] D'après l'article 41.4 du Règlement de médiation du CPAM, « *à défaut d'accord sur l'identité du médiateur au bout du délai indiqué à l'alinéa 2 ci-dessus*, *le Centre procède d'office à la nomination d'un Médiateur unique* ».

[93] L'article 11.5 du Règlement de médiation du CPAM énonce que « *tout médiateur pressenti doit être confirmé par le Centre*, *après avoir produit une déclaration d' indépendance, de disponibilité et d'acceptation de la mission* » (nous soulignons).

[94] L'article 5.3 du Règlement de médiation de la CCI énonce : « *Avant sa nomination ou sa confirmation*, *le Médiateur pressenti signe une déclaration d'acceptation*, *de disponibilité*, *d'impartialité et d'indépendance*, *dûment signés et datés. Le Médiateur pressenti fait connaître par écrit les faits ou circonstances qui pourraient être de nature à mettre en cause son indépendance*

Convention du CIRDI[95] et le Règlement de conciliation de la CNUDCI[96] convergent pour exiger également que le tiers fasse preuve de neutralité et de probité. En fait, les exigences morales et professionnelles pesant sur le tiers sont assez semblables à celles des arbitres,[97] la nuance se trouvant dans la nature de la mission confiée au médiateur. Etant donné que ce dernier n'a pas de pouvoir juridictionnel, la problématique des conflits d'intérêts est moins prégnante. En fait, le risque d'une décision arbitrairement défavorable à une partie est moindre, l'issue heureuse d'une médiation n'étant possible qu'avec l'approbation des parties. Ceci dit, il est parfaitement possible qu'un médiateur partial influence le choix d'un justiciable dans un sens contraire à ses intérêts. Pour cette raison, comme l'arbitre, le tiers a le devoir de conserver une équidistance vis à vis des parties. La question qui se pose ici est celle de la possibilité de passer du rôle de médiateur à celui d'arbitre.

En effet, le problème se pose parce que dans le cadre d'une conciliation, le tiers accède à des informations qu'il n'aurait pas forcément eues pendant une procédure contentieuse. Pour parvenir à un accord, des confidences inimaginables dans une approche conflictuelle sont souvent faites au médiateur. Il serait utopique de croire que le tiers devenu arbitre ne se laisse pas influencer par les déclarations compromettantes entendues en cours de médiation. Malgré cette réalité, les dispositions relatives à la médiation judiciaire donnent au juge le pouvoir de concilier les parties.[98] Est-ce à dire que les juges sont considérés comme des êtres capables de se défaire de tout ce qu'ils ont appris lors des pourparlers de médiation ? Difficile de répondre à cette question. En tout cas, le droit comparé traite diversement la succession des missions d'arbitre et de médiateur.

Au terme d'une étude comparatiste,[99] il ressort que le droit comparé est tantôt favorable, tantôt hostile, à la possibilité pour l'arbitre d'agir comme conciliateur. Vu le caractère quasi inexistant de dispositions légales régissant la médiation conventionnelle en zone CEMAC, il n'est pas aisé de se prononcer sur le cumul

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dans l'esprit des parties, *ainsi que les circonstances qui pourraient faire naitre des doutes raisonnables quant à son impartialité. Le Centre communique ces informations par écrit aux parties et leur fixe un délai pour faire connaître leurs observations éventuelles* ».

[95]L'article 14 de la Convention CIRDI dispose : « *Les personnes désignées pour figurer sur les listes* [*des arbitres et conciliateurs*] *doivent jouir d'une haute considération morale*, *être d'une compétence reconnue en matière juridique*, *commerciale*, *industrielle ou financière et offrir toute garantie d'indépendance dans l'exercice de leurs fonctions* ».

[96]L'article 4 *in fine* du Règlement de la CNUDCI prévoit qu' « *en recommandant des conciliateurs ou en les nommant*, *l'institution ou la personne en question ont égard aux considérations propres à garantir la nomination d'une personne indépendante et impartiale et*, *dans le cas d'un conciliateur unique ou d'un troisième conciliateur*, *tiennent compte du fait qu'il peut être souhaitable de nommer une personne de nationalité différente de celle des parties* ».

[97]Ph. Stoffel-Munck, « Rapport de synthèse », *Petites Affiches*, 03 décembre 2009 n 241, *Numéro spécial*, *médiation*, *arbitrage et expertise*, *état et perspective dans l'Océan indien*, *La Réunion*, *les 28 et 29 avril 2008*, p. 53.

[98]V. supra, n 8.

[99]L. Jaeger et C. Lachman, « Interactions entre arbitrage et médiation », *op. cit*., pp. 15–20.

des fonctions d'arbitre et conciliateur. Tout au plus, l'on peut s'inspirer des pays qui, comme ceux de la CEMAC, sont de culture civiliste d'inspiration française. En France, des plumes expertes[100] s'accordent pour s'opposer au fait que l'arbitre puisse devenir médiateur. Emboitant le pas à la doctrine, la jurisprudence hexagonale distingue « *une atteinte à l'impartialité objective du tribunal arbitral du fait de la mission de conciliation qu'il avait préalablement exercée* » et « *la transgression par lui d'une obligation de confidentialité à l'égard des informations recueillies dans la phase de conciliation* ».[101] En d'autres termes, le fait de respecter la confidentialité des échanges de la phase de conciliation n'est pas exclusif de la partialité des arbitres. L'on comprend alors aisément que le Règlement de médiation du Centre de Médiation et d'Arbitrage de Paris (CMAP)[102] subordonne le cumul de l'arbitrage et de la conciliation par le ou les mêmes individus à l'acceptation des parties. Dans l'espace CEMAC, l'article 48. 4 *in fine* du Règlement du CPAM énonce que « *le Médiateur ne peut être désigné arbitre ni intervenir à quelque titre que ce soit dans le litige subsistant*, *sauf à la demande écrite de toutes les parties* ». Il est à noter que le texte cité ci-dessus pose le principe de l'interdiction des fonctions d'arbitre à un médiateur, ce sans laisser aux parties la faculté d'en décider autrement. On retrouve d'ailleurs la même approche avec les Règlements de conciliation et de médiation du CAMC de Dakar[103] et du CAMC-O de Ouagadougou,[104] ainsi que le Règlement ADR du Centre d'arbitrage, de médiation et de conciliation (CAMeC)[105] de la Chambre de commerce et d'industrie du Bénin. Il résulte de ces règlements qu'

[100]De manière très claire, D. Bensaude (« Note – Cass. civ. 1ère, 9 janvier 2007, Société fédérale du Crédit mutuel du Nord de la France c/ Banque Deluac et Cie », *Revue de l'arbitrage* 2007, p. 471, sp. p. 478) exprime l'opinion de la doctrine française en affirmant que « *l'intervention des mêmes personnes pour conduire ces deux missions*[*arbitre et conciliateur*] *dans un même litige*, *peut* (. . .) *atténuer la qualité de la conciliation et*, *en cas d'échec de celle-ci*, *affecter la régularité de la phase d'arbitrage qui la suit* ». V. également, Ch. Jarrosson, « Note – Cour d'appel de Paris (1re Ch. Suppl.) 28 mars 1991, Caisse régionale de garantie de la responsabilité professionnelle des notaires c/ Epoux Bruère et autre », *Revue de l'arbitrage* 1991, p. 473 ; Thomas Clay, « L'arbitre peut-il avoir été précédemment conciliateur ? », *D*. 2004, Somm. p. 3180.

[101]Cass. civ. 2ème 10 juillet 2003 ; adde M. Bandrac, « Note – Cass. civ. 2ème 11 juillet 2002 ; Cass. civ. 2ème 21 novembre 2002 ; Cass. civ. 2ème 10 juillet 2003 ; Cass. civ. 2ème 20 novembre 2003 », *Revue de l'arbitrage* 2004, p. 291.

[102]L'article 7.9 du Règlement de médiation du CMAP prévoit que « *le médiateur ne peut être désigné arbitre ni intervenir à quelque titre que ce soit dans le litige subsistant*, *sauf à la demande écrite de toutes les parties* ».

[103]L' article 14 du Règlement de conciliation et de médiation du CAMC stipule : « *Les parties et le conciliateur s'engagent à ce que ce dernier ne remplisse pas les fonctions d'arbitre*, *de représentant ou de conseil d'une partie dans une procédure arbitrale ou judiciaire liée au différend objet de la médiation* ».

[104]A la seule différence que l'article 7 du Règlement de conciliation et de médiation du CAMC-O utilise le terme médiateur au lieu de conciliateur, il reprend *in extenso* l'article 14 du Règlement de conciliation et de médiation du CAMC.

[105]Conformément à l'article 5.3 du Règlement ADR du CAMeC, « *le médiateur ou le conciliateur ne peut être par la suite désigné comme arbitre dans le litige ayant fait l'objet d'une tentative infructueuse de médiation ou de conciliation* ».

« *il semble* (. . .) *assez généralement admis qu'il est à priori peu souhaitable qu'une même personne intervienne successivement comme médiateur ou conciliateur puis comme arbitre sur le même litige* ».[106]

2.5 Le Processus de Médiation

La recherche d'un règlement amiable obéit à deux séquences fondamentales que sont la phase introductive et les pourparlers proprement dits. Comme tout mode alternatif de règlement de litige, le démarrage d'une médiation suppose une manifestation de volonté des parties. Quelle que soit la personne qui en a l'initiative, le juge, les arbitres, le centre de médiation, ou les litigants, ces derniers doivent exprimer leur consentement. Pour autant, aucun formalisme n'est prévu, les parties ayant le pouvoir, comme expliqué plus haut,[107] de solliciter une solution négociée à tout moment dans la forme de leur choix. En revanche, les médiations conventionnelles sollicitées par une partie débutent toujours par le dépôt d'une demande conjointe ou individuelle.[108] Le plus important est que chacune des parties donne son accord pour entamer des négociations car, comme nous l'avons indiqué, « *il n'y a pas de médiation par défaut* ».[109]

La réticence à la conduite d'une médiation par un arbitre tient considérablement à la nature de ses obligations et prérogatives en phase de règlement amiable.[110] Tout d'abord, il importe de souligner que le processus de médiation est caractérisé par une grande souplesse procédurale,[111] le tiers et les parties devant uniquement s'entendre sur un *modus procidendi* conforme à l'égalité des droits de ces dernières.[112] Ainsi, le conciliateur est exonéré de respecter le principe du contradictoire, il lui

[106]L. Jaeger et C. Lachman, « Interactions entre arbitrage et médiation », *op. cit*., p. 19.

[107]V. supra, n 12.

[108]L'Article 36 du Règlement de médiation du CPAM prévoit que « *la demande de médiation peut être conjointe*, *c'est-à-dire introduite par les deux parties*, *ou*, *à défaut*, *par la partie la plus diligente* », http://www.cadevafrique.org/images/docs/textefondateur/Reglement.pdf

[109]A. Ngwanza, « Regards franco-africains sur les étapes de la médiation commerciale », *op. cit*., p. 39.

[110]Malgré l'intérêt croissant pour la médiation et la création d'une association des centres africains d'arbitrage et de médiation (ACAM) en 2009, il n'existe pas un code déontologique pour les médiateurs dans l'espace CEMAC.

[111]E. Loquin (« Synthèse », *in Les médiateurs en France et à l'étranger. Colloque du 17 novembre 2000*, Société de législation comparée, 2001, p. 105, sp. p. 110) justifie la souplesse procédurale de la médiation par le fait que celle-ci repose sur une « *approche du litige plus psychologique que juridique* ».

[112]La liberté des parties et du médiateur pour fixer les règles gouvernant les négociations, n'est pas absolue. En matière sociale, l'article 139.2 du Code du travail camerounais indique que « *les modalités de convocation et de comparution des parties sont fixées par arrêté du ministre chargé du Travail*, *pris après avis de la Commission nationale consultative du travail* ».

appartient simplement de mener les échanges en ayant le souci de l'équité. Il s'ensuit qu'aussi bien dans la conciliation conventionnelle que dans la conciliation légale, les discussions sont conduites sous le prisme de l'efficacité.[113] Dans cette optique, le droit d'entendre séparément chaque contradicteur est une méthode efficace pour délier les langues. Le corollaire de la confiance des parties envers le médiateur est un devoir de confidentialité. Il lui est interdit de communiquer à une partie les informations qu'il a reçues de l'autre sous le sceau de la confidentialité.[114] Toutefois, il n'est pas proscrit que le médiateur sollicite les compétences d'un expert ou les minutes d'un notaire, si cela concourt à apurer le conflit d'une part, et si les parties l'acceptent d'autre part.

Les litigants eux- mêmes ne sont pas exonérés du devoir de non divulgation des informations obtenues lors de la conciliation. En fait, cela s'entend bien car, « *érigée en règle d'or*, *la confidentialité irradie complètement la recherche d'apaisement du litige* ».[115] L'article 45.3 du Règlement de médiation du CPAM précise à ce propos qu' « *aucune constatation*, *déclaration ou proposition d'accord faites par les parties et/ou le Médiateur ne peut être utilisée ultérieurement*, *même en justice*, *sauf accord formel de toutes les parties* ». Toutefois, pour ferme que soit l'obligation de confidentialité, elle ne saurait supplanter une obligation légale de révélation. De plus, dans le cadre de la médiation judiciaire, l'on est en droit de s'interroger sur le respect de la confidentialité par le juge conciliateur. Aussi longtemps que les audiences de conciliation judiciaire se déroulent-elles à huis clos,[116] on est en droit de se demander comment on peut empêcher un juge de conduire les débats sur la base d'éléments découverts lors de la tentative de conciliation. Quoi qu'il en soit, le mutisme auquel sont soumis conciliateur et litigants, est une conséquence de l'inapplication du principe du contradictoire. Aux fins de succès de la conciliation, il faut que les informations soient dévoilées en toute sécurité. Ce n'est qu'à ce prix que le médiateur peut apaiser la perception que les parties ont du conflit.[117]

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[113]L'article 43.3 du Règlement de médiation du CPAM stipule : « *Le médiateur procède librement*, *avec célérité et équité*, *et en prenant en considération les volontés exprimées par les parties*, *afin de leur proposer une solution susceptible de satisfaire l'une et l'autre*, *et de conduire à un accord sur l'ensemble des aspects du différend* ».

[114]Conformément à l'article 45.2 du Règlement de médiation du CPAM, « *lorsque le médiateur reçoit d'une des parties des informations concernant le différend*, *il peut les communiquer à l'autre partie s'il en a reçu l'accord par la partie émettrice. Toutefois*, *lorsqu'une partie fournit au médiateur une information sous la recommandation expresse qu'elle doit demeurer confidentielle*, *le médiateur ne saurait la dévoiler à l'autre partie* ».

[115]A. Ngwanza, « Regards franco-africains sur les étapes de la médiation commerciale », *op. cit*., p. 43.

[116]L'article 229 du Code congolais du travail indique que « *sauf au stade de la conciliation*, *l'audience est publique* ». Dans le même sens, article 329 du Code du travail gabonais, article 422 du Code du travail tchadien.

[117]Pour Y. Chaput (« Médiation et contentieux des affaires », *in Médiation et arbitrage. Alternative dispute resolution. Alternative à la justice ou justice alternative*, Litec, 2005, p. 93, sp. p. 109) la pratique des échanges séparés, encore appelés *caucus*, concourt à une plus grande franchise. Dans le même sens, H.-J. Nougein et al, *Guide pratique de l'arbitrage et de la médiation commerciale*,

L'autre élément d'attractivité de la médiation réside dans la brièveté de sa durée. L'article 46.1 du Règlement de médiation s'inscrit dans cette ligne en énonçant que « *le médiateur dispose d'un délai de trente* (*30*) *jours pour conclure la médiation à compter de la date de la rencontre préparatoire visée à l'article 42 ci-dessus ou*, *si cette rencontre ne s'est pas avérée nécessaire*, *à compter de la date où le Médiateur a formellement accepté sa mission* ». A la différence du texte cité ci-dessus, certains règlements de médiation d'Afrique de l'Ouest permettent aux parties ou au médiateur de solliciter une prorogation du délai de la conciliation.[118]

En revanche, pour les médiations d'essence légale, la rapidité a reçu une acception particulière, les textes étant muets sur le temps imparti à la recherche de la solution concertée. De manière marginale, l'article 64 alinéa 2 de la loi n 009/PR/98 portant sur les télécommunications au Tchad[119] et l'article 349 du Code du travail centrafricain[120] limitent la durée des pourparlers. Contrairement au silence général sur la durée de la médiation, la législation sociale centrafricaine met un soin particulier à obliger le conciliateur à mettre fin promptement à la médiation.[121] Quant au droit gabonais, il impose la rapide transmission du dossier à la juridiction en charge de purger le litige.[122] En matière de médiation judiciaire, aucun délai n'est prévu, il faut s'en remettre à la diligence du juge conciliateur pour éviter la poursuite de négociations qui s'éternisent indéfiniment. Dans tous les cas de figure, comme toute procédure de règlement, la médiation connait une issue qui répond à un régime particulier.

Litec, 2004, p. 231 ; G. Tarzia, « Médiation et institution judiciaire », *in Médiation et arbitrage. Alternative dispute resolution. Alternative à la justice ou justice alternative*, Litec, 2005, p. 19, sp. p. 25.

[118] A. Ngwanza, « Regards franco-africains sur les étapes de la médiation commerciale », *op. cit*., p. 45.

[119] L'article 64 alinéa 2 de la loi n 009/PR/98 portant sur les télécommunications au Tchad dispose : « *L'O.T.R.T. se prononce dans un délai de deux* (*2*) *mois après avoir mis les parties à même de présenter leurs observations. Sa décision est motivée et précise les conditions équitables d'ordre technique et financier dans lequel l'interconnexion doit être assurée* ».

[120] L'article 349 du Code du travail centrafricain dispose : « *La tentative de conciliation devant l'inspecteur du travail et des lois sociales ne peut excéder deux* (*2*) *mois à partir de la première séance de conciliation* ».

[121] D'après l'article 349 du Code du travail centrafricain, en cas de trois absences successives du demandeur ou défendeur, l'affaire est classée sans suite ou un procès verbal de carence est dressé. Dans un sens voisin en matière de conflits collectifs sociaux, article 368 alinéa 5 du texte précité.

[122] L'article 314 alinéa 3 du Code du travail gabonais dispose : « *En cas de non-conciliation*, *l'inspecteur du travail est tenu de transmettre le dossier au tribunal dans un délai maximum de trois mois. Passé ce délai*, *les parties peuvent saisir directement la juridiction* ».

2.6 Échec de la Médiation

L'issue d'une conciliation procède d'une démarche manichéenne, soit elle a réussi, soit elle a échoué. Bien que la réussite d'une médiation puisse être partielle ou totale, elle est relativement aisée à constater. Par contre, il en va autrement de son échec qui se décline tantôt du désaccord explicite des parties, de l'écoulement du temps ou de la défaillance des parties. Etant donné que la fin de la médiation se caractérise toujours par un procès verbal mentionnant le résultat des pourparlers, la cause de l'insuccès est toujours indiquée.[123] A la différence du désaccord des parties qui relève d'une approche casuiste, le dépassement du délai se vérifie par simple computation de la durée des échanges conduits par le conciliateur. Quant à la défaillance, elle s'entend de la non participation d'une ou de toutes les parties soit par absence, soit par ignorance des sollicitations du tiers.[124] En matière de médiation conventionnelle, la défaillance s'entend aussi du défaut de paiement des frais de médiation.[125]

Lorsque la conciliation a échoué, les parties ont la latitude d'engager ou de renoncer une action contentieuse. Cependant, il est des hypothèses où le médiateur a une obligation légale de transmettre le procès verbal de non conciliation à la juridiction compétente. C'est notamment le cas en matière sociale où l'inspecteur du travail doit saisir le juge pour les conflits individuels[126] ou la juridiction arbitrale pour les différends collectifs.[127] Le conciliateur est donc dessaisi de l'affaire, sauf s'il s'agit d'un juge, car, comme expliqué plus haut,[128] il ne peut pas conduire une médiation et un arbitrage pour la même affaire. C'est ainsi que la procédure conflictuelle se met en branle, ce qui ne retire pas aux parties la possibilité de mettre fin au différend par un accord postérieur survenu en cours d'instance juridictionnelle. La poursuite de la procédure contentieuse est aussi tributaire du fait qu'aucun plaideur ne se désiste après les convocations par la juridiction compétente.

[123] Article 351.6 du Code du travail centrafricain.

[124] Tribunal de première instance de Cotonou, jugement n 20, 15 juillet 2002, *M. Gilbert Bebol c/ Ecobank Bénin SA*, www.ohada.com, Ohadata J-04-396.

[125] D'après l'article 47.1 du Règlement de médiation du CPAM, « *la médiation prend fin par* : (. . .) *c*) *la défaillance des parties*, *en raison du non paiement des frais de médiation* ».

[126] Article 139.6 du Code du travail camerounais, Article 353 du Code du travail centrafricain, article 314 alinéa 3 du Code du travail gabonais.

[127] Article 160 du Code du travail camerounais, Article 360 du Code du travail centrafricain.

[128] V. supra, n 27–28.

2.7 Réussite de la Médiation

2.7.1 Notion et effets de la Réussite de la Médiation

La médiation connait une issue favorable quand le litige est complètement ou partiellement purgé. En cas d'accord partiel, le procès verbal de conciliation dressé par le tiers et signé des parties indiquent avec clarté les points de divergence subsistant. Sur cette base, la réussite partielle de la médiation s'apparente à une tentative infructueuse, la transmission de l'accord partiel emportant saisine de la juridiction compétente sur les points non tranchés. En revanche, l'occurrence d'un consensus permettant de désamorcer complètement le litige produit des conséquences différentes. L'aboutissement heureux de la conciliation éteint le litige,[129] l'accord conclu étant homologué judiciairement.[130] Il en est ainsi puisque le succès de la médiation équivaut à la conclusion d'une transaction. Des plumes expertes considèrent d'ailleurs que la transaction « *peut être placée sur le même plan que la conciliation et la médiation* ».[131] De plus, tout comme la transaction, l'écrit est une condition *ad validitatem* du procès verbal de médiation. En matière de médiation conventionnelle, l'article 47.2 du Règlement de médiation du CPAM énonce que « *lorsque la médiation se termine par un accord*, *le médiateur formalise l'accord dans un Protocole d'accord qui est signé par les parties et visé par le médiateur* ». Il en découle que les procès verbaux de médiation ont l'autorité de la chose jugée entre les parties.[132] Peu importe que les voies de recours aient été épuisées, car comme l'a soutenu la CCJA, « *il est généralement admis qu'une* (. . .) *transaction est légale* ; *qu'elle est également valable à tout moment où les voies de recours ne sont pas épuisées*, *même lorsque ne subsiste* (. . .) *que la voie du recours extraordinaire* ; *qu'au demeurant ladite transaction n'ayant été ni dénoncée*

[129] Allant dans ce sens, la CCJA (08 avril 2010, arrêt n 022/2010, *Crédit Lyonnais Cameroun S. A. c/ Société Freshfood Cameroun*, *en présence de AES Sonel*, *Recueil de Jurisprudence de la CCJA* n 15, Janvier - Juin 2010, p 129 ; Le Juris Ohada n 3/2010, juillet-août-septembre, p. 15, www.ohada.com, Ohadata J-12-45) a estimé qu'en l'absence de contestation du protocole d'accord par les litigants, « *la saisie attribution par Freshfood à l'encontre du Crédit Lyonnais* [*n'était*] *pas fondée* ».

[130] Article 139 alinéa 3 Code du travail camerounais, article 351 alinéa 3 Code du travail centrafricain, article 226 alinéa 3 Code du travail congolais, article 420 alinéa 3 Code du travail tchadien.

[131] H. Croze, C. Morel et O. Fradin, *Procédure civile. Manuel pédagogique et pratique*, *op. cit*., n 620.

[132] Article 2052 et suivants du Code civil de 1804. Il convient de préciser que le Code civil français de 1804 est en vigueur dans les pays francophones de la CEMAC par héritage colonial. Aussi longtemps, que des lois internes ont-elles abrogé certaines dispositions du Code civil de 1804, les textes relatifs à la transaction sont restées inchangés.

ni remise en cause par les parties, *elle continue de développer ses effets et s'oppose par conséquent au présent recours en cassation qui*, *de ce fait*, *doit être déclaré irrecevable* ».[133]

Toutefois, la différence fondamentale entre un accord de conciliation judiciairement homologué et une transaction réside dans le fait qu'il est moins difficile d'invoquer la nullité de la seconde que celle du premier. En effet, il appartient au juge de ne pas entériner un arrangement entaché de quelque illicéité. Tandis que d'après l'article 2053 du Code civil de 1804, « ... *une transaction peut être rescindée*, *lorsqu'il y a erreur dans la personne ou sur l'objet de la contestation*.

Elle peut l'être dans tous les cas où il y a dol ou violence ».

2.7.2 Exécution des Accords de Médiation

Dans l'espace CEMAC, les accords de médiation peuvent faire l'objet d'une homologation judiciaire.[134] Cependant, à l'opposé des autres tentatives de règlement amiables régies par la loi, la médiation conventionnelle souffre d'un déficit normatif quant à la force juridique des accords qu'elle peut générer.[135] Le droit OHADA n'a pas contribué à améliorer la situation, l'article 33 de l'AUPRSVE prévoyant que « *constituent des titres exécutoires* : (...) *les procès verbaux de conciliation signés par le juge et les parties* ». En imposant la signature du juge, la disposition précédente affaiblit la valeur des accords de médiation conventionnelle. De plus, même pour la conciliation en matière de télécommunications, la CCJA a précisé que lorsque le droit national dispose que les décisions de l'organe de conciliation sont susceptibles de recours, elles ne constituent pas des titres exécutoires.[136]

Malgré l'ignorance de la médiation conventionnelle par les textes, les accords qui en résultent peuvent faire l'objet d'une homologation judiciaire. Pour ce faire, les litigants peuvent saisir un notaire aux fins d'authentification de leur accord puisque les actes notariés constituent des titres exécutoires. L'inconvénient de cette démarche est le fait qu'après avoir payé les frais de médiation, il faudra encore rémunérer les services du notaire. A défaut d'avoir recours aux soins notariaux, les

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[133]CCJA, 03 juin 2010, arrêt n 031/2010, *Apollinaire Compaoré c/ Cherif Ould Abidine*, inédit.

[134]En matière sportive par exemple, l'article 41 alinéa 2 du Règlement CCA-CNOSC dispose : « *Toutefois*, *une partie munie d'un procès-verbal de conciliation totale ou d'une sentence devenue définitive peut saisir le Président du Tribunal de Première Instance*, *du lieu de situation du siège du Comité National Olympique et Sportif Camerounais aux fins d'apposition de la formule exécutoire* ».

[135]A. Dieng (« Approche culturelle des ADR en OHADA », *Journal Africain du Droit des Affaires* 2011-1, p. 25, sp. p. 32) constate que « *les textes sur les procédures d'homologation des transactions ou accords issus de la médiation conventionnelle sont souvent inexistants ou peu clairs au sein des Etats membres et ne sont pas actuellement pris en compte dans le cadre de l'OHADA* ».

[136]CCJA, arrêt n 009/2008, 27 mars 2008, *Société Côte d'ivoire Telecom c/ Société Loteny Telecom*, *Actualités juridiques*, n 60–61, p. 430, www.ohada.com, Ohadata J-09-316.

parties devront utiliser un expédient en saisissant le juge aux fins de les concilier. A l'occasion de la conciliation judiciaire, ils feront homologuer l'arrangement qu'ils ont initialement conclu. Pour efficace que ce soit cette astuce, on ne peut pas éluder le fait qu'elle présente un inconvénient quant à la durée de la médiation, elle oblige les parties à faire une procédure en deux étapes.

2.8 Coûts

La justice publique étant gratuite dans les pays de l'OHADA, les médiations judiciaires, hormis, les S'il est établi que toutes les conciliations légales sont gratuites, il n'en demeure pas moins qu'obliger les parties à saisir un juge en simulant une conciliation pour transformer leur accord en titre exécutoire constitue un frein au développement de la médiation conventionnelle. Cette dernière étant payante, il n'y a pas de raison que les parties y recourent alors qu'elles savent qu'une action judiciaire sera nécessaire pour avoir la garantie de l'exécution de leur arrangement. De plus, les magistrats de la zone CEMAC, n'ayant pas une culture de la médiation, leur diligence n'est pas garantie. Il est à espérer que le législateur OHADA songera à adopter un texte qui, à l'instar de la Directive n 2008/52/CE du Parlement européen et du Conseil du 21 mai 2008 sur certains aspects de la médiation en matière civile et commerciale, soit adopté en zone OHADA afin de les inciter à avoir une nouvelle philosophie du procès. Cette perspective futuriste contribuera à envisager sereinement la médiation en ligne, tout autant que celle qui est transfrontalière.

3 Médiation Transfrontalière

3.1 La Notion de Médiation Transfrontalière

Une bonne intelligence de la médiation transfrontalière postule de la distinguer de la médiation interne. Cette distinction s'impose car si l'on emploie l'adjectif transfrontalière comme un synonyme du terme international, le risque de confusion est grand. En effet, l'existence d'un élément d'extranéité ne confère pas automatiquement à la médiation une dimension transfrontalière. Ainsi, un litige inhérent à un contrat international, au sens du droit international privé, peut être résolu par une conciliation interne. Cette dernière ne sera transfrontalière que si elle s'est déroulée dans un Etat autre que celui dans lequel l'accord qui en découle doit être exécuté. En conséquence, peu importe que le différend sous-jacent à l'arrangement conclu par les litigants soit interne ou international. Partant de cette précision terminologique, il est pertinent de situer de l'étude de la médiation transfrontalière dans la problématique générale de la réception des actes extra judiciaires étrangers dans un pays de la CEMAC.

3.2 Reconnaissance et Exécution des Règlements Étrangers

De manière constante, les textes internes des Etats francophones de la CEMAC n'évoquent que la reconnaissance des sentences arbitrales et des actes authentiques comme actes extra judiciaires. Toutefois, cela ne signifie pas que les procès verbaux de médiation étrangers n'ont aucune chance d'être reconnus. Bien au contraire, étant donné qu'ils sont des titres exécutoires quand ils ont reçu l'onction du juge ou du notaire,[137] ils peuvent l'objet d'une procédure d'exequatur.[138] Pour autant, grande reste la question des règles applicables à ladite procédure d'exequatur.

Sur ce point, il convient de dire que les pays de la CEMAC sont signataires de conventions internationales multilatérales et bilatérales de coopération judiciaire. Il s'agit notamment de la Convention de Tananarive du 12 septembre 1961 en matière de coopération et des accords bilatéraux entre la France et chacun des Etats francophones de la CEMAC. Ces textes contiennent tous des dispositions relatives à la reconnaissance des actes extra judiciaires. Cependant, le seul acte extra judiciaire visé par ces conventions c'est l'acte authentique. S'agissant des conditions de reconnaissance des actes notariés, donc d'un accord de médiation authentifié, l'article 37 alinéa 2 de la Convention de Tananarive dispose que l'autorité du lieu de reconnaissance « *vérifie seulement si les actes réunissant les conditions nécessaires à leur authenticité dans l'Etat où ils ont été reçus et si les dispositions dont l'exécution est poursuivie n'ont rien de contraire à l'ordre public ou aux principes du droit public applicables dans cet Etat* ». On retrouve la même disposition dans tous les accords bilatéraux avec la France.[139] Il convient de relever que la souplesse

[137] L'article 33 de l'AUPSVE dispose : « *Constituent des titres exécutoires* :

1. *les décisions juridictionnelles revêtues de la formule exécutoire et celles qui sont exécutoires sur minute* ;
2. *les actes et décisions juridictionnelles étrangers ainsi que les sentences arbitrales déclarés exécutoires par une décision juridictionnelle*, *non susceptibles de recours suspensif d'exécution*, *de l'État dans lequel ce titre est invoqué* ;
3. *les procès verbaux de conciliation signés par le juge et les parties* ;
4. *les actes notariés revêtus de la formule exécutoire* ;
5. *les décisions auxquelles la loi nationale de chaque État partie attache les effets d' une décision judiciaire* » (nous soulignons). L'alinéa 5 de cet article 33 montre l'accueil favorable du droit OHADA envers les accords transactionnels, sachant que ces derniers ont l'effet de l'autorité de la chose jugée entre les parties (v. dans ce sens CCJA, 03 juin 2010, arrêt n 031/2010, *Apollinaire Compaoré c/ Cherif Ould Abidine*, *op. cit*).

[138] Cour d'appel d'Abidjan, Chambre civile et commerciale, 06 février 2001, arrêt n 182, *Looky Lamseh c/ Fofana Birahima*, www.ohada.com, Ohadata J-02-110.

[139] Article 42 alinéa de l'Accord de Coopération en matière de justice entre le gouvernement de la République française et le gouvernement de la République unie du Cameroun du 21 Février 1974 ; article 36 alinéa 2 de l'Accord de Coopération en matière de justice entre la France et la République centrafricaine du 18 janvier 1965 ; article 57 alinéa 2 de la Convention de coopération en matière judiciaire entre la République Française et la République Populaire du Congo du 01 janvier 1974 ; article 41 alinéa 2 de la Convention d'aide mutuelle judiciaire, d'exequatur des

des dispositions ci-dessus évoquées, n'est pas toujours vérifiée en pratique, la jurisprudence ayant eu à faire preuve d'une rigueur étrangère au libéralisme de l'ordre public international.[140]

Quant aux procès verbaux de médiation judiciaire, ils devraient être soumis au régime des décisions judiciaires étrangères en matière civile, commerciale, sociale. Il s'agit d'un contrôle de régularité de l'acte et non de son contenu, ce qui en l'occurrence, protège l'accord des parties d'un refus d'exequatur.[141] Le point commun entre accords de médiation judiciaire et ceux conclus en dehors du juge résident dans le fait qu'ils acquièrent la valeur d'une décision nationale passée en force jugée.

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jugements et d'extradition entre la France et le Gabon du 23 juillet 1963 ; article 40 alinéa 2 de l' Accord en matière judiciaire entre le gouvernement de la République Française et le gouvernement de la République du Tchad du 06 Mars 1976.

[140]Dans une affaire de transaction internationale conclue en France (TGI Yaoundé, jugement n 332 du 22 juillet 1987, *Autorité de tutelle de la SNH c/ Directeur général de la SNH*, affaire citée par F.-X. Bouyom, « Les clauses d'arbitrage international et leur validité selon le droit camerounais », *Revue juridique et politique indépendance et coopération* mars-juin 1988 n 2et 3, p. 365, sp. p. 373) le juge camerounais a refusé de passer outre les interdictions du droit interne pour reconnaitre l'accord des parties. Il a décidé que « *la Société nationale des hydrocarbures*, *en tant qu'établissement public de droit camerounais*, *était*, *dès sa création*, *incapable de conclure un contrat qui l'oblige sans l'autorisation expresse de l'autorité de tutelle* ». En l'espèce, la théorie de l'apparence était possible sous réserve que les interlocuteurs de la SNH n'aient jamais eu affaire à quelque autorité de tutelle lors de la conclusion du contrat litigieux. S'il n'est pas certain que la transaction concernée par cette affaire avait pris la forme authentique, il n'en demeure pas moins que l'argumentation du juge camerounais ne laisse pas penser que l'apposition de la formule exécutoire sur l'accord transactionnel litigieux aurait modifié sa position.

[141]Pour mémoire l'article 34 de l'Accord de Coopération en matière de justice entre le gouvernement de la République française et le gouvernement de la République unie du Cameroun du 21 Février 1974 dispose : « *En matière civile*, *sociale ou commerciale*, *les décisions contentieuses ou gracieuses rendues par une juridiction siégeant en France ou au Cameroun sont reconnues de plein droit sur le territoire de l'autre Etat si elles réunissent les conditions suivantes* :

(a) *Les parties ont été régulièrement citées*, *représentées ou déclarées défaillantes* ;
(b) *Le litige entre les mêmes parties*, *fondé sur les mêmes faits et ayant le même objet* :
- *n'est pas pendant devant une juridiction de l'Etat requis*, *ou*
- *n'a pas donné lieu à une décision rendue dans l'Etat requis*, *ou*
- *n'a pas donné lieu à une décision rendue dans un Etat et réunissant les conditions nécessaires à son exequatur dans l'Etat requis* ;

(c) *La décision*, *d'après la loi de l'Etat où elle a été rendue*, *ne peut plus faire l'objet d'un recours ordinaire ou d'un pourvoi en cassation* ;
(d) *La décision émane d'une juridiction compétente d'après les règles de conflit de l'Etat requis*, *sauf renonciation de la partie intéressée* ;
(e) *La décision n'est pas contraire à une décision judiciaire prononcée dans cet Etat et possédant à son égard l'autorité de la chose jugée* ;
(f) *Elle ne contient rien de contraire à l'ordre public de l'Etat où elle est invoquée ou aux principes de droit public applicables dans cet Etat* ». On retrouve une disposition similaire dans les autres accords bilatéraux, l'article 30 de la Convention de Tananarive s'y rapprochant considérablement.

4 Cyberjustice

D'entrée de jeu, il faut signaler que présentement il n'existe aucune institution proposant les *Online Dispute Resolution* (ODR) en région CEMAC. La médiation en ligne participe de la cyberjustice ; cette dernière « *s'entend comme* (...) *l'intégration des technologies de l'information et de la communication dans les processus de résolution des conflits – judiciaire ou extrajudiciaire* ».[142] Il serait excessif de dire que la médiation sur la toile est totalement inconnue du paysage des modes alternatifs de résolution des conflits en zone CEMAC. En effet, tous les pays de la sous région évoquée par la présente étude sont membres de l'Organisation Mondiale de la Propriété intellectuelle (OMPI). Or, il se trouve que celle-ci propose dorénavant des services d'arbitrage et de médiation en ligne.[143] S'il est vrai que ces outils n'ont pas encore fait l'objet d'une publicité massive en zone CEMAC, on ne peut éluder leur existence.

Malgré la faible connaissance des ODR en Afrique, en partie à cause de la fracture numérique, il y a lieu de mettre en relief les avantages de la médiation en ligne. Contrairement aux conciliations classiques exigeant la présence des litigants, et / ou de leurs représentants et du tiers, les ODR se font à distance. Une telle approche permet un gain de temps et limite considérablement les frais de médiation. Dès lors que la transmission des documents procède d'un système sécurisé, le mécanisme est fiable.[144]

Outre les litiges du commerce international, la médiation en ligne dans l'espace CEMAC a toute sa place pour le règlement des différends de cyberconsommation, voire de consommation tout court. Compte tenu de l'engorgement des juridictions judiciaires, il serait judicieux d'envisager les ODR au regard de la croissance exponentielle du commerce électronique. L'explosion des prestations de service utilisant les technologies de l'information et de la communication est un bon présage pour les ODR. Pour autant, il ne faut pas perdre de vue que les populations vivant en zone CEMAC ont une culture de l'oralité dont le poids est décisif dans le règlement amiable des litiges. En région rurale par exemple, les conciliations participent de tout un rituel qui relève du fait social. Par conséquent, un effort de pédagogie s'impose pour convaincre les justiciables que le fait de ne pas rencontrer physiquement son contradicteur n'est pas un handicap. Ce faisant, la médiation en ligne sera un moyen de « *permettre au citoyen d'étancher sa soif de justice*, *de faire de celle-ci un produit de grande consommation en augmentant l'offre de justice* ».[145]

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[142] N. Vermeys, « La cyberjustice et L'espace OHADA : des outils virtuels pour une avancée réelle », *Journal Africain du Droit des Affaires*, février 2013, numéro spécial, *L'arbitre*, *l'avocat et les entreprises face au droit au droit OHADA*, Actes Forum OHADA CANADA, p. 102.

[143] http://www.wipo.int/amc/fr/center/background.html

[144] Pour détails sur les offres d'ODR, v. M. Philippe, « Et maintenant où en sommes-nous avec la résolution des litiges en ligne (ODR) ? », *Revue de droit des affaires internationales* 2010-6, p. 563.

[145] J. Yado Toe, « Les modes informels de régulation des délits et des conflits dans les quartiers pauvres de Ouagadougou », *in Pauvreté urbaine et accès à la justice en Afrique – Impasses*

Vu les pesanteurs de la justice en Afrique en général, et dans l'espace CEMAC en particulier, ne serait-ce qu'à titre expérimental, la médiation en ligne est bienvenue.

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The Courts and Bar Association as Drivers for Mediation in Finland

Petri Taivalkoski and Annika Pynnä

Abstract Finnish dispute resolution landscape is characterized by the predominant position of arbitration on the one hand and the endeavour to settle disputes amicably on the other hand. The exceptional feature as to mediation is that in Finland it is the Bar Association that has been at the forefront in developing mediation as an alternative for general civil and commercial matters. Mediation is now gaining ground through the court-annexed mediation that is starting to establish itself as a dispute resolution method.

The Finnish Mediation Act (394/2011) constitutes the essential legislative framework for mediation in civil and commercial matters in Finland. As a matter of Finnish law, mediation is always voluntary. The conduct of the mediation proceedings is not regulated in detail but is consequently left to be agreed in each case by the mediator and the parties. However, for court-annexed mediation the Mediation Act includes certain general procedural provisions.

As to settlement agreements reached by mediation, obtaining a title for enforcement is available in both court-annexed and out-of-court mediations, under certain conditions.

1 The Existing Situation of ADR

Finland has a strong tradition of using arbitration as an alternative to court litigation. The legislative framework and the courts in Finland have generally been very supportive of arbitration, and the Arbitration Institute of the Finland Chamber of Commerce has been administering arbitrations since its establishment in 1911, making it one of the oldest functioning arbitration institutes in the world. In Finland, arbitration has long been the standard dispute resolution mechanism for commercial disputes. In 1962 Finland ratified the New York Convention of 1958, and the current Finnish Arbitration Act of 1992 broadly reflects the main principles of the UNCITRAL Model Law on International Commercial Arbitration.

P. Taivalkoski (✉) • A. Pynnä
Dispute Resolution, Roschier, Attorneys Ltd., Helsinki, Finland
e-mail: petri.taivalkoski@roschier.com; annika.pynna@roschier.com

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As for the development of mediation in Finland, it should be noted that the Finnish mediation trajectory differs somewhat from that of various other European countries, e.g., those of continental Europe. Unlike in some other countries, in Finland it is the Bar Association that has been at the forefront in developing mediation as an alternative for general civil and commercial matters. The Bar Association launched its Mediation Rules as early as 1998 and initiated public discussion of alternatives to the traditional win-lose methods of dispute resolution, i.e., litigation and arbitration. The Finnish Bar Association is in all likelihood one of the first bar associations in the world to include mediation in its program.[1]

Finland does, however, have a longer tradition of using mediation in certain specific areas of law and for particular types of cases, such as collective labor disputes. There is also a dedicated mediation scheme for certain criminal matters and minor civil matters, whereby municipalities offer the services of a neutral mediator to facilitate a meeting between the victim and offender to seek an agreement about restitution for the consequences of an offence. However, for civil and commercial matters generally, the use of mediation in Finland is still in its initial stages.

It is customary in commercial matters to try to resolve disputes amicably through negotiations between the parties (potentially assisted by counsel) before proceeding to litigation or arbitration. Thus, there is a culture of seeking settlement that does not include a structured mediation process. Although parties do not have a duty to consider mediation prior to litigation or other types of ADR, their counsel are required by the Bar Association's Code of Conduct to consider whether the dispute could be settled or resolved by use of ADR. This evaluation must be carried out before and during the assignment that the counsel has received from the client. Counsel has a duty to facilitate the best possible solution for a client. In making this evaluation, counsel should consider also several non-legal aspects, from economics to the emotional impact on the client.

2 The Basis for Mediation

2.1 The Notion of Mediation

Mediation always refers to the intervening of a third party, which distinguishes it from negotiating. For the purposes of this Chapter, mediation is defined as a voluntary process, in which an independent and impartial third party – a mediator – seeks to assist the parties to resolve their differences through negotiation. Therefore, the "end-product" of mediation, when successful, is a settlement agreement. Various evaluative processes thus fall outside of the scope of this Chapter.

[1] P. Taivalkoski & C. Wallgren, 'Asianajajan eettiset säännöt ja sovintomenettely' (2000) 4 *Defensor Legis* 625.

Under Finnish law, there are no requirements for parties to participate in mediation. Because mediation is voluntary, the parties must always agree on mediation irrespective of whether it is undertaken in or out of court.[2] A precondition for mediation is that the matter is amenable to mediation and a settlement is appropriate in view of the claims of the parties.[3] This means that mediation is, as a general rule, available in all cases in which the civil rights involved are those on which the parties are free to agree. An example of a civil right that is not amenable to mediation and settlement because the parties are not free to agree on the outcome is the establishment of paternity. For matters concerning the status and rights of a child, court-annexed mediation is possible but the Mediation Act requires that the interests of the child are protected and that due notice is taken of certain provisions in substantive law.[4]

Court-annexed mediation was first introduced in Finland in 2006 and has gained ground after a somewhat hesitant start. By the end of 2010, some 600 completed court-annexed mediations had been reported to the Finnish Ministry of Justice. The popularity and case number of court-annexed mediation depends largely on how active particular district courts have been in incorporating mediation in their services. The conduct of the judge and counsel, including their awareness of the possibilities of mediation and their activity in proposing mediation, also has a significant impact on whether a particular case ends up in mediation.[5]

Between the years 2006 and 2009, court-annexed mediation grew from 90 cases a year in 2006 to 130 in 2009 for the whole county. During that period mediation applications represented a total of 1.3 % of the case load in civil matters. Court-annexed mediation was most often applied for in disputes concerning realty, rental relations or chattels, and family law disputes. Court-annexed mediations were most often commenced between private persons, and the median value of each case was approximately EUR 16.000.[6] After 2009 the number of mediation applications has risen further: 219 for 2010 and 311 for 2011, while the number of settlements achieved was 96 in 2010 and 222 in 2011.[7]

The Finnish Bar Association has not compiled statistics regarding mediation under its rules, which would be the main out-of-court structured mediation option in Finland. Gathering such information is difficult since there is no obligation on mediators to inform the Bar if they have acted as a mediator in a dispute. However, based on information received in 2012, at least 21 cases came to the Bar

[2]Mediation Act, Section 4(3).

[3]Mediation Act, Section 3(2).

[4]Mediation Act, Section 10(1).

[5]K. Ervasti, ‘Court Mediation in Finland’, (2011) Tutkimuksia-sarja No 254, Oikeuspoliittinen tutkimuslaitos, p. 62.

[6]K. Ervasti, ‘Court Mediation in Finland’, (2011) Tutkimuksia-sarja No 254, Oikeuspoliittinen tutkimuslaitos, p. 58.

[7]Ministry of Justice, *Yleiset tuomioistuimet ja työtuomioinstuin vuonna 2011*, p. 42.

Association's attention that year. Parties to these cases have more than often been companies and the disputes concerned, e.g., building contracts, company law and information technology.[8]

2.2 The Existing Legal Basis for Mediation

The Act on Court Mediation and Confirming Settlements in Courts (394/2011) (the 'Mediation Act'), which entered into force 21 May 2011, constitutes the essential legislative framework for mediation in civil and commercial matters in Finland. The unofficial English translation of the Mediation Act prepared by the Finnish Ministry of Justice is available online.[9]

Finland implemented the EU Mediation Directive 2008/52/EC (the 'Directive') through the Mediation Act. Although the Directive applies only to cross-border disputes, Finland opted for a broader scope of application in the Mediation Act, which consequently covers, as a general rule, cross-border and domestic disputes alike.[10] The Mediation Act mainly addresses court-annexed mediation but also includes rules relating to the enforceability of settlement agreements that result from out-of-court mediation. Thus, large parts of out-of-court mediation remain unregulated.

The implementation of the Directive in Finland resulted in two other legislative changes that are worth mentioning. First, to protect the mediator's duty of confidentiality, a new provision was inserted in the Finnish Code of Judicial Procedure (4/1734), which concerns the admission of evidence in judicial proceedings and provides that the mediator or mediator's assistant may not testify about knowledge gained in the course of the mediation on the subject matter of the mediation, unless particularly compelling reasons require the admission of such testimony. Such particularly compelling reasons could be deemed to exist, e.g., if the mediator's testimony is necessary to prevent the conviction of a person of a criminal offence that he or she did not commit. Second, the Finnish Act on Statute of Limitations (728/2003) (the 'Limitations Act') provides that the commencement of a mediation procedure falling under the scope of application of the Mediation Act will suspend any period of limitation in the same manner as the filing of a court claim. These aspects are discussed further under Sects. 5 and 6.

[8] Based on an interview with Ms. P. Kivikari, Deputy Secretary General of the Finnish Bar Association, in 2012.

[9] See http://www.finlex.fi/en/laki/kaannokset/2011/en20110394.pdf (visited 14 October 2014).

[10] Mediation Act, Section 1.

3 The Mediation Agreement/The Agreement to Submit Disputes to Mediation

In the case of out-of-court mediation under the Mediation Rules of the Finnish Bar Association, the agreement to commence mediation in case of a dispute is often entered into at one of two stages: either in the original substantive contract, for example as part of a so-called multi-tier dispute resolution clause or other dispute resolution clause involving mediation, or when the dispute has already arisen as a stand-alone mediation agreement. The Bar Association provides a brief model agreement on its website for the latter type of agreement.[11]

Finnish law does not require a mediation agreement or clause to be in written form. Nor are the legal consequences of the mediation process dependent on the form in which the agreement was concluded. However, in practice mediation agreements are generally made in writing. A specific feature with regard to court-annexed mediation is that the mediation commences by an application submitted by one or both parties. It is recommendable to include voluntary and optional mediation as a first stage in any contractual dispute resolution mechanisms. Once the dispute has arisen, the threshold to suggest mediation may be higher for reasons of bargaining psychology. On the other hand, a purely optional mediation step does not prevent the parties from resorting directly to legal proceedings in a situation where attempting to mediate would not make any sense.

4 The Mediator

Under the Mediation Act, enforceability of a mediated settlement agreement requires that the mediator be trained in mediation.[12] Thus, it is not mandatory to have a mediator that has received training, but it would be necessary if one wants to ensure the possibility of confirming enforceability under the Mediation Act. It is notable that the Mediation Act does not specify the necessary training.

In court-annexed mediation, judges of the relevant district court act as mediators. In practice, judges who act as mediators must undertake the mediation training provided by the Ministry of Justice. The purpose of the training is to ensure that the quality of the mediation is guaranteed, and that the mediation is 'efficient, unbiased and skilled'. The training comprises both a theory part and practical exercises. The training is based on the philosophy of facilitative mediation and it was originally developed in cooperation with mediation specialists from CEDR/MATA in London. Other requirements on the judge-mediator under court-annexed mediation are that

[11] See http://www.asianajajat.fi/asianajopalvelut/sovintomenettely/sovintomenettelysopimus (visited on 14 October 2014).

[12] Mediation Act, Section 18.

he/she be independent and impartial vis-à-vis the parties, and the same general rules apply to a judge's independence as for other types of court proceedings. In addition, it is important to note that the judge-mediator may not act as judge in potential subsequent proceedings regarding the same matter should the mediation be unsuccessful.[13]

For bar members acting as mediators in out-of-court mediation, it is the Bar Association that provides the mediation training. The Bar Association's training is based on the same philosophy and developed by the same specialists as the training of judges, and it is designed to give practical skills to advocates acting as mediators. According to the Bar Association Mediation Rules, the mediator shall be impartial and independent and notify the parties in advance of any circumstances that may give cause for doubt as to his/her impartiality and independence.[14] Under the conflict of interest rules in the Code of Conduct of the Bar Association, a bar member acting as mediator cannot subsequently act as counsel for one of the parties in court proceedings regarding the same matter should the mediation be unsuccessful.

Furthermore, it should be noted that both in court-annexed and out-of-court mediation the mediator is subject to certain confidentiality requirements. This duty of confidentiality by the mediator is discussed further in Sects. 5 and 6 in connection with other confidentiality issues that concern mediation processes.

5 The Process of Mediation

In essence, the process of mediation is a structured negotiation process lead by the mediator. Mediation can further be characterized as an informal, confidential, flexible and future-oriented procedure, which adapts to each individual situation. Mediators are encouraged to use various techniques that help the parties understand and identify their needs and interests. Thus, the mediator doesn't normally make settlement proposals to the parties but rather creates the framework in which the parties can themselves conclude a settlement.[15] The "tool-box" of the mediator typically includes the use of open questions, summaries, paraphrasing and reality-testing.

Court-annexed mediation is commenced mainly in two ways: one of the parties or both together file an application for mediation with the court prior to or during legal proceedings, or alternatively, if the proceedings are already pending, the court might also suggest mediation on its own initiative. Once the parties have agreed to mediate in court, the court decides when mediation will start. The parties in principle have the opportunity to request that a particular judge at the relevant court be their mediator. In any mediation, which is a purely voluntary procedure, it is of course

[13]Mediation Act, Section 14.

[14]Mediation Rules, Article 4.

[15]K. Ervasti, 'Court Mediation in Finland' (2011) Oikeuspoliittisen tutkimuslaitoksen tutkimuksia No 256, Oikeuspoliittinen tutkimuslaitos, p. 9 and 11.

key that the parties are fully satisfied with the person who acts as the mediator. The appointment of the mediator takes effect when the mediation begins, and the mediator must be a judge of the appointing court. The mediator-judge may use an assistant where needed if the parties consent to the appointment of an assistant. Therefore, in matters requiring specific expertise the mediator-judge may, if the parties agree, be aided by an assistant who has the relevant expertise.[16]

As stated above, in the case of out-of-court mediation under the Mediation Rules of the Finnish Bar Association, the agreement to commence mediation in case of a dispute is often entered into either in the original substantive contract or when the dispute has already arisen as a stand-alone mediation agreement. In the agreement the parties can mention the name of a member of the bar whom they have agreed to appoint as mediator or request that the Bar Association's Mediation Board proposes or appoints a mediator. Mediation is then commenced either by the parties directly approaching the mediator whom they have chosen or by a written application to the Mediation Board, with the above mentioned agreement appended.[17]

Under Finnish law, a pending mediation process also has an effect on the running of limitation periods. Simultaneously as the Mediation Act came into force on 21 May 2011 the Limitations Act was changed accordingly. The relevant change was that as of 21 May 2011 also out-of-court mediation has suspended the running of the period of limitations.[18]

Under the Limitations Act the suspension of the running of the limitation period starts from when the mediation proceedings become pending. In court-annexed mediation, the relevant point in time is when the court decides upon the commencement of mediation. Thus, mere delivery of the application documents to the district court does not trigger the suspension. In out-of-court mediation, the agreement between the parties and the mediator resulting in the commencement of the mediation has the effect of triggering the suspension. The suspension then lasts as long as the proceedings continue. On the day the mediation proceedings conclude, the suspension of the limitation period ends.[19]

The actual and specific conduct of the mediation proceedings are mainly left to be agreed in each case by the mediator and the parties. However, for court-annexed mediation the Mediation Act includes certain general provisions. According to the Mediation Act, mediation shall proceed promptly, even-handedly and impartially. The mediator shall hear the parties and consult with them. With the consent of the parties, also other persons may be heard and other information submitted. The mediator may consult with a party without the other parties present, if all the parties

[16]Mediation Act, Section 5.

[17]Mediation Rules, Article 3.

[18]K. Ervasti, 'Court Mediation in Finland' (2011) Oikeuspoliittisen tutkimuslaitoksen tutkimuksia No 256, Oikeuspoliittinen tutkimuslaitos, p. 27.

[19]Limitation Act, Section 11.

consent to this. The mediator decides, after consultation with the parties, on how the mediation shall otherwise be arranged.[20]

For out-of-court mediation under the Bar Association's Mediation Rules some general stipulations are likewise included in the rules. According to the Mediation Rules, the process shall primarily be conducted based on the agreement between the parties. In case there is no such specific agreement, the mediator determines the process after hearing the parties. In any case the proceedings shall be fair and efficient and the parties shall strive to cooperate with the mediator in order to appropriately contribute to attempting to reach settlement. Unless otherwise agreed the mediator may also hold separate caucus meetings with the parties.[21] In the bar mediation training the emphasis is on the use of a structured process allowing for sufficient time for the exploration of the parties interests.

In Finland, out-of-court mediation, for example mediation conducted in accordance with the Mediation Rules of the Bar Association, is as a rule confidential.[22] In contrast, court-annexed mediation is as a general rule public, following the general rule of the public nature of court proceedings. However, the parties may request that the proceedings be conducted behind closed doors unless the credibility of the mediation or other compelling reason demands openness. In addition, the public is excluded from caucus sessions that are held with only one party present.[23] Following the general rule of court proceedings being public, court documentation is also public unless specifically classified or ordered confidential. Therefore, any settlement agreement confirmed by a court will be a public document unless the court specifically grants confidentiality upon application. The court may only grant confidentiality based on certain limited criteria.[24]

Despite the public nature of court-annexed mediation, the Mediation Act does include provisions regarding the mediator's duty of confidentiality, as is required by the Directive. Hence, the Mediation Act provides that neither the mediator nor his/her assistant may reveal what they have learned regarding the mediated matter, unless the person benefitting from the confidentiality obligation consents to disclosure or disclosure is otherwise provided by law.

In the case of out-of-court mediation under the Mediation Rules of the Finnish Bar Association, the mediator must keep all matters relating to the mediation confidential.[25] If a third party is to be heard during the mediation process, the parties can require the third party to sign a confidentiality agreement. In addition, the parties themselves must keep the mediation process confidential.

[20]Mediation Act, Section 6.

[21]Mediation Rules, Article 7.

[22]Mediation Rules, Article 9.

[23]Mediation Act, Section 12.

[24]The Mediation Act refers in this respect to the Act on the Publicity of Court Proceedings in General Courts.

[25]Mediation Rules, Article 9.

6 Failure of the Mediation and Its Consequences

Both court-annexed mediation and out-of-court mediation are entirely voluntary and consequently end whenever a party decides not to continue it. Generally a party may inform of his/her will to discontinue the mediation free of form. It is not necessary for the parties to provide any explanation for this decision to step back from mediating. In this situation the mediation ceases despite the other party's willingness to continue the process.[26]

Either type of mediation can also end when the mediator determines that continuing the mediation has no purpose. According to the preparatory works of the Mediation Act such a situation might be at hand where the parties fail to follow the mediation procedure or fail to actively take part in the mediation and thus the mediator sees no foundation for the mediation to continue.[27] On the other hand, a situation where one of the parties appears to be trying to benefit from the other party's inability to protect their interests may also lead to the decision of the mediator to discontinue the process. Finally, situations may occur in which the mediator considers continuing the mediation procedure impractical due to the fact that the process simply is not progressing as desired and therefore decides to end it.[28]

In any case the mediator should not end the mediation in a manner which would lead to this decision coming as a surprise to the parties. It follows that the mediator must first hear the parties in regard to the decision to discontinue mediation. This hearing may be conducted informally. Despite the free form of the hearing process it is required that the mediator must inform the parties of his/her view that the mediation process should be ceased and the reasoning behind this request. The parties must also be given an opportunity to present their views of the matter at hand. If during the hearing of the parties the actual cause for ending the mediation process actually ceases to exist, the mediation may be continued as from the standing of the process prior to this hearing.[29]

An unsuccessful mediation raises the issue of confidentiality in any subsequent legal proceedings. In 2011, to further emphasize the mediator's duty of confidentiality in court-annexed mediation, a new provision was inserted in the Finnish Code of Judicial Procedure[30] concerning the admissibility of evidence in judicial proceedings. According to the said provision, the mediator or mediator's assistant may not testify on matters that have come to their knowledge in the course of the mediation, unless this is required by important reasons. Such an important reason

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[26] K. Ervasti, 'Vaihtoehtoinen konfliktinratkaisu ja tuomioistuinsovittelu' published in 'Conflict Management – Riidanratkaisun uusi maailma' (2005, edited by S. Turunen), Edita, p. 257.

[27] Government Bill 114/2004, p. 38.

[28] K. Ervasti, 'Vaihtoehtoinen konfliktinratkaisu ja tuomioistuinsovittelu' published in 'Conflict Management – Riidanratkaisun uusi maailma' (2005, edited by S. Turunen), Edita, p. 257–258.

[29] K. Ervasti, 'Vaihtoehtoinen konfliktinratkaisu ja tuomioistuinsovittelu' published in 'Conflict Management – Riidanratkaisun uusi maailma' (2005, edited by S. Turunen), Edita, p. 258.

[30] Chapter 17, Section 23.

may for example be where the testimony is necessary to ensure the best interest of a child or to prevent violations of a person's mental or bodily integrity. Furthermore, the Mediation Act contains an additional provision on confidentiality applicable to the parties.[31] To enable the conduct of settlement negotiations in good faith without fear of adverse consequences if a settlement is not reached, the use of statements made in the course of mediation for the purposes of reaching a settlement as evidence is prohibited in later judicial proceedings.

In practice, the confidential nature of out-of-court mediation entails the same duty that the Mediation Act applies to court-annexed mediation: the parties are not permitted to disclose any offers made for the purpose of reaching settlement during the mediation, any admissions of the other party, or any opinions expressed by the mediator during the mediation. Under the Finnish Code of Judicial Procedure, the parties are prevented from naming the mediator as witness in any proceedings relating to the issue at dispute.

7 Success of Mediation and Its Consequences

7.1 Meaning and Consequences

Mediation can end in several different ways, some of which lead to enforceability determinations. Both court-annexed mediation and mediation out-of-court end when:

1. the parties reach settlement (but do not request subsequent confirmation),
2. the parties have their settlement agreement confirmed by the court, or
3. the parties inform the mediator that a settlement has been reached.

The end result of a successful mediation procedure is a settlement agreement. If one of the parties does not act in accordance with the concluded settlement, the other party may be forced to seek for a basis for the enforcement of the settlement at hand. However, as mediation settlements are based on the parties' free will, the parties are usually willing to follow the settlement agreement also without having it confirmed or enforced.

Under Finnish law only mediation settlements that have been confirmed have direct procedural impact with regard to a court proceeding on the same dispute. The confirmation of a settlement agreement has an immediate effect on any pending judicial proceedings as any pending judicial proceedings cease immediately upon such confirmation. In addition to the fact that confirmation is generally not necessary, it should be noted that often the parties specifically do not want the settlement to be confirmed by a court. A reason behind this might be that the parties don't want the settlement to become public through a court proceeding concerning the confirmation of the settlement at hand. Although unconfirmed

[31] Mediation Act, Section 16.

settlement agreements do not have direct procedural impact on a court proceeding on the same dispute, they often still lead into the same end result. If the parties decide not to confirm the settlement, the court proceeding is usually in any case ended by a joint request of the parties.

If a confirmed settlement only concerns a part of the dispute in progress, a court procedure on the same matter continues in regard to the parts that have not been confirmed through the settlement. Respectively, if only a part of the dispute is settled, the mediation process can be continued with respect to the parts of the dispute that the parties have not reached settlement on.[32]

7.2 Enforcement of the Settlement Reached by the Parties

When the parties do reach a settlement of their dispute through mediation, they can have their settlement agreement confirmed as enforceable irrespective of whether the mediation was court-annexed or out-of-court. The situation for enforceability of out-of-court settlements has significantly improved as a result of the Mediation Act. Before the Mediation Act, out-of-court settlement agreements were valid and binding as such, but they were not enforceable without initiation of litigation on the merits. In contrast, under the Mediation Act confirmation can be sought upon application.[33]

In practice, the confirmation takes place by delivering an application to the district court with jurisdiction. The application must contain the mediated settlement agreement with the relevant details, i.e. the names of parties and the mediator, the matter in mediation, and the contents of the mediated agreement. The court confirms the settlement agreement in writing.

However, the Mediation Act sets certain criteria for an out-of-court settlement agreement to be eligible for confirmation. The mediation must have been organized on a basis of an agreement, a set of rules, or a similar arrangement in which the parties have themselves voluntarily sought to settle their dispute. It follows that only settlement agreements achieved in a structured, facilitative mediation process may be confirmed as enforceable.[34] The Mediation Act explicitly provides that it does not apply to processes in which a third party makes decisions or recommendations as an expert, irrespective of whether such decisions or recommendations are binding on the parties. Consequently, different types of evaluative alternative dispute resolution methods used commonly, for example, in the construction industry, fall outside of the scope of the Mediation Act.[35]

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[32]K. Ervasti, 'Court Mediation in Finland' (2011) Oikeuspoliittisen tutkimuslaitoksen tutkimuksia No 256, Oikeuspoliittinen tutkimuslaitos, p. 42.

[33]Mediation Act, Sections 18–26.

[34]Mediation Act, Section 18.

[35]Mediation Act, Section 18.

The Mediation Act also incorporates certain substantive limitations on the confirmation of settlement agreements resulting from both court-annexed and out-of-court mediation. The court cannot accordingly confirm a settlement that is (1) against the law, (2) clearly unfair, or (3) breaches the right of a third party.[36] A settlement agreement is likely to be against the law if it contains stipulations that are contrary to the fundamental principles of the legal system, *ordre public*, or contrary to an explicit (mandatory) statutory provision. However, it is clear that such is not the case when the court would simply have decided the matter differently. Likewise, it is irrelevant whether the parties' demands would have no basis in law or would not be in accordance with contract law principles: within the general limits set, it is entirely for the parties to decide what terms they voluntarily accept.

The second criterion for non-confirmation, clear unfairness, is difficult to evaluate and needs to be determined on a case-by-case basis. In any case, the unfairness should be apparent and the threshold for proof thereof set high. The general principles under Finnish law regarding the adjustment of unfair contract terms might provide assistance in interpreting fairness in the given situation. In the third instance, a court cannot confirm a settlement agreement that interferes with the rights of a third party, because the settlement agreement – as with any other private law agreement – is made solely between the parties to the agreement.

In conclusion, there are a few, exhaustively-listed grounds on which the confirmation of a settlement agreement may be refused. However, in practice, enforcement will not be necessary in most cases since the settlement agreement is complied with voluntarily. Furthermore, the parties may not want their settlement agreement to become public and therefore will opt for not confirming their out-of-court settlement in court. In such a case, the settlement is nevertheless valid and binding on the parties as a contract.

8 Costs of the Mediation

The costs of court-annexed mediation consist of the service charge of the court (at present EUR 122) and the costs of an assistant to the mediator-judge (if utilized). The parties do not need to pay any fees for the services of the judge-mediator, because those services – just as in litigation – are provided as a public service. Court-annexed mediation charges are thus fairly modest. The party making the application for mediation pays the service charge and the parties mutually pay for the assistant (if utilized). The parties each bear the costs of their potential own counsel. The costs cannot be claimed as legal costs in possible court proceedings following the mediation.[37]

[36] Mediation Act, Section 23.

[37] Mediation Act, Section 27.

In private out-of-court mediation the mediator generally charges a fee for his/her services. The fees of the mediator may be freely agreed between the parties and the mediator. For example, where the mediation is carried out under the Mediation Rules of the Bar Association, the mediator charges an hourly fee, which is split equally between the parties according to the main rule.[38] The Bar Association does not charge an administrative fee for nominating the mediator or proposing a mediator to the parties. The Arbitration Institute of the Finland Chamber of Commerce on the other hand charges a fee of EUR 2.000 for nominating a mediator.[39] Cost efficiency is therefore a factor in favor of court-annexed mediation.

How the potential legal costs of the parties' counsels are divided between the parties is a matter of agreement in the settlement. However, in the absence of an agreement the presumption under the Mediation Rules of the Bar Association is that each party bears its own costs. Finally, it should be mentioned that the costs incurred in out-of-court mediation may not be claimed as legal costs in possible court proceedings following the mediation in matters where the monetary interest at stake is not significant.

9 Cross-Border Mediation

9.1 Notion and Main Features

The Directive applies to cross-border disputes in civil and commercial matters. It covers disputes in which at least one of the parties is domiciled in a Member State of the European Union other than that of any other party on the date on which they agree to use mediation or on the date mediation is ordered by a court.

Although the Directive only applies to cross-border disputes, Finland opted for a broader scope of application for its implementation in the Mediation Act. Within its scope of application the Mediation Act, hence, covers as a general rule cross-border and domestic disputes alike. Besides the Mediation Act, Finnish law does not regulate cross-border mediation. Thus, the above presented parameters of the Mediation Act apply likewise to cross-border mediation conducted in Finland.

As the national regulation concerning cross-border mediation is based on EU legislation, it is necessary to keep in mind the main goals of the underlying Directive when assessing domestic regulation on the matter. Initially, the Directive's aim was to improve the accessibility of dispute resolution procedures in cross-border disputes by encouraging the use of mediation in Member States.[40] Moreover, it is pursued under the Directive to reassure a practical relationship between mediation

[38] Mediation Rules, Article 11.

[39] See http://arbitration.fi/en/appointment-of-conciliators/ (visited 14 October 2014).

[40] Government Bill 284/2010, p. 4.

and other dispute resolution procedures. For this to be accomplished, the Directive sets certain requirements for the framework of cross-border mediation in each Member State. As mentioned, in Finland these requirements are addressed by the Mediation Act, which does not make a difference between rules to be applied to domestic and cross-border mediation.

9.2 Recognition and Enforcement of Foreign Mediation Settlements

According to the Directive, for a confirmed settlement to be enforceable in another Member State it is required that the settlement is confirmed as enforceable in a separate procedure also in the other Member State in accordance with relevant national provisions.[41]

The international scope of the provisions in the Mediation Act relating to confirmation of settlement agreements is limited to settlements reached in the Member States of the European Union. However, the provisions do not apply to a settlements reached in Denmark or to settlements from EU Member States which do not pertain to a cross-border dispute as defined in the Directive.[42] With these restrictions, mediation settlements reached in other EU Member States are confirmed in Finland according to the same rules as domestic mediation settlements.

As discussed above in Sect. 7.2, the Mediation Act sets out certain conditions based on which it is possible to leave a settlement unconfirmed despite a party's application for confirmation. These conditions concern settlement agreements resulting from both court-annexed and out-of-court mediation. The court cannot accordingly confirm a settlement that is against the law, clearly unfair, or breaches the right of a third party.[43] It should be noted that although a mediation settlement can be denied confirmation in situations where it contradicts with Finnish legislation, this does not mean that for the settlement to be enforced it must be correct from a material point of view.[44]

10 E-justice

No particular initiatives in relation to e-justice and mediation in the Finnish courts or in out-of-court mediation have been published in Finland. However, there are various specific and ongoing projects in relation to developing electronic

[41] Government Bill 284/2010, p. 7.

[42] Mediation Act, Section 1.

[43] Mediation Act, Section 23.

[44] Government Bill 284/2010, p. 5–6.

communication in the courts in general. In 2010, the Finnish Ministry of Justice initiated an extensive project to develop the electronic system of general courts. Although the project does not directly concern mediation, it will surely have an impact on the e-justice possibilities of court-annexed mediation as well.

In practice, the personal and physical presence of the parties and the mediator in one room together is often considered a significant contributing factor to successful mediation. However, for example a meeting by video link in case that would be more practical and efficient might work in some cases. It all depends on the specific circumstances of the case and what the parties and mediator consider suitable.

Mediation in Germany: Finding the Right Balance between Regulation and Self-Regulation

Burkhard Hess and Nils Pelzer

Abstract This chapter explores the current legal framework of mediation in Germany. The Mediation Law of 2012, implementing the Mediation Directive, now regulates a variety of important aspects, but many provisions governing mediation are found in other statutes as well. It may be said that the law has a broad scope but little content: On the one hand, it establishes a uniform system for both domestic and cross-border mediation; on the one hand, it confines itself to regulating minimum requirements, especially as far as the structure of the mediation process, default rules for mediation agreements and the enforcement of mediated settlements are concerned. This goes back to the idea that on the one hand, mediation puts forward the autonomy of the conflicting parties and should therefore not be pressed into a rigid procedure, and on the other hand, there is a need for reliable rules for the interplay between mediation and court proceedings. One German particularity is the existence of an in-court mediation scheme conducted by a "conciliation judge" who is not entitled to decide the case, which has been quite successful.

1 The Existing Situation of ADR in Germany

Germany is a country with a traditionally strong court system. Therefore, ADR has played a rather small role for a long time. Nevertheless, a variety of ADR mechanisms exist in Germany.

A representative survey from 2010 showed that more than half of the German population knew about mediation as a means to resolve a conflict, and the data

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This chapter partly draws on previous research by the authors on different ADR instruments in Germany, published in *Steffek/Unberath* (eds.), Regulating Dispute Resolution, pp. 209–238.

B. Hess • N. Pelzer (✉)
Department of European and Comparative Procedural Law, Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, Luxembourg, Luxembourg
e-mail: burkhard.hess@mpi.lu; nils.pelzer@mpi.lu

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revealed a big potential for mediation since a large majority of the respondents preferred amicable solutions over court judgments.[1]

However, it may be said that private mediation in the sense of the definition given by the Mediation Law (below Sect. 2.1.) is not yet widely used, although training programmes for mediators are plentiful. It is almost impossible to find reliable statistical data on the annual number of mediation proceedings. A survey conducted among lawyers in 2004 estimated the figure at about 2,000–2,500 private mediations per year.[2] Even if this number has increased in the past 10 years and mediation is not seen as something exotic anymore,[3] it cannot be doubted that private mediation has yet to take root in German society.[4]

Judicial mediation exists both as in-court mediation and court-annexed mediation (cf. below Sect. 2.2). Mediation by the courts had been much contested before it had been officially endorsed by the Mediation Act,[5] which introduced court mediation into the Code of Civil Procedure (Zivilprozessordnung – ZPO).[6] Quite naturally, court mediation is more evaluative in its style than private mediation because it takes place to a larger extent in the "shadow of the law" and of the judiciary than private mediation.[7]

These court-based mediation schemes seem to have been more successful, particularly in family matters. Again, it is hard to find reliable statistical data for the whole of Germany because the different projects are run under the aegis of the 16 federal states. To give an example, "mediation judges" in Lower Saxony have mediated approximately 2,400 judicial mediations each year, with the settlement rate being approximately 80 %.[8] In the state of Schleswig-Holstein, 1,108 judicial mediations took place in 2010.[9]

Besides mediation in the above sense, there are also "consumer mediation" schemes such as ombudsman proceedings for certain consumer complaints, e.g. in insurance or banking matters, which carry mediation in their names but are quite different in nature.[10] Ombudsman schemes have been quite successful not only in

[1] *Bruttel/Timmesfeld*, ZKM 2011, 71, 72 et seq.

[2] *Kirchhoff*, ZKM 2007, 138.

[3] See also *Horstmeier*, Das neue Mediationsgesetz, para 1.

[4] See also *Filler*, Commercial Mediation in Europe, p. 101.

[5] BGBl. I 2012, 1577.

[6] For an overview to the debate, see *Hess*, ZZP 124 (2011), 137 et seqq.

[7] *Tochtermann,* Die Unabhängigkeit und Unparteilichkeit des Mediators, pp. 73 et seqq.

[8] See *Niedersächsisches Justizministerium,* Mediation an niedersächsischen Gerichten.

[9] See a joint request of five of the six political groups of the *Landtag* (the state parliament) of Schleswig Holstein: *Fraktionen CDU, SPD, FDP, Bündnis 90/Die Grünen und SSW*, Schleswig-Holsteinischer Landtag Drucks. 17/2276.

[10] *Hess*, Gutachten, p. F 31; *idem*, ZZP 118 (2005), 427, 442; and recently *Berlin*, Alternative Streitbeilegung, pp. 227 et seqq.

the fields of banking and insurance, but also in the public transport sector.[11] The whole system of consumer mediation will have to be completed in 2015 due to the Consumer ADR Directive.[12]

Conciliation (*Schlichtung*), where the neutral third party (conciliator) makes a non-binding proposal for solving the conflict, is widely used in collective labour disputes. Another example is the recently enacted Aviation Conciliation Law (Gesetz zur Schlichtung im Luftverkehr).[13] Chambers for Industry and Commerce also offer dispute resolution services labelled as "conciliation". The distinction between mediation and conciliation is not always clear[14]; "mediation" and "conciliation" have even been used interchangeably in legal practice.[15] Furthermore, state-approved conciliation bodies (*Gütestellen*, *Schiedsstellen*) exist. They may offer, but are not confined to, mediation proceedings. These institutions documented 12,359 civil actions in 2013, encompassing data of 12 of the 16 federal states (*Länder*).[16] Out of these proceedings, 51.8 % were settled amicably. Their amount of cases has slightly decreased since the peak of 13,196 cases was reached in 2002.[17]

Expert opinions (*Schiedsgutachten*) including those with temporarily binding effect ("*Adjudikation*")[18] have been widely used as a binding instrument; non-binding adjudication, however, is also possible.[19] (Non-binding) expert opinions may be integrated in mediation proceedings. The mediator may suggest to the parties that important preliminary legal or technical questions be assessed by an

[11] *Fritz* in *Fritz/Pielsticker*, Mediationsgesetz, Andere Verfahren I comments 43 et seqq. (p. 758); see generally *Scherpe*, Außergerichtliche Streitbeilegung in Verbrauchersachen, and *T. von Hippel*, Der Ombudsmann im Bank- und Versicherungswesen.

[12] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR). Cf. *Hess* in *Dethloff, Hess* et al., Freiwilligkeit, Zwang und Gerechtigkeit, pp. 33 et seqq.

[13] BGBl. I 2013, 1545.

[14] *Breidenbach*, Mediation, p. 4; *Hess*, Gutachten, pp. F 30 et seq.; *Stubbe*, BB 2001, 685, 689.

[15] *Hess*, Gutachten, p. F 30; cf. the legislative materials to the first draft of the Mediation Law, BT-Drucks. 17/5335, at 14. But see *Stubbe*, SchiedsVZ 2006, 150, 152, who claims that contrary to Anglo-American legal systems, conciliation and mediation can be clearly distinguished in German law. This is due to the fact that his definition of mediation seems to be narrower than laid down in the Mediation Law, comprising only facilitative mediation.

[16] No statistical data was available for the states of Baden-Württemberg, Bavaria, Bremen and Hamburg.

[17] *Bundesamt für Justiz*, Übersicht über die Tätigkeit der Schiedspersonen.

[18] *Greger/Stubbe*, Schiedsgutachten, paras 193 et seqq.; *Fritz* in *Fritz/Pielsticker*, Mediationsgesetz, Andere Verfahren I paras 25 et seqq. (pp. 752 et seqq.); *Sessler* in *Eidenmüller*, Alternative Streitbeilegung, pp. 16 et seqq.

[19] *Greger/Stubbe*, Schiedsgutachten, paras 193 et seqq.; *Fritz* in *Fritz/Pielsticker*, Mediationsgesetz, Andere Verfahren I, paras 45 et seqq, 208 et seqq.

adjudicator.[20] This can be recommendable if the positions of the parties are too far apart and an expert evaluation can be used as an authoritative basis for further negotiation.[21]

Early neutral evaluation and mini trials are other ADR instruments increasingly known in Germany.[22] Arbitration is frequently used in international commercial disputes.

2 The Basis for Mediation

2.1 The Notion of Mediation

According to section 1(1) Mediation Law (Mediationsgesetz – MediationsG), mediation is defined as a confidential and structured procedure in which the parties voluntarily and on their own initiative try to reach an amicable resolution of their dispute with the support of one or more mediators. A mediator is described by the law as an independent and impartial person without any decision-making power who guides the parties through the mediation procedure, cf. section 1(2) Mediation Law. Due to this circular description, this definition has been subject to criticism.[23]

Before the Mediation Law had been enacted, a wide range of definitions had been suggested in the academia.[24] They all named as a core principle that a neutral third party – who may not decide the conflict – helps the parties negotiate their conflict voluntarily and autonomously.[25] Many of these definitions, however, focused on facilitative and interest-based approaches, thereby excluding more evaluative styles of mediation.[26] Although the definition given by the Mediation Law leaves room for different varieties, commentators of the new law generally still put emphasis on facilitative mediation.[27]

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[20] Greger/Stubbe, Schiedsgutachten, paras 350 et seq.

[21] *Stubbe*, BB 2001, 685, 689.

[22] *Unberath*, in *Greger/Unberath*, Mediationsgesetz, Introduction comments 66 et seq.; *Fritz* in *Fritz/Pielsticker*, Mediationsgesetz, Andere Verfahren I comments 19 et seqq. (pp. 749 et seqq.).

[23] *Risse*, SchiedsVZ 2012, 244, 245 et seq.; dissenting *Henssler/Deckenbrock*, DB 2012, 159, 161 ("unproblematic").

[24] For an in-depth analysis, see *Wendenburg*, Der Schutz der schwächeren Partei in der Mediation, pp. 3 et seqq.

[25] *Breidenbach*, Mediation, p. 4; *Hess*, Gutachten, pp. F 15 et seqq.; *Tochtermann*, Die Unabhängigkeit und Unparteilichkeit des Mediators, p. 64.

[26] See, e.g., *Haft*, in Haft/Schlieffen, Handbuch Mediation, paras 2.1 et seqq.; *Wendenburg*, Der Schutz der schwächeren Partei in der Mediation, pp. 44 et seqq.

[27] *Etscheid* in Fritz/Pielsticker, Mediationsgesetz, Methodik II comment 18 (p. 616). *Unberath* in *Greger/Unberath*, Mediationsgesetz, section 2 comment 174 even claims that a mediator who evaluates certain aspects of the conflict breaches his duty and can therefore be liable to pay damages; cf. *Eidenmüller/Prause*, NJW 2008, 2737, 2739 for a more differentiated viewpoint.

2.2 The Existing Legal Basis for Mediation

Enacted on 21 July 2012, the Mediation Law is the main legal basis for mediation in Germany. For court mediation and court-annexed mediation, a legal basis can mainly be found in sections 278 and 278a ZPO.

The option of court and court-annexed mediation is provided not only in the ZPO, but also in various other procedural codes. Sections 36(5), 135(1) and 156(1)(3) of the Act on the Procedure in Family Matters and in Matters of Non-contentious Jurisdiction (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit – FamFG). In family matters, the courts may order the parties to take part in a free information session on mediation. According to section 156(2) FamFG, the judge may endorse a settlement on parental custody reached by family mediation (even without any intervention of a lawyer) in a court approved settlement.[28] However, it should be noted that parties are not obliged to make a mediation attempt.

Sections 54(6), 54a of the Labour Courts Act (Arbeitsgerichtsgesetz – ArbGG), section 202(1) of the Social Courts Act (Sozialgerichtsgesetz – SGG), section 173(1) of the Code of Administrative Court Procedure (Verwaltungsgerichtsordnung – VwGO) and section 155 FGO of the Code of Fiscal Court Procedure (Finanzgerichtsordnung – FGO) provide for court or court-annexed mediation mechanisms equivalent to the provisions in the ZPO or directly refer to these provisions.

Mediation may be used in almost all areas of law,[29] ranging from neighbour law (disputes between neighbours concerning noise, pets, trees and the like), family law, labour law, construction law, insurance law, intellectual property law, insolvency law, administrative law including environmental law, healthcare law, local administration[30] etc., to name some of the more prominent examples. It seems to be less used in social security law and fiscal law[31] (but see the newly enacted section 155 FGO mentioned above). In administrative mediation, including mediation in tax matters, administrative bodies are subject to fundamental principles of the rule of law, cf. Art. 20(3) of the Basic Law (Grundgesetz – GG).[32]

Provisions governing mediation in German law do not distinguish between domestic and cross-border mediation. Therefore, the general legal framework also applies to international mediation, cf. below Sect. 9.1.

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[28] *Hess*, Gutachten, pp. F 50 et seqq.

[29] *Horstmeier*, Das neue Mediationsgesetz, paras 21 ff.; *Unberath*, in *Greger/Unberath*, Mediationsgesetz, Introduction comments 45 et seqq. For detailed explanations of the use of mediation in different fields see chapters 19–33 of the volume of *Haft/Schlieffen*, Handbuch Mediation.

[30] *Becker/Fittschen* (eds.), Bürgermeister und Mediation.

[31] *Hess*, Gutachten, p. F 6.

[32] *Stumpf*, Alternative Streitbeilegung, p. 282 et seq; *Hölzer/Schnüttgen/Bornheim*, DStR 2010, 2538, 2540, who correctly also point to the principle of equal treatment according to Art. 3(1) GG.

3 The Mediation Agreement

The mediation agreement, i.e. the agreement to submit disputes to mediation, can either be concluded in a mediation clause in a contract before the dispute arises or *ad hoc* after a dispute has arisen. In reality, commercial contracts in Germany almost completely lack mediation clauses.[33]

German law does not have any specific provisions relating to mediation agreements. As far as the parties agree on rules as to how to solve their conflict, the mediation agreement is understood as a contract; therefore, it is governed by contract law.[34] As far as procedural questions are concerned (such as the admissibility of a claim or evidence), the agreement is governed by procedural law.[35] Technically, concerning the substantial provisions of the agreement, there is no differentiation as to whether the mediation agreement is concluded before or after the dispute has arisen. The duties of the parties are regulated by the mediation agreement and the rules of procedure of mediation associations, which can be incorporated into the agreement.

Form requirements for mediation clauses do not exist. It has been correctly pointed out that section 1031 ZPO, which governs form requirements for arbitration agreements, is not applicable to mediation agreements.[36] There is a general duty to cooperate with regard to the mediation process and to negotiate in good faith; this follows from section 242 of the Civil Code (Bürgerliches Gesetzbuch – BGB).

If a mediation clause is incorporated in standard terms, the further requirements of sections 305 et seqq. BGB have to be met. Therefore, an agreement may be invalid if it unduly puts the other party at disadvantage, section 307 BGB.[37]

Under German law it is not possible to sue the other party to take part in a mediation procedure.[38] In practice, it is also almost impossible to sue the other party for damages under contract law because there will be hardly any damage.[39] But in theory, a party which does not comply with the obligation to mediate (i.e., at least appoint a mediator and attend a first meeting, see below) bears liability on the basis of sections 280(1) and 241(2) BGB. For instance, costs expended in vain by the other party and other potential damages could be claimed.

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[33] *Filler*, Commercial Mediation in Europe, p. 105.

[34] See *Tochtermann* in *Hopt/Steffek*, Mediation, p. 549; *Eidenmüller*, Vertrags- und Verfahrensrecht der Wirtschaftsmediation, p. 9.

[35] *Eidenmüller*, Vertrags- und Verfahrensrecht der Wirtschaftsmediation, p. 10; *Hess* in *Haft/Schlieffen*, Handbuch Mediation, paras 43.21 et seqq.

[36] *Tochtermann* in *Hopt/Steffek*, Mediation, p. 549; *Unberath*, NJW 2011, 1320, 1322; dissenting *Risse*, Wirtschaftsmediation, section 3 comment 14.

[37] See *Tochtermann* in *Hopt/Steffek*, Mediation, p. 550.

[38] *Greger* in *Greger/Unberath*, Mediationsgesetz, section 1 comments 168 and 191, against *Eidenmüller*, Vertrags- und Verfahrensrecht der Wirtschaftsmediation, p. 23.

[39] *Greger* in *Greger/Unberath*, Mediationsgesetz, section 1 comment 169.

However, if the parties have concluded a mediation agreement, they may not bring the claim before a court or an arbitral tribunal. In general, the court or tribunal will reject the claim as temporarily inadmissible if either party raises this objection.[40] Whether this is the case depends on the interpretation of the agreement, i.e. whether the parties wanted mediation to be compulsory prior to starting court proceedings or not. There is no case-law of the Federal Court of Justice (Bundesgerichtshof – BGH) concerning this question; however, the BGH has ruled in this respect for certain conciliation clauses,[41] which are comparable to mediation clauses.[42] Court or arbitration proceedings are therefore only admissible after the parties have unsuccessfully attempted mediation. This entails that the parties – according to the principle of *pacta sunt servanda* – are obliged to appoint a mediator, at least to attend the first meeting (and, depending on the situation, a caucus) and to comment on the substance.[43] However, since mediation is based on the principle of voluntariness, the parties are free to withdraw from mediation at any time and without any justification once the mediation procedure has started.[44] This right has now been codified in section 2(5) of the Mediation Law, cf. below at Sect. 6.

Concerning the effect of mediation on limitation and prescription periods, section 203 BGB generally stipulates that limitation is suspended in the case of negotiations. Due to the multitude of possible options, the beginning and the end of negotiations have not been defined by law. If a mediation clause exists, negotiations begin at the moment that one party requests the other party to start the mediation proceedings.[45] In the case of ad-hoc mediation, negotiations about the question whether mediation should be conducted are included.

Another problem arises due to the fact that section 203 BGB is not applicable to other notice periods. Therefore, the parties may agree on the suspension on these periods in their mediation agreement. Furthermore, if one party prevents the other party from timely exercising the respective right in bad faith, the notice may still be regarded as exercised in time according to section 242 BGB.[46]

If the parties agree to mediate when proceedings are already pending before a national court, they may apply for a stay of proceedings according to section 251 ZPO. The court has to grant the application if it considers it suitable for

[40] *Hess* in *Haft/Schlieffen*, Handbuch Mediation, para 43.67; *Tochtermann* in *Hopt/Steffek*, Mediation, p. 539; *Unberath*, NJW 2011, 1320, 1321 et seq.

[41] BGH NJW-RR 2009, 637; NJW 1999, 647; NJW 1977, 2263. Dissenting OLG Frankfurt NJW-RR 2010, 788 et seq.; LG Heilbronn ZKM 2011, 29.

[42] *Tochtermann* in *Hopt/Steffek*, Mediation, p. 538 et seq.; *Unberath*, NJW 2011, 1320, 1321 et seq.

[43] *Unberath*, NJW 2011, 1320, 1322; *Tochtermann* in Hopt/Steffek, Mediation, p. 549.

[44] *Unberath*, NJW 2011, 1320, 1322.

[45] *Hess* in *Haft/Schlieffen*, Handbuch Mediation, para 43.70.

[46] *Hess* in *Haft/Schlieffen*, Handbuch Mediation at para 43.69; *Ulrici* in Münchener Kommentar ZPO, section 278a comment 18, who correctly points out that an autonomous interpretation of "limitation and prescription periods" within the scope of Article 8(1) of the Mediation Directive has to be taken into consideration.

the purpose intended. Section 251 ZPO also applies if the parties agree on court-annexed mediation on suggestion of the court, cf. section 278a ZPO. In general, the consequences of the stay of proceedings are the same as those of interruption and suspension (section 249 ZPO).[47] This means in particular that any procedural actions taken by a party with a view to the main action while the proceedings are interrupted or suspended will have no legal effect vis-à-vis the other party, cf. section 249(2) ZPO. However, pursuant to section 251(2) ZPO, the order of stay of proceedings has no impact on the statutory periods or the deadlines mentioned in section 233 ZPO, these are the periods or deadlines for submitting the particulars of its appeal, the grounds for filing the appeal on points of law, the complaint against denial of leave to appeal, or the complaint on points of law, or where a party was prevented from adhering to the period for the restoration of the status quo ante.

4 The Mediator

As a principle, anybody may act as mediator. However, this was not always clear, since mediation often touches on legal questions. Section 2(3)(4) of the Legal Services Act (Rechtsdienstleistungsgesetz – RDG) now clearly states that mediation and comparable methods of alternative dispute resolution are not restricted to legally trained persons unless the mediator intervenes in the discussions of the conflicting parties by providing proposals for legal arrangements. If, however, a legal practitioner serves as mediator, he is subject to the regulations of the legal profession (section 18 of the Rules on the Professional Practice for Lawyers, Berufsordnung für Rechtsanwälte – BORA). That includes that a lawyer may only use the title of "mediator" if he or she can prove on the basis of qualified training that he or she masters the principles of mediation procedure (section 7a BORA).

This shows that the capacity to act as a mediator has to be differentiated from the authority to use certain occupational titles.

The Mediation Law has further introduced the title of a certified mediator (*zertifizierter Mediator*) as described by sections 5 and 6 in order to ensure the quality of mediation (Article 4 of the Mediation Directive[48]). The first draft of the Mediation Law stated that there is a conflict between the interest of consumers in a transparent mediation market and the need for advancement of mediation not regulated by law.[49] At first, it was therefore considered sufficient to set up common minimum standards. However, the final version of the Law entitles the Federal Ministry of Justice to create rather detailed outlines of training requirements, a draft of which has recently been published.[50] The draft ordinance stipulates, amongst

[47] *Gehrlein* in Münchener Kommentar ZPO, section 251 comment 13.

[48] 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.

[49] Legislative materials, BT-Drucks. 17/5335, p. 18.

[50] The draft may be found at *Klowait/Gläßer*, Mediationsgesetz, pp. 693 et seqq.

others, a training requirement of at least 120 h (cf. section 3(2) of the draft) plus 20 h of further training per year, section 4(1). To keep his or her title, a certified mediator is further obliged to conduct at least four mediations within 2 years, section 5(1). The contents of the 120 h basic training are meticulously listed with time schedules in an annex.

It should be noted that this only refers to certified mediators. It is unclear what requirements apply to an uncertified mediator, who, according to section 5(1) of the Mediation Law, also has to prove that he has the necessary knowledge and experience to conduct mediation proceedings.[51] The reinforced training requirements are attributable to successful lobby work – mediation training is a profitable business.[52] It is unclear whether they may sustainably enhance the quality of mediation in practice[53]; rather there is reason to fear that the rigid rules as suggested by the Federal Ministry of Justice will rather have a hampering effect on the development of mediation.

In the case of private mediation, pursuant to section 2(1) Mediation Law, the parties appoint the mediator. If the parties cannot agree on a mediator, the mediation agreement (or the rules of a mediation organisation incorporated into the mediation agreement) frequently provides for a "fall back solution": in this case, the mediator is appointed by an "appointing authority".[54] In the case of court-annexed mediation, the court may either simply suggest mediation or name a concrete mediation association or mediator.[55] The parties are not required to comply with such a suggestion.[56] Lastly, as far as court mediation is concerned, the conciliation judge is determined in advance in a plan of allocation of duties within a court.[57] The parties cannot contest this determination.

The duties of the mediator are laid down in the mediation contract between the parties and the mediator as well as in statutory law. First, the duties stipulated in the Mediation Law apply equally for all mediators. Section 2 of the Mediation Law incorporates several elements of the European Code of Conduct for Mediators[58] and imposes several duties of care on the mediator. The provisions of this section are non-mandatory, and the parties may derogate from them in their mediation contract.[59]

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[51] *Henssler/Deckenbrock*, DB 2012, 159, 167.

[52] *Risse*, NJW 2012, 244, 251.

[53] *Hess*, Gutachten, p. F 127.

[54] *Risse*, NJW 2012, 244, 247.

[55] Against the option of suggesting one specific mediator *Fritz* in *Fritz/Pielsticker*, Mediationsgesetz, section 278a ZPO comment 43.

[56] *Ulrici* in Münchener Kommentar ZPO, section 278a ZPO comment 11.

[57] *Foerste* in *Musielak*, ZPO, section 278 para 14.

[58] Legislative materials, BT-Drucks. 17/5335, p. 14, see below in this section.

[59] *Risse*, NJW 2012, 244, 247.

According to section 2(2), mediators have to make sure that the parties have understood the principles and the process of the mediation and that they participate on a voluntary basis. The impartiality of mediators is stipulated in section 2(3); they have to guarantee that all of the parties are integrated in the mediation process in an appropriate and fair manner. Mediators may hold a caucus with each side upon approval of the parties. If the parties reach a settlement, section 2(6) stipulates that mediators have to ensure that the parties have full knowledge of the facts and understand the content of the settlement. Furthermore, a mediator shall expressly mention that a party that is not professionally advised may have the agreement reviewed by external advisors. A final agreement may be documented in written form with the consent of the parties.

According to section 3(1) of the Mediation Law, a mediator must disclose to the parties any circumstances which might impede his impartiality and neutrality. When such circumstances occur, he may only carry out the mediation if the parties explicitly state that they do not have any objections. Pursuant to section 3(5), upon request a mediator has to inform the parties about his professional background as well as his mediation training and experience.

Section 4 of the Mediation Law stipulates that the mediator is bound to confidentiality concerning any information that has become known to him in the course of his duties. The mediator is also required to inform the parties about the scope of his confidentiality obligation.

Secondly, there are duties of professional law, which only apply for members of the respective professional groups. Pursuant to section 18 BORA, a lawyer is still subject to professional rules when acting as an intermediary, conciliator or mediator. Those rules basically include the same duties as imposed on mediators by the Mediation Law and thus reinforce the latter, for example sections 43a(2) and 2 BORA constitute an obligation of the lawyer to maintain confidentiality. Additionally, lawyers are obliged to prevent a clash of interests, which implies that a mediator may not advise either party after the mediation has taken place.

Notaries acting as mediators are subject to the same duties of confidentiality and impartiality, cf. sections 14(1)(2) and 18 of the Federal Notary Law (Bundesnotarordnung – BNotO). Beyond these obligations, before the notarisation of a mediation settlement, a notary has to find out the will of the parties, clarify the facts and to instruct the parties regarding its legal implications, as stipulated by section 17(1) of the Notarisation Act (Beurkundungsgesetz – BeurkG). Generally speaking, notaries have a greater responsibility to ensure the fairness of the outcome of the mediation (section 14 BNotO).

If a mediator violates an obligation arising from the mediation agreement, he may be held liable according to general contract law rules (sections 280 et seqq., 241(2) BGB).[60] However, in practice it is generally very difficult for a party to enforce such a claim because a link between the violation of the duty of the mediator and concrete

[60]Notaries acting as mediators are also subject to the liability provision under section 19(1) BNotO.

damages is very difficult to prove.[61] Furthermore, the contractual exclusion of liability for negligent behaviour of the mediator has become a common phenomenon.[62]

The European Code of Conduct for Mediators[63] has been quite influential in Germany. Mediation centres like EUCON or CfM have required their members to comply with the ethical guidelines of the Code.[64]

Put more generally, the role of mediation centres may not be underestimated. They organize mediator training programmes and will be responsible for the certification of "certified mediators" once the relevant statutory instrument according to section 6 Mediation Law will have been issued.[65] Mediation organisations are said to have a fairly influential lobby.[66] With the state only providing for minimum regulation, they have basically the function of self-regulators of the mediation market.

5 The Process of Mediation

As there are almost no statutory regulations concerning the mediation procedure and the enactment of the Mediation Law did not bring considerable changes. This goes back to the idea that on the one hand, mediation puts forward the autonomy of the conflicting parties and should therefore not be pressed into a rigid procedure. In practice, rules of procedure of the mediation organisations provide for the bulk of the procedural framework.

The mandatory framework for the mediation procedure is set out by section 2 Mediation Law (for details see above at 4). The basic principles of mediation are the neutrality, independence and impartiality[67] of the mediator, confidentiality, voluntariness and autonomy of the parties and the structured nature of the mediation process; cf. section 1 Mediation Law.

The confidentiality obligation of the mediator is stipulated in section 4 Mediation Law. From its wording, it is not clear whether this obligation also applies to the parties themselves. An agreement concerning confidentiality may, however, be included in the mediation agreement or the rules of procedure, as, for example, in section 10.1 DIS Mediation Rules.[68]

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[61] *Tochtermann* in Hopt/Steffek, Mediation, p. 561 et seq.

[62] *Unberath*, ZKM 2010, 166 et seq.

[63] http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.

[64] For instance, CfM states on its website (translation by the authors): "CfM has committed to the European Code of Conduct for Mediators and is listed on the EU list of mediators' organisations of the European Commission. Therefore all its members are required to comply with the ethical guidelines of the Code." Cf. *Centrale für Mediation (CfM)*, Verhaltenskodex.

[65] Some mediation institutions already advertise trainings for "certified mediators" although the statutory instrument does not yet exist, cf. *Woertge*, Thema: "Zertifizierte/r MediatorIn".

[66] *Risse*, SchiedsVZ 2012, 244, 251.

[67] See generally *Tochtermann*, Die Unabhängigkeit und Unparteilichkeit des Mediators.

[68] *Risse*, SchiedsVZ 2012, 244, 247.

In theory, court mediation could be ordered unilaterally by the court during the proceedings.[69] This contravenes to the principle of voluntariness, and it is to be seen whether this will actually happen in practice.

There are no statutory time limits or rules as regards the duration of the mediation proceedings. Neither are there any special rules as to the relationship of mediation or the mediator to public authorities during the mediation procedure.

6 Failure of the Mediation and Its Consequences

Mediation has failed if either the mediator or one of the parties has declared the proceedings to be terminated, cf. section 2(5) Mediation Law. This is in line with the voluntary nature of mediation. The mediation agreement or the rules of procedure may provide for conditions under which a termination of mediation is valid. For example, section 8.1(2) of the DIS Mediation Rules states that mediation may be terminated "by declaration of one party, provided that at least one mediation meeting or no mediation meeting within 2 months after confirmation of the mediator took place. The written declaration is addressed to the other party and the mediator."[70] It is advisable that the parties agree on precise conditions when mediation is deemed to have failed because the suspension effect on limitation periods is lifted in this event. Nevertheless, it should be noted that pursuant to section 203(2) BGB, the limitation period expires 3 months after the end of the suspension at the earliest.

For the parties, failure of mediation obviously means that their conflict has not been settled. Nevertheless, the parties have to pay remuneration to the mediator *pro rata* for services already rendered, cf. section 628(1)(1) BGB.[71] In case of a multi-tier conflict resolution clause that provides arbitration as the next and final step of conflict resolution, each party may commence arbitration proceedings. The same applies if the parties agree on ad-hoc arbitration. Otherwise, each party may commence court proceedings – the claim is not temporarily barred from state courts anymore.

In case that court proceedings had already been opened and stay of proceedings has been ordered according to section 251 ZPO (see above Sect. 1.3), each party may resume the proceedings upon written notice to the court, cf. section 250 ZPO.

If a mediation conducted by a "conciliation judge" according to section 278(5) ZPO fails, the conciliation judge will send the procedural files back to the original judge, including a note that the conciliation proceeding was unsuccessful, but without giving any reasons.[72]

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[69] *Foerste* in Musielak, ZPO, section 278 comment 14.

[70] *German Institution of Arbitration (DIS),* DIS Mediation Rules (in force as from May 1, 2010).

[71] *Unberath*, in Greger/Unberath, Medationsgesetz, section 2 comment 254.

[72] *Förste* in Musielak, section 278 comment 15a.

7 Success of Mediation and Its Consequences

7.1 Meaning and Consequences

(a) Mediation is considered successful if a mediation settlement agreement (in German, a variety of terms are used: *Vergleichsvertrag*, *Mediationsvergleich*, *Abschlussvereinbarung*, *Mediationsergebnis*, *Mediationsvereinbarung*, *Mediationsergebnisvereinbarung*)[73] has been reached. In most cases, a mediation settlement has the character of a settlement agreement within the meaning of section 779(1) BGB, which requires an extremely low degree of mutual concessions of both parties.[74]

(b) There are no special formal or substantial requirements for the settlement agreement unless the parties have agreed on written form beforehand (cf. section 127 BGB) or the settlement contains a legal transaction that requires a specific form (cf. sections 311b, 623, 766 BGB).[75]

A settlement regulates the legal relationship between the parties anew and determines it with binding force.[76] The effect of the settlement and the extent to which the dispute is resolved depend on the concrete substance of the settlement agreement.

7.2 Enforcement of the Settlement Reached by the Parties

The first draft of the Mediation Act proposed to introduce a new section 796d ZPO, providing for a simple and cost-efficient way to obtain an enforceable mediation settlement.[77] It was intended that notaries and local courts should be able to accept the settlement and declare its enforceability. However, this provision was entirely deleted during the legislative process.

Nevertheless, German law provides for several ways to transform an out-of-court settlement into an enforceable title under sections 794 et seqq. ZPO. On the one hand, the settlement may be registered or confirmed before a notary. If the notary himself is involved in the mediation process, he may directly issue a declaration of enforceability. On the other hand, if lawyers reach a mediation settlement on

[73] For a detailed analysis, see *Wendenburg*, Der Schutz der schwächeren Partei in der Mediation, p. 33.

[74] *Eidenmüller*, Vertrags- und Verfahrensrecht der Wirtschaftsmediation, p. 43, *Hess* in *Haft/Schlieffen*, Handbuch Mediation, para 43.58.

[75] Hess in Haft/Schlieffen, Handbuch Mediation, para 43.58.

[76] Stadler in Jauernig, BGB, section 779 comment 11; Habersack in Münchener Kommentar BGB, section 779 comment 31.

[77] BT-Drucks. 17/5335, pp. 7 and 21.

behalf of the parties, it may be declared enforceable by the civil courts or notaries according to sections 796a et seqq. ZPO.

Settlements reached by court mediation are enforceable titles according to section 794(1) ZPO. The same goes for mediation settlements issued by a state-approved conciliation body. For settlements reached in court-annexed mediation, the rules for private mediation apply; however, it is possible to resume the court proceeding in order to issue an enforceable court settlement.[78]

8 Costs of the Mediation

As far as private mediation is concerned, the remuneration of mediators is not regulated by law, but usually agreed between the parties. According to section 34(1) of the Lawyers' Remuneration Law (Rechtsanwaltsvergütungsgesetz – RVG), lawyers acting as mediators shall work towards an agreement concerning fees. If no agreement is reached, civil law rules apply, which means that the usual remuneration is deemed to be agreed (section 612 BGB). In practice, fees amount to EUR 200–600 per hour in commercial disputes and EUR 50–250 per hour for family mediations.[79] In addition, if the parties are represented by a lawyer in the mediation proceedings, remuneration will have to be paid to the lawyer.[80]

Mediation by a conciliation judge is free of additional costs. Legal fees are considerably lower if a settlement is reached in this way[81]: if the parties settle the case during court proceedings, they are not required to pay a fee for the judgment. However, in this case, the statutory lawyers' fee is increased as a settlement incentive, no. 1,000 of the List of Applicable Fees (Vergütungsverzeichnis – VV) of the RVG.[82] On the other hand, lawyers may not charge extra fees for the conciliation hearing.[83]

In family matters, the courts may order the parties to take part in an information session on mediation which is free of costs, cf. sections 135(1) and 156(1)(3) FamFG.

According to section 69b of the Court Fees Law (Gerichtskostengesetz – GKG) and section 61a of the Law on Court Fees in Family Matters (Gesetz über Gerichtskosten in Familiensachen – FamGKG), the federal states are entitled to reduce or abolish certain legal fees if a claim is withdrawn after a successful ADR

[78] Foerste in *Musielak*, ZPO, section 278a comment 3.

[79] *Tochtermann* in *Hopt/Steffek*, Mediation, p. 542. *Bischoff*, MDR 2003, 919, gives a figure of EUR 150–650 per hour; and *Filler*, Commercial Mediation in Europe, 83, provides an estimate of 150–400 per hour or 1400–1900 per day.

[80] For details, see *Tochtermann* in *Hopt/Steffek*, Mediation, p. 542.

[81] *Hess*, Gutachten, p. F 132.

[82] Cf. *Tochtermann* in *Hopt/Steffek*, Mediation, p. 543.

[83] Cf. *Tochtermann* in *Hopt/Steffek*, Mediation, p. 543.

procedure (within or outside of the court system). An additional requirement is that the claimant's statement of claim must include that ADR is intended or has already been commenced or the court had suggested an ADR procedure. This gives the parties an incentive to reach a settlement during mediation so as to save litigation costs.[84] These provisions have been enacted in 2012 together with the Mediation Law. So far, no federal state has made use of this authorization; this is relatively unlikely at times when public exchequers are short of cash.

As a rule, legal aid for private mediation is not available. An exception was made by courts in family cases in which the court ordered or suggested the mediation procedure, i.e. in cases of court-annexed mediation.[85] However, this case law is limited to family cases concerning visitation rights, where out-of-court settlement has been given priority for quite a long time, and may not be generalized.[86]

The grant of legal aid as such comprises the lawyer's fees for an out-of-court settlement attempt. However, the mediator's fees are not included. Furthermore, state agencies, such as debt counselling or youth aid, must be used instead when available.[87] Therefore, a needy claimant is more likely to go to court than conduct mediation.

Since 2012, section 7 of the Mediation Law allows the federal government and the federal states to cooperate in order to conduct research projects to evaluate the consequences of financial assistance for mediation for the federal states. This gives an opportunity to introduce experimental projects concerning legal aid for mediation at some courts – under conditions similar to ordinary legal aid.

On the other hand, an application for legal aid for court proceedings can be rejected if the applying party is not willing to take part in mediation. Pursuant to section 114 ZPO, an application for legal aid can be dismissed on the basis of frivolity.[88] One may argue that ADR is not mandatory and the right of access to justice prohibits this, but if the opposing party offers a fair and promising mediation, the applicant does not need to rely on public assistance.

9 Cross-Border Mediation

9.1 Notion and Main Features

There are no special rules for cross-border mediation. As has been said before (s. above at 2.2.), the German Mediation Law takes into account both national and cross-border mediation – the implementation of the Mediation Directive into

[84] *Risse*, SchiedsVZ 2012, 244, 253 et seq.

[85] AG Eilenburg FamRZ 2007, 1670; OLG Köln FamRZ 2011, 1742.

[86] See also *Lilja/von Lucius/Tietz* in *Klowait/Gläßer*, Mediationsgesetz, para 1.2.56.

[87] *Hess*, Gutachten, pp. F 114 et seq.

[88] AG Bochum, FamRZ 2003, 772, but see OLG Hamm, FamRZ 2003, 1758.

German law came along with a high degree of "gold-plating". The Mediation Law is thus applicable regardless of the fact whether the dispute has a cross-border element or not.[89] Therefore, a definition of cross-border mediation similar to that in Article 2 of the Mediation Directive does not exist.

The Mediation Law does not contain any conflict of law rules. The agreement to mediate has to be considered a contractual obligation under the Rome I Regulation.[90] The same goes for the confidentiality agreement,[91] whereas the validity of the temporary waiver of action depends on the *lex fori*.[92] The law applicable to the contract with the mediator is subject to the Rome I Regulation; a right to refuse evidence before state court proceedings is governed by the *lex fori*.[93]

9.2 Recognition and Enforcement of Foreign Mediation Settlements

Regarding recognition and enforcement, there are some discrepancies to the principle that there are no separate rules for cross-border mediation.

In principle, a foreign mediation settlement has the same effects as a mediation settlement without cross-border elements. It is therefore considered a mere contract between the parties which still has to be declared enforceable. The question whether the requirements of a settlement agreement are met depends on the law applicable to the original contract[94] if no choice of law has been made by the parties.[95]

A "foreign" mediation settlement could nevertheless be made enforceable by notarization with the help of a German notary. On the other hand, a settlement notarized by a foreign notary does not fall within the scope of section 794(1)(5) ZPO.[96] However, mediation settlements notarized by a notary of an EU Member

[89] See also *Fritz* in *Fritz/Pielsticker*, Mediationsgesetz, section 1 comments 6.

[90] See *Hess* in *Haft/Schlieffen*, Handbuch Mediation, para 43.75; *Unberath* in *Greger/Unberath*, Part 5 comment 6; *Eidenmüller*, Vertrags- und Verfahrensrecht der Wirtschaftsmediation, 54.

[91] *Unberath* in *Greger/Unberath*, Part 5 comment 6.

[92] *Hess* in *Haft/Schlieffen*, Handbuch Mediation, paras 43.74; *Eidenmüller*, Vertrags- und Verfahrensrecht der Wirtschaftsmediation, 55 et seqq.

[93] *Hess* in *Haft/Schlieffen*, Handbuch Mediation, paras 43.74, 43.78; *Eidenmüller*, Vertrags- und Verfahrensrecht der Wirtschaftsmediation, 58 et seq.; *Hutner*, Das internationale Privat- und Verfahrensrecht der Wirtschaftsmediation, 203 et seqq.; all referring to the legal situation before the entry into force of the Rome I Regulation.

[94] *Martiny* in *Reithmann/Martiny*, Internationales Vertragsrecht, para 379; *Spellenberg* in Münchener Kommentar BGB, Art. 12 Rom I-VO comment 179.

[95] BGH IPRax 2002, 37; OLG München IPRax 1990, 320.

[96] *Schack*, Internationales Zivilverfahrensrecht, para 912; *Wolfsteiner* in Münchener Kommentar ZPO, section 794 comment 139.

State can be enforced according to Article 57 of the Brussels I Regulation[97] or by making use of a European Enforcement Order pursuant to Article 25 of the EEO Regulation.[98] An enforceable settlement among attorneys (see above Sect. 7.2) may not itself be considered an "authentic document", but a declaration of enforceability of this settlement by a court or a notary according to sections 796b and 796c ZPO falls under the scope of Article 57 Brussels I Regulation.[99] Furthermore, a German notary may notarize a foreign mediated settlement, which is in turn enforceable according to section 794(1)(5) ZPO.[100]

Court mediation settlements or private mediation settlements declared enforceable by a foreign court outside the EU are not automatically enforceable in Germany by virtue of section 794(1)(1) ZPO.[101] However, court mediation settlements may still be considered to be settlement contracts, but they are not automatically enforceable in this event. In German law, a court settlement is considered to have a "double nature" with a contract element and a procedural element.[102] As far as the contractual side of the court settlement is concerned, the law applicable is the law of the original claim that has been settled.[103]

Within the EU, court mediation settlements fall under the scope of Article 58 of the Brussels I Regulation and can therefore be declared enforceable in Germany. Furthermore, foreign court mediation settlements – as well as mediation settlements that have been declared enforceable by a court of another EU Member State – may be enforced in Germany by means of a European Enforcement Order.[104] There is some disagreement as to whether Article 58 of the Brussels I Regulation applies to foreign mediation settlements confirmed by courts. The question should be answered positively[105]: the term "settlement approved by a court" should be widely interpreted in order to ensure the free movement of enforceable instruments

[97] See *Hutner*, Das internationale Privat- und Verfahrensrecht der Wirtschaftsmediation, pp. 255 et seqq; cf. generally *Hess*, Europäisches Zivilprozessrecht, paras 6.261 et seqq.

[98] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims; cf. *Hutner*, Das internationale Privat- und Verfahrensrecht der Wirtschaftsmediation, pp. 257 et seqq.

[99] *Hess* in *Haft/Schlieffen*, Handbuch Mediation, para 43.80; *Trittmann/Merz*, IPRax 2001, 178, 183; *Hutner*, Das internationale Privat- und Verfahrensrecht der Wirtschaftsmediation, pp. 260 et seqq.

[100] *Hutner*, Das internationale Privat- und Verfahrensrecht der Wirtschaftsmediation, p. 259.

[101] *Schack*, Internationales Zivilverfahrensrecht, para 912.

[102] This is the prevailing opinion in both legal doctrine and case-law, cf. *Jauernig/Hess*, Zivilprozessrecht, para 48.4.

[103] *Martiny* in Reithmann/Martiny, para 379.

[104] See Article 24 of the EEO Regulation.

[105] Cf. *Hess*, Europäisches Zivilprozessrecht, para 6.258; *Schlosser*, EU-Zivilprozessrecht, Art. 58 EuGVVO comment 1.

especially in the field of consensual dispute resolution.[106] In any case, Art. 2(b) Brussels I^{bis} Regulation[107] will bring clarity to this question.

10 E-Justice

As far as the use of e-justice devices in mediation is concerned, no special provisions exist. "Online mediation", i.e. mediation with the help of emails, chatrooms, video conferencing services etc., is generally permitted,[108] even if these means of communication lack certain advantages of personal interaction.[109] However, the Mediation Law does not require that a mediation has to take place at one physical site. A settlement may even be concluded by means of an email since there are no special formal requirements concerning settlement agreements. In practice, ODR mechanisms already exist for consumer disputes.[110] The implementation of the Consumer ADR Directive (see above at 1)[111] and the entry into force of the Consumer ODR Regulation[112] will further strengthen the use of the internet in consumer mediation.

In addition, in court mediation by a conciliation judge the general rules concerning e-justice apply.

Generally it can be said that e-justice is still in its infancy in Germany. To give an example, in principle, legal documents may be filed with courts electronically (cf. section 130a ZPO), but implementing legislation is still widely lacking. Although a variety of pilot projects have been initiated in this respect in the meantime,[113] specific ways to use this device in mediation can hardly be found. In court mediation, a hearing is necessary,[114] which generally entails the appearance of the parties in

[106] *Staudinger* in *Rauscher*, Europäisches Zivilprozess- und Kollisionsrecht, Art. 58 Brüssel I-VO para 6; *Dörner* in *Saenger*, ZPO, Art. 58 comment 2.

[107] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[108] *Hagel* in *Klowait/Gläßer*, Mediationsgesetz, section 2 Mediation Law para 11.

[109] *Fritz* in *Fritz/Pielsticker*, Mediationsgesetz, Methodik para 51.

[110] See, for instance, the website of the "online conciliator" at www.online-schlichter.de.

[111] For instance, the Directive stipulates in its Article 8(a) that all ADR procedures are available and easily accessible both online and offline.

[112] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR)

[113] An overview of the pilot projects can be found at *Justizportal des Bundes und der Länder* (ed.), Elektronischer Rechtsverkehr.

[114] *Ahrens*, NJW 2012, 2465, 2470; *Foerste* in *Musielak*, section 278 comment 15.

person, cf. section 278(3). Only if the court does not order appearance in person, the parties may be represented by a lawyer.

In contrast, another device of e-justice – although not widely used so far – is more suitable to be used in mediation proceedings: section 128a ZPO allows the court to use videoconferencing tools in a hearing upon agreement with the parties. This provision may also be applied to the "conciliation hearing" within the meaning of section 278(5) ZPO. This is consistent with the principles of mediation as long as confidentiality is ensured. There is no requirement in German law or doctrine that both parties have to be personally present at one place in the first mediation meeting. Since mediation is exceedingly based on the principle of voluntariness, the parties could also agree on videoconferencing in private mediation; this would not conflict with the definition of mediation as provided in section 1 Mediation Law. Since agreement of the parties is mandatory within the scope of section 128a ZPO, the use of videoconferencing in a conciliation hearing would be in line with the principles of mediation.

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Mediation: The Greek ADR Journey Through Time

Georgios Diamantopoulos and Vassiliki Koumpli

Abstract Traditionally, amicable dispute resolution methods have been recognised and often promoted by the Greek legislator. Various forms of conciliation and 'mediation' in the broad sense have been provided by the GrCCP and other special laws. In 2010, the GrMA was enacted in order to implement Directive 2008/52/EC, introducing a coherent framework for the regulation of mediation in civil and commercial matters. In the same spirit, two years later, Art. 214B was added to the GrCCP providing for judicial mediation, which is conducted exclusively by judges. Both institutions are currently applicable on a totally voluntary basis. Despite the adequacy of the existing legal framework, mediation is still treated with certain scepticism by both legal professionals and the parties. One can note, however, that since the enactment of the GrMA and Art. 214B GrCCP an increasing number of professionals appear to be interested in learning about the new institution. Given also the significant delays in the state-administered justice, one can expect that in the long term more interested parties may be drawn to mediation and other ADR forms.

1 The Existing Situation of ADR

In modern societies civil law dispute resolution is guaranteed by the rule of law and entrusted to civil courts. In this sense, the constantly increasing number of such disputes has been welcomed as a sign of democratisation and a decisive step towards

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G. Diamantopoulos (✉)
Law School of the Aristotle University of Thessaloniki, Thessaloniki, Greece
e-mail: diamlaw1@otenet.gr

V. Koumpli (✉)
Hellenic Institute of International and Foreign Law, Athens, Greece
e-mail: vkoumpli@hiifl.gr

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the cultural and social emancipation of citizens (Νίκας 2012, § 59 I, p. 338). In the last decades, however, effective delivery of justice has been adversely affected by the workload of courts, the frequent abuse of procedural rights and infrastructure shortcomings. This has given rise to the development of ADR. As highlighted by the Scientific Committee of the Parliament in its report of 8 December 2010, issued on the occasion of the enactment of the GrMA,[1] ADR processes aim at a private solution, which will restructure the relationship of the parties and the issues that may have arisen between them. Such processes are based on the principle of private autonomy and the freedom of contract (Art. 5(1) of the Constitution; Art. 361 GrCC; Χριστοδούλου 2010, 288, 293; Kourtis 2013, 194).[2]

The Greek legislator has traditionally regarded conciliation as the best ADR method (Νίκας 1984, § 1 III, pp. 30 et seq.; Χαμηλοθώρης 2000, 31).[3] In popular consciousness, the worst settlement equals the best judgment. In this framework, the Greek legislator has assigned wide conciliatory tasks to judges. For instance: (a) justices of peace shall attempt to conciliate disputes falling within their competence before the hearing of the particular case; they can also conduct voluntary conciliation, upon request of the parties, in civil law cases falling outside their competence (Arts 208 and 209 GrCCP)[4]; (b) civil judges[5] are encouraged to conciliate disputes at any stage of the proceedings, according to Arts 233(2)-(4)[6] and 524(1) GrCCP; (c) Art. 667 GrCCP[7] provides for the judge's duty to attempt to

[1]Law 3898/2010 titled 'Mediation in civil and commercial matters' implemented Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ C 286, 17.11.2005, 1. See in particular Part A of the Explanatory Report to the GrMA.

[2]Cf. Areios Pagos (Full Bench) 16/2013; Areios Pagos (Full Bench) 26/2006; Areios Pagos 103/2012; Areios Pagos 175/2010; Areios Pagos 2103/2009; Areios Pagos 1764/2009; Areios Pagos 1740/2009; Areios Pagos 851/2009; Areios Pagos 255/2009; Areios Pagos 53/2007; Areios Pagos 139/2006; Athens Court of Appeal 6848/2008; Athens Court of Appeal 2803/2008; Athens Court of Appeal 961/2008; Piraeus Court of Appeal 457/2008; Dodekanisa Court of Appeal 10/2007; Thessaloniki Court of Appeal 305/1998, with further references.

[3]On ADR as a previous useful or even necessary formal condition for the recourse to state justice from a comparative perspective, reference may be made to G.-E. Calavros (Γρ.-Ε. Καλαβρός 2010, 166, 167).

[4]According to Art. 212(4) GrCCP, conciliation under Arts 208 et seq. GrCCP has the same effect with court settlement. Christodoulou, (Χριστοδούλου 2010, 288, 293) considers the provisions of Arts 208 and 214A GrCCP as examples of court-annexed and out-of-court mediation respectively (Μανιώτης 2012, 712; Αναστασοπούλου 2011, 1; *contra* Klamaris and Chronopoulou 2013, 587).

[5]Respectively, Art. 46(1) of the former Lawyers Code (Decree 3026/1954) provided for the lawyer's duty to attempt conciliation in cases that are considered suitable. The same provision is also included in Art. 7b of the Ethical Code of Legal Profession. The current Lawyers Code (Law 4194/2013) classifies 'mediation in order to seek compromise' among the lawyer's duties.

[6]As amended by Art. 22(3)-(4) of Law 3994/2011 (Anthimos 2012, 156–157).

[7]See also Law 1876/1990, which provides for the out-of-court resolution of certain labour law disputes by the Organisation for Mediation and Arbitration, a legal entity under private law (Χαμηλοθώρης 2000, 43; Χαμηλοθώρης 2011, 57; Περιβολάρης 2008, 15). Law 1569/1985

conciliate labour law disputes (Μακρίδου 2009, 139); (d) in the field of public law, Art. 23 of Law 2882/2001 provides for the judge's duty to attempt conciliation in cases of expropriation.[8]

Particular mention should be made of the mandatory out-of-court procedure for dispute resolution that was introduced by Art. 214A GrCCP, which was added by Law 2298/1995.[9] Without having produced the expected results, Art. 214A GrCCP has been recently amended by Law 3994/2011, providing for the optional conciliation on the parties initiative.[10] Admittedly, this amendment has significantly enlarged the importance of such conciliation (Απαλαγάκη 2012, 572) by (a) giving this a universal character; (b) inciting the judge to encourage conciliation at any stage of the proceedings (Art. 233 GrCCP); and (c) giving the minutes of such conciliation an effect similar to notarial act (Art. 293(1) GrCC P; Διαμαντόπουλος 2013, 72 et seq.). Those elements considered, authoritative representative of legal doctrine notes that "[...] without exaggeration, conciliatory dispute resolution could be embodied in the objectives of the civil trial [...]" (Νίκας 2012, § 59 I, p. 339; as to the purposes of the civil trial, see Διαμαντόπουλος 1996, § 3 II, pp. 87 et seq., notes 102 et seq.).

ADR methods have also been provided by special laws, such as Art. 15 of Law 4013/2011 on the settlement committees for commercial leases (Κατράς 2011, 193 et seq.; Κοτζαμάνη 2012, 361 et seq.) or, even earlier, Art. 11 of Law 2251/1994 on the committee for the amicable settlement of consumer disputes (Κουτσουράδης 2005, 353 et seq., 372 et seq.; Παπαϊωάννου 2005, 139 et seq.). The latter committee was one of the entities entrusted with the out-of-court conciliation process under the former wording of Art. 2 of Law 3869/2010 on over-indebted individuals (Κρητικός 2012, 302 et seq.). In this case, the failure of the out-of-court conciliation constituted a formal condition for the filing of the application of

providing for the out-of-court resolution of traffic accident disputes has been abolished by Law 1867/1989.

[8] Art. 23(5) of Law 2882/2001, which was added by Art. 131(3) of Law 3070/2012, classifies the preparation of a settlement agreement among the duties of the legal representative of the state in cases where the relevant compensation does not exceed the amount of 30.000,00 euros.

[9] The Greek legislator (conforming to Nr. R (86) 12 of 16.12.1986 Recommendation of the Committee of Ministers of the Council of Europe) introduced conciliation as a mandatory stage before the hearing. After continuing postponements due to the reactions of Bar Associations, Law 2915/2001 eventually activated the provision and replaced the term 'conciliatory dispute resolution' in Art. 214A GrCCP with the term 'out-of-court dispute resolution', on the grounds that the full acceptance of the positions of one party without any compromise cannot be excluded (Diamantopoulos 2003, § 6 I, p. 319, 320).

[10] By virtue of Art. 19 of Law 3994/2011 (Απαλαγάκη 2011, 30 et seq.). On potential misconducts on the occasion of the possibility of conciliatory dispute resolution under Art. 214A GrCCP, see Order Nr. 1/2000 of the President of the Trikala Multi-Member Court of First Instance. The relevant statistics concerning Athens, Thessaloniki and Heraklion Courts of First Instance (2001–2006) and East Macedonia-Thrace and Thessaloniki Courts of First Instance (2001–2011) show that in practice the new institution was not welcomed (Αναστασοπούλου 2011, 3; Ηλιακόπουλος 2012, 21 et seq.).

an indebted individual (not for the hearing) for the judicial settlement of their debts (Αρβανιτάκης 2010, 1464, 1467; Κατηφόρης 2013, 9 et seq., notes 23 et seq.). After its amendment by Law 4161/2013, Art. 2 of Law 3869/2010 provides for the optional mediation before the filing of the application of an indebted individual. In case of failure of mediation, the application of an indebted individual is filed with the competent justice of peace and only after such filing can the process of out-of-court conciliation take place. Last but not least, one should mention the mechanism of the Directorates of Labour Inspection, which are entrusted – among others – with "[. . .] the mediation between employers and employees for the amicable resolution of disputes emerging during labour relationships, towards the consolidation of social peace" (Ορφανίδης 2006, 454; Χαμηλοθώρης 2000, 44, 2011, 57).[11]

Prevailing ADR method in Greece is still arbitration, which is governed by Arts 867–903 GrCCP (Κουσούλης 2004, *passim*; Άνθιμος 2010, 472).[12] Arbitral expertise (Ορφανίδης 2006, 454) as well as preliminary evidence[13] may similarly be considered as ADR processes, given their deterrent effect on the commencement of proceedings.

Mediation has been officially included in the ADR methods provided by Greek law since the enactment of the GrMA in 2010.[14]

2 The Basis for Mediation

Greece has been one of the first EU member states to implement Directive 2008/52/EC by enacting the GrMA (Κλαμαρής 2010, 473 et seq.; Βαλμαντώνης 2013, 353; Άνθιμος 2012, 278; Παντελίδου-Κουρκουβάτη 2012, 1509, who argues – exaggerating – that there have been delays in the implementation of Directive 2008/52/EC).[15] According to Art. 4 GrMA "[M]ediation means a structured

[11] Article 3(1)(a)(dd) of Presidential Decree 369/1989.

[12] International commercial arbitration is governed by Law 2735/1999. See Areios Pagos 102/2012.

[13] Civil Procedure Draft VI (1961) 182.

[14] As to the difference between mediation and compromise, see Κόμνιος 2007, 32; Χριστοδούλου 2010, 289: by contrast with compromise, which is based on the reconciliation of the conflicting positions, mediation is based on the creation of 'new value', focusing on the parties' interests and extending to the process taking place even before the conclusion of the final agreement. The institution of conciliators, as provided by Art. 123 of the old Civil Procedure of 1834, may be considered as forerunner of mediation. See Οικονομίδης and Λιβαδάς 1925, § 156, p. 255, note 1. See Αναστασοπούλου 2011, 44, with reference to the past institution of 'Sastis' (=Σαστής) in Crete, an elder villager who undertook to peacefully resolve 'vendettas' in case of murder or animal theft. For an overview of the history of conciliatory dispute settlement in ancient and medieval Greece as a precursor of modern mediation, see Αντωνέλος and Πλέσσα 2014, 3–10.

[15] K. Calavros (K. Καλαβρός 2012, § 31 III, p. 20, note 2) disapproves for systematic and methodological reasons the inclusion of mediation provisions in a separate act, outside the GrCCP. In contrast, as member of the legislative committee of the Ministry of Justice (as reconstituted by Nr. 66492/13.6.2008 Decision of the Minister of Justice), he welcomed the choice of the

process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. It does not include attempts made by the justices of peace or the courts to settle a dispute in the course of judicial proceedings according to Arts 208 et seq. and 233 GrCCP".[16] Mediation obviously differs from any other out-of-court or conciliatory dispute resolution process due to the mandatory participation of the mediator, namely a third person in relation to the parties, who is asked to conduct mediation.

According to Art. 3(1)(a) GrMA, the parties may in principle agree to have recourse to mediation before or during the pendency of a suit (mediation *ex voluntate*). The parties may also be invited by the court to do so during the pendency of a suit, as provided by Art. 3(1)(b) GrMA (mediation *ex juditio*). In this case, the recourse to mediation is registered in the record of the court.[17] Mediation may further be ordered by another EU court (Art. 3(1)(c) GrMA)[18] as well as be imposed by another provision of law (Art. 3(1)(d) GrMA, mediation *ex lege*).[19] One can note that even though Art. 3 GrMA defines when recourse to mediation is possible, it does not define what 'recourse' means and, subsequently, when the mediation process begins. Legal doctrine has dealt with this question stating that "what is

latter as regards the integration of such provisions in the GrCCP. See draft Art. 208 GrCCP, as would be amended in order to regulate mediation, in Ειδική Νομοπαρασκευαστική Επιτροπή του Υπουργείου Δικαιοσύνης για την τελική διαμόρφωση του ΚΠολΔ 2009, 168, 169, as well as the relevant Explanatory Report on p. 46, 47; *contra* Πολυζωγόπουλος 2011, 270. The Scientific Committee of the Parliament, however, highlights in its report of 8 December 2010 that "[. . .] mediation does not constitute an alternative or out-of-court justice-rendering scheme, given that the mediator is not allowed to express or impose his own views concerning the dispute, the existing rights and, ultimately, the settlement [. . .]. Therefore, its inclusion in a separate chapter of the GrCCP on the model of arbitration is not necessary".

[16] Art. 214A(4)(a) GrCCP as added by Art. 1 of Law 2298/1995 and before its amendment provided that parties attempting conciliation could be assisted, if they wished so, by a third party jointly selected (Αμανατίδης 2000, 1572).

[17] Even in this case mediation remains voluntary for the parties (Klamaris and Chronopoulou 2013, 590).

[18] K. Calavros (K. Καλαβρός 2012, § 31 III, p. 24, 25) strongly argues that this obviously may occur only in cross-border disputes under Art. 4(a)(bb) GrMA and constitutes a case of free circulation of – not final – court judgments within the EU without the interference of *exequatur*. He doubts, furthermore, whether such cases fall within the field of the GrMA and disagrees as to the venue of mediation: this, as in arbitration cases, shall be defined in the parties' agreement or shall result from the fact of the conduct of a mediation process in a particular venue, without being important, in both cases, whether mediation was ordered by a EU court or not.

[19] Legal doctrine (K. Καλαβρός 2012, § 31 III, p. 25) has heavily criticised such provision as contrary to the Greek legal order and Directive 2008/52/EC, given that Art. 5(2) provides that the latter applies "without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system". However, this form of mandatory recourse to mediation has not been regulated by Greek law so far (Klamaris and Chronopoulou 2013, 590).

critical is the time when the mediation procedure actually begins, i.e. the time when the parties appoint a mediator in order to start the mediation procedure to solve their dispute" (Klamaris and Chronopoulou 2013, 593). According to the current legislative framework, recourse to mediation is made on the parties' or on the court's initiative. In both cases, mediation remains a non-binding and clearly private dispute resolution scheme. State justice is neither disputed nor 'privatised', given that access to the judicial system is not excluded, on the one hand, and mediation cannot be imposed on the parties, on the other hand; the parties are still free to choose the suitable scheme for the resolution of their dispute.[20]

A judicial mediation procedure for private law disputes is provided by Art. 214B GrCCP, which was added by Art. 7(1) of Law 4055/2012 (Θάνου-Χριστοφίλου 2013, 937 et seq.; Φράγκου 2014, 15 et seq.; Παντελίδου-Κουρκουβάτη 2012, 1509, who seems to be cautious, considering judicial mediation as a distortion which may hinder the evolution of mediation in Greece). Such ADR scheme is also voluntary (Απαλαγάκη (–Μπαλογιάννη) 2013, Art. 214(B) nr. 2; Μαργαρίτης and Μαργαρίτη 2012, Art. 214B nr. 4)[21] and conducted by judges. For this reason, at every court of first instance and court of appeal of the country, one or more of the presidents or senior judges shall be appointed as full-time or part-time mediators for a term of 2 years, which may be extended for one more year.[22] Recourse to mediation may take place before filing a suit or during *lis pendens*. The parties or their attorneys shall file the relevant application in writing. During *lis pendens*, the court – when it considers it appropriate and having taken account of all circumstances of the case (e.g. nature of the dispute, evidence difficulties etc., see Νίκας 2012, § 59 V, p. 344) – may invite the parties at any stage of the proceedings to use judicial mediation. Once the parties agree, the court shall adjourn the case for a hearing on a short date, which shall not exceed six months. The procedure of judicial mediation contains separate and joint hearings and discussions among the attorneys of the parties and the mediator judge, who may offer the parties non-binding suggestions as regards the resolution of the dispute. Mediation shall be conducted in such a way as to respect confidentiality, unless the parties agree otherwise. In this respect, before the opening, all persons involved are bound in writing to observe the confidentiality of the procedure. Judicial mediation under Law 4055/2012 has met strong criticism. Legal doctrine argues against the discretion of the judge to refer a case to judicial mediation instead of himself attempting to conciliate the parties during the hearing, in accordance with Art. 233 GrCCP. The referral of the case to another judge – who may act sometimes as mediator and sometimes as judge, depending on his appointment as

[20]Part A of the Explanatory Report to the GrMA.

[21]Legal doctrine in Greece consistently argues that ADR cannot be provided as mandatory since this would be contrary to Art. 20 of the Constitution (Απαλαγάκη 2012, 573) and Art. 6(1) ECHR (K. Καλαβρός 2012, § 31 III, p. 25), which guarantee the right of free access to justice.

[22]As amended by Art. 102(2) of Law 4139/2013 (Απαλαγάκη (–Μπαλογιάννη) 2013, Art. 214(B) nr. 2; Μαργαρίτης and Μαργαρίτη 2012, Art. 214B nr. 4).

full-time or part-time mediator – cannot be easily justified (Απαλαγάκη 2012, 573; Απαλαγάκη (–Μπαλογιάννη) 2013, Art. 214B, nr. 9; cf. Ηλιακόπουλος 2012, 28 et seq., on the occasion of the relevant discussion in the field of German law).[23] It is further noted in this respect that such mixed role of the judge may give rise to constitutional law concerns, given that the referral of the case to judicial mediation during *lis pendens* may put into question the principle of natural judge (Art. 8 of the Constitution; Art. 108 GrCCP), undermine personal and functional guarantees concerning the administration of justice and lead to delays.[24] It has been also argued, nevertheless, that such initiative actually constitutes an aspect of active management of the case by the court (case management). The judge becomes a manager who directs each case to the appropriate procedure, applying the innovative concept of the 'Multi-Door Courthouse'.[25]

Art. 2 GrMA, in conformity with Arts 1 and 867 GrCCP concerning arbitration cases, provides that "private law disputes can be referred to mediation upon agreement of the parties, provided that the latter have the right to dispose of the relative rights and obligations".[26] Family law disputes (e.g. matrimonial disputes and disputes concerning the relationships between parents and children; see Κόμνιος 2007, 49; Μαργαρίτης and Μαργαρίτη 2012, Art. 867 nr. 2.)[27] as well as rights concerning the protection of personality (e.g. religious conscience and worship)[28] cannot, thus, be referred to mediation (or arbitration). According to the

[23]Anthimos (Άνθιμος 2012, 284) highlights the contrast between Art. 214B GrCCP and Law 3898/2010 (as well as Directive 2008/52/EC) and argues that the provisions of Law 3898/2010 regarding training and accreditation should be applicable to judges, too.

[24]See Χριστοδούλου 2010, 291, noting that *ex juditio* court mediation falls outside the field of Directive 2008/52/EC. As to the question of the appropriateness of the judge acting as mediator, given the concurrence of conciliatory and decisive competences in the same person in case of failure of a mediation attempt (Ορφανίδης 2006, 458).

[25]This innovative concept is attributed to Prof. Frank Sander: Sander, Varieties of Dispute Processing, 70 F.R.D.111 (1976); see Βαλμαντώνης 2013, 356, who exposes his experience as Judge at the Athens Court of First Instance (Department of Obligations), having the chance to implement Art. 214B GrCCP twice in the judicial year 2011–2012. Cf. Ηλιακόπουλος 2012, 29, 30.

[26]Cf. Patra Court of Appeal 1263/2006.

[27]ADR may find its application to matrimonial disputes in case of consensual divorce (Καραμπατζός 2006, 525, 526, note 125, with references). Although the preamble of the Directive states as examples of rights and obligations on which the parties are not free to decide themselves rights and obligations that 'are frequent in family law and employment law', neither the Greek statutory text nor its Explanatory Report state any matters of family and labour law which are not at the parties' disposal. As pointed out (Kourtis 2013, 195, with further references at note 7), it is a matter on which Greek legal doctrine and courts will be called to give their interpretation in the future.

[28]Cf. Athens Court of Appeal 4535/1998. According to the Explanatory Report to the GrMA (Art. 2), the latter does not apply to revenue, customs or administrative matters or to the liability of the state for acts or omissions in the exercise of state authority (*acta jure imperii*). See also Ταμπάκης 2012, 548; Άνθιμος 2010, 475; *contra* Γρ.-Ε. Καλαβρός 2010, 165, 166. As to the exclusion of mediation (as well as arbitration) in case of provisional remedies, see Χριστοδούλου 2010,

right view, such right of disposal is wider than the relevant right to compromise (Κουσούλης 2004, Art. 867, p. 8; *contra* Κ. Καλαβρός 2012, § 31 III, p. 25; cf. Σαρίδου 2012, 281).[29] It should be noted, however, that this condition is not provided as regards judicial mediation under Art. 214B(1) GrCCP, probably due to legislative oversight, rather than conscious choice.

It should be highlighted that at the moment only in the field of over-indebted individuals does mediation in the strict sense, as it is established by the GrMA, explicitly apply by reference of Art. 2 of Law 3869/2010 as amended by Law 4161/2013. Of course, mediation in the strict sense is expected to apply to other areas, too.[30] Nonetheless, 'mediation' processes in the broad sense have also been provided by special rules concerning particular fields and institutions. Such is the case of (a) Art. 102 of the Greek Bankruptcy Code (Law 3588/2007), as recently amended by Law 4013/2011[31]; (b) Presidential Decree 190/2006 on the insurance mediation[32]; (c) the Hellenic Ombudsman for Banking-Investment Services, a private, non-profit entity, initially set up in 1998 by virtue of decision of the Hellenic Bank Association, which deals with disputes arising from the provision of banking and investment services (Καράκωστας 2004, 454 et seq.; Μπώλος 2004, 1130 et seq.; Αλικάκος 2005, 1682; Χαμηλοθώρης 2007, 217, 218); (d) in the field of public law, Art. 1(1) of Law 2477/1997, as amended by Art. 1(1) of Law 3094/2003, on the Greek Ombudsman, an independent administrative authority conducting a form of mediation between citizens and government departments or public services in the wide sense in cases where personal rights or legal interests of the citizens may have been violated; (e) in the field of criminal law, Art. 11 of Law 3500/2006 providing for the criminal mediation in case of crimes involving domestic violence; (f) similarly in the field of criminal law, Art. 308B of the Greek Criminal Code, which was added by Law 3904/2010, providing for the criminal conciliation (Μυλωνόπουλος 2011, 53 et seq.; Ηλιακόπουλος 2012, 27). So far

292 (with the exception, however, of disputes merely heard according to provisional remedies proceedings, e.g. in the case of Art. 988 GrCCP).

[29]Cf. Minutes of the Committee for the Review of the CCP 1967, 357, 358; Koussoulis (Κουσούλης 2004) notes that disputes arising from the exercise of formative rights for which there is a right of disposal, but not a right to compromise, can be subjected to arbitration (and, thus, mediation).

[30]E.g., in the areas of sports law, medical responsibility, intellectual property rights, specific family law matters, hotel business etc. (see, respectively, Μαναράκης 2012, 417 et seq.; Παντελίδου-Κουρκουβάτη 2014, 95 et seq.; Θόδου 2014, 121 et seq.; Πούλιος 2014, 129 et seq.; Τζορμπατζόγλου 2014, 143 et seq.).

[31]The mediation procedure under Article 102 of the Greek Bankruptcy Code aims at facilitating the conclusion of an agreement between the debtor and the creditors for the rehabilitation of the enterprises facing existing or predictable financial difficulty at a pre-bankruptcy stage (Μανιώτης 2012, 712).

[32]Art. 2(3) of Legislative Decree 190/2006 provides that 'insurance mediation' means any activity of presentation, proposal, provision of preparatory work for the conclusion of insurance contracts or assistance during the enforcement of such contracts.

there are no official statistics available as regards mediation under the GrMA. With regard to judicial mediation under Art. 214B GrCCP (in force since 2 April 2012 as to Courts of First Instance and 20 Mars 2013 as to Courts of Appeal), 9 out of 16 cases have been settled in the Athens Court of First Instance, while 4 out of 7 cases have been settled in the Thessaloniki Court of First Instance.[33]

3 The Agreement to Mediate

Art. 2(b) GrMA stipulates that "the agreement to submit a dispute to mediation is evidenced by virtue of a written document or the court records in case of Art. 3(2) and is governed by the provisions of substantive contract law". By contrast with arbitration agreements, where Arts 868 and 869 GrCCP provide for the written form as a condition for the validity of such agreements, in mediation the written form has only the role of documentary evidence, with no particular form being required for the validity of the agreement to mediate.[34] As noted in the Explanatory Report to the GrMA, this provision contributes to the legal certainty as regards the agreement to mediate as well as to the protection of the parties, who may be obliged to attend the mediation process and to participate in good faith.[35]

According to the general principles of Greek civil law, such agreement is valid, unless its content is contrary to prohibitive provisions of law or good morals (Arts 174 and 178 GrCC). However, apart from the substantive law effects, the said agreement has also procedural law effects, given that it is designed – in case of success – to prevent recourse to civil justice. It is argued that the mere fact that provisions of substantive contractual law regulate such contracts does not necessarily transform them into substantive law contracts, since their fundamental element is not the resolution of substantive claims, but the submission of a dispute to another procedure, along with the simultaneous relinquishment of the state judicial procedure. They can, consequently, be considered as procedural law agreements governed by substantive law only as regards their validity (Klamaris and Chronopoulou 2013, 597, 591, 592; *contra* K. Καλαβρός 2012, § 31 III, p. 26; Anthimos 2012, 159; Αγγούρα 2014, 23 et seq., who are clearly in favour of the substantive nature of such agreement).[36] In other words, the argumentation

[33]By the President of the Athens Court of First Instance Mrs I. Stratsiani and the President of the Thessaloniki Court of First Instance Mrs Aik. Fragkou.

[34]As to arbitration, see instead of others Areios Pagos 1737/2009; Larissa Court of Appeal 338/2012; Athens Court of Appeal 1105/2009; as to mediation, see among others Χριστοδούλου 2010, 295; Kourtis 2013, 203: "the written form is not a condition of validity of the agreement to mediate. However, it is considered that the role that the writing requirement plays in ensuring that the parties actually agreed on mediation cannot be overlooked.".

[35]Explanatory Report to the GrMA (Art. 2).

[36]For an analysis of the doctrines concerning the legal nature of the mediation agreement (as a *sui generis* substantive law agreement or purely procedural law agreement), see Κόμνιος 2007,

concerning the twofold legal nature of judicial settlement may equally be applied to the case of mediation (Νίκας 1984, § 2, p. 36 et seq., particularly at p. 82 et seq.).

All disputes arising from a particular legal relationship between the parties – regarding either their rights and obligations or the interpretation of the terms of the specific contract as well as its validity and its termination – can be subjected to mediation.[37] In the same spirit, claims of both parties arising from relationships, actions or omissions can equally be subject to mediation.[38]

The agreement to mediate can be concluded either separately or jointly, in the same document with the main contract (as mediation clause). Even in the latter case, however, it constitutes a separate agreement, distinguished from the main contract, and is independent and autonomous, without being affected by this. This autonomy of the mediation agreement as regards the main contract normally entails its validity even after the termination of the main contract.[39]

The principle of freedom of the parties in mediation presupposes, under Art. 2(a) GrMA, that they have full knowledge of the merits and the legal dimension of their dispute in order to agree on its referral to this process.[40] This does not exclude the contractual provision of referral to mediation of future disputes arising in the framework of a specific legal relationship,[41] provided that such agreement is also repeated after the dispute has arisen.[42]

Even in the latter case, however, such mediation clause cannot prevent recourse to state justice once the said dispute arises, as provided by Arts 8(a) and 20(1) of the Constitution and Art. 6 ECHR. As noted in the Explanatory Report to the GrMA, the mediation clause does not entail procedural effects as those arising in case of an arbitration clause (Klamaris and Chronopoulou 2013, 592, 594; Kourtis 2013, 204; in the same direction Ορφανίδης 2006, 459, as regards mediation clauses included in regulations of apartment blocks; *contra* Ηλιακόπουλος 2012, 25; as to an intermediate position see Anthimos 2012, 159, who argues that "there is some room for debate in this area" regarding Art. 3(1) GrMA). In this framework, the agreement to mediate constitutes a ground for a genuine dilatory objection under substantive law, which refers to the legality of the claim and not to the admissibility

36, 37. See also Χριστοδούλου 2010, 298, stating that the contract between the mediator and his client has rather the nature of a mixed contract, combining elements of more contractual types under the GrCC.

[37]Cf. Areios Pagos 506/2010; Athens Court of Appeal 6020/2011, as to arbitration agreements.

[38]Athens Court of Appeal 6020/2011.

[39]Athens Court of Appeal 6020/2011; see also Athens Court of Appeal 1105/2009, with further references with regard to arbitration agreements.

[40]Art. 2 stipulates, among others, that the parties agree to use mediation even after the dispute has arisen, in accordance with Art. 2(a) of Directive 2008/52/EC.

[41]The written agreement to mediate future disputes shall refer to specific legal relationship, in the framework of which the said disputes will arise, without, however, being necessary to define specific disputes; Cf. Athens Court of Appeal 6020/2011 (regarding arbitration).

[42]Explanatory Report to the GrMA (Art. 3).

of the filing of the lawsuit or the hearing (under Art. 263 GrCCP; Χριστοδούλου 2010, 294; Άνθιμος 2010, 477; Ηλιακόπουλος 2012, 25; Γραβιάς 2012, 248).[43] Adopting this position, the legislation is in conformity with the case law of Greek courts. For example, in 1971 Areios Pagos (confirming past case law[44]) refused to recognise procedural effect to 'mediation' (in the broad sense) or conciliation clauses on the ground that access to justice can be prevented only in the case where a third person, empowered by a relevant agreement of the parties, makes a legally binding decision on the case, as happens in arbitration.[45]

The breach of the mediation agreement may give rise to the contractual obligation of the parties to attempt to settle the dispute.[46] In any case, the agreement on recourse to mediation after the commencement of the trial does not constitute contractual waiver of the document of the claim under Art. 294 GrCCP (Κόμνιος 2007, 41), given that in this case the court is obliged to suspend the hearing (Art. 3(2)(b) GrMA; cf. Art. 214B GrCCP).

In order to protect and ensure the validity of the parties' claims, the compatibility between procedural and substantive rules regarding limitation and prescription periods is required, so that the parties will not be discouraged from referring to mediation due to the risk of extinction of such claims. In this respect, Art. 11 GrMA stipulates that the recourse to mediation interrupts the statute of limitations and the prescription period for as long as the mediation procedure lasts. Without prejudice of Arts 261 et seq. GrCC, limitation and prescription period that has been interrupted, restarts once the report of failure is drafted or a party serves the statement abandoning the mediation to the other party and the mediator or the procedure is in any other way terminated (Γρ.-Ε. Καλαβρός 2010, 181 et seq.; Klamaris and Chronopoulou 2013, 594,).[47]

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[43] According to Klamaris and Chronopoulou 2013, 594: "the beginning of a mediation procedure blocks the opening/continuation of a trial before state courts". Komnios (Κόμνιος 2007, 41) argued (*de lege ferenda*) that the valid referral of a dispute to mediation and the timely presentation of the relevant procedural objection should create lack of jurisdiction of civil courts under the resolutive condition of (a) the validity of the mediation agreement and (b) the failure of mediation, which will then reset the jurisdiction of civil courts *ipso jure*; in this direction Ορφανίδης 2006, 459, 460 (*de lege ferenda*); see also Kourtis 2013, 204, note 56. As to the mediation clause for future disputes as Standard Form Contract under Art. 2 of Law 2251/1994, see in detail Χριστοδούλου 2010, 294, 295.

[44] Areios Pagos 473/1955.

[45] Areios Pagos 620/1971; in the same direction, among many others, Areios Pagos 32/2009; Three-Member Athens Court of First Instance 2377/1987; Single-Member Athens Court of First Instance 6172/1975.

[46] Legal doctrine further argues that where a party to a dispute does not perform her obligation to attempt to settle the dispute, the other party has a defensive right of substantive law, which has a temporary effect leading to the suspension of her own performance (Χριστοδούλου 2010, 293, 294; Kourtis 2013, 204).

[47] Klamaris and Chronopoulou notε that "[t]he reference to Arts 261 et seq. of the Greek Civil Code and the provision of Art. 11 of the GrMA cannot be considered as successful. They create specific interpretative difficulties, which could suspend and influence both the success of mediation

4 The Mediator

Art. 4(c) GrMA defines the mediator as "a third person in relation to the parties, who is asked to conduct mediation in an effective, competent and impartial way, regardless of the way in which that third person has been appointed or requested to conduct the mediation".

Initially, it was provided that in domestic disputes mediators should be attorneys accredited pursuant to Art. 7 GrMA. After the amendment of the GrMA by para. IE.2 of the first Article of Law 4254/2014, it is provided that also in domestic disputes the parties are allowed to appoint any person accredited according to the GrMA,[48] as has been provided with regard to cross-border disputes. Under Art. 8(2) GrMA, the mediator may be appointed by the parties or by a third party of their choice.

As already mentioned, in case of judicial mediation under Art. 214B GrCCP, mediators are judges of the court of first instance or the court of appeal, provided that they have not been involved in the particular dispute (Μανιώτης 2012, 711).

The involvement of mediators may be based – usually – on a contract between them and the parties, on a public law instrument (judgment) or even *de facto*, without any existing relationship with the parties (Χριστοδούλου 2010, 297, noting that the agreement to mediate may relate the mediator with only one of the parties). The GrMA refers to only one mediator (singular) and never to mediators. Nor is the term co-mediation found anywhere in the relevant provisions. It cannot be ruled out, however, since no explicit exclusion is made (Klamaris and Chronopoulou 2013, 598). Mediators are not obliged to accept their appointment (Art. 8(4) GrMA); if they accept it, however, they have to act in compliance with the powers and duties given to them by the parties. Before accepting their appointment, mediators must verify that they have the appropriate expertise and premises to conduct mediation and, upon request, they must disclose information concerning their knowledge and experience to the parties (Art. 1.2. of the Code of Conduct).

The law does not provide for the possibility of expelling or discharging the mediator. Maybe a forthcoming ministerial decision will regulate the issue (Klamaris and Chronopoulou 2013, 598; Kourtis 2013, 206, aptly points out that "the mediator must immediately declare any possible conflict of interest, because a late disclosure

as an institution as well as its acceptance as an alternative dispute resolution mechanism". As to the interpretative difficulties of Art. 11 of the GrMA, see also Polyzogopoulos 2013, 1758. As to the issue whether the interruption applies both to claims of parties involved in the mediation process (*inter partes*) and those of third parties (*erga omnes*), see in detail Χριστοδούλου 2010, 303; Anthimos 2012, 156, both arguing that the interruption due to the recourse to mediation has an *erga omnes* effect.

[48]The requirement that lawyers can act as mediators only after their accreditation has, according to Klamaris and Chronopoulou 2013, 602, a suspensive effect, since lawyers shall not suggest mediation to their clients on their own initiative. As to the complaints about the monopoly of lawyers in the domestic mediation arena (Anthimos 2012, 160, with references at notes 38 et seq.).

might jeopardise the mediation. Articles 52 et seq. CCP which set out the reasons and procedures for the exception of a judge from the panel hearing of a case could be applied *mutatis mutandis*").

Art. 5 GrMA provides that mediators training institutions shall be civil non-profit organisations founded by at least one bar association and at least one chamber, and working after being licensed under Art. 7 GrMA. Particular issues concerning such organisations (e.g. licensing process, conditions of operation, programme and content of the training, professional qualities of trainers, sanctions etc.) are regulated by Presidential Decree 123/2011.

Furthermore, Art. 6 GrMA provides for the establishment of the Mediators Certification Commission under the auspices of the Ministry of Justice, Transparency and Human Rights, which is entrusted with the certification of mediators, the supervision of training organisations, the supervision of mediators as regards their compliance with the Code of Conduct and the proposal to the Minister of Justice, Transparency and Human Rights as regards the imposition of sanctions to training organisations.[49]

According to Art. 7 GrMA, the Department of Advocates and Bailiffs of the General Directorate of Administration of Justice of the Ministry of Justice, Transparency and Human Rights is entrusted with the accreditation of mediators, the issuance of the relative administrative acts, the drafting of records containing the names of accredited mediators and licensed training organisations, and their distribution to the courts (Γιαννοπούλου 2014, 79 and seq.).

In the event that a mediator violates the Code of Conduct, the Minister of Justice, Transparency and Human Rights has the power, with the consent of the Mediators Accreditation Commission, to revoke the accreditation temporarily or permanently according to the severity of the violation or the repeated behaviour of the mediator (Art. 5 Code of Conduct).

Art. 4(c) GrMA reiterates part of the wording of Art. 3(b) of Directive 2008/52/EC, stating that the mediator shall conduct in an effective, impartial (Κολτσάκη 2014, 79 and seq.) and competent way. Under Art. 8(4) GrMA, mediators are not obliged to accept their appointment.[50] They are only liable for fraud, by contrast with arbitrators, who are also liable for gross negligence (Art. 881 GrCCP).

Art. 9 GrMA provides for the duty of the mediator to draw up a mediation agreement record containing: (a) the mediator's full name; (b) the location and time of mediation proceedings; (c) the names of the participants; (d) the agreement to

[49]In this respect, the Minister of Justice, Transparency and Human Rights has issued two ministerial decisions dealing with the regulations of operation of the relevant bodies: Ministerial Decision Nr. 34801 οικ./24.4.2012 and Ministerial Decision Nr. 34802 οικ./24.4.2012 (cf. Ρίζος 2011, 245 et seq.; Χριστοδούλου 2010, 300, as regards e.g. the legal nature of codes of ethics, their effect on third parties, the extent of the right of self-regulation of the said organisations, etc.).

[50]Mediators can, however, terminate the process in case they notice any violation of criminal law provisions or the Code of Conduct (Σκορδάκη 2012, 188).

mediate upon which the mediation procedure was based; (e) the agreement reached in the mediation or the failure of the mediation and the cause of the dispute.

After the end of the mediation proceedings, the minutes are signed by the mediator, the parties and their attorneys. Upon request of at least one of the parties, the original document of the agreement can be submitted by the mediator to the Court of First Instance of the jurisdiction where the mediation took place.[51]

By virtue of Art. 7 GrMA, Ministerial Decision Nr. 109088 οικ./12.12.2011 of the Minister of Justice, Transparency and Human Rights on the accreditation requirements for foreign mediators (see Σκορδάκη 2012, 184, 185, as regards the criticism against the exclusion of recognition of accreditation titles acquired outside EU, such as in the USA),[52] as well as the Code of Conduct which accredited mediators shall respect, have already been issued.

The mediator is obliged under the Code of Conduct to ensure that prior to the beginning of the mediation the parties have understood and expressly agreed on the terms and conditions of the agreement to mediate, including any provisions relating to obligations of confidentiality of the mediator and the parties (Art. 3.1. Code of Conduct).

Obviously, the Greek legislator took significant measures in order to ensure the quality of mediation as provided in Art. 4 of Directive 2008/52/EC. It has been argued, however, that complexity, bureaucracy and difficulties in the implementation of the existing legal framework unfortunately contribute to the maintenance of the limited interest in ADR methods in Greece (K. Καλαβρός 2012, § 31 III, p. 23, argued in favour of the establishment of strict criteria as regards the option of lawyers-mediators).

5 The Process of Mediation

Mediation procedure is basically governed by Art. 8 GrMA in a spirit of flexibility, given that the relative details are to a large extent determined by the mediator after consultation with the parties. The parties are free to agree with the mediator on the manner in which the mediation is to be conducted either by reference to a set of rules or otherwise (Art. 3.1. Code of Conduct). The lack of formality should not, however, be considered as introducing an out-of-law process. Mediation is not over and above the law. On the contrary, fundamental procedural achievements, such as the equality of the parties, the independence and impartiality of mediators etc., are necessary

[51]Decision Nr. 85485 οικ./18.9.2012 of the Ministers of Finance and Justice, Transparency and Human Rights, issued by virtue of Art. 9 GrMA, set the relevant fee at the amount of 100,00 euros.

[52]Cf. Athens Administrative Court of Appeal 1777/2009; Athens Administrative Court of Appeal 608/2008.

in order to ensure its success (Μανιώτης 2012, 716, argues that the regulatory framework of mediation must not be determined exclusively by the parties).[53]

An important element of the mediation procedure is its confidential character. As stipulated in Art. 10 GrMA, mediation shall be conducted in such a way as to respect confidentiality, unless the parties agree otherwise. The parties may bind themselves in writing to maintain confidentiality as to the contents of any agreement reached between them, unless the disclosure of its content is necessary for the enforcement of such agreement.

None of the persons involved in the mediation procedure (e.g. mediators, parties, their attorneys etc.) shall be heard as witness in the future (they are exempted according to Art. 400 GrCCP).[54] Nor shall they be compelled to disclose information concerning the mediation procedure in subsequent court or arbitration proceedings, unless it is imposed by public policy rules and in particular when it is required in order to ensure the protection of children or to prevent harm to the physical or psychological integrity of a person.

As regards judicial mediation (Art. 214B(6) GrCCP), it is also expressly provided that all persons involved bind themselves in writing to maintain confidentiality. The procedure shall be similarly conducted in such a way as to respect confidentiality, unless the parties agree otherwise.

Despite the objective of the flexibility, as stated above, mediation procedure is also regulated by framework provisions. In this respect, Art. 8(1) GrMA provides that the parties shall attend the mediation procedure accompanied by authorized attorneys.[55] By virtue of Art. 8(2) GrMA the mediator shall be appointed by the parties or a third person of their choice.[56] It is subsequently stated that the parties are free to terminate the mediation procedure whenever they wish.[57] Art. 8(3)(b)

[53]Explanatory Report to the GrMA (Art. 8).

[54]However, the objection of witness exemption under Art. 403 GrCCP loses its significance since the court may take into account evidence not fulfilling legal requirements (Κόμνιος 2007, 34; Νικολόπουλος 2011, § 16 V, p. 260 et seq., 265 et seq.; Παϊσίδου 2008, 464). The issue has not been dealt with by Γρ.-Ε. Καλαβρός 2010, 178 et seq.; Αναστασοπούλου 2011, 43; Anthimos 2012, 159. See also Ρίζος 2011, 48 on the comparison between the mediator and the technical advisor.

[55]This provision has been criticised by Σκορδάκη 2012, 186, who notes that it is difficult to justify such obligation, given also its absence even in arbitration proceedings; she admits, however, that attorneys may contribute to reaching and drafting an enforceable agreement (in this direction, see also Ρίζος 2009, 42 43; Παντελίδου-Κουρκουβάτη 2012, 1511). No specific obligation is provided for the lawyers of the parties as regards the conduct of mediation (see among others Klamaris and Chronopoulou 2013, 590).

[56]The mediator may be chosen on the basis of the records under Art. 7 GrMA in case of domestic mediation, or from foreign mediation institutions in case of cross-border disputes.

[57]Given that the parties shall have full control over the result of the mediation (i.e. reaching of an agreement), while the mediator shall have full control over the procedure, Skordaki (Σκορδάκη 2012, 187) argues that the "termination of the mediation procedure by the parties" shall be interpreted as a declaration that they are not willing to reach an agreement and, so, the mediator shall terminate the procedure without delay.

GrMA stipulates that no minutes or records are kept.[58] The mediator can, moreover, communicate and meet in private each party. Similar provisions are introduced by Art. 214B(3)(a) GrCCP as regards judicial mediation.

Neither the GrMA nor Art. 214A GrCCP provide directly for the duration of the mediation procedure. This could be determined by provisions concerning the court procedure. In this respect, Art. 3(1)-(2) GrMA stipulates that the recourse to mediation results in a temporary stay of court proceedings up to the termination of the mediation, which cannot exceed the period of 6 months. Similar provision can be found in Art. 214B(4) GrCCP concerning judicial mediation.

One should note that the main mediation procedure may finish even within 1 or 2 days, reaching an agreement or not (Παντελίδου-Κουρκουβάτη 2012, 1513). In this direction, Art. 12(1) GrMA provides that the mediator is remunerated on an hourly basis and for a period of time not exceeding 24 h, including the time necessary for preparation for the mediation procedure.[59]

6 Failure of Mediation and Its Consequences

As already stated, Art. 8(3) GrMA provides that the parties can finish the mediation procedure at any time they wish, meaning that they can declare their will not to reach an agreement and, thus, the mediator himself proceeds immediately to the termination of the procedure. GrMA does not contain specific provisions in case of an unsuccessful mediation. The last paragraph of Art. 9 GrMA only stipulates that in case of unsuccessful mediation the mediator shall draw up and sigh the minutes alone. He shall not, however, mention the cause of such failure and the party responsible for it (Klamaris and Chronopoulou 2013, 596).

Even though the GrMA does not explicitly enumerate the consequences following an unsuccessful mediation, its spirit makes it clear that at least on some occasions there shall be consequences of a substantive or procedural nature. For instance, the prescription period that was interrupted shall be renewed. If the mediation was ordered by the court, the latter continues the proceedings after summons by any of the interested parties. If the parties refer to mediation before the commencement of the court proceedings, they can file a lawsuit concerning their claim (Klamaris and Chronopoulou 2013, 596). Contrary to the initial proposal,[60]

[58] Skordaki (Σκορδάκη 2012, 187, 188) notes that this ensures the confidentiality of the procedure as well as the rapport between the mediator and the parties.

[59] Anthimos (2012, 161) argues, however, that "mediation ... seems to be a pretty luxurious means of dispute resolution for small claims and cases falling under the subject matter jurisdiction of the Justices of Peace".

[60] See draft Art. 208(2) GrCCP, as is to be amended in order to include regulation on mediation issues, in Ειδική Νομοπαρασκευαστική Επιτροπή του Υπουργείου Δικαιοσύνης για την τελική διαμόρφωση του ΚΠολΔ 2009, 168, where is noted that in case of unsuccessful

neither the GrMA nor Art. 214B GrCCP eventually prohibit a second attempt to mediate in case of failure; in this sense no judicial review procedures are provided in such case, since mediation may only result either in a conciliatory settlement or in failure (Ηλιακόπουλος 2012, 32; Τίτσιας 2012, 318).[61]

According to an apposite remark (Παντελίδου-Κουρκουβάτη 2012, 1511), both the mediation process and the final outcome often allow the parties to express their negative emotions and the tension that they may feel due to the bad development of their entrepreneurial, private, family or other relationships. This mere fact, even in case of failure,[62] may lead both parties to mature in a short period of time, to reassess the advantages and disadvantages of their positions, to re-evaluate the goodwill of the other party and the suggestions made during the mediation and to discuss their case and the available options in the presence or their attorneys, even in the absence of the mediator, coming to an agreement. It is stated, in the same framework, that sometimes, 1 or 2 months after the first unsuccessful mediation, the procedure is repeated on the parties' initiative and in the presence of the mediator, eventually resolving the dispute by signing the final agreement.

7 Success of Mediation and Its Consequences

As stated in Art. 9 GrMA, after the successful conclusion of the mediation procedure the mediator, the parties and their attorneys sign the minutes, that is the proceedings record. Upon request of at least one of the parties,[63] the mediator submits the original document of the minutes to the court of first instance of the jurisdiction where the mediation took place.[64]

The Explanatory Report to the GrMA highlights that the mediation procedure, from its very beginning, during its course and until its – successful or not – termination, constitutes a consensual and voluntary process. In this respect, given the nature and the purpose of mediation one may think that mediation agreements are probably more suitable for voluntary execution, so that the maintenance of an amicable and workable relationship between the parties is ensured to the benefit of their individual and professional as well as the social interest. It has been considered necessary, however, that certain conditions for the enforcement of such agreements

mediation, a second attempt between the same parties is not allowed (see also Άνθιμος 2010, 489).

[61] Part A of the Explanatory Report to the GrMA.

[62] See Part A of the Explanatory Report to the GrMA, stating that even in case of failure, the parties will have obtain the benefit of having at least discussed and tried to understand each other's positions.

[63] However, Art. 6(1) of Directive 2008/52/EC requires both parties' consent even in this case.

[64] In case of either a mediation under the GrMA or a mediation under Art. 214B GrCCP, the interested party pays the fee of 100,00 euros.

shall be established, so that recourse to mediation is further encouraged and the involved parties rely on a predictable legal framework.[65]

By virtue of Art. 9(3) GrMA, since their filing to the clerk of the one-member court of first instance the minutes recording a mediation agreement concerning a claim subject to enforcement constitute an enforceable title under Art. 904(2) GrCCP, which contains a list of instruments that may constitute enforceable titles, including the minutes of court proceedings embodying conciliation.

As clearly stated, in order to be enforceable, the mediation agreement shall concern a claim capable of being materialised through enforcement proceedings (Klamaris and Chronopoulou 2013, 595).[66] This means that an obligation to provision, action or omission shall be assumed or imposed through such agreement (cf. among others Νίκας 2010, § 18 II, p. 367, 368; Areios Pagos (Full Bench) 2092/1986). Without doubt, the Greek legislator has expressed himself in a narrower way than he wanted so that the view under which the said provision does not apply to formative rights (as is, for instance, the case of distribution of immovable property), cannot be welcome (K. Καλαβρός 2012, § 31 III, p. 28). Therefore, the creation, the alteration or even the abrogation of real rights can take place by virtue of the minutes recording a mediation agreement (Διαμαντόπουλος 2013). The Explanatory Report to the said Article of the GrMA supports this view, stating that this provision ensures the immediate execution of the mediation agreement with no further recourse to other legal proceedings and without neglecting the voluntary nature of the whole process; the inscription of the executory formula is made according to Art. 918(2)(b) GrCCP, namely by the judge of the one-member court of first instance.

On the occasion of the comparison between the legal provisions concerning the minutes recording the conciliatory dispute resolution under Art. 214A GrCCP and the minutes recording a mediation agreement under Art. 9 GrMA, it has been argued that the former equal to judicial settlement as regards their effects, resulting in the quashing of the proceedings (under the wording of Art. 214A(3)(d) GrCCP), while the latter do not carry this quality (K. Καλαβρός 2012, § 31 III, p. 28, 29). This view cannot be welcomed if one considers that this difference in the wording accrues from the essential distinguishing feature of the two cases. The minutes recording the conciliatory dispute resolution under Art. 214A GrCCP always involve commencement of the court proceedings, whereas the minutes recording a mediation agreement do not involve such commencement of the court proceedings. In this sense, the minutes recording a mediation agreement clearly fall within the scope of the out-of-court settlement under Art. 293(2) GrCCP (Κόμνιος

[65]Explanatory Report to the GrMA (Art. 9). G.-E. Calavros (Γρ.-Ε. Καλαβρός 2010, 163) considers the provision that the enforcement of conciliation agreements depends on the parties will as an ‘intentionally weak point’.

[66]K. Calavros’ reservations (K. Καλαβρός 2012, § 31 III, p. 29) that the wording of Art. 9 GrMA could result in the misunderstanding that parties’ agreements simply recognising claims are enforceable too, are considered exaggerating.

2007, 51; cf., however, Klamaris and Chronopoulou 2013, 595, who talk about 'simple agreement').[67] One should accept, however, that once filed with the clerk of the court of first instance and, thus, explicitly become enforceable under Art. 904(2)(c) GrCCP (and not under Art. 904(2)(g) GrCCP), the minutes recording a mediation agreement equal to judicial settlement, resulting, thus, in the quashing of the proceedings that may have already commenced, as well as to the form of notarial act, being, thus, able to be used as title to be registered, when the mediation concerns the creating, transfer, alteration or abrogation of real rights on immovable property. Both the wording and the spirit of the Greek legislator moves towards this direction, if one also considers that such provision for the quashing of the proceedings under Art. 214A(3)(d) GrCCP is not even included in Art. 214B GrCCP on judicial mediation, although Art. 293(1)(b) explicitly equates judicial mediation with judicial settlement; consequently, judicial mediation certainly implies the quashing of the proceedings. The opposite approach, i.e. that the quashing of the proceedings is only possible when the minutes recording a mediation agreement are included in the minutes of the proceedings under Art. 293(1) GrCCP so that a judicial settlement subsequently takes place (Κ. Καλαβρός 2012§ 31 III, p. 29; Κόμνιος 2007, 51; Τζινοπούλου 2007, 174; Ηλιακόπουλος 2012, 31), is regarded as purely formalistic – particularly if one considers that the latter usually happens when the mediation did not take place according to the institutional framework set out by the GrMA.[68] In other words, an invalidly conducted mediation would be considered as equal to a validly conducted mediation.

8 Costs of Mediation

Pursuant to Art. 12(1) GrMA, the mediators' remuneration is to be calculated on an hourly basis. Under the same provision, the occupation of mediators cannot exceed 24 h, including preparation time. The parties and the mediator, however, can agree otherwise as regards the mediator's remuneration method (Klamaris and Chronopoulou 2013, 592; Kourtis 2013, 213, noting that the parties and the mediator may agree to apply a mode of mediator's remuneration different from the one based on an hourly rate; See also Χριστοδούλου 2010, 51, who argues that when the mediator is an attorney lawyers fees regulations should apply; such approach cannot be easily justified, however). By virtue of Art. 9(2) GrMA, the mediator's

[67]Cf. ultimately Areios Pagos (Full Bench) 4/1990; Areios Pagos (Full Bench) 2092/1986; Areios Pagos 1540/2003; Patra Court of Appeal 148/2002, with further references.

[68]For instance, because the mediator is not accredited according to the GrMA. In such cases, the minutes recording the mediation agreement can become enforceable (a) when they are incorporated in a notarial act; (b) after the issuance of an order of payment when the agreement concerns the recognition of a money claim; (c) when they are incorporated in the minutes recording court proceedings embodying the settlement of the parties under Art. 293(1) GrCCP (see also Χριστοδούλου 2010, 306 et seq.; Σκορδάκη 2012, 192).

remuneration shall be borne by the parties in equal shares, unless otherwise agreed by them. The parties shall also bear the fees of their attorneys. Art. 12(3) GrMA provides that the particular determination and adjudication of the hourly based mediator's remuneration shall be made by the Minister of Justice.[69]

It is to be noted that there is no particular provision as regards the mediator's remuneration in case of judicial mediation under Art. 214B GrCCP (Άνθιμος 2012, 283).

It is to be also reminded that, apart from the mediator's remuneration, in both cases of mediation (GrMA and Art. 214B GrCCP), when the mediator submits the original document of the minutes to the court of first instance of the jurisdiction where the mediation took place, the interested party shall pay a relevant fee, as stipulated in Art. 9 GrMA.[70]

Neither the GrMA nor other special legislation contains provisions dealing with legal aid for the mediation process in particular.

Legal aid in civil and commercial matters is governed by the provisions of Arts 194 et seq. GrCCP on the 'benefit of poverty' and Law 3226/2004, which was promulgated to implement Directive 2002/8/EC.[71] It introduced a complete system of legal aid for civil and commercial matters covering both internal disputes as well as disputes with cross-border implications when the parties are citizens of a Member State of the European Union or have their domicile or residence in a Member State. After its enactment, the application of the provisions of Arts 194 et seq. GrCCP in case of civil and commercial disputes has been limited to legal entities as well as to individuals who are not citizens of a Member State of the European Union and have their domicile or residence outside the European Union (Yessiou-Faltsi 2011, 206).

It has been argued that such provisions can hardly apply to legal aid for the mediation process covering its costs as well as the remuneration of attorneys and mediators.[72] However, given that according to Art. 196(1) GrCCP and Art. 8(1) of

[69]By virtue of Decision Nr. 1460/ οικ./27.1.2012 of the Minister of Justice, Transparency and Human Rights, the mediator's hourly based remuneration has been determined at the amount of 100,00 euros.

[70]Decision Nr. 85485 οικ./18.9.2012 of the Ministers of Finance and Justice, Transparency and Human Rights has set the relevant fee at the amount of 100,00 euros. *Supra* notes 76 and 94.

[71]Directive 2002/8/EC of the Council of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating legal aid for such disputes, EE L 26, 31.1.2003, 41.

[72]Cf. Recitals (11) and (21) and Art. 10 of Directive 2002/8/EC. See also Άνθιμος 2010, 480–481; Anthimos 2012, 154; Άνθιμος 2014, 46. The latter also refers to Art. 10(c) of Law 3226/2004, which provides that "in case of cross-border disputes legal aid may also consist in the appointment of a legal adviser to assist with the settlement of the dispute before the commencement of a court proceeding", arguing that this provision could be understood as covering the attorney's remuneration in case of mediation, but it cannot not be considered as covering the mediator's remuneration and other costs of mediation.

Law 3226/2004 legal aid can also be granted for actions not associated with "trial",[73] one could conclude that under the existing legal framework legal aid can cover all the costs of mediation, including the remuneration of attorneys and mediators. Of course, legal aid can be granted under the provisions of Arts 194 et seq. GrCCP and Law 3226/2004 for the enforcement of authentic instruments embodying a mediation agreement.

9 Cross-Border Mediation

9.1 Notion and Main Features

The notion of 'cross-border mediation' in the Greek legal order shall be deducted by the provision of Art. 4(a) GrMA, which defines the term 'cross-border dispute'. Almost repeating the wording of Art. 2 of Directive 2008/52/EC, Art. 4(a) GrMA provides that a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which: (a) the parties agree to use mediation after the dispute has arisen; (b) mediation is ordered by a court of a Member State; (c) an obligation to use mediation arises under national law; or (d) an invitation is made to the parties by the court before which an action is already brought. The said provision further states that a cross-border dispute shall also be one in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date on which the circumstances mentioned above under (a)-(c) occurred. So far the GrMA constitutes the only regulatory framework concerning cross-border mediation. This does not mean, however, that a mediation process cannot take place when one of the parties is, for instance, domiciled outside the EU. Such process may of course be defined as 'cross-border mediation'; however, this case is not regulated by Greek law and none of the provisions of the GrMA shall apply.[74]

The provisions of the GrMA apply to both internal and cross-border mediation within the EU, which are, thus, regulated in a uniform way. The only exception to such rule of uniform or 'monistic' regulation was introduced by the provision of Art. 4 GrMA, which required that particularly in domestic disputes mediators should be only attorneys accredited according to the GrMA, while in cross-border disputes parties are allowed to appoint any person accredited according to the GrMA. Such differentiation was seemingly unjustified and could give rise to constitutional law concerns on grounds of infringement of the principle of equality (Art. 4 of the

[73] An analysis of the said provision of the GrCCP can be found in Κεραμεύς, Κονδύλης and Νίκας (−Ορφανίδης) 2000, Art. 196.

[74] By contrast with international arbitration, which is governed by Law 2735/1999.

Constitution).[75] As already mentioned, after the amendment of the GrMA by para. IE.2 of the first Article of Law 4254/2014, it is provided that also in domestic disputes the parties are allowed to appoint any person accredited according to the GrMA, as provided with regard to cross-border disputes.

Ultimately, particular mention should be made of certain conflict of laws issues that may arise concerning cross-border mediation. This is the case of the law applicable to contracts that are related to the mediation procedure, such as: (a) the agreement to mediate; (b) the agreement between the mediator and the parties; and (c) the agreement settling the dispute between the parties (cf. in this respect Alexander 2013, 170–171). In case of a cross-border mediation the law applicable to the relevant contracts – particularly in case of an agreement under (a) or (b) – shall be governed by the Rome I Regulation.[76] As to agreements that escape the ambit of Rome I Regulation[77] – which might be the case of an agreement under (c) – the old provision of Art. 25 GrCC is still applicable (for an overview see Vrellis 2009, 81 et seq.).

9.2 Recognition and Enforcement of Foreign Mediation Settlements

In spite of the voluntary character of the mediation process, there is currently no doubt that this comprises the freedom to resolve a specific dispute by a binding and enforceable agreement (Hopt and Steffek 2013, 3 et seq., at 45 et seq.). This is of particular importance at the level of cross-border mediation, where the effectiveness of a given enforcement regime for foreign mediation settlements may be a decisive factor for the success of the institution of mediation itself.

In this respect, foreign mediation agreements that have been made enforceable in a Member State of the European Union shall be recognised and declared enforceable in Greece as follows[78]: (a) by virtue of Arts 57 and 58 of the Brussels I Regulation,[79]

[75] As to the relevant debate, see instead of others Anthimos 2012, 160, with further references. It is needless to mention that in case of a cross-border mediation outside the scope of the GrMA no particular requirements seem to apply as regards the qualities and the accreditation of the mediator.

[76] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, EE L 177, 4.7.2008, 6, in force since 17 December 2009.

[77] As defined in Art. 1 of the Rome I Regulation.

[78] See Directive 2008/52/EC, Recitals (20) and (21).

[79] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, EE L 12, 16.1.2001, 1. From 10 January 2015 Regulation (EC) No 44/2001 has been replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, 1 (Brussels I bis). Since this date, Articles 58 and 59 of Brussels I bis Regulation are applicable.

which apply to authentic documents and court settlements respectively in civil and commercial matters; (b) by virtue of Art. 46 of the Brussels II Regulation,[80] which applies particularly to authentic instruments and agreements in matrimonial matters and matters of parental responsibility; (c) by virtue of Art. 48 of Regulation EC No 4/2009,[81] which applies particularly to authentic instruments and court settlements relating to maintenance obligations; (d) by virtue of Arts 59–61 of Regulation EU No 650/2012,[82] which applies particularly to authentic instruments in matters of succession; (e) by virtue of Regulation EC No 805/2004,[83] which provides for the issuance of a European Enforcement Order in case of uncontested claims. In the latter case, in fact, a foreign mediation agreement may be recognised and enforced even when it would be inadmissible if reached in Greece, given that Greek courts shall not be able to invoke the public order clause to prevent enforcement in such cases (Κόμνιος 2007, 51, 52; Γρ.-Ε. Καλαβρός 2010, 176 et seq.; Άνθιμος 2010, 480; Anthimos 2012, 152).[84] Mediation agreements reached within the European Union, which have not been recorded in an authentic instrument and are not enforceable in a Member State, can be made enforceable according to Art. 904 GrCCP, namely: (a) by being incorporated in a notarial act; (b) after the issuance of an order of payment when the agreement concerns the recognition of a money claim; (c) when they are incorporated in the minutes recording court proceedings embodying the settlement of the parties under Art. 293(1) GrCCP.

Foreign mediation agreements reached outside the European Union, which are registered as an authentic instrument and are enforceable according to the law of the country of origin, shall become enforceable in Greece in accordance with the provisions of Art. 57 of the Lugano Convention of 2007[85] (with regard to Norway, Switzerland and Iceland) or any existing bilateral treaties, otherwise in accordance with Art. 905 para. 2 GrCCP, provided that they are not contrary to good morals and the Greek public order. If such agreements have not been recorded in an authentic instrument, they can be made enforceable according to Art. 904 GrCCP, as mentioned above, i.e. (a) by being incorporated in a notarial act; (b) after

[80]Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, EE L 338, 23.12.2003, 1.

[81]Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, EE L 7, 10.1.2009, 1.

[82]Council Regulation (EU) No 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, EE L 201, 27.7.2012, 107.

[83]Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, EE L 143, 30.4.2004, 15.

[84]The public order clause can be invoked in the case of the Brussels I Regulation, Brussels II Regulation etc.

[85]Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30.10.2007, EE L 339, 21.12.2007, 1.

the issuance of an order of payment when the agreement concerns the recognition of a money claim; (c) when they are incorporated in the minutes recording court proceedings embodying the settlement of the parties under Art. 293(1) GrCCP (see also Kourtis 2014, 198).

10 E-Justice

The application of (e)justice instruments to the mediation process is currently provided by Directive 2013/11/EU,[86] which shall be transposed to Greek law by 9 July 2015, and Regulation (EU) No 524/2013,[87] which is applicable from 9 January 2016. Both legal instruments provide for the establishment of online dispute resolution mechanisms for consumer disputes (Κόμνιος 2013, 419 et seq.; Κόμνιος 2014, 31 et seq.).

The GrMA does not regulate the application of e-justice instruments to the mediation process. At the same time, the application of such instruments cannot be excluded, given also the absence of any provision explicitly requiring the physical presence of the parties at specific stages of the process (Klamaris and Chronopoulou 2013, 599).[88] The use of online technology may facilitate the mediator and the parties when direct meetings are not possible due to geographic distance or other barriers. Therefore, it could be an advantage in case of certain cross-border mediation processes or even when the value of the dispute does not justify the costs of physical presence (Μακρής 2009, 157 et seq., *passim*).

11 Concluding Remarks

Mediation is, above all, a philosophical concept known to almost all civilisations. Without doubt, nevertheless, its promotion nowadays is based on a certain political choice about the governance of the state, aiming at important economies on the budget concerning the function of justice and, of course, taking account of the cost of the latter for the whole society. This trend necessarily implies a new interpretation and understanding of the principle of access to justice, as provided by Art. 20 of the

[86]Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.06.2013, 63.

[87]Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.06.2013, 1.

[88]See Directive 2008/52/EC, Recital (6). Even though Art. 8(1) GrMA stipulates that "the parties attend the process with an attorney", should not be interpreted as requiring the physical presence of the parties or their attorneys, but rather the participation of the attorney in the process.

Constitution and Art. 6 of the European Convention on Human Rights. Towards this direction, it is explicitly stated in the Recital (5) of Directive 2008/52/EC that the "objective of ensuring better access to justice should encompass access to judicial as well as extrajudicial dispute resolution methods", which should be offered and organised by the state. Such methods should be considered as 'complementary' and not 'alternative' dispute resolution methods.

With the exception of arbitration, ADR methods have been treated with certain scepticism in Greece for a number of reasons, such as the fear before the unknown or even the famous Mediterranean mentality (Polyzogopoulos 2013, 1759). As happened in many other jurisdictions, the majority of lawyers in Greece still regard ADRs as ways of '*A*ccelerated *D*ecrease of *R*evenue'. Given, moreover, the relatively low court costs, interested parties have not been prevented from referring to court proceedings even when the possibilities of winning the case are limited (Makridou 2010, 127).

The promotion of mediation in Greece depends on the awareness of its advantages as an innovative tailor-made process which allows the parties to discover the core of their conflict and reach solutions that only satisfy their interests, but could not be obtained in a court room. A curriculum reform in law schools seems to be necessary in this respect. Furthermore, the quality of the mediators' training as well as the compliance with high ethical standards will definitely play an important role. Admittedly, a first step towards a positive familiarisation with mediation processes is being made through judicial mediation due to the institutional authority and reliability of judges in the minds of the parties in Greece. This is a great advantage, which, at least at the moment, outweighs disadvantages such as the burdening – or the failure of disburdening – of courts and the lack of mediation training requirements as regards judges-mediators. Despite the limited application of the existing legal framework, one can note that since the enactment of the GrMA and Art. 214B GrCCP an increasing number of professionals appear to be interested in learning about the new institution. Given also the significant delays in the state-administered justice, one can expect that in the long term more interested parties may be drawn to mediation and other ADR forms.

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Mediation in Italy: Feature and Trends

Alessandra De Luca

Abstract This chapter examines the present situation of mediation in Italy, trying to highlight the most important features and trends.

Although the right of access to the courts guaranteed by article 24 of the Italian Constitution has traditionally been seen as a right of access to a judge and to a decision by the judge, in recent times Italy too shared the general trend towards ADR. Mediation is the most widespread ADR device and also the one to which the Italian legislator has attached more importance as a means to alleviate the workload of the court system.

The legislative decree of 4 March 2010, no. 28 implemented the EU directive by enacting the first general regulation of mediation for civil and commercial disputes, without distinguishing between domestic and cross-border mediations. The hallmark of the new regulation, and its most controversial feature, is "mandatory out-of-court mediation" for the disputes concerning a large and diverse range of subject matters. Another distinguishing feature of the Italian system is the adoption of administered mediation, with mediators acting only within the framework of registered centres established by public or private bodies. While informality is one of the basic principles concerning the process of mediation, the initial and final stages of the procedure are considerably regulated, with several provisions intended to encourage the parties to reach an agreement.

Even though it is possible for the procedure to take place online, the regulation is scarce and ODR is still underdeveloped.

A. De Luca (✉)
Dipartimento di Scienze Giuridiche, University of Florence School of Law and a Lecturer of Comparative Law at the University of Florence School of Economics and Management, Florence, FI, Italy
e-mail: adeluca@unifi.it

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1 The Existing Situation of ADR

Although the right of access to the courts guaranteed by article 24 of the Italian Constitution has traditionally been seen as a right of access to a judge and to a decision by the judge (Varano and Simoni 2012, 43), in recent times Italy too shared the general trend towards alternative methods of dispute resolution (Trocker and Varano 2005, 259–261). Therefore, even if in the Italian legal system there is not the wide variety of ADR that can be found in common law countries, today the range of ADR devices existing in Italy includes arbitration, mediation, the *negoziazione paritetica* procedure, and a series of complaint procedures.

Arbitration, which is the more traditional ADR, is not very often used. On the contrary, nowadays a very significant number of disputes are solved by *negoziazioni paritetiche*. These procedures are based on a negotiation before joint committees made up of representatives of providers and users of a service and have been developing in Italy since the 1990s on a voluntary basis in fields such as telephone and insurance services (Vaccà 2011; Minelli 2011a, 97–101). Also complaint procedures – which are usually offered free of charge by independent authorities such as the Authority for Telecommunications and the Antitrust Authority, and by bodies like the Banking Ombudsman – play a significant role in the Italian ADR landscape.[1]

Mediation, however, is the most widespread ADR device[2] and, as we shall see, also the one to which the Italian legislator has attached more importance as a means to alleviate the workload of the court system. Actually, if judicial conciliation has a long-standing history in Italian civil procedure – although not a very successful one (Varano and De Luca 2007, 13–14; Queirolo et al. 2012, 253–254) -, from the 1990s the need to address the problem of the excessive length of judicial proceedings has led our legislator to introduce several out-of-court conciliation procedures (Silvestri 2008, 249–251).

On this regard, three main legislative measures should be mentioned. First, the law of 29 December 1993, no. 580, which entrusted the Chambers of commerce with the task to institute and promote arbitration and conciliation procedures for disputes between businesses and between businesses and consumers. Second, the law of 31 March 1998, no. 80, which transformed the optional attempt of conciliation provided for labour disputes by articles 410 to 412-*bis* of the Code of civil procedure into a mandatory one. In these cases the prospective claimant shall promote the conciliation attempt before conciliation committees or local organs of the state administration before pursuing her claim in court. The performance of the

[1] According to the annual report published by ISDACI (*Istituto scientifico per l'arbitrato, la mediazione e il diritto commerciale*), which is by now the most comprehensive source of information about ADR in Italy, in 2010 only 753 disputes were referred to administered arbitration, whereas there were 17,407 *negoziazioni paritetiche*, the Authority for Telecommunications received 3,731 complaints, and the Banking Ombudsman 3,409 complaints (Bonsignore 2012, 27–28).

[2] In 2010 almost 68,000 mediations were initiated (Bonsignore 2012, 27).

conciliation attempt constitutes a condition for the claim to further proceed (Varano and De Luca 2007, 14). Third, the legislative decree of 17 January 2003, no. 5, providing for a new special procedure for "corporate cases", introduced a form of optional out-of-court conciliation before centres registered with the Ministry of Justice together with the provision of a series of incentives in order to promote its use (Varano and De Luca 2007, 15; Silvestri 2008, 251).

The results of these measures, however, fell short of expectations. As it has recently been observed, in the years following the first modern mediation law of 1993

> a paradox emerged in Italy: disputants as a whole refused to use mediation to resolve their disputes even though statistics demonstrated that when mediation *was* used, the success rate was quite high. During this time period, mediation was used in a mere 0.1 per cent of Italian cases though mediated cases enjoyed an 80 per cent success rate (Marinari 2012, 188).

In particular, although the overall impression about the procedures developed by the Chambers of commerce is positive, their availability seems not yet as much known as it should be (Varano and Simoni 2012, 48–49). For labour disputes, whereas the optional out-of-court conciliation attempt had traditionally been rather successful, after conciliation became mandatory in many cases the filing of the application has turned out to be a mere formality (Trocker 2010, 15). This is probably why the law of 4 November 2010, no. 183 amended the relevant provisions of the Code of civil procedure again and restored the optional character of the conciliation attempt. The procedure for corporate cases, in turn, after an experience of a few years has been deemed so unsatisfactory that it has been abolished by article 54 of the law of 18 June 2009, no. 69, with a notable exception, however: the provisions concerning arbitration and out-of-court conciliation.

Actually, those provisions were the basis for the legislative decree of 4 March 2010, no. 28 on "mediation aiming at conciliation of civil and commercial disputes" (henceforth "the legislative decree"), that introduced the first general regulation of mediation for civil and commercial disputes in the Italian legal system and implemented the directive no. 2008/52/EC on mediation in civil and commercial disputes (henceforth "the directive").

2 The Basis for Mediation

2.1 The Notion of Mediation

Until not many years ago, in the Italian legal system the term "mediator" meant "broker" and the related contract was referred to as "mediation", whereas provisions concerning a non-adjudicatory dispute resolution procedure referred to it as "conciliation".[3] The word "mediation" in the context of methods of dispute resolution

[3] See, e.g., articles 185 and 410 of the Code of civil procedure. For a comprehensive translation and a commentary on the Italian Code of civil procedure see Grossi and Pagni (2010).

first appeared in family[4] and criminal[5] procedures at the beginning of the 2000s. Since then, however, the term "mediation" has become more and more frequent, generating a certain degree of confusion and debate among scholars, because the difference between "conciliation" and "mediation" was not at all clear.

This uncertainty has been solved by the legislative decree, whose article 1 for the first time gives a definition of mediation as

> the activity, whatever its name, carried out by an impartial third party aiming at assisting two or more parties in the search of an agreement to settle a dispute, also by the formulation of a proposal to solve that same dispute.

The original wording of this provision referred to both facilitative and evaluative mediation, putting them on an equal footing. The current definition of mediation, as modified by the law of 9 August 2013, no. 98, seems to favour the first one, instead, thus stressing the voluntary nature of mediation.

That same article defines a "conciliation" as the agreement reached by the parties as a result of mediation.

Although it is not explicitly stated in the legislative decree, this definition excludes judicial conciliation. Such an interpretation can be inferred not only from the fact that the legislation contains only provisions concerning mediation carried out by a third private party, but also from article 2 of the directive that was implemented by the legislative decree. According to that provision, the notion of mediation "excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question".

The legislative definition of "mediation", instead, explicitly excludes from this notion *negoziazione paritetica* (article 2 of the legislative decree). In fact, these procedures are based on a negotiation that does not provide for the presence of an impartial third party.[6]

Until the legislative decree was adopted, in Italy there was no provision concerning court-annexed mediation. However, this lack of legislative regulation was not intended as a prohibition and court-annexed schemes were developed in some courts of first instance, namely in Milan and in Florence. Then, article 5, paragraph 2 of the legislative decree, implementing the provision of article 5, paragraph 1 of the directive, introduced court-annexed mediation providing that, having regard to the nature of the case, the level of the proof-taking stage and the conduct of the parties, the judge may suggest them to submit their dispute to mediation, also during the appeal proceedings. This provision, which was not applied very frequently,[7] has

[4] See article 342-*ter* of the Italian Civil code, introduced by the law of 4 April 2001, no. 154 (on restraining orders in cases of family abuses) and article 155-*sexies* of the Italian Civil code, inserted by the law of 8 February 2006, no. 154 (on joint custody) (Varano and De Luca 2007, 16).

[5] See the legislative decree of 28 August 2000, no. 274 (Queirolo et al. 2012, 255, ft. 6).

[6] For the same reason, *i.e.* the lack of an impartial third party, also complaint procedures provided for by service charters are explicitly excluded from the notion of mediation.

[7] According to the statistics provided by the Ministry of Justice, from 21 March 2011 to 31 December 2012 court-annexed mediations were only 2.9 % of the mediations

been amended in 2013 and the mere suggestion has been transformed into an order, thus introducing in the Italian legal system a "mandatory court-annexed mediation" for all civil and commercial disputes.

But this was never intended as the main type of mediation by our legislator. The hallmark of the new regulation of mediation, and its most controversial feature, was "mandatory out-of-court mediation" that was provided for by paragraph 1 of the same article 5 for the disputes concerning a large and diverse range of subject matters.[8] In all these cases, if the parties have not filed an application for a conciliation attempt before pursuing their claim in court, the judge, also on her own motion, will establish a 15 days deadline to file the application and fix a new hearing after the time limit within which mediation must come to an end.

2.2 The Existing Legal Basis for Mediation

As we have seen, in Italy the first general regulation of mediation for civil and commercial disputes was introduced by the legislative decree of 4 March 2010, no. 28, which was adopted by the Government upon delegation contained in article 60 of the law of 19 June 2009, no. 69 (henceforth "the law no. 69/2009"). The legislative decree was implemented and integrated by the Ministerial decree of 18 October 2010, no. 180, on mediation centres, mediators, and mediation costs (henceforth "the Ministerial decree").

It is worth noting that the legislative decree was more than the means to implement the directive. Actually, encouraging the use of out-of-court mediation was one of the measures that the law no. 69/2009 provided in order to enhance the overall efficiency and competitiveness of Italian civil procedure.[9] The purpose of our legislator, in fact, was to lay down a new general regulation of mediation that, while complying with the directive, extended the solutions provided for corporate cases by the legislative decree of 17 January 2003, no. 5 to all civil and commercial disputes. This is why the existing regulation refers to mediation in general, without distinguishing between internal and cross-border mediation. On this respect Italy, like other European countries, went further than the requirements of the directive.

As soon as the provisions of the legislative decree concerning mandatory out-of-court mediation came into force (on 21 March 2011), they were challenged before

initiated. https://webstat.giustizia.it/Analisi%20e%20ricerche/Mediazione%20civile%20al%2031%20dicembre%202012.pdf. Accessed 17 October 2014.

[8]Condominium, property rights, division of assets, hereditary succession, leases, gratuitous loans, immediate family company agreements, rental companies, damages resulting from vehicle and boat accidents, medical malpractice, defamation by the press or other means of advertising, insurance or banking and financial contracts.

[9]On the connection between the excessive duration of proceedings and lost economic development, see Martuscello (2011, 49–51).

the Constitutional court and the Court of Justice of the European Union. This attack, led by the bar, produced two significant results.

First, as a response to some of the challenges brought before the Constitutional court (Marinaro 2012, 1018–1019), the Ministerial decree was amended by the Ministerial decree of 6 July 2011, no. 145, that increased mediators' qualification requirements and reduced the costs of mandatory out-of-court mediations.

Second and foremost, the provisions on mandatory out-of-court mediation were held unconstitutional by the decision of the Constitutional court of 6 December 2012, no. 272.[10] However, this decision was not based on the finding that mandatory mediation *per se* infringed some constitutional principles. Actually, the substantive challenges to mandatory out-of-court mediation were not even considered by the Court, because the first issue it had to decide was the alleged violation of the constitutional rules on delegation of the legislative function.[11] The Court found that the guiding principles and criteria established by the law no. 69/2009 did not enable the legislative decree to provide for a mandatory out-of-court mediation and this was enough to dispose of the case. This made it possible for the government to pass the decree law of 21 June 2013, no. 69 (henceforth "the decree law no. 69/2013"), transposed into and amended by the law of 9 August 2013, no. 98 (henceforth "the law no. 98/2013"), whose article 84 restored mandatory out-of-court mediation[12] and also modified other provisions of the legislative decree. The new provisions are in force since 20 September 2013.

In sum, at present the general legal framework for mediation in Italy consists of the legislative decree no. 28 of 2010 as amended in 2013, and the Ministerial decree no. 180 of 2010 as amended in 2011.

In addition to this general regulation, special rules for specific areas of law still exist. Whereas article 23 of the legislative decree repealed the provisions about out-of-court conciliation in corporate cases that were the model for the new general regime, it explicitly refers to the existing provisions concerning other cases of compulsory mediation and to conciliation in labour disputes in order to exclude

[10] According to the data provided by the Ministry of Justice, from 21 March 2011 (when mandatory out-of-court mediation came into force) to 31 December 2012 215,689 mediation proceedings were initiated. During this period, however, the other party participated in the procedure only in 27 % of cases. The success rate in case of participation was 43.9 %, with a declining trend (from 59.3 % in the first trimester of 2011 to 38 % in the fourth trimester of 2012). https://webstat.giustizia.it/Analisi%20e%20ricerche/Mediazione%20civile%20al%2031%20dicembre%202012.pdf. Accessed 17 October 2014.

[11] According to article 76 of the Italian Constitution "The exercise of the legislative function may not be delegated to the Government unless principles and criteria have been established and then only for a limited time and for specified purposes."

[12] Cases concerning vehicle and boat accidents were excluded. Actually, during the period when out-of-court mediation had been mandatory it had proved to be particularly ineffective in this type of disputes, because insurance companies did not take part in the procedure in 95 % of cases. https://webstat.giustizia.it/Analisi%20e%20ricerche/Mediazione%20civile%20al%2031%20dicembre%202012.pdf. Accessed 17 October 2014.

their abrogation.[13] While the latter has already been briefly discussed above, the main example of the former is compulsory out-of-court mediation provided for the disputes between telecommunications operators and end-users by the law of 31 July 1997, no. 249 as implemented by the decision no. 173/07/CONS of the Communications Regulatory Authority.[14]

3 The Mediation Agreement/the Agreement to Submit the Dispute to Mediation

Before the legislative decree of 17 January 2003, no. 5, Italian courts did not recognize any effect to mediation clauses (i.e. agreements to resort to a mediation procedure if any dispute arises in the future). Then, article 40, paragraph 6, of that legislative decree provided that when the parties inserted a mediation clause in a statute of a company and then the claim was brought without previously attempting to mediate the dispute, the court could enforce the clause.

Article 5, paragraph 5, of the legislative decree extended this provisions to mediation clauses in contracts. It also provided that upon request by the defendant, to be made at the first defence - and this is an important difference from the regime provided for mandatory out-of-court mediation -, the judge or the arbiter shall establish a 15 days deadline to file the petition and fix a new hearing after the time limit within which mediation must come to an end.

There are no particular legal requirements regarding the form or content of these mediation clauses, therefore they are valid insofar as the general rules concerning the formation of contracts are complied with.

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[13] Also the special provisions on mediation existing in family law were unaffected by the new legislative regulation (Varano and Simoni 2012, 48).

[14] This procedure was recently considered by the European Court of Justice in the *Alassini* case (Joined Cases C-317/08 to C-320/08, 18 March 2010) that concluded that "Article 34 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on Universal Service and users' rights relating to electronic communications networks and services (Universal Service Directive) must be interpreted as not precluding legislation of a Member State under which the admissibility before the courts of actions relating to electronic communications services between end-users and providers of those services, concerning the rights conferred by that directive, is conditional upon an attempt to settle the dispute out of court.

Nor do the principles of equivalence and effectiveness or the principle of effective judicial protection preclude national legislation which imposes, in respect of such disputes, prior implementation of an out-of-court settlement procedure, provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or gives rise to very low costs – for the parties, and only if electronic means is not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires."

While the law establishes that mediation is to be held in the place where the judge having jurisdiction sits, the parties, in the mediation clause or in a subsequent agreement, may choose a different location for the mediation to be held.

These clauses are not very frequent,[15] and no specific provision concerning the agreement to submit the dispute to mediation once the dispute has arisen exists in our system.

4 The Mediator

One of the distinguishing features of the Italian system is the adoption of administered mediation, that is to say that mediators are not supposed to act as individuals but only within the framework of mediation centres registered with the Ministry of Justice. If a mediation takes place before a non registered organism or a private mediator, the procedure is not considered to fulfil the condition of article 5, paragraph 1 of the legislative decree, concerning mandatory out-of-court mediation. Furthermore, in case the parties reach an agreement, it will be treated as a common private agreement and therefore it will not enjoy the advantages provided for mediation settlements by the law (Queirolo et al. 2012, 257).

The Ministerial decree no. 180/2010, implementing article 16 of the legislative decree, sets the requirements (aiming at guaranteeing professionalism and efficiency) and the procedure for the registration of mediation centres (Queirolo et al. 2012, 264). They may be established by any public or private authority, but the Italian legislator seems to favour those created by the local bar associations at each *tribunale* (the courts of first instance of general jurisdiction), and those established by other professional organisations and by the Chambers of commerce (legislative decree, articles 18 and 19). In the first case, the legislative aim was clearly to engage the bar and gain its support for mediation, which was rightly seen as fundamental for the success of the reform. In the second case, the privileged position is due mainly to the desire to take advantage of the expertise developed by these professionals (e.g. notaries and accountants) and institutions.

The rules establishing who may serve as a mediator in Italy are set forth by article 4, paragraph 3 of the Ministerial decree of 18 October 2010, no. 180 as amended by the Ministerial decree of 6 July 2011, no. 145 (see Sect. 2.2). The requirements are:

(a) at least a 3-years university degree (but not necessarily a law degree) or the enrolment in a professional association;

[15] According to the statistics of the Ministry of Justice, from 21 March 2011 to 31 December 2012 a mere 0.3 % of the mediations that were initiated were based on a mediation clause. https://webstat.giustizia.it/Analisi%20e%20ricerche/Mediazione%20civile%20al%2031%20dicembre%202012.pdf. Accessed 17 October 2014.

(b) a specific training that can be acquired only by attending the courses organised by registered institutions.[16] Article 18 of the decree provides an initial training course of at least 50 h and biennial refresher courses of at least 18 h. The contents of the courses are both theoretical (the study of mediation legislation, techniques and methodologies) and practical. In their first 2 years, mediators are also required to assist a seasoned mediator in at least 20 mediations held before registered centres.
(c) good standing, that is that the mediator must not have been convicted for a crime or subjected to detention measures, disqualified from public office, subjected to security or precautionary measures, or to a disciplinary sanction more serious than a warning.

The task to verify the mediator's qualifications is entrusted to mediation centres, which may require higher qualifications, especially as far as training is concerned, for the mediators to enrol.

A very important provision on this matter, however, has been recently added by the decree law no. 69/2013, transposed into and amended by the law no. 98/2013. While restoring compulsory mediation, a measure that the bar had opposed, it tried to gain the favour of the legal profession by establishing that all lawyers enrolled with the local bar council are mediators as of right. This controversial provision is somehow mitigated by the requirement of initial and continuing training on mediation, according to article 55-*bis* of the code of conduct for lawyers. However, this provision does not go further than establishing a generic requirement of training, being primarily concerned with guaranteeing the independence of the lawyer acting as a mediator.[17]

Both in case of out-of-court and court-annexed mediation, while the parties (or, better, the party who files the mediation request) are free to choose the mediation centre, the mediator is selected by the centre itself (legislative decree, article 8, paragraph 1), according to the criteria established in its rules of procedure and taking into account the professional competence of mediators in the light of their degree (legislative decree, article 3, paragraph 2 and Ministerial decree, article 7, paragraph 5, letter e)). However, the rules of procedure of mediation centres may grant the parties the possibility to jointly select the mediator (Ministerial decree, article 7, paragraph 5, letter c)), and many centres availed themselves of this possibility (Marinari 2012, 197). Where specific technical competences are needed, auxiliary mediators may be appointed. In these cases there will be a co-mediation. If this is

[16]The rules concerning the requirements and the procedure for registration of these mediation training institutions are established by articles 17–19 of the Ministerial decree.

[17]The Ministerial decree of 4 August 2014, no. 139 added article 14-*bis* to the Ministerial decree no. 18 of 2010, that enhanced the guarantees of impartiality with several measures, including barring mediators from assisting parties in procedures held before the centers they have a connection with and from having a professional relationship with one of the parties in the two years following the end of the mediation procedure.

not possible, the mediator may appoint experts, whose fee is regulated by the rules of procedure of the mediation centre (Queirolo et al. 2012, 272).

Mediators are under a general duty to adhere to legislative rules concerning mediation and to the rules of procedure and the code of conduct of the centres they are registered with. These codes of conduct may differ from each other, but many centres have adopted the European Code of Conduct for Mediators (Marinari 2012, 196).

The legislative decree establishes some other specific duties. Probably one of the most important one is confidentiality, but this topic will be dealt with below, when describing the mediation procedure. Besides that, article 14 of the legislative decree provides a duty of impartiality (mediators can't take any right or duty somehow connected with the matters dealt with; they have the duty to sign a declaration of impartiality, in accordance with the rules of procedure of the mediation centre, and to inform the parties and the centre about possible causes of partiality) and a prohibition against taking fees directly from the parties. Mediators have also the duty to reply promptly to any organisational request of the mediation centre.

Under article 11 of the legislative decree, finally, the mediator has the duty to make a conciliation proposal when the parties who have not reached an agreement jointly ask her to do so. This proposal must comply with public policy and mandatory rules (legislative decree, article 14, paragraph 2, letter c)). The parties are free to accept it or not, but in the subsequent trial the party who refused the proposal may be subjected to adverse cost consequences under article 13 (on which see Sect. 6).

In case of violation of these duties, the parties may ask the mediation centre to replace the mediator (article 14, paragraph 4). This procedure is to be regulated by the rules of procedure of each mediation centre.

As for the issue of responsibility of the mediator, the adoption of a system of administered mediation entails that the parties who suffered any damage in the first place shall ask for compensation from the mediation centre, who is under the duty to get an insurance coverage of, at least, 500,000 Euros (Ministerial decree, article 4, paragraph 2, letter b)). Actually, by filing the application for a conciliation attempt the parties have established a contractual relationship with that centre. If, then, the mediator is responsible for the damages occurred, the centre will seek compensation against her. Some centres also asks their mediators to subscribe to individual insurance policies (Queirolo et al. 2012, 266–267).

5 The Process of Mediation

The basic principles concerning the process of mediation in Italy may be drawn from article 3 of the legislative decree. They are confidentiality, impartiality, and informality.

Confidentiality has always been considered an essential feature of mediation, and two articles of the legislative decree are devoted to this topic.

First, according to article 9, all staff members of the mediation centre and all the persons involved in the administration of the mediation process have a general duty of confidentiality. Moreover, when the mediator meets separately with the parties, she is under a duty of confidentiality vis-à-vis the other parties about the statements made and the information emerged during those separate sessions, unless the interested party waives her right. No duty of confidentiality for the parties seems to be provided for, although some interpret article 9 so that to include the parties among those under the duty of confidentiality (Danovi 2011, 784).

The consequences of this duty are provided for by article 10, under which the statements of the parties and the information acquired in a mediation process cannot be used in court, unless the party giving the statement or the information agrees. Oral evidence and decisory oath (i.e. an oath that will determine the outcome of the case, taken by one party upon a challenge from the opponent to swear the truth of a favourable fact)[18] about these statements and information are excluded. Furthermore, mediators cannot be summoned as witnesses on what they learned during the mediation process, unless keeping the information confidential would violate the law.

Impartiality refers to mediators, and this subject has already been dealt with (see Sect. 4). Informality, instead, refers to the acts, but also – according to article 8, paragraph 3 of the legislative decree – to the procedure and it means that, though there is a certain amount of legislative regulation concerning its initial and final stages, the development of the procedure has been scarcely regulated and it should advance in the most speedy and simple way.

The only provisions in this connection are article 6, concerning the duration of mediation, article 4, regarding the application for mediation, and articles 8 and 11, regulating the initial stage and the final stage of the procedure, respectively.

The time limit within which the procedure should end is three months,[19] although nothing prevents the mediation to continue if the parties so agree. According to article 7 of the legislative decree this period shall not be considered when calculating the duration of the proceedings under the so called *legge Pinto*, concerning the compensation for unreasonable delays in the adjudication of disputes (law of 24 March 2001, no. 89). This provision, clearly aiming at protecting the Italian state against recourses to obtain compensation for unreasonable delays, is questionable in case of mandatory out-of-court or court-ordered mediation, because the parties had no choice but to start mediation.

[18]This means of legal proof, based on the idea that the challenged party will swear the truth under the threat of religious and moral sanctions, is a kind of a relic still surviving in some civil law jurisdictions, but it is hardly ever used (Chase and Hershkoff 2007, 10).

[19]Initially it was four months. The duration has been reduced by the decree law no. 69/2013. According to the statistics provided by the Ministry of Justice, the median duration of mediation is 77 days in cases where the parties fail to reach and agreement and 65 days in cases of success. https://webstat.giustizia.it/Analisi%20e%20ricerche/Mediazione%20civile%20al%2031%20dicembre%202012.pdf. Accessed 17 October 2014.

With reference to the application, according to article 4, it must give information about the mediation centre, the parties, the dispute, and the reasons of the claim. Notwithstanding the principle of informality, the important consequences deriving from the filing of this application (e.g. the competence of the mediation centre in case more applications are filed with different institutions, and the effects on limitation and prescription periods) will inevitably tend to make it a rather technical document (Queirolo et al. 2012, 271).

Whereas originally the party could select the location she preferred, after the decree law no. 69/2013 transposed into the law no. 98/2013 the application should be filed with a mediation centre based in the place where the judge having jurisdiction sits.

After the application has been filed, according to article 8 the mediation centre selects the mediator, arranges the first meeting within 30 days, and communicates the application and the date for the meeting to the other party.

The law no. 98/2013 amended article 8 to provide that this first meeting should be devoted first of all to explaining the purpose and procedure of mediation and to ascertain the willingness of the parties to engage in it. Then, only if this willingness exists, the mediator proceeds with mediation. In case the subject matter of the dispute falls within the scope of mandatory mediation, attendance of this first meeting is deemed to satisfy the prescribed condition and therefore the parties may file their claim in court (article 5, paragraph 2-*bis* of the legislative decree). That same law also established that in case of mandatory mediation[20] the parties must be assisted by a lawyer during all the procedure.[21] This is clearly another concession to the bar, which has always called for such a measure during the debates on the regulation of mediation. This concession may contribute to an increase of the costs of mediation. However, no sanction is explicitly provided for in case one or both parties are not assisted by a lawyer.

With regard to the final stage of mediation, according to article 11, if an agreement is reached, it has to be attached to the record of the procedure. If, instead, the parties fail to reach an agreement, the mediator draws up the records of the procedure where she takes note of this failure.[22] The records of the procedure should

[20] Although some have interpreted the new text of article 8 of the legislative decree to mean that the assistance of a lawyer is always necessary, if read together with the other provisions of the legislative decree modified in 2013, the more reasonable interpretation of this provision is that this obligation only exists in case of mandatory (out-of-court or court-ordered) mediation.

[21] According to the statistics provided by the Ministry of Justice, from 21 March 2011 to 31 December 2012 about 20 % of parties were not assisted by a lawyer. https://webstat.giustizia.it/Analisi%20e%20ricerche/Mediazione%20civile%20al%2031%20dicembre%202012.pdf. Accessed 17 October 2014.

[22] The records of the procedure, whether they take note of the fact that the parties reached an agreement or that they did not, have to be signed by the mediator and by the parties. On the distinction between the agreement and the records of the procedure see Queirolo et al. (2012, 275).

also take note of the failure of one of the parties to participate in the mediation. The records are lodged with the mediation centre, which will issue copies upon request by the parties.

If the parties do not reach autonomously an agreement the mediator may also put forward a proposal. She is obliged to make a proposal if, at any stage of the procedure, the parties ask her to do so. Before putting forward the proposal, however, the mediator shall inform the parties about the consequences deriving from not accepting it under article 13 of the legislative decree (on which see Sect. 6). The written proposal shall be communicated to all the parties, who must accept or refuse it within 7 days. Failure to answer within this time limit corresponds to an implicit refusal. In this case the proposal and the positions of the parties will be written down in the records of the procedure taking note of the failure to reach an agreement.

This provision about the mediation proposal, together with the sanction provided for by article 13, has been widely criticized because, according to its critics, it would contain an element of coercion that would be in contrast to the voluntary nature of mediation. But such an objection is valid only if one adopts a facilitative notion of mediation and has no basis if the parties themselves ask the mediator to make a proposal. In any case, the Ministerial decree allows mediation centres to exclude the power of the mediator to make such a proposal in their rules of procedure, and many centres actually provided that the proposal can be made only upon joint request by the parties (Alpa and Izzo 2012, 172–173). Therefore the parties may easily avoid this risk when choosing the mediation centre (Marinari 2012, 196).

With reference to the relationship existing between mediation and public authorities during the mediation procedure, three aspects should be mentioned. First, according to article 5, paragraph 3, during the course of the mediation procedure the courts may grant urgent and precautionary measures.[23] Second, according to article 11, paragraph 3, if the agreement is to be transcribed in public real estate registries under article 2643 of the Civil code, the signatures of the record of procedure have to be certified by an authorised public officer. Third, although it is not explicitly provided for by the rules concerning mediation, in case the parties reach an agreement nothing prevents them from turning to a notary and transform the agreement into a "public act", an act having a strong evidentiary value that is recognized as a title empowering to levy execution under article 474 of the Code of civil procedure. It is also possible to make the agreement enforceable by having it certified by a notary, but according to the same provision this "certified private writing" is not a title to commence the execution of obligations to delivery a movable or to release an immovable.

[23] According to the case law of the Italian Constitutional court, the possibility to obtain interim measures where the urgency of the situation so requires is a condition for the constitutionality of the legislation that requires to satisfy some conditions (e.g. making an attempt of conciliation) before bringing a claim into court (the so-called "conditional jurisdiction").

6 Failure of Mediation and Its Consequences

As the main purpose of mediation consists in reaching an agreement to settle a dispute, mediation may be said to have failed when no agreement is reached. As illustrated above, this failure may be the result, among others, of one of the parties not participating in the mediation, or of (one of) the parties refusing the proposal of agreement put forward by the mediator.

In case of mandatory out-of-court mediation or court-ordered mediation, the failure of the mediation entails the possibility to bring the claim or, if the judicial proceedings had already started, to continue it. Article 5, paragraph 2-*bis* – that was added by the law no. 98/2013 –, clarifies that if the first meeting before the mediator ends without an agreement (at least on the willingness of the parties to go on with the procedure), the condition for bringing or continuing the case is satisfied.

Furthermore, in order to promote a collaborative attitude by the parties and encourage them to take part in the procedure, in case of failure of the mediation the legislative decree provides for some sanctions against the party whose behaviour proved to be unreasonable.

First, according to article 8, paragraph 5, of the legislative decree, unjustified failure to participate in the mediation may be taken into account by the court in the following proceeding under article 116 of the Code of civil procedure, which provides that the judge may draw adverse inferences also from the parties' demeanour during the proceeding. In order to make this sanction against unjustified failure to participate in the mediation more effective, the decree law of 13 August 2011, no. 138 added that in case of mandatory mediation the party who fails to participate in the mediation with no justification will also have to pay a fine equal to the court costs paid for the enrolment of the case.

Second, when the mediator put forward a proposal of agreement and one of the parties refused it, article 13 provides for an exception to the basic rule that costs follow the event. In case the decision of the court is equal to the proposal, the winning party who refused the proposal will bear all the costs and fees incurred after its formulation and the costs of mediation. Furthermore, that same party will have to pay a fine equal to the court costs paid for the enrolment of the case. In case, instead, the decision of the court is only partially equal to the proposal, if serious and exceptional reasons exist, the court may decide that the winning party bears her costs and fees, including mediation costs.

The Constitutional court, besides holding that the provisions of the legislative decree on mandatory out-of-court mediation were unconstitutional, extended the effects of its decision of 6 December 2012, no. 272 also to articles 8, paragraph 5, and 13. However, the decree law no. 69/2013 transposed into the law no. 98/2013 reintroduced them both without any variation.

It should be noted, though, that during the period when they were in force, these two sanctions were not much used. In fact, on the one hand, it is not at all clear what kind of circumstantial evidence may be inferred from the failure to participate in the

mediation. On the other hand, the exception to the rule that costs follow the event supposes that the mediator put forward a proposal of agreement, which in practice was rare.[24]

7 Success of Mediation and Its Consequences

7.1 Meaning and Consequences

Mediation is considered to finish successfully when the parties reach an agreement, either autonomously or by accepting the proposal put forward by the mediator under article 11 of the legislative decree.

This agreement may be a settlement in the meaning of article 1965 of the Civil code[25] or not, because it needs not to contain reciprocal concessions. But in any case it has a contractual nature and therefore the rules about formal and substantive requirements for, as well as those concerning the effect of, contracts apply. The only specific requirements provided for by the legislative decree are that it has to be signed by all the parties of the agreement and that the signatures have to be certified, usually by the mediator or, if the agreement has to be transcribed in public real estate registries, by an authorised public officer (article 11, paragraph 3, of the legislative decree).

In order to promote the use of mediation, article 17 paragraph 3 of the legislative decree provides that, in case an agreement is reached, the records of the procedure are exempt from the registration tax up to € 50,000.

7.2 Enforcement of the Settlement Reached by the Parties

According to the original provisions of the legislative decree, in order to become titles empowering to levy execution, all agreements had to be homologated by the President of the *tribunale* sitting where the mediation centre has its main office. Whereas article 6 of the directive required member states to ensure that "the parties, or one of them with the explicit consent of the others", could request that the content of a written agreement resulting from mediation be made enforceable, according to article 12 of the legislative decree the application may be filed by the interested party without the consent by the others. In this case the Italian legislator went beyond the minimum requirements of the directive, providing for a solution that extends the possibilities to make the agreement enforceable.

[24] In 2010, only in 1 % of mediations the mediator put forward a proposal on her own motion, and in 0.5 % of cases upon request by the parties (Luiso 2012, 156).

[25] According to this provision, a settlement is a contract by which the parties end an existing or possible dispute by making reciprocal concessions.

In the homologation procedure the judge has to verify that formal and substantial requirements are complied with. The formal requirements are that the mediation centre is a registered one; that the agreement falls within the scope of the legislative decree (i.e. it deals with a civil or commercial dispute); that all the parties signed the agreement, and that the signatures are certified (Minelli 2011b, 297). The substantial requirements are that the agreement does not violate public policy or mandatory rules.[26]

The law no. 98/2013 amended article 12 of the legislative decree introducing a significant change. If all the parties participating in the mediation were assisted by a lawyer and all the parties and their lawyers signed the agreement, this is a title empowering to levy execution without need of homologation. This is obviously another way to enhance the role of lawyers in the mediation procedure, considering also that they have to certify that the agreement complies with public policy and mandatory rules. Only if one of those requirements is missing (for example, because one of the parties was not assisted by a lawyer), homologation is still needed for the agreement to be fully enforceable.

8 Costs of the Mediation

The costs of mediation are predetermined and vary according to the nature, public or private, of the mediation centre. Under article 17, paragraph 4, of the legislative decree minimum and maximum fees for centres established by public bodies are provided for by a Ministerial decree,[27] whereas private centres may fix them autonomously, although within the rather strict guidelines set by the Ministerial decree. This means that there are the basis for a price competition among private mediation centres. According to the same provision, some reductions and increases are provided depending on various circumstances.

The party entitled to legal aid under the Presidential decree of 30 May 2002, no. 115 – a case that is not very frequent because of the rather strict financial requirements (Varano and De Luca 2007, 19) – does not have to pay any fee, but only in case of mandatory out-of-court mediation or court-ordered mediation.[28] Otherwise all the parties have to pay the mediation fees regardless of their means.

Lastly, in order to promote the use of mediation, article 17 provides, besides the exemption from the stamp tax and any other tax for all the acts and documents of the procedure (paragraph 2), the exemption from the registration tax up to € 50,000 for

[26] Article 12 does not explicitly provide for an appeal against the order rejecting the application for homologation, but the positive solution seems to prevail among scholars (D'Alessandro 2011, 4).

[27] Every 3 years the amounts may be adjusted taking into account the variation of the consumer price index.

[28] This second exemption from the costs of mediation for the parties entitled to legal aid has been introduced by the law no. 98/2013 as a result of the changes to court-annexed mediation.

the records of the procedure in case an agreement is reached (paragraph 3). Another financial incentive is provided for by article 20 of the legislative decree: the parties who pay the mediation costs are entitled to a tax credit up to € 500 in case of success and € 250 in case of failure of the mediation.

Article 17 of the legislative decree has been implemented by article 16 and Annex A of the Ministerial decree as amended by the decree of 6 July 2011, no. 145. According to article 16, first of all, each party has to pay a € 40 fee at the beginning of the procedure, which will count towards the final costs. The initiating party will pay this sum when filing the application, whereas the other party will pay it when accepting to participate in the procedure. Then the parties should pay at least half of the sum due before the first meeting.

In case of mediation centres established by public bodies, the maximum costs of mediation for each party depend on the amount in controversy as stated in the application. According to Annex A they are as follows:

Cases up to € 1,000: costs € 65
Cases from € 1,001 to 5,000: costs € 130
Cases from € 5,001 to 10,000: costs € 240
Cases from € 10,001 to 25,000: costs € 360
Cases from € 25,001 to 50,000: costs € 600
Cases from € 50,001 to 250,000: costs € 1,000
Cases from € 250,001 to 500,000: costs € 2,000
Cases from € 500,001 to 2,500,000: costs € 3,800
Cases from € 2,500,001 to 5,000,000: costs € 5,200
Cases above € 5,000,000: costs € 9,200

In case of voluntary mediations, these amounts may be increased of no more than a fifth in particularly important, complex, or difficult cases. They should be increased of no more than a fourth in case of success of the mediation procedure, and of a fifth if the mediator makes a proposal under article 11 of the legislative decree.

In case of mandatory mediation, instead, the amount of the first six brackets should be reduced of a third and the amount of the others should be halved. These amounts have to be increased of no more than a fourth in case of success of the mediation procedure. No other increase is possible.

According to the Ministerial decree as amended in 2011, in case no party other than the initiating party participate in the procedure, the costs of mediation are € 40 for the cases up to € 1,000 and € 50 for the others. But the law no. 98/2013 modified article 17 of the legislative decree adding paragraph 5-*ter* under which no fees are to be paid to the mediation centre when the first meeting ends with a failure. This last provision is destined to override the previous one and is certainly a good news for the parties, especially in case of mandatory mediation, but may pose some problems to mediation centres.

The costs of mediation are fixed, In particular, they are unaffected by the number of meetings and cannot be increased in case of replacement of the mediator or of

co-mediation. They do not include, however, expert fees,[29] which are regulated by the rules of procedure of mediation centres.

The costs are paid to the mediation centres, which then pay the mediators for their services.

9 Cross-Border Mediation

9.1 Notion and Main Features

In the legislative decree containing the general regulation of mediation in civil and commercial disputes there is no provision giving the notion of cross-border mediation. However, considering that this measure was explicitly adopted (also) to implement the directive, it is possible to refer to the notion given by article 2 of the directive, according to which

> a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which:
>
> (a) the parties agree to use mediation after the dispute has arisen;
> (b) mediation is ordered by a court;
> (c) an obligation to use mediation arises under national law; or
> (d) for the purposes of Article 5 an invitation is made to the parties.
>
> 2. Notwithstanding paragraph 1, for the purposes of Articles 7 and 8 a cross-border dispute shall also be one in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in paragraph 1(a), (b) or (c).
>
> 3. For the purposes of paragraphs 1 and 2, domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001.

The lack of a legislative notion of cross-border mediation is the consequence of the choice not to have separate regulations for domestic and cross-border mediations and to apply the legislative measures adopted to implement the European directive to all mediations. Therefore, no separate legal frameworks exists.

9.2 Recognition and Enforcement of Foreign Mediation Settlements

The only specific provision concerning the enforcement of foreign mediation agreements is article 12, paragraph 1, of the legislative decree, under which, in

[29] According to article 8, paragraph 4, of the legislative decree experts may be appointed by the mediator when specific technical competences are needed and auxiliary mediators cannot be appointed.

order to become a title empowering to levy execution, a cross-border mediation agreement has to be homologated by the President of the *tribunale* of the place where the agreement has to be enforced. This means, on the one hand, that in this case the place (and the State) where the mediation took place is irrelevant; on the other hand, that the agreement will be homologated even if the mediation was not administered by a mediation centre that was registered according to Italian legislation (Bove 2012, 706).

Since no other specific provisions exists, the general regulation concerning the homologation of mediation agreements should apply (Minelli 2011b, 293). Therefore, as in the case of domestic settlements, the application may be filed by the interested party without the consent of the others, and the court should verify that formal requirements were complied with (except the fact that the mediation centre is a registered one) and that the agreement is not against public policy or mandatory rules.

As an alternative, the interested party could make the mediation agreement enforceable in the Member state where the mediation procedure took place and then obtain its recognition in Italy under article 24 of the Regulation (EC) no. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims and article 58 of the Council Regulation (EC) no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (D'Alessandro 2011, 10).

10 E-Justice

According to article 3, paragraph 4 of the legislative decree the rules of procedure of mediation centres may provide for the procedure to take place online. In this case the rules of procedure have to guarantee communications security and data protection. The legislative purpose is to promote a further simplification and de-bureaucratization of mediation procedures, as well as a cost reduction, in order to encourage their use. On the other hand, if the mediation procedure could be accessed only by electronic means access to justice might be in practice impossible or excessively difficult for some individuals, especially those without access to the Internet (see the decision of the European Court of Justice in the *Alassini* case). Therefore, under article 7, paragraph 4, of the decree no. 180/2010 the rules of procedure of the centres cannot provide that mediation takes place online only.

The paucity of the legislative regulation on online mediation has been criticized because it may cause some problems. For example, it is not clear how the parties may sign the records of procedure and the agreement and how these signatures may be certified by the mediator. Except for the case in which all the parties and the mediator have a digital signature – which at present is not very frequent – a possible solution is that the rules of procedure should provide the obligation of the parties to print and sign the documents, then certify the signatures before a public officer and send the documents to the mediation centre. The centre, in turn, will keep one original and send back the other duly signed documents (Marucci 2011, 107–108).

Since there is no legislative limitation on the types of disputes that can be submitted to online mediation, one of the topics in the scholarly debate is the identification of the distinctive features of this method of dispute resolution in order to determine for which controversies it is more suitable.

First of all, online mediation seems particularly suitable for disputes connected to the internet, such as those deriving from electronic commerce (Lombardi 2012, 462). Apart from this type of cases, online mediation has a clear advantage in case of disputes between persons living far from each other, because it eliminates the problems connected with distance, but it requires parties' familiarity with technologies. With reference to the possibility of personal contact among the parties and between them and the mediator, instead, it is necessary to be aware of the different techniques that can be used, sometimes alternatively, sometimes cumulatively. Being only textual, some tools – such as chat rooms and emails – may be useful to deal with situations where the disagreement between the parties is so bitter that a personal contact is not possible, because the parties refuse it, or not advisable. But these tools prevent the analysis of non-verbal communication, which is an important element in mediation. Instead some other tools, namely web conferences, allow a fuller communication and reproduce more closely the conditions of traditional mediation, although not to the fullest extent because of the limits of technology (De Bonis 2010, 314–317; Lombardi 2012, 462–471).

The Chambers of commerce, which have been entrusted with the task to promote mediation since the nineties, have been the main supporters and providers of online mediation in Italy so far. Actually, the oldest online mediation service existing in our country is *RisolviOnline* (www.risolvionline.com). It was instituted by the Chamber of Commerce of Milan in 2001 to deal with commercial disputes and it employs a chat line and/or a discussion forum using a private area of the Internet site. According to the statistics available on the website, however, in 2011 and 2012 there were respectively only 40 and 37 mediation requests.[30] These data clearly illustrate how underdeveloped ODR is in Italy. Another important experience is *Conciliaonline* (www.conciliaonline.net), a national platform for online mediation created in 2008 and used by several mediation centres, mainly centres established by Chambers of commerce. This platform offers several technical alternatives, but the most used one is web conference (De Bonis 2010, 317).

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Regulating Mediation in Japan: Latest Development and Its Background

Shusuke Kakiuchi

Abstract In Japan, conciliation and mediation procedures are provided by courts, administrative organs and private institutions. While court-annexed judicial conciliations procedures have long tradition, the activities of private ADR services vary highly in quantity and the number of cases disposed of by these services remains still considerably smaller than lawsuits and court-annexed conciliation procedures. As far as the current regulation of dispute resolution is concerned, the distinction between conciliation and mediation is not relevant in Japan. Although private mediation procedure is widely left to the arrangement between the mediation service provider and its users, the ADR Act, which was enacted in 2004 and entered into force in 2007, provided some basic principles for mediation procedures and introduced a certification system. However, no special procedural effect is admitted to mediation agreements nor to mediation settlements. The regulation regarding the qualification of mediators has been considerably affected by the Attorney Act prohibiting persons without the qualification of attorney at law from engaging in conciliation or mediation on a regular or business basis. Costs of private mediation services varies, but most of them are free of charge or require only marginal fees. Cross-border mediation has just started to develop mainly in the field of family cases. The use of information technology (E-justice) is largely left to the future development.

S. Kakiuchi (✉)
Graduate Schools for Law and Politics, The University of Tokyo, Tokyo, Japan
e-mail: s-kaki@j.u-tokyo.ac.jp

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1 Current Situation of the Dispute Resolution Mechanisms in Japan[1]

In Japan, there are five major types of dispute resolution mechanisms. These are: (i) litigation, (ii) court-annexed conciliation procedures, (iii) arbitration/mediation procedures provided by administrative organs, (iv) arbitration/mediation procedures provided by private associations and (v) other, non-institutionalized mechanisms such as negotiation, conciliation and mediation on a purely ad hoc basis.

Among these dispute resolution mechanisms, some procedures cover all kinds of civil disputes while others are specialised in a specific type of dispute. Lawsuits, court-annexed conciliation and dispute resolution services provided by bar associations belong to the first group, whereas many others fall under the latter.

1.1 Litigation

It is often said that the litigation rate in Japan is considerably lower than other developed countries (Wollschläger 1997). However, this does not mean that litigation plays only a marginal role in the landscape of dispute resolution in Japan. On the contrary, so far as statistical data shows, litigation is the most commonly used procedure to resolve civil disputes. In 2013, 147,390 cases[2] were brought to district courts, which are the courts of general jurisdiction at first instance, and 333,812 cases were brought to summary courts,[3] which deal with cases of lower value (Annual Report of Judicial Statistics 2013).[4] These numbers are obviously larger than the number of cases brought to judicial conciliation and other alternative proceedings (see below Sects. 1.2, 1.3 and 1.4).

There are two possible explanations for this paradox. First, there may be some other procedures, like negotiation or ad hoc mediation process, which successfully manage a large amount of disputes but are invisible from our view because they do not appear in statistical data.[5] Another hypothesis is that there exist no such successful dispute resolutions procedures and most of the latent disputes are left

[1] As overview of the dispute resolution mechanisms in Japan, see also Kakiuchi (2013). Additionally, Baum (2013) should be referred to as a comprehensive study of mediation in Japan.

[2] Including cases concerning personal status (e.g. divorce), over which family courts have had jurisdiction since 2004.

[3] Summary courts have jurisdiction over cases with a claim value up to 1,400,000 yen.

[4] The total of civil cases peaked in 2009 when it reached 905,588 per year.

[5] The traditional explanation finds its basis in the so-called non-litigious character or mentality of the Japanese people: "Commentators, both within and without Japan, are almost unanimous in attributing to the Japanese an unusual and deeply rooted cultural preference for informal, mediated settlement of private disputes and a corollary aversion to the formal mechanisms of judicial adjudication" (Haley 1978).

unattended or unrecognised. Although it is likely that, many disputes are settled through negotiation between parties,[6] the truth seems to lie somewhere in between. In either case, it is worth noting that organised arbitration or mediation procedures provided by private organisations still remain to be developed in Japan.

1.2 Judicial Conciliation Procedures[7]

Traditionally, there have been two kinds of judicial conciliation procedures carried out in courthouses: attempts to compromise (*Wakai*) by the judge and court-annexed conciliation procedures independent of lawsuits. In addition to these traditional mechanisms, a special conciliation procedure in labour cases was introduced recently.

1.2.1 Attempts to Compromise by Judge

First, there is the attempt to compromise by a judge. Judges, who are authorised to advise parties to compromise at any stage of the lawsuit (Art 89 Code of Civil Procedure[8]), make active use of this possibility and a considerable number of cases have been terminated by settlements thus recommended by judges.[9]

According to the common understanding in Japan, conciliation conducted by the trial judge has several merits. First, it is efficient because the judge, acting as mediator, does not need to learn the case afresh, since it is his case and he has been already involved as the trial judge. In a similar way, it saves time and energy in case of an inability to reach a settlement: in that event, the judge can simply go back to his original task to render a judgment. Second, this method creates a guarantee of quality of the solution. Since it is the trial judge who suggests a solution, parties may expect that it is in accordance with the judge's evaluation on the merits. This is a great advantage of conciliation by the trial judge. However, this method has also problems. First, theoretically, it meets with criticism in terms of the self-determination of parties. In fact, it is questionable whether parties have the full liberty to refuse the judge's proposal because it may result in a similar, or even worse, judgment. Second, practically, this mechanism may require a great deal of labour from trial judges. If the number of lawsuits increases and the possibility

[6]For the mechanism of settlements in traffic accident cases, see e.g. Ramseyer and Nakazato (1999) 90 ff.

[7]See Sect. 2.1 below as regards the terminology.

[8]This provision has its origin in Art 269 of the German Code of Civil Procedure of 1877, which was adopted by the Japanese legislator as Art 221 of the Code of Civil Procedure of 1890.

[9]In 2013, 34.5 % of district court cases were disposed of by such settlements (Annual Report of Judicial Statistics 2013).

of increasing the number of judges is quite limited because of financial reasons, judges will one day have no choice but to concentrate their effort and energy on the rendering of judgments. This is one of the reasons why the Japanese legislator is trying to promote the use of ADR outside courthouses.

1.2.2 Court-Annexed Conciliation Procedures Independent of Lawsuits (*Chôtei*)

As the second type of court-annexed conciliation procedures, there are court-annexed conciliation procedures[10] independent of lawsuits conducted by a conciliation committee composed of one professional judge and two or more laypersons who are selected from one of the following three categories: (i) individuals qualified as attorneys at law, (ii) experts with knowledge contributing to resolution of disputes in civil or family matters,[11] and (iii) other lay persons with sufficient experience in social life in general.

Court-annexed conciliation procedures in civil matters are available for all types of civil disputes except for family matter disputes. As a general rule, the proceeding is introduced on a petition of one of the parties to a dispute.[12] It can be ordered by the trial court as well. However, once the pre-trial proceedings for arrangement of the issues and evidence have been concluded, each party to the lawsuit has the right to refuse this order (Art 20 Civil Conciliation Act). The proceeding is not open to the public. Parties are required to appear in person and are normally heard by the conciliation committee separately outside the presence of the other party. The agreement of the parties resulting from successful conciliation is recorded by the court and has the same effect as a record of settlement in court (Art 16 Civil Conciliation Act), which has, in turn, the same effect as a final and binding judgment (Art 267 Code of Civil Procedure). Thus, if a party to a settlement does not fulfil the agreed upon terms, compulsory execution is available.

For family cases (e.g. divorce), the court-annexed conciliation procedure in family matters[13] is available. This procedure takes place in family courts. Since an attempt at conciliation is a prerequisite to a lawsuit in family cases (Art 257 Act on Procedures in Family Affairs), parties are required to bring the case to the

[10]This type of procedure was introduced for the first time in 1922 for cases concerning lease of lands and buildings. It was extended to all types of disputes during the World War II. The current procedure is governed by Civil Conciliation Act, which was enacted in 1951.

[11]For example, experts such as licensed real estate appraisers and licensed architects take part as committee members particularly in cases involving matters such as defective construction.

[12]As far as court-annexed conciliation in civil matters is concerned, it is, as a general rule, not a pre-condition for starting proceedings before a court. Exceptionally, it is obligatory in case of an action for increase or decrease in the amount of land or building rent (Art 24-2 Civil Conciliation Act).

[13]This procedure was introduced in 1947 at the same time as the establishment of family courts.

court-annexed conciliation before filing a lawsuit. The structure of the proceeding is essentially the same as the normal civil matter conciliation.

In 2013, 43,747 cases[14] were docketed for civil matter conciliation, and 139,593 cases for family matter conciliation (Annual Report of Judicial Statistics 2013). The rate of success is 32.4 %[15] for civil matter conciliation and 53.0 % for family matter conciliation.

1.2.3 Special Conciliation Procedure in Labor Cases (*Rôdô Shinpan*)

As regards judicial conciliation proceedings, there is another procedure specialized in individual labor cases, which was introduced in 2006. This procedure is a kind of hybrid of conciliation and litigation procedure. At the first stage of the procedure, a panel composed of a judge and two lay persons, one representing employee side and one representing employer side, tries to settle the case. If this effort does not succeed, a decision is made based on the evaluation of the case by the panel. In fact, this decision functions as a kind of settlement proposal: parties may express their disapproval to the decision. If none of the parties object, the decision becomes binding. If, to the contrary, any party objects, the decision becomes void and the procedure moves to the stage of litigation. To speed up the procedure, the meeting for conciliation may not be held more than three times in principle.

This procedure was quickly accepted by users and has become now equally important as litigation in the field of labor disputes. In 2013, there were 3,678 petitions for this procedure (Annual Report of Judicial Statistics 2013). This number, which is even larger than the number of labor litigation cases in the same year (3,209), shows the important role it plays in the field.

1.3 ADR Services by Administrative Organs

In addition to these judicial conciliation procedures, which take place in court-houses, there are some ADR services provided by administrative organs. For example, there is the Environmental Dispute Coordination Commission (*Kôgai tô Chôsei Iinkai*), the Central Labor Relations Commission (*Chûô Rôdô Iinkai*) and the National Consumer Affairs Center of Japan (*Kokumin Seikatsu Center*). Local

[14]Total of cases docketed in high courts, district courts & summary courts, excluding conciliation proceedings for individuals in insolvency (*Tokutei chôtei*) which were introduced in 2000.

[15]It is worth mentioning also that the court can render a decision representing the content of a possible settlement that it considers to be appropriate, when parties do not come to a settlement. This decision is called “decision in lieu of settlement”. Parties can express their disapproval within two weeks, which makes the decision void. If none of the parties object, the decision has the same effect as a compromise in court. In 2013, 25.4 % of cases were terminated successfully by such decisions (Annual Report of Judicial Statistics 2013).

Table 1 Principal ADR services by administrative organs (2013)

	Cases received	
	Mediation/conciliation	Arbitration
National Consumer Affairs Center (*Kokumin Seikatsu Center*)	151	–
Environmental Dispute Coordination Commission (*Kôgai tô Chôsei Iinkai*)	5	32
Central Labor Relations Commission (*Chûô Rôdô Iinkai*)[a]	441	1
Committee for Adjustment of Construction Work Disputes		
Central Committee	47	6
Prefectural Committees	79	15
Dispute Resolution Center for Nuclear Damage Compensation (*Genshi Ryoku Songai Baishô Funsô Kaiketsu Center*)	14,238[b]	–

[a]Number of the adjustment cases under the Labor Relations Adjustment Law
[b]The total of cases it has received since its establishment in Sep 2011 (as of 19 Dec 2014)

governments are also involved in dispute resolution services with their consumer centers.[16] Their activities consist mainly in consultation services, which play an important role in consumer dispute resolution.[17]

It is worth mentioning also that the Dispute Resolution Center for Nuclear Damage Compensation (*Genshi Ryoku Songai Baishô Funsô Kaiketsu Center*) was established in September 2011 as a result of the March 2011 earthquake and the subsequent nuclear accidents. As of 19 December 2014, it has received 14,238 petitions for conciliation and 11,500 cases have been terminated, among which 9,500 were terminated by a settlement agreement.

1.4 Private ADR Services

As for private ADR services, a great variety of services are provided in accord with the type of dispute. They can be grouped into three categories: (i) ADR services sponsored by a specific industry, (ii) ADR services sponsored by a local bar association or an association of experts in a specific field such as land and building surveyors and (iii) other ADR services. Since the Act on Promotion of Use of Alternative Dispute Resolution (hereafter ADR Act) entered into force in 2007, some ADR services have obtained certification from the Minister of Justice, which was newly established by this law.[18]

[16]E.g. Consumer Life Center of the City of Tokyo (*Tôkyô-to Shôhi Seikatsu Sôgô Center*) etc.

[17]The nation-wide network of local consumer centers called "PIO-NET" (Practical living Information Online-NETwork) received 939,126 requests for consultation in 2013.

[18]As of December 2014, 130 private ADR services have been certified.

1.4.1 ADR Services Sponsored by a Specific Industry

One of the oldest and the most important private ADR organisations, the Center for Settlement of Traffic Accident Disputes (*Kôtsû Jiko Funsô Shori Center*) (founded in 1974), belongs to the first category. This center provides a procedure of semi-mandatory character before its judging committee as the final stage of its ADR services. The award rendered by this committee does not bind the victim of the accident, but it does bind the other party, which is usually an insurance company.[19] This is enabled by the support of the insurance industry for the ADR activities of the center (the center was founded under the sponsorship of insurance companies). Similarly, there are also various product liability centers that were founded after the enactment of the Product Liability (hereafter: PL) Law in 1996, e.g. the PL Center for Consumer Products (*Shôhi Seikatsu Yôhin PL Center*) and the Electric Appliances PL Center (*Kaden Seihin PL Center*). Most of these PL centers are sponsored by a specific industry. In addition, the use of ADR has been strongly promoted in the field of financial business since the amendment of the Financial Instruments and Exchange Act and other related laws in 2009, which introduced a scheme of mediation procedures conducted by certified investor protection organisations (so-called "*Kin'yû ADR*"). Such a procedure is provided, for example, by the Financial Instruments Mediation Assistance Center (FINMAC), which is sponsored by entities such as the Japan Securities Dealers Association and the Investment Trusts Association.

1.4.2 ADR Services Sponsored by a Local Bar Association or Similar Entities

On the other hand, many local bar associations have their own "Dispute Resolution Centers" or "Arbitration Centers".[20] The procedures offered by these centers consist of mediation and arbitration. However, despite their names, as a practical matter their activities concentrate on mediation because arbitration requires an arbitration agreement, the existence of which cannot always be expected.

Whereas these centers accept any type of dispute of a civil law nature, there are ADR centers operated by other types of experts which handle more limited types of disputes corresponding to their area of expertise. This type of service is provided by patent attorneys (*Benri shi*), associations of judicial scriveners (*Shihô shoshi*), administrative scriveners (*Gyôsei shoshi*),[21] labor and social security attorneys (*Shakai hoken rômu shi*), land and building surveyors (*Tochi kaoku chôsa shi*), etc.

[19] Art 20 of the Center's rules provides that the insurance company should respect the award of the committee.

[20] E.g. Arbitration Center of the Daini Tokyo Bar Association. This center was founded in 1990 as the first organization of this kind. There are now 35 similar centers.

[21] Administrative scriveners are certified specialists for administrative procedure.

1.4.3 Other Private ADR Services

As other ADR services, which belong to neither of the two above-mentioned categories, there are, for example, arbitration and conciliation procedures for maritime affairs of the Japan Shipping Exchange, arbitration and mediation procedures for commercial affairs of the Japan Commercial Arbitration Association and similar procedures of the Japan Sports Arbitration Agency.

1.4.4 Current Situation of Private ADR Services

There is no statistical data showing the total number of cases received and dealt with by these private ADR services. However, based on each organisation's periodical reports and some available statistics, we can draw a rough picture of the situation.

In terms of the number of received cases, the Center for Settlement of Traffic Accident Disputes is outstanding. In 2013, it received 8,176 applications for mediation and there were 7,285 cases terminated by a successful settlement. Among other services, there are some receiving hundreds of cases per year. For example, the Japanese Bankers Association received 247 applications for mediation in 2013. The Dispute Resolution Support Center of the Aichi-ken Bar Association received 213 applications for mediation in the same year and this number was the largest among ADR centers of local bar associations.[22] In contrast to these rather successful organisations, most private ADR services receive significantly fewer cases. For example, the Japan Shipping Exchange received only 12 applications for arbitration and the Japan Commercial Arbitration Association received 26 applications for arbitration and five for mediation in 2013. The Ministry of Justice reported that the total number of cases that all the 123 certified private mediation organisations received in 2012 was 1,284, and there were 38 organisations which received no cases at all in the same year. However, it should be added that if we take account of their consultation services, the role of such private providers should not be underestimated, for the number of requests for consultation they receive is much larger than applications for mediation.[23] This suggests that it is not mediation or conciliation by a neutral third party that people in trouble expect primarily from private services. Rather, they want more direct supporters who stand on their side instead of a neutral mediator or conciliator. If they find themselves in need of intervention by a neutral third party, they seem to prefer going to court.

From these data, we can conclude that the activities of private ADR services vary highly in quantity and, at any rate, the number of cases disposed of by these services remains still considerably smaller than lawsuits and court-annexed conciliation procedures.

[22]The total of 35 centers was 1,012 in 2013.

[23]The Ministry of Justice reported that in 2011 the total number of demands for consultation received by all 110 of the certified private mediation organisations was 21,938.

Table 2 Principal private ADR services (2013)

	Cases received	
	Mediation	Arbitration[a]
Services Sponsored by a Specific Industry		
Center for Settlement of Traffic Accident Disputes (*Kôtsû Jiko Funsô Shori Center*)	8,176	699
Electric Appliances PL Center (*Kaden Seihin PL Center*)	2	0
Automotive PL Consultation Center (*Jidôsha Seizôbutsu Sekinin Sôdan Center*)	16	1
Japanese Bankers Association (*Zenkoku Ginkô Kyôkai*)	247	–
Financial Instruments Mediation Assistance Center (FINMAC) (*Shôken Kinyû Shôhin Assen Sôdan Center*)	159	–
Services Sponsored by a Local Bar Association or Similar Entities		
Sendai Bar Association Dispute Resolution Support Center (*Sendai Bengoshi-kai Funsô Kaiketsu Shien Center*)	153	0
Aichi-ken Bar Association Dispute Resolution Center (*Aichi-ken Bengoshi-kai Funsô Kaiketsu Center*)	213	2
Daini Tokyo Bar Association Arbitration Center (*Daini Tokyo Bengoshi-kai Chûsai Center*)	85	1
General Dispute Resolution Center (*Sôgô Funsô Kaiketsu Center*)	147	1
Nichibenren Traffic Accident Consultation Center (*Nichibenren Kôtsû Jiko Sôdan Center*)	1,445	12
Other Private ADR Services		
Japan Shipping Exchange (*Nihon Kaiun Shûkai-jo*)	0	12
Japan Commercial Arbitration Association (*Nihon Shôji Chûsai Kyôkai*)	5	26
Japan Sports Arbitration Agency (*Nihon Sports Chûsai Kikô*)	0	25

[a]Including similar proceedings such as non-binding arbitration

2 Regulation of Mediation

2.1 The Notion of Mediation

The Japanese legal term, which has a meaning the most close to "mediation", is "*chôtei*". This term has, however, several meanings according to the context it is used. First, the above mentioned court-annexed civil or family conciliation procedures are referred to by this term. Thus, in its formal sense, "*chôtei*" means these procedures as regulated by Civil Conciliation Act or Act on Procedures in Family Affairs. Since the intervention by the third party (conciliation committee) in these procedures consists mainly in proposing a concrete solution of the case and persuading parties to accept it, "conciliation" is used commonly as its English

translation.[24] Second, in academic discussion on ADR, the term "*chôtei*" is used often in a broader sense, meaning a process through which parties to a dispute seek, with the involvement of a third party, a resolution of the dispute by way of agreement (settlement), regardless of how intense the third party involvement is. In this context, only procedures aiming at a resolution by way of adjudication or arbitral award are excluded from the definition. Thus, "*chôtei*" in this broader sense includes not only court-annexed conciliation procedures, but also attempts to compromise by trial judges, conciliation and mediation services by administrative organs and similar extra-judicial services by private organisations.

On the other hand, there are some legal texts referring to "*assen*", which is normally translated as "mediation" (Japanese Law Translation Database 2014). According to the common understanding, this term doesn't imply necessarily proposal of the outcome made by the third party and differs from "*chôtei*" in this respect. However, since the notion of "*assen*" does not exclude strictly the possibility of such proposals, the difference between these two concepts is not clear. In addition, as far as the current regulation of dispute resolution is concerned, the distinction between conciliation and mediation (nor the distinction between "*chôtei*" and "*assen*") is not relevant in Japan. Thus, in Japanese legal context, it is not necessary to insist on this distinction.

In conclusion, it is not appropriate to limit the scope of this chapter to the "mediation" in the narrow sense. The following explanation will hence deal with both conciliation and mediation in Japan, which corresponds to "*chôtei*" in the broader sense. As regards the terminology, the term "conciliation" will be used in this report to designate the procedures provided by public organs including the judiciary and "mediation" will be used to designate private ADR services with the exception of arbitration, a terminology which corresponds approximately to the common usage in Japan.

2.2 *Existing Legal Basis for Mediation*

First, judicial conciliation procedures and ADR services provided by administrative organs are regulated by the laws which establish these institutions.

Second, as for private mediation procedures there is the ADR Act, which was enacted in 2004 and entered into force in 2007. In addition, as mentioned in Sect. 1.4.1 above, in the field of financial business there is the Financial Instruments and Exchange Act amended in 2009.

As we have already seen the outline of regulation in respect of judicial conciliation, the explanation here will focus on the regulation of private mediation.

[24]For example, online translation dictionary provided by the Japanese Government gives "conciliation" as the first translation for "*chôtei*" (Japanese Law Translation Database 2014).

2.2.1 Overview of the Regulation of Private Mediation

So far as private mediation is concerned, mediation procedure is widely left to the arrangement between the mediation service provider and its users who are parties to a dispute. In other words, the principle of freedom of contract applies entirely. Additionally, since there are no default legal rules regarding the mediation procedure, it is entirely subject to private regulation by contract. In other words, only general principles of civil law, such as conditions for valid agreements, effects of contracts and public order, apply to private mediation.

However, this description needs some additional remarks.

First, except for mediation procedures on a purely ad hoc basis, which remain to be exceptional, mediation services are provided by permanent organisations. In the latter cases, it is common that users accept the procedural rules provided by these organisations.[25] In this sense, rules of these organisations play a role similar to default rules.

Second, the impact of the ADR Act should be taken into account. The outline of this act will be described in Sect. 2.2.2 below.

Third, as explained in Sect. 4.1 below, there is a rather strict regulation regarding the qualification of mediators: in principle, only the attorneys are allowed to engage in mediation on a regular basis with the intention of receiving fees with exception of mediators of certified ADR providers. Hence, certification standards may well affect the content of private mediation services. It is to be noted in this regard that the ADR Act regulates matters such as the neutrality of mediators (Art 6(3) and (4) ADR Act), an appropriate method for giving notification when executing procedures (Art. 6(6) ADR Act) and prompt notification of the request for mediation to the other party (Art 6(9) ADR Act).

Forth, if a party to the dispute is a consumer, provisions of the Consumer Contract Act may apply.

2.2.2 The ADR Act[26]

The so-called ADR Act (the Act on Promotion of Use of Alternative Dispute Resolution) was enacted in 2004 and entered into force in 2007.

This law is a result of the latest reform of justice system based on the recommendation of the Justice System Reform Council (*Shihô Seido Kaikaku Shingi Kai*), which submitted its final report in 2001 (Recommendations of the Justice System Reform Council 2001). The report pointed out the need for reinforcement and vitalization of ADR: although "various types of ADR are available in Japan", "[i]n reality ... with the exception of some organizations, these mechanisms are not fully functioning". Thus, "in order to make the justice system more user-friendly", in

[25] If users do not like them, they simply decline to use the service.

[26] See Kakiuchi (2014) as overview of this act in German language.

addition to making special efforts to improve the function of adjudication, "efforts to reinforce and vitalize ADR should be made so that it will become an equally attractive option to adjudication for the people", because "[u]nlike the rigid judicial procedures, ADR makes it possible to respond flexibly, with resolutions that give scope to users' autonomy, resolutions behind closed doors to protect privacy and business secrets, simple and prompt resolutions at low cost, fine-tuned resolutions making use of the knowledge of experts in various fields, and resolutions in line with the actual circumstances regardless of legal rights and obligations" (Justice System Reform Council 2001, chap. II, part 8).

The ADR Act itself provides its purpose in Article 1. According to this article, the purpose of the law is to enable 'parties to a dispute to choose the most suitable method for resolving a dispute with the aim of appropriate realization of the rights and interests of the people'.

For this purpose, the Act declares some basic principles regarding ADR. But the main novelty brought by this Act is the certification system for private mediation procedures.

This certification is given by the Minister of Justice and has two aims.

The first aim is to give users more information about ADR. This is expected in two ways. On the one hands, the fact that an ADR service is certified by the Minister of Justice will show users that it meets the standards for certification. Thus, the certification will give a useful device for users to choose an ADR procedure. On the other hands, certified organizations are obliged to keep the transparency of their activities and this will also increase information given to the public.

The second aim of certification system is to admit special legal effects to certified procedures. The effects given are determined by Chap. 3 of the Act (Art 25 and the following). Among the effects admitted by these articles, nullification of prescription (Art 25) and suspension of legal proceedings (Art 26) are worth mentioning. However, the most important legal effect connected to the certification is, in fact, the effect concerning the fees of mediator. This effect is not provided by Chap. 3 of the law, but by an article of another chapter of the law, which is entitled "Miscellaneous Provisions". The importance of this provision will be explained in Sect. 4.1 below.

These special effects aim obviously at promoting the use of certified private ADR services. It should be noted, however, that, on the one hand, this certification system doesn't intend to prohibit the activities of non-certified mediation organizations. On the other hand, the effects listed in the Act are not particularly strong compared with regulations in some other countries. For example, the law says nothing about the enforceability of solutions resulting from certified mediation procedures.

3 The Mediation Agreement

3.1 Legal Conditions for Agreement

There is no specific regulation regarding the conditions for mediation agreements. Thus, general conditions for valid agreements, such as capacity, valid manifestation of intention and conformity with public order, apply without any special requirements regarding the form or the content of agreement.

It should be noted, however, that some provisions of the Consumer Contract Act may apply, if a party to the dispute is a consumer. Thus, for example, clauses of such agreements are void if they restrict the rights of consumers or expand the duties of consumers beyond those under the provisions of the Civil Code and other laws and impair the interests of consumers unilaterally contrary to the principle of good faith (Art 10 Consumer Contract Act), although no such instances have been reported so far.

It is also worth mentioning that the ADR Act refers to the contract between the ADR service provider and the parties as a base for private dispute resolution procedures (Art 2 ADR Act). However, since this is a contract between an ADR organization and each party, it should be distinguished from a mediation agreement between two parties.

3.2 Procedural Effect of a Mediation Agreement

While the use of 'good faith negotiation' clause has been rather common in Japanese contract practice, the use of a clause prescribing mediation remained rare until recently. Consequently, there have been few academic discussions or court decisions on the question.

However, an interesting case was reported recently in this regard.[27] In this case, the Tokyo High Court held that a mediation clause does not prevent an action before the state courts. The Court justified this mainly with the following two reasons: (i) Unlike an arbitration agreement, in case of which dispute resolution without legal action is guaranteed, a mediation clause cannot replace entirely the resort to legal action. Therefore, access to courts should not be deprived by its inclusion in a

[27]Tokyo High Court, Judgment of 22 June 2011, *Hanrei Jihô*, Vol. 2116, p. 64. In the case at issue, the agreement between the plaintiff and the defendant included the following clause: "To the extent that any Party disagrees about how to allocate a Shared Resolution Amount [. . .] under this Agreement, the Parties shall conduct good faith negotiations concerning any such dispute. If such negotiations do not fully resolve the dispute within 60 days of the commencement of such good faith negotiations, any Party may then submit the matter to a neutral Japanese mediator. [. . .] If mediation does not fully resolve the dispute, the Parties agree that any legal action to resolve any remaining issues shall be commenced in the courts of Japan." (translated by the author)

contract. (ii) Art 26 ADR Act authorises the court to suspend legal proceedings for 4 months at the longest when a certified dispute resolution procedure is in progress and this means that a mediation clause does not prevent parties from filing a legal action, because it justifies only discretionary suspension of proceedings.

As this decision states, it goes too far to conclude that a simple mediation clause provides a reason to dismiss an action brought before a state court. However, it is questionable if this means that such a clause may produce absolutely no procedural effect at all. Since it is commonly accepted that an agreement not to bring a legal action before the courts (*pactum de non petendo*) is effective, a mediation clause may be interpreted as such an agreement as far as the terms of agreement are precise and reasonable, though its effect should be limited to a certain period.[28]

As for the question whether there are any state court procedures aiding the enforcement of a mediation agreement (e.g. appointing mediators and contesting mediator impartiality), no such procedures exist currently in Japan.

3.3 Enforceability of a Mediation Agreement

The answer to the question whether duties to submit the dispute to a mediation are enforceable depends on the meaning of enforceability.

First, there is the question whether such duties are executable in the sense that the procedure of compulsory execution is applicable. Generally speaking, three methods are available for compulsory execution of obligation in Japan. However, it is commonly accepted, that the first method, direct compulsion is not applicable to specific performance of an obligation of action or inaction.[29] On the other hand, the second method, execution by a third party at the obligor's cost, is not by nature applicable to an obligation to submit a dispute to a mediation. Thus, the question comes down to that of the applicability of the third method, so-called indirect compulsory execution. This method consists in a procedure through which court orders the obligor to pay a certain amount of money to the obligee. The amount is determined by court estimating the appropriate amount for securing performance of the obligation and calculated in proportion to the period of the delay (Art 172 Civil Execution Act). However, the prevailing opinion holds that an obligation is not enforceable even in the way of indirect compulsory execution if its utility consists essentially in voluntary performance (Uchida 2005, 111).[30] Although there

[28] See also Kakiuchi (2004) 104–105.

[29] Art 414 Civil Code provides that the enforcement of specific performance shall not apply to cases where the nature of the obligation does not permit such enforcement. It is commonly accepted that the enforcement of specific performance is not applicable to obligations of action or inaction other than delivery of things because of the nature of obligations.

[30] Thus, for instance, the obligation of a spouse to live together with the other spouse is not enforceable at all.

have been practically no discussions on the applicability of indirect compulsory execution to duties here in question, it seems difficult to answer the question in the affirmative since spontaneity is essential for a successful mediation. Besides, it would not make sense to file a lawsuit in order to obtain a title of obligation, which would be necessary for such a compulsory execution.

Second, the question arises whether such duties could be enforced by legal sanction in case of default. So far as such a duty is validly agreed, liability can well be imposed for its non-performance under the general conditions provided by Art 415 Civil Code.[31] However, it may be hard to prove the existence of damage and the amount thereof.

4 The Mediator

4.1 Qualification of Mediators

As for the qualification of a mediator, the regulation in Japan has been considerably affected by an article of the Attorney Act which provides that "No person other than an attorney ... may, for the purpose of obtaining compensation, engage in the business of providing legal advice or representation, *handling arbitration matters*, *aiding in conciliation,*[32] ... or other general legal services"[33] (Art 72 Attorney Act; emphasis added). Thus, it prohibits persons without the qualification of attorney at law from engaging in conciliation or mediation on a regular or business basis. Violation of this is punishable as a crime (Art 77 Attorney Act). These provisions have been giving rise to the discussion whether a mediator or arbitrator without qualification of attorney at law may receive fees for his or her activities. In academia, the prevailing opinion has been holding that such activities may be saved from punishment in so far as the mediation or arbitration in question is considered to be unpunishable "lawful business" in the sense of Art 35 Penal Code. However, notwithstanding this interpretation, the position of mediators or arbitrators remains unsecure because punishability depends on the evaluation of 'lawfulness' in each case. This was one of the problems that the legislator had to cope with through the enactment of ADR Act. According to Art 28 ADR Act, mediators are allowed to receive fees as far as their mediation services have been certified by the Minister of Justice. Nevertheless, the problem remains because this exception is not applicable to arbitration and the treatment of uncertified mediators is left untouched.

[31] It provides that if an obligor fails to perform consistent with the purpose of the obligation, the obligee shall be entitled to demand damages arising from such failure.

[32] The word "conciliation" in the translation corresponds to the word "*wakai*" in Japanese. This word has a broad meaning including conciliation, mediation and settlement.

[33] As English translation of this act, see Japanese Law Translation Database (2014).

Consequently, the present position of Japanese law in this regard can be summarised as follows:

(i) On the one hand, if mediation occurs on a purely ad hoc basis, there is no legal regulation regarding the quality of a mediator.
(ii) On the other hand, if a mediator carries out his/her services on regular basis, the regulation is different according to whether he/she requires any fees for his/her services. (a) If no fees are intended, the regulation is the same as in case (i). (b) Conversely, if any compensation is intended, a strict regulation applies. As mentioned above, only attorneys are allowed to engage in such mediation with a few exceptions (Art 72 Attorney Act[34]). One of the major exceptions to this rule was introduced by the ADR Act. Persons who carry out mediation services on a regular basis may obtain certification by the Minister of Justice for their services (Art 5 ADR Act). Mediators of certified ADR providers may receive fees for their certified dispute resolution services notwithstanding Art 72 Attorney Act (Art 28 ADR Act).

Thus, certification standards play an important role in this context. The ADR Act imposes diverse conditions in this regard. For example, a person who is an organised crime group member is not eligible to obtain the certification (Art 7(8) ADR Act). In addition, in cases where the ADR provider is not qualified as an attorney, the provider has to take "measures to ensure that an attorney is available for consultation when specialized knowledge on the interpretation and application of laws and regulations is required in the process of providing private dispute resolution" (Art 6(5) ADR Act). According to the guideline issued by the Ministry of Justice for enforcement of the ADR Act, "when specialized knowledge on the interpretation and application of laws and regulations is required" means "cases where an advanced legal issue, the judgment of which is generally difficult for an ordinary citizen, arises, and its solution would be necessary to determine how to manage the subsequent proceedings"[35] (section 2(5) of the guideline). Furthermore, according to the same guideline, mediators should be capable of determining by themselves whether they stand in need of 'specialized knowledge on the interpretation and application of laws and regulations', namely consultation with an attorney. This determination should not depend on a subjective judgment of the mediator, but should be made 'in conformity with objective standards based on the type and amount of dispute, nature and substance of the question, etc' (section 2(5)e(a) of the guideline). To meet this requirement, such standards need to be given to the mediator in advance, e.g. in the form of a manual which explains basic statutes and case law concerning the types of disputes for which the provider is certified, so that the mediator can resort to an attorney when he faces a legal question which is not explained in this manual (*ibid*).

[34]Punishment by imprisonment with work for not more than 2 years or a fine of not more than JPY 3,000,000 applies to its violation (Art 77 No. 4 Attorney Act).

[35]Translation by the author.

According to the explanation given by one of the authors of the guideline, the justification for such regulation is found in the idea that "since private dispute resolution procedures intervene in disputes among other persons, it is natural to require them to be executed in a fair and appropriate manner"[36] (Uchibori 2005, 8).

However, it is discussed in academia whether these regulations are not excessive in the way they hinder particular types of mediation, such as mediation based on a purely facilitative approach, in favour of an evaluative, law-oriented approach toward mediation (Kakiuchi 2010).

4.2 Duties of Mediators

As indicated in Sect. 2.2.1 above, regulation of private mediation is widely left to the parties' hands, although procedural rules provided by ADR organisations play an important role in practice. This applies equally to the duties of mediators.

However, it is worth mentioning that the ADR Act has several articles regarding the duties of mediators.

First, the Act declares that ADR procedures 'shall [. . .] be executed in a fair and appropriate manner while respecting the voluntary efforts of the parties to the dispute for dispute resolution, and be aimed at achieving prompt dispute resolution based on specialized expertise and in accordance with the actual facts of the dispute' and 'Persons involved in the alternative dispute resolution procedures shall, in compliance with the basic concepts set forth in the preceding paragraph, strive to cooperate and collaborate with one another' (Art 2 ADR Act). However, this duty is quite abstract and without any sanction.

Second, as the certification standards, the Act requires that the applicant should establish "a method for preserving in an appropriate manner suited to the nature of the information, the communications of the parties to a dispute or other third parties that are contained in opinions stated or materials submitted or presented through private dispute resolution procedures" (Art 6(11) ADR Act).

Third, the Act imposes several duties on certified dispute resolution business operators. For example, certified dispute resolution business operators must, prior to conclusion of a contract for execution of certified dispute resolution procedures, give the parties to a dispute an explanation of certain aspects, including the matters concerning the selection of a dispute resolution provider, matters concerning any fees or expenses payable by the parties to a dispute, and the standard operation process from the commencement to the termination of executing the certified dispute resolution procedures (Art 14 ADR Act).

Generally speaking, it does not make a difference whether the mediator is a lawyer or not. However, while the duty of confidentiality is expressly stipulated for

[36]Translation by the author.

lawyers by the Attorney Act (Art 23[37]) and they are accordingly granted the right to refuse to testify (Art 197 Code of Civil Procedure), the duty of confidentiality of mediators who lack qualification as a lawyer is only indirectly suggested by the above-mentioned certification standards. Consequently, they have no right to refuse to testify.

As for code of conduct for mediators, there have been yet no such codes generally accepted.

5 The Process of Mediation

5.1 Basic Principles for Mediation

As mentioned in Sect. 4.2 above, the ADR Act declares that ADR procedures 'shall [. . .] be executed in a fair and appropriate manner while respecting the voluntary efforts of the parties to the dispute for dispute resolution, and be aimed at achieving prompt dispute resolution based on specialized expertise and in accordance with the actual facts of the dispute' (Art 2 ADR Act). From this provision, we may deduce several basic orientations for mediation in Japan. Those are (1) fairness of the procedure, (2) appropriateness of the procedure, (3) respect for the voluntariness, (4) promptness of the procedure, (5) utilization of specialized expertise and (6) respect for individuality of each dispute ("actual facts of the dispute").

Since this provision applies to all kinds of ADR,[38] all mediation procedures, regardless of certified or not, shall be carried out in conformity of these principles. Although this provision has no direct legal effect, these principles are reflected to some extent in the certification standards. For example, the applicant shall establish 'a method for excluding dispute resolution providers who are interested parties of a party to a dispute or have any other causes which may harm the fair execution of private dispute resolution procedures' (Art 6 (iii)), so that the fairness of the procedure is guaranteed.

As for the confidentiality, the ADR Act makes no explicit mention to it as a basic principle. Only, there are some requirements as certification standards regarding appropriate measures to assure the confidentiality of communications in mediation process (Art 6 (xi) and (xiv) ADR Act). However, as mentioned in Sect. 4.2 above, the right to refuse to testify is not admitted to neither parties nor mediators with the exception of mediators qualified as attorney at law.

[37]It provides that '[u]nless otherwise provided by law, an attorney or a former attorney shall have the right and bear the duty to maintain the confidentiality of any facts which he/she may have learned in the course of performing his/her duties.'

[38]Article 1 of the Act defines the concept of ADR as "procedures for resolution of a civil dispute between parties who seek, with the involvement of a fair third party, a resolution without using litigation".

5.2 Conduct of the Procedure

The conduct of mediation process is also widely left to the parties' hands, or practically to the hands of ADR service providers. Only certified providers are required to establish methods for conducting appropriately their procedures. Thus, they shall establish 'a standard operation process from the commencement to the termination' of the procedure (Art 6(vii) ADR Act), "an appropriate method for giving notification" (Art 6(vi) ADR Act) and "requirements and modes of operation for the parties to a dispute to terminate" the procedure (Art 6 (xii) ADR Act).

As for the duration of mediation, the Act requires as one of the certification standards that "when the dispute resolution provider considers it impossible to arrange settlement between the parties to a dispute through private dispute resolution, the dispute resolution provider shall promptly terminate the private dispute resolution procedures and notify the parties to the dispute to that effect" (Art 6 (xiii) ADR Act). No specific time-limits are determined though.

Although the ADR Act declares that "[t]he government shall, with the objective of promoting the use of alternative dispute resolution, research and analyze the trends, use, and other matters of alternative dispute resolution procedures at home and abroad, provide relevant information, and take other necessary measures, thereby endeavoring to familiarize the public with alternative dispute resolution" (Art 4(1) ADR Act), there is no specific regulation at present enabling collaboration between private mediation process and judicial or non-judicial public authorities.

It is worth mentioning in this regard that there is at present no mechanism allowing a trial court to refer a dispute to a private mediation procedures, whereas the court may refer its case to a court-annexed conciliation procedure. Although the possibility to introduce such an institution was discussed during the legislative proceedings surrounding the ADR Act, it was rejected for the following reasons. First, if this referral is of a compulsory character, it would infringe on the right of access to the courts as guaranteed by the Constitution (Art 32). Second, if it means only to recommend to parties that they use ADR on a voluntary basis, it is possible without any express provision of law. Third, under the present state of affairs whereby the performance of extra-judicial ADR procedures remains still unsatisfactory and the courts are not well informed about them, such a provision could easily become a dead letter.

Nevertheless, the need for creating a flow of cases from courts to ADR procedures still exists. Thus, recently, the Japan ADR Association, which was founded by private ADR organisations in 2010, submitted to the Minister of Justice its recommendations for the reform of the ADR Act, including a proposal to provide expressly in the Act that courts can recommend to parties that they resort to a private ADR service (Japan ADR Association 2010, Recommendation 6-1).[39] However, the Ministry of Justice has been holding that there is no pressing need for such a reform (Kakiuchi 2014, 21).

[39]The author participated in the working group preparing the recommendation as its chairperson.

6 Failure of the Mediation

A failure of a mediation means that a mediation procedure ends without reaching any settlement agreement between the parties. As far as certified ADR service providers are concerned, as mentioned in Sect. 5.2 above, they shall promptly terminate their procedures if it appears impossible to arrange settlements (Art 6 (xiii) ADR Act). In such cases, they shall promptly notify the parties about the termination (*ibid*). This notification serves, then, as the standard for the nullification of prescription: if the party that made the request for mediation file a lawsuit within 1 month from the date of the notification, the prescription shall be deemed to be nullified on the date of the request for mediation (Art 25 (1) ADR Act).

At present, no other specific effects or sanctions are legally provided for a failure of mediation.

7 Success of the Mediation Procedure

A mediation procedure is considered as successful, if it terminates with a settlement between parties. This settlement is a normal contract, the conditions for which are governed by provisions of the civil code regarding the validity of contracts. This situation is essentially the same as for mediation agreements explained in Sect. 3.3 above.

Since these settlements remain normal extra-judicial contracts, they are not enforceable as such. In fact, the enforceability of settlements resulting from private mediation was one of the questions, which produced the most serious debates during the legislative proceedings on the ADR Act. While the opinion in favour of the enforceability was fairly strong, it could not overcome the anxiety over an abuse of such a possibility.[40]

Consequently, as a general rule, a party to a settlement needs to file a new lawsuit based on it so as to carry out a compulsory execution if the other party fails to perform her/his obligation. However, it is worth mentioning that there are several ways to facilitate the enforcement of settlements.

First, if the parties so agree, they can conclude an arbitration agreement and thereby appoint the mediator as their arbitrator. Thus, the arbitral tribunal may record the settlement in the form of arbitral award, which has the same effect as a normal arbitral award (Art 38(1) and (2) Arbitration Law). A party seeking enforcement of an arbitral award may apply to a court for a decision authorizing such enforcement against the counterparty (Art 46(1) Arbitration Law). Since this procedure is more simple than the ordinary one, it provides a useful way to render a settlement enforceable.

[40]The debate still continues and Japan ADR Association proposed the introduction of enforceability recently in its recommendations for the reform of ADR Act (Japan ADR Association 2010). However, at present, the Ministry of Justice is not willing to cope with this problem (Kakiuchi 2014).

Second, for the parties who came to a settlement, the institution of 'settlement prior to filing of action' is available. A party may file a petition for settlement with the summary court (Art 275 Code of Civil Procedure) and let the court official record this settlement. Thus, the settlement will have the same effect as a final and binding judgment (Art 267 Code of Civil Procedure).

Third, though the availability is limited to a claim for payment of a certain amount of money or claims concerning any other fungible thing, parties may go to a notary who will accordingly prepare a notarial deed, based on which compulsory execution can be carried out (Art 22(5) Civil Execution Act).

In practice, these three methods (the first one in particular) play a role equivalent to the enforceability of settlements.

Differing from these extra-judicial settlements, settlements resulting from judicial conciliation procedures are enforceable in the same way as court judgments (see Sect. 1.2 above).

8 Costs of the Mediation

8.1 Costs of Judicial Conciliation Procedures

General expenses to operate judicial conciliation procedures (spaces for procedures – courtrooms -, allowance for conciliators, etc.) are, of course, borne primarily by the state. Thus, costs which parties must bear are quite small, if not free of charge.

In case of court-annexed conciliation for civil matter, the applicant must pay a petition fee according to the value of matter (Art 3 Act on Costs of Civil Procedure, Appended Table 1(14)). For example, if the amount the applicant demands from the other party is 1,500,000 Yen, the fee will be 6,500 Yen. As regards other expenses, such as costs of transportation and fees for representatives, each party bear their own costs (Art 20-2 and 22 Civil Conciliation Act, Art 26(1) Act on Procedure in Non-contentious Cases).

In case of family conciliation, the petition fee is 1,200 Yen regardless of the value of matter (Art 3 Act on Costs of Civil Procedure, Appended Table 1(15)-2).

8.2 Costs of Private Mediation Services

The fee system of private mediation services varies depending on the type of the service concerned.

Most of mediation services sponsored by a specific industry provide their services free of any charges.[41] Some of them provide a special procedure with a certain charge in addition to ordinary free of charge mediation. In such cases, it is

[41]Exceptionally, Financial Instruments Mediation Assistance Center (FINMAC) requires a fee varying from 2,000 to 50,000 Yen according to the value of matter.

common that ordinary mediation procedure is carried out with one single mediator, whereas the other, pay procedure is presided by a panel with experts, as is the case for Electric Appliance PL Center and Automotive PL Consultation Center.

As for mediation services sponsored by a local bar association or similar entities, it is common to require an application fee and an additional fee in case of successful settlement. The latter is generally calculated according to the amount that the applicant obtains by the settlement. For example, General Dispute Resolution Center requires 10,000 Yen as an application fee and if parties reach a settlement according to which the applicant obtains 1,000,000 Yen, it requires 15,000 Yen in addition. In addition, some organizations require fees for each meeting as is the case for Daini Tokyo Bar Association Arbitration Center.

The fee system varies for other services providers. There are some requiring only a fee at the beginning of the procedure, like Japan Sports Arbitration Agency, and some requiring a kind of contingent fee, like Japan Commercial Arbitration Association.

8.3 Legal Aid

Concerning the court-annexed conciliation procedures, the court may grant aid for a person who does not possess the means to pay the cost necessary for preparation and conduct of proceedings, or who will incur extreme hardship in life by paying such costs (Art 22 Civil Conciliation Act, Art 29 Act on Procedure in Non-contentious Cases; Art 32 Act on Procedures in Family Affairs). However, this aid does not take the form of fee waiver, but only defers payment of the fees.

In addition, there is a legal aid program provided by Japan Legal Support Center (JLSC). This covers the fees parties shall pay to attorneys representing them in litigation and other court proceedings including civil and family conciliation (Art 4 and 30(ii)(a) Comprehensive Legal Support Act). However, similarly to the aid granted by court, this form takes the form of lending money and aid recipients shall repay it to the Center.[42] The exemption of repayment is admitted only on an exceptional basis.

As for private mediation services, no legal aid has been available for the above mentioned fees required by ADR service providers. The legal aid program of JLSC may apply to attorney's remuneration if parties are represented by such, because it is available for attorney's remuneration incurred in "negotiations that are deemed necessary for the settlement of disputes in advance of civil judicial decision proceedings" (Art 30(ii)(a) Comprehensive Legal Support Act). Nevertheless, this possibility has been unknown to most of users and hardly used with the exception

[42]The monthly repayment begins from the third month following the month in which the grant was given.

of ADR for nuclear damage compensation.[43] However, JLSC intends at present to extend the availability of its legal aid to private mediation fees.

9 Cross-Border Mediation

9.1 Notion of Cross-Border Mediation

There has been no special legal regulation for cross-border mediation in Japan. There is no data showing the number of mediation cases involving international elements with the only exception of the court-annexed family conciliation procedure, for which it is reported that, in 2013, there were 3,311 new coming conciliation cases, any or all parties of which were foreigner(s) (Annual Report of Judicial Statistics 2013).

It is worth mentioning, in addition, that recently, Japanese parliament endorsed the conclusion of the treaty Hague Convention on the Civil Aspects of International Child Abduction. Accordingly, a law[44] stipulating domestic implementation procedures for the Convention was enacted in June 2013. This law provides, among others, the availability of the court-annexed family conciliation procedure for the cases for the return of children. According to the law, court may, with the agreement of both parties, refer such cases to family conciliation procedure (Art 144 of the Act). Although a few special provisions apply to the proceedings in such cases, the basic structure of the procedure remains the same. Nevertheless, the fact that one of the parties is a foreigner with a cultural background differing from Japanese may have certain impact on the way of conducting the procedure. Further, there are five private institutions which the Ministry of Foreign Affairs commissions the mediation proceedings. Fees for these proceedings are incurred by the Ministry of Foreign Affairs. Parties may resort to other private mediation institutions as well, in which case, however, all the cost must be borne by parties.

9.2 Recognition and Enforcement of Foreign Mediation Settlements

As explained in Sect. 3.3 above, mediation settlements are not immediately enforceable as such and the same applies to foreign mediation settlements. They are

[43] It is reported that during the period from April to September 2013, 679 applicants of this ADR were granted the aid for representative's remuneration. See the material No. 6 submitted to the 7th meeting of the Working Group for the ADR Act (only Japanese version is available at: <http://www.moj.go.jp/housei/adr/housei09_00051.html>).

[44] Act on Implementation of the Convention on the Civil Aspects of International Child Abduction.

admitted only the effect as normal contracts and insofar, there is no need to consider the "recognition" of such agreements. They are valid according to the applicable substantive law concerning its validity. If a party to such an agreement needs to enforce it in Japan, she/he is required to file a lawsuit or to resort to other measures as explained in Sect. 3.3.

The situation becomes different if there are court decisions authorizing compulsory execution based on these mediation agreements (e.g. decisions homologating such settlements in French law). In this case, it is worth considering whether such court decisions come under one of the "titles of obligations" (*Schuldtitel*), based on which compulsory execution may be carried out (Art 22 Civil Execution Act). Among such titles listed by Art 22 Civil Execution Act, "a judgment of a foreign court for which an execution judgment has become final and binding" (Art 22 (vi) Civil Execution Act) might apply to such foreign decisions authorizing a compulsory execution, so far as they take the form of court decisions (and not mere protocols[45]) and consequently can be considered as "judgment[s] of a foreign court" as mentioned in this provision. If a foreign decision authorizing compulsory execution of a mediation agreement can be considered as "a judgment of a foreign court", a party may file a lawsuit seeking an "execution judgment" which declares that compulsory execution shall be permitted in Japan. A foreign decision has the effect of a title of obligations so far as an execution judgment of a Japanese court has become final and binding.[46]

This conclusion remains, however, still uncertain, because there has been yet no precedent applying this provision to foreign court decisions authorizing compulsory execution of a mediation agreement.

10 E-Justice

Concerning the court-annexed conciliation procedures, so-called telephone and TV conference are in principle[47] available when a party lives in a remote place or the court finds it appropriate for any other reasons (Art 22 Civil Conciliation Act, Art 47 Act on Procedure in Non-contentious Cases; Art 54 Act on Procedures in Family Affairs). Thus, it is allowed in such instances to carry out the conciliation without

[45]The prevailing opinion has been holding that a mere protocol of compromise in court does not come under the notion of "judgment of a foreign court". Only documents taking the form of court decision can be considered as such. Accordingly, it has been discussed that a so-called "consent judgment" and "jugement d'expédient" may be considered as "foreign judgment[s]" in this context. See e.g. Akiyama et al. (2006) 512.

[46]Thus, from the viewpoint of the party seeking for compulsory execution, it would not be always clear if this procedure is more convenient than filing a normal lawsuit based on the mediation agreement.

[47]As exception to this principle, these devices are not available for examination of evidence (Art 47 Act on Procedure in Non-contentious Cases; Art 54 Act on Procedures in Family Affairs).

physical presence of any parties in courtroom.[48] The decision of in which cases and in which manner to use these devices is widely left to the discretion of the court. Except for divorce and dissolution of adoptive relations cases (Art 268(3) Act on Procedures in Family Affairs),[49] it is also allowed to conclude conciliation agreements using these devices. When these devices are used, the court must pay full attention to the identification of the person who is not physically present (Art 42 Supreme Court Rules on Procedure in Non-contentious Cases; Art 42 Supreme Court Rules on Procedure in Family Affairs). Normally, it is expected that such person appears to her/his nearest court or to the office of her/his attorney and use the telephone there, so that court clerks or the attorney can verify the person's identity.

As for private mediation services, there is no legal regulation concerning the use of such devices for conciliation or mediation and it is left to the service provider's decision, whether and to what extent they make use of such devices. So far, most of private ADR services require in principle the physical presence of parties. Some trials have been reported, however, to make use of e-devices.[50]

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[48]However, in conciliation cases, it is rare that none of the parties come to the court.

[49]The reason for this exception is that in case of agreement of divorce or dissolution of an adoptive relation, the intention of parties should be more carefully confirmed than in other cases.

[50]For example, Automotive PL Consultation Center reports its success in a pilot case using TV conference system.

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The Legal Framework for Mediation in Kazakhstan: Current State, Expectations of Public Recognition and Perspectives for Development

Farkhad Karagussov

Abstract This Chapter includes an overview and analysis of the legal framework for mediation in Kazakhstan. Established principles and process of mediation, legal status of mediators and requirements with respect to the form and content of the mediation agreement, as well as the meaning and consequences of successful and failed mediation are described in the Chapter. Issues of cross-border mediation, recognition and enforcement in Kazakhstan of foreign mediation settlements, as well as possibilities for use of electronic means for mediation in Kazakhstan are also considered. Special consideration is paid to theoretical views of the most authoritative Kazakhstani scholars concerning the meaning of mediation and correlation of this ADR device (new for Kazakhstan) with other forms of disputes resolutions available under the national laws. Separate focus is made on current results of practical implementation of the Law of the Republic of Kazakhstan dated 28 January 2011 "On Mediation" during the period after its introduction, including certain statistics, as well as on assessments of the Law and perspectives of further development of mediation in Kazakhstan.

1 The Existing Situation of ADR in the Republic of Kazakhstan

The legal system of the Republic of Kazakhstan (the "**RK**") recognizes a number of alternative means for dispute resolution ("**ADR**") including such as arbitration, both international and domestic, and mediation. Although, at present, there no law exists in Kazakhstan operating the term "alternative dispute resolution" directly, some official documents representing conceptions or programs for further social and legislative development refer to ADR and to mediation as an ADR device.

F. Karagussov (✉)
Institute of private law of Caspian University, Almaty, Republic of Kazakhstan
e-mail: karagussovyk.f@mail.ru

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Moreover, those documents also call for further introduction of different means of ADR into the Kazakhstan's legal system.

Particularly, *The Conception of the Legal Policy of the Republic of Kazakhstan adopted by the Decree of the President of the RK dated 20 September 2002 #449* (now expired) proposed that in addition to all efforts in developing the Kazakhstani judicial system alternative methods for settlement of civil-law disputes must be provided for, in particular, with the aim to regulate functioning of arbitration tribunals and to converge to international standards. Later on, in Ch 4 of *The Conception for Development of the Civil Society in the Republic of Kazakhstan for the period of 2006–2011 approved by the Decree of the President of the RK dated 25 July 2006 #154* there is now stated that in addition to the judicial practice there are alternative ways to settle social, interpersonal conflicts and disputes apply, and there the system to conform (harmonize) interests exists. Currently, in *The Conception of the Legal Policy of the Republic of Kazakhstan for the Period from 2010 till 2020 adopted by the Decree of the President of the RK dated 24 August 2009 #858* (now in force) in Sec 2.7 there is also stated that "establishing of different ways and means for achieving compromises between parties of private-law conflicts (such as mediation, intermediation and others) in both judicial and out-of-court procedures, including, among others, mandatory discussions of a possibility to use some means and conciliation procedures when preparing a case for a court's settlement, as well as development of out-of-court forms of protection of civil rights" are defined as a guideline for development of the RK's civil procedural legislation. In addition, in Sec 3.2 of the latest Conception there is also declared that the system of arbitration courts and tribunals shall be further developed.

In line with those conceptual documents approved by the President of Kazakhstan as mentioned above, there three laws were adopted.

The first one is the *Law dated 28 December 2004* "*On Arbitration*" (as amended). It regulates terms and conditions of creation and functioning of arbitration tribunals in the RK, as well as procedures for enforcement of their decisions. Particularly, according to its Art 1, it applies with respect to disputes arising out of civil-law relationship with participation of individuals and/or legal entities. Under Art 6 of this Law, arbitration tribunals shall settle such disputes in accordance with legislation of Kazakhstan. Art 32 regulates the terms under which competent courts provide assistance to arbitration tribunals to secure enforcement of future arbitral awards on separate disputes.[1] Art 33 of this Law also sets forth that arbitral awards are acknowledged to be mandatory for the parties of a respective dispute. Finally, its Art 46 further establishes that when the parties fail to implement an arbitral award

[1]Please note, that according to definitions included into Art 2 of the Law "On Arbitration" and Art 2 of the Law "On International Arbitration" the term "competent court" means "a court of the judicial system of the Republic of Kazakhstan which in accordance with the civil procedural legislation of the Republic of Kazakhstan is authorized to settle disputes arising out of civil-law relations as the court of first instance".

such award becomes subject to its enforcement pursuant to execution procedures as provided for by the RK laws on execution of judicial decisions.

The second one is the *Law dated 28 December 2004* "*On International Arbitration*," (also as amended). Its initial title was the Law "On International Commercial Arbitration" and that title was legislatively replaced with the current title in July 2013. The Law regulates those relations arising in the process of functioning of international arbitration on the territory of the RK, as well as procedures and conditions for acknowledgement and enforcement of international arbitral awards in Kazakhstan. Pursuant to its Art 1 the Law "On International Arbitration" applies with respect to disputes arising out of civil-law relationship with participation of individuals and legal entities which disputes are resolvable by international arbitration. Art 6(4)[2] specifically provides for that a dispute can be brought to and settled in the international arbitration if at least one party of the dispute is a non-resident of the Republic of Kazakhstan. According to Art 32 arbitral awards are acknowledged to be mandatory and, when a respective petition is submitted to a competent court, it shall be carried into effect in accordance with the RK civil procedural legislation. Art 25–1 also regulates the terms under which competent courts provide assistance to arbitration tribunals to secure enforcement of future arbitral awards on separate disputes, as well as in collecting evidences.

Both of these Laws concerning arbitration establish certain restrictions with respect to those categories of disputes that cannot be settled in arbitration, including international arbitration. However this is a topic of separate consideration as it goes beyond the scope of consideration in this chapter. Nevertheless it should be mentioned that arbitration is considered to represent one of ADR available under the laws of Kazakhstan.

Later on the third act has been passed as the legal framework for another type of ADR. In particular, the RK *Law dated 28 January 2011* "*On Mediation*" (the "**Mediation Law**") has been adopted to create a legal framework for mediation in Kazakhstan.[3]

The aforementioned Laws serve as the legal framework for a number of permanently functioning organizations of arbitration and mediation centers. But none of these three Laws expressly defines (in legal terms) arbitration, international arbitration and mediation as types of ADR. However, having an access to dossiers of drafts of all these Laws, which include the RK Government's explanatory notes, conclusions and scientific expert opinions made to accompany the drafts of the Laws when they were submitted to the RK Parliament, one will find that these acts were initially meant to regulate respective types of alternative dispute resolution of civil-

[2]Please note that each time when a reference to an article of a law is made to being followed by a figure in round brackets such figure indicate a particular clause of the article.

[3]See: The Law of the Republic of Kazakhstan dated 28 January 2011 "On Mediation" in English is allocated on the official website of the Union of Judges of the Republic of Kazakhstan (http://www.ujk.kz/union/?sid=133, *accessed 24 August 2013*) and on the website of the Center of Mediation and Alternative Disputes Resolution in Almaty (http://elmediacia.kz/images/file/first/01e.pdf, *accessed 18 June 2014*).

law disputes and (as mediation) some other types of conflicts.[4] In addition, in the most of scientific and mass media publications of Kazakhstani scholars, judges and attorneys all three of these procedures are clearly regarded as types of ADR.

In their turn, Kazakhstani scholars have considered the notion of ADR and different types of ADR in their publications. Particularly, professors Yu. Basin and M. Suleimenov stipulated that there, basically, the following three types of ADR can be distinguished: (i) negotiations, (ii) mediation and (iii) arbitration.[5] In his later article professor M. Suleimenov mentioned that there two different positions exist concerning a content of the concept of ADR: some scholars believe that ADR creates an alternative to courts of general jurisdiction, but others consider judicial system and arbitration as two separate phenomena and they treat all other procedures as the alternative (i.e. as ADR) to disputes settlement in both state courts and arbitration. Suleimenov personally considers alternative procedures for dispute resolution as an aggregate of means and methods used by parties to achieve an agreement and when necessary – with involvement of an independent third party whose final judgment with respect to the merits of the dispute case is either advisable or obligatory.[6] And in the same article, in addition to the aforementioned arbitration, mediation and negotiations, he also mentions such types of ADR as med-arb (mediation and arbitration), mini trial, reconciliation of the parties, non-obligatory arbitration or expert assessment opinion.

No other ADR devices, except for arbitration and mediation, are currently proposed and regulated in Kazakhstan under its national law. Certainly, in accordance with general principles declared in the RK Civil Code, participants of civil-law relationship are entitled to establish forms, terms and conditions of their relations and to choose forms and means for settlement of their disputes and conflicts. However we believe that any type of ADR can be viewed as being available under an applicable law if a settlement reached in result of an ADR can be effectively enforced according to direct provisions of national legislation and not just because of a fact that applicable law does not prohibit a procedure. No arrangement can be identified as an ADR device if an applicable law fails to provide support in implementation of results of such arrangement proposing judicial support to enforce the settlement.

[4]Please note, that these documents are available to subscribers to the Information System "Yurist" (the Kazakhstan Legal Database as the part of the Information Systems "PARAGRAPH") – see: http://online-zakon.kz, *accessed 17 June 2014*.

[5]See: Basin and Suleimenov, *Arbitrazhniye sudy v Kazakhstane: problemy pravovogo regulirovaniya* (Arbitration Tribunals in Kazakhstan: Problems of Legal Regulations). Published in: Arbitration Tribunals in Kazakhstan: Problems of Legal Regulations (materials of the international scientific and practical conference held in Astana on 3 February 2003). Responsible editor – Suleimenov. / Almaty: KazGYuU, 2003 (306 pages). P. 19.

[6]See: Suleimenov, *Chastnoye processual'noye pravo (Pravo al'ternativnogo razresheniya sporov)* (The Private Procedural Law (the Law of an Alternative Dispute Resolution)). Published in: Law Monthly Bulletin "Yurist" (the Lawyer). – Almaty, 2011 (#2). P. 13.

2 The Basis for Mediation in the Republic of Kazakhstan

2.1 The Notion of Mediation

As the legal term the notion of mediation has been introduced into the legal system of the Republic of Kazakhstan in 2011 when the Mediation Law was adopted. The Mediation Law serves as the legal basis for organization of mediation in Kazakhstan, defines principles of mediation and regulates mediation procedures. It also determines the status of mediators.

Art 2 of the Mediation Law in its sub-clause 5 includes the legal definition of mediation. According to this definition, mediation represents a procedure for resolution of a dispute or a conflict between its parties with assistance of a mediator or several mediators implemented based on the voluntary agreement of the parties with the purpose to achieve a solution mutually acceptable to the parties.

The Mediation Law in its Art 3 declares the following as purposes of mediation:

(i) achievement of a possible scenario/solution to resolve a dispute (conflict) acceptable for both parties of the mediation procedure; and
(ii) decrease of level of the parties' proneness to conflict.

These purposes shall be achieved in each case when mediation takes place to resolve a particular dispute (conflict).

As mentioned above, the Mediation Law does not specifically identify mediation as an alternative way for dispute resolution. However in all of available publications in Kazakhstan mediation is acknowledged as a type of ADR and it is generally understood similar way as it is defined in the Mediation Law. For example, M. Suleimenov defines mediation as a settlement of a dispute with assistance of an independent neutral intermediary who promotes to achieve an agreement between the parties.[7] A. Duisenova (the Executive director of the Kazakhstani International Arbitrage) also emphasizes that a mediator is not an arbitrator, he/she does not determine who is right and who is wrong, he/she does not make a decision on a dispute. Mediator helps the parties to settle the conflict with benefits to all the parties.[8] The judge A. Sholimova proposes that as a type of ADR mediation represents a specific form of intermediation which does not propose that a third party makes a judgment on a dispute, but correspondingly a mediator's main purpose is to assist parties of the dispute to bring the dispute, as soon as possible, to a mutually

[7]See: Suleimenov, *Mediaciya v Kazakhstane: tekyscheye sostoyaniye i perspecktivy razvitiya* (Mediation in Kazakhstan: Current Status and Perspectives for Development). Published in: Law Monthly Bulletin "Yurist" (the Lawyer). – Almaty, 2009 (#12). P. 13.

[8]See: Klemenkova, *Drugoi istochnik pravosudiya* (Other Source of Justice). Published in the weekly bulletin "Strana I Mir" (The Country and the World) #14, 2 April 2012.

beneficial and viable solution.[9] Such common understanding of mediation is also expressed in the publication of all reports made by its participants at the international conference organized by the Institute of Legislation of the RK Ministry of Justice and held on 19 October 2012 in Astana.[10]

Under the Mediation Law mediation can be used to settle disputes and conflicts arising out of civil, labor, family and other types of relationships with participation of individuals and/or legal entities. The Mediation Law also allows using mediation to settle disputes and conflicts within criminal legal proceedings on cases concerning crimes of a little and middle heaviness (i.e. those which are not serious or major crimes) unless otherwise is established by laws of Kazakhstan, as well as such disputes arising in the process of execution of judicial decisions (judgments).

However, mediation cannot apply if: (i) a dispute (conflict) infringes or can infringe on interests of third parties not participating in mediation; or (ii) a dispute (conflict) infringes or can infringe on interests of an individual(s) who are legally incapable or restrictedly capable due to a court's decision(s); and (iii) when a state authority (state body) is a party to a dispute (conflict).

It is also prohibited to apply mediation on criminal cases concerning corruption offences and other crimes against interests of state service and state governance.

All the respective provisions as mentioned above are included in Art 1 of the Mediation Law.

According to the Mediation Law, there both out-of-court and court-annexed mediation are accepted in Kazakhstan. Art 20(2) of the Mediation Law specifically states that mediation to settle disputes can be applied in both cases: before the parties bring their dispute to court or after trial proceeding starts.

2.2 *The Existing Legal Basis for Mediation in the Republic of Kazakhstan*

The Mediation Law serves as a primary source of the existing legal framework for mediation in Kazakhstan. However, respective provisions of the RK *Civil Procedural Code of 13 July 1999* and *the Criminal Procedural Code of 13 December 1997* (both as amended) also regulate certain aspects concerning conduct of mediation. Such regulation mostly relates to time periods for conduct of mediation

[9] See: Sholimova, *Preimuschestva i primery razresheniya sporov* (Mediation: Benefits and Examples of Dispute Resolution) – http://www.zakon.kz/analytics/4560329-mediacija.-preimushhestva-i-primery.html, *accessed 16 June 2014*.

[10] See: The Status and Perspectives for Development of the Institute of Mediation in the Circumstances of Social Modernization of Kazakhstan: materials of the international scientific and practical conference held on 19 October 2012. – Astana: "Institute of Legislation of the Republic of Kazakhstan", 2012 (172 pages). (www.izrk.kz/images/stories/mediacia86.pdf, *accessed 10 August 2013*).

and acknowledgement of settlement agreements reached in result of mediation by courts and prosecuting authorities (as it is provided for in Arts 24(4) and 27(7) of the Mediation Law).

It should be noted that the Mediation Law does not prevent mediation to settle conflicts arising out of administrative-law relationships or in connection with administrative violations, though it also does not include any specific provision concerning this aspect. Nether the RK *Code concerning Administrative Violations dated 30 January 2001* (as amended) establishing rules for judicial proceedings on administrative violations, nor the RK *Law dated 27 November 2000* "*On Administrative Procedures*" (as amended) which sets forth procedures for administrative protection of rights and legitimate interests of citizens, operate the notion of mediation and provide for any regulation of mediation within respective judicial proceedings and implementation of administrative procedures. Nevertheless, one can see from the statistic data shown below in this chapter that respective categories of such conflicts were already settled in mediation in Kazakhstan. These statistics relates mostly to settlements reached in out-of-court mediation. However, particular importance should be given to the fact that state courts also refer to mediation. For example, it has been published that judges of the Specialized administrative court of Aktau city applied the Mediation Law during consideration of cases related to family and social matters as provided for in the RK Code concerning Administrative Violations to terminate 58 of such administrative cases in 2013 and 89 administrative cases in 2014 in connection with the parties' reconciliation.[11] It also worth to indicate that neither the Mediation Law nor any of the Law "On Arbitration" and the Law "On International Arbitration" contain any provisions allowing to reveal any relationships between mediation and arbitration. Though, in its turn, when referring to mediation within the judicial proceeding on a civil-law disputes, Art 27(5) of the Mediation Law provides for mandatory approval of the settlement agreement by the court to be made according to the procedures established in the RK Civil Procedural Code: such approval is required by Art 49 of the RK Civil Procedural Code.

Professor M. Suleimenov also mentions the absence of a special regulation in existing legislation of Kazakhstan for mediation under the auspice of an institutionalized arbitration.[12] For example, none of the aforementioned Laws related to arbitration regulates whether arbitration should be suspended if the parties of the dispute reach an agreement to solve it in mediation. On the contrary, these Laws on arbitration propose that the parties may reach an amicable agreement and the tribunal will have to formally confirm it. It should be noted that in one of his publications M. Suleimenov proposed to draft, on the basis of the

[11] See: http://www.zakon.kz/4635839-s-nachala-goda-v-aktau-prekrashheno-89.html, *accessed 29 July 2014*.

[12] See: Suleimenov and Duisenova, *Razvitiye arbitrazha i mediatcii v Kazakhstane* (Development of Arbitration and Mediation in Kazakhstan). Published on the website of Kazakhstan International Arbitrage: www.arbitrage.kz/461, *accessed 16 June 2014* (file 15).

2002 – UNCITRAL Model Law on International Commercial Conciliation, a law on conciliation procedures with participation of mediator in civil-law judicial proceedings and in arbitration. However this proposal with respect to regulation of mediation in arbitration has not been implemented.[13]

The Mediation Law has been amended three times after it was adopted in 2011.

First time amendments to the Mediation Law were introduced by the RK *Law dated 17 February 2012* "*On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan Concerning Matters of Improvement of Appeal, Appellate (Cassational) and Supervisory Proceedings, Increase of Level of Trust and Provision of Accessibility to Justice*". One of the amendments replaced conditions and procedure for extension of period for mediation. Particularly, if under the earlier version of Art 23(2) initial 30-day period for mediation in the court-annex procedure could be extended for another 30 days by the court and only "if necessary", the amendment now sets forth that the parties themselves (not the court) can make such extension in the respective mediation agreement followed by their subsequent joint notice to be given to the court. In addition, no "necessity" rule to justify such extension remained. This amendment made legal framework for the mediation agreement to correspond to general rules of the RK Civil Code regarding any agreement, providing that only the parties to the agreement may amend it, and not any third party is entitled to do it.

Another amendment introduced by the aforementioned amending Law dated 17 February 2012 has a rather technical nature. In particular, initial version of Art 27(5) earlier proposed that an amount of the state due paid prior to submission of a dispute to a court shall, after a settlement agreement is concluded, be returned to its payer in the procedure set forth in the RK Civil Procedural Code. However because such procedure is established in the RK Tax Code, the amendment to the Mediation Law has now corrected this reference.

Second time amendments to the Mediation Law were introduced by the RK *Law dated 3 July 2013* "*On Amendments and Additions to the Constitutional Law of the Republic of Kazakhstan and Certain Legislative Acts of the Republic of Kazakhstan on the Matter of Exclusion of Contradictions, Omissions, Collisions Between Norms of Law in Different Legislative Acts and Provisions Favoring Commitment of Corruption Violation*". One of the amendments relates to the provision of Art 1(2) of the Mediation Law according to which mediation cannot apply, in addition to other established cases, if a dispute (conflict) infringes or can infringe on interests of an individual(s) who are restrictedly capable due to a court's decision(s).

Significant amendment was made to Art 24(3) which now sets forth that if in mediation one of the parties of it is a minor, then participation of its teacher or psychologist or the minor's legal representative shall be obligatory. Before such amendment reference to minors' legal representatives (parents, guardians, etc.) was missing.

[13]See: Suleimenov, *Razvitiye mediatcii kak al'ternativnogo sposoba razresheniya sporov* (Development of Mediation as Alternative Way of Disputes Resolution). Published on the website of Kazakhstan International Arbitrage: www.arbitrage.kz/461, *accessed 16 June 2014* (file 6).

The rest of amendments entitled akims (mayors) of towns subordinated to oblast (Kazakhstani regional) centers, in addition of other categories of local akims, to maintain registers of non-professional mediator.

The latest amendments were introduce to the Mediation Law pursuant to the RK *Law dated 15 January 2014* "*On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on the Matter of Improvement of the Execution Proceedings.*" According to them mediation has become available to settle conflicts and disputes arising during the process of execution of judgments (judicial acts).

In connection with the latest amendment to the Mediation Law one should note that general widening of those fields where mediation can be used is considered as a positive tendency allowing effective application of this primary mean of dispute resolutions. However, when mediation is allowed on the stage of execution of judicial decisions it can mean a contradiction or, at minimum, violation of the *RK 1995 Constitution* which in its Art 76(3) establishes obligatoriness (binding force) of all decisions, verdicts and other judicial enactments within the entire territory of the RK. According to the Concept of the RK legal policy provision of strict execution of judicial acts has been established as an important measure to increase effectiveness of judicial proceedings in Kazakhstan. If a settlement in mediation on the stage of execution of a judicial act would to any extent allow changing the meaning and/or content of a court's decision or verdict, it can be qualified as non-performance of judicial acts or hindering of their execution and would entail established administrative of criminal liability. Therefore, introduction of the mediation tool to be used during the process of execution of judicial acts requires more research in the context of its correspondence to the RK Constitution and further detailed regulation in law.

2.3 Current Results of Implementations of the Law on Mediation in the Republic of Kazakhstan and Certain Assessments

After the Mediation Law was passed in 2011 a lot of different types of activities concerning creation of organizational, methodological and cadre elements of successful functioning of mediation device have been undertaken in Kazakhstan.

A number of organizations involved in activities associated with organization of mediations and mediators' training were established in different cities of Kazakhstan, as well as registers of certified mediators have been formed. For example, as one of the most notable, the Integrated Center of Mediation and Peacemaking "Mediation" (headed by Mrs. S. Romanovskaya) has been set up in Almaty with branches in other regions of Kazakhstan. As it is mentioned in the Center's website (www.mediation.kz, *accessed 16 June 2014*), during the last three-year period after adoption of the Mediation Law the Center has provided training and certified 183 mediators under three specially designed training programs such as "General Course

of Mediation", "Specialized Course of Mediation" and "Training for Mediation Trainers". In the register of this Center there 98 certified mediators included.

The Kazakhstani Center of Mediation (www.kazmediation.kz, *accessed 16 June 2014*) in Almaty (director Mrs. I. Vigovskaya) has also created its own register of mediators. This register divides mediators based on where mediators reside and where they can effectively offer their services. Such division includes 12 major cities of Kazakhstan and even Munich (Germany).

The Kazakhstan International Arbitrage (KIA) chaired by professor M. Sulemenov also offers mediation as alternative way for disputes resolution (www.arbitrage.kz, *accessed 16 June 2014*). Mediation is carried out in accordance with the KIA Rules of Reconciliation (Mediation).

There other mediators' organizations can be also found in Kazakhstan.

The overall trend is an increase in a number of mediations in different areas of private and public (administrative and criminal) law. In addition, certain increase in the number of certified mediators could be also noted, as well as in the number of people interested in taking special training to become certified mediators.

There no centralized official statistic and analytical information exist in Kazakhstan concerning number of mediations. Each organization of mediators, however, can offer their own data.

For example, from the website of the aforementioned Integrated Center of Mediation and Peacemaking "Mediation" one can know that starting from August 5, 2011, when the RK Law "On Mediation" came into effect, professional mediators of the Center prepared (invited to mediation) and completed mediation on 1 dispute considered within a criminal proceedings on criminal case (related to a traffic accident), on 18 civil-law disputes (arisen from family, labor and other legal relations), as well as more than 200 disputes concerning consumer rights protection.[14]

From the official website of the Specialized Inter-District Juvenile Court of Karagandy oblast of the RK (www.juvencourt.kz, *accessed 20 August 2013*) more detailed information could be found regarding results of activity of the Center of Mediation and Law "Dostasu" located in the city of Karagandy. As it is announced "there are more than 65 of successfully conducted mediations on the credit of the Center "Dostasu". Those are disputes where the mediators from this Center helped to parties in out-of-court procedure to cross the difficult way from conflict to agreement. The amount of only monetary claims settled in such mediations exceeded 10 million tenge. These results of mediation have been categorized as follows:

- reconciliation of the parties on instituted criminal cases – 2 mediations (3,6 %);
- family conflicts, including partition of property and determining children's place of residence – 14 mediations (21,8 %);
- consumer disputes – 18 (32,7 %);
- credit relationships (disputes between banks and their clients regarding loans repayment) – 4 mediations (7,2 %);

[14]See: http://www.mediation.kz/index.php?newsid=24 (*as of 7 August 2013*).

– commercial disputes, including those with participation of several legal entities – 8 mediations (14,4 %);
– refusal from mediation – 1 case;
– disputes with providers of public services – 4 mediations (7,2 %);
– interpersonal conflicts, including those on instituted administrative proceedings (light harm to someone's health, slander, insult) – 4 mediations (7,2 %);
– disputes with mass media – 3 mediations (5,5 %);
– disputes between individuals regarding money claims – 8 mediations.[15]

Separate statistics concerning resolution of conflicts and disputes in juvenile courts up to date have been mentioned in publication of the chairperson of the Specialized Inter-District Juvenile Court of Zhambyl oblast of the RK Mrs. T. Sultanova. She indicates that the number of resolutions in the form of mediation agreement in juvenile courts has yet been small. For example for the year 2013 there 467 civil-law cases were considered and only two of them were withdrawn due to conclusion of mediation agreements.[16]

On the website of the Media Center of the RK Internal Affaires authorities there the following has been announced: "for the half-year period [*of 2013*] 475 cases were closed (completed) with the use of mediation. It is undoubtedly progress! Taking to the consideration that during the last year [*2012*] peacemakers [*mediators*] managed to settle and prevent judicial proceedings in only 122 conflicts".[17]

Irrespective of such particular figures one should note that they relate only to numbers of settlement agreements, but not to any actual performance under settlement agreements and/or their enforcement (especially when they are reached in out-of-court mediation). In the later cases it is meant to say that any settlement agreement reached in result of out-of-court (as well as in court-annexed) mediation is treated as a separate private agreement subject to voluntary execution or its private enforcement. If the parties to a settlement agreement fail to properly perform under the agreement they are entitled to seek its enforcement in court. Obviously, such scenario does not allow to effectively achieving the declared goals of introduction of mediation into the RK's legal system since it does not prevent further submission of the respective dispute to courts and, thus, it does not preclude significant decrease of pressure on courts. However even possibility for the judicial enforcement of the settlement agreement allows lesser load on courts because their focus in such cases shall be limited to the analysis of a content of the agreement and revelation of its validity only.

[15]See: http://juvencourt.kz/ru/mediatsiya-v-kazakhstane-pervyi-opyt-vnedreniya-i-primeneniya-%C2%A9.html, *accessed 20 August 2013*.

[16]See: Sultanova, *Po soglasheniyu – mirovomy ili mediativnomu* (According to an agreement – amicable settlement or mediation). – http://www.zakon.kz/4632552-po-soglasheniju-mirovomu-i-mediativnomu.html *accessed 17 June 2014.*

[17]See: *Mediaciya: perviye resultaty* (Mediation: First Results) at: http://press.mediaovd.kz/ru/?p=1150, *accessed 20 August 2013.*

The same website of the Media Center includes a kind of forecast stating that if such increase would take place in future, there is a good perspective that the Mediation Law "will finally start work in full."

Karagandy Center of Mediation and Law "Dostasu" has also noted positive trends. They particularly mention, as positive examples, successful mediation on such disputes as partition of property and business, reconciliation and repayment of debts when periods of limitation of action expired, amicable resolution of about 20 consumer rights related disputes. For the last category of disputes they see it significant that successful dispute resolution became possible due to use of principles and methods of mediation and not with any references to legal norms and sanctions of the consumer law. They also believe that first outcome of application of the Mediation Law shows wide opportunities for spread of mediation in Kazakhstan. "Taking into consideration politically correct mentality of Kazakhstani people we believe that mediation will have important future. However, introduction of mediation into life moved a significant layer of legal and humanitarian problems."[18] Some specific problems are mentioned in this publication, but we can identify them, in addition to other, from another sources.

For example, representatives of Kazakhstani mediators' organizations who participated in the conference held on 26 September 2012 in Almaty blamed judges, prosecutors and investigators that they do not explain people the meaning of mediation and possibilities offered by the Mediation Law.[19]

Even a year after adoption of the Mediation Law there was an opinion that a little change appeared to happen. The head of the Bostandyk District Court in Almaty A. Sarsembayev identified two reasons to this: (i) there are no authoritative mediators yet and (ii) people do not know how to treat [*use, apply*] mediation.[20]

Similarly, the former Chairman of the RK Supreme Court B. Beknazarov also mentioned the following: "mediation procedures have not begin to work to the fullest extent . . . There the Law [*On Mediation*] exists, many public association of mediators have been created, [*such of*] private mediators as the matter of fact, but it is not everywhere people take mediation as real opportunity to resolve a dispute . . . May be it is because here in Kazakhstan it's been more convenient and easier to file a suit to courts. We have insignificant amount of dues for application to courts established. Nevertheless, we require from chairmen of courts to create necessary conditions for mediators."[21]

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[18] See: http://juvencourt.kz/ru/mediatsiya-v-kazakhstane-pervyi-opyt-vnedreniya-i-primeneniya-%C2%A9.html, *accessed 20 August 2013*.

[19] See: "*Kazakhstanskiye sudii ignoriruyun Zakon o mediacii*" ("Kazakhstani Judges Ignore the Law On Mediation"), published at: http://www.zakon.kz/4450458-kazakhstanskie-sudi-ignorirujut-zakon-o.html, *accessed 16 June 2014*.

[20] See: Klemenkova, *Drugoi istochnik pravosudiya* (Other Source of Justice). Published in the weekly bulletin "Strana I Mir" (The Country and the World) #14, 2 April 2012.

[21] See: Beknazarov's interview to Ukrainian mass media on 25 June 2013 at: http://www.nomad.su/?a=10-201306260021, *accessed 16 June 2014*.

However practicing mediators see that the judiciary of Kazakhstan shows a positive perception of mediation as a method of reconciliation of parties of a conflict/dispute. "However, while judges positively take for the new law [*the Mediation Law*], internal affairs authorities in the meantime do not demonstrate such understanding. At the same time, for the present, there is no mutual understanding achieved with the most of practicing lawyers, attorneys and notaries, who believe that mediators act as their competitors, and they forget that mediators and lawyers are representatives of allied professions having the same historical roots."[22]

In their turn, its is fair to mention that representatives of the RK General Prosecutor's Office also support introduction of mediation into the practice allowing its application during different stages of judicial proceedings and on pre-trial examination/investigation of criminal cases. Certain proposals on content of the legislation concerning mediation are also voiced.[23]

There is also an opinion that a model for regulation of mediation chosen by Kazakhstani law looks not viable and "adoption of the Law On Mediation will bring more harm than advantages."[24] The critic is expressed concerning (i) legal determination of those fields where mediation can be used, (ii) the sphere of application of the Mediation Law which is also improperly defined (as M. Suleimenov says, without clear separation of mediation in case of civil-law disputes and in criminal proceedings), (iii) unnecessary strict rule with respect to mediators performing on the non-professional basis, (iv) provisions regarding content of the mediation agreement, etc. In his later article professor M. Suleimenov, however, expressed his hope that mediation in Kazakhstan will develop as it is an international trend, and he proposed certain priority directions for such development.[25] We tend to share this opinion and to support these proposals.

In addition to the aforementioned the following should be mentioned. Issues concerning the concept and significance of mediation as ADR were brought to public consideration in Kazakhstan quite recently and there is no specific monographs issued by Kazakhstani scholars related to the topic. The most of related publications are made in mass media, mostly for the purpose of publicity of the Mediation Law and first results of its application. However, professor M. Suleimenov as

[22] See: Akmetova, Blaschenko and Karlash, *Mediaciya v Kazahstane: pervii opyt vnedreniya i primeneniya* (Mediation in Kazakhstan: the First Experience of Introduction and Application). – http://juvencourt.kz/ru/mediatsiya-v-kazakhstane-pervyi-opyt-vnedreniya-i-primeneniya-%C2%A9.html, *accessed 20 August 2013*.

[23] See: Karabayev, *O perspecktivah razvitiya institute mediacii v ugovovnom sudoproizvodstve* (On Perspectives of Development of the Notion of Mediation in Criminal Proceedings). – www.zakon.kz/187584-o-perspektivakh-razvitija-instituta.html, *accessed 16 June 2014*.

[24] See: Suleimenov and Duisenova, *Byt' li nezavisimoi mediacii v Kazahstane?* (Whether an Independent Mediation will Exist in Kazakhstan?). Published on the website of Kazakhstan International Arbitrage: www.arbitrage.kz/461, *accessed 16 June 2014* (file 26).

[25] See: Suleimenov, *Razvitiye mediacii kak al'ternativnogo sposoba razresheniya sporov* (Development of Mediation as Alternative Way of Disputes Resolution). Published on the website of Kazakhstan International Arbitrage: www.arbitrage.kz/461, *accessed 16 June 2014* (file 6).

one of the most prominent scholars in Kazakhstan in the field of private law and dispute resolutions and as the Chairman of the Kazakhstani International Arbitrage dedicated a number of his publications to the notion of mediation, analysis of the Mediation Law and its perspectives. In this chapter there are references made to the following articles of professors M. Suleimenov and Yu. Basin which, no doubt, can be considered as the most authoritative scholarly contributions (single or jointly) to the topic until today:

(i) Suleimenov M.K. *Razvitiye mediacii kak al'ternativnogo sposoba razresheniya sporov* (Development of Mediation as Alternative Way of Disputes Resolution). Can be found on the website of the Kazakhstani International Arbitrage: www.arbitrage.kz/461 (file 6), *accessed 16 June 2014*;

(ii) Suleimenov M.K. *Mediaciya v Kazahstane: sovremennoye sostoyanie i perspektivy razvitiys* (Mediation in Kazakhstan: Current Status and Perspectives for Development). Published in: The Law Monthly Bulletin "Yurist" (the Lawyer). – Almaty, 2009 (#12);

(iii) Suleimenov M.K. *Chastnoye processual'noye pravo (pravo al'ternativnogo razresheniya sporov)* (The Private Procedural Law (the Law of an Alternative Dispute Resolution)). Published in: The Law Monthly Bulletin "Yurist" (the Lawyer). – Almaty, 2011 (#2);

(iv) Basin Yu. G. and Suleimenov M.K. *Arbitrazhnie sudi v Kazahstane: problemy pravovogo regulirovaniya* (Arbitration Tribunals in Kazakhstan: Problems of Legal Regulations). Published in: Arbitration Tribunals in Kazakhstan: Problems of Legal Regulations (materials of the international scientific and practical conference held in Astana on February 3, 2003). Responsible editor – M.K. Suleimenov. / Almaty: KazGYuU, 2003 (306 pages);

(v) Suleimenov M.K. and Duisenova A.E. *Byt' li nezavisimoi mediacii v Kazahstane?* (Whether an Independent Mediation will Exist in Kazakhstan?). Can be found on the website of the Kazakhstani International Arbitrage: www.arbitrage.kz/461 (file 26), *accessed 16 June 2014.*

A number of publications concerning practical issues of mediation and training for mediators in Kazakhstan were made by S. Romanovskaya, I. Vigovskaya and some other practicing lawyers. But they cannot be considered as scholarly contributions. Nevertheless, attention should be also paid to published results of the conference organized by the Ministry of Justice of the RK in 2012 and dedicated to mediation: "The Status and Perspectives for Development of the Institute of Mediation under Conditions of Social Modernization of Kazakhstan: materials of the international scientific and practical conference 19 October 2012". – Astana: "Institute of Legislation of the Republic of Kazakhstan", 2012 (172 pages) (can be also found in its electronic format on the following website of the Institute of Legislation of the RK: www.izrk.kz/images/stories/mediacia86.pdf, *accessed 10 August 2013*.

3 The Mediation Agreement/the Agreement to Submit Disputed Matters to Mediation in the Republic of Kazakhstan

3.1 Legal Definition of the Mediation Agreement

As the general rule set forth in Art 20(1) mediation can take place if there is a mutual agreement of the parties to settle a dispute (conflict) between them in mediation. Conclusion of a mediation agreement is the mandatory pre-requisite for conduct of mediation in any out-of-court mediation, court-annexed mediation or criminal proceedings.

The Mediation Law includes legal definition of the mediation agreement (*'dogovor o mediatsii'*). According to sub-clause 7 of Art 2 of the Mediation Law such agreement means "a written agreement of parties [*to it*] which is concluded [*by them*] with a mediator before mediation starts with the purpose to settle a dispute (conflict)". Those individuals and/or legal entities who/which are in conflict or disputes between them, if such disputes (conflicts) can be settled in mediation according to Art 1 of the Mediation Law, are defined as the parties of mediation, and together with a mediator they are defined as participants of mediation (sub-clauses 6 and 8 of Art 2 of the Mediation Law respectively).

The Mediation Law does not specifically regulate whether mediation agreement can be entered into to settle a specific dispute (conflict) only, or whether the parties to any contractual arrangement can agree in principle and with binding effect that once a dispute arises it would be solved in mediation. Professor M. Suleimenov proposes that if the parties to a contract wish to apply mediation as part of the procedure for settlement a dispute arising out of or in connection with the contract, they can include into the contract the following clause on mediation. He also believes that they can include even more procedural and organizational provisions into the contract.[26]

However, it appears that the Mediation Law proposes that a mediation agreement can be entered into only when a specific dispute (conflict) has already taken a place. This understanding follows from the definition of the mediation agreement (as mentioned above) and from the requirement of sub-clause 1 of Art 21(2) stating an identification of a matter of the dispute as one of essential terms of any mediation agreement, as well as from the content of Art 23 requiring settlement of the dispute within 30 days after conclusion of the mediation agreement. Some other provisions of the Mediation Law also consider a mediation agreement to be entered into in connection with a particular dispute.

[26]See: Suleimenov, *Mediaciya v Kazahstane: tekuscheye sostoyaniye i perspectivy razvitiya* (Mediation in Kazakhstan: Current Status and Perspectives for Development). Published in: Law Monthly Bulletin "Yurist" (the Lawyer). – Almaty, 2009 (#12). P. 17.

3.2 The Form and Content of the Mediation Agreement

As mentioned above, any mediation agreement must be entered into in the written form. No oral agreement on mediation can be valid. At the same time, no registration or notarial verification of mediation agreement is required.

Art 21(2) of the Mediation Law establishes what terms and conditions of the mediation agreement shall be considered as essential to it. The list of such essential terms includes 11 items. Having such regulation analyzed, one should remember that indication of essential terms of a contract in respective laws allows to identify the type or nature of each particular contract and to decide whether the respective contractual arrangement can be viewed as enforceable contract under related legal provisions. The legal effect of this requirement is that if any of these terms and conditions is not included into a mediation agreement, than under Art 393 of the *RK Civil Code of 27 December 1994* (as amended) such mediation agreement will not be considered as concluded (entered into) by the parties to it, and the parties may not have a perspective to seek protection of their rights and interests under the agreement. M. Suleimenov and A. Duisenova have reasonably criticized such solution claiming that this list is unnecessary extensive and a greater part of such terms and conditions, in principle, could not be defined as essential terms of mediation agreement.[27]

One of such called essential term of a mediation agreement sounds especially unreasonable. Particular, sub-clause 8 of clause 2 of Art 21 of the Mediation Law requires that mediation agreement includes "grounds and volume of liability of the mediator who participates in the dispute settlement for his/her actions (inaction) which entailed damage to the parties of mediation". Such provision contradicts to the nature of mediation and regulated status of mediators. As the term "mediation" is defined in Art 2 of the Mediation Law, mediator only assists the parties to achieve a mutually acceptable solution. In addition, as per Art 27, any settlement agreement shall regulate a settlement between the parties and it becomes a contractual arrangement between the parties subject to performance by the parties voluntary without involvement of the mediator. Thus, no mediator can be liable for any damage of any party since no mediator can force the parties to enter into a settlement agreement, as well as to enter into it on any specific terms. Nor the mediator can control the parties in their performance under the settlement agreement.

3.3 Significance of Conclusion of the Mediation Agreement

A mediation agreement is a contract entered into by the parties of a dispute (conflict) with a mediator concluded voluntary with the intention to find acceptable solution

[27] See: Suleimenov and Duisenova, *Byt' li nezavisimoi mediacii v Kazahstane?* (Whether an Independent Mediation will Exist in Kazakhstan?). Published on the website of the Kazakhstan International Arbitrage: www.arbitrage.kz/461 (file 26), *accessed 18 June 2014.*

of the dispute. Until the mediation agreement is in force it binds the parties to it. However, there are no so much responsibilities of the parties to a mediation agreement to be enforced against any of them. No one can be forced/enforced to choose mediation for dispute resolution, to elect specific person as a mediator, to continue participating in mediation or to enter into a settlement agreement. And mediators can act only with the consent of the parties of a dispute (conflict). At the same time mediators can be subject to claims for breach of his/her duties, including any related damage claims.

Mediation represents an attempt to resolve a dispute without submitting a suit to the court. If mediation fails, nothing prevents to seek judicial resolution or resolution in arbitration.

However, one should note that conclusion of a mediation agreement does not suspend the course of the limitation period established by the law (Art 182 of the RK Civil Code). At the same time, under Art 183 of the RK Civil Code if the parties of the dispute enter into the mediation agreement, that fact interrupts the course of the limitation period and if the parties fail to resolve the dispute, the course of the limitation period starts to count again and the time before the mediation agreement was entered into cannot be included in the new period.

If, in contrast, a dispute has been already submitted for the courts resolution, conclusion of the mediation agreement represents a ground for suspension of the respective civil judicial proceedings on the case (Art 23(3) of the Mediation Law). However, the parties of the dispute in this case become responsible for certain notifications addressed to the respective court with respect to the course and results of mediation (*please see below*). In addition, participants of mediation are responsible to complete mediation in such time as prescribed in Art 23(2) of the Mediation Law since expiration of the respective time period terminates mediation (sub-clause 5 of Art 26 of the Mediation Law). According to Art 242 of the RK Civil Procedural Code the court is obliged (not simply entitled) to suspend respective judicial proceeding in the case when the parties have entered into the mediation agreement. Such suspension shall take place until mediation terminates (Art 244 of the Civil Procedural Court).

No specific rules are established with respect to dispute resolution in arbitration on this matter. However general rules on suspension and interruption of the limitation period apply.

Some specific regulation is provided for in Art 24 of the Mediation Law with respect to mediation taking place in course of criminal proceedings. Particularly, it is established that conclusion of a mediation agreement does not suspend the proceeding with respect to a criminal case, and mediation itself should be completed within the timeframe established by the criminal procedural law for pre-trial and judicial proceedings.

Two other provisions of this Art 24 are also important in terms of consideration of any effect which mediation agreement may (or may not) have on future proceedings and status of the parties of mediation. First of all, it is clearly set forth that "the fact of participation in mediation may not be considered as an evidence of admission of guilt by a participant of the proceedings who also acted as the party of mediation".

And the second provision include the statement that "refusal to sign a settlement agreement on the conflict may not impair (worsen) position (standing) of the participant of the judicial proceeding who also acted as the party of mediation". It all corresponds to the presumption of innocence and principles of judicial proceedings declared by the *RK Constitution of 30 August 1995* (Art 77) and the Criminal Procedural Code (Art 19).

4 The Mediator in the Republic of Kazakhstan

4.1 Legal Status of the Mediator (General Requirements)

According to the definition included in Art 2 of the Mediation Law, the term "mediator" means "an independent individual involved by the parties for conduct of mediation on the professional and non-professional basis in accordance with requirements of this Law". Arts 9–11 of Ch 2 of the Mediation Law relate to the status of mediators.

Particularly, according to Art 9 of the Mediation Law, an independent, impartial individual who is (i) not interested in the outcome of affair (ii) who is chosen by the parties of mediation at their mutual consent and (iii) agreed to perform the mediator's functions provided that (iv) he/she has been included in the register of mediators, can be elected by the parties to a dispute (conflict) as the mediator.

In its turn, an individual may not be a mediator if any of the following (as established in Art 9(7) of the Mediation Law) is applicable to him/her:

(i) the person is authorized to perform state (governmental) functions or has a similar status (for example, if the individual occupies a position at any central or local governmental bodies, some of state owned organizations, elected as deputy to the Parliament of the RK or local representative bodies);
(ii) the person is recognized by the court as being legally incapable or restricted in his/her capability;
(iii) with respect to such person a criminal prosecution is carried out; or
(iv) the person has a criminal record remaining not cancelled.

As it is set forth in clause 8 of Art 9 of the Mediation Law, an agreement between the parties of mediation may establish additional requirements with respect to mediator. The meaning of this provision is not clear. On one hand, if the term "an agreement between the parties of mediation" is meant to relate to a mediation agreement, there is a little sense on establishing any additional requirements concerning a mediator because exactly by the mediation agreement a particular mediator is considered to be appointed and such mediator shall be logically considered to meeting all the requirements. On the other hand, if any other type of agreement between the parties of mediation is meant, there is even less sense in this provision, since there will be no mediator appointed if the parties fail to agree on a particular person and/or such person refuses to sign respective mediation agreement.

According to clauses 5 and 6 of Art 9 of the Mediation Law activities of mediators (performance of the mediator's functions) do not constitute an entrepreneurial activity and those who perform as mediators are entitled to be engaged in any other business and activities that are not prohibited by the legislation of the Republic of Kazakhstan.

4.2 Categories of Mediators

As it follows from the legal definition of mediator, there are two acknowledged categories of mediators. Under the first category there professional mediators fall under. The second category includes those mediators who perform their functions on the non-professional basis.

The Mediation Law is not sufficiently clear in setting criteria on which this two categories are distinguished. However, it appears that the drafters of the Mediation Law proposed such criteria as entitlement of professional mediators to be paid for performance of the mediation functions. In this respect Art 22(2) of the Mediation Law provides for that professional mediators conduct mediation both for consideration (a fee for mediation) and gratis. In turn, clause 6 of this Art 22 sets forth that non-professional mediators shall be reimbursed with their expenses (when the expenses are allowed for such reimbursement by the Mediation Law) incurred in connection with mediation. Similarly, Art 21(1) of the Mediation Law proposes that the fee payment terms and conditions shall be essential term of the mediation agreement concluded with a professional mediator. However, there is no prohibition for non-professional mediators to be paid for their performance as mediators. And in general, there is no any rational to prohibit receiving of a consideration for mediator's services. Eventually, the choice of a mediator and terms of the mediation agreement falls under sole discretion of the parties to the mediation agreement and there is no ground to restrict the freedom-of-a-contract entitlement that the parties enjoy under respective provisions of the RK Civil Code.

In connection with this we see the only reason to separate mediators into these two categories which is to offer to the parties of any dispute (conflict) a choice between specially trained mediators who fall under provisions of any professional code of conduct and those individuals who have extensive life experience and gained authority in the society.

Under Art 9(3) of the Mediation Law a person can carry out activity of mediators on a professional basis if he/she meets the following requirements:

(i) he/she is in the age of 25 or older,
(ii) he/she has the higher education,
(iii) he/she has a document (certificate) confirming the he/she has completed a training under the program of preparation of mediators, and
(iv) he/she is included into the register of professional mediators.

For non-professional mediators no special certification is required, but, apparently, a certain life experience is expected, since according to Art 9(3) the activity of mediator on a non-professional basis can be carried out by those persons who are (i) at the age of 40 and older, and (ii) included in a register of nonprofessional mediators.

Into the later category of non-professional mediators there members of local community can be also included if they are chosen to conduct a mediation. As Art 15 of the Mediation Law reads, such people can perform as mediators "along with" mediators performing on the non-professional basis. However we see no ground to extinguish another category of mediators in addition to those two that are already described above. Such members of local communities should be better considered also as mediators performing on the non-professional basis: their status is regulated by the same set of rules which regulate all non-professional mediators and they are also subject to inclusion in the same registers as all other mediators acting on the non-professional basis.

The only difference is that under Art 15 of the Mediation Law such members of local communities can be elected for their inclusion into the respective mediators' register as non-professional mediators by a meeting (gathering) of respective local community, whereas other non-professional mediators are expected (obliged, according to Art 16(2) of the Mediation Law) to apply for their inclusion into such registers on their own.

One provision of Art 15 of the Mediation Law with respect to setting forth criteria for those people who can be elected as non-professional mediator sounds ambiguous. Particularly, it establishes that a local community can elect those members of the community to be mediators who "have a great life experience, authority and impeccable reputation". As such these criteria can be accepted. However all of them are of a subjective nature and can be differently assessed by different people. What is the sense to include these criteria if there is no provision in the Mediation Law allowing challenging the election and no legal consequences established for proposing people to be non-professional mediators if to someone's opinion they do not match the criteria? Inclusion of this and similar provisions into a law are not in compliance with generally accepted requirements of legal technique.

4.3 Choice of a Mediator

Regardless of whether it is out-of-court or court-annexed mediation it is the sole discretion of the parties to a dispute (conflict) to choose a mediator who would help them to resolved the dispute (conflict). It is only mutual agreement of the parties is required to elect particular mediator(s).

The parties' choice of particular mediator(s) shall be reflected in their mediation agreement as its essential condition (Art 21(2) of the Mediation Law). The parties are free to voluntary elect the mediator(s) (Arts 9(1) and 20 (7) of the Mediation Law), to decline a mediator (Art 11(1) of the Mediation Law) and to replace the

mediator with other chosen mediator (Art 12(1) of the Mediation Law). In all cases of election and replacement of mediator(s) the parties' mutual agreement is required. However the right to decline a mediator under sub-clause 2 of Art 11(1) can be implemented by any of the parties of mediation: in such a case it will mean rejection from the entire mediation and, subject to such declination is made in writing, that will terminate mediation as it is set forth in Art 26 of the Mediation Law.

No one can force the parties to agree on having mediation and to make a choice of a mediator(s). However, when mediation takes place in the course of civil or criminal judicial proceeding the parties are required to notify the court or prosecuting agency (as the case may be) about the person(s) they choose as mediator(s) (Art 12(1) of the Mediation Law).

4.4 Specific Rights and Duties of the Mediator

Art 10 of the Mediation Law establishes what constitutes rights and duties of mediator. Basically, the content and extent of such right and duties are established due to the purpose and nature of mediation.

For example, there are only two specific rights of mediators are set forth in this Art 10. The first one entitles mediator to meet the parties of mediation within the course of mediation (with both of them simultaneously and/or with each of them separately) and to give them oral and written recommendation concerning settlement of the dispute (conflict).

In addition, mediators are permitted, and they are given a respective right, to inform the public about his/her activity, but with observance of the confidentiality principle established in Art 4 and explained in Art 8 of the Mediation Law. The meaning of this principle is described in more details later in this report. It, however, becomes obvious that formulation of this right of mediators is slightly controversial: from the one hand, mediators are entitled to disclose information about their activity as mediator, but, from the other hand, they cannot disclose anything they knew in the course of mediation if they failed to obtain a written permission of a party of the mediation who presented this information in the course of mediation. Under Art 8(3) of the Mediation Law, mediators shall be liable according to respective legislative provisions for unauthorized disclose of the respective information. And, under such regime, it becomes logical that there can no duty of disclosure exist for mediator.

According to Art 10(4) of the Mediation Law mediators may have other rights provided for by the RK legislation. There are no specific rights additionally expressed in other legislative acts of regulations at this moment, though some other rights of mediators are provided for in the Mediation Law itself. For example, under Art 12(3) mediator has the right to decline from conduct of mediation, if he/she believes that further efforts in the course of mediation will not lead to settlement. Mediator may also terminate mediation with the consent of the parties of mediation formulated in writing.

The following duties of mediators are established in Art 10 of the Mediation Law:

(i) within the course of mediation the mediator is responsible to act only with the consent of the parties of the dispute, and
(ii) the mediator must (before mediation starts) explain to the parties purposes of mediation and rights and obligations of the parties.

Besides, under Art 12(2) of the Mediation Law a mediator must decline to be mediator if certain circumstances preventing performance of the mediator's functions arise. It should be also considered as a duty of mediators.

In addition, according to the aforementioned Art 10, any professional mediator must observe a Code of Professional Ethics of Mediators to be approved by an association (union) of mediators. Mediators may carry out other responsibilities provided for by Kazakhstani legislation. It would be logical to expect any liability established or provided for in Kazakhstani laws for violation of the codes of conduct. However, for example, in the Code of Rules of Conduct for Professional Mediator of the United Center of Mediation and Peacemaking "Mediation" there is no any relevant provision found.[28]

At the same time, according to Art 14(7) of the Mediation Law, if a professional mediator violates requirements of this Law, participants of mediation may submit their complaint to the respective organization of mediators which, "upon confirmation of the violation shall suspend activity of the mediator with respective indication of the suspension in the register of professional mediators for the term of six month". This provision can be considered as kind of liability of mediators for breach of their duties. However it appears to have been formulated incorrectly. First of all, it does not indicate how the violation could be confirmed and who is expected to confirm it in order for such confirmation to be reasonable and reliable. Secondly, no any organization of mediators can suspend a mediator's activity by definition, because each mediator is an independent person to be elected by the parties of mediation without any influence from any side. The organization can only delete the mediator's data from its register or make other relevant record in the register.

Although there are no any additional specific duties or responsibilities of mediators established in other laws and regulations of Kazakhstan, all mediators should observe general responsibilities of any participants of social relations, such as to act reasonably, fairly and in good faith, refrain from causing harm to others, misuse or abuse his/her rights (Art 8 of the RK Civil Code).

In contrast, there less responsibilities are set forth in the Mediation Law for the parties of the dispute. They are not obliged to settle their dispute (conflict) in mediation and they can refuse to participate in mediation at their own discretion at

[28] See: The Code of Rules of Conduct for Professional Mediator of the PA "United Center of Mediation and Peacemaking "Mediation", approved by the Management Board of this Center on 25 March 2011 and its General Assembly on 5 August 2011. – http://www.mediation.kz/index.php?do=static&page=akti, *accessed 17 June 2014*.

any moment (Art 5(2) and sub-clause 3 of Art 11(1) of the Mediation Law). They are also entitled, at their mutual agreement, to replace a mediator with another one (Art 12(1) of the Mediation Law). As said above, no one can be force/enforce to choose mediation for dispute resolution, to elect specific person as a mediator, to continue participating in mediation or to enter into a settlement agreement.

Art 11(1) of the Mediation Law lists rights of the parties of mediation corresponding to the general approach mentioned in the preceding paragraph. In the line with implementation of this principle of voluntariness of mediation no specific duties for the parties of mediation is set forth in the RK legislation. However, once a settlement agreement is reached, the parties are obliged to implement it according to its terms and conditions (Art 11(2) of the Mediation Law).

4.5 Associations and Organizations of Mediators

According to Art 13(6) of the Mediation Law an association (union) of mediators is entitled (not obliged) to develop and approve a Code of Professional Ethics of Mediators. Under its legal definition, such association (union) can be created "with the purpose of coordination of activities of organizations of mediators, as well as for protection of their rights and legitimate interests" (sub-clause 3 of Art 2 of the Mediation Law). It is not clear which rights and interests (of mediators or organizations of mediators) are referred to in this legal definition. It seems that the most correct understanding is that it relates to rights and interests of organizations of mediators because according to Art 110 of the RK Civil Code an association (union) is defined as the form of a non-commercial organization created by legal entities (not by individuals) for the purpose of representation and protection of interests of its members/founders only. In general, it seems to be not reasonable to creating any structure to protect rights and interests of mediators as they perform special function to assist in dispute resolution. In connection with this we believe that attaining any special status to mediators to protect such status would not promote the entire idea of mediation.

To the extent we are aware there has been no any association (union) of mediators created in Kazakhstan yet. And, therefore, no any Code of Professional Ethics of Mediators approved by such an association (union) exists at this time in Kazakhstan.

At the same time, the Mediation Law in its Art 2 includes the definition of "organizations of mediators" which are defined as noncommercial organizations created for association of mediators on a voluntary basis for achievement by them of common aims with respect to development of mediation, provided that such aims do not contradict to legislation of the Republic of Kazakhstan.

Art 13 of the Mediation Law provides more detailed regulation with respect to status and the role of such organizations of mediators. Particularly it is set forth that, as noncommercial, nongovernmental, self-financed and self-governed organizations created under the initiative of mediators, such organizations of mediators shall be created for the purpose to provide material, organizational and legal and other

conditions for rendering service of mediators related to carrying out mediation. For this purpose organizations of mediators are entitled to provide professional training and improvement of professional skill for mediators with delivery of the document (certificate) certifying completion of corresponding courses related to mediation.

No special provision providing for adoption of any Code of Conduct for Mediators by any organization of mediators is included in the Mediation Law. However, in absence of an association (union) of mediators which can be set up by organizations of mediators, some of such organizations have adopted their codes of conduct. It has been already mentioned above such a code adopted by the United Center of Mediation and Peacemaking "Mediation". However this document cannot have its legal effect with respect to professional mediators in the context of their duty to observe a Code of Professional Ethics of mediators as established in Art 10 (4). On websites of other organizations of mediators like the Center of Mediation and Alternative Dispute Resolution[29] or the Kazakhstani Center of Mediation[30] and some others, no any similar code is found at all.

Mediation centers established in Kazakhstan are set up as organizations of mediators (those which has been already mentioned above and the most of other) play an important role with regard to development of mediation in Kazakhstan. This role is based on respective provisions of the Mediation Law establishing for such organizations the purpose to promote development of mediation (Art 2) and empowers them with such rights as training and certification of mediators (Art 13(3)), organizational support of mediation (Art 13(2)) and maintenance of registers of professional mediators.

If to address available websites of any of such organizations of mediators, one can find out the following services offered by the aforementioned mediation centers:

(i) services on organization and conduct of mediation: mostly, it means organizational support at all stages from election of mediators until mediation completes; the centers can also recommend a candidate to be chosen as mediator if the parties request for such recommendation (Art 20(8) of the Mediation Law);
(ii) consulting services to identify a level of proneness to conflict in a company;
(iii) accreditation: this means confirmation of compliance of professional level of a specialist to be included into the register of professional mediators maintained by the respective center of mediation. According to Art 14(1) of the Mediation Law each organization of mediators shall form and maintain its register of professional mediators for mediation on the territory of Kazakhstan. This Art 14 sets forth provisions concerning requirements to be met for a person to be included in the register of professional mediators, data which shall be reflected in the register, procedures for inclusion into the register, conditions and procedures for removal form the register, requirements as to

[29] See: http://elmediacia.kz, *accessed 17 June 2014*.

[30] See: http://kazmediation.kz, *accessed 17 June 2014*.

public accessibility of the register. It seems that this Art 14 is written with unnecessary details that could be moved down to the level of internal rules of each of the mediators' organization. But there one of its provisions is of real legal significance and it is reasonably included into this Art. This provision states that, if the organization rejects to include an applicant into its register of professional mediators or excludes him/her from the register, such rejections or exclusion, as the case may be, can be appealed before the court;

(iv) training and certification: according to Art 9(4) of the Mediation Law such training must be provided in accordance with programs to be approved in procedure determined by the Government of Kazakhstan. Required Procedure has been approved in the form of *the Rules For Undergoing a Study on Programs for Mediators' Training by the Resolution of the RK Government dated 3 July 2011 #770*. Model training curriculums on three different programs (such as "General Course of Mediation" for 48 teaching hours, "Specialized Course of Mediation" for 50 teaching hours and "Course for Training Trainers for Mediators" for 32 h) and a model form of the Certificate to confirm completion of a course has been also approved by this Resolution.

In addition to existence of registers of professional mediators formed and kept by organizations of mediators (mediation centers) there also registers of nonprofessional mediators can exist. Such registers shall be formed and maintained by local executive authorities, namely by akims of each respective town, settlement or a district in a city. Inclusion into such register shall be done by way of notification, though (at the same time) it is established that each non-professional mediator is obliged to apply to respective local authority to be included into such register. All these requirements together with other rules concerning formation and maintenance of registers of non-professional mediators are established in Art 16 of the Mediation Law.

5 The Process of Mediation in the Republic of Kazakhstan

5.1 Principles of Mediation

There the following five principles are set forth in Art 4 of the Mediation Law to serve conduct of mediation:

(i) voluntariness;
(ii) equality of rights of parties to the mediation;
(iii) independence and impartiality of a mediator;
(iv) inadmissibility of interruption in the mediation procedure, and
(v) confidentiality.

Each of these principles is explained in respective Arts of the Mediation Law.

Particularly, according to Art 5 of the Mediation Law the principle of voluntariness means, first of all, that no mediation procedure can be started and/or conducted unless all the parties to it express their voluntary will to settle their conflict or dispute by means of mediation: such wills of all parties to mediation shall be declared in a particular agreement on mediation to be entered into by the parties. In addition, this principle means that the parties to mediation are entitled to reject the mediation at any stage of the respective procedure, and although this provision is not so clear, there is no doubt that either party can make such rejection and respective mediation can terminate in both cases when (i) both parties agreed to terminate the procedure and (ii) when either party rejects the mediation. Again, in absence of clear regulation, it appears to be correct point of view that any rejection of mediation shall be made in the express form by either an agreement on termination of mediation or, at least, by formal notice of a party rejection of mediation. And, finally, this principle of voluntariness includes entitlement of the parties to mediation to dispose, at their own discretion, of their material and procedural rights, to increase or decrease amounts of their claims or to refuse of the dispute (conflict), as well as it means the parties' freedom to choose matters for their discussion of options for mutually acceptable agreement between them (solution).

Under Art 6 of the Mediation Law, parties to mediation have equal rights when choosing a mediator, a mediation procedure, their position under such procedure, ways and means to uphold their positions, as well as when receiving any information within the mediation, valuating acceptability of terms and condition of an agreement on settlement of the dispute (conflict). This principle of equality of the parties to mediation also means that the parties have equal obligations associated with respective mediation.

The principle of independence of a mediator is explained in Art 7 of the Mediation Law. In particular, it is established that "when conducting mediation a mediator is independent form the parties to the mediation and state authorities, as well as from other legal entities, officials and individuals". This principle also means that each mediator is independent when choosing means and methods of mediation and determining, provided however that such means and/or methods are acceptable under the Mediation Law. To support observance of this principle of mediators' impartiality, Art 7(2) of the Mediation Law also sets forth such duties of each mediator as (i) to be impartial, (ii) to conduct mediation in interests of both parties to it and (iii) to provide that both parties equally participate in the mediation procedure. A mediator must reject to conduct mediation if there are any circumstances precluding the mediator's impartiality.

According to Art 7(3) of the Mediation Law any interference in a mediator's activity from the part of persons and entities mentioned in previous paragraph is prohibited with the exception of those cases when such interference is provided for in the laws of Kazakhstan. As an example, such interference is possible when a mediator is suspected of a crime or administrative violation.

The principle of confidentiality of conduct of mediation is developed in Art 8 of the Mediation Law. This Art 8 prohibits all participants of mediation (including parties to it and a mediator(s)) to disclose any information they have known in the

course of mediation unless they receive a written permission to such disclosure from the party to mediation who provided this information. Any disclosure without such permission of a respective party to mediation entails a liability as provided for by the laws of Kazakhstan. In order to support confidentiality of mediation Art 8(2) of the Mediation Law also sets forth that mediators may not be interrogated as a witness with respect to information they knew in the course of mediation, with the exception of cases provided for by the RK laws. No such case can be identified in the law at this moment.

All other provisions of the Mediation Law are construed in compliance with these principles.

5.2 Conduct of Mediation

Articles of Ch 3 of the Mediation Law contain provisions to regulate conduct of mediation. Specific provisions relate to choice of place and time for mediation, language requirements for conducting mediation, conditions for conduct of mediation and some other related issues.

According to Art 17 of the Mediation Law, as the basic rule it is set forth that mediation shall be carried out in accordance with the procedure agreed by the parties of mediation which procedure shall not contradict to requirements of the Mediation Law. The parties may agree to apply a procedure (regulations) for conduct of mediation adopted by organizations (any particular one) of mediation.

The parties are free to choose a place for mediation and language on which mediation will be carried on. With the parties consent mediator appoints a date and time for mediation (Arts 18 and 19 of the Mediation Law).

Among the rules of significant legal importance there are those provisions of the Mediation Law related to duration of mediation and established timeframe for mediation to be conducted.

Again, the general rule is that a time period for mediation shall be defined by respective mediation agreement, and when mediation is carried on as the out-of-court procedure (i.e. beyond the civil-law or criminal proceedings) all participants of mediation (i.e. the parties and mediator) should do their best to complete the procedure within the period not exceeding 60 calendar days (Art 20(9) of the Mediation Law). In an exceptional case when the dispute (conflict) is very complicated or there is a necessity to gather additional information/documents this time period for the out-of-court mediation can be extended by agreement of the parties and with consent of the mediator. However it cannot be extended for more than another 30 calendar days.

A kind of controversial regulation is established in Art 23(1) of the Mediation Agreement according to which when a dispute arisen out of civil-law, labor, family or other relationships with participation of individuals and/or legal entities is brought to be settled in mediation, the mediation should be completed not later than in 30 calendar days after the mediation agreement was entered into. This period

can be extended by mutual decision of the parties for another 30 calendar days in case if it is necessary. In total the period for mediation to be completed may not exceed 60 calendar days. Inclusion of this provision into the Mediation Law means that general provision of Art 20(9) of the Mediation Law in terms of respective time limitation can apply to mediation for settlement disputes which cannot be identified as "disputes arisen out of civil-law, labor, family or other relationships with participation of individuals and/or legal entities". But it is difficult to imagine what could be such disputes beyond those arisen out of "other" (which in this case may be understood as any*)* relationships.

It also worth to mention that parties of a dispute are not limited in their attempts to settle the dispute in a number of mediations following each other and, to the extent it is reasonable, even taking place simultaneously. For each of such separate out-of-court mediations separate time limits would apply.

In Art 23(1) of the Mediation Agreement according to which, when mediation is chosen to settle a dispute arisen out of civil-law, labor, family or other relationships with participation of individuals and/or legal entities which has been already brought to court, the mediation should be also completed not later than in 30 calendar days after the mediation agreement was entered into. This period can be extended by mutual decision of the parties for another 30 calendar days in case if it is necessary. In total the period for mediation to be completed may not exceed 60 calendar days. In any case of such extension the parties must jointly inform the court in writing about the extension.

Special regulation of time limits are establishes in the Mediation Law for mediation conducted within the course of criminal proceedings. These specifics have been already mentioned in the last paragraphs of Sect. 3.3 of this chapter above.

There is no provision in the Mediation Law expressly prohibiting to have a number of mediations within the same judicial of criminal prosecuting procedures, provided that all that takes place and should be completed or otherwise terminated within established time period for completion of the respective proceedings.

There certain specifics are established in Art 25 of the Mediation Law with respect to settlement disputes in the sphere of family relationship allowing mediation to resolve controversies between spouses concerning continuation of their marriage, implementation of parental rights, determination of place of residence for children, parents' contributions to support children and any other disputes which may occur in family relations. Some special rules to protect interests of children have been also introduced to that Art 25.

5.3 Communications with Public Authorities During the Mediation

The Mediation Law contains very few provisions concerning, to a limited extent, relationships existing between the mediation and the mediator with public authorities, both judicial and non-judicial (notaries, land registrars, commercial registrars, etc.) during the mediation procedure.

If to consider mediator's relationships with aforementioned third parties, possibilities for such relationships are limited by application of the following principles:

(i) from the one hand, all activities of mediator in the course of mediation, by definition, shall be focused to his/her communications with the parties of mediation only, and therefore it does not propose mediator's contacts with any third party. And this principle is also reflected in specific formulation of mediator's rights as set forth in Art 10 of the Mediation Law proposing his/her meetings exactly with respective parties and not anyone else. Moreover, by application of the principle of independence (as it's been already described above) mediators carrying on mediations are independent from state authorities, other legal entities, public officers and individuals; and
(ii) from the other perspective, the Mediation Law does not prohibit mediators from having any contact with any third parties for purpose of mediation, but in any of his/her actions mediator can act only with the consent of the parties of respective mediation (Art 20(2) of the Mediation Law).

At the same time, in a law it can be required that mediator directly communicates to an authority or official. For example, under Art 25(3) of the Mediation Law mediator must apply to an authority entitled to protect children's rights if in the course of mediation any facts which threaten or can threaten normal growth and development of a child on seriously affect the child's legitimate interests. Yet, this is the only provision of this kind included into the Mediation Law.

More specifically the Mediation Law regulates situations when the parties of mediation should communicate with third parties. In essence, it relates to mediation agreed upon within civil-law judicial proceedings and criminal proceeding. In this case the Law specifically requires that the parties of mediation (not mediator, nor all participants of mediation) communicate to the court or prosecuting authority, as the case may be.

Such communications shall be made by the parties of mediation when, during the course of respective proceedings, they are required to jointly notify the court or prosecuting authority about their agreement to settle their dispute (conflict) in mediation or to extent initial term of mediation, as well as about results of mediation both when a settlement agreement is entered into and when mediation terminates for another permitted reason (clauses 2, 3 and 4 of Art 23 and clause 6 of Art 24 of the Mediation Law).

It is important to note that in their relationships with the parties of disputes and conflicts permissible for settlement in mediation, judicial and prosecuting authorities are prohibited from forcing the parties to agree to mediation but they can offer settlement in mediation at request of one of the parties of the dispute or conflict (clauses 3 and 4 of Art 20 of the Mediation Law).

In addition, if in the course of mediation and for the purpose of the dispute resolution participants mediation or parties of it would need or would be required to communicate with any public authority, notary or other third parties, nothing prevents them from such communication subject to observance of the confidentiality principle and the other party's rights and legitimate interests.

6 Failure of Mediation and Its Consequences in the Republic of Kazakhstan

Art 26 of the Mediation Law includes exhaustive (closed) lists of circumstances upon which mediation terminates. One of these five cases shall be qualified as successful completion of mediation: it happens when the parties of the respective dispute or conflict manage to reach a settlement agreement. In this case the purpose of mediation as formulated in Art 3 of the Mediation Law (please see in this chapter above) shall be deemed achieved.

The other four grounds for termination of mediation can be qualified as failure of mediation, since its purpose is not reached. Particularly, in addition to conclusion of a settlement agreement, mediation shall terminate in either case when:

(i) mediator discovered circumstances which do not allow any possibility for settlement of a dispute or conflict in mediation (these may relate to any of the circumstances indicated in Art 1 of the Mediation Law which prevent settlement of dispute by way of mediation);
(ii) the parties made written refusal from mediation in connection with impossibility to settle the dispute (conflict) be way of mediation;
(iii) one of the parties refused its further participation in mediation having such refusal made in writing, or
(iv) when the time period allowed for conduct of mediation as established by Mediation Law in Arts 23 and 24 (as described above) expired.

There is also another ground for termination of mediation not included into Art 26 but provided for in Art 22(5) of the Mediation Law. This ground proposes that a mediator refuses to conduct mediation by virtue of circumstances hindering his/her impartiality in a particular situation.

In all these cases mediation terminates when respective ground for termination is properly fixed. For example, as it is set forth in Art 26 of the Mediation Law, mediation terminates:

(i) from the day respective time period for mediation expired;
(ii) from the day when a party of mediation sent its written refusal to continue a mediation to another participants of particular mediation, or
(iii) from the day when both parties signed their written agreement to refuse mediation in connection with impossibility for the dispute's settlement by way of mediation.

With respect to termination of mediation when mediator discovered circumstances preventing mediation for settlement of a particular dispute or conflict the Mediation Law does not specifically indicate either the moment of termination of mediation or how the mediator's respective findings should be expressed. It sounds reasonable that in such a case mediation terminates from the moment when mediator announced to the parties of mediation that he/she revealed circumstances under which mediation cannot be used for settlement of the dispute of a conflict.

Similarly, when a mediator refuses to conduct mediation due to impossibility for him/her to be impartial in a particular situation, such mediation terminates from the moment when the mediator announced to the parties of mediation that he/she couldn't be impartial.

The Mediation Law does not specifically address the issue of consequences of the failure of mediation for the parties involved and for the mediator. However, it looks obvious that with occurrence of any of this circumstances respective mediation agreement automatically terminates and, correspondingly, relationships between participants of mediation arisen out of this mediation agreement shall also be cancelled.

When there is a termination of mediation taking place within civil-law proceedings or criminal proceedings, such termination (failure of mediation) shall cause either renewal of civil-law proceedings or completion of criminal proceeding in due course.

If it is an out-of-court mediation set for a dispute resolution, then failure of such mediation shall cause renewal of the course of respective limitation period.

Apparently, effect of failure of mediation differs depending on which circumstances caused the failure. In particular, when mediation terminates due to identification of circumstances preventing settlement of a dispute (conflict) by way of mediation this would prevent the parties of the dispute from any future attempts to settle their dispute in mediation.

In all other cases, failure of mediation would, in principle, allow another attempts to settle the dispute by way of mediation, provided that for mediation agreed within the course of legal proceedings established time limits for respective proceeding allow another mediation.

There are no particular consequences of failure of mediation for mediator in the most of these cases with the exception of when mediation terminated upon the mediator's refusal due to absences of his/her impartiality. In this case such mediator will not be able to be chosen by the parties of a dispute (conflict) to settle it in another mediation to take place based on new mediation agreement (which shall be concluded with another mediator).

7 Success of Mediation and Its Consequences in the Republic of Kazakhstan

7.1 Meaning of Successful Mediation and Its Consequences in the Republic of Kazakhstan

According to Art 26 of the Mediation Law, conclusion of a settlement agreement constitutes the ground for termination of mediation from the day when the parties of mediation have entered into (signed) the agreement. With the conclusion of the

settlement agreement the purpose of mediation declared in the Law is achieved and, therefore, mediation is considered to finish successfully in Kazakhstan.

Art 27 of the Mediation Law provides for specific requirements with respect to the form and substance of a settlement agreement.

It is required that the settlement agreement shall be made in written form and it must be signed by the parties settled their dispute or conflict. The agreement becomes effective as of the day of its signing by the parties unless this agreement is reached in mediation taken place within civil-law judicial proceedings. In this later case the settlement agreement must be forwarded immediately after its signing by the parties to the judge considering respective civil case for the agreement's approval by the judge in the procedure set forth by the RK Civil Procedural Code.

Any settlement agreement must include the following provisions:

(i) reference to the parties of mediation (parties of the respective dispute or conflicting parties);
(ii) substance of the dispute (conflict);
(iii) identification of the mediator chosen by the parties;
(iv) terms and conditions agreed by the parties to settle their dispute or conflict;
(v) ways and time limits for implementation of the agreed terms and conditions regarding settlement of the dispute (conflict), and
(vi) consequences of failure to implement or properly implement of the settlement terms and conditions.

Apparently, any failure to comply with these requirements legally established with respect to the form and content of a settlement agreement may put a question as to acknowledgement and/or enforceability of the agreement. In addition, special provisions are established in the law with respect to conditions for enforceability of settlement agreements reached in court-annex and criminal proceedings mediation (see below).

With conclusion of the settlement agreement it is not only mediation terminates but also all rights and responsibilities of the mediator shall cancel. After the agreement becomes effective no any further involvement of the mediator in implementation or enforcement of the settlement agreement is proposed.

Separate provisions are established in the Mediation Law concerning status and effect of settlement agreements reached in the court-annexed mediation and criminal proceedings.

As mentioned above, the settlement agreement made in the course of civil judicial proceedings is subject to approval by a judge considering the case. Apparently, such agreement's effectiveness is subject to the required approval and above mentioned requirement of the agreement's effect from the date of its signing would not apply in this case.

It can be also concluded that the judge is not obliged to approve the settlement agreement automatically and he/she will have to examine the agreement as to whether its terms and conditions do not contradict or otherwise violate imperative provisions of the law. According to Article 49 of the RK Civil Procedural

Code the court may cancel the settlement agreement if it contradicts to the RK legislation or violates someone's rights and freedoms provided for in the laws of Kazakhstan.

Once the court approves the settlement agreement, it will come into full effect and constitute a ground for termination of the judicial proceeding with respect to the dispute settled by this agreement on a respective stage of the judicial proceedings. Particularly, under Arts 247, 342 and 383–1 of the RK Civil Procedural Code approval of a settlement agreement by the court terminates the proceeding on the 1st instance, appellation or cassation stages, as the case may be.

There is no other express provision requiring homologation of settlement agreements by the court or other public authority established in the Mediation Law.

However, there is a ground to believe that settlement agreements reached within criminal proceeding would also require certain acknowledgment or, at least, examination by respective prosecuting authority.

As it is defined in clauses 6 and 7 of Art 27 of the Mediation law, the settlement agreement reached by the parties in result of mediation during the course of criminal proceedings constitutes an agreement resolving a conflict by way of compensation of harm and reconciliation of a person committed a crime with the person suffered from the crime. Once the settlement agreement is reached it must be immediately forwarded to the respective prosecuting authority and, if the RK Criminal Procedural Code allows it, such settlement agreement can serve as the circumstance excluding or allowing avoidance of criminal prosecution. This would mean that respective prosecuting authority or criminal court would also examine the settlement agreement of whether its essence complies with requirements of the law in order to refer to the agreement as ground for cancelling criminal prosecution.

7.2 Enforcement of the Settlement Reached by the Parties of Mediation in the Republic of Kazakhstan

As a general principle Art 27(3) of the Mediation Law establishes that the settlement agreement is subject to voluntary implementation by the parties to the agreement according to its terms and conditions.

This principle is fully applicable to mediation taken place as out-of-court procedure. Particularly, Art 27(4) sets forth that "an agreement to settle a dispute entered into before consideration of a civil-law case in the court represents a transaction aimed to establish, change or terminate civil-law rights and obligations of the parties [*to the dispute*]".

There is the opinion that conclusion of a settlement agreement gives rise to a new relationship between the parties of a dispute which, obviously, replaces the previous relationships which led the parties to the dispute and mediation. In case

of enforcement of a settlement agreement in court such new relationship based on the settlement agreement would constitute the subject of respective judicial consideration.[31]

Art 27 of the Mediation Law also provides for that, if the settlement agreement is not implemented or is implemented improperly, the party who violated the agreement shall be liable as established by the laws of Kazakhstan. It is proposed that if the settlement agreement is not implemented or implemented improperly, respective party to it may use the same means of protection as proposed for application when any other civil-law agreement is violated, including the right to brought a case to the court.[32]

It worth to mention that at the opinion of professor M. Suleimenov, there have been essential mistake of Kazakhstani legislators that there were two different phenomena mixed up in the Mediation Law and that regulation of the third phenomenon has been simply missed. He reasonably believes that out-of-court mediation and court-annexed mediation should be better regulated separately, as well as special regulation is needed for mediation under the auspice of an institutionalized arbitration, which is not even considered by existing legislation in Kazakhstan at all.[33]

We can add that separate regulation should be also offered to regulation of mediation in the course of criminal proceedings. Mixing all this within the frame and content of a single Mediation Law causes incompleteness and contradicting nature of the respective legal framework and legal regime.

8 Costs of the Mediation

Art 22 of the Mediation Law deals with the issue of expenses related to mediation. As such expenses there the following two categories are indicated:

(i) mediators' fee (consideration), and
(ii) the mediator's expenses incurred in connection with mediation including costs of transportation to the place of mediation, accommodation and catering.

[31] See: "Implementation of Agreements Reached in Mediation in the CIS Member States" (review of the International Scientific and Practical Conference dedicated to alternative dispute resolution in the CIS (from national to international instruments of dispute settlement) held in Minsk, Belarus on 21 June 2013. – http://www.zakon.kz/analytics/4567196-ispolnenie-soglashenijj-zakljuchennykh.html, *accessed 17 June 2014*.

[32] See: "Implementation of Agreements Reached in Mediation in the CIS Member States" (review of the International Scientific and Practical Conference dedicated to alternative dispute resolution in the CIS (from national to international instruments of dispute settlement) held in Minsk, Belarus on 21 June 2013. – http://www.zakon.kz/analytics/4567196-ispolnenie-soglashenijj-zakljuchennykh.html, *accessed 17 June 2014*.

[33] See: Suleimenov and Duisenova, *Razvitie arbitrazha i mediacii v Kazahstane* (Development of Arbitration and Mediation in Kazakhstan). Published on the website of Kazakhstan International Arbitrage: www.arbitrage.kz/461 (file 15), *accessed 17 June 2014*.

This list of expenses is exhaustive and it does not permit other types of the expenses.

Parties of mediation jointly in equal parts shall cover these expenses. However in their respective mediation agreement the parties may agree on different distribution of coverage such expenses.

As mentioned in this chapter above, regulation of the issue of payment any fee (consideration) to mediators is not sufficiently clear in the Mediation Law. From one hand, it prescribes including into the agreement the reference to an amount of the fee payable to a professional mediator, if such payment is provided at all, and it is silent as to whether any payment of consideration to non-professional mediators can be made (which payment, at the same time, is not prohibited by law). From the other hand, it is established that non-professional mediators shall be reimbursed with the expenses he/she incurs in connection with mediation, remaining silent with respect to any possibility for reimbursement of expenses to professional mediators.

This makes the Mediation Law remaining ambiguous. Similar ambiguity is caused by the provision of clause 5 of its Art 22 which requires that mediator must return to the parties of mediation all the money he/she received from them when the mediator rejects to conduct mediation due to circumstances preventing his/her impartiality. Such regulation sounds too strict because the participants of mediation may reveal respective circumstances after mediation started and it is not fair to leave the mediator not compensated for his/her expenses incurred before the circumstances were discovered. In principle, such issues should be better left for discretion of the parties to respective mediation agreement.

The Mediation Law does not specifically address the issue of whether any legal aid is available to participants (including mediator and the parties) of mediations. However it does not mean that the parties of a mediation agreement cannot agree to cover expenses associated with receiving legal advice or other type of legal services to be received by all the participants during mediation.

And there is, certainly, no any restriction for each party of mediation to pay for its own expenses related to legal aid it receives in connection with its participation in mediation.

9 Cross-Border Mediation

9.1 Notion and Main Features of Cross-Border Mediation in the Republic of Kazakhstan

Legislation of Kazakhstan does not operate the notion of cross-border mediation. At present, there is also no sufficient theoretical consideration of this matter in publications of local scholars and practicing lawyers or other specialists in the field of mediation. Accordingly, there is no any separate legal framework in Kazakhstan to specifically regulate cross-border mediation.

As mentioned above, the Mediation Law (according to its preamble) is set to regulate social relationship in the sphere of organization of mediation in the RK. Pursuant to Art 1(1) of the Mediation Law mediation can be used for settlement disputes and conflicts within the framework of Kazakhstani law. In connection with this the conclusion can be made that the Mediation Law together with related provisions of other laws of Kazakhstan (such as, for example, the RK Civil Procedural Code or Criminal Procedural Code) constitutes a legal framework for domestic mediation only.

However, professor M. Suleimenov paid attention to the failure to regulate "mediation with foreign element".[34] He specifically mentioned that respective regulation assumes certain peculiarities in regulating respective relationships involving such foreign element that were missed in the draft the Mediation Law and are still missing in it after its adoption as well as in any other existing law of Kazakhstan.

9.2 Recognition and Enforcement of Foreign Mediation Settlements in the Republic of Kazakhstan

Laws of Kazakhstan do not directly regulate those aspects related to recognition and enforcement of foreign mediation settlements. However general rules of the Kazakhstan's material and procedural legislation would apply to enforce settlements reached in foreign mediation. However, there should be separate categories of such settlements differentiated, as the regimes for the enforcement differ.

If, for example, the settlement was reached in out-of-court mediation and the parties formulated respective agreement, than in order for it to be enforced in Kazakhstan directly the parties should choose Kazakhstani legislation as governing law for the respective settlement agreement and, preferably, judicial proceedings in the RK courts or Kazakhstani arbitration for disputes' resolution under such settlement agreement to enable its enforcement in Kazakhstan. The RK Civil Code allows parties to a contractual arrangement with participation of foreign individuals and legal entities to choose Kazakhstani legislation as governing law for their settlement agreements (Art 1112) where such governing law would apply to rights and obligations of the parties thereto, performance under the agreement, consequences of failure to perform or properly perform thereunder, etc.

The parties may also choose foreign courts or foreign arbitration for disputes resolutions under such settlement agreements. In this case respective provisions of the RK Civil Procedural Code will apply to identify whether a decision of foreign court or foreign arbitral tribunal would be enforceable in Kazakhstan. According to Art 425 of the RK Civil Procedural Code decisions of foreign courts and arbitration

[34]See: Suleimenov and Duisenova, *Razvitie arbitrazha i mediacii v Kazahstane* (Development of Arbitration and Mediation in Kazakhstan). Published on the website of Kazakhstan International Arbitrage: www.arbitrage.kz/461 (file 15), *accessed 17 June 2014*.

shall be acknowledged and enforced in Kazakhstan if it is provided for by the law or international treaty of the Republic of Kazakhstan and on the principle of mutuality. Particularly, enforcement of judicial decisions of courts of a particular foreign state shall be possible if there a bilateral treaty between Kazakhstan and a respective state exists. If to say about enforcement of foreign arbitral awards, such enforcement can be done on the basis of the *New York Convention on Acknowledgment and Enforcement of Foreign Arbitral Awards of 10 June 1958* to which Kazakhstan joined in 1995 pursuant to the *Decree of the RK President dated 4 October 1995 #2485*.

Similar consideration, as is made in the preceding paragraph, should be taken to the account when discussing mediation settlement reached in the court-annexed procedure and in foreign arbitration provided that the foreign court or arbitration tribunal approves respective settlement agreement. Respective judicial decision of a foreign court or foreign arbitral award by which a mediation settlement is approved or otherwise homologated can be enforced in Kazakhstan according to the provisions referenced above.

10 E-Justice

The Mediation Law does not address the issue of possible use of information technologies for purpose of mediation. It allows the parties of mediation to agree on the procedure for conduct of mediation provided that any such agreed procedure, including agreed application of respective regulations adopted by a mediation center, does not violate this Law (Art 17). At the same time it entitles mediators to independently choose means and methods of mediations admissible under this Law (clause 1 of Art 7).

However this Law does not propose any particular mean or method for mediation. We can only refer to Art 10(1) where it is provided for that mediator has the right to have meetings with all the parties together or each of them personally. The conclusion can be made that the Mediation Law does neither prohibit any use of electronic means of communication nor it prescribes to have only meetings in person for the mediation participants during the procedure or any stage of it (such as beginning, completion or other). Imperative provisions of the RK law or any principles of mediation (both express and, if any, implied) do not restrict this freedom of choice to use electronic devices, equipment and information technologies for out-of-court mediation in Kazakhstan.

With respect to the court-annexed mediation it worth to mention that Kazakhstani judicial system offers quite a wide range of opportunities for use (e)Justice device in the course of judicial proceeding starting from bringing a suit before court.

The reference can be made to the one of interviews that the former Chairman of the RK Supreme Court B. Beknazarov gave to mass media in 2013. He particularly mentioned the following: “Information technologies in the Republic of Kazakhstan have been used since 1999. Particularly, the integrated automated informational and analytical system of judicial bodies has been introduced in our country. Each

suit is registered in the single database and this allows tracking the process on the case: to identify current stage of the proceedings, if there is any red tape. … The system of videoconference is especially important for us. There quite a lot of judicial procedures are implemented by means of videoconference. … Sms-messaging is used to summon witnesses for hearings. … Special technology called 'electronic observation proceeding' is also used allowing participants of the proceedings to familiarize with a case materials being outside of the court, distantly: so, being at home a person can become familiar with all documents related to the process. This system shows positive effect. It is very convenient for citizens. Besides, a claimant may file his claim to the court in the electronic form and to receive a decision in the same form. This makes an access to Justice easier."[35] Detailed information concerning use of information technologies in courts of Kazakhstan, including retrospective analysis, description of current state of affaires and indication of ways for further development, can be found on the website of the Supreme Court of Kazakhstan.[36]

The most of these technologies and means of communications are used in the judicial proceedings pursuant to respective provisions of the RK Civil Procedural Code. Among such provisions the following ones can be mentioned: Art 90 (regarding use of scientific and technical means in the process of presenting evidences), Art 134 (which allows summons to the courts hearing with use of sms-messaging to a subscriber number of cellular communications or electronic mail messages), Arts 150 and 151 (which provide for submission of a suit in the electronic format as e-document).

Based on the provisions of the RK Civil Procedural Code new forms of electronic interaction of citizens and organizations with judicial authorities via Internet resources were developed and presented in the Supreme Court in June 2014.[37] In connection with this one of important members of the Supreme Court of the RK specifically indicated that Internet and its facilities are considered as a sufficient precondition for development of (e)Justice in Kazakhstan, and the information technologies will be used for purposes of civil proceedings in courts to the maximum extent.[38] It is believed that such regulation will increase effectiveness of and impartiality in civil justice, it will have a positive impact on the quality of

[35]See: Beknazarov's interview to Ukrainian mass media on 25 June 2013 at: http://www.nomad.su/?a=10-201306260021, *accessed 24 August 2013*.

[36]See: Ganiyeva, *Informatsionniye tehnologii v sovremennyh sudah Kazahstana* (Information technologies in modern courts of Kazakhstan). – http://sud.kz/rus/content/informacionnye-tehnologii-v-sovremennyh-sudah-kazahstana*, accessed 17 June 2014.*

[37]See: http://www.zakon.kz/4629916-teper-sudebnye-dokumenty-mozhno-podavat.html, *accessed 5 June 2014*.

[38]See: http://www.zakon.kz/4630019-kazakhstanskie-sudi-budut-izuchat.html, *accessed 6 June 2014*.

justice and further strengthening of independence of the judiciary.[39] In addition, as expected it will help to considerably decrease budget expenses. Particularly, it was calculated that with the proposed introduction of an online-service for the purpose to facilitate familiarization with judicial documents on the web site of the Supreme Court of the RK expenses for paper, other consumables and posting will be reduced by ten times.[40]

No doubt that these technologies and means of communication can be used for mediation taking place within the course of respective judicial proceedings.

[39] See: http://www.zakon.kz/4630009-v-kazakhstane-obsuzhdajut-novuju.html, *accessed 6 June 2014.*

[40] See: http://bnews.kz/ru/news/post/209222/, *accessed 17 June 2014*.

Mediating in Lebanon: From Old to New?

Jalal El-Ahdab and Myriam Eid

Abstract Mediation is an ADR method yet to incorporate into the Lebanese legal system: there is no statutory framework governing or providing for mediation procedures in Lebanon, although a draft law on judicial mediation has been submitted in 2009 by the Government to the Parliament for approval.

As such, mediation is only governed by the general provisions governing any civil transactions within the Lebanese Code of Obligations and Contracts. By the same token, having few cases on the subject, this tends to show that either mediation is rarely used or that it leads to very few controversies, which is a sign of success.

Despite the absence of (statutory or case) law in that field, mediation has been practiced in Lebanon for many years now and is today evolving as a recognized means of effective dispute resolution.

As a sign of this trend, several centers for mediation have been established in Lebanon, endowed with their own mediation rules.

1 The Existing Situation of ADR in Lebanon

Several alternative dispute resolution mechanisms have grown under Lebanese law. This is notably the case for arbitration which was integrated into the Lebanese Code of Civil Procedure (**CCP**) in 1983 (articles 762–821) and which gave rise to abundant and very favorable case law for the past 20 years. The legislator has also mentioned conciliation as an alternative mechanism for dispute resolution at articles 460 and 461 of the CCP without however establishing a conciliation standard mechanism the same way as the one relating to arbitration; article 461 of the CCP gives the litigants the right to have recourse, at any time during proceedings before the courts, to conciliation and upon successful completion thereof, to request

J. El-Ahdab (✉)
Ginestié Magellan Vincent-Paley (Paris), Paris, France
e-mail: Ahdab@ginestie.com

M. Eid, Esq.
Ahdab Law Firm (Beirut), Beirut, Lebanon
e-mail: m.eid@ahdablawfirm.com

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the judge to issue a decision endorsing the outcome of the conciliation. Article 460 CCP gives the judge before whom an action has been brought to attempt to conciliate between litigants.

The law on arbitration does not provide for any relation between arbitration and mediation. It does not further provide for multi-tier arbitration. However, practically, it is always possible to provide for mediation as preliminary step that precedes arbitration. This is also the case for some specific disputes such as labor disputes, where the law provides for mandatory conciliation prior to having recourse to statutory arbitration as well as consumers disputes which, as will be seen further below.

2 The Basis for Mediation in Lebanon

2.1 The Notion of Mediation

Mediation has not yet been integrated into the Lebanese legal system. There is no general statutory framework governing or providing for a mediation procedure in Lebanon. This makes it hard to identify the notion of mediation as perceived by the Lebanese legal system. Notably, the Lebanese Code of Civil Procedure which encompasses many provisions on arbitration –at articles 762 *et.seq.* – does not include any articles on mediation. However, a draft law on Judicial Mediation[1] has been submitted in 2009 by the Government to the Parliament for approval (**Draft Law on Mediation** or **Draft Law**). It has not to date been discussed or voted in Parliament and thus, remains until further notice a draft law that has no legal force in Lebanon.

A sort of "mediation" can however be found as a means of dispute resolution in some specific Lebanese regulations, namely, the Consumer Protection Law and the Law pertaining to the "Mediator of the Republic."[2] Such a procedure is of a statutory nature: it is mandatory and therefore does not equate to the conventional mediation subject-matter of this study.

This does not, nevertheless, exclude the practice of mediation which, albeit not yet codified and limited in scope, is an old tradition in Lebanon. Hence, the practice of mediation *via* what is referred to as the *Sheikh Solh* - an elderly of the village deemed wise and old enough to resolve disputes- has for long been considered in Lebanon as standard practice for dispute resolution that aims at resolving disputes amicably without the need to resort to courts. It survives nowadays in some Lebanese villages where family clans still play an important role in the village's political life and social peace. It is also considered as part of the customs of some

[1] See the French version of the Draft Law on Mediation as submitted by the Government upon the CPM's proposal to the Parliament in June 2009 and as published by the "Centre Professionnel de Médiation" on the following link: http://www.cpm.usj.edu.lb/doc/loi_fr%20version%201-2009.pdf

[2] See also Sect. 2.2 below.

villages where some men (normally old enough to be considered wise), known for their integrity and moral standing would act as mediators for conflicts between members of the village. This is especially the case when an accident or a crime occurs and where the victim and the assaulter belong to two different clans; the *Sheikh Solh* of both clans come together with other third parties in order to resolve the matter and to avoid possible vendettas between the two clans. This has been recently the case in the Bekaa valley where the clan leaders and elderly *Sheikh Solh* have interfered to resolve a dispute relating to a murder of one of the clans' member and which ended up in an agreement between the clans to hand over any assaulters to the Lebanese authorities and to ban any action of retaliation or vendetta.

Mediation is further used today to attempt to find fair solutions in family disputes. It is standard practice before confessional tribunals which deal in Lebanon with personal status issues; this is the case for divorces where the confessional judge invite the couples in dispute to his office in an attempt to have them discuss the dispute and agree on a pacific solution. This is primarily the case in marital disputes that involve an international parameter with couples having dual citizenships or multiple residences, in Lebanon and abroad. It is also the case for child custody and inheritance disputes.[3]

Mediation can finally be practiced in Lebanon on conventional basis. Mediation agreements are binding as contracts under General Contract Law. This is also corroborated by the proliferation of Mediation Centers, the last of which being a private center – the Lebanese Mediation Center (**LMC**) – recently established within the Chamber of Commerce, Industry and Agriculture of Beirut and Mount Lebanon (**CCIABML**) and endowed with specific mediation rules that have adopted recent trends in international mediation as will be seen further below. It can also been witnessed through the existence of other mediation centers, the first of which – the *Centre Professionnel de Médiation* (**CPM**) – having been established in 2006 within Saint Joseph University as a private center dealing with conventional mediation.[4]

2.2 The Existing Legal Basis for Mediation

As previously mentioned, there is no preexisting legal framework for mediation in Lebanon, save for some specific legislations that provide for mediation in certain disputes.

[3]See J. Hawari Bourgély, "L'état des lieux de la médiation au Liban et les règles déontologiques et formation des médiateurs," *Lebanese Review of Arab and International Arbitration*, Issue No.49, pages 10 *et. Seq.;* See also, M. Issa El Khoury, "Spécificité du rôle de l'avocat dans la médiation: "l'exemple des litiges complexes," *ibid.,* pages 17–18.

[4]For further information on the CPM practice, see the CMP's official website on the following link: http://www.cpm.usj.edu.lb/en/

However, this study will introduce the provisions of the Draft Law on Mediation where appropriate as this Law, having been submitted by the Government, may show the conception Lebanon may have and if endorsed, would adopt with respect to mediation. Article 1 of the Draft Law gives the parties the right to resort to mediation in order to "avoid a dispute" or "resolve it" in matters where compromise is permitted.

Hence, the Lebanese Code of Obligations and Contracts[5] states (**COC**) that "*one may not compromise in questions of civil or personal status, or relating to public policy or personal rights, but one may enter into a compromise concerning the pecuniary interests resulting from issues of civil status or criminal matters.*" Furthermore, the same Code provides[6] that "*one may not compromise on alimony: but that one may compromise on the method used to pay for alimony or on the method of payments of amounts which are already due.*" It also provides that "*one may also compromise on an amount, which is less than the legal share*" as "*one may also compromise on an amount, which is less than the legal share as established by the law, of acquired inherited rights, provided that the parties are aware of the amount of the succession.*"[7]

Article 2 further determines the mission of the mediator as to "encourage dialogue" between the parties under his/her administration in order to enable them to reach a solution they agree on themselves and which then should be consecrated in a "contract."

Herewith are the following documents relating to mediation in Lebanon:

- Annex I: Draft Law on Judicial Mediation dated 15 June 2009 (in French);
- Annex II: Lebanese Consumers Protection Law issued in January 2005 (in English); and
- Annex III: the CCIABML Rules of Mediation (2012) (in English)

Two areas, as previously mentioned, are expressly concerned with mediation under the Lebanese Law; hence, article 82 of the Lebanese Consumers Protection Law (**CPL**)[8] provides for statutory mediation for disputes arising out of the application or interpretation of the Consumers Protection Law between a consumer and a professional or a factory and which amount does not exceed 3 million LBP, that is 2.000 USD. Articles 83 to 96 of the CPL thoroughly provide for the mediation procedure that should be followed for disputes falling within the scope of article 82

[5] Article 1037 of the COC.

[6] Article 1039 of the COC.

[7] Article 1040 of the COC.

[8] See notably, Articles 82–103 of the Lebanese Consumers Protection Law relating to Mediation; The English version of the Law No. 695 of 4 February 2005 pertaining to Consumers Protection is available on the following link: http://www.brandprotectiongroup.org/pdf/consumer.pdf; For ease of reference it has also been attached at Annex 2 herewith. The full text of the Consumers Protection Law can be found in its Arabic original version on the following link: http://www.economy.gov.lb/public/uploads/files/6589_1683_4515.pdf

of the CPL. For the rest or if the mediation was not successful, the dispute shall be referred to a dispute resolution committee established under article 97 of the CPL for final and binding determination. Article 82 of the CPL clarifies the purpose of mediation which is made in "*an attempt to reconcile between the two parties*."

Furthermore, in 2005,[9] the legislator established an optional mediation procedure for disputes arising between citizens and state entities, to be conducted according to the terms of the law by an appointed mediator referred to as the "Médiateur de la République." It should be noted however that the Mediator's position has not, to date, been filled due to political reasons. Although such mediation is not comparable to private and contractual mediations, its adoption by the Lebanese lawmaker may show a certain political awareness and some willingness to increase the use of mediation in certain areas.

The above mentioned laws do not refer to cross-border mediation and solely relate to internal mediation.

Out of court and annexed mediations are possible in Lebanon if both parties agree to them as per the general rules pertaining to the freedom of contracting enshrined within the COC. However, article 2 of the Draft Law on Mediation gives the judge or the court seized with a dispute the power to propose to the litigants either *ex officio* or upon the request of one the parties to resolve the dispute through mediation. In case both parties agree thereon, the court has to temporarily stay the proceedings, nominate a mediator and refer the parties to mediation. During the mediation phase, the judge maintains the power to issue all kinds of measures he/she deems necessary. Article 2 also envisages the possibility of referral of a dispute pending before the court to mediation in case both parties agree thereon in writing. The same procedure as described above would apply.

There is no record of the number of mediation procedures conducted in Lebanon as such practice began recently to expand as explained above. However, the practice of mediation seem to be growing in Lebanon with the recent bill (Draft Law) submitted by the Government with respect to mediation as well as the establishment of a new center in 2012 within the CCIAMBL. The Beirut Bar Association has recently taken more interest in mediation and signed in June 2013 a convention with the CPM for the creation of a mediation cell within the Association aiming at training lawyers wishing to be involved in mediation.[10] Other syndicates have also taken interest in mediation; hence, the Associations of Medical Doctors as well as the Order of Engineers and Architects in Beirut have both recently organized seminars in collaboration with the CPM on the importance of mediation in medical and construction disputes

[9]See Law No. 664 of 4 February 2005 pertaining to "Médiateur de la République" (Mediator of the Republic) in Lebanon, which can be found (in French) on the following link: http://www.cpm.usj.edu.lb/doc/Loi-Mediateur.pdf

[10]See the Article "la médiation, le Cheikh Solh du XXI Siècle", published in "L'Orient Le Jour" Newspaper, 12 October 2013, on the following link: http://photos.usj.edu.lb/pdf/pdf_1257-2067.pdf

3 The Mediation Agreement/the Agreement to Submit the Dispute to Mediation

Lebanon did not adopt a general legislation pertaining to conventional mediation. Thus, the mediation agreement will be examined with reference to the Draft Law on Mediation as well as the CCIABML Mediation Rules (the "CCIABML Rules"), the most recent arbitration center and the only one to have specific mediation rules. Although they do not constitute state legislations, the Draft Law (if adopted) and the Rules (if chosen by the parties) would apply on the mediation procedure. Both documents would however show the conception of mediation and may affect its practice in Lebanon as well as any possible mediation laws that might be adopted in Lebanon.

The Draft Law mostly targets judicial mediation conducted after a dispute has been brought before courts. Therefore, the Draft Law does not contain provisions relating specifically to mediation agreements. However, as previously mentioned, the Draft Law provides at article 1 for the possibility to agree on mediation prior to any dispute without determining the form, content or scope of such mediation agreements. Article 2 devoted to judicial mediation does also mention the duty of the court to stay the proceedings and refer the parties to mediation in the event there was a mediation agreement made in writing for this purpose. From the sum of the above, it could be inferred that mediation agreements prior or during the proceedings are possible if made between the parties. Regarding the signature of the agreement and whether such agreements should be signed by the parties, the provisions of the Draft Law remain silent. The form of such agreements may however be subject to the general provisions relating to contracts as contained in the COC which give effect to the freedom of the parties to contract save where the law specifically provides otherwise.

As for the CCIABML Rules, article 6 provides for the requirement that the mediation agreement be signed by the parties wishing to have recourse to mediation. According to article 6, the mediation agreement should, prior to its signature, be sent for approval by the CCIABML, after which it would be signed by the parties. It further notes that the mediation agreement "*provides the essential legal basis for mediation*" and "*will normally be signed at the beginning of the mediation day on behalf of the parties and the mediator.*" Such mediation agreement seems to relate to the event the parties agreed to submit a dispute to mediation after it has arisen. The event of a mediation agreement that has been signed prior to the dispute has not been contemplated in this article. However, article 6, *in fine*, envisages the event where there is a non-signed pre-mediation contract and notes that "*in any mediation contract with the parties, the mediator will observe its terms as to confidentiality, even though the agreement has not yet been signed.*" This provision, if read *a contrario*, would confirm that any signed pre-mediation agreement should be given full effect. This is so notably that the CCIABML Rules give in annex three template mediation clauses, the second of which constituting a typical pre-dispute

mediation clause which puts upon the parties the obligation to submit their disputes to mediation once these occur.

Concerning the form and content of mediation agreements, neither the Draft Law nor the CCIABML Rules provide for the exact form and content thereof. It could be inferred that both should be made in writing and preferably signed by both parties in implementation of the general provisions of the Code of Obligations and Contracts as well as the Code of Civil Procedure in this respect, notably to ensure they are duly proven as under Lebanese law written evidence shall prevail and is in principle the means of evidence adopted for agreements.[11] An exception to this principle would be that in commercial matters where under the Lebanese Code of Commerce, commercial matters can be proven by oral testimony.[12]

Article of 3 of the Draft Law determines the content of the judge's decision to refer the parties to mediation and which should contain (1) the parties' express consent; (2) the name of the mediator; (3) the period of the mediation as of the date of the notification of the appointment to the mediator with one possible renewal; (4) the amount of the advance on the mediator's fees and the share to be borne by each its parties.

The agreement to mediate would entail the obligation on each of the parties to refer the dispute to mediation. This is a plain application of the binding effect of agreements under Lebanese law which are compulsory upon those who have agreed on them as per article 221 of the COC.[13] This is well reflected at both article 2 of the Draft Law which requires the judge to stay proceedings and refer the dispute to settlement via mediation if both parties agree to that or in the existence of written mediation agreement and article 2 of the CCIABML Rules which requires referral to arbitration in the existence of a mediation agreement. It should be noted that mandatory referral to mediation does not entail the requirement for the parties to agree on a solution at the end of the mediation. It entails the requirement for both parties to resort to mediation in an attempt to resolve the dispute, without having to agree on the outcome of the dispute.

As there is no official law on mediation in Lebanon, there are no provisions directly relating to the liability resulting from the breach of the mediation agreement. However, as the mediation agreement is so far in Lebanon an agreement that has not been specifically dealt with by the law, it remains subject to the general principles enshrined within the COC and governed by article 221 (paragraph 2) which requires the parties to perform contracts in good faith. This may entail liability upon the party that fails to participate in the mediation procedure without a valid reason. As the mediation agreement generates an obligation to perform an act

[11] For details on the form of contracts and means of proof in Lebanese Civil Law, see articles 143 *et seq.* of the CCP, notably 253 where oral testimony is not admitted in principle for civil contracts which exceed a certain amount.

[12] See article257 (1) of the CCP.

[13] Article 221 of the COC, originally drafted in French provides as follows: "*Les conventions régulièrement formées obligent ceux qui y ont été parties.*"

and as under Lebanese law and due to "individual freedoms" such obligations can only be performed either by penalty/day inflicted by the judge in order to overcome a party's reluctance or by damages paid by the party having failed to duly participate in the mediation phase.[14] There are no records of any case law that has ruled as such regarding mediation agreements.

The deadlines with respect to prescription and limitation periods relating to future pleadings before national courts or arbitrators are suspended until the end of the mediation phase. This is what has been adopted by the Draft Law at article 12.

As there are no law in this respect, proceedings before national courts or arbitrators may be stayed in the event of a mediation procedure until the end of the procedure upon the judge's discretion. This is reflected at article 2 of the Draft Law as previously mentioned. However, under the CCIABML Rules, proceedings may be launched or pursued despite the conduct of mediation.

4 The Mediator

As previously mentioned, Lebanon did not adopt a general legislation pertaining to conventional mediation. Thus, there are no provisions governing the mediator's status.

As for the Draft Law, article 5 provides for the requirements that should be met in the person of a prospective mediator as follows:

- Not to have been sentenced in criminal matters;
- To hold a degree or certificate of practice of mediation;
- To have sufficient experience that qualifies him/her to conduct mediation in light of the nature of the dispute; and
- To be independent and impartial from the parties and to comply with confidentiality requirements.

As for the CCIABML Rules, article 3 gives the parties the option to either nominate an mediator of their own or to choose an mediator from the panel of mediators of the CCIABML provided in both cases that the mediator comply with the code of conduct of the Lebanese Arbitration Center.

As for the CPM, it gives the parties the same option provided also the mediator complies with the code of ethics of the CPM.

Under the Draft Law, the mediator is to be appointed by the judge. The parties have no possibility to nominate or appoint the mediator on their own. Under the CCIABML Rules and the CPM, the parties directly choose the mediator either from the panel of the center or otherwise.

The main duties of the mediator as per article 6 of the Draft Law is (1) to confirm in writing his/her approval to conduct mediation while asserting his independence and impartiality from the parties as well as confidentiality; (2) to invite the parties to

[14] See articles 250 and 251 of the COC pertaining to the performance of contracts.

the start mediation sessions; (3) to encourage the parties to have discussions under his administration while treating them equally; in this respect, the Draft Law notes that the mediator has no investigative powers but may where necessary and after having had the agreement of both parties, hear third parties.

Article 4 of the CCIABML Rules thoroughly lists the duties of the mediator which include that of hearing both parties' pleadings and drafting a settlement agreement when appropriate.

There are no express duties of disclosure in any of the above rules. However, such duty can be inferred from the mediator's express duties of impartiality and independence.

There are no express provisions as to the responsibility of the mediator however such responsibility results from any breaches of the provisions relating to the mediator's ethics and conduct as provided for under the CCIABML Rules as well as the Code of Ethics of the CPM[15] and articles 6 and 10 of the Draft Law as may be the case.

As previously mentioned, there exist, to the best of our knowledge, only two Mediation Centers in Lebanon: first, the "Centre Professionnel de Médiation" established in Beirut by Saint Joseph University in 2006 and which appears to be the first mediation institution to be established in Lebanon; second, the LMC established in 2012 through a cooperation agreement signed between the CCIABML and the International Finance Corporation an International Organization that is member of the World Bank Group.

Regarding the CMP, while being a private center, the CPM meets both academic and professional objectives. Academically, the CPM offers a one-year mediation training consisting of 8 sessions (of 3 days each), including psychological and legal trainings, as well as developing communication skills, at the successful end of which the participants get the possibility to be registered as members of the CPM Mediators' List subject to ethical requirements, such as independence and diligence.[16] On a professional level, the CPM may receive requests for intervention as mediator on different topics and would choose one or more of the mediators registered on its list for this purpose.

As for the LMC, it offers its services to the business community, private clients and the public sector. Its mission covers training and accreditation of mediators, conducting commercial mediation cases and raising awareness on the benefits of mediation.

[15] *Op.cit.*

[16] See the rules of ethics adopted by the CPM at the following link: http://www.cpm.usj.edu.lb/service-regl-ethi.html

5 The Process of Mediation

As previously mentioned, Lebanon has not, to date, adopted a general legislation pertaining to conventional mediation. Thus, there are no provisions that govern the mediation process.

6 Failure of the Mediation and Its Consequences

As previously mentioned, Lebanon has not, to date, adopted a general legislation pertaining to conventional mediation. Thus, it is not possible to determine the legal consequences of a failure to mediate.

7 Success of Mediation and Its Consequences

As previously mentioned, Lebanon has not, to date, adopted a general legislation pertaining to conventional mediation. Thus, there are no provisions governing the consequences regarding the success of a mediation process. However, article 8 of the Draft Law requires any settlement agreement to be submitted to the relevant court which should endorse it and order its enforcement.

Reference is made to the discussion relating to the application of the general rules of Contract Law (COC) to mediation agreements executed in Lebanon.

8 Costs of the Mediation

As previously mentioned, there are no provisions governing the costs of mediation. However, under article 9 of the Draft Law, it is for judge to determine the costs of the mediation as well as the fees of the mediation and the shares that should be borne by each party.

9 Cross-Border Mediation

9.1 Notion and Main Features

As previously mentioned, Lebanon has not, to date, adopted a general legislation pertaining to conventional mediation and which may include cross- border mediation.

9.2 Recognition and Enforcement of Foreign Mediation Settlements

As previously mentioned, Lebanon has not, to date, adopted a general legislation pertaining to conventional mediation. However, cross- border mediation may be admitted and enforced in Lebanon as a foreign agreement.

10 E-Justice

As previously mentioned, Lebanon has not, to date, adopted a general legislation pertaining to conventional mediation and thus, there are no provisions governing e-justice. Reference is made to the discussion on the provisions of the COC that are applicable to mediation agreements.

La Médiation à la Croisée des Frontières : Le cas Luxembourgeois

Séverine Menétrey

Abstract The interest in mediation in the Grand Duchy of Luxembourg has increased with the entry into force of the Law of 24 December 2012 implementing Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters. Luxembourg decided to apply the new rules both to domestic and cross-border disputes. However, it is difficult to go beyond the text. The gap between the doctrinal and legislative discourse on mediation and the practical effectiveness of this alternative dispute resolution mechanism remains important in Luxembourg.

Résumé L'intérêt pour la médiation au Grand-Duché du Luxembourg s'est accru avec l'entrée en vigueur de la loi du 24 décembre 2012 transposant la Directive 2008/52/CE sur certains aspects de la médiation civile et commerciale. Ce texte ne s'est pas contenté d'améliorer le cadre juridique applicable à la médiation, il a défini la notion de médiation à la fois conventionnelle et judiciaire tant dans sa dimension interne que transnationale. Il est cependant difficile d'aller au-delà du texte. Le décalage existant entre le discours doctrinal et législatif sur la médiation et l'effectivité pratique de ce mode de règlement demeure important au Luxembourg.

La médiation existe depuis longtemps dans de nombreux systèmes et connaît, notamment sous l'influence du droit européen, un succès grandissant dans les Etats membres de l'Union européenne à tout le moins dans sa promotion et dans le discours politique et juridique. Sur le strict plan juridique néanmoins, elle demeure parfois difficile à saisir, même si elle suscite une attention grandissante des juristes.

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S. Menétrey (✉)
Université du Luxembourg, Luxembourg, Europe
e-mail: severine.menetrey@uni.lu

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La médiation est « à la mode », elle ouvre de nouveaux marchés aux praticiens et son étude renouvelle la question de la juridicité dans le règlement des différends pour les universitaires.[1] Parallèlement, les pouvoirs publics ont trouvé dans la médiation un outil permettant d'alléger le rôle des tribunaux et l'encouragent largement. La Directive 2008/52/CE *sur certains aspects de la médiation civile et commerciale* a permis de donner une nouvelle impulsion à ce mode de règlement des différends dans les Etats membres de l'Union européenne. C'est clairement le cas au Grand-Duché du Luxembourg. La médiation au Grand-Duché du Luxembourg a été profondément modifiée par l'entrée en vigueur de la loi du 24 décembre 2012 qui crée un véritable cadre législatif autonome pour la médiation en matière civile et commerciale allant au-delà de la simple transposition de la Directive. Cette loi a été insérée dans le Nouveau code de procédure civile (NCPC) aux articles 1251-1 à 1251-24.

Seule la médiation en matière civile et commerciale retiendra notre attention, mais il paraît utile, au stade introductif, de relever qu'il existe d'autres formes de médiation au Luxembourg. La médiation est conçue de manière large dans des domaines extra-juridiques comme la médiation scolaire ou encore la médiation interculturelle ou de voisinage.[2] De même la médiation dans les relations familiales n'était pas, jusqu'à la loi du 24 février 2012, envisagée sous un angle strictement juridique. Dans d'autres domaines spécifiques, la médiation a fait l'objet d'un encadrement législatif particulier, c'est le cas notamment de la médiation pénale[3] ou de la médiation dans le cadre de la loi sur le surendettement.[4] Le secteur financier n'est pas en reste puisque la loi relative au secteur financier prévoit que « l'Institut monétaire luxembourgeois est compétent pour recevoir les réclamations des clients des personnes soumises à sa surveillance et pour intervenir auprès de

[1] Sur les écrits au Luxembourg sur la médiation, voy. F. Farjaudon et E. Sevellec, « Médiation civile et commerciale : émergence d'une nouvelle voie procédurale pour la résolution des conflits ? », *JurisNews Arbitrage et procédure civile*, vol. 2, n 1/2013 ; J. Kayser, « Le nouveau droit de la médiation civile et commercial au Grand-Duché du Luxembourg », *Journal des Tribunaux luxembourgeois*, 2/2012, p. 49 ; T. Hoscheit, *Le droit judiciaire privé au Grand-Duché du Luxembourg*, Ed. Bauler, 2012, p. 83 ; J. Kayser and F. Moyse, « 18. Luxembourg », in *EU Mediation. Law and Practice*, Oxford University Press, 2012, p. 239. Et avant la réforme : N. Bannasch & E. Grumberg, « La médiation au Grand-Duché de Luxembourg », *Codex*, juin 2003, p. 172–189 ; L. Err, « La médiation judiciaire », *Codex*, juin/juillet 2002, p. 188–192 ; P. Demaret, « L'expérience en médiation : étude sur la pratique du Centre de médiation de Luxembourg » ; P. Schroeder, « La médiation », *Codex*, sept. 2001, p. 224–228.

[2] Sur ces différents types de médiations, voir ARC, *Panorama de la médiation au Luxembourg*, septembre 2008, disponible en ligne sur <http://www.mediation.lu/panaroma_mediation_Luxembourg.pdf>

[3] Loi du 6 mai 1999 *relative à la médiation pénale*, *Mémorial A*, n 67 du 11 juin 1999.

[4] Règlement grand-ducal du 17 juillet 2001 *portant organisation et fonctionnement de la Commission de médiation dans le cadre de la loi sur le surendettement*, Mémorial A, n 136 du 27 décembre 2000. V. M. Neyens, « La nouvelle loi sur le surendettement », *Bulletin luxembourgeois des questions sociales*, 2001, vol. 9, p. 145–180 ; vol. 11(2002) p. 53–106.

ces personnes, aux fins de régler à l'amiable ces réclamations ».[5] L'encadrement légal de la médiation a longtemps été limité à la matière pénale et aux médiations institutionnalisées dans des domaines particuliers. Des projets de loi en cours envisagent la mise en place d'autres médiations institutionnelles en matière de travail et santé notamment.[6] Il existe également une médiation administrative exercée depuis 2004 par l'ombudsman.[7]

Pour s'en tenir à la médiation civile et commerciale, il convient de comprendre la place de la médiation par rapport aux autres modes alternatifs de règlement des litiges et par rapport aux modes de règlements judiciaires (et juridictionnels) (Sec. 1). Après avoir précisé le cadre juridique applicable, ainsi que les principales règles relatives à la convention de médiation et au médiateur (Sec. 2), il conviendra d'examiner les spécificités de la médiation transnationale (Sec. 3).

1 La Place de la Médiation au Grand-Duché du Luxembourg

L'article 1251-2 (1) NCPC définit la médiation de la manière suivante :

> On entend par « médiation » le processus structuré dans lequel deux ou plusieurs parties à un litige tentent volontairement par elles-mêmes, de parvenir à un accord sur la résolution de leur litige avec l'aide d'un médiateur indépendant, impartial et compétent.
>
> La médiation peut être engagée par les parties, proposée par le juge ou sur demande des parties ordonnée par un juge. Elle exclut les tentatives de conciliation faites par le juge saisi d'un litige pour résoudre celui-ci au cours de la procédure judiciaire relative audit litige.

La médiation ainsi entendue concerne à la fois la médiation conventionnelle que les parties décident seules de manière purement volontaire et la « médiation judiciaire » dont la désignation est trompeuse puisque le juge se contente de proposer aux parties de recourir à la médiation, à moins qu'il ne soit lui même saisi d'une demande en ce sens par les parties. Il importe de distinguer la médiation des autres modes alternatifs de règlement des différends (Sec. 1.1) et de préciser les relations entre la médiation et le processus judiciaire (Sec. 1.2).

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[5]Loi du 5 avril 1993 *relative au secteur financier*, *Mémorial A*, n 27 du 10 avril 1993. Art. 58. V. J-J. Schonckert, « La médiation dans le secteur financier : médiation privée ou règlement à l'amiable de l'article 58 de la loi relative au secteur financier », *Bulletin droit et banque*, 2006, p. 13–22.

[6]Le projet de loi n 6545 portant réforme du dialogue social à l'intérieur des entreprises déposé le 25 février 2013 prévoit d'accorder une place à la médiation dans les conflits du monde du travail, notamment à travers l'instauration d'une Commission de Médiation. Le projet de loi 6469 déposé le 21 août 2012 relatif aux droits et obligations du patient et des prestataires de soins de santé, prévoit la création d'un « Service national d'information et de médiation dans le domaine de la santé ».

[7]Loi du 22 août 2003 instituant un médiateur, *Mémorial A*, n 128 du 3 septembre 2003. V. M. Thewes Marc, « La médiation administrative : commentaire de la loi du 22 août instituant un médiateur », *Luxemburger Wort*. - Jg. 156(2004) Nr. 113(15. Mai) p. 4.

1.1 La Médiation et les Autres Modes Alternatifs de Règlement des Différends

Qu'elle soit judiciaire ou conventionnelle, la médiation est un processus dont les parties elles-mêmes sont les acteurs, le médiateur n'étant qu'un guide. L'article 1251-1 (1) indique expressément que la médiation ne se confond pas avec la conciliation judicaire. Elle se distingue également de l'arbitrage, mais ses rapports avec la transaction sont plus complexes. Reprenons.

La conciliation judiciaire en droit luxembourgeois est un principe directeur de la procédure civile prévu à l'article 70 NCPC qui dispose *in fine* qu'il « entre dans la mission du juge de concilier les parties ». Le soin apporté par le législateur luxembourgeois de distinguer (par l'exclusion) la médiation et la conciliation judiciaire à l'article 1251-1 (2) est bienvenu. Si l'on s'attache purement aux termes du NCPC luxembourgeois la médiation est un processus structuré qui requiert un minimum de formalisme et de garanties permettant aux parties, en présence d'un tiers qui n'est pas un juge, mais un médiateur, de parvenir à un accord. Par contraste, la conciliation réside dans l'accord spontané et ponctuel des parties devant le juge dans le cadre d'une procédure judicaire conduite devant lui.

La différence entre la médiation et *l'arbitrage* (régi par les articles 1224 et suivants du NCPC) tient au fait que l'arbitrage, contrairement à la médiation, est un mode *juridictionnel* de règlement des différends. Certes ce sont les parties qui confèrent à l'arbitre le pouvoir de juger, mais la fonction juridictionnelle qu'il exerce le distingue radicalement du médiateur. L'arbitre a le pouvoir et le devoir de trancher en droit (sauf amiable composition) un différend, alors que le médiateur ne fait que rapprocher les parties en les guidant afin qu'elles trouvent elles-mêmes un accord. L'arbitre est le plus souvent (même si ce n'est ni obligatoire ni systématique) juriste, ce qui n'est pas le cas du médiateur. Il convient néanmoins de remarquer sur ce point, non sans crainte, que le champ de la médiation est largement investi par les juristes et le droit. La juridification et la judiciarisation croissantes de la médiation laissent craindre une évolution similaire à celle de l'arbitrage. L'arbitrage qui a longtemps été un mode certes juridictionnel, mais souple de règlement des différends s'est fortement procéduralisé et judiciarisé perdant, dans certains cas, les avantages qui étaient initialement les siens. Fassent les juristes qu'il n'en advienne pas ainsi de la médiation.

La transaction prévue à l'article 2044 du Code civil est un « contrat par lequel les parties à un litige (déjà porté devant un tribunal ou seulement né entre elles) y mettent fin à l'amiable en se faisant des concessions réciproques ».[8] Dans la première proposition de loi, L. Err distinguait la transaction « en ce qu'elle est une convention par laquelle les parties terminent une contestation née ou à naître au moyen de concessions réciproques. Pour une transaction, le tiers n'est pas

[8] G. Cornu, *Vocabulaire juridique*, Association Henri Capitant, éd. Quadrigue/PUF, 4ème éd., 2009, page 928.

indispensable, l'objet est pécuniaire et il existe des obligations réciproques ».[9] L'éventuelle absence d'un tiers neutre et impartial dans la transaction n'emporte pas totalement conviction. Certes la médiation décrit davantage un processus structuré pour parvenir à un accord que la transaction. La question se pose néanmoins de savoir si l'accord qui résulte de la médiation n'est pas une transaction. Certes la transaction a pour caractéristique de devoir contenir des concessions réciproques. Rien n'empêche les parties à l'issue d'une médiation réussie, contenant des concessions réciproques, de conclure une transaction qui a autorité de chose jugée et s'impose au juge comme aux parties.

1.2 La Médiation et le Système Judiciaire

La médiation telle que prévue dans le NCPC conjugue un processus purement volontaire et consensuel à un encadrement légal strict qui interagit avec la procédure judiciaire ordinaire. Le NCPC établit une distinction entre la *médiation dite conventionnelle* (articles 1251-8 à 1251-11 NCPC) qui est indépendante de toute procédure judiciaire et *la médiation dite judiciaire* (articles 1251-12 à 1251-16 NCPC) qui intervient au cours d'une procédure judiciaire.

Dans le cadre de la médiation judiciaire, l'interaction entre le processus de médiation et le système judiciaire est importante. Certes, « les parties peuvent solliciter une médiation soit dans l'acte introductif d'instance, soit à l'audience, soit par simple demande écrite déposée ou adressée au greffe » (article 1251-12 (4)). On peut cependant penser que la médiation sera le plus souvent proposée par le juge qui dans tous les cas *ordonne* la médiation après avoir fixé une audience pour décider de la médiation.

En vertu de l'article 1251-12 (1) alinéa 1, « le juge déjà saisi d'un litige peut, à tout stade de la procédure à la demande conjointe des parties ou *de sa propre initiative* mais avec l'accord des parties, inviter celles-ci à une médiation, tant que la cause n'a pas été prise en délibéré ». L'alinéa 2 prévoit que « les parties elles-mêmes peuvent, conjointement et de manière motivée, demander au juge qu'il leur désigne un médiateur ». Même si l'accord des parties est requis, le pouvoir d'initiative ou d'impulsion du juge est important. Il peut, à tous les stades de la procédure, inviter les parties à une médiation tant en première instance qu'en appel. En revanche, l'article 125112 (2) exclut le recours à la médiation judiciaire devant la Cour de cassation et en référé.

Il n'est pas anodin de souligner que c'est une décision du juge saisi au principal qui ordonne la médiation. Cette décision, conformément à l'article 1251-12 (3) mentionne expressément l'accord des parties, le nom, la qualité et l'adresse du médiateur, la durée de sa mission et la date à laquelle l'affaire est rappelée à

[9]Proposition de loi n 4969 portant introduction de la médiation civile et commerciale dans le NCPC, (doc. parl. 4969, page 5).

l'audience. La décision qui ordonne la médiation est transmise par simple courrier tant au médiateur qu'aux parties et à leurs avocats. Elle peut être prise par mention au dossier et n'est pas susceptible de recours.

Dans le cadre de la médiation judiciaire toujours, les délais de prescription ont été interrompus par l'acte introductif d'instance. En elle-même donc la décision qui ordonne la médiation n'a pas d'effet sur la prescription. En revanche, la médiation judiciaire va avoir un effet sur les délais de procédure. Selon l'article 1251-12 (6) alinéa 1, « lorsque les parties sollicitent conjointement qu'une médiation soit ordonnée, les délais de procédure qui leur sont impartis sont suspendus à dater du jour où elles formulent cette demande ». L'alinéa 2 précise que « lorsque l'une des parties sollicite qu'une médiation soit ordonnée, les délais de procédure qui leur sont impartis sont suspendus à dater du jour où l'autre partie a donné son accord à cette demande ». L'alinéa 3 ajoute que, en cas d'échec de la médiation, les parties peuvent, à l'audience à laquelle l'affaire est rappelée devant le juge, solliciter de nouveaux délais pour la mise en état de la cause.

Au cours du processus de médiation judiciaire, « le juge reste saisi [. . .] et peut, à tout moment, prendre toute mesure qui lui paraît nécessaire » (article 1251-13 (3)). En particulier il peut à la demande d'une partie ou du médiateur mettre fin de manière anticipée au processus de médiation. L'article 1251-13 (5) ajoute que « la cause du litige peut être ramenée devant le juge avant le jour fixé par simple déclaration déposée ou adressée au greffe par les parties ou l'une d'elles. La cause est fixée dans les quinze jours de la demande ».

Enfin, la médiation judiciaire menée par un médiateur agréé ou non devra être homologuée. Le système judiciaire aura donc toujours le dernier mot. L'homologation est le même pour la médiation judiciaire et la médiation conventionnelle. Les requêtes en homologation sont déposées devant le président du tribunal d'arrondissement sauf dans le cadre de la médiation familiale où le juge compétent pour homologuer l'accord est le juge saisi au principal.

Cette particularité démontre que la médiation familiale entretient des liens particulièrement étroits avec la procédure judiciaire ordinaire. Il découle des articles 1251-17 à 1251-20 consacrés à la médiation familiale que le juge agit de manière déterminante dans le processus de médiation en ordonnant une réunion d'information entre les parties et le médiateur, en désignant un médiateur obligatoirement agréé et enfin en vérifiant si l'accord issu de la médiation peut être homologué.

Par contraste et en toute logique, la médiation conventionnelle entretient moins de liens avec le système judiciaire puisqu'elle a pour caractéristique de pouvoir intervenir en dehors de toute procédure. Cependant, on verra que les interactions ne sont pas exclues. Ainsi, la clause de médiation est opposable au juge faisant obstacle à l'exercice de son pouvoir juridictionnel.[10] Toute « collaboration » avec le système judiciaire n'est, par ailleurs, pas exclue puisque les parties pourront toujours

[10] Article 1251-5 (2) NCPC.

obtenir du juge étatique des mesures provisoires et conservatoires.[11] En outre, la signature d'un accord en vue de la médiation suspend le cours de la prescription durant la médiation ce qui ménage la possibilité de recours judiciaires futurs.[12] Enfin, l'homologation de l'accord de médiation est identique que la médiation soit judiciaire ou conventionnelle.[13]

2 L'Encadrement Juridique de la Médiation

La médiation en matière civile et commerciale a en effet été introduite dans le NCPC par la loi du 24 février 2012[14] complétée par un règlement grand-ducal du 25 juin 2012 *fixant la procédure d'agrément aux fonctions de médiateur judiciaire*.[15] Après avoir précisé le champ d'application matériel et territorial de la médiation (Sec. 2.1), il convient de présenter les différentes étapes qui jalonnent le processus de médiation (Sec. 2.2).

2.1 Le Champ d'Application

L'article 1251-1 NCPC prévoit un champ d'application matériel de la médiation particulièrement large :

> (1) En matière civile et commerciale, tout différend, à l'exception (i) des droits et obligations dont les parties ne peuvent disposer, (ii) des dispositions qui sont d'ordre public et (iii) de la matière relative à la responsabilité de l'Etat pour des actes et des omissions commis dans l'exercice de la puissance publique, peut faire l'objet d'une médiation soit conventionnelle, soit judiciaire.
> (2) En matière de divorce, de séparation de corps, de séparation pour des couples liés par un partenariat enregistré, y compris la liquidation, le partage de la communauté de biens et l'indivision, d'obligations alimentaires, de contribution aux charges du mariage, de l'obligation d'entretien d'enfants et de l'exercice de l'autorité parentale, le juge peut proposer aux parties de recourir à la médiation familiale.

[11] Article 1251-5 (3) NCPC.

[12] Article 1251-9 (3) NCPC.

[13] Article 1251-11 NCPC.

[14] *Mémorial A* n 37 du 5 mars 2012. La loi est disponible en ligne < http://www.legilux.public.lu/leg/a/archives/2012/0037/a037.pdf>. Le NCPC est également disponible en ligne < http://www.legilux.public.lu/leg/textescoordonnes/codes/nouveau_code_procedure_civile/>

[15] *Mémorial A* n 134 du 4 juillet 2012, disponible en ligne sur <http://www.legilux.public.lu/rgl/2012/A/1700/A.pdf>

La matière civile et commerciale est une notion autonome du droit de l'Union qui découle du champ d'application du règlement 44/2001 (CE) du 22 décembre 2000 *concernant la compétence judiciaire*, *la reconnaissance et l'exécution des décisions en matière civile et commerciale*. La médiation s'applique à tous les différends « à l'exception des droits et obligations dont les parties ne peuvent disposer ». Le critère essentiel est donc la libre disposition des droits et obligations des parties. Dans la mesure où la médiation est un processus volontaire dont l'objectif est d'atteindre un accord entre les parties, il est normal que les parties puissent également disposer librement des droits et obligations qui font l'objet de cet accord. Cette exclusion ne soulève pas ou peu de difficulté sauf peut-être en matière familiale puisque, dans de nombreux systèmes, la matière familiale est par essence indisponible. L'ambiguïté n'existe pas en droit luxembourgeois puisque la médiation judiciaire en matière familiale est expressément consacrée. En revanche l'exclusion des différends mettant en cause des d'ordre public soulève de nombreuses interrogations. A titre principal, cette exclusion présuppose que le médiateur se réfère aux règles de droit. Ce ne sont en effet pas les *matières relevant de l'ordre public*, mais bien les dispositions d'ordre public qui sont visées. Enfin la médiation ne s'applique notamment ni aux matières fiscale, douanière ou administrative, ni à la responsabilité de l'Etat pour des actes ou des omissions commis dans l'exercice de la puissance publique.

En ce qui concerne le champ d'application territorial, la volonté d'étendre aux litiges internes les dispositions de la Directive 2008/52/CE a toujours été très claire dans l'esprit du législateur : « convaincus de la plus-value d'un cadre juridique clair et prévisible pour la médiation, les auteurs du projet de loi proposent de reprendre également pour les litiges nationaux les principes énoncés par la Directive ».[16]

La loi luxembourgeoise, contrairement à la Directive 2008/52/CE s'applique indistinctement aux litiges transfrontaliers (au sein de l'Union européenne) et aux litiges nationaux. Comme nous l'examinerons dans la partie III, la notion de litiges transfrontaliers reçoit une acception réduite aux des litiges intra-européens. Elle laisse en suspens la question des médiations internationales c'est-à-dire celles dont l'élément d'extranéité concerne un Etat tiers.

2.2 Les Différentes Étapes du Processus de Médiation

Le processus de médiation lui-même demeure –et c'est heureux- le plus largement étranger au droit. Il n'en demeure pas moins que la part du droit est grandissante dans le processus lui-même (Sec. 2.2.3). Cette juridicisation du processus de médiation doit être prise au sérieux car elle témoigne d'une emprise des juristes sur la médiation (et en tant que médiateurs) qui risque d'emmener la médiation sur les traces de l'arbitrage avec le développement d'un contentieux *ante* et *post*

[16]Projet de loi n 6272 du 7 avril 2011 et l'avis du Conseil d'Etat du 5 juillet 2011 qui l'a suivi.

médiation. En effet, la phase pré et post médiation est fortement encadrée par le droit. C'est le cas pour le fondement de la médiation qu'est la convention de médiation (Sec. 2.2.1), mais aussi pour les qualités que doit remplir le médiateur (Sec. 2.2.2) et l'issue de la médiation (Sec. 2.2.4).

2.2.1 La Convention de Médiation

L'expression « convention de médiation » n'est pas très claire dans la mesure où elle peut aussi bien désigner la clause ou le contrat par laquelle les parties s'engagent à recourir à la médiation que l'accord organisant le déroulement du processus de médiation une fois le principe de recourir à celui-ci acquis. Enfin l'expression pourrait aussi définir l'accord résultant de la médiation qui n'est autre qu'une forme de convention entre les parties.

Le droit luxembourgeois manque de lisibilité sur ce point :

- A l'article 1251-5 (1) NCPC, il est prévu que « tout contrat peut contenir une *clause de médiation*, par laquelle les parties s'engagent à recourir à la médiation en vue de résoudre d'éventuels différends que la validité, l'interprétation, l'exécution ou la rupture du contrat pourraient susciter ».
- L'article 1251-9 NCPC concerne, quant à lui, *l'accord en vue de la médiation*. « L'accord en vue de la médiation contient l'accord des parties de recourir à la médiation ; le nom et l'adresse des parties et de leurs conseils ; le nom, la qualité et l'adresse du médiateur [. . .] ; un exposé succinct du différend ; les modalités d'organisation et la durée du processus ; [. . .] ».
- L'article 1251-10 NCPC porte enfin sur *l'accord de médiation* : « lorsque les parties parviennent à un accord de médiation, celui-ci fait l'objet d'un écrit daté et signé par toutes les parties ».

Laissons ce dernier accord de médiation à part pour le traiter ultérieurement et nous focaliser sur *la clause de médiation* (ce que le questionnaire semble désigner comme convention de médiation) et sur *l'accord en vue de la médiation* (ce que le questionnaire semble désigner comme entente). Notons que la clause de médiation ne concerne par définition que la médiation conventionnelle. En revanche, l'accord en vue de la médiation (prévu à l'article 1251-9 pour la médiation conventionnelle) devrait également se rencontrer dans le cadre de la médiation judiciaire. En effet, si le juge ordonne la médiation dans une décision selon l'article 1251-14, il mentionne l'accord des parties, le nom, la qualité et l'adresse du médiateur et la durée de sa mission, mais renvoie à l'article 1251-9, pour ce qui est du déroulement de la médiation. Reste à savoir comment cette liberté de conclure un accord organisant la médiation dans le cadre de la médiation judiciaire se conjuguera avec la décision du juge ordonnant la médiation et avec l'article 1251-13. Ce dernier prévoit que si le médiateur accepte sa mission, il informe les parties « du lieu, jour et heure où les opérations de médiation commenceront. Les parties pourront se faire assister par leur avocat », sans mention aucune d'un quelconque accord en vue de la médiation.

Pour répondre clairement à la question, il existe des règles applicables à la convention de médiation et à l'entente des parties. Ainsi, l'article 1251-5 (1) NCPC pose un principe de validité des clauses de médiation au moyen desquelles les parties s'engagent à recourir à la médiation. Tandis que l''article 1251-9 NCPC encadre strictement le contenu de l'accord en vue de la médiation.

(a) Les conditions de fond et de forme de la clause de médiation

L'article 1251-5 (1) NCPC prévoit que « tout contrat peut contenir une clause de médiation, par laquelle les parties s'engagent à recourir à la médiation en vue de résoudre d'éventuels différends que la validité, l'interprétation, l'exécution ou la rupture du contrat pourraient susciter ». Aucune condition de forme particulière n'est prévue, même si pour des raisons probatoires tout laisse à croire que la clause doit être écrite. L'article 1251-5 (2) qui porte sur les effets de la clause de médiation indique que celle-ci peut en être privé si la clause n'est « pas valable ou [qu'elle] ait pris fin ».

Quelles pourraient être les causes d'invalidité d'une clause de médiation ? Sans doute, rejoint-on ici le champ d'application matériel de la médiation au sens du NCPC et plus largement les conditions de validité du contrat de droit commun. Qu'en est-il d'une clause de médiation qui porterait sur une matière d'ordre public ? Le cas est hypothétique car s'il y a contrat, il y a libre disposition des droits et l'on voit mal, dans un contrat, une clause de médiation qui serait contraire à l'ordre public sans que le contrat lui-même ne le soit. Cette remarque conduit à s'interroger sur l'autonomie de la clause de médiation : une clause de médiation demeure-t-elle valable si le contrat dans lequel elle est insérée est annulé ? On connaît la réponse *in favorem arbitrandum* pour la clause compromissoire en matière d'arbitrage. Rien ne permet d'augurer la même destinée pour la clause de médiation, mais on peut craindre que la juridification et la judiciarisation de la médiation ne l'entraînent dans les mêmes excès que l'arbitrage.

La situation est également complexe et incertaine en ce qui concerne la terminaison de la clause de médiation. L'article 1251-5 (2) sous-entend que la clause de médiation peut prendre fin avant même que le processus de médiation n'ait été entamé. Une multitude de cas est envisageable puisque la créativité des parties est infinie ; par exemple une clause de médiation pourrait prévoir que pendant une période d'un moins à compter de la survenance du différend les parties s'efforcent de régler leur différend par la médiation. Des difficultés d'interprétations des clauses sont à prévoir surtout si la médiation de juridictionnalise.

(b) Les conditions de fond et de forme de l'accord en vue de la médiation

Par contraste avec la clause de médiation, les conditions de fond et de forme de l'accord en vue de la médiation sont strictement encadrées par l'article 1251-9 NCPC :

> (1) Les parties définissent entre elles les modalités d'organisation de la médiation et la durée du processus. Cette convention est consignée par écrit dans un accord en vue de la médiation signé par les parties et par le médiateur. Les frais et honoraires de la médiation sont à charge des parties à parts égales, sauf si elles en décident autrement.

(2) L'accord en vue de la médiation contient :

1. l'accord des parties de recourir à la médiation ;
2. le nom et l'adresse des parties et de leurs conseils ;
3. le nom, la qualité et l'adresse du médiateur, et le cas échéant, la mention que le médiateur est agréé par le ministre de la Justice ;
4. un exposé succinct du différend ;
5. les modalités d'organisation et la durée du processus
6. le rappel du principe de la confidentialité des communications et pièces échangées dans le cours de la médiation ;
7. le mode de fixation et le taux des honoraires du médiateur, ainsi que les modalités de leur paiement ;
8. la date et le lieu de signature ; et
9. la signature des parties et du médiateur.

L'accord en vue de la médiation est écrit et signé par les parties et le médiateur. Le contenu en est strictement limité. Cependant l'article 1251-9 (2) n'indique pas si ces mentions sont prescrites à peine de nullité. Or, la nature de cet accord en vue de la médiation n'est pas facile à déterminer : soit il s'agit d'un contrat de droit privé classique, soit il s'agit déjà et par anticipation d'un acte de procédure. Le terme « entente entre les parties » (utilisé dans le questionnaire) incline à le considérer comme un accord procédural –un contrat de procédure- conclu entre les parties. Quoi qu'il en soit puisque la nullité n'est pas expressément prévue par le NCPC aucune nullité de forme ne pourra être encourue sur le terrain procédural puisque la règle pas de nullité sans texte s'applique. La sanction d'une éventuelle méconnaissance de l'article 1251-9 (1) et (2) reste donc, en raison des difficultés de qualification et faute de pratique, difficile à anticiper.

(c) **Les effets de la clause de médiation**

La clause de médiation lie les parties. Sa violation serait donc susceptible d'engager la responsabilité contractuelle de la partie qui saisirait un tribunal étatique en violation de la clause. L'utilisation du conditionnel est cependant de rigueur, d'une part, à l'instar des violations de clauses compromissoires, le préjudice subi est difficilement évaluable et d'autre part et surtout les effets procéduraux de la clause de médiation suffisent à en assurer l'effectivité.

En effet, selon l'article 1251-5 (2), « le juge du fond ou l'arbitre saisi d'un différend faisant l'objet d'une clause de médiation *suspend l'examen de la cause à la demande d'une partie*, à moins qu'en ce qui concerne ce différend, la clause ne soit pas valable ou ait pris fin. *L'exception doit être soulevée avant tout autre moyen de défense et exception*. L'examen de la cause est poursuivi dès que les parties ou l'une d'elles, ont notifié au greffe et aux autres parties que la médiation a pris fin ».

La clause de médiation fait donc obstacle à l'examen au fond de la demande en justice. La qualification de cet obstacle est toutefois sujette à caution. Le terme « exception » utilisé par le NCPC suggère une exception d'incompétence de la même manière que la présence d'une clause compromissoire prive le juge de se prononcer en premier lieu sur sa compétence. Cependant, puisque le médiateur –

et ce contrairement à l'arbitre- est dépourvu de tout pouvoir juridictionnel, la qualification d'exception d'incompétence doit être écartée.[17]

Il s'agirait alors davantage d'une exception de nullité de fond ou d'une fin de non recevoir faisant obstacle (temporairement) à l'exercice du pouvoir de juger de la juridiction étatique. Une fin de non recevoir au régime juridique particulier qui serait soulevée *in limine litis*. Par ailleurs, la sanction prévue –l'effet à proprement parler de la clause de médiation- est la suspension de l'examen de la cause. Il semblerait donc en pratique que si une partie saisit un juge luxembourgeois normalement compétent par un acte introductif d'instance et que l'autre partie oppose à cette demande l'existence d'une clause de médiation, le juge suspendra l'affaire. Cela signifie que, en cas d'échec de la médiation, l'instance pourra reprendre (et en réalité commencer) sans qu'un nouvel acte introductif d'instance soit requis.[18]

Quoi qu'il en soit, en présence d'une clause de médiation et si une des parties l'invoque, le juge ne pourra connaître de l'affaire au fond. En effet la clause de médiation fait obstacle à l'exercice de son pouvoir juridictionnel par le juge du fond. La référence faite au « juge du fond (ou à l'arbitre) » est particulièrement importante dans la mesure où, en vertu de l'article 1251-5 (3), « la clause de médiation ne fait pas obstacle aux demandes de mesures provisoires et conservatoires ». L'article ajoute que « l'introduction de telles demandes n'entraîne pas renonciation à la médiation ».

Le NCPC est muet quant à l'effet de la clause de médiation sur la prescription à proprement parler. Dans l'hypothèse où une partie saisit (en violation de la clause) un tribunal celle-ci est interrompue. Dans le cas contraire (*a priori* plus fréquent), si la clause elle-même n'a pas d'effet sur la prescription, l'accord en vue de la médiation dont la signature est la mise en œuvre de la clause de médiation suspend le cours de la prescription.

(d) **Les effets de l'accord en vue de la médiation**

Le principal effet de l'accord en vue de la médiation c'est-à-dire l'entente des parties sur le déroulement de la médiation est de suspendre la prescription et ce pendant toute la médiation (article 1251-9 (3)). L'article 1251-5 (4) ajoute que « sauf accord exprès des parties, la suspension de la prescription prend fin un mois après la notification faite par l'une des parties ou par le médiateur à l'autre ou aux autres parties de leur volonté de mettre fin à la médiation. Cette notification a lieu par lettre recommandée ».

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[17]La solution serait différente dans le cas d'une clause dite « méd-arb », car dans ce cas, la clause tout en prévoyant un recours préalable à la médiation prévoit surtout la compétence du tribunal arbitral, Tribunal d'Arrondissement de Luxembourg (2ème chambre), 22 juin 2012, *JTL n 27*, 03/2013, p. 87, obs. J. Kayser.

[18]Les moyens de défense manquent cruellement de précision en droit luxembourgeois et cette nouvelle disposition en témoigne. La jurisprudence (antérieure à la loi de 2012) est extrêmement pauvre et assez peu claire quant à la qualification de l'obstacle procédural à l'exercice du pouvoir juridictionnel du fait de la présence d'une clause de médiation, voir Tribunal d'arrondissement de Luxembourg, 15 novembre 2006, n 1419/2006, judoc 99862836.

Les effets de l'accord en vue de la médiation sur d'éventuels recours devant les tribunaux ou en arbitrage ne sont pas expressément envisagés par le NCPC. Deux observations s'imposent cependant. D'abord, il faut admettre que dans la grande majorité des cas, un accord en vue de la médiation sera conclu conformément à une clause de médiation dont il constitue la mise en œuvre si bien que l'article 1251-5 (2) sera applicable. Ensuite, dans l'hypothèse (exceptionnelle) où les parties décideraient *ex nihilo* de soumettre leur différend à la médiation, l'accord en vue de la médiation prendrait alors davantage la forme d'un compromis de médiation rendant le recours à cette dernière obligatoire.

Mérite également d'être signalé l'article 1251-12 (6) qui concerne l'hypothèse d'une médiation judiciaire demandée par les parties au juge. Cet article précise que, indépendamment de tout accord en vue de la médiation (dont le sort dans le cadre de la médiation judiciaire n'est pas certain), le simple accord de volontés des parties de recourir à la médiation emporte des conséquences procédurales puisqu'il suffit à suspendre les délais de procédure.

Enfin en ce qui concerne la responsabilité d'une partie (ou du médiateur) qui ne respecterait pas l'accord en vue de la médiation, il s'agit assurément d'une responsabilité contractuelle avec le même problème d'évaluation du préjudice qu'en cas de violation de la clause de médiation. Notons que le fait même de s'interroger sur la possible responsabilité d'une partie qui ne respecterait pas l'accord en vue de la médiation montre que celle-ci est sur une pente glissante de juridification. Qu'un mode consensuel et apaisé de règlement des conflits en dehors des considérations juridiques puisse conduire à engager la responsabilité contractuelle de celui qui y participe . . . on appréciera le paradoxe.

2.2.2 Le Médiateur

Après avoir examiné comment s'opère le choix et la désignation du médiateur (a), il conviendra de s'interroger sur le contenu de ses obligations (b) et l'étendue de sa responsabilité (c).

(a) **Le choix du médiateur**

Selon la définition du médiateur donnée par l'article 1251-2 (2) « tout tiers sollicité pour mener une médiation avec efficacité, impartialité et compétence » peut agir comme médiateur. Cette définition reprend celle qui figure dans la Directive 2008/52/CE qui reste muette par rapport à l'exigence d'un agrément du médiateur. Son article 4 (2) prévoit que « les Etats membres promeuvent la formation initiale et continue des médiateurs afin de veiller à ce que la médiation soit menée avec efficacité, compétence et impartialité à l'égard des parties ».

Le Luxembourg a décidé de mettre en place un système d'agrément des médiateurs prévu à l'article 1251-3 NCPC complété par un règlement grand-ducal du 25 juin 2012 *fixant la procédure d'agrément aux fonctions de médiateur judiciaire et familial*. La mise en place d'un tel système ne s'inscrit cependant pas dans la logique du droit de l'Union en général et de la Directive 2008/52/CE en

particulier. Son article 4 (1) privilégie l'autorégulation de l'activité de médiateur plutôt que d'exiger des Etats membres d'ancrer dans leur législation nationale des critères d'accréditation particuliers.[19] En effet un système national d'agrément ou d'accréditation risque de constituer une discrimination faisant obstacle à la libre prestation de service au sein de l'Union européenne. Ces exigences contradictoires rendent le texte luxembourgeois un rien confus.

L'article 1251-3 NCPC prévoit que la médiation peut être confiée à un médiateur agréé ou à un médiateur non agréé. Un médiateur agréé est une personne physique accréditée par le ministre de la Justice. L'article 1251-3 (2) énonce les conditions d'agrément parmi lesquelles figure l'obligation de posséder une formation spécifique en médiation. Le règlement grand-ducal du 25 juin 2012 *fixant la procédure d'agrément aux fonctions de médiateur judiciaire* complète cette disposition et précise en particulier les documents requis pour faire une demande ainsi que le contenu de la formation spécifique en médiation.

En permettant le recours aux deux types de médiateurs agréés et non agréés, le droit luxembourgeois tente de concilier la liberté des parties, la libre circulation des médiateurs au sein de l'Union européenne et la sécurité juridique. L'exercice est acrobatique. D'abord, l'article 1251-3 (1) alinéa 3 dispose que « le prestataire de services de médiation qui remplit des exigences équivalentes ou essentiellement comparables dans un autre Etat membre de l'Union européenne [e]st dispensé de l'agrément ». Cette disposition, qui vise la reconnaissance mutuelle, est dépourvue de toute portée normative puisque l'agrément n'est pas obligatoire pas même pour la médiation judiciaire sauf pour les médiateurs luxembourgeois ! Reprenons.

En ce qui concerne la médiation judiciaire, l'article 1251-12 (1) prévoit à l'alinéa 1 à que « les parties s'accordent sur le nom d'un médiateur agréé ou dispensé de l'agrément conformément à l'article 1251-3, paragraphe (1), alinéa 3 ». Cela signifie que le médiateur doit être agréé sauf si en qualité de « prestataire de services de médiation », il remplit des exigences comparables dans un autre Etat membre. L'alinéa 3 introduit une exception, *en cas de litiges transfrontaliers* pour lesquels des médiateurs non agréés (y compris luxembourgeois donc) peuvent être désignés.

En ce qui concerne la médiation familiale, l'article 1251-18 prévoit également le recours à un médiateur agréé s'il est luxembourgeois ou dispensé de l'agrément s'il est « prestataire de services de médiation ». Aucune dérogation en cas de litige transfrontalier n'est prévue.

La situation semble inutilement complexe : complexe parce qu'un contentieux risque de naître sur la désignation du médiateur et inutile parce qu'aucune sanction n'est prévue dans le cas où la médiation (judiciaire en matière interne et familiale) serait conduite par un médiateur non agréé.

[19] Article 4 (1) de la Directive : « Les États membres encouragent, par tout moyen qu'ils jugent approprié, l'élaboration de codes volontaires de bonne conduite et l'adhésion à ces codes, par les médiateurs et les organismes fournissant des services de médiation, ainsi que d'autres mécanismes efficaces de contrôle de la qualité relatifs à la fourniture de services de médiation ».

Qui peut désigner le médiateur ? Dans le cadre de la médiation conventionnelle, l'article 1251-8 NCPC prévoit que « les parties désignent le médiateur d'un commun accord ou chargent un tiers de cette désignation ». Le nom, la qualité et l'adresse du médiateur figurent dans l'accord en vue de la médiation signé par les parties et le médiateur (article 1251-9 (2)).

Pour ce qui est de la médiation judiciaire, l'article 1251-12 (1) alinéa 1 prévoit que « les parties s'accordent sur le nom d'un médiateur ». L'alinéa 2 du même article ajoute que « les parties elles-mêmes peuvent, conjointement et de manière motivée, demander au juge qu'il leur désigne un médiateur ». Dans tous les cas c'est la *décision* qui ordonne la médiation qui contient le nom, la qualité et l'adresse du médiateur (article 1251-12 (3) alinéa 1).

(b) **Les obligations du médiateur**

En termes très généraux, le médiateur a pour obligation conformément à l'article 1251-2 (2) de « mener une médiation avec efficacité, impartialité et compétence. [Il] a pour mission d'entendre les parties ensemble, le cas échéant séparément afin que les parties arrivent à une solution du différend qui les oppose ». En termes plus précis, les obligations du médiateur seront définies dans l'accord en vue de la médiation.

Le médiateur est donc tenu à une obligation d'impartialité et de « compétence » qui réside dans ses qualifications et expériences professionnelles. Celles-ci sont précisées pour le médiateur agréé à l'article 1251-3. En ce qui concerne l'obligation d'indépendance et d'impartialité, le NCPC demeure assez vague. Dans le cadre de la médiation judiciaire, il est indiqué à l'article 1251-12 (1) alinéa 2 que « le médiateur peut être récusé ». L'alinéa 3 précise que « si la récusation est admise, si le médiateur refuse la mission, ou s'il existe un autre empêchement légitime, il est pourvu au remplacement du médiateur par le juge qui l'a commis ». Il est difficile de prévoir si et comment cette disposition pourrait être étendue à la médiation conventionnelle. Pour celle-ci en effet, le NCPC ne dit mot et l'on se référera à l'article 7 du règlement du Centre de médiation civile et commerciale (CMCC) qui prévoit que « le médiateur doit être impartial et indépendant des parties et, le cas échéant, leur faire connaître ainsi qu'au Conseil d'Administration du CMCC, les circonstances qui seraient, aux yeux des parties, de nature à affecter son indépendance ».[20]

En termes plus précis, le médiateur est tenu par une obligation de confidentialité. En vertu de l'article 1251-6 (1), « les documents établis, les communications faites et les déclarations recueillies au cours d'un processus de médiation ou en relation avec le processus de médiation et pour les besoins de celle-ci sont confidentiels ».

Le NCPC ne comporte pas d'obligation expresse de divulgation du médiateur. Cependant puisque le médiateur doit accomplir sa mission avec impartialité on doit considérer que cette obligation est implicite. Elle figure expressément à l'article 7

[20]Le règlement du CMCC est disponible en ligne sur <http://www.centre-mediation.lu/sites/default/files/Reglement.pdf>.

du règlement du CMCC. Au surplus, comme mentionné, l'article 1251-13 (1) alinéa 2 prévoit –pour la médiation judiciaire- que « le médiateur peut être récusé ».

(c) **La responsabilité du médiateur**

La principale obligation du médiateur étant la confidentialité, le droit luxembourgeois accorde une attention particulière à la responsabilité du médiateur en cas de violation de ce devoir de discrétion. L'article 1251-6 (3) prévoit qu'en cas de violation de l'obligation de confidentialité en dehors de ces hypothèses, « le juge ou l'arbitre se prononce sur l'octroi éventuel de dommages-intérêts ». L'article 1251-7 prévoit des sanctions pénales :

> Sans préjudice quant aux obligations légales, le médiateur ne peut rendre publics les faits dont il prend connaissance du fait de sa fonction. Il ne peut être appelé comme témoin dans une procédure judiciaire relative aux faits dont il a eu connaissance au cours de la médiation. L'article 458 du code pénal s'applique au médiateur agréé et non agréé, ainsi qu'à toute personne participant à l'administration du processus de médiation.[21]

Pour le reste, la responsabilité du médiateur désigné dans le cadre d'une médiation judiciaire demeure difficile à anticiper et paraît assez hypothétique dans la mesure où le médiateur peut être remplacé (article 1251-13 (4)) et que la cause du litige peut être ramenée devant le juge par simple déclaration écrite des parties au greffe (article 1251-13 (5)).

Concernant la médiation conventionnelle et dans la mesure où les obligations du médiateur sont définies dans l'accord en vue de la médiation, le médiateur pourra engager sa responsabilité contractuelle, mais le cas peu souhaitable semble heureusement d'école.

On notera que ni le NCPC ni le règlement grand-ducal du 25 juin 2012 *fixant la procédure d'agrément aux fonctions de médiateur judiciaire* ne fait référence à un quelconque code d'éthique ou de bonne conduite. Contrairement à ce que préconisait la Commission européenne en termes d'autorégulation de l'activité de médiateur, le Luxembourg a préféré poser des critères d'agrément. Le droit luxembourgeois reste cependant modeste en ce qui concerne les obligations (notamment de divulgation) comparé aux codes de conduite existants comme le Code de conduite européen pour les médiateurs.[22]

L'impact des centres de médiation semble lui aussi modeste. Il existe plusieurs centres de médiation au Grand-Duché du Luxembourg disposant chacun une liste de médiateurs. Après l'entrée en vigueur de la loi sur la médiation en matière civile et commerciale du 24 février 2012, le Centre de Médiation du Barreau de Luxembourg s'est transformé en avril de la même année en Centre de Médiation Civile et Commerciale (CMCC). Le Centre a un règlement et une liste de médiateurs, mais ne se réfère pas au Code de conduite européen.

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[21] L'article 458 Code pénal prévoit que « toutes autres personnes dépositaires, par état ou par profession, des secrets qu'on leur confie, qui, hors le cas où ils sont appelés à rendre témoignage en justice et celui où la loi les oblige à faire connaître ces secrets, les auront révélés, seront punis d'un emprisonnement de huit jours à six mois et d'une amende de 500 euros à 5 000 euros ».

[22] Le Code est disponible en ligne sur <http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_fr.pdf>.

2.2.3 Le Processus de Médiation

Le processus de médiation connaît quelques principes (a), mais la conduite de la médiation demeure (pour le moment en tout cas) aux marges du droit (b), ce qui n'empêche pas une collaboration –fondée sur la règle de droit- entre le médiateur et le juge (c).

(a) **Principes relatifs au processus de médiation**

Il existe peu de règles et principes qui régissent expressément le processus de médiation. Il est cependant un principe commun à la médiation judiciaire et conventionnelle auquel le NCPC accorde une importance particulière, il s'agit de la confidentialité.

Référence à la confidentialité a déjà été faite comme devoir principal du médiateur. L'article 1251-6 dispose à cet effet :

> (1) Les documents établis, les communications faites et les déclarations recueillies au cours d'un processus de médiation ou en relation avec le processus de médiation et pour les besoins de celle-ci sont confidentiels. Sauf accord de toutes les parties pour permettre l'homologation par le juge de l'accord de médiation, ni le médiateur, ni les personnes participant à l'administration du processus de médiation ne peuvent les utiliser, produire ou invoquer dans une procédure judiciaire, administrative ou arbitrale ou dans toute autre procédure visant à résoudre des conflits et ne sont pas admissibles comme preuve, même comme aveu extrajudiciaire.
>
> [. . .]
>
> (3) [. . .] Les documents confidentiels qui sont malgré tout communiqués ou sur lesquels une partie se base en violation de l'obligation de confidentialité sont d'office écartés des débats.

L'accord en vue de la médiation doit contenir « le rappel du principe de la confidentialité des communications et pièces échangées dans le cours de la médiation » (article 1251-9 (2)-6). Il s'agit donc bien d'un principe qui irrigue tant la médiation conventionnelle que la médiation judiciaire. Le principe ne souffre que de deux exceptions. Selon l'article 1251-6 (2),

> L'obligation de confidentialité peut être levée
> – pour permettre la divulgation du contenu de l'accord de médiation en vue de la mise en œuvre ou l'exécution dudit accord ; et
> – pour des raisons impérieuses d'ordre public, notamment pour assurer l'intérêt des enfants ou empêcher toute atteinte à l'intégrité physique ou psychique d'une personne.

La contradiction en revanche n'est pas un principe de la médiation. En principe la contradiction est respectée puisque le médiateur a pour mission que les parties parviennent ensemble à une solution du différend qui les oppose. Toutefois, pour atteindre cet objectif, le médiateur peut « entendre les parties ensemble et le cas échéant séparément » (article 1251-2 (2)) sans qu'une exigence de débat contradictoire soit clairement affirmée.

Enfin, faut-il rappeler que le principe cardinal de la médiation réside dans la volonté des parties. Si celles-ci ne « jouent pas le jeu » de la médiation, le processus est voué à l'échec. La volonté des parties se trouve à l'origine même du recours à la

médiation. En effet, y compris dans la médiation judiciaire (et ce même en matière familiale), si le juge peut inviter les parties à recourir à la médiation et même leur proposer une séance d'information gratuite en présence du médiateur, seules les parties décident ou non de se soumettre à la médiation. Le déroulement et l'issue de cette dernière dépendent entièrement de la volonté des parties.

(b) **Conduite de la médiation**

Il convient d'opérer une distinction selon qu'il s'agit d'une médiation judiciaire ou d'une médiation conventionnelle.

Concernant la médiation judiciaire, sa particularité -comme son nom l'indique- réside dans la place qu'y occupe le juge. C'est à la demande des parties ou (et on peut présumer que ce sera plus fréquemment le cas) de sa propre initiative que le juge peut, à tous les stades de la procédure inviter les parties à une médiation sauf en référé et en cassation. Les parties doivent y consentir et s'accordent sur le nom du médiateur à moins qu'elles ne demandent au juge de le désigner. Si les parties sollicitent le juge, « une audience pour décider de la médiation est fixée dans les quinze jours » (article 1251-12 (4)).

La décision qui ordonne la médiation est notifiée au médiateur désigné qui dispose d'une semaine pour donner son accord. Si tel est le cas, il « informe le juge et les parties du lieu, jour et heure où les opérations de médiation commenceront. Les parties pourront se faire assister par leur avocat » (article 1251-13 (1)).

Enfin à l'expiration de sa mission, le médiateur informe par écrit le juge de ce que les parties sont ou non parvenues à trouver un accord conformément à l'article 1251-15.

Pour le reste (excepté la question des délais traitée ci-dessous), le NCPC est, logiquement, muet sur le déroulement à proprement parler de la médiation. Il prévoit seulement à l'article 1251-14 que « la médiation se déroule conformément aux dispositions des articles 1251-9 et 1251-10 ». Ce renvoi est assez curieux dans la mesure où l'article 1251-9 porte sur l'accord en vue de la médiation et l'article 1251-10 sur l'accord de médiation (l'accord final des parties). Il faut comprendre que le déroulement de la médiation comme son issue sont déterminés par les parties à l'instar de la médiation conventionnelle. On voit mal comment il pourrait en aller autrement compte tenu de la nature consensuelle de ce mode de règlement des différends même lorsqu'il survient alors qu'une instance judiciaire a déjà été introduite.

En ca qui concerne les délais, la décision prononçant le recours à la médiation est notifiée au médiateur dans un délai maximum de huit jours. Le médiateur dispose d'une semaine pour accepter ou refuser sa mission (article 1251-13 (1) alinéa 1). La durée et les délais sont strictement déterminés par le juge. Selon l'article 1251-12 (3) alinéa 1, la décision qui ordonne une médiation fixe la durée de la mission du médiateur, sans que celle-ci puisse excéder trois mois. Le juge décide donc de la durée de la médiation en fonction des enjeux en cause puisque sa décision « fixe la date à laquelle l'affaire est rappelée à l'audience ». L'alinéa 2 prévoit que « les opérations de médiation devront être terminées au plus tard trois mois après

la saisine du médiateur. Elles pourront être prolongées sur demande conjointe des parties par simple déclaration écrite déposée ou adressée au greffe pour une durée supplémentaire d'un mois ».

L'article 1251-12 (5) précise qu'au plus tard à l'audience de retour de l'affaire fixée par le juge, les parties informent le juge de l'issue de la médiation. « Si elles ne sont pas parvenues à un accord, elles peuvent solliciter un nouveau délai ou demander que la procédure soit poursuivie ».

Selon l'article 1251-13 (3), le juge qui reste saisi durant la médiation peut « à la demande du médiateur ou de l'une des parties, mettre fin à la médiation avant l'expiration du délai fixé ». Dans la continuité, l'article 1251-13 (5) prévoit que « la cause du litige peut être ramenée devant le juge avant le jour fixé par simple déclaration écrite déposée ou adressée au greffe par les parties ou l'une d'elles. La cause est fixée dans les quinze jours de la demande ».

Concernant la médiation conventionnelle, aucune disposition du NCPC –et c'est heureux- ne détermine son contenu pas plus que son déroulement. L'article 1251-9 prévoit seulement que l'accord en vue de la médiation fixe notamment « les modalités d'organisation et la durée du processus ; le rappel du principe de la confidentialité des communications et pièces échangées dans le cours de la médiation ; le mode de fixation et le taux des honoraires du médiateur, ainsi que les modalités de leur paiement ».

En ce qui concerne les délais, indépendamment de la suspension de la prescription par l'accord en vue de la médiation, le NCPC n'adresse pas la question de la durée et des délais de la médiation conventionnelle. L'accord en vue de la médiation doit seulement, selon l'article 1251-9 (2) contenir « les modalités d'organisation et la durée du processus » sans qu'aucune référence au délai de trois mois prévu pour la médiation judiciaire ne soit mentionnée.[23]

(c) Collaboration entre le processus de médiation et les autorités judiciaires ou para-judiciaires

A titre général l'article 1251-2 (2) alinéa 2 prévoit que « le médiateur ne dispose pas de pouvoirs d'instruction. Toutefois, il peut, avec l'accord des parties, entendre les tiers qui y consentent ». Le médiateur est dépourvu de toute fonction juridictionnelle. Même dans le cadre judiciaire, la médiation n'a aucune dimension –fut-elle symbolique- juridictionnelle. Le médiateur n'a aucune maîtrise sur le processus et encore moins sur ce qu'il est convenu d'appeler par facilité mais par erreur la procédure de la médiation. Dans ces conditions, la question de la collaboration entre le processus de médiation et les autorités judiciaires ou para-judiciaires révèle en elle-même le risque de juridictionnalisation croissante de la médiation. Il serait cependant absurde, si les parties se mettent d'accord sur ce point, d'empêcher la participation au processus de médiation d'instances externes comme un expert ou un notaire. Cette collaboration n'est nullement prévue par les textes, mais rien ne s'y oppose.

[23] L'article 6 du Règlement du CMCC fait référence au délai de trois mois.

La collaboration avec les autorités judiciaires est davantage formalisée tant en ce qui concerne la médiation conventionnelle que la médiation judiciaire.

En ce qui concerne la médiation conventionnelle, la « collaboration avec les autorités judiciaires » est sans doute une expression excessive dans la mesure où l'article 1251-5 (3) NCPC prévoit seulement que « la clause de médiation ne fait pas obstacle aux demandes de mesures provisoires et conservatoires ». L'absence d'obstacle n'est pas à proprement parler une collaboration, mais admettons qu'il s'agisse d'un premier pas. D'autant que le même article précise que « l'introduction de telles demandes n'entraîne pas renonciation à la médiation ». Il est en théorie donc possible que des mesures provisoires ou conservatoires soient ordonnées par le juge, tandis que le médiateur cherche à rapprocher les parties. En pratique, on pourra s'interroger sur les chances de succès d'une médiation au cours de laquelle l'une des parties « gagne » au provisoire ou à l'inverse craindre les accords hâtifs pour éviter tout recours en référé. Il n'en demeure pas moins opportun que la loi maintienne la possibilité de ces recours qui sans être une franche collaboration entre le processus de médiation et les instances judiciaires permettent une certaine coordination.

En ce qui concerne la médiation judiciaire, la collaboration entre le processus de médiation et les instances judiciaires est par essence accru puisqu'une décision judiciaire « ordonne, prolonge ou met fin à la médiation » (article 1251-16 (1)). Il ne semble cependant pas que ce soit le sens donné ici au terme de collaboration entre médiateur et autorité judiciaire. Il convient toutefois de noter que le juge « reste saisi durant la médiation » et peut, selon l'article 1251-13 (3), « à tout moment, prendre toute mesure qui lui paraît nécessaire ». La formule est suffisamment large pour que l'on se perde en conjectures à son propos. Il paraît toutefois difficile d'envisager que le médiateur puisse avoir recours au juge comme l'arbitre aurait recours au « juge d'appui » précisément parce que le médiateur contrairement à l'arbitre est dépourvu de pouvoir juridictionnel. On voit mal aussi comment le juge pourrait s'immiscer dans le processus de médiation à proprement parler sans porter atteinte à l'intégrité de celui-ci et à celle de la future procédure juridictionnelle en cas d'échec de la médiation. L'article 1251-16 (3) *in fine*. prévoit seulement qu'à la demande du médiateur ou de l'une des parties, le juge puisse mettre fin de manière anticipée à la médiation. Le médiateur peut demander au juge de mettre fin à la médiation : maigre collaboration.

2.2.4 Issue de la Médiation

La médiation est réputée réussie lorsque les parties parviennent à un accord qui résout en tout ou partie leur différend. Cet accord prend la forme d'un écrit dénommé « accord de médiation » (a). Cet accord de médiation doit être homologué pour être exécutoire (b). En cas d'échec de la médiation, la voie judiciaire demeure ouverte (c). Dans tous les cas, la question des coûts devra être réglée (d).

(a) L'accord de médiation

Selon l'article 1251-10 « lorsque les parties parviennent à un accord de médiation, celui-ci fait l'objet d'un écrit daté et signé par toutes les parties. Il est dressé

en autant d'exemplaires que de parties. L'accord de médiation n'est pas signé par le médiateur, sauf demande expresse de toutes les parties. Cet écrit contient les engagements précis pris par chacune d'elles ».

La question des effets du règlement c'est-à-dire des effets de l'accord de médiation tant à l'égard des parties que du médiateur ne se pose pas ou plus exactement ne s'analyse pas en ces termes. Le NCPC ne règle que les effets procéduraux de l'accord en particulier sa force exécutoire. Il reste muet sur sa portée substantielle.

On entend par portée substantielle les conséquences directes sur les droits des parties. En effet, l'accord de médiation est un contrat qui détermine le contenu précis des obligations de chacune des parties permettant de résoudre le litige qui les opposent. A lui seul –indépendamment de toute homologation lui conférant la force exécutoire-, l'accord de médiation est un contrat dont les effets substantiels modifient la situation juridique des parties. A la rigueur la force exécutoire n'est pas déterminante sachant que les parties s'obligent par contrat et que le manquement à celui-ci pourra être sanctionné, (*a fortiori* si l'accord de médiation est une transaction). Le propos est cependant fort théorique car il ressort de la rédaction du NCPC et de la logique de juridictionnalisation de la médiation dont elle témoigne que l'accord de médiation est un contrat d'un type particulier puisqu'on peut en demander l'homologation à un juge. La question des effets du règlement sur les parties ne se pose donc pas en pratique indépendamment de celle de l'homologation. On soulignera néanmoins que l'accord de médiation est, en principe, signé par les parties seulement ce qui met en valeur la dimension contractuelle de l'acte.

C'est seulement à la demande expresse de toutes les parties que le médiateur signe l'accord de médiation. Cette signature à la portée incertaine ne fait pas de lui le garant de l'engagement des parties liées contractuellement par l'accord. D'une certaine manière, d'ailleurs l'accord de médiation le dessaisit de l'affaire, comme le jugement dessaisit le juge.

(b) **L'homologation**

La volonté de conférer aux accords de médiation un titre exécutoire dérive directement de la Directive 2008/52/CE qui prévoit en son considérant 19 que « la médiation ne devrait pas être considérée comme une solution secondaire par rapport aux procédures judiciaires au motif que le respect des accords issus de la médiation dépendrait de la bonne volonté des parties. Les Etats membres devraient donc veiller à ce que les parties à un accord écrit issu de la médiation puissent obtenir que son contenu soit rendu exécutoire ».

L'article 1251-11 dispose à cet effet que « en cas d'accord total ou partiel, l'accord de médiation obtenu conformément aux articles 1251-8 à 1251-10 peut être soumis pour homologation au juge compétent qui lui donne force exécutoire conformément au chapitre IV du présent titre ». L'article 1251-15 (3) prévoit la même chose en ce qui concerne la médiation judiciaire. L'article 1251-21 qui ouvre le chapitre IV intitulé « de l'homologation et du caractère exécutoire des accords de médiation » dispose très simplement que « l'homologation confère force exécutoire à l'accord de médiation ».

La demande en homologation est adressée par l'une des parties au moins (pour les accords de médiation nationaux seulement[24]) au président du Tribunal d'arrondissement,[25] qui vérifie notamment si elle n'est pas contraire à l'ordre public et si le litige est susceptible d'être réglé par voie de médiation. L'article 1251-22 (2) dispose à cet effet :

> le juge refuse l'homologation de cet accord de médiation :
> – si celui-ci est contraire à l'ordre public ;
> – si celui-ci est contraire à l'intérêt des enfants ;
> – si en vertu d'une disposition spécifique il n'est pas possible de le rendre exécutoire ; ou
> – si le litige n'est pas susceptible d'être réglé par voie de médiation.

En matière familiale, une importance particulière sera accordée à l'intérêt des enfants, mais ce n'est pas la seule spécificité. Ce sera en effet, le juge saisi au principal et non le président du tribunal d'arrondissement qui sera compétent pour homologuer la médiation. L'article 1251-20 prévoit de manière spécifique et surprenante que « à l'audience à laquelle l'affaire est réappelée et après avoir vérifié si l'accord n'est pas contraire à l'ordre public ou à l'intérêt des enfants, si le litige est susceptible d'être réglé par voie de médiation ou si le médiateur était agréé à cette fin par le ministre de la Justice, le juge homologue l'accord intervenu, fût-il partiel ».

Un accord de médiation conclu dans un autre Etat membre peut faire l'objet d'une homologation ; l'article 1251-23 portant spécifiquement sur l'homologation, la reconnaissance et l'exécution au Luxembourg d'un accord de médiation conclu dans un autre Etat membre de l'Union européenne sera examiné ultérieurement.

(c) L'échec de la médiation

La médiation ayant pour but l'accord des parties sur la résolution de leur litige, son échec signifie que les parties ne sont pas parvenues à un accord et que leur litige demeure. Il y a constat d'échec lorsque les parties ne parviennent pas à un accord écrit daté et signé contenant les engagements précis pris par chacune d'elles. En revanche l'accord de médiation peut être partiel lorsque les parties s'accordent sur certains aspects du litige, mais que d'autres perdurent et seront vraisemblablement résolus par la voie judiciaire.

En cas d'échec de la médiation, les parties se trouvent dans la situation qui était la leur avant le processus. C'est le retour au *statu quoi ante* : le différend subsiste et devra être résolu d'une manière ou d'une autre.

Dans le cas d'une médiation conventionnelle, la clause préalable de médiation sera épuisée et le juge pourra être saisi. Nous avons relevé l'ambiguïté des termes de l'article 1251-5 (2) qui prévoit que le juge saisi en violation d'une clause de

[24]En cas de litige transfrontalier, le consentement de toutes les parties est requis que l'accord de médiation ait été conclu au Luxembourg ou non.

[25]Il y a deux tribunaux d'arrondissement au Grand-Duché du Luxembourg, sera compétent celui dans le ressort duquel la personne contre laquelle l'exécution est demandée a son domicile ou sa résidence ou à défaut devant le tribunal du lieu où l'accord de médiation doit être exécuté (article 1251-24).

médiation « suspend l'examen de la cause », mais que celui-ci « est poursuivi dès que les parties ou l'une d'elles ont notifié au greffe et aux autres parties que la médiation a pris fin ». Ainsi, il semblerait qu'en cas d'échec de la médiation, l'instance puisse reprendre (et en réalité commencer) sans qu'un nouvel acte introductif d'instance soit requis.

En médiation judiciaire, l'article 1251-12 (5) dispose que, au plus tard à l'audience de rappel de l'affaire fixée par le juge, « les parties informent le juge de l'issue de la médiation. Si elles ne sont pas parvenues à un accord, elles peuvent solliciter un nouveau délai ou demander que la procédure soit poursuivie ». De même l'article 1251-15 (2) précise que, « en cas de désaccord total ou partiel, la procédure judiciaire est poursuivie sauf accord des parties à voir prolonger la mission du médiateur d'un délai supplémentaire d'un mois ».

La reprise de l'instance implique que les parties manifestent leur volonté en ce sens. L'instance reprend en l'état où elle se trouvait avant que le juge ordonne la médiation sachant que les délais de procédure ont été, conformément à l'article 1251-12 (6) suspendus. L'article 1251-13 (5) prévoit également qu'en cas d'échec de la médiation, « la cause du litige peut être ramenée devant le juge avant le jour fixé par simple déclaration écrite déposée ou adressée au greffe par les parties ou l'une d'elles. La cause est fixée dans les quinze jours de la demande ».

(d) **Coûts**

Selon l'article 1251-9 (1) relatif à la médiation conventionnelle mais auquel les dispositions sur la médiation judiciaire renvoient, « les frais et honoraires de la médiation sont à charge des parties à parts égales, sauf si elles en décident autrement ». Le même article 1251-9 (2) ajoute que l'accord en vue de la médiation prévoit « le mode de fixation et le taux des honoraires du médiateur, ainsi que les modalités de leur paiement ». Concernant la médiation judiciaire, l'article 1251-16 (2) indique que « Le jugement interlocutoire fixe le montant de la provision à valoir sur la rétribution du médiateur. La provision est à la charge des parties à parts égales sauf si les parties en décident autrement ». En principe donc le coût de la médiation est réparti à parts égales entre les deux parties.

A noter en matière familiale que, selon l'article 1251-17, le juge peut proposer aux parties une réunion d'information qui est gratuite. L'article 5 du règlement grand-ducal du 25 juin 2012 *fixant la procédure d'agrément aux fonctions de médiateur judiciaire et familial* prévoit à l'article 5 que « le médiateur ayant tenu la réunion d'information gratuite en application de l'article 1251-17 NCPC adresse sa demande en remboursement dans les limites du tarif fixé à l'article 4 au ministre de la justice ». L'article 4 prévoit qu'il « est alloué au médiateur agréé une vacation horaire qui est fixée à cinquante-sept euros. Le montant n'est pas majoré du montant de la taxe sur la valeur ajoutée. La règle de l'échelle mobile des salaires n'est pas applicable ».

Les différents centres de médiation prévoient des taux de rémunération plus ou moins transparents. Selon le CMCC, les honoraires du médiateur sont facturés d'après un taux horaire fixé d'un commun accord entre le médiateur et les parties.

Par ailleurs, le CMCC peut facturer des frais de dossier.[26] J. Kayser précise que « pour les litiges dont l'enjeu remonte à plus de 15 000 EUR, par exemple, à part les frais d'ouverture de 150 EUR respectivement 300 EUR selon l'existence ou non d'une clause de médiation, un montant horaire de 230 EUR est facturé à l'heure actuelle par le CMCC ».[27] L'ALMA prévoit que, pour la médiation conventionnelle, les tarifs sont fixés librement par le médiateur, sauf pour les médiations socio-familiales prises en charge par l'Office nationale de l'Enfance qui sont facturées à 62,41 euros par heure. En ce qui concerne, la médiation judiciaire, la vacation horaire est de 57 euros.[28]

3 La Médiation Transfrontalière

A titre liminaire, il convient de préciser que compte tenu de sa situation géographique et de sa taille, le Grand-Duché du Luxembourg connaît sur une base très régulière des litiges transfrontaliers. Dans ces conditions, on peut penser que la médiation, dans sa dimension transfrontalière, pourra y connaître un certain succès. Il convient néanmoins de se mettre d'accord sur cette notion (Sec. 3.1) avant d'examiner les difficultés propres à la reconnaissance et à l'exécution des « médiations étrangères » (Sec. 3.2).

3.1 La Notion de Médiation Transfrontalière

La « médiation transfrontalière » n'est pas une expression utilisée par le NCPC qui lui préfère celle de « litige transfrontalier ». L'article 1251-4 prévoit à cet effet que l'

> on entend par 'litige transfrontalier', tout litige dans lequel une des parties au moins est domiciliée ou a sa résidence habituelle dans un Etat membre autre que l'Etat membre de toute autre partie à la date à laquelle :
>
> (a) les parties conviennent de recourir à la médiation après la naissance du litige ;
> (b) la médiation est ordonnée par une juridiction ;
> (c) une obligation de recourir à la médiation prend naissance en vertu du droit national ; ou
> (d) les parties sont invitées par une juridiction saisie d'une affaire à recourir à la médiation.

Cette disposition du Code reprend quasiment mot pour mot l'article 2 de la Directive 2008/52/CE. Cette reprise à l'identique n'est guère surprenante car en réalité le législateur luxembourgeois ne s'est pas intéressé spécifiquement aux litiges

[26] Informations disponibles en ligne sur <http://www.centre-mediation.lu/node/19>.

[27] J. Kayser, « Le nouveau droit de la médiation civile et commercial au Grand-Duché du Luxembourg », *Journal des Tribunaux luxembourgeois*, 2/2012, p. 49.

[28] Informations disponibles en ligne sur <http://alma-mediation.lu/wp-content/uploads/2012/10/Exigences-légales-médiation-judiciaire.pdf>.

transfrontaliers. Comme il a été mentionné, dès l'origine, l'ambition était d'englober la médiation dans son acception la plus large sans distinguer entre les litiges internes et les litiges transfrontaliers.

Les litiges transfrontaliers sont circonscrits à l'Europe. L'article 1251-4 fait référence aux autres « Etats membres » de l'Union européenne à l'exclusion des autres Etats. On doit donc comprendre que seuls les différends intra-européens sont concernés, à l'exclusion des différends internationaux dont l'élément d'extranéité concerne un Etat tiers.

Il paraît toutefois difficile d'en déduire que tout litige impliquant une partie domiciliée dans un Etat tiers est insusceptible d'être résolu par la voie de la médiation. Une telle interdiction serait contraire tant à la logique conventionnelle de la médiation qu'aux principes du commerce international. Rien dans la loi luxembourgeoise ne s'oppose à ce qu'il existe des médiations conventionnelles véritablement internationales. La question demeure plus ouverte, en revanche, en ce qui concerne la médiation judiciaire et familiale. Une interprétation extensive paraît d'autant plus possible que les distinctions entre la médiation interne et la médiation transfrontalière sont pratiquement inexistantes.

Il convient toutefois de mettre à part les règles relatives à la reconnaissance et l'exécution des règlements étrangers puisque, en cette matière, non seulement les règles varient selon que la médiation est interne ou transfrontalière au sens européen, mais il est certain que ces règles sont spécifiques aux médiations obtenues au sein de l'Union européenne.

Quelles sont les distinctions entre la médiation interne et la médiation transfrontalière ?

La loi luxembourgeoise a fait le choix de ne pas opérer de distinction entre la médiation interne et la médiation transfrontalière au sens européen auquel nous nous limiterons dans ces développements. Le régime juridique est commun. Certes, par évidence, les règles relatives la reconnaissance des accords de médiation conclus dans un autre Etat membre sont spécifiques à la médiation transfrontalière.

A ces différences liées uniquement aux effets de l'accord une fois conclu, on doit ajouter quelques divergences minimes selon que la médiation est interne ou transfrontalière. Ces divergences, déjà évoquées, concernent le médiateur et notablement sa qualité de médiateur agréé. Dans le cas d'un litige transfrontalier et dans le cadre d'une médiation judiciaire, le médiateur désigné par le juge n'a pas besoin d'être agréé. Par contraste, dans le cas d'un litige interne, les parties doivent s'accorder sur le nom d'un médiateur agréé ou dispensé de l'agrément luxembourgeois parce que ressortissant de l'Union européenne et agréé dans des conditions similaires dans son Etat d'origine. En pratique donc un médiateur luxembourgeois non agréé ne peut pas être désigné dans une médiation judiciaire interne alors qu'il pourra l'être dans le cadre d'une médiation judicaire transfrontalière. Cette faculté n'est pas possible en matière de médiation familiale. L'intérêt de la distinction reste à trouver !

La seule véritable distinction concerne l'homologation aux fins de conférer force exécutoire à un accord obtenu dans un autre Etat membre ne revêtant pas la force exécutoire dans cet Etat. En somme, les seules distinctions entre la médiation interne

et la médiation transfrontalière présentant un intérêt concernent la reconnaissance et l'exécution des accords de médiation.

3.2 Reconnaissance et Exécution des « Médiations Étrangères »

Le NCPC prévoit des règles spécifiques en vue d'obtenir la reconnaissance et l'exécution au Luxembourg d'un accord de médiation conclu dans un autre Etat membre de l'Union européenne que l'accord soit ou non revêtu de la force exécutoire dans cet Etat membre. *Il n'existe pas de règles relatives à la reconnaissance et à l'exécution d'accords de médiation qui seraient conclus dans un Etat tiers*. Il est difficile de déterminer quelles règles devraient trouver à s'appliquer dans cette hypothèse. On peut imaginer qu'un accord de médiation homologué par un juge étranger puisse faire l'objet d'un exequatur dans les mêmes conditions qu'un jugement étranger (articles 677 à 678 NCPC). La Cour de cassation française a tranché en ce sens au sujet d'un accord des parties reconnu par un juge purement passif dans le processus. Et nous rejoignons Gilles Cuniberti lorsqu'il écrit, au sujet de cette décision que « l'implication limitée ou inexistante de l'autorité à l'origine de l'acte dans son élaboration est indifférente [dans l'obtention de l'exequatur].[29]

En revanche, il paraît difficile de considérer les accords de médiation conclus dans un Etat tiers sans formule exécutoire dans cet Etat, autrement que ce qu'ils sont, à savoir de simples contrats. Il ne semble pas possible qu'un juge luxembourgeois puisse les homologuer pour leur conférer la force exécutoire comme il peut le faire (non sans problèmes en perspective) avec les accords de médiation « communautaires ».

Seules les règles relatives à la reconnaissance et l'exécutions des accords de médiation conclus dans un autre Etat membre de l'Union européenne retiendront notre attention.

3.2.1 Les Effets d'un Accord de Médiation Étranger

Un accord de médiation conclu dans un autre Etat membre de l'Union n'a, en principe, pas d'autre effet immédiat que celui d'un contrat, c'est-à-dire qu'il lie les parties et s'oppose aux tiers. Les effets et notablement la force exécutoire qui lui

[29] Civ. 1ère, 17 octobre 2000, *Barney's*, n 98–19913, voy. G. Cuniberti *et alii*, *Droit international de l'exécution*, Paris, JGDJ/Lextenso, 2011, p. 25. « De fait, pour les destinataires de la norme, les conditions de son élaboration importent peu : ils constatent seulement que la décision veut modifier leurs droits et obligations et tendent donc à s'y conformer. Cela reviendrait à tromper leurs attentes que de remettre en cause son effet au prétexte d'une des modalités de son élaboration. Il n'existe pas de raison de restreindre la portée de l'arrêt *Barney's* dont la solution semble même pouvoir être étendue aux actes des autorités étrangères non juridictionnelles ».

sont reconnus dans l'Etat dans lequel il a été conclu pourront être reconnus dans des conditions simplifiées. Mais surtout, un juge luxembourgeois, saisi d'une demande en ce sens, pourra homologuer c'est-à-dire conférer la force exécutoire à un accord de médiation conclu dans un autre membre et dépourvu dans celui-ci d'un tel effet.

Le NCPC opère ainsi une distinction selon que l'accord est exécutoire dans l'Etat membre dans lequel il a été conclu ou qu'il ne l'est pas. Dans la première hypothèse, les règles relatives à la reconnaissance et à l'exécution des jugements rendus dans un autre Etat membre sont applicables (article 1251-23 (1)). Dans la seconde hypothèse –dans laquelle l'accord de médiation ne revêt pas la force exécutoire dans l'Etat membre dans lequel il a été conclu, les parties (toutes) peuvent déposer une requête en homologation auprès du président du tribunal d'arrondissement (article 1251-23 (2)).

3.2.2 Le Cadre Juridique Applicable à la Reconnaissance et à l'Exécution d'un Accord de Médiation Étranger

En raison de la distinction opérée par le NCPC, seront examinées successivement les règles relatives strictement à ce qui est désigné comme la reconnaissance et l'exécution d'un accord de médiation étranger (a) et les règles relatives à l'homologation d'un tel accord (b) ; ces dernières étant réservées aux accords ne revêtant pas la force exécutoire dans l'Etat membre où ils ont été conclus.

(a) **La reconnaissance et l'exécution d'un accord de médiation revêtu dans l'Etat membre où il a été conclu de la force exécutoire**

L'article 1251-23 (1) renvoie pour « la reconnaissance et l'exécution au Luxembourg d'un accord de médiation conclu dans un Etat membre de l'Union européenne autre que le Danemark et rendu exécutoire dans cet Etat membre en application de la directive 2008/52/CE sur certains aspects de la médiation en matière civile et commerciale », aux articles 679 à 685-1 du NCPC. Ces dispositions portent sur l'exécution des « décisions étrangères soumises à un traité ou un acte communautaire ». L'article 685-1 fait un renvoi général au Règlement 44/2001 *concernant la reconnaissance et l'exécution des décisions en matière civile et commerciale* dit Règlement Bruxelles I.

(b) **L'homologation d'un accord de médiation ne revêtant pas la force exécutoire dans l'Etat membre où il a été conclu**

L'article 1251-23 (2) prévoit que, « en vue d'obtenir l'homologation aux fins de conférer force exécutoire à un accord de médiation conclu dans un autre Etat membre de l'Union européenne ne revêtant pas la force exécutoire dans cet Etat membre, les parties ou l'une d'entre elles avec le consentement de toutes les autres parties déposent une requête en homologation auprès du président du tribunal d'arrondissement. L'accord de médiation est joint à la requête ».

Le consentement de toutes les parties est requis, alors qu'une seule partie peut déposer une requête en homologation d'un accord de médiation interne. Il convient

de noter que l'article 1251-22 prévoit également que dans le cadre d'un accord de médiation obtenu au Luxembourg mais concernant un litige transfrontalier, le consentement de toutes les parties est requis pour déposer une requête en homologation. Le consentement de toutes les parties est également mentionné à l'article 6 de la Directive 2008/52/CE.

Concernant les conditions de fond, outre les conditions relatives à l'homologation des accords de médiation internes à savoir la conformité à l'ordre public, l'intérêt des enfants, la « médiationabilité » et l'impossibilité de rendre l'accord exécutoire, l'article 1251-22 alinéa 2 ajoute que

> le juge refuse également l'homologation de l'accord de médiation conclu en matières fiscale, douanière ou administrative, de la responsabilité de l'Etat pour des actes et des omissions commis dans l'exercice de la puissance publique, ainsi que de l'accord de médiation conclu en matière de droit de la famille si cet accord de médiation n'est pas exécutoire dans l'Etat dans lequel il a été conclu et la demande visant à le rendre exécutoire est formulée.

L'exclusion des matières fiscale, douanière et administrative est redondante avec la condition que le litige soit susceptible d'être réglé par voie de médiation. En revanche, l'exclusion de la matière familiale est particulièrement importante dans la mesure où, dans de nombreux Etats membres, la matière familiale est indisponible. Ainsi, un accord de médiation portant sur l'autorité parentale en violation du droit de l'Etat dans lequel il a été conclu ne pourra pas être homologué au Luxembourg.

Cependant, on peut penser que se présentera tôt ou tard le cas d'un accord de médiation conclu dans un Etat membre ayant refusé l'homologation de l'accord (par exemple dans un pays qui n'autoriserait pas le recours à la médiation en matière de propriété intellectuelle). Un accord de médiation serait ainsi nul dans un Etat membre et pourvu de la force exécutoire dans un autre… sans compter que la décision luxembourgeoise homologuant l'accord de médiation obtenu dans un Etat tiers pourrait à son tour bénéficier de la libre circulation des jugements. Ces incertitudes laissent craindre l'émergence de ce que l'on pourrait appeler un « contentieux post-médiation » ce qui serait un bel oxymore procédural.

3.2.3 Conditions et Critères à la Reconnaissance et à l'Exécution des Accords de Médiation Étrangers

Les conditions et critères de l'homologation ayant été déjà traitées, seules les conditions d'obtention de l'exequatur d'un accord de médiation conclu et homologué dans un Etat tiers retiendront notre attention. Le droit luxembourgeois n'opère aucune distinction selon que l'accord découle d'une médiation conventionnelle ou d'une médiation judiciaire pas plus qu'il ne distingue selon que la médiation ait été menée à terme par un médiateur agréé ou non. Pour être reconnu et déclaré exécutoire au Luxembourg, l'accord de médiation doit avoir été homologué dans l'Etat où il a été rendu.

Comme il a été dit, l'article 1251-23 (1) renvoie aux articles 679 et suivants du NCPC et au Règlement Bruxelles I. La demande en exequatur est présentée par voie

de requête au président du tribunal d'arrondissement du lieu dans lequel l'exécution est poursuivie. Les documents pertinents (on pense à l'accord de médiation et à la décision l'homologuant) doivent être fournis. Notons qu'en vertu de l'article 680 la représentation par avocat est obligatoire (alors qu'elle ne semble pas l'être dans le cadre de la requête en homologation). En revanche, contrairement à la requête en homologation, la requête en exequatur peut être demandée par une partie seulement.

En ce qui concerne les conditions de fond, elles sont réduites. Saisie d'une requête en exequatur, la juridiction saisie procède à un simple contrôle formel des documents produits. Conformément à l'article 41 du Règlement Bruxelles, à ce stade, la partie contre laquelle l'exécution est demandée ne peut pas présenter d'observations. Cependant, la décision accordant l'exequatur (comme celle la refusant) peut faire l'objet d'un recours. A ce moment là, et conformément à l'article 34 du Règlement Bruxelles I, la reconnaissance sera refusée si elle est manifestement contraire à l'ordre public ; si les droits de la défense n'ont pas été respectés ou encore en cas de décisions inconciliables.

Le renvoi pur et simple aux dispositions relatives à la reconnaissance et à l'exécution des jugements étrangers est une solution de facilité qui ne résout pas toutes les difficultés. Certes contrairement à l'homologation elle peut être demandée par l'une des deux parties seulement. Cependant, la décision rejetant ou accordant l'exequatur peut faire l'objet d'un recours ce qui ne semble, dans les textes à tout le moins, pas le cas des décisions prononçant l'homologation d'un accord de médiation.

Une fois exequaturé ou homologué l'accord de médiation étranger aura les mêmes effets qu'un accord de médiation interne homologué c'est-à-dire en particulier qu'il aura la force exécutoire.

En conclusion, le cadre législatif de la médiation au Grand-Duché du Luxembourg est désormais bien ancré dans le Nouveau Code de procédure civile. La médiation retient l'attention de la doctrine souvent praticienne et des pouvoirs publics. Cependant, l'effectivité de ce mode de règlement des différends demeure modeste. Il n'existe pas d'informations statistiques officielles relatives à la médiation civile et commerciale,[30] mais les décisions y faisant référence demeurent

[30]Voy. J. Kayser and F. Moyse, « 18. Luxembourg », in *EU Mediation. Law and Practice*, Oxford University Press, 2012, p. 242 écrivent sur le sujet « statistics » : *as the law only came into force recently*, *there are no official statistics available at the moment*.

Pour les statistiques relatives à l'ombudsman voir http://www.ombudsman.lu/doc/doc_accueil_143.pdf

On peut néanmoins se référer aux chiffres donnés par le Centre de médiation qui est une association sans but lucratif (ASBL), créée en 1998 ayant pour objet de gérer des services de médiation et qui entretient des contacts réguliers avec les autorités. Selon son rapport d'activité pour l'année 2012, la médiation pénale (parquet majeur) représente 26 % des dossiers traités ; les dossiers transmis par le parquet mineur ne représentant que 5 % des dossiers. Les médiations familiales représentent 65,41 % des dossiers. Le Centre souligne une augmentation du nombre des dossiers qui lui sont adressés tant par le biais associatif que par le biais d'avocats pour un nombre total de 292 affaires introduites en 2012. Rapport disponible en ligne <http://www.mediation.lu/CM_activites_2012.pdf>

extrêmement limitées. Certes, on pourrait dire que les décisions judiciaires sont rares car la médiation est efficace. On peut également penser que, pour l'heure, il y a un décalage entre le discours (y compris législatif) sur la médiation et sa mise en œuvre effective. Le même constat doit être fait pour la cyber-médiation qui bien qu'encouragée par la Chambre de commerce dans son avis sur le projet de loi portant introduction de la médiation en matière civile et commerciale dans le NCPC, n'est qu'un vain mot.

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Mexico and Civil, Family and Commercial Mediation: A Search for Complementary Routes to the State Courts

Nuria González-Martín

Abstract Mexico is a federation organized into 31 states and a Federal District (Mexico City), almost every one of which has legislative sovereignty for a significant number of matters, including family matters.

For practical considerations, this paper will only refer to the laws that deal with mediation in Mexico City, stressing the sometimes substantial differences between its legislation and that of the rest of Mexico.

With this in mind, the Alternative Justice Law of the Mexico City High Court of Justice (MCHC), is the main law that regule this subject. Thus, in the ordinary laws of the Federal District, mediation is upheld in: the Alternative Justice Law of the MCHC; the Mexico City Code of Civil Procedures; the Mexico City Code of Criminal Procedures and the Juvenile Justice Law for the Mexico City. Likewise, it has effects in matters regarding the Mexico City Civil Code, the Mexico City Registral Law and the Organic Law of the MCHC.

Mediation in Mexico finds its legal basis in the Mexican Constitution, specifically in Article 17, paragraph four, which establishes that the law will provide alternative conflict resolution mechanisms. Likewise, Article 18, paragraph six, of the Constitution states that alternative justice procedures shall be used whenever possible in cases of juvenile justice in conflict with criminal law.

In Mexico, mediation in courts –the most widely used form– has been in force since 1998 when the State of Quintana Roo reformed its constitution and laws to include it. To date, there are Mediation Centres or Alternative Justice in 29 states, and only 3 states do not have Mediation Centres: Guerrero, San Luis Potosí and Sinaloa.

I wish to acknowledge and thank Víctor M. Navarrete Villarreal for his support and encouragement regarding this contribution. His knowledge, passion for Alternative Dispute Resolution and friendship are priceless.

N. González-Martín (✉)
Institute for Legal Research, National Autonomous University of Mexico (UNAM),
Circuito Maestro Mario de la Cueva s/n, Mexico City, 04510, Mexico
e-mail: nuria.gonzalez68@gmail.com

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All the laws that govern mediation in Mexico contemplate the existence of an agreement or settlement. Some laws give them similar force of res judicata, while for other laws, agreements serve as the basis for the legal action.

The binding force of the mediation settlement has been strengthened by recent reforms in the matter of 19 June 2013 and 8 August 2013.

It is clear that the mediation settlement or agreement is res judicata and that only an administrative complaint or an Amparo trial can be attempted to go against its execution. Both remedies are lay down against the rulings of a judge ordering the execution of a settlement, but not against the settlement itself or its contents.

Even though in the case of non-compliance, mediation settlements reached through public and certified private mediators are enforceable in national Mexican courts, the real problem lies in actually recognizing and enforcing said settlements in an international context.

Most of the conventions drafted at the Hague Conference of Private International Law lead to co-operation. Co-operation among administrative and judicial authorities may be needed to help facilitate the enforceability of the agreement in all the States concerned.

1 The Existing Situation of ADR in Mexico

The legal grounds for Alternative Dispute Resolution (ADR) in Mexico is found in Article 17, paragraph four, of the Mexican Constitution (MC), which states that:

> The laws shall provide alternative mechanisms to resolve controversies. For criminal matters, laws shall regulate the application of said mechanisms, ensure redress of damages and establish the cases in which judicial supervision is needed.

Likewise, Article 18, paragraph six, of the Constitution states that:

> Alternative forms of justice should be used in the implementation of this system (the juvenile justice system), where appropriate. In all proceedings in which an adolescent is prosecuted, due process of law and independence among the authorities that issue the referral and those that enforce the measures shall be observed. These measures should be proportional to the transgression carried out and shall aim at the adolescent's social and family reintegration, as well as the full development of his or her person and capacities. Confinement shall only be used as an extreme measure and for the shortest possible time. Confinement can only be applied to adolescents over the age of fourteen who have committed antisocial acts deemed serious.

In Mexico, mediation in courts –the most widely used form– has been in force since 1998 when the State of Quintana Roo reformed its constitution and laws to include it. To date, there are Mediation Centres or Alternative Justice in 29 states, and only 3 states do not have Mediation Centres: Guerrero, San Luis Potosí and Sinaloa.

The most widely used alternative dispute mechanisms in Mexico are conciliation and arbitration (Navarrete 2010).

It should be noted that conciliation is regulated in various procedural provisions in Mexico, mainly in civil and family matters.

The procedure of conciliation can be defined as: "... the agreement reached by the parties in a process in which there is a dispute on the application or interpretation of their rights, that allows said process to be deemed unnecessary ..." (Diccionario Jurídico Mexicano 1989)

According to doctrine, conciliation is defined as an "... agreement celebrated between those who find themselves faced with a conflict of interests, for the purpose of avoiding a trial or putting a rapid end to one already initiated without having to go through all the formalities that would otherwise be needed to end it." (De Pina and De Pina Vara 1995) Other authors consider this dispute resolution mechanism an "agreement or compromise of parties that, by a waiver, settlement or transaction, make the pending litigation unnecessary or prevent future litigation." (Couture 1993)

Conciliation not only solves litigation, but it also prevents litigation itself. Through this system, the third party external to the controversy assumes an active role that consists of bringing the parties closer and proposing concrete alternatives to resolve their differences by mutual consent.

With this resolution instrument, it is important for the conciliator to be preferably a dispute expert since he should not limit himself to mediating between parties as he also has the obligation to propose specific solutions.

Within the scope of Mexico City jurisdiction, conciliation is regulated in the Mexico City Code of Civil Procedures.

Legislation in some Mexican states has made significant progress in conciliation within their legal proceedings. Thus, for instance, the Coahuila Code of Civil Procedure sets forth three types of conciliation: one the parties propose to the judge; one proposed by the judge and one proposed by a third party chosen by the parties. It can be seen that the degree of freedom granted to the litigants under this Code is broader compared to similar provisions in other states.[1]

Conciliation carried out as a part of legal proceedings needs to be reclaimed. However, it might be more important to encourage extra-judicial conciliation, which should be carried out by real professionals trained in alternative dispute resolution procedures.

In terms of arbitration, Mexico's Constitution of Cadiz, 1824 Federal Constitution, 1836 centralist Constitution and 1856 Organic Statute expressly recognize the possibility of having disputes that only affect private interests resolved by arbitrators.

The 1872 Code of Civil Procedure gives parties the freedom to agree on arbitration. Briceño Sierra states that civil negotiations are open to arbitration, even when civil responsibility stems from a crime. (Briseño 1969)

Title Eight of the Code of Civil Procedure in force sets forth the figure of Arbitration Proceedings. The Commercial Code also establishes commercial arbitration with more advanced regulation since much of its content was taken from the Model Law drafted by the United Nations Commission on International Trade Law (UNCITRAL).

[1] See Articles 844–848 of the Code Of Civil Procedure for the State of Coahuila de Zaragoza.

Arbitration proceedings are carried out before people who are not State judges; if they are, they do not act as such, but as individuals. In some legislations, judicial officers are allowed to be arbitrators, but without assuming a State role.

Arbitration is a kind of two-party process in which the third party called an arbitrator is not limited to proposing a solution to the parties, but arranges said settlement through a binding ruling known as an award. (Ovalle 1996)

This procedure can be defined as "... the legal institution by which the law authorizes the parties, by means of an arbitration clause or an arbitral agreement, to submit their present or future differences to the decision made by one or more persons called arbitrators". (Chessal 2000)

In Mexico, more private institutions specialized in providing services for handling private commercial arbitration procedures spring up every day.

Arbitration presents a dual advantage in the face of a jurisdictional solution. First of all, it implies the presence of a third party outside the litigation who is generally an expert in the field of the dispute, while also denoting the use of mediation, amicable efforts, conciliation and other alternative dispute resolution resources within the same proceedings. While done elsewhere, as in *med-arb* or *arb-med* processes, this amalgam of proceedings has not taken root in Mexico. Secondly, in addition to the flexibility of its solutions, the rights and obligations of the parties are also determined in the arbitration, similar to what occurs with jurisdiction.

Even though certain progress has been made in arbitral matters in Mexico, there is still much to be done. It should be noted that even when local legislation establish this figure, there is no proper regulatory systematization to govern it.

Critics of arbitration argue that the procedure is costly. However, new frameworks under which jurisdictional bodies can channel arbitration services to institutions with which they have collaboration agreements should be explored. These participation systems could include tax incentives so that individuals in the field of arbitration can render their services pro bono or at an accessible fee.

Another model that could be tried is the one followed in some states of the United States of America. Unlike traditional arbitration, which is voluntary but has a compulsory settlement, a system that obligates the parties to invoke the arbitral procedure to deal with certain issues has been instituted in the United States, but with the important difference that the award is not mandatory. The issues processed through this channel are presented before a court-appointed arbitrator, usually a lawyer who is not involved in the case or a retired judge. At the end of this proceeding, the arbitrator issues an award that has the force of *res judicata* unless any of the parties seeks a complete review of the issue by means of a trial. In these cases, any potential temerity of the dissatisfied party is financially sanctioned if a better result than the one reached in arbitration is not obtained in the trial.[2] (Goldberg and Goldberg 1992)

[2]This procedure is known as *Court-Annexed Arbitration* and has been adopted by more tan 20 U.S. States.

After this brief overview of the principal alternative dispute resolution mechanisms in Mexico, consideration should be given to the debate on mediation and its differences with conciliation that has arisen in Mexico.

The neutral third party in the mediation should abstain from proposing solutions to the dispute presented by the parties since the mediator only serves as a facilitator of dialogue and negotiation between the parties involved. In this sense, mediation differs from conciliation in that the neutral third party in a conciliation process proposes possible solutions while in a mediation process, it is necessary for the mediator to abstain from emitting even an opinion on the problem at hand. Some authors, like Estavillo Castro, hold that there is really no consensus on the differences between mediation and conciliation. Estavillo maintains that "[l]ikewise, in terms of the nature of the activities to be enacted by the body in charge of guiding the conciliation or mediation, we do not find a clear distinction, let alone consensus, in the various sources consulted because while certain authors assert that the *conciliator* proposes solutions and the *mediator* does not, others hold the exact opposite. And the same thing happens regarding the possibility of the conciliator or mediator meeting with the parties, because while certain authors declare themselves in favor of the conciliator or mediator holding private meetings ("caucuses") with each party, others do not advise it. Something similar happens regarding the stance taken toward celebrating meetings with both disputing parties simultaneously, or regarding the presence or lack thereof of the parties' attorneys in said meetings." (Estavillo 1996)

The UNCITRAL Mode Law on International Commercial Conciliation does not make any distinction between mediation and conciliation. Article 1, paragraph three, of the model law establishes that "[f]or the purposes of this Law, "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute."[3]

It is clear that international consensus point out that it is irrelevant whether it is called conciliation or mediation, since even though a conciliator can propose solutions, he or she cannot impose them on the parties.

To a certain extent, in Mexico, we have run into the dogmatism of thinking that it is more likely to adhere to a mediation settlement than to that arises from a conciliation process since some argue that by proposing solution, a conciliator influences the parties to take a given decision, which does not arise out of a genuine conviction. This point is debatable and we believe it will continue to be so. The

[3]Resolution adopted by the UN General Assembly [on the report of the Sixth Committee (A/57/562 and Corr.1)] 57/18. Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law, 2002.

paradox lies in that many Mexican states allow the neutral third party to act as mediator and if his or her role is not successful, he or she assumes the role of conciliator.[4]

On a different note, mediation in Mexico differs from arbitration in terms of the methodologies used by each figure. While mediation respects the idea of having conflict resolved impartially and fairly, arbitration is formal and structured, and in some way is similar to the judicial process. Thus, there are many similarities between the award and the sentence. The arbitrator's performance in previous stages like the settlement, the arbitration clause, the evidentiary debate and later arguments, recalls the performance of ordinary judges.

Mediation tends to be more cooperative and creative. The mediator does not seek pre-established answers that resolve the matter in dispute, but a rapprochement of the parties to reach an agreement freely and voluntarily that lightens their earlier differences. The aim is to eliminate the idea that the other party is necessarily an adversary to be defeated and to begin viewing the other party as someone with whom he or she can relate to since a relationship and social co-existence must still be maintained between them (Gozaini 1995).

While this procedure is the most flexible, creative and open proceedings in alternative justice, as with negotiation, the aim is to make the interests of the parties in conflict compatible so as to generate win-win solutions.

The advantages of mediation can be summarized as follows: (a) it uses simple language; (b) due to its lack of strict formality, it is sufficiently flexible to be adapted to the circumstances and the people involved; (c) it tries to conserve the relationship between the parties instead of destroying it; (d) it engenders creative agreements; (e) the parties can keep control of their interests and of the proceedings throughout the mediation; and (f) in terms of cost and time, it is less onerous than a trial.

Mediation can be useful in a wide array of matters, ranging from corporate, international, political, neighborhood, school, commercial, family and civil cases to criminal ones. In other words, some form of mediation can be used for any type of human conflict.

2 The Basis for Mediation

2.1 The Notion or Concept of Mediation

In Mexico, mediation is a procedure in which the parties have control over the process of dispute resolution; that is, a negotiation assisted by an impartial third party that helps the parties reach constructive communication, which in turn allows them to discuss their interests and needs satisfactorily within the bounds of the law.

[4]This is the case in Aguascalientes, Campeche, Durango, Estado de México, Hidalgo, Jalisco, Michoacán, Quintana Roo, Tlaxcala, Veracruz and Yucatán, to mention the most important ones.

As it is an assisted negotiation, it usually follows the core pillars of principled negotiation as posed by Fisher, Ury and Patton (Fisher, Ury and Patton 1994). In other words, the impartial mediator or third party must lead the parties to:

(a) Separate the people from the problem; that is, for them to realize that both parties have valid, but different perceptions of the issue, which has consequently eroded their relationship, and that the objective reality holds a problem, which adversely affects them;
(b) Focus the discussion on the parties' interests, not on their positions;
(c) Invent options for mutual gain, and
(d) Insist on using objective criteria.

The Harvard method of mediation is the one most widely used in Mexico. However, for certain issues, like family matters, Folger's transformative mediation model is followed. The Sara Cobb model, that is, using a narrative approach, is less common and has been more successful among mediators initially trained as therapists.

In this moment is important underline that Mexico is a federation organized into 31 states and a Federal District, almost every one of which has legislative sovereignty for a significant number of matters, including family matters.

For practical considerations, this paper will only refer to the laws that deal with mediation in Mexico City, stressing the sometimes substantial differences between its legislation and that of the rest of Mexico.

With this in mind, Article 2, Section X of the Alternative Justice Law of the Mexico City High Court of Justice (MCHC), which defines mediation as a: "Voluntary procedure by which two or more persons involved in a dispute, which are designated as the mediates, seek to and build an acceptable solution to said dispute, with the assistance of an impartial third party called a mediator."

Thus, in the ordinary laws of the Federal District, mediation is upheld in: the Alternative Justice Law of the MCHC; the Mexico City Code of Civil Procedures; the Mexico City Code of Criminal Procedures and the Juvenile Justice Law for the Mexico City (González and Navarrete 2014).[5]

Likewise, it has effects in matters regarding the Mexico City Civil Code, the Mexico City Registral Law and the Organic Law of the MCHC (González and Navarrete 2014).[6]

[5] See the latest reforms in the *Gaceta Oficial del Distrito Federal N° 1629* of 19 June 2013. Decree issued by the 6th Legislative Assembly of Mexico City and in *Gaceta Oficial del Distrito Federal* of 8 August 2013, regarding the following provisions: Alternative Justice Law of the Mexico City High Court of Justice, reformed Articles, 2, 9, 14, 15, 18–20, 22–25, 27,28, 32,35, 36, 37 Bis, 37 Ter, 38–60; Code of Civil Procedures, reformed Articles 42, 55, 137Bis, 327, 426, 443, 444, 500 and 941.

[6] As of the cited reforms published in the *Gaceta Oficial del Distrito Federal* of 19 June 2013 and *Gaceta Oficial del Distrito Federal* of 8 August 2013, the reformed articles of note in these regulations are: the Mexico City Code of Civil Procedures, Articles 287, 3,005, 3,043, 3,044; the

2.2 The Existing Legal Basis for Mediation

Mediation in Mexico finds its legal basis in the Mexican Constitution, specifically in Article 17, paragraph four, which establishes that the law will provide alternative conflict resolution mechanisms. Likewise, Article 18, paragraph six, of the Constitution states that alternative justice procedures shall be used whenever possible in cases of juvenile justice in conflict with criminal law.[7]

Except for the Constitution, mediation is not envisioned at a federal level even though there is an initiative for a Federal Alternative Justice Law, which has been presented in the Senate by the Partido Acción Nacional (National Action Party) committee. This bill proposes federal jurisdiction for civil, commercial and agrarian matters.

It might be better for Mexico to have a General Law on Mediation since this type of law would regulate federal and local cases in which there is a concurrent jurisdiction between the federation and states.

A general law is applied in the entire country and allows action. Therefore, there is harmonization in states and in the nation without any conflict arising between the different levels of government. For instance, education or health is of such importance that its regulation is not given solely to the federation or the states, but is framed within a general law that provides the main regulatory guidelines and determines the jurisdiction of both levels of government.

A general law establishes a common language, as well as minimum standards for action. As mentioned before, various state laws now regulate mediation and conciliation *sui generis* and there are no minimum standards for training mediators or conciliators. In other words, there are many differences in their regulation.

We believe it would be beneficial to draft a general law using the UNCITRAL Model Law on International Commercial Conciliation as a reference point. This body of regulations conceived by the United Nations (UN) is drafted in such a way that it gives each State room for maneuver to adapt model law precepts to its own legal and social context. The language used is characterized by constructive ambiguity. Mexico has been able to introduce model laws with certain success, as in the case of the UNCITRAL Model Law on Arbitration, which was introduced into the Commercial Code in the early 1990s. Once again, we advocate the confluence

Mexico City Registral Law, Articles 49 Bis and 79; and the Organic Law of the Mexico City High Court of Justice, Articles 61, 186 Bis 1, 186 Bis 5.

[7] http://info4.juridicas.unam.mx/ijure/fed/9/

and complementarity of Hard Law and Soft Law regulatory techniques (González 2011) that serve as models when updating and implementing an area like mediation.

In our opinion, a general law would better organize the mediator "career". Minimum training and competence standards would be set and it would be possible to draft more coherent standards to govern mediation at a national level that would then give way to cross-border mediation in view of current demand.

If this means of harmonization outlined by means of a general law for whatever reason is not carried through, another viable proposal is that of implementing guidelines in countries or even among states, in the case of a federal system, in an effort to harmonize criteria. In the specific case of international family mediation, it would give legal certainty and security in international parental child abduction associated with international family mediation. The contents of these guidelines should cover issues like mediator training (fields and hours or techniques, for instance), domestic violence and mediation, mediation principles, online dispute resolution and mediation, and cost, among others.[8]

It is expected that Mexico will implement public mediation, which is conducted by civil servants, and private mediation, which involves individuals who in the free exercise of their profession facilitate negotiations between disputing parties.

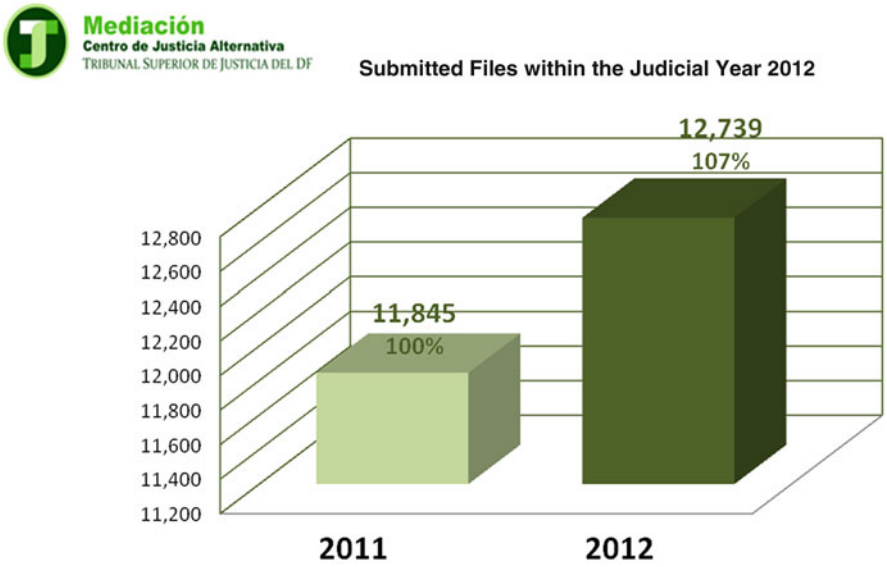
The group of public mediators encompasses local court mediators, state and Mexico City Attorney General Office mediators, and municipal mediators.

Within the domestic scope and from among the mediation services offered by the court, citizens can turn to public or private mediators. The binding force of the agreements ensuing from public or private mediation is the same[9] in the terms of being enforceable, that is to say, they are similar to and comparable to a court ruling.

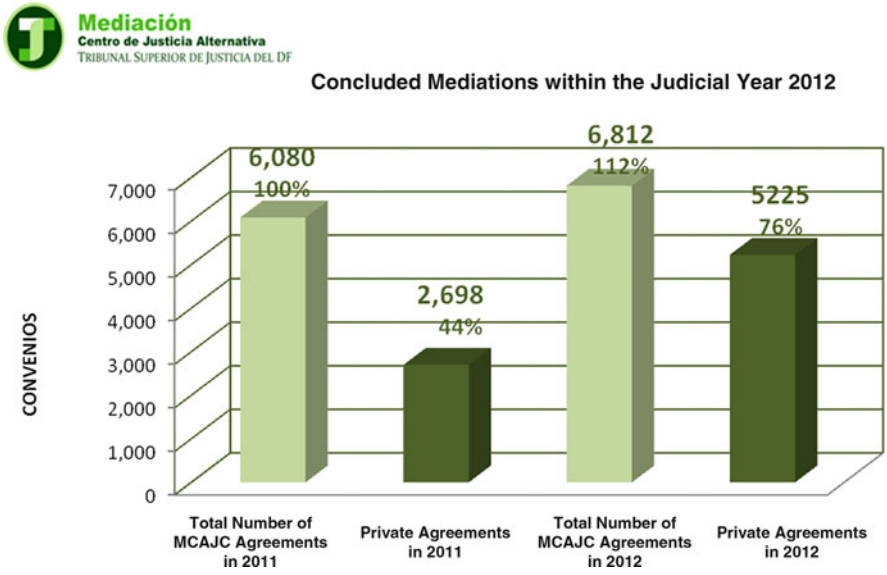
Based on the statistics provided by the Mexico City Alternative Justice Centre (MCAJC) for the 2011–2012 judicial year (December 2011 to November 2012) –verbatim–, a total of **7,514** cases were attended. Of this number, **2,218** or 29 % were sent to mediation. **1,587** of the mediated disputes culminated in a settlement, which comes to **71 %** of all the disputes submitted to mediation. Likewise, a total of **5,225** settlements were reached through private mediation, to make a total of 6,812 settlements.

[8] See in the United States, "Guidelines for Mediating International Family Matters", Task Force on International Family Mediation, ABA/SIL, 12 February 2013.

[9] In speaking of private mediators, by default, we refer to those who are certified by the State High Court of Justice at which they practice. There is no private mediation in the states of Baja California, Puebla, Querétaro or Tabasco. With this, we note that for non-certified private mediators, the binding force of the settlements is based on a private document, which could form the basis of action. There would be no difference between this type of agreement and a contract between individuals.



Issues attended directly at the AJC and by private mediators are included

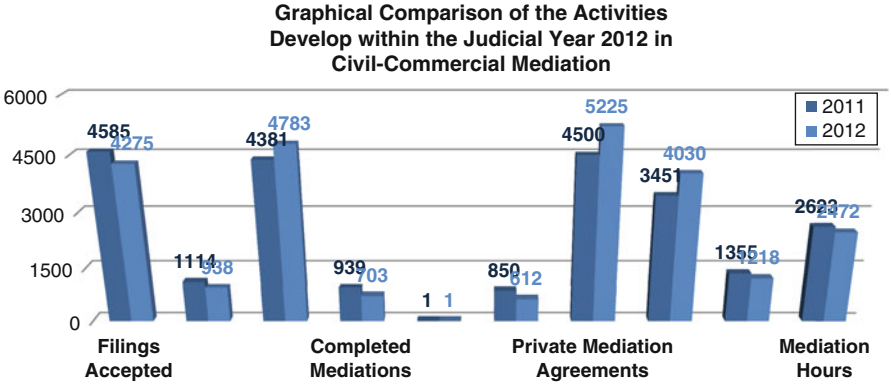


The proportion of private mediation agreements increased significantly compared to the total of signed agreements and almost doubled from one judicial year to the next

Prior to assistance in the process in the hands of the parties involved in the mediation, the Mexico City Alternative Justice Centres (AJC) provided **7,345** pre-mediations and issued a total of **7,129** invitations. The cases attended by different areas are as follows:

2.2.1 Civil-Commercial Matters[10]

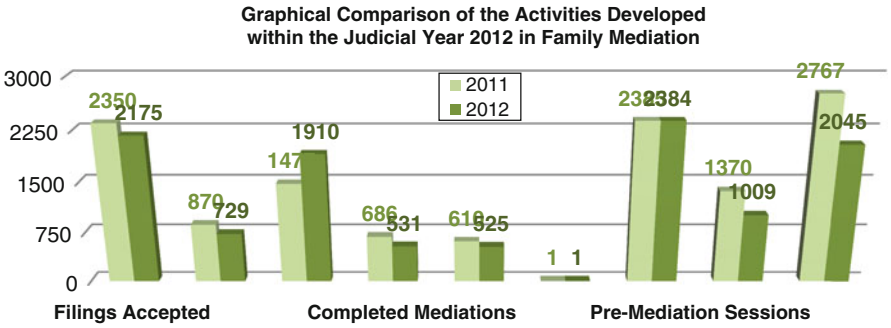
1. **4,275** files were opened
2. **4,783** invitations were sent to counterparts so they could participate in the mediation procedure
3. **703** mediations were concluded
4. **4,030** pre-mediation sessions were held
5. **1,218** mediation sessions were held
6. **612** agreements were formalized
7. An average of **7,956** agreements were drafted



2.2.2 Family Matters

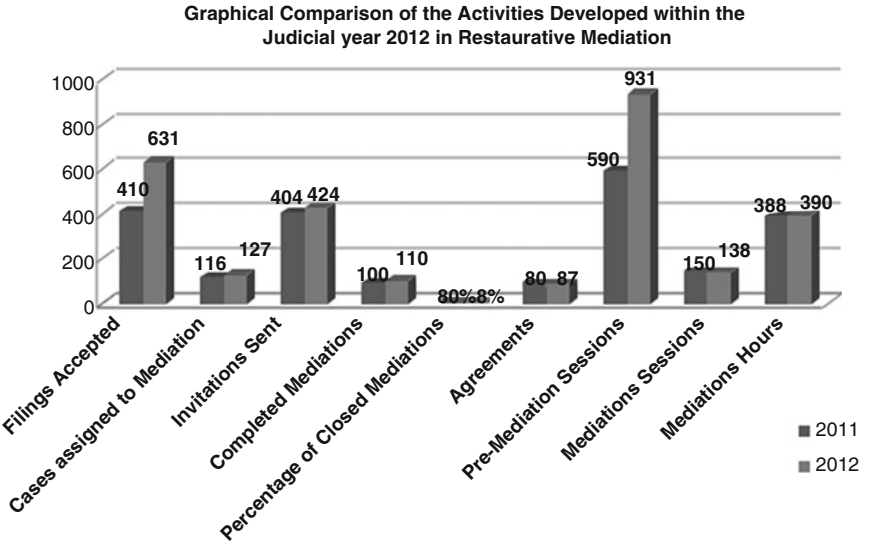
1. **2,175** files were opened
2. **1,910** invitations were sent to counterparts for them to participate in the mediation proceedings
3. **531** mediations were concluded
4. **2,384** pre-mediation sessions were held
5. **1,009** mediation sessions were held
6. **525** agreements were formalized
7. An average of **3,675** agreements were drafted

[10]As an aside from the literal nature of the transcribed data, we would like to inform the reader that the MCAJC has collaborative agreements with the Mexico City Housing Institute, INFONAVIT, LOCATEL, the Mexico City Attorney General's Office and the Mexican Mortgage Association, among others, which explains the significant and distant number in terms of relationships with other areas of mediation, like family or criminal ones.



2.2.3 Criminal Matters

1. **631** files were opened
2. **424** invitations were sent to counterparts so they could participate in the mediation procedure
3. **110** mediations were concluded
4. **931** pre-mediation sessions were held
5. **138** mediation sessions were held
6. **87** agreements were formalized
7. An average of 455 agreements were drafted



2.2.4 Juvenile Justice

In response to the support requested by Judges for Oral Proceedings in Juvenile Justice at the Mexico City Reclusorio Preventivo Sur [South Preventive Prison], criminal and juvenile justice mediators at the Alternative Justice Centre attended and participated in the 646 occasions their assistance was requested during the reported period. Of this figure, 485 were requests for support in alternative conflict solution mechanisms and 161 were requests for support for restorative hearings, which correspond to 544 cases in said courts. Two hundred and seventy agreements were obtained through alternative conflict resolution mechanisms and 71 agreements on restorative hearings, investing a total of 1,276 working hours.

In terms of the support requested by the judges for Written Proceedings in Juvenile Justice, criminal and juvenile justice mediators at the Alternative Justice Centres, 34 requests for support were attended, 24 of which were for alternative dispute resolution mechanisms and 10 for restorative hearings, which correspond to 29 cases in said courts. Eighteen agreements were reached through alternative dispute resolution mechanisms, investing a total of 94 working hours.

In his report, Mexico City AJC Director Pascual Hernández Mergoldd states that the Mexico City AJC currently has 18 mediators: five in civil-commercial mediation, six in family mediation and seven in criminal and juvenile justice mediation.

Likewise, by virtue of that set forth in the MCHC Law of Alternative Justice and according to that stipulated in Article 18, clause (A), the Director General, Mediation Directors and Assistant Operations Directors that meet the requirements established by law can be mediators. Currently, seven more people can be appointed public mediators on having completed courses and post-graduate studies through agreements with the MCHC Institute for Judicial Studies.

With 25 public mediators, including Assistant Directors, Mediation Directors and even the General Director, in addition to 105 certified private mediators, the response capacity for 2012 guaranteed that the MCAJC was better prepared to attend the demand for mediation services.

Mediation in Mexico is predominantly circumscribed to ordinary matters since most mediation services are rendered at local courts. In other words, as mentioned above, mediation is applied in issues regarding family, civil, commercial, criminal and juvenile justice law. It has also seen a certain level of development in municipal law.

Cross-border mediation is not set forth. There is only domestic or national mediation and specifically for local or state levels; hence the reiterated importance of having a General Law of Mediation that regulates mediation both nationally and internationally. Even then, the section corresponding to cross-border mediation makes reference to Mexico's situation on this issue in greater detail.

3 The Mediation Agreement/The Agreement to Submit the Disputed to Mediation

All the laws that govern mediation in Mexico contemplate the existence of an agreement or settlement. Some laws give them similar force of *res judicata*, while for other laws, agreements serve as the basis for the legal action.

In Mexico City, this aspect issue is clear. Article 38 of the Alternative Justice Law of the MCHC states:

> The agreement celebrated between mediatees with official certification granted by the Area Director of the matter in question, with the formalities stipulated in this law, shall be valid and enforceable according to its terms.
>
> The settlement shall entail its execution for its enforcement via proceedings before the courts. A negative response to its execution on behalf of the jurisdictional body shall be the cause of administrative liability, except when the settlement does not comply with one of the requirements stipulated in Article 35 of this law.
>
> In the case of non-compliance with the agreement in criminal matters, the rights of the affected party shall be protected so as to present the case through the appropriate channels and forms.
>
> The agreements arising from proceedings led by court officers[11] and private mediators certified by the Court according to the formalities stipulated in this Law, and who are duly registered before the Centre under the terms provided by this Law, the Rules and Regulations, accordingly, shall have the same effect.
>
> If the agreement arising from the proceedings led by the court officer or Court-certified private mediator does not comply with any of the formalities set forth in this Law, and can be remedied, the registry process before the Centre shall be suspended and shall be returned to the court officer or private mediator, accordingly, to rectify said formalities; otherwise, the registry shall be refused and the corresponding penalty procedures shall be initiated.
>
> By agreement of the mediatees, the settlements can be entered in the Public Register of Property and of Commerce, according to the corresponding laws.

The binding force of the mediation settlement has been strengthened by recent reforms in the matter of 19 June 2013 and 8 August 2013.

Thus, the new Article 426 of the Mexico City Code of Civil Procedures stipulates that:

> There is *res judicata* when the ruling instigates enforceability or when the parties celebrate a settlement arising from the mediation procedure referred to in Alternative Justice Law of the Mexico City High Court of Justice.
>
> By law, the following are deemed enforceable:
>
> . . .
>
> VII. Settlements arising from the mediation procedure referred to by the Alternative Justice Law of the Mexico City High Court of Justice.

It is clear that the mediation settlement or agreement is *res judicata* and that only an administrative complaint or an *Amparo* trial can be attempted to go against its execution. Both remedies are lay down against the rulings of a judge ordering the execution of a settlement, but not against the settlement itself or its contents.

[11] In Mexico, these court officers are known as *secretarios actuarios.*

Regarding the mediation clauses in a contract, it can be asserted that Mexico has yet to develop a culture of mediation in which parties include a mediation clause, even though it is common to set arbitration clauses. The Mexican Arbitration Centre (MAC) has drafted mediation-type clauses, but these have not yet permeated in society.

As to the obligation of subjecting a dispute to mediation, once a lawsuit has been initiated, the new reforms maintain that a civil or family judge can urge or recommend that that the parties attempt mediation before continuing with the trial. This possibility is set forth in the new Article 55 of the Mexico City Code of Civil Procedures, which establishes that:

> ...
>
> If in the acts of the proceedings, the judge notes that the matter can be solved through mediation, the judge shall urge the parties to turn to the mediation proceedings referred to in the Alternative Justice Law of the Mexico City High Court of Justice, and through said proceeding, attempt to reach an agreement to end the dispute. The judge may order the suspension of the trial for a period of up to 2 months with the effects set forth in said Alternative Justice Law as of the moment in which the parties inform him or her that the corresponding mediation proceedings have commenced.
>
> In the event that the parties are able to build an agreement through mediation proceedings, they shall inform the Judge, who shall order the end of the proceedings and duly file the case. In the event that upon receiving the pre-mediation the parties do not accede to the proceedings or after having initiated it, were not able to reach an agreement within the established period of time, they shall notify the judge for him or her to make the corresponding provisions and to continue with the proceedings.

Thus, exclusively for family matters and according to Article 287 of the Mexico City Civil Code, if people who are getting a divorce do not reach an agreement on the legal effects of the divorce (child support, care and custody of children under 18, the dissolution of the marital partnership, etc.), ancillary proceedings are still open for the exercise of their rights. However, the judge shall also urge the parties to attempt mediation before initiating an ancillary proceeding.

In cases of family disputes, Article 941 of the Mexico City Code of Civil Procedure states that the judge must also urge the parties to resolve their differences through mediation before continuing with the litigation.

As to the requirements for mediation settlements, it should be noted that these may vary slightly depending on whether the settlements stem from public or private mediation.

For public mediations, Article 35 of the MCHC Alternative Justice Law states that the agreements reached by the mediatees can adopt the form of written settlement, which must contain the following formalities and requirements:

> I. The place and date;
>
> II. The name, age, nationality, marital status, profession or occupation, and place of residence of each of the mediatees;
>
> III. In the case of corporations, it shall include an appendix with the document that accredits the legal personality of the proxy or legal representative in question;
>
> IV. The precedents of the dispute between the mediatees that led them to turn to mediation;
>
> V. A chapter of the official statements, if the mediatees so wish;

VI. A precise description of the obligations to be given, discharged or not discharged as agreed upon by the mediatees; as well as the place, manner and time in which these are to be fulfilled;

VII. The signatures or fingerprints, where relevant, of the mediatees; and

VIII. The name and signature of the General Director, the acting Mediation Director or Assistant Director or, where relevant, the corresponding Court Officer, that for the record, he or she attests to the conclusion of the agreement, as well as the Centre seal; and

IX. The registry number or code at the Centres.

The Settlement shall be drawn up, at least, in triplicate; in all events, it should be ensured that regardless of the number of copies, one should be retained by the Centre and each party should receive a copy for his or her records.

In the case of private mediations and according to that set forth in Article 50 of the Alternative Justice Law of the MCHC, the requirements are:

I. The registry number corresponding to that set forth in Article 44 of this Law;

II. The place and date;

III. The private mediator's full name, certification registry number, seal and signature;

IV. The full name, where relevant, of the external specialist(s) who participated;

V. The name, age, nationality, marital status, profession or occupation, and place of residence of each of the mediatees;

VI. In the case of corporations, it shall include an appendix with the document that accredits the legal personality of the proxy or legal representative in question;

VII. The precedents of the dispute between the mediatees that led them to turn to mediation;

VIII. A chapter of the official statements, if the mediatees so wish;

IX. A precise description of the obligations to be given, discharged or not discharged as agreed upon by the mediatees; as well as the place, manner and time in which these are to be fulfilled;

X. The signatures or fingerprints, where relevant, of the mediatees;

XI. A certification from the private mediator at the end of the document, which shall state that:

a) The identity of the mediatees was verified and that to his or her opinion, said mediatees are capable of participating in the proceedings;

b) He or she counseled the mediatees regarding the merit, consequences and legal scope of the agreements contained in the settlement, and

c) The acts the mediator deems necessary and related to the authorized settlement, especially those corroborating that the obligations imposed by this Law, the Rules and Regulations were fulfilled to the satisfaction of the mediatees.

In the certification, the private mediator shall expressly indicate the means used to verify the identity of the mediatees.

For the private mediator to certify the capacity of the mediatees, it is sufficient for him or her to observe that there are no obvious manifestations of legal incapacity and not been informed that the mediatee(s) has been declared legally incompetent.

Regarding the effects, it has been mentioned that they have the official status of *res judicata* as if it were an enforceable court ruling.

The party that does not comply with the settlement will probably face the enforced implementation of the settlement as if it were a ruling to be fulfilled by force if necessary.

From a theoretical point of view, since mediation is an alternative means of solving disputes peacefully, it follows the guidelines and principles of arbitration. Therefore, a plea of *lis pendens* is in order if the mediation is on-going even

considering that at any moment the mediatees might withdraw from the proceedings, thus ending them. The courts would then assume jurisdiction.

While in Mexico there is a tendency towards staying the proceedings, another exception would be not complying with one of the requirements needed to proceed with legal action.

Lastly, if mediation has already been carried out and a settlement has already been attained, it would be have the legal status of *res judicata*.

Article 7 of the Alternative Justice Law of the MCHC states that at the close of the statute of limitations and the order for the suspension of the proceedings during the mediation shall be given for a maximum of 2 months.

4 The Mediator

Mexico has no general rule for a person to act as a mediator. Most states only require that these facilitators be trained to steer mediation proceedings. However, other states, like Mexico City, more specific requirements must be met.[12] Article 18 of the Alternative Justice Law of the MCHC establishes the requirements to act as a public mediator:

> To be a public mediator assigned to the Centre [it is necessary to]:
>
> I. be a Mexican citizen in full exercise of his or her civil and political rights and be at least 25 years of age on the day of his or her appointment;
>
> II. have a degree in law and a *cédula profesional*,[13] as well as a minimum of 2 years of provable professional experience in any of the matters under the jurisdiction of the Centre;
>
> III. apply and pass the corresponding selection process, taking exams and training courses (...).

It should be noted that the position of public mediator is that of a non-union employee. Thus, the mediator does not belong to the Court labor union. The

[12]For example, Aguascalientes requires that its mediators-conciliators have degrees in Law, Sociology, Education or any related social science. This also applies to private mediators. In Baja California, specialists (mediators) must be college graduates, but does not specify any particular field. Baja California Sur has public and private mediators. In Campeche, mediators can be public or private, and must have a *cédula profesional* in social sciences or humanities. In Chiapas there are public and independent specialists. They must have a *cédula profesional* in social sciences (arbitrators must necessarily have a degree in law). In Jalisco, there are public and private mediators that only require a *cédula profesional*, but it does not specify any particular field. Tamaulipas does not require a college degree, but requires accreditation in mediation training. There is also public and private mediation. In Yucatán, mediators must have a *cédula profesional*, but no mention is made of a particular degree. There is also public and private mediation.

[13]This is an issue we have repeatedly questioned in our papers as it is unseemly that in a globalized world and the overwhelming mobility in which we are immersed, a *cédula profesional* is still required. This document is solely issued for degrees obtained in Mexico. In this particular case, it applies to specifically to degrees in law and entails a drawn-out, tedious process that is incomprehensible and unattainable unless it is done through an *Amparo.*

mediator holds his or her position for 3 years. To be ratified for another 3-year term, he or she must pass a work skills examination. The Mexico City Judicial Council is the body that ultimately decides whether the mediator can retain his or her position.

The Centre directors, as well as the Court Officers who meet the legal requirements and receive the appropriate training can be registered as mediators. Their status as public mediator must also be ratified every 3 years and is lost on leaving the Centre or not being a Court Officer, accordingly.

On the other hand, there is the figure of private mediator, who is an individual properly trained to act as mediator and has received official certification to celebrate mediation settlements. To practice, a mediator must be duly certified and registered by the Alternative Justice Centre in his or her state.

Basically, a private mediator must fulfill the same requirements as those for a public mediator. However, he or she must also comply with the conditions set forth in Article 18 of the Alternative Justice Law of the MCHC:

> (. . .)
> III. Have a good professional reputation and acknowledged integrity;
> IV. Not have been convicted by a final judgment of an intentional crime that merits corporal punishment;
> V. Take and pass an examination on work skills;
> VI. Pass the training courses for certification and registration,
> VII. Complete the internship hours at the Centre as established in the Rules/Regulations.

The certification and registration granted by the Centre will be valid for 3 years. To renew certification and registration, the work skills examination must be taken and passed. The provisions on the matter stipulated by the Rules and Regulations must also be met.

There is a creditable innovation in the legal reform of 19 June 2013 which states that public mediators who cease being civil servants of the Court can be certified and registered as private mediators.

In Mexico City, public mediators compete for the position. They take a course and are tested by both the MCHC Institute of Legal Studies and the MCHC Alternative Justice Centre. The final decision on who will form part of the Centre as a mediator lies with the Mexico City Judicial Council, at the motion of the General Director of the Centre.

The public mediator attends the users of this service in turn; that is, the parties do not choose it and can refuse it if they notice that the facilitator has a conflict of interest in the case.

Private mediators take a 147-h diploma course organized by both the MCHC Alternative Justice Centre and the MCHC Institute of Legal Studies. This is not strictly an application process since in the case all the applicants pass a diploma course and examinations, they can be certified and registered by the MCHC

Alternative Justice Centre. They are evaluated and must also complete 40 h of internship under the supervision of public mediators.[14]

According to Provisional Article 5 of the Decree by which various provisions of the Alternative Justice Law of the MCHC are reformed, amended and repealed, published on 19 June 2013, private mediators with current certification and registration before the MCHC must take a training and refresher course to maintain their registration.[15]

The choice of private mediator is open. Parties can choose the one who most appeals to them from an official list published in the MCHC Court Bulletin.

The main obligations of a public mediator set forth in Article 21 of the Alternative Justice Law of the MCHC are the following:

> I. Conduct the proceedings clearly, transparently and in an orderly manner as befits mediation, based on its guiding principles;
>
> II. treat the mediatees with respect and diligence, acting before them without discriminatory stances or attitudes;
>
> III. abstain from disclosing and using the information obtained in the performance of one's duties and fulfill the duty of confidentiality;
>
> IV. conduct the mediation with flexibility, responding to the needs of the mediatees in order to bring about negotiation by stimulating effective communication and understanding between the parties;
>
> V. ensure that the mediatees participate freely and voluntarily, without any coercion or undue influence;
>
> VI. ensure that the agreements reached by the mediatees respect the law and made in good faith;
>
> VII. sign the letter of independence;
>
> VIII. sign a confidentiality agreement with the mediatees and undergo on-going training.

The public mediator can terminate the mediation under any of the following conditions:

(a) When one or both of the mediatees lack respect towards following the rules on their behavior in the mediation;
(b) When there is a lack of collaboration between one or both of the mediatees;
(c) When one or both of the mediatees fail to attend two consecutive sessions without any justification, or one of them fails to attend three consecutive sessions without any justification;
(d) When the mediation becomes pointless or futile for the pursued aim;
(e) When one or both of the mediatees so request it.

According to Article 22 of the Alternative Justice Law of the MCHC:

> Public mediator shall have the obligation of following the rules and procedures established by the Rules.

[14]Between 2009 and 2012, a 120-h course was given at the MCHC Alternative Justice Centre with a 10-h internship instead of the above-mentioned diploma course.

[15]See the most recent notification of the "Curso de capacitación y actualización para mediadores privados certificados" published in *Boletín Judicial. Órgano Oficial del Tribunal Superior de Justicia del Distrito Federal,* Tomo CXCII, No. 152, 10 September 2013, pp. 9–10.

> In acting as public mediators, Court Officers shall submit a weekly written report to the Centre on the mediations underway in which they shall clearly and accurately record the names of the mediatees, the type of mediation service, the number of mediation sessions and identification data of the corresponding trial or proceedings by means of consecutive numbers.
>
> If the mediation concluded with a settlement in the presence of the mediator, he or she must annex it for registry at the Centre under the terms set forth by this Law.
>
> The records that prove that the mediatees were duly guided during the pre-mediation stage must be appended to the report, along with the letter of independence, the confidentiality agreement and, where necessary, a copy of the settlement and other documentation deemed relevant or should be recorded as appended as stipulated by this Law or the Rules and Regulations.

It should be noted that Court Officers, who in addition to having the possibility of being public mediators are court employees; that is to say that they internally depend on a judge and are an inherent part of the team that works with the head of the jurisdictional body.

In general and despite the fact that a private mediator must comply with other obligations since he or she is not a civil servant, it can be said that these duties are basically the same as those for public mediators.

First of all, a mediator must not disclose anything which has been said to him or her or discussed during the mediation. Confidentiality is key in fomenting trust between the parties. Therefore, the law stipulates that a mediator cannot act as a witness in any legal proceedings related to the cases in which he or she is involved under the terms of the principle of confidentiality that governs mediation and the duty of professional secrecy that serves them.

However, there is an exception to said principle of confidentiality. This applies when in the performance of their duties, there is evidence of threats against their lives or physical or mental integrity of any of the mediatees or when there is information on ex officio prosecutable offenses have been committed, mediators are obligated to direct them to the corresponding specialized institutions, or if necessary, inform the corresponding authorities.

Public mediators and Court Officers acting as mediators are responsible for the offenses and/or crimes committed in the exercise of their duties and they shall therefore be subject to the proceedings and sanctions stipulated in the Organic Law of the MCHC, the Federal Law of the Responsibilities of Public Servants, and other applicable laws.

Without prejudice to the legal responsibilities a private mediator may incur in the exercise of his or her duties, he or she is subject to the disciplinary regime and procedure set forth in the Alternative Justice Law of the MCHC. The mediator who breaches the obligations stipulated in this Law and in the breach of the obligations established in the Regulations and Rules.

The administrative sanctions applicable to private mediators are:

I. A written caution with a warning and fine under the premises set forth in the Rules;

II. Temporary suspension of registration, which can last from 1–3 months under the premises set forth in the Rules, and
III. The cancelation of registration in the following cases, in serious cases.

Mexico City does not yet have a Code of Conduct for mediators. Even then, several documents are being drawn up. The Alternative Justice Centre of the MCHC is working on a draft of a Code, as is the National College of Certified Mediators, S.C., an institution that aims at bringing together all the mediators in the country.[16]

Until recently, there was an institution made up of court mediation centres from all states under the umbrella of the National Commission of Mexican High Courts of Justice. This section of the commission was dissolved, but local courts address matters regarding mediation every time the Commission meets.

Great expectations revolve around further disseminating mediation through the above-mentioned National College of Certified Mediators, as long as it does not only take into account public mediators, but also private ones. Among the projected endeavors, there is the one to bring about the drafting of a general law on mediation in the federal legislative branch. This would standardize the practice of this procedure throughout Mexico, a basic issue as discussed above.

5 The Process or Procedure of Mediation

Mediation proceedings are governed by eight guiding principles set forth in Article 8 of the Alternative Justice Law of the MCHC:

> I. Disposition: Individual must choose to participate in mediation by their own free and genuine will;
>
> II. Confidentiality: The information generated by the parties during mediation cannot be disclosed;
>
> III. Flexibility: Mediation lacks any type of rigidity, since it stems from the willingness of the mediatees;
>
> IV. Neutrality: The mediators guiding the mediation must keep the proceedings devoid of judgments, opinions and prejudice towards the mediatees, which may influence the decision-making process;
>
> V. Impartiality: The mediators guiding the mediation must maintain the proceedings free of favoritism, partialities or personal preferences that imply conceding advantages to any of the mediatees;
>
> VI. Fairness: Mediators shall provide fair conditions between the mediatees to reach a mutually satisfactory agreement;
>
> VII. Legitimacy: The mediation shall be limited by the willingness of the parties, the law, morality and high standards of conduct;
>
> VIII. Economy: The proceedings shall entail minimal cost, time and personal hardship.

It should be pointed out that the last five principles do not differ from those that must necessarily exist in any trial. However, the first three stand out since they are essential to mediation proceedings: Disposition, confidentiality and flexibility.

[16]Bylaws: 15 August 2012. http://www.conamec.com.mx

The stages of the proceedings are very similar to those accepted in other contexts. As established in Article 30 of the Alternative Justice Law of the MCHC, they are[17]:

I. Opening:

(a) A meeting between the mediator and the mediatees;
(b) Summons and signing of the rules of mediation and the confidentiality agreement;
(c) Briefing on the forms and premises for terminating the mediation;
(d) Signing of the confidentiality agreement; and
(e) Summary of the Conflict

II. Case analysis and agenda building:

(a) Identification of the points of conflict;
(b) Acknowledgement of co-responsibility;
(c) Identification of the conflicting interests and the real needs underlying the conflict;
(d) Awareness of the emotional aspects of the mediatees;
(e) A list of the issues related to the mediation; and
(f) Attention given to the points on the agenda.

III. Solution-Building:

(a) Proposing options;
(b) Evaluation of and selecting options; and
(c) Agreement-building

IV. Closing:

(a) Review and consensus of the agreements; and
(b) Drafting the agreement, and if adopting it in written form, signing.

The mediation proceeding is carried out in group and individual sessions; that is, in the presence of the parties involved and in *caucus*.

In Mexico City, public mediation can last for up to five sessions, but if the mediator is of the opinion that more time is needed, this period can be extended but should not exceed ten sessions.

[17]Regardless of the stages established in this article, there is always a previous stage commonly known as pre-mediation, during which a briefing is given and invitations are made. As of that moment, the rest of the related session formally begin.

Article 7 of the Alternative Justice Law of the MCHC states that in the event the parties are litigating in court, the statute of limitations and the order for the suspension of the proceedings during the mediation shall be given for a maximum of 2 months.[18]

With the reforms made in July and August 2013, civil judges and family members can urge the parties to turn to mediation. The parties have the obligation to notify the judge that they are attempting to resolve their dispute through mediation and so the legal proceeding can be suspended. This, however, does not imply that they are being denied justice since the entire proceeding is suspended and their rights to later litigate in court are not affected if the mediation fails.

Currently, mediation settlements can be registered before the Public Register of Property and of Commerce, which offers legal certainty to both the parties and any third party that might claim having a superior right regarding real property.

6 Failure of the Mediation and Its Consequences

According to Article 34 of the Alternative Justice Law of the MCHC, it can be affirmed that mediation fails under the following premises: when there is a lack of respect or aggressive behavior by one party towards the other, the mediator or any person authorized to intervene in the mediation, the seriousness of which prevents any later attempt at future dialogue; when there is mutual or separate consent from the parties; when both parties fail to attend two consecutive sessions without any justification, or when one party fails to attend three consecutive sessions without any justification; when the behavior of one or both parties clearly implies that there is no willingness to reach an agreement.

The mediator has the obligation to employ all pertinent measures within reach for the mediation to conclude successfully, as long as they do not breach the law, morality or high standards of conduct.

There are no legal consequences for either the parties or the mediator when no agreement is reached. The parties can litigate their case in court and the mediator has to attend a feedback session with his or her co-workers.

As seen, there is no consequence set forth by law against the mediatees or the mediator; because of the principle of willingness, no one can be forced to reach an agreement, not even if ordered by a judge. Unless he or she acts with negligence or in bad faith, the mediator is not responsible if the parties do not reach an agreement.

In the event of negligence on behalf of the mediator, an administrative act is filed against the mediator, or if it is more serious, it is brought before the Judicial Council to see whether a penalty should be imposed as it would for any civil servant of the MCHC.

[18]This has also been mentioned above in Article 55 of the Mexico City Code of Civil Procedures.

7 Success of the Mediation and Its Consequences

7.1 Meaning and Consequences

In principle, mediation is deemed successful when the parties in conflict have been able to formalize their agreement, through a settlement that fully or partially solves the points in conflict.

While it is true that the ideal situation would be for this to occur, mediation is also thought to be successful when the parties reach verbal agreements even if they are not in writing. Sometimes, the parties agree on issues that have more to do with their co-existence than with the fulfillment of legal obligations. In these cases, the mediation proceedings have been able to improve the relationship between the parties, which has a positive effect from a moral standpoint and can prevent future legal conflicts.

7.2 Enforcement of the Settlement Reached by the Parties

As mentioned, all the laws that govern mediation in Mexico take into account the existence of an agreement or settlement. Some laws give it force similar to that of *res judicata* while others settlements serve as the basis for legal action. This situation is clear in Mexico City. The cited Article 38 of the Alternative Justice Law of the MCHC sets forth its enforceable implementation.

8 Costs of the Mediation

In the case of public mediation, the mediation proceedings are free of charge to the parties. Public mediators perceive a salary for the work carried out and are legally prohibited from charging for their services as mediators.

Meanwhile, private mediators need to discuss payment for their services with the parties. It should be noted that with the recent legal reforms, private mediators must do the work *pro bono* to help the low-income population.

Legal aid is offered by the Office of the Public Defender, an agency of the Mexico City Legal Council (Executive Branch) or by a private attorney, as the case may be.

9 Cross-Border Mediation

9.1 Notion and Main Features

The dynamics of international relations, whether family, civil, commercial or criminal, converge on the inertia or need to encompass the knowledge, dissemination and implementation of international regulations, particularly if it is part of an internal legal system of a given country.

Therefore, mediation holds an important place in highly prestigious and important international treaties or agreements. Thus, if we confine ourselves to family matters, Article 31 of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility states that:

> The Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to:
>
> *a)* . . . ;
>
> *b)* facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies (. . .)

Likewise, in the European Union, Article 55 of the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 contains the following similar provision: (Vigers, Doc. Prel. N 5)

> The central authorities shall, upon request from a central authority of another Member State of from a holder of parental responsibility, cooperate on specific cases to achieve the purposes of this Regulation. To this end, they shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to: (. . .) facilitate agreement between holders of parental responsibility through **mediation** or other means, and facilitate cross-border cooperation to this end.

Mexico has not signed or ratified any of the two universal or regional conventions despite the fact that it is part of the 1980 Hague Convention on the Civil Aspects of International Child Abduction. Articles 7 and 10 of this convention stipulate the voluntary return or an amicable resolution while posing the use of alternative dispute resolution mechanisms, which includes mediation[19]:

> "Article 7: Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve other objects of this Convention".
>
> In particular, either directly or through an intermediary, they shall take all appropriate measures –
>
> " . . .
>
> *c)* **to secure the voluntary return of the child or to bring about an amicable resolution of the issues**;
>
> . . . "
>
> "Article 10: The Central Authority of the State where the child is shall take or cause to be taken **all appropriate measures in order to obtain the voluntary return of the child**."

This truly a good way of promoting voluntary and amicable resolutions while alluding to mediation.[20]

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[19] www.hcch.net under the section entitled Conventions.

[20] We would like to use this opportunity to emphasize that it is truly important to differentiate between mediation and a voluntary return or amicable resolution. In the specific case presented

Specifically in terms of the importance of mediation, it is such that even the Hague Conference on Private International Law, the managing body of this international standard accepted worldwide, sets forth parallel Soft Law instruments in the Conclusions and Recommendations issued after work done by their specialized sections on the practical operation and implementation of the specific conventions in question. This Soft Law instrument aims at updating –with said non-binding instruments that still play an influential role in national legislative and judicial work– matters that have become obsolete in the face of the changes seen in an ever-moving and ever-changing society.

One result of these Conclusions and Recommendations was the drafting of the Guides to Good Practice, which include Soft Law instruments, and in view of the issue raised in the 1980 Hague Convention, we should highlight the Guide to Good Practice for Mediation.[21]

Both Hard Law documents –Conventions or traditional treaties– and Soft Law documents –Conclusions and Recommendations or Guides to Good Practice– gain so much prominence that they become the appropriate and needed complementary aspects that give coverage to statutory arrangements of great consequence and give mediation a significant position. We can only hope that the international community echoes the importance and magnitude of incorporating them into their internal laws. Meanwhile, Mexico is yet another country that has not incorporated them, neither in fact nor in law, into its cross-border mediation despite having a high number of cases involving, for instance, children and the need to implement agreements between parents seeking the best interest of their children.

9.2 Recognition and Enforcement of Foreign Mediation Settlements

Even though in the case of non-compliance, mediation settlements reached through public and certified private mediators are enforceable in national Mexican courts, the real problem lies in actually recognizing and enforcing said settlements in an international context.

Most of the conventions drafted at the Hague Conference of Private International Law lead to co-operation. Co-operation among administrative and judicial authorities may be needed to help facilitate the enforceability of the agreement in all the States concerned. One of the proposals, as part of the Conclusions and Recommendations of Part II (January 2012) of the Sixth Meeting of the Special

here on international parental abduction of minors, the mechanism of voluntary return is considered the core or basis of the 1980 Hague Convention. However, it is not the only or the main solution offered by this Convention, thus stressing the role of mediation as an alternative means of dispute resolution.

[21] www.hcch.net under the section of International Child Abduction.

Commission on the Practical Operation of the 1980 Hague Convention and the 1996 Hague Convention, recommended that further substantive work be done in the specific area "cross-border recognition and enforcement of agreements in international child disputes, possibly in the form of a binding instrument and not tied specifically to the 1980 or 1996 Conventions."[22] In this sense, the Hague Conference on Private International Law through its governing Council on General Affairs and Policy, in recognition of the growing use of mediation and other forms of amicable resolution to resolve international child disputes, mandated that an Expert Group be established "to carry out further exploratory research on cross-border recognition and enforcement of agreements reached in the course of international child disputes ...". This an Expert Group must examine and identify the nature and extent of the legal and practical problems, including jurisdictional issues, involving the cross-border recognition and enforcement of these voluntary agreements and to evaluate the benefit of a new instrument, whether binding or non-binding, in this area (González 2014b). Definitely, the goal of the meeting will be to prepare conclusions and recommendations for the Council evaluating the need, desirability, and feasibility of a future instrument.[23]

In the interim, although Mexico City has made progress in the efficiency and the implementation of settlements arising from mediation, this same means of conflict resolution when issued abroad should be aligned with the legal systems of each State Party and adopt the international custom. One proposal is to designate the mediation agreement as a "transaction agreement", which makes it possible to refer to this juridical figure that exist in every State Party. If such a contract does not exist, the requirements and elements of a contract's existence and validity to be applied would be those with the closest resemblance found in the unknown figure in a given legal system and through the principles of analogy.

This consideration is valid in any country. However, for "out-of-court settlements as a result of mediation" celebrated abroad or issued by a foreign mediator to be effective in Mexico, there are two avenues available:

(a) Abide by the rules established in Article 14 of the Federal Civil Code, in terms of being able to turn to the courts and ask the presiding judge to apply the foreign law under the terms of said precept.
(b) According to the rules of Domestic Law, preliminary mechanisms for the ratification of the contents and the signing of the settlement can be instigated in an effort to ensure compliance with this Convention through executive channels.

[22] "Report of the Further Work Recommended by the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention", Prel. Doc. No 12, March 2012, p. 4. www.hcch.net

[23] Report of the Further Work Recommended by the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention", Prel. Doc. No 12, March 2012, www.hcch.net at paras 11–37; 44.

Mexico needs to assume its international commitments, whether through the implementation or application of hard law or soft law mechanisms. One instance would be the recommendation or inclusion of the aforementioned Sixth Meeting of the Special Commission to review the Practical Application of the Hague Convention of 1996, Part I, June 2011, on establishing Central Contacts Points to locate international family mediators in cases of international parental abduction and mediation.

The publication of academic work undoubtedly fulfills an important role by highlighting the need to give coverage to international standards that must be implemented by those countries that sign and ratify international conventions, and that attended and pledged their country's response by participating in the meetings held by the mentioned special commissions.

10 E. Justice

When speaking of e-Justice, we often think of e-Mediation. There are really no obstacles for e-Mediation in Mexico. One avenue to be explored is whether the principle of functional equivalence used to accept e-documents when the law requires them in writing might also be valid in allowing virtual presence to substitute the physical presence of the parties.

On the other hand, it might be possible to consider a general principle in the spirit of Mexican legislation, which accepts, receives and definitely welcomes advances in communication and information technologies. Combining this with Mexico's clear acceptance of alternative dispute resolution mechanisms (even at a constitutional level as seen in Articles 17 and 18), the result would be openness toward the use of Online Dispute Resolution (ODR) (González et al. 2013).

Digital economy must also deal with solving disputes through ODR. The private sector has already availed itself of ODR mechanisms to solve disputes that have mostly arisen from e-commerce, as in the cases of eBay,[24] Amazon.com, and ILCE (Latin American Institute of e-Commerce),[25] among others.

[24]Through the Resolution Program.

[25]This is a regional Non-Governmental Organization that advocates Digital Economy in Latin America through joint initiatives like e-Commerce days, awards in Latin America, dissemination, the development of educational content, seller trust, *Program Red*/ODR, seminars, conferences, networking, and so on. The ILCE facilitates the implementation of ODR to satisfy the needs of both online users and online consumers while limiting the number of disputes stemming from e-business whether online or mobile. The aims of this NGO are to seek regional co-operation between organizations and systems, to encourage good practices and legal frameworks for the implementation of ODR, to help ODR suppliers in a harmonious local and regional implementation of the mechanisms, education, dissemination, training activities and so on to increase public trust in Digital Economy.

In the Mexican public sector, consumer protection is offered through Concilianet.[26] It could be said that with Concilianet, Mexico has a possible model for replication around the world. According to Domínguez Acosta,[27] this project began in 2003 with the legislative work of an in-depth reform to the Federal Consumer Protection Law. Now that these reformed entered into force in 2004, Article 99 of this law introduces the "obligation of the PROFECO (Federal Consumer Protection Agency) to receive complaints or claims presented in writing, orally, by telephone or **electronically**." Moreover, Article 11 of this same law states that "The conciliation hearing can be carried out by telephone or through any other medium deemed suitable **(such as the Internet)**=" (emphasis added). Meanwhile, Article 69, clause c, notes that individuals can file writs and queries for administrative procedures through electronic means of communication.

Concilianet began operations on 3 June 2008 as a means for online dispute resolution from filing a complaint to the end of the conciliatory proceedings, and it is completely free. It is easy to access and brings conciliation proceedings closer to citizens through the use of online and offline technologies, as well as communication tools. Its challenges are: protecting the consumer, properly planning for the success of the project and keeping the platform updated and in optimal conditions.

International organizations (González 2010 and González a)[28] have also shown a clear interest in ODR and have standards that lead to conflict resolutions through electronic means. To highlight the driving force behind this interest, we allude to the fact that the work of the UNCITRAL is unique in that it centres its arguments on the creation of a global ODR system for cross-border e-Commerce. Thus, it proposes a model law to govern the resolution of these disputes online[29] and in which the

[26] http://concilianet.profeco.gob.mx

[27] Assistant Advocate of Services for the Federal Consumer Protection Agency (PROFECO).

[28] For instance, the OAS is currently in the process of developing a regional ODR system: the CIDIP-VII B for matters of e-Commerce and consumer protection.

[29] UNCITRAL (Group III), the Commission resolves to establish an ODR task force (July 2010). During the 22nd period of session, the 1st meeting took place in Vienna from 13 to 17 December 2010 and the analysis of the issue began by asking the Secretariat for a draft of the ODR Rules of Procedure http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V11/813/11/PDF/V1181311.pdf?OpenElement.

The following meetings were held during the 23rd period of sessions (23–27 May 2011 in New York and 14–18 November 2011 in Vienna). The topics addressed in the Model Law were: 1. The states of the process: (a) Stage 1, Direct technology-assisted negotiation; Stage 2, an agreement facilitated by an impartial human being and technology; Stage 3, final decision by an impartial party in the event of not reaching an agreement in Stage 2; 2. Rules of Procedure: (a) initiating cases/notifications/deadlines; (b) documentary evidence/burden of proof; (c) e-signatures for opening, responding and agreements; (d) treatment of the parties in terms of equal treatment, confidentiality, impartiality and so on, and (e) the procedures for each of the 3 stages; 3. Types of disputes to be excluded: (a) tax, (b) intellectual property, (c) privacy violations and (d) claims for damages including moral duty, lost profits and emerging duties.

Preparatory meeting for the 45th session of the UNCITRAL Commission in New York from 25 June to 6 July 2012, Review of the Guide for the Incorporation of Domestic Law, new version of the UNCITRAL Model Law.

bases for discussion are outlined based on the issues that are contested the most, which are: the establishment of a global system –difficult in gaining consensus in view of questions regarding its financing, for instance–; the prevention of various interconnected ODR suppliers; effectiveness and justice for the consumer and the service provider; the aptness of combining existing ODR, their implementation, ODR payment, the role to be fulfilled by both public and private sectors and the fundamental issue of respect towards cultural differences –basically because of the different behavior patterns regarding misleading/legal advertising or what is considered even-handed or fair.

Lastly, it should be kept in mind, not only in Mexico, but everywhere, that whenever electronic mediation is allowed, it must be ensured that none of the parties is jeopardized by the use of electronic means. From this standpoint, thought needs to be given as to whether it would be better not to use e-Mediation for certain types of cases in view of their complexity or their specific subject-matter.

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Mediation of Legal Disputes in Norway. Institutionalized, Pragmatic and Increasingly Popular

Camilla Bernt

Abstract Mediation plays an increasingly important part as a dispute resolution mechanism for civil law disputes in Norway, and the Norwegian legislator has taken several steps to facilitate the use of mediation. However, regardless of incentives to increase the use of private, out-of-court mediation, most mediation is provided by publicly funded mediation institutes, and there is still a very small market for private mediators. Several of the most commonly used mediation institutes are closely connected to the court system, either as mandatory steps before the instigation of legal proceedings, or in the form of in-court mediation institutes. Especially rettsmekling (judicial mediation) has been successful. The approach to mediation in Norway has for the most part been fairly pragmatic, recognizing the benefits of amicable settlement of disputes, but with a rather eclectic view of mediation, sometimes including procedures and techniques that blur the line between mediation and other dispute resolution mechanisms. For instance, an evaluative mediator role is allowed for several mediation institutes, and some mediation institutes are integral parts of or mixed with other dispute resolution mechanisms, for instance adjudication. For parental court disputes concerning custody and visitation rights, evaluation is especially prominent. The approach to mediation is often fairly outcome-oriented. In this chapter, the most important Norwegian mediation institutes will be explored and compared, and the overall picture of mediation in Norway will be discussed.

The parts of the report concerning mediation after the institution of legal proceedings is based on my book Camilla Bernt, *Meklerrollen ved mekling i domstolene* (*The role of the Mediator in Mediation within the Courts*), Fagbokforlaget, Bergen 2011.

C. Bernt, PhD (✉)
Faculty of Law, University of Bergen, Bergen, Norway
e-mail: Camilla.Bernt@jur.uib.no

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1 The Existing Situation of ADR in Norway

In Norway, the awareness of alternative dispute resolution (ADR) seems to have risen considerably in recent years among politicians and legislators, as well as jurists, businesses, and in public debate.

For commercial contracts, arbitration has traditionally been the ADR mechanism of choice. However, this has begun to change during the last decade or so. Mediation clauses have become more common, and some industries develop their own hybrid processes. In large contracts in the building industry there are sometimes clauses prescribing mediation during the contract period, with the aim of avoiding large, costly, time-consuming, highly escalated conflicts.[1] Oslo Chamber of Commerce has its own mediation institute.[2]

For other disputes, the use and awareness of ADR has varied considerably, largely depending on the type of dispute. Where ADR mechanisms have been used, institutionalized forms of ADR have been by far most common, offered either by the state – sometimes even mandated by law – or by specific industries for consumer contracts. In other words, the market for private dispute resolution businesses has been small.

Since 1795 the *conciliation boards* have been a mandatory first step in legal proceedings in most types of civil lawsuits. The conciliation boards consist of three lay members, who attempt facilitating settlement and also have the power to adjudicate the disputes, under certain conditions.[3] For divorcing couples with joint children, and for former spouses wanting to bring their custody dispute to court, mediation is mandated by law.[4]

For other types of civil disputes, as well as for some types of criminal offences, the *National Mediation Service* is the most commonly used mediation institute.[5]

Apart from these institutes, the only common ADR mechanisms for non-business contracts, are those offered by different industry boards or tribunals, and the Norwegian Consumer Council and Consumer Disputes Commission. The procedures of these institutions vary, but generally speaking they review complaints from consumers concerning breach of contract, due to defective goods or services. Most commonly, they provide a non-binding opinion, which the parties may choose to use as basis for settlement of the case. The Norwegian Consumer Council acts as

[1] Anne Austbø og Geir Engebretsen, *Mekling i rettskonflikter* (Mediation of Legal Disputes) 2nd edition Oslo 2006, p. 31.

[2] http://www.chamber.no/Arbitration+and+Dispute+Resolution.9UFRjO1K.ips (English).

[3] Mediation at the conciliation boards will be described and discussed in further detail throughout this article.

[4] For further details on this requirement, see Sect. 2.2.1. The mediation institute is described and discussed in further detail throughout this article.

[5] Mediation at the National Mediation Service is described and discussed in further detail throughout this article.

a mediator between the parties,[6] but the cases are normally handled in writing.[7] The Consumer Disputes Commission adjudicates disputes on the request of a party when mediation at The Consumer Council has been unsuccessful, and their decisions will have the same binding effect as a judgment.[8]

In 2005 the Norwegian parliament (*Stortinget*) enacted a new Dispute Act.[9] This was based on a proposal drafted by an expert committee (*Tvistemålsutvalget*).[10] The committee's report emphasized the importance and benefits of ADR, and several steps were taken to facilitate the use of such mechanisms. Firstly, the committee was inspired by recent British reforms of civil procedure, where so-called pre-action protocols were introduced.[11] A simplified version was introduced for Norwegian civil procedure, comprising chapter 5 of The Dispute Act. The parties are mandated to have certain communication before filing their lawsuit, regarding the matters of the dispute and key evidence, c.f. sections 5-2 and 5-3. Furthermore, the parties are mandated to consider and inquire whether an amicable solution can be reached, and to attempt ADR if appropriate, c.f. The Dispute Act section 5-4. The failure to follow these pre-action protocols will not lead to the dismissal of the lawsuit, but it may influence the court's decision on legal costs.[12] As a main rule, the winner of a lawsuit is ordered to pay the other party's legal costs (including lawyer fees et cetera), c.f. The Dispute Act section 20-2 (1) and (2). There are exceptions to this rule, for example when the winning party can be reproached for the dispute not being settled out of court, c.f. section 20-1 (3) b.

Secondly, to promote out-of-court settlement a set of (non-mandatory) statutory rules for out-of-court mediation were enacted, c.f. The Dispute Act chapter 7.

Thirdly, The Dispute Act section 8-1 states that the court has a duty, at every stage of the court proceedings, to assess the possibility of reaching an amicable settlement of the dispute as a whole, or parts thereof, through mediation or judicial mediation, unless the characteristics of the case or other circumstances render mediation unsuitable.

For court cases, 1997 was a watershed year, due to the introduction of *rettsmekling*, hereafter referred to as *judicial mediation*, a specific in-court mediation institute, as a trial project in some Norwegian courts. Judicial mediation was

[6] Act on the Handling of Consumer Disputes (The Consumer Disputes' Act) 28 April 1978 no. 18 section 5.

[7] An English presentation of The Norwegian Consumer Council and Complaints' Board is provided at http://www.forbrukerradet.no/forside/other-languages/complain-to-forbrukerr%C3%A5det .

[8] The Consumer Disputes Act 28 April 1978 no. 18 sections 1, 4, 6 and 11. An English presentation of The Norwegian Consumer Disputes Commission is provided at http://www.forbrukertvistutvalget.no/xp/pub/hoved/english/489330.

[9] Act Relating to Mediation and Procedure in Civil Disputes [The Dispute Act] 17 June 2005 no. 90.

[10] NOU 2001: 32 Rett på sak.

[11] NOU 2001: 32 p. 208–211.

[12] NOU 2001: 32 p. 209.

gradually introduced to all district and appellate courts, and became a permanent mediation institute in The Dispute Act. The introduction of judicial mediation meant that more judges and legal counsel became familiar with mediation as a method of dispute resolution.

In 2004 considerable amendments were made to The Children Act, with particular focus on the preparatory stages of the trial in parental disputes concerning custody and visitation rights. A main goal was to facilitate settlement, and a specific mediation institute was introduced, where the presiding judge mediates, most often together with a psychologist, c.f. The Children Act sections 59 and 61.[13]

Summing up, there has been considerable development in the field of ADR in Norway in recent years, especially for in-court mediation. For out-of-court dispute resolution there is still considerable room for growth. Firstly, the use of private, non-institutional mediation is very limited, and secondly, the variety of ADR mechanisms commonly used is fairly limited.

2 The Basis for Mediation in Norway

2.1 The Notion of Mediation

In Norway, mediation has traditionally not been a topic for legal doctrine, and there has been little legislation. In recent years, particularly since 1997, the awareness of mediation as a method of conflict resolution for civil law disputes has grown immensely among lawyers, following the introduction of *judicial mediation*, where cases are mediated by another neutral than the presiding judge, normally another judge from the court in question. The introduction of a specific in-court-mediation procedure in parental disputes concerning custody and visitation rights in 2004 was similarly significant, and this mediation institute has been much debated since.

However, the introduction of these and other mediation institutes has happened fairly pragmatically, recognizing the benefits of mediation for parties, courts and the community, but applying a rather eclectic approach to the concept of mediation. Therefore, some of the Norwegian mediation institutes allow for a great variety of mediation techniques and approaches, for instance allowing fairly extensive evaluation from the mediator(s), in some instances blurring the line between mediation and other ADR processes, such as Early Neutral Evaluation. No code of conduct for mediators exists. Furthermore, the requirements for mediator training are fairly limited.

With the exception of cases concerning custody and visitation rights, for which there is mandatory out-of-court mediation, mediation of civil law disputes is most

[13] Act relating to Children and Parents. [The Children Act] 8 April 1981 no 7. This mediation institute, as well as judicial mediation, will be described and discussed in further detail throughout the article.

common after the instigation of legal proceedings. As mentioned, so far out-of-court mediation of legal disputes has not grown particularly popular among the general public and lawyers, and there are very few people who are able to make a living as a mediator. In-court mediation is however quite popular and often successful – at least when assessed by looking at the settlement statistics in mediated cases. For instance, the settlement rates for *judicial mediation* pursuant to The Dispute Act sections 8-3 to 8-7 are in the range of 70–80 % of the mediated cases.[14]

There is only very limited statistical information available about mediation. Certainly, no general statistics measuring the number of mediations or the settlement percentages in Norway in total exist. There are also very few statistics for individual mediation institutes. For instance, the yearly report of the Norwegian courts in 2013 does not include an overview of the number of mediations or settled cases.[15] For mediations at the *family counseling offices*, which is the main forum for the mandatory custody mediations, Statistic Norway reports that 19,600 mediations took place in 2013, but in 61 % of the cases mediation only amounted to the mandatory 1 h. Interestingly, the statistic does not include information about the settlement percentage.[16]

2.2 The Existing Legal Basis for Mediation in Norway[17]

2.2.1 Out-of-Court Mediation

As mentioned, The Dispute Act of 2005 chapter 7 introduced a set of non-mandatory rules for out-of-court mediation. The Dispute Act entered into force 1 January 2008. The rules were introduced to increase awareness of out-of-court mediation as a viable dispute resolution mechanism for civil law disputes, and serve as an incentive to settle out of court. When a dispute is mediated in accordance with these not very detailed rules, it is exempt from the rules of mandatory mediation at the conciliation boards, cf. The Dispute Act section 6-2 (2) b. The conciliation boards are not defined as courts in The Courts Act section 1, but they are in practice a first instance of court in most civil cases concerning assets of a value of less than 125,000 NOK (Norwegian kroner), i.e. approximately 14,500 Euros, c.f. section 6-2. The main task of the conciliation boards is mediation, but they also have limited judicial powers, c.f. section 6-10. The conciliation boards are intended to provide swift and affordable dispute resolution, and consequently the mediation process in

[14] http://www.domstol.no/en/Civil-case/Sakstyper/Judicial-mediation/.

[15] http://aarsmelding.domstol.no/.

[16] http://www.ssb.no/en/sosiale-forhold-og-kriminalitet/statistikker/meklingfam/aar/2014-06-26 (English).

[17] English translations of several of the acts referred to in this country report can be found at the following webaddress: http://www.ub.uio.no/ujur/ulov/english.html.

most cases is very simplified, perhaps often too simplified to qualify as mediation in the common meaning of the word in mediation theory.

As mentioned, there is a specific out-of-court mediation institute for parental disputes on custody and visitation. Mediation is a requirement for all separating couples with children under the age of 16, and for all parents who wish to instigate legal proceedings concerning custody or visitation rights. However, the mandatory mediation is limited to 1 h.[18] In addition the parents may be offered up to 6 h of voluntary mediation.[19] The role of the mediator is described in a circular from the Ministry of Children, Equality and Social Inclusion: The goal is to help the parents reach an amicable settlement. This also includes providing the parents with information about rights and obligations of parents and children, for instance the legal implications of different custody arrangements, and knowledge about the reactions of parents and children to the breakdown of the parents' relationship etc.[20]

Another out-of-court mediation institute is The National Mediation Service. This mediation institute offers mediation of both criminal cases and civil disputes, c.f. The National Mediation Service Act section 1.[21] The criminal cases are referred to The National Mediation Service by the prosecuting authority, c.f. The Criminal Procedure Act section 71a, and if a settlement is reached, the prosecuting authority can only instigate criminal proceedings against the offender if there is a significant non-performance on part of the offender, c.f. The National Mediation Service Act section 21, second paragraph.

2.2.2 In-Court Mediation

There are three mediation institutes within the courts: Firstly, the settlement efforts of the presiding judge, which are sometimes referred to as mediation or *ordinary mediation* ("ordinær mekling"). These mediation efforts can take place at any stage of the process, either during the preparatory stage or during the main hearing. Since the mediator is the presiding judge, the mediator has to abide by the rules and principles of fair trial. Therefore, caucuses are not allowed, c.f. The Dispute Act section 8-2 (1). Furthermore, the judge cannot propose settlements and evaluate the case in a manner that may impair his or her impartiality as a judge, c.f. The Dispute Act section 8-2 (1). There has been a growing awareness of the limits this

[18]Mediation for separating spouses and cohabitants is prescribed in The Marriage Act of 4 July 1991 no 47 Section 26, cf. Act relating to Children and Parents. [The Children Act] 8 April 1981 no 7 section 51 and the Family Allowance Act of 8 March 2002 no 4 Section 9, fifth paragraph. As regards the requirement for mediation before the commencement of legal proceedings, see The Children Act Sections 51 and 56 second paragraph.

[19]C.f. The Children Act section 54.

[20]Rundskriv Q-02/2007 p. 4.

[21]The Act relating to the mediation by the National Mediation Service [National Mediation Service Act] 20 June 2014 no. 49.

implies – and should imply – for the settlement efforts of the judge, and it was underlined in the preparatory works of The Dispute Act that when a more thorough mediation process is needed, this should take place in the form of *judicial mediation* ("*rettsmekling*").[22]

Judicial mediation is a mediation process, in which the mediator may be – and in most cases *is* – one of the judges of the court in question, but not the presiding judge. However, the mediator may also be another person with mediation experience and qualifications, for instance a lawyer, or another person with a different profession and education relevant to the case in question, c.f. The Dispute Act section 8-4.[23] Judicial mediation is, next to mediation at The National Mediation Service the Norwegian mediation process with the most comprehensive statutory regulation, c.f. The Dispute Act section 8-5. The rules are however not rigid, and the mediation process is very flexible. Firstly, it is stated that the mediator determines the method of the mediation together with the parties, and he may have caucuses with them. Furthermore, it is stated that the mediator shall behave in an impartial manner and seek to clarify the interests of the parties in the dispute, with the aim of reaching an amicable settlement. The mediator can point to possible options for settlement, and may discuss strengths and weaknesses in the reasoning and arguments of the parties. This means that the mediator is allowed to evaluate the case. In the preparatory works the Ministry of Justice has emphasized that the mediator should be careful with using evaluative techniques, since this may cause ambiguity for the parties on whether the court or the parties are responsible for the content of the settlement. The mediator should as a main rule not act as a guarantor for the fairness of a settlement. Furthermore, it is underlined that the mediation process is not designed for determining legal disputes, particularly not such disputes requiring evidence.[24]

The Dispute Act section 8-5 (4) states that the mediator may allow the hearing of evidence in the mediation process. However, to my knowledge, hearing witnesses in the course of judicial mediation is rare. In some instances experts on the disputed issues partake in the mediation, but most commonly, the only evidence presented is various documents, maps and photographs. Any presentation of evidence in judicial mediation is in any case very informal.

As a consequence of the flexible legal framework for the judicial mediation process – which allows evaluative mediator behavior as well as caucuses – a judge who has served as a mediator in judicial mediation cannot preside over the case in a subsequent hearing, should the mediation efforts not lead to a settlement of all issues in dispute, c.f. The Dispute Act section 8-7 (2). This statute states that the judge may only partake in further proceedings in the case after mediation when the parties ask him or her to do so, and the judge does not consider it imprudent. It is emphasized

[22]Bernt 2011 chapter 9, with further references.

[23]C.f. Tvistelovforskriften (Supplementing subordinate legislation to The Dispute Act) 21 December 2007 no. 1605 sections 8 and 9 for further details on the qualifications and experience required for judicial mediators.

[24]Ot.prp. nr. 51 (2004–2005) p. 390 and 126. See also p. 124–125.

in the preparatory works that this is an exception, that the parties must explicitly ask for it, and that the judge should never suggest it. Rather, the judge should inform the parties at the commencement of mediation that another judge will be assigned to preside over the case, should the mediation not lead to settlement of the dispute as a whole, unless the parties specifically request that the mediating judge stays on the case.[25] The function of the exception must be to allow for the judge to continue as a mediator when the mediation efforts fail in a mediation process where the judge has had no caucuses with either party, and has not expressed any opinions on the subject matter of the case that may impair his or her impartiality. Particularly when the mediation efforts are abandoned at an early stage of the mediation process, this may be the case. Norway has many small district courts with very few judges, which means that a failed mediation may lead to a delay of the further proceedings in the case if another judge is not readily available.[26] However, to my knowledge, the exception is rarely used.[27]

Norway has almost no specialization of the court system, but there are nevertheless courts of special jurisdiction that handle disputes and other matters concerning real estate; the *land consolidation courts*. In these courts many of the same procedural rules and practices apply as for the courts of general jurisdiction. Settlement efforts by the presiding judge are common, and since 2007 there has been *judicial mediation* in the land consolidation courts.[28] With few exceptions, the same rules apply to this judicial mediation institute as for the equivalent institute in the courts of general jurisdiction. The few differences that exist are a consequence of the special features of these specialized courts and their subject-matter jurisdiction, which extends beyond the traditional adjudicative jurisdiction in disputes that characterizes the jurisdiction of courts of general jurisdiction. Given the format of this article, these differences will not be further explored.

The third mediation institute within Norwegian courts is a mediation process for parental disputes concerning custody and visitation, provided by The Children Act sections 59 and 61. The mediation takes place at the preparatory stages of the trial, during court sessions. The presiding judge acts as a mediator, normally together with a court appointed expert, most often a psychologist with expertise on parental disputes, and/or child psychology. The psychologist may meet with the parents prior to the mediation and may caucus with them during the process, whereas the judge

[25]Ot.prp. nr. 51 (2004–2005) p. 391–392.

[26]Bernt 2011 p. 468–473.

[27]Richard Knoff, «Evaluering av prøveordningen med rettsmekling" ("Evaluation of the Judicial Mediation Pilot Scheme") in *NOU 2001*: *32 Rett på sak. Lov om tvisteløsning* (*tvisteloven*) p. 1133–1207 on p. 1136 and 1179–1182 found in his study in 2000 that in only 3 of 102 cases the judge kept the case after failed judicial mediation.

[28]Administrative Regulation on Judicial Mediation in The Land Consolidation Courts 22 January 2007 no. 80 established a pilot scheme, and this will be a permanent mediation institute when the new land consolidation courts' act enters into enters into force 1 January 2016, c.f. Act relating, c.f. Act relating to Land Consolidation etc. [The Land Consolidation Act] 21 June 2013 no. 100 section 6-1 second paragraph, c.f. The Dispute Act chapter 8, and section 6-18.

cannot do so. The judge must not act or evaluate the case in a manner that may impair his or her impartiality, cf. The Dispute Act section 8-2 (1), c.f. The Children Act section 59, third paragraph.

In many cases the psychologist will conduct some investigations prior to the mediation. In addition to talking to the parents, he or she will frequently talk to the children and may also observe the interaction between each parent and the children. This means that the psychologist in many cases not only has the role of a mediator, but rather a hybrid role combining mediation with evaluation.

The Children Act section 61 no. 7 provides that the parties may enter into interim settlements. This is common. This enables settlement of disputes where the parties are not ready to commit more permanently to a certain custody and visitation arrangement. The certainty that they can renegotiate the arrangement enables parents who are unsure of the feasibility of the arrangements, or who are afraid to lose face when agreeing to another arrangement than the one they have claimed, to find amicable solutions in the best interest of the child. The idea is that it is easier to commit to an arrangement permanently after experiencing the pros and cons of the temporary settlement. Furthermore, it may be useful to have the opportunity to test whether a certain arrangement is in the best interests of the child. The court appointed expert will often be given the task to serve as a mentor for the parents during the interim settlement period, for example helping them to handle issues of conflict. This mentorship may serve as an incentive to enter into temporary custody arrangements, and may increase the chances of more permanent settlements.[29]

As mentioned, The Dispute Act section 8-2 (1) applies to custody and visitation mediations. This means that the legislator has intended that the judge who mediates normally should preserve his impartiality and therefore also preside over a subsequent main hearing and adjudicate the case, when a settlement is not reached.[30] However, the preparatory works recognize that in some cases the judge's impartiality may be impaired.[31]

A psychologist or other expert who has served as a mediator and/or mentor during the preparatory stages of the trial will in many cases also serve as a court appointed expert during the main hearing, providing the court with an expert evaluation on the quality of care each parent has to offer and the best interests of the child. Whether a new expert is appointed or not, is a question about whether the expert's involvement during the preparatory stages is liable to impair the expert's impartiality. The Dispute Act section 25-3 (3) states that the standard of impartiality for experts is the same as for judges.[32] Some judges and psychologists regard the combination of the role of court appointed expert with a prior engagement as a mediator and mentor in the same case inappropriate, and some psychologists never

[29]NOU 1998: 17 p. 48 and Ot.prp. nr. 29 (2002–2003) p. 45.

[30]C.f. Ot.prp. nr. 29 (2002–2003) p. 43.

[31]Ot.prp. nr. 29 (2002–2003) p. 88. See Bernt (2011) p. 208–209.

[32]C.f. The Courts of Justice Act sections 106-108.

agree to combine these roles in a case. This skepticism is supported by mediation theory. The combination of the role of mediator and mentor on one hand, and evaluating the parents as part of adjudication on the other, is not only in conflict with the theoretical stand that mediators should not evaluate.[33] It also blurs the line between the role of helper (mediator/mentor) and the role of decision-maker. Although it is the judge, not the appointed expert, who decides on the matter of custody and visitation, the opinion of the expert is given considerable weight in most cases. *Katrin Koch* found in a survey in 2000 that the judgments were in accordance with the expert opinion in 70 % of the cases.[34]

In another survey conducted by Kathrin Koch in 2008 she found that a new expert was appointed in only 16 out of 101 cases where the mediation efforts did not lead to settlement.[35] The number of cases where the case was assigned to a new judge was similarly low; 15 out of 101 cases.[36]

Some courts prefer judicial mediation to the mediation procedure prescribed in The Children Act. The reasons for this may vary, but ensuring a clear separation of the roles of mediator and judge in each case seems likely to be a main reason. However, the ability for the mediating judge to participate in caucuses with the parties is probably equally important. Some judges are uncomfortable with a mediation procedure where they are not able to participate in all parts of the mediation process, having to leave important parts of the process to a psychologist or other expert. Looking at the procedure from a mediation theory point of view, this skepticism seems well founded.

2.2.3 Areas of Law Covered by the Mediation Institutes

Apart from the specific mediation procedure in The Children Act, and some limitations on the subject-matter jurisdiction (competence) of the conciliation boards,[37] the mediation institutes described above apply to all types of civil law legal disputes where the parties have freedom of contract. There is no specific legal framework for cross-border mediation, and the mediation institutes therefore apply similarly to both cross-border and internal mediation. Whether a cross-border

[33] See for instance Kimberly K. Kovach & Lela P. Love, "Mapping Mediation: The Risk of Risikin's Grid", *Harvard Negotiation Law Review*, Volume 3, Spring 1998, p. 71–110 and Vibeke Vindeløv, Mediation. A Non-Model, Djøf Publishing, Copenhagen 2007.

[34] Katrin Koch, "Når mor og far møtes i retten – barnefordeling og samvær», («When mother and father meet in court – custody arrangements and visitation») *NOVA-rapport* 13/2000.

[35] Katrin Koch, *Evaluering av saksbehandlingsreglene for domstolene i barneloven – saker om foreldreansvar*, *fast bosted og samvær*, (*Evaluation of the procedural rules of courts in cases pursuant to The Children Act – cases concerning parental responsibility*, *custody and visitation*) Oslo 2008 p. 23.

[36] Koch 2008 p 23.

[37] C.f. The Dispute Act section 6-2.

dispute can be mediated according to Norwegian rules, therefore depends wholly on the rules of jurisdiction and international private law.

3 The Mediation Agreement/Agreement to Submit the Dispute to Mediation in Norway

The Dispute Act section 7-1 has a provision for the mediation agreement in out-of-court mediation. It does not apply to all out-of-court mediation, only mediation according to the rules in chapter 7. The agreement must be in writing and provide that the rules in The Dispute Act for out-of-court mediation shall apply to the mediation. The requirement of a written agreement is to be interpreted liberally. If the parties have sent a joint request to the district court asking that a mediator is appointed, this will satisfy the requirement of written agreement. There is a specific rule protecting consumers from being pressured to mediate by stronger counterparts: A mediation agreement which is entered into before the dispute occurred, is not binding on a consumer.[38]

There are no further requirements regarding form or content of the mediation agreement. However, it is stated in section 7-1 (2) that each of the parties can at any stage decide to end the mediation.

The significance of the limitation of the scope of section 7-1 to mediation according to the rules in chapter 7 is that when the mediation agreement does not satisfy these requirements, the mediation will not have certain legal implications it would otherwise have had. Firstly, the exception from the requirement of mandatory mediation at the conciliation boards, c.f. section 6-2 (2) b, will not apply.

Secondly, when there is a valid mediation agreement according to chapter 7, this may have influence of the court's decision on legal costs. As mentioned above, as a main rule, the winner of a lawsuit is ordered to pay the other party's legal costs (including lawyer fees et cetera), c.f. The Dispute Act section 20-2 (1) and (2). However, when the winning party can be reproached for the dispute not being settled out of court the court may rule differently, c.f. section 20-1 (3) b. If the parties have entered into a binding agreement to mediate according to section 7-1, and a party has failed to participate in mediation, this exception is of course applicable. However, when the agreement to mediate does not satisfy the requirement of written form, or when a consumer has entered into such an agreement before the dispute arose, the preparatory works state that the failure to participate in mediation according to the agreement shall not have any consequences for the question of legal costs.[39]

Out-of-court mediation does not in itself suspend prescription and limitation periods. The instigation of a lawsuit however has this effect, meaning that in-court mediation and mediation at the conciliation boards will suspend prescription and

[38] Ot.prp. nr. 51 (2004–2005) p. 385–386 has further details on the provisions.

[39] C.f. Ot.prp. nr. 51 (2004–2005) p. 386.

limitation periods.[40] This effect occurs regardless of whether there is a written mediation agreement or not. Most often, such an agreement does not exist for in-court mediations.

4 The Mediator in Norway

4.1 Who Can act as a Mediator?

There is no specific authorization for mediators in Norway. The different mediation institutes have different rules and practices for the selection of mediators. Generally, fairly limited mediation training is required. There are however other requirements for some of the mediation institutes, for instance concerning profession, experience and personal qualities. Whether the role of mediator is limited to certain professions varies. In Table 1, a brief overview is given.

Table 1 Who can be mediators?

Mediation institute	Who can be mediators?	Legislation
The National Mediation Service	Men and women 18 years of age or older, regardless of occupation, may apply to be appointed as members of the National Mediation Service. They must be personally suitable and reside within the same municipality as the mediation service. There are detailed rules excluding persons with serious or newer offences on their criminal records from appointment. The mediator in each case is appointed by the The National Mediation Service.	The National Mediation Service Act, 20 June 2014 no 49 sections 4, 5 and 6.
Conciliation boards	Men and women 25 years of age or older, regardless of occupation, can be elected as conciliation board members by the municipal council. Those appointed as members must be especially suited for the task and have a good command of both written and oral Norwegian. In practice, former politicians are often elected as conciliation board members. The parties are not able to choose their mediators.	Courts of Justice Act, 13 August 1915 no. 5, sections 27, 56 and 57.

(continued)

[40] Act relating to the Limitation Period for Claims 18 May 1979 no. 18 section 15.

Table 1 (continued)

Mediation institute	Who can be mediators?	Legislation
Family Counseling Offices	Primarily professionals employed by the Family Counseling Offices, clergymen (and women), professionals employed by public health and social institutions or by the Pedagogic Psychological Services. When needed, authorization may be given to psychologists, psychiatrists and advocates in private practice. Regardless of profession, a mediator must have a sound knowledge of adult and child reactions in relation to the break-up of the parents' relationship, and should be well-informed on professional and legal issues relevant to these cases, such as child and family psychology, research, mediation methodic, legislation etc. The County Governor decides which training is required. The parties do not have any say in the choice of mediator of their dispute.	Administrative regulation regarding mediation pursuant to The Marriage Act and The Children Act 18 December 2006 no. 1478, section 4.
"Advocate Mediation" according to the Rules of The Norwegian Bar Association	Advocates who are included on the list of approved mediators. The inclusion on this list requires that the advocate either has completed the training offered by The Norwegian Bar Association, or has other reciprocal education or training, or documented experience. Approval as a mediator according to this mediation institute is given by The Norwegian Bar Association's Mediation Committee, which is authorized to formulate more detailed requirements for authorization. The mediator is chosen by the parties. The parties may also request that a mediator is appointed by the district court from their list of judicial mediators.	Guidelines for mediation with advocates as mediators, The Norwegian Bar Association 24 November 2000, section 11. Guidelines for mediation with advocates as mediators, section 3, c.f. The Dispute Act section 7-2 (1).

(continued)

Table 1 (continued)

Mediation institute	Who can be mediators?	Legislation
Mediation according to The Dispute Act chapter 7	Any person the parties choose, or a person appointed by the district court from the list of judicial mediators on the request of the parties. The mediator must however be impartial and have no connections with either party. Furthermore, he or she must be qualified to act as a mediator. For further details on the qualifications and experience required for mediators appointed from the court's selection of judicial mediators, see "Judicial Mediation" below.	The Dispute Act section 7-2, c.f. section 8-4.
The judge's settlement efforts	A judge or assistant judge, presiding over the case in question. All judges and assistant judges are expected to complete a course including different topics relevant to the role as a judge. Mediation is one of these topics, amounting to 2 days of training for judges, and 1 day for assistant judges[a].	The Dispute Act section 8-2. (For the regulation of the authority of assistant judges, see Courts of Justice Act section 23, c.f. sections 53-55, with further details in the Administrative Directive on the Conditions for Employment of Assistant Judges G-46/1999 chapter 5.)
Judicial mediation	(a) A judge or assistant judge (b) A person from the court's panel of approved judicial mediators (c) Another person to whom the parties consent The mediator must be impartial. The standard of impartiality is the same as for judges. The court appoints the mediator. Predominantly judges act as mediators. A main reason for this is that the parties must pay the fees of an external mediator, c.f. chapter. 8 below.	The Dispute Act section 8-4, c.f. Courts of Justice Act sections 106-108.
	To be included in the court's selection of external mediators, the mediator must fulfill four cumulative conditions: • Have personal qualities that makes him or her suited for the role • Competency regarding judicial mediation or a similar mediation institute • Experience from judicial mediation or a similar mediation institute • Special insights in such subject matters needed by the court for the purpose of judicial mediations	Administrative Regulation relating to The Dispute Act 21 December 2007 no. 1605 section 9.

(continued)

Table 1 (continued)

Mediation institute	Who can be mediators?	Legislation
	The criteria are discretionary, and approval therefore relies on a concrete evaluation of his or her personal qualities, qualifications and experience. Rather than an isolated evaluation of each criterion, the court must look at the totality of the person's qualities, qualifications and experience. The reason why there is not a general requirement of a certain type of training for external judicial mediators is that there is currently no authorization for mediators in general – or for judges who mediate[b].	
Judicial mediation in the land consolidation courts	The land consolidation courts' judge and/or an engineer employed by the court may act as a mediator. He or she is allocated by the court, without input from the parties.	The Land Consolidation Courts' Act 21 June 2013 no. 100 section 6-18
Mediation in parental court disputes on custody and visitation rights	A judge or assistant judge presiding over the case in question, most often together with a court appointed expert. There is no specific regulation determining which professions who may act as experts in this capacity, but psychologists are most commonly used[c]. There are no specific requirements regarding mediation training and experience for the experts. For the required training for judges, see "The judge's settlement efforts" above. There are no specific provisions regarding personal qualities and mediation experience, but it is underlined in the preparatory works that cases concerning custody and visitation rights should be assigned to judges who are particularly interested in such cases, thus enabling the judges who work with these cases to obtain experience and maintain their knowledge and skills relating to such cases[d].	The Children Act section 61 no. 1.

[a]Bernt 2011 p. 264–265, c.f. information collected from executive officer Anita Singsaas, Domstoladminstrasjonen, Enhet for kompetanse (The Norwegian Courts' Administration, The Competence Unit) by phone call 17 June 2010

[b]Bernt 2011 p. 261–262, with critical remarks on p. 272

[c]Bernt 2011 p. 282–283, c.f. Ot.prp. nr. 29 (2002–2003) p. 43, cf. p. 88

[d]Bernt 2011 p. 281, c.f. Ot.prp. nr. 29 (2002–2003) p. 43 and 76, and NOU 1998: 17 p. 67 and 71

4.2 Duty of Disclosure for the Mediator?

The question of duty of disclosure only arises when the mediation takes place behind closed doors, thus enabling confidentiality. The regulation of the duty of disclosure varies for different mediation institutes. For some mediation institutes there are specific statutes addressing the issues, or some of them. Some questions must be determined based on non-statutory law, and since the question of duty of disclosure rarely has been an issue in Norwegian case law, the law is not always clear.

For *The National Mediation Service* it is stated in The National Mediation Services Act section 9, fourth paragraph that the court cannot admit evidence from a mediator that he or she cannot give without violating his or her duty of confidentiality, which is described in chapter 5.1.3.3 below, "unless the court, after weighing the importance of observing the duty of confidentiality against the importance of obtaining information in the case, decides by court order that the witness shall nevertheless give evidence". It is added that "Unless both parties consent, the witness may not give evidence concerning what the parties have acknowledged or offered during mediation". In relation to confidentiality and disclosure, the essence of this statute is that as a testimony from the mediator on what took place in mediation requires a court order, and such an order must be based on the court's discretional evaluation that the importance of the information outweighs the importance of observing the duty of confidentiality. And under no circumstances may the mediator disclose the parties' admissions or offers against the wishes of a party.

It is emphasized in the preparatory works that when a mediator through mediation becomes aware of circumstances that give him or her reason to believe that a child is being severely neglected etc., he or she has a duty to report this.[41] Furthermore, it is stated that if a settlement is presented as evidence in a court case, the mediator is allowed to give evidence on whether the parties' agreement during mediation is correctly recorded in the settlement.[42]

Furthermore, upon conclusion of the mediation, The National Mediation Service has a duty to report to the prosecuting authority on the fact that an agreement has been entered into and approved. Secondly, the mediation service must notify the prosecuting authority if the offender breaches the agreement. Thirdly, when the agreement is fulfilled, confirmation of this must be sent.[43]

For mediation at the *family counseling offices*, there is a duty for mediators and other personnel to report to child protective services when there is reason to believe that a child is being abused at home, or subject to other forms of serious neglect, or when a child has shown lasting serious behavioural problems, c.f. The Family

[41]Prop. 57 L (2013–2014) p. 83, c.f. Act of 17 July 1992 No. 100 Relating to Child Welfare Services (The Child Welfare Act) section 6-4.

[42]Prop. 57 L (2013–2014) p. 84.

[43]The National Mediation Service Act sections 20 and 21.

Counseling Offices Act section 10. The mediators and other personnel are also obliged to provide information on the request of the child protective services.[44]

For *judicial mediation*, The Dispute Act section 8-6 (2) states that the mediator is only allowed to provide evidence on the question of whether the settlement is in accordance with the agreement reached by the parties in the mediation. These rules also apply to *out-of-court mediation* pursuant to The Dispute Act chapter 7 and "advocate mediation".[45] For these mediation institutes there is no regulation – statutory or otherwise – on the issue of information about probable serious child neglect, etc. There is however a non-statutory principle of *necessity* in Norwegian law, and this is applicable under such circumstances, overriding the rules of confidentiality.[46] Whether this rule places a *duty* of disclosure on all mediators, is however unclear.

For *in-court mediation of custody disputes* pursuant to The Children Act section 61 no. 1, section 50 states that the rules in The Family Counseling Offices Act sections 9 and 10 apply correspondingly for a court appointed expert that has been assigned as a mediator etc. Although it seems natural that the judge has the same duty of disclosure as court appointed experts, the wording of the statute, i.e. use of the term "the assignment", suggests that judges are not included. However, as mentioned above, the non-statutory principle of *necessity* overrides the duty of confidentiality in such instances.

4.3 The Responsibility of the Mediator

The question of responsibility of the mediator for malpractice is not commonly discussed in Norway, and there is no specific legislation on this matter in particular. Furthermore, there are no precedents, and to my knowledge this issue has not arisen in any published court decisions. It is not discussed in Norwegian legal doctrine. The latter is however not surprising, as mediation until recent years has not been dealt with in Norwegian legal science. Furthermore, as mentioned, apart from the settlement efforts of some judges, mediation was until 1997 largely limited to conciliation boards, The National Mediation Service and the Family Counseling Offices. In these three types of mediation parties often, or in the case of The

[44]In addition, The Family Counseling Offices Act section 9 states that the mediators and other personnel have a duty to report to the Public health and care services and Social services – and on these authorities' request provide information – if there is reason to believe that a pregnant woman is abusing intoxicating substances in such a manner that it is more likely than not that the child will be born with injuries.

[45]C.f. The Dispute Act section 7-3 (6) and Guidelines for mediation with advocates as mediators section 6, c.f. section 1.

[46]Bernt 2011 p. 297–298, c.f. Ørnulf Rasmussen, *Kommunikasjonsrett og taushetsplikt i helsevesenet* (The right of communication and the duty of confidentiality in the health services) Ålesund 1997 p. 606–622.

National Mediation Service: always, negotiate without the aid of an advocate, which is probably a main explanation for the lack of focus on the issue of mediator responsibility.[47] Another probable explanation is that the question of mediator malpractice seems more likely to be in focus when the dispute concerns substantial amounts of money. The abovementioned mediation forums rarely handle such cases. However, as a result of the increase of mediations within the court system, where parties more often than not have legal counsel present, more focus on mediator liability might follow in the future.

Since there is no specific legislation on mediator liability, the question of liability depends on the mediator's profession and the mediation institute. Generally, the question of liability for damages is a fault-based liability. The standard of due care is generally speaking stricter for professionals than for others,[48] but for judges the threshold for liability has nevertheless been higher rather than lower than the general norm, c.f. Courts of Justice Act sections 200-201. It is, however, unclear whether this liability is supplemented with a master-servant liability for the state as an employer, and, if so, whether the threshold for liability is lower than for the personal liability for the judge.[49]

4.4 Code of Conduct for Mediators?

There is no general code of conduct for mediators in Norway, and most mediation institutes do not have ethical codes.[50] Consequently, in most cases which ethical rules a mediator is bound by depend on his or her profession.

For instance, there is a specific set of ethical principles for judges, which were passed 1 October 2010 by The Norwegian Judges' Association. These include a couple of provisions relevant to mediation. In Sect. 3, fourth paragraph, it is stated that the judge shall actively facilitate amicable settlements. However, it is then underlined that the parties shall not be pressured into settlement. In Sect. 3, second paragraph, it is stated that a judge must not express his opinion on cases that he is handling or cases that he is likely to handle in the future. These two ethical principles are significant for judges who mediate. Both case law and The Disciplinary Board for Judges have until the last decade been fairly accepting of pressure during the course of mediation or other settlement efforts, and of evaluations or prognoses

[47] C.f. The National Mediation Services Act section 15.

[48] Nils Nygaard, *Skade og ansvar* (*Damage and Liability*) 6th edition Bergen 2007 p. 194–195. For the question of liability for advocates, see p. 483–490. Liability for mediators is however not addressed.

[49] A brief overview is given in Bernt 2011 p. 26–27, c.f. NOU 2001: 32 p. 543–544.

[50] An exception is the National Mediation Services. They have a set of ethical principles. These principles are brief and fairly general. C.f. Konfliktrådet (The National Mediation Service), *Håndbok for meglere* (*Handbook for mediators*) chapter 4.

regarding the issues in dispute. The reasoning behind the acceptance of some degree of pressure has been that settlement generally is in the best interest of the parties. Evaluative statements have been accepted because one has considered that the parties in most cases are able to understand that the views expressed are preliminary, and that the judge will be able and willing to change his mind when necessary after hearing all the evidence and legal argumentation. Case law, both national and international on the issue of impartiality, as well as the preparatory works for The Dispute Act of 2005, has led to a more critical approach towards pressure and prognoses.[51] Whereas the ethical principle prohibiting pressure applies to all three mediation institutes within the courts, the principle addressing opinions only prohibits such evaluation in mediations where the mediator is, or at a later stage may be, the presiding judge. This means that in judicial mediation, a mediating judge may state his opinion on the case, since judicial mediators as an overriding main rule cannot preside over a case they have attempted to mediate, c.f. The Dispute Act section 8-7 (2). As mentioned in Sect. 2.2.2 above, the Ministry of Justice have stated in preparatory works of The Dispute Act that mediators should be careful with such statements.

The ethical code for attorneys does not have any specific regulation regarding the role of mediator.[52] Neither does the ethical principles for psychologists.[53]

5 The Process of Mediation in Norway

5.1 Basic Principles in Mediation

5.1.1 Introduction

As mentioned earlier, the approach to mediation as a method of dispute resolution in Norway has traditionally been fairly pragmatic and eclectic. Furthermore, it has been quite fragmented, in the sense that different mediation institutes have developed independently and at different times, based on different needs and ideologies. For this reason, it varies to some extent which principles apply to each mediation institute, and how strictly they are adhered to. The institutional context of a mediation model certainly also influences how the mediation principles apply. Below, I will describe how different mediation principles apply to mediation in Norway, and show which differences exist between the different models. Given the number of different mediation institutes, each governed by different legislation

[51] I have analyzed these issues thoroughly in Bernt 2011 p. 46 and chapter 9.

[52] C.f. The Advocate Administrative Regulation 20 December 1996 no. 1161 chapter 12.

[53] The Ethical Principles for Psychologists, The Norwegian Psychologists' Association 1998 (http://www.psykologforeningen.no/Fag-og-profesjon/For-fagutoevere/Etikk/Etiske-prinsipper-for-nordiske-psykologer/(language)/nor-NO).

and/or other rules, a comprehensive account for all mediation institutes in relation to each principle will not be possible within the scope of this publication.[54]

5.1.2 Voluntariness and Party Autonomy

The question of voluntariness in mediation can be divided into three elements: Firstly, the question of whether the parties *choose to mediate*, or whether they are obliged to accept mediation. The second question is whether the parties can *decide freely to abandon* the mediation attempts. The third question is whether the parties have *full autonomy to determine the content of the settlement*.

If none of the three elements of voluntariness are in place, it is hard to imagine that anyone would regard the procedure in question as mediation. However, limitations connected to one or a couple of the elements do exist for some of the Norwegian mediation institutes. Nevertheless, it is not disputed in Norwegian legal theory that these dispute resolution processes are mediation processes. A brief overview of how the concept of voluntariness applies to different mediation institutes will be given in Table 2.

Table 2 Voluntariness and party autonomy in different mediation institutes

Mediation institute	The decision to mediate	The decision to settle or abandon mediation efforts	The content of the settlement
The National Mediation Service	In criminal cases the prosecution authorities decide whether to offer mediation. The consent of offender and victim is required. C.f. The Criminal Procedure Act section 71a.[g] In civil disputes, normally one or both parties initiate mediation, and mediation is voluntary.	The offender and/or the victim/ the parties in a civil dispute may decide to abandon mediation efforts at any time during the process.	In criminal cases: The offender and the victim decide the content of the settlement, but the mediator is obliged to ensure that the settlement is not unreasonable. If the settlement is unreasonable or other weighty concerns render the settlement unsuitable, the mediator will refuse to approve it, The The National Mediation Service Act section 14. In civil disputes the parties have full autonomy over the content of the settlement

(continued)

[54]There are other out-of-court mediation institutes in addition to those mentioned in this report. Apart from the family counseling offices and The National Mediation Service, which are responsible for a large portion of Norwegian mediations, I have excluded institutes that are limited to certain subject matters/fields of law.

Table 2 (continued)

Mediation institute	The decision to mediate	The decision to settle or abandon mediation efforts	The content of the settlement
Conciliation Boards	Mediation is mandated by law in many cases, c.f. The Dispute Act section 6-2 and Sect. 2.2.1 above.	The parties decide freely whether to abandon mediation efforts at any time during the process.	The parties have full autonomy over the content of the settlement, but they will not be able to enter into an in-court settlement (enforceable settlement) if the contents are contrary to *ordre public* or peremptory rules of law (a rule of law, the operation which cannot be dispensed with by private parties[a]). C.f. The Dispute Act section 19-11 (3), c.f. section 6-8 (6).
Family Counseling Offices	Mediation is mandated by law for separating couples with children under the age of 16, and parents wishing to instigate legal proceedings on the matters of custody and visitation rights[b].	Only 1 h of mediation is mandatory. Thereafter, the parties decide freely whether to abandon mediation.	The parties have full autonomy over the content of the settlement.
"Advocate Mediation" pursuant to the Rules of The Norwegian Bar Association	Mediation is voluntary, c.f. Guidelines for mediation with advocates as mediators sections 2 and 6.	The parties decide, c.f. section 6.	The parties have full autonomy over the content of the settlement.
Mediation pursuant to The Dispute Act chapter 7	Mediation is voluntary, c.f. section 7-1 (1).	The parties decide, c.f. section 7-1 (2).	The parties have full autonomy over the content of the settlement.
The judge's settlement efforts[c]	The judge initiates it during the preparatory stages or the main hearing of the case.	The parties decide whether to settle.	The parties have full autonomy over the content of the settlement, but will not be able to enter into an in-court settlement if the content is contrary to *ordre public* or peremptory rules of law, see *The conciliation boards* above, c.f. The Dispute Act section 19-11 (3).

(continued)

Table 2 (continued)

Mediation institute	The decision to mediate	The decision to settle or abandon mediation efforts	The content of the settlement
Judicial mediation[d]	The court decides, but the parties' consent is required as a main rule, c.f. The Dispute Act section 8-3. It is underlined in the preparatory works that mediation without the consent of both parties can only be decided under exceptional circumstances, for instance in disputes between close relatives, where adjudication would only cement the conflict between the parties[e].	The parties decide.	See "The judge's settlement efforts" above.
Mediation in parental court disputes on custody and visitation rights	The court decides.	The parties decide.	The parties decide the content of the settlement, but they cannot enter into an in-court settlement that is contrary to *ordre public* or peremptory rules of law, c.f. The Dispute Act section 19-11 (3). The court cannot approve a settlement that is clearly contrary to the best interests of the child[f].

[a]Definition by Ronald L. Craig, *Stor norsk-engelsk juridisk ordbok* (Large Norwegian-English Law Dictionary) Oslo 1999 p. 185

[b]The Marriage Act 4 July 1991 no. 47, section 26, cf. The Children Act of 8 April 1981 no. 7 Section 51 and The Family Allowance Act 8 March 2002 no. 4 Section 9, fifth paragraph. As regards the requirement for mediation before the commencement of legal proceedings, see The Children Act sections 51 and 56, second paragraph

[c]Includes the judge's settlement efforts in the land consolidation courts

[d]Includes judicial mediation in the land consolidation courts

[e]Ot.prp. nr. 51 (2004–2005) p. 388–389

[f]This is not clearly stated in statutory law, but it is recognized in the preparatory works of The Dispute Act, c.f. Ot.prp. nr. 51 (2004–2005) p. 438 and NOU 2001: 32 p. 725, as well as in legal doctrine. C.f. Bernt 2011 p. 415–417 with further references

[g]The Criminal Procedure Act 22 May 1981 no. 25

5.1.3 Confidentiality

5.1.3.1 Overview

Confidentiality consists of several different aspects: Firstly, the question of whether the mediation happens behind *closed doors*, without access for others than the parties, the mediator(s) and other persons specifically invited and approved by the parties, and secondly the question of *whether the mediator is bound by confidentiality*, and – if so – whether there are any exceptions to this. Thirdly, there is a question of *whether – and*, *if so*, *to which extent – the parties are bound by confidentiality*. This is raises a more specific question of whether the mediator or a party can give evidence in court on what took place in the mediation. The question of disclosure for the *mediator* in has already been addressed in Sect. 4.2 above. The question of whether the *parties* can disclose information from the mediation in court proceedings will be addressed below.

5.1.3.2 Does the Mediation Take Place Behind Closed Doors?

Whether mediation takes place behind closed doors, depends on the mediation institute. Out-of-court mediation is confidential. This is also the case for judicial mediation and mediation in parental court disputes on custody and visitation rights.[55] Since the judge's settlement efforts occur in course of the normal proceedings of the case, mediation normally takes place during court sessions, either the main hearing or during a court session at the preparatory stages of the trial. This means that the presiding judge in most cases does not mediate behind closed doors, with the above mentioned exception for custody disputes etc.[56]

Mediation at the conciliation boards is in a sense a hybrid of out-of-court and in-court mediation because the conciliation boards function as a first instance of court in many cases, c.f. The Dispute Act section 6-2 and chapters 2.2.1 and 5.1.2 above. As a main rule, the mediation therefore takes place in meetings that are equivalent to court sessions, and these are public.[57] However, if the parties have declared that they do not wish the case to be adjudicated in case the mediation does not lead to settlement, c.f. The Dispute Act section 6-8 (1), the mediation will take place behind closed doors on the request of both parties, c.f. section 6-9 (1).

[55]The Dispute Act section 8-5 (1), c.f. The Courts Act section 124 and section 125 second paragraph, c.f. section 122.

[56]Convention for the Protection of Human Rights and Fundamental Freedoms article 6, 1 and The Courts' Act section 124, c.f. section 122.

[57]The Dispute Act section 6-9 (1), c.f. Courts of Justice Act chapter 7.

5.1.3.3 Mediator Confidentiality

The issue of *confidentiality* for mediators and parties arises when mediation takes place behind closed doors. In these cases, the *mediators* will always be bound by confidentiality. However, the extent of confidentiality varies. For mediators at the family counseling offices, the duty of confidentiality applies to information of a private nature.[58] The same rule applies for The National Mediation Service, but with the addition that the mediator cannot, against the express wishes of one or more parties give evidence on the parties' admissions and offers during the mediation.[59] For mediations according to The Dispute Act chapter 7, or "advocate mediation" the same rules applies as for judicial mediation. These rules will be addressed below.[60]

For in-court mediations of disputes concerning custody and visitation rights, the court appointed expert may reveal any information to the judge, but is otherwise bound by confidentiality.[61]

For judicial mediation the issue of mediator confidentiality is addressed in The Dispute Act section 8-6 (2). The mediator is bound by confidentiality concerning everything that was said and done during the mediation. As mentioned in Sect. 4.2 above, the mediator is nevertheless allowed to give evidence on the question of whether the settlement is in accordance with the agreement reached by the parties in the mediation.

5.1.3.4 Party Confidentiality

The extent of *party confidentiality* depends on the mediation institute. For judicial mediation, The Dispute Act section 8-6 first paragraph states that parties – in other contexts than in a court proceeding – are bound by confidentiality only for such information that was given under the condition of confidentiality. In other words: Unless such a condition was stated, the information is not confidential. In the preparatory works information of a strict personal nature and trade or business secrets are mentioned as examples. It is also underlined that information that is included in other confidentiality rules and exceptions from the duty to give evidence, c.f. The Dispute Act chapter 22, c.f. section 21-5, is also confidential.[62]

It must however be underlined that this rule of fairly limited confidentiality does not address the question of which information may be conveyed in legal proceedings in the dispute in question or another dispute. Disclosure of information in this context is limited by a much more far-reaching rule of confidentiality. The Dispute

[58]The Family Counseling Offices' Act 19 June 1997 no. 62 section 5a.

[59]The National Mediation Service Act section section 9, fourth paragraph.

[60]C.f. The Dispute Act section 7-3 (6) and Guidelines for mediation with advocates as mediators section 6, c.f. section 1.

[61]The Children Act section 50.

[62]Ot.prp. nr. 51 (2004–2005) p. 391.

Act section 8-6 (1) states that the parties cannot, either in the same or a different court case, give evidence on what was revealed during the mediation. There are, however, two notable exceptions: Firstly, the parties can provide information on specific evidence which was communicated or revealed during the mediation, and which has not been communicated outside the mediation. This rule is inspired by US judicial mediation institutes, and according to the preparatory works, the purpose is to avoid that parties use the mediation to "immunize" evidence that they want to avoid being presented in court.[63] Secondly, the parties can reveal settlement proposals that have been protocolled according to section 8-5 (5). According to section 8-5 (5), a party's settlement offer shall be protocolled on his or her request.

The rules of party confidentiality in court and on other arenas apply for out-of-court mediation pursuant to The Dispute Act chapter 7, c.f. section 7-3 (6). It is not clear whether these rules also apply when mediation in the conciliation boards have taken place behind closed doors. There is no provision on this matter in The Dispute Act. However, when the mediation itself happens behind closed doors, it seems reasonable that the mediation is protected by the same confidentiality as judicial mediation and out-of-court mediation according to The Dispute Act chapter 7.

As mentioned in Sect. 2.2.1 above, the mediation institute in The Dispute Act chapter 7 is non-mandatory. This means that unless the parties have agreed to mediate in accordance with these rules, they do not apply. A consequence of this is that the prohibition to provide evidence on what took place in the mediation does not apply to out-of-court mediations in general, only when the parties have agreed to mediate according to the rules in chapter 7. When there is no specific exception, the general duty to give evidence in court applies, c.f. The Dispute Act section 21-5. For the purpose of "advocate mediation", this issue has been resolved by stating in the guidelines section 1 that the rules in The Dispute Act section 7 apply, unless the parties and mediator explicitly state otherwise in the form of a written agreement.

The National Mediation Service Act does not address the issue of *party* confidentiality. However, the rules on confidentiality in The Public Administration Act applies, c.f. The National Mediation Service Act section 8, c.f. the Public Administration Act section 13b, last paragraph. This means that information of a personal nature is confidential.[64] Furthermore, a party can, prohibit the mediator from giving evidence in court on the parties' admissions and offers in mediation, c.f. section 9 paragraph, *in fine*.

There is no specific regulation of party confidentiality regarding the contents of mediations at the family counseling offices. However, the rules on confidentiality in The Public Administration Act applies, c.f. The Family Counseling Offices Act section 13.

[63] Ot.prp. nr. 51 (2004–2005) p. 391.

[64] The Public Administration Act. Act relating to procedure in cases concerning the public administration 10 February 1967.

5.1.4 Neutrality and impartiality

All Norwegian mediation institutes that have been described in this chapter have in common that the mediator is a neutral and impartial third party. The usages of these terms vary, and sometimes they are treated as synonyms. In Norway the latter is generally the case. In some definitions the principle of *neutrality* refers to the mediator's interest in the dispute and prescribes that a mediator should not act in a dispute if he or she has a financial or personal interest in the outcome, whereas *impartiality* refers to the requirement that the mediator is not biased.[65]

It must of course be noted that the principle of *neutrality*, according to the definition above, does not apply to all mediations, for instance in mediation at a workplace or in an organization, where the mediator is a superior mediating a conflict between subordinate colleagues.

For the mediation institutes described in this chapter, neutrality and impartiality are safeguarded with rules stating that there must not be any circumstances present that are liable to impair the mediator's impartiality or neutrality.[66] However, as shown in Sects. 2.1 and 2.2, several of the mediation institutes allow or include evaluative mediator behavior, and in some parts of mediation theory it is then argued that this compromises *impartiality* in mediation.[67] In my opinion, this may be the case for some forms of evaluation under some circumstances. I find that evaluation is particularly likely to compromise impartiality in situations where the mediator has other roles in the same case, for instance when a judge mediates, or when a court appointed expert is assigned both to mediate and write a recommendation to the court, for instance on the questions of custody and visitation rights for children. For the judge, the most critical issue is whether he or she can be viewed as an impartial and neutral *judge* after having voiced his opinions during the mediation, before evidence has been heard. The parties may also fear that the judge's suggestions and evaluation are motivated by a strong wish to settle the case – to avoid another case on a full case docket. The latter would compromise his *neutrality* as well as impartiality according to the definition above.

For the court appointed expert, typically a psychologist in a custody dispute, there are two questions; firstly whether he or she is neutral and impartial in the role

[65] Bernt 2011 p. 300–305 with examples and further references. For an English text written by a Nordic expert, see Vindeløv 2007 p. 205–208.

[66] For the National Mediation Service and the family counseling offices the rules on impartiality and neutrality in The Public Administration Act, sections 6 to 9 apply, c.f. National Mediation Service Act section 8 and The Family Counseling Offices Act section 13. For in-court mediation the regulation in The Courts of Justice Act sections 106-108 apply for judges, judicial mediators and court appointed experts, c.f. The Dispute Act section 8-4 (2) (judicial mediators) and section 25-3 (3) (court appointed experts). For mediation according to The Dispute Act chapter 7, section 7-2 (2) states that the mediator must be "impartial and independent of the parties", and when a mediator from a district court's selection of external judicial mediators is requested, the rules in The Courts of Justice Act sections 106-108 apply, c.f The Dispute Act section 8-4 (2).

[67] See for instance Vibeke Vindeløv 2007 p. 99 and 160–161.

as mediator, or coloured by findings from his or her evaluative work, and secondly whether he or she is impartial in the role as an expert after having related to the parties in the role of mediator. A party may fear that an unwillingness to settle in mediation may affect the expert's opinion of him or her unfavorably.

5.2 *Existing Bases for the Development of the Procedure: Timeframes Etc*

The framework conditions are not the same for all mediation institutes. For *out-of-court mediation* pursuant to The Dispute Act chapter 7, and several other out-of-court mediation institutes, the parties decide the timeframes and the procedure. The only legal impediments on this freedom are prescription and limitation periods. As mentioned in chapter 3 above, out-of-court mediation cannot suspend prescription and limitation periods. Another impediment may be limited financial resources, when the parties must pay the mediator's fees.

For The National Mediation Service, there is no legislation limiting the length of mediation, or other legislation limiting the mediator's freedom to adapt the mediation to the parties' needs. For the *family counseling offices* there are rules on the length of mediation in situations where such mediation is mandated by law, c.f. Sect. 2.2.1 above. As mentioned, the mandatory mediation is limited to *one hour*, c.f. The Children Act section 54. However, parents who have not come to an agreement after 1 h "shall be encouraged to continue mediating for up to 3 h more", and "They may be offered mediation for a further 3 h if the mediator considers that this may result in the parties reaching an agreement". This means that the maximum duration of mediation in these cases is 7 h. In the preparatory works it is stated that whether the parties are offered more mediation after the 4 first hours, is a discretionary decision for the mediator, based on his assessment of the likelihood that the parties reach an amicable solution as a result of 3 more hours of mediation. It is underlined that these 3 h should not be offered automatically, but should be based on a case-by-case decision by the mediator.[68] It is needless to say that for cases where there is a high level of conflict between the parents 7 h in total is not much time, which means that many such disputes end up as lawsuits.

For *in-court mediation of custody disputes*, the procedure allows for several meetings, each lasting for several hours.[69] The parties may enter into interim settlements,[70] with a few months' duration, and then the parties reconvene at another meeting to determine whether to make the arrangement permanent, or renegotiate.

[68] Ot.prp. nr.103 (2004–2005) p. 57.

[69] C.f. The Children Act section 61 no. 1.

[70] C.f. The Children Act section 61 no. 7.

For *judicial mediation*, it is stated in the preparatory works that the duration of mediation will vary from a few hours in a normal case, to a couple of days in large cases.[71]

The settlement efforts of the presiding judge occur as an integrated part of the proceedings of the case, either at the preparatory stages or during the main hearing. The timeframes therefore vary, but generally it is a fair assumption to make that during the main hearing it would be difficult to set aside much time for mediation, as there has to be sufficient time for the hearing of evidence etc. if the mediation efforts fail and the case has to be adjudicated. In some cases, the judges set aside a few minutes before a break in the main hearing to raise the issue of settlement with the parties, and then the parties and counsel are given the task, during a break (for instance during lunch) to negotiate. When the court reconvenes after the break, the judge will raise the question of settlement again, and hear from the counsel and parties whether they attempted to negotiate, and where they are at now. Whether the judge will pursue the issue of settlement further in course of the main hearing depends on the feedback combined with the judge's preferences and the time available.

5.3 The Relationship Between the Mediation and Public Authorities During the Mediation Procedure

Whether there is a relationship between the mediation and public authorities, and the nature and extent of such a relationship, depends on the mediation institute. Some of these aspects have already been touched upon in other parts of this article. As shown, several mediation institutes in Norway are closely connected to public authorities. There are three in-court mediation institutes, where judges (often) serve as mediators. In two of these, the mediator is also the presiding judge, whereas in judicial mediation, this is almost out of the question.[72] Furthermore, Norway has two mandatory out-of-court mediation institutes: Firstly; mediation at the conciliation boards is required before the commencement of legal proceedings in many cases, c.f. The Dispute Act section 6-2. Secondly; for separating couples with children under the age of 16, mediation at the family counseling offices is mandatory. Such mediation is also mandatory before the commencement of legal proceedings on custody and visitation rights.[73] There is also a provision in The Children Act section 61 no. 2 that a judge may mandate that a custody case where legal proceedings have been instigated, is subject to out-of-court mediation. However, this provision is rarely used.

[71] NOU 2001: 32 p. 723.

[72] See sections 2.2.2 and 4.1 above, with references.

[73] See section 2.2.1 above, with references.

Another mediation institute closely connected to public authorities is the The National Mediation Service. As mentioned, The National Mediation Service mediate criminal cases which have been referred to it by the prosecuting authority, c.f. The Criminal Procedure Act section 71a. And if a settlement is reached, the prosecuting authority can only instigate criminal proceedings against the offender if there is significant non-performance on part of the offender, c.f. The National Mediation Service Act section 21, first paragraph in fine. To enable the enforcement of this rule, the The National Mediation Service report to the prosecuting authority both on the issue of whether a settlement is reached and whether the terms of the settlement have been fulfilled or breached, c.f. section 20 second and third paragraph and section 21.

6 Failure of the Mediation and Its Consequences in Norway

The consequences of no settlement – or only a partial settlement – in a civil law dispute depend on the mediation institute. After out-of court mediation, it is naturally the parties' decision how to deal with (the remainder of) the dispute.

After in-court mediation, the dispute (or remaining parts of it) will automatically be subject for adjudication. Since judicial mediation does not take place in court sessions, but at separate mediation meetings, it is expressly stated in The Dispute Act section 8-7 (1) that the court proceedings continue when the case is not settled. It is also stated that "The court shall, as far as possible, seek to ensure that unsuccessful judicial mediation does not cause delay in the progress of the case." To this end, the date of the main hearing is scheduled before the mediation commences, c.f. The Dispute Act section 9-4 (2).

For the mediator personally, both in out-of-court and in-court mediation, the outcome has no legal consequences. The success or failure of mediations of course may influence the mediator's reputation, and thereby have financial consequences if the mediator's services are paid for by parties, or he or she is appointed by court or other authorities on a case-by-case basis. However, other than that, he or she will still receive his or her fees in full unless the mediation efforts are considered a defective performance of the mediation contract. For a judge who mediates, and does so in a manner that is clearly defective, the parties may make a formal complaint to The Disciplinary Board for Judges, c.f. The Courts of Justice Act section 236. The disciplinary board has two types of sanctions; critique and warnings. The latter is the most severe reaction, and it is rarely used. To my knowledge, no successful complaints have been made, where the parties have claimed that the mediator's faulty performance has led to the failure of the mediation, and the threshold for disciplinary reactions on such grounds, would – and in my opinion should – undoubtedly be high.

7 Success of Mediation and Its Consequences in Norway

7.1 Meaning and Consequences

Whether mediation is considered a success or a failure in each case depends on the purpose of the process and the expectations of the parties. In general, for most of the mediation institutes described in this report settlement seems to be regarded as the main success criteria, at least in the sense that settlement is the main *purpose* of these mediation institutes. In other words, mediation is generally not based on the ideology of the transformative mediation model, where the main goal is to change the parties' ability – and the ability of society at large – to handle conflict.[74] With such a goal, settlement in itself is not the main success criteria.

A notable exception from the main focus on settlements is The National Mediation Service, which is strongly inspired by the famous article "Conflict as Property" written by professor Nils Christie in 1976, where he argues that the handling of conflicts has become far too professionalized, and that society has thereby been robbed of the ability of involvement, and thereby also of the opportunity to debate the established norms.[75] The influence from Christie was for example very clear in the wording of the former Administrative Regulation relating to the National Mediation Service section one, which stated that the parties themselves should actively contribute to the resolution of the conflict, and that the settlement should be based on the interests of both parties. Furthermore, it was stated that the national mediation service shall "strengthen the local community's ability to deal with minor crime and other conflicts, and thereby also contribute to the prevention of crime" (my translation). In the current administrative regulation, the influence from Christie is not so evident in the wording. However, this influence is still clear when reading the preparatory works to the current National Mediation Service Act.[76]

Although settlement is the main purpose of most Norwegian mediation institutes, the mediations may be considered successful without settlement of the dispute as a whole. For instance, *judicial mediation* can be considered a success in situations where the case is not settled. This is evident in the provisions on judicial mediation in The Dispute Act. In section 8-3 (2) it is stated that the court, when deciding whether to mediate, must consider "the likelihood of reaching a settlement *or simplifying the case*" (my emphasis). The preparatory works state that the court must consider not only the likelihood of settlement, but also whether judicial mediation can contribute to simplification of the case, for example partial settlement, or that

[74]Bush, Robert A. Baruch og Joseph P. Folger, *The Promise of Mediation. The Transformative Approach to Conflict*, Revised edition San Francisco 2005 p. 13 and 21–22.

[75]Christie, Nils, "Conflict as Property", *The British Journal of Criminology* (1) 1977 p- 1–15. (It was however first published in 1976 in Norwegian at The University of Oslo.)

[76]C.f. Prop. 57 L (2013–2014).

parties may decide to abandon certain positions or evidence that they have planned to submit (typically – reducing the number of witnesses).[77]

7.2 *Enforcement of the Settlement Reached by the Parties*

The requirements for the settlement's form and content depend on the mediation institute. Generally, there are no other formal requirements for an out-of-court settlement, than those which apply to any contract. It can be oral or written, detailed or brief, like any other contract.

For settlements in criminal cases mediated at The National Mediation Service, however, The National Mediation Service Act section 17 has some requirements. Firstly, there is a requirement that the settlement is set out in writing. Secondly, if a party is a minor or declared to be without legal capacity, the agreement must be approved by his or her guardian. Thirdly, an agreement based on the assumption that a payment or service will be rendered to the injured party must determine the amount of the payment or extent of the service and when it is due. Furthermore, it must also be determined whether the agreement represents the final settlement between the parties. It is reasonable that specific requirements are set out for settlements of criminal cases, since settlement is an alternative to criminal prosecution.

In Norway, a settlement of a dispute can be either an *out-of-court* settlement; "utenrettslig forlik", or an *in-court* settlement; "rettsforlik". An out-of-court settlement has the same legal status as any other contract, meaning that as a main rule execution requires a court decision determining – depending on the nature of the disagreement between the parties – the validity of the contract, the issue of whether the other party is in breach of contract, and/or the amount etc. In-court settlements, on the other hand, have the same effects as court judgments in relation to execution, meaning that they can be executed without further legal proceedings, with the aid of the enforcement authorities.[78] According to Norwegian law in-court settlements are available for in-court mediation (all three mediation institutes) and at the conciliation boards. But, because in-court settlements are public, some parties choose out-of-court settlements when mediating in court. Doing so however means that execution without further legal proceedings is not available.

[77] Ot.prp. nr. 51 (2004–2005) p. 388.

[78] C.f. The Execution Act 26 June 1992 no. 86 section 4-1. The first paragraph states that there must be grounds for execution for a claim to be executed, and in the second paragraph such grounds are listed. One such ground is a judgment; another is an in-court settlement. Another is promissories where the parties have explicitly stated that payment can be enforced without prior legal proceedings, c.f. section 7-2 (a). An out-of-court settlement in itself cannot fulfil the requirements for such a promissory, because it is normally reciprocal and refers to circumstances outside of the document itself, i.e. the dispute between the parties, c.f. for example Advokatfirmaet Ruv, "Gjeldsbrev" (Promissories), *Jusinfo.no*, http://jusinfo.no/index.php?site=default/721/1699/1702/1703, with further references.

For an agreement to be entered into in the form of in-court settlement, Norwegian law has certain requirements regarding form and content. Firstly, as mentioned in Table 2 above, the parties will not be able to enter into an in-court settlement if the contents are contrary to *ordre public* or peremptory rules of law, i.e. a rule of law, the operation which cannot be dispensed with by private parties, c.f. The Dispute Act section 19-11 (3). Secondly, the settlement must be in writing, signed by all parties and the mediator(s), and must be included in the court record, c.f. section 19-11 (1) and (2). Furthermore, before entering into the in-court settlement the parties must be informed of its effect, c.f. section 19-11 (3), c.f. section 11-5.

Although there are very few restrictions on the parties regarding the content of the in-court-settlement, it must be noted that the effect of direct enforceability is limited to those issues that were included as subject matters of the lawsuit. Should the parties choose to include other elements in the settlements, these must be enforced through a lawsuit, similar to out-of-court settlements.[79]

8 Costs of the Mediation

The costs of mediation vary. One significant factor is of course whether the parties have legal counsel. This is an option for all mediation institutes, except at The National Mediation Service, c.f. The National Mediation Services Act section 15.

Another significant factor is whether the parties have to pay the mediator's fees. Whereas the mediation services of The National Mediation Service and The Family Counseling Offices are free of charge, mediation pursuant to The Dispute Act chapter 7 and "advocate mediation" require that the parties pay the mediator's fees. Mediation at the conciliation boards, in-court mediation pursuant to The Children Act section 61 and the judge's settlement efforts pursuant to The Dispute Act section 8-2 do not incur any other fees than the court fees that incur when filing a lawsuit.

In judicial mediation pursuant to The Dispute Act sections 8-3 to 8-7 the parties only have to pay the mediator's fees if an external mediator is appointed, c.f. section 8-4 (3). Judges as mediators are free of charge, as for other in-court mediation institutes.

Legal aid will cover the cost of legal counsel for those entitled, and it can also cover the costs of an applicant's portion of a mediator fees. There is a general requirement in The Legal Aid Act section 1 that the costs are necessary for a satisfactory solution of the applicant's problem. When deciding whether legal aid for mediator fees will be granted, it will also be considered whether public mediation

[79]This has been established by the Norwegian Supreme Court in Rt. 2005 p. 985, c.f. Bernt 2011 p. 446–447 with references to other authors.

services are a satisfactory alternative.[80] For some types of cases legal aid can be granted to those with an income and fortune under certain amounts,[81] for instance for parental disputes on custody and visitation rights, disputes between divorcing spouses concerning the division of property, cases concerning compensatory damages for personal injury and cases where an employee is suing an employer for wrongful termination, c.f. The Legal Aid Act section 11 no. 7. For other types of cases, legal aid can be granted for those with incomes and fortunes lower than the limit, when the case "seen from an objective point of view is especially pressing for the applicant", c.f. section 11, third paragraph. This means that for instance for such common areas of conflict as contractual disputes concerning real estate, or property disputes between neighbours, the right to legal aid is limited to situations where the case is considered "especially pressing".

9 Cross-Border Mediation

9.1 Notion and Main Features of Cross-Border Mediation in Norway

As mentioned in the beginning of this chapter, arbitration has traditionally been the chosen ADR mechanism for commercial contracts. However, there has been some development in recent years, and mediation of such matters is more common than it used to be. It is a fair assumption to make that the desire to avoid expensive, complicated and lengthy litigation or arbitration is particularly strong in cross-border conflicts, with parties from different jurisdictions. It can therefore be assumed that mediation and similar ADR mechanisms can be particularly useful in such instances.

As mentioned in chapter 3 above, The Dispute Act section 7-1 (1) states that contracts with *consumers* cannot validly mandate mediation as a dispute resolution mechanism. An agreement to mediate must be entered into after the dispute has arisen, which renders it a fair assumption to make that out-of-court mediation seldom occurs in cross-border disputes involving consumer contracts, at least when governed by Norwegian law.

[80] C.f. Act relating to Free Legal Aid (The Legal Aid Act) 13 June 1980 no. 35 section 14, c.f. Administrative Regulation regarding Legal Aid, 12 December 2005 no. 1443 section 3-3, c.f Circular from The Ministry of Justice and Police G-12/2005 chapters 5.2.1, 5.2.3, 6.2.1 and 6.2.2.

[81] The maximum income is currently NOK 246,000 (29,000 €) for singles and NOK 369,000,- (43,000 €) for married couples and others with joint finances. The maximum fortune is NOK 100,000,- (12,000 €), c.f. Administrative Regulation regarding Legal Aid section 1.

As mentioned in Sect. 2.2.3 above, there is no specific statutory regulation for cross-border mediation in particular. Whether the mediation institutes are applicable for cross-border cases therefore wholly depends on the rules of jurisdiction and international private law.

9.2 *Recognition and Enforcement of Foreign Mediation Settlements in Norway*

Which effects a foreign settlement has in Norway depends on several factors: *Firstly*; the content of the settlement. These are matters of contract law that cannot be explored here, but generally speaking, in most cases the content of the settlement does not serve as an obstacle for recognition.

Secondly, the effects depend on whether Norway has entered into a treaty with the country on the issue of enforceability of settlements.[82]

Thirdly, the *type* of settlement also influences whether the settlement in itself serves as grounds for execution, or whether a lawsuit to determine the validity of the claim is required. If the latter is the case, the settlement will be viewed as any other foreign contract by the courts, and the issue of enforceability will therefore depend on whether the contract is valid, and on the contents, i.e. the first factor described. As mentioned in Sect. 7.2, Norwegian law distinguishes between in-court and out-of court settlements for the purposes of enforcement.

The Execution Act section 4-1 second paragraph litra f states that a foreign *public* settlement ("offentlig forlik") can be enforced in Norway when it is agreed in a treaty with a foreign nation that such settlements shall be binding and enforceable in Norway. The meaning of the term *public* settlement is not explained in the preparatory works, but it undoubtedly includes in-court settlements. A main characteristic of an in-court settlement is, as mentioned in Sect. 7.2 above, that it is in fact public. The Dispute Act section 19-16 states that foreign *in-court* settlements are binding in Norway to the extent determined by law or by treaty with the state in question, as long as they are not contrary to peremptory law or *ordre public*.

Norway is a party to *The Lugano Convention*,[83] which includes most civil and commercial disputes, c.f. article 1. The convention article 58 states that a settlement entered into before the court during legal proceedings, and which is enforceable in the state in which it was entered into, can be executed without further proceedings in the receiving state. To enable execution in Norway a party with legal interest must make a request to his or her local district court that the settlement is declared enforceable, c.f. articles 38 and 39, c.f. Attachment II. There is an exception from the right to execution if the settlement is deemed contrary to *ordre public*.

[82]The Execution Act section 4-1, second paragraph, litra f.

[83]The Lugano Convention 30 October 2007.

10 E-Justice

The term e-justice seems quite unknown in Norway. Searches on the internet sites of The Norwegian Bar Association, The Norwegian Courts and The Norwegian Jurist Association of the term "e-justice" do not produce any hits.[84] Searches in the databases for the most common Norwegian legal journals do not produce any results either. And regardless of terminology, the application of e-justice instruments to mediation has not been much discussed in Norway.

For some mediation institutes the application of e-justice instruments seems out of the question. For mediation at the family counseling offices and at The National Mediation Service, face-to-face meetings, where all parties are present together with the mediator, are particularly important. For other out-of-court mediation, such as mediation of business disputes with highly professionalized parties, or disputes where the relationship between the parties will end when the dispute is settled, the application of e-justice instruments could be an option, depending on the nature of conflict and the parties' needs and interests.

For judicial mediation it is required that the parties are personally present, c.f. The Dispute Act section 8-5 (2). For mediation efforts by the presiding judge, and in-court mediation of custody disputes etc., party presence is as a main rule not a requirement.[85] However, in many cases, for instance custody disputes etc., mediation without the personal presence of the parties is contradictory to a main feature of mediation: the positive effects on conflicts that the face-to-face meetings of mediations often have. Generally, if the relationship between the parties – for instance as neighbours, co-parents, close relatives or business relations – has to continue on some level after the dispute is settled, mediation should predominantly take place in meetings where parties and mediator(s) are all personally present.

[84] Searches conducted 9 September 2013 by the author.

[85] C.f. The Dispute Act section 23-1.

La Médiation, une Autre Voie de Justice au Portugal ?

Maria José Capelo

Abstract The problems associated with traditional judicial dispute resolution system has opened the door to Alternative Dispute Resolution Methods in Portugal. Over the last decade, Portugal has progressively promoted mediation by adopting specific legislation for different subject matters, such as family, labour and criminal law (public mediation). The Act 29/2013, of 19 April, lays down the general principles applicable to mediation in Portugal, as well as the legal framework of public and civil and commercial mediation.

This chapter seeks to analyse the legal principles of mediation, rules of procedure, enforceability of agreements resulting from mediation, cross-border mediation and online mediation.

1 Modes Extrajudiciaires de Résolution des Conflits

Les sociétés modernes produisent aujourd'hui d'innombrables litiges et les citoyens sont de plus en plus conscients de leurs droits, exigeant des réponses rapides et moins onéreuses pour résoudre leurs problèmes. Au Portugal, la justice publique a révélé son incapacité à répondre à ce défi, puisqu'elle est très coûteuse et lente. La crise des institutions judiciaires de l'État a déterminé l'inversion des paradigmes dans le cadre de la justice (Vicente 2009, 126 ; et Silva 2009, 19). Cela a justifié l'accent mis sur les mécanismes alternatifs (à la justice étatique) avec l'aide du gouvernement et le soutien de la doctrine (Pedroso et al. 2003, 41–52).

Depuis la Loi n°1/89, du 8 juillet, la *Constitution de la République Portugaise* a admis la prévision, au niveau législatif, d'instruments et de modes non

M.J. Capelo (✉)
Faculdade de Direito, Universidade de Coimbra, Pateo da Universidade, 3004-545 Coimbra, Portugal
e-mail: mjcapelo@fd.uc.pt

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juridictionnels de règlement des conflits (cf. art. 202/4). Sous l'influence des politiques européennes, la résolution amiable des litiges[1] a été encouragée et simplifiée (Cruz 2013, 102–103).

Aujourd'hui, il existe une variété de mécanismes extrajudiciaires extérieurs à l'institution judiciaire et d'autres utilisés lors d'une procédure devant un juge. Ces mécanismes recouvrent, *lato sensu*, l'arbitrage, la médiation, la conciliation et l'ombudsman (« Provedor do cliente »).

Outre la conciliation judiciaire (directe), les dernières expériences au Portugal, dans le cadre des mécanismes extrajudiciaires concernent, essentiellement, la médiation. Ce mécanisme représente un engagement gouvernemental clair depuis 1997, date de la signature du protocole entre le Ministère de la Justice et l'Association du Barreau pour la création du Bureau de la Médiation Familiale. Ce Bureau assure la confidentialité, le caractère volontaire de la médiation et la flexibilité et la célérité de la procédure (Vargas 2006, 61–64 ; Pedroso et al. 2003, 71), ainsi que la recherche d'une meilleure relation entre les parties (en litige) à l'avenir (Xavier, p.1135).

Le recours à la médiation apparaît également dans le cadre de litiges du droit de la consommation (Décret-loi n°146/99 du 4 mai) ou ceux qui concernent les valeurs mobilières (Décret-loi n°486/99 du 13 novembre).

La première décennie de ce siècle est également marquée par la création de trois systèmes publics importants de médiation : le système de médiation du travail (créé en 2006), le système de médiation familiale (créé en 2007) et le système de médiation pénale (créé en 2008 pour la conclusion du régime de médiation mis en place par la Loi n°21/2007 du 12 juin).

En 2001, la Loi n°78/2001 du 13 juillet[2] a instauré les *Juridictions de Paix*. Ces tribunaux ont compétence pour les (petits) litiges dont les montants n'excèdent pas 15 000 €, concernant les conflits qui touchent surtout les affaires familiales, le voisinage et le logement. Cette loi a été envisagée comme un moyen efficace de «déjudiciarisation» (Ribeiro 2002, 43–44 ; Pedroso et al. 2003, 27–41). Elle consacre la médiation en dehors de tout le procès ainsi comme au cours d'une procédure civile (déjà engagée devant les « Juridictions de Paix » – arts 16, 49 à art. 56). Pour atteindre ce but, un service de médiation publique a été établi auprès de chaque Juridiction de Paix. Les personnes peuvent recourir au «Service de médiation» même en cas de litiges qui ne soient pas de la compétence des « Juridictions de Paix».[3]

Lorsqu'il s'agit de litiges relevant de la compétence des Juridictions de Paix, les parties sont invitées à la médiation après la plainte et l'accord, auquel elles peuvent parvenir, sera homologué par le juge. À défaut d'accord, le juge de la juridiction de paix doit recourir à une tentative de conciliation et si celle-ci échoue, le litige sera jugé par le juge de la juridiction de paix.

[1] Dans ce sens – règlement amiable – l'arbitrage est exclu.

[2] Cette loi a été modifiée par la Loi n°54/2013, du 31 Juillet.

[3] Cf. art. 14 *Portaria* (Arrêté) n°1112/2005, du 28 octobre.

En 2009, la Loi n°29/2009 du 29 juin a transposé, d'une façon « minimaliste»[4] la directive n○2008/52/CE du Parlement Européen et du Conseil du 21 mai 2008 relative à certains aspects de la médiation civile et commerciale. Elle a expressément prévu la possibilité d'utiliser les systèmes de médiation avant ou au cours d'une action en justice. Ce régime a été prévu dans le Code de Procédure Civile (arts 249-A, 249-B, 249-C et 279-A), malgré les critiques à la technique législative (Cebola 2010, 447).

Après la publication du Nouveau Code de Procédure Civile (Loi n°41/2013, du 26 Juin- *NCPC*) les arts 249-A, 249-B et 249-C ont été abrogés. Le contenu de l'art. 279-A, concernant la médiation au cours de l'action en justice, a été reproduit dans l'art. 273 du Nouveau Code de Procédure Civile, mais le contenu des arts 249-A, 249-B et 249-C a été déplacé (avec des modifications) vers la nouvelle loi sur la médiation : *Loi n°29/2013, du 19 avril* (*L.Méd*).

Le *NCPC* prévoit la conciliation (par le juge) (art. 594) et conjointement la possibilité de recourir à la médiation (au cours de l'action en justice) (art. 273). De cette façon, le juge civil conserve la mission de conciliation des parties, malgré la consécration du mécanisme alternatif (extrajudiciaire) qui constitue la médiation. Le juge a le pouvoir de déterminer « l'expédition» (renvoi) du litige à la médiation lorsqu'il l'estime appropriée (et quel que soit le stade de la procédure) sauf si l'une des parties s'y oppose.[5] Ce recours (médiation « déléguée») permet de séparer la fonction de juge (dire le droit) du rôle de régler à l'amiable les litiges. Néanmoins, la loi n'est pas très claire en ce qui concerne les possibilités et les conditions de recours à la médiation comme mode alternatif à la conciliation judiciaire. La tentative de conciliation peut être utilisée deux fois (au cours de la première audience ou de l'audience finale), mais elle n'est pas permise en matière de droits et d'obligations dont les parties ne peuvent pas disposer par elles-mêmes en vertu de la législation applicable. Le magistrat conciliateur peut formuler une proposition ou suggérer une solution aux parties (Art. 594/3, *NCPC*), mais sans jamais laisser transparaître la décision qu'il pourrait prendre s'il était amené ultérieurement à trancher le litige en cas d'échec de la conciliation. Cependant, le risque de partialité du juge peut exister.

En 2013, la *L.Méd*. a certainement été le moment le plus important en ce qui concerne les mécanismes extrajudiciaires de résolution des litiges. Elle réglemente les principes généraux de la médiation (qu'elle soit menée par des organismes publics ou par des entités privées),[6] le régime juridique de la médiation civile et commerciale, le statut juridique des médiateurs et le régime juridique des systèmes publics de médiation. Néanmoins, si elle encourage le recours à ce mécanisme alternatif, elle ne remplace pas le système judiciaire public, mais veille à articuler

[4]Il s'agit d'une transposition qui ne comprend que 4 articles (dans le Code de Procédure Civile).

[5]Art. 273 NCPC.

[6]Cette loi est applicable aux Services de Médiation auprès de chaque Juridiction de Paix.

ces deux moyens de résolution des litiges. Les mécanismes de règlement des litiges peuvent être complémentaires mais aussi se renforcer mutuellement afin de pacifier les relations sociales (Pedroso et al. 2003, 47–49).

2 La Médiation en Elle-Même

2.1 La Notion de Médiation

D'après l'art. 2 de la *L. Méd*, la médiation est un mécanisme de résolution amiable de litiges, à caractère volontaire, par lequel deux ou plusieurs parties essaient de parvenir à un accord avec l'aide d'un médiateur, un tiers impartial et neutre (Lopes et Patrão 2013, 48–49). À travers la médiation, la solution n'est jamais imposée aux parties, puisque ce sont elles qui, par ce processus, vont découvrir et harmoniser leurs intérêts (Gouveia 2014, 50–52).

Dans l'encadrement juridique de la *L. Méd*. (cf. art. 2), le rôle principal du médiateur consiste, de manière impartiale, à aider les participants dans leurs efforts de parvenir à un règlement amiable du litige. La suggestion d'une solution est matière à controverse (Lopes et Patrão 2014, 132–134). À notre avis, la caractéristique la plus importante de la médiation est sa flexibilité, en raison de sa capacité de s'adapter aux exigences de chaque situation, en laissant les participants trouver une issue mutuellement favorable.

Les actes constitutifs ou réglementaires, des systèmes publics de médiation (du travail, familiale et pénale), consacrent une notion, plus détaillée, du médiateur (un médiateur « spécialisé » -Lopes et Patrão 2014, 23).

2.2 Cadre Juridique

La *L. Méd.* a consacré, pour la première fois, les principes généraux régissant la médiation existant au Portugal (qu'elle soit menée par des organismes publics ou par des entités privées), le régime juridique de la médiation civile et commerciale, le statut juridique des médiateurs et le régime juridique des systèmes publics de médiation (médiation familiale, du travail et pénale). La médiation doit respecter le caractère confidentiel du processus (art. 5), garantir l'impartialité (art. 6), l'indépendance du médiateur (art. 7) et l'égalité des parties (art. 6). Le caractère volontaire (art. 4) est, au Portugal, une condition *sine qua non* de la médiation, bien que les personnes soient encouragées à recourir à la médiation.[7]

[7]L' art. 1774 *Code Civil* consacre le devoir d'informer les conjoints, avant la procédure de divorce, de l'existence de Services de Médiation Familiale (Cf Xavier 2010, 1139–1143).

La compétence et la responsabilité du médiateur sont très importantes pour le succès de la médiation (art. 8). En parvenant à un accord, celui-ci aura force exécutoire (sans obligation d'homologation) (art. 9).

La *L. Méd* prévoit que les principes directeurs s'appliquent à toutes les médiations menées au Portugal, quelle que soit la nature du litige qui fait l'objet de médiation (cf. art. 4). Or, nous pouvons en déduire qu'elle est applicable tant aux litiges internes qu'aux litiges transfrontaliers. Le législateur a apparemment fait usage du principe par lequel les règles de procédure (à savoir, la « procédure de médiation») sont toujours d'application territoriale (Lopes et Patrão 2014, 17).

3 La Convention de Médiation

Les litiges en matière civile et commerciale, concernant les intérêts de nature patrimoniale (cf. art. 11/1, *L.Méd*), peuvent faire l'objet d'une médiation. Les litiges, concernant des intérêts de nature non patrimoniale, peuvent également faire l'objet de médiation, à condition que les parties puissent conclure une transaction sur le droit litigieux (cf. art. 11/2, *L.Méd*). L'art. 12 définit que les parties peuvent prévoir, dans le cadre d'un contrat, que les litiges éventuels émergents de cette relation juridique sont soumis à la médiation. La convention de médiation, conclue en violation de l'art. 11, est considérée nulle (cf. art. 12/3, *L.Méd*).

La convention doit adopter la forme écrite, sous peine de nullité. Cette exigence est satisfaite lorsque la convention comprend un document écrit signé par les parties, un échange de lettres et tout autre moyen de télécommunication permettant d'obtenir des preuves écrites, y compris des moyens de communication électroniques (art. 12/2/3, *L.Méd*).

La Cour, devant laquelle l'action est déposée sur une matière couverte par un accord de médiation, doit, à la demande de la partie défenderesse (déduite jusqu'au moment où il présente sa première plaidoirie sur le fond), surseoir à statuer et à renvoyer l'affaire à la médiation.

Le recours à la médiation préalable à l'action en justice suspend les délais de forclusion et de prescription à partir de la date de signature du protocole de médiation et, dans le cas de médiation menée dans les systèmes publics de médiation, à partir du moment de l'acceptation de la médiation (cf. art. 13).

Pendant l'action en justice, les parties peuvent aussi convenir de recourir à la médiation. Dans ce cas, elles doivent établir un accord sur la durée de la suspension de l'instance (cf. arts 272/4, et 273 du NCPC).

4 Le Médiateur

Il appartient aux parties de s'accorder sur le choix d'un ou de plusieurs médiateurs des litiges. Ceux-ci exercent une activité indépendante sur le territoire national. La participation à cours proposés par des entités certifiées par le service du Ministère

de la Justice, défini par l'arrêté du membre du gouvernement chargé de la justice, constitue une formation orientée spécifiquement vers l'exercice de la profession de médiateur des litiges.

Dans les systèmes publics de médiation (du travail, familial et pénal) les participants pourront indiquer le médiateur du litige qu'elles souhaitent parmi les médiateurs inscrits sur les listes de chaque système public de médiation. Lorsque le médiateur des conflits n'est pas indiqué par les parties, sa désignation est effectuée conformément à l'ordre résultant de la liste sur laquelle il est inscrit, de préférence par voie informatique.

L'impartialité et l'indépendance caractérisent le rôle du médiateur. Il est de son obligation de veiller à la qualité de ses services et de son niveau de formation. Il doit informer les parties sur les principes fondamentaux et les étapes de la procédure de médiation, ainsi que sur les règles à suivre. Il doit adopter un comportement responsable et de sincère collaboration avec les participants, et s'assurer que celles-ci ont capacité d'agir.

Le médiateur du litige est responsable de ses actes et il n'est soumis à aucune orientation, technique ou déontologique, de professionnels d'autres domaines, sans préjudice, toutefois, dans le cadre des systèmes publics de médiation, des compétences des entités gestionnaires de ces systèmes.

Il doit agir dans le respect des règles éthiques et déontologiques prévues par la Loi n°29/2013 et par le Code de Conduite Européen (pour les médiateurs) (cf. art. 26, al. k), *L.Méd*).

Le médiateur des litiges qui ne respecterait pas les obligations de l'exercice de ses activités est civilement responsable des dommages causés conformément aux règles générales du droit (art. 8/3, *L.Méd.*).

5 Le Processus de Médiation

La procédure de médiation doit être aussi rapide que possible et être concentrée sur le moins de réunions possibles. La durée de la procédure de médiation est fixée dans le protocole de médiation, mais elle peut cependant être modifiée au cours de la procédure en accord avec les parties. (cf. art. 21 *L. Méd.).* La procédure peut être suspendue, dans des circonstances exceptionnelles, dûment justifiées, notamment afin de tester des accords provisoires (art. 22 *L. Méd.*). La suspension de la procédure de médiation, convenue par écrit par les parties, a lieu sans préjudice de la suspension des délais d'action en justice.

Les informations fournies à titre confidentiel au médiateur des litiges par l'une des parties ne peuvent pas être communiquées, en l'absence de son consentement, aux autres parties intéressées dans la médiation. Le devoir de confidentialité, relatif aux informations sur le contenu de la médiation, peut prendre fin pour des raisons d'ordre public, notamment en vue d'assurer la protection de l'intérêt supérieur de

l'enfant et de l'intégrité physique ou psychologique d'une personne ou lorsque cela est nécessaire aux fins de la mise en œuvre de l'accord obtenu par voie de la médiation. Les parties doivent être traitées de manière équitable (cf. art. 6 *L. Méd*) au cours de la procédure de médiation. Le médiateur des litiges est responsable de la gestion de la procédure de façon à garantir l'équilibre des pouvoirs.

En cas de nécessité, le médiateur doit suggérer aux parties l'intervention ou la consultation de techniciens spécialisés, lorsque cela s'avère nécessaire ou utile à la bonne information des parties (cf. art. 26, al. e) , *L.Méd*.).

6 Échec

La procédure de médiation prend fin lorsque l'une ou de l'autre des parties y renonce ; ou quand le médiateur des litiges, de manière motivée, en décide ainsi et, au cas où il s'avère impossible de parvenir à un accord (art. 19 *L.Méd*.). Le contenu des réunions de médiation ne peut pas être pris en compte par un tribunal ou dans le cadre d'un arbitrage. En cas d'échec de la médiation préalable à l'action en justice, les fonctions du médiateur cessent et l'instance poursuit son cours ordinaire comme si rien ne s'était passé. Les délais de prescription et de forclusion reprennent lorsque la procédure de médiation prend fin en raison du refus de l'une des parties de la poursuivre, ou de l'arrivée à échéance d'un délai maximum prévu pour la médiation ou encore lorsque le médiateur détermine la fin de la procédure.

7 Réussite de la Médiation

Le contenu de l'accord issu de la médiation est librement fixé par les participants et il est consigné par écrit et signé par les participants et par le médiateur (art. 20 L.Méd.). L'accord a force exécutoire, sans nécessité d'homologation, notamment quand il concerne un différend qui peut faire l'objet de médiation et que celle-ci a été réalisée conformément à la loi, que les parties ont la capacité d'agir et que le contenu ne soit pas contraire à l'ordre publique (art. 9/1 *L.Méd*) Il est aussi nécessaire que le médiateur des litiges soit inscrit sur la liste des médiateurs des conflits établie par le Ministère de la Justice (art. 9/1/al.e, *L.Méd*).

Dans la médiation «préalable» à l'action en justice, les participants, étant parvenus à un accord suite à ce processus de médiation, peuvent désormais saisir le juge compétent pour que cet accord soit homologué (art. 14 *L.Méd*). Cette homologation judiciaire de l'accord vise à contrôler : l'objet de la médiation, la capacité d'agir des parties, le respect des principes généraux du droit et de la bonne foi art. 14/3, *L.Méd*). Le juge doit aussi contrôler si l'accord ne constitue pas un abus de droit ou n'est pas contraire à l'ordre publique (art. 14/3, *in fine*, *L.Méd*).

8 Frais de la Médiation

Les honoraires du médiateur feront l'objet d'un accord entre lui et les parties, chargées du paiement, et doivent être prévus dans le protocole établi au début de chaque procédure (art. 29 *L.Méd*). La rémunération du médiateur des litiges dans le cadre des systèmes publics de médiation est fixée conformément aux actes constitutifs ou réglementaires de ceux-ci (art. 42 *L.Méd*).

Les participants peuvent comparaître personnellement ou se faire représenter aux réunions de médiation ou être accompagnés par des avocats ou des avocats stagiaires (art. 18/1 *L.Méd*) (Gouveia 2014, 52–56; Lopes et Patrão 2014, 124–126). Les parties peuvent également se faire conseiller par des techniciens dont ils estiment la présence nécessaire au bon développement de la procédure de médiation, dès lors que l'autre partie ne s'y oppose pas (art. 18/2 L.Méd).

Actuellement, notre système ouvre la possibilité de l'octroi d'une assistance judiciaire pour les médiations menées dans les systèmes publics de médiation et dans la Justice de Paix.[8] Toutefois, dans la médiation pénale, il est prévu une exonération de frais.[9] Par ailleurs, dans le processus d'attribution de l'autorité parentale, lorsque le tribunal renvoie les participants vers la médiation (familiale), les participants sont exonérés de taxes.[10]

9 Médiation Transfrontalière

9.1 La Notion de Médiation Transfrontalière

La *L. Méd.* n'adopte pas de notion de médiation transfrontalière. Comme le prévoit l'art. 3, les principes énoncés dans la loi s'appliquent à toutes les médiations menées au Portugal, et de cet fait nous pouvons en déduire que les litiges objet de médiation au Portugal peuvent avoir un lien avec des ordres juridiques étrangers. En outre, dans ces litiges « plurilocalisés », les parties peuvent choisir la loi applicable au fond du litige (Lopes et Patrão 2014, 140).

[8]Cf. Article 17 Loi n°34/2004, du 29 juillet (avec la rédaction de la Loi n°47/2007, le 28 août), et art. 9 *Portaria* no10/2008, du 3 janvier.

[9]Cf. art. 13 du *Regulamento do sistema de mediação penal (Règlement du système de médiation pénale).*

[10]Cf. Art. 6/2, Despacho do Secretário de Estado da Justiça (*Arrêté du Secrétaire d'État de la Justice*) n°18778/2007, du 13 juillet 2007.

9.2 Reconnaissance et Exécution des Règlements Étrangers

L'accord de médiation (issu de la médiation réalisée dans un autre État membre de l'Union Européenne) a force exécutoire, sans besoin d'homologation par un juge (à moins que la loi ne l'impose) quand le système juridique de cet État lui donne force exécutoire et à condition que le litige puisse faire l'objet de médiation (art. 9/1, al. a), et 4, *L. Méd*). En outre, l'accord, qui en ressort, ne peut en aucun cas être contraire à l'ordre publique (cf. art. 9/1/d, et 4, *L. Méd*).

L'art. 15 prévoit aussi que les normes sur la médiation préalable à l'action en justice, notamment la suspension des délais et la faculté de requérir l'homologation judiciaire de l'accord, sont applicables aux procédures de médiation qui se sont déroulées dans un autre État membre de l'Union Européenne (Lopes et Patrão 2014, 101–102).

10 Cyberjustice en Matière de Médiation (e-Médiation)

La *L.Méd* ne prévoit pas expressément (ou n'interdit pas) la « e-médiation» (Lopes et Patrão 2014, 122–124). On peut donc raisonnablement admettre cette « modalité » de médiation, puisqu'elle se révèle utile dans les litiges sur des achats en ligne et pour ceux qui ont une valeur peu élevée. De plus, la médiation « on line/en ligne » entraîne une diminution des coûts, puisque les parties n'ont pas besoin de se déplacer pour parvenir à trouver un accord (cf. art. 18/1, *L.Méd*). Elles peuvent communiquer selon leur disponibilité. La sécurité de la confidentialité des données communiquées dans le processus de médiation peut être assurée par le biais de techniques telles que la signature électronique.

En revanche, la Cybermédiation entraîne la perte de la dynamique de la médiation traditionnelle, car elle a lieu à distance et par écrans d'ordinateur interposés, et non plus en face-à-face. Ce manque de présence personnelle peut rendre plus difficile pour le médiateur le maintien d'un contrôle efficace et flexible de la négociation. Dans un espace virtuel, des difficultés peuvent également survenir, concernant la confiance apportée au médiateur, une personne que les participants ne connaissent peut-être pas.

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Les Diverses Facettes de la Médiation au Québec : Présent et Avenir

Sylvette Guillemard

Abstract Mediation is governed by several different legal regimes in Québec. Family mediation and small claims mediation (before the small claims division of the Court of Québec) are governed by rules set out in the Code of Civil Procedure.

Judicial mediation, in the form of settlement conferences, is also defined in the Code of Civil Procedure. A judge acts as mediator to settle a case already brought before the courts.

In 2015, the new Code of Civil Procedure will come into force. In response to the comments made by various stakeholders, the new text will include several provisions dealing specifically with private mediation, until now governed by the general law. Nothing is specifically included for the non-judicial settlement of disputes with a foreign element.

Although the digital environment is generally used in Québec, and despite the fact that it will be especially relevant to the new Code of Civil Procedure, it is not mentioned specifically in the legal texts.

Résumé Il existe au Québec plusieurs régimes régissant la médiation. Celle utilisée en matière familiale et celle utilisée dans le cadre des réclamations de peu d'importance (devant la Cour du Québec, division des « petites créances ») sont actuellement encadrées par des règles contenues dans le Code de procédure civile.

Il en va de même avec la médiation judiciaire, la Conférence de Règlement à l'amiable, où c'est un juge qui agit à titre de médiateur à l'occasion d'une action intentée devant les tribunaux judiciaires.

En 2015, un nouveau Code de procédure civile va entrer en vigueur. Faisant écho aux souhaits exprimés dans divers milieux, ce nouveau texte comportera plusieurs dispositions portant spécifiquement sur la médiation conventionnelle, pour le moment régie par le droit commun. Rien n'y est spécifiquement prévu pour les règlements non judiciaires des différends qui comportent un élément d'extranéité.

S. Guillemard (✉)
Avec la Collaboration d'Audrey Laudon et de Sylvain Pierrard, étudiants, faculté de droit, Université Laval, Québec, Canada
e-mail: Sylvette.Guillemard@fd.ulaval.ca

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Bien que l'environnement numérique soit de fréquentation courante au Québec et malgré le fait que son usage va être particulièrement mis en valeur par le nouveau Code de procédure civile, les textes de lois l'ignorent.

1 La Situation Actuelle des Modes Non Judiciaires de Règlement des Différends au Québec

Lorsque l'on veut, au Canada, traiter de sujets juridiques, il y a parfois lieu de faire une distinction entre le droit applicable « d'un océan à l'autre »[1] et les normes applicables dans chacune des provinces qui le composent. En raison de la structure fédérale du Canada, la Constitution (*Loi constitutionnelle de* 1867) statue sur « la distribution des pouvoirs législatifs » soit la répartition des champs de compétence législative entre le parlement fédéral et les législatures provinciales. Alors que l'article 91 énumère ce qui ressortit exclusivement au pouvoir fédéral, c'est à l'article 92 que sont indiquées les matières relevant des dix ordres juridiques provinciaux. Le paragraphe 13 de cet article prévoit que les législatures provinciales peuvent adopter des lois portant sur « la propriété et les droits civils dans la province », le paragraphe 14 leur attribue le pouvoir sur « [l]'administration de la justice dans la province, y compris la création, le maintien et l'organisation de tribunaux de justice pour la province, ayant juridiction civile et criminelle, y compris la procédure en matières civiles dans ces tribunaux », le paragraphe 16 leur octroyant la possibilité d'adopter des lois sur « [g]énéralement toutes les matières d'une nature purement locale ou privée dans la province ».

Par conséquent, s'il y a lieu de légiférer sur le règlement non judiciaire des différends en matière civile[2] et commerciale, cela relève des parlements provinciaux. Et dans la mesure où il n'y a pas de lois, de normes encadrant spécifiquement la résolution amiable des différends ou certains de ses aspects, celle-ci reposant sur une base contractuelle, la réflexion sera là aussi contenue dans les cadres provinciaux. Pour diverses raisons, ce texte ne traitera que de la situation au Québec.[3]

Pour ce qui est du règlement non judiciaire des différends, en 2014 il existe au Québec l'arbitrage, mode répandu tant en matière interne qu'en matière internationale. La nature juridique de l'arbitrage est décrite au *Code civil du Québec* (C.c.Q.) alors que les règles qui sont plus de nature procédurale sont contenues au

[1] « *A mare usque ad marem* » est la devise du Canada.

[2] À ce stade ci, nous incluons les matières familiales dans la grande rubrique des matières civiles. Pour les fins de cette étude, nous excluons du domaine de recherche d'autres champs du droit, champs spécifiques comme les relations de travail, le droit criminel ou le droit administratif qui peuvent parfois leurs propres modes de règlement des différends, privés ou non. Ainsi, les litiges administratifs de droit privé sont tranchés généralement par des tribunaux administratifs et comme ils sont maîtres de leur procédure, le C.p.c. ne s'applique pas à eux.

[3] Dans le domaine du droit privé, le Québec est un ordre juridique fondamentalement et essentiellement civiliste, parfois teinté de common law.

Code de procédure civile (C.p.c.). Il faut mentionner à cet égard que le Québec a adopté *grosso modo* un seul régime juridique pour l'arbitrage, qu'il soit interne ou non. Seules quelques dispositions particulières sont prévues lorsque l'élément d'extranéité l'oblige.

Un autre mode non judiciaire de règlement des différends en usage actuellement est la médiation. Comme nous allons l'expliquer dans ce texte, il existe actuellement au Québec deux grandes familles de médiation. La médiation judiciaire, instituée en 2002 lors de l'adoption d'un nouveau *Code de procédure civile*, intervient en cours d'instance et est menée par un magistrat. L'encadrement de ce mode de règlement des différends, dénommé Conférence de Règlement à l'Amiable, est prévu depuis une dizaine d'années au *Code de procédure civile*, aux articles 151.14 à 151.23.

L'autre forme de médiation est ce que l'on peut appeler la médiation extra-judiciaire ou médiation conventionnelle. Il s'agit d'une démarche volontaire des personnes pour essayer de résoudre leurs différends en dehors de tout cadre judiciaire, institutionnel ou étatique. À l'heure actuelle, la médiation conventionnelle n'est régie légalement que dans deux domaines, en matière familiale et dans le cadre des réclamations de faible importance, les « petites créances ». Dans les deux cas, les règles se trouvent dans le *Code de procédure civile*. En dehors de ces champs très précis, la médiation extrajudiciaire civile et commerciale ne fait, aujourd'hui, l'objet d'aucun texte normatif en vigueur. Toutefois, c'était l'un des vœux du législateur québécois d'officialiser et de promouvoir d'autres formes de recherche de « justice » en dehors du recours classique qu'est la saisine des tribunaux étatiques. À cette fin, il a prévu d'inclure dans le *Code de procédure civile* des règles régissant ce qu'il a choisi de désigner comme des « modes de prévention et de règlement des différends » (PRD). L'adoption de ces nouvelles règles a été faite à l'occasion d'un énorme chantier de réfection de la procédure civile québécoise qui visait à doter le Québec d'un *Code de procédure civile* entièrement rénové, même si une transformation assez considérable a déjà été effectuée en 2003. C'est maintenant chose faite puisque le nouveau *Code de procédure civile* du Québec a été adopté le 20 février 2014 (Code de 2015). Toutefois, et cela complique un peu les choses, l'entrée en vigueur de ce code n'a pas été immédiate mais est repoussée à une date indéterminée! Le site du ministère de la Justice indique : « L'objectif est de prévoir une entrée en vigueur de l'ensemble des dispositions à l'automne 2015 » (Gouvernement du Québec 2014), sans plus de précisions.

Ce texte va donc tenir compte de cette particularité législative en faisant état non seulement de la situation actuelle mais également de celle qui va régir les justiciables dans un avenir proche, sous l'empire du « nouveau » *Code de procédure*.

Pour terminer cette présentation générale du sujet, il faut signaler qu'il y a très peu de textes sur la question de la médiation à l'heure actuelle, de textes d'un niveau scientifique valable. On en trouve quelques uns sur la médiation judiciaire, la Conférence de Règlement à l'Amiable, mais très peu dans le domaine de la médiation en générale, familiale ou, encore moins, en matière civile et commerciale. « Et force est de constater que, dans la très grande majorité des cas, ils présentent simplement le processus en mettant généralement l'accent sur ses avantages et sont loin de fournir des explications au phénomène, encore moins de comporter une

approche critique » (Guillemard 2012). De tout ce que nous avons pu consulter, « [l]'un des textes les plus intéressants que nous ayons trouvés abordant la question de certains liens entre droit et modes non judiciaires de règlement des différends a été rédigé non par pas un juriste mais par un sociologue, Claude Nélisse » (Guillemard 2012).

Quant aux autres façons de résoudre les difficultés entre citoyens, elles sont nettement plus difficiles à étudier et à recenser en raison de leur caractère informel, privé et dans une certaine mesure, aléatoire. Et en raison de l'absence – naturelle et compréhensible – d'encadrement normatif. On peut penser à ce chapitre à la négociation, outil de communication presque quotidien ou d'utilisation très commune pour le citoyen et processus régulièrement employé par les avocats avec leurs confrères dans le cheminement d'un dossier, voire son aboutissement.[4] On peut dire que la négociation est l'étape fondamentale de la recherche de solution en cas de différend et si les échanges entre les individus impliqués n'aboutissent pas, ceux-ci pourront éventuellement avoir recours à la médiation. Cette dernière serait en quelque sorte l'étape numéro deux dans la recherche d'une solution. On peut d'ailleurs voir la médiation comme une forme plus aboutie, plus sophistiquée de négociation :

> la médiation est somme toute une négociation assistée. En d'autres termes, il s'agit d'un processus par lequel deux personnes échangent des points de vue, des souhaits, des propositions dans le but d'arriver à une solution et ce, avec l'aide ou par le biais d'une tierce personne. Ce tiers n'est là que pour faciliter le dialogue, en quelque sorte. Il ne donne pas son opinion et surtout, il n'impose pas la solution. Celle-ci émane uniquement des personnes qu'oppose le différend ou la difficulté (Guillemard 2011).[5]

Il existe au Québec 4 sortes différentes de médiation – entendons par là 4 registres différents de litiges régis par autant d'ensembles de règles, la Conférence de Règlement à l'Amiable, la médiation dans le cadre des petites créances, la médiation en matière familiale, soumise aux règles du *Code de procédure civile*, et la médiation libre, régie par le droit commun. Dans un avenir proche, va s'ajouter un cinquième registre, la médiation conventionnelle encadrée par le *Code de procédure civile*. Il est donc impossible de présenter la situation au Québec sous forme de généralités. Ainsi, on ne peut présenter les règles liées « au médiateur » ; il n'y a qu'à penser, comme nous l'exposerons, au médiateur privé, conventionnel, qui n'a rien de comparable, ni en termes de statut, ni de nomination, pour ne parler que de cela, avec le juge chargé d'une. En matière de divergence, on peut également évoquer l'aboutissement d'une médiation en matière familiale, non qualifiée par le droit québécois alors qu'il attribue à celle de la Conférence de Règlement à l'Amiable

[4] Voir le fameux « règlement hors cour » qui, s'il n'est pas la conclusion d'une médiation, est la plupart du temps le résultat d'échanges, de négociations entre avocats et qui intervient souvent la veille ou le matin même du procès. D'ailleurs, la négociation et ses techniques font l'objet d'un enseignement spécifique dans la formation des futurs avocats à l'École du Barreau du Québec.

[5] Pour tout savoir sur la médiation, voir Institut de médiation et d'arbitrage du Québec.

la qualification de transaction. De même, la règle de la non-contraignabilité du médiateur varie selon les circonstances.

Le plan et la structure de l'exposé qui suit ne peuvent ignorer ces particularités.

2 Les Fondements de la Médiation

2.1 La Notion de Médiation

Par médiation, nous entendons un mode de résolution des différends reposant sur la seule volonté des personnes et où elles se font assister par un tiers, le médiateur. Peut-être certains font-ils une distinction entre médiation et conciliation. Pour notre part, nous tenons les deux termes pour à peu près équivalents. Dans sa version actuelle,

> [l]e *Code de procédure civile* ne donne pas de définition des divers termes qu'il utilise pour désigner les modes alternatifs, médiation, conciliation. D'après les articles où il les emploie, on déduit que « conciliation » désigne le fait de parvenir à un accord amiable alors que la médiation est le mécanisme par lequel y parvenir. Ainsi, en matière familiale, l'article 815.2 C.p.c. indique : « À tout moment avant le jugement et avec le consentement des parties, le tribunal peut, pour une période qu'il détermine, ajourner l'instruction de la demande en vue de favoriser soit la réconciliation, soit la conciliation des parties notamment par la médiation. »
>
> En ce qui a trait au mécanisme, le Code en prévoit deux, la médiation et la « conférence de règlement à l'amiable ». La première semble utilisée uniquement en matière familiale et pour les petites créances et il faut donc comprendre que la seconde sert dans tous les autres domaines (Guillemard et Menétrey 2011).[6]

2.2 L'Encadrement Normatif de la Médiation au Québec

Comme nous l'indiquons au début de ce texte, on peut classer la médiation québécoise en deux grandes familles, la médiation judiciaire (2.2.1), en première instance (a) et en appel (b), et la médiation extrajudiciaire (2.2.2), soit, pour reprendre les termes d'une pionnière en matière de médiation judiciaire, celle « réalisée à l'extérieur du contexte judiciaire institutionnel » (Otis 2005). Parlant de médiation extrajudiciaire, le droit québécois encadre celle qui a cours en matière familiale (a), alors que celle qui porte sur d'autres sujets en matière civile et

[6] Pour un auteur, « [l]a nuance entre la conciliation est la médiation est plutôt mince », (Lacoursière 2008). Par ailleurs, il ne nous semble pas réellement nécessaire, dans l'esprit de cette étude, de faire une distinction entre les divers types de médiations. En effet, pour certains, utiliser le mot « médiation » seul, sans lui accoler un adjectif descriptif, est une hérésie. Pour eux, la médiation facilitatrice est bien différente de la médiation évaluative qui, elle, se distingue de la médiation transformative, toutes ces dernières étant bien différentes de la médiation classique!

commerciale est apparentée actuellement à un électron libre (c), sauf pour ce qui concerne les litiges portant sur des réclamations de sommes peu élevés, introduits devant la division des petites créances de la Cour du Québec (b). La médiation conventionnelle, que l'on pourrait qualifier de générale, va toutefois faire son entrée dans le Code de 2015 (d).

2.2.1 La Médiation Judiciaire

2.2.1.1 En Première Instance

Description et Encadrement

Au Québec, l'expression recouvre un processus très précis qui ne semble exister, malgré l'homonomie, dans aucun autre ordre juridique. Il s'agit d'une médiation menée alors que les parties sont engagées dans des procédures étatiques, qu'elles ont déjà saisi la justice publique – méthode connue ailleurs, en France, par exemple – mais, et là réside la particularité, conduite, présidée par un magistrat en exercice:

> À toute étape de l'instance, le juge en chef peut, à la demande des parties, désigner un juge pour présider une conférence de règlement à l'amiable. Dans leur demande, elles lui exposent sommairement les questions en litige.
>
> Le juge en chef peut également, de sa propre initiative, recommander aux parties la tenue d'une telle conférence. Si elles y consentent, il désigne alors un juge pour la présider (C.p.c.).[7]

Comme elle est gérée par l'administration judiciaire, bien que l'on ne trouve la précision ni dans le *Code de procédure civile* ni dans les règlements judiciaires,[8] cette médiation appelée Conférence de Règlement à l'Amiable a lieu dans l'enceinte du palais de justice. Contrairement au principe de la publicité des procès, énoncé à l'article 13 C.p.c., en vertu de l'article 151.16, les séances de Conférence de Règlement à l'Amiable sont tenues à huis clos.

Parlant des conditions matérielles dans lesquelles elle se déroule, il faut savoir que la Conférence de Règlement à l'Amiable est gratuite pour les justiciables qui veulent s'en prévaloir. Autant dire que les « frais liés à la présence d'un juge médiateur, à l'occupation d'une salle, etc. [. . .] sont donc à la charge de l'ensemble des contribuables » (Guillemard et Menétrey 2011). Certains font valoir à cet égard qu'il n'est pas impossible que parfois, au lieu d'avoir recours à une médiation extrajudiciaire dont les frais doivent être assumés par eux, des justiciables préfèrent

[7] La médiation judiciaire fait l'objet de plusieurs dispositions dans le C.p.c., notamment aux articles 151.14 à 151.23.

[8] Les règlements judiciaires, communément appelés « règles de pratique », sont des normes adoptées par les juges et qui complètent les dispositions du Code de procédure. Sur le sujet voir Guillemard et Menétrey 2011.

déclencher des procédures étatiques pour ensuite immédiatement demander des séances de médiation judiciaire.[9]

Une auteure souligne que la médiation judiciaire a tendance à suivre une procédure uniformisée, ce qui la rend moins souple que le processus libre :

> L'institution doit [...] appliquer des règles particulières, fixes, spécifiques à l'institution et uniformes pour assurer la stabilité d'un système qu'il faut protéger dans son intégrité. Le processus systémique répondra aux spécificités de chaque tribunal. Le juge-conciliateur sera limité dans ses interventions, par son autorité morale à titre de fiduciaire du « droit », et en temps, puisqu'il s'inscrit dans un système judiciaire qui doit rendre des comptes à l'administration publique. Par conséquent la conciliation judiciaire ne peut pas s'adapter au gré du juge-conciliateur et des parties dans certains aspects. C'est cette caractéristique qui offre au public la garantie d'une procédure conforme à une norme et à des standards essentiels pour des fins éthiques et déontologiques (de Kovachich 2006).

Il est important de faire ressortir parmi les règles liées à la médiation judiciaire, à l'article 151.15 C.p.c., l'expression « à la demande des parties » au premier alinéa et au second la précision « si elles y consentent ». Elles indiquent bien l'aspect volontaire du recours à ce mode non étatique de résolution des différends. De plus,

> [l]e caractère consensuel à cet égard différencie justement les modes alternatifs du recours classique aux tribunaux étatiques. Alors que le demandeur se passe de l'accord du défendeur pour saisir le juge, un médiateur, un conciliateur – et même un arbitre – ne peut être investi du pouvoir de se pencher sur le litige entre des parties sans l'accord de toutes celles qui sont concernées (Guillemard et Menétrey 2011).

Le tribunal ne peut jamais imposer aux parties la tenue d'un Conférence de Règlement à l'Amiable (*Mc Nicoll* c. *9102-5932 Québec inc.* 2004).

Non seulement la participation à la Conférence de Règlement à l'Amiable repose sur les parties et sur elles seules, mais en outre elles y jouent un rôle actif. En effet, ce sont elles qui, avec le juge, établissent des règles de procédure pour la régir : « Le juge définit, de concert avec les parties, les règles applicables à la conférence et les mesures propres à en faciliter le déroulement et il établit avec elles le calendrier des rencontres » (C.p.c.). Ce sont elles, également, qui, avec le juge, décident qui peut assister aux séances de médiation, mais seulement dans la mesure où cette présence est « utile au règlement du litige », comme le prévoit l'article 151.17 C.p.c.

Tout le monde, justiciables, juge, éventuellement avocats ou autres personnes invitées à participer à la Conférence de Règlement à l'Amiable, est tenu à la confidentialité (C.p.c.).

Malgré cette volonté commune des parties et ce qu'énonce l'article 151.18 C.p.c., on ne retrouve dans ce processus aucun « contrat de médiation ». Exactement de la même façon qu'un auteur disait au début du siècle passé : « Il n'y a, dans les rapports établis par l'instance entre les parties et dans les obligations qui en résultent, rien de

[9] Pour indication, au 1er janvier 2014, les tarifs judiciaires de la procédure introductive d'instance imposés à une personne physique varient de 62 à 732 dollars, selon le montant du litige. Rappelons que selon les termes de l'article 151.15 C.p.c., la médiation judiciaire peut être demandée par les parties « à toute étape de l'instance », soit dès le début du processus.

contractuel » (Tissier 1908), il n'y a rien de contractuel ou de conventionnel dans la médiation judiciaire à la québécoise.

Le Juge Médiateur

Quand nous parlions d'homonomie, nous avions à l'esprit le droit français, le droit belge ou le droit suisse qui connaissent également le processus. Cependant, la différence essentielle entre eux et le droit québécois réside sur la personne du médiateur. En dehors du Québec, le juge désigne pour remplir cette tâche un « tiers », non un juge. Au Québec, au contraire, le médiateur est un juge, un juge en exercice, non un magistrat à la retraite. À notre avis, cela ne va pas sans poser de problèmes, notamment en ce qui a trait à la place du droit dans ce mode de résolution des différends à l'amiable, mode théoriquement non juridique (Guillemard 2012). Il faut aussi remarquer que contrairement à ce qui constitue l'essence de la médiation, dans le cadre de la Conférence de Règlement à l'Amiable, les personnes engagées dans le différend ne choisissent pas le tiers qui peut les aider. Il leur est totalement imposé.

Il n'est pas obligatoire pour un juge d'agir à titre de médiateur judiciaire. Certains refusent ce rôle. Sur les 144 juges que compte la Cour supérieure, en 2008–2009 moins d'une soixantaine avait accepté d'agir à titre de médiateur.

Les magistrats qui sont intéressés à agir comme médiateurs « doivent acquérir de nouvelles habiletés et compléter de nouveaux apprentissages. Chaque juge appelé à siéger dans ce domaine doit suivre une formation particulière » (Cour supérieure du Québec 2010).

Mentionnons que le *Code de procédure civile* considère que le juge médiateur . . . reste un juge puisque, aux termes de l'article 151.14 C.p.c., il lui accorde « l'immunité judiciaire » dans l'exercice de cette fonction.

Bien entendu, le juge chargé de la conférence ne peut être un magistrat lié de près ou de loin au dossier judiciaire en cours. Ainsi, si la conférence échoue et que les parties poursuivent le processus judiciaire, le juge médiateur ne pourra en aucun cas être susceptible de juger du dossier au mérite, comme l'indique l'article 151.23 al.1 C.p.c. Le code n'évoque pas la participation antérieure du magistrat médiateur dans le dossier mais la logique veut qu'il y ait, en amont comme en aval de la médiation, des « cloisons étanches » (Guillemard et Menétrey 2011) entre elle et la procédure traditionnelle.

Liens avec le Processus Judiciaire

En premier lieu, rappelons que la Conférence de Règlement à l'Amiable intervenant à l'occasion d'un recours judiciaire, elle a lieu en parallèle avec lui. Comme nous allons le mentionner, elle s'inscrit dans le cadre dédié à la poursuite sans en modifier fondamentalement les paramètres temporels.

Il faut savoir qu'au Québec, depuis le 1er janvier 2003, les parties sont tenues de respecter un délai pour mettre le dossier en état. En effet, entre la signification de

l'acte introductif d'instance et la mise en état, il ne peut s'écouler plus de 180 jours, exception faite des matières familiales où le délai est porté à un an.

> Durant cette période de 180 jours ou d'un an, les parties doivent convenir d'un commun accord d'un certain nombre de points procéduraux, par exemple s'il y aura ou non des moyens préliminaires (moyen déclinatoire, moyen dilatoire, moyen de non-recevabilité) et le délai dans lequel ils devront être présentés, le délai de production de la défense et éventuellement de la réponse. La seule incidence que peut avoir la médiation judiciaire est de permettre au juge médiateur, s'il le trouve nécessaire, de modifier ces délais, en ne dépassant toutefois pas le délai de rigueur de l'article 110.1 C.p.c., cela va sans dire (Guillemard 2012).

Le fait de recourir à des séances de Conférence de Règlement à l'Amiable ne permet ni d'interrompre, ni de suspendre l'écoulement de ces délais (C.p.c.). En fait, cela n'est pas vraiment choquant dans la mesure où la Conférence de Règlement à l'Amiable est un processus de courte durée, généralement de l'ordre de quelques heures.

En outre, contrairement à la règle prévue en droit français, le recours à la médiation judiciaire n'a aucun impact sur la prescription, peut-être là aussi parce que sa durée se compte plus en heures qu'en jours.

Fin de la Conférence de Règlement à l'Amiable

Échec de la Conférence de Règlement à l'Amiable

Si les parties ne sont pas parvenues à un accord, l'action judiciaire continue son cours, sans intervention ou divulgation d'aucune sorte de la part du juge médiateur. Le secret de ce qui a été dit au cours de la médiation s'étend également aux parties.

Est-ce dire que ce temps de médiation non aboutie durant le cours de l'action en justice a été vain ? Sur le plan judiciaire, la réponse est négative puisque si les parties le désirent, la séance de médiation pourra tenir lieu de conférence préparatoire, prévue à l'article 279 C.p.c. Cette conférence, tenue peu avant le procès, est une rencontre entre le juge chargé du dossier et les avocats et dont l'objet est principalement de trouver « les moyens propres à simplifier le procès et à abréger l'enquête ». Il est en effet des cas où la médiation judiciaire a permis de dégager les points essentiels du litige, d'écarter des questions non réellement pertinentes, de séparer le bon grain de l'ivraie. Pour éviter la multiplication des procédures, ce qui a des impacts négatifs en termes de temps et d'argent aussi bien pour les justiciables que pour l'administration de la justice, autant récupérer les échanges qui peuvent être utiles.

Réussite de la Conférence de Règlement à l'Amiable

En revanche, si les parties sont parvenues à un accord grâce à la médiation, il n'y a évidemment plus lieu de poursuivre le litige, de continuer la procédure judiciaire. Cet accord entre elles constitue, comme le dit l'article 151.22 C.p.c., une « transaction ». Rappelons qu'aux termes du *Code civil du Québec* et de son article 2631, « [l]a transaction est le contrat par lequel les parties préviennent une contestation à naître, terminent un procès ou règlent les difficultés qui surviennent

lors de l'exécution d'un jugement, au moyen de concessions ou de réserves réciproques ».[10] Étant à la fois de nature contractuelle et juridictionnelle, la transaction lie les parties et a l'autorité de la chose jugée. Comme le prévoit l'article 151.22 C.p.c., si nécessaire, pour être exécuté de force, l'accord conclu à la fin de la Conférence de Règlement à l'Amiable devra être homologué par un juge (C.c.Q.). Quel juge ? Celui qui a présidé la médiation ou un autre ? Pour le moment, personne n'a répondu à cette question laissée sans réponse dans le Code mais rien ne s'oppose, semble-t-il à ce que « l'une ou l'autre des options soit possible » (Guillemard Menétrey 2011).

À noter que la demande d'homologation de l'accord final de la médiation est présentée, sur le plan procédural, par requête introductive d'instance (C.p.c.), comme toute autre demande en justice ordinaire. Ici, l'intervention du magistrat est plus que limitée puisqu'il n'a pas à se prononcer sur le fond de l'affaire ni sur les termes de l'entente :

> Le juge doit [. . .] en général se limiter à entériner l'entente écrite, et ce, en dépit du fait qu'il la considère comme injuste. Le tribunal n'est pas compétent pour ajouter des conditions implicites à une entente claire. Il doit cependant s'assurer que l'entente reflète l'intention des parties.
>
> Il n'y a pas de place dans la procédure d'homologation pour un jugement de valeur du juge sur le bien-fondé des prétentions des parties ou des sacrifices mutuellement consentis. L'homologation donne accès au contrôle par le tribunal de la légalité, et non de l'opportunité ou de l'équité de leur règlement (Latulippe 2012).

Droit International Privé

Ici, nous répondons à la question suivante : la médiation judiciaire peut-elle se dérouler au Québec, alors que le dossier ou la dispute est « internationale » ? Comme tout différend, le problème peut opposer deux personnes relevant d'ordres juridiques distincts. Le dossier comportant ainsi un élément d'extranéité, il déclenchera la logique du droit international privé. Au Québec, où cette matière est codifiée, les règles sont contenues au Livre X du *Code civil du Québec*. Si, en vertu des règles de rattachement juridictionnel, parfois appelées règles de conflits de juridictions, l'autorité québécoise est compétente,[11] les parties pourront sans difficulté avoir recours à la médiation judiciaire encadrée par le *Code de procédure civile* du Québec puisque la procédure est soumise à la *lege fori* (C.c.Q.). Par conséquent, même si l'une des parties relève d'un ordre juridique qui ignore le processus, les parties pourront tenter de régler leur difficulté par ce biais.

Une fois homologué par le juge, l'accord issu de la médiation devrait sans difficulté pouvoir être reconnu et exécuté à l'étranger selon les règles locales de reconnaissance des décisions étrangères[12] puisqu'il aura été transformé ainsi en jugement québécois.

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[10] Un auteur dit que « [l]'homologation vien[t] alors dorer d'une auréole judiciaire la transaction intervenue » (Hélène 1997).

[11] Par exemple, si le domicile du défendeur est au Québec (C.c.Q.).

[12] Voir le développement sur le sujet *infra*, p. 35.

Efficacité

Dans son rapport d'activités produit en 2010, la Cour supérieure fait le bilan de la Conférence de Règlement à l'Amiable relevant de sa compétence. Ce rapport indique qu' « [e]n 2008–2009, plus de 1 100 dossiers ont fait l'objet d'une conférence de règlement » (Cour supérieure du Québec 2010)[13] et qu'environ 80 % des dossiers ainsi traités ont été couronnés de succès. On peut peut-être rester perplexe devant un tel succès et non pas simplement conclure aveuglément au succès indéniable de ce mode de règlement des différends. Il y a certainement lieu de se demander comment et pourquoi sur 100 dossiers destinés initialement à être réglés par voie judiciaire, donc théoriquement cherchant à faire valoir des droits, une quantité très importante d'entre eux trouve une solution d'un tout autre ordre, notamment fondée sur le dialogue plutôt que l'adjudication et dans une très grande mesure en tout cas, s'éloignant du discours juridique.

> Peut-être qu'une des raisons en est que trop de demandes en justice se trouvent inutilement sur les rôles des tribunaux, n'étant pas fondamentalement de l'essence de celles qui relèvent du judiciaire [. . .]. En réalité, il est possible que ce chiffre démontre plutôt qu'au départ, toutes ces affaires ainsi réglées par la médiation avaient emprunté la *mauvaise voie*. Il n'est pas exclu de croire que sur l'ensemble de ces affaires réglées par la médiation, une très grande majorité d'entre elles l'aurait été exactement de la même façon en choisissant dès le départ le bon véhicule (Guillemard 2012).[14]

La Conférence de Règlement à l'Amiable est-elle réellement une « médiation », autrement dit un mode de résolution des litiges *amiable*, *en dehors du droit* ? On peut en douter, notamment en raison de la figure hautement judiciaire du magistrat qui la dirige et, ce qui est lié à cela, de l'éventuelle intervention du droit, de la règle juridique dans la négociation (Guillemard 2012).

Le Code de 2015

Étant donné la volonté du gouvernement – des gouvernements qui se succèdent – très clairement exprimée d'inciter les justiciables à recourir à des modes non judiciaires de règlement des différends, on ne s'étonnera pas que le Code de 2015 reconduise la médiation judiciaire. Le texte reproduit, en moitié moins d'articles, l'état actuel des choses, peut-être pas à la lettre mais clairement son esprit.

Il y a lieu de noter une différence mais qui, à notre avis, n'est qu'un choix d'organisation générale des règles contenues au Code : l'immunité du juge médiateur n'est plus expressément indiquée au sein des articles couvrant la matière. Il y a tout lieu de croire que le législateur a considéré qu'ayant inscrit le principe de l'immunité de la magistrature dans les principes généraux au début du Code, il

[13] On pourra également lire l'enquête menée à la demande du ministère de la Justice sur le sujet. Bien qu'un peu ancienne – elle date de 2008 –, elle fourmille de renseignements intéressants et de données encore pertinentes (Ministère de la Justice 2008).

[14] (italiques dans le texte original).

était inutile de le répéter plus loin.[15] Toutefois, nous voyons une légère difficulté avec cette question dans la mesure où cet article fait partie des « principes de la procédure applicable devant les *tribunaux de l'ordre judiciaire* » (Code de 2015). Or, par définition et, espérons-le, dans l'esprit du législateur et dans celui des magistrats, un juge médiateur n'est pas assimilable à un « tribunal de l'ordre judiciaire »

2.2.1.2 En Appel

Le *Code de procédure civile* québécois donne également aux parties la possibilité d'avoir recours à une Conférence de Règlement à l'Amiable dans le cadre d'un appel.

La procédure, les conditions et l'issue sont réglées en un article, l'article 508.1 C.p.c. qui synthétise l'esprit et la lettre des dispositions prévues pour la première instance aux articles 151.14 à 151.23 C.p.c. Il y a tout lieu de croire qu'en cas de silence de l'article 508.1 C.p.c. sur un sujet donné, il faille s'en remettre aux règles ayant cours en première instance.

La différence majeure entre les deux niveaux de juridiction porte sur l'effet du processus de médiation sur la procédure judiciaire en termes temporels. Alors que, souvenons-nous-en, en première instance, cette dernière suit son cours, sauf intervention expresse du juge médiateur en ce sens, en appel, le dépôt d'une demande de Conférence de Règlement à l'Amiable « suspend les délais impartis au présent titre » (C.p.c.).[16] Tout est donc suspendu le temps que se déroule la médiation judiciaire.[17]

2.2.2 La Médiation Extrajudiciaire

2.2.2.1 La Médiation en Matière Familiale

Description et Encadrement

D'abord instaurée comme « projet-pilote mis au point par les services d'expertise psychosociale rattachés à la Cour supérieure » (Noreau 2004),[18] la médiation en matière familiale est introduite en 1997 dans le *Code de procédure civile* (*Loi instituant au Code de procédure civile la médiation préalable en matière familiale et modifiant d'autres dispositions de ce code* 1997) qui y consacre une douzaine

[15] Code de 2015, art. 9, al. 3.

[16] Le « présent titre » dont il est question est le titre II du Livre III du *Code de procédure civile* et qui contient toutes les règles régissant l'appel.

[17] On ne note aucune différence dans le Code de 2015.

[18] Pour des explications sociologiques sur l'émergence et le succès de ce mode de résolution des différends en matière familiale, lire ce texte.

d'articles. En réalité, le *Code de procédure civile* traite de tout sauf de la médiation elle-même, c'est à dire, comme nous le signalerons plus loin, qu'il oblige à *envisager* la résolution du différend par la médiation, qu'il indique que cela se fait par le biais d'une séance d'information sur la médiation et qu'il précise que les coûts d'un certain nombre de séances sont pris en charge par le Service de médiation familiale, autrement dit par le ministère de la Justice du Québec.

Ce mode de résolution des différends en matière familiale vise de permettre aux conjoints avec enfants et qui se séparent de pouvoir des décisions sur divers plans – questions liées à la garde, questions économiques – en bonne intelligence. Elle vise en effet à couvrir tous les aspects de la rupture, qu'ils soient psychologiques ou matériels. Contrairement aux couples sans enfants, il est vital pour l'avenir de tous que la facette communicationnelle du couple formé par les parents soit maintenue dans la meilleure santé possible puisque les deux parents vont avoir à se parler, à échanger au sujet des enfants et ce, pendant plusieurs années. Au-delà des questions purement juridiques, on pourrait presque dire « à la place » de ces sujets, ils ont à apprendre à communiquer dans un nouveau contexte. La difficulté n'est pas tant de savoir *de quoi* parler que de *comment* le faire. On peut également penser que la médiation contribue à la « dédramatisation » (Théry 1992) de la situation, pour reprendre le terme d'Irène Théry, sociologue du droit.

La plus grande originalité des dispositions du *Code de procédure civile* à ce sujet ne repose pas tant sur les prescriptions liées aux séances de médiation que sur ce qui les précède.

En effet,

> aucune demande mettant en jeu l'intérêt des parties et celui de leurs enfants ne peut être entendue par le tribunal, lorsqu'il existe entre les parties un différend relativement à la garde des enfants, aux aliments dus à une partie ou aux enfants ou au patrimoine familial et aux autres droits patrimoniaux résultant du mariage ou de l'union civile, à moins que les parties n'aient préalablement participé à une séance d'information sur la médiation et qu'une copie du rapport du médiateur ou, le cas échéant, d'une attestation de participation n'ait été produite au moment de l'audience (C.p.c.).

C'est dire que, en règle générale, la porte du tribunal québécois restera définitivement fermée tant que les parties concernées n'ont pas participé, non pas à des séances de médiation mais à une *d'information* séance sur la médiation. En d'autres termes, les personnes sur le point de saisir un juge dans le cadre d'une séparation doivent être informées de l'existence d'une méthode non judiciaire de résolution des différends qui pourrait leur permettre d'aboutir aux mêmes fins qu'un procès.

Ce faisant, le législateur respecte l'esprit fondamentalement volontaire de ce mode de résolution des différends. Il serait tout à fait contradictoire de chercher à imposer à des personnes une démarche reposant sur leur seule volonté[19] !

[19]Une exception toutefois à cette affirmation, prévue à l'article 815.2.1, al. 1 C.p.c. Non pas avant mais une fois la procédure judiciaire entamée, le juge peut obliger les parties à recourir à la médiation familiale.

Quatre articles du *Code de procédure civile* portent sur cette information préalable et ses deux issues possibles : soit les parties ne sont pas intéressées par ce mode de règlement des différends, auquel cas elles peuvent saisir un juge, le rapport du médiateur ayant tenu la séance d'information faisant foi de l'exigence prévue à l'article 814.9 C.p.c., soit les personnes souhaitent procéder par elles-mêmes, en dehors du cadre judiciaire et elles se tournent alors vers la médiation. Celle-ci est brièvement envisagée par deux articles, tout à fait suffisants pour établir le cadre légal du processus.[20] L'article 814.7 C.p.c. indique qui assiste ou peut assister à la médiation et le suivant codifie la liberté essentielle en la matière, soit celle de se retirer du processus de médiation sans avoir à se justifier. Le Code prévoit en outre la gratuité d'un certain nombre de séances de médiation,[21] ce qui constitue évidemment un incitatif. Cela ne signifie pas que toutes les questions seront résolues au cours de ces séances, la pratique démontre même généralement le contraire, mais cela soulage financièrement d'autant les intéressés tout en les initiant à cette méthode.

Le Médiateur

Dans le cadre de la médiation familiale, les parties n'ont pas l'entière liberté de choix en ce qui concerne la personne du médiateur. En effet, selon le *Règlement sur la médiation familiale*, le tiers qui agit à ce titre doit faire partie de l'une des catégories professionnelles énumérées à l'article 1 et en outre, doit être accrédité selon les prescriptions du même Règlement.[22] Les professions envisagées ne sont pas particulièrement liées au droit. En effet, en dehors des avocats et des notaires, peuvent être médiateurs les membres

> de l'Ordre professionnel des conseillers et conseillères d'orientation du Québec, de l'Ordre des psychologues du Québec, de l'Ordre professionnel des travailleurs sociaux et des thérapeutes conjugaux et familiaux du Québec ou de l'Ordre professionnel des psychoéducateurs et psychoéducatrices du Québec ou être un employé d'un établissement qui exploite un Centre de protection de l'enfance et de la jeunesse au sens de la Loi sur les services de santé et les services sociaux (chapitre S-4.2) et, dans ce dernier cas, satisfaire aux conditions nécessaires pour être admissible à l'un des ordres professionnels ci-dessus mentionnés (*Règlement sur la médiation familiale*).

[20]En réalité, ils sont complétés par les articles 827.2–827.4 C.p.c. qui contiennent des détails sur les exigences d'accréditation pour le médiateur, le contenu de son rapport, etc.

[21]Le nombre de séances ainsi que le tarif des honoraires des médiateurs accrédités à cette fin sont fixés par règlement (voir *Règlement sur la médiation familiale*). Actuellement la durée prise en charge par le gouvernement est de 5 heures, 2 h30 dans certains cas comme les demandes de révision. Le futur *Code de procédure civile* comporte le même principe, voir Code de 2015, art. 619.

[22]Pour prendre connaissance des conditions d'accréditation des médiateurs familiaux, voir EUCALOI.QC.CA 2013. À titre informatif, signalons qu'au 1er janvier 2010, on comptait 930 médiateurs familiaux inscrits sur la liste des médiateurs agréés par le ministère de la Justice, voir COAMF 2012.

Pour obtenir l'accréditation, le Règlement impose à ces personnes de suivre une « formation de base de 60 heures en médiation familiale ». Les soixante heures sont ainsi réparties : 15 heures sont consacrées à la fois aux « aspects économiques, légaux et fiscaux », 15 heures portent sur « les aspects psychologiques et psychosociaux » de la séparation. À cela s'ajoutent 24 heures sur la technique même de la médiation et sa déontologie et 6 heures servent à sensibiliser les futurs médiateurs aux questions de la « violence intra-familiale ».

Rien n'interdit aux candidats ou aux médiateurs ainsi formés de poursuivre en approfondissant les matières par 15 h sur la « médiation et sur la négociation » et

> 30 heures sur les sujets complémentaires à la formation universitaire du demandeur ; dans le cas d'un médiateur dont la formation est de nature psychologique ou psychosociale, ces heures porteront sur les aspects économiques, légaux et fiscaux et dans le cas d'un médiateur dont la formation est de nature juridique, ces heures porteront sur les aspects psychologiques et psychosociaux (*Règlement sur la médiation familiale*).

C'est l'organisme accréditeur qui « doit organiser » les cours, sans les dispenser lui-même, du moins sans obligation dans ce sens.

Toujours pour obtenir l'accréditation, le médiateur doit

> s'engager à compléter, dans les 2 ans de l'accréditation, 10 mandats de médiation familiale sous la supervision d'un médiateur accrédité qui a complété 40 mandats de médiation familiale et à suivre dans ce délai une formation complémentaire de 45 heures en médiation familiale. Cette formation doit être suivie après l'accréditation du médiateur (*Règlement sur la médiation familiale*).[23]

La fin de la Médiation et les Documents Qui en Résultent

Nous avons mentionné qu'en matière de Conférence de Règlement à l'Amiable, soit de médiation judiciaire, le code qualifiait très classiquement de « transaction » l'accord intervenu entre les parties. À l'inverse, et de façon un peu surprenante, il reste muet sur la fin de la médiation familiale. Tellement muet qu'il ne la désigne même pas, ne lui attribue pas un nom. Le *Règlement sur la médiation familiale* en parle une fois et le désigne comme le « résumé des ententes ». Le *Comité des organismes accréditeurs en médiation familiale* (COAMF) désigne ainsi « le document final du processus de médiation » en expliquant que ce document est somme toute un outil de travail qui sera éventuellement complété, peaufiné mais qui, en aucun cas, ne peut prétendre à un statut juridique. Il fait « état des consensus des conjoints/parents quant aux objets soumis à la médiation » (COAMF 2012).

En fait, « [l]e résumé est distinct de la convention devant être présentée aux instances judiciaires pour être entérinée » (COAMF 2012). Étant donné l'objet de ce document, il nous semble que le choix du terme « résumé » n'est pas indiqué car il

[23]Le Règlement impose de façon assez détaillée le type et la nature des 10 mandats mentionnés ci-dessus.

a un côté réducteur peu approprié en l'espèce. Le terme « projet » reflèterait mieux l'essence du document. D'ailleurs, pourquoi ne pas parler plus simplement et de façon plus réaliste d' « entente entre les parties », terme sans connotation juridique ? L'accord intervenu entre les parties avec l'aide du médiateur n'est qu'un premier pas vers une solution finale et il n'acquerra un statut juridique qu'au terme d'un processus qui passe par la « rédaction du projet de convention que prépare [un] juriste aux fins du dépôt devant les instances judiciaires ou aux fins de règlement entre les conjoints/parents » (COAMF 2012).

Si l'on se doute que l'issue malheureuse de la médiation mène au procès, qu'en est-il de l'issue heureuse ? La fin souhaitée de l'exercice est l'accord entre les personnes impliquées et il est non seulement intéressant mais vital, pourrions-nous dire, de comprendre comment le droit le perçoit, le qualifie, quelle valeur il lui attribue, etc. Comme nous l'avons mentionné, au Québec, ce n'est pas clair. Cette lacune est plutôt embarrassante. Cet accord est-il de nature contractuelle ou non ? Si oui, s'agit-il du contrat nommé qu'est la transaction, comme le prévoit l'article 2631 du *Code civil du Québec* ?

Au terme d'une étude sur la médiation judiciaire, une auteure souligne la différence entre les deux types d'accords, celui conclu à la fin de la médiation judiciaire et celui conclu en matière de médiation familiale : « il semble qu'en matière familiale le règlement qui interviendrait ne puisse être qualifié de transaction compte tenu du caractère indivisible de la transaction. On parlera davantage d'une entente ou d'une convention, *mais l'effet est le même* » (Latulippe 2012).[24]

Personnellement, nous voyons mal le fondement de la distinction de la qualification entre les deux types d'accords, celui parvenu au terme du processus mené par un magistrat et celui, extrajudiciaire, en matière familiale. Les reproches adressés à ce dernier pour le qualifier de transaction, en particulier indivisibilité, absence de concessions réciproques, nous semblent pouvoir être tout autant destinés à la Conférence de Règlement à l'Amiable.

Cet accord en matière familiale pourrait être qualifié par les parties elles-mêmes de transaction, le silence du législateur ne l'interdisant pas. Cependant, comme pour tout acte juridique, la désignation ou la dénomination par les parties n'est pas forcément exacte ou ne reflète pas parfaitement la réalité et surtout, ne lie aucunement le juge. Par conséquent, celui-ci peut toujours requalifier l'entente intervenue entre les parties.

Mentionnons que, à la fin du processus, le médiateur de son côté fait rapport au ministère de la Justice du Québec.

Les Normes de Pratique

On l'aura compris, il n'existe pas actuellement au Québec de réel encadrement normatif de la pratique de la médiation familiale. Les personnes pratiquant la médiation familiale sont soumises aux codes de déontologie de leur ordre professionnel mais

[24](nos italiques).

dans la majorité des cas, ceux-ci sont muets sur le sujet qui nous occupe. C'est pour cette raison que le COAMF a élaboré un *Guide de normes de pratique en médiation familiale*, dont la dernière édition date de 2012. Ces « normes » n'ont en réalité aucune valeur juridique mais visent uniquement à « oriente[r] [. . .] l'exercice professionnel » (COMAF 2012) des médiateurs familiaux. Cependant, on sait que l'autoréglementation en milieu professionnel a un certain poids, surtout en cas de lacune étatique dans le domaine.

Les « normes » dont nous parlons ici « régissent les relations entre les médiateurs, les comédiateurs, les superviseurs, leurs clients, leurs collègues, les officiers de justice, les autres intervenants aux dossiers et le public en général » (COMAF 2012). Elles encadrent la conduite des médiateurs, leurs devoirs, les conditions de leur rémunération. Elles prévoient la convention de médiation qu'elles désignent « contrat de médiation » et qui lie les parties et le médiateur et par lequel, notamment, les premières renoncent à entreprendre des procédures judiciaires ou s'engagent à les suspendre, si elles se sont déjà engagées dans cette voie. Ce guide décrit également le « résumé des ententes de médiation » qui « constitue le document final du processus de médiation en faisant état des consensus des conjoints/parents quant aux objets soumis à la médiation » (COMAF 2012). Il précise : « Le résumé est distinct de la convention devant être présentée aux instances judiciaires pour être entérinée ». Exprimons là la même réserve que celle déjà exprimée quant à la dénomination de ce document entérinant l'accord des parties et, par-delà la question linguistique, sa nature. Le « résumé » en question ne constitue pas dans l'esprit des personnes qui réfléchissent et statuent sur la médiation un instrument final. Il est un « outil de travail » (COMAF 2012). En d'autres termes, en réalité, le processus n'est pas terminé. On pourrait dire que malgré la fin de la médiation, les parties ne sont pas soulagées. Au contraire, elles doivent poursuivre des démarches, notamment continuer à réfléchir au différend et à son éventuelle solution en lisant et relisant le résumé, soumettre le résumé à un juriste pour avis, et faire rédiger par ce dernier ce qui sera l'entente « finale » à partir du résumé « aux fins du dépôt devant les instances judiciaires ou aux fins de règlement entre les conjoints/parents » (COMAF 2012). D'ailleurs, fait important à souligner, seul le médiateur y appose sa signature: « Le médiateur ne doit pas faire signer le résumé par les conjoints/parents, ni laisser aucun espace sur le résumé où ils pourraient y apposer leur signature. Le médiateur doit inclure un avertissement [. . .] la nature et la portée du document, ainsi que les risques que sa signature ou sa mise en application ferait courir aux conjoints/parents » (COMAF 2012). Le Guide encadre de façon très détaillée le contenu et la forme du résumé.

Le Code de 2015

La médiation familiale peut presque être qualifiée d'institution « traditionnelle » dans le droit judiciaire québécois contemporain, datant, comme nous l'avons indiqué, d'une bonne vingtaine d'années et personne n'a jamais mis en doute son bien-fondé et son efficacité. Le Code de 2015 reprend donc les règles à son égard, sans réel changement, semble-t-il.

Le processus est encore découpé en deux étapes, la médiation elle-même précédée de l'information obligatoire des conjoints sur l'existence de la médiation (Code de 2015), par le biais d'une séance – uniquement collective, dorénavant mais à laquelle les conjoints ne sont pas obligés d'assister en même temps –. Faute d'assistance à cette séance, les conjoints ne pourront pas être entendus par un juge.[25] On parle toujours de dossiers où l'intérêt de l'enfant est en jeu. À noter que les séances préalables portent, outre sur la médiation, sur « la parentalité », dont on ne sait pas trop ce que le terme désigne. Le législateur a prévu que la séance d'information soit donnée par « deux médiateurs accrédités [. . .] dont un seul doit être juriste » (Code de 2015). Il y a tout lieu de croire et d'espérer que l'autre médiateur sera spécialiste de la « parentalité ».

Autant le Code actuel est disert sur la suite de la séance d'information, autant le Code de 2015 est laconique. La seule chose concrète qu'il exprime est que les parties reçoivent une attestation de participation. Peut-être est-il évident que les parents convaincus par l'aide dont ils pourraient bénéficier avec des séances de médiation choisiront cette voie alors que les autres se tourneront vers le tribunal.

Les nouvelles règles établissent expressément ce qu'il advient du déroulement de la procédure judiciaire à l'occasion de laquelle les parties choisissent d'avoir recours à la médiation familiale et, de façon plus générale, sont explicites en ce qui a trait aux délais dans un cadre pareil. D'abord, en vertu d'un pouvoir discrétionnaire, « le tribunal peut suspendre l'action ou ajourner l'instance pour une période d'au plus trois mois » (Code de 2015).[26] De plus, la première séance de médiation doit avoir lieu au plus tard 20 jours après que le tribunal ait décidé de la suspension de l'instance pour cause de médiation (Code de 2015).

La médiation familiale en cours d'instance prend fin par la production « au registre du tribunal » du rapport du médiateur. Le texte du Code ne dit pas formellement ce qu'il advient de ce rapport ou du moins quel en est l'effet, en dehors du fait que le juge initialement saisi de la poursuite judiciaire se voit remettre le dossier des parties grossi du rapport afin de fixer la date de l'instruction (Code de 2015).

[25] Contrairement à l'article 814.11 C.p.c. actuel, il ne semble y avoir aucune exception à l'obligation d'information préalable. Cette étude n'est pas le cadre idoine mais il faut certainement s'Interroger sur l'impossibilité faite ainsi à des justiciables à d'avoir accès à leur « juge naturel », le juge étatique . . .

[26] Il ne faut toutefois pas oublier le délai de rigueur prévu par l'article 173 et qui impose aux justiciables de procéder à la mise en état du dossier dans l'année du début de l'institution des procédures en matière familiale. Il n'est pas déraisonnable de penser que si le juge a accordé un ajournement de trois mois pour la tenue d'une médiation, cela constituera l'un des rares cas prévus d'autorisation de prolongation du délai.

2.2.2.2 La Médiation en Matière de Petites Créances

Le droit judiciaire québécois opère une distinction, en termes de compétence et de règles de procédure, entre les litiges de peu d'importance sur le plan monétaire, et les autres. Les premiers, dont le plafond maximal est de 7 000 dollars, relèvent de la compétence de la Cour du Québec, division des petites créances.[27]

Lorsqu'un demandeur intente une poursuite dans ce cadre, le défendeur a plusieurs options, dont demander la tenue d'une médiation (C.p.c.). Le recours à ce mode de résolution des différends peut également être proposé par le greffier aux parties dès que possible, en vertu de l'article 973 C.p.c., qui contient d'ailleurs tous les éléments sur la question.[28]

La médiation, version petites créances, est faite par un médiateur relevant du service de médiation de ce tribunal, le médiateur étant alors un avocat ou un notaire accrédité comme médiateur par son ordre professionnel. On retrouve dans l'article 973 C.p.c. la règle de l'étanchéité entre la médiation et l'audience judiciaire en vertu de laquelle ce qui a été dit ou produit dans le cadre de la première ne peut se retrouver dans la seconde.

À noter, la durée de la médiation envisagée par l'article 973 C.p.c. est très courte, vraisemblablement, dans un souci de proportionnalité avec l'objet du litige. Le code parle en effet de « *la* séance de médiation ».[29]

Ce qui est très intéressant ici est que lorsque la médiation aboutit à une entente, celle-ci doit être déposée au greffe et par la suite, elle sera « entérinée par le juge ou le greffier et équivaut alors à jugement » (C.p.c.). Cela la distingue de l'entente en matière familiale dont on se sait ce qu'elle est et de l'entente selon le Code de 2015 dont on apprend clairement qu'elle n'aura pas de nature juridictionnelle.[30] Cette entente acquiert donc un statut plus officiel qu'une transaction, comme celle qui intervient à la suite d'une Conférence de Règlement à l'Amiable et qui, par conséquent, elle, a éventuellement besoin d'une étape supplémentaire, l'homologation, pour valoir jugement.[31]

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[27] Nous ne ferons pas de développement particulier sur ce que prévoit le Code de 2015 sur le sujet car, en dehors du montant de la réclamation donnant compétence à ce tribunal, qui passera à 15 000 dollars, les articles portant sur la médiation, 547, al. 2 (1) et 556, sont sensiblement identiques aux dispositions actuelles.

[28] Il ne ressort pas très clairement de la lecture des articles 965, al. 2 (1) et 973 C.p.c. si, quand le défendeur souhaite soumettre le différend à la médiation en vertu du premier article, il s'agit automatiquement de celle prévue dans le deuxième. La logique semble indiquer que oui.

[29] (nos italiques).

[30] Pour la première, voir *supra* p. 17, pour la seconde voir *infra* p. 33.

[31] Voir *supra* p. 12.

2.2.2.3 La Médiation Extrajudiciaire en Matière Civile et Commerciale

État Actuel

Vide Juridique

Bien qu'étant incontestablement un mode de résolution des différends utilisé par certains citoyens, la médiation extrajudiciaire ne fait l'objet d'aucun encadrement législatif au Québec actuellement.

Même si la médiation et l'arbitrage se déroulent tous les deux en dehors des murs du Palais de justice, ces modes de résolution des différends se distinguent par les rôles éminemment différents du médiateur et de l'arbitre. Alors que le premier ne fait que guider les personnes impliquées vers une solution qui émanent d'elles en fin de compte, le second est apparenté à un juge privé dans la mesure où il impose sa solution.[32] Cependant, ces moyens d'apaisement social ont un point commun dans la mesure où ils constituent, très généralement, des modes volontaires et surtout « privés » de résolution des différends. En effet, ils n'utilisent aucune ressource étatique et n'existent, si l'on peut dire, que par le bon vouloir et l'argent des intéressés. C'est pour cette raison que ces deux services aux citoyens sont parfois offerts sous un même toit, gérés par une même entité.

Ainsi, au Québec, l'Institut de médiation et d'arbitrage du Québec (IMAQ) « est dédié au développement et à l'utilisation extensive de méthodes de prévention et de règlement des différends. Sa mission en est une [*sic*] de service et d'éducation. L'IMAQ est le principal organisme sans but lucratif au Québec à regrouper des tiers impartiaux qualifiés qui agissent comme facilitateurs, médiateurs ou arbitres. » (Institut de médiation et d'arbitrage du Québec). Les médiateurs liés à cet institut sont « accrédités ». Cela signifie, toujours aux termes des règles internes de ce regroupement, que les personnes doivent être membres d'un ordre professionnel désigné et doivent avoir suivi une formation *ad hoc* d'au moins 40 heures (Institut de médiation et d'arbitrage du Québec). Une université québécoise[33] dispense une formation de médiateur qui, bien sûr, vaut pour l'accréditation au sein de l'IMAQ. Plusieurs autres organismes ont leurs propres « normes » pour délivrer des accréditations, par exemple le Barreau du Québec ou l'Institut d'arbitrage et de médiation du Canada.

Le programme de « formation » des médiateurs, leurs droits et obligations, la tenue et le déroulement des séances de médiation, etc. est entièrement laissé au libre choix des organismes accréditeurs ou des « écoles » qui dispensent la formation. Actuellement, il n'y a donc à proprement parler aucun encadrement juridique particulier pour ce processus de règlement des différends. Bien sûr, comme pour toute activité humaine, le droit commun veille! Les règles portant sur la responsabilité civile et celles sur la responsabilité contractuelles peuvent éventuellement intervenir.

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[32] Sans même parler du fait que dans le cas de la médiation, la solution n'est pas « juridique » alors qu'elle l'est dans celui de l'arbitrage.

[33] Université de Sherbrooke.

Actuellement, contrairement à ce qui se passe avec la médiation familiale, on ne peut pas dire que les médiateurs conventionnels soient régis par quoi que ce soit, même du *soft law*. L'IMAQ, sur la page d'accueil de son site Web, donne un certain nombre de renseignements, allant des avantages de ce mode amiable de résolution des différends au déroulement de la médiation en passant par la convention de médiation et les honoraires du médiateur. Le site de l'institut présente également un code d'éthique, le tout sans grande valeur juridique . . .

Force est donc de constater, sans regret aucun d'ailleurs, qu'en dehors d'encadrement juridique particulier, le droit commun va s'appliquer à toutes les facettes du processus de la médiation et des relations qu'il implique.

La Clause de Médiation

En commençant par le commencement, soit l'acte qui énonce la volonté de recourir à la médiation, il y a tout lieu de croire que la « convention de médiation » peut être comparée *mutatis mutandis* à une « convention d'arbitrage ». En droit québécois, il s'agit d'un contrat nommé encadré par les articles 2638 à 2642 C.c.Q. L'article fondamental, l'article 2638 C.c.Q., définit ainsi cette convention : « La convention d'arbitrage est le contrat par lequel les parties s'engagent à soumettre un différend né ou éventuel à la décision d'un ou de plusieurs arbitres, à l'exclusion des tribunaux ».

Pour ce qui est de la forme des contrats, le droit québécois repose sur le principe du consensualisme, en vertu duquel ils ne sont soumis à aucune forme particulière pour se voir revêtir d'une efficacité *ad validitatem*. Le principe est exprimé à l'article 1385 C.c.Q. Cependant, la loi peut prévoir une forme particulière et c'est d'ailleurs le cas pour le contrat d'arbitrage : « La convention d'arbitrage doit être constatée par écrit » (C.c.Q.). On explique la règle par le fait que le tribunal étatique étant le for naturel des justiciables, se soustraire à sa juridiction demande un acte réfléchi que permet plus l'écrit que l'oral.

Si la clause de médiation intervient à l'occasion d'une opération contractuelle, il nous semble logique qu'on la considère autonome, au même titre que la clause d'arbitrage (C.c.Q.).

En ce qui a trait au fond de la clause, on peut proposer les mêmes limites que celles prévues généralement à l'arbitrage : on ne peut régler par médiation les sujets liés à l'état et la capacité des personnes ni ceux présentant un caractère d'ordre public. Dans le cas de l'arbitrage, le droit québécois interdit d'y avoir recours dans les matières familiales (C.c.Q.).[34] Puisque la médiation familiale est spécifiquement prévue par le *Code de procédure civile*, on pourrait envisager que, sauf cas prévus par la loi, la médiation est interdite en matière familiale. En effet, comme nous l'avons souligné, seules les situations mettant en jeu l'intérêt de l'enfant sont admissibles en médiation. Toute autre question ou différend familial doit être présenté à un juge étatique.

[34]Cela signifie, par exemple, que seul un tribunal étatique peut prononcer un divorce ou statuer sur un régime matrimonial.

L'étude du non-respect d'une clause de médiation doit être envisagée sous deux facettes. En premier lieu, quel serait l'effet de la violation de la clause par une partie sur l'autre partie ? Il y a tout lieu de croire que si l'une de personnes impliquées écartait le recours à la médiation en préférant saisir le tribunal étatique, l'autre pourrait, en théorie, la poursuivre en recherchant sa responsabilité contractuelle puisque « toute personne a le devoir d'honorer les engagements qu'elle a contractés. Elle est, lorsqu'elle manque à ce devoir, responsable du préjudice, corporel, moral ou matériel, qu'elle cause à son cocontractant et tenue de réparer ce préjudice » (C.c.Q.).

Cependant, en pratique, il nous semble que ce serait passablement vain car les dommages sont à la fois difficiles à prouver et forceraient probablement l'application de la maxime de *minimis non curat lex*.

Plus intéressante est certainement la seconde branche de la question, celle de l'efficacité de la clause écartant le recours au tribunal judiciaire sur le tribunal lui-même. Peut-on dire que la volonté des parties lui fait perdre sa compétence ? Cela nous semble difficile à soutenir. Si, avec une clause d'arbitrage, la réponse est positive c'est en raison du pouvoir juridictionnel de l'arbitre, « équivalent », pourrait-on dire, à celui d'un juge étatique. La différence fondamentale entre le mode arbitral et le mode judiciaire est que le premier est privé alors que le second est public mais pour le reste, dans les deux cas, le tiers impose une solution – contraignante – aux parties. La solution est à la fois juridique et externe aux parties. Il en va de façon complètement différente avec la médiation qui est fondamentalement « une maïeutique » (Kessedjian 2013). D'ailleurs, dans l'état actuel du droit judiciaire québécois, on voit mal quel moyen pourrait être invoqué pour faire décliner compétence au juge ainsi saisi. Comme nous venons d'y faire allusion, le moyen déclinatoire est écarté et parmi les moyens de non-recevabilité, aucun ne s'applique à la seule présence d'une clause de médiation (C.p.c.).

La Responsabilité du Médiateur

Toujours en l'absence de normes particulières, en ce qui a trait à la conduite du médiateur lui-même, le droit commun va se charger de le surveiller. En particulier, l'article 1457 C.c.Q. a vocation naturelle à s'appliquer si nécessaire :

> Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposent à elle, de manière à ne pas causer de préjudice à autrui.
>
> Elle est, lorsqu'elle est douée de raison et qu'elle manque à ce devoir, responsable du préjudice qu'elle cause par cette faute à autrui et tenue de réparer ce préjudice, qu'il soit corporel, moral ou matériel.

Le Code de 2015[35]

Présentation Générale

Les doléances adressées au système de justice étatique au Canada et au Québec ne sont pas très originales. Il est trop lent, trop cher, trop complexe, trop souvent

[35] Plusieurs des propos qui suivent sont très largement inspirés de ceux tenus dans Guillemard 2011 et 2012 quand ils ne les reproduisent tout simplement pas.

inaccessible et fait preuve d'indifférence face aux besoins humains des justiciables. D'ailleurs, les citoyens semblent faire de moins en moins confiance au système judiciaire et à ses acteurs. En 2011, 63 % des Canadiens font confiance aux juges, 30 % aux avocats, alors que les pompiers remportent 97 % des suffrages et les ambulanciers 93 % (Léger Marketing). Certains prônent, pour éviter ces inconvénients, d'avoir recours aux modes de PRD, Prévention et Règlement des Différends, dont fait partie la médiation. En recourant à la médiation, les citoyens sont encouragés à adhérer à la philosophie de la « justice participative », soit, pour reprendre l'intitulé d'un rapport de la Commission du droit du Canada, à œuvrer à la « transformation des rapports humains par la justice participative » (Commission du droit du Canada 2003). Ce faisant, la Commission oppose les modes de PRD à la justice traditionnelle, froide, inhumaine et aveugle.

Surfant sur cet élan participatif, on pourrait presque dire sur cette mode pour le participatif,[36] le législateur québécois a décidé d'en faire la promotion pour tenter d'alléger les rôles des tribunaux. Profitant d'un vaste chantier de rénovation du *Code de procédure civile*, il a introduit divers modes de PRD dans le nouveau Code. « Promotion » n'est pas une figure de style puisque les notes explicatives qui précédaient le texte alors qu'il était « projet de loi » indiquaient que ses dispositions permettaient « d'affirmer l'existence des modes privés et volontaires de prévention et de règlement des différends, d'inciter les parties à considérer le recours à ces modes avant de s'adresser aux tribunaux et à coopérer activement dans la recherche d'une solution [...] » (*Loi instituant le nouveau Code de procédure civile*). Par ailleurs, la disposition préliminaire du Code fait ouvertement référence aux « modes privés de prévention et de règlement des différends » et mentionne également « des procédés adéquats, efficients, empreints d'esprit de justice et favorisant la participation des personnes », termes derrière lesquels se profile notamment la médiation.

En outre, le code débute par un titre consacré aux « principes de la procédure applicable aux modes privés de prévention et de règlement des différends », dans un livre, portant lui-même sur « le cadre général de la procédure civile ». C'est dire si l'expression « procédure civile » subit une modification majeure de sens et donc de contenu car pour le moment, elle désigne encore « l'ensemble des règles à suivre et

[36]Dans les sociétés occidentales contemporaines, la participation des citoyens est un maître-mot : « Les citoyens sont appelés, plus, encouragés, à "participer", à prendre une part importante, peut-être même déterminante, dans des décisions, des activités. Les chauffeurs de taxis ne sont plus les maîtres du trajet. Alors qu'il y a encore quelques années, on s'asseyait dans la voiture en ne pensant à rien, maintenant, le chauffeur compte sur son client pour lui indiquer le trajet qu'il préfère. Le client du taxi *participe* à l'élaboration du trajet. Lorsque l'on va chez le dentiste et qu'une dent nécessite une réparation majeure, il n'est pas rare que le dentiste demande si l'on préfère un traitement ou une extraction. Le client du dentiste *participe* à la décision thérapeutique. Sans parler des nombreux comités de parents d'élèves, instaurés maintenant depuis un certain temps et qui ont "pour fonction de promouvoir la *participation* des parents" puisqu'il leur permet de participer à l'accomplissement d'un "but commun, la réussite des élèves" » (Guillemard 2012).

des formalités à accomplir pour *faire apparaître le droit* et en assurer la sanction » (Reid). Le tout premier article du *Code de procédure civile* se lira ainsi:

> Les modes privés de prévention et de règlement des différends sont choisis d'un commun accord par les parties intéressées, dans le but de prévenir un différend à naître ou de résoudre un différend déjà né.
>
> Ces modes privés sont principalement la négociation entre les parties au différend de même que la médiation ou l'arbitrage dans lesquels les parties font appel à l'assistance d'un tiers. Les parties peuvent aussi recourir à tout autre mode qui leur convient et qu'elles considèrent adéquat, qu'il emprunte ou non à ces modes.
>
> [. . .]

À partir de 2015, on peut affirmer que la médiation sera intégrée au système judiciaire étatique par l'insertion des règles la régissant au *Code de procédure civile*.

En ce qui concerne les modes non étatiques de règlement de différends, le Code de 2015, dès son premier article, en prévoit deux autres, aux côtés de la médiation, la négociation et l'arbitrage. Négociation et médiation ont des traits communs dans la mesure où s'ils aboutissent à un résultat satisfaisant, ce résultat émanera des personnes à l'origine opposées par le différend ; médiation et arbitrage ont ceci de commun qu'ils requièrent l'assistance d'un tiers. De plus, ce premier article prévoit, sans que l'on comprenne exactement de quoi il s'agit, que « [l]es parties peuvent aussi recourir à tout autre mode qui leur convient et qu'elles considèrent adéquat, qu'il emprunte ou non à ces modes ». Il pourrait donc y avoir des façons de régler les différends proches cousins de la médiation, sans qu'ils soient *stricto sensu* de la médiation. Bien évidemment, le Code de 2015 reprend les règles sur la médiation judiciaire ou Conférence de Règlement à l'Amiable, introduites dès 2003.[37]

Signalons que comme il s'agit encore du *Code de procédure civile*, les règles ne s'appliquent pas aux domaines spécialisés auxquels nous avons fait allusion plus haut, au début de ce texte. Cependant, il faut noter que dans le nouveau Code, il est prévu qu'en cas de litige entre l'État ou ses organismes et des personnes privées ou publiques, les parties peuvent s'en remettre, avant toute saisine des tribunaux étatiques, aux modes de PRD (Code de 2015).

Terminons cette présentation générale en précisant que le nouveau Code ne fait pas de différence entre différends internes ou différends transnationaux pour ce qui concerne les modes de règlement des différends non adjudicatoires. Cependant, si le problème comporte un élément d'extranéité, certaines difficultés risquent de se soulever. En effet, si les parties impliquées dans un litige souhaitent le faire trancher par un tribunal judiciaire et que le tribunal québécois est compétent par le jeu des règles de rattachement juridictionnel, clause d'élection de for comprise (C.c.Q.), comme la procédure est régie très classiquement par la *lex fori* (C.c.Q.), le juge devra s'assurer que l'article premier alinéa 3 du Code de 2015 aura été respecté : « Les parties doivent considérer le recours aux modes privés de prévention et de règlement de leur différend avant de s'adresser aux tribunaux ». Outre le fait qu'on ne sait pas du tout comment va être interprétée par les tribunaux l'obligation de « considérer »,

[37] Voir *supra*, p. 8.

très nouvelle dans le droit québécois, et quelle preuve devra être apportée de cette disposition d'esprit pour satisfaire le magistrat, on peut se demander comment elle va être accueillie par les parties étrangères.

La Convention de Médiation

Le Code de 2015 légalise le caractère volontaire du recours à la médiation qui repose sur un « commun accord », comme le dit l'article premier.

Le Code de 2015 n'apporte aucune précision par rapport à l'état actuel de la question de la convention de médiation ou n'entraîne pas de modification du droit commun en matière de contrat. Le droit québécois n'imposera aucune condition de forme ou de fond particulière en la matière.

Comme il s'agit d'un contrat ordinaire, qu'adviendra-t-il si l'une des personnes refuse finalement de participer à la médiation prévue ? À notre avis, pas grand chose. D'abord, le Code prévoit, à l'article 614, qu' « [u]ne partie peut, en tout temps, selon sa seule appréciation et sans être tenue de dévoiler ses motifs, se retirer du processus ou y mettre fin ». En d'autres termes, elle peut être délivrée de l'obligation d'honorer les engagements auxquels elle a consenti par la convention de médiation et ce, à n'importe quel stade, même entre son acquiescement à recourir à ce mode de PRD et le début du processus. Aucune responsabilité contractuelle ne peut donc être engagée à cet égard. Ensuite, rappelons que, dans la même situation, elle aura respecté l'obligation faite à l'article premier du code d'avoir « considéré » cette solution.

Liens avec d'Autres Processus de Résolution des Différends

Les délais

Le fait de recourir à la médiation conventionnelle, même dès lors qu'une instance civile a été introduite devant un tribunal québécois, ne modifie en rien la règle incontournable du délai de six mois reconduite dans le Code de 2015.[38] En revanche, l'article 612 du code prévoit que le fait de recourir à la médiation alors qu'une demande est pendante devant un tribunal permet au juge de suspendre l'action aussi longtemps que dure le mode amiable de résolution du litige. Sans toutefois excéder le délai de rigueur de six mois. Et encore faut-il que la loi le permette également.

La clause de médiation a-t-elle une influence sur la prescription ? Dans tous les cas, le droit québécois permet à des parties de convenir de renoncer à la prescription acquise et au bénéfice du temps écoulé. Reprenant les termes mêmes de l'article 2883 C.c.Q., l'article 7 al. 2 permet aux parties de « renoncer à la prescription acquise et au bénéfice du temps écoulé pour celle commencée » et les autorise, en outre, à convenir de suspendre la prescription, à l'avance, le temps que la médiation se déroule mais pour un maximum de six mois. Le Code contient ici une exigence formelle, en obligeant les parties à « convenir [de ceci], dans un écrit qu'elles signent ».

Le recours à d'autres modes de résolution des différends

[38]Pour quelques explications sur le délai, voir *supra* p. 11.

Le fait de choisir la médiation ne peut en aucun cas faire perdre aux justiciables leur droit d'agir en justice, considéré généralement comme un droit fondamental. En revanche, l'exercice de ce droit est-il modifié par la nouvelle philosophie de la procédure québécoise ? Pas automatiquement, pas par le seul effet de la loi mais les parties elles-mêmes peuvent convenir d'y renoncer pendant le processus de médiation, comme l'indique l'article 7 al. 1, sauf si le recours au tribunal est nécessaire à la préservation de leur droit.

Par conséquent, les parties pourraient légalement s'engager en parallèle dans diverses avenues pour tenter de régler le différend, médiation et action judiciaire, par exemple. Comme en droit québécois, ni les règles relatives à la médiation ni celles régissant l'arbitrage ne laissent entrevoir d'exclusivité de chacun de ces modes de règlement des litiges,[39] la même conclusion s'impose, les parties pouvant donc se présenter légalement en même temps devant un médiateur et devant un arbitre.

À notre avis, pour donner toute son efficacité au processus de médiation, les parties auraient intérêt à rédiger une clause de médiation indiquant que tant qu'elle dure, les parties ne peuvent s'adresser ni à un tribunal étatique, ni à un tribunal arbitral, par exemple. En somme, prévoir l'exclusivité de la médiation, du moins, avant de pouvoir s'adresser à un autre forum.

Le Médiateur

Qui peut être médiateur et comment est-il nommé ?

Le Code de 2015 ne change pas beaucoup l'état du droit à cet égard. Il n'indique pas qui peut agir à titre de médiateur. La lecture de l'article 3 permet de conclure qu'il peut s'agir d'une personne rémunérée pour cela ou d'un bénévole, ce qui, comme actuellement, permet le recours à « n'importe qui », un voisin ou un professionnel de la médiation. Contrairement à la matière familiale, comme nous l'avons mentionné, les affaires civiles et commerciales ne nécessitent pas le recours à un médiateur accrédité. Cependant, la lecture de l'article 606 permet de comprendre que le code envisage qu'un médiateur puisse ou non être accrédité, en indiquant au passage que l'accréditation est attribuée « par un organisme reconnu par le ministère de la Justice ». À l'heure actuelle, une recherche sur le Web ne donne pas de renseignements utiles sur le mécanisme de demande d'accréditation et quels sont aujourd'hui les médiateurs accrédités.

Ce sont les parties qui choisissent d'un commun accord le médiateur. Le principe général, énoncé à l'article 3, est repris dans les dispositions spécifiques à la médiation en ajoutant une option : le médiateur peut aussi être choisi « par l'entremise d'un tiers » (Code de 2015).

Obligations et pouvoirs du médiateur

Le Code de 2015 fait plus que poser des principes ou des grandes lignes. Il détaille de façon assez complète les obligations et pouvoirs du tiers qui va aider

[39] En affirmant ceci, nous ne faisons allusion qu'à la famille des modes « amiables » de règlement des litiges. En revanche, il ne peut y avoir simultanéité entre juridiction étatique et juridiction arbitrale (C.p.c. et Code de 2015).

les parties, ainsi que le déroulement de la médiation. On peut s'interroger sur ce choix du législateur québécois qui, ce faisant, enserre dans des règles, pire, dans un Code, un processus qui se distingue originellement par sa souplesse et son absence de formalisme, ce qui constitue d'ailleurs son principal attrait pour les personnes qui se tournent vers lui. Cela fait aussi que le Code se transforme plus, à cet égard en « guide pratique » qu'en un recueil contenant « l'ensemble des règles à suivre et des formalités à accomplir pour faire apparaître le droit et en assurer la sanction » (Reid 2010).[40]

Toujours est-il que le rôle du médiateur, selon le Code, est d'aider « les parties à dialoguer, à clarifier leurs points de vue, à cerner leur différend, à identifier leurs besoins et leurs intérêts, à explorer des solutions et à parvenir, s'il y a lieu, à une entente mutuellement satisfaisante » (Code de 2015).

De façon plus générale, le médiateur aura l'obligation de respecter et faire respecter le principe de proportionnalité, principe qui irrigue la procédure civile québécoise depuis 2003. C'est-à-dire que les parties et les tiers doivent « veiller à ce que les démarches que [les parties] entreprennent demeurent proportionnelles quant à leur coût et au temps exigé, à la nature et à la complexité de leur différend » (Code de 2015).

Comme tous les tiers, le médiateur a aussi le devoir d'agir « avec impartialité et diligence » (Code de 2015) en respectant le principe de la bonne foi. Plus précisément, il « a l'obligation d'agir équitablement à l'égard des parties », notamment en veillant « à ce que chacune d'elles puisse faire valoir son point de vue » (Code de 2015).

Au moment de la conclusion de la médiation, le tiers a l'obligation de s'assurer que toutes les parties comprennent l'entente intervenue (Code de 2015).

L'un des pouvoirs importants du médiateur est celui de mettre fin au processus s'il considère que c'est dans l'intérêt des parties impliquées, c'est-à-dire dans le cas où il est « convaincu que le processus est voué à l'échec ou susceptible de causer un préjudice sérieux à une partie s'il se poursuit » (Code de 2015). Un peu dans le même esprit, sans y mettre totalement fin, le médiateur peut suspendre le processus (Code de 2015), toujours en se fondant sur le meilleur intérêt des personnes engagées.

Si le médiateur contrevient à ses obligations, sa responsabilité sera différente, précise le Code, selon qu'il est un professionnel en la matière ou non. Dans ce dernier cas seulement, il ne pourra être poursuivi que s'il a commis « une faute lourde ou intentionnelle », comme le prévoit l'article 3 al. 2. Pour les autres, il faut croire que les règles habituelles de la responsabilité civile, peut-être également celles de la responsabilité contractuelle pourront jouer en tant que sanctions issues du

[40]Il faut reconnaître que plusieurs articles ne présentent pas un grand intérêt juridique. Pour n'en citer qu'un : « Avant d'entreprendre la médiation, le médiateur informe les parties sur son rôle et ses devoirs et précise avec elles les règles applicables à la médiation et la durée du processus » (Code de 2015). De même, un code de procédure civile est-il le lieu indiqué pour préciser : « Le médiateur peut communiquer avec les parties séparément, mais il est alors tenu de les en informer » ? (Code de 2015).

droit commun. Dans certaines situations, c'est-à-dire lorsqu'il s'agit d'un médiateur accrédité, semble-t-il, le code lui impose de détenir une assurance responsabilité (Code de 2015).

Il n'est pas question, dans le code, d'immunité accordée au médiateur conventionnel, accrédité ou non, contrairement à ce qui est prévu pour le juge médiateur.

L' éthique du médiateur

À ce chapitre, les nouvelles dispositions sont on ne peut plus lacunaires alors qu'elles entendent tracer un portrait assez complet du médiateur et de ses devoirs. L'article 606 al.2 parle de règles déontologiques auxquelles doivent être soumis les médiateurs. Médiateurs accrédités seulement et uniquement dans les cas où il serait question de leur contraignabilité ?

> Pour invoquer le privilège de non-contraignabilité, le médiateur doit être accrédité par un organisme reconnu par le ministère de la Justice ; en outre, il doit être assujetti à des règles déontologiques [. . .].

Pour avoir la réponse à ces questions que ne manque pas de soulever cet article, il faudra attendre de voir ce qu'en disent les magistrats . . .

La collaboration entre le processus de médiation et d'autres modes de résolution des différends

La question est, du moins actuellement tant que le Code de 2015 n'est pas sujet à interprétation, surtout par les tribunaux, assez vite résolue : en règle générale, il y a une cloison étanche entre ce qui se passe ou ce qui s'est passé pendant la médiation et le reste du monde.

L'article 606 est clair à ce sujet mais la règle ne vaut que pour le médiateur accrédité. L'autre, le médiateur « ordinaire », ne peut invoquer le privilège de non contraignabilité. La règle de la confidentialité vaut aussi pour les personnes impliquées dans la médiation :

> Le médiateur ou un participant à la médiation ne peut être contraint de dévoiler, dans une procédure arbitrale, administrative ou judiciaire liée ou non au différend, ce qui lui a été dit ou ce dont il a eu connaissance lors de la médiation. Il ne peut non plus être tenu de produire un document préparé ou obtenu au cours de ce processus, sauf si la loi en exige la divulgation, si la vie, la sécurité ou l'intégrité d'une personne est en jeu, ou encore pour permettre au médiateur de se défendre contre une accusation de faute professionnelle. Enfin, aucune information ou déclaration donnée ou faite dans le cours du processus ne peut être utilisée en preuve dans une telle procédure.
>
> [. . .]

De plus, l'obligation de confidentialité s'étend aux documents contenus dans le dossier de médiation (Code de 2015).[41]

Pour conclure sur ces nouvelles dispositions en ce qui a trait au médiateur lui-même, il semble que le Code accepte qu'il y ait deux grandes catégories de médiateurs conventionnels : ceux qui seraient accrédités, soumis à des règles de

[41] Et ce, en dépit de la loi québécoise sur l'accès à l'information qui permet la divulgation de documents détenus par un organisme public (*Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels*).

conduite, de déontologie, dont la responsabilité sera difficilement engagée et . . . les autres, dont il vaut mieux ne pas se demander ce qu'ils sont et comment, en dehors du droit commun, leurs clients seront protégés.

Le Processus de Médiation

Les règles et principes

L'architecture du Code de 2015 est éclatée en la matière puisqu'il débute par des principes, applicables à tous les modes non étatiques de règlement des différends pour ensuite comporter, quelque cinq cents articles plus loin, des règles propres à chacun d'entre eux. Et notamment pour la médiation, il faut reconnaître que cette structure entraine bon nombre de répétitions.

En essayant nous-mêmes de ne pas trop redire ce qui a déjà été écrit plus haut, disons que, à titre de principe général, les parties impliquées dans une médiation doivent évidemment y « participer de bonne foi, en faisant preuve de transparence l'une envers l'autre, à l'égard notamment de l'information qu'elles détiennent » (Code de 2015). Elles ont également une obligation de coopération et sont tenues de partager les coûts de la médiation.

Les règles que nous avons évoquées à propos de la confidentialité des communications durant la médiation[42] sont l'écho du principe énoncé sur ce sujet à l'article 4. Ce dernier est cependant tempéré par l'article 5 qui permet la divulgation de données « anonymysées » par le médiateur à des fins de recherche scientifique, d'enseignement ou de statistiques.

Le médiateur est également tenu à la confidentialité en ce qui concerne les informations reçues de l'une des parties, vis-à-vis de l'autre, sauf autorisation expresse (Code de 2015).

En ce qui concerne le déroulement de la médiation, il faut d'abord mentionner que si le code fournit un cadre, d'ailleurs relativement lâche sur le sujet, les parties peuvent elles-mêmes le compléter, comme le leur permet l'article 6. Cette disposition énonce aussi le caractère résiduel des règles contenues au *Code de procédure civile* en matière de déroulement, de procédure de la médiation. Elles ne s'appliqueront qu'à défaut d'entente des parties sur le sujet.

Comme tout mode de règlement amiable des différends, la médiation doit se dérouler dans le respect des règles d'ordre public et des droits et libertés de la personne (Code de 2015).

Elle débute au moment choisi par les parties, soit d'un commun accord, soit à l'initiative de l'une d'entre elles et ce, sans autre formalité. Si la partie qui n'a pas pris l'initiative ne répond pas à l'autre, elle sera considérée comme refusant de participer à la médiation (Code de 2015).

Le médiateur convoque les parties à des rencontres, soit ensemble, soit séparément. Elles ont le devoir d'y assister puisque l'article 609 précise que « [l]es parties s'engagent à participer à toute réunion à laquelle le médiateur les convie ». Elles peuvent se faire accompagner de qui bon leur semble mais par-dessus tout,

[42] Voir *supra* p. 30.

elles doivent « s'assurer que les personnes autorisées à conclure une entente sont présentes ou qu'elles peuvent être consultées en temps utile pour donner leur accord ».

Le processus, même plus, le différend, se termine soit par une entente (Code de 2015) ou, comme nous l'avons déjà signalé, par la décision du médiateur d'y mettre un terme (Code de 2015).

Échec de la Médiation

En cas d'échec de la médiation, les parties peuvent saisir les tribunaux étatiques si la médiation a pris place avant la saisine de ceux-ci. Rappelons que, dans ce cas, les justiciables seront allés au-delà du diktat prévu à l'alinéa 3 de l'article premier du code, l'obligation de « considérer » un mode amiable avant de pouvoir intenter une action judiciaire. Elles peuvent bien évidemment s'adresser à un tribunal arbitral si elles en ont convenu ainsi.[43]

Si la médiation conventionnelle était intervenue en cours d'instance, et qu'elles n'ont pas conclu d'accord, elles relanceront les procédures judiciaires, dont la suspension prend alors évidemment fin.

Réussite de la Médiation

La médiation prend fin et est réputée réussie lorsque les parties ont définitivement résolu leur différend grâce à elle et qu'elles sont arrivées à une « entente mutuellement satisfaisante » (Code de 2015).

L'article 613 précise que « [l]' entente contient les engagements des parties ». Sans que cela soit dit expressément, il y a tout lieu de déduire de cette formulation que l'accord intervenu doit se présenter sous forme écrite.

Il faut souligner, à l'article 613, une précision surprenante qui, nous le devinons, risque de faire couler beaucoup d'encre, tant doctrinale que jurisprudentielle. L'entente de fin de médiation « ne constitue une transaction que si la matière et les circonstances s'y prêtent et que la volonté des parties à cet égard est manifeste » (Code de 2015).[44] Contrairement à ce qui a cours actuellement en médiation familiale, où, comme nous l'avons signalé, le code est silencieux, ici le législateur est très clair.

Selon le nouveau code donc, l'accord final de médiation pourra être qualifié de transaction mais à condition seulement que « la matière » s'y prête – seront donc exclues les questions liées à l'état et à la capacité des personnes, ainsi que celles intéressant l'ordre public (C.c.Q.) –, ainsi que « les circonstances » – que faut-il entendre par cette précision . . . imprécise ? Qu'il y a eu au cours des échanges des

[43]Par exemple, les parties peuvent convenir de recourir en priorité à la médiation et, en cas d'échec de celle-ci de s'adresser à un tribunal arbitral. La même formule peut être utilisée pour un recours en premier lieu à la médiation et ensuite à un tribunal judiciaire.

[44]De façon très classique, en droit québécois, « la transaction est le contrat par lequel les parties préviennent une contestation à naître, terminent un procès ou règlent les difficultés qui surviennent lors de l'exécution d'un jugement, au moyen de concessions ou de réserves réciproques » (C.c.Q.).

concessions ou des réserves réciproques, comme le veut l'article 2631 C.c.Q. ? – et, condition supplémentaire, que les parties aient eu l'intention de voir dans leur entente finale une transaction.

Pour Nabil Antaki, dans le cadre de modes amiables de résolution des litiges, le principe s'énonce de façon inverse de ce que prévoit le Code de 2015 : « [l]e contrat qui concrétisera les termes de l'entente et mettra fin au litige sera, le plus souvent, un contrat nommé de transaction [. . .] » (Antaki 1998). Il rappelle les trois éléments d'une transaction, la situation litigieuse, la réciprocité des concessions et l'intention de mettre fin au litige. Il faudrait donc, pour que l'accord ne soit pas de la nature d'une transaction, qu'au moins l'un de ces éléments soit défaillant. Il nous semble que la réciprocité des concessions, ce que Nabil Antaki appelle « consentir des sacrifices réciproques » (Antaki 1998)[45] est inhérente au processus. Si ce n'est pas le cas, il n'y aura peut-être pas de transaction mais on pourra aussi difficilement parler de médiation ! Quant à l'intention de mettre fin au litige, tous les adeptes de la médiation expliquent que c'est le moyen doux et amiable de mettre fin à un différend ou d'éviter un litige.

Par ailleurs, si l'on ajoute que le futur code permettra aux parties *déjà engagées* dans une procédure judiciaire de recourir à la médiation extrajudiciaire, à la médiation conventionnelle,[46] il semble difficile de comprendre pourquoi, sauf situation expressément envisagée par elles, leur accord à l'issue de la médiation ne viserait pas à terminer le procès, un des effets de la transaction, selon l'article 2631 C.c.Q. ?

Cet article 613 nous semble en totale contradiction avec la volonté du législateur de vouloir faire de la médiation un acte de justice. En outre, alors que ce que souhaitent l'administration judiciaire et le législateur, c'est la diminution des recours aux tribunaux, que faire si cet accord qui ne jouit pas de l'autorité de la chose jugée et qui ne peut faire l'objet d'une procédure d'homologation en raison de sa lacune juridictionnelle[47] doit être exécuté de force ? Évidemment, comme il s'agit « d'un simple contrat innommé » (Antaki 1998), le seul recours possible sera une poursuite en justice, un recours devant les tribunaux pour inexécution du contrat . . .

[45]On peut s'interroger sur la nature des concessions. Doivent-elles porter sur des droits que détiennent les parties ou sur des prétentions ? S'il fallait considérer le premier élément, cela exclurait d'office l'entente de fin de médiation du registre de la transaction puisque l'une des caractéristiques de la médiation est de se situer sur un terrain principalement communicationnel et non juridique. En d'autres termes, les parties cherchent à trouver une solution concrète et adaptée à leurs besoins pour rétablir le lien entre elles et non l'application d'une règle de droit, tranchée et tranchante. La doctrine et la jurisprudence françaises, qui se sont penchées sur cette question, privilégient la thèse de la concession d' « intentions initiales », de prétentions (voir Julienne 2012).

[46]L'article 147 Code de 2015 permet au défendeur, en réaction à l'assignation, de proposer au demandeur « une médiation ou une conférence de règlement à l'amiable ».

[47]En toute logique, le Code de 2015 ne prévoit aucune mesure de type « exécutoire » pour l'accord de fin de médiation.

Coûts de la Médiation
De façon générale, les parties qui auront eu recours à une médiation devront en assumer les coûts à parts égales. L'article 615 indique ce qui constitue les coûts de la médiation : honoraires du médiateur, déplacements et autres frais engagés par le médiateur, frais d'expertises ou liés à d'autres « interventions convenues par les parties ». Au-delà de cela, les frais sont à la charge de chacune des parties.

3 La Médiation Transfrontalière

3.1 Absence de Notion de Médiation Transfrontalière

Étant donné l'absence d'existence de la médiation en général en droit québécois actuel, il n'y a rien de surprenant à l'absence totale de cette notion également. La section du droit québécois concernant les situations comportant un élément d'extranéité se trouve dans le *Code civil du Québec*, dont l'entrée en vigueur remonte à 1994.[48] Or rien ne touche de près ou de loin à la médiation, sauf, bien sûr, les règles générales sur les actes juridiques. S'il y avait lieu de se demander si le tribunal québécois est compétent pour se prononcer sur la validité de la clause de médiation, par exemple, il faudrait suivre les règles indiquées à l'article 3148 C.c.Q.. Quant à savoir quelle loi la régirait, pour sa forme, il faudrait s'en remettre à l'article 3109 C.c.Q. et pour son fond, la réponse serait fournie par les articles 3111 à 3113 C.c.Q. Vraisemblablement, le débat aurait lieu à l'occasion d'un différend lié au sujet ou à l'opération contractuelle à l'occasion de laquelle la clause a été adoptée.

Comme nous l'avons fait remarquer plus haut, le *Code de procédure civile* de 2015 même s'il fait une large place à la médiation, ainsi qu'aux « demandes intéressant le droit international privé » (Code de 2015), ne fait aucune différence entre médiation interne et médiation internationale. Nous sommes enclines à croire que le codificateur a tout simplement fait l'impasse sur la question, n'ayant en tête que la médiation interne. À cet égard, on note une différence avec l'arbitrage puisque, dans le nouveau code, des articles sont consacrés aux « dispositions particulières à l'arbitrage commercial international » et qu'un chapitre porte sur « la reconnaissance et l'exécution des sentences arbitrales rendues hors du Québec » (Code de 2015).

Ajoutons que, sur le plan international, malgré les vœux de plusieurs, la médiation est très peu utilisée comme mode de règlement des différends. L'absence d'encadrement légal serait l'une des raisons principales à ce peu d'intérêt (Talpis 1997).

[48] Jusque-là, les quelques règles régissant la matière étaient contenues de façon un peu chaotique dans le *Code civil du Bas-Canada*. En 1994, le codificateur a consacré un livre entier du Code (Livre 10) à la discipline.

3.2 Reconnaissance et Exécution des Règlements Étrangers

Le droit québécois ne comporte aucune règle spécifique sur la question de la reconnaissance et de l'exécution des règlements étrangers. Si l'on fait référence aux accords de fin de médiation, dont il y a tout lieu de croire qu'ils constituent, en dehors du Québec, des transactions dans les pays de tradition civiliste[49] ou s'y apparentent, ils n'ont par eux-mêmes aucune force exécutoire au Québec. Bien évidemment, ils ne peuvent pas non plus faire l'objet d'une procédure d'*exequatur* ou d'homologation ou, pour employer les termes consacrés, de reconnaissance et d'exécution. En effet, le *Code de procédure civile* actuel du Québec régit, aux articles 785 et 786, la reconnaissance et l'exécution des *décisions* étrangères. Il est de la nature même d'une entente de médiation qu'elle ne constitue pas une « décision ». Ce terme désigne une décision judiciaire et uniquement elle puisque même une sentence arbitrale, n'émanant pas de l'autorité publique étatique, n'est pas une « décision » et, à ce titre, doit elle aussi être homologuée pour acquérir force exécutoire, qu'il s'agisse d'une sentence nationale[50] ou d'une sentence rendue hors du Québec.[51]

Si l'entente de médiation est une simple entente, nous avons déjà eu l'occasion de mentionner qu'elle est alors un contrat. Et seulement un contrat, n'ayant pour lui que sa force obligationnelle, énoncée ainsi par le droit québécois : « Le contrat valablement formé oblige ceux qui l'ont conclu non seulement pour ce qu'ils y ont exprimé, mais aussi pour tout ce qui en découle, d'après sa nature et suivant les usages, l'équité ou la loi » (C.c.Q.).

Dans le cas où l'une des parties ne respecte pas la transaction, ne se conforme pas à ses obligations nées de la transaction, cela pourra aboutir à un litige de nature contractuelle et une action en responsabilité contractuelle pourra être intentée devant un tribunal.[52] Prenant pour hypothèse ici que la situation comporte un élément d'extranéité – parties relevant de deux ordres juridiques différents, par exemple – il y aura lieu de recourir aux règles de droit international privé québécois afin de déterminer quel tribunal pourra être compétent (rattachement juridictionnel) et quelle loi sera appliquée (rattachement normatif).

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[49] « The status of a mediated settlement which can be classified as a transaction in most civil law jurisdictions has the effect of "chose jugée" (*res judicata*) » (Talpis 1997). Dans les ordres juridiques de common law, on aura plutôt tendance à les considérer comme des contrats.

[50] « La sentence arbitrale n'est susceptible d'exécution forcée qu'après avoir été homologuée » (C.p.c.). « La sentence arbitrale telle qu'homologuée est exécutoire comme un jugement du tribunal » (C.p.c.).

[51] « La demande de reconnaissance et d'exécution est présentée par voie de requête en homologation adressée au tribunal qui, au Québec, aurait été compétent à statuer sur l'objet du différend confié aux arbitres. [. . .] » (C.p.c.). « La sentence arbitrale telle qu'homologuée est exécutoire comme un jugement du tribunal » (C.p.c.).

[52] À moins que les parties préfèrent recourir à la médiation pour faire respecter les termes de l'entente de médiation !

Si la transaction conclue à l'étranger a été homologuée sur place et doit être exécutée au Québec, elle ne sera ni plus ni moins un jugement étranger, une « décision étrangère » pour utiliser l'expression du *Code civil du Québec,* et à ce titre sera soumise aux exigences des articles 3155 C.c.Q. et suivants. Étant donné que cette étude concerne la médiation et non le processus judiciaire, nous allons nous contenter d'esquisser à grands traits les conditions de reconnaissance des décisions étrangères, telles que les indique l'article 3155 C.c.Q. Il prévoit la compétence de l'autorité étrangère, le caractère final de la décision étrangère, le respect des règles de procédures, la litispendance, l'exclusion des matières fiscales étrangères et le respect de l'ordre public. Il est important de mentionner aussi l'article 3158 C.c.Q. : « L'autorité québécoise se limite à vérifier si la décision dont la reconnaissance ou l'exécution est demandée remplit les conditions prévues au présent titre, sans procéder à l'examen au fond de cette décision ». Cela signifie que le juge québécois, saisi d'une demande de reconnaissance d'une transaction ayant acquis à l'étranger le statut « totalement juridictionnel »[53] ne peut se prononcer ni même se pencher sur le contenu même de l'entente issue de la médiation. Et ce, en théorie, même si son résultat est contraire à l'ordre public, comme le prévoit l'article 3155 par. 5.

Quid de l'entente de médiation, conclue à l'étranger et y ayant le caractère exécutoire, « directement exécutoire », serions-nous tentée d'écrire, c'est-à-dire sans passer par une procédure d'homologation judiciaire ? La réponse est fournie par l'article 3163 C.c.Q. : « Les transactions exécutoires au lieu d'origine sont reconnues et, le cas échéant, déclarées exécutoires au Québec aux mêmes conditions que les décisions judiciaires pour autant que ces conditions leur sont applicables ». Notons bien que c'est le *caractère exécutoire* de l'entente et non pas sa reconnaissance judiciaire au lieu de sa conclusion qui lui permet d'être éventuellement entérinée par les autorités judiciaires québécoises (Lachance 2005). Le texte de l'art. 3163 C.c.Q. est inspiré de l'article 19 de la Convention de La Haye du 1er février 1971 sur la reconnaissance et l'exécution des jugements étrangers en matière civile et commerciale mais malheureusement, il n'en a pas repris tous les éléments puisque les termes « passées devant un tribunal au cours d'une instance » ont été omis.[54] Cela semble faire baigner l'article 3163 C.c.Q. dans un certain flou. À l'Assemblée nationale, lors des débats qui ont entouré l'adoption de cet article, quelqu'un avait suggéré : « Mais si la loi étrangère à laquelle s'applique la transaction n'exige pas l'homologation, elle n'aura pas besoin d'être homologuée. Dès lors que la transaction est exécutoire, selon les règles du droit étranger, les

[53] Nous utilisons cette expression puisque, à la base, la nature d'une transaction est en partie contractuelle, en partie juridictionnelle. Le fait de l'homologuer l'assimile totalement à un jugement.

[54] « Les transactions passées devant un tribunal au cours d'une instance et exécutoires dans l'État d'origine, seront déclarées exécutoires dans l'État requis aux mêmes conditions que les décisions visées par la présente Convention en tant que ces conditions leur seront applicables » (*Convention sur la reconnaissance et l'exécution des jugements étrangers en matière civile et commerciale* 1971).

tribunaux québécois reconnaîtront la force exécutoire de cette transaction » (Québec, Assemblée nationale 1991 dans Lachance 2005). Autrement dit, inutile de passer par la procédure d'homologation de l'entente, en cas de refus par une partie de se soumettre à ses termes, le tribunal saisi de la difficulté verra dans l'accord un acte exécutoire.

Cela serait en effet envisageable mais que faire alors de l'article 3163 C.c.Q. lorsqu'il parle de la comparaison avec les conditions dans lesquelles les décisions judiciaires sont reconnues et déclarées exécutoires ? Un jugement étranger ne pouvant s'imposer en tant que tel dans un autre ordre juridique, il doit être soumis à une procédure locale afin d'être transformé en acte judiciaire local contraignant. L'article 3163 signifie qu'il en va de même, *mutatis mutandis*, pour les transactions étrangères, même – directement – exécutoires à l'étranger.

Pour résumer, ou bien la transaction étrangère a été homologuée par un tribunal à l'étranger, auquel cas, lorsqu'elle arrive au Québec, elle est . . . un jugement étranger, nécessitant exemplification (C.c.Q.) ; ou bien la transaction est *per se* exécutoire à l'étranger et elle doit alors faire l'objet d'une homologation au Québec (C.c.Q.).

Dans ce dernier cas, passant en revue les exigences de l'article 3155 C.c.Q., on peut écarter la question de la compétence (par. 1) de l' « autorité » étrangère puisqu'il n'y a pas d'autorité, de décideur, dans le processus de médiation, ainsi que celle du caractère final ou exécutoire de l'accord (par. 2). Cette exigence peut être traduite en termes de transaction par la force obligatoire du contrat. Peut-il y avoir, dans le cadre de la médiation, « violation des principes essentiels de la procédure » (par. 3) ? Pour répondre à cette question, même si cela semble surprenant, il faut d'abord se demander si les personnes impliquées dans la médiation sont soumises à ce qu'au Québec on désigne comme les principes essentiels de la procédure. Généralement, cette expression est comprise comme faisant référence au droit pour chaque partie de faire valoir ses prétentions (*audi alteram partem*) et à celui d'être traité de façon impartiale. Si l'on pense à l'équité de traitement des personnes et à l'impartialité dont doit faire preuve le tiers médiateur, la réponse est affirmative. En revanche, on peut faire valoir que ne constituant pas un processus judiciaire, justement, les principes prévalant dans le cadre de ce dernier n'ont pas tous à être imposés. Ainsi, le principe du contradictoire ne semble pas sacro-saint en médiation. Au contraire, le médiateur doit s'en détacher et c'est d'ailleurs ce qui lui permet d'entendre les parties séparément, situation totalement inadmissible dans un cadre judiciaire. Pour ce qui est de la litispendance (par. 4), cela semble devoir être exclu car la seule véritable litispendance ne peut exister qu'entre deux tribunaux étatiques puisque la finalité de l'exception de litispendance est d'éviter d'obtenir des jugements contradictoires. Déjà, entre l'arbitre et le juge étatique, deux types de justice « contraignantes », la question de l'existence possible de litispendance est loin de faire l'unanimité (Poudret 2002), il nous semble que l'action étatique et le recours à la médiation sont tellement différents qu'on peut difficilement les mettre en concurrence et donc parler de litispendance. En revanche, comme nous en avons déjà parlé, la saisine d'un juge étatique en même temps que le recours à un tiers facilitateur soulèvera une question de respect d'obligations contractuelles, nées de la clause de médiation.

L'absence de conformité du « résultat de la décision étrangère » à « l'ordre public tel qu'il est entendu dans les relations internationales » (par.5) est rarement acceptée comme motif de refus de reconnaissance d'une distribution des pouvoirs par la jurisprudence québécoise. Le risque que l'accord intervenu entre les parties dans le cadre d'une médiation viole l'ordre public est-il plus grand ? En théorie oui puisque l'ordre public est une notion juridique.[55] Or, nous l'avons dit, médiation et droit ne sont pas forcément intimement liés. Cependant, la pratique démontre, comme nous l'avons indiqué, que lorsque les parties parviennent à un accord au terme d'une médiation conventionnelle, leur accord n'est en réalité qu'un projet qui va servir de base, entre autres, à une consultation auprès d'un juriste qui s'assurera notamment de sa conformité à l'ordre public. Dans l'état actuel des choses, il nous semble donc qu'au Québec, le refus d'homologation pour cause de contravention à l'ordre public est peu vraisemblable.

Enfin, si l'accord de médiation étranger portait sur des lois fiscales étrangères (par. 6), la reconnaissance n'interviendrait pas.

Les autres conditions, comme le jugement par défaut (C.c.Q.) ou la question de la loi appliquée (C.c.Q.), ne sont pas pertinentes en matière d'ententes comme celles qui nous occupent.

Comme dans le cas d'un jugement étranger, le juge québécois saisi de la demande de reconnaissance de la transaction étrangère se contentera de vérifier les critères que nous venons de passer en revue sans avoir le droit de se pencher sur le fond de la transaction (C.c.Q.).[56]

Bien sûr, il ne nous est pas possible de nous prononcer sur la situation inverse, soit la reconnaissance à l'étranger d'un règlement de médiation intervenu au Québec puisque les conditions de réception des actes étrangers, privés ou judiciaires, varient d'un ordre juridique à un autre.

4 La Cyberjustice

4.1 Précisions Terminologiques

Le recours à la technique numérique, ce qu'évoque le mot « cyberjustice », peut couvrir deux réalités. Soit l'utilisation de procédés informatisés au service des tribunaux qui prendront « réellement le virage technologique [qui] facilitera la preuve documentaire et testimoniale [et qui] offrira l'occasion de réfléchir aux implications de la technologie sur le processus judiciaire, sur ses rituels et sur le droit lui-même » (Lafond 2012). Soit « l'intégration des technologies de l'information et de la

[55] « Au sein d'un ordre juridique, termes servant à caractériser certaines règles qui s'imposent avec une force particulière [. . .] » (Cornu 2001).

[56] Les autres articles en matière de conditions de reconnaissance et d'exécution des décisions étrangères ne présentent pas d'intérêt pour les transactions (C.c.Q.).

communication dans le processus de résolution des conflits » (Lafond 2012), ce qui a donné naissance à ce que l'on nomme le règlement des différends en ligne.[57] C'est cette deuxième acception qui retiendra ici notre attention. Ce procédé peut aussi bien chercher à régir des situations litigieuses nées d'échanges informatisés, virtuels, que des disputes issues de relations dans le monde « réel ». Pour en faire un rappel historique très bref, à la fin des années 90, des chercheurs de Montréal ont créé le cybertribunal, ayant vocation à résoudre des difficultés entre commerçants œuvrant sur le Web et consommateurs, dans la foulée duquel est né un système d'arbitrage informatisé pour les litiges liés aux noms de domaines. D'autres systèmes de résolution informatisée des différends ont vu le jour par la suite.

Lorsque l'on s'en tient à la « médiation en ligne » ou plus largement au « règlement des différends » en ligne, là aussi, le nombre de variations sur un même thème semble assez grand : parle-t-on d'une machine, plutôt d'ailleurs d'un logiciel, qui gère les échanges entre les personnes ? Parle-t-on d'autre chose où la technique aurait un rôle prépondérant, qui rendrait le mode de résolution des différends totalement inédit ? Ou, plus simplement, de l'utilisation des appareils techniques actuels pour communiquer ? Pour certains, dans le procédé en ligne, le médiateur

> tente d'amener les parties à conclure une entente en communiquant avec elles par des voies essentiellement électroniques. Si certaines institutions d'ODR mettent en ligne des outils de communication plutôt limités, comme le courriel, d'autres proposent des dispositifs plus avancés comme les communications via sites web sécurisés, ou encore la vidéoconférence, permettant des discussions bilatérales ou triangulaires, voire une participation en direct de témoins, experts et conseils (Iavarone-Turcotte 2012).

Force est donc de constater que « malheureusement », cette façon de faire n'exploite pas l'informatique à des fins de résolutions des différends. Elle ne fait que faciliter la communication, au sens technique du terme, rendue difficile par la distance. On pourrait presque imaginer une façon de faire identique par voie postale. Il s'agit donc plus à proprement parler d'une médiation à distance que d'une cybermédiation.

Très en vogue au tournant du siècle, les nouveaux modes de résolution des différends – eux-mêmes d'un genre nouveau – ont donné lieu à une littérature juridique abondante au Québec, mais l'engouement et partant la réflexion sur eux semblent s'essouffler à l'heure actuelle. Même si le droit québécois a fait le « saut technologique » il y a quelques années par l'adoption en 2001 de la *Loi concernant le cadre juridique des technologies de l'information*, on ne trouve aucune trace législative du recours aux règlements de différends en ligne. Dans l'état actuel des choses, les règles portant sur la Conférence de Règlement à l'Amiable autant que celles régissant la médiation familiale, les unes et les autres contenues au *Code de procédure civile*, sont conçues de façon évidente pour des médiations dans le monde réel et non dans le cyberespace. Même si le droit doit faire preuve de souplesse, il nous semble absolument impossible de les déformer au point de les

[57] Connu aussi sous le nom d'*Online Dispute Resolution*.

faire convenir à des règlements de différends en ligne. La même remarque s'impose en ce qui concerne le projet de *Code de procédure civile*. Il ressort de la lecture des dispositions proposées que la cyberjustice en est exclue.

4.2 Applications Potentielles

Les quelques propos qui suivent n'ont rien de « national » et seront donc très brefs. Par définition en effet, la réflexion sur ce sujet concerne autant le Québec que n'importe quel autre ordre juridique ou État. Outre les noms de domaine,

> la cyberjustice traite les conflits opposant des entreprises, mais aussi ceux relatifs à la famille, au travail, au voisinage et aux relations entre les citoyens et l'État. Elle permet surtout d'offrir une voie de traitement à de petits conflits en manque de forums judiciaires ou extrajudiciaires ou à ceux qui impliquent, ce qui est très fréquemment le cas sur Internet, une organisation située à l'extérieur du Québec (Lafond 2012).

Une recherche effectuée par nos soins n'a pas permis de dégager de réponse à la question suivante : la cybermédiation est-elle utilisée au Québec et si oui, dans quels secteurs d'activités ?

Pour ce qui est des avantages et inconvénients de la justice en ligne, dans ce registre non plus, nous n'avons rien de purement québécois à indiquer. Tout le monde s'entend pour y voir des avantages en termes de temps et d'argent. En outre, le fait de pouvoir régler ses différends à partir d'un ordinateur, confortablement installé chez soi est certainement un attrait. En revanche, si certains reprochent à la justice étatique sa froideur, il y a fort à parier qu'un ordinateur ne procure pas beaucoup de chaleur humaine. On parle de l' « éloignement et de [l']impersonnalité » lorsque l'on évoque les ODR. Or la relation, la communication entre personnes, qu'il s'agisse des personnes aux prises avec un problème ou du tiers qui les accompagne, est un des éléments souvent décrits comme la clé du succès en médiation. Il arrive que le virtuel ait besoin de se rapprocher du réel : « dans certains cas, un médiateur humain peut intervenir, à la demande des parties » (Lafond 2012).

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La Médiation en Roumanie la Médiation entre l'Habitude d'Avoir Recours au Système Traditionnel de Justice et le Remboursement de l'Intégralité des Frais de Justice

Daniel-Mihail Şandru and Dragoş-Alin Călin

Abstract The failure to acknowledge the institution of mediation and the legislation in the relevant field is deemed as the most frequently encountered cause for the reluctance shown by companies and the general public in what concerns mediation, which is liable to lead to a lack of a "culture of mediation". The institution of mediation was recently introduced in domestic legislation.

The Romanian legislation provides for reimbursement of all legal costs in case parties settle a dispute by relying on mediation. The results reached in Romania by relying on mediation prove that the latter is liable to ensure an out of court settlement which is cost-effective and rapid within proceedings that are tailored to the needs of parties. In parallel with the provisions on financial incentives, a Mediation Council – in capacity of national body in the relevant field – has been established. Its tasks are to promote the mediation, to develop training standards, to train trainers, to issue documents certifying the professional qualifications of mediators, to adopt a code of ethics as well as to develop proposals meant to improve legislation.

Mediation is not sufficiently promoted at local, national and international level. Although considerable progress has been made, which are supported by European legislation, a key challenge in promoting cross-border mediation results from the lack of information for litigants, lawyers, judges, and more broadly citizens regarding mediation and its advantages. The path dependence of relying on traditional justice system and insufficient knowledge of alternative dispute resolution leads to higher costs and waste of valuable time. In case mediation is not organized under or next to the courts and is regulated as an independent profession, as is the case

D.-M. Şandru (✉)
Centre des Études de Droit Européen, Institut des Recherches de l'Académie Roumaine, Bucarest, Roumanie
e-mail: mihai.sandru@gmail.com

D.-A. Călin
Cour d'Appel de Bucarest, VIIéme Chambre Civile, Bucarest, Roumanie
e-mail: dragos.calin@just.ro

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in Romania, communication between mediators, parties and the judiciary could be hampered, especially if there is not a tradition of relying on alternative dispute resolution.

Résumé La méconnaissance de l'institution de la médiation et de la législation dans le domaine sont les causes les plus souvent rencontrées pour la retenue des sociétés et du public en général envers la médiation, ainsi que le manque d'une « culture de la médiation », l'institution étant introduite depuis relativement peu de temps dans la législation interne.

La loi roumaine prévoit le remboursement de l'intégralité des frais de justice si les parties résolvent un litige en cours par la médiation. Les résultats obtenus en particulier la Roumanie prouvent que la médiation permet d'assurer une résolution extrajudiciaire économiquement avantageuse et rapide des litiges grâce à des procédures adaptées aux besoins des parties. Parallèlement aux dispositions sur les incitations financières, un Conseil de médiation – autorité nationale de pratique de la médiation constituée en tant qu'entité juridique séparée et autonome – a été établi ; il est entièrement consacré à la promotion des activités de médiation, à l'élaboration de normes de formation, à la préparation des formateurs, à la délivrance de documents attestant des qualifications professionnelles des médiateurs, à l'adoption d'un code déontologique ainsi qu'à l'élaboration de propositions en vue de développer la législation.

La médiation n'est pas suffisamment promue au niveau local, national et international. Même si des progrès considérables ont été réalisés, des progrès soutenus par la législation européenne, une des principales difficultés dans la promotion de la médiation transfrontalière résulte de l'insuffisance d'information des justiciables, des avocats, des magistrats, des citoyens en général en ce qui concerne la médiation et ses avantages. L'habitude d'avoir recours au système traditionnel de justice et la connaissance insuffisante des modes alternatifs de règlement des conflits conduisent à des coûts plus importants et une perte de temps considérable. Dans le cas où la médiation n'est pas organisée dans le cadre ou à côté des juridictions et est réglementée comme étant une profession indépendante, comme c'est le cas pour la Roumanie, la communication entre la nouvelle profession, les médiateurs, les parties et les magistrats est entravée, surtout s'il n'existe pas une tradition d'utilisation des modes alternatifs de règlement des conflits.

1 La Médiation en Roumanie

1.1 Historique de la Médiation

En Roumanie, les premières initiatives de promotion de la médiation ont commencé en 1996, quand la Fondation pour le Changements Démocratiques a développé le premier projet dans le domaine de la médiation, avec le support du Canadian

International Institute for Applied Negociation (CIIAN), projet dans lequel plusieurs représentants des professions juridiques et représentants du Ministère de la Justice ont été impliqués.[1]

Pendant la période 1999–2000, le Ministère de la Justice a développé un programme de formation des médiateurs, soutenu par l'Association du Barreau Américain, par le programme CEELI et un projet avec le support de la Fondation pour le Changements Démocratiques, dans le cadre duquel un programme-pilote pour la promotion et l'application de la médiation dans le Tribunal d'Instance du Secteur 3, Bucarest, a eu lieu.

En 2000, le Ministère de la Justice ouvre le premier projet de loi concernant la médiation, projet qui s'est confronté avec une opposition forte, premièrement de la part des parlementaires avocats. L'idée que la médiation soit l'une des solutions pour une amélioration de la qualité de l'acte de justice et le soulagement des instances juridiques été, pourtant, comprise dans les engagements d'adhésion de la Roumanie à l'Union Européenne, sans mentionner explicitement si cet objectif sera accompli par l'intermédiaire d'une loi-cadre ou seulement à travers un règlement concernant l'application de la médiation en relation avec les instances de jugement.

Jusqu'à l'élaboration du projet de loi concernant la médiation et la profession de médiateur, en 2005, d'autres projets concernant la médiation ont aussi été proposés au Parlement, mais ils n'ont pas bénéficié d'un soutien parlementaire suffisant.

Les principales organisations non-gouvernementales avec lesquelles le Ministère de la Justice s'est trouvé dans un constant conflit sur la législation concernant la médiation et la profession de médiateur ont été : La Fondation pour le Changements Démocratiques, L'Association Pro Médiation, La Fondation – Centre de Médiation et Sécurité Communautaire Iasi, L'Association "Centre de Médiation Craiova", L'Union des Centres de Médiation de Roumanie, L'Association des Médiateurs Professionnels (A.M.P.), L'Association de L'Institut Roumain de Training et l'Association ALMA-RO.[2]

[1] Voir **Sanda Elena Lungu**, **Dragoș Călin**, *Certains aspects sur la médiation en Roumanie. Prime pour aller en médiation*, Revista Forumul Judecătorilor nr. 2/2012, p. 129–140. Dans la période immédiatement suivante, le Ministère de la Justice a obtenu un financement de la part de la Fondation pour une Société Ouverte, pour appliquer la médiation comme méthode alternative dans la Justice et, implicitement, l'élaboration d'un projet de loi concernant la médiation a été considérée. Il est important de mentionner que, dorénavant, il y a eu une préoccupation constante de la part du Ministère de la Justice pour collaborer et se consulter avec des représentants de la société civile sur le thème de la médiation et de la profession de médiateur.

[2] L'activité de lobby développée pendant la période 2000–2006 par ces associations non-gouvernementales spécialisées dans le domaine de la médiation s'est constamment déroulée aussi au niveau des commissions de spécialité des deux Chambres du Parlement.

1.2 Le Système Juridique Général et les Approches Doctrinales Avancées à Son Sujet

Le droit roumain se réfère au système de droit écrit, le système romano-germanique, dont les principes généraux sont fixés par la Constitution et détaillés par les Codes civil, pénal, commercial, de la famille et du travail. Les procédures civile et pénale prévoient notamment les principes de l'oralité des débats, du contradictoire, la publicité des audiences, le droit à la défense, le rôle actif de l'instance, la bonne foi, la présomption d'innocence et la légalité de l'incrimination et de la peine. La loi consacre 3 degrés de juridiction : les tribunaux de première instance (*judecătorii*), les tribunaux de grande instance (*tribunale*) et les cours d'appel (*curți de apel*). Il existe également des instances militaires. La Haute Cour de cassation et de justice est la plus haute instance au sein de la hiérarchie judiciaire. Le système judiciaire roumain ne comprend qu'un seul ordre de juridiction. Les tribunaux de première instance siègent dans chaque grande ville, ils ont une compétence de droit commun en matière civile, pénale, commerciale, droit de la famille, droit du travail. Tout tribunal de première instance siège à juge unique. Les tribunaux de grande instance siègent dans chaque capitale départementale. Chaque cour d'appel exerce sa compétence dans une circonscription qui peut comprendre plusieurs tribunaux de grande instance. La Haute Cour de cassation et de justice ne statue que sur les pourvois en cassation traitant uniquement les questions de droit. La Cour est aussi responsable de l'interprétation et l'application unitaire de la jurisprudence par l'ensemble des juridictions. La Cour est organisée en quatre sections, civile et de propriété intellectuelle, pénale, de contentieux administratif et fiscal et enfin civile/commerciale. Il existe un Parquet auprès de chaque instance judiciaire. Le parquet est placé sous l'autorité hiérarchique du Ministre de la Justice. Son activité vise à faire respecter l'égalité des citoyens devant la loi et il doit exercer ses fonctions avec impartialité.[3] Le *Conseil supérieur de la magistrature* est l'organe constitutionnel qui garantit l'indépendance de l'ordre judiciaire. En outre, il garantit le respect des critères de compétences et de déontologie dans l'exercice des professions de juge et de procureur. L'organisation et l'administration de la justice en tant que service public sont garanties par le *ministère de la Justice*, qui est chargé en Roumanie de l'élaboration, de la coordination et de l'application de la gouvernance et de la stratégie judiciaire.

Le 22 mai 2006, dans le Journal Officiel est parue la **Loi no. 192/2006 concernant la médiation et l'organisation de la profession de médiateur**. On doit mentionner le fait que cette forme de la loi, à laquelle les représentants de la société civile ont aussi contribué, est la cinquième variante de projet de loi concernant la médiation depuis l'année 2000.

[3] Voir https://e-justice.europa.eu/content_judicial_systems_in_member_states-16-ro-fr.doc. Aussi **Andreea Mirela Staicu**, *La réforme du système judiciaire roumain dans le processus d'adhésion de la Roumanie à l'Union européenne*, http://www.ena.fr/index.php?/fr/content/download/832/5348/file/staicu.pdf.

La loi a été conçue, promue et, ultérieurement adoptée afin de soutenir la médiation telle que définie par les actes normatifs adoptés au niveau européen.

1.3 Les Modes de Prévention et de Règlement des Différends qui Existent en Roumanie et l'Interaction qui Prévaut entre eux et la Médiation

Les systèmes alternatifs de résolution des litiges, connus sous le nom d'ADR, sont des moyens par lesquels les parties qui se trouvent en conflit peuvent arriver à un accord amiable relatif aux problèmes qu'ils rencontrent.

Les principales méthodes ADR qui peuvent être rencontrées en Roumanie sont : la médiation, l'arbitrage et la conciliation.

Donc, la médiation, comprise dans le système alternatif de résolution des conflits (ADR), maintient son caractère consensuel et fournit aux parties toute la confidentialité pour les discussions dans le cadre de la relation avec le médiateur. Par la conciliation, une tierce personne peut proposer une solution, mais qui ne soit pas obligatoire pour les parties. L'arbitrage représente une méthode de résolution des conflits lors des instances, très semblable à la procédure judiciaire, ou les parties choisissent une ou plusieurs personnes physiques auxquelles on présente le cas pour obtenir une sentence obligatoire. Dans le cadre de certains modèles d'arbitrage, pour la mise en exécution de la sentence, il est nécessaire d'effectuer quelques procédures dans le cadre des instances judiciaires. La résolution du conflit entre les parties est représentée par leur accord sur la cause du litige. Fondamentalement, l'accord appartient aux parties, n'étant pas imposé, élaboré ou censuré par le médiateur. La médiation permet aux participants de trouver une solution au conflit généralement acceptée avec un médiateur, la volonté de parvenir à un compromis entre les parties étant primordiale. La différence par rapport à toute solution imposée (sentence, l'arbitrage), c'est que la solution des parties satisfait leurs besoins et leurs désirs et élimine en grande partie l'éventualité d'un futur conflit entre les mêmes personnes.

En ce qui concerne le méd-arb (l'abréviation pour médiation-arbitrage qui désigne, *lato sensu*, toutes les procédures qui mélangent les deux méthodes alternatives de résolution des conflits, la médiation et l'arbitrage), certains États connaissent une réglementation expresse de l'institution (c'est le cas de la France), d'autres non, mais cela ne signifie pas nécessairement qu'on doit exclure son application dans la mesure où il existe des textes juridiques qui ne l'interdissent pas (le cas de la Roumanie).[4]

[4] Voir **Andreea Pop**, *Le méd-arb*, *mode alternatif de règlement des conflits*, *dans le droit comparé*, Studia Universitatis Babes Bolyai Iurisprudentia nr. 1/2011, p.129–240 http://studia.law.ubbcluj.ro/articol.php?articolId=374.

1.4 La Médiation est Intégrée au Système Judiciaire Étatique

La médiation, en tant que solution de substitution en matière de résolution des conflits, a constitué l'un des thèmes importants de la stratégie de réforme de la justice en Roumanie et représente une priorité dans le plan d'action pour la mise en œuvre de la stratégie de réforme du système juridique 2005–2007.

La Loi no. 192/2006 concernant la médiation et l'organisation de la profession de médiateur précise pour la première foi quel est le lieu de la médiation dans le système de résolution des conflits, comment on peut faire appel au service de médiation et qui peut être un médiateur. L'adoption de la Loi no. 192/2006 concernant la médiation et l'organisation de la profession de médiateur a permis le début de la construction d'un système unitaire d'application de la médiation en Roumanie.

1.5 Des Informations Statistiques Relatives à la Médiation

Pour 2010, les statistiques montrent la réticence de la part des justiciables en ce qui concerne l'usage la médiation comme une procédure alternative de règlement des différends (les tribunaux ont fait en 2010 seulement 258 médiations lors des procédures). Le rapport sur la situation de la justice en 2010 en Roumanie, publié par le Conseil supérieur de la magistrature, souligne que « cette procédure alternative de résolution des litiges vise à alléger la charge de travail des tribunaux, mais si l'on examine les réponses données par ces derniers au questionnaire destiné à recueillir les données nécessaires à l'élaboration du rapport mentionné ci-dessus, seules 258 affaires ont été résolues par une procédure de médiation en 2010, chiffre qui traduit la réticence des parties à utiliser cette méthode ». Il n'est pas précisé si ce chiffre regroupe les réponses de toutes les juridictions roumaines. D'après le même rapport élaboré pour 2010, 179 tribunaux de première instance, 41 tribunaux de grande instance, 4 tribunaux spécialisés et 15 cours d'appel ont rendu la justice en Roumanie. L'activité totale représente 2 916 776 affaires (2 383 770 en 2009) soit 22 % de plus que l'année précédente et presque 40 % de plus qu'en 2008.

Pour 2011, les tribunaux ont disposé 1 654 médiations au cours des procédures judiciaires. Les statistiques montrent que cette procédure a commencé à être utilisée aussi dans la poursuite pénale, où actuellement seuls deux cas ont été résolus par la médiation.[5] Les rapports sur la situation de la justice en 2012 et 2013 en Roumanie, publiés par le Conseil supé rieur de la magistrature, précisent 1 729, respectivement 1 762 médiations au cours des procédures judiciaires. Pour 2013, l'activité totale des tribunaux représente 2 408 240 affaires.

[5] Voir **Sanda Elena Lungu**, **Dragoş Călin**, *Certains aspects sur la médiation en Roumanie. Prime pour aller en médiation*, Revista Forumul Judecătorilor nr. 2/2012, p. 129–140. Voir **Bogdan Matei**, Médiation familiale : l'expérience Roumaine, http://www.europarl.europa.eu/RegData/etudes/note/join/2011/453187/IPOL-JURI_NT(2011)453187_FR.pdf.

2 Le Cadre Juridique Applicable

2.1 La Notion de Médiation

Selon l'art.1 de la Loi no. 192/2006, modifié par la Loi no. 370/2009 : "(1) La médiation représente une modalité de résoudre les conflits amiablement, à l'aide d'une troisième personne spécialisée dans la qualité de médiateur, en respectant les conditions de neutralité, impartialité, confidentialité et ayant, librement le consentement des parties. (2) La médiation est basée sur la confiance que les parties accordent au médiateur, en tant que personne apte à faciliter les négociations entre eux et de les soutenir pour la résolution du conflit, en obtenant une solution réciproquement convenable, efficace et durable."

Ensuite, l'art. 2 de la loi prévoit un aspect essentiel de la médiation, le caractère volontaire de l'appel à la médiation, en laissant de la place pour l'utilisation de la médiation dans toutes les étapes d'un litige, respectivement avant, pendant et après un procès devant l'instance : "Si la loi ne prévoit autrement, les parties, des personnes physiques ou juridiques, peuvent faire appel à la médiation volontairement, même après le début d'un procès devant les instances compétentes, en convenant de résoudre, de cette manière-là, tout conflit en matière civile, commerciale, familiale, pénale et autre, dans les conditions prévues par cette loi".[6]

2.2 Le Cadre Juridique Applicable à la Médiation en Roumanie

Le cadre juridique de la médiation en Roumanie a été défini par **la loi 192/2006 relative à la médiation et à l'organisation des professions de la médiation**, telle que publiée le 22 mai 2006 au Journal Officiel roumain. La loi roumaine définit la médiation comme une méthode de résolution des conflits à l'amiable avec l'aide d'une tierce personne, médiateur qualifié, respectant la neutralité, l'impartialité et la confidentialité, méthode dépendant de la libre volonté des parties. La loi ne prévoit pas différentes catégories de médiations selon les domaines du droit. Les normes générales sont applicables à toutes les formes de médiation, exception faite des dispositions spécifiques à la législation sur les conflits familiaux qui précisent de façon détaillée la typologie des conflits susceptibles d'être soumis à la médiation, la possibilité d'analyser le bien-fondé d'un règlement par la médiation et les obligations supplémentaires incombant dans ce cas aux médiateurs. Depuis l'entrée en vigueur de la loi, en 2006, elle a été complétée et modifiée à plusieurs

[6]Sauf disposition contraire par la loi, il reste possible de choisir la médiation après le déclenchement d'un procès devant les instances compétentes. Voir **Sanda Elena Lungu**, *Roumanie*, *Rapport*, en **Béatrice Brenneur**, *Panorama des médiations du monde*, *La médiation*, *langage universel de règlement des conflits*, L'Harmattan, Paris 2010, p.158–159.

reprises : par la loi n 370 du 3 décembre 2009 modifiant et complétant la loi sur la médiation et par la loi n 202 du 26 octobre 2010, relative aux étapes visant à accélérer la procédure. Avec les nouvelles dispositions de la loi n 202 du 26 octobre 2010, relative aux étapes visant à accélérer la procédure, le code de procédure civile mentionne pour la première fois la possibilité de recourir à une procédure de médiation.

Par la Loi n 134/2010 concernant le Code de procédure civile et la Loi n 76/2012 de mise en application de la loi concernant le Nouveau Code de procédure civile a été adopté un nouveau Code de procédure civile, apportant en même temps une série de modifications à la loi sur la médiation. Cette législation, comme de nombreux actes normatifs adoptés durant la période 2012–2013 concernant la médiation, a marqué une période pleine d'incertitudes et de modifications successives de la législation sur la médiation en générale et sur la législation civile en particulier. Pour cette raison, nous n'allons pas présenter toutes ces modifications, mais nous allons souligner les dispositions légales qui sont en vigueur maintenant, en précisant les normes qui représentent une stimulation dans le développement de la médiation en Roumanie, comme celles que nous considérons comme représentant un inconvénient, une régression par rapport à la période antérieure de 2013.

La possibilité de présenter l'accord de médiation directement au notaire ou à une juridiction a été réglementée, sans qu'il y ait un dossier inscrit au rôle, pour en donner une force exécutoire, après la vérification des conditions impératives de fond et de forme. Même si, initialement, dans ce dernier cas, la demande au tribunal était exemptée du paiement de la taxe judiciaire de timbre, ce qui a représenté une mesure d'encourager les parties de recourir à la procédure de médiation et de donner force exécutoire à leur accord de volonté, par la suite, cette disposition a été modifiée, de manière inexplicable, dans le sens de l'obligation des parties à payer la taxe de timbre prévue par la loi pour le litige respectif. Cette mesure paraît être d'autant plus incompréhensible qu'il se crée aux parties qui résolvent par la médiation un conflit, sans ne plus l'amener devant le tribunal et sans plus donner lieu à des dépenses de la part de l'Etat, une situation plus difficile, que si, tout d'abord, elles déposent une demande en justice et ensuite elles présentent l'accord de médiation au tribunal, cas pour lequel est restituée la taxe judiciaire de timbre payée pour que la juridiction soit investie, à l'exception des cas pour lesquels le conflit résolu par la voie de la médiation est lié au transfert de droit de propriété et/ou la constitution d'un autre droit réel sur un immeuble.

La modification la plus importante de la Loi n 192/2006 dans l'application des dispositions de la Directive en ce qui concerne l'obligation des Etats membres de prendre les mesures efficaces pour la transposition de celle-ci, mais qui représente en même temps une mesure de sanction, est contenue à l'art. 2 et prévoit que « dans les litiges qui peuvent former, conformément à la loi, l'objet d'une médiation, les parties et / ou la partie concernée, le cas échéant, sont tenues de prouver qu'elles ont participé à la réunion d'information sur les avantages de la médiation ». Mais, le 7 mai 2014, la Cour constitutionnelle, par la Décision no. 266/2014 a déclaré que la les dispositions précitées sont inconstitutionnelles.

Les domaines du droit privé et du droit public où la médiation est utilisée

Selon la loi roumaine, qui réglemente un large domaine d'application, peuvent être soumises à la médiation des litiges en matière civile, commerciale, familiale,[7] pénale, dans le domaine de la protection du consommateur mais aussi dans la situation des conflits aux droits disponibles et dans le contentieux du droit du travail. En ce qui concerne la médiation au cours d'un procès civil, dans le cas où le litige a été jugé, la résolution du conflit par la médiation peut avoir lieu à l'initiative des parties ou à la recommandation de l'instance, acceptée par les parties. A la clôture du procès de médiation, le médiateur est obligé d'informer l'instance sur le résultat de la médiation. Dans la situation où l'on a obtenu un accord, à la demande des parties, l'instance peut prononcer une décision, en prenant note de la transaction des parties et décidera, à la demande des parties, des dépens respectifs.

Par contre, ne peuvent pas être résolues par la médiation les questions liées aux droits strictement personnels, tels que le statut d'une personne ainsi que les droits dont les parties ne peuvent pas disposer par convention.

Le cadre juridique en vigueur s'applique à la fois aux différends internes et transfrontaliers ou distinctement ?

Le cadre législatif national qui réglemente les activités de médiation ne prévoit pas de dispositions spécifiques en matière de médiation des conflits transfrontaliers, donc le cadre juridique en vigueur s'applique à la fois aux différends internes et transfrontaliers ou distinctement.

Mais, la Roumanie est aussi un pays membre de l'Union européenne, donc, la **directive 2008/52/CE** du Parlement européen et du Conseil, du 21 mai 2008, sur certains aspects de la médiation en matière civile et commerciale, a un champ d'application large incluant tous les modes alternatifs de résolution des litiges transfrontaliers, qu'ils aient un caractère judiciaire ou extrajudiciaire, se rapportant « aux matières civiles et commerciales, à l'exception des droits et obligations dont les parties ne peuvent pas disposer (...), aux matières fiscale, douanière ou administrative, ni à la responsabilité de l'Etat pour des actes ou des omissions commis dans l'exercice de la puissance publique ». La directive du 21 mai 2008 régit l'ensemble des médiations transfrontalières portant sur des matières de nature civile ou commerciale, que ces médiations soient judiciaires ou conventionnelles. Cette vision extensive du champ de la médiation se retrouve dans la définition que la directive donne dans son article 3 a à la notion de « médiation », dont le caractère très vaste recouvre ainsi non seulement la médiation conventionnelle et judiciaire au sens du droit roumain, mais également les conciliations menées par les conciliateurs de justice, ainsi que tout processus qui répondrait à la définition de la directive, sans pour autant employer l'appellation de « médiation » ou de « médiateur ». Inversement, certains processus qualifiés de médiation n'entrent pas

[7]Les conflits familiaux suivants sont susceptibles de faire l'objet d'une procédure de médiation : malentendus entre époux sur la continuation du mariage, exercice de l'autorité parentale, définition du lieu de résidence des enfants issus du mariage, contribution des parents à la pension alimentaire due pour l'enfant ainsi que d'autres problèmes de toute nature survenant entre les époux en relation avec les droits personnels ou patrimoniaux dont ils jouissent d'après la législation en vigueur.

dans le champ de la directive, comme par exemple ceux qui doivent être regardés, en réalité, comme des recours administratifs préalables ou encore ceux qui se bornent à émettre un avis aux administrations ou entreprises qui les saisissent à cette fin.

3 La Convention de Médiation

3.1 Des Règles Applicables à la Convention de Médiation en Vue de Solutionner des Différends Éventuels et à l'Entente entre des Parties Afin de Soumettre un Différend Né à la Médiation. Les Conditions de Forme et de Fond Pertinentes dans les Deux Cas et les Effets Découlant de Chacun

La convention de médiation est le contrat par lequel des parties s'accordent pour désigner un médiateur chargé de faciliter la conclusion d'une transaction mettant fin au litige né ou à naître. Elle peut être soit un compromis de médiation lorsqu'elle est conclue après l'éclatement du litige, soit une clause de médiation lorsqu'elle figure dans le contrat de base. Comme il est souvent plus facile pour les parties de prévoir une clause de médiation lors de la rédaction du contrat, il est fortement suggéré de l'inclure à ce moment. La mise en application d'une clause de médiation déjà prévue au contrat est une façon très répandue d'enclencher celle-ci. Une telle clause permet aux parties de soumettre à la médiation tout conflit découlant du contrat. Les parties s'engagent alors, en cas de différend, à soumettre celui-ci à la médiation plutôt que de recourir à un tribunal. Qu'il s'agisse d'un compromis ou d'une clause, la convention de médiation est, en règle générale, constatée par écrit.

3.2 Les Aspects de la Responsabilité Reposant sur les Parties et Associés au Non-Respect de l'Un ou l'Autre de ces Deux Types Convention. Les Effets de la Convention et de l'Entente sur d'Éventuels Recours Devant les Tribunaux ou en Arbitrage Ainsi qu'à l'Égard de Causes Pendantes

Une fois le médiateur choisi, les parties signent avec ce dernier une convention de médiation. Cette convention comprend généralement une clause de confidentialité et fixe le coût des services du médiateur. Elle sert aussi à déterminer l'objet de la médiation et à encadrer son déroulement.

La durée du délai de prescription dans ces cas est suspendu, mais pour un maximum de 3 mois à partir du début de la médiation. Toutefois,si la médiation

intervient à la demande des parties au cours du procès dans des affaires civiles par les tribunaux ou d'arbitrage, le tribunal doit suspendre son jugement sur la base de l'accord des parties [art. 411 alinéa (1) point 1 NCPC].

4 Le Médiateur

4.1 Qui Peut Être Médiateur ?

Conformément à l'art. 7 de la Loi no. 192/2006, modifiée par la Loi no. 370/2009, "toute personne qui remplit les conditions suivantes peut être un médiateur : (a) a une capacité d'exercice totale ; (b) a des études supérieures ; (c) expérience de plus de 3 ans ; (d) est médicalement capable d'exercer cette activité ; (e) jouit d'une bonne réputation et n'a jamais été condamnée définitivement pour avoir commis une infraction intentionnelle, capable d'heurter le prestige de la profession ; (f) a achevé la formation de médiateur, dans les conditions de la loi, ou d'un programme postuniversitaire niveau master dans le domaine, reconnu conformément à la loi et approuvé par le Conseil de médiation ; (g) a été autorisée comme médiateur dans les conditions de cette loi".

La Loi 192/2006, modifiée par la Loi no. 370/2009 et l'OG no. 13/2010 réglemente les conditions dans lesquelles les citoyens d'autres Etats et des Etats membres de l'Union Européenne, de l'Espace Economique Européen et de la Confédération Suisse sont reconnus comme médiateurs en Roumanie, sur la base des documents qui attestent leur qualification dans la profession de médiateur et les conditions dans lesquelles un citoyen roumain, en possession des documents de qualification dans la profession de médiateur dans l'un de ces Etats, peut être reconnu comme médiateur en Roumanie.

Les antécédents des médiateurs roumains sont très diversifiés, des avocats aux anciens juges, des psychologues, ingénieurs, médecins, économistes, ou des policiers. Certains d'entre eux suivent des cours de médiation juste pour mieux comprendre le concept de la médiation. D'autres voient la médiation comme une alternative qui pourrait apporter plus de satisfactions professionnelles. Quelle que soit la raison, tous ces gens se tournent vers une autre façon de résoudre les conflits, une approche plus constructive, plus créative.[8]

[8] **Roxana Maria Călin**, *Discuții cu privire la aplicarea legii medierii de instanțele judecătorești. Critica unor dispoziții legale*, Revista Forumul Judecătorilor nr. 4/2012, p.112.

4.2 Qui Peut le Nommer ou le Désigner, Que Ce Soit Dans le Contexte d'une Médiation Privée ou Dans Celui d'une Médiation Judiciaire

Pour contribuer à l'organisation du système, la Loi no. 192/2006 a créé un organisme autonome, qui développe une activité d'intérêt publique. C'est le Conseil de médiation, constitué de 9 personnes autorisées comme médiateurs (et trois membres suppléants), désignées par vote par les médiateurs autorisés. Dans le cadre d'un mandat de 2 ans. Les membres du Conseil assument la responsabilité de réglementation dans le domaine de la médiation, envisageant, en principal, l'assurance de la qualité de l'acte de médiation et la construction d'un système cohérent d'utilisation de la médiation en Roumanie.

En ce qui concerne le fonctionnement du Conseil de médiation, l'art. 19 de la Loi no. 192/2006 prévoit : "(1) Le Conseil de Médiation se réunit une fois par mois ou chaque fois qu'il est nécessaire, a la convocation du président. (2) Les réunions du Conseil de médiation sont publiques, à l'exception du cas où ses membres décident autrement. (4) Dans l'exercice de ses attributions, le Conseil de médiation adopte des décisions par vote à la majorité de ses membres. (5) Aux travaux des Conseil de médiation peuvent être invités à participer des personnes de toute autre institution ou organisme professionnel, la consultation desquelles est nécessaire pour prendre des mesures ou pour adopter les décisions du Conseil de médiation."

Les attributions principales du Conseil sont, aussi, définies par la loi (art. 20) : il promeut l'activité de médiation et représente les intérêts des médiateurs autorisés, afin d'assurer la qualité des services dans le domaine de la médiation, selon les dispositions de la loi ; élabore les standards de formation dans le domaine de la médiation, sur la base des meilleures pratiques internationales dans la matière ; autorise les programmes de formation professionnelle initial et continu, autant que les programmes de spécialisation des médiateurs ; élabore et actualise la liste des fournisseurs de formation des médiateurs qui ont obtenu l'autorisation ; autorise les médiateurs, dans les conditions prévues par cette loi et par la procédure établie par le Règlement d'organisation et fonctionnement du Conseil de médiation ; coopère, par le Système d'information dans le cadre du marché intérieur, avec les autorités compétentes des autres Etats membres de L'Union Européenne, de l'Espace Economique Européen et de la Confédération Suisse, afin d'assurer le contrôle des médiateurs et des services qu'ils rendent, conformément aux dispositions de l'OUG no. 49/2009 ; élabore et actualise le tableau des médiateurs autorisés ; garde les évidences des bureaux des médiateurs autorisés ; surveille l'accomplissement des standards de formation dans le domaine de la médiation ; publie les documents qui prouvent la qualification professionnelle des médiateurs ; adopte le Code d'éthique et de déontologie professionnelle des médiateurs autorisés et les normes de responsabilité disciplinaire de ceux-ci ; prend des mesures pour l'accomplissement des dispositions contenues dans le Code d'éthique et de déontologie professionnelle des médiateurs autorisés et applique les normes concernant leur responsabilité disciplinaire ; fait des propositions pour l'achèvement ou, selon le cas, la corrélation

de la législation concernant la médiation ; adopte le règlement concernant son organisation et fonctionnement ; organise la sélection du conseil de médiation suivant, dans les conditions prévues par la loi ; accomplit toute autre attribution prévue par la loi.

Le Conseil de médiation est la seule institution qui a la responsabilité d'établir les formes d'exercice de la profession de médiateur et d'en garder l'évidence. Dans un premier temps, il faut déposer au Conseil de médiation une requête d'évaluation, accompagnée par un dossier contenant les actes qui prouvent le fait que la personne concernée s'inscrit dans le respect des dispositions des arts. 7 et 72 par. (2) de la Loi no. 192/2006 et dans la deuxième étape, il faut déposer une requête pour l'approbation de la forme dans laquelle ils veulent pratiquer la profession de médiateur.

Les médiateurs autorisés sont inscrits dans un Tableau des Médiateurs, publié chaque année dans le Journal Officiel de la Roumanie, sur le site du Conseil de Médiation et sur le site du Ministère de la Justice qui, à son tour, va distribuer le Tableau à toutes les instances juridiques et à toute autre institution intéressée par la médiation. Le Tableau des Médiateurs est actualisé chaque mois, après chaque réunion du Conseil qui approuve l'inclusion dans le tableau de nouveaux médiateurs.

A présent, le Tableau des Médiateurs comprend environ 1 750 médiateurs autorisés.

La médiation constitue une profession ouverte a un groupe très large de personnes, pas seulement aux avocats, mais permet aux parties d'être assistées par les avocats.

4.3 Quelles Sont les Obligations des Médiateurs et Quelle est la Nature des Obligations de Divulgation Auxquelles il est Assujetti

Le médiateur doit être neutre, impartial et indépendant. Le médiateur doit respecter la confidentialité des informations portées à sa connaissance dans le cadre de ses activités de médiation, ainsi que des documents qu'il a élaborés ou qui lui ont été transmis par les parties au cours de la médiation, même après la fin de sa mission (loi n 192/2006). Cette obligation n'est pas limitée dans le temps (code d'éthique et de déontologie professionnelle des médiateurs). En ce qui concerne la possibilité d'entendre un médiateur comme témoin dans un procès, l'article 37 de la loi n 192/2006 stipule qu'un médiateur ne peut être entendu en tant que témoin sur des faits en relation avec des actions ou documents de toute nature dont il aurait eu connaissance pendant la médiation.

Les principes garants de la qualité de médiateur :

- *l'impartialité* : le médiateur n'a pas à prendre parti ni à privilégier un point de vue sur un autre ; le médiateur s'interdit d'exercer avec les mêmes personnes

une autre fonction que celle de médiateur ; le médiateur ne peut intervenir dans une médiation impliquant des personnes avec lesquelles il entretient des liens personnels ou économiques.
- *l'autonomie* : il appartient au médiateur de préserver l'autonomie de sa mission et de la refuser le cas échéant, de la suspendre ou de l'interrompre si les conditions nécessaires ne lui semblent pas ou plus remplies ; il veille à l'équité de l'accord envisagé.
- *la compétence* : le médiateur possède une qualification dans les techniques de médiation ; il doit participer de manière régulière et impérative à des séances collectives d'analyse de la pratique lui permettant de procéder à une réflexion sur les conditions d'exercice de son activité de médiateur.

La médiation est basée sur la coopération des parties et l'utilisation par le médiateur de certaines méthodes et techniques spécifiques, fondées sur la communication et la négociation. Le négociateur ne peut pas imposer aux parties une solution relative au conflit soumis à la médiation. Son rôle est d'assister les partis et les soutenir dans leur démarche commune de règlement du conflit, afin d'arriver à une solution convenable pour toutes les parties en médiation.[9]

Le médiateur a le droit de recevoir un honoraire, décidé par négociation avec les parties, comme le remboursement des dépenses dues à la procédure de médiation. L'honoraire doit être d'un montant raisonnable et doit considérer la nature et le sujet du conflit. Sauf convention contraire, les honoraires de la médiation sont supportés par les parties, de manière égale. Le Contrat de médiation représente un titre exécutoire en ce qui concerne les obligations des parties à payer l'honoraire du médiateur, à la date prévue. Comme la médiation est un service privé, il n'y a pas de barème d'honoraire officiel qui pourrait être utilisé par le médiateur et les parties ; chaque prestataire de services est libre de décider les honoraires en utilisant des barèmes d'honoraires ou par fixation individuelle pour chaque cas.

4.4 L'Enseignement Obligatoire des Médiateurs

La formation du médiateur est pluridisciplinaire. Elle se fonde sur des connaissances et habilités développées antérieurement, mais, aussi, sur d'autres complètement nouvelles, spécifiques à la médiation, à un niveau minimal, imposé par le standard occupationnel. Etre médiateur est, tout d'abord, une option professionnelle qui se fonde sur le désir de contribuer, ainsi, au progrès de la société. Dans ce sens, le médiateur est une personne constamment orientée vers l'autodépassement et qui se trouve dans un développement professionnel permanant. Le Code éthique et déontologique du médiateur l'y oblige,et même le Conseil de médiation s'ajoute

[9] Voir **Smaranda Angheni**, *Rapport*, http://www.cedr.org/congresses/caserta/CII_ROM_FR.pdf.

à la tendance internationale d'obliger le médiateur à démontrer la preuve de sa préparation continue en établissant un nombre minimum d'heures de formation annuelle.

Selon la loi roumaine de la médiation, les cours de formation des médiateurs peuvent être organisés aussi dans le cadre des institutions d'enseignement supérieur accréditées, spécialement dans le cadre des programmes de master, mais ils ont besoin de l'autorisation du Conseil de Médiation. Cette autorisation est nécessaire dans les conditions où la médiation est une profession distincte, différente de celle pour laquelle le programme de master a été organisé.

Des informations que possède le Conseil de Médiation, les programmes de niveau du master, jusqu'à présent, sont orientés vers un niveau purement théorique et n'assurent pas le développement des habilités comprises dans le Standard occupationnel du médiateur. C'est le motif pour lequel le Conseil de médiation n'a pas assumé la responsabilité de valider la préparation de ceux qui ont obtenu une maîtrise dans des programmes du niveau master – qui n'ont pas été approuvés, antérieurement, par le Conseil, et, implicitement, n'ont pas été inclus parmi les médiateurs autorisés.

Le Conseil de Médiation a institué le registre national des associations professionnelles de médiateurs. Ce registre énumère les organisations non gouvernementales qui encouragent la médiation et qui représentent les intérêts professionnels des médiateurs. Conformément à l'article 12 de la loi 192/2006, les médiateurs agréés sont inscrits au « répertoire des médiateurs », géré par le Conseil de médiation et publié au Journal officiel roumain, partie I. Le « répertoire des médiateurs » est également disponible sur les sites web officiels du Conseil de Médiation et du Ministère de la Justice. La liste des médiateurs agréés contient des informations sur: leur appartenance à des associations professionnelles ; l'établissement où ils ont obtenu leur diplôme ; le programme de formation à la médiation qu'ils ont suivi ; les langues étrangères dans lesquelles ils peuvent assurer des services de médiation et leurs coordonnées.[10]

4.5 La Responsabilité du Médiateur

Conformément au *Code d'éthique et de déontologie professionnelle des médiateurs*,[11] le médiateur est responsable civilement, pénalement et disciplinairement pour le manquement à ses obligations professionnelles, en conformité avec le droit

[10]Les personnes souhaitant faire appel à la médiation pour résoudre un litige peuvent prendre contact avec un médiateur dans un délai d'un mois à compter de la date d'affichage du « répertoire (liste) des médiateurs » dans les locaux des tribunaux et de publication sur le site web du ministère de la Justice. Le conseil de médiation est légalement tenu de mettre régulièrement à jour — au moins une fois par an — le répertoire (la liste) des médiateurs et de communiquer ces mises à jour aux tribunaux, aux autorités locales et au ministère de la Justice.

[11]http://www.mediereneamt.ro/codul-de-etica.pdf.

civil, pénal et les règles établies par le Conseil de Médiation. Le médiateur est le garant du déroulement apaisé du processus de médiation, il informe les personnes que, tout au long du processus de médiation, elles ont la possibilité de prendre conseil auprès de différents professionnels. Il existe aussi un *Code de conduite européen pour les médiateurs*[12] qui énonce une série de principes que les médiateurs peuvent volontairement respecter, sous leur propre responsabilité. Il peut être utilisé par les médiateurs intervenant dans tout type de médiation en matière civile et commerciale.

4.6 Le Rôle Joué par les Centres de Médiation en Roumanie Ainsi Que Leur Impact Sur le Développement de la Médiation

Les centres de médiation en Roumanie ont constitués un impact très fort sur le développement de la médiation.

Par exemple, en mai 2003, par l'Ordre du Ministère de la Justice, le Centre Pilot de Médiation auprès du Tribunal Dolj et du Tribunal d'Instance Craiova a été fondé et, par l'Ordre no. 2683/16.09.2003, le Règlement concernant l'organisation et fonctionnement du centre a été approuvé et l'Association « Centre de Médiation Craiova » a été constituée. A partir de novembre 2003, l'activité du Centre de Médiation a démarré par l'organisation d'une session de médiation des affaires jugées par le Tribunal d'Instance de Craiova et le Tribunal de Grande Instance Dolj et de sessions de formation des médiateurs, adressées aux avocats, en tant que principal groupe-cible.

Par un programme initié par le Centre de Médiation Craiova, avec l'appui du Centre Culturel de l'Ambassade des Etats Unis, le Ministère de la Justice et des Barreaux de Roumanie, à partir de en 2005, ont été organisé à Craiova des cours de formation des médiateurs sous la direction des quelques médiateurs avec une vaste expérience de Washington DC – Etats Unis. Après les cours organisés à Craiova, ont été créé des Centres de Médiation dans chaque département de Roumanie, ultérieurement ils se sont constitués dans l'Union des Centres de Médiation de Romania (UCMR).

A partir de Février 2009, l'Association Le Centre de Médiation de Craiova a été déclarée comme une organisation d'utilité publique par l'arrêté gouvernemental no. 103/2009. Les panélistes CMC ont un rôle actif dans le développement de la médiation en Roumanie. Il y a plus de 100 spécialistes neutres qui sont activement impliqués dans la médiation et à la promotion de ce domaine. Quatre membres du centre faisaient partie de la première réunion du Conseil de Médiation. Avec leurs collègues, ils ont conçu et mis en œuvre les règlements de médiation roumains et créé ainsi l'environnement juridique de la médiation en Roumanie.

[12] http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_fr.pdf.

5 Le Processus de Médiation

5.1 Les Règles et les Principes Qui Régissent le Processus de Médiation et la Conduite de Celle ci

Conformément aux dispositions de la loi sur la médiation, le processus de médiation est dirigé uniquement par les parties. Les parties peuvent choisir librement leur médiateur (excepté pour une procédure judiciaire où le juge est nommé au hasard) et décident des points à aborder ainsi que de la date et du lieu des sessions de médiation. Dans la mesure où la médiation est une procédure extrajudiciaire, le cadre procédural est moins formel, sans règles et restrictions de forme imposées par des tiers ou une législation et sans contraintes ou sanctions en cas de violation des règles.[13] Enfin, la médiation peut surtout être programmée à n'importe quel moment à la demande des parties sans respecter les délais spécifiques aux procédures judiciaires. En Roumanie, l'accord entre les parties issu de la médiation a la valeur d'un acte sous-seing privé. Sa mise en exécution dépend donc de la bonne volonté des parties quant au respect ou au non-respect de l'accord, aucune autorité ne pouvant intervenir. Pour rendre exécutoire le contenu d'un accord issu de la médiation, les parties peuvent s'adresser à un notaire ou au tribunal.

La confidentialité constitue un principe de base de la médiation, établi à la fois par la loi n 192/2006 sur la méditation et l'organisation des professions de la médiation et par le code d'éthique et de déontologie professionnelle des médiateurs. Le secret professionnel est reconnu non seulement comme un droit mais également comme une obligation fondamentale et primordiale du médiateur. L'obligation de conserver la confidentialité des informations au cours de l'activité de médiation et à l'égard des documents rédigés au cours de la médiation, même après sa retraite, est également prévu par la Loi n. 192/2006 (art. 32), ainsi que dans le Code d'éthique et de déontologie professionnelle du médiateur. En outre, les infractions aux obligations de confidentialité, d'impartialité et de neutralité par le médiateur doivent engager la responsabilité disciplinaire de ce dernier ou même la responsabilité civile, en vertu des exigences de l'art. 42 de la loi.

En ce qui concerne la possibilité du médiateur d'être entendu comme témoin, les dispositions de la Loi n. 192/2006 veulent que le médiateur ne puisse pas être entendue comme témoin a parler de ses actes ou des instruments utilisés lors de la procédure de médiation. Dans les affaires pénales, le médiateur peut être entendu comme témoin que s'il a l'accord préalable, express et écrit des parties et, le cas échéant, des autres parties intéressées. La capacité d'un témoin est primaire par rapport à celui d'un médiateur, en ce qui concerne les faits et circonstances qu'il connaissait avant de devenir médiateur dans ce cas particulier. Dans tous les cas, après avoir été entendu comme témoin, le médiateur ne peut plus exercer l'activité

[13] Voir **Bogdan Matei**, *Médiation familiale : l'expérience Roumaine*, http://www.europarl.europa.eu/RegData/etudes/note/join/2011/453187/IPOL-JURI_NT(2011)453187_FR.pdf.

de médiation dans ce cas particulier. Une exception à l'obligation des parties à garder la confidentialité est prévue au chapitre VI – « Des dispositions particulières concernant la médiation de certains litiges », respectivement à la section I – « Dispositions spéciales concernant les affaires familiales », dans l'art. 66 l'article 2 il est prévu que, si au cours de la médiation, le médiateur apprend l'existence de certains faits qui mettent en péril la croissance normale ou le développement d'un enfant ou gravement atteinte à son meilleur intérêt, il doit être tenu d'en informer l'autorité compétente.

Les dispositions de l'article 6 de la directive, relatives à la possibilité de demander que le contenu de l'accord écrit issu de la médiation soit rendu exécutoire, ont déjà été transposées dans la législation nationale en matière de droit civil, commercial et de la famille. Conformément à l'article 59, confirmé par l'article 63 de la loi n 192/2006, l'accord entre les parties peut être soumis à homologation par un notaire ou, en fonction des circonstances, par un tribunal qui, à la demande des parties, ordonne que son contenu soit rendu exécutoire. D'après l'article 58 de la loi n 192/2006, l'accord de médiation doit être transmis au notaire ou à une cour uniquement dans des situations spécifiques. Ainsi, lorsque le conflit à l'origine de la médiation concerne un transfert de propriété privée immobilière ou lorsque la loi, sous peine de nullité, stipule que « si certaines exigences tant de fond que de forme doivent être remplies, les parties doivent soumettre l'accord établi par le médiateur à un notaire ou au tribunal ».

La procédure de médiation se déroule de la manière décidée par les parties. Si, et dans la mesure où, les parties n'ont pas pris de décision à ce sujet, le médiateur, conformément au présent règlement, décide de la manière dont se déroulera la procédure de médiation. Chaque partie coopère de bonne foi avec le médiateur afin que la procédure de médiation progresse aussi rapidement que possible. Le médiateur est libre de rencontrer séparément les parties et de s'entretenir séparément avec elles, étant entendu que les informations communiquées lors de ces rencontres et entretiens ne peuvent être divulguées à l'autre partie sans l'autorisation expresse de la partie de qui elles émanent. Dès que possible après sa nomination, le médiateur, en consultation avec les parties, fixe le calendrier selon lequel chaque partie remettra au médiateur et à l'autre partie un exposé résumant le fondement du litige, les intérêts de cette partie, ses arguments au sujet du litige et l'état actuel de celui-ci, ainsi que tout autre renseignement et pièce qu'elle estime nécessaire aux fins de la médiation, notamment afin de définir les questions en cause. À tout moment de la procédure de médiation, le médiateur peut proposer qu'une partie fournisse tous les renseignements et pièces complémentaires qu'il juge utiles. Une partie peut, à tout moment, soumettre au médiateur, pour sa considération exclusive, des renseignements et pièces écrits qu'elle considère comme confidentiels. Le médiateur ne peut, sans l'autorisation écrite de cette partie, divulguer ces renseignements ou pièces à l'autre partie.

La médiation en Roumanie est volontaire. Le tribunal devant lequel un litige est porté ne peut proposer aux parties que l'affaire soit renvoyée à la médiation, il n'a pas le droit d'ordonner la médiation. Le juge doit essayer, durant tout le procès, de concilier les parties. L'article 21 NCPC (*concernant l'essai de concilier*

les parties) présente les principes fondamentaux du procès civil, l'obligation pour le juge de tenter la conciliation des parties tout au long du processus, de donner des orientations requises par la loi et la recommandation de régler à l'amiable le différend par la médiation.

L'Ordonnance d'urgence no. 90 du 12 Décembre 2012 modifiant et complétant la loi no. 192/2006 a disposé que les deux parties sont obligées d'assister à une séance d'information concernant la médiation ; mais ce n'est que de l'information. La médiation n'est jamais obligatoire, il faut que les deux parties soient consentantes. De plus, cela concerne seulement les personnes qui ont porté plainte, et qui se dirigent vers un procès. Cette ordonnance d'urgence a été promulguée de manière à ce que les citoyens songent à utiliser plus sérieusement la médiation comme moyen de résoudre leurs problèmes.[14]

Selon le dernier développement dans la législation sur la médiation en Roumanie, dans les litiges qui peuvent se former, conformément à la loi, l'objet d'une médiation, les parties et / ou la partie concernée, le cas échéant, sont tenus de prouver qu'ils ont participé à la séance d'information sur les avantages de la médiation, dans les domaines suivants[15]:

- dans le domaine de la sécurité des consommateurs, quand un consommateur invoque l'existence d'un dommage suite à l'achat d'un produit ou d'un service défectueux, le non-respect des clauses contractuelles ou des garanties accordées, l'existence de clauses abusives incluse dans le contrat conclu entre les consommateurs et les opérateurs économiques, ou de la violation d'autres droits prévus par la législation nationale ou de l'Union européenne dans le domaine de la sécurité des consommateurs ;
- en matière de droit de la famille, dans les situations prévues par l'art. 64 ;
- dans le domaine des litiges concernant la possession, les limites de propriété, ainsi que dans d'autres litiges qui considèrent les relations voisins ;
- dans le domaine de la responsabilité professionnelle dans laquelle la responsabilité professionnelle peut être tenue, dans la mesure où à travers des lois spéciales aucune autre procédure n'est prévue ;
- dans les litiges découlant de la conclusion, de l'exécution de contrats de travail individuels ;
- dans les litiges civils dont la valeur est sous 50.000 lei, à l'exception des litiges dans lequel il est prononcé une ordonnance exécutoire de l'ouverture de la procédure d'insolvabilité, des actions concernant le Registre du Commerce et des cas dans lesquels les parties choisissent de recourir aux procédures prévues à l'art. 999–1018 du NCPC ;
- dans le cas de crimes pour lesquels l'action pénale est mise en mouvement par la personne lésée et la réconciliation des parties supprime la responsabilité

[14] Voir **Claudiu Ignat**, http://www.lepetitjournal.com/bucarest/accueil/actualite/137807-justice-la-mediation-l-autre-option.

[15] Voir **Sanda Elena Lungu**, **Mihaela Mărgineanu**, *Deficienţe şi dificultăţi în noile reglementări privind medierea*, Revista Forumul Judecătorilor nr. 4/2012, p. 103–111.

pénale, après le dépôt de la plainte, si l'acteur est connu ou a été identifié, à la condition que la victime exprime sa / son consentement à participer à la séance d'information avec l'acteur.

La preuve de la participation à la séance d'information sur les avantages de la médiation dans une affaire donnée doit être faite par *un rapport d'information* publié par le médiateur qui avait obtenu l'information.

Dans les affaires civiles, l'Ordonnance d'urgence no. 90 du 12 Décembre 2012 a institué, avec effet à partir du 1er Août 2013, la sanction de rejet de l'action comme irrecevable, en raison de l'incapacité du demandeur de remplir son obligation de participer à la séance d'information concernant la médiation.[16]

Le 7 mai 2014, la Cour constitutionnelle, par la Décision no. 266/2014 a admis à l'unanimité l'exception d'inconstitutionnalité dirigée contre les dispositions de l'article 2, paragraphe 1, et 1^2 de la Loi n. 192/2006 concernant la médiation et la profession de médiateur et a déclaré que les dispositions précitées sont inconstitutionnelles.

Suite à la décision de la Cour constitutionnelle, ***la participation à des séances d'information sur les avantages de la médiation est désormais facultative*** **et non plus une condition pour l'introduction de l'action judiciaire**.

Le mécanisme d'accorder la force exécutoire des accords résultant de médiation:

La modification de la loi n 192/2006 par la loi n 370/2009 a apporté une série de spécifications significatives dans l'adoption de dispositions de la directive concernant les mécanismes par lesquels les arrêts résultant de l'utilisation de médiation peuvent devenir exécutoires.

Ainsi, dans le sens de l'art. 59 de la loi n 192/2006, "l'accord des parties peut être présenté à un notaire public, ou, le cas échéant, à l'approbation d'un tribunal, en vertu des exigences prévues à l'art. 63", ces dernières dispositions faisant référence à la résolution réglementée par le Code de procédure civile.

Si le litige médiation vise la cession des droits de propriété privée concernant des biens immobiliers ou lorsque la loi l'exige, sous peine de nullité le respect des conditions de forme, les parties sont tenues d'avoir l'accord rédigé par le médiateur, par le notaire ou de le déposer devant le tribunal – l'article 58 alinéas 4 et 5 de la loi n 192/2006 modifié.

Le juge est obligé d'informer sur la médiation mais le juge n'est pas obligé de proposer une médiation. Il n'y a pas beaucoup de cessions visant à encourager les juges à proposer une médiation. Dans le Code de procédure civile sont quelques cessions qui ne sont pas obligatoires. Le juge peut recommander une médiation,s'il

[16]Voir aussi **Constantin Adi Gavrilă**, *Breaking Down the Romanian Mediation Law*, http://jamsadrblog.com/2012/04/26/breaking-down-the-romanian-mediation-law/, **Constantin Adi Gavrilă**, *Mandatory information sessions starting January 2013 in Romania*, http://kluwermediationblog.com/2012/07/30/mandatory-information-sessions-starting-January-2013-in-romania.

estime que c'est approprié pour le cas. Le juge peut inviter les parties à une séance d'information sur la médiation. Dans les affaires commerciales, les parties peuvent tenter une médiation avant le procès.

La séance d'information faite par le médiateur est gratuite.

Les juges peuvent recommander la médiation. Conditions : la connaissance approfondie des dispositions légales, la connaissance et la compréhension de la procédure de médiation, la participation aux cours de formation. Verbalement, dans la séance du tribunal : au début des débats, dans chaque cas qui peuvent être soumises à la médiation ; en phase écrite : des brochures d'information affichées dans les salles des tribunaux ; des documents d'information liés aux citations à comparaître ou l'information écrite dans les citations à comparaître ; des messages audio/vidéo ; points d'information.

Difficultés dans la promotion de la médiation : le manque d'informations entre les personnes qui cherchent des conseils juridiques, les avocats, les magistrats et les citoyens en général ; petit nombre de médiateurs dans certaines régions, le manque de communication entre les médiateurs et les magistrats, l'opposition des avocats, des magistrats ou des partis, le manque de moyens financiers nécessaires à la promotion, la confidentialité qui empêche la publicité.

Son but de résoudre les différends entre les parties a été confondu avec les institutions de procédure civile et les institutions civiles qui ont conduit à la déviation de l'objectif visé dans la promotion de la médiation : de soulager les tribunaux et de trouver des solutions viables pour effectivement contourner la procédure devant les tribunaux. Certaines dispositions de la loi sur la médiation ont été interprétées au-delà du but recherché par le législateur, qui était d'harmoniser les relations entre les individus à travers l'identification, même par eux, d'une solution sur le différend. Ainsi, il existe des situations où les médiateurs ont agis en tant que notaire public, en ce qui concerne la conclusion des actes juridiques sans faire de la médiation elle-même. C'est la situation dans laquelle il a été conclu un accord de pré-vente (pre-sale agreement) et, sans opposition d'une partie à conclure un acte notarié, l'une des parties a introduit un appel à prononcer une décision et dans ces litiges la première audition ou la seconde audition, les parties ont présenté un accord de médiation. L'objectif des parties dans de tels cas est plus qu'évident : pour éviter la procédure effectuée par le notaire relative à la conclusion de l'acte authentique, impliquant des contrôles de la situation de l'immobilier dans le pays, l'authentification des titres fournis par le vendeur, et les frais de notaire, alors l'impôt. En outre, les médiateurs, de connivence avec les parties, ont détourné l'objet de la médiation réglementée par le législateur.

La médiation n'est pas suffisamment promue au niveau local, national et international. Même si des progrès considérables ont été réalisés, des progrès soutenus par la législation européenne, une des principales difficultés dans la promotion de la médiation transfrontalière résulte de l'insuffisance d'information des justiciables, des avocats, des magistrats, des citoyens en général en ce qui concerne la médiation et ses avantages. L'habitude d'avoir recours au système traditionnel de justice et la connaissance insuffisante des modes alternatifs de règlement des conflits conduisent à des coûts plus importants et une perte de temps considérable. Dans

le cas où la médiation n'est pas organisée dans le cadre ou à côté des juridictions et est réglementée comme étant une profession indépendante, comme c'est le cas pour la Roumanie, la communication entre la nouvelle profession, les médiateurs, les parties et les magistrats est entravée, surtout s'il n'existe pas une tradition d'utilisation des modes alternatifs de règlement des conflits.

Les changements apportés à la loi no. 192/2006 par la *loi no. 370/2009 et par l'ordonnance du Gouvernement no. 13/2010* ont été nécessaires pour l'harmonisation de la législation interne avec la législation de l'Union Européenne, spécialement avec les dispositions de la **directive 2008/52/CE** du Parlement Européen et du Conseil concernant certains aspects de la médiation en matière civile et commerciale. Ainsi, des dispositions expresses concernent la façon par laquelle les parties peuvent donner force exécutoire a l'accord de médiation, par le notaire publique ou l'instance (art. 59).

Malheureusement, ces changements n'ont pas envisagé l'effet de la médiation sur la prescription et la déchéance, au sens de la suspension ou l'interruption de celles-ci, selon les demandes de la Directive.

En droit de de la famille, le médiateur veille à ce que le résultat de la médiation ne contrevienne pas à l'intérêt supérieur de l'enfant et encourage les parents de se concentrer, principalement, sur les besoins de l'enfant.

Une disposition importante de la loi roumaine de médiation est celle concernant la médiation des causes pénales, autant avant l'information des organes judiciaires, que plus tard, pendant l'enquête pénale ou le jugement.

La médiation en matière pénale ne peut pas être imposée à aux parties, elle doit être acceptée, à la fois, par la partie défenderesse et par l'accusé. La médiation peut avoir lieu avec la garantie du droit pour chaque partie à l'assistance juridique et/ou aux services d'un interprète (si nécessaire).

Conformément à l'art. 60 ind.1 alinéa 1 g de la loi n 115/2012, les parties étaient tenues d'apporter la preuve de la participation à la séance d'information concernant la médiation en ce qui concerne « les infractions pour lesquelles une procédure pénale est engagée sur plainte préalable de la partie défenderesse, le rapprochement des parties supprime la responsabilité pénale après la réception de la plainte, si l'auteur est connu ou identifié, sous la condition que la victime consent à participer à la séance d'information **avec l'accusé** ». La loi a soulevé une vague de protestations dans la société civile et dans les médias, qui ont qualifié la proposition d'"**aberrante**".[17] Partir du principe que l'on sait mieux que la victime ce qui est bon pour elle ouvre la voie à tous les abus. D'un autre côté, celui d'une médiation entre la victime et l'agresseur vient de ce que l'on appelle la « *restorative justice* » (justice réparatrice), qui se propose d'impliquer plus les citoyens que l'Etat dans la bonne marche de la justice. Cette nouvelle loi était en contradiction avec les dispositions de la Convention du Conseil de l'Europe sur la prévention et la lutte contre la violence à l'égard des femmes et la violence domestique, en particulier son article 48 qui

[17] Voir http://www.presseurop.eu/fr/content/article/3347761-la-mediation-coupable-victime-est-elle-une-solution.

exige des parties qu'elles interdisent les modes alternatifs de résolution des conflits obligatoires, y compris la médiation et la conciliation, en ce qui concerne toutes les formes de violence à l'égard des femmes couvertes par cette Convention. Cette loi était aussi contraire à l'article 56 de la Convention, selon lequel les Etats doivent protéger les droits et les intérêts des victimes, notamment en veillant, lorsque cela est possible, à ce que les contacts entre les victimes et les auteurs d'infractions soient évités.[18]

Dans ce contexte, l'Ordonnance d'urgence no. 90 du 12 Décembre 2012 a modifié la loi et dispose que, si la victime refuse de participer avec l'auteur, la séance est effectuée séparément.

Le gouvernement roumain a essayé de transposer certaines des dispositions de la directive, par la loi n 202 du 25 Octobre 2010 sur certaines mesures concernant l'accélération de la résolution des cas. Le Code de procédure civile a été modifié, ainsi que le Code de procédure pénale et le Code de la famille.

Les modifications apportées à la loi no.192/2006 concernant la médiation et l'organisation de la profession de médiateur par la Loi n 370/2009 étaient nécessaires pour se conformer à la **directive 2008/52/CE** du Parlement européen et du Conseil. Ainsi, il affirme que l'accord des parties peut être rendu exécutoire par un tribunal ou un notaire. En outre, les parties sont tenues de respecter les termes de l'accord, si le droit interne l'exige, pour valider leur acte. Malheureusement, le changement apporté aux codes ou à la loi no.192/2006 en Décembre 2009 ne couvre pas toutes les questions demandées par la directive.

En Roumanie, conformément à l'art. 720^{-1} du Code de procédure civile, dans les actions et les demandes entre les professionnels quantifiables en argent et tirées des rapports contractuels, avant d'intenter une action judiciaire, le demandeur va essayer de régler le litige soit par la médiation, soit par voie de conciliation directe avec l'autre partie. Le demandeur devra répondre à la partie adverse, l'informant par écrit en ce qui concerne ses prétentions, leurs moyens juridiques et tous les documents qui les soutiennent. La convocation sera faite par lettre recommandée avec accusé de réception, par télégramme, télex, fax ou tout autre moyen de communication qui offrent une transmission de documents à accusé de réception. La convocation peut être faite par la remise des documents exigeant la confirmation de la réception par signature. La date de la conciliation doit être fixée au plus tôt 15 jours après la réception des documents. Le résultat de conciliation sera prévu dans un document mentionnant les créances réciproques et le point de vue de chaque partie. Le délai de prescription du droit à une contentieuse soumise à la médiation ou de conciliation sera suspendu pendant la durée de cette procédure, mais pas pour plus de 3 mois à compter de son commencement.[19]

[18] Voir http://assembly.coe.int/ASP/NewsManager/FMB_NewsManagerView.asp?ID=8404&L=1.

[19] Dans le domaine de droit commercial, en Roumanie, même l'arbitrage est utilisé dans une moindre mesure, mais les grandes entreprises préfèrent cette forme pour une résolution rapide des conflits.

Conformément à l'art. 11 de l'Ordonnance d'Urgence du Gouvernement no. 80/2013 (publiée au Journal officiel no. 392/29 juin 2013) sont assujetties au paiement d'une taxe de 20 RON les demandes par lesquelles les justiciables veulent obtenir une décision de justice qui confirme l'accord des parties, y compris lorsque l'accord est issu à la suite de la médiation. Lorsque l'entente ou l'accord de médiation vise le transfert du droit de propriété ou d'un autre droit réel portant sur un ou plusieurs biens immobiliers, à la somme indiquée s'ajoute 50 % de la valeur de la taxe qui serait dû pour l'action en revendication du bien ayant la valeur la plus grande des biens faisant l'objet du droit réel transféré.

Lorsque l'entente ou l'accord de médiation a comme objet le partage, à la somme fixe s'ajoute 50 % de la valeur de la taxe, calculée conformément à l'art. 5.

Cette ordonnance a aussi modifié la loi sur la médiation conformément à laquelle "la demande adressée au juge en vue d'obtenir une décision de justice qui confirme l'accord des parties, issu à la suite de la médiation est assujettie au paiement d'une taxe, conformément à la loi."

5.2 Des Informations Relatives à la Durée de la Médiation et Tout Type d'Échéance Qui Pourrait Prévaloir en la Matière

Une procédure de médiation qui se termine par un accord de médiation peut être menée à bien en quelques heures, tout au plus quelques jours si plusieurs rendez-vous sont prévus. Ainsi, du début du litige jusqu'à sa conclusion, il peut s'écouler quelques jours si l'on prend également en compte le fait qu'il faille rendre exécutoire l'accord conclu volontairement par les parties. Dans le cas d'une procédure judiciaire, la résolution d'un conflit prendra des mois (exceptionnellement) ou des années.[20]

5.3 La Collaboration entre le Processus de Médiation Comme tel et le Médiateur vis-à-Vis des Instances Externes, Judiciaires ou Extrajudiciaires (Notaires, Experts), au Cours du Processus de Médiation

Le médiateur favorise le règlement du litige entre les parties de la manière qu'il estime appropriée, mais il n'a pas le pouvoir d'imposer un règlement aux parties. S'il estime que le litige entre les parties n'est pas de nature à être réglé par voie de médiation, le médiateur peut proposer aux parties les procédures ou moyens qui, compte tenu des particularités du litige et des relations d'affaires pouvant exister

[20] Voir **Bogdan Matei**, *Médiation familiale* : *l'expérience Roumaine*, http://www.europarl.europa.eu/RegData/etudes/note/join/2011/453187/IPOL-JURI_NT(2011)453187_FR.pdf.

entre les parties, lui paraissent offrir les meilleures chances d'aboutir au règlement le plus efficace, le moins coûteux et le plus fructueux de ce litige. En particulier, le médiateur peut proposer : le recours à un expert pour une ou plusieurs questions ; le recours à l'arbitrage ; la communication des dernières offres de règlement de chaque partie et, à défaut de règlement par la médiation et sur la base de ces dernières offres, le recours à un arbitrage dans lequel le rôle du tribunal arbitral se limite à décider laquelle de ces dernières offres doit prévaloir ; ou le recours à un arbitrage dans lequel le médiateur, avec l'accord express des parties, agit en tant qu'arbitre unique, étant entendu que le médiateur peut, dans la procédure arbitrale, prendre en considération des renseignements qui lui ont été communiqués pendant la procédure de médiation etc . . . Le rôle de l'avocat en médiation est déterminant. La médiation ne peut s'imposer contre la volonté des avocats, qui sont actuellement de plus en plus nombreux à adhérer à cette autre forme de justice.

6 Échec de la Médiation

Il n'est pas obligatoire que la procédure de la médiation se termine par un accord de médiation. Les parties peuvent dénoncer le contrat de médiation à n'importe quel moment et peuvent renoncer à la médiation. Il est aussi possible que la médiation n'aboutisse pas à un accord, malgré les efforts des parties. Dans ces situations, l'échec de la médiation sera mentionné dans un document par le médiateur. Un accord de médiation représente une manifestation de volonté des deux parties donc c'est un contrat. Comme dans n'importe quel contrat, il est possible que les parties ne respectent pas leurs engagements. Dans le cas de la médiation, cette situation ramène les parties au point où elles étaient avant de recourir à la médiation.

La procédure de médiation prend fin à la signature d'une transaction entre les parties réglant une partie ou la totalité des questions en litige entre elles. Sur décision du médiateur, si celui-ci estime que la poursuite de la médiation n'est pas de nature à aboutir au règlement du litige ; ou par une déclaration d'une partie, faite à tout moment entre sa participation à la première réunion entre les parties et le médiateur et la signature d'une transaction.

7 Réussite de la Médiation

7.1 Les Conditions de Forme et de Fond les Effets du Règlement

Les parties doivent avoir la volonté d'arriver à un compromis. Si, lors de la médiation, une des parties se maintient sur une position rigide considérant qu'elle a raison, la médiation ne mènera probablement pas à un accord. Les parties doivent faire preuve d'efforts afin de trouver une solution : elles doivent renoncer à leur

orgueil, être ouvertes dans les discussions avec le médiateur, être patientes, explorer toutes les variantes possibles afin d'arriver à un accord. Lorsque les parties sont arrivées à un accord, elles peuvent conclure une entente, qui doit respecter la loi et l'ordre publique. Cette entente peut être soumise à la vérification d'un notaire en vue d'authentification ou, le cas échéant, à l'accord d'un tribunal, dans les conditions de la loi. Lorsque le litige est en train d'être réglé par une juridiction, le règlement de celui-ci par le biais de la médiation peut être réalisé à l'initiative des parties ou à la recommandation de la juridiction, acceptée par les parties.[21] Pourtant, compte tenu du fait que les parties perdent du temps et de l'énergie pour arriver à un accord, il est difficile de croire qu'une des parties ne va pas le respecter, en assumant le risque que cette décision soit qualifiée comme étant de mauvaise foi.

7.2 Les Conditions Requises Afin Que le Règlement Soit Exécutoire

Les dispositions de l'article 6 de la directive précitée, relatives à la possibilité de demander que le contenu de l'accord écrit issu de la médiation soit rendu exécutoire, ont déjà été transposées dans la législation nationale en matière civile, commerciale et familiale. Conformément à l'article 59, confirmé par l'article 63 de la loi n 192/2006, l'accord entre les parties peut être soumis à homologation par un notaire ou, en fonction des circonstances, par un tribunal qui à la demande des parties ordonne que son contenu soit rendu exécutoire. D'après l'article 58 de la loi n 192/2006, l'accord de médiation doit être transmis au notaire ou à une cour uniquement dans des situations spécifiques. Ainsi, lorsque le conflit faisant l'objet de la médiation concerne un transfert de propriété privée immobilière ou lorsque la loi, sous peine de nullité, dispose que « si certaines exigences tant de fond que de forme doivent être remplies, les parties doivent soumettre l'accord établi par le médiateur à un notaire ou au tribunal ».

8 Coûts

8.1 Comment Sont Établis les Coûts d'une Médiation

La procédure de médiation n'est pas gratuite ; son coût fait l'objet d'un accord entre le médiateur et les parties. À moins que les parties n'en décident autrement, la taxe d'administration, les honoraires du médiateur et tous les autres frais de la procédure de médiation, y compris notamment les frais de déplacement nécessaires du médiateur et tous frais liés aux services d'experts, sont répartis à égalité entre les parties.

[21] Voir **Smaranda Angheni**, *Rapport*, http://www.cedr.org/congresses/caserta/CII_ROM_FR.pdf.

8.2 Aide Juridique. Remboursement des Frais de Justice

Dans la même ordonnance d'urgence du gouvernement on trouve aussi des dispositions pertinentes, respectivement, celles incluses dans l'art. 20 concernant la possibilité de rembourser le montant payé pour les frais de médiation, si, avant de se rendre devant une Cour, la médiation avait été utilisé, mais aussi dans le cas où la médiation a été utilisé après s'être rendu devant une Cour, mais avant la première journée d'audience.

Les dispositions incluses dans l'art. 63 l'article 2 de la Loi n 192/2006 sont également pertinentes et, là, il est indiqué que si le conflit avait été réglé par la médiation, par le jugement prononcé, la Cour statue aussi, à la demande de l'intéressé, le remboursement des frais judiciaires, donc les taxes judiciaires de timbre payées.

Par la *Résolution du 13 septembre 2011 sur la mise en œuvre de la directive relative à la médiation dans les États membres* (*2011/2026*(*INI*)), le Parlement européen a constaté que certains États européens ont pris diverses initiatives en vue de fournir des aides financières aux parties qui ont recours à la médiation : en Bulgarie, les parties se voient rembourser 50 % de la redevance publique déjà versée pour le dépôt de la plainte auprès du tribunal si elles parviennent à résoudre le litige par la médiation et la législation roumaine prévoit le remboursement de l'intégralité des frais de justice si les parties résolvent un litige en cours par la médiation. Les résultats obtenus en particulier par l'Italie, la Bulgarie et la Roumanie prouvent que la médiation permet d'assurer une résolution extrajudiciaire économiquement avantageuse et rapide des litiges grâce à des procédures adaptées aux besoins des parties. À noter également les résultats positifs de la loi roumaine sur la médiation : parallèlement aux dispositions sur les incitations financières, un Conseil de médiation – autorité nationale de pratique de la médiation constituée en tant qu'entité juridique séparée et autonome – a été établi ; il est entièrement consacré à la promotion des activités de médiation, à l'élaboration de normes de formation, à la préparation des formateurs, à la délivrance de documents attestant des qualifications professionnelles des médiateurs, à l'adoption d'un code déontologique ainsi qu'à l'élaboration de propositions en vue de développer la législation.

8.3 Mesures Incitatives et des Sanctions si la Médiation n'Est pas Utilisée. Sanction du Refus d'Aller en Médiation

Dans la nôtre législation, il y a une seule disposition spéciale qui peut être considéré comme étant une pénalité, l'art. 16 section 2 de l'Ordonnance d'urgence no. 51/2008[22] en ce qui concerne l'assistance judiciaire en matière civile, selon laquelle

[22]L'ordonnance prévoit que : « Dans le cas où la personne qui remplit les conditions [. . .] apporte la preuve que, avant le début du procès, elle a suivi la procédure de médiation relative litige, elle bénéficie de la restitution de la somme payée au médiateur à titre d'honoraire. Du même

le juge peut rejeter la demande judiciaire d'assistance publique s'il est prouvé que le requérant avait refusé, avant de début du procès, de suivre la procédure de médiation.

9 Médiation Transfrontalière

9.1 La Notion de Médiation Transfrontalière

9.1.1 Le Sens et la Portée de la Médiation Transfrontalière en Roumanie

La Roumanie est un pays membre de l'Union européenne. La directive du 21 mai 2008 régit l'ensemble des médiations transfrontalières portant sur des matières civiles ou commerciales, que ces médiations soient judiciaires ou conventionnelles. Cette vision extensive du champ d'application de la médiation se retrouve dans la définition que la directive donne dans son article 3 a à la notion de « médiation », dont le caractère très vaste recouvre ainsi non seulement la médiation conventionnelle et judiciaire au sens du droit roumain, mais également les conciliations menées par les conciliateurs de justice, ainsi que tout processus qui répondrait à la définition de la directive, sans pour autant employer l'appellation de « médiation » ou de « médiateur ». Inversement, certains processus qualifiés de médiation n'entrent pas dans le champ de la directive, comme par exemple ceux qui doivent être regardés, en réalité, comme des recours administratifs préalables ou encore ceux qui se bornent à émettre un avis aux administrations ou entreprises qui les saisissent à cette fin.

La directive entend par « litige transfrontalier », tout litige dans lequel l'une des parties au moins est domiciliée ou a sa résidence habituelle dans un État membre autre que l'État membre de toute autre partie, à la date à laquelle le litige est soumis à la médiation ou à laquelle la procédure de médiation est engagée. « On entend également par litige transfrontalier, tout litige dans lequel des procédures judiciaires ou d'arbitrage suivant une médiation entre les parties sont entamées dans un État membre autre que celui dans lequel les parties sont domiciliées ou ont leur résidence habituelle » à la date visée ci-dessus.[23]

droit bénéficie aussi la personne qui remplit les conditions [...], si elle sollicite la médiation après le début du procès, mais avant le premier jour de présentation. » (article 20) ; « Si la requête pour laquelle on sollicite l'aide publique judiciaire fait partie de la catégorie de celles qui peuvent être soumises à la médiation ou à d'autres procédures alternatives de résolution, la requête d'aide publique judiciaire peut être rejetée, si on démontre que le demandeur de l'aide publique judiciaire a refusé, avant le début du procès, de suivre une telle procédure » (article 16 alinéa 2).

[23] **Voir Zeno Şuştac**, **Jamie Walker**, **Claudiu Ignat**, **Anca Elisabeta Ciucă**, **Sanda Elena Lungu**, *Best Practice Guide on the Use of Mediation in Cross-border Cases*, Bucarest 2013. Aussi **Bogdan Matei**, *Médiation familiale : l'expérience Roumaine*, http://www.europarl.europa.eu/RegData/etudes/note/join/2011/453187/IPOL-JURI_NT(2011)453187_FR.pdf.

9.1.2 Les Distinctions Entre la Médiation Interne et la Médiation Transfrontalière Telles Qu'Établies, le Cas Échéant, par le Régime Juridique Roumain

En Roumanie, les lois nationales ne réglementent pas la médiation transfrontalière, qui suit, le cas échéant, les principes du droit international privé.

9.2 Reconnaissance et Exécution des Règlements Étrangers

En ce qui concerne les pays de l'Union européenne, même si les accords obtenus par le biais de la médiation sont en général plus susceptibles d'être exécutés volontairement, la directive veille à ce que tous les États membres instaurent une procédure par laquelle un accord peut, à la demande des parties, être confirmé par un jugement, une décision ou un acte authentique d'une juridiction ou d'une autorité publique. Cette procédure permet la **reconnaissance mutuelle et l'exécution** dans toute l'UE des accords issus d'une médiation, aux mêmes conditions que celles établies pour la reconnaissance et l'exécution des décisions judiciaires en matière civile et commerciale et en matière matrimoniale et de responsabilité parentale.[24]

[24] Voir http://www.europedia.moussis.eu/books/Book_2/3/8/1/1/?lang=fr&all=1&s=1&e=10. Le Règlement (CE) n 44/2001 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale détermine la compétence des tribunaux en matière civile et commerciale. Il dispose que les décisions rendues dans un État membre de l'Union européenne (UE) sont reconnues dans les autres États membres, sans qu'il soit nécessaire de recourir à aucune procédure sauf en cas de contestation. Une déclaration relative à la force exécutoire d'une décision doit être délivrée après un simple contrôle formel des documents fournis, sans que la juridiction puisse soulever d'office un des motifs de non-exécution prévus par le règlement. Le règlement ne couvre ni les matières fiscales, douanières ou administratives ni les matières suivantes : l'état et la capacité des personnes physiques, les régimes matrimoniaux, les testaments, les successions ; les faillites ; la sécurité sociale ; l'arbitrage. Plusieurs instruments juridiques de l'UE ont remplacé les conventions préexistantes. Ainsi un règlement, remplaçant la convention dite "Rome I", dispose qu'un contrat est régi par la loi choisie par les parties, soit expressément, soit comme résultant de façon certaine des dispositions du contrat ou des circonstances de la cause [Règlement (CE) 593/2008]. Le règlement sur la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale, qui a remplacé la convention de Bruxelles de 1968, prévoit des dispositions concernant les compétences générales et les compétences spéciales en matière d'assurance, de contrats conclus par les consommateurs, de contrats individuels de travail et certaines compétences exclusives [Règlement (UE) 1215/2012]. Il comporte également des règles concernant la prorogation, la vérification, la recevabilité, la reconnaissance et l'exécution des décisions, les actes authentiques et les transactions judiciaires. D'autres règlements établissent : des règles régissant la reconnaissance mutuelle des mesures de protection en matière civile ordonnées dans un État membre [Règlement (UE) 606/2013] ; et un cadre général d'activités visant à faciliter la mise en œuvre de la coopération judiciaire en matière civile [Règlement (CE) 743/2002]. Ce dernier règlement a les objectifs suivants : encourager cette coopération ; améliorer la connaissance mutuelle des systèmes légaux et judiciaires en matière civile ; faciliter l'application correcte des instruments européens dans ce domaine ; et

En ce qui concerne le rapport avec les autres pays, conformément à l'article 1095 du Nouveau Code de procédure civile, « les jugements étrangers sont reconnus de plein droit en Roumanie, s'ils se réfèrent au statut personnel des citoyens de l'Etat où ils ont été prononcés dans un État tiers, a d'abord été reconnu dans l'État de la nationalité de chacune des parties ou la compétence de la juridiction étrangère n'était pas fondée uniquement sur la présence du défendeur ou de biens sans relation directe avec le litige dans l'Etat dont relève cette juridiction, si ne sont pas contraires à la loi, à l'ordre publique de droit international privé roumain et les droits de défense ont été respectés. »

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améliorer l'information du public sur l'accès à la justice, la coopération judiciaire et les systèmes légaux des États membres. De règlements spécifiques concernent : la loi applicable au divorce et à la séparation de corps [Règlement (UE) 1259/2010] ; la compétence, la reconnaissance et l'exécution des jugements en matière matrimoniale et en matière de responsabilité parentale des enfants communs [Règlement (CE) 2201/2003] ; la reconnaissance et l'exécution des décisions et la coopération en matière d'obligations alimentaires [Règlement (UE) 4/2009]. Des procédures existent pour la négociation et la conclusion d'accords entre les États membres et les pays tiers sur des questions particulières concernant la compétence, la reconnaissance et l'exécution des jugements et des décisions en matière matrimoniale, de responsabilité parentale et d'obligations alimentaires [Règlement (UE) 664/2009]. L'Union européenne a approuvé la convention de La Haye du 23 novembre 2007 sur le recouvrement international des aliments destinés aux enfants et à d'autres membres de la famille ; ses États membres sont liés par cette convention [Décision 2011/432 et convention]. De règles communes s'appliquent : à l'aide judiciaire et à d'autres aspects financiers des procédures transfrontalières civiles [Directive 2003/8] ; à la signification et à la notification dans les États membres des actes judiciaires et extrajudiciaires [Règlement (CE) 1393/2007] ; et aux procédures d'insolvabilité transfrontalières concernant le patrimoine d'un débiteur insolvable [Règlement (CE) 1346/2000]. La procédure européenne d'injonction de payer vise à simplifier, à accélérer et à réduire les coûts de règlement dans les litiges transfrontaliers concernant des créances pécuniaires incontestées [Règlement (CE) 1896/2006]. La procédure européenne de règlement des petits litiges est à la disposition des justiciables parallèlement aux procédures prévues par les législations des États membres en vue de simplifier et d'accélérer le règlement des petits litiges transfrontaliers et d'en réduire les coûts [Règlement (CE) 861/2007]. Le titre exécutoire européen pour les créances incontestées permet aux créanciers qui ont obtenu une décision exécutoire à propos d'une créance qui n'a jamais été contestée par le débiteur, de procéder directement à son exécution dans un autre État membre, sans qu'il soit nécessaire de recourir à une procédure intermédiaire dans l'État membre d'exécution (suppression de la procédure de l'exequatur) [Règlement (CE) 805/2004]. Une décision-cadre fixe les règles selon lesquelles un État membre reconnaît et exécute sur son territoire une décision de confiscation rendue par un tribunal compétent en matière pénale d'un autre État membre [Décision-cadre 2006/783]. En règle générale la loi applicable à une obligation non contractuelle résultant d'un fait dommageable est celle du pays où le dommage survient (Rome II) [Règlement (CE) 864/2007]. Une directive facilite l'accès à des procédures alternatives de résolution des litiges et favorise le règlement amiable des litiges transfrontaliers en encourageant le recours à la médiation et en garantissant une articulation satisfaisante entre la médiation et les procédures judiciaires [Directive 2008/52]. Un règlement a défini la compétence, la loi applicable, la reconnaissance et l'exécution des décisions, et l'acceptation et l'exécution des actes authentiques en matière de successions et a créé un certificat successoral européen [Règlement (UE) 650/2012]. Des procédures existent pour la négociation et la conclusion d'accords entre les États membres et des pays tiers sur des questions particulières concernant : le droit applicable aux obligations contractuelles et non contractuelles [Règlement (UE) 662/2009].

10 Cyberjustice

La **directive 2013/11/UE** relative au règlement extrajudiciaire des litiges liés au droit de la consommation et le **règlement 524/2013** relatif au règlement en ligne des litiges liés au droit de la consommation ont été adoptées par le Parlement et le Conseil européen le 21 mai 2013. Ces mesures visent à créer des organes extrajudiciaires de qualité pour tous les litiges de nature contractuelle entre les consommateurs et les entreprises. Sur ce sujet, la **directive 2013/11/UE** doit être transposée dans les États membre avant le 9 juillet 2015. La Commission a proposé notamment la mise en place d'une plateforme facilitant le règlement impartial, transparent, efficace et équitable, par voie extrajudiciaire, des litiges en ligne entre consommateurs et professionnels. À partir de 2016 (*le règlement doit entrer en application le 9 janvier 2016*), les consommateurs de tous les pays de l'Union européenne devraient pouvoir bénéficier de moyens de recours plus rapides, moins onéreux et plus accessibles qu'une procédure judiciaire pour régler en ligne leur litige lié à un achat sur internet.

Mediation in Russia: At the Beginning

Alexey Argunov, Vsevolod Argunov, and Alexander Akhmetbekov

Abstract Starting 2011, mediation has been applied as an alternative extrajudicial procedure for dispute resolution in Russia. The new alternative dispute resolution method involving independent mediators was called to reduce the burden on Russia's judicial system. After more than 3 years following the introduction of the mediation procedure, the authors are trying to analyse its applicability and influence on development of the judicial and extrajudicial system of dispute resolution in Russia.

This Chapter provides a general overview of regulatory provisions of the mediation procedure. The authors analyse the practice of implementation of this alternative procedure for dispute resolution, including such specific instruments as cross-border mediation and electronic mediation.

The analysis also includes comments on the practical aspects and problems that face the parties to the dispute, the comparison with foreign mediation procedural aspects, as well as some statistics.

1 Basis for Mediation

1.1 Concept of Mediation

Alternative ways of dispute resolution, for instance, mediation, are not wide spread in Russia. The only exception could be arbitration, in particular, international commercial arbitration, which is the most applicable by various ADR. Along with

A. Argunov (✉)
Civil Procedural Law Department, Russian Academy of Justice, Moscow, Russia
e-mail: argunovav@gmail.com

V. Argunov
Civil Procedural Law Department, Moscow State University (Named After M.V. Lomonosov), Moscow, Russia
e-mail: argunov@mail.ru

A. Akhmetbekov
Department of Civil Law, LLM Lomonosov Moscow State University, Moscow Office of Gide Loyrette Nouel, Moscow, Russia
e-mail: alexander.akhmetbekov@gide.com

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the mediation and arbitration, we should also refer to the pre-trial procedure of dispute resolution, which shall be followed prior to application to the court. This procedure could be mandatory (based on the direct provisions of law) or voluntary (pursuant to the contractual obligations). In case the pre-trial procedure of dispute resolution is mandatory, the parties can only apply to the court, and the court may accept respective statement of claim after the parties prove that they have fulfilled their obligations within this pre-trial procedure of dispute resolution.

Mediation in Russia is a relatively new procedure. Mediation was first developed approximately 20 years ago, however during this period it has not become popular in Russia. Respective legislative background was first set on 2011.

Russians usually prefer to settle dispute by their own efforts, if they are supposed to succeed, rather than apply to a third party for these purposes. Moreover, the services of the mediator shall be paid.

However during the last 20 years, especially after the Soviet Union ceased to exist, people have applied more frequently to the court in order to settle the disputes. This fact is illustrated by the statistics: the quantity of civil disputes heard by the courts is growing 3–5 % annually. The aggregate amount of civil cases decided by the civil state courts is approximately 12.5 million per annum.[1] In its turn, the quantity of disputes settled within the mediation procedures approximately amounts to 2–3 thousand per annum, which is less than 0.1 % of the amount of civil cases decided by the state civil courts.[2]

According to the data distributed by the Supreme Court of the Russian Federation, as of 2011, the organizations providing the mediation services (Centres of mediations and others) have only been founded in 27 regions of the Russian Federation (there are 85 regions in Russia).[3] Therefore, today there is no social and cultural background for the development of mediation in Russia.

Despite this, on 27 July 2010 the Federal law "On alternative procedure for settlement of disputes involving mediator (mediation)" was adopted (hereinafter – the "**Law on mediation**"). This law is entirely related to private mediation. The Law on mediation was drafted within the European Union project TACIS "Improvement of Access to Justice in the Russian Federation"[4] and at the expense of the European Union. This confirms there were no acute needs in this law (otherwise it could have

[1]For court statistics please refer to the official web-site of the Court Department of the Russian Federation at: http://www.cdep.ru

[2]There is now Russia-wide statistics. The preliminary data is provided based on various sources on the amount of mediation proceedings in Russia.

[3]A memorandum of the Supreme Court of the Russian Federation on court practice of application of the Law on mediation (adopted by the Presidium of the Supreme Court of the Russian Federation dated 6 June 2012) // Bulletin of the Supreme Court of the Russian Federation. 2012. No. 8.

[4]For more details please refer to: http://ec.europa.eu/europeaid/index_en.htm

been adopted long before and without any foreign assistance). Moreover, the Law on mediation has not been widely discussed by the scientific community and is even treated by some scientists as "adopted in back rooms".[5]

The Law on mediation for the first time in Russia gives definition of the term "mediation". Clause 1 of the Law on mediation defines the mediation as "an alternative procedure for the settlement of disputes involving an intermediate and independent third party – the mediator". Clause 2 of the Law on mediation states that the mediation procedure means the "way of dispute resolution with involvement of the mediator and based on the voluntary agreement of the parties for the purposes of reaching a mutually acceptable solution".

It is also to be said that mediation in Russia can only exist outside court procedures, meaning this is a non-judicial mediation.

Pursuant to the provisions[6] of the Russian Civil Procedural Code and the Russian Arbitration Procedural Code,[7] the judge, while preparing the case for the hearing on the merits, shall promote the amicable settlement of the dispute by the parties. The judge shall also clarify to the parties that at any moment of the court hearings they have a right to enter into the amicable agreement, including pursuant to the mediation procedure. The parties can also apply to the treaty for settlement of the dispute. However these provisions are rather of procedural importance, and hardly can be treated as a "court mediation procedure".[8]

In Russia the parties to the dispute can also execute an agreement to submit a dispute for the mediation. However the mediation proceedings are held outside the court proceedings (as if no court proceedings existed).

We shall however note that should the parties enter into the agreement on mediation, the judge shall postpone the court hearings. Moreover, there is an option of court approval of the mediation agreement by the court as a settlement agreement with respect to the case considered by the court.[9] There are no other differences

[5]Sevastianov G.V. Modern tendencies of development of Alternative Dispute Resolution in Russia // Development of mediation in Russia: theory, practice, education. Collected works under the editorship of E.I. Nosyreva, D.G. Filchenko. Moscow, Infotropic Media, 2012. P. 25–37.

[6]Please refer to Clause 148, 150 of the Russian Civil Procedural Code; Chapter 15 of the Russian Arbitration Procedural Code.

[7]This Code regulates the disputes resolution by state courts, what are called in Russia "Arbitrazh" due to historical reasons.

[8]This idea has been supported in the doctrine of Prof. E.A. Treshcheva. For more details please refer to: Judicial settlement procedures: a right to exist. // Development of mediation in Russia: theory, practice, education. P.106–118.

[9]Certain scientists believe that the Russian model of mediation is similar to the same in the Netherlands, since provisions of the Russian legislation include all the main features of the Dutch model of judicial mediation, including: (1) a possibility to mediate after initiation of the civil court proceedings; (2) recommendations of the court; (3) possibility to mediate with an external professional mediator; and (4) approval of the mediation agreement as an amicable agreement, and termination of court proceedings. Please refer to: Abolonin V.O. In search of the Russian model of court mediation // Russian juridical journal. 2011. No. 5. P.120–127.

between the mediation procedures, whether conducted with respect to the disputes already being considered by the court, or with respect to those not yet filed to the court. In this context we would draw your attention to the fact that the judges or their assistants cannot be appointed as mediators.

1.2 Existing Legal Basis for Mediation in Russia

We have already noted that the mediation procedure in Russia is mainly regulated by the Law on mediation. There are also correspondent provisions in the Russian Civil Procedural Code, the Russian Arbitration Procedural Code and the Federal Law "On arbitration courts in the Russian Federation". The Civil Code of the Russian Federation (Clause 202) also refers to the mediation while describing that the duration of the limitation period shall be suspended in case the parties enter into the mediation procedure.

We also have to note that the Russian legislation does not recognize the cross-border mediation procedure or an international mediator (please refer to Section III thereof for more details).

In the Russian doctrine the majority of scientists treat the mediation procedure as a civil law institute. Please refer to the list of references provided at the end of this Report for more details.

1.3 Mediation Agreement and Agreement to Submit a Dispute for the Mediation

The Law on mediation refers to the following three types of agreements related to the mediation procedure: (1) Agreement on mediation; (2) Agreement to submit a dispute for the mediation; and (3) Mediation Agreement (a result of mediation).

The Agreement on mediation means a written agreement which could be executed by the parties before any dispute arises (a so called "mediation clause") or after a dispute has arisen. This Agreement on mediation relates to the settlement of a dispute by means of the mediation procedure (Clause 2 of the Law on mediation). The Law on mediation does not provide any specific requirements to this Agreement on mediation, except for the following mandatory conditions: (1) written form and (2) a reference to the subject of the agreement – meaning an exact legal relation, which caused (or may cause) a dispute.

The Agreement to submit a dispute for the mediation means an agreement of the parties, which initiates the mediation procedure with respect to the dispute which has already arisen between the parties (Clause 2 of the Law on mediation). Pursuant

to Clause 8 of the Law on mediation, an Agreement to submit a dispute for the mediation shall be executed in written form and shall include the following details:

1. subject of the dispute;
2. name of the mediator, mediators or an organization rendering services on provision of the mediation procedure;
3. mediation procedure;
4. separation of expenses, related to the mediation procedure, between the parties; and
5. terms of the mediation procedure.

It is worth saying that both the Agreement on mediation and the Agreement to submit a dispute for the mediation shall be treated as civil agreements (contracts), so the general provisions of the civil legislation shall apply in both cases. In particular, these agreements will be null and void in case the parties fail to agree on any of the mandatory provisions (related to the written form of the agreement or to the essence of the agreements).

At the same time, it is not possible to force a party to the mediation agreement to follow this agreement and participate in the mediation procedure. Both the Agreement on mediation and the Agreement to submit a dispute for the mediation, if executed before the dispute has arisen, do not limit any party's rights to apply to the court for the dispute resolution. This rule is directly provided by Clauses 4 and 7 of the Law on mediation stating the following: the existence of the Agreement on mediation or the Agreement to submit a dispute for the mediation, and performance of relevant procedures, shall not restrain the parties from application to the arbitration or to the court, unless otherwise provided by the federal laws.

The doctrine already calls these agreements "declarative", and the respective obligations of the parties "quasi-obligations".

It should be noted though that despite the fact that the legislation provides an opportunity to settle this issue otherwise (by means of the following wording: "unless otherwise provided by the federal laws"), today there are no special rules provided by any laws or regulations in this regard.

Please note however that should the Agreement on mediation be executed after initiation of the court proceedings, the court may (as per the motion of any party) postpone the court proceeding for up to 60 days for the purposes of settlement of the dispute via the mediation procedure (Clause 169 of the Russian Civil Procedural Code, Clause 158 of the Russian Arbitration Procedural Code).

Therefore, both the Agreement on mediation and the Agreement to submit a dispute for the mediation, if executed before the dispute has been passed to the court, does not have any "procedural" consequences and does not restrain the parties from application to the court. On the contrary, should the respective agreement be executed while the dispute is being decided by the court, this agreement could be treated as a reason for delay of the court hearings.

1.4 Mediator

Pursuant to Clause 15 of the Law on mediation a mediator can render its services both on the professional and non-professional basis. The non-professional mediation services could be rendered by the individuals over 18 years old, being fully capable and having no criminal records. The professional mediator shall be at least 25 years old, shall have a higher vocational education and special mediators education.

Pursuant to Clause 9 of the Law on mediation, in order to hold a mediation procedure, the parties shall mutually choose one or more mediators. The rule requiring two parties' approval of choice of a mediator, applies to the Agreement on mediation if it has been executed before the application to the court and after any party has already initiated court proceedings.

If the parties agree to apply to the company rendering mediation services (not a particular mediator), this company may recommend a candidate to the position of a mediator. Should the parties fail to appoint the mediator, this company could appoint one.

The main duties of the mediator are: (1) assistance to the parties during the dispute resolution and (2) non-disclosure of information which has been obtained during the mediation proceedings. The mediator shall be independent and impartial to the parties.

Pursuant to Clause 5 of the Law on mediation, the mediator, unless the parties agree otherwise, is not entitled to disclose the information related to the mediation proceedings that had been delivered to him during the mediation procedure. This obligation is stated by those provisions of the Civil Procedural Code and Arbitration Procedural Code, that grant a witness immunity to the mediator, meaning that the mediator cannot be interrogated as a witness with respect to the information what he had recognized during the mediation procedure (Clause 69 of the Russian Civil Procedural Code and Clause 56 of the Russian Arbitration Procedural Code). Moreover, Clause 6 of the Law on mediation provides that should the mediator get information from any party during the mediation procedure, he could disclose this information only as per the confirmation of this party.

The independence and impartiality rules are basic requirements applied to the mediator according to Clause 9 of the Law on mediation. This Clause states that should any circumstance appear during the mediation procedure that could affect the independence and impartiality of the mediator, the latter shall immediately inform of this fact the parties or the company rendering services of providing mediation.

According to Clause 17 of the Law on mediation, the mediators and the companies rendering services on provision of mediation are liable before the parties for any damages that may occur as a result of the mediation proceedings.

Therefore the mediator bears a civil liability which could be contractual or delictual. Moreover, the mediator could be subject to the criminal liability for disclosure of the parties' private confidential information – pursuant to Clause 137 of the Russian Criminal Code (breach of private life).

Finally we shall stress that there is a lack of centres of mediation in Russia, and their activity does not affect the mediation development. The most famous centres

of mediation are the Center of mediation and law[10] and the Center of mediation of the Ural State Law Academy.[11] The main purposes of centres of mediation are provision of education and certification programs and rendering mediation services by means of intermediary procedures.

No unified code of conduct has been adopted by the mediator, which could be mandatory for all mediators and recommended by the legislative authorities. Centres of mediation usually adopt their own codes for their mediators.

1.5 Procedure of Mediation

According to the Clause 11 of the Law on mediation, the terms and conditions of the mediation procedure shall be defined by the Agreement on holding mediation. However the parties may refer to the rules of mediation approved by the respective organization (providing the mediation services) – the Centre of mediation. This rules shall apply while settlement of the dispute. The parties can also decide that the mediator shall choose the mediation procedure. However the mediator is not entitled to make any propositions regarding dispute resolution (unless the parties agreed otherwise).

The Law on mediation also provides general principles of mediation – the principles of voluntariness, confidentiality, cooperation and equality of the parties, impartiality and independence of the mediator (please refer to the Clause 3 of the Law on mediation).

As for the terms of the mediation procedure, please be advised the Law on mediation provides that the respective terms shall be defined by the parties in the respective Mediation Agreement. These terms cannot exceed 180 days in case the mediation is hold with respect to the dispute not being decided by the case. Should the mediation be held with respect to the dispute already being decided by the court, the terms of mediation proceedings shall not exceed 60 days (Clause 15 of the Law on mediation).

We draw your attention to the fact that the legal regulation of relations between the mediators, mediation procedure, execution bodies and court is minimal. As already described, there is no judicial mediation in Russia. An agreement on holding mediation procedure, if executed while the dispute is being decided by the court, leads to postponement of the court hearing for up to 60 days. Should the parties settle the dispute pursuant to the mediation proceedings, the respective settlement agreement (mediation agreement) could be adopted by the court as an amicable agreement (please refer to Chap. 7 hereof for more details).

[10]The autonomous Non-Profit-Organization Scientific and Methodological Center for Mediation and Law. 2014. http://www.mediacia.com/en/en_index.htm

[11]The Center of mediation of the Ural State Law Academy. 2014. http://www.mediation-ural.com

1.6 Failure of the Mediation Procedure and Its Consequences

The mediations proceedings do not always succeed to resolve the disputes. The Law on mediation regulates these cases as follows:

(i) Parties' failure to settle the dispute. In this case the parties executed the Agreement on termination of mediation proceedings without settlement of a dispute. In contrast to item (iii) below, in this case the Law on mediation requires that both parties express their desire to terminate the mediation proceedings (please refer to Clause 14 of the Law on mediation). The legal literature stresses that this provision of the Law on mediation is quite impractical, as it is hard to imagine that the parties to the dispute should sign any agreement since the conflict had not been resolved[12];

(ii) Inexpedience of further mediation proceedings. In this case the mediator shall consult to the parties and send them a written request claiming for termination of the mediation proceedings to its inexpedience (Clause 14 of the Law on mediation). A mediator makes a decision that the mediation proceedings are inexpedient on its own opinion after he consults to the parties. The Law on mediation does not provide any special requirements to the mediator's request on termination of mediation proceedings, so it makes sense to refer to the lack of mutual understanding between the parties during the mediation proceedings, and on inexpedience of further mediation actions;

(iii) A party's rejection of further mediation proceedings. In this case a rejecting party shall send a written claim to the mediator (Clause 14 of the Law on mediation); and

(iv) Expiration of time frames for mediation proceedings. Should the parties fail to settle the terms provided by the Law on mediation (usually 180 days or, if the court or treaty proceedings have already been initiated – 60 days), the mediation proceedings shall be terminated (Clause 14 of the Law on mediation).

Please note in all these cases the mediation proceedings shall be terminated.

The scientific and practical literature also refers to the following case of termination of mediation proceedings: termination of the Agreement on mediation. This approach makes sense and is not prohibited, however the Law on mediation does not name this case of termination of the mediation proceedings.

Termination of the mediation proceedings causes substantive and procedural consequences. In general, should the parties fail to resolve the dispute, they may at any moment once again apply to the mediator for the settlement of this very dispute. The Law on mediation does not provide any restrictions in this respect.

[12]Kuznetsov E.N. Comments to the art.14. Comments to the Law on mediation (clause-by-clause). Ed. S.K Zagaynova, V.V. Yarkov. Moscow: Infotropic Media, 2012. P.167–173.

Please also note that in case the mediation proceedings are held after the dispute had been passed to the state or treaty court for resolution, and should the parties fail to enter into the mediation agreement, the dispute shall be resolved by the court (treaty) by means of adoption of a court decision.[13]

1.7 Success of the Mediation Procedure

In case of success, the mediation proceedings result in the mediation agreement between the parties.

Pursuant to the Law on mediation, the mediation agreement shall be executed in a written form and shall include the following details (Clause 12 of the Law on mediation):

- information on the parties;
- details of the dispute;
- terms and conditions of the mediation proceedings;
- information on the mediator;
- obligations, terms and conditions of the dispute resolution as agreed by the parties.

The mediation agreement shall be signed by the duly empowered representatives of the parties to the dispute (Clause 160 of the Russian Civil Code).

The mediator shall pay special attention to the fulfillment of each of these conditions of the mediation agreement – in order to comply with applicable law and follow the parties' interests.[14]

In case the mediation agreement is executed before the dispute is passed to the court (treaty), it shall be deemed to be a civil transaction aimed to establishment, change or termination of parties' rights and obligation. Respectively, the provisions of the Russian Civil Code regulating novation, termination, waiver of debt, set-off and indemnification shall apply (Clause 12 of the Law on mediation). Please note that Clause 12 of the Law on mediation is a dispositive provision of law, therefore the legal freedom of the parties is only limited by general imperative provisions of law.[15]

Pursuant to Clause 12 of the Law on mediation, the mediation agreement, if executed after the dispute had been delivered to the court (treaty) for resolution, could be adopted by the court as an amicable agreement. Details of approval of the

[13] A memorandum of the Supreme Court of the Russian Federation on court practice of application of the Law on mediation (adopted by the Presidium of the Supreme Court of the Russian Federation dated 6 June 2012) // Bulletin of the Supreme Court of the Russian Federation. 2012. No.8.

[14] Kalashnikova S.I. Mediation in the sphere of civil jurisdiction. Dissertation of the Candidate of legal scientists. Yekaterinburg. 2010. P.151.

[15] The same, p. 129.

mediation agreement by the treaty courts are regulated in Clause 6.1 of the Federal law dated 24 July 2002 No. 102-FZ "On the courts of arbitration in the Russian Federation",

An amicable agreement can only be executed in the court by the parties' request. Respectively, the question of adaptation of the mediation agreement as an amicable agreement by the court shall be initiated by the parties to the dispute. The court usually approves as an amicable agreement pursuant to the procedural rules and regulations. The amicable agreement shall comply with the laws and shall not breach the rights and interests of third parties (Clause 139 of the Arbitration Procedural Code, Clause 39 of the Civil Procedural Code). The approval of the amicable agreement is grounds for the termination of court proceedings (Clause 150 of the Arbitration Procedural Code, Clause 220 of the Civil Procedural Code).

Court resolution on approval of an amicable agreement is subject to the immediate execution (Clause 141 of the Arbitration Procedural Code). The critics reasonably advise the mediation agreement shall not be treated as a simple amicable agreement though.[16]

The complex analysis of relevant court practice confirms that while considering the mediation agreement, the judges usually follow Clause 12 of the Law on mediation and Clause 39 of the Civil Procedural Code, what state that should the mediation agreement fail to comply with laws and regulations or should it breach third parties' rights and interests, it shall not be adopted by the court as an amicable agreement.

At the same time, as of June 2012 there were no cases of judges rejecting to adopt a mediation agreement as an amicable agreement of the parties to the dispute, on the grounds of their failure to comply with provisions of law.[17]

It is well known that the basic principle for holding mediation is voluntariness. When the parties enter into the mediation agreement, they voluntarily accept respective obligations and are not forced to perform these obligations. That is why Clause 12 of the Law on mediation provides that the mediation agreement shall be performed by the parties based on the principles of voluntariness and bona fides. Development of these principles and mechanics of the mediation agreement (in order to make it more obligatory for the parties) is one of the most current and perspective trends of further development of the Russian legislation on dispute resolution.

Today there are no mechanisms for the enforcement of a mediation agreement in Russia. In particular, this relates to the non-judicial mediation agreement. In general, absence of this mechanics complies with basic ideas of mediation. Successful dispute resolution procedures mean that the parties work out a solution

[16]Solomeina E.A. Comments to the art.12. Comments to the Law on mediation (clause-by-clause). Ed. S.K Zagaynova, V.V. Yarkov. Moscow: Infotropic Media, 2012. P.141–154.

[17]A memorandum of the Supreme Court of the Russian Federation on court practice of application of the Law on mediation (adopted by the Presidium of the Supreme Court of the Russian Federation dated 6 June 2012) // Bulletin of the Supreme Court of the Russian Federation. 2012. No.8.

that fully meets their interests. As a result, a voluntary execution of this agreement is profitable for both parties. Should any party reject performing the mediation agreement, it means that the purposes of the mediation had not been reached.[18]

In these circumstances, should any party breach the rights of another party following improper execution (non-execution) of a mediation agreement (which had been executed before delivery of a dispute to the court or a treaty), these breached rights shall be restored pursuant to the general provisions of the civil legislation (Clause 12 of the Law on mediation).

Provided that the mediation agreement is a deal, it replaces any prior agreements and consents between the parties applicable to the disputed relations. That is why the bona fide party of the mediation proceedings is entitled to file a claim to the court based on the recent conditions of the meditation agreement. However this party cannot refer to the prior agreements and obligations of the parties which had been resolved in the mediation agreement. So there is no simplified way of enforcement and execution of the mediation agreement executed during the non-judicial mediation.

Numerous Russian scientists support an idea of enforcement of mediation agreements. In particular, V.V. Yarkov considers an opportunity of enforcement of a mediation agreement by means of its notarial certification and stresses that this should comply with the essence of mediation and could facilitate its further development and make it more attractive for the participants of civil turnover.[19]

We shall also note that the notarial certification of a mediation agreement is the easiest and most prompt way of provision of its enforcement. This mechanics does not require any significant changes in the current legislation.[20]

Meanwhile the following rules apply with respect to the mediation agreements approved by state court or arbitration court. Pursuant to the provisions of the Civil Procedural Code and the Arbitration Procedural Code, an amicable agreement duly approved by the court, shall be enforced. A court while adopting an amicable agreement controls its legality. Should any party avoid execution of this agreement, the other party could apply to the court with a motion on issue of a writ of execution. Respectively, the amicable agreement will be enforced pursuant to the rules of enforcement proceedings. A writ of execution could also be issued after a court resolution on termination of court proceedings due to execution and approval of an amicable agreement comes into force. Therefore an amicable agreement approved by the state court or arbitration court, in subject to the enforcement.

[18] Solomeina E.A. Comments to the art.12. Comments to the Law on mediation (clause-by-clause). Ed. S.K Zagaynova, V.V. Yarkov. Moscow: Infotropic Media, 2012. P.142.

[19] Yarkov V.V. To the project Law on mediation // Arbitration court. 2006. No.6. P.20.

[20] Kalashnikova S.I. Mediation in the sphere of civil jurisdiction. Moscow, 2011. P.166–178.

1.8 Costs

We have all grounds to state that the Russia follows the way of commercialization of mediation. This in particular means that a mediator will not get any financial support from the state. There are no state intermediaries in Russia. Nor there is free legal support for participation in the mediation proceedings.

In accordance with Clause 10 of the Law on mediation, the mediator can act both on the paid and free of charge basis. Organizations providing the mediation services act on the fee basis. Services of mediators and mediation organizations are usually paid by the parties in equal portions, unless the parties agreed otherwise.

There are no established fee rates or ways of payment of the mediator's services. These issues shall be defined by the mediation organizations and mediators – with no regard if the latter act on the professional or non-professional basis. As a rule, the mediation organizations adopt their own by-laws regulating their fee rates and ways payment of the fees.

The usual practice is to establish a one-time paid and non-refundable registration fee. The parties may also be required to pay the earnings and administrative fees to the mediator. Tariffs could be fixed fees or depend on the amount of the claim.

Additional expenses could also be subject to repayment (expenses for call of witnesses, conducting an expertise etc.).

The fees of a mediator may also depend on its qualification, claimed amount, duration of mediation proceedings, territorial aspects and other factors. An aggregate hourly fee rate of a mediator amounts to RUR 5,000. If the dispute is rather simple, the hourly fee rate of a mediator amounts to RUR 2,000.[21] The majority of mediation centres calculate their fees depending on the type and complexity of a dispute. Respectively the hourly fee rate could vary from RUR 1,500 to RUR 80,000.[22] However the initial consultation can be free of charge.

Based on the above, the fee earnings of qualified mediators in Russia could be twice as expensive as the court expenses.[23] This is one of reasons why the new mediation proceedings are not popular in Russia. For instance, the Moscow City State Arbitration Court in 2012 did not adjudicate a single case involving mediators. The judges explain that the parties to the dispute have no motivation for application to the commercial mediator, since this causes additional expenses – apart from the state fee and legal expenses.[24]

[21] http://mediator-e.ru/prais

[22] For example: Regulation on the fees and costs for providing mediation of the autonomous Non-Profit-Organization Scientific and Methodological Center for Mediation and Law: http://www.mediacia.com/m_docs/15_polojenie_o_rashodah_21_01_.2011.pdf

[23] Lisitsyn Valery. Did not grow up to the mediation. Childhood diseases of the new procedure // RG – Business. No. 801 dated 7 July 2011.

[24] RBC NEWS, 29.05.2013: http://www.arbitr.ru/press-centr/smi/84351.html

2 Cross-Border Mediation

2.1 Notion of Cross-Border Mediation

Despite the fact that development of settlement procedures in Russia corresponds to the investment attraction of the country, the Russian institute of mediation with respect to the disputes involving a foreign element are far from European and international samples.

The Law on mediation does not regulate the issues of intermediary involving a foreign element. An international intermediary is not recognized by the Russian legislation as well. That is why participation in the mediation of foreign parties (or stateless persons) is regulated by general rules on the status of these persons.

The respective provisions of the Constitution of the Russian Federation (Clauses 19, 46–48, Clause 4 of the Federal law dated 25 July 2002 No. 115-FZ "On the legal status of foreign citizens in the Russian Federation") regulating equity before the law and court mean that this principle only apply to the citizens of the Russian Federation, foreign citizens and stateless persons. These persons participate in the civil relationships based on the provided national regime (Clause 2 of the Russian Civil Code).

The same regime is provided to the foreigners and stateless persons, international organizations for protection of their rights (Clause 396 of the Russian Civil Procedural Code, Clause 254 of the Russian Arbitration Procedural Code). Respectively foreign citizens and stateless persons are free to apply to a mediator for the disputes resolution – along with Russian citizens and companies.

Further, the Law on mediation is silent about the possibility for a foreign citizen or a stateless person to act as a mediator. The Russian legal science says these individuals could act as mediators, provided that they legally locate in Russia and meet the requirements of applicable laws.[25] We trust this statement is correct with respect to the professional mediators as well.

2.2 Recognition and Enforcement of Foreign Mediation Settlements

Developers of the UNCITRAL Model Law on International Commercial Conciliation (adopted by UNCITRAL on 24 June 2002) highlight that through the regime of accelerated enforcement of an amicable agreement, the attractiveness of the

[25]Zagaynova S.K. Comments to the art. 2. Comments to the Law on mediation (clause-by-clause). Ed. S.K Zagaynova, V.V. Yarkov. Moscow: Infotropic Media, 2012. P.129.

settlement procedure grows up. The states are proposed to adopt national acts on settlement procedures with inclusion of description of an enforcement procedure or to refer to the provisions regulating enforcement.

Recommendations of the Committee of Ministers of the Council of Europe also numerous times pointed out the necessity of creation of mechanics for enforcement of mediation agreements.[26]

In accordance with Clause 6 of the 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,[27] the states – members to the EU shall provide the instruments of acknowledgment of a mediation agreement and, therefore, guarantee to the interested parties possibilities to enforce the decision and results of such settlement (despite the type of mediation).

Russia is not party to these international acts. We have already mentioned with respect to the national mediation agreements, today the Russian legislation is silent about the enforcement of mediation agreements. The mechanisms for acknowledgement and enforcement of foreign mediation agreements in Russia, is also absent.

Legal community in Russian acknowledges that an international community pays attention to the enforcement of such agreements, which guarantees protection and respect of rights and interests of parties to the settlement procedures. An instrument for cure of these disadvantages of the Russian legislation could be non-judicial (private) mediation agreements under the Law on mediation and to have it certified with a notary public (please refer to the Section 7 on enforcement of national non-judicial mediation agreements).

Moreover, if the national legislation provides an opportunity to approve the mediation agreement in the court (executed by means of a private mediation), or for appointment of a mediator as an arbitrator, which could make a final decision based on this mediation agreement, it is strongly recommended to follow these ways of a "combined" settlement procedure blending two various ways of settlement of the dispute.[28] Of course, these decisions could be acknowledged and enforced in Russian only in the general way of execution of foreign court and arbitration decisions (Chapter 45 of the Russian Civil Procedural Code, Chapter 31 of the Russian Arbitration Procedural Code).

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[26]Recommendation N Rec (2001)9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties; Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters of 15.09.1999; Recommendation N R (98) 1 of the Committee of Ministers to member states on family mediation of 21.01.1998; Recommendation R (2002) 10 of the Committee of Ministers to member States concerning mediation in civil matters of 18.09.2002.

[27]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.

[28]Kalashnikova S.I. Mediation in the sphere of civil jurisdiction. Moscow, 2011. P.124–136.

3 (e) Justice

3.1 Application of (e) Justice Instruments to the Mediation

Starting 2004–2005, Russian courts use electronic technologies. As of July 1, 2010 the Federal law No. 262-FZ dated 22 December 2008 "On providing of access to the information on actions of courts in the Russian Federation"[29] came into force. This Federal law approved a number of instruments of so called electronic justice.

Today Internet is also wide-spread and commonly used in Russia – each court has its own web-site, containing all necessary information about this court, its departments, "videoconference" system, electronic database of court acts, on-line broadcasting of court hearings of the Presidium of the Highest Arbitration Court of the Russian Federation. New automotive informational systems BRAS, AIS ISK[30] have been created in the system of the Russian arbitration courts. GAS "Justice"[31] has been created in the Russian system of Civil Courts. Through the system "MyArbitr" the parties may file the documents (including the Statements of Claim) to the Russian state arbitration courts.[32]

All the above mentioned also applies to the criminal and administrative court proceedings as well.

The Federal Special Purpose Program "Development of the court system in Russia in 2013–2020" provides the further development of electronic justice – the creation of mobile justice, implementation of software for analytical support and scanning of all the documents submitted to the courts, as well as formation of electronic case files and archive of cases. These improvements could make justice more accessible for the citizens, and make the courts more effective and qualitative.[33]

The Russian legislation in the sphere of mediation is silent about any electronic devices that could be used within the mediation procedure. The Law on mediation does not provide any other forms of cooperation with a mediator, except for personal meetings and negotiations, oral discussions and adoption of certain documents in a written form.

Modern Russian doctrine on mediation also does not pay attention to this problem. We may only confirm that the electronic devices, that could improve the Russian mediation, could be discovered by the business practice, considered by the

[29]Collected Legislation of the Russian Federation. 2008. No.52 (part 1). Page 6217.

[30]AIS ISK: http://kad.arbitr.ru

[31]GAS Pravosudie: http://www.sudrf.ru

[32]MyArbitr: https://my.arbitr.ru/#index

[33]Resolution of the Government of the Russian Federation dated 27 December 2012 No.1406 "On federal special purposes program "Development of the judiciary system in Russia in 2013–2020" // Collected Legislation of the Russian Federation. 2013. No.1. Page 13.

doctrine and further appreciated – unless arguing main principles of mediation. In particular, the principle of confidentiality and personal data protection (Clauses 5, 6 of the Law on mediation) and principle of equity and cooperation of the parties and provision of equal possibilities to participate in the mediation procedure (Clauses 3, 7, 11 of the Law on mediation).

Despite the mediation procedure requires personal involvement (at least, during key meetings), the Law on mediation does not directly name this as a principle of mediation (Clause 3 of the Law on mediation). Therefore there are no legislative restrictions for application of the videoconferences, online consulting via IP-telephony, mutual exchange of electronic letters and documents while holding mediation proceedings.

All these instruments could broaden the capabilities of the parties and the mediator for the purposes of dispute resolution.

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Mediation in Slovenia: A Fruitful and Widespread Tool for Resolving Disputes

Rajko Knez and Petra Weingerl

Abstract This contribution aims to provide an overview of the legal landscape for mediation in Slovenia. It embarks first on the overview of the existing situation of ADR in Slovenia, identifying the court-annexed mediation in civil and commercial matters that are carried out under the auspices of the courts as the most commonly used method. This is followed by the examination of the basis for mediation in Slovenia, primarily focusing on the Mediation Act, with short overview of some other legal instruments touching on conduct of mediation (the Act on Alternative Dispute Resolution in Judicial Matters, the Civil Procedure Act, Financial Operations, the Insolvency Act, the Patients Rights Act). The contribution provides the sketch of the rules relating to the mediation agreement/agreement to submit the dispute to mediation, the mediator, the process of mediation, failure and success of the mediation and the consequences, examining also rules related to the enforcement, the settlement and costs. Further, also the cross-border mediation is examined, before the chapter concludes with the overview of e-Justice in Slovenia.

1 The Existing Situation of ADR in Slovenia

The mediation in Slovenia is understood as the mechanism for resolving disputes between two or more parties with the help of a neutral third person, being more informal, confidential, rapid and less burdensome in terms of costs as the judicial proceedings.[1] It is generally accepted that the recourse to mediation is voluntary,

[1]These characteristics of the mediation are named also on the webpage of the Ministry of Justice, http://www.mp.gov.si/si/storitve/alternativno_resevanje_sporov/splosno_o_mediaciji/.

R. Knez (✉)
Faculty of Law, University of Maribor, Maribor, Slovenia
e-mail: rajko.knez@um.si

P. Weingerl
Faculty of Law and University College, University of Oxford, Oxford, UK
e-mail: petrawww@gmail.com

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although there are some derogations to this general principle of alternative dispute resolution mechanisms. The elements of mandatory mediation are present in relation to court-annexed mediation within the Act on Alternative Dispute Resolution in Judicial Matters (Zakon o alternativnem reševanju sodnih sporov,[2] hereinafter the ZARSS) and in the newly adopted amendments of the Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act (Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju,[3] hereinafter: the Insolvency Act).

The definition of the term mediation is provided in the Mediation in Civil and Commercial Matters Act (Zakon o mediaciji v civilnih in gospodarskih zadevah,[4] hereinafter: the Mediation Act). Pursuant to the Mediation Act, the mediation means a structured process whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a neutral third person (the mediator).[5] Such structured process means mediation for the purposes of the Mediation Act irrespective of how if it is named or referred to, for example as conciliation, intervention in the dispute, or with some other expression.[6] The Mediation Act governs a common legal regime for all types of mediation, including both internal and cross-border mediation, and thereby sets a monistic legal framework for mediation in Slovenia.

The Mediation Act covers mediation of the civil and commercial matters, i.e. property-related matters, except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law.[7] It applies also to mediation in other matters, if appropriate and not excluded by the law.[8] The Mediation Act is applicable to mediation regardless of the trigger for the use of this alternative dispute resolution mechanism. The recourse to mediation can be made on the basis of the parties' agreement reached before or after the dispute arises, a referral by the court, arbitral tribunal or other competent national authority.[9]

In Slovenia, mediation is accepted both outside and within the framework of national courts; therefore, both out-of-court and court-annexed mediations are accepted.[10]

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[2]Official Gazette of the Republic of Slovenia, Nos 97/09 and 40/12 – ZUJF. See also Razdrih (2010) 11.

[3]Official Gazette of the Republic of Slovenia, No 36/2013.

[4]Official Gazette of the Republic of Slovenia, No 56/08.

[5]Article 3(1) of the Mediation Act.

[6]Ibid.

[7]Article 2(1) of the Mediation Act.

[8]Article 2(2) of the Mediation Act.

[9]Article 2(3) of the Mediation Act.

[10]For the discussion on mediation-friendly legal environment in Slovenia see Knez and Weingerl (2014).

As regards the court-annexed mediation, the Civil Procedure Act (Zakon o pravdnem postopku[11]) provides that the court has a duty to draw the parties' attention to the possibilities of interrupting the legal proceedings due to alternative dispute resolution mechanisms, or to refer them to such mechanisms whenever this is appropriate.[12] In 2010, the ZARSS was introduced, making the court-annexed mediation obligatory for the first instance courts and appellate courts; Slovenia was the first country, alongside the Netherlands, to make the mediation mandatory for those courts (Zalar (2012) 3). The ZARSS requires first-instance and second-instance courts to adopt and bring into force a programme of alternative dispute settlement to allow parties to use the alternative means of settlement in disputes on commercial, labour, family and other civil law matters. Courts are obliged to allow the parties to use mediation, whereas other forms of alternative dispute resolution are optional (and not offered to the parties so far).[13,14] Moreover, Slovenia is the only country in Europe that has introduced the model of the multi-door courthouse, which was introduced with the ZARSS and was modelled according to the US model (Zalar (2012) 3). This model sets the alternative dispute mechanisms as the first choice dispute resolution method, whereas the court proceedings are the method of the last resort (Zalar (2012) 3).

The ZARSS introduces a special information session on mediation.[15] The court has the power to refer the parties to take part in such information session. If the party does not attend it and there are no justifiable reasons for her absence, she must reimburse the costs incurred by the opposing party.[16] The courts are entitled to refer the parties to mandatory mediation on the basis of the outcome of the information session.[17] If the party manifestly unreasonably declines the settlement of the dispute, the ZARSS provides for the sanction in the form of reimbursement of the opposing party's costs regardless of the outcome of the judicial proceedings.[18]

The mandatory mediation is governed also by the Insolvency Act, which came into force on 15 June 2013. This Act widens the scope of the use of mediation in Slovenia. Mediation is not used in insolvency proceedings since it is predominantly used for resolving disputes, whereas insolvency proceedings are non-contentious proceedings (see also Zalar (2013); Plavšak (2013)).

Concerning out-of-court mediation, there are several non-governmental organisations that are active in the field of mediation (Permanent Court of Arbitration

[11] Official Gazette of the Republic of Slovenia, No 26/99.

[12] See article 305.b(3) of the Civil Procedure Act.

[13] See the webpage of the Ministry of Justice, http://www.mp.gov.si/si/storitve/alternativno_resevanje_sporov/mediacija_v_praksi/.

[14] Article 4(4) of the ZARSS.

[15] Article 18 of the ZARSS.

[16] Article 18(5) of the ZARSS.

[17] Article 19 of the ZARSS.

[18] Article 19(5) of the ZARSS.

at the Chamber of Commerce and Industry of Slovenia, Slovenian Association of Mediators, the Centre for Mediation at the Legal Information Centre, Slovenian Association of Mediation Organisations (MEDIOS), and Institute for Mediation and Arbitration under the auspices of the Bar).

The most commonly used method is the court-annexed mediation in civil and commercial matters that are carried out under the auspices of the courts. The District Court in Ljubljana is the pioneer of this dispute settlement mechanism in Slovenia, having introduced it in 2001. The success of this programme has been confirmed internationally, as the District Court in Ljubljana in 2005 took part in the competition for the Crystal Scales of Justice Prize for innovative practices contributing to the efficiency and quality of civil justice, organised by the Council of Europe and the European Commission. It was chosen among the best three models, also called the models of good practice (Jovin-Hrastnik (2013) 1123; Zalar (2012); Kranjčević (2012) 3).

In 2011, there were 2,735 cases successfully resolved with the court-annexed mediation at the first instance courts (Betetto (2012) 26–27). The average success rate of the mediation, measured with the number of reached agreements, is more than 50 % (Zalar (2012) 12).

2 The Basis for Mediation in Slovenia

2.1 The Mediation Act

The basic principles and rules on mediation procedure are governed by the Mediation Act, which was adopted on 23 May 2008 and has been in force since 21 June 2008.[19] It transposes the Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters[20] (hereinafter: Directive 2008/52/EC) to Slovenian law. Nonetheless, the goal of the Mediation Act was not solely the transposition of the Directive 2008/52/EC, as one of the reasons for its adoption was also the gradual tendency of the UNCITRAL towards the international harmonisation of mediation rules, which was taken into account while drafting the Mediation Act. During the preparation and adoption of the Mediation Act, the Recommendations of the Council of Europe were also taken into account.[21]

The Mediation Act applies to all mediations (cross-border and internal) in disputes arising out of civil, commercial, labour, family and other property-related matters with regard to claims which may be freely disposed of and settled by the

[19] For the commentary on the Mediation Act and other ADR-related acts see Zalar et al. (2012).

[20] 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 [2008] OJ L 136/3.

[21] See the Proposal of the Mediation Act, EVA 2008-2011-0003, p. 2.

parties. Its provisions also apply to mediation in other disputes, as long as such application complies with the nature of the legal relationship out of which the dispute has arisen and if this is not excluded by the law.

Although the Mediation Act has not introduced mediation in the Slovenian legal regime, it is an important piece of legislation as there was no legislation regulating mediation systematically in Slovenia until its adoption. There were only rules regulating mediation in specific areas, such as in collective labour disputes as governed in the Collective Agreements Act (Zakon o kolektivnih pogodbah), disputes between employer and employee as governed in the Employment Relationship Act (Zakon o delovnih razmerjih), disputes among insurance companies and consumers as governed in the Financial Instruments Market Act (Zakon o trgu finančnih instrumentov) and the Insurance Act (Zakon o zavarovalništvu). Inter alia, mediation is regulated also in the Patient Rights Act (Zakon o pacientovih pravicah) and in the Copyright and Related Rights Act (Zakon o avtorski in sorodnih pravicah). Therefore, the contents of the Mediation Act may be described as a general regulation for all types of mediation and cover mediation associated with judicial procedures and extrajudicial mediation, whereas specifics of some special procedural rules are left to be regulated in the sector-specific instruments.

2.2 The Act on Alternative Dispute Resolution in Judicial Matters

The ZARSS, which was adopted in 2009 and came into force on 15 June 2010, contains specific provisions on mediation offered by courts to parties in judicial proceedings. It imposes the obligation to all first instance courts and courts of appeal to offer mediation and other alternative dispute resolution mechanisms to parties in civil, commercial, family and labour disputes.

2.3 The Civil Procedure Act

According to the Civil Procedure Act, the court must, at any time, look for the possibility of a court settlement. Parties can conclude a court settlement at any stage during the proceedings.[22] A settlement hearing is a compulsory part of the proceedings.[23] The main purpose of the settlement hearing is peaceful settlement of a dispute. The court may interrupt civil proceedings for up to 3 months if parties agree to try an alternative dispute resolution.[24]

[22] Article 306 of the Civil Procedure Act.

[23] Article 305a of the Civil Procedure Act.

[24] Article 305 of the Civil Procedure Act.

2.4 The Insolvency Act

The new amendments of the Insolvency Act came into force in June 2013. Inter alia, new provisions are the provisions governing mandatory mediation in insolvency proceedings[25] and the mediation that parties have agreed upon prior to the law suit having been filed.[26]

2.5 The Patients Rights Act

The Patients Rights Act introduces mediation as a means of resolving disputes between a patient and a provider of medical services. In case of such disputes, mediation is offered to parties by the Commission for the Protection of Patients Rights.

3 The Mediation Agreement/Agreement to Submit the Dispute to Mediation

The mediation agreement is governed by Article 6 of the Mediation Act, which provides rules on the commencement of the mediation proceedings. The mediation agreement or the mediation clause is accompanied by the existence of an agreement to mediate entered by the parties just before the commencement of the mediation, once the dispute has already arisen.[27] In the case of the mediation clause conducted in advance, the mediation starts as soon as the party receives the initiative of the opposing party to start the mediation procedure.[28] If the parties concluded no such mediation clause and the dispute arises, the mediation starts when the parties reach the agreement to mediate. If a party proposes the mediation, the opposing party has to accept the proposal in 30 days of its receipt or in the period set in the proposal, otherwise it is deemed that the proposal has not been accepted.[29]

The Mediation Act does not prescribe any rules on the formal validity of the agreement to mediate. Thus, it can be reached also on the basis of implication by conduct.[30]

[25] Article 48a of the Insolvency Act.

[26] Article 48b of the Insolvency Act.

[27] Article 6(2) of the Mediation Act.

[28] See article 6(1) of the Mediation Act.

[29] See article 6(2) of the Mediation Act.

[30] See the Proposal of the Mediation Act, EVA 2008-2011-0003, p. 37.

If the parties have agreed to the mediation and explicitly agreed that they will not commence arbitration or judicial proceedings relating to existing or future disputes until a certain amount of time passes, or until the occurrence of the certain event, the arbitration or the court must dismiss the case if the defendant objects, unless the claimant proves that otherwise serious and irreversible consequences could occur.[31] The objection must be made in the statement of defence at the latest. However, the Mediation Act specifically provides that the initiation of the arbitration or judicial proceedings does not in itself constitute a waiver of the mediation agreement or the termination of the mediation process.[32]

As regards the effect of the mediation on limitation and prescription periods, the provisions of the Mediation Act ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process. It provides in Article 17 that limitation and prescription periods do not run during mediation. If the mediation ends without agreement on the settlement of the dispute, the limitation period continues to run from the time the mediation process is completed. The time that elapsed before the start of the mediation shall be counted in the limitation period provided by law.[33]

If a special regulation prescribes time limits for bringing an action, this period would not expire prior to 15 days after the mediation ends.[34]

4 The Mediator

The provisions on the mediator are governed by the Mediation Act. The mediator is defined as any third person who is asked to conduct mediation, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.[35] The Mediation Act provides that one or more mediators can take part in the mediation proceedings.[36]

The appointment of mediators is governed by Article 7 of the Mediation Act. It provides that parties appoint the mediator with an agreement, unless they agree upon a different procedure of appointment. They have a possibility to ask a third party or organisation to appoint the mediator on their behalf.

[31] Article 16(1) of the Mediation Act.

[32] Article 16(3) of the Mediation Act.

[33] Article 17(2) of the Mediation Act.

[34] Article 17(3) of the Mediation Act.

[35] Article 3(1)(b) of the Mediation Act.

[36] Ibid.

The person chosen to act as a mediator has a duty to immediately disclose all circumstances that could affect his impartiality and independence.[37] He is bound by this duty throughout the entire mediation procedure.

The Mediation Act does not contain rules dealing with the issue of the capacity of the mediator to serve as a mediator in cross-border mediation, except for the requirement of the impartiality and independence. Parties are free to choose a mediator of their own choice as long as they agree on the person chosen. Therefore, foreigners are not excluded to serve as mediators. When third parties or organisations choose the mediator on behalf of the parties, the Mediation Act explicitly provides that they may appoint the mediator with a nationality different than the nationality of the parties if this is justified with the requirement of impartiality, independence or other justified reasons.[38]

Further on, rules on mediators are found in the ZARSS, which are applicable only to the court-annexed mediation, when the court before which an action is brought invites the parties to use mediation in order to settle the dispute. The ZARSS provides that courts have to have lists of mediators. The mediators are put on the list after fulfilling legal requirements set in Article 8 of the ZARSS.[39]

The requirements for a mediator, in relation to cases where a court refers parties to the mediation, are found in the ZARSS. It provides that the Ministry of Justice keeps a central register of mediators who operate in courts under alternative dispute resolution programmes.[40] In order to be put on the list of mediators at court, mediators have to fulfil requirements set out in the ZARSS. Those requirements are, among others, legal capacity, obtained undergraduate degree and completed training for mediators prescribed by the minister of justice.[41] Candidates successfully complete their training after a minimum attendance of 40 h in the training programme and completed final exam.[42] These requirements are further developed in the Rules on mediators in the programmes of the court.[43] There is no legal obstacle for the foreigners to be put on the list of mediators if they fulfil those requirements.

The Mediation Act and the Rules on mediators in the programmes of the court do not prescribe the duty of mediators or mediation organisation to hold an insurance policy to cover liability towards third parties arising from the mediation. The responsibility of the mediator is to be assessed pursuant to general principles of law of obligations and tort law. Consequently, the law applicable to the responsibility of the mediator in cross-border mediation is found in the Code of Obligations.

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[37] Article 7(4) of the Mediation Act.

[38] Article 7(3) of the Mediation Act.

[39] See articles 7, 8, 9 and 10 of the ZARSS.

[40] Article 10 of the ZARSS.

[41] See article 8(1) of the ZARSS.

[42] Article 22 of the Rules on mediators in the programmes of the court.

[43] Official Gazette of the Republic of Slovenia No 22/2010.

Nevertheless, as far as the mediators included in the courts' list of mediators are concerned under the court-annexed mediation, the rules on responsibility are found in the ZARSS. The ZARSS provides that mediators who act contrary to the legislation, rules of the mediation programme, or contrary to the rules of the mediation ethics, shall be erased from the list. The same is true also in the circumstances when the mediator performs mediation procedure with negligence or irregularly.[44] The mediator's service is supervised by the leader of the mediation programmes of the court and the judge responsible for the evaluation of the performance of mediation proceedings.[45] Supervision focuses especially on the compliance with legislation, with provisions of the mediation programmes of the court, on ethical standards of mediation, on evaluation questionnaire and on parties' comments and opinions.[46]

The Slovenian Association of Mediators has adopted the Code of Conduct for Mediators in 2007. Moreover, it has signed the declaration with the commitment to respect the European Code of Conduct for Mediators prepared by the European Commission.

5 The Process of Mediation

The general rules on mediation procedure can be found in the Mediation Act. It governs the procedure of out-of-court mediation and court-annexed mediation. Special rules governing the court-annexed mediation are found also in the ZARSS.

The Mediation Act provides as a general principle, that parties may agree on the mediation procedure (voluntariness).[47] This can be done by reference to some already existing rules of mediation procedure. Therefore, the actual procedure of a given mediation is not subject to formal procedural requirements. Consequently, the regulations of the organisation chosen by the parties to conduct the mediation will govern the mediation process so long as the regulations ensure the confidentiality of the proceedings.

The confidentiality of the proceedings is governed by Articles 10 and 11 of the Mediation Act. Article 10 of the Mediation Act, governing the confidentiality within mediation proceedings, stipulates that information received from one party may be disclosed to another party, unless information has been given to the mediator subject to a specific condition that it be kept confidential. Article 11 of the Mediation Act, governing the confidentiality outside mediation proceedings, stipulates that information resulting from mediation shall be confidential, unless the parties have

[44] Article 8(3) of the ZARSS.

[45] Article 31(1) of the Rules on mediators in the programmes of the court.

[46] Article 31(2) of the Rules on mediators in the programmes of the court.

[47] Article 8(1) of the Mediation Act.

agreed otherwise, if their disclosure is required by law, or where such disclosure is necessary for the implementation or enforcement of the dispute settlement agreement.

Given that mediation is intended to take place in a manner which respects confidentiality, unless agreed otherwise, neither parties, mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in judicial proceedings, arbitration or similar proceedings regarding information arising out of or in connection with a mediation process, concerning:

- the invitation of the parties to mediation or the fact that the party was willing to participate in mediation;
- opinions and proposals regarding the possible settlement of the dispute;
- statements or confessions made by the parties during mediation;
- proposals of the mediator;
- the fact that a party had indicated willingness to accept the mediators' proposal for the settlement;
- documents prepared solely for the purpose of mediation.[48]

This information shall be disclosed in judicial proceedings, arbitration or other proceedings solely where this is necessary due to the overriding considerations of public policy, or where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.[49] This is one of the most important rules, since the parties would like to have a "safe firewall" between different proceedings, i.e. that unsuitable position in one proceeding does not influence the position in another procedure that follows.

The mediator is entitled to take active steps of his own and to propose possible solutions of the dispute. All proposals of a mediator require the acceptance of the parties, since proposals are not automatically binding.[50]

In the course of the mediation proceedings, the mediator is allowed to meet or communicate with each party separately or with all parties together throughout the mediation procedure.[51]

The Mediation Act does not contain rules on duration of the mediation. Such provisions are found in the Civil Procedure Act, providing that the court may interrupt civil proceedings for up to 3 months, if parties agree to try an alternative dispute resolution.[52]

[48] Article 12(1) of the Mediation Act.

[49] Article 12(3) of the Mediation Act.

[50] See article 8(4) of the Mediation Act.

[51] Article 9 of the Mediation Act.

[52] Article 305 of the Civil Procedure Act.

6 Failure of the Mediation and Its Consequences

Slovenian legislation does not contain special provisions on the failure of the mediation. Thus, for the purposes of the consequences of the failure, the general provisions on bearing the costs of mediation and confidentiality found in the Mediation Act and the ZARSS are to be taken into account.

It can be deducted from the provision governing the end of mediation that the mediation fails if parties do not agree on the appointment of a mediator within 30 days after the beginning of mediation, if the mediator, upon the consultation with the parties, declares that there is no point continuing with the mediation, and if the parties declare in writing that the proceedings have come to an end.[53]

7 Success of Mediation and Its Consequences

7.1 Meaning and Consequences

When parties find an acceptable solution to their dispute, they can conclude the settlement agreement which is considered as a successful ending of the mediation procedure. The Mediation Act provides a possibility for the mediator to cooperate in making such written settlement agreement.[54]

Once parties reach a settlement of their dispute in mediation procedure, they expect their settlement to be performed without the delay. Unlike in an arbitration procedure, the settlement in mediation is not a binding decision on the dispute; therefore, it is not in itself directly enforceable.

However, the Mediation Act provides under Article 14 that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable through directly enforceable notarial protocol, a court settlement or the arbitral award based on the settlement of the dispute. The mediation agreement becomes binding and directly enforceable through these mechanisms.

The court settlement is regulated in Article 306 of the Civil Procedure Act, providing that the parties may settle a dispute in the context of judicial proceedings concerning the dispute in question at any point during the proceedings. A party to the settlement may be also a person that is not a party to the judicial proceedings. According to Article 309 of the Civil Procedure Act, the settlement can be reached during the judicial proceedings or before the action is brought in the court.

The procedure for agreement reached in mediation to become directly enforceable through directly enforceable notarial protocol is provided under Article 20.a of the Execution of Judgements in Civil Matters and Insurance of Claims Act (Zakon

[53] Article 14(1) of the Mediation Act.

[54] Article 14(1) of the Mediation Act.

o izvršbi in zavarovanju,[55] hereinafter: the Execution Act). Notarial protocol is enforceable if the debtor agreed on its direct enforceability and if the claim arising out of notarial protocol is due.

7.2 Enforcement of the Settlements Reached by the Parties

The vast majority of the settlements are performed voluntarily. However, if the party fails to execute a settlement, the opponent party needs to take steps to enforce performance of it. It needs to invoke the powers of the State, through the national courts, in order to obtain a right to be paid from the opponent party's assets or in any other way to compel performance of the award (Blackay et al. (2009) at para. 11.07). The enforcement of settlements is regulated by the provisions of the Execution Act. When the debtor does not perform its obligations, judicial order provides for the enforced performance of its duties. Due to the prohibition of self-help, the creditor has to request the intervention of the public authorities to restore the situation as demanded by the final judicial decision.

In the Slovenian legal order, enforcement means the compulsory judicial enforcement of enforceable titles that are issued for the fulfilment of a claim.[56] By way of an exception, in family matters, enforcement may also cover execution of non-pecuniary claims which are directed to legal relationship among family members itself. Enforceable titles are enforceable court decisions (judgements or arbitration awards, decisions and payments orders or other court or arbitration orders) and court settlements, enforceable notarial protocol and other enforceable decisions or instrument defined as an enforceable title by a law, ratified and published international treaties, or legal acts of the European Union that are directly applicable in Slovenia.[57]

An enforcement title is suitable for the enforcement if it defines the creditor and the debtor, the subject, type, scope and time of fulfilment of the obligation.[58] If a proposal for the enforcement is submitted to a court which did not decide on the claim, the court must be provided with the original or a certified copy of the enforceable title on which the declaration of enforceability is based.[59]

The Execution Act sets out several types of enforcement measures, which are the sale of moveable property, the sale of immoveable property, the transfer of a pecuniary claim, the liquidation of other financial rights or economic rights and book-entry securities, the sale of a partner's shareholding and the transfer of

[55] Official Gazette of the Republic of Slovenia, No 51/98.

[56] Article 1 of the Execution Act.

[57] Article 17 of the Execution Act.

[58] Article 21(1) of the Execution Act.

[59] Article 42(1) of the Execution Act.

funds held by organisations authorised to conduct payment transactions. These enforcement measures can apply to all objects of enforcement, except those exempted by the law.[60]

The main effect and the purpose of all enforcement measures is to pay off the creditor's claim. An executing court may impose a fine on a debtor that acts contrary to its decisions by, for example, concealing, damaging or destroying his assets aimed to be the object of the execution, performs an act which may cause the creditor damage that is irreparable or hard to repair, acts contrary to decisions on insurance of claims, cites false information on his assets or hinders or does not permit the examination and valuation of immoveable property.[61]

If a debtor, in violation of a decision of an executing court, disposes of his assets, such disposal will be valid only under two conditions – the property being amortised and the opposing party acting in good faith at the time of the transfer or encumbrance of property (does not know and cannot know that the debtor does not have the right to dispose of the assets). A debtor who, in order to prevent the creditor from being paid, destroys, damages, disposes of or conceals part of his assets during compulsory enforcement, thereby damaging the creditor, is also criminally liable and may be fined or imprisoned in this regard for up to 1 year.[62]

A legal remedy, an ordinary appeal, against a decision issued at first-instance level is titled complaint. The debtor and a third party, having a right to object to the enforcement, may file an objection against such a decision on enforcement.[63] A complaint may be brought by a debtor, a creditor, a third party with a right to the enforcement object that prevents enforcement and a purchaser in the auction. As a rule, cassation is not permitted in the enforcement procedure. Thus, a complaint cannot set aside the enforcement actions in the enforcement procedure, except for the settlement phase. As a rule, a creditor may not be repaid until the enforcement decision becomes final. Finality is achieved when a complaint against an enforcement decision cannot be filed any longer – either because the deadline for the complaint has passed or the court ruled negatively on the complaint.

8 Costs of the Mediation

The costs of mediation entail common costs of the parties (e.g. the costs of the mediator's reward and his travel expenses) and the parties' own costs (e.g. travel expenses, costs of representation by lawyer, etc.). The Mediation Act provides that the mediator has the right to compensation and reimbursement of reasonable

[60] Article 32 of the Execution Act.

[61] See also <http://ec.europa.eu/civiljustice/enforce_judgement/enforce_judgement_sln_en.htm> accessed 24.03.2013.

[62] Ibid.

[63] See articles 53 and 64 of the Execution Act.

costs, unless he concluded a different agreement with the parties or the rules of the institution where the mediation takes place provide otherwise.[64] If the parties have not agreed otherwise, each party shall bear its own costs, whereas the common cost of the mediation is borne by the parties in equal parts.[65]

Regarding the court-annexed mediation, the ZARSS provides that, in mediation in matters of relationships between parents and children, and in proceedings concerning the termination of employment, the mediator's reward and his travel expenses shall be borne by the court.[66] In all other matters, except in commercial disputes, the mediator's reward and his travel expenses incurred shall be borne by the court for the first 3 h of mediation.[67] In mediation carried out in commercial disputes, the parties themselves bear the mediator's reward and his travel expenses in equal parts, if not agreed otherwise.[68]

The recipient of legal aid in judicial proceedings is entitled to legal aid also in mediation if he is obliged to take part in the mediation and the opponent party gave its consent to try to resolve the dispute in mediation.[69]

9 Cross-Border Mediation

9.1 Notion and Main Features

The Directive 2008/52/EC was implemented in Slovenia with the Mediation Act in May 2008, remarkably only 2 days after the adoption of the Directive and therefore 3 years before the set date of transposition. While the Directive lays down only minimum standards to encourage mediation in cross-border civil and commercial matters, the Slovenian regulation sets a general scheme that would be applicable to any kind of mediation. Due to the fact that the Mediation Act refers to mediation in general, it does not define the notion of cross-border mediation. It does not differentiate between different types of mediation and is applicable to all various kinds of mediation, including internal, cross-border and international mediation. This approach is in accordance with the 8th recital of the Preamble of the Directive 2008/52/EC, which authorises Member States to apply the same provisions also to internal mediation processes.

[64] Article 18(1) of the Mediation Act.

[65] Article 18(2) of the Mediation Act.

[66] Article 22(1) of the ZARSS.

[67] Article 22(2) of the ZARSS.

[68] Article 22(3) of the ZARSS.

[69] Article 28 of the Free Legal Aid Act.

9.2 *Enforcement of Settlements Reached in Other EU Member States Which are Enforceable in Their Country of Origin*

9.2.1 Legal Framework

Enforcement of settlements in civil and commercial matters reached in another EU Member State is governed by the provisions of Brussels I Regulation.[70] Article 58 provides that a settlement which has been approved by a court in the course of proceedings and is enforceable in the Member State in which it was concluded shall be enforceable in the State addressed under the same conditions as authentic instruments. Enforcement of authentic instruments is regulated by Article 57, which provides that an authentic instrument which is enforceable in one Member State shall, in another Member State, be declared enforceable there, on application made in accordance with the procedures on enforcement of judgements provided for in section II of chapter III of the Brussels I Regulation (Article 38, et seq.). According to these procedures, settlements in civil and commercial matters reached in one EU Member State shall be enforced in another Member State when they are enforceable in the Member State of origin. The parties may appeal against a decision on an application for a declaration of enforceability.

Articles 42.a and 42.b of the Execution Act provide rules on a declaration of the enforceability in accordance with the legal acts of the EU, which are applied directly in Slovenia, and rules on recognition and enforcement of foreign decisions or foreign authentic instruments.

9.2.2 Conditions for Enforceability

The settlements reached in another EU Member State are recognised and enforced pursuant to the procedure provided by the Brussels I Regulation. Therefore, the recognition of such settlements is automatic and parties do not have to initiate any proceedings in order to have their settlement recognised. However, the enforcement of the settlement reached in another EU Member State is not automatic and a simple procedure has to be carried out. The court is competent only to verify the positive requirement, i.e. if the required documentation is enclosed. It is not competent to verify the conditions to refuse the recognition and enforceability in the first phase of the procedure; this is possible only after the opponent party filed an appeal (a complaint).

The Execution Act provides that a declaration of enforceability of a court decision or an authentic instrument, on the basis of a directly applicable EU act, is to be issued at the request of a party by the authority that decided on the claim in the first place, or that drew up the authentic instrument.[71] As regards the competence

[70] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1.

[71] Article 42.a of the Execution Act.

of a Slovenian court to recognise and enforce a decision of another Member State, the competent court is the district court on whose territory the debtor permanently or temporarily resides.[72]

9.2.3 Effects Provided and from Which Moment These Effects are Produced

The enforceability of the settlements reached in another Member State which are enforceable in their country of origin provides the same effects as in its country of origin (extended effect).

9.3 Enforcement in Slovenia of Settlements Reached in a Non-EU Country Which are Enforceable in Their Country of Origin

9.3.1 Legal Framework

The relevant provisions for enforceability of settlements from non-EU member states are found in the Execution Act, especially Articles 13 and 42.b, the Arbitration Act (Zakon o arbitraži[73]), and in the Law on private international law and procedure (Zakon o mednarodnem zasebnem pravu in postopku, hereinafter: Private International Law Act; PILA). Article 13 of the Execution Act deals with the enforcement of the foreign decisions and foreign authentic instrument. Article 42.b of the Execution Act provides rules on recognition and enforcement of foreign decisions or foreign authentic instruments. The PILA contains special rules on recognition and enforcement of foreign court decisions, whereas provisions on recognition and enforcement of arbitral decisions are found in the Arbitration Act.

9.3.2 Conditions for Enforceability

Article 13 of the Execution Act provides that the enforcement of foreign court decisions may be executed if the conditions prescribed with the law are fulfilled. The notion of a foreign court decision has been extended also to other decisions of the competent authority; in cases where the country of origin also makes judicial decisions equal to other decisions (authentic instruments) of different state authorities, issued in a civil or commercial matter with an international element.[74]

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[72] Article 42.b of the Execution Act.

[73] Official Gazette of the Republic of Slovenia No 45/08.

[74] Article 94 PILA.

9.3.3 Effects Provided and from Which Moment These Effects are Produced

The enforceability of the settlements reached in another country and which are enforceable in their country of origin provides the same effects as the settlement reached in Slovenia.[75]

9.4 Enforcement of Settlements Reached Abroad Which Lack Enforceability in Their Country of Origin

Enforcement of settlements in civil and commercial matters reached in another EU Member State is governed by the provisions of Brussels I Regulation. According to the procedures governed in Brussels I Regulation, settlements reached in one EU Member State shall be enforced in another Member State when they are enforceable in the Member State of origin.

Therefore, settlements reached in another Member State which lack enforceability in the country of origin cannot be enforced pursuant to the provisions on enforcement found in Brussels I Regulation. Article 13 of the Execution Act provides that foreign authentic instruments can be enforced in Slovenia if they fulfil the requirements for recognition provided in the EU legislation, i.e. requirements of the provisions of Brussels I Regulation.

However, these procedures are not applicable to settlements which have not been approved by a court. Such settlements are not directly enforceable.

Enforcement of court settlements reached in a country outside the EU is regulated by the provisions of the PILA. Article 103(2) of the PILA prescribes that an order of enforcement of the settlement's country of origin has to be provided. Therefore, settlements which lack enforceability in their country of origin are not enforceable pursuant to the PILA.

10 E-justice

10.1 General Remarks

In Slovenia, the eJustice programme is closely connected with the project Strategy of Modernization of Justice System, with the aim to modernise the internal business processes at the courts and under stakeholders in the judicial system, like prosecutors' offices and the state attorney's office (Klaneček 2013).

[75] Article 94 PILA.

One of the major tasks of this modernisation project is the setting up of electronic registries, with the aim to set up registers at courts, prosecutors' offices, state attorneys' office, and the Ministry of Justice. These registries are in the process of being connected, such as registers at prosecutors' offices, which will be able to secure an exchange of information with all the involved stakeholders in a criminal case in a secure manner, perhaps even for purposes of criminal judicial investigation. The whole criminal case will be administered and tracked electronically (Klaneček 2013).

To ensure better access to justice for the citizens, all legislation is available on the Internet on the web pages of ministries, Government, and the Parliament. Moreover, the case law of the Appellate Courts and Supreme Court, and also of the Constitutional Court, is available online through the websites www.sodnapraksa.si and http://www.us-rs.si/odlocitve/vse-odlocitve/, some of the decisions being available also in English. All legislation and case law is freely accessible to everyone interested in accessing the contents of a specific act or judgment. Additionally, citizens can give their suggestions and can help create a better legislation through the e-Government State portal.[76]

Citizens have also at their disposal the support service interface, which citizens can access at the notaries' office, namely e-Notary. Citizens no longer have to visit one register and then visit another one, or bring a lot of documents to the notary public. The notary public now has access to all of the official registers and databases necessary for the matter to be resolved or the service performed. The e-Notary now offers a complete set of services to citizens (Klaneček 2013).

Citizens have the possibility to find out different useful contents on the web pages of the Supreme Court, which can help them in handling different situations while being involved in trial, such as information which may help citizens that are invited to go to court to testify as a witness, jurisprudence, schedule of the court cases, hearings, etc.

On the national level, the interoperability backbone has been prepared, which will enable a secure exchange of information and electronic documents between all judiciary institutions, and will implement the national connector to eCODEX (Klaneček 2013).

10.2 e-Enforcement

The Ministry of Justice has set up the online e-Justice portal named e-Sodstvo. This information system enables the carrying out of tasks from 8 am until 8 pm each working day and provides online services for citizens, who are able to use e-services to submit applications electronically. Part of this electronic system is also sub-portal for electronic services related to execution, called e-Enforcement

[76] <http://e-uprava.gov.si/e-uprava/> accessed 24.03.2013.

or e-Izvršba. These electronic services enable electronic submission of proposals, applications and other documents, handling electronic registers in enforcement procedures and insurance and queries on enforcement procedures and insurance, as provided in Article 3 (1) of Rules on forms, types of enforcement of civil claims and the course of automated enforcement proceedings (Pravilnik o obrazcih, vrstah izvršb in poteku avtomatiziranega izvršilnega postopka).[77]

The electronic system of e-Enforcement gives parties the possibility to electronically file the request for execution or enforcement. According to the procedure laid down in the Rules on forms, types of enforcement of civil claims and the course of automated enforcement proceedings, e-Enforcement provides automated processes in relation to enforcement of the pecuniary claims on the basis of an authentic document, except on the basis of the bill of exchange.[78]

The registered users (everyone can register) are able to use the e-Enforcement system in order to file a request for execution on the basis of an authentic document, or to carry out a check list of the procedural steps in the process from electronic filing for enforcement of the authentic document. Forms and proposals for enforcement of authentic documents can be printed.[79] Additionally, the internal qualified users are able to use the system to ex officio submit a request for the execution and the proposal for insurance, to submit the application for suspension execution, withdrawal or partial withdrawal of a request for enforcement or insurance, review their electronic documents in a single e-Enforcement and to monitor the procedural steps in the process in which they have lodged the electronic application.[80]

11 Conclusion

Mediation developed rapidly in the past few years in Slovenia. It is a rather young area of law, i.e. legal remedies that comprise part of law that emerged approximately a decade ago. Activities to develop the mediation were supported also by the legislator and institutions, like courts. Adoption of the Mediation Act in 2008 was the important foundation for the further development of the mediation. As a result, the environment for the mediation improved significantly. Another reason for this improvement is the approach of the judiciary towards the mediation. The mediation is seen as a tool for amicable solutions of disputes that courts in Slovenia have approached in a positive manner and created an environment in which the mediation

[77] Official Gazzette of the Republic of Slovenia, No 121/2007.

[78] Article 5 of the Rules on forms, types of enforcement of civil claims and the course of automated enforcement proceedings.

[79] Article 6(3) of the Rules on forms, types of enforcement of civil claims and the course of automated enforcement proceedings.

[80] Article 6(4) of the Rules on forms, types of enforcement of civil claims and the course of automated enforcement proceedings.

has become a strong legal institute of ADR. Following this initial development, parties – also commercial parties – increased their interest in searching for fast and less costly solutions of disputes. Also some sector specific regulations were adopted, invoking the mediation as a tool for dispute resolution in certain areas. As it is also reflected in the award the Crystal Scales of Justice Prize of the European Council and European Commission that recognised the Slovene model as a model of good practice, the mediation is firmly anchored in the Slovene legal system and well accepted in the practice.

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A Developing Mediation Minnow: The South African Perspective

Theo Broodryk

Abstract The shift in South Africa from the adversarial mode of resolving disputes to one embracing modes of alternative dispute resolution has been slow compared to the emergence of mediation on the international legal stage. There is no single, general, statute that regulates mediation in South Africa. There are, however, various statutes that operate in different contexts that, in some way or another, make reference to mediation as an alternative dispute resolution process. Mediation in South Africa denotes a flexible concept and, consequently, one that is difficult to define. The concept connotes a different meaning to different users in different South African contexts. Although mediation has generally been slow to take off in South Africa, in employment law mediation has been and continues to be a successful, institutionalised, dispute resolution method. Further, court-annexed mediation rules were recently published and the Department of Justice and Correctional Services will be launching court-annexed mediation at pilot site courts across the country on 1 December 2014. This chapter provides a South African perspective on mediation and will focus on various issues related to mediation in South Africa such as the mediation agreement, the mediator, the mediation process, mediation costs, success and failure of mediation, cross-border mediation and so forth.

1 Alternative Dispute Resolution

There are essentially three major categories of South African dispute resolution processes. In the first category are those dispute resolution processes involving private decision-making by the parties themselves, which category includes negotiation and mediation. In the second category are those dispute resolution processes involving private adjudication by third parties, which category includes arbitration. In the third category are those dispute resolution processes involving adjudication by a public

T. Broodryk (✉)
Department of Private Law at the Faculty of Law, Stellenbosch University, Stellenbosch, South Africa
e-mail: tbroodryk@sun.ac.za

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authority, which category includes formal litigation before the courts. All methods other than the primary methods of dispute resolution are to some extent derivatives or applications of these processes.[1]

The shift in South Africa from the adversarial mode of resolving disputes to one embracing modes of alternative dispute resolution has been slow compared to the emergence of mediation on the international legal stage in the 1970's.[2] Arbitration, which entails an impartial third party deciding a submitted issue after reviewing evidence and hearing argument from the parties,[3] is the most regulated South African alternative dispute resolution method. On the contrary, there is no single, general, statute that regulates mediation in South Africa. Mediation in South Africa denotes a flexible concept and, consequently, one that is difficult to define. The concept connotes a different meaning to different users in different South African contexts. Its meaning varies when, for example, contrasting 'private mediation' (where, generally, the mediation is triggered by contractual agreement) and various forms of 'institutionalised mediation' (where mediation is connected to the courts or required by statute).[4]

Although mediation has generally been slow to take off in South Africa, in employment law mediation has been and continues to be a successful, institutionalised, dispute resolution method. The Commission for Conciliation, Mediation and Arbitration (CCMA), established in terms of the Labour Relations Act 66 of 1995, as amended (LRA), has jurisdiction over the majority of South African employment disputes. During the 2011/12 financial year, a total of 161,588 disputes were referred to the CCMA: an average of 649 (646 for the previous year) new cases referred every working day. This represented a five percent caseload increase over the 2010/11 financial year and the trend was projected to continue into 2012/13. The settlement rate of disputes referred to the CCMA stands at 72 %.[5]

Further, court-annexed mediation rules (Mediation Rules) were recently published and the Department of Justice and Correctional Services will be launching court-annexed mediation at pilot site courts across the country on 1 December 2014. The Mediation Rules provide the procedure for the voluntary submission of civil disputes to mediation in selected courts.[6]

[1] P Pretorius *Dispute Resolution* (1993) 3.

[2] A Anthimos, A V Baker, G De Palo, W A Herbert, M Judin & N Tereshchenko "International Commercial Mediation" 45.1 *International Lawyers* (2011) 111 119.

[3] Pretorius *Dispute Resolution* 4–5.

[4] L Boulle & A Rycroft *Mediation*: *Principles*, *Process*, *Practice* (1997) 4–5.

[5] Annual Report 2011/2012. http://www.ccma.org.za/UploadedMedia/CCMA_2011-2012_Annual_Report.pdf (last visited Aug. 30, 2013).

[6] Rule 72.

2 The Basis for Mediation

2.1 The Notion of Mediation

Generally, attempts at defining mediation have been made either with reference to its values, principles and objectives, or in terms of the practical application of the concept, in other words describing how mediation works in practice. Each has its strengths and weaknesses. It has been suggested that, as important as any theoretical or statutory definitions may be, they are *working* definitions at most.[7] Nevertheless, these working definitions assist in identifying the core and variable features of mediation, especially when comparing it to other alternative dispute resolution methods. For example, Boulle and Rycroft define mediation as:

> a decision-making process in which the parties are assisted by a third party, the mediator, [and] the mediator attempts to improve the process of decision-making and to assist the parties reach an outcome to which each of them can assent.[8]

Pretorius defines mediation as:

> an extension of the structured negotiation process involving the services of an acceptable, impartial and neutral third party to assist the parties in dealing with their dispute and, where possible, to reach agreement.[9]

According to Salem, mediation can be defined as:

> a process in which an impartial intervenor, who can be called a third party regardless of how many other parties there are to the conflict, assists the disputants to reach a voluntary settlement of their differences through an agreement that defines their future behaviour. It is usually a structured process involving face-to-face negotiations.[10]

It is clear from the aforementioned *working* definitions that there are certain core and variable features that make it possible to distinguish mediation from other alternative dispute resolution processes. In this regard, Boulle and Rycroft identify the following features as core features of mediation:

(i) a decision-making process;
(ii) in terms of which the parties are assisted by a third person, the mediator;
(iii) who attempts to improve the decision-making process; and
(iv) to assist the parties reach an agreed outcome.[11]

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[7] Boulle & Rycroft *Mediation*: *Principles*, *Process*, *Practice* 3–4.

[8] 3.

[9] Pretorius *Dispute Resolution* 4.

[10] R A Salem "Mediation – the Concept and the Process" in O Geldenhuys & W K Kawa (eds) *Third party intervention*: *Mediation*, *Facilitation and Negotiation* Occasional Paper No. 11 June 1985 2.

[11] Boulle & Rycroft *Mediation*: *Principles*, *Process*, *Practice* 7.

On the other hand, Boulle and Rycroft list *inter alia* the following variable features of mediation:

(i) the degree to which parties enter into mediation consensually;
(ii) the extent of parties' ability to choose a mediator;
(iii) the qualification, expertise and skills of the mediator;
(iv) the independence and neutrality of the mediator;
(v) the extent and nature of the mediator's interventions;
(vi) the degree of confidentiality of the process; and
(vii) the extent and nature of the rules and procedures followed.[12]

2.2 Existing Legal Basis for Mediation

As mentioned, mediation in South Africa is not regulated by a single, general, statute. There are, however, various statutes that operate in different contexts that, in some way or another, make reference to mediation as an alternative dispute resolution process. These statutes are referred to below:

Antarctic Treaties Act 60 of 1996
The Protocol on Environmental Protection to the Antarctic Treaty, referred to in Schedule 1 of the Antarctic Treaties Act[13] and incorporated into South African law, provides that any dispute concerning the interpretation or application of the aforementioned Protocol, may be resolved at the request of any party through *inter alia* mediation.

Child Justice Act 75 of 2008
The Child Justice Act[14] refers to 'victim-offender mediation' which may take place if both the victim and the child consent. The mediation is intended to bring a child (who is alleged to have committed an offence) and the victim together to promote restorative justice through *inter alia* the restorative actions of the child.

Children's Act 38 of 2005
There are various references to mediation in the Children's Act.[15] For example, if there is a dispute between a child's unmarried biological father and the biological mother regarding the father's parental responsibilities, the matter must be referred for mediation.[16]

[12] 9.
[13] 60 of 1996.
[14] 75 of 2008.
[15] 38 of 2005.
[16] Section 21.

Commission on Gender Equality Act 39 of 1996

Section 11 of the Commission on Gender Equality Act[17] effectively provides that, upon receipt of a complaint, the Commission shall investigate any gender related issues and endeavour to resolve any issues or rectify any omission *inter alia* by way of mediation.

Companies Act 71 of 2008

Section 166 of the Companies Act[18] provides that, as an alternative to applying to court or filing a complaint with the Companies Commission, a person may refer a matter either to the Companies Tribunal or to an agency or person for resolution of the dispute *inter alia* by way of mediation.[19]

According to Brand, Steadman and Todd, mediation has been slow to take off as a form of alternative dispute resolution in commercial disputes. The perception exists that mediation is a 'soft' process, participation in which reflects weakness or indecisiveness by disputants. Further, the business community and commercial lawyers seem to be inherently conservative.[20] Nonetheless, an important source of support for commercial mediation in South Africa is the corporate governance directives.

The Institute of Directors in Southern Africa formally introduced the King Code of Governance Principles (Code) and the King Report on Governance (Report) (collectively referred to as King III). King III was unveiled in September 2009 and came into effect on 1 March 2010. It provides *inter alia* as follows:

> It is accepted around the world that ADR is not a reflection on a judicial system of any country, but that it has become an important element of good governance. Directors should preserve business relationships. Consequently, when a dispute arises, in exercising their duty of care, they should endeavour to resolve it expeditiously, efficiently and effectively. Also, mediation enables novel solutions, which a court may not achieve, as it is constrained to enforce legal rights and obligations. In mediation, the parties' needs are considered, rather than their rights and obligations. It is in this context that the Institute of Directors in South Africa (IoD) advocates administered mediation and, if it fails, expedited arbitration.[21]

It is the first time that mediation has been expressly endorsed in a South African code on corporate governance. The view has accordingly been proffered that the aforementioned endorsement together with the provisions of the new Companies Act,[22] are likely to stimulate the mediation of disputes within companies and between companies and other entities.[23]

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[17] 39 of 1996.

[18] 71 of 2008.

[19] Section 16.

[20] J Brand, F Steadman & C Todd *Commercial Mediation*: *A User's Guide* (2012) 4.

[21] 13–14. Principle 8.6 of Chapter "The Courts and Bar Association as Drivers for Mediation in Finland" deals with alternative dispute resolution in more detail. It provides that the "board should ensure disputes are resolved as effectively, efficiently and expeditiously as possible".

[22] 71 of 2008.

[23] Brand et al. *Commercial Mediation* 7.

Constitution of the Republic of South Africa, 1996
Ordinary bills affecting provinces must first be passed by the National Assembly and then referred to the National Council of Provinces (NCOP). If the NCOP rejects a Bill or if the National Assembly refuses to pass a Bill amended by the NCOP, the Bill must be referred to the mediation committee. The same procedure applies for Schedule 4 Bills passed by the NCOP and referred to the National Assembly.

Consumer Protection Act 68 of 2008
Section 70 of the Consumer Protection Act[24] provides that a consumer may seek to resolve any dispute in respect of a transaction or agreement with a supplier by *inter alia* referring the matter for mediation. Section 77 further makes provision for consumer protection groups to be supported by the Commission in dispute resolution through mediation.

Development Facilitation Act 67 of 1995
The Development Facilitation Act[25] contains various references to mediation as an alternative dispute resolution method. For example, an administrative development tribunal may refer a dispute to mediation. A party to a dispute before such a tribunal may also apply for the dispute to be resolved through mediation.[26]

Electricity Regulation Act 4 of 2006
The Regulator must act as a mediator, or appoint a mediator, to mediate a dispute between licencees if both parties make such a request.[27]

Estate Agency Affairs Act 112 of 1976
In terms of the Estate Agency Affairs Act,[28] the Estate Agency Affairs Board may attempt to resolve any dispute between complainants and estate agents by inviting the parties to participate in mediation proceedings.[29]

Extension of Security of Tenure Act 62 of 1997
A party to any dispute in terms of the Extension of Security of Tenure Act[30] may request the Director-General to appoint a mediator to mediate the dispute.

Financial Advisory and Intermediary Services Act 37 of 2002
In terms of section 27(5) of the Financial Advisory and Intermediary Services Act,[31] on submission of a complaint the Ombud may, in investigating or determining an officially received complaint, follow and implement any appropriate procedure, including mediation.

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[24] 68 of 2008.

[25] 67 of 1995.

[26] Section 22.

[27] Section 42.

[28] 112 of 1976.

[29] Section 4 of GN R51 in GG 21997 of 26-01-2001.

[30] 62 of 1997.

[31] 37 of 2002.

Financial Services Ombud Scheme Act 37 of 2004
The Financial Services Ombud Scheme Act[32] defines 'scheme' as any scheme or arrangement established by or for a financial institution in order to resolve a client's complaints by an Ombud, including any arrangement in terms of which resolution of the complaint is to be achieved by *inter alia* mediation.[33]

Further Education and Training Colleges Act 16 of 2006
Section 21 of the Further Education and Training Colleges Act[34] provides that, if a dispute arises about the payment or employment conditions of a lecturer or a member of the support staff, any party to the dispute may refer the dispute to a bargaining council or to the CCMA to be resolved through conciliation.

Gas Act 48 of 2001
Parties may, in terms of section 30, request that the Gas Regulator act as a mediator in any dispute in a matter falling in the ambit of the Gas Act[35] or that the Gas Regulator appoint a suitable mediator.

Health Professions Act 56 of 1974
Minor transgressions referred to the Ombudsman must be mediated by the latter.[36]

Higher Education Act 101 of 1997
The institutional statutes published in terms of the Higher Education Act[37] provide that, in each institution, an institutional forum must advise the council on *inter alia* mediation-related issues.

Human Rights Commission Act 54 of 1994
Section 8 provides that the Commission may, by mediation, conciliation or negotiation endeavour to resolve any dispute or to rectify any act or omission, emanating from or constituting a violation of or threat to any fundamental right.

Income Tax Act 58 of 1962
Under the rules promulgated under section 107A, taxpayers disputing their tax assessment may, with the consent of the commissioner for the South African Revenue Service, submit the dispute to facilitation which, in essence, constitutes regulated mediation.

KwaZulu-Natal Ingonyama Trust Act 3 of 1994
The KwaZulu-Natal Ingonyama Trust Act[38] provides that the accounting authority shall strive to settle any conflict or dispute that may arise as a result of any act

[32] 37 of 2004.

[33] Section 1.

[34] 16 of 2006.

[35] 48 of 2001.

[36] Section 3 of GN R102 in GG 31859 of 06-02-2009.

[37] 101 of 1997.

[38] 3 of 1994.

or omission of the accounting authority by negotiations, and where necessary by mediation, rather than by confrontation and that, if settlement of any such conflict or dispute cannot be achieved in that manner, then it shall be referred to arbitration in terms of the Arbitration Act 42 of 1965.[39]

Labour Relations Act 66 of 1995

The LRA as a general rule requires that employment disputes be referred to conciliation prior to adjudication or industrial action. Mediation in the context of the resolution of South African labour disputes has been very successful since the establishment of the CCMA in 1994. The LRA in section 115(1)(a) provides that the function of the CCMA is *inter alia* to "resolve, through conciliation, any dispute referred to it". Section 115(1)(b) provides that where a matter cannot be resolved through conciliation, the CCMA is enjoined to arbitrate the matter. Section 135 further provides:

(1) When a dispute has been referred to the Commission, the Commission must appoint a commissioner to attempt to resolve it through conciliation.
(2) The commissioner must determine a process to attempt to resolve the dispute, which may include-

(a) mediating a dispute;
(b) conducting a fact-finding exercise; and
(c) making a recommendation to the parties, which may be in the form of an advisory arbitration award.

In terms of the LRA a distinction is made between conciliation and mediation. Paleker suggests that conciliation appears to be wider than mediation and that mediation seems to fall under its umbrella. He states that many labour lawyers believe that the term "conciliation" was inserted simply to give a commissioner maximum flexibility and creativity when determining a resolution process and that nothing much should be made of the distinction. Others view conciliation as allowing the commissioner to take a more interventionist role than would be the case under mediation.[40]

Local Government: Municipal Finance Management Act 56 of 2003

Section 44 provides that whenever a dispute of a financial nature arises between organs of state the parties concerned must as promptly as possible take all reasonable steps that may be necessary to resolve the matter out of court. If the National Treasury is not a party to the dispute, the parties must report the matter to the National Treasury and may request the National Treasury to mediate between the parties or to designate a mediator.

[39] Section 25 of GN R1237 of 02-10-1998.

[40] M Paleker "Mediation in South Africa: Here But Not All There" in N Alexander (ed) *Global Trends in Mediation* 2 ed (2006) 333 356.

Local Government: Municipal Systems Act 32 of 2000
It is recommended in terms of the Local Government: Municipal Systems Act[41] that disputes that arise in ward committees should be mediated.[42]

Land Reform (Labour Tenants) Act 3 of 1996
The Land Reform (Labour Tenants) Act[43] contains various references to mediation of disputes. For example, section 36 provides that the Director-General may appoint one or more persons with expertise in relation to dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle a dispute.

The Mediation in Certain Divorce Matters Act 24 of 1987
The Mediation in Certain Divorce Matters Act[44] provides that the function of the family advocate is to "institute an enquiry to enable him to furnish the court . . . with a report and recommendations on any matter concerning the welfare of each minor child or dependent child of the marriage or regarding such matter as is referred to him by the court".[45] It characterises the mediation process as an enquiry – nowhere are the mechanics of the enquiry explained. According to Paleker, the reference to 'enquiry' suggests that the family advocate may embark on fact-finding with a view to informed decision-making. He states that fact-finding is not in itself inimical to mediation as long as the mediator remains neutral but that neutrality is difficult to guarantee under the Mediation in Certain Divorce Matters Act[46] because, when the family advocate is unable to resolve a dispute between parties through an enquiry, the matter goes to court where the advocate may appear to cross-examine witnesses and adduce evidence.[47]

National Credit Act 34 of 2005
In terms of section 134 of the National Credit Act,[48] as an alternative to filing a complaint with the National Credit Regulator, a person may refer a complaint relating to a credit provider that is not a financial institution, to mediation.

National Environmental Management Act 107 of 1998
The National Environmental Management Act[49] has broad provisions that allow various differences, disagreements and appeals to be mediated by the Director-General or an appointed mediator.

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[41] 32 of 2000.

[42] Section 18 of GN 965 in GG 27699 of 24-06-2005.

[43] 3 of 1996.

[44] 24 of 1987.

[45] Section 4(3).

[46] 24 of 1987.

[47] Paleker "Mediation in South Africa: Here But Not All There" in *Global Trends in Mediation* 336–337.

[48] 34 of 2005.

[49] 107 of 1998.

National Forests Act 84 of 1998
The National Forests Act[50] in section 31 *inter alia* provides that a community forestry agreement must provide for dispute resolution through informal mediation or arbitration. Further, the Minister, as defined, may make regulations to deal with facilitation, mediation and arbitration before a panel member.

National Land Transport Act 5 of 2009
Section 46 effectively provides that, if a matter which the contracting authority and an operator cannot reach agreement on is not urgent, it must be referred to mediation.

National Land Transport Transition Act 22 of 2000
Regulations established under the National Land Transport Transition Act[51] provide a *pro forma* founding agreement for transport authorities. The *pro forma* agreement makes provision for disputes and differences to be resolved through negotiation and, should negotiation be unsuccessful, through mediation.

National Payment System Act 78 of 1998
Section 11 provides that, if a Reserve Bank settlement system participant considers itself aggrieved by a decision taken by the Reserve Bank in terms of the National Payment System Act,[52] an attempt to settle this dispute must first be made through consensus, and if this is unsuccessful, the parties may agree to mediation.

National Ports Act 12 of 2005
The Regulator can, in terms of the National Ports Act,[53] determine that a complaint be mediated.[54]

National Sport and Recreation Act 110 of 1998
In terms of section 13, the Minister for Sport and Recreation in South Africa may intervene in a matter by referring the matter for mediation or issuing a directive, as the case may be, in disputes referred to in the aforementioned section, such as: alleged mismanagement; any matter in sport or recreation that is likely to bring an activity into disrepute; or non-compliance with guidelines or policies issued or any measures taken to protect or advance persons or categories of persons disadvantaged by unfair discrimination.

National Water Act 36 of 1998
Section 150 provides that: "The Minister may at any time and in respect of any dispute between any persons relating to any matter contemplated in this Act, at

[50] 84 of 1998.

[51] 22 of 2000.

[52] 78 of 1998.

[53] 12 of 2005.

[54] Section 4 of GN 826 in GG 32480 of 6-08-2009.

the request of a person involved or on the Minister's own initiative, direct that the persons concerned attempt to settle their dispute through a process of mediation and negotiation".

Pan South African Language Board Act 59 of 1995
The Board may, in terms of section 11 of the Pan South African Language Board Act,[55] endeavour to resolve and settle any disputes arising from complaints filed with the Board concerning any alleged violations or threatened violations of a language right, language policy or language practice by *inter alia* mediation.

Pension Funds Act 24 of 1956
In practice, the adjudicator appointed in terms of the Pension Funds Act[56] attempts to mediate most disputes prior to adjudication to ensure that disputes are, as far as possible, disposed of in a procedurally fair, economical and expeditious manner.

Petroleum Pipelines Act 60 of 2003
Parties may request that the national energy regulator act as a mediator in any dispute in a matter falling within the ambit of the Petroleum Pipelines Act[57] or that the regulator appoint a suitable mediator.[58]

Post Office Act 44 of 1958
The rules of the Post Office Retirement Fund, promulgated under the auspices of the Post Office Act,[59] include a provision that any dispute in relation to the aforementioned rules shall be referred to mediation for a recommendation.

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
Section 7 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[60] provides that:

> If the municipality in whose area of jurisdiction the land in question is situated is not the owner of the land the municipality may, on the conditions that it may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the municipality may determine.

[55] 59 of 1995.

[56] 24 of 1956.

[57] 60 of 2003.

[58] Section 12 of GN 342 in GG 30905 of 04-04-2008.

[59] 44 of 1958.

[60] 19 of 1998.

Probation Services Act 116 of 1991
The Probation Services Act[61] provides for programmes or services aimed at the provision of mediation for victims of crime as well as early intervention services and programmes including mediation for accused persons.[62]

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
In terms of section 21 of the Promotion of Equality and Prevention of Unfair Discrimination Act,[63] the Equality Court may, during or after an enquiry, refer any proceedings before it to any relevant constitutional institution or appropriate body for mediation, conciliation or negotiation.

Promotion of National Unity Act 34 of 1995
Section 11 of the Promotion of National Unity Act[64] provides that, when dealing with victims, the actions of the Commission shall be guided by the *inter alia* informal mechanisms for the resolution of disputes, including mediation, arbitration and any procedure provided for by customary law and practice shall be applied, where appropriate, to facilitate reconciliation and redress for victims.

Public Protector Act 23 of 1994
The Public Protector is, in terms of section 6 of the Public Protector Act,[65] competent to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by mediation, conciliation or negotiation. Also in terms of section 6, the Public Protector may, upon receipt of a complaint or on request relating to the operation or administration of the Promotion of Access to Information Act 2 of 2000, endeavour, in his or her sole discretion, to resolve any dispute by way of mediation, conciliation or negotiation.

Recognition of Customary Marriages Act 120 of 1998
The Recognition of Customary Marriages Act,[66] in section 8, provides that nothing contained therein relating to the dissolution of customary marriages may be construed as limiting the role, recognised in customary law, of any person in the mediation, in accordance with customary law, of any dispute that arises prior to the dissolution of a customary marriage by a court.

Rental Housing Act 50 of 1999
According to section 13 of the Rental Housing Act,[67] if the tribunal is of the view that a dispute arising from a complaint laid with the tribunal concerning an unfair practice may be resolved through mediation, it must appoint a mediator.

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[61] 116 of 1991.

[62] Section 3.

[63] 4 of 2000.

[64] 34 of 1995.

[65] 23 of 1994.

[66] 120 of 1998.

[67] 50 of 1999.

Restitution of Land Rights Act 22 of 1994
Section 13 of the Restitution of Land Rights Act[68] provides that, if at any stage during the course of the Commission's investigation it becomes evident that there are two or more competing claims to a particular right in land; in the case of a community claim, there are competing groups within the claimant community making resolution of the claim difficult; where the land which is subject to the claim is not state-owned land, the owner or holder of rights in such land is opposed to the claim; or there is any other issue which might usefully be resolved through mediation and negotiation, the Chief Land Claims Commissioner may direct the parties concerned to attempt to settle their dispute through a process of mediation and negotiation.

Short Process Court and Mediation in Certain Civil Cases Act 103 of 1991
Mediation was introduced into the Magistrate's Court through the Short Process Court and Mediation in Certain Civil Cases Act[69] (Short Process Court Act). It also established a new court, called the Short Process Court in which mediation is practised.[70] The Short Process Court Act provides a statutory framework for mediation of disputes that fall within the jurisdiction of a Magistrate's Court or Short Process Court.

Skills Development Act 97 of 1998
The constitution of the IT, Electronics and Telecommunication Technologies Skills Education Training Authority (SETA) allows members or employees to refer disputes to mediation.

South African Institute for Drug-Free Sport Act 14 of 1997
If any national sports federation or sports organisation fails to co-operate with the Institute for Drug-Free Sport, a report may be made to the Minister of Sport and Recreation, who may intervene by referring the matter to mediation.[71]

State Information Technology Agency Act 88 of 1998
The Minister, as defined in the State Information Technology Agency Act,[72] has made regulations regarding the procedure to resolve disputes between the State Information Technology Agency and any department. These regulations provide that disputes may be referred to the Minister for mediation.[73]

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[68] 22 of 1994.

[69] 103 of 1991.

[70] Paleker "Mediation in South Africa: Here But Not All There" in *Global Trends in Mediation* 336–337.

[71] Section 11.

[72] 88 of 1998.

[73] Section 6 of GN 904 in GG 28021of 23-09-2005.

Telecommunications Act 103 of 1996
The Telecommunications Authority has issued guidelines, which guidelines include *inter alia* that a party may, under certain circumstances, request the Telecommunications Authority's assistance in resolving the dispute through mediation.

Court-Connected Mediation
Rule 37 of the Uniform Court Rules was, for a long time, the only mechanism available to accommodate alternative dispute resolution in the High Court.[74] Rule 37 sets out the different matters that must be dealt with at a pre-trial conference. Subrule 37(6) states that:

> The minutes of the pre-trial conference shall be prepared and signed by or on behalf of every party and the following shall appear therefrom . . . (c) that every party claiming relief has requested his opponent to make a settlement proposal and that such opponent has reacted thereto; (d) whether any issue has been referred by the parties for mediation, arbitration or decision by a third party and on what basis it has been so referred . . . .

Apart from the above Rule 37, the Mediation Rules were recently published and the Department of Justice and Correctional Services will be launching court-annexed mediation at pilot site courts across the country on 1 December 2014. The Mediation Rules provide the procedure for the voluntary submission of civil disputes to mediation in selected courts.[75] The Mediation Rules are in the form of amendments to the rules regulating the conduct of proceedings of South African Magistrates' Courts. Rule 73 of the Mediation Rules defines "mediation" as:

> the process by which a mediator assists the parties in actual or potential litigation to resolve the dispute between them by facilitating discussions between the parties, assisting them in identifying issues, clarifying priorities, exploring areas of compromise and generating options in an attempt to solve the dispute.

The Mediation Rules apply to the voluntary submission by parties to mediation of disputes prior to commencement of litigation and disputes in litigation which has already commenced and as contemplated in rules 78 and 79.[76] Rule 75 provides that the parties may refer a dispute to mediation prior to the commencement of litigation or after commencement of litigation but prior to judgment, provided that where the trial has commenced the parties must obtain the authorisation of the court. A judicial officer may at any time after the commencement of litigation, but before judgment, enquire into the possibility of mediation of a dispute and accord the parties an opportunity to refer the dispute to mediation.

[74]Paleker "Mediation in South Africa: Here But Not All There" in *Global Trends in Mediation* 340.

[75]Rule 72.

[76]Rule 74.

Matrimonial and Family Disputes

In *MB v NB*[77] (the *Brownlee case*), the court held that legal representatives of the parties to a divorce must advise the parties of the benefits of mediation in appropriate circumstances. The court ordered that each party bear his own costs as taxed on a party and party basis. Referring to the apparent failure of the attorneys on both sides to consult their clients on the benefits of mediation, Brassey AJ stated as follows: "For this they are to blame and they must, I believe, shoulder the responsibility that comes from failing properly to serve the interests of their clients".[78] In *S v J and another*,[79] Lewis JA after stating that "litigation has not been in any of the parties' interests", held as follows:

> I endorse the views expressed by Brassey AJ in *MB v NB* that mediation in family matters is a useful way of avoiding protracted and expensive legal battles, and that litigation should not necessarily be a first resort.[80]

Section 33 of the Children's Act,[81] now reinforced by both the *Brownlee* and *S v J* judgments, suggests that in future divorce actions involving minor children, as a matter of course, the court is likely to insist on mediation before resorting to litigation.

3 The Mediation Agreement/Agreement to Submit a Dispute to Mediation

Insofar as private mediations are concerned (as opposed to other forms of institutionalised mediation) mediation is generally only possible if there is a mutual agreement between the parties. The mediation agreement, in terms of which parties agree to subject themselves to mediation, will generally deal with a wide range of issues, including but not limited to:

(i) The mediation time-frame;
(ii) Who the appointed mediator is or what the procedure is to appoint a mediator;
(iii) The procedures or rules for the mediation. The agreement may also provide that mediation will take place in accordance with the rules of a mediation and arbitration institution, or it may be silent on the procedure, in which case, generally, the mediator will determine the procedure[82];

[77] 2010 3 SA 220 (GSJ).

[78] Par 59.

[79] 2011 2 All SA 299 (SCA).

[80] Par 54.

[81] 38 of 2005.

[82] P Ramsden *The Law of Arbitration*: *South African & International Arbitration* (2009) 2.

(iv) The powers and responsibilities of parties involved in the mediation[83];
(v) Confidentiality requirements;
(vi) The payment of fees[84]; and
(vii) Parties' disclosure obligation of relevant information and documentation.[85]

It is generally the case that private mediators and mediation agencies have standard form agreements to mediate. It is, however, also acceptable to insert into written contracts a mediation clause. There is, however, some uncertainty as to the enforceability of such a mediation clause in the event of non-compliance. There is no legislative basis for enforcing such a mediation clause; however, its enforceability is likely to be determined by the courts in terms of general contractual principles. Accordingly, although a contract may be terminated, there may be residual provisions of the agreement, such as a mediation clause, requiring performance from the parties post termination. Another example would be the incorporation of a restraint of trade provision into a contract of employment, which provision survives the termination of the contract and imposes certain duties on the contracting parties post-termination. It can, accordingly, be argued that mediation clauses derive their authority from the agreement of the parties, are severable from the contract and should be enforced by the courts even where the main contract is void.[86] In other words, where one of the parties to a mediation agreement, or a contract which contains a mediation clause, has failed to comply therewith, said conduct may amount to a breach of the contract. The effect of such a mediation clause is therefore that the obligation to mediate becomes an enforceable term of the contract – in other words, parties are obliged to attempt to mediate the dispute before resorting to arbitration or litigation.[87]

Where a party commences legal proceedings without first complying with an agreement to mediate, the defendant can approach a court to stay the litigation – the court may then refuse to adjudicate the matter in light of the non-compliance with the mediation agreement (or the mediation clause, as the case may be). A stay in proceedings is generally the most feasible remedy where one party is in breach of an agreement to mediate, especially insofar policy considerations support the grant of a stay of the litigation where the parties have freely and voluntarily given their consent to mediate.[88]

Apart from approaching a court to seek in stay in litigation proceedings, another contractual remedy for breach of contract is specific performance in terms of which

[83]Boulle & Rycroft *Mediation*: *Principles*, *Process*, *Practice* 115.

[84]Standard agreements stipulate that the meditator's fees will be shared by the parties equally which provides a further reassurance as to the mediator's impartiality, although in some cases one party only might cover the full fee.

[85]Boulle & Rycroft *Mediation*: *Principles*, *Process*, *Practice* 131.

[86]227–228.

[87]Pretorius *Dispute Resolution* 173.

[88]Boulle & Rycroft *Mediation*: *Principles*, *Process*, *Practice* 234–235.

the court orders a contracting party to carry out the obligations agreed to (in this case, the obligation to mediate). It is a discretionary remedy i.e. it is ordered at the discretion of the court. There are, however, various problems associated with an order of specific performance where a party has failed to comply with the agreement to mediate. For example, an order for specific performance is unlikely where it will be difficult for the court to supervise the performance – a court is unlikely to issue orders which cannot be enforced. However, if damages would be an inadequate remedy the courts could, on equitable principles, consider an order for specific performance.

A further possible remedy is an award of damages for the breach of an agreement to mediate. An award of damages is generally made to put a plaintiff in the position he or she would have been in had the defendant carried out its contractual obligations. One of the major difficulties in this regard is that it is only possible to speculate in what position the plaintiff would have been had the agreement to mediate been complied with.

Finally, in the event that the mediator fails to comply with the agreement to mediate, the remaining parties to the mediation may have a remedy for breach of contract. However, to pursue this remedy, legal proceedings would need to be instituted which is what the parties were attempting to avoid in the first place. It would also not assist in resolving the original dispute.[89]

4 The Mediator

The Mediation Rules define a 'mediator' as a person selected by parties or by the clerk of the court or registrar of the court from a schedule referred to in Rule 86(2), to mediate a dispute between the parties.[90] Insofar as private mediations are concerned, the parties generally have a free choice of mediator. The parties may, for example, choose to approach a private mediation service in which case the latter service may provide a choice between various mediators. The characteristics, qualifications and skills of the mediator are generally taken into account in appointing a suitable mediator. There are various other considerations as well, such as the reputation of the mediator, the terms of the mediator's agreement to mediate, membership of a professional association, the applicable scale of fees and so forth. [91]

Ramsden, in relation to the role of the mediator, explains that:

> In mediation an independent mediator commonly known as a *neutral* attempts to mediate or facilitate the amicable resolution of the dispute. Unlike an arbitrator, the mediator's role is not to adjudicate the dispute. The role of the mediator is to facilitate the parties in

[89] 235–237.

[90] Rule 73.

[91] Boulle & Rycroft *Mediation*: *Principles*, *Process*, *Practice* 68, 77–78, 82.

> listening to and understanding the other party's arguments. The mediator does not propose a compromise or settlement or make an adjudication unless the parties have agreed thereto. As with negotiation, the parties reach agreement in the form of a compromise or settlement under their own free will.[92]

According to Boulle and Rycroft "Mediators are expected to act impartially, aid in improving communications between parties, enhance the negotiation process and act as the agents of reality but without making final decisions". The mediator is responsible for facilitating the mediation process – the responsibility of the mediator is not to act as a judge, advisor or representative. The mediator does not express his or her views on the merits or make suggestions about the outcome.[93]

The general principle is that, insofar as private mediation is concerned, anyone may mediate – training, experience or membership of a professional association is not a legislated prerequisite for appointment as a mediator. However, private mediators are generally regulated if they are also members of a professional association which has set up a regulatory scheme for those of its members offering mediation as part of their normal services. Agencies such as the CCMA also have tighter forms of control over those who conciliate under their auspices, including their own training, accreditation, standard-setting and accountability systems.[94]

There is no single set of mediator standards applicable to the conduct of mediation in South Africa. However, various organisations have established their own mediator standards for those operating under their auspices. These standards differ in various respects, but nonetheless tend to have been strongly influenced by one another. Some of these standards constitute binding rules whilst others constitute a set of guiding principles; alternatively, a mixture of the aforegoing. These standards generally deal with the ethical duties of the mediator as well as other practices and standards expected of mediators. In some mediator standards an attempt is made to describe the mediation process and to list the functions of mediators. These functions generally include, but are not limited to, assessing the suitability of the matter for mediation, ensuring that all parties are fully informed of the nature and purpose of the mediation, providing structure and control throughout the mediation process and terminating the mediation when appropriate. The enumeration of these functions effectively constitutes a checklist for mediators and serves to promote consistency in mediation practice; however, many of the mediator functions are worded at levels of generality which do not provide much precision on their own.[95]

On 5 March 2010, the Dispute Settlement Accreditation Council (DiSAC) was launched. DiSAC has now defined, published and adopted a national system of mediation accreditation standards, which standards are based on those of the

[92] Ramsden *The Law of Arbitration*: *South African & International Arbitration* 2.

[93] Brand et al. *Commercial Mediation* 25.

[94] Boulle & Rycroft *Mediation*: *Principles*, *Process*, *Practice* 200.

[95] 205–207.

International Mediation Institute.[96] It provides *inter alia* that "The Mediation Accreditation Standards presented here by the Dispute Settlement Accreditation Council is a major step towards establishing national professional accreditation standards in South Africa for dispute settlement practitioners" and that:

> The system of standards and accreditation provided by DiSAC is a voluntary, 'opt-in' system. It is not a licensing system. This implies that no practitioner can be forced to apply for accreditation, and that accreditation is not a requirement for practicing as a dispute settlement practitioner.[97]

Insofar as mediation conducted under the auspices of the Mediation Rules is concerned, the Mediation Rules provide that the qualifications, standards and levels of mediators who will conduct mediation under the rules, will be determined by the Minister and that a schedule of accredited mediators, from which mediators must be selected, will be published by the Minister.[98] No such schedule has been published to date.

5 The Process of Mediation

In light of the *Brownlee* case and other recent developments in South African law, it has been argued that a number of principles pertaining to mediation should now be accepted as forming part of South African law. One of these principles is that the parties to a dispute are obliged to consider the appropriateness of mediation.[99] Secondly, parties should refer a matter to mediation where a reasonable chance exists that it might contribute to the dispute being settled in totality or to a settlement of certain issues in dispute. Moreover, the principle emerges that attorneys are duty-bound to advise their clients of the benefits of mediation and to provide them with advice concerning the submission of a dispute to mediation. Finally, a party or legal representative neglecting such duty makes him vulnerable to be punished by means of an adverse costs order.[100]

Besides the aforementioned general principles, there are numerous variable features of mediation, such as confidentiality. Confidentiality entails that what is discussed between the parties in the mediation remains private and confidential and the outcome of the mediation is published only if the parties agree to it. In practice there are differing degrees of confidentiality that apply to different

[96] http://www.usb.ac.za/disputesettlement/pdfs/DiSAC_Mediation_Accreditation_Standards_VERSION_1.pdf (last visited Aug. 30, 2013).

[97] 4.

[98] Rule 86.

[99] Rule 37 of the Uniform Court Rules.

[100] Anthimos et al. "International Commercial Mediation" (2011) *International Lawyers* 123.

situations. In certain instances mediation proceedings are confidential in all respects and in other instances all or part of what is said will not remain confidential because of *inter alia* the wishes of the parties, the nature of what is disclosed, and so forth.[101] Mediation also generally takes place on a without prejudice basis. In other words, parties to mediation do not surrender their rights to resort to litigation should the mediation be unsuccessful.[102] It is also important to note that any party who is not a party to the mediation agreement, or to the confidentiality undertakings in the settlement agreement, should be required to ensure their commitment to confidentiality in other ways. For example, a mediator can ask the 'outside' party to sign confidentiality undertakings before exposing said party to the mediation process.[103]

Private mediation is generally a voluntary process. Parties are free to continue or to withdraw at any time without prejudice to any other steps that they may wish to take.[104] And since the parties cannot be forced to reach agreement, settlement is always entirely voluntary. The flexibility and informality of mediation enables the parties themselves to decide, with or without the help of a mediator, who should attend to make the negotiations effective, what is to be discussed and when and where the mediation will be held. All these things can be changed and adapted in the course of the mediation process. This flexibility is a major benefit of mediation when compared to formal or institutional dispute resolution in court or tribunal processes.[105]

It is possible for the parties to mediation to agree to specific time-limits before which the mediation process must be concluded. The general view is, however, parties should be encouraged to extend, by agreement, the cut-off time for the conclusion of mediation where the parties are negotiating in good faith and settlement remains a possibility. It is also suggested that parties should keep the mediation process alive for a period after the mediation has failed so that they can reconsider last offers and proposals. Generally, however, the court-referred mediation process may be limited to a few hours (the same applies to, for example, mediation proceedings conducted under the auspices of the CCMA).[106]

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[101] Boulle & Rycroft *Mediation*: *Principles*, *Process*, *Practice* 7–10.

[102] Brand et al. *Commercial Mediation* 25.

[103] Boulle & Rycroft *Mediation*: *Principles*, *Process*, *Practice* 249.

[104] R A Salem "Mediation – the Concept and the Process" in O Geldenhuys & W Kawa (eds) *Third party intervention*: *Mediation*, *Facilitation and Negotiation* Occasional Paper No. 11 (1985) 1 2; P Pretorius "Negotiation and Arbitration in Industrial Disputes" in O Geldenhuys and W Kawa (eds) *Third party intervention*: *Mediation*, *Facilitation and Negotiation* Occasional Paper No. 11 (1985) 56 57.

[105] Brand et al. *Commercial Mediation* 24.

[106] 64.

6 Failure of Mediation and Its Consequences

The aim of mediation is to facilitate settlement of the dispute. However, this is for obvious reasons not always possible. The failure of mediation does not necessarily mean that the process was without value – although mediation may ultimately have been unsuccessful, it may nevertheless result in, for example, a narrowing of the issues or in agreement on an alternative process to resolve the issues.

Various circumstances may arise that result in the termination of the mediation proceedings, such as: agreement between the parties resulting in the settlement of the dispute; the procedure that had been agreed upon has been completed or the time period allowed for mediation in the agreement has expired; the mediator is of the view that there are no reasonable prospects of resolving the dispute (in *toto* or in part); one of the parties has notified the other party and the mediator that it wishes to terminate the mediation process; or another resolutive condition of the agreement to mediate has been triggered.

Where the parties to mediation are unable to reach agreement, the parties are entitled to pursue relief by utilising alternative dispute resolution methods. For example, the claimant may institute proceedings in a court of law.[107] In this regard, it is important to keep in mind that mediation does not amount to an alternative to resorting to litigation; rather, mediation is a step towards achieving resolution which, if unsuccessful, is followed by litigation.[108] In other words, parties in mediation do not forfeit any of their legal rights and remedies. Where there is no settlement at mediation, and there are legally recognised rights involved, each side can go on to enforce its rights through appropriate judicial procedures.[109]

Rule 82 of the Mediation Rules provides that, if a settlement is not reached at mediation in a dispute which is not the subject of litigation, the clerk or registrar of the court must, upon receipt of the report from the mediator, file the report. If a settlement is not reached at mediation in a dispute which is the subject of litigation, the clerk or registrar of the court must, upon receipt of the report from the mediator, file the report to enable the litigation to continue, from which time all suspended time periods will resume.

7 Success of Mediation and Its Consequences

If the mediation results in the settlement of the dispute, the mediator will generally *inter alia* outline the process that was followed, including: an identification of the issues in dispute; verify that each of the issues has been addressed; ensure

[107] Boulle & Rycroft *Mediation*: *Principles*, *Process*, *Practice* 85.

[108] A T Trollip *Alternative Dispute Resolution in a Contemporary South African Context* (1991) 7.

[109] Pretorius "Negotiation and Arbitration in Industrial Disputes" in *Third party intervention*: *Mediation*, *Facilitation and Negotiation* 69.

that the parties understand the terms of the agreement; supervise the reduction of the agreement to writing; clarify the status of the agreement, particularly where there is a need for ratification; and, encourage the parties to sign the agreement if appropriate.[110] In certain situations an extensive post-mediation debriefing and feedback session is conducted. This involves a critical analysis and evaluation of the mediation session and the completion of a written report. Some mediators assume the responsibility of monitoring the mediated agreement and supervising its implementation. This is intended to maintain the momentum achieved by parties and to prevent non-compliance. In some situations mediators will shepherd the settlement through all subsequent stages up to the making of a consent order by the relevant court.[111]

The result of a successful mediation is a settlement or compromise that is captured in an agreement which both parties have signed. This agreement is legally binding in the same way and to the same extent as any other legal contract.[112] Where a settlement agreement is concluded, the agreement will supersede the parties' prior rights unless there are grounds on which a court can invalidate it.

Rule 82 of the Mediation Rules provides that, in the event that the parties reach settlement, the mediator must assist the parties to draft the settlement agreement, which must be transmitted by the mediator to the clerk or registrar of the court. If a settlement is reached at mediation in a dispute which is not the subject of litigation, the clerk or registrar of the court must, upon receipt of the settlement agreement from the mediator, file the settlement agreement. If a settlement is reached at mediation in a dispute which is the subject of litigation, the clerk or registrar of the court must at the request of the parties and upon receipt of the settlement agreement from the mediator, place the settlement agreement before a judicial officer in chambers for noting that the dispute has been resolved or to make the agreement an order of court, upon the agreement of the parties. Settlement agreements must be reduced to writing and signed by the parties.

8 Costs of the Mediation

The parties to a dispute that is mediated are, generally, responsible for the mediator's fees, the fees of their representatives, the costs of travel, accommodation expenses and the costs of the venue. The parties would typically pay mediator's fees and the cost of the venue on an equal basis and then pay for their own costs in relation to representation, travel and accommodation.[113] In terms of Rule 84 of the Mediation Rules, parties participating in mediation are liable for the fees of the mediator,

[110] Brand et al. *Commercial Mediation* 42.

[111] Boulle & Rycroft *Mediation*: *Principles*, *Process*, *Practice* 104.

[112] Ramsden *The Law of Arbitration* 3.

[113] Brand et al. *Commercial Mediation* 66.

except where the services of a mediator are provided free of charge. Liability for the fees of a mediator must be borne equally between opposing parties participating in mediation, provided that any party may offer or undertake to pay in full the fees of a mediator. The tariffs of fees chargeable by mediators will be published by the Minister together with the schedule of accredited mediators referred to in Rule 86(2). No such tariffs or schedule has been published to date. Furthermore, there is a provision in the Legal Aid Guide which provides that no legal aid shall be rendered for arbitration, mediation, conciliation or any other forms of alternative dispute resolution. However, this contradicts section 149 of the LRA which specifically provides that the CCMA, if asked, may together with the Legal Aid Board, arrange for a legal practitioner *inter alia* to engage in dispute resolution activities.[114]

9 Cross-Border Mediation

9.1 Notion and Main Features

Cross-border mediation is a concept that is relatively unknown in South Africa. Although the importance of mediation as a means of resolving disputes is slowly but surely gaining recognition South Africa still has a long way to go before cross-border mediation is likely to enjoy the status it deserves. It entails a change in the mind-set of South African legal practitioners away from the resolution of disputes in litigious or adversarial fashion towards increased utilisation of alternative dispute resolution methods.[115]

The expertise of South African mediators has, however, been recognised internationally and has been employed in volatile negotiations in various countries, such as Northern Ireland, Spain, the Middle East and elsewhere. Further, the African Mediation Association has been formed to promote mediation across the continent. There seems to be a general awareness of the fact that the South African dispute resolution system must be world-class and appropriate to the resolution of potentially complex and significant cross-border or multi-jurisdictional disputes. There will be no shortage of suitable mediators; however formal accreditation with an internationally recognised mediation body is essential to the credibility of mediation in South Africa.[116]

[114] Pretorius *Dispute Resolution* 40.

[115] Anthimos et al. "International Commercial Mediation" (2011) *International Lawyers* 119.

[116] C Todd & J Brand "New Era Dawns for Commercial Dispute Resolution" (2008) http://www.bowman.co.za/News-Blog/Blog/NEW-ERA-DAWNS-FOR-COMMERCIAL-DISPUTE-RESOLUTION (last visited Sept 25, 2013).

9.2 Recognition and Enforcement of Foreign Mediation Settlements

Where parties to cross-border mediation conclude a settlement agreement and a dispute arises from said agreement, one would first need to determine the court or other body which has jurisdiction to hear the dispute. If a South African national is a party to the mediation, it does not necessarily mean that a South African court will be vested with jurisdiction to adjudicate the dispute – the question of jurisdiction depends on the relevant rules of the law of civil procedure.[117]

Further, the legal system governing the settlement agreement must be ascertained through the rules of South African private international law. Essentially, a contract is governed by the law which the parties expressly agreed should govern their contract, failing which the court which has jurisdiction to hear the dispute will attempt to determine the parties' unexpressed or tacit choice of law.[118] In the absence of either of the aforegoing, the court must assign a proper law to the contract by, essentially, selecting the legal system most closely connected to the contract.[119]

Once it has been determined that South African national law is the proper law of the contract, the local court will apply the relevant South African legal principles to resolve the dispute which, in the case of a cross-border settlement agreement, is the South African law of contract and the rules of the South African law of civil procedure will be followed in the process. A South African court may also determine that the contract before it is governed by a foreign legal system. For example, the parties may have inserted a choice-of-foreign-law clause in their contract. The parties are also free to indicate that the courts of one country should have jurisdiction to hear a dispute, but that the law of another country should be applied by such foreign court.[120]

A foreign judgment is, in terms of the common law, not directly enforceable in South Africa. For such a judgment to be enforceable, the judgment creditor would need to institute proceedings *de novo* in a South African court on the basis of the judgment of the foreign court. The common-law procedure is cumbersome and subject to the requirements for the enforcement of foreign judgments generally. However, the Enforcement of Foreign Civil Judgments Act 32 of 1988 makes it possible to, in certain circumstances, directly enforce a foreign judgment in South Africa (subject to various requirements, one of which is registration).[121] In *Richman v Ben-Tovim*[122] it was held that a foreign judgment is not directly enforceable

[117] E Spiro *The General Principles of the Conflict of Laws* (1982) 71.

[118] J C W van Rooyen *Contracts in the South African Conflict of Laws* (1972) 236.

[119] JP van Niekerk & WG Shulze *The South African Law of International Trade*: *Selected Topics* (2000) 262–263, 280–282; Van Rooyen *Contracts in the South African Conflict of Laws* 236.

[120] Van Niekerk & Shulze *The South African Law of International Trade* 263–264.

[121] 266–26.

[122] 2007 2 All SA 234 (SCA).

in South Africa, but that it constitutes a cause of action and will be enforced provided that, *inter alia*, the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by South African with reference to the jurisdiction of foreign courts.

10 E-justice

One of the characteristics of mediation is that it is a flexible and informal process. Generally, the parties can decide, with or without the help of the mediator, who should be in attendance at the mediation, what is to be discussed and when and where the mediation will be held. The procedure can be negotiated and adapted by the parties themselves. Informality is closely linked to flexibility – informality refers to the setting, style and tone of the mediation and the interpersonal behaviour and conduct of the participants.[123]

The mediation process is largely unregulated and is informed *inter alia* by the background, training and style of the mediator, the nature of the dispute and dispositions of the disputants, the availability of funds and other resources and external factors such as the existence of a statute regulating the mediation.[124] It is increasingly the case that technology is used in the conduct of the mediation. For example, it is sometimes necessary for a mediation to be conducted telephonically because of geographical distance, limited resources, safety requirements or legal necessity.[125] According to Pretorius:

> Pre-mediation communications may conveniently be conducted telephonically. It is obviously preferable for the mediation itself to be conducted in the presence of both parties. But with mediation there are no fixed rules and video conferencing may well be a solution worth exploring – but only where necessary.[126]

On 15 August 2014, the Law Society of South Africa (LSSA) held an information communication technology (ICT) session with the aim of developing a holistic approach to ICT in the legal profession. Mr Brendan Hughes (Mr Hughes), attorney and chairperson of the LSSA's e-law committee, expressed the view that "the pervasive reach of technology has an impact on legal practice and institutional functioning". He referred to case law in respect of which judicial recognition of the impact of technology on law and society had already been given. For example, reference was made to *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal*

[123] Boulle & Rycroft *Mediation*: *Principles*, *Process*, *Practice* 34.

[124] 85.

[125] 109.

[126] P J Pretorius *Commercial mediation in the Southern African Development Community* (2007) http://www.resm.co.za/commercial-mediation-in-the-southern-african-development-community/ (last visited Sept. 27, 2013).

Kitchens[127] where Judge Esther Steyn for the first time approved service of court documents *via* Facebook. Judge Steyn held that "Changes in the technology of communication have increased exponentially and it is therefore not unreasonable to expect the law to recognise such changes and accommodate it."[128]

It is therefore likely that the use of ICT in alternative dispute resolution will intensify in future. It has even been suggested that alternative dispute resolution may, in future, be facilitated online. In other words, parties may resort to online dispute resolution through the use of technology, particularly the internet, to augment alternative dispute resolution processes.[129]

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[127] 2012 (5) SA 604 (KZD).

[128] Par 2; N Manyathi-Jele"ICT and the Profession" (2014) 200 *De Rebus* 1, 10–11; See also, for example, *Simmers v Campbell Scientific Africa* (*Pty*) *Ltd and Others* (2014) 8 BLLR 815 (LC) where the commissioner in the preceding arbitration allowed a complaintant in a sexual harassment case to give evidence telephonically because she was in Australia.

[129] I Knoetze "Courtroom of the Future – Virtual Courts, E-Courtrooms, Videoconferencing and Online Dispute Resolution." (2014) 200 *De Rebus* 1, 29 and 32.

Mediation in Spain: Novelties Derived from the Boost of the European Legislator

Carmen Azcárraga Monzonís and Pablo Quinzá Redondo

Abstract This paper seeks to analyse the Act 5/2012, of 6 July of mediation in civil and commercial matters, which has resulted in the definite incorporation to the Spanish legal system of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008. This law intends to enhance the access to mediation as a way of dispute resolution between private parties, which, while it had been already in practice in some Autonomous Communities in certain matters, lacked of a specific normative body to regulate it. The law is certainly limited in regulating certain aspects of mediation, whereas in some other aspects it still raises some concerns. All of these questions are to be examined in the present work alongside a set of proposals.

1 The Existing Situation of ADR

The dispute resolution system mostly used in Spain is still access to court. ADR mechanisms, above all arbitration and mediation, have been developed in the last decades both in law and in practice but at the present moment the absence of an ADR culture does not foster the resource to these systems as a way to resolve disputes in civil and commercial matters. Hence, promotion and information about ADR systems by legal operators (universities, bar associations, even courts as we will see

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C. Azcárraga Monzonís (✉) • P. Quinzá Redondo
International Law Department, University of Valencia, Valencia, Spain
e-mail: carmen.azcarraga@uv.es; pablo.quinza@uv.es

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later) is still necessary to promote its use in Spain (Barona 2014, 4–8; Esplugues 2013, 166–174; Barona 2013b, 13–15).

Arbitration has been considered a 'judicial equivalent' according to the case law of the Spanish Constitutional Court (Judgement 62/1991) while ascertaining that the right of access to justice (stated in Article 24 of the Spanish Constitution) is not violated by the decision of submitting a controversy to arbitration. Arbitration is regulated in the Spanish Arbitration Act 60/2003 of 23 December[1] and consumer arbitration performed by the so-called *Juntas arbitrales de consumo* is developed by Royal Decree 231/2008 of 15 February governing the Consumer Arbitral System.[2]

Focusing on mediation, several Acts coexist in Spain as a consequence of the legislative competence of *Comunidades Autónomas* (Autonomous Regions) in this matter (Barona and Esplugues 2009, 311). Most of the Spanish regions have adopted Mediation Acts since 2001 despite the controversial debate about the constitutional ground of their legislative competence, while the first state Act on this matter has been recently adopted, in 2012. Before Act 5/2012 of 6 July 2012 on Mediation in Civil and Commercial Matters (MA hereinafter)[3] only some isolated rules of national application existed in the Spanish legislation.

The new MA of 2012 follows the system of the UNCITRAL Model Law on International Commercial Conciliation of 2002 (as reflected in the Preamble of the Act, Recital II) and transposes the Directive 2008/52/CE of 21 May 2008 on certain aspects of mediation in civil and commercial matters[4] (Esplugues 2014b, 485–771).[5] It also fulfils the mandate of the Third Final Disposition Act 15/2005 of 8 July 2005 amending the Civil Code on Separation and Divorce Matters[6] which compelled the Government to adopt a Draft Bill on Mediation. The mandate was fulfilled 17 years later.

The MA of 2012 and its developing regulation Royal Decree 980/2013 of 13 December[7] set forth a flexible legal framework for mediation that aims to favour the resource to this ADR system by the parties in the covered civil and commercial matters. As will be explained later, the new MA covers civil and commercial matters available for parties, including family matters, as a field where mediation has been particularly developed in Spain. It is actually interesting to note the broader scope of application of this new legislation in comparison with regional Acts of mediation in force in Spain. By contrast some other matters which have had -and still have- a

[1] BOE n. 309 of 26.12.2003.

[2] BOE n. 48 of 25.2.2008.

[3] BOE n. 162 of 7.7.2012.

[4] OJ L 136 of 24.5.2008.

[5] See the analysis of the implementation of the Directive in EU Member States. The author notes in p. 769 that the Directive has certainly led to the presence of this institution in EU Member States but many and important differences can still be ascertained.

[6] BOE n. 163 of 9.7.2005.

[7] BOE n. 310 of 27.12.2013.

particular development in law and practice in Spain[8] (Ordóñez 2009; Calderón and Iglesias 2011)[9] have been explicitly excluded from its scope of application: criminal mediation, mediation with public administrations, labour mediation and consumer mediation (Article 2(2) Act) (Iglesias et al. 2012, 451).

2 The Basis for Mediation

2.1 The Notion of Mediation

A definition of "mediation" is provided for in Article 1 MA, which follows Article 3(a) of the Directive on Mediation of 2008. Mediation is defined as a mean for resolution of disputes, regardless of the term used, by which two or more parties attempt to reach a settlement voluntarily with the intervention of a mediator.

Mediation is primarily based on the core principle of party autonomy. It is voluntary and consequently parties are granted the possibility to start the mediation procedure and take decisions about continuing or ending it up when desired, either by the adoption of a settlement or simply because they have decided to give up. Article 6 MA states that the existence of a written agreement stating the commitment to submit to mediation existing or future disputes entails that the procedure agreed in good faith shall be attempted before going to court or using any other extrajudicial mechanism. But the same provision says that no party shall be forced to continue the mediation procedure or to conclude an agreement.

2.2 The Legal Basis for Mediation

The MA of 2012 establishes a general legal regime covering "mediation in civil and commercial matters, including cross-border disputes, provided that they do not affect rights and duties which are not available for the parties under the relevant applicable law". This Act will be applicable if it is explicitly or implicitly chosen by the parties or, in case of lack of choice, when one party at least is domiciled in Spain and the mediation takes place in Spain (Article 2 MA).

As regards the basis for mediation under the MA, this new legislation only states the voluntary submission to mediation. As previously said, the main principle

[8] In Recital II MA the Spanish legislator confirms that the existence of this list of exclusions does not preclude the development of mediation in these fields but aims at setting aside their regulation in favour of specific legal frameworks.

[9] Some scholars have actually supported the use of mediation in many fields, including administrative or criminal matters and individual labour contracts and relationships between the State or public entities with individuals when the State is acting without public power.

under which mediation has been regulated is party autonomy and this premise has prevented the recognition of mandatory mediation (Azcárraga 2009, 174–175),[10] which by contrast is accepted in other EU Member States and also by the Directive of 2008.

Consistently with the above, court-annexed mediation –which is also contemplated in the Spanish legislation- cannot be imposed by the court but can be suggested. In fact the MA of 2012 amended the Spanish Civil Procedure Act 1/2000 of 7 January (CPA hereinafter) [11] in order to include a new task for courts in the promotion of mediation. Article 414 CPA states currently after such amendment that the notice for the preliminary hearing must include information about the possibility for the parties to negotiate a possible solution to the dispute, including the resort to mediation. And during the hearing courts "may invite" the parties to reach an agreement to resolve the dispute, if appropriate through a mediation procedure, urging them to attend at least an informative session.

3 The Mediation Agreement

The mediation agreement is the decision of the parties to submit the dispute to mediation. Article 6(2) MA refers to it as "a written agreement (*pacto por escrito*) stating the commitment of the parties to submit to mediation any current or prospective dispute". This agreement will have effect even if the object of the dispute is the validity or existence of the contract in which this clause is included.

The Act does not clarify the specific content it should have. To this end mediation institutions suggest useful standard clauses in case the parties might be interested in including a mediation agreement in a contract.

The nature of this agreement is one of the most controversial issues in this field. While some academics support a contractual nature (Palao 2003, 85; Orejudo 2011) others consider that it should have extra-contractual nature due to its limited level of obligatoriness (Calderón and Iglesias 2011, 39–41). As previously said, the existence of a "written agreement" by the parties to submit their disputes to mediation is the ground for the mediation procedure to be initiated. Article 16(1) MA states that the mediation procedure may be started upon joint request by both parties or by only one of them "in fulfilment of an existing agreement between them to resort to mediation". In doing so the parties obliged themselves to attempt the procedure agreed in good faith before going to court or to any other extrajudicial system (Article 6(2) MA) but they are not forced to remain in the mediation procedure or to conclude a final settlement (Article 6(3) MA).

[10]Former drafts of this regulation had contemplated mandatory mediation in two situations: monetary claims and separation and divorce. These provisions were finally eliminated.

[11]BOE n. 7 of 8.1.2000.

On the other hand, Article 10(2)(II) MA explicitly states that while mediation is pending no party will be allowed to lodge a claim as regards the same dispute with the exception of interim measures or other urgent measures necessary in order to prevent the loss of goods or rights. In fact, the written agreement to submit the dispute to mediation and the initiation of the mediation procedure prevent courts from hearing the dispute as soon as the interested party invokes the pending mediation procedure (Article 10(2)(III) MA and subsequent amendments of CPA).[12]

Furthermore, Article 4(I) MA states that the request for initiation of mediation regulated in Article 16 MA will stay the prescription and expiration of legal actions from the date of reception of this request by the mediator or from the moment it has been deposited before the institution of mediation, when applicable. The suspension will last until the date of the signature of the final settlement (or, if no settlement has been reached, until the date of the final minutes (*acta final*) or when mediation finishes as a result of any of the causes foreseen in Article 22 MA (Article 4(III) MA). If the minutes of the constitutive session are not signed within 15 days from the day the request for initiation was received, time periods will start again (Article 4 (II) MA).

4 The Mediator

The success of mediation very much depends on the profile of mediators. These professionals must meet a number of requirements to guarantee the quality of the procedure. The MA of 2012 establishes in particular three kinds of rules in this regard (Calderón and Iglesias 2011, 55): rules fixing the requirements to become a mediator (Article 11 MA), rules about training and elaboration of Codes of Conduct (Article 12 MA) and rules establishing rights and obligations (for instance, impartiality -Article 13 MA- or civil liability –Article 14 MA).

According to Article 11 MA (the first provision of Title III entitled "Statute of the mediator"), the conditions to become a mediator include being a natural person[13] who fully enjoys civil rights and is not prevented from acting as a mediator by his professional regulation. Moreover he shall have an official University Degree or a Professional Degree (*Formación profesional*) and must have attended specific training provided by properly accredited institutions. This training, which has been

[12]The MA of 2012 has also amended Articles 39, 63(1) and 65(2) CPA governing the possibility to contest the jurisdiction. The new wording of these provisions enables parties to lodge a declination plea before the court in those cases where the dispute has been submitted *to arbitration or mediation*. This novelty offers the parties a remedy against breach by the parties of the agreement to submit the controversy to mediation or against the lodge of a claim in case mediation is pending (Recital V MA).

[13]Article 11(1)(II) MA states that legal persons developing mediation activity shall appoint a natural person who fulfils the legal requirements for performing these tasks. Mediation institutions are regulated in Article 5 MA.

developed by Royal Decree 980/2013 of 13 December, will be valid for performing mediation activities in any place of the Spanish territory.[14]

Mediators must be independent and impartial. Article 7 MA clearly says that they cannot act in prejudice or interest of any of the parties. Consequently, Article 13(4) MA states that the mediator shall not initiate the mediation or will have to give it up (the resignation of mediators is foreseen in Article 13(3) MA) if circumstances affecting his impartiality occur. Paragraph 5 of the same provision adds that before initiating or continuing his task the mediator must reveal any circumstance which could affect his impartiality or create a conflict of interests.

These circumstances will include in any case: any relationship of personal, contractual or business character with any of the parties, any interest –direct or indirect– in the result of the mediation, having acted previously in favour of one or more of the parties. In these cases, the mediator can only accept or continue with the mediation if he ensures that he is able to work with impartiality, and the parties accept him and declare this acceptance expressly. The duty of revealing this information remains during the whole procedure of mediation.

Consistently with the above, mediators shall fulfil their task "faithfully". Otherwise they may incur in liability for damages (Article 14 MA) and in order to cover this possibility they must subscribe a civil liability insurance or equivalent guarantee. This issue has also been developed by the above mentioned Royal Decree of 2013, as well as the creation of a Registry of Mediators and Mediation Institutions the Government was compelled to regulate in accordance with the Eighth Final Disposition MA.[15]

5 The Procedure of Mediation

The mediation procedure is based on a number of fundamental principles recognised in every Mediation Act in force in Spain: voluntariness and availability of the dispute, impartiality and neutrality of the mediator, confidentiality, good faith and mutual respect between the parties and active cooperation of the parties with the mediator (Articles 6 ff MA).

Starting from the above, the MA of 2012 has implemented a simple, affordable and short procedure (Recital III of Preamble MA). As a general rule it is foreseen as flexible but the MA has established at least that it has to follow a number of

[14]This regulation develops certain aspects of the MA of 2012 such as the training of mediators. Article 5 states that the specific formation of mediators shall last 100 h minimum. Training abroad will be valid if the foreign institutions were accredited in the respective countries. Continuous assessment is also regulated in Article 6.

[15]Chapter IV Royal Decree 980/2013 of 13 December regulates civil liability insurance and Chapter III creates and regulates the Registry of Mediators and Mediation Institutions.

phases. The mediation starts with the request to begin a mediation procedure lodged by both parties or by one of them on the basis of a previous written agreement (the previously explained Sect. 3).

This request shall be lodged before mediation institutions or before the mediator proposed by one of the parties to the others or already appointed by them (Article 16(2) MA). If the request is lodged by both parties in the framework of ongoing proceedings they may apply for the suspension under the procedural legislation.

Once the request is received and unless otherwise provided by the parties, an informative session will be organised by the mediator/s or the mediation institution. In this meeting the parties will be informed by the mediator about the causes potentially affecting his impartiality, his experience and formation, as well as the features of mediation, the costs, the procedure and legal consequences of the settlement they may reach and the time period for signing the minutes of the constitutive session. Unexcused absence to this informative session shall be understood as not being interested in mediation anymore. This information is not considered to be confidential.

The mediation procedure will start with a constitutive session, where the parties will agree upon it and provide basic information which will be subsequently contemplated in the minutes (if this information is not provided the minutes will state that the mediation has been attempted without success): identification of the parties, appointment of the mediator or institution of mediation or the acceptance of the appointed person by one of the parties, object of the dispute, agenda and time limit of the procedure, information about the total cost of the mediation and basis for its determination including the fees of the mediator and other expenses, declaration of voluntary acceptance by the parties and that they assume the obligations derived from the mediation, the venue and language of the procedure (Article 19 MA).

Mediation will be "as short as possible", with the minimum possible number of sessions (Article 20 MA)[16] and will be conducted by the mediator in an equal and equilibrated manner for parties (Article 21(1) MA) in order for them to achieve a settlement by themselves. Communications may be simultaneous or not. In the latter case the mediator will inform the parties about the celebration of private meetings with the other party/ies but confidentiality will also apply as regards their content.

In accordance with Article 22(1) MA the mediation procedure finishes either successfully (the parties reach an agreement over the dispute) or unsuccessfully (no agreement is reached, the time period for mediation is over, the mediator believes that the positions of the parties are irreconcilable or there is any other cause that gives rise to its end). Minutes shall be issued and signed by every person involved (parties and mediators) but in case any of the parties refuses to sign the mediator shall leave notice thereof in the minutes providing the parties with a copy at their request (Article 22(3)(II) MA).

[16]The MA does not provide more information about the duration of the procedure. By contrast, regional Acts contemplate more specific rules depending on the circumstances, nature and complexity of the dispute.

In case an agreement is reached by the parties either as to the whole dispute or part of it, the settlement will contain the name and domicile of the parties, the name of the mediator or the mediation institution, the date and place of conclusion, the obligations agreed by each party and acknowledgement of the proper development of the whole mediation procedure. The agreement will be signed by the parties or their representatives and everybody shall receive an original copy of it (Article 23(2) and (3)(I) MA). The mediator will inform the parties about the binding nature of the settlement and their right to notarize it in order to make it fully enforceable (Article 23(3)(II) MA).

All the phases of the mediation procedure or a part of it can also be accomplished online. Article 24 MA states that the parties can agree upon the use of electronic means (video conference, for instance) but in this case the identity of the parties and the respect of the principles foreseen shall be guaranteed. In particular, monetary claims up to 600 euro must be carried out preferably by electronic means, except if one of the parties has no access to them.[17]

6 Failure of Mediation and Its Consequences

Obviously, the greatest success of mediation would be the conclusion of an agreement between the parties. However, not achieving an agreement is not always considered a failure because mediation can also help to improve the relationship between the parties. As highlighted in the Preamble of the Act: "to reach an agreement is not compulsory, because, sometimes, like practice shows, mediation aims frequently at simply improving the relationships [between the parties] without the intention of reaching a particular agreement" (Recital IV of Preamble MA).

If no agreement is reached, this can be due to several reasons foreseen in Article 22 MA: all the parties, or some of them, exercise their right to finish the mediation (in such case the mediator must be informed), the time period to carry out the procedure has finished, the mediator considers that the positions of the parties are irreconcilable, resignation of the mediator, or the mediator has been challenged by the parties and they have not appointed another mediator.

After the end of the mediation procedure every document shall be returned to the parties. Mediators must keep in their custody and preserve all the documents which have not been returned to the parties for 4 months. These documents will be included in a file (Article 22(1) MA).

The failure of mediation does not prevent future judicial or arbitration procedures.

[17]The use of electronic means is developed in Chapter V Royal Decree 980/2013 of 13 December. This issue will be tackled in Section 10 of this contribution (e-Justice).

7 Success of Mediation and Its Consequences

7.1 Meaning and Consequences

As previously highlighted, the greatest success of mediation would be the conclusion of a settlement by the parties. According to Article 23(1) MA, such agreement can cover every issue subject to mediation or just some aspects of the dispute. Under Article 23(2) MA, the parties –or their representatives– must sign the mediation settlement and both parties and the mediator will keep a copy of this record. It is only possible to challenge the mediation settlement through action of nullity pursuant any of the causes foreseen for invalid contracts (Article 23(4) MA).

As a matter of principle, the agreement is binding for the parties and the fact that it has been reached by themselves ensures a high level of voluntary fulfilment. However, in case of non compliance judicial proceedings may be started by the parties to claim for its enforcement provided that it has previously been converted into an enforceable title. We will approach the enforcement of settlements in the next section.

7.2 Enforcement of the Settlement Reached by the Parties

The guidelines contemplated in the Directive of 2008 about the enforcement of settlements reached in the framework of mediation procedures have been implemented into the Spanish legislation. The new Act regulates the enforcement of settlements reached in both domestic and cross-border disputes. We will refer to the latter scenario in the section devoted to cross-border mediation; as regards domestic mediation, the MA of 2012 distinguishes between out-of-court mediation and court-annexed mediation.

As previously mentioned, in out-of-court mediation the parties may request the notarization of the settlement (Article 23(3) and 25(1) MA). Notarized mediation settlements are non-judicial documents with enforceable character under Article 517(2)(2) CPA. In order to notarize the agreement parties must provide the notary with a copy of the agreement together with the minutes of the constitutive and final sessions. The presence of the mediator at this moment is not deemed necessary (Article 25(1)(II) *in fine* MA). The notary shall verify that the relevant settlement complies with the requirements contemplated by the MA as well as its conformity with "law" (*Derecho*) (Article 25(2) MA).

As regards court-annexed mediation Article 25(4) MA states that the parties may apply for the judicial homologation of the settlement before the judge under the rules of the procedural legislation.

This distinction will also be important in order to establish the competent court to hear the enforcement of the agreement. In accordance with Article 26 MA the enforcement of a settlement reached in the framework of ongoing proceedings shall

be initiated before the same court which homologated it. By contrast, the enforcement of settlements notarized at the end of out-of-court mediation procedures is granted to the Court of First Instance of the place where the agreement had been signed, according to Article 545(2) CPA.

8 Costs of Mediation

As a general rule, Article 15(1) MA states that the costs of mediation must be shared between the parties unless they agree otherwise and irrespective of the outcome of the mediation procedure.

It is important to differentiate between the expenditures related to the intervention of mediators as to their performance in said condition (professional fees and expenses) and those that are a product of the performance of the service provided by a mediation institution when the parties seek such an institution to carry out and administer the mediation process (Barona 2013a, 325).

On the other side, the Spanish law gives no indication as to the possible expenses that can arise –for the parties- from legal, economic, psychological, etc., counselling, although, these cannot be considered as "expenses" derived from the mediation process and shall be borne by each of the represented parties.

Another relevant question is the one that refers to the system by which those expenses are to be distributed, and in that sense, the general rule states an equitable sharing by the parties. However, the parties are free to follow a different allocation mechanism and also, there is the possibility of an "incorporation by reference" – otherwise known as indirect agreement system – in which the bylaws or regulations of the mediation centre or institution have incorporated a different criterion than the one that states the egalitarian division of expenses (Barona 2013a, 329).

As to the provision of funds, Article 15(2)(I) MA states its imperative character, whereas Article 15(2)(II) MA regulates its consequences. In that sense, if the parties do not provide the required funding within the provided dateline, the mediator or the institution in charge of the process, can terminate it immediately, without prejudice of the possibility for the mediator or institution to issue an ultimatum for the parties to provide the funds.

Nevertheless, this issue very much varies from one region to others if regional Acts are to be applied. Access to mediation may be complimentary where it is conceived as a public and free service.[18] Furthermore citizens may also be granted free legal assistance. Additional Disposition 2 MA states in particular that public Administrations will "try" to include mediation in free assistance prior to proceedings according to Article 6 of Free Legal Assistance Act 1/1996, of 10

[18]For instance, Article 9 Act 4/2005 concerning the Social Specialised System of Family Mediation of Castilla-La Mancha states that the service undertaken by this organism is complimentary, so that the mediator is not allowed to receive any compensation from the parties.

January.[19] Furthermore most of the regional Acts also refer to this same state legislation as to free legal assistance,[20] while others base this right on regional rules.[21]

9 Cross-Border Mediation

9.1 Notion and Main Features

In accordance with Article 3(1) MA and following the guidelines of Article 2 of the Directive on Mediation of 2008, the determination of the international nature of mediation rests with two main elements, territorial and temporal (Robles 2008, 101–102). A dispute is deemed to be "cross-border" in two different situations. Firstly, if at least one of the parties is domiciled or habitually resident in a different State from the one where the other party/ies being affected [by the mediation][22] is/are domiciled when mediation is agreed or is compulsory under the relevant law. And secondly, also disputes resolved through mediation –regardless of the place where mediation took place– where as a consequence of the change of domicile of any of the parties the settlement or any of its consequences are intended to be enforced in a different state.

According to Article 3(2) MA if the parties *reside* [sic] in different EU Member States, the *domicile* (Calderón and Iglesias 2009, 31)[23] shall be determined in accordance with Articles 59 and 60 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in

[19]BOE n. 11 of 12.01.1996.

[20]For instance, Article 6(2) Family Mediation Act of Valencia of 2001; Article 26 Family Mediation Act of Asturias of 2007; Article 27 Family Mediation Act of Andalucía of 2009; Article 24(1)(b) Family Mediation Act of Aragón of 2011.

[21]For instance, Article 21 Family Mediation Act of Canarias of 2003; Article 13 Family Mediation Act of Castilla y León of 2006; Articles 6(1) and 9(c) Family Mediation Act of Baleares of 2010; Article 24(1) Mediation Act of Cantabria of 2011.

[22]This broad and undefined concept could include collective or third parties whose interests may be affected, despite not being a party in the dispute nor being legitimated to sign a possible final settlement.

[23]The wording of the MA of 2012 mixes "residence" and "domicile" although it has also been supported that the use of these two different terms might also permit the extension of the possible application of the Spanish Act, given that the domicile and the habitual residence of the parties could be placed in different countries.

civil and commercial matters[24] (Brussels I Regulation,[25] replaced as of 10 January 2015 by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).[26]

The MA of 2012 follows a monistic approach and provides for a general regime for domestic and international mediation. But it is also assumed that in practice these two kinds of mediation entail different needs and ways of developing the respective procedures. For instance, the intervention of several mediators (as foreseen in Article 18 MA) may even be necessary in cross-border mediation, where different languages and cultural traditions are usually involved. Enhancing the use of Information Communication Technologies (ICT) in mediation (Vázquez 2011, 2737–2762) is also particularly interesting for international disputes because of the geographical distance which often exists between the parties (Articles 5(2) and 24 MA).

The material scope of application covered by the Act is applicable to domestic and international mediation. As previously clarified, the Act covers "mediation in civil and commercial matters, (Esplugues and Azcárraga 2013, 63)[27] including cross-border disputes, provided that they do not affect rights and duties which are not available for the parties under the relevant applicable law" and excludes some other matters explicitly listed (Article 2 MA).

Concerning the determination of "the relevant applicable law", this shall be determined under the relevant choice-of-law rule governing the civil or commercial matter constituting the object of the dispute. Consequently, the law governing the civil or commercial matter in that particular cross-border conflict will establish the rights and duties which are not available to the parties, which might differ from those established by the national legislation for domestic mediation in the same matter. Therefore, it might also be the case that a particular matter covered by the Act is considered a civil or commercial matter under its scope of application whereas it is not in the domestic scope for cases outside the EU (for instance, in labour contracts).

As regards the profile of mediators in cross-border disputes, the peculiarities of international mediation require a careful selection of the mediator in order to guarantee the success of the procedure. A mediator acting in cross-border cases should have additional competence and training including linguistic competence

[24]From the perspective of the Spanish legal system Article 59 Regulation Brussels I refers to Article 40 of Spanish Civil Code under which the domicile of individuals is the place of their habitual residence. Concerning legal persons Article 60 points as domicile the place where the relevant legal person has its statutory seat, or central administration or principal place of business.

[25]OJ L 12 of 16.1.2001.

[26]OJ L 351 of 20.12.2012.

[27]From our perspective, the notion of "civil and commercial matters" should be autonomously interpreted by the European Court of Justice, as it derives from an EC Directive. However Article 12(1) Spanish Civil Code must also been considered to this end, as the general rule for characterisation in the Spanish private international law system.

and multicultural education (Jagtenberg 2001, 92) as well as a deep knowledge of Comparative and Private International Law (Vilalta 2011, 33). However, the Spanish legislation does not provide for special rules in this regard; neither the MA nor the Royal Decree of 2013 developing it.

On the other hand, no specific reference is made in the Act regarding the nationality of the mediator or the question of whether foreign citizens may work as mediators in Spain but the developing regulation of 2013 clarifies some of these aspects. The MA does not apparently prevent foreigners –both EU citizens or from third countries- from performing mediation tasks in Spain. The above mentioned requirements to work as a mediator in Spain are mandatory for every person interested in this field but the Spanish legislator is aware of the practical consequences of EU freedoms as regards mediators already established in other EU Member States willing to perform mediation services in Spain. To this end Article 14(3) Royal Decree of 2013 states that mediators "recognised" in other EU Member States may also register in Spain.[28]

Together with the above, Article 5(2) Royal Decree of 2013 clarifies that training abroad will be valid if the foreign institutions providing it were accredited in the respective countries. And moreover foreign mediation entities are also included in Article 5(1) MA when defining the concept of "mediation entity" and these will also be allowed to register in Spain under Article 20 Royal Decree of 2013. In case of doing it they will have to clarify whether they are registered in other countries.

Finally, we would also like making reference to the law governing the civil liability of the mediator in cross-border cases. In the event that a mediator is found civil liable (Article 14 MA) the law governing this issue shall be the one determined under the rules of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).[29] We support the same interpretation as regards the law governing the payment of the mediator.

9.2 Recognition and Enforcement of Foreign Mediation Settlements

Article 25(3) MA foresees the possible enforcement abroad of settlements reached in Spain (Esplugues 2014a; Navas 2014).[30] This provision states that notarization is required for the settlement to be enforced abroad, as well as compliance with the conditions established by international conventions in force in Spain and relevant

[28] In order to do so, they must attach to their application an official certificate of the registration in their country of origin or of their condition of mediator issued by the competent authority translated into Spanish.

[29] OJ L 177 of 4.7.2008.

[30] A Comparative Law study about this issue is provided by these authors.

EU rules. This provision must be interpreted together with Article 27 MA, which regulates the enforcement of cross-border settlements by distinguishing their origin and the possible enforceability they may have acquired in the country where they were concluded.

Article 27 MA provides for two situations as regards the enforcement in Spain of foreign settlements: firstly, those cases where the foreign settlement has been declared enforceable by a foreign authority (usually the country where the mediation procedure took place); and secondly, those situations where the foreign settlement has not acquired enforceability abroad because it has not been declared enforceable by a foreign authority. In both situations foreign "documents" will not be enforced in Spain if they violate public policy, this being the sole ground for denial of enforcement. Moreover, the jurisdiction to hear this kind of claims is regulated in Article 955 of the former Civil Procedure Act of 1881 (CPA 1881).

This provision was amended firstly in 2003[31] with the aim of granting jurisdiction to Courts of First Instance to hear recognition and enforcement claims of foreign judgments and other judicial and arbitral decisions, and then in 2011[32] to confirm the latter rule as regards judicial decisions, extend the competence of commercial courts in the relevant matters and include mediation settlements in its scope of application.

Furthermore it is also important to stress that the authenticity of the document must be evidenced[33] if no special rule abolishing this requirement is provided for in international or other special rules for the relevant document (for instance legalisation has been abolished for authentic instruments covered by European Regulations). This means that it shall be presented either legalised or "apostilled",[34] when appropriate, and, if needed, translated into Spanish or other official language in the relevant Spanish territory.[35]

9.2.1 Settlements Which Have Been Declared Enforceable Abroad

A further classification must be made in this group:

(a) enforceable settlements covered by the material scope of application of EU instruments which regulate the circulation of judicial and non-judicial decisions in civil and commercial matters (although with different levels of mutual recognition);
(b) enforceable settlements concluded in third countries which are bound with Spain by multilateral conventions such as the Convention on Jurisdiction and the

[31] Act 62/2003, of 30.12.2003. BOE n. 313 of 31.12.2003.

[32] Act 11/2011, of 20 May. BOE n. 121 of 21.05.2011.

[33] Article 323 CPA.

[34] The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents of 1961. BOE n. 229 of 25.09.1978.

[35] Article 144 CPA.

Recognition and Enforcement of Judgments in Civil and Commercial Matters of 2007 (Lugano Convention)[36] or bilateral agreements, in the relevant matter; and

(c) other settlements not covered by EU legislation or international conventions in force in Spain, either because they were adopted in a third country not linked with Spain by international conventions or they refer to a particular matter not covered by existing instruments. In these cases, Article 27(1) MA simply states that a settlement which was declared enforceable abroad can only be enforced in Spain if such enforceability derives from the intervention of a competent authority performing equivalent functions to those undertaken by Spanish authorities.

9.2.2 Settlements Which Have not Been Declared Enforceable Abroad

Although the success of mediation very much depends on the enforceability of the settlement, it might happen that such efficacy is not granted in some countries,[37] or that it is made dependant on the performance by the parties of some extra activity, which they fail to do, usually because it does not relate to a key part of the dispute.

The MA deals with the enforcement in Spain of settlements which were not declared enforceable in the country of origin. Article 27(2) MA states to this effect that this kind of settlements may only be enforced in Spain if they have been previously notarized by a "Spanish notary" (we support the view that this requirement is not related with the nationality of the authority but as an authority performing notarial activity in Spain) at the request of the parties, or of one of them with the explicit consent of the others. Several interesting aspects may be drawn from this rule.

Firstly, the Spanish legislator has appointed notaries as guarantors of the enforcement efficacy of mediation settlements in the Spanish territory. This rule aims primarily at overcoming the lack of public intervention in the country of origin of the mediation agreement. This objective may have been reached through the intervention of other national authorities, but the Spanish legislator has chosen notaries to whom it has granted a function of control of legality of foreign settlements in those situations where such control did not happen in the country of origin (Ybarra 2012, 24–25).

This being the case, secondly, some have even wondered whether this control is really necessary, taking into account, for instance, that it is not foreseen for other kinds of foreign decisions such as arbitral awards. Article 45(1) Arbitration

[36] OJ L 147 of 10.6.2009.

[37] This should not happen in EU Member States as a consequence of the mandate of Article 6(1) Directive 2008/52/EC: "Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable."

Act 60/2003 provides for the enforceable nature of awards establishing a privileged mechanism which facilitates their international circulation through the application of the New York Convention on the recognition and enforcement of foreign arbitral awards of 1958[38] if no bilateral convention more favourable to the particular recognition exists. In mediation, by contrast, even though such control may be justified, the said requirement may also hamper the international circulation of settlements reached in mediation procedures. In brief, this rule can affect the resort to mediation in cross-border disputes given that other mechanisms of resolution of conflicts which may be used to resolve international controversies do not contemplate such conditions for the full efficacy of the final decision.

Thirdly, the significance of party autonomy in mediation is also noteworthy at this stage -as it actually is in the whole mediation system (Palao 2012)- in order to notarize the settlement. The parties must seek the intervention of the notary jointly if they want their settlement to have enforceable efficacy in Spain, or at least one of them with the explicit consent of the others (Article 27(2) MA, as mentioned before). Consequently, one of the parties cannot apply for the notarization on his own and the implicit consent of the other is not foreseen either.

This rule, which actually derives from Article 6 of the Directive, entails a serious problem: enforcement can easily be blocked if any of the parties refuses to notarize the settlement. We consider that this issue should be revised if the final objective is to enhance the resort to mediation. Enforcement should not depend on both parties. They reached an agreement, so a friendly implementation of the agreement is almost guaranteed. But in those cases where this does not happen, the interested party should be able to enforce it. This is again the case for arbitral awards under Article 37(8) Arbitration Act 60/2003.

10 E-justice

Recital 9 of the European Directive of 2008 states that "[t]his Directive should not in any way prevent the use of modern communication technologies in the mediation". The Spanish MA has actually gone further in the promotion of the use of new technologies in mediation and suggests the parties taking these resources into account.

Several organisations already offered in Spain Online Dispute Resolution (ODR) services before the adoption of the new legislation of 2012, mainly in the field of consumer protection.[39] But the main novelty concerning the use of ICT in mediation

[38] BOE n. 164 of 11.07.1977.

[39] For instance, *Confianza Online*, managed by *Autocontrol*, and *Asociación Española de Comercio Electrónico* (AECEM-FECEMD) provide ODR services for disputes related with publicity, electronic commerce, personal data, accessibility and use of services, as well as protection of minors.

is actually the promotion of the use of electronic means in the new Act of 2012 and the further development of this possibility in the Royal Decree of 2013.[40]

Article 24 MA allows the parties involved in mediation procedures to develop them by electronic means (videoconference or other similar means of transmitting voice or image) either partly or totally provided that their identity and the principles governing mediation are safeguarded. Moreover, this provision suggests using ODR for monetary claims up to 600 euro, which will be "preferably" carry out by electronic means unless its use is not possible for the parties and provided that the their positions are not be based on legal arguments (Article 30 Royal Decree of 2013).

The mediator should inform them about the electronic tools they could use and he should verify that both of them know how they work. The private or joint sessions could be done by videoconference and the final settlement could be included in an electronic document subjected to the agreement of the parties via email. In this sense, if all parties receive a copy and recognise that it is an agreement approved online this would permit a faster conclusion of the final settlement (Sanz 2011, 446).

Although the MA does not explicitly mention the use of ICT in cross-border mediation, we understand that the use of online mediation is not only possible in this scope but even convenient, taking into account that parties usually reside in different countries and trips are an expensive cost which could be avoided using videoconference, Skype or easy access Websites with forms in different languages and technical support.

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[40]Chapter V of Royal Decree 980/2013 of 13 December, Articles 30 ff.

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Mediation in Taiwan: Present Situation and Future Developments

Kuan-Ling Shen

Abstract The mediation system, the history of which can be traced back to the period of Japanese rule in Taiwan, is one of the mechanisms for alternative dispute resolution. To lessen the burden on the courts and to provide parties an approach to resolve disputes, the Judicial Yuan has promoted these mechanisms for several years. Regarding the mediation system in Taiwan, a distinction is made between court-annexed mediation and out-of-court mediation, which includes mediation in town and mediation in the administrative agencies. And each type is regulated by separate laws or rules with principles that protect procedural justice. The court-annexed mediation, which is regulated by the Code of Civil Procedure, includes both mandatory and voluntary mediations, differing from mediation out of court. In addition, the newly-implemented Family Proceedings Law also mandates that contentious family cases must first go through court-connected mediation before litigation. Meanwhile, out-of-court mediation allows specific professional disputes to enter mediation proceedings. As for the mediators, mediation in court is primarily conducted by judges while mediation out of court is conducted by mediation committees selected by law. If mediation is successful, its effectiveness varies from type to type. Cross-border mediation is mainly governed by the Chinese Arbitration Association, with only a few cases mediated over the past 10 years.

1 The Existing Situation of ADR in Taiwan

Along with the progress of society and economic life, lawsuits are gradually increasing and becoming more complicated. Under the limited resources of the justice, in order to reduce the number of lawsuits, each country has begun initiating legislative trends to promote "Alternative Dispute Resolution" (hereinafter ADR) mechanisms. ADR is a term generally used to refer to informal dispute resolution processes in which the parties meet with a professional *third party* who helps them resolve their dispute in a way that is less formal and often more consensual than

K.-L. Shen (✉)
Professor, Department of Law, National Taiwan University, College of Law, Taipei, Taiwan
e-mail: kshen@ntu.edu.tw

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is done in formal litigation procedures. The most common forms of ADR are *mediation* and *arbitration*.[1] Although the concept of ADR started in America,[2] due to its evident accomplishments in reducing the burden on courts, in recent years it has begun to influence the legislative trends of European countries as well. Germany is an example of this. The tradition in Germany has been to solve disputes by litigation, but on January 1, 2000 it began implementing the mandatory mediation system for some incidents such as those involving monetary amounts under EUR 750.[3] Moreover, in June 2008 the European Union announced a directive for mediation, which required each member state to implement national laws to comply with the Directive within 3 years.[4]

In contrast to western countries, the tradition of the Taiwanese society in resolving disputes is not in litigation, and most Taiwanese people view lawsuits as perilous undertakings. Since the ancient times, ideas such as "litigation finally is terrible" (zhouyi), "there must not be any litigation" (Confucius Analects), "peace is best", or "law should not enter the family" have been prevalent, and thus instead of litigation, society searches for other methods of dispute resolution. In the rural areas, mediation is led by clan leaders or fathers as they participate in negotiations and resolve conflicts.[5] During the 50 years of Japanese rule, due to the Japanese tradition of "mediation over litigation", the Japanese vigorously advocated the mediation system in Taiwan. Therefore, under the legal culture of the Japanese mediation policy and emphasis on mediation, the Taiwanese society has long had a legal mentality of emphasizing mediation over litigation. The mediation system has become a main mechanism of conflict resolution within traditional agricultural societies.[6] However, since the lifting of martial law in 1987, along with the progressive establishment of the "legal state", in which the exercise of

[1]Spangler, Brad. "Alternative Dispute Resolution (ADR)." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Research Consortium, University of Colorado, Boulder. Posted: June 2003 <http://www.beyondintractability.org/essay/adr/>.

[2]Frank E. A. Sander, Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice: Varieties of Dispute Processing (April 7–9, 1976), 70 F.R.D. 79, 111–16 (1976); Ettie Ward, *Mandatory Court-Annexed Alternative Dispute Resolution in the Federal Courts*: *Panacea or Pandemic*?, 81 ST. JOHN'S L. REV. 77, 81 (2007).

[3]§ 15 a EGZPO.

[4]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.

[5]Tsung-fu Chen, *Litigation and Social Development*, Proceedings of the National Science Council Part C: Humanities and Social Sciences, 10[4], 43(2003).

[6]Duan Lin, *The Antagonism Arising through the Differences between Chinese and Western Legal Concepts*: *The Derivation of Taiwan Law*, Confucian Ethics and Legal Culture, pp. 214, Taipei: Chiliu (1994); Duan Lin, *Confucian Ethics and Legal Culture*, pp. 83–92 Taipei: Chiliu (1994); Duan Lin, *Legal Awareness of the Chinese*: *The Example of the Modern Significance of the Mediation System in Taiwan*, paper presented at the Interdisciplinary Conference on Way of Thinking and Its Modern Significance: The 4th Annual Conference on Chinese Psychology and Behavior, Taipei: Institute of Ethnology of Academia Sinica & College of Psychology of National Taiwan University (1997).

governmental power is constrained by the law, in addition to judicial reform and the strengthening of the independence of the Justice, the number of lawsuits in Taiwan has continued to increase year by year. There were 119,932 civil litigation cases of the first instance in 1998, but in 2007 it had already increased to 295,169.[7] Over the past 10 years, this number has more than doubled, creating a great burden for the courts.

Therefore, the Judicial Yuan has greatly advocated ADR over the last few years, with strengthening the court mediation being classified as one of the important policies of the Judicial Yuan in 2006, in hopes of lessening the burden on the courts. In addition, in the autonomous local towns, the mediation system is again being seriously considered, with great improvement in 2005. In July 2006, the arbitration system was strongly advocated by the Executive Yuan when they sponsored the "Taiwan Economic Sustainability Development Conference", in which the arbitration system was discussed in many topics, emphasizing the need for increased popularization, promotion, and quality of the arbitration system. A plan was developed to unite the country's arbitration associations with industry and commerce circles with the goal of promoting the arbitration system and improving the quality of arbitrators. From this it can be seen that in Taiwan, after continuing to receive the western "rule by law" legal and litigation systems, these past 10 years have produced similar questions and phenomena, namely, the increase in unresolved cases as a result of the great proliferation of litigation cases. Therefore, the court is not able to bear the increased burden, which has delayed individual lawsuits and hindered the effectiveness of the rights of the litigants. Thus, in recent years the Judicial Yuan has again returned to advocating the ADR. However, in differing from the traditional society, under the concept of the "legal state", *mediation* is a part of procedural law and thus must incorporate legal procedure.

2 The Basis for Mediation in Taiwan

2.1 The Notion of Mediation

Mediation is a form of alternative dispute resolution, which provides parties an approach to resolving disputes. This type of settlement is not ruled by a neutral third party, but usually arises through an agreement between the parties.[8] In Taiwan, its legal basis can be found not only in the "Taiwan Code of Civil

[7]Department of Statistics, Judicial Yuan, *Judicial Statistics Yearbook* (*2007*), *10. Types of Civil Cases Terminated in the First Instance by the District Courts – By Year*, in: http://www.judicial.gov.tw/juds/index1.htm.

[8]Lian-Gong Chiou, *The Legal Theory of Option of Civil Procedure*, in: The Theory of Civil Procedure Option, pp.25-(2000).

Procedure" (hereinafter Code of Civil Procedure),[9] but also in other laws as well as administrative rules.[10] The relevant provisions will be introduced in detail below.

In addition to mediation, other ADR mechanisms existing in our country include settlement, arbitration, and quasi-arbitration. But regardless of the conflict resolution system, they are all based on respecting the subjectivity of parties in the procedure and giving parties the right to choose the type of procedure for dispute resolution and to participate in the procedure to influence the discovery of facts and the implementation of the law. Three possible procedures to choose from include litigation, mediation, and arbitration, any of which may have different effects on the outcome. In guaranteeing *procedural rights*, rights of freedom, property rights, and existing rights of the Constitution, the law must respect the dignity of the people and promise the parties the right to measure his or her *substantive* and *procedural interests* and to freely decide to use any kind of conflict resolution procedure.

There are several principles to be adopted in mediation to protect *procedural justice*:

1. *The principle of voluntariness*: Different from litigation, mediation proceedings start on a voluntary basis for both parties. This principle dominates whether the mediation is successful, since a successful mediation requires an agreement between the parties. Although the legislators might require that the parties go into mediation prior to litigation, the parties still retain their right to a final decision. The parties also have the right to select different procedures, such as litigation or arbitration, to resolve their disputes.
2. *The principle of neutrality*: Neutrality is necessary in mediation proceedings. On one hand, mediators should possess "*individual neutrality*", i.e., they should not get involved in the disputes concerned. Furthermore, "*procedural neutrality*" is also a necessity, i.e., mediators should assist the parties in pursuing a fair proceeding and help the parties with communication in order to reach an agreement. In a nutshell, mediators should try their best not to affect the process and results of mediation proceedings, but instead facilitate a neutral procedure.
3. *Self-responsibility of the parties*: Both mediators and judges have their own responsibilities. However, it is the parties who should be responsible for the results of mediation, not the mediators.
4. *Informational transparency*: During mediation proceedings, both parties should be given equal access to all the relevant facts and rights, so as to take into account both substantive and procedural interests before making any judgments.
5. *Confidentiality*: Unless the parties agree to disclose, both parties and mediators shall keep in confidence all information gleaned during the course of handling mediation cases, and such information cannot be submitted to the court in the subsequent litigation.

[9] *See* Code of Civil Procedure Art. 403–462.

[10] *See* more in Township Mediation Ordinance, Family Proceedings Law, Government Procurement Law, Labor Dispute Settlement Law, Medical Law, Consumer Protection Act, etc.

2.2 The Existing Legal Basis for Mediation

In the mediation system in Taiwan, distinction is made between *court-annexed mediation* and *out-of-court mediation*, which includes *mediation in town* and *mediation in the administrative agency*. And each type is regulated by separate laws or rules.

First, the court-annexed mediation system is regulated by the Code of Civil Procedure. In 1999 there were significant changes, including expanding the scope of the definition of *mandatory mediation* incidents, reinforcing and increasing the number of mediators, establishing the Med-Arb system, and facilitating the shift from litigation of first instance to mediation by the agreement of the parties. As of 2007, mediation by party agreement can be used in the second instance as well.

As for lawsuits concerning property rights, in accordance to Article 403 of the Code of Civil Procedure, the cases outlined below should first pass through the court mediation system before the suit is brought. The following are the so-called mandatory mediation incidents: (1) Disputes arising from a relationship of adjacency between real property owners or superficiaries, or other persons using the real property; (2) Disputes arising from the determination of boundaries or demarcation of real property; (3) Disputes among co-owners of real property arising from the management, disposition, or partition of a real property held in undivided condition; (4) Disputes arising from the management of a building or of a common part thereof among the owners of the dividedly-shared title or persons using the building; (5) Disputes arising from an increment or reduction/exemption of the rental of real property; (6) Disputes arising from the determination of the term, scope, and rental of a superficies; (7) Disputes arising from a traffic accident or medical treatment; (8) Disputes arising from an employment contract between an employer and an employee; (9) Disputes arising from a partnership between the partners or between the undisclosed partners and the nominal business operator; (10) Disputes arising from proprietary rights between spouses, lineal relatives by blood, collateral relatives by blood within the fourth degree of relationship, collateral relatives by marriage within the third degree of relationship, or head of the house or members of the house; (11) Other disputes arising from proprietary rights in which the price or value of the object in dispute is less than NTD 500,000.

To a certain degree, mandatory mediation limits the right of the parties to institute legal actions by delaying their access to litigation. Therefore, it is necessary to have a legitimate reason for mandatory mediation. For example, if the parties have close relations (e.g., if they are neighbors, relatives, or friends), the harmony of these relationships should be maintained (e.g., 1, 4, 5, 10); if the value of the matter of controversy is not sufficiently high (e.g., 11); if submitting evidence and finding the truth are difficult such that the parties would spend excessive time and cost through litigation (e.g., 7); or if the disputes are not contingent and not necessary to judge right or wrong, but rather to establish a new relationship for the future (e.g., 2, 3, 4). Moreover, if mediation fails, the parties may still pursue litigation; therefore, the

parties are not being denied access to litigation. Mandatory mediation is less limiting than mandatory arbitration with respect to the *rights to procedural options*.[11]

In addition, according to the newly-implemented Family Proceedings Law of 2012, which especially emphasizes the function of mediation for family matters, all contentious family cases must in principal first go through court-annexed mediation before litigation. Relevant examples include cases such as divorce, terminated adoption, cases requiring inheritance allotment, and other cases wherein the parties have the right of disposition.

Secondly, the "Township Mediation Ordinance", which was amended most recently in 2008, provides that townships shall establish a Mediation Committee, allowing people to resolve their disputes. Article 1 of the Township Mediation Ordinance states that both criminal cases, which may only be filed upon complaint, and civil cases may be brought to township mediation. In this regard, both public and private law are covered.

In addition, mediation for specific professional disputes must be carried out by administrative authorities established by the mediation committee. Most of these mediations are governed by specific administrative laws, including the Government Procurement Law and the Consumer Protection Act (*See* Appendix). As for mediation in administrative agencies, this type of mediation usually covers areas of both private and public law. There are various administrative authorities in charge of specific professional disputes, such as public construction contract disputes, labor disputes, and consumer disputes. Most disputes that fall under the umbrella of these administrative agencies are specific civil disputes, while others might involve criminal cases. Moreover, since mediation in administrative agency is one kind of administrative procedure, to some extent certain public laws, for instance the Administrative Procedure Law, are covered by this mediation system as well.

After martial law was lifted in 1987, along with the gradual establishment of a country and society ruled by law, the number of litigations [issues] has increased yearly. In 1998, the Court of First Instance had 109,504 cases, while by 2007 this number had risen to 294,860 (*See* Table 1), increasing nearly one and a half times and thereby creating a heavy burden on the judiciary. Therefore, in recent years the Judicial Yuan has strongly promoted an out-of-court dispute resolution system, with strengthening this system being classified by the Judicial Yuan in 2006 as one of the most important policies for reducing the burden on the judiciary.[12] The caseloads of the civil courts have increased heavily, and in observing the relationship between the growth and decline in the number of cases in both civil mediation and the Court of First Instance, it is apparent that after reaching a peak in 2007, the number of cases handled by the Court of First Instance has declined in the subsequent years (*See* Table 1). But in the time period from 1999 until 2010,

[11]Lian-Gong Chiou, *New Changes in Mediation Procedure*, The Theory of Civil Procedure Option, pp. 192-, Taipei: Lian-Gong Chiou (2000).

[12]Department of Statistics, Judicial Yuan. *Judicial Statistics Yearbook 2010*, 27. State of Civil Mediation Cases Terminated by the District Courts – By Year, in: http://www.judicial.gov.tw/juds/index1.htm.

Table 1 Number of cases of first instance in district courts

Year	Total litigation cases	Total court mediation cases	Number of successful court mediations	Number of settlements in litigation proceedings
1970	41,671	10,526	4,505	
1971	41,685	10,584	5,619	
1972	38,102	8,884	4,730	
1973	32,630	9,014	4,900	
1974	30,253	7,741	3,567	
1975	39,899	6,307	2,757	
1976	54,883	6,486	2,860	
1977	56,720	6,127	2,836	
1978	50,917	5,890	2,223	
1979	56,680	5,746	2,040	
1980	63,044	5,215	1,438	
1981	65,148	4,874	1,252	10,561
1982	78,159	4,807	1,025	12,617
1983	83,138	4,702	1,003	12,445
1984	82,090	4,446	834	11,314
1985	90,005	4,692	879	12,904
1986	74,444	4,350	749	10,106
1987	58,463	4,046	781	7,953
1988	56,515	3,792	660	7,021
1989	58,996	3,343	400	6,343
1990	69,757	6,330	2,639	7,237
1991	75,912	3,371	501	8,168
1992	77,035	2,929	383	8,064
1993	83,195	4,383	517	8,500
1994	81,976	23,505	2,859	7,142
1995	91,827	27,572	3,915	6,963
1996	103,143	36,099	4,649	7,615
1997	109,504	45,456	5,588	8,179
1998	119,760	56,692	6,212	7,483
1999	144,464	46,786	4,608	8,132
2000	150,871	45,216	4,977	7,967
2001	156,269	48,878	6,265	8,150
2002	169,758	60,804	9,080	7,736
2003	180,986	70,507	11,196	7,885
2004	187,500	53,823	10,602	7,008
2005	207,079	52,044	12,341	6,404
2006	277,107	65,428	18,741	7,208
2007	294,860	80,444	24,306	7,911
2008	230,104	78,284	24,515	7,715
2009	183,106	81,301	28,625	7,969
2010	149,055	82,586	30,623	7,355
2011	132,031	82,190	32,442	7,089
2012	135,512	95,805	35,513	6,896

the Court of Mediation's number of resolved cases has grown 93 %. The success rate also rose from 10.97 to 37.04 %. In contrast, in other types of out-of-court dispute resolution reconciliations, the success rate has dropped, the reason being that more cases go through mediation, and if consensus is not reached in the mediation process, it is much more difficult to reach a litigation settlement. In light of the increase in the volume of mediation cases, after the Court Organization Act created the judicial officer system (Articles 7–1 and 7–2 of the Court Organization Act), the Judicial Yuan instructed all district courts that judicial officers must handle civil mediation and family affairs mediation procedural matters starting November 7, 2008. Furthermore, it also strengthened the professionalism of mediation committee members, recruiting retired judges, lawyers, doctors, architects, professors, mental health counselors, and other professionals to serve as mediation committee members to hear the details of complex cases containing professional legal issues.

Prior to 1997, the number of cases in which mediation was used showed a steady increase, consistently greater than court-mediated cases, which declined. Clearly, in towns, mediation is used at a much higher rate than court-mediation. However, it is worth noting that since 1998, the number of court-mediated civil cases has increased marginally each year, while the use of township mediation was slightly reduced. Since 2002, the number of civil mediation cases in rural areas has shown a reduction, vis-à-vis court-mediated cases, and the gap has expanded each year (*See* Table 2). In other words, people in Taiwan tend to utilize courts to solve civil disputes. Due to the promotion spearheaded by judicial officials, mediation in court has gradually become more significant than lawsuits in solving civil disputes. There are two reasons for this. The first pertains to the important amendments and corrections made to civil litigation law in 1999, 2000, and 2003. The civil law was amended to facilitate the search for points of dispute in court mediation to improve the hearing process in the future, which resulted in most people becoming more likely to use court mediation to resolve civil disputes. On the other hand, the second reason pertains to problems involving the selection of mediation committee members. That is, in the past criticisms have often been directed at the selection process; for example, that the committee position could be used as a reward, that the appointee's character and knowledge were lacking, or that the appointee might even be involved with the mafia, all of which gradually led to a loss of trust in the process. In 2005, the township mediation code addressing the selection of mediation committee members was amended. With the exception of those within the jurisdiction who have legal or professional experience, who are impartial and trustworthy, and who are selected by the town or district mayor, appointees must be approved by the District Court of the jurisdiction or by the branch prosecutor's office, and they are reported to the county government for approval along with their qualifications. Furthermore, in accordance to the "Anti-Gangster Clause", anyone found guilty of a crime under the Organized Crime Prevention Act shall not serve on the mediation committee. However, these amendments have not enhanced the use of mediation in town. Obviously, citizens rely more on court-annexed mediation.

As civil disputes are increasingly being resolved through court-annexed mediation in Taiwan, it is worthwhile discussing whether this could result in uncertainty

Table 2 Number of cases of court mediation and town-and-city mediation

Year	Number of court mediations	Number of town-and-city mediations	Success rate of court mediations (%)	Success rate of town-and-city mediations (%)
1970	10,526		42.80	
1971	10,584		53.09	
1972	8,884	4,973	53.24	48.89
1973	9,014	4,625	54.36	49.79
1974	7,741	5,072	46.08	46.24
1975	6,307	4,938	43.71	55.57
1976	6,486	5,156	44.09	50.25
1977	6,127	5,347	46.29	44.29
1978	5,890	4,533	37.74	46.26
1979	5,746	5,223	35.50	47
1980	5,215	5,128	27.57	39.27
1981	4,874	5,147	25.69	44.38
1982	4,807	5,409	21.32	43.8
1983	4,702	6,868	21.33	42.5
1984	4,446	10,878	18.76	55.75
1985	4,692	17,678	18.73	84.96
1986	4,350	19,111	17.22	60.26
1987	4,046	22,206	19.30	60.92
1988	3,792	21,819	17.41	64.25
1989	3,343	20,813	11.97	64.18
1990	6,330	22,125	41.69	60.37
1991	3,371	28,379	14.86	61.9
1992	2,929	35,583	13.08	62.2
1993	4,383	38,709	11.80	62.55
1994	23,505	38,858	12.16	62.31
1995	27,572	46,608	14.20	63.69
1996	36,099	53,530	12.88	66.3
1997	45,456	62,334	12.29	66.37
1998	56,692	58,279	10.96	67.42
1999	46,786	64,916	9.85	69.75
2000	45,216	62,689	11.01	68.58
2001	48,878	57,423	12.82	67.91
2002	60,804	51,717	14.93	64.84
2003	70,507	50,105	15.88	66.53
2004	53,823	46,509	19.7	70.92
2005	52,044	50,814	23.71	70.63
2006	65,428	50,210	28.64	70.32
2007	80,444	47,869	30.21	68.4
2008	78,284	47,882	31.32	70.12
2009	81,301	47,903	35.21	69.02
2010	82,586	50,384	37.08	68.95
2011	82,190	50,564	39.47	70.63
2012	95,085	50,205	37.35	69.95

of rights, as well as the possibility that there may be a detrimental effect on the predictability of legal decisions. Shifting cases from the court's adjudicative processes may impact the development of law and legal certainty. The mediation and litigation systems both have their unique strengths and weaknesses, and the parties' selection should be based on what they really consider to be a balance of their procedural and substantive interests. Mandatory mediation should not become a barrier to trial for those who need a judicial decision. While the judicial administration strongly encourages the mediation system, it is worth keeping in mind whether it should also equally concern itself with ways to enrich and enhance the quality of the litigation system through training and development of judges and lawyers and increasing the number of judges, thereby strengthening the confidence of the parties in the courts' verdicts.

3 The Mediation Agreement

In Taiwan, there is no legislation addressing the *mediation agreement* or agreement to submit the dispute to mediation. Therefore, mediation agreements between parties may not have any particular legal basis in Taiwan's legal system. Cases involving mediation agreements are difficult to be observed in practice. However, on the basis of the basic principle of contract, mediation agreements are permitted and acknowledged. According to Article 404, Section 2 of the Code of Civil Procedure, for cases in which the parties have agreed to refer their dispute to court mediation before initiating the relevant action, an action initiated by one party shall be deemed an application for mediation by that party upon the objection of the opposing party. Notwithstanding, once the parties have proceeded orally on the merits, no such objection may be raised.

4 The Mediator

To serve as a mediator in Taiwan, one should be qualified under different rules concerning out-of-court and court-annexed mediation.

The *mediation proceeding* in court is conducted in principal by the summary court judge (Article 406–1, Paragraph 1 of the Code of Civil Procedure). However, because Taiwan's judges have the educational background expected of those working in litigation in the legal system, they may be unaccustomed to the mediation proceedings. To facilitate an effective mediation proceeding, depending on the type of dispute, mediation should be attempted in advance by one to three mediators

appointed by the judge.[13] To select the best mediator for a case, the judge should take under consideration the type of case at hand, relevant legal relationships, where the dispute occurred, as well as professional knowledge, special skills, and work and life experience of the mediators. To increase the quality of mediators, in 2006 the Judicial Yuan began encouraging retired judges to volunteer to serve as mediators. This is to increase the probability of reaching an agreement.

According to the Selection Regulations of the Court Mediators (hereinafter the Selection Regulations) established by the Judicial Yuan, the mediator is appointed by the president of each court, and the number of people chosen to serve as mediators must be in accordance with the need of each district court. The list of mediators must be made and submitted to the Judicial Yuan for reference. Anyone having one of the following qualifications may be appointed to be a mediator: (1) a person of good character and reputation; (2) a person enthusiastic about the work involved in mediation; (3) a person with a stable life and ample time to devote to the work of mediating; (4) a person in good physical and mental health; (5) a person with civil or familial experience in dispute resolution; (6) a person with extensive social knowledge or experience; or (7) someone possessing other qualities deemed appropriate (Article 4 of the Selection Regulations). After appointment, mediators are eligible to serve 2-year terms, and when the term ends they must be reappointed if they are to continue to serve. However, the court may shorten the term according to its needs. To select the best mediator for the case at hand, the judge should take under consideration the type of case, the relevant legal relationship, and where disputes occurred, as well as professional knowledge, special skills, and work and life experience of the mediators. To increase the quality of mediators, in 2006 the Judicial Yuan began encouraging retired judges to volunteer to serve as mediators.

In addition, since 2005, in mediation cases involving *family disputes*, experts on family matters, including psychologists, social workers, or people with professional experience in family mediation or psychological counseling, have served as special family case mediators. Because expert mediators must be approved by both parties, parties consider mediators as contributing to the communication of controversial issues, and statistical analysis shows an increase in the proportion of successful mediation. Therefore, beginning in April 1, 2007, in Taiwan all 18 district courts began to introduce family professionals into family disputes. In the Taipei District

[13] According to the Selection Regulations of the Court Mediators established by the Judicial Yuan, the mediator is appointed by the president of each court, and the number of people chosen as mediators must be in accordance with the need of each district court. A list of mediators must be made and reported to the Judicial Yuan for reference. Anyone having one of the following qualifications may be appointed as mediator: (1) a person of good character and reputation; (2) a person enthusiastic about the work involved in mediation; (3) a person with a stable life and ample time to devote to the work of mediating; (4) a person in good physical and mental health; (5) a person with civil or familial experience in dispute resolution; (6) a person with extensive social knowledge or experience; or (7) someone possessing other qualities deemed appropriate (Article 4 of the Selection Regulations). After appointment, mediators are eligible to serve 2-year terms and when the term ends they must be reappointed if they are to continue to serve. However, the court may shorten the term according to its needs.

Court's Family Mediation, a consultative model was also introduced wherein the counselor provides the party with the necessary psychological support services, and through problem-solving orientated intervention strategies assists the client in clarify his or her own ideas, thereby achieving the goal of the proceedings. This allows the mediation to focus on the core problem as soon as possible and to develop effective resolution strategies. In accordance to the principles of the mediation procedure, if, after different *psychological consultants* meet with both parties individually, they believe that the parties should meet for a discussion and if the parties agree to such a meeting, the meeting may take place. The meeting should be co-chaired by two psychological consultants, each representing one side. This meeting can lead to both parties reaching an agreement.

Article 32 of the new Family Proceedings Law provides that mediators for family cases shall equip themselves with a sense of gender equality and respect for diverse cultures. In addition, according to the Selection Regulations of the Family Mediators established by the Judicial Yuan, family mediators should have at least one of the following qualifications: (1) a person of good character and reputation; (2) a person enthusiastic about the work involved in mediation; (3) a person with a stable life and ample time to devote to the work of mediating; (4) a person in good physical and mental health; (5) a person with extensive social knowledge or experience; (6) a person who was once a judge; (7) a psychologist; (8) a social worker; (9) a doctor; (10) a lawyer; (11) a person with professional experience in psychological counseling; or (12) a person with professional experience in family mediation (Article 4 of the Selection Regulations of the Family Mediators). However, anyone who is found in accordance with Article 7 is not qualified to be a family mediator. For instance, one should not be subject to the order of the commencement of guardianship. Moreover, before and after being selected, family mediators shall attend professional classes instituted by the Judicial Yuan (Article 5 of the Selection Regulations of the Family Mediators). Family mediators are appointed by the president of each court, and the number of people chosen as mediators must be in accordance to the need of each district court (Article 6 of the Selection Regulations of the Family Mediators). If any party objects to the selected mediators or if both parties agree to select other mediators, the court may appoint other mediators at its discretion.

In 2005, the township mediation code addressing the selection of mediation committee members was amended. With the exception of those within the jurisdiction who have legal or professional experience, who are impartial and trustworthy, and who are selected by the town or district mayor, appointees must be approved by the District Court of the jurisdiction or the branch prosecutor's office and reported to the county government along with their qualifications for approval. Furthermore, in accordance to the "Anti-Gangster Clause", anyone found guilty of a crime under the Organized Crime Prevention Act shall not serve on the mediation committee. At the same time, in order to prevent conflicts of interest, mediation committee members are subject to the approval of the town's representative body, which has veto power. To ensure gender equality in mediation, each committee must include one woman to ensure that in cases of domestic violence or sexual abuse the victim's rights are protected.

Regarding the selection of mediators for administrative mediation, in principle, the competent authority of the municipality, county, or city sets up the mediation committee. Those with legal or professional experience having a position of neutrality may be appointed to the mediation committees. Mediators are sometimes selected by competent authorities, while others might be chosen by both parties as permitted by law.

In delineating the mediator's character, a mediator should play a *fair*, *impartial*, *independent*, and *neutral* role, dedicated to facilitating the communication between parties in the mediation proceeding in order to reach a mediation agreement. Therefore, the duties of mediators should be designed to achieve this goal. In our country, several rules have been made. But the law does not regulate mediators' disclosure obligation, focusing only on the general obligations. In court-annexed mediation, Article 414 of the Code of Civil Procedure provides, "The mediation shall be conducted peacefully and sincerely. Appropriate mediation or guidance shall be provided to the parties. An appropriate proposal should be recommended with a view to a fair and amicable resolution acceptable to the parties." Though the Article itself does not state the obligation, we can infer from the words that the purpose of the provision is to regulate the mediators. Because mediation is one type of ADR that requires an agreement by the parties, the mediators should act neutrally and encourage communication in persuading the parties to reach reasonable agreements. The recommended resolution also requires neutrality. Mediators, including judges and members of the mediation committees, shall keep in confidence all information containing another person's professional or business secrets or other matters involving another person's privacy learned by them in the course of handling mediation cases.[14] In addition, mediation committees are obliged to disqualify themselves in certain situations.

Article 32, Paragraph 3 of the Family Proceedings Law provides that family mediation proceedings should be applied to provisions addressing mediation in the Code of Civil Procedure. For instance, mediators in family mediation must act neutrally and enact their *confidentiality obligation*. However, due to unique issues and items of public interest arising out of family issues, the court has implemented various obligations solely for family mediators. For example, family mediators presently handling issues relating to underage children shall not endanger the interests of underage children. In addition, family mediators shall ensure the safety of victims during mediation proceedings.

As to mediation in town, mediation committees also have the obligation to keep information in confidence and to disqualify themselves when necessary. Mediators must maintain a neutral and impartial attitude during the process.

Mediation for public construction contract disputes is conducted by the Executive Yuan's Public Construction Commission Procurement Complaint Review Board. The Board should impartially exercise its power.[15] The Board committee members

[14] *See* Code of Civil Procedure Article 426.

[15] *See* Government Procurement Law Article 86.

should be impartial and neutral in exercising their authority and should attend the meetings in person. In addition, they have the obligation to withdraw as appropriate.

Mediators and mediation committees for labor disputes have the duty of confidentiality to the event at issue.[16] In addition, they are also required to withdraw or disclose information in some cases in compliance with the law.[17]

As to mediation for medical malpractice, the general obligation of confidentiality is also regulated. In addition, in cases that contain the same facts and reasons in which multiple parties are involved, if one party enters into mediation with other parties, mediators shall not leak out or make reference to the statements or results in other cases without the parties' consent.[18]

Mediation committees and mediators for consumer disputes also have the duty of confidentiality.[19] The committees shall withdraw automatically from the cases in which they themselves or their cohabiting family members are involved.[20]

In pursuit of satisfying the principle of *autonomy*, several ethical norms for mediators are made in light of types of mediation. For example, the Ethical Norms apply to both court-annexed mediators and to family mediation committees. These norms contain standards of action for mediators.

By observing the contents, we may summarize in three points how the ethical rules are designed: (1) mediators shall be impartial; (2) mediators are obliged to keep confidence and to avoid conflict of interests; and (3) mediators shall be dedicated and professional. These obligations for mediators have been drafted into the norms as well. These rules facilitate the *impartiality*, *neutrality*, and *independence* of mediators.

What can be done if the mediators violate the norms? Though some norms have not specifically addressed this issue, Article 29 of the Selection Regulations of the Family Mediators provides that in cases in which a family mediator violates the Ethical Norms, the court may discipline the mediators after an investigation of the circumstances and interviews with the relevant officials and people.

5 The Process of Mediation

5.1 The Court-Annexed Mediation Proceedings

In order to increase the likelihood of reaching a settlement, the judge will appear in mediation sessions when the mediation has reached a stage with prospects shown for a successful mediation, or when the circumstances require the judge's presence. Notwithstanding, mediation may be conducted immediately by the judge upon the

[16] *See* Labor Disputes Guidelines Article 24.

[17] *See* Regulations for the Mediation of Labor-Management Disputes Article 9, 10, 18, 19.

[18] *See* Draft for Medical-Management and Medical-Compensation Articles 13 and 17.

[19] *See* Consumer Protection Act Article 45–1.

[20] *See* Regulations for the Mediation of Consumer Disputes Article 10.

parties' agreement to do so or when the judge considers it appropriate to do so. In order to improve the credibility of the mediators and to respect the right of the parties to select their mediators, in cases in which a party objects to any of the appointed mediators, or if the parties agree to appoint other appropriate persons, the judge may re-appoint or appoint such persons as agreed-upon by the parties. But if both parties agree to move the case from litigation to mediation, because the civil trial judge is more familiar with the details of the case, the judge may also conduct mediation proceedings further and the case will not be removed to the summary court judge. Furthermore, the court-annexed mediation proceedings are as follows:

With the exception of cases addressed by the subparagraphs of Article 406, Paragraph 1 of the Code of Civil Procedure, the matters provided under Article 403 shall be subject to mediation by the court before the relevant action is initiated (Article 403 of the Code of Civil Procedure). For matters not provided in Article 403, a party may apply for mediation before initiating the relevant action (Article 404 of the Code of Civil Procedure). In general, a successful mediation is reached upon the agreement of the parties (Article 416 of the Code of Civil Procedure). In mediations for disputes over proprietary rights, with the consent of both parties, the mediators may, in their discretion, propose the terms of mediation. The terms of the mediation proposed by the mediators shall be made either in writing bearing the date, or shall be documented in the mediation proceeding transcript by the court clerk, signed by the mediators, and forwarded to the judge for review and approval. After the judge approves the proposed terms, the mediation shall be deemed successful (Article 415–1 of the Code of Civil Procedure). Additionally, in mediations for disputes over proprietary rights, if the parties are unable to but are close to reaching an agreement, the judge shall take all circumstances into consideration, consult with the mediators, balance the interests of the parties, and thereafter, subject to the main intent expressed by the parties and propose a resolution on its own initiative (Article 417 of the Code of Civil Procedure). A party to the mediation or an interested person who has intervened may object to the proposed resolution provided in Article 417 within a 10-day peremptory period following the service thereof. In cases in which no objection is raised within the period provided in the preceding paragraph, the mediation shall be deemed successful in accordance with that the proposed resolution (Article 418 of the Code of Civil Procedure).

If the parties cannot reach any agreement, or in cases in which the judges propose a resolution in accordance with Article 417 and an objection is raised to it within the 10-day period, the mediation shall then be unsuccessful (Article 418 of the Code of Civil Procedure).

The court clerk shall maintain a transcript of the mediation proceeding, record any continuances and whether the mediation was successful, and document the oral argument. Notwithstanding, mediators conducting the mediation may themselves make record of an unsuccessful mediation or a continuance. If the judge at the mediation session announces the proposed resolution provided in Article 417, such fact shall be documented in the transcript (Article 421 of the Code of Civil Procedure) (Fig. 1).

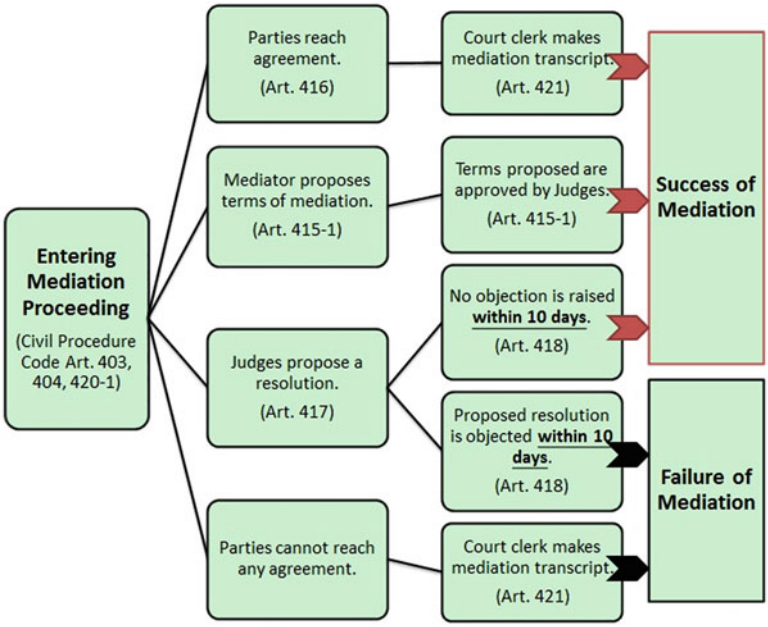

Fig. 1 Court-annexed mediation proceedings with relevant provisions

5.2 The Mediation in Town

The mediation in Town Proceedings are as follows: In civil cases in which both parties consent to submit the disputes to mediation, parties may apply for mediation in written or verbal statements to the mediation committee. However, if the oral argument has already been concluded in the first instance, no such application may be initiated (Articles 10 and 11 of the Township Mediation Ordinance). The court under the first instance may transfer the following cases to the mediation committee for mediation by a ruling: (1) cases falling under Article 403, Paragraph 1 of the Code of Civil Procedures; (2) cases that are suitable for mediation which concern ancillary civil action under the criminal procedure; (3) other civil cases that are suitable for mediation (Article 12 of the Township Mediation Ordinance).

The mediation committee shall designate the mediation session after the application for mediation has been accepted or after the court has transferred the mediation and shall inform the parties or the representatives of the parties to attend the mediation meetings. The session shall be held within 15 days upon acceptance of the application or transfer, but an extension may be requested by the parties (Article 15 of the Township Mediation Ordinance). Both parties may recommend one to three person(s) to sit in on the mediation meetings, to assist the party, and to work in coordination with the members (Article 17 of the Township Mediation Ordinance). A third party having an interest in the subject matter of the mediation may, with the permission of the mediation committee, intervene in the mediation

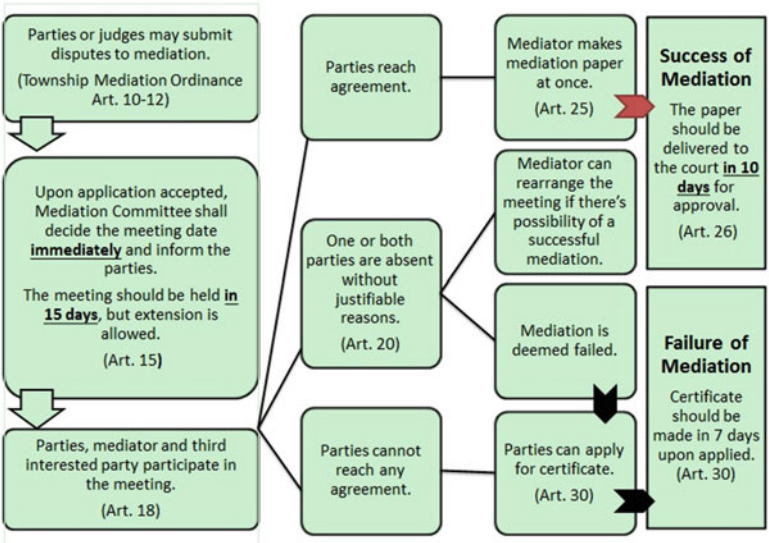

Fig. 2 Mediation in town proceedings with relevant provisions

proceeding. The interested party may, with the consent of both parties and his or her own agreement, join the mediation as one of the parties (Article 18 of the Township Mediation Ordinance).

A successful mediation is reached upon the agreement of the parties. When mediation achieves success, the mediation committee shall conduct the mediation agreement which shall be sealed, signed, or fingerprinted by the parties and the members who attended the meeting of the mediation (Article 25 of the Township Mediation Ordinance). In cases in which a party has failed to appear at the mediation session without just cause, the mediation shall be deemed unsuccessful. However, if the mediation committee believes that there is a likelihood of achieving a successful mediation, the mediation committee shall designate another mediation session for further mediation (Article 20 of the Township Mediation Ordinance).

If the parties fail to reach an agreement, the mediation is thus unsuccessful. The parties may apply to the mediation committee for the certificate of failure of the mediation. The certificate shall be issued within 7 days after the application. If a mediation case transferred from a court cannot be successful, the mediation committee shall notify the court immediately and refer the case to the court with all relevant materials (Article 30 of the Township Mediation Ordinance) (Fig. 2).

6 Failure of the Mediation and Its Consequences

Failure of the mediation occurs when both parties cannot reach a mutually acceptable agreement on the disputes concerned. In cases of an unsuccessful mediation after both parties have appeared at the mediation session, the court may, upon such

a motion by one party, order an immediate oral argument in accordance with the litigation proceeding applicable to the subject matter to avoid procedural delays. Notwithstanding, if the opposing party has moved for a continuance, the court shall so grant the motion to protect the party's procedural right to argument. The action shall be deemed to have been initiated upon the filing of the application for mediation. In cases of an *unsuccessful mediation*, in which the applicant for mediation initiates the action within the 10-day peremptory period following service of the certificate of unsuccessful mediation, such action shall be deemed to have been initiated upon the filing of the application for mediation. The same shall apply in cases in which such action has been initiated before the certificate is served. In cases in which the mediation is deemed applied for by initiating the action or by the debtor's objection to a payment order, and if the mediation is unsuccessful, the court shall order immediate oral argument in accordance with the litigation proceeding applicable to the subject matter, except if the party has moved for continuance. In such case, all effects resulting from the original initiation of action or the application for issuance of a payment order shall remain operative (Article 419 of the Code of Civil Procedure). Since the mediation has been initiated, the party obviously wishes to exercise his or her right. Hence, the above provision is designed to prevent a problem which may occur under Article 133 of the Civil Code, i.e., to prevent the parties from abstaining from reaching successful mediation so as to preserve the prescription.

Moreover, in order to facilitate the parties to be frank in the proceeding and to reach a successful mediation, no mediation or guidance shall be provided by the mediators or the judge, and no representations or concessions made by the parties during the mediation proceeding may be admitted as the basis for making decisions in an action initiated as a result of an unsuccessful mediation (Article 422 of the Code of Civil Procedure). Regardless of the extent to which the mediation procedure is carried, the mediation fails when at least one of the parties is not willing to reach an agreement. In that case, the duty of the mediator is then accomplished.

7 Success of Mediation and Its Consequences

7.1 Meaning and Consequences

7.1.1 Mediation in Civil Courts

Mediation proceedings may end when the parties reach an agreement that settles their dispute. A *successful mediation* shall have the same effect as a settlement in litigation, which has the same effect as a final judgment with binding effect. To improve the likelihood of success in mediation, Taiwan's 1998 Code of Civil Procedure Amendments added two ways in which mediation can succeed, other than by agreement by both parties:

The first is the so-called "*med-arb*" or " *quasiarbitration*-" model: In the mediation of disputes over property rights, with the consent of both parties, the mediators may, at their discretion, propose the *terms of mediation*. Except as otherwise agreed-upon by the parties, the terms of mediation shall be determined by the majority of the mediators. In cases in which the mediators are unable to propose terms of the mediation, the judge may, with the consent of both parties, propose the terms or designate another mediation session or deem the mediation unsuccessful. The terms of the mediation proposed by the mediators shall be made either in writing bearing the date, or shall be indicated in the mediation proceeding transcript by the court clerk, signed by the mediators, and forwarded to the judge for review and approval. Once the judge approves the proposed terms, the mediation shall be deemed successful (Article 415–1 of the Code of Civil Procedure).

The second is via *court-proposed mediation resolution* without the objection of the parties: In cases of mediation for disputes over property rights, if the parties are unable to but are close to reaching an agreement, the judge shall take all circumstances into consideration, consult with the mediators, balance the interests of the parties, and thereafter, subject to the main intent expressed by the parties and propose a resolution on its own initiative. The proposed resolution provided in the preceding paragraph shall be served upon by the parties and the interested persons who have intervened (Article 417 of the Code of Civil Procedure). A party to the mediation or an interested person who has intervened may object to the proposed resolution of a judge within a 10-day *peremptory period* following the service thereof. In cases in which no objection is raised, the mediation shall be deemed successful in accordance with the proposed resolution. In cases in which objection is raised within the period, mediation shall be deemed unsuccessful and the court shall notify the parties and the interested persons who have intervened (Article 418 of the Code of Civil Procedure).

7.1.2 Family Mediation

A successful family mediation under Article 30 of the Family Proceedings Law should satisfy two requirements: In addition to a *mutual agreement* by both parties, the settlement must be recorded in the mediation transcript. However, concerning the matters of divorce and termination of adoption, only when both parties express the agreement in person will the mediation be considered established (Article 30 of the Family Proceedings Law).

7.1.3 Mediation in Town

For mediation in town to be successfully established, after an agreement is reached in a township or town, the town hall must commence mediation within 10 days of the day of establishment. The mediation record must be sent to the jurisdiction's

Court of Audit (Article 26 of the Township Mediation Ordinance). If the content of the mediation does not contravene the law, does not threaten public order and morality, and is not unenforceable, then the court shall approve the mediation.

7.1.4 Mediation in Administrative Agency

7.1.4.1 Mediation for Public Construction Contract Disputes

The Procurement Complaint Review Board mediation process and its effect, with the exception of circumstances specifically mentioned in this law, apply the mediation regulations of the Code of Civil Procedure. Unless the parties have reached an agreement, during the mediation process the mediation committee members may exercise their own discretion to submit their *mediation proposal* in writing to the Procurement Complaint Review Board. If the authorities do not agree with the proposal, it shall first be submitted to a higher authority for approval, along with the Review Board and company's reasoning (Article 85, Section 3 of the Government Procurement Law). If the parties are unable to reach an agreement, but are close to reaching an agreement, the Review Board may propose its own mediation plan, while taking into account all circumstances, including the opinion of the mediation committee, and also seeking to balance the interests of the two sides while staying within the bounds of their primary wishes. Both parties, as well as other interested parties, shall have 10 days from the day the Review Board makes its proposal to raise objections. If objections are raised within the 10 day period, mediation is deemed not to be established. If, however, no objections are raised within the 10 day period, mediation is deemed to be established (Article 85, Section 4 of the Government Procurement Law).

7.1.4.2 Mediation for Labor Disputes

For mediation under the Labor Dispute Settlement Law, the competent authority of the municipality, county, or city assembles the mediation committee, which is composed of three to five members. The competent authority appoints one to three members, and the parties each appoint one member. For mediation of labor disputes, a majority of the mediation committee members must be present before meetings may begin. Only when a majority of committee members are present may they decide on and adopt a mediation plan. Once both sides agree and sign a mediation plan adopted by the committee, mediation is deemed to be established.

7.2 Enforcement of the Settlement Reached by the Parties

There are various ways of handling disputes outside of the regular arbitration system, all with varying degrees of *effectiveness*. Though the effectiveness varies from type to type, whenever an agreement is made, the duty of the mediator is

then considered to be accomplished. The principle methods of determining the effectiveness of a successful mediation can be divided into the following categories:

The first type shares the same effectiveness, *enforceability*, and *force of res judicata* as a final binding judgment. This includes that: (1) Court mediation has the same efficacy as a settlement in litigation (Article 416, Paragraph 1 of the Code of Civil Procedure); and (2) Settlement of litigation has the same efficacy as final binding judgments (Article 380 of the Code of Civil Procedure) because it is determined, it possesses *res judicata*, and it is enforced (Article 4, Paragraph 1, Item 3 of the Enforcement Act). However, if the parties feel they have cause, they may apply to have mediation revoked or voided. Additionally, the original claimant for mediation may also apply to have mediation revoked or voided by filing a rejoinder of charges or a counterclaim requesting that the court invalidate the mediation, even if at the time of the application for mediation litigation had already begun (Article 416, Paragraph 2, Item 3 of the Code of Civil Procedure). Family mediation has the same efficacy as final binding judgments (Article 30, Paragraph 2 of the Family Proceedings Law). This mediation is basically enforceable (Article 186 of the Family Proceedings Law).

There are several types of disputes that may be resolved out of court without court review of the agreement, but have the same efficacy and enforceability as court-rendered judgments. Examples include: (1) Public construction contract dispute mediation between authorities and contractors performed by the Executive Yuan's Public Construction Procurement Review Board. Because it uses the same rules as mediation in the Code of Civil Procedure (Article 85, Section 1, Paragraph 3 of the Government Procurement Act), it does not require court approval, yet it has the same effect as court-rendered judgments; (2) Arbitration award: The arbitration award shall be binding on the parties and have the same force as a final judgment of a court. An award may not be enforceable unless a competent court has, on application of a concerned party, granted an enforcement order. However, the arbitral award may be enforced without having an enforcement order granted by a competent court if the contending parties agree in writing and the arbitral award concerns any of the following subject-matters: (i) Payment of a specified sum of money or a certain amount of fungible things or valuable securities; or (ii) Delivery of a specified movable property (Article 37 of the Arbitration Act).

On the other hand, several other types of enforceable judgments that do not require court approval do not possess the *force of res judicata*. They are: (1) Payment of money, property, securities, or other personal property as restitution from one person to another, which are enforced by the Notary Public (Article 13 of the Notary Law); (2) Agreements under the Evidentiary Protection process are enforceable (Article 376–1 of the Code of Civil Procedure); (3) Mediation between tenants and landlords that occurs in towns, cities, or municipalities under the specific Farm Tenancy Medication Committee. If established, one party may file with the judiciary for enforcement, and need not pay the enforcement fee (Section 27 of the Land Rent Reduction Ordinance '375'). Since these agreements have enforceability, but not *res judicata*, the parties have the right and obligation to contest them and still seek further litigation.

The third type, though they have the same efficacy as court-rendered judgments (*res judicata*, finality), are not enforceable. The parties must request an enforcement ruling from the court. This is mainly for disputes outside the court that deal with non-public documents. For example: arbitration awards, arbitration settlements, and arbitration mediation (Article 37 and Article 44, Paragraph 2 of the Arbitration Act).

The fourth type may only have the efficacy of a final binding court-rendered judgment after approval of the court has been applied for and received, though it is fully enforceable. There are many types of mediation via the mediation committee which fall under this category, and they have the same effect as *court-rendered judgments* unless a party files a motion to void or revoke and the motion is approved. Otherwise, re-litigating the same case is impossible. For example: (1) Mediation in towns and townships must be recorded and reported to the relevant local authority or to the courts for approval within 10 days of mediation being established. In this case, the court shall review the mediation plan as soon as possible, checking that it does not contravene any laws, or run contrary to good morals, public order, or best practices, and that it is not unenforceable, in which case the court will not approve the mediation. If the court approves, the mediation plan shall be signed and sealed by the judge, after making a copy for public record, and the plan shall be returned to the town, township, or city and served to the parties (Article 26 of the Township Mediation Ordinance). Once the mediation has been approved by the court, the parties shall not institute further litigation, discussion, or seek private restitution on the matter. This civil mediation, once approved by the court, has the same effect and force as court-rendered judgments (Article 27 of the Township Mediation Ordinance). For cases in which civil mediation has been applied for and established, but a party's claim for voiding or revocation has been approved by the court, the party must file the relevant documents within 30 days, and in this case the court's original approved mediation plan is revoked. Once civil mediation has been moved to the court, and the court has approved a claim for voiding or revocation, the claimant party then has 30 days to submit documentation to the court requesting to return to mediation (Article 29 of the Township Mediation Ordinance). (2) Consumer dispute mediation cases under the relevant township, county, or city government's consumer dispute mediation committee. (3) Securities and futures investors' dispute mediation cases carried out under the securities and futures investors' protection mediation committee (Article 26 of the Investor Protection Act). (4) Public nuisance dispute mediation carried out under the relevant township, county, or city government's public nuisance dispute mediation committee (Article 30 of the Public Nuisance Dispute Mediation Act). (5) Copyright dispute mediation carried out under the copyright dispute mediation committee (Section 82, Article 2, Paragraph 2 of the Copyright Act).

The fifth type is not enforceable and does not possess the *force of res judicata*. An enforcement ruling must be applied to the court. Although labor dispute mediation committees are also set up by the township, county, and city governments, they differ from the above four categories because the dispute is viewed as a *contractual*

dispute between parties. When a party for labor representation is on one side of the dispute, agreements are viewed as collective agreements between parties (Article 21 of the Labor Dispute Settlement Law). When one party does not fulfill his or her obligations, the other party may apply to the courts for enforcement without the need to pay the court fees. After obtaining a ruling for the enforcement of the agreement, the agreement will be enforced (Article 37 of the Labor Dispute Settlement Law). Therefore, labor dispute mediation does not have the same effect as regular court-rendered judgments.

8 Costs of the Mediation

Regarding the costs of the mediation, details are regulated in different rules concerning out-of-court and court-annexed mediation:

First, Article 77–20 of the Code of Civil Procedure provides, "In a motion for mediation of disputes over proprietary rights, no filing fees will be taxed if the price or value of the claim is less than NTD 100,000. A filing fee shall be taxed for claims valued at NTD 100,000 or greater according to the following rates: NTD 1,000 if the price or value of the claim is NTD 100,000 or more but less than NTD 1,000,000; NTD 2,000 if the price or value of the claim is NTD 1,000,000 or more but less than NTD 5,000,000; NTD 3,000 if the price or value of the claim is NTD 5,000,000 or more but less than NTD 10,000,000; NTD 5,000 if the price or value of the claim is NTD 10,000,000 or more. No filing fees will be taxed on a motion for mediation of disputes over non-proprietary rights. For cases in which an action is initiated within 30 days following an unsuccessful mediation, the party moving for mediation may have the filing fees paid for that motion deducted from the court cost to be paid." In cases of a successful mediation after the action was referred to mediation under Article 420–1, the plaintiff may move for the return of two-thirds of the court costs paid within 3 months from the day of the successful mediation. For *family mediation cases*, the court should apply the provisions of the Code of Civil Procedure and the Family Proceedings Law.[21]

Second, as to mediation in town, according to Article 23 of the Township Mediation Ordinance, parties shall not be charged any fees or remuneration, but they should pay the fee for inspection. Article 28 further provides that in civil cases that are referred by the court that have reached agreement, parties can apply for a refund equal to two-thirds of the court costs, the same as for mediation in civil court.

With the exception of mediation for public construction contract disputes, all other types of mediation via administrative agency are free of charge (that is, free of the administrative fee generally required in mediation).

[21] *See* Code of Civil Procedure Part II Chapter II "Mediation Proceeding", Article 77–20; Family Proceedings Law Article 33, 36.

Our legal system recognizes legal aids in mediation proceedings. The Legal Aid Act can serve as a basis for the application of legal aid in mediation affairs. Articles 1 and 2 of the Legal Aid Act address mediation for those who are indigent or who are unable to receive proper legal protection for other reasons. The standard for indigent people is determined in Article 3 and those qualified can apply for legal aid.[22,23] On the other hand, those falling under any paragraph of Article 14[24] can apply for legal aid without consideration of their financial ability. The purpose of this law is to protect people's rights and interests. Our Constitutional Court has interpreted this point as conveying that the law should protect the procedural rights of the people. Since mediation is an exercise of procedural rights, there is no doubt that this law should regulate mediation affairs.

9 Cross-Border Mediation

9.1 Notion and Main Future

According to the CAA (The Chinese Arbitration Association, hereinafter the CAA), "cross-border mediations" refer to "cases in which at least one party is a foreign cooperation". According to the statistics relating to foreign cases in 2000–2012 (*See* Table 3), over the past decade the CAA only accepted two cases for foreign mediation, which constitute only 1.258 % of the total number of mediation cases it has accepted.

In general, mediation under the CAA should be held in the Mediation Center of the CAA, complying with the CAA Mediation Rules. The Center accepts cases for mediation at the request of one or more disputing parties. These rules shall govern disputes submitted to the Center. But if the parties have agreed to adopt a different set of mediation rules, their agreement shall prevail (Article 2 of the Mediation Rules).

[22] *See* Legal Aid Act Article 13.

[23] The Standard List, *see* in: http://www.laf.org.tw/tw/a2_2_2.php.

[24] *See* Legal Aid Act Article 14: "If an applicant meets one of the following conditions, the applicant may apply for legal aid without considering his or her financial capability:

1. Without retaining an attorney or representative, the defendant who is on trial for a crime which is punishable for more than 3 years or is adjudicated by the high court as the court of first instance.

2. Without retaining an attorney or representative, a defendant who is on trial and is unable to express himself or herself clearly because of mental retardation and the chief presiding judge considers it necessary to retain an attorney or representative for the defendant.

3. A person who is qualified as a low-income resident under the Social Relief Act."

Table 3 Foreign cases in CAA mediation center

Year/type of cases	Total amount	Engineering	Securities	Marine affairs	Commerce	Insurance	Services	Rental affairs	Others	Public sectors involved	Foreign affairs
2000	182	141	9	3	20	1	3	3	2	129	27
2001	237	196	6	2	19	4	3	4	3	171	13
2002	211	173	4	2	22	1	2	3	4	140	16
2003	197	141	4	1	25	1		7	7	124	14
2004	189	143	1	3	19	1	12	6	4	121	9
2005	161	111	2	6	11	3	17	4	7	81	9
2006	132	94	2	0	16	1	11	4	4	71	10
2007	176	112	0	5	20	0	30	7	2	100	12
2008	209	155	1	2	16	3	16	5	11	140	10
2009	213	122	0	2	28	1	21	9	30	145	12
2010	185	129	0	2	20	2	8	6	18	102	12
2011	109	70	0	2	16	0	4	3	14	66	7
2012	137	74	8	4	14	2	12	1	22	61	8

Others refer to intellectual property rights events, laboring affairs, trusts, family affairs, and management affairs

9.2 *Recognition and Enforcement of Foreign Mediation Settlements*

The effect of a successful *foreign mediation* in the CAA Mediation Center varies based on whether the mediator is affiliated with the Center. If a dispute is settled by a mediator who is an arbitrator affiliated with the Center, the effect of the settlement is governed by Article 45 of the Arbitration Law (Article 3 of the CAA Mediation Rules). Pursuant to Article 45 of the Arbitration Law, the mediation agreement has the same effect as that of an arbitral settlement agreement. However, the terms of the mediated agreement may be enforced only after the court has granted an application for enforcement by a party and has issued an enforcement order. If a dispute is settled by a mediator who is not an arbitrator affiliated with the Center, the Center may request a notary public, pursuant to Article 14, Section 1 of the Civil Notaries Law, to notarize the settlement agreement if the disputing parties so request (Article 3 of the CAA Mediation Rules).

10 E-Justice

The electronic filing system for the courts in Taiwan first emphasized the establishment of an electronic catalog and display system for case files. This system will be integrated in the existing operating system for judges. Judges are free to choose between using a projector and scanning key case files, which brings great convenience in scanning full dossiers. The mid-term goal of the digitalization effort is to construct paperless proceedings. An online exchange system for electronic legal documents has been planned to enhance the degree of E-justice. In line with the digitalization of dossiers, the Judicial Yuan will strengthen the informational infrastructure, including improving the network bandwidth, to facilitate the exchange of digital dossiers. Meanwhile, relevant legal norms and technologies will be developed to protect the parties' privacy and to prevent abuse of digital evidence.[25]

To work with the digitalization project, the Judicial Yuan has promulgated the "Guidelines for the Retrieval of Electronic Court Records" (hereinafter Guidelines). The Guidelines is to regulate the network service for the retrieval of electronic court records in the first and second instance (Article 1 of Guidelines). Within 5 days after the hearing, the court clerk shall upload the electronic files that are not excluded by the court; the system will automatically upload if overdue (Article 3 of Guidelines). To utilize the service, the applicant must first be legally qualified (Article 4 of Guidelines). Applicants shall then fill out the forms and send them to the authority with other required documents to obtain an account for the service (Article 6 of Guidelines). If the electronic records are inconsistent with the paper records, the paper files shall prevail (Article 10 of Guidelines).

[25]Judicial Yuan. (2013, April 19). *Judicial Weekly*. Retrieved from http://www.judicial.gov.tw/jw9706/pdf/1641-1.pdf.

Mediation in Ukraine: Urgent Issues of Theory and Practice and Necessity of Legislative Regulation

Svitlana Fursa

Abstract The institution of mediation is well known in Ukraine, however, actually it is not regulated by the law and a lot of people are still unaware of such process. As noted by some authors, today mediation as such exists only on "public basis", and actually is not regulated by law.

In Ukraine there is the necessity to formulate the definition of "mediation" and embody its principles, all responsibilities and results, special aspects of the process of mediation and mediation agreement as well, functions, rights and duties of the mediator as well as assign the functions of mediator not only to specially trained persons-mediators, but the notaries and lawyers. As there is the number of institutions in Ukraine that are applied in jurisdictional processes and in its essence it is nothing more than the mediation, although they are named differently. It is important to describe the possibility for the settlement of the dispute by making the settlement agreement as well as introduce the implementation of the mediation in notarial practice and law enforcement process.

The main question in Ukraine is the regulation of mediation at the national level and developing of the framework of cross-border mediation in future. As in Ukraine there is only three draft bills "On mediation" and the draft Law "On Amendments to Certain Legislative Acts of Ukraine on the use of mediation" and it is recommended to use some other international and national laws.

The process of mediation has proven its success and significance in the world practice and has the potential to take a worthy place in Ukraine as one of the alternative methods of law enforcement and protection of human rights.

S. Fursa (✉)
Department of Notarial and Executive process and advocacy,
Kiev Taras Shevchenko National University, Kiev, Ukraine
e-mail: fursa_2003@mail.ru

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1 The Basis for Mediation in Ukraine

The institution of mediation is well known in Ukraine, however, as noted by some authors, today mediation as such exists only on "public basis", and actually is not regulated by law.[1] While analyzing the legal systems of other countries, it is worthwhile noting that the process of mediation has proven its success and significance in the world practice and has the potential to take a worthy place in Ukraine as one of the alternative methods of law enforcement and protection of human rights.

In order to enforce the obligations taken by Ukraine as a member of the United Nations and the Council of Europe on implementation of mediation and the necessity of its legislative regulation, these issues for a long time have been a subject of discussion in Ukraine, but the specific Law of Ukraine "On mediation", which would define its general and basic principles has not been adopted yet. Three draft bills "On mediation" under registration No. 7481 dated December 17, 2010; registration No. 8137 dated February 21, 2011; registration No. 10302 dated April 5, 2012 and the draft Law "On Amendments to Certain Legislative Acts of Ukraine on the use of mediation" under registration No. 10301 dated April 5, 2012 were registered in the Supreme Council of Ukraine.

The adoption of the Law of Ukraine "On mediation", in our opinion, would be a significant step towards the development of conciliative (non-judicial) procedures in our country. But for that purpose, it should be promoted in different ways today. In practice, most of the conflicts that reached a blind alley could be solved out, if the parties timely involved the independent specialist-mediator who would be able to assist the parties to resolve the conflict situations through negotiations. Currently, the majority of Ukrainian citizens who are parties to the conflicts are unaware of the mediation and its benefits over the judicial procedure for dispute resolution.

So at this stage, it is better for Ukrainian legal community to arrange various joint activities aimed at the gradual introduction of mediation in domestic practice. Particular attention should be also paid to the level of training of mediators who actually will create the "image" of mediation procedure in Ukraine and impact on dynamics of its development in our country.[2]

Being a chair of Notarial and Execution Process and Advocacy Department of Taras Shevchenko National University of Kyiv (Ukraine) for notaries, lawyers, enforcement agents (court enforcement agents) specialization, the author raises questions about the necessity of introducing the mediation in these jurisdictional processes, that is, the mediation could be implemented in notarial practice as well as

[1] Ohrenchuk A. The experts of SIC on mediation, the practice of its implementation: problems and perspectives // http://www.prostopravo.com.ua/klub_yuristov/yuridicheskiy_rynok/stati/eksperty_sng_o_mediatsii_praktike_ee_primeneniya_problemah_i_perspektivah

[2] Saenko M. The experts of SIC on mediation, the practice of its implementation: problems and perspectives // http://www.prostopravo.com.ua/klub_yuristov/yuridicheskiy_rynok/stati/eksperty_sng_o_mediatsii_praktike_ee_primeneniya_problemah_i_perspektivah

practice of law enforcement process. Therefore, these professionals have to possess the knowledge and skills to carry out such conciliation.

In order to give the mediation a new impulse in development, certain conditions should be provided: first of all, new special law should be adopted and amendments to the procedural regulations acts (codes) should be introduced.

Since the mediation in Ukraine is regarded as the procedural mechanism, scientists attribute it to the public fields of law, as its procedure is regulated by the state and is compulsory for the subjects of its implementation. Therefore, in this context, we can say that it has a public form, but the content of mediation concerns private – the legal issues of subject in civil relations.

The main question in Ukraine is the necessity for regulation of mediation at the national level, that is, as internal; but the possibility of developing of a framework of cross-border mediation in future is not excluded.

1.1 The Notion of Mediation

There is no consensus on the concept of "mediation" among Ukrainian scientists. Nowadays it is only formulated by the scientists at theoretical level.

In Ukraine, the term "mediation" is fixed in the draft Law of Ukraine "On mediation". According to the preamble of the Law, the mediation is considered as a non-judicial procedure that is used in order to resolve conflicts and disputes quickly and effectively. But this notion is simplistic, since it does not specify the entity involved in resolving such conflicts and disputes.

The author believes that the definition of "mediation" proposed in Wikipedia is noteworthy. Thus, "the mediation – is a type of alternative dispute resolution, method of resolving conflicts with the involvement of arbitrator (mediator) who helps the parties of the conflict to organize the communication process and analyze the conflict situation so that they could choose the option solution that would satisfy the interests and needs of all parties to the conflict".

In theory, the conciliation procedures are understood as the processes (set of activities) to achieve mutually acceptable and mutually beneficial results of the settlement or other legal uncertainties among the parties through direct negotiations involving the conciliator (mediator).[3]

However, depending on the field of jurisdiction, where the mediation may occur, the concept of it could be stated in different ways, taking into account the specifics of this field of jurisdiction.

Speaking about the mediation in commercial disputes, the conciliation means the conduct of negotiations between the parties with the participation of the mediator about the possibility of reconciliation, and the conditions of this reconciliation in

[3]Rozhkova M. A. Settlement agreement: implementation in commercial rotation. M. Statut, 2005. p. 148.

commercial (economic) disputes arising from civil relations with the purpose of developing of mutually acceptable settlement between litigants and its subsequent implementation (Article 1 of the Commercial Procedural Code of the Russian Federation).

In the case of conciliation in criminal proceedings, the scientists determine it as the compromise. The compromise as a way of resolving conflicts in criminal procedure is achieved through voluntary mutual concessions of the parties, in order to achieve personally desired result. The use of compromise method in resolving conflicts sometimes occur in the pre-trial proceedings as well as at the trial stage of criminal proceedings.[4]

1.2 The Existing Legal Basis for Mediation in Ukraine

There is no special law that regulates the mediation in Ukraine but it is recommended to use in Ukraine several international and national law acts:

1. United Nations Convention "On jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children" (the date of signing – 19.10.1996, date of ratification in Ukraine – 14.09.2006, entered into force in Ukraine – 01.02.2008),[5]
2. Law of Ukraine "On free legal assistance" dated 02.06.2011,[6]
3. Decree of the President of Ukraine "Concept on the Development of Criminal Justice for Minors" (№ 597 /2011 dated May 24, 2011).[7]
4. Criminal Procedure Code of Ukraine (hereinafter – CPC) dated 13.04.2012.[8]

The current legislation of Ukraine provides the possibility for the settlement of the dispute through peaceful means, in particularly by making the settlement agreement in civil proceedings (Art. 175 of the Civil Procedure Code of Ukraine),[9] commercial proceedings (paragraph 3 of Art. 78 of Commercial Procedure Code

[4]Paryzkyi I. V. The concept and essence of compromises in criminal procedure // Business, economy and law. 2010. № 8. p. 174–177.

[5]United Nations Convention "On jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children" (the date of signing – 19.10.1996, date of ratification by Ukraine – 14.09.2006, entered into force in Ukraine – 01.02.2008) www.rada.gov/ua

[6]Law of Ukraine "On free legal assistance" dated 02.06.2011 www.rada.gov/ua

[7]Decree of the President of Ukraine "Concept on the Development of Criminal Justice for Minors" (№ 597 /2011 dated May 24, 2011) www.rada.gov/ua

[8]Criminal Procedure Code of Ukraine www.rada.gov/ua

[9]Civil Procedure Code of Ukraine www.rada.gov/ua

of Ukraine),[10] the Laws of Ukraine "On International Commercial arbitration",[11] "On restoring debtor solvency or declaring a debtor bankrupt",[12] "On arbitration courts"[13] and "On procedure for the settlement of collective labor disputes".[14]

The Chapter VI of CPC of Ukraine envisages criminal proceedings on the basis of agreements on reconciliation between the victim and the suspect or the defendant which in theory is called "restorative justice".

According to the Art. 468 of CPC of Ukraine the following agreement can be concluded in criminal proceedings:

1. the settlement between the victim and the suspect or the defendant;
2. the agreement between the prosecutor and the suspect or the defendant about the admission of guilt.

However, this reconciliation agreements may be concluded in the proceedings concerning criminal offenses, crimes of little and average gravity and criminal proceedings in the form of private prosecution (paragraph 3. 469 of CPC of Ukraine).

For that matter, it is quite important to unify the approaches to understanding the institution of mediation at the international level, because there is a number of institutions in Ukraine that are applied in jurisdictional processes and in its essence it is nothing more than the mediation, although they are named differently, such as the settlement agreement and so on.

2 The Doctrinal Approaches to Understanding of Mediation

Being an expert in the area of procedural civil science, the author considers it necessary to formulate the official term of "mediation" in the legislation of Ukraine and assign the functions of mediator not only to specially trained persons-mediators for this purpose, but the notaries and lawyers as well. However, the Law "On mediation" and the procedural codes should provide exceptions to the general rule about persons who have no right to conduct the mediation procedure.

In this connection, we should pay attention to the provision of paragraph 1 of the Article 469 of the CPC of Ukraine that the settlement may be concluded on the initiative of the victim, suspect or defendant. The arrangements for conciliation agreement may be conducted by the victims themselves, suspect or defendant, defense counsel representative, or by any other person agreed by the parties to

[10]Commercial Procedure Code of Ukraine www.rada.gov/ua

[11]Law of Ukraine "On International Commercial arbitration" www.rada.gov/ua

[12]Law of Ukraine "On restoring debtor solvency or declaring a debtor bankrupt" www.rada.gov/ua

[13]Law of Ukraine "On arbitration courts" www.rada.gov/ua

[14]Law of Ukraine "On procedure for the settlement of collective labor disputes" www.rada.gov/ua

the criminal proceedings apart from the investigator, prosecutor and judge. In other words, the agreement on settlement cannot be made according to the initiative of the investigator, prosecutor and judge, because the mediation is a paid intermediary activity. The court is able only to explain to the relevant parties their right to use the mediation procedures and their consequences, and that is the essence of the CPC of Ukraine. As to the defense counsel in criminal proceedings, there should be made additions to the article 19 of the Law of Ukraine "On advocacy and legal practice" to attribute "the performance of mediation function by the lawyers" to the lawyer type of activity. The only exception to general rule can be the agreement provided by point 2 of the paragraph 1 of the Article 468 of the CPC of Ukraine, which refers to the agreement between the prosecutor and suspect on recognition of guilt.

With regard to civil and commercial litigation, the settlement agreement between the parties is made on the initiative of the parties, the court only aware them of their right to enter into such settlement agreement under the Art. 31 of the CPC of Ukraine. The lawyers may assist the parties in formulation of that agreement, making the draft of their agreement. The court under the paragraph 5 of the Article 175 of the CPC of Ukraine has only the right to accept its terms and conditions if such settlement agreement is not contrary to the interests of the parties and the legislation, and explains the consequences of such agreement to the parties. It should be noted that the procedural regulations refer to the settlement agreement as the product of conciliation procedures, but the procedure is unnamed. Therefore, the way of conclusion of settlement agreement by the parties, discussion of its terms should be called the "mediation" and this concept should be fixed in Commercial and Civil Procedure Codes of Ukraine. In this connection the amendments should be made to the Art. 27 of the Civil Procedure Code of Ukraine, where among the rights and responsibilities of the persons involved in the case, specify their right at any stage of civil process to resolve the conflict through mediation procedure, and the paragraph 3 of the Art. 31 of the Civil Procedure Code of Ukraine shall be read as follows: "The parties may at any stage of civil proceedings achieve the amicable agreement on results of mediation". In these types of proceedings the mediation can be held by the lawyers and mediators. The court simply explains to the parties their rights, that they can resolve a conflict through the mediation at the request by one of the parties; the court may adjourn the proceedings for a specified time for their decision about the conduction of mediation.

2.1 The Mediation in the Notarial Process

Regarding the notarial process, now there is the necessity to empower the notaries with mediation function in Ukraine.

As to the notaries, such proposal of the author is determined by those features of mediation, which should be attributed to its advantages over the judicial

methods of law enforcement and protection of human rights, namely: time-saving, cost reduction of dispute resolution process, ability to influence on the outcome, confidentiality of procedures, ability to maintain or restore business relations with partners, ability to prevent such conflicts in the future, guaranty of willful execution of the notarial act (if the mediation was successful) and simplifying the execution of a notarial act in a case it was not performed by one of the parties of the conflict with the help of notary's executive endorsement.

According to the Law of Ukraine "On Notaries" the notary is a person endowed by the state with the power to execute jurisdictional function by certifying indisputable rights and facts of legal significance to provide them with legal certainty, in other words, execution of function of "preventive justice" – prevention of the conflict. Today, the notary in Ukraine is a serious competitor to the court proceedings. Notaries, in fact, already carry out the mediation, but these actions have not yet received the official title "mediation".

Thus, according to the Law of Ukraine "On Notaries", while certifying the contract the notaries have to explain to the parties the nature of this contract; warn about the consequences of notarial acts, so that the ignorance of the law could not be used to their detriment; provide with the legal advice in order to select the best alternative of protection of indisputable right out of court; contribute in reclaiming the needed for notarial acts document; establish true intentions of each party of the contract, and the absence of the parties' objections to each of the terms of the contract by the same understanding of the meaning, the terms of the contract and its legal implications for each party. In this case, while certifying the contract, the notaries should take into account the principle of notarial secret and avoid the possibility of interference of third parties.

Today Ukraine stands on the way of joining the International Union of Notaries,[15] therefore, the notaries have to provide the legal assistance to individuals and perform the above mentioned powers through mediation procedure, which should take place at the stage of preparation for notarial proceeding.

In particular, in Ukraine there are cases of execution the mediation procedures by the notary for certification of alimony agreements or mixed alimony contracts with elements of education and determination of place of residence of the child,[16] in particular, the notaries while communicating with parents of minors, under aged children should explain them the benefits of notary certification of contracts before the court procedure for recovery of alimony, coordinate the amount of alimony payment, as well as provide other assistance concerning the maintenance of the child, the place of residence, explain the procedure for execution of the contract on

[15]Shtuniuk A. Why do our notaries need International Union? // Judicial bulletin of Ukraine // 2013. № 29 (942). p.12.

[16]Fursa S.Y., Dragnievich L.Y., Fursa Y. I. Family relations in notarial process. Reference book for notaries. – K.: "Publishing House" In Jure", 2003. – 352 p.

the basis of executive notary act in case if one of the party fails to comply with the terms of such agreement on the voluntary basis. Saving time and money while certifying this agreement are the benefits of this procedure. If the parties could not come to the conclusion, the notary explains them their right to appeal to the court to resolve the issue of alimony.

The procedure of mediation is often used by the notaries of Ukraine in cases where a person wishes to determine the property share in case of his or her death by certifying the contract.

In Ukraine these contracts include the inheritance agreement, contract of life maintenance (care), annuity agreement. But these agreements should be distinguished according to their nature, because they lead to different legal consequences, that is when parties of the contract apply to the notary with the intent to sign a contract about the post-mortuary disposition or the will, the notary have to explain to them the nature and the consequences of this contract or offer the alternative way of certifying donation agreement in case of death or attestation of the will.

The notary procedure has to include not only explanation of rights and obligations of individuals, warning about consequences from execution of notarial acts, so that the lack of judicial information could not lead to the harm of the parties, but identify the real goal, which the person wants to achieve as the result of agreement. For this purpose the notary have to explain the alternative way of disposition of the property or clarify the terms of contract due to the law protection of the right of individuals in order to avoid violation of law.

2.2 The Mediation in Enforcement Proceedings

As to the procedure of enforcement of court decisions, under the Law of Ukraine "On Enforcement Proceedings" and the Article 372 of the Civil Procedure Code the parties on the stage of enforcement of court decision are able to reach the settlement agreement. With the help of mediation a number of problems associated with a large amount of enforcement proceedings, deadlines of enforcement, complexity and the inability to enforce certain decisions could be resolved at the stage of execution. The mediation helps to take into account the interests of both the debtor and creditor, the parties themselves can decide the question of voluntary execution of court decision by the mutual concessions, indicate the property which may be levied primarily. This settlement agreement can be regarded as a form of the mediation agreement, which terminates the mediation procedure in enforcement process. The mediation in enforcement proceedings can occur at the stage of voluntary execution (Article 25 of the Law of Ukraine "On Enforcement Proceedings") and during compulsory enforcement of the judgment. But first of all, the legislative changes must be made to this law regarding to the possibility of participation of mediator in the enforcement proceedings or execution of mediation functions by the lawyer of the parties in the enforcement process.

3 The Mediation Agreement (the Agreement to Submit Disputed to Mediation)

In the draft Law of Ukraine "On mediation" there is a rule that provides the content and form of the mediation agreement.

Thus, the mediation is based on the agreement that could be entered by the parties to the conflict (dispute) with one or more mediators and organizations providing mediation. The mediation agreement has to be done in writing form, signed by all the parties to the conflict (dispute) and the mediator (mediators) or organization that provides mediation. This agreement has to comply with all the general principles of civil legislation of Ukraine concerning the content of contracts.

In addition, the mediation agreement should include:

- provisions about the adoption by the parties of the conflict (dispute) of the principles of mediation set out by this Law;
- definition of the place of mediation;
- specifying the period of mediation;
- the costs of payment for the procedures by the parties to the conflict (dispute), the size and mode of payment fee to the mediator (mediators) or organization that provides mediation.

The parties to the conflict (dispute) and the mediator (mediators) or organization that provides mediation are empowered to determine other conditions of mediation in the mediation agreement, which are not inconsistent with this Law, the other laws and regulations of Ukraine.

The mediation agreement has to be concluded in the number of copies in accordance with the number of conflict (dispute) parties – one for each party and each of mediators or organizations providing mediation.

The mediation agreement on conflict (dispute) takes effect on the day of its signing by the parties of the conflict (dispute) and the mediator (mediators) or organization that provides mediation. Aside from that, the duration of the mediation agreement should be mentioned.

The mediation agreement could be certified in any mode provided for by the current legislation of Ukraine.

In the Criminal Procedure Code of Ukraine there are two rules that govern the content of the conciliation agreement: Article 471 of the CPC and content of plea agreement (Article 472 CPC), which can be concluded during the trial or pre-trial investigation.

4 The Mediator in Ukraine

The draft law "On mediation" establishes requirements for the mediator. The mediator could be an individual who has passed special training in the relevant area in Ukraine or abroad and received the certificate or other document, which proves

the passing by him or her of the appropriate training. Moreover, the mediator could be an individual who at the time of formation of contract of the mediation turned twenty-one.

The parties and/or organizations that provide mediation may establish additional requirements for the mediators, including the age, education, experience and so on. But, in our view, a list of requirements for the mediator should be complemented by the requirement of legal education, because in the jurisdictional process the mediator is unable to provide knowledgeable assistance in resolving the conflicts without knowing national legislation and the rules of foreign and international law, because very often the participants of the dispute are foreign entities.

As to the mediator's special training in Ukraine or abroad, we should focus on the fact that education in Ukraine and abroad are fundamentally different. Therefore, the legislation of Ukraine should include the procedure for the recognition of documents that confirm completion of the training in the sphere of "mediation" and which were obtained outside of Ukraine (nostrification).[17]

The mediator could not be a person with the criminal record, who is not released from conviction in the manner prescribed by law, or incapacitated and disabled person under court decision.

The draft law "On mediation" refers to the Code of Ethics for Mediators, but nowadays this Code doesn't exist in Ukraine.

As to the organizations which carry out the training of mediators, it is necessary to define such authorities under the legislative level and identify the procedure for giving the licenses to legal entities who will give the training to the mediators and define supervisory authority over the conduct of training of mediators and their practices, determine the enterprises, organizations and institutions that will have the register of trained mediators. It is reasonable to develop a unified register of mediators, which will help to insure a unified record of mediators within the state.[18] Subsequently, we should talk about the development of International Register, since the question of mediation should not be limited to Ukrainian boarders.

The mediator has to be certified by any company, institution or organization which train the mediators in Ukraine or abroad under the program which comprises of not less than forty academic hours, including practical training.

The document, which confirms the passing of appropriate training, is the certificate or other document that includes:

– surname, name and patronymic of the person who has passed the training;
– name of the entity which conducted training;
– surname, name and patronymic of persons who conducted training;
– number of hours of training, including number of hours for practical training.

[17]Commentary and proposition of legal department of the Supreme Court of Ukraine to the draft laws of Ukraine "On mediation" and "On amendments to some of the legislative acts of Ukraine on implementation of mediation".

[18]Commentary and proposition of legal department of the Supreme Court of Ukraine to the draft laws of Ukraine "On mediation" and "On amendments to some of the legislative acts of Ukraine on implementation of mediation".

4.1 Fundamental Rights and Duties of the Mediator

During the mediation the mediator may:

- determine the procedure of mediation;
- verify the powers of the representatives of the parties of mediation;
- meet individually with each of the parties of mediation or at the same time with all of the parties of mediation under the conditions which ensure confidentiality;
- offer the parties of mediation to suspend mediation for additional preparatory actions or involvement of the necessary experts from one of the mediation parties;
- assist the parties of mediation in formulating the content of the results of the mediation agreement reached by the parties in accordance with the decision of the mediation;
- stop the mediation process;
- use the other rights provided by the mediator under laws of Ukraine, as well as the mediation agreement.

If the mediator has received from other party some information relating to the mediation, he/she shall be entitled to disclose such information to another party only with the prior consent of the party that provided the information.

The mediator has no right to give the parties legal advice, expert opinions or other advice on the subject of conflict (dispute) or possible outcomes of conflict resolution (dispute) in which he/she is directly involved as the mediator.

The mediator has no right without the consent of the parties to make any public statements on the merits of the conflict (dispute). We believe that this provision of the draft law restricts the right of mediator to reach agreement between the parties and the implementation of the functions of mediator in the conflict (dispute), because if the function of mediator will be provided by the lawyer, notary, namely they have to provide legal advice to the parties and explain the best ways of protecting their rights and the consequences that may occur as a result of the settlement agreement between the parties.

The mediator has no right to impose the decision to the parties of mediation, that is, he/she has no right to enforce the person, the decision has to be free without coercion.

As to the duties of mediator, he/she has to act within the laws of Ukraine, norms of professional ethics of mediators and the mediation agreement. During the mediation he or she has to:

- provide clarification on the mediation procedure to the parties of mediation;
- inform the parties of mediation about the conflict of interest in accordance with this Law;
- use efforts provided by the legislation of Ukraine to achieve the settlement of the conflict (dispute) by the parties during the mediation;
- do not delay the mediation without good excuse;
- refrain from giving the parties of mediation any promises or guarantees of specific results of mediation.

5 The Process of Mediation in Ukraine

The principles of mediation in Ukraine are the principle of voluntariness, self-determination, equality of the parties, privacy, independence and impartiality of the mediator, the principle of language in which the mediation will be executed.

1. The principle of voluntariness of mediation lies in the fact that no one can be enforced to resolve the conflict (dispute) by the mediation. The parties of the conflict (dispute) participate in the mediation by mutual agreement and may refuse from its implementation at any time before the conclusion of the agreement and find another way to resolve the conflict (dispute). The participation in mediation cannot be considered as the admission of guilt by the person or the charges against his or her claims, as well as the rejection of their claims.
2. The principle of self-determination of parties of mediation means that the parties are free to find common solutions to resolve the conflict (dispute) and independently determine its possible solutions.
3. The principle of equality of mediation parties means that the parties have equal rights during the mediation. It is prohibited to give any party of mediation privileges or restrictions based on race, color, political, religious or other beliefs, sex, ethnic or social origin, property, residence, language and other characteristics.
4. The principle of confidentiality of mediation means that during the mediation all information relating to specified procedures have to be remained confidential, except on occasions prescribed by law of Ukraine, as well as occasions where the parties have agreed in writing otherwise.

   The mediator shall not disclose the information relating to mediation that became known during the mediation, without the prior written consent of all parties to mediation.

   If the parties haven't agreed in writing otherwise, in any other procedures for resolving conflict (dispute), including litigation and arbitration, parties of mediation, organizations providing mediation and their employees are not entitled to refer to the information about:

   – proposition of the parties to apply to the mediation procedure;
   – consent of the party to participate in the mediation procedure;
   – considerations or suggestions of the parties on possible ways to resolve the conflict (dispute);
   – statements made by the parties during the mediation;
   – proposition of the mediators;
   – acception of proposition by one of the parties to regulate the conflict (dispute);
   – other information relating to mediation.

5. The principle of independence and impartiality of the mediator means that he or she is independent in the work and acts in the manner prescribed by the legislation of Ukraine.

The mediator has no right to participate in the mediation of conflicts (disputes) in which he/she has a personal interest, including personal or financial interest in resolving such conflicts (disputes), or if he/she is related by family or business relationship with one or more parties of the mediation, or if he/she considered the conflict (dispute) as an official of the competent authority or its representative or advisor at least to one of the parties of mediation, or if there are other circumstances which can cast the doubt on the impartiality of the mediator. If there is at least one of the following circumstances, the mediator has to inform the parties of the conflict, and if such circumstances become known during the mediation – immediately after their detection.

The mediator who realizes conflict (dispute) mediation cannot be the representative or advisor one of the parties during consideration of the same conflict (dispute) by the competent authority.

In our opinion, the mediator cannot be a person who is or was in the service or in other depending on one of the party of mediation.

6. The principle of language used for mediation.

The parties of mediation in the mediation agreement are able to determine the language or languages for the mediation. If the mediation agreement does not contain the reference to the language that will be used in the mediation, then it should be conducted in the Ukrainian language.

All the contracts, agreements, statements and other documents prepared in the process of mediation or its results should be conducted in the language or languages chosen by the parties of mediation.

If the mediation provisions and/or mediation agreement contains no reference to the language in which mediation is carried out, then all the contracts, agreements, statements and other documents prepared in the process of mediation should be conducted in Ukrainian language.

5.1 Appointment and Replacement of Mediator

The parties of mediation have to choose one or more mediators by mutual consent on the independent basis.

If the mediation agreement was signed with the organization that provides mediation, the organization may recommend a candidate (candidates) for mediator or to assign him/her (them) in the case when the parties have made a corresponding appeal to the organization under contract in order to conduct the mediation. The confirmation of the candidate of mediator can take place in any way that the parties and organizations providing this mediation recognize as enough for such approval.

The parties have the right to replace the mediator, and if the mediation is conducted by several mediators – either one or all the mediators at any time of the mediation until the conclusion of the agreement on the results of mediation. In this case, the transactions between the parties and the mediator (mediators) are carried out in accordance with the terms of mediation.

5.2 Agreement of the Results of Mediation

The draft law No. 10301 indicates that according to the results of mediation the parties may enter into the agreement on results of mediation and/or perform any other activities which are not prohibited by the law, in accordance with the agreements.

However, if the mediation agreement is the ground to appeal to the court, in case of failure to execute or execution of its conditions by the mediator not in good faith, such agreement is the subject compulsory conclusion and certification (recognition, approval, certification) by the competent authority which has carried out the mediation. For example, if the mediation was conducted in notarial process for certification of transaction, the result of the mediation has to be transformed into the notarial act, which has to be certified by the notary. If in the court, the settlement agreement as the result of mediation procedure shall be recognized by the court and be certified by him.

If the mediation was conducted out of the court, notary, state executive service, the results of mediation agreement between the parties to the conflict (dispute) have to be concluded in writing form in accordance with the general principles of civil legislation of Ukraine and principles of mediation statement, indicating the statement of decision reached by the parties on extrajudicial settlement of the conflict (dispute) .

The agreement on results of mediation includes:

- date and place of conclusion of the results of mediation;
- name (for legal entities) or surname, name and patronymic if any (for individuals) of the parties of mediation, their location (for legal entities) or residence (for individuals), identification codes of business entity if any (for legal entities and individuals registered as entrepreneurs) or personal identification numbers if any (for individuals);
- subject of the conflict (dispute);
- statement of the decision reached by the parties on extrajudicial settlement of the conflict (dispute).

The mediation parties have the right to determine the provisions and other statements of the agreement of mediation.

The mediation agreement has to be concluded in multiple copies according to the number of parties to mediation – one for each side.

The agreement on results of mediation (conflict) comes into effect on the date of its signing by the parties, unless otherwise is provided by the agreement between them. This provision can occur only when the mediation is held by the mediator and the parties.

The agreement on results of mediation of the dispute shall be executed in multiple copies according to the number of parties to mediation – one for each

side and one copy to the competent authority handling the relevant dispute. The agreement on results of mediation of the dispute shall enter into force on the day after signing by the parties and approval by the competent authority which conducts these relevant proceedings concerning dispute, unless otherwise is prescribed by the current legislation of Ukraine.

The results of mediation agreement can be certified by any method provided by the current legislation of Ukraine, that is, if there is no special (compulsory) form of certifying the mediation agreement under the law of Ukraine, the following procedure may be decided by the parties, for example, the parties can certify that agreement in notary.

In one of the draft bills (No. 10301 dated April 5, 2012) there is a provision that if the parties want to conclude the mediation agreement in judicial proceedings in an attempt to settle their dispute, then the period of limitation is stopped for the period of mediation. In this context, we should agree with the opinion of the Supreme Court of Ukraine that this provision has to be revised, because the grounds for suspension of the limitation period are specified in the Article 263 of the Civil Code of Ukraine. A list of these grounds is not exhaustive and does not provide the mediation procedures. The draft law No.10301 does not provide changes to the Code. Thus, if the draft law No.10301 in the proposed version will be passed then the conflict of the law will arise. However, it should be noted that the provisions of the draft law No.10301 on the suspension of limitation period does not relate to the subject of the regulation of the draft law being analyzed.[19]

5.3 Refusal from Mediation

According to the draft law "On mediation" the parties are empowered to reject from it at any stage of the mediation. However, the draft law does not contain the grounds for such refusal, they, for example, should include improper performance by the mediator of its rights and obligations, lack of competence, disclosure of confidential information by the mediator without the agreement of the parties, the will of the parties of mediation. This failure leads to the termination of mediation and to legal consequences for the parties to mediation and to the mediator, arising out of the contract. In particular, for the parties it could be the payment for the mediator's work that was done, for the mediator – compensation of the damages or the termination of certificate and so on.

[19]Commentary and proposition of legal department of the Supreme Court of Ukraine to the draft laws of Ukraine "On mediation" and "On amendments to some of the legislative acts of Ukraine on implementation of mediation".

5.4 Termination of Mediation

The grounds for termination of mediation include:

(a) conclusion by the parties of agreement on results of mediation – on the day of entry into force of the agreement;
(b) statement of the mediator, that was made after the consultation with the parties that the further action in the conflict (dispute) will not lead to the agreement on results of mediation – on the day of submission of such application by the parties to the conflict (dispute);
(c) application made by all the parties of mediation on its termination – on the day of submission of such application by the parties to the mediator.

These grounds for termination of mediation should be supplemented also by
(d) death, announcement of individual party as dead, liquidation of legal entity. This reason is caused by the provisions of the Civil Code of Ukraine, the Commercial Code of Ukraine as the procedure of mediation has a contractual nature.

5.5 Implementation of the Agreement on Mediation Results

The results of mediation agreement are binding to the parties of mediation. If one of the parties breaks its obligations under the agreement on results of mediation, the other party may refer to the court with the claims against the party that violated its obligations under the agreement on results of mediation.

As to the timeframe of mediation, it should be determined by the parties in the agreement on mediation.

6 Responsibility of the Mediator and the Consequences Which Arise from the Mediation Agreement in Ukraine

According to the draft law "On mediation" the mediator is liable for the violation of this Law, other laws and the laws of Ukraine, norms of professional ethics of mediators and mediation agreement.

The damage caused to the parties as a result of unqualified services of the mediation shall be compensated by the mediator in accordance with the procedure established by the civil legislation of Ukraine, as well as by the contract for mediation.

Special liability of mediator for disclosure of information, which became known to him/her in the process of mediation (break of confidentiality), is not provided, but it should be regulated by the Law "On mediation", the Code of Ethics of Mediator

and should lead to cancellation of his certificate if he systematically breaks the law and the principle of confidentiality and to be the ground for termination of mediator's activity.

Moreover, the question of responsibility for the violation of the principle of confidentiality (disclosure of information) should be provided in the contract (agreement) on mediation in terms of civil liability, if the person was harmed both materially and morally by the disclosure of such information.

The civil liability of mediator has to be insured in the manner prescribed by the current legislation of Ukraine.

7 The Success of Mediation Process

The number of disputes which were successfully resolved through mediation in Ukraine is very small compared with the number of cases resolved in the court.

There is no official information on the number of positively resolved disputes and the number of mediators in Ukraine.

But based on the information over the Internet, there are already positive results in resolving conflicts through the mediation in Ukraine. Thus, the law firm "Legal Alliance" was the first one who applied in Ukraine the mediation procedure in resolving the conflict between their two regular customers in pharmaceutical sphere. That conflict resolution through the procedure of mediation was the beginning of rendering by this law firm of such specific service and showed the tendency of applying mediation in Ukraine. Regarding to this, N. Lavrenova pointed out that "accompanying the interests of the majority of participants of pharmaceutical market, we risk appearing at the crossroads of interests of several of our very important client. And our main task is to separate their ways, to find a compromise that would suit both of the parties, to help them build a constructive dialogue. Taking into account national peculiarities of doing business and the lack of the legal mechanism to enforce into progress the settlement agreements in the case of failure to execute them voluntarily, the parties don't want to apply to the mediation procedure. Perhaps the legal regulation of the mediation will increase the confidence in this procedure and will be an effective tool for resolving disputes in Ukraine."[20]

According to the information over the Internet the number of public institutions that provide the services of mediation increases.

Thus, in 2008 the Ukrainian Mediation Center was created in Kyiv-Mohyla Business School.

Besides, the Ukrainian Centre for Understanding, Odessa Mediation Group and others operate in Ukraine.

[20]Lavrenova N. The experts of SIC on mediation, the practice of its implementation: problems and perspectives // http://www.prostopravo.com.ua/klub_yuristov/yuridicheskiy_rynok/stati/eksperty_sng_o_mediatsii_praktike_ee_primeneniya_problemah_i_perspektivah

These organizations are engaged in elaboration of knowledge in this field, training the mediators. Leading specialists from the public entities were involved in the development of the Draft Law "On Mediation" No. 8137 of 21.02.2011 that in the future will ensure the implementation of culture of alternative dispute resolution in Ukraine.

8 Costs of the Mediation

The cost of mediation procedure in Ukraine is not the same and depends on the conflict, the terms of its settlement, the specialization of the mediator and other criteria.

8.1 Legal Assistance and the Grounds on Which it is Available

As to the legal assistance, there is a law "On free legal assistance" in Ukraine. Besides, the issue of state legal assistance is regulated by the Article 12 of the Civil Procedure Code of Ukraine and by other procedural Codes of Ukraine.

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Fursa, S., and O. Snidevych. 2010. Ensuring the right to consideration by arbitration tribunal. *Notary. Advocacy. Court* 5(55): 9.

Mykytyn, Y. 2006. *Mediation in criminal cases: some legal aspects*. Kyiv. p. 84.

Udalova, L., and I. Paryzkyi. 2012. Application of compromise in resolving conflicts during the preliminary investigation. K., Publishing House "Skif". p. 184.

[21] Short list of the most influential scientific works on this topic.

Annexes

MEDIATION-QUESTIONNAIRE-VIENA-2014 (ENGLISH)

19th International Congress of Comparative Law, Vienna 20 to 27 July 2014

Topic II. C: "La médiation dans une approche transfrontalière et judiciaire/ Mediation, more particularly, cross-border and judicial mediation"

To: All National Reporters **Date: November 30th, 2012**
From: Carlos Esplugues and Louis Marquis, General Reporters

First, let us thank you for agreeing to serve as a national reporter on this highly interesting and relevant topic. We are sure that we are going to learn a lot from you and we look forward to a fruitful collaboration with you in the next several months.

C. Esplugues, L. Marquis (eds.), *New Developments in Civil and Commercial Mediation*, Ius Comparatum - Global Studies in Comparative Law 6,
DOI 10.1007/978-3-319-18135-6

In the following pages you will find some relevant information about the objectives and goals we want to reach when dealing with this topic and some technical issues regarding deadline, language and manuscript.

I. Preliminaries

I.1. Our project: Many countries in the world have known mediation for a long time. However, national legislations show different approaches for the regulation of mediation and many differences in several key issues seem to exist. In fact, not even a clear notion of the institution is said to exist in many countries. Mediation is growingly approached as a cost-effective and quick extrajudicial method of resolution of disputes; a flexible tool which is easily adaptable to the needs and expectations of the parties. Our task is to explore the basic regulation of mediation in your country, and to ascertain those areas of law susceptible of being covered by it. Some key topics regarding mediation will be dealt with and a special reference to cross-border disputes and to the cooperation between national courts and mediators will be made.

I.2. Publication: An offer for publication of some of the national reports has been received from Springer, at the collection *Ius Gentium*. Unfortunately not all national reports will be published.

II. The Basis for Mediation

II.1. The concept of Mediation: (a) Please provide here the notion of mediation that exists in your country and (b) the existing legal basis and, in case, any doctrinal approach you may consider relevant. Also (c) a reference to other ADR devices exiting and/or used in your country and their relationship with mediation should be made here.

Please state (d) whether mediation is accepted in your country outside and/or within the framework of national courts: that is, whether out-of-court or/and court-annexed mediation are accepted. Please (e) provide any statistic information as regards the number of mediations in your country and the existing trend.

II.2. Existing legal bases for mediation in your country: Please state (a) the existing legal framework for mediation in your country. In case of no specific legal bases for mediation, please state on what ground reference to mediation stands. In an annex please (b) provide the text of the codification in English, French or Spanish, or provide an electronic link to the codification and a brief list of the most authoritative scholarly contributions to the topic.

Please (c) state those areas of law –public and private- covered by mediation in your country and (d) whether existing regulation refers to internal and cross-border mediation or only to any one of them.

II.3. The mediation agreement/agreement to submit the dispute to mediation: Please (a) state whether your legislation deal with the mediation agreement and/ or with the mediation to submit the dispute to mediation once the dispute has arisen. Please approach (b) any legal requirements as regards the form and content of any/both of them (in case) existing in your country and (c) those effects arising out of it/them (in case).

Please refer (d) to responsibility, if any, arising out of the breach of the agreement entered. Please mention what effects the agreement may have on (e) future plead before national courts and arbitration (specially as regards the suspension of prescription and limitation periods) and on (f) already pending claims before national courts.

II.4. The mediator: Please state (a) who may serve as mediator in your country and (b) who appoints/select him/her both in case of out-of-court and court-annexed mediation, in case any difference may exist. Please mention (c) which are his/her main duties, (d) whether any duty of disclosure exists for the mediator and its extent. Also, please (e) approach the issue of the responsibility of the mediator and the (f) existence of any Code of Conduct for Mediators in your country. A (g) reference to the role played by Mediation Centres in your country and their role and responsibility as regards the development of the mediation will be welcome as well.

II.5. The procedure of mediation: Please (a) refer those basic principles that encompasses mediation in your jurisdiction (confidentiality, voluntariness . . .) and any (b) existing basis for the development of the procedure, (c) especially as regards the duration of mediation and any time-limits which may exist.

Please approach (d) the issue of the relationship existing between the mediation and the mediator with public authorities, both judicial and non-judicial (notaries, land registrars, commercial registrars . . .) during the mediation procedure.

II.6. Failure of the mediation: Please refer to the failure of the mediation, (a) its meaning and (b) consequences for the parties involved and for the mediator.

II.7. Success of the mediation procedure: Please (a) state when mediation is considered to finish successfully in your country. Please refer (b) which are –if any- the formal and substantive requirements for the settlement reached by the parties in the mediation and (c) the effect of the settlement reached as regards the parties, the mediator and the dispute referred to mediation. Please mention (d) what conditions are requested for the agreement reached to be fully enforceable in your country and € whether homologation by the court or any other public authority is needed and on which grounds.

II.8. Costs: Please refer (a) which costs mediation entails and (b) whether legal aid, and in the affirmative on which grounds, is available.

III. Cross-Border Mediation

III.1. Notion of cross-border mediation: Please refer (a) what cross-border mediation signifies in your country. Please (b) state on general terms which differences as to the legal regulation of internal and cross-border mediation exists in your country in case of a separate legal framework.

III.2. Recognition and enforcement of foreign mediation settlements: Please state (a) what sort of effects, if any, a settlement reached in a foreign agreement may produce in your country. Please, in the affirmative, (b) state the legal framework applicable to the recognition and enforcement of foreign mediation settlements and (c) legal conditions and (d) grounds for it. When dealing with the previous questions, please –if necessary- differentiate between agreements reached in out-of-court and in court-annexed mediations. Please mention (e) what sort effects produce the agreement once recognized in your country.

IV. (e) Justice

IV.1. Application of (e)Justice instruments to mediation: Please (a) refer to the possible application of (e) Justice devices to mediation in your country. Please state (b) on what areas and on what legal grounds. Please think of the compatibility of (e) Justice devices with some basic principles of mediation: e.g., personal presence of the parties in the first meeting . . .

V. Technical Issues

V.1. Deadline: We think of **September 15th 2013** as the deadline for submitting the national reports to the General Reporters. Accordingly, reports that are received after that date will not be taken into account in drafting the General Report, and will not be available for publication in the prospective book referred to above.

V.2. Language: The two official languages of the Academy are French and English. Consequently, the national reports must be written in one of those languages. The choice between them is free for you.

V.3. Manuscript: Manuscripts should not be bigger than 25–30 pages or 13,000–15,000 words. Please send them to **Carlos.Esplugues@uv.es** and **Louis.Marquis@etsmtl.cain** in electronic form in word.

V.4. Varia: Please write your manuscript in Arial 12, and footnotes in Arial 10. Please use footnotes, not endnotes. We are flexible as regards the specific way of citation. We will accept your national way of citation as far as it provides a clear reference of the work quoted. Please provide a list of abbreviations used and, in case the book/article mentioned is not in English or French a translation to those languages.

MÉDIATION-QUESTIONNAIRE-VIENNE-2014 (FRANÇAIS)

19è Congrès International de Droit Comparé, Vienne, 20 au 27 Juillet 2014

Sujet II. C: "La médiation dans une approche transfrontalière et judiciaire/ Mediation, more particularly, cross-border and judicial mediation"

À: Rapporteurs nationaux **Date: 30 novembre 2012**
De: Carlos Esplugues et Louis Marquis, Rapporteurs Généraux

D'emblée, nous vous remercions d'avoir accepté d'agir à titre de rapporteur national à propos de ce sujet de grand intérêt. Nous sommes convaincus que vous apporterez une contribution inestimable à nos travaux et nous nous réjouissons de la collaboration fructueuse que nous entretiendrons dans les prochains mois.

Dans les pages qui suivent, vous trouverez des informations sur les objectifs que nous poursuivons ainsi que des renseignements au sujet des délais, de la langue et des règles applicables au manuscrit.

I. CONTEXTE

I.1. Le projet: La médiation existe depuis fort longtemps et dans plusieurs pays. Cette vaste couverture va de pair avec le fait que les systèmes juridiques nationaux approchent différemment la médiation. Par ailleurs, même là où elle existe, la médiation demeure parfois difficile à saisir sur le plan juridique. Présentement,

elle suscite une attention grandissante. On y voit un moyen efficace de règlement des différends et un processus facilitant l'élaboration de solutions durables. Notre objectif consiste à comprendre le cadre juridique applicable à la médiation dans votre État. Quelques sujets d'intérêt seront abordés plus spécifiquement, et une attention particulière sera accordée aux différends transfrontaliers ainsi qu'à la collaboration entre les tribunaux nationaux et les médiateurs.

I.2. Publication: Une offre de publication d'un volume a été reçue de la part de la maison d'édition Springer, le tout à l'intérieur de la collection *Ius Gentium.* Malheureusement pas tous les rapports nationaux seront publiés.

II. LA MÉDIATION

II.1. La médiation en elle-même: (a) Précisez quelle(s) notion(s) de la médiation existe(nt) dans votre État, (b) le système juridique général dans lequel elle(s) évolue(nt) et les approches doctrinales avancées à son sujet. De même (c), nous vous prions de relever les modes de prévention et de règlement des différends qui existent dans votre État et l'interaction qui prévaut entre eux et la médiation.

Veuillez indiquer (d) si la médiation est intégrée au système judiciaire étatique ou pas et, le cas échéant, de quelle façon. Finalement (e) veuillez fournir des informations statistiques relatives à la médiation (volume de cas de médiation, tendances, etc.).

II.2. Le cadre juridique applicable: Veuillez préciser (a) le cadre juridique applicable à la médiation dans votre État. Si ce cadre spécifique n'existe pas, indiquez quels sont les principes généraux pertinents. En annexe (b) veuillez fournir les textes juridiques applicables à la médiation (anglais, français, espagnol), un lien Internet vers ces textes ainsi qu'une liste sélective des textes doctrinaux de premier plan ou usuels en la matière. Veuillez (c) préciser les domaines du droit privé et du droit public où la médiation est utilisée et (d) si le cadre juridique en vigueur s'applique à la fois aux différends internes et transfrontaliers ou distinctement.

II.3. La convention de médiation: Veuillez (a) indiquer si le cadre juridique prévoit des règles applicables à la convention de médiation en vue de solutionner des différends éventuels et à l'entente entre des parties afin de soumettre un différend né à la médiation. Veuillez préciser (b) les conditions de forme et de fond pertinentes dans les deux cas et (c) les effets découlant de chacun. Indiquez (d) les aspects de la responsabilité reposant sur les parties et associés au non-respect de l'un ou l'autre de ces deux types convention. Mentionnez quels sont les effets de la convention et de l'entente sur (e) d'éventuels recours devant les tribunaux ou en arbitrage (ex. : par rapport à la prescription) ainsi qu'à l'égard (f) de causes pendantes.

II.4. Le médiateur: Veuillez indiquer (a) qui peut agir à titre de médiateur et (b) qui peut le nommer ou le désigner, que ce soit dans le contexte d'une médiation privée ou dans celui d'une médiation judiciaire. Précisez (c) quelles sont ses obligations, et (d) quelle est la nature des obligations de divulgation auxquelles il

est assujetti. Veuillez (e) aborder la question de la responsabilité du médiateur et (f) s'il doit respecter un code d'éthique ou de bonne conduite. Vous pouvez (g) fournir des informations au sujet du rôle joué par les centres de médiation dans votre État ainsi qu'à l'égard de leur impact sur le développement de la médiation.

II.5. Le processus de médiation: Veuillez (a) indiquer les règles et les principes qui régissent le processus de médiation (confidentialité, ...) et (b) la conduite de celle-ci; (c) en particulier, veuillez fournir des informations relativement à la durée de la médiation et tout type d'échéance qui pourrait prévaloir en la matière. Veuillez expliquer (d) comment il peut y avoir collaboration entre le processus de médiation comme tel et le médiateur vis-à-vis des instances externes, judiciaires ou extra-judiciaires (notaires, experts), au cours du processus de médiation.

II.6. Échec de la médiation: En cas d'échec de la médiation, veuillez indiquer (a) ce que cela signifie et (b) ses conséquences à l'égard des parties et du médiateur.

II.7. Réussite de la médiation: Veuillez (a) indiquer à quel moment une médiation est réputée être réussie selon le droit de votre État. Indiquez (b) quels sont, le cas échéant, les conditions de forme et de fond à satisfaire afin que cette réussite soit considérée valide, et (c) les effets du règlement élaboré relativement aux parties, au médiateur et au différend au centre de la médiation. Veuillez mentionner (d) quelles sont les conditions requises afin que le règlement soit exécutoire au sein de votre État et (e) si une homologation par un tribunal ou une autorité publique est nécessaire et selon quels critères.

II.8. Coûts: Veuillez indiquer (a) comment sont établis les coûts d'une médiation, (b) si une aide juridique est accessible et, le cas échéant, sur la base de quels critères.

III. MÉDIATION TRANSFRONTALIÈRE

III.1. La notion de médiation transfrontalière: Veuillez expliquer (a) le sens et la portée de la médiation transfrontalière dans votre État. Veuillez (b) présenter, de façon générale, les distinctions entre la médiation interne et la médiation transfrontalière telles qu'établies, le cas échéant, par le régime juridique de votre État.

III.2. Reconnaissance et exécution des règlements étrangers: Veuillez indiquer (a) quels sont les effets qu'un règlement étranger atteint par voie de médiation peut avoir dans votre État. Dans l'affirmative, (b) veuillez indiquer quel est le cadre juridique applicable à la reconnaissance et à l'exécution d'un tel règlement, (c) quelles sont les conditions à rencontrer et (d) tout autre critère pertinent. Dans tous les cas, veuillez indiquer, si cela s'avère nécessaire, les différences entre les règlements intervenus dans le contexte de médiations privées et celui de médiations judiciaires ou para-judiciaires. Veuillez mentionner (e) les effets découlant d'un tel règlement une fois qu'il est reconnu dans votre État.

IV. CYBERJUSTICE

IV.1. Application de la cyberjustice en matière de médiation: Veuillez indiquer (a) quelles sont les applications potentielles de la cyberjustice en médiation. Veuillez indiquer (b) quels sont les secteurs d'activités les plus intéressants à ce sujet et pourquoi. Veuillez fournir (c) quelques réflexions sur la compatibilité entre certaines particularités de la cyberjustice et les principes traditionnels liés à la médiation (ex.: présence des parties, etc.).

V. LOGISTIQUE

V.1. Échéance: L'Académie a déterminé que le **15ème septembre 2013** était l'échéance de remise des rapports nationaux aux Rapporteurs Généraux. Cette échéance est de rigueur.

V.2. Langue: Le français et l'anglais sont les deux langues officielles de l'Académie. Les rapports nationaux doivent donc être rédigés dans l'une ou l'autre de ces langues. Il vous est libre de choisir celle que vous préférez pour les fins de votre rapport.

V.3. Manuscrit: Les manuscrits doivent comprendre entre 13,000 et 15,000 mots. Veuillez les expédier par courriel, en format Word, à Carlos.Esplugues@uv.es et et à Louis.Marquis@etsmtl.ca

V.4. Varia: Veuillez remettre votre manuscrit en adoptant Arial 12 pour le texte principal et Arial 10 pour les notes de bas de page (n'utilisez donc pas de notes de fin de document). Nous n'exigeons pas un mode de citation en particulier: vous pouvez donc utiliser votre mode de citation usuelle en autant qu'il contient les informations requises. Veuillez fournir une liste des abréviations et advenant le cas où le titre d'un livre ou d'un article était dans une langue autre que le français ou l'anglais, veuillez nous procurer une traduction du titre dans ces deux langues.