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# BEST PRACTICE GUIDE ON THE USE OF MEDIATION IN CROSS-BORDER CASES

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**BEST PRACTICE GUIDE ON  
THE USE OF MEDIATION IN  
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## TABLE OF CONTENTS

### CHAPTER 1

#### Overview on the mediation in cross-border conflicts – sources and application area..... 7

<b>1. Introduction. Short history .....</b>	<b>7</b>
<b>2. Sources of cross-border mediation .....</b>	<b>9</b>
a. Legislative Act .....	9
b. Contract.....	10
c. Judicial practice.....	10
d. Custom.....	11
<b>3. Application areas of cross-border mediation .....</b>	<b>12</b>
a. Types of cross-border mediation in civil matters, lato sensu.....	13
b. Types of cross-border mediation in civil and commercial matters.....	14
i. Council Regulation (EC) No 44/2001 of 22 December 2000 .....	18
ii. Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 .....	18
iii. Recommendation of the Committee of Ministers no. (2002) 10 on mediation on civil matters.....	19
c. Cross-border family mediation.....	19
i. Recommendation of the Committee of Ministers no. (98) 1 on family mediation.....	19
ii. The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.....	22
iii. Guidelines for a better implementation of the Recommendation concerning family mediation and mediation in civil matters, CEPEJ, 2007 .....	23
d. Cross-border mediation in penal matters .....	24
i. Recommendation no. (99) 19 concerning mediation in penal matters .....	24
ii. Guidelines for a better implementation of the Recommendation concerning mediation in penal matters .....	25
e. Cross-border mediation in matters of consumer protection .....	25
i. Commission Recommendation 2001/310/EC of 4 April 2001 on the principles applicable to out-of-court bodies involved in the consensual resolution of consumer disputes .....	25

ii. Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes.....	26
iii. Initiatives in the field of consumer protection for cross-border mediations .....	27
f. Other application areas of the Mediation Directive. Advantages .....	27
g. Fields where the Mediation Directive is not applied .....	28
<b>4. Conclusions .....</b>	<b>29</b>

## CHAPTER 2

<b>Importance of training mediators in cross-border disputes .....</b>	<b>37</b>
<b>1. Introduction .....</b>	<b>37</b>
<b>2. Training environment and context.....</b>	<b>39</b>
a. Types of cases requiring mediation (with examples).....	39
b. Who qualifies for training as a cross-border mediator? (requirements, prerequisites).....	41
c. Selection of co-mediators and the consequences on training.....	42
d. Presentation of training carried out up to now.....	42
<b>3. Content of training .....</b>	<b>46</b>
a. Legal framework: national legislation on family, the Hague Convention, Brussels II bis Regulation .....	47
b. Psycho-social aspects: the dynamics of conflict in bi-national families, effects of child abduction on children, benefits of mediation, ethical aspects of mediation .....	49
c. Cultural aspects of conflict resolution and mediation, changing the aspect of families in Europe, the language role, working with interpreters .....	51
d. The mediation process .....	52
i. Mediator's role, co-mediation .....	53
ii. Models and styles of (cross-border) family mediation .....	53
iii. Instruments and methodologies for the mediation of conflicting cases .....	54
iv. Including the child's voice in the mediation.....	55
e. Interdisciplinary collaboration.....	55
<b>4. Training methodology .....</b>	<b>56</b>
<b>5. Trainers .....</b>	<b>58</b>
<b>6. Networking, training and continuous support for cross-border mediators .....</b>	<b>58</b>
<b>7. Conclusion.....</b>	<b>59</b>

## CHAPTER 3

<b>Specific procedural aspects concerning cross-border mediation</b> .....	<b>61</b>
<b>1. Specific procedural aspects</b> .....	<b>61</b>
a. Legislative alignment.....	61
b. Models of cross-border mediation .....	62
c. Mediation organized by one or more states .....	63
d. Choosing the mediator.....	64
e. Language used in cross-border mediation.....	65
f. The mediation contract .....	66
<b>2. Access to cross-border mediation</b> .....	<b>67</b>
<b>3. Child's and third-parties' participation in mediation</b> .....	<b>70</b>
<b>4. The mediation agreement. Content. The enforceable nature. The content of the court decision in case the resolution is ruled based on a mediation agreement</b> .....	<b>74</b>
a. The mediation agreement. Content.....	74
b. The enforceable nature of the mediation agreement.....	77
c. The content of the court decision in case the resolution is ruled based on a mediation agreement.....	81
<b>5. Conclusions</b> .....	<b>83</b>

## CHAPTER 4

<b>Principles, methods and models of cross-border mediation</b> .....	<b>85</b>
<b>1. Introduction</b> .....	<b>85</b>
<b>2. General context</b> .....	<b>86</b>
a. About mediation .....	86
b. About the mediator .....	89
c. Cross-border mediation.....	92
d. The normative and organizational framework of applying cross-border mediation .....	92
<b>3. Principles applicable to mediation</b> .....	<b>94</b>
a. Mediator's neutrality and fairness .....	95
b. Confidentiality of information that the mediator has access to .....	96
c. Free consent and self-determination of parties making use of mediation .....	97
d. Legality and fairness of understanding between the parties .....	99
<b>4. The mediation process</b> .....	<b>100</b>
a. Preparing the mediation .....	100
b. Conducting the mediation .....	103
c. The structure of the mediation session .....	106
<b>5. Models, methods and procedures of organizing and conducting the mediation</b> .....	<b>108</b>

a. Mediation models.....	108
b. Mediation methods.....	109
c. Mediation procedures.....	109
<b>6. Specific procedural methods in cross-border mediation.....</b>	<b>110</b>
a. The specificity of mediation in cross-border disputes.....	110
b. Examples of organizing mediation in cross-border disputes.....	111
<b>7. Conclusions.....</b>	<b>116</b>

## CHAPTER 5

### Promoting and applying cross-border mediation. Legislative aspects.

<b>Present public authorities.....</b>	<b>119</b>
<b>1. Introduction.....</b>	<b>119</b>
<b>2. Promoting cross-border mediation.....</b>	<b>120</b>
a. Information subject to promotion.....	120
b. Means of promoting cross-border mediation 4.....	123
i. On a European level.....	123
ii. On a national level.....	124
c. Difficulties in promoting cross-border mediation.....	125
<b>3. Applying cross-border mediation.....</b>	<b>126</b>
a. Information subject to promotion.....	126
b. Persons involved in applying cross-border mediation.....	128
c. Difficulties in applying cross-border mediation.....	128
<b>4. Legislative aspects concerning the promotion and application of cross-border mediation.....</b>	<b>132</b>
a. Legislation prior to Directive no. 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters.....	132
b. Directive no. 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters.....	138
i. Application areas.....	139
ii. Definitions.....	139
iii. Essential provisions contained in the Directive and the way these are reflected in the Romanian internal legislation.....	140
<b>5. Public authorities present in the promotion and application of cross-border mediation.....</b>	<b>146</b>

# **CHAPTER 1**

## **OVERVIEW ON THE MEDIATION IN CROSS-BORDER CONFLICTS – SOURCES AND APPLICATION AREA**

**Zeno Daniel Şuştaç**

### **1. Introduction. Short history**

Globalization and quasi-ubiquity of technologies associated to these have led to an exponential increase of interhuman and interinstitutional communication, with the consequence of rapidly escalation of differences, disputes or misunderstandings, often transformed in litigations sent to the courts of law, according to historically established social practices. But, sometimes the act of justice rendered by the magistrates has the major disadvantage that it leaves one or more involved parties in a cause being unsatisfied with the decision; thus, it generates the image of a resolution formulated based on the “loser-winner” binomial. The consequence of this type of perception of litigants is often, besides the preservation of their conflicting status, the prolongation of judicial dispute; this is due to the will of revenge, with additional costs in time and money for both the parties and the judiciary. The mediation as an alternative method of conflict resolution, starts, right from the beginning, from the principle of counterbalancing the parties’ interests, of the remanence of an agreement obtained based on their free will, sustainable and perceived as mutually beneficial. This fact, in the context of the globalization phenomenon, confers mediation the quality of being a cross-border and often cross-cultural method with a universal value, of conflict approach and resolution.

The citizen’s guidelines concerning cross-border disputes in the European Union suggests, as a priority method of the resolution thereof, an amicable manner of approach, a resolution way alternative to justice, whenever such a step is possible.

The concern for establishing certain criteria off balancing gains and losses must exceed, for the involved parties, the barrier of their own interests with their common interest in the first place. In this context, mediation as an alternative dispute resolution method brings the possibility of introducing a neutral and impartial third-party who draws up



the general lines in the conflict between parties, in the attempt to identify a beneficial resolution for all parties involved, all the more in the field of cross-border conflict mediation. The mediator's role, as a facilitator of the discussions, is to bring in the center of negotiations the parties' wishes, in order to encourage the shaping of an agreement between the parties involved.

On the European Union level, mediation was constantly stimulated by the passing of certain efficient implementation mechanisms. The right to free movement of the citizens of the member states significantly multiplies the perspectives of intercultural bridging and it implicitly increases the possibility that conflicts arise between persons in different member EU states.

The resolution of cross-border conflicts by methods alternative to classic justice is of high interest to each member state of the European Union. Over time, international instruments were adopted, on the level of both the European Council and the European Union.

An overview on the chronology when the various documents concerning alternative dispute resolution methods show the increasing concern for this area, first of the European Council and then, especially after the consolidation in its current form, of the European union. Starting with the 80s, the continental level approach of the ADR methods grew in intensity – from Recommendations of the Committee of Ministers concerning the access to justice (1981) or diminishing the tasks of courts of law (1986) to the level of the European Council – until the most important document of the European Union concerning mediation: Directive 2008/52/EC. One must note the fact that from simple recommendations, the trend is towards a European level unification, by means of Directives which, according to their programmatic value, set forth the goals that need to be attained by member states, leaving the choice of means to the national authorities. In order for the principles provided by the directives to become effective at a citizen level, the national legislator must pass transposition acts to the national legislation, whereby the latter shall be adapted to the goals defined in the directives. Thus, we witness a historical process with predictable development and implementation consequences in the field of alternative dispute resolution solutions, at both a European and national level, to the continuous increase of the ADR methods impact in the field of culture and jurisprudence of the general public.

Most of the European Union countries have adopted a specific legislation concerning mediation; at an internal level, there are either a mediation law, or specific provisions included in codes which encourage the resort to mediation. In this respect, mediation in cross-border conflicts is of high interest, already materialized since 2000, when the European Commission presented a Green Card on the alternative dispute resolution methods in civil and commercial matters. The green card was intended as a case study in performing alternative dispute resolution methods in the European Union; this study was resulted from counseling with member states and other parties involved, in order to improve the general framework in the field of mediation.

The foreign element is the one that confers mediation with cross-border mediation values. This results in a factual circumstance due to which a legal report is connected to two or more than two law systems; in this case, law systems of certain member states of the European Union. In cross-border environments, the parties are law students, natural or legal persons, pertaining to several member states.

## **2. Sources of cross-border mediation**

If we make an analogy with the sources of law, the following may be considered as sources of the mediation institution:

**a. Legislative Act**, a unilateral manifestation of will of a body with competences in the field, which comprises rules of conduct producing  $\square$  erga omnes  $\square$  effects; these cannot be performed by using coercion. These normative acts that regulate a field of interest may have a national or international nature. A national law concerning an obligatory mediation or a European directive (a source of European Law), which is to be transposed by the member states to a certain deadline may be considered as sources of mediation (imposed mediation).

**The following normative acts show relevance for the cross-border mediation:**

- At the level of the European Council, various international instruments have been adopted, including **Recommendation R (81) 7** of the Committee of Ministers on the access to justice, **Recommendation R (86) 12** of the Committee of Ministers concerning measures to prevent

and reduce the excessive workload in the courts, **Recommendation R (93) 1** of the Committee of Ministers on effective access to the law and to justice, **Recommendation R (94) 12** of the Committee of Ministers on the independence, efficiency and role of judges, and **Recommendation R (95) 5**, concerning the improvement of the functioning of appeal system and procedures in civil and commercial matters, **Recommendation no. (98) 1 of the Committee of Ministers** on family mediation, **Recommendation no. (2002) 10 of the Committee of Ministers** on mediation in civil matters, **Recommendation no. (2001) 9 of the Committee of Ministers** on alternatives to litigation between administrative authorities and private parties, Guidelines for a better implementation of the Recommendation concerning family mediation and mediation in civil matters, CEPEJ, 2007, as well as instruments concerning mediation in penal matters.

- At the level of the European Union, one must note **Directive no. 2008/52/EC of the European Parliament and of the Council of 21<sup>st</sup> May 2008 on certain aspects of mediation in civil and commercial matters**, **Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes**, and **Commission Recommendation 2001/310/EC of 4 April 2001 on the principles applicable to out-of-court bodies involved in the consensual resolution of consumer disputes**.

**b.** The **contract** containing provisions concerning mediation undertaken by the parties may give rise to mediations and not litigations (conventional mediation). At an European level, there is a certain tendency to introduce certain contractual provisions that refer to mediation, as a resolution method of choice for certain potential conflicts that may arise from the construction or enforcement of such contracts.

**c.** The **Judicial practice** may be a source of mediation in case the cases are submitted to mediators in certain concrete situations (judicial mediation). In several European states, jurisprudence is favorable of the attempt to resolve litigation by mediation, at the magistrate's recommendation, even in default of express legal provisions that would compel the said to carry out mediation.

**d. The Custom**, the unwritten source of law and, at the same time, the oldest source of law.

The proven custom of court action in case of conflict, developed by democratic countries, especially by the United States, led, some decades ago, to the occurrence of an excessive overload of the courts; this is an increasing phenomenon not only in the Western world. It became a problem of judicial practice, but also of resolution of certain trends of traceable magnitude at the level of the entire society and of introducing to public conscience the alternative conflict resolution methods. Currently, one may discuss with solid arguments about the occurrence and persistence of the habit to solve disputes out-of-court. In the United States, the birth place of European mediation, the cases related to consumers' rights, to malpractice or family, to quote but these three situations, has already been solved for many years, as a habit, by methods alternative to classic justice, especially by out-of-court mediation. In Europe, especially in the Netherlands and Germany, under the influence of the American school of mediation, we recorded evolutions that signal the set of the custom to approach, by means of cross-border mediation, the so-called cases of child-abduction, where the parents are residing in different countries. Also, outside the European continent, in South Africa, where the elimination of apartheid regime led to the situation where the workforce comprised of majoritarian ethnics was managed by the white minority, mediation became the current practice of work conflict resolution, in order to avoid the occurrence of new interracial conflicts. The practical needs of the society reaffirm, with reference to the field of mediation, the rule of continuous adaptation and transformation of customs, which confirms the appreciation that these are notable sources of law.

Outside the instruments at the level of European Council and European Union, in each member state there are national mediation-related instruments. Some states have laws dedicated to mediation; other member states have provisions on mediation in general normative acts. The mediation process in member states and the specificity of national legislation in the field of mediation may be referred to by accessing the European e-Justice Portal ([www.E-Justice.eu](http://www.E-Justice.eu)) developed by the European Union. In Romania, the mediation and mediator were regulated by the passing of Law no. 192/2006, starting from the idea that mediation is one of the important topics of the justice reform strategy, being a priority within the Action Plan to implement the Reform Strategy of the judicial system between 2005 and 2007. The passing of

this law aimed at reducing the workload of courts and, consequently, the relief thereof from as many cases as possible, thus trying to increase the quality of the justice act by satisfying the parties' interests. Mediation is regarded as an elaborate process, where the conflicting parties have the opportunity to express their wishes, needs, aspirations, expectations and interests, also helping to individual and group reflection, in view of making the best decision for themselves.

According to a study carried out for the European Commission and made public in Leuven on 17<sup>th</sup> January 2007, each state has its own ADR mix, for there is no ideal combination. In a certain state, the imposition of a certain type of ADR is reached by the multitude of factors including historical, judicial, political, socio-economical, educational and cultural factors.

A major success at a European level in the field of mediation may also be considered the passing by the European Commission on 4<sup>th</sup> July 2004 of the mediator's code of conduct, which numerous associations of mediators have already applied to, in the attempt to unify the guidelines that the mediators across the European Union abide by.

### **3. Application areas of cross-border mediation**

According to Directive 2008/52/EC, a cross-border dispute shall mean the dispute in which at least one of the parties is domiciled or habitually resident in an EU member state other than that of any other party or parties the former is in dispute with. The time we report to this case may be the date when the parties agree to use mediation, the time when the mediation is ordered by a court, the time when an obligation to use mediation arises under national law, or the time when an invitation to mediation is made to the parties.

The Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Directive on consumer Alternative Dispute Resolution) defines the cross-border dispute as a □contractual dispute arising from the sale of goods or provision of services, in case the consumer, when ordering such goods or services, is domiciled in a member state other than that of the trader□.

For the purpose of the directive, cross-border disputes are also referred to in the case when, following the mediation, judicial or arbitrary proceedings are engaged in a member state other than the one where the parties are domiciled in.

The resolution of cross-border conflicts by mediation may be carried out at the initiative of the parties involved, at the request of the court in cases when the latter requests the parties to use mediation or when the national law provides mediation.

The application areas of mediation in cross-border conflicts are various, and the European Union actively promotes mediation as a resolution method of this type of disputes. This is addressed both to natural and legal persons willing to get proactively involved in the resolution of their own disputes by referring to a qualified specialist to run the mediation process.

#### **a. Types of cross-border mediation in civil matters, *lato sensu***

Mediation in cross-border disputes may not be restricted only to certain fields or situations, as it may be used whenever the interested parties have the capacity of disposing thereof with regards to the rights subject to mediation in such case.

In such cases, mediation is a voluntary procedure. The parties may organize the mediation as they find fit, by setting forth their own rules and having the possibility to terminate it at any time. One must note the fact that mediation appeared as an alternative to the judicial system and it is not a component thereof. The solution obtained by mediation is not a solution inferior to the one ruled by the court of law. But it must observe the legislation in force and not breach the ethics.

Both natural and legal persons, of private or public law, may use mediation. The object of cross-border mediation may aim at malpractice, the field of insurances, employment agreements or any other field. Cross-border mediation may also be carried out online by using modern communication technologies in the mediation process, with the observance of rules and principles used in a common procedure. Co-mediation (the presence of two or more mediators) is possible in the case of cross-border dispute mediation. Usually, it is a voluntary, informal procedure, where the parties have the possibility to settle their development framework in accordance to their needs and interests, being able to discard the initiated mediations at any time.

The difference between cross-border mediation and the national cross-border is given by the presence or absence, respectively, of the foreign element. As for the rest of it, the procedure is similar, with certain particularities generated by a different legislative framework.

Upon analyzing the international mechanisms dealing with mediation, we can refer to the following types of cross-border mediation in civil matters, *lato sensu*:

- **Cross-border mediation in civil and commercial matters**
- **Cross-border family mediation**
- **Cross-border mediation in matters of consumer protection**
- **Cross-border mediation in penal matters**

**b. Cross-border mediation in civil and commercial matters** is dealt with by Directive 2008/52/EC. This applies to all procedures in which the parties to a cross-border dispute take efforts in reaching an amicable agreement, with the support of a mediator. Cases concerning precontractual negotiations, quasi-judicial procedures, certain systems of judicial counseling, systems of consumer complaint resolution, arbitration, expert decisions and procedures within which the individuals or bodies running the procedure issue an official recommendation, be it compulsory or not are exempt from the use of mediation in civil and commercial matters; mediation may be applied in any other situation.

The main source of mediation in cross-border conflicts is Directive 2008/52/EC of the European Parliament and of the Council of 21st May 2008 concerning certain aspects of mediation in civil and commercial matters, the framework legislation prepared since 2002, following the consulting of the member states. The Green Card with respect to ADR in 2002 proposed the future creation of a predictable judicial environment, proper for encouraging the use of mediation.

**Directive 2008/52/EC** of the European Parliament and of the Council of 21st May 2008 concerning certain aspects of mediation in civil and commercial matters aimed at encouraging a different type of justice, by simplifying these dispute resolution methods.

The directive provides that there is nothing that would prevent the member states from applying its procedures also in the internal mediation procedures, although it is not especially dedicated cross-border disputes. The text of the directive recommends that a framework

provision is inserted in the legislation of national states, which would also comprise aspects of civil procedure.

The role of the Directive is not to modify national legislation in the field when they provide a regulated framework with provisions over those provided in the directive (the use of mediation is compulsory or is subject to certain incentives or sanctions). Neither the self-regulation systems in the field of mediation should suffer any changes with respect to non-regulated aspects in this directive. National legislations in the field shall not comprise provisions that restrict free access to justice. The essence of the directive consists in ensuring a harmonious relationship between mediation and judicial procedures. The directive is dedicated to the resolution of those disputes that are based on rights on which the parties may dispose and validly conclude mediation agreements concerning to the said.

Cross-border mediation is defined as a structured process in which the parties to a dispute try, out of their own will, to reach an amicable agreement, with the existence of a qualified mediator, able to run the mediation process. This excludes the course's proceedings of solving the dispute during the judicial procedures. By referring only to the parties to a dispute, the regulation only considers the pursued conflicts and disputes. The mediator is in its turn defined as a third-party able to run the mediation process in an efficient, unbiased and competent manner. Although provisions are vague with respect to both cross-border mediation and the notion of mediator, several aspects are noticed:

- Cross-border mediation is a structured process
- It is a voluntary process
- It refers to disputes on the dockets of the courts, but it does not exclude the mediation of non-pursued disputes
- The mediator is a competent and unbiased person Article 4 in the Directive stresses upon ensuring the mediation quality:
- Establishing control mechanisms in the member states of the quality of the mediation service
- Adoption of national codes of conduct for mediators
- Encouraging the initial and continuous training of mediators

The use of mediation in the case of civil or commercial cross-border conflicts is also detailed:



- The courts may invite the parties in certain situations to use mediation for dispute resolution
- The courts may invite the parties to take part in a briefing session concerning the use of mediation (if this sessions are organized and easily accessible)
- National legislation may prove the compulsoriness of the use of mediation
- National legislation may comprise incentives or sanctions for the use or non-use of mediation
- National legislations concerning mediation may not restrict the parties' right to free access to justice

Another concern of the European Parliament and of the Council of the European Union shown in the directive is related to the confidentiality of mediation in cross-border disputes. Thus:

- Mediation shall be carried out in a confidentiality-compliant manner
- The parties taking part in mediation may decide on the contrary, by having the possibility to agree if and under what circumstances will they make public the details of the agreement they reached following the mediation process
- The mediators and the other parties involved in the mediation procedure may not use information collected during mediation within the judicial or arbitrary procedures; this obligation is valid without a time limit
- There are a few exceptions:
  - overriding considerations of public policy (when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person)
  - disclosure of the content of the agreement is necessary in order to implement or enforce that agreement.

The effects of mediation on Effect of mediation on limitation and prescription periods show interest from the perspectives of the Directive. Thus, the use of mediation as a means of dispute resolution shall not prevent the parties to use a judicial or arbitrary procedure subsequently. For this reason, during the development of mediation, the running of the prescriptive or limitation terms shall be suspended.

The mediation for the purpose of the Directive is organized with the observance of the following principles:

- It is dominated by the public or private system
- May take place inside or outside the judicial procedure
- The use of mediation does not limit the access to justice
- Shall ensure a balance between the duration of required procedures, in order to address to justice and the promotion of the mediation procedures
- The mediation procedures shall be quick and easily accessible
- Useless delays and the use of mediation as a delay tactics shall be avoided
- Mediation shall be used mainly in situations where judicial procedure entails high costs or when it becomes a procedure of an excessive formality
- Mediation shall mainly maintain dialog and relationships between the parties
- The states are encouraged to create full or partial free mediation systems
- The states are encouraged to provide judicial assistance in cases when the interests of certain parties require a special protection
- The mediation costs shall have to be reasonable
- The mediation costs shall take into account the actual workload taken by the mediator and no other criteria

Necessary actions shall be taken in view of selection, empowerment, training and qualification of mediators, including those involved in international mediations. It is recommended that at the end of mediation, there is a written document concerning the object, the length and resolution of the agreement. The mediators shall notify the parties in respect with its enforcement methods, since it is important that these agreements are not contrary to public order.

Mediation-related information that shall be supplied by the state shall comprise the following:

- At least a general information on mediation
- Detailed information on mediation in civil matters, including with respect to costs and the efficiency of mediation
- Regional and/or local information centers shall be created

- A special briefing shall be held for the professionals involved in the functioning of justice

Also, the states should create mechanisms that would allow the use of mediation, in order to solve the problem with foreign elements and to promote collaboration between services interested in civil mediation, with the purpose of using international mediation.

i. **Council Regulation (EC) No 44/2001 of 22 December 2000 (the “Brussels I” Regulation)** on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters lays down bylaws base on which it shall be established what courts are competent to rule a certain cross-border case, the rule of thumb being that the courts in the member state where the defendant is domiciled or where the company office of an individual against whom the action was filed are the competent courts (with certain exceptions.) Knowing the Regulation may facilitate the enforcement actions of certain mediation agreements in the cross-border field.

ii. **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**, the European Enforcement Order is a certificate accompanying a national court settlement, a judicial transaction or an authentic instrument, allowing the execution thereof in another member state. These provisions are important to be known by practitioners and the public in cases when the enforcement of agreements resulted from the mediation is required, in the situations provided by **Directive 2008/52/EC**.

**Directive 2008/52/EC** provides that the party that took part in a mediation finalized with a written mediation agreement, with the written consent of the other party, has the possibility to request that it becomes enforceable. The mentions specified in the agreement, under the terms above, become enforceable outside the situations when the agreement content is contrary to the right of the member state or in case when the right of the state where the request is made does not provide the possibility that it is enforceable. The ways by which the content of the agreement resulted from the mediation may become enforceable are as follows:

- The ruling of a court decision in this respect
- The issuing of a decision by a competent authority
- The transformation in an authentic instrument

In order to encourage these steps, the member states are compelled to notify the European Commission on the names of the courts of law or of other competent authorities to receive such type of requests.

iii. **Recommendation of the Committee of Ministers no. (2002) 10 on mediation on civil matters**, adopted by the Committee of Ministers on 18<sup>th</sup> September 2002, at the 808<sup>th</sup> meeting of the Ministers' Deputies.

For the purpose of the Recommendation, mediation is defined as a procedure by which the parties negotiate their litigious issues in order to come to a settlement, being assisted by one or more mediators. Its application area refers to all matters in the civil area, including commercial law, consumer law, labor law, without referring to the administrative or criminal law.

### **c. Cross-border family mediation**

In the current European context, the field of family disputes makes a consistent part of cross-border practice in mediation, showing certain particularities that are to be detailed hereunder, in light of the incidental provisions in the field.

i. Recommendation of the Committee of Ministers no. (98) 1 on family mediation, adopted on 21<sup>st</sup> January 1998 at the 616<sup>th</sup> meeting of the Ministers' Deputies.

Family disputes, for the purpose of the Recommendation, are the ones:

- Involving persons between which there are continuing and interdependent relationships
- That arise in an unwanted context and may aggravate it
- Within them, the separation or divorce have a strong impact on children and on all family members

The recommendation acknowledges the beneficial effects of mediation, resulted from the research in the field:

- Communication between family members is improves
- The conflict intensity between the involved parties is reduces
- The continuity of relations between parents and children is ensured
- Economic and social costs caused by family disruption
- The time period required for conflict resolution is reduced

□ An amicable settlement is obtained

The phenomenon of internationalization of family relationships and the complex problematic generated by this phenomenon led to the necessity of the most frequent use of family mediation, as the states are encouraged to apply family mediation whenever possible. Family mediation is that process when an unbiased and neutral third-party called mediator assists in the negotiations between the parties in order to reach a common agreement. It may be applied in any dispute between the members of the same family based on blood or marriage ties.

The Recommendation lays down or repeats basic principles of family mediation, dealing with aspects of interest concerning the application area, organization, process structure, the mediation status, specific procedures, promotion, access to mediation and international elements. Usually, the mediation is non-binding, organized as the respective state deems it necessary, as the mediation may be public or private. Irrespective of the situation, there must be procedures for the selection, training and qualification of the mediators, with the observance by the mediators of certain □good practice bylaws□.

The family mediation process is organized as follows:

- The mediator is unbiased towards the parties
- The mediator is neutral towards the mediation result
- The mediator does not impose solutions, he/she observes their points of view and he/she generates the equality of parties in the negotiation process
- During the mediation, the right to private life is guaranteed
- The discussions during mediation are confidential and may not be made public unless with the agreement of the parties or if allowed by the national legislation
- In certain cases, the mediator shall inform the parties on the possibility to use marriage counseling or other type of counseling
- The mediator shall grant a primary interest to the child's welfare and best interests
- The mediator shall encourage parents to focus on the child's needs
- The mediator shall take care to find out if they ware or may be subject to an abusive relationship

- The mediator shall decide in every case if the mediation procedure is recommended in the respective situation
- The mediator may provide information of a legal nature
- Yet, the mediator may not provide the parties with legal counseling
- The mediator may inform the parties on the option to call to the services of an attorney or other professional

The states are recommended to facilitate the approval process of the agreements resulted from the mediation by the judicial authorities or of another type and to ensure specific execution mechanisms according to the national legislation.

Other recommended actions:

- The termination of judicial procedures at the time the mediation is initiated
- Ensuring the possibility that, in urgent cases, the competent authorities are able to take measures in order to protect the children or their assets
- Notifying the competent authorities on the resume/termination of the mediation process and on the existence/non-existence of an agreement

The state shall promote the development of family mediation by public information programs settling proper information methods with respect to mediation as an alternative process of family dispute resolution. The state shall take the necessary actions to encourage the use of family mediation, both in national and international disputes.

In cases involving foreign elements:

- Mediation shall be used especially when there are children-related matters (especially with respect to custody and visitation right), when the parents live in different states
- By mediation, the parents are encouraged to solve their disputes concerning the organization or reorganization of custody and the visitation right
- If one of the parents retains the child against the law, international mediation shall be addressed only if this is not carried out for the purpose of a delayed return of the minor
- National services involved in family mediations shall cooperate in order to facilitate the access to international mediation

- International mediators involved in family mediations shall benefit from prior training

ii. In family mediations, one shall also consider the principles stated by the Hague Convention of 25th October 1980 on the civil aspects of international child abduction. Article 7 of this Convention states that the central authorities of the signatory states "take all appropriate measures to secure the voluntary return of the child or to bring about an amicable resolution of the issues". The most recent Hague Conventions explicitly state the use of mediation, in the first place, but also the use of conciliation and other similar methods. The Hague Convention on International Private Law published a Good practice guideline in mediation in 2012, developed based on the principles and applicable framework of the Convention of 25th October 1980; it was recommended not only to the states signatory to it, but also to the states making part of other conventions, such as the **Hague Convention of 19<sup>th</sup> October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children**, or the **Hague Convention of 23<sup>rd</sup> November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance**. Not in the least, the document addresses all factors interested in the efficient and effective promotion of cross-border mediation in the field of international family disputes, be it governments or central authorities, judges, attorney, mediators or parties involved in cross-border cases.

The possibility offered by the adoption of mediation as a resolution procedure for family conflicts created by child abduction is much extended. Mediation may approach many aspects of the family conflict, some deemed as irrelevant by a court of justice and, consequently, unconsidered in case of trial. Mediation often goes to the root of conflicts that generated the case of child abduction, by providing solutions impossible in a court of law. But the Hague Convention of 25<sup>th</sup> October 1980 draws attention that all this advantages are time-consuming, which is contrary to the urgent nature of the amicable resolution in international cases of child abductions, which imposes that mediation in these cases observe the very precise time requirements; consequently, mediation must be limited as an approach and well balanced between the need to further investigate the respective topics, namely the terseness one with positive effects on the time factor. One must note the set of general

rules set forth by the Hague Convention of 25th October 1980, in this respect:

- mediation in international cases of child abduction shall be dealt with expedience
- the mediation process shall not cause delays to the procedures of child return, according to the Hague Convention
- the parties must be notified on the possibility to use mediation as soon as possible
- the opportunity of mediation shall be assessed in each case
- the mediation services in the cases of international child abduction must ensure the scheduling of the mediation sessions with short notices
- the initiation of the child return procedures shall be considered before the initiation of mediation

The particularities of mediation carried out under the set of rules and principles of the Hague Convention of 25th October 1980, a framework on which all subsequent documents in the field are based, are relevant especially throughout Chapter 2 of the Good practice guide, which states that “one cannot stress enough on the difference between mediation in family issues at a national level and international media-tion”. The document insists upon the fact that mediation in international family disputes is far more complex and it requires from the mediators involved to have a relevant additional training. It also aligns a set of rules on the times for organization and progress of mediation, starting from the prerequisite that the time factor is decisive in the cases of child abductions, more precise that there is a major concern to restore the pre-abduction status quo, as soon as possible, to the best interest of the affected child. The 1980 Convention protects first of all the best interests of the child, including by preventing one of the parents to gain an advantage by establishing an artificial jurisdiction tie, at an international level, in order to get the child’s custody. Mediation becomes, in such a context, a means of legal action of the first degree.

iii. In its turn, the **Guideline for a better Recommendation concerning family mediation and mediation in civil matters, CEPEJ, 2007** comprises provisions on the participation and protection of children in the mediation procedure:

- The member states shall apply appropriate protective actions and fair trial guarantees, in order to support and protect children;



- The state members shall act together in order to examine, assess and identify certain sets of good practice;
- The European Council and European Union shall contribute to this respect;
- Children shall take part in mediation only if their age and maturity shall allow it;
- The parents' role in mediation is important, inasmuch as they are likely to reject taking part in the mediation;
- It is recommended the participation of social workers, psychologists and legal representatives of the child, when they take part in mediation.

#### **d. Cross-border mediation in penal matters**

In its civil aspect, the point of interest for this guide, mediation may be used in almost any criminal case.

i. **Recommendation no. (99) 19 concerning mediation in penal matters** was adopted by the Committee of Ministers on 15<sup>th</sup> September 1999, at the 679<sup>th</sup> meeting of the Ministers' Deputies and detailed by the **Guideline for a better Recommendation concerning family mediation and mediation in civil matters**, adopted by the European Commission for Justice Efficiency (CEPEJ) on 7<sup>th</sup> December 2007.

The recommendation was established following the more frequent use of mediation in penal matters, a flexible and comprehensive, dedicated to issue resolution by involvement of the parties as alternatives to traditional criminal procedure. It may assume the active involvement in the mediation of victim, the victim-offender and all other parties involved, as well as of the community, with the observance of the European Convention requirements of human rights and fundamental freedoms.

Mediation in penal matters shall apply in all situations where the victim and victim-offender have the possibility to actively participate, based on their free consent expressed upon the resolution of the problems caused by the offence, with the help of an independent, qualified third-party – the mediator.

The general principles of the Recommendation follow exactly the purpose and practice of mediation; in a criminal context, one should note the following:

- Mediation is possible in any stage of the procedure that the criminal justice takes
- The mediation services shall benefit from autonomy from the system of criminal justice
- The resolutions obtained by mediation shall have the same status as the court decisions or settlements

ii. The **Guidelines for a better implementation of the Recommendation concerning mediation in penal matters** identifies a series of specific issues that member states deal with in the development of mediation in the penal field, especially due to differences of approach, costs and psychological barriers at the level of victim-offender – victim, as well as a generous set of principles that further detail the major guidelines of mediation, as an alternative dispute resolution method, with reference to the particularities of the penal matters.

#### **e. Cross-border mediation in matters of consumer protection**

Another point of interest concerning cross-border disputes is the field of consumer disputes. In this field there are minimum quality criteria and principles that the out-of-court bodies involved in the amicable resolution of consumer disputes should provide to the litigants, as it is recommended to establish a database with the out-of-court systems that the member states deem as compliant with the applicable principles. The restrictions thus imposed exclusively refer to the out-of-court stage, as there are not applicable in the judicial phase.

i. Directive 2008/52/2008 has a limited interference on the field of consumer protection, reminding only the incidence in the field of the Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the amicable resolution of consumer disputes.

Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts does not distinctly refer to mediation as a resolution method for the conflicts in this field, yet leaving open the possibility of using the procedure. Yet, Directive 97/7/EC provides that it is applied to third-parties in charge with the out-of-court resolution of disputes in consumption matters, where, irrespective of the name, they shall try to solve a dispute by approaching the parties in an attempt to find a mutually

agreed solution. Obviously, mediation is one of the variants in these cases.

Cross-border disputes also take interest in the Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Directive on consumer Alternative Dispute Resolution), as well as the Proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer Online Dispute Resolution). When interpreting all this regulations, we notice that the field of consumer protection is a segment of interest from the point of view of cross-border relationships, with a high potential for mediation.

ii. **Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes** was adopted for the purpose of strengthening consumers' trust in the functioning of the internal market, by giving them the possibility to solve their disputes in an efficient and proper manner.

Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes provides that the member states ensure that the natural persons responsible for alternative dispute resolution have the required expertise and are unbiased and:

- have the necessary knowledge, skills and experience
- may not be dismissed without solid reasons
- are not in a conflict of interest with any of the conflicting parties

The proposal for a directive meets the European consumers facing issues when they purchase goods and domestic market services (in 2010, approximately 20% of them were faced with such issues). This notices that the options the European consumers currently have available also include mediation.

In its turn, the European Union has involved in the financial support of certain projects in the field of dispute resolution between the consumers and online manufacturers, by taking part in the launch of the "ECODIR" system (Electronic Consumer Dispute Resolution), the electronic platform for dispute resolution or prevention. The platform uses a three-step system based on negotiation, mediation or recommendation.

Another field where mediation of cross-border conflicts plays an important role is that of electronic commerce, be it B2B (business-to-business), or B2C (business-to-consumer). The parties involved in the first case are companies or organizations, in the second case, companies sell their products and services to individual buyers – natural persons.

iii. Initiatives in the field of consumer protection for cross-border mediations

There are also other initiatives of the European Commission to encourage the amicable resolution of cross-border disputes in the field of consumption:

- The **European “ECC-Net” (European Consumer Centres Network) extra-judicial network** is a structure of consumer assistance and information established at the EU level, made of national points of contact as settled in each member state. The network was established by the merger of two existing networks: the European Consumer Centres or Euro-offices, which provided information and support in the case of cross-border purchases and the European Extra-Judicial Network (EEJ-Net), which offered consumers support in dispute resolution by means of Alternative Dispute Resolution methods (ADR), such as mediation or arbitration.
- The **network for the out-of-court dispute resolution in the field of “FIN-NET”** financial services makes the connection between national competent bodies within out-of-court dispute resolution, by providing consumers dealing with an issue in the field of financial services with a means to identify and use an appropriate resolution method.

#### **f. Other application areas of the Mediation Directive. Advantages**

Subject to cross-border mediation for the purpose of the Directive are conflicts in various fields such as insurances, labor, malpractice, financial-banking or any other field of interest. The advantages of the use of cross-border mediation in these situations are obvious:

- The costs of the procedure process are way below the judicial costs, inasmuch as there is a foreign element (which assumes covering significant distances between the locations of the involved parties in order to participate in the judicial procedures), as well as linguistic, cultural and procedural barriers. The use of modern communication

technologies mentioned by Directive 2008/52/EC may significantly contribute to the decrease of the financial costs of mediation.

- The involvement in the construction and control of the resolution directly by the parties generates a resolution based on needs and interests and, not necessary, only on their legal rights
- The member states shall be exempt from supporting an expensive judicial; procedure, the overload of the courts shall be avoided and there shall be prerequisites to increase the quality of the act of justice
- The nervous consumption of the involved parties shall be greatly decreased, as their involvement may be focused on building mutually beneficial agreements
- The resolution period of such cross-border conflicts shall be greatly reduced
- The misunderstandings between the parties are likely to solve in a sustainable manner, leading to a restoration or maintenance of the relationships

#### **g. Fields where the Mediation Directive is not applied**

Cross-border mediation is not a panacea that applies and works in every situation, although its applicability area is extremely large both in the civil and commercial field. Article 1(2) of the Directive shows that its provisions do not apply with respect to rights and obligations which are not at the parties' disposal under the law. These are the situations in which the parties may not reach an amicable settlement without flouting the legal framework.

The Directive Provisions do not apply to fiscal, customs or administrative matters or to the cases concerning the fulfillment or non-fulfillment of certain functions in exercising the public authority.

In the fiscal field, the impossibility of application arises from the fact that the fiscal obligations of a person may not be negotiated, as they are settled by binding normative acts and, as a result, may not be used in mediation. The situation is similar to the case of customs duties, as their amount may not be subject to mediation, because this aspect exceeds the legal framework, and the payment obligation thereof may not be removed.

Administrative procedures rank among the same approach, being in direct connection with a general normative framework of performing the

activity of public administration. Their purpose is to fulfill the competence of public authorities with the observance of public interest and the legitimate interests of natural or legal persons and the rules of law, as they may not be subject to mediation.

This directive is not applicable in case of precontractual negotiations and in the case of quasi-judicial procedures or of procedures in which the individuals or bodies running the procedure issue an official recommendation on dispute resolution. The cases that the Directive refers to include certain systems of judicial counseling, consumer complaint resolution systems, arbitration and expert decisions. Yet, these cases are not comprehensively listed, as there is a possibility, depending on the circumstances, that there are other cases in which the parties do not have the quality of disposing with respect to their rights, and so that the directive provisions may not be applied.

#### **4. Conclusions**

Statistic and qualitative analysis of the casuistry of cross-border conflicts imposes the conclusion that mediation does not cover, like the ADR method, only the type of disputes contained in the European recommendations or directives. Starting from this statement, we may conclude that cross-border mediation may be used for any type of dispute, in case the following conditions are concomitantly met:

- There is a foreign element
- The parties accept mediation voluntarily
- The parties have a disposition capacity
- The dispute may be settled by mediation and may be used in mediation
- The settlement between the parties is not contrary to the national or international legislation
- The resulted agreements are enforceable

It became obvious that mediation in the field of cross-border disputes shows a high complexity element due to different legislations in the case, as well as due to different national jurisdictions. As a result, one must notice that the mediators involved in such cases shall have to make sure that the settlements that the parties shall reach do not breach the legislations in their originating states, inasmuch as the parties may

wish to enforce the mediation agreement at a later time. The unanimously accepted conclusion at a European level stresses on the fact that such cases require specialized mediators and a clear framework legislation in the field of cross-border mediation. Directive 2008/52/EC take a first step in this respect, which imposes the argumentation that in the near future, there will be a need for other regulations that would refer to a much broader variety of disputes. With respect to the qualification of the mediators involved in cross-border mediations, it turns out that this is a fundamental requirement for outlining, at the level of the European Union, a favorable practice for the establishment and development of this area. The European mediator certificate is yet to happen but, we draw the conclusion that it is also a necessary thing, especially in the field of cross-border mediation, where the professional qualities of mediators should be at the highest standards in order to cope with the requirements from the beneficiaries of this alternative dispute resolution method. An additional difficulty element present in this type of mediations is given by the pertaining to different cultures of the parties involved in the procedure, of inherent language barriers, of different customs, etc. So, it shall be assumed that the degree of qualification of the mediators in the EU member states and the existing codes of conduct for mediators is proof of their performance, both by initial training at a high standard and by a uniformization of the training standard at an European Community level, especially in the case of professionals focusing on cross-border mediations. After having noted these remarks, we may still see that, in the member states, there are currently enough judicial guarantees in the field of mediation to consider that the mediators in the European Union may cope with cross-border mediation.

It is obvious that the notion of cross-border mediation does not refer only to the disputes mediated in the European Union member states. In contrast, we see that one must not misinterpret cross-border mediation for the purpose of European regulations (especially, Directive no. 2008/52/EC of the European Parliament and of the Council of 21<sup>st</sup> May 2008 on certain aspects of mediation in civil and commercial matters), as the cross-border mediation defined in the general meaning.

Such a conclusion is similar to the mistake of identifying by synonymy of completely different concepts, such as “international” and “European”. We strongly believe that the literature, currently under expansion and further research, shall deal in detail with these differentiations, which is also to be expected at the level of the following European regulations in

the field. We start from the prerequisite that the directive on mediation in civil and commercial matters is just a first step in the field of cross-border mediation and under no circumstances is it a final legal framework, impossible to improve. We consider that the constant concern of the European institutions in the field of uniformization is a good sign for the development of mediation and alternative dispute resolution methods across the continent, with the observance of certain high standards. It is advisable that, in the near future, the notion of cross-border mediation acquires, apart from the theoretical valences under consolidation at this time, the especially practical value, which is so necessary at a large scale in the European Union member states.

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## **CHAPTER 2**

### **IMPORTANCE OF TRAINING MEDIATORS IN CROSS-BORDER DISPUTES**

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#### **The importance of training mediators on cross-border disputes**

Training mediators in cross-border disputes is still a relatively new field. Experience so far has found that even well-trained and experienced mediators need specialized training to face the challenge of mediating international family conflicts.

In Chapter 1 we look at the views expressed so far by the relevant European and international bodies. Chapter 2 examines the background and context of training and Chapter 3 goes into the content of such training. Chapter 4 looks at the methodology needed to train cross-border family mediators appropriately and Chapter 5 examines the question of what qualifications the trainers need to have and what their role should be. Finally, Chapter 6 lays out the need for on-going training and support for cross-border mediators.

#### **1. Introduction**

The Committee of Ministers of the Council of Europe and the Hague Conference have long established the necessity of training cross-border mediators. Recommendation No R (98) 1 of the Committee of Ministers to member states on family mediation says “states should see to it that there are appropriate mechanisms to ensure the existence of procedures for the selection, training and qualification of mediators” and that standards are to be “achieved and maintained by mediators”. In relation to international matters the recommendation goes on to state: “Taking into account the particular nature of international mediation, international mediators should be required to undergo specific training.”

Recommendation Rec (2002)10 of the Committee of Ministers to member states on mediation in civil matters maintains that “States should consider taking measures to promote the adoption of appropriate standards for the selection, responsibilities, training and qualification of mediators, including mediators dealing with international issues.”

The Hague Conference itself devotes Chapter 3 of the Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Mediation (2012) to the topic *Specialised training for mediation in child abduction cases/Safeguarding the quality of mediation*. Particular emphasis is put on the need for specially qualified mediators. Child abduction should preferably be conducted by family mediators with adequate experience and special training. Qualification standards and training programs may be established by states to support mediation in such cases (cf. Hague Conference on Private International Law Permanent Bureau 2012: 38).

The research report done by the Catholic University of Leuven in the context of the EU Civil Justice-funded project Training in International Family Mediation (TIM) examines the issues and conflicts facing international families, gives an overview of family mediation and family mediation training in Europe and lays out the challenges facing cross-border family mediators – thus outlining the skills and knowledge needed that must consequently be incorporated into training in international family mediation which must live up to these challenges (Pali and Voet 2012).

Finally, it is necessary to establish certain standards in the field of international family mediation. Mediators should possess a high degree of knowledge, know-how and sensibility in regard to cross-border and cross-cultural mediation. It would be useful to establish a code of conduct for international family mediation that covers confidentiality, the extent of the field as well as legal issues concerning the enforcement of agreements. Training should rely heavily on interaction and role-plays, giving mediators first hand-experience and drawing on their different backgrounds. Furthermore, the field would benefit from the establishment of an international register of qualified cross-border mediators, setting standards for training, accreditation and continuing supervision (Parkinson 2011: 369).

## **2. Training environment and context**

In this chapter we look at the background and context of training cross-border mediators, including an overview of the kinds of cases needing to be mediated, the question of who qualifies to be trained as a cross-border mediator and what consequences this has for mediation training. Finally, an overview of the training carried out thus far is given.

The number of international marriages within the EU exceeds 350.000 per year and is growing. This includes couples with different nationalities, those who live in a country outside of their own state and couples of the same nationality living in a different country.

There are over 170.000 divorces of such couples each year (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20070913STO10370+0+DOC+XML+V0//EN> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20070913STO10370+0+DOC+XML+V0//DE>). In each one of those cases involving children couples must make important decisions regarding custody, residence, contact and visitation. Separation and divorce is necessarily a painful process for all involved – especially for the children. It is not easy to continue exercising full parental responsibility after a separation or divorce and the challenges facing cross-border families are even greater than those facing families who will be staying in the same city or country. Relationship conflicts can also be exacerbated by a complicated legal situation.

### **a. Types of cases requiring mediation (with examples)**

Not all cross border family disputes involve the judicial system – many are resolved informally without resorting to judicial means. For example, a Latvian-Italian couple that had settled in Latvia may agree that the Italian wife may return to Italy to live there with the children, arranging for regular contact and visits to the father. Generally, the more amicable the separation or divorce the easier it is to agree on what should happen afterwards. There are also parents who are so upset and overwhelmed by the situation that they may not see themselves in a position to negotiate what they would regard as a fair solution. These are the cases that never reach the courts but may seek out mediation on their own.



Secondly, there are couples that in engage judicial mechanisms and perhaps mediation to settle their disputes. Carrying on the example of the Latvian -Italian couple: the father may insist that the parents maintain joint custody and not trust the mother to support regular contact and visits. The mother on the other hand may want to ensure that the father pays child support, meaning they can negotiate directly through lawyers and/or mediators or seek out the courts with the aim of reaching enforceable decisions, which again must be made legally binding in both or all states involved. The Explanatory Memorandum of Recommendation R (98) 1 of the Council of Europe's Committee of Ministers points to the fact that there are also cases where children are opposed to access or custody. Such cases pose a special emotional strain on all family members involved.

The most escalated cases are those involving child abduction – whether or not the 1980 Hague Convention applies. Here, one parent has acted unilaterally without the consent of the other parent to remove the child or children from their place of habitual residence or retained them in the other country, perhaps unlawfully. While the reasons the taking parent – usually the primary caregiver, i.e. the mother – gives are often understandable from an interpersonal perspective (“I felt trapped”, “I couldn't live there any more after we broke up”, “My qualifications are not recognized in the other country and I have no perspective of finding a good job”, “If I'm going to be a single parent I need my family around to support me”), this behavior causes an immediate and pronounced escalation of the conflict. The taking parent may feel bad but in the end justified at having taken such a drastic measure and may or may not have been aware of the fact that this step can easily bring on both civil and criminal legal measures. The left-behind parent is often hurt and enraged, feels helpless and powerless and cannot believe that their former partner has taken such a step (“How could she have done this to me?”). Both parents are terrified of losing their child or children. In this situation communication between the parents often breaks down completely, making it impossible to find amicable solutions. Both parents may take legal action, attempting to maintain or change the status quo in relation to custody and access rights to their own advantage or commence divorce proceedings. The most pressing form of legal action often initiated is a 1980 Hague Convention case, which however, regulated only the question of return or no return of the child – all other issues are to be settled later. In the process of all

this and in the middle of two different jurisdictions, the parents increasingly lose sight of each other as being jointly responsible for their children's well-being and even of their children's needs. It is difficult to escape from this spiral of conflict. Mediation offers a way out, an opportunity to focus on all the issues at hand and to make decisions that reach far beyond the scope of what the court will decide.

However, mediating such cases poses a severe challenge even to experienced mediators.

It follows that there is a need for preventative counseling and mediation. As a rule, the sooner a case is mediated in the course of a conflict the easier it will be to find a solution. For this reason, it is important that mediators trained in cross-border disputes are also open to the idea of mediating before a conflict has escalated and that counseling and advice centers send clients to specially qualified and trained mediators preventatively. At an early stage of separation or the breakdown of a relationship, mediation can help parents understand each other's perspectives and find a solution that accommodates both the parents' and the child's needs. Such an agreement can resolve what country the parents and child are to live in, lowering the risk of a future parental child abduction (cf. Hague Conference on Private International Law Permanent Bureau 2012: 87).

**b. Who qualifies to train as a cross-border mediator? (requirements, prerequisites)**

Cross-border mediators are often called upon to work with high conflict cases. For this reason, they need to be well-trained and experienced practitioners. They should have had initial legal, psychosocial or educational training and professional experience, be familiar with escalated conflict dynamics and have some kind of personal or professional experience working with couples from varying cultural backgrounds. But practice and training in the EU member states varies widely: there are countries such as the England and Wales and Austria where family mediation is very much established and widespread, in-depth training is available, standards have long been set and legislation is in place, and there are other countries in which family mediation is just beginning to be pioneered, with very little practice and no specialized training whatsoever in this area. Thus, since experienced mediators are not always available, it

may be necessary to pair more experienced with less experienced mediators (cf. Hague Conference on Private International Law Permanent Bureau 2012: 38).

### **c. Selection of co-mediators and consequences for training**

The Wroclaw Declaration on Mediation of Bi-national Disputes over Parents' and Children's Issues from 2007 advocates the mediation of cross-border family conflict by two mediators, a man and a woman, one with a legal and the other with a psychosocial or educational background, one from each of the countries represented by the couple and preferably both speaking both languages involved (<http://www.mikk-ev.de/wp-content/uploads/wroclaw-declaration.pdf>). Following these principals as a guide, it will be necessary to train mediators with all the required backgrounds (women/men, legal/psychosocial backgrounds, different languages and different cultural backgrounds) so you have the right combinations of co-mediator teams when the need arises.

### **d. Overview of training conducted so far**

Although no standard cross-border mediation training has been established to date, this field has seen pioneering activity in recent years.

In 2006 GEMME France, the French Chapter of the European Association of Judges for Mediation, published a practical guide on judicial mediation that mentions issues of mediation training and professional ethics. AIFI, a primarily francophone interdisciplinary NGO with members in Canada and Europe published a Guide to Good Practice in Family Mediation in 2008 which addresses the issue of training and accreditation for international family mediation (see Hague Guide to Good Practice Mediation 2012 p. 37). As of 2012 AMORIFE INTERNATIONAL and IRTS offer a French- and English-language European diploma course in International Family Mediation ([http://www.irts-fc.fr/11\\_actu/z\\_telechargement/programe\\_mme\\_MFI\\_franco\\_anglais.pdf](http://www.irts-fc.fr/11_actu/z_telechargement/programe_mme_MFI_franco_anglais.pdf)). There have been several initiatives in the UK to develop standards for international family mediation.

The three established organizations offering child abduction mediation in a systematic way, Reunite in Britain, the Dutch Child Abduction Center IKO and the German NGO Mediation in

International Conflicts involving Parents and Children/MiKK, have different approaches to mediation and thus to training. All three organizations work with co-mediation.

Reunite has a limited number of mediators and women work in teams as do mediators with a psychosocial background. There is no expectation that the mediators will match the cultural background of the parties or be fluent in their languages. Reunite was a pioneer in this field and its new mediators have mostly been trained on-the-job by working with experienced Reunite mediators. Two Reunite mediators participated in the TIM Training for Trainers in 2012.

The IKO cross-border mediators work in teams with one mediator with a legal and one with a psychosocial background. The mediators were trained in two groups, the first in 2008 and the second in 2010. The training sessions focused on the techniques of cross-border mediation used in different countries, on intercultural relationships, on the voice of the child in mediation and on the role of the Mediation Office. The participants were trained mediators working in the field of child abduction and the trainers were academics who are also practitioners and were chosen on the basis of their skills and availability. IKO's Mediation Office organizes a one-day assessment once a year for the mediators. Of the 18 mediators trained at IKO 17 are still active. Future training will be organized on demand.

MiKK operates a network of 150 specialized mediators who work in over 30 languages according to the principals of the Wroclaw Declaration. Between 2003 and 2012 MiKK conducted seven two-day seminars with a total of around 150 participants. The seminars are open to fully trained and experienced practicing mediators from a variety of professional and cultural backgrounds wishing to gain further knowledge and skills in the field of international family mediation. Participation in this training was a requirement for having oneself place on the list of mediators (<http://www.mikk-ev.de/english/list-of-mediators/>). The trainers were all experienced mediators and trainers in the field off cross-border family mediation. Topics covered in the training include the legal context of cross-border family mediation (1980 Hague Confention and the Brussels II bis Regulation), framework and specifics of mediating child abduction cases, cross-cultural aspects and methodologies for mediating high conflict cases; case studies and role play have a dominant position in the training.

In addition to these seminars, MiKK has conducted a number of training workshops in the context of the five bi-national projects so far active. The Franco-German Mediation Project had a pioneering role in this field and was most active between 2004 and 2006, when three week-long trainings were held for mediators from both countries who developed their skills and mediated together. Important issues during these sessions were legal and cultural aspects of mediation, integrating the voice of the child in the mediation or in some cases the children themselves. The practitioners involved in this project mediated more than 30 cases in bi-national teams of co-mediators and the project was evaluated (see Carl and Alles 2009 and Carl and Walker 2011). About five mediators have been involved in the UK-German project which has not included training aspects. Around 30 mediators and other professionals participated in a German-American training seminar in 2006 and around 60 Polish and German mediators and other professionals participated in five bi-national meetings in Wroclaw and in Berlin between 2007 and 2010. Thirty-two professionals were present at the first meeting (weekend training) of the German-Spanish project in Berlin in 2012.

Finally, MiKK trainers were partially responsible for training the first group of IKO mediators in 2008. They were also invited by the Australian Central Authority to conduct a 4-day specialized training in International Family Mediation with 30 Australian family mediators from across the country in 2012 and together with Reunite will conduct a 2 ½ day training in Japan in early 2013.

The most comprehensive training carried out so far in this field was conducted by the EU Civil Justice funded project *Training in International Family Mediation* (TIM) between 2010 and 2012. Project partners were Child Focus (Belgium), the Catholic University of Leuven (Belgium) and MiKK (Germany); IKO was an associate partner. The study carried out initially by the Catholic University of Leuven on *Family Mediation in International Family Conflicts: The European Context* (Pali and Voet 2012) served as a basis for the development of a 60-hour training concept which was piloted in September and October 2011 in Brussels with 21 mediators from 20 EU member states plus Croatia. In February, March and April 2012 an 80-hour Training for Trainers in International Family Mediation was carried out with 47 participants from 22 Member states plus Croatia and Turkey, again in Brussels. Altogether, 68 mediators and

mediation trainers representing all EU member states except for Cyprus were trained. The course content covered the following topics:

- Families in Europe and effects of child abduction on children
- Language and interpretation in international family mediation
- Cultural aspects of communication and conflicts in international family mediation
- Legal context: the 1980 Hague Convention, the Brussels II bis and national family law
- Legal aspects of mediation: written agreement, memorandum of understanding, mirror order
- Ethical aspects of child abduction cases
- Mediating in child abduction cases with non-Hague Muslim countries
- Models of international family mediation
- Specific tools and methodologies, including:
  - o Co-mediation
  - o Caucus/individual sessions
  - o Online mediation
  - o Cooperation with legal and other professions
  - o The voice of the child in mediation.

Emphasis was put on practical exercises, case studies and role play.

The Training for Trainers also included elements of training and networking with other professionals, addressing issues such as the question of who needs to be trained in order to call attention to cross-border family mediation (e.g. Central Authorities, ministries of justice, lawyers, judges, consular employees, social workers, guardians ad litem) and how we can gain access to these potential supporters. For this reason, most countries were represented by at least two mediators/trainers. An opportunity to network between the two groups was provided and the response to the training was overwhelmingly positive.

MiKK was responsible for developing both training concepts and all of the lead trainers were MiKK mediators/trainers. Guest trainers from the Belgium, the UK, the Netherlands, Spain and Australia conducted individual sessions. The fact that there were three times

as many applicants for each of the trainings than places available shows the intense and growing interest in this field. The ultimate goal of the project was to form an EU-wide network of qualified mediators and mediation trainers working in this field both at home and abroad. The TIM mediators are now in a position to mediate cross-border family conflicts, including child abduction cases as they arise in a number of combinations according to the principles of the Wroclaw Declaration (bi-gender, interdisciplinary, bi-cultural and bi-lingual). Further, they are very enthusiastic and committed to building local networks and continuing to network with each other and newcomers to the field in order to further the cause of international family mediation (see <http://www.crossbordermediator.eu>).

### **3. Content of training**

The official documents dealing with the content of cross-border mediation training display a wide consensus. The Explanatory Memorandum to Recommendation No. R (98) 1 of the Committee of Ministers to member states on family mediation mentions the following topics:

- family law and international private law relating to custody, access and child abduction
- challenges and fears faced by parents seeking to retain joint parental responsibility across borders
- risks of parental child abduction
- varying cultural expectations involved
- the role of the extended family in the child's upbringing.

The Explanatory Memorandum goes on to state that "International mediators will need to work flexibly (using a variety of models, for example shuttle mediation, video conferencing and so on) in order to mediate across distances and will need the knowledge of foreign languages or the competency and training in the appropriate use of interpreters and other experts as deemed necessary in any specific case".

As the Guide to Good Practice (Hague Conference on Private International Law Permanent Bureau 2012: 38-39) points out,

training must impart mediators with the following knowledge and abilities:

- Relevant socio-psychological and legal knowledge
- Recognition of parties' capacity to engage in mediation, identifying difficulties and potential patterns of abuse
- Cross-cultural competence and language skills
- Familiarity with relevant national and international legal instruments
- Ability to draw the parents' attention to the needs of the child, urging them to include the child in the process
- Competence to assist parents in reaching agreements that can be implemented in all relevant legal systems.

In the following subchapters a detailed overview of the necessary training components will be given.

#### **a. Legal framework: national legislation on family, the Hague Convention, Brussels II bis Regulation**

Mediators need at least basic knowledge of the following aspects of national family law:

- joint custody of married parents after separation and divorce
- custody and access regulations for unmarried parents and consequences in the case of separation
- question of whether one party must be declared guilty when a couple divorces
- access to legal aid and to mediation aid for divorcing couples with limited funds
- question of whether or not parental child abduction is a crime

Of course, this information is much more accessible to mediators with a legal background than to psychosocial mediators. This is, again, why they need to work together as co-mediators.

While it is important for mediators to be familiar with the legal aspects of the conflict, it is paramount that parties receive adequate legal counsel to inform them of their rights and duties and the legal consequences of any decisions. Due to the complex legal situation in international family disputes, specialist legal counsels should both support the discussion during mediation and the elaboration of



agreements to ensure their legal applicability in all relevant jurisdictions. The Central Authority or a different public institution may provide specialist legal advice. Mediators should only provide legal information to a very limited degree and refer parties to the relevant experts (Hague Conference on Private International Law Permanent Bureau 2012: 61-62).

It is not possible to effectively mediate child abduction cases without a good understanding of the 1980 Hague Convention. Even many legal practitioners are often not familiar with this convention and mediators sometimes face the problem of working with parties who have inadequate or faulty legal advice – putting them in a difficult situation. In particular, it is important to be aware of the fact that 1980 Hague Convention cases normally deal only with the issue of return or non-return of the child to its habitual country of residence where all further custody and access issues are to be settled.

The 1980 Convention influences the mediation in that:

- it means that the mediation must be carried out at short notice
- it drastically restricts the timeframe of the mediation, often to the space of several days
- it puts the parties (and the mediators) under pressure to achieve results within a relatively short period of time
- it places the initial focus on the question of return or non-return.

For many mediators who are used to doing family mediation over a period of weeks and months it is an extra burden to work under time constraints and under pressure, including the awareness that the mediation bureau and the judge may well be waiting for results. Another dimension is the fact that the mediation is often organized at short notice and not always where the mediators live, meaning that they must be willing and able to travel and spend several days away from home.

The mediation itself is frequently influenced by the question of how the parties see their chances of “winning” the case. Often there is a power imbalance between the parties, e.g. the left-behind parent assuming that he or she will most likely win the case. This affects the dynamics of the mediation and the mediators need to be aware of this and in a position to move quickly from the purely legal aspects of the case to the interpersonal aspects. The left-behind parent does

not always actually want the child to be returned. There are reasons why parents put in Hague applications, e.g.

- The left-behind parent may want his wife / her husband back.
- The left-behind parent distrusts the legal system in the country to which the child has been abducted and is afraid of losing contact to the child.
- A father who feels angry at his wife for having taken the child without his consent may want to get back at her or even avenge himself by bringing a case.
- Since communication between the parents in such situations often breaks down, the left-behind parent may see the Hague case as an opportunity to force the taking parent to re-establish communication.

A key factor in mediating these cases is the question as to whether the child or children were abducted from an on-going marriage or relationship or from a situation in which the parents were already separated or even divorced and living separately. If the relationship was still intact – at least from the perspective of the left-behind parent – the mediation will more than likely be dealing strongly with relationship issues.

The 1996 Convention is likely to play an ever more significant role in the future and mediators will need to be familiar with it.

Understanding the Brussels II bis Regulation and putting that knowledge into practice is difficult for legal practitioners, to say nothing of mediators without a legal background. Again, the Guide to Good Practice points to the fact that mediators must be aware of the complex legal framework, including the aspect of enforceability in different national jurisdictions (p.91).

#### **b. Psychosocial aspects conflict dynamics in bi-national families, the effects of child abduction on children, benefits of mediation, ethical aspects of mediation**

Regarding the psychosocial aspects of cross-border family mediation it is important to impart information and facilitate exchange over the question of conflict dynamics in bi-national families, e.g. the fact that when couples separate topics such as distance to their country of origin, availability and contact to family members on a regular basis and job opportunities suddenly become an issue and sometimes

even threatening (which is often not understood by the former partner). When circumstances change it can become necessary for the mother to return to work or she may need more help with child care on a daily basis and more moral support from family and friends than she did when she was married. Mediators must also be mentally prepared to work with a parent who has realized that the other parent is determined to have the child returned – even if the abducting parent stays where he or she is. The decision as to whether or not to follow the child is an extremely difficult one. In some cases one or both of the parents have new partners and may even be expecting a new baby. This also significantly affects parties' willingness to negotiate and the dynamics of the mediation.

Another key issue is that of the effects of child abduction on children. Mediators should be aware of the parents' responsibility to find amicable solutions allowing their children to have significant contact with both of them – and know how to refocus the parents' attention on this issue when they get caught up in their own conflict dynamics. Also, mediators need to know what the effects of losing contact to one parent for a significant period of time can be. In some child abduction cases there is the risk that one parent will later get sole custody of the child and the other will only have very little contact, either because there is a danger of re-abduction and the non-custodial parent only has supervised contact or because the child is returned to its habitual country of residence where pending criminal charges against the abducting parent prevent him or her from traveling to that country. For the mediation process itself it is essential to make it clear to the parents that they are both very important to their children, even if parents and children do not live in the same country and do not see each other on a daily basis.

Concerning the benefits of mediation it is important to make it clear that the parents have a one-time opportunity to make their own decisions rather than leaving this up to the court. This must be done without putting them under pressure, since it is their decision whether or not to reach an agreement or a partial agreement in mediation. They should realize that the judge will only make a decision based on the legal situation and that mediation allows them to consider the situation as a whole, especially the needs of the child or children. Mediators must learn to accept a decision by the parties to put their destiny in the hands of the judge rather than making their own decisions as to their future and that of their children.

Ethical aspects of mediation that should be dealt with in the training are questions such as what to do if one party reveals vital information that would influence the mediation process to the mediators in an individual session but does not want that information revealed to the other party. Other issues might be how to deal with power imbalance between the parties in the mediation and what to do if one party threatens the other or if one party has received inadequate legal advice. These are all situations that can and do arise in child abduction mediations and even if there are not set answers mediators should be prepared for them.

**c. Cultural aspects of conflict resolution and mediation, changing face of families in Europe, role of language, working with interpreters**

One of the most challenging aspects of mediating cross-border family disputes is the cross-cultural dimension. When bi-national couples meet and fall in love they are often fascinated by the fact that their new partner comes from a different cultural and national background – the differences are interesting and enriching. When the relationship breaks down, however, these same differences may come to feel threatening and the parties may fall back into familiar patterns of thought and behavior. Accordingly, mediators must be aware of cultural and religious issues that may affect the situation (cf. Hague Conference on Private International Law Permanent Bureau 2012: 62).

Some of the aspects that may play a role in the mediation are:

- Parental roles, e.g. importance of the mother and father to the child at different ages, attitudes towards divorce and single parenthood
- The role of the extended family, e.g. relationship between nuclear and extended family, role of the grandparents and other relatives in child-raising, importance of holidays and (religious) celebrations
- Upbringing and education, e.g. practices and attitudes in regard to childcare, giving children and teenagers freedom and liberties
- Dealing with family conflicts, e.g. direct (open) or indirect patterns of expressing feelings and of conflict resolution.

Another important issue cross-border mediators need to be prepared for is the role of language and the possibility of working with interpreters. Usually the couple has had a common language but as this may be the mother tongue of one party and not the other the non-mother tongue party may feel at a disadvantage and wish to speak his or her own language in the mediation. Also, when strong feelings come up parties tend to speak their mother tongue. The mediators should be aware of the language issue and deal with it flexibly, e.g. if one party says something that neither their partner nor one of the mediators understands the mediator who also speaks that language can interpret. If there is a general language problem and the parties wish to speak different languages (as perhaps there has been no contact between them for quite some time) a professional interpreter is needed. Having an extra person in the mediation inevitably changes the dynamics of the situation. The mediators must take the time to prepare the interpreter ahead of time and insure that he or she does not take on an independent role, e.g. by becoming an advocate of the party being interpreted. Another effect, of course, is that having an interpreter slows down the mediation process considerably unless the interpretation is done simultaneously. Finally, the mediation agreement may need to be formulated in both languages. This is usually done by the mediators.

#### **d. The mediation process**

The mediation process in cross-border family disputes often differs from the process in disputes involving only one jurisdiction. As a rule, the mediators are in closer contact with the parties before the mediation begins than usual and there is a very intense preparation phase. The parties must agree to the conditions of the mediation before it begins and are sent an Agreement to Mediate (<http://www.mikk-ev.de/english/information/agreement-to-mediate/>) ahead of time. The mediators must be aware of their special role in these cases, be flexible in working with different styles and know how to bring the interests and needs of the child into the mediation. It is also essential that they are in a position to formulate a mediation agreement according to the specific demands of the case and know what steps the parties, their legal counsel and the judge must undertake to make the agreement or memorandum of understanding legally binding in both jurisdictions, i.e. via a mirror order.

#### i. Role of the mediator, co-mediation

In practice, co-mediation has proven to be the most effective method of mediating cross-border family disputes. Especially in highly escalated cases, two mediators working together can defuse and help to solve conflicts more efficiently. This is particularly effective if a bi-cultural bilingual model of mediation is used. This includes mediators from each of the parties' cultural and linguistic backgrounds and helps the mediators understand the individual parties' perspectives, values and desires. In such a team, mediators can facilitate discussion across cultural boundaries and help the parties find a solution they can both agree to. While this model can help the parties feel understood in the mediation, the mediators must make clear that they represent neither of the parties and draw attention to their impartiality.

Many mediators have not yet worked with co-mediation at all, much less with a co-mediator from a different country with a different professional background and training. This means that future cross-border family mediators must be trained how to work together. Relevant issues here are:

- Background, training and previous experience: how do we each mediate?
- Use of methodologies, techniques and language
- Awareness of and experience with the parties' cultural backgrounds
- How to approach the parties before the mediation, e.g. who speaks with which parent / with the lawyers? Who writes which emails in which language?
- Communication with each other during the mediation.

Furthermore, it is essential that seminar participants gain practice in co-mediation in role play. When they later mediate real cases they may well be working with a co-mediator they have never met or worked with before, so they will need to know what questions to discuss with each other ahead of time, gain a common understanding of the case and how they want to want to approach it and decide how to proceed if they disagree on something.

#### ii. Models and styles of cross-border family mediation

Cross-border mediators should be aware of the different models and styles of mediating these specialized disputes. Either they will be

working within a set system, as with Reunite, IKO or MiKK, or they must decide themselves how they want to approach the mediation. Often the parameters of the mediation are determined by outside circumstances, i.e. the fact that one parent will only be visiting for a limited period of time, a court hearing that has been scheduled – perhaps to allow the mediation to take place before a decision is made – or the fact that the available finances limit the mediation to a certain number of hours. Mediators will need to be flexible enough to deal with such limiting circumstances.

Another issue is the fact that the usual mediation phases are often put in a different order, especially in child abduction cases. If there is time pressure and a court hearing pending, the parties will need to explore their options much sooner in the mediation process than this is usually done. Examining the needs and interests of the parties and their children is often done in relation to the options. In high conflict cases the mediators will need to gather enough information about the past to be in a position to explore the conflict, but generally should avoid spending a significant amount of time delving into the past since this inevitably leads to bringing up old conflicts which may have been smoldering for years and will most likely not be resolved in the mediation. Mediators need to practice effective time management when there is limited time available.

### iii. Tools and methodologies for mediating high conflict cases

The most important tools for mediating high conflict cases are individual sessions, shuttle mediation and reflecting team. As individual sessions and shuttle mediation are not common in family mediation practice in Europe, future cross-border mediators will need to familiarize themselves with the advantages and pitfalls and have some experience in role play with when and how to orchestrate these methodologies in a mediation. Also, they must contemplate how to deal with the issue of confidentiality in relation to individual sessions. One way to relate what has been discussed in individual sessions is “reflecting team”. This is a method in which the mediators discuss among themselves what is going on between the parties with these present. It is an excellent way to switch the focus of a mediation from the subject matter/issues (which may be highly conflictual) to the level of conflict dynamics. Reflecting team can be very useful but it is important to employ it correctly, meaning this should be included in the training if the trainers practice this technique themselves.

Another tool that is becoming increasingly important in cross-border cases is online mediation. This is a very practical tool to use when parents are far apart and unable to meet personally or to continue a mediation that began face-to-face but could not be concluded before one parent had to leave.

iv. Bringing the voice of the child into the mediation

Since mediation in cross-border cases ultimately has the child's welfare in mind, mediators should urge parents to focus on their child's needs, stressing the importance to inform and consult their child throughout the mediation process (cf. Hague Conference on Private International Law Permanent Bureau 2012: 61).

This is no easy task for the mediators. While parents agree that they want what is best for their child they usually have radically different views as to what that is – and these views happen to correspond with what that parent wants. Future cross-border mediators must learn when and how to bring the views of the child into the mediation. They may decide to employ child-focused as opposed to child-inclusive mediation. Both are based on the child's need for the parents to solve their on-going conflict and need for security and a close relationship to both parents. Child-focused mediation uses different techniques to gain insight into what the child is like and what the parents think the child wants. Child-inclusive mediation actually brings the child into the mediation process, with or without the parents present depending on the case. Here it is essential that the child is heard without giving him or her the responsibility of making decisions. Child-inclusive mediation can only be done if both parents and the child agree. It is important that hearing the child does not put him or her under additional pressure. Children may well also be heard by the judge and/or a guardian ad litem.

**e. Interdisciplinary cooperation**

Because of the nature of cross-border family disputes, especially those involving the judicial system in one way or another, it is absolutely essential that mediators cooperate across disciplinary borders. In fact, there is often much more contact in these cases than in regular mediation cases. Before the mediation begins the mediators may be in touch with the Central Authority – they may even be asked by the Central Authority to mediate the conflict. Either the mediation bureau or the mediators must explain to the parties



that they may well need to be in contact with their lawyers during the mediation so that the lawyers can check over a proposed agreement before it is finalized. In child abduction cases the mediators are sometimes in email contact with the lawyers before the mediation commences or speak to them over the phone. Indeed, it must be clear that both parties' lawyers support the mediation and if there is no mediation bureau to clarify this the mediators themselves will have to do it. The court must be made aware of the fact that the mediation is taking place and suspend proceedings during the mediation. Also, the court will be informed as to whether or not an agreement has been reached and if there is an agreement and the parties consent the judge will receive a copy of it – usually via the lawyers. Finally, the judge's support may be needed to render the mediation agreement legally binding in both (all) jurisdictions. (see Kiesewetter 2011)

#### **4. Methodology of training**

Cross-border mediators need not only knowledge but far-reaching skills which can only be acquired by interactive, participatory learning. As too much theory would overwhelm participants, the training must offer a balanced mix of theory and practice. Only training involving the principle of experiential learning will allow mediators to build on their previous experience and prepare them adequately for working with high conflict cases. Working with interdisciplinary groups of mediators from both legal and psychosocial backgrounds means that the participants will be able to learn not only from the trainers but also from each other. This does, however, present the challenge of teaching legal content in such a way as not to overwhelm psychosocial participants and psychosocial content in such a way as not to overwhelm legal mediators. Since the knowledge imparted in both cases is so specialized there is little risk that these groups will become bored.

In regard to methodology the following elements are absolutely essential:

- theoretical input
- work in small groups
- practical exercises

- case studies and
- role play.

The theoretical input must be presented in “digestible” increments, e.g. using visualization and avoiding long presentations. Small groups can work together on varying tasks in different combinations, the main value being that the participants can take a much more active role than in a large group. Sometimes it will be necessary to report back to the larger group and at other times it will suffice to discuss new insights gained in the group. Practical exercises are extremely useful in putting what one has learned into immediate practice, thus ensuring it will not be forgotten. Case studies afford a realistic view of the intricacies and challenges that will be facing the future cross-border mediators. And finally, role play is an essential element in learning how to mediate international family conflicts. It is important that the role play takes place in a trusting atmosphere where participants feel free to make and learn from their mistakes and not under undue pressure to be perfect at something they are only just learning. All participants should have the opportunity to mediate in at least one role play, thus enabling them to practice co-mediation. Playing the parties (mother or father) will give them a deeper understanding of what the parents go through emotionally during the mediation process and how specific methodologies such as active listening, reframing, individual sessions and reflecting team affect the parties.

Conducting training with mediators from different countries and cultural backgrounds may present a challenge as not all participants are equally fluent in the language of the training. This makes the training harder to follow for some participants. However, as the TIM training showed, this experience proved to be a great enrichment for the participants and the trainers themselves since the groups represented such a wide range of professional backgrounds, cultures and languages – thus anticipating the situation they would face when mediating. Even the fact that some mediators and trainers were much more experienced than others did not turn out to be an insurmountable problem.

An essential methodological element of any mediation training and especially of cross-border training involves developing a trusting and affirmative relationship between the participants and the group and among the group members. This can be done by employing

elements of introduction and sharing and by the open and curious attitude of the trainers.

## **5. Trainers**

The Hague Guide to Good Practice makes no recommendations on the topic of trainer qualification but it is important that the trainers themselves are practicing cross-border mediators. This makes them credible for the participants as they can integrate their own experience – positive as well as negative – into the training. It also gives the trainers more confidence. The only exception to this rule should be when training programs are just getting started. If no mediators are available with previous experience it is acceptable to use trainers who are pioneering this field in their country.

A further requirement is that the trainers need to be experienced trainers accustomed to working together in interdisciplinary cross-cultural teams, e.g. along the lines of the Wroclaw Declaration. Trainers need to be dedicated to the process of establishing cross-border mediation in its own right, open to the input of participants who have more experience than they do in certain areas (willing to learn from them) and flexible in their methodology, i.e. able to recognize when an exercise or role play is not going well and in a position to react accordingly. Just as the parties are the experts in their own conflict and it is the mediators' job to help them improve communication and seek amicable solutions, trainers should act as experts who are open to learning themselves, both on a content and on a methodological-didactical level. Last but not least it is important that trainers are willing to play a role beyond the initial training process. They should be available to provide participants with on-going support and supervision after the conclusion of the initial training.

## **6. On-going networking, training and support for cross-border mediators**

Training mediators is only the first step in qualifying and preparing them for working in this field. Local, regional and European networks need to be set up, ensuring that the trained mediators will have

access to cases and that when they have cases supervision and on-going follow-up support and training will be available. This is important to keep participants motivated, especially if they do not yet have any cases. Also, it is essential to create organizations such as Reunite, IKO and MiKK that are in a position to advise parents and professionals involved in these cases, screen cases for mediation, manage the cases, look for appropriate mediators and do evaluation and follow-up.

One of the biggest challenges to organizing and maintaining on-going networks and training programs is the lack of funds for such endeavors. Indeed, setting up a network of qualified mediators requires dedication and commitment and is again a process that will take years. This task cannot be achieved without appropriate funding.

## **7. Conclusion**

Cross-border family mediation – including child abduction cases – is usually so emotionally charged and legally complicated that even experienced mediators need special training in this area. This chapter has shown why in-depth training is so important to enable mediators to effectively face the multiple challenges of working with these very special cases. Participants must receive the opportunity to learn the appropriate content from experienced mediators and mediation trainers via varied appropriate methodologies in a conducive atmosphere. Finally, mediators active in this field need on-going training and support as they venture out into practicing mediation in this relatively new area.

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## CHAPTER 3

### SPECIFIC PROCEDURAL ASPECTS CONCERNING CROSS-BORDER MEDIATION

Claudiu Ignat

#### 1. Specific procedural aspects

Cross-border mediation as an alternative conflict resolution method with foreign elements, becomes possible and efficient when international bylaws are properly and duly fulfilled by an internal legislation that would allow its performance under the best conditions, especially that in this context there are much more outlined factors, such as the language difference, cultural differences, distance, factors that may anytime turn into insurmountable communication barriers. The absolutely necessary prerequisites for being able to talk about a cross-border mediation are the creation of a legislative framework for carrying out this procedure, the creation of procedural standards bilaterally and multilaterally accepted by the states.

##### a. Legislative alignment

The judicial systems directly involved or by means of their citizens in the conflict subject to mediation must provide mediation as a means of resolution for internal and international conflicts. This may be accomplished either by the adoption of specific, own laws, or by the ratification, adoption, acceptance or accession to some multilateral treaties<sup>1</sup>, agreements or joint projects at a governmental level.

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<sup>1</sup> Law no. 590/2003 on treaties, published in the Official Journal, Part I no. 23 on 12/04/2004, Art 1(1)

f) ratification refers to the means of expressing the consent of becoming a part to the treaty and which was signed by the Romanian side, by the adoption of a ratification law by the Parliament or, under the terms of law, by Government Emergency Ordinance;

The states that are part of international treaties or agreement in the family law or civil law matters see themselves compelled to use mediation or other alternative methods in conflicts with a certain object, such as divorce, custody of child, cases of international abduction, etc.

The Hague Convention of 1996, also referred to as the Hague Convention on Protection of Children<sup>2</sup>, which Romania adhered to in 1992, *provides in art. 31 that Central Authorities of the Contracting States shall take all appropriate steps to 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 Hague Convention applies.*

Central Authorities play an essential part in order to encourage the amicable settlement of family conflicts by promoting easy ways to access cross-border mediation and other alternative conflict resolution methods, to create the judicial bylaws based on which the authorities' obligation is outlined, in order to get involved and play an active part in fulfilling this goal.

This is why central authorities shall act quickly to the child's interest, either on the grounds of the convention itself, or the national laws and bi- or multilateral conventions that the state signed and assumed.

## **b. Models of cross-border mediation**

By means of the various pilot projects of cross-border mediation, especially in the field of child protection, certain models of mediation have been drawn up, such as:

- mediation carried out by a single mediator, who attempts to settle the conflict directly, with all parties present;

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g) approval refers to the means of expressing the consent of becoming a part to the treaty and which was signed by the Romanian side, by the adoption of a decision approved by the Government;

h) accession refers to the means of expressing the consent of becoming a part to a multilateral treaty that was not signed by the Romanian side;

i) acceptance refers to the means of expressing the consent of becoming a part to a multilateral treaty that was not signed by the Romanian side and that expressly provides this method;

<sup>2</sup> The Hague Convention of 19<sup>th</sup> October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children.

- bilateral co-mediation carried out by a mediator in each state in the same location with all parties;
- parallel co-mediation held by each mediator in his/her own state with only one party; the two co-mediators are to communicate to one another, at a later time, through internet/teleconference.

A particularity of mediations with children that can apply to any of these models, was to include the child as a participant for the hearing of the latter during this mediation.

### **c. Mediation organized by one or more states.**

When mediation is organized only by one of the states, the mediator shall see that mediation is either directly on the territory of his/her own state in the presence of all parties, or he/she shall held separate sessions with the parties, by travelling also in the other state, and when the parties wish this, the mediator shall choose an indirect mediation via internet or videoconference. The last variant of indirect mediation shall be influenced both by the parties' will, but it will sometimes be imposed by geographic distance (which may determine significant material expense and a lot of time for the parties travelling to meetings with the mediator), or by the weather conditions at a certain time (snowfalls, hurricanes or other natural phenomena that may prevent the parties from traveling even for a larger period of time), or by drawbacks that, although are independent of the parties' will, may endanger the agreements obtained in the previous sessions.

Other times, mediation is organized by both states, so that the prototype of bi- or multilateral mediation is accomplished, in which the mediators of all the states work together to solve the case. This is the way the Franco-German concept of bilateral mediation was designed, whose success was proven in time; the premise of this project was the involvement of mediators in both states.

In February 2003, German Minister of Justice Brigitte Zypries and her French counterpart Dominique Perben signed the Franco-German bilateral conflict mediation agreement on conflicts involving parents and children. The mediators involved in the project took part in special courses for such mediation. The courses focused on the legislation of the other state, but also on its customs and culture. In the three years of the project financed by the two states, more than 30 conflicts were settled, concerning parental authority in Franco-German families. The project said that one of the potentials of international mediation resides



in the fact that the law rules applicable in the field go to a secondary level and the only rules that make the basis of the agreement between the parties are the interests and expectations of each party” and also of great advantage is the fact that mediation is an “alternative method by which one can get rid of the barrier put by the legislations of the two countries”.

Based on the experience of this project in 2009, at the 7th European Conference on family law, the European Council laid the basis of a parliamentary project on international mediation in family relationships. In the same time was created a summary of the impact of Franco-German bilateral mediation. In the matter of international abduction of children involved in family conflicts, the Hague Convention in 1980 was adopted, which regulated the mediation procedure as an amicable resolution method with positive effects on the long run with respect to the parents’ relationship with their children, but also the reduction of the stress that a divorce usually puts on a child’s psychic.

This Convention, ratified by 87 states, lays down the operation rules of an international civil judicial mechanism, aimed at returning children up to 16 years old, abducted children or children retained in another member state of the Convention to the state of residence.

#### **d. Choosing the mediator**

International mediators must be good specialists in mediation, to have good knowledge of cultural diversity, they must be flexible, willing to cooperate and excellent communicators in the other language. In the Franco-German project, the main goals was to adopt co-mediation as a procedure, carried out in parallel by a team of mediator: a French mediator and a German one, preferably chosen among the mediators with different professional backgrounds, thus trying to give each party trust and the guarantee of an unbiased approach and, at the same time, a dualist approach of the conflict.

The parties involved in a conflict are usually distrustful of the persons coming from the other state; there often is this presumption that each mediator shall have a biased attitude towards the citizen in his/her state. Often, each participant joins mediation with a sum of negative experience related to formalities, bureaucracy and incomprehensible procedures, which would make them reserved towards any procedure, be it mediation.

This is why the two co-mediators who try to work together for the same goal may represent a “model of constructive cooperation” to the parties.

Mediators must be specialized in this type of mediation, they must be accustomed to the legislation and culture of the other party, they must know the rights they are entitled to and the obligations held by each party in their own states.

In the field of child protection, bilateral projects entered into by Germany and France and later on with Spain, Poland, the United States of America, provided that this co-mediation is made by a mediator man on one side and by a mediator woman on the other side, one with a legal training, and the other with a training in education or psychology.<sup>3</sup>

Following a study on international mediations made with the application of the provisions of the Hague Convention of 25<sup>th</sup> October 1980 on the civil aspects of international child abduction, it was noticed that out of the 18 successful mediations, only two of them were mediated by a mixed team of a man and a woman; in all the other mediations, communication was facilitated by women mediators.<sup>4</sup>

#### **e. Language used in cross-border mediation**

One of the essential qualities of the mediator involved in cross-border mediation is the thorough knowledge of the language of the other state. Especially in family law, there is an extremely high emotional charge, and the parents’ needs and interests may be better and more freely expressed in their mother tongue, without linguistic constraints.

This is why mediators must easily manage themselves in both languages; they must lead the mediation in this way, since the parties’ understanding alone is not enough.

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<sup>3</sup> The international mediator must:

- be specialized in the type of mediation he/she wishes to make on a bilateral level;
- have a continuous and sustained training-some opinions claim that it requires at least 1-year course, as the basic course is not enough;
- have language skills in at least 2 foreign languages; - make proof of a broad experience;
- have a good understanding of the history, culture and religion of the other state.

<sup>4</sup> Buck, Trevor: An evaluation of the long-term effectiveness of mediation in case of international parental child abduction. June 2012, Reunite International Child Abduction Center page 80.

#### **f. The mediation contract**

The contract between the mediator and mediated parties is both a guarantee and a proof that the parties are well informed with respect to the terms and conditions of this procedure.

The terms of the mediation contract must be clear and provide all the information required about the mediation process, including detailed information about possible costs.

Right before the start of the mediation, the parties to mediation must manifest their willingly consent, by a written agreement, within the contract between the mediator and the parties, if there are no other normative provisions in one of the states involved.

The contract should explain the mediator's role as a neutral and unbiased third-party and outline the fact that the mediator only assists the communication between the parties and that he/she do not represent either party. This final provision is extremely important in case the mediation is to be carried out, in a cross-border family conflict, as a bilateral, bilingual co-mediation, because the parties tend to feel a closer connection to the tie speaking the same language and with the same cultural principles.

The mediation contract drafted during the mediation of an international family conflict should expressly provide that the mediator cannot and will not provide judicial counseling on the application of the agreement between the parties in different judicial systems relevant in the case, and also that he/she cannot provide information or advice related to this aspect.

This is why it is important to cooperate with the legally specialized representatives of the parties or sometimes with the parties' appealing to independent sources of judicial counseling.

The confidentiality of the mediation process is not only an essential principle, but this condition must be specified and outlined in the mediation contract.

In addition, the contract may also include a clause whereby the parties undertake not to summon the mediator as a witness, but also references to the methods used, to the application area of mediation, to possible costs that this procedure may entail.<sup>5</sup>

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<sup>5</sup> Mediation-Guide to Good Practice of the Hague Convention of 25th October 1980 on the civil aspects of international child abduction.

If this information is not included in the provisions of the contract, it should be notified to the parties by other means such as flyers, communications submitted to parties or displayed on the website of the mediator or of the central authority, in order to be acknowledged by the parties before the start of the mediation.

## **2. Access to cross-border mediation**

Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters provides that its provisions "should apply to processes whereby two or more parties to a cross-border dispute attempt by themselves, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator. It should apply in civil and commercial matters", but non to the rights on which the parties are not free to decide.

### *Subjective condition*

Access to cross-border mediation, according to this directive is first of all conditioned by the capacity of the parties. Thus, the possibility to appeal to this procedure pertains to anyone who domiciles or resides in a member state of the European Union (except for Denmark), who takes part in a cross-border conflict whose object is subject to the directive.<sup>6</sup>

### *Objective conditions*

One of the conditions based on which access may be granted to cross-border mediation is that the member states involved must have adopted certain normative acts compliant with the provisions of the Directive, by creating the legal framework for the performance of this procedure.

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<sup>6</sup> Article 2 in Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters provides certain aspects of mediation in civil and commercial matters "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;
- d. an invitation is made to the parties".

The object of dispute must fall under the cases that, according to national or international bylaws, may be settled by the alternative mediation method, without prejudice to the public policy or accepted principles of morality.

Although 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters speaks about parties as natural persons, having the domicile or residence as an identification attribute, cross-border mediation, especially in commercial matters, may also have legal persons of private law, when the signatory states of this bi- or multilateral agreement wish it.

Access to this procedure is not restricted by the existence of requests in the contentious proceedings.

The member states of the Hague Convention in 1980 shall establish a central authority that would be able to provide information about the costs and services of international family mediation in child abduction or shall delegate this duty to a central authority that would represent a contact point for all those who wish to use this procedure.

The first step in facilitating access to this type of mediation is the very provision of information related to the international mediation services on the grounds of the judicial bylaws specific to each state involved.

The commission established especially to apply the Hague Convention in 1980 on international child abduction and the Hague Convention in 1996 on Protection of Children, at the 6<sup>th</sup> meeting, recommended that additional works be carried out, in order to promote coherence in the interpretation and application of article 13 (1) b) including, but not limited to the accusations of domestic and family violence.

This Commission recommended the General Affairs and Politics Council to authorize the establishment of a workgroup comprised of judges, central authorities and trans-disciplinary experts for the elaboration of a Guide to Good Practice concerning the interpretation and application of article 13 (1) b), aimed at providing guidance to judicial authorities, by taking into account the special conclusions and recommendations in the past.<sup>7</sup>

The workgroup established this way settled certain principles for the creation of mediation structures, requiring the states that wish to involved in the process of cross-border family mediations and

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<sup>7</sup> Guide to Good Practice of the Hague Convention of 25<sup>th</sup> October 1980 on international child abduction, item 321.

implicitly, in the application of these principles, to establish a central contact point for all those interested, where anyone can find out information about the cross-border mediation services from one country or another, the costs that these services entail, the list of specialized mediators in international mediation, but also about certain important aspects related to the way that a mediation agreement, once obtained, may become binding to the parties, and how we can apply this mediation agreement.

Information should be provided by a state in both its official language and one of the two official languages of the European Union, namely English and French, and the established contact data (the name of the authority in charge with information, address, telephone number, email address, but also the name of the person responsible), shall have to be communicated to the Permanent Bureau of the Hague Conference, as further proof of transparency and accessibility.

Another information-related condition is the expedience with which the responsible authority should answer to information requests.

The drafted principles proved their relevance in time, in cases of cross-border mediation, be it compliant with the Hague Convention of 25/10/1980 on international child abduction and not only.

In this matter of international child abductions, given the emotional and psychological fragility of the parties, it is preferable that the contact and information point established by the states signatory to the Hague Convention in 1980 be at the state central authority itself, and in case the briefing shall be made by an independent body, cooperation and connection between those two should be very close, in order to ensure a very fast and relevant briefing and processing of the request to return the child in cases of international abduction.

The party shall be informed on mediation, the procedures of the Hague Convention of 25<sup>th</sup> October 1980 on the civil aspects of international child abduction and on the services in this matter. The responsible authority shall also try to approach the other party in order to convince it to join mediation and thus to encourage an amicable resolution of the conflict, followed, in a case of international child abduction, by child's voluntary return, as soon as possible.

The involvement of the states was different, as there were countries that, wishing to implement this type of mediation, promoted international mediation, providing themselves mediation services or employing such services from another provider.

### 3. Child's and third-parties 'participation in mediation

A special application area of cross-border mediation is that of conflicts related to family law, where the existence of underage children may represent the most important prerequisite for the parents to maintain, even after separation, a civilized and cooperative relationship in the education and raising of their children. Initially, in the Franco-German pilot project of cross-border mediation, direct involvement of children was not provided as part of the resolution procedure for family law conflicts related to children.

Hearing the children within the mediation procedure is usually left to the mediator, in respect to each case, by his/her experience and the parents' wishes.

Practice proved the necessity to discuss delicate matters in advance with the parents, of listening to and taking child's needs into account. Once the parents are aware of these needs, they will also have to take responsibility for the decisions they made.

In 2003, the European Council laid down<sup>8</sup> in art. 55 (1) e) of Regulation (EC) no. 2201/2003 concerning cooperation in matters specific to parental responsibility<sup>9</sup> that the central authorities, upon request of another central authority of another member state or the

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<sup>8</sup> Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

<sup>9</sup> Regulation (EC) no. 2201/2003 Cooperation on cases specific to parental responsibility Art. 55 The central authorities shall, upon request from a central authority of another Member State or 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:

(a) collect and exchange information:

(i) on the situation of the child;

(ii) on any procedures under way; or

(iii) on decisions taken concerning the child;

(b) provide information and assistance to holders of parental responsibility seeking the recognition and enforcement of decisions on their territory, in particular concerning rights of access and the return of the child;

(c) facilitate communications between courts, in particular for the application of Article 11(6) and (7) and Article 15;

(d) provide such information and assistance as is needed by courts to apply Article 56; and;

(e) facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end.

holder of parental responsibility facilitate both an agreement by mediation or by other means and cross-border cooperation to this end.

According to the provisions of Regulation (EC) no. 2201/2003, the hearing of the child plays an important role. A child's participation in the mediation or other ADR method is generally perceived and applied differently, from one state to another.

During the hearing of the child, the mediator must focus on the protection of the child from the effects of the conflict and to make sure he/she will not feel in any way the responsibility of the decisions made by the parents, that he/she will not feel overwhelmed by the existing situation. The hearing of the child will be carried out when this action is deemed as fit in connection to the child's age and his/her degree of maturity.

Sometimes the hearing may be carried out by a psychologist or even by the mediator. This is why, in bilateral projects on mediation in matters related to child custody, it was deemed as efficient and necessary to train one of the mediators in psycho-pedagogy. The practice of psychologists trained in the hearing of children within mediation, certain types of questions asked to children were outlined:

- Questions to establish if and to what extent the child understands the reasons for which he/she is heard;
- Questions about the child and his/her current life able to create relationship of trust with the mediator;
- Questions concerning the way that the child sees or wants to change the current situation and especially what he/she would change;
- The child will also be asked if he wishes that the mediator be able to pass on the hearing to the parents and if he/she agrees to it.

The sine qua-non condition for the hearing of a child within the mediation procedure is that the respective child should wish to be heard, and that his/her parents accept this form of involvement. This hearing is also useful to the mediator who, once he/she is in the middle of different interpretations and opinions of the parents, must clarify the real position of the child, by helping the parents find options that may decrease the magnitude of the conflict.

But not only hearing is important but, sometimes, the participation of a child is enough to help relieve the atmosphere and overcoming certain barriers and positions that the parents stubbornly sustain. In such a



case concerning the return to Germany of a child born in the United States of America, the mediators found it fit to first prepare the parties in view of a meeting between the child and the father. Despite the fact that they did not speak the same language (the 2 and a half year old child only spoke German, while the father only spoke English), the way that they manage to interact determined both the change of mother's attitude, who became more open to negotiations, and confirmed the redeeming idea of the mediators, who tried to go beyond the initial blockage and managed to make the parties cooperate.<sup>10</sup>

The purpose of involving a child in an international family mediation may be to outline the best needs and wishes of the child, of making the parents know them, to take them into account when they accept a solution related to the child or not. Sometimes, the practice in mediations concerning international abductions showed that direct involvement of a child either may be difficult, or it implies certain risks; for this reason, child's representation is advised.

International documents grant states even much more freedom in choosing themselves the procedural means and legislative channels by which the child may be involved or represented in both judicial proceedings and alternative procedures.

The Romanian judicial system gives the judge in family disputes the possibility to hear the children directly. The child may be heard in a normal court session or alone in the council chamber or in the presence of an assistant worker. The hearing of the child by the magistrate is carried out with the observance of the general principle of the child's best interest<sup>11</sup>, but also that of the magistrate's specialization, differentiated hearing, and prior training of the magistrate in view of interrelationship with the child<sup>12</sup>.

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<sup>10</sup> Paul, Christoph C./Walker, Jamie: Family Mediation in International Child Custody Conflicts: The Role of the Consulting Attorneys; American Journal of Family Law 1/2008 page 45; Mediation bei Internationalen Kindschaftskonflikten e.V., www.mikk-ev.de

<sup>11</sup> Law 272/2004 on protection and promotion of child's rights, published in the Official Journal, Part I no. 557 on 23<sup>rd</sup> June 2004, art. 2 (3) "The principle of child's best interest shall prevail in all proceedings and decisions related to children, as undertaken by the public authorities and authorized private bodies, as well as the cases settled by the courts of law".

<sup>12</sup> Coordonatori Mona-Maria Pivniceru, Cătălin Luca Ghid de audiere a copilului în proceduri judiciare, Ed. Hamangiu București 2009 pp. 56-60.

When judges are reserved of the child's involvement or direct hearing within the judicial proceedings, international instruments allow the hearing of the child by a psychologist or social worker, who will pass on to the court a report concerning the result of hearing.

A challenge in international child abduction is also the cases of abduction of children coming from mixed families, when the child is abducted to an Arab state, when the return attempts are blocked by the authorities' refusal to cooperate and the innate reserve arising from cultural and religious differences. This is why the conclusion of bilateral agreements with these states, whereby encouraging the resolution of such conflicts by means of cross-border mediation, would represent, to the parents and underage children involved, a proof of the support that the foreign authorities should provide them.

The presence of translators within the mediation as third-parties raises the problem of parents' trust in the way and accuracy of translation but also of the observance by the translators of the confidentiality condition, which is a matter of the mediation process.

During the mediation procedure, third-parties, family members, friends or proxies of authorized institution may appear, and whose opinion may be requested by the mediator or the parties (e.g.: representatives of the supervisory body, of the school where the child goes, of the hospital unit where he/she is treated), in order to establish as clearly as possible, the way in which the interests and needs of the child/parents may be satisfied as good as possible.

The presence of attorneys may be a guarantee of the legal framework, especially when the mediator does not have a legal training, thus risking to reach an agreement that includes provisions that breach inalienable rights or binding rules of any of the states.

The presence of the attorneys was also accepted via telephone or email.

The conclusions and understanding that the parties reach through mediation is often brief, with subjective elements, aiming mainly at their needs and those of their children, in case of such a conflict.

Thus, for the required legal configuration of this agreement falls with the counseling attorneys, who have the possibility to notify each party on the positive and negative aspects implied by the resolution of their dispute in court, they may help them understand, from the point of view of the other party, how their case is seen and help them decide to

the best of their knowledge, if a mediation is in their interest and that of the underage children.

Cross-border mediation carried out under the terms of the provisions of the Hague Convention of 25<sup>th</sup> October 1980 on international child abduction is concluded with the so-called *Memorandum of understanding*, processed in legal terms by the legal representatives of the parties.

The court must motivate the parents in such situations, by giving them the possibility to try mediation with the observance of the internal and international legal provisions.

Like in the case of other states, the judicial bylaws of internal law adopted by Romania promoted the judge's obligation to invite the parties to try amicable resolution of a conflict by mediation. Thus, the briefing session becomes binding to the applicant in the first stage, by giving a chance to know the mediation at a macro-social level as an efficient procedure of fast and beneficial dispute resolution.

But, in order to promote mediation with persuasion, a judge should know it and, if possible, to believe that a certain type of dispute, with respect to the parties involved, may stand great chances of resolution by mediation or by other method alternative to the judicial procedure. This is why the states are constantly encouraged to include information on the mediation process per se in the training of magistrates.

In cases of international child abduction, the judge plays an important part in promoting agreed discussions, because, irrespective if the mediation was already generically proposed by the central competent authority, the court where the action was filed shall send the parties to the briefing session on.

#### **4. The mediation agreement. Content. The enforceable nature. The content of the court decision in case the resolution is ruled based on a mediation agreement**

##### **a. The mediation agreement. Content**

According to some studies, the mediation agreements are greatly observed, as the parties are directly involved in the decision process. The agreement should be a summary of their needs and interests and of those directly or indirectly affected by the dispute.

Preferably, from a formal point of view, the agreement shall be drafted bilingual, the parties and the mediator shall verify the accuracy of translation, in order to avoid further interpretations or inadvertences that may endanger the application of agreement.

The mediator/co-mediators shall ensure that the joint decisions made by the parties do not breach the laws or moral principles of the other state and they are enforceable; for this reason, as we were saying, specialized consulting shall be requested.

The parties may provide in agreement that this deed is binding provided its legality is checked by the attorneys of all parties until a certain deadline, and in case these legal representatives deem it necessary to include certain important provisions in the report with the legal requirements of either state involved, they should resume the discussions with the mediator and, implicitly, the negotiation of such completions.

Nevertheless, the agreement may include the parties' decision to use mediation before appealing to the judicial methods, in case of misunderstandings arising from the performance of the agreement terms or upon the occurrence of new disputes in case of continuous relationships, like those concerning the custody and raising of a child.

In some cases of international family mediation, mediators deemed it useful to draft an intermediate mediation agreement<sup>13</sup>, after the first common sessions; this agreement helps the parties clearly settle the long and short-term goals, that they wanted to reach fulfill together with the mediator.

What is important in a case entailing a continuous relationship with the child is that the parties are open to further mediation every time an incident occurs or that they decide only on a short run, following that, after this period, the agreement terms are reopened for discussion.

Agreements obtained in a cross-border mediation of a family conflict refer to the way the parties decide to act, sometimes on a relatively short term (e.g. until the completion of the school year, until one of the parents moves to the other state). If some of the conditions considered when entering into the agreement are not met, and the parties wish, through mediation, to settle the way their relationship will develop with

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<sup>13</sup> Paul, Christoph C./Walker, Jamie: An International Mediation: From Child Abduction to Property Distribution. Magazine: American Journal of Family Law 3/2009, pag. 168; Mediation bei Internationalen Kindschaftskonflikten e.V., [www.mikk-ev.de](http://www.mikk-ev.de)

the children, for instance in light of these changes, they may negotiate a new agreement or they may change some of the previously settled terms. But, when the parties unreasonably wish to change the provisions of the agreement, the written and binding form of the agreement previously undertaken by the parties provides a guarantee of its forced execution, if required.

The terms of the mediated agreement must be elaborated so that they allow the effectiveness and also the enforcement of the mediation agreement. In addition, practice in this type of mediation showed that it is very important that, before the completion of the agreement, the parties benefit from a limited time of reflection; during that time, they have the possibility to obtain specialized judicial counseling with respect to all the legal implications and consequences of the understanding in all the law systems in the case.

The mediator, if he/she participates in the drafting of the agreement, must be aware of the fact that one of the purposes of the mediation agreement is its enforceability, and for this reason he/she must take all actions required to render the agreement effective and to ensure its execution with respect to the specific judicial bylaws of the states involved. An essential point in bilateral conventions of cross-border mediation regulation is the cooperation between the administrative and judicial authorities in order to facilitate the enforcement of the mediation agreement. To this end, international bylaws encourage the courts of law to request assistance from the central authorities, if required, but also to make use of national or international judicial bylaws.

In order to prepare the implementation of these alternative procedures, the member states to the Hague Convention in 1980 are not bound but they are advised to consider the necessity of adopting normative provisions that would support the enforcement procedures of the mediation agreements.

In order that the solutions obtained through mediation are sustainable, the mediated agreement must fulfill all the legal conditions of the enforceable nature of each state involved.

When, by means of the agreement obtained through mediation, the parties reach an understanding and settle the return of the child, this agreement must be enforced with expedience, thus avoiding any further confusions or the potential child's estrangement from the stability elements the latter has, from the people and places he/she knows.

But, the memorandum of understanding, the agreement outlined by the parties, often with the help of the mediator, shall become effective as long as it is not compliant with the applicable judicial bylaws of the states involved.

In case the validity itself of the agreement provisions or a part thereof depends on the subsequent approval of the court, the agreement terms should include the fact that its enforcement shall be conditioned by the court's approval, as this is just a provisional agreement<sup>14</sup> until the condition affecting the agreement is met<sup>15</sup>.

#### **b. The enforceable nature of the mediation agreement**

Already since 21<sup>st</sup> May 2008, art. 20 of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters stated the following: "The content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognized and declared enforceable in the other Member States in accordance with applicable Community or national law. This could, for example, be on the basis of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters or 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."

The concluded mediation agreement becomes enforceable, as a guarantee that the Member States of the European Union ensures to all parties or only to one of the parties, when all the other parties expressly give their consent in this respect. Thus, the parties or the interested parties have the possibility to request the enforceability of the content of the agreement acquired through mediation.

As we were saying, there is the exception given by the refusal of the declaration of enforceability, when, by its content, the agreement is contrary to the right of the member state where the request is made and when the right of that state does not provide the possibility that it

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<sup>14</sup> Referred to by some international instruments or in the legislations of other states as "memorandum of understanding".

<sup>15</sup> Art. 1400 in the Romanian Civil Code and art. 64 in Law no. 192/2006, modified by Law no. 202/2012 on divorce, effective from its ruling in the court and not retroactively from the conclusion of the mediation agreement.

renders the agreement enforceable. Every Member State of the European Union is compelled to establish and also to notify the European Commission on the courts of law or other competent authorities to render the agreement enforceable by a decision or a certified document.

In the Romanian internal law, as per the provisions of art. 59 in Law no. 192/2006 on mediation and organization of the mediator profession, with subsequent amendments, the notary public may certify the agreement or the competent court may rule, upon the parties' request, in the council chamber, the approval resolution of the parties' understanding, which is enforceable on the territory of our state. In case there is a sue petition at the time when the parties accepted mediation, the agreement entered into by the parties following these non-contentious proceedings shall be the base for the consent judgment, which, from a procedural point of view, represents an enforceable deed.

The New Civil Procedure Code<sup>16</sup>, in art. 1093, defines "foreign judgments" as acts of contentious or non-contentious jurisdiction of the courts, notarial acts or of any other competent authorities in a Member State of the European Union, thus including the potential enforceable mediation agreements concluded in another state following a trans-national mediation.

Art. 1102 "(1) Foreign judgments which are not willingly enforced by those bound to execute them may be enforced on the Romanian territory, based on the given approval, upon the interested person's request, by the court within the jurisdiction of which the enforcement shall be carried out.

(2) Foreign judgments whereby taking preventive seizures and those given with provisional enforcement may not be executed on the Romanian territory."

The conditions for approval are:

- The enforcement of the foreign judgment is approved only if the judgment is enforceable according to the law of the office state of the court that ruled it.

- the court that had, according to the law of the office state, the competence to judge the trial without being exclusively grounded on the presence of the defendant or other goods thereof, without direct

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<sup>16</sup> The New Civil Procedure Code Republished in the Official Journal, Part I no. 545 on 03/08/2012, which would become effective on 1<sup>st</sup> February 2013.

connection to the dispute in the office state of the respective jurisdiction;

- there is reciprocity as regards the effects of foreign judgments between Romania the state of the court that ruled the judgment.”

Thus, art. 682 in the Civil Procedure Code includes, among other enforcement orders, the “*authentic instruments*”. According to the Romanian law, a mediation agreement directly obtained by the mediator, without any court order whereby the court would take note of this understanding, must be authenticated in order to be rendered in forced execution.

Once it becomes an enforcement order on the Romanian territory, the mediation agreement may benefit this enforcement in all the Member States of the European Union, under the terms established by Regulation 44/2001/EC.

Since the enforceability of the agreement is subject to the procedural rules of the member state where this agreement is concluded, the other state may acknowledge the enforcement order or it may preclude enforcement, just like the Italian courts may invoke the nullity or annulment of a mediation agreement under the terms of provisions in art. 615 in the Italian Code of Civil Procedure. But the same article provides as an exception the impossibility to invoke nullity when a court from the other state decided on its being binding to the parties of the mediation agreement, because in such case there would be a claimed preclusion.<sup>17</sup>

The content of Directive 2008/52/EC, art. 6(2)<sup>18</sup>, and other normative acts of other member states show that one of the minimum standards of enforcing the mediation agreement is that both parties agree to it.

For instance, in Italy, the Court President, before ruling on the enforcement of a transitional mediation agreement, must verify the existence of an agreement and afterwards, he/she must rule if this agreement is “contrary” to the Italian “public policy or legally binding rules”. Nevertheless, Italy does not ask the consent of all the parties for enforcement, unlike other member states such as Spain or Germany. Spain, in exchange, established non-contentious procee-

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<sup>17</sup> Elena D Alessandro, *Il riconoscimento delle sentenze straniere*, Ed Giappichelli 2007 page 18;

<sup>18</sup> “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”.



dings, whereby, upon the parties' request or with their agreement and upon the request of only one party, the notary may enforce the mediation agreement or he/she may reject the request if he/she will consider that it is contrary to public policy.

As regards the manifestation of the parties' will in view of the enforcement, practice proved that the binding party shall often try to avoid expressing this agreement, which may determine delays in the enforcement of the provisions of the obtained agreement.

This is perhaps why more mediators, in cross-border mediations, choose, in the final understanding, to insert the prior agreement of the parties, and that this agreement is rendered effective in any of the states involved. When mediation is successful, but the parties or either party refused to insert this provision, the enforcement of the agreement cannot be made in Spain, and the only solution is to obtain an European enforcement order.

A parental agreement, in order to become effective, may require notarization or homologation by a court.

In this context of recognition and actual application of the solutions accepted under the mediation agreement, it becomes important the cooperation between the administrative/judicial authorities of the various states in question, which may support the parties' efforts to grant the agreement a long-term sustainability and render it enforceable and legally effective.

Art. 17 of Regulation 44/2001 of the EC of 22<sup>nd</sup> December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters claims that:

“By virtue of the same principle of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation”

The same Regulation no. 44/2001/EC provides, in art. 57 and 58 that “ A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Member State shall, in another Member State, be declared enforceable there, on application made in accordance with the procedures provided for in Articles 38, et seq.” and that the court may refuse or revoke a declaration of

enforceability only if enforcement of the instrument is “manifestly contrary to public policy in the Member State addressed.” Moreover, the regulation assimilates “authentic instruments” to which shall apply these provisions and conventions concluded before certain administrative authorities or authenticated by the said and apply the same regime to judicial transactions that were approved by a court during a trial and that are enforceable in the member state where they were concluded.

**c. The content of the court decision in case the resolution is ruled based on a mediation agreement**

In the matter of family law, the court shall check the legality of the mediation agreement, it shall take note of this agreement and shall order the actions that go beyond the scope of the mediation agreement. The operative part shall include those understandings from the mediation agreement for matters on which the parties may order, in a field that makes possible to solve the conflict by mediation.

The court checks the character requirements of the parent who is granted the child’s custody. Then, it will certify the understandings concerning each head of claim, it shall take note of each covenant and it shall include in the operative part only those commonly agreed to parts in the agreement with respect to aspects that the court is not authorized to change – such as the partition agreement.

When mediation is carried out in parallel with the judicial proceedings, the use of mediation may be conventional (upon the parents’ initiative), either legal, when the court recommends mediation (by applying mandatory rules), or it compels the parties to use mediation (if there are legally binding rules in this respect).

By the change of the Romanian law in mediation matters<sup>19</sup>, art. 61 provides, for disputes subject to a claim on the dockets of the courts, that they may be solved through mediation “*from the initiative of the parties or at the proposal of either party or at the court’s recommendation, with respect to rights that the parties may order under the law*”.

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<sup>19</sup> Law no. 115/2012 on 4<sup>th</sup> July 4 2012 for the amendment and completion of Law no. 192/2006 on the mediation and organization of the mediator profession in Romania, published in the Official Monitor no. 441 on 22.05.2006.

According to art. 63, “In case the dispute was settled through mediation, the court shall rule, upon the parties’ request, with the observance of legal terms, a settlement that shall benefit from the probative value of an authentic act, which is very important to the parties, and has the enforceable title given by the law and, in addition, once the dispute is settled, a new claim, with the same object, the same case and the same parties may be rejected by admitting the absolute and preemptory exception of first instance, of the finality.” Paragraph 3 of the same article provides that the “*Consent judgment ruled according to the provisions of this law has an enforceable title*”.

By means of this consent judgment, the court may only declare the existence of the parties’ consent, to verify whether the provisions breach the laws and public policy. If we are in the presence of a cross-border mediation agreement, the initially designated court, if it deems itself materially and territorially competent to trial the dispute, shall make the verification both according to the legal provisions (both internal, as well as international regulations) applicable to the dispute (including in what concerns the territorial and material competence), as well as according to the bilateral agreements between the states and the international instruments, which are applicable with priority over its own law.

If the Romanian court is the one ruling the settlement whereby it approves the mediation agreement entered into between the parties, it shall also be able to order the tax exemption in case the legal conditions are met.

The courts should apply the common procedure whereby certifying the parties’ agreement and settling the consent judgment ; here it also includes the verification of supporting of this agreement by all the parties<sup>20</sup>.

If there are no contrary or special provisions in bilateral agreements on cross-border mediation, the courts shall rule taking note of the concluded agreement, according to its own law and international instruments. In the matters of family law, for the head of claim concerning divorce, it shall order the disruption of marriage as settled by the parties in the mediation agreement and it shall also take note of the understandings made for each ancillary cause of claim.

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<sup>20</sup> Dec. no. 195/2011 case file no. 2724/233/2009 of the Galați Court in reports of court orders ruled in the matters of mediation, Dec. no. 195/2011 case file no. 2724/233/2009 of the Galați court, pages 178-180.

When there are no special procedures, the court shall rule the consent judgment including, in the operative part of the latter, the very content of the immediate agreement, according to the ordinary rules.

## 5. Conclusions

In support of conflict resolution through cross-border mediation are the provisions of international instruments and governmental bilateral projects, as the states take efforts for correct and complete information of their citizens, in order to establish certain rules of procedure and standards, but also of an organizational framework, able to ensure the successful development of mediation.

In the field of children custody, of establishing the visitation right, the maintenance obligations, the cross-border mediation procedure grants the parents the guarantee that there will be no delay like in the judicial settlement and the much too slow and bureaucratic enforcement of a hard-gained court order. Thus, a potential judicial procedure of returning a child will be neither failed nor slowed down, since it may be carried out in parallel with the parties' mediation.

The aim of reaching an amicable solution, with long-term positive effects, implies that cross-border mediation may be accessed not only as a procedure prior to the judicial one, but, as we claimed above, event concomitant to the classic one, and sometimes occurred in the execution stage of a court order.

An important thing is that all those facing situations where, on the grounds of a separation between husbands, they must be aware of the fact that the sooner they use mediation or another alternative conflict resolution method, the better can they avoid a possible or even imminent abduction of the children. This is why, in this matter, there must be a permanent national information according to which a child may leave the country only with the express consent of the other parent with custody rights or based on a court order; the Romanian law was modified in this respect<sup>21</sup>.

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<sup>21</sup> According to the provisions of art. 2(2) in Law no. 248/2005 published in the Official Journal no. 682 on 26/07/2005 on the status of free circulation of Romanian citizens abroad with subsequent amendments and completions, Romanian children may travel abroad only accompanied, with the consent of their parents or their legal tutors.



## **CHAPTER 4**

### **PRINCIPLES, METHODS AND MODELS OF CROSS-BORDER MEDIATION**

**Anca Elisabeta Ciucă**

#### **1. Introduction**

Directive EC/52/2008 identified mediation in cross-border disputes as a distinct application area of mediation. To this end, the Directive outlines the need of differentiating between the general aspects governing the mediator's activity in any situation subject to mediation and the mediation-specific aspects in cross-border disputes.

Each situation subject to mediation is different, it has its own particularities, and, as such, it requires a permanent adaptation of the mediator, who still has to proof a great flexibility and a permanent adaptability. Still, mediation is governed by a set of principles found in the entire activity of the mediator and which constantly determine the way of working with the parties.

The parties' needs, their particular characteristics lead to the building of certain action models which are found redundantly in the mediator's activity, but the personal style determines a specific working procedure. There is a great variety of situations in which the mediators is called to intervene, by constantly adopting the application of general aspects, namely principles and methods, to the particular case of the parties who requested the mediator's support.

In order to ensure mediation services for standing of litigants, most Member States have adopted normative acts whereby defining the accreditation of mediators, as well as the way in which access is ensured to mediation services in cross-border disputes.

Applicable principles, models, methods and procedures in cross-border mediation are presented further below, as well as those related to the access to mediation services in various Member States.

## 2. General context

### a. About mediation

Mediation is broadly defined as the “*the intervention in a standard negotiation or conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute. In addition to approaching content aspects, mediation may also contribute to the establishment or consolidation of the relationships between the parties, based on trust and respect, or upon the conclusion of a relationship between the parties, in a manner that would minimize costs and the negative psychological impact on them*”<sup>22</sup>.

Although it also approaches other aspects related to relationship and communication, mediation as defined by Christopher Moore (1996) pays the greatest attention to negotiation between the parties, in order to make the best decision on the issue it is facing. Moreover, this approach of mediation also accepts situations in which negotiation occurs event at the end of a relationship, and not at its beginning or to consolidate the relationship.

In contrast, mediation may also be defined as “*a social process in which a third-party helps the parties in their efforts of improving the quality of interaction and communication between them*”<sup>23</sup>.

The first definition sees mediation as a *structured process* oriented to the adoption of a decision negotiated by the parties with respect to the object of dispute, aiming at the *resolution* of the conflict.

The second definition considers mediation as a *social process*, aimed at leading to the *improvement of the relationship* between the parties, in order to build the parties’ capacity of taking better joint decisions, due to a better understanding of the situation.

The two definitions rather influence the way of approach of the third-party’s intervention that, in the first case, is much more oriented to

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<sup>22</sup> Moore, Christopher W. - “*The Mediation Process – Practical Strategies for Resolving Conflict*”, Second Edition, published by Jossey-Bass Publishers, San Francisco, California, US, 1996; page 15.

<sup>23</sup> Prein, Hugo – “*Mediation of conflict – a practical approach*”, Manual for acquiring professional skills and mediation techniques, second edition, Boom, Amsterdam; page 6.

formulating an agreement with respect to the disputed aspects, whereas the second case pays attention to the improvement of the relationship between the conflicting parties. On the other hand, the analysis of the two definitions and the purpose of intervention results in the fact that, sometimes, in order to be able to make decisions concerning the conflict resolution, the parties first need a stage where they come to a better understanding of each other's way of acting and reacting in the given conflicting situation, so that the relationship between them is sufficiently improved and so that they become able to jointly formulate a covenant as a subsequent stage.

Used in relation with the judicial proceedings, mediation is primarily oriented towards the joint formulation by the conflicting parties of an understanding with respect to the aspects subject to dispute; only in this way can they provide a faster and cheaper out-of-court alternative for them.

Starting from the main objective stated in the Preamble, namely of "*securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice...*"<sup>24</sup>, Directive 2008/52/EC defines the type of mediation subject to this normative act, namely as "*a structured process, however named or referred to*"<sup>25</sup> "...".

As opposed to the traditional methods of conflict resolution by imposing the administrative decision of an authority or by invoking certain rights before the judiciary bodies, mediations builds the solution starting from the identification and awareness of the "*real interests*" of all the conflicting parties. The parties are assisted by a third-party who helps them communicate, negotiate and build together a way of dispute settlement, to which they unanimously agree, without feeling constraint.

As reported to the judicial proceedings, mediation is an out-of-court dispute resolution method, which ensures a greater efficiency from a cost perspective and a fast resolution from a procedural perspective, since the way it is organized, the time and place of mediation, as well as the duration of the mediation sessions are adapted to the parties' needs. The fact that resolution is the result of a negotiation between

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<sup>24</sup> "Directive 2008/52/EC of the European Parliament and of the Council of 21<sup>st</sup> May 2008 on certain aspects of mediation in civil and commercial matters"; Preamble (5)

<sup>25</sup> "Directive 2008/52/EC of the European Parliament and of the Council of 21<sup>st</sup> May 2008 on certain aspects of mediation in civil and commercial matters"; art. 3, letter (a).



the parties, and that the final decision is jointly accepted by the parties, ensures higher chances of enforcing the solution and render it a greater stability than in the case of enforcement through an administrative decision or a court order.

Although a court order has a final nature and is opposable to all third-parties, as regards the costs and adaptability to the parties' needs, an amicable resolution of a dispute is preferred.

European-level statistics<sup>26</sup> in commercial matters show that, at the level of the 26 Member States to which Directive 2008/52/EC is applicable, the average length of a trial is 505 calendar days (Belgium), with a maximum length of 1290 calendar days (Slovenia). The costs associated to these trials, at a statistic level, represent an average of 16.6% (Belgium) at an European level, going as high as 33.0 % (Czech Republic) of the amount to be recovered in court. The estimated costs include trial expenses (judicial taxes, experts, etc.), expenses with lawyers' fees and expenses with the enforcement of the court order.

To name some examples, in Bulgaria, the average length of a trial in court is 505 calendar days, and the average trial expense amounts to 16.6% of the amount to be recovered, which is the object of the trial, whereas in Italy the average length of a trial is 1210 calendar days, and the average trial expense amounts to 29.9% of the amount to be recovered in court. By using mediation, the parties need an average of 45 days in Belgium, and 47 days in Italy, respectively, to settle the dispute, and the costs caused by mediation in these countries taken as examples represent only 43.75% of the costs of a trial in Belgium, and only 27.78 of the costs of a trial in Italy, respectively<sup>27</sup>.

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<sup>26</sup> De Palo, Giuseppe; Feasley, Ashley; Orecchini, Flavia - „*Quantifying the cost of not using mediation – a data analysis*”, published by The Directorate – General for International Policies, Policy Department, Citizens' Rights and Constitutional Affairs, 2011; pp. 11 – 12;  
<http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf>

<sup>27</sup> „*Quantifying the cost of not using mediation – a data analysis*” – De Palo, Giuseppe; Feasley, Ashley; Orecchini, Flavia; published by *The Directorate – General for International Policies, Policy Department, Citizens' Rights and Constitutional Affairs*, 2011; pp. 13;  
<http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf>

## **b. About the mediator**

The mediator is the third party who intervenes and helps the parties negotiate, “a person who is not directly involved in the dispute<sup>28</sup>”. The mediator’s role is to provide the parties with “a new perspective” on the disputed topics and to help them “build a relationship oriented towards issue settlement”. The mediator “has no decision-making power, may not compel the parties to settle the conflict between them in one way or another and nor can he/she enforce the decision of the parties”<sup>29</sup>.

For the purpose of Directive 2008/52/EC, according to the definition given in art. 2 letter (b), a 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”.

By the given definition, the Directive also outlines the minimum training coordinates of the third-party (third person), namely of the mediator. Mediator’s training necessarily and minimally includes theoretical knowledge about the mediation process (mediation as a structured process), skills concerning the conducting of the mediation process, but also a training concerning the mediator’s skills, both at a general level, but also at the level of requirements regulated by the law. This specific and distinct training is compulsory irrespective of the experiences in other fields or the way that the mediator, as third person, was requested to conduct a certain mediation. In other words, irrespective of the previous profession, of the previous professional experiences or the institutional reports that he/she previously established, the third person who wishes to have the position as mediator has, in all cases and without exception, the obligation to a distinct training in order to conduct a mediation process.

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<sup>28</sup> Moore, Christopher W. - “*The Mediation Process – Practical Strategies for Resolving Conflict*”, Second Edition, published by Jossey-Bass Publishers, San Francisco, California, US, 1996; page 15.

<sup>29</sup> Moore, Christopher W. - “*The Mediation Process – Practical Strategies for Resolving Conflict*”, Second Edition, published by Jossey-Bass Publishers, San Francisco, California, US, 1996; page 17.

The Directive pays a special attention to ensuring the quality of the mediation service and compels the member states to encourage “*by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organizations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.*” (art. 4(1)). A model, based on which a professional code of conduct for mediators may be developed at the level of each member state or each professional association, is available on the official website of the European Commission who, ever since 2002 launched a public discussion on a Code of Conduct for mediators and included their most representative organizations in discussions.<sup>30</sup>

The *European Code of Conduct for Mediators* reiterates the minimum *training* requirements, mediator's honesty in establishing the mediation sessions and other meetings with the parties, the *principles* based on which he/she acts, namely neutrality, fairness, confidentiality and free consent of the parties, as well as the conditions to ensure *decisional autonomy* (self-determination) of the parties in the mediation process and in formulating the understanding, as well as several minimum requirements related to the mediation process and the mediation procedure whereby the efficacy of the mediator's intervention is ensured.

In order to conduct mediation in an efficient manner, the mediator propose the parties a certain approach of the mediation, so that they meet their goal in formulating an understanding with respect to the dispute resolution, with lower costs and in a reasonable time. Therefore, it is an ethical obligation of the mediator of being permanently oriented towards efficacy and efficiency, to the benefit of the parties. On the other hand the express requirement of leading mediation *in a competent manner* implies a solid training as regards the mediation process, the ability to conduct the mediation process and knowledge of the field in which the conflict occurs. Moreover, in order to ensure the competency of the way mediation is conducted, the mediator is compelled to refuse to take over a case if he/she does not have the minimum knowledge required of the field.

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<sup>30</sup> *European Code of Conduct for Mediators*,  
[http://ec.europa.eu/civiljustice/adr/adr\\_ec\\_code\\_conduct\\_en.pdf](http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf)

The third-party, the third person or the mediator, as he/she is referred to by the Directive, conducts his/her intervention by observing a set of principles, namely neutrality, fairness, confidentiality and self-determination of the parties. Prior knowledge of these principles ensures the mediator's *acceptability*<sup>31</sup> by the parties. *Acceptability* does not necessarily mean that the parties wish for the mediator's intervention, or to accept his/her suggestions concerning the way in which they will negotiate, expressed either under the form of rules, to accept the approach strategy of the problem proposed by the mediator, as well as the clarifications and completions he/she made during the mediation.

In all cases, the success of the mediation is based on the trust that the parties grant the mediator, as a specialized person and able to help them solve their dispute. The building of trust in the mediator and, implicitly, in the mediation as an amicable dispute resolution method, starts right from the way the profession is organized, so that a minimum quality standard is ensured<sup>32</sup>. To this end, every mediator or body in the field of mediation is compelled to organize themselves so that they observe principles concerning independence, transparency, efficiency and accuracy of services they provide.

Mediators and bodies in the field of mediation who provide or promote mediation services are compelled to honestly inform the general public with respect to the membership to a certain professional category, training and experience in mediation, the areas of practice in compliance with the related professional experience that recommends them in taking over the mediation of a dispute in a certain field, as well as with respect to the costs of services they provide. Also, mediators and mediation-related bodies are compelled to provide the general public with information that shows an estimate of the length of the mediation service in a certain type of dispute and of not making promises concerning the outcome, unless in a statistical or percentage format, by specifying the source for all the types of information they provide<sup>33</sup>.

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<sup>31</sup> Moore, Christopher W. - *"The Mediation Process – Practical Strategies for Resolving Conflict"*, Second Edition, published by Jossey-Bass Publishers, San Francisco, California, US, 1996; pp. 15-16.

<sup>32</sup> *Directive 2008/52/EC of the European Parliament and of the Council of 21<sup>st</sup> May 2008 on certain aspects of mediation in civil and commercial matters*, published in the *Official Journal of the European Union* of 24.5.2008, L 136/4, item (18).

<sup>33</sup> *Commission Recommendation 2001/310/EC, of 4 April 2001, on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes*,

### **c. Cross-border mediation**

By Directive 2008/52/EC, the European Union includes mediation in the judicial systems of the Member States from a procedural point of view and renders a judicial value both to the parties' step of solving the dispute amicably, and to the understanding that they may come to as a result of going through the mediation procedure. The Directive defines a new application area of the mediation, namely mediation in cross-border disputes<sup>34</sup>. In the particular case in which at least one of the parties is domiciled or residing in another state, the parties must deal with some inherent cultural differences, potentially linguistic ones, but also with the understanding of the other law system than the one they are accustomed to.

Although the field of occurrence was previously defined by practice, namely family, commerce, neighborhood (delimitation of property boundaries), malpractice, financial – banking, criminal (victim – victim offender) or in cases with children (at least one of the party is a child), *cross-border disputes* add the foreign element which differentiates the requirements on the mediator's specialization, as a third person asked to help the parties in the conflict resolution, and make *cross-border* mediation a new application area.

### **d. The normative and organizational framework of applying cross-border mediation**

Directive 2008/52/CE identifies a series of condition for the mediation in cross-border disputes within the European Union becomes applicable; its objective is to contribute in this way to a better functionality of the domestic market.

The *availability of the mediation services* is one of the first conditions for the mediation to become applicable in cross-border disputes. Thus,

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published in the Official Journal of the European Communities in 19.4.2001, page L 109/56.

<sup>34</sup> *Directive 2008/52/EC of the European Parliament and of the Council of 21st May 2008 on certain aspects of mediation in civil and commercial matters*, published in the *Official Journal of the European Union* of 24.5.2008, L 136/4, art. 2(1): "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 for the purposes of Article 5 an invitation is made to the parties".

*“Member States shall encourage, by any means which they consider appropriate, the availability to the general public, in particular on the Internet, of information on how to contact mediators and organizations providing mediation services.”* (art. 9, *Information for the general public*).

For the transposition of this provision, it required the adoption or modification of internal normative acts at the level of each Member State, especially of the legislation on the organization of the mediation services. By the end of 2012, such a law (*Mediation Act*) was adopted or modified and completed in almost all the 26 Member States that participated in the adoption of the directive, except for Denmark, who did not participate in the adoption and, consequently, the directive is not applicable to it.

Under the law, each member state designated a competent authority for the organization of the mediation services in relationship to the courts, ensuring the recognition of mediators’ professional training and the information for the public with respect to the access to the mediation services in that respective state, by publishing a list or book or table of authorized/accredited mediators. Also, the competent authority in the field of mediation is compelled to take the necessary steps so that the public information about mediators, the organizations providing mediation services and the mediation service abide by the requirements of Directive 2008/52/EC and of *Recommendation 2001/310/EC*, on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes<sup>35</sup>.

In order to prevent a perception of inferiority on mediation as opposed to the act of justice due to the fact that the enforcement of the agreement resulted from the mediation strictly depends on the parties’ goodwill, Directive 2008/52/EC recommends the member states to *“ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable”*

(item 19). By such provisions, as well as by other amendments of the codes of civil conduct of the member states, in compliance with its provisions, Directive 2008/52/EC encourages the use by complementing the steps taken in court with the mediation procedure, as an out-of-court method, in a given dispute. These provisions lead to

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<sup>35</sup> *Commission Recommendation 2001/310/CE, of 4 April 2001, on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes*, published in the Official Journal of the European Communities in 19.4.2001, pp. L 109/56.

amendments to the Civil Codes and Civil Procedure Codes that would include mediation and give the parties the possibility of enforcing the agreement resulted from a mediation.

In order to avoid excessive extension of a trial in court, but also exaggerated costs to support it, the use of “*pre-contractual negotiations or to processes of an adjudicatory nature such as certain judicial conciliation schemes, consumer complaint schemes, arbitration and expert determination or to processes administered by persons or bodies issuing a formal recommendation, whether or not it be legally binding as to the resolution of the dispute*”<sup>36</sup> is not excluded either.

Mediation does not exclude the use of other out-of-court methods or processes of an adjudicatory nature, but it adds on them, at least for the aspects in which the parties should adopt a joint decision, such as the decisions related to the application of the decision issued by one of the third-parties listed in item 11 in the Preamble to the Directive. To sum up, although legislative amendments and completions lead to the recognition of mediation as an out-of-court dispute resolution method and made it possible for the agreement to be recognized by the court, nevertheless they lead to the exclusion of other forms of amicable resolution or processes of an adjudicatory nature of certain conflicts that may eventually turn into disputes.

### 3. Principles applicable to mediation

In order that mediation reaches its objective, namely of giving the parties a chance to build together a mutually beneficial and unanimously accepted resolution, the main condition is that they are assisted by a specialized third person, referred to as mediator, which the parties vest with trust and accept to conduct the discussions they will be having in order to formulate a solution.

As a method of dispute **amicable resolution**, mediation is in all cases governed by the following principles:

□ the mediator conducts the mediation process in a **neutral and unbiased** manner, without being in a conflict of interest with the parties or with the object of dispute;

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<sup>36</sup> Directive 2008/52/EC of the European Parliament and of the Council of 21st May 2008 on certain aspects of mediation in civil and commercial matters, publishes in the Official Journal of the European Union of 24.5.2008, L 136/4, item (11).

- the mediator keeps the **confidentiality** on all aspects that he/she may take note of in this capacity, as regards the parties and the object of dispute;
- the mediator observes the **self-determination of the parties**, ensuring that:
  - the parties use mediation **voluntarily** and are not forced to accept, continue or finalize the mediation;
  - the parties **jointly** agree on the terms of their understanding and no conditions with respect to it are imposed on them;
  - the parties **decide freely and on an informed basis** on the acceptance of mediation, the mediator and the way they settle their dispute, whose object is subject to mediation.
- the mediator sees that the **understanding between the parties is legal and reasonable**, so as not to contain excessive or illegal provisions.

#### **a. Mediator's neutrality and fairness**

By accepting a request, the mediator undertakes to conduct the mediation process in a *neutral and unbiased* manner, to ensure fair treatment to all the parties involved in the conflict, thus giving them equal chances as regards the resolution of the dispute subject to mediation. Thus, during the entire process, the mediator *approaches a neutral position and he/she maintains a fair attitude* towards the conflicting parties.

The mediator is compelled to inform the parties on any situation that may take him/her in a conflict of interests with either parties or with both parties, or with the object of dispute. In case there are any other reasons that may affect his/her neutrality and fairness, the mediator is compelled to refuse to take over the respective case.

If, during the mediation process, new information occurs that would take him/her in a conflict of interest with either party or with the object of dispute, as well as information that affects his/her capacity of conducting the mediation process in a neutral and unbiased manner, the mediator is compelled to notify the parties on the newly occurred situation and withdraw from mediation.



If, during the mediation process, either party shows a reduced capacity of negotiating an agreement favorable to it, the mediator may provide general specialized information, but he/she may not provide specialized consulting. The information may be of a legal nature or of any other nature and, as the case may be, the mediator may recommend the consulting of a specialist in the field, such as an attorney, a legal expert or a marriage counselor, as the case may be. In order to further conduct the process in a neutral and unbiased manner, the mediator may inform the parties on the option to use the services of a specialist in the field, but he/she may not impose or condition further mediation by the presence or individual consulting of the parties of such a specialist.

**b. Confidentiality of information that the mediator has access to**

By accepting the commitment of mediating a dispute between two or more parties, the mediator compels to ensure confidentiality of the parties' identity and all the information provided by them during the mediation process, in common sessions or in separate sessions. The obligation to keep confidentiality starts right from the mediation preparation stage, when the mediator gets in contact with each party, preparing them to participate in the mediation process. Starting from the preparation stage, the mediator may disclose to the other party or to any other persons, or he/she may make public only that information for the disclosure of which the party or the parties gave their written approval. Thus, the mediator guarantees the parties their right to private life, the privacy of personal data, as well as the confidentiality of any information related to the parties.

In case that either party wishes to keep the confidentiality on certain aspects that, being known by the other party, could significantly influence the way of settling the dispute, the mediator may refuse to continue mediation, without disclosing the information that was provided to him/her and on which the respective party wishes to keep confidentiality.

In all cases, if he/she had access to confidential information provided by at least two of the conflicting parties, the mediator may no longer be employed by either party in another capacity except for as an expert for the same object of dispute, such as an attorney, a marriage counselor or other type of expert.

There are also exceptions with respect to the obligation to keep confidentiality by the mediator. Thus, in case when, during the mediation process, he/she takes note of information with respect to facts that endanger the raising and development of the child, the mediator is compelled to notify the supervisory body, without being compelled anymore to keep confidentiality. In case that, during the mediation, a situation occurred due to which the mediator was compelled to breach the confidentiality obligation, he/she may no longer continue the mediation, irrespective of the parties' decision.

The mediator may not have the capacity as witness. Nevertheless, if the parties decide it or if the situation implies that the mediator be heard as a witness with respect to aspects related to the parties, after being in his/her capacity as a witness, the mediator may no longer continue the mediation.

### **c. Free consent and self-determination of parties making use of mediation**

By their participation in the mediation, the parties give their consent of taking part in a negotiation, so that they find together the best means to settle a dispute. But they may negotiate only if they express their **free consent** in this respect and their right to self-determination is observed, namely the freedom to make their own settlement, under the terms that they consider the most appropriate for their particular situation. Thus, *self-determination* and *decision-making authority* of the parties are essential for the negotiation to lead to a sustainable solution, perceived as efficient, realistic and correct by the parties.

Consequently, the mediator conducts the discussions and negotiations between the parties, without exercising any constraint on them, except for certain minimum rules of conduct, which he/she may make known from the beginning and for which the parties give their consent, before the actual beginning of the mediation.

The parties' autonomy in decision-making during mediation may never be total; they are interdependent to each other or to third-parties that influence their decisions. In all the cases other types of constraints are exercised on the parties, such as the restraints related to time, money, energy, imagination, intelligence, knowledge in a certain field, language, etc. These constraints may determine them to make certain decisions that are not favorable to them or

may prevent them from identifying an opportunity in what the other party states. Other times, the parties may trust too much in their own qualities, abilities or resources, in which case their attention is only focused on certain aspects in the negotiation with the other party.

For this reason, the mediator still has a *corrective*<sup>37</sup> and *completion role*<sup>38</sup>, by constantly helping to clarify certain aspects by reformulations, reclassifications or questions. Moreover, in case either party feels intimidated or imbalanced by the other party, the mediator's role is to help it restore its self-confidence, to identify its strong points on which it builds its argumentation, the potential dispute resolution proposals or to evaluate the proposals of the other party from a different perspective. Although constantly correcting and completing the declarations or proposals of the parties, the mediator is compelled to do this without distorting the meaning of what the parties say, by constantly building on what the parties have already brought up to discussion.

Previous to taking over the commitment, but also at the beginning of each meeting with the parties, the mediator is compelled to explain the way that the mediation procedure will be conducted, what are the minimum rules of conduct that he/she recommends based on his/her previous experience and that the parties undertake to comply with, what role will the parties have in the mediation, what is expected of them and what are the consequences of conducting the mediation procedure and of signing a final agreement. The terms of a potential agreement are jointly set out by the parties, and the decisions of the parties are made on an informed basis. The mediator is responsible for ensuring that the parties have correctly understood the terms of agreement, that their decision was made based on free consent and that no aspect with respect to their understanding is imposed on them.

Self-determination of the parties also when the parties **voluntarily** use mediation and they may not be compelled to accept, continue or complete the mediation, if they do not wish so.

The parties have the freedom to choose themselves a mediator, the latter may not be imposed on them, and the mediator may not

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<sup>37</sup> Example: Here you meant ... (a transposition in common language follows, without technical terms or other forms of specific language of a professional or social category)

<sup>38</sup> Example: Could you be more specific? What exactly are you referring to?

exercise any constraints on the parties with respect to the acceptance, continuation or completion of the mediation.

By information provided prior to the beginning of mediation, by subsequent clarifications and by his/her conduct throughout mediation, the mediator constantly encourages the parties to exercise their autonomy in decision-making.

#### **d. Legality and fairness of understanding between the parties**

The mediator is compelled to ensure that the **understanding between the parties does not contain excessive or illegal provisions** and that it only refers to aspects that the parties may decide on.

In order for the parties to reach a resolution that is perceived by each of them as reasonable, the mediator's role is to ensure that there is constantly a *balance of power* between the parties. The balance of power between the parties may be affected by behavior, perceptions or concrete actions of either party or of another party taking part in the mediation. Thus, if either party threatens, shows certain aspect related to its own person or to the other party in a distorted manner, such as aspects related to the financial requirements or social position, or uses stereotypes or perceptions that make the other party vulnerable, the respective party upsets the balance in terms of power between the parties. The mediator's role is to constantly prevent these natural tendencies between the parties, by clarifications or reference to the rules of conduct, which all the parties agreed to comply with before entering the mediation.

By maintaining the balance of power between the parties, the mediator prevents the formulation of an understanding that may contain excessive provisions for at least one of the parties, which would subsequently lead to the impossibility of applying the agreement containing the terms of their understanding. By this constant endeavor, the mediator ensures that the formulated solution is a realistic and correct one.

The mediator does not impose solutions; he/she observes the parties' points of view and guarantees the parties' equal opportunities in the negotiation process. Nevertheless, in certain cases, the mediator shall inform the parties on the possibility to use marriage counseling or other type of counseling, as the case may be. When children are also involved in the dispute between the parties,

the mediator shall show a primary interest in the welfare and the best interest of the child. Thus, the mediator shall encourage the parents to focus on the child's needs, to formulate dispute resolution proposals that would ensure their normal development; in this respect, they also have the possibility to claim the *child's best interest*.

Right from the first contact with the parties, the mediator analyzes if mediation is recommended in the respective dispute and what are the aspects of the dispute that are recommended to or may, from a legal point of view, be settled through the mediation procedure. When the parties begin to formulate the final agreement, the mediators makes sure that it only refers to aspects concerning rights that the parties may decide on, that it is legal and that it is enforceable without prejudice to the parties' interests. It is the mediator who shall identify and bring up to discussion the potential excessive or illegal provisions, by helping the parties clarify such situations, either by their removal, or by reformulation.

The parties are assisted by the mediator in order to formulate the final mediation agreement, so that it only includes provisions of *giving, taking or doing* concerning their own person, thus maintaining the realistic nature of the understanding between the parties. The language that the agreement is written in must be accessible to all the signatory parties, and the mediator's role is to bring up to discussion, for clarification purposes, each term of the agreement. If specialized terms are used, that either party is not accustomed to, the mediator may even invite the parties to ask the opinion of an expert in the field or to invite such an expert to.

#### **4. The mediation process**

The mediation process mainly implies three distinct stages: preparing the mediation, conducting the mediation and concluding the mediation.

##### **a. Preparing the mediation**

The **preparation stage** starts when at least one of the parties requests the services of a mediator, with the intent of trying to settle a dispute with another party, previously identified by the first party.

**Choosing the mediator** implies that the party has access to information concerning the available mediation services, but also minimum information about the mediator's experience and ability of mediating in a given situation. Right from the moment of choosing the mediator, the party that wishes to use mediation vests with trust both the service of providing services of the mediation it uses, and the mediator it addresses to.

There are also situations in which the parties jointly agree to use mediation in order to start, continue or complete the negotiations between them. In this case, the parties jointly agree to a profile of the mediator and choose their source of information to identify the best suited mediator for the situation they are facing and that they wish to settle through mediation.

Choosing the mediator is an important step for the parties, which is why they need to access information that would allow them a first understanding of the way in which mediation may help them settle their conflicting situation or influence the way in which the dispute they are or will be involved in shall be settled. This need of the parties determined the building of standalone information systems with respect to mediation and the choosing of the mediator, but also to the mediation in general and its aspects. The information systems address a wider public, by giving those who inform themselves or are informed the possibility of self-selection as future parties in the mediation. In this way, the voluntary nature of mediation is ensured, and the responsibility transfer with respect to dispute resolution starts functioning right from the mediator selection stage, thus building the self-determination of the parties as a fundamental principle of mediation.

The chosen mediator takes a first contact with the party requesting him/her and starts preparing the mediation.

If the parties appear together or the party requesting mediation undertakes to convince the other party to take part in the mediation or if there is a third person who takes over the task of motivating both parties into participating in the mediation, then the mediator shall focus on establishing the object of dispute and on choosing the most suited strategy of approach, in order to conduct mediation between the conflicting parties. Although the parties have already chosen to take part in the mediation, the mediator ensures that the parties'

motivation is real and that they understood exactly what they can obtain or solve by taking part in the mediation.

If only one party starts the mediation procedure and appeals to a mediator, the preparation stage also includes the mediator's endeavor of motivating the other party to accept mediation. In this case, in the preparation stage, the mediator, after the first discussion with the party requesting him/her, gets in contact with the other party and invites it to a discussion, in order to introduce it to the advantages of using the mediation procedure in the dispute that it has with the other party and thus motivating it to accept the participation in mediation, on an informed basis.

Preparing the mediation includes finding out the first information on the parties and the conflict between them, but the purpose of the individual talks that the mediator has with them is to establish the object of mediation, the parties' ability of negotiation and the actual restraints that they have in finally formulating a mutually beneficial agreement, such as other aspects concerning the potential communication barriers between the parties. This analysis that the mediator carries out leads to choosing a strategy with respect to the way the mediation will be conducted, but also to defining certain procedural aspects. The parties are likely to participate in the mediation more efficiently, if they benefit from the assistance of an expert, either on a permanent basis during the mediation sessions, or outside the mediation session, for consulting on different legal aspects or of any other nature. In the same way a translator or an interpreter may be required, so that the parties can communicate, and all these aspects are settled in the preparation stage, after the discussions with the parties. The purpose of all these discussions, to the parties, is to remove as much as possible the unexpected situations, the potential failures or the timely estimate of possible deadlock situations during the mediation, thus giving both the parties and the mediator the possibility of preparing prior to the beginning of the mediation.

The most valuable information for reaching the mediation objectives is what the parties will discuss during the mediation sessions/meetings. The complexity of the situation shall influence on how much the issue needs to be further examined.

The professional training of the mediator also implies a self-evaluation of fairness and neutrality, if there is a conflict of interests

between the parties or the object of dispute, and if the mediator considers him/herself emotionally capable of managing the situation. In this stage, the mediator may identify a potential danger of violence from either party or both parties and, by analyzing the degree of danger, he/she may decide whether the mediation shall start or not.

The mediator is the host of mediation. Consequently, the mediator is responsible of deciding, in the end, where the mediation takes place. The mediation may be conducted at the mediator's office, but also in any other location that the mediator and the parties jointly settle. Nevertheless, the mediator has the final decision on the place of conducting the mediation, because the mediator is fully responsible for the observance of the principles governing mediation.

The mediation contract shall be signed by the parties and the mediator, as a completion of this preparation stage. The contract shall reflect the general aspects concerning the principles and obligations of the mediator and the parties, but also the particular procedural aspects concerning the way the mediation will be conducted. If the mediator and the parties have signed the mediation contract, they are prepared to start the mediation.

## **b. Conducting the mediation**

As a way of organization, mediation is conducted within one or more meetings between the parties, assisted by the mediator. The length and working method within these meetings are jointly settled by the mediator and the parties, on the mediator's proposal. In addition, the mediator is free to use certain techniques of his/her own, such as bringing certain aspects up to discussion during the common session/meeting or in separate sessions/meetings, or the prioritized approach of certain aspects related to the discussed issue between the parties.

Mainly, all meetings between the mediator and the parties, together or separately, shall benefit from confidentiality, both from the point of view of the place where they are conducted, and from the point of view of the information that the mediator has access to.

*Structurally*, the mediation is conducted by approaching the aspects related to the history of the conflicting situation (*What happened? How did you get in this situation?*), the current situation is evaluated (*What is the current situation?*), and subsequently, the parties are



invited to view the future situation that they wish for (*How would you like the things concerning this situation to happen in the future?*).

The mediation session always starts with a short *presentation of the process* by the mediator. Now are restated and clarified aspects related to the *rules concerning the parties' conduct* during the mediation, and the mediator shall make sure they understood what their role is and if they are ready to negotiate, by accepting the presence of the mediator and his/her intervention from the point of view of conducting the mediation process.

It is important that the parties understand exactly the importance of the agreement and especially of a potential written agreement that may be formulate at the end of mediation, but also the legal consequences of signing the agreement.

The success of mediation is directly proportionate with the degree of understanding and acceptance from the parties in negotiation, of the way in which the mediation principles work and how can these be observed by the signatory parties to a mediation contract.

By clarifying, right from the beginning, the aspects related to the confidentiality of the information and especially of how important it is for the parties and mediator to keep the confidentiality of the information provided during the mediation, may also lead to the clear establishment of the way the parties and the mediator ensure the confidentiality of the information, but also to the type of information and the form that it may be disclosed or submitted to third-parties. Although the parties will be constantly tempted to draw the mediator's willingness or even support to their side, they will finally appreciate the fact that the mediator maintained his/her neutrality and fairness during the mediation, having clarified this aspects right from the beginning.

The beginning of the mediation is the time when the mediator helps the parties discuss and accept that they are in a dispute, that they need and accept the intervention of a third person so that the negotiations between them may start, advance or finalize. Thus, the mediator makes sure right from this stage that the parties will accept his/her interventions, whose objective is only to clarify certain aspects or to complete certain interventions of the parties, without distorting their meaning or content.

In order for the discussions to evolve towards a constructive negotiation, based on the parties' interests, the mediator constantly

“*educates*” the parties to talk only about the aspects relevant to the given issue, to be efficient and to overcome their emotional states that prevent them to communicate with the other party. The mediator’s intervention in the discussions between the parties is constantly discrete, punctual and supportive. The mediator notices the deadlock and responds the parties who, by their presence in the mediation and by assuming their role, have shown they are willing to overcome the difficult moments, have the will of moving on, but they need the mediator’s support to do that.

By repeating a certain way of formulating, positively and constructively, part of the parties’ declaration, the mediation leads the parties towards a pragmatic approach of the discussed issues, helps them overcome previous emotions and “*see*” a possible resolution of the issue. When the parties are prepared to look to the future rather than accuse each other and criticize with respect to past aspects, the mediator’s role is to identify this moment, to collect the ideas stated by the parties and structure them under the form of proposals for future actions that, in this way, would settle the conflict between them.

Thus, mediation ensures a significant increase of the discussions between the parties, allowing them to go faster through the formulation, clarification and agreement stages with respect to a solution package for the conflicting issue.

The more the parties started the mediation greatly affected by the emotional part of their relationship, the more will they appreciate the beginning of negotiations based on pragmatic proposals, acceptable for both parties. There is a risk that the parties are now overcome with an “*enthusiasm*” that would make them pay less attention to certain aspects such as application details (*who will do what?*) or to potential risk upon the enforcement of the solution that is now starting to be formulated (*if not....., then how.....? or but if ...?*).

The mediator’s role is to help the parties analyze the resolution proposals, so that the *final solution* is *efficient* (it is the most efficient resolution method), *correct* for all the parties, but also *realistic* (it takes into account the constraints that the parties are subject to, but also the potential risks outside the parties). The mediator helps the parties “*test*” the solution from the point of view of fairness, realism and efficiency, thus giving the chance that the final solution lasts in time, namely to be sustainable.

**c. The structure of the mediation  
session IDENTIFYING THE ISSUES**

*WHAT THE MEDIATOR DOES:* he/she asks for a brief presentation of the situation from each party: an overview of what happened. This gives the parties the opportunity to explain the situation from their own perspective. The mediator reformulates/reflects on what each party said, in order to be sure that each party understands the other party's perspective. The mediator asks if he/she understood correctly and clarifies where necessary. By using clarifying questions, the mediator obtains the information required to correctly formulate the issues faced by the parties. The mediator identifies the issues (e.g. you may write them down on a flipchart) and lets the parties establish the priorities, thus formulating the agenda.

**EXPLORING THE ISSUES AND INTERESTS**

*WHAT THE MEDIATOR DOES:* starting with the first issue on the agenda, the mediator looks for pertinent information, by using open questions. Thus, new information may be discovered for either party or even for both parties. He/she listens carefully in order to discover the assumptions and perceptions. He/she clarifies the intentions and the impact. He/she explores the interests for the positions and arguments in order to create the necessary understanding that would allow the parties to detach from their positions. E.g.: "*For how long have you been dealing with this issue*"; "*How did you feel when this happened?*"; "*What are the important aspects to you?*"

If necessary, the mediator discusses with the parties in individual meetings (separate sessions). Thus, he/she helps the parties overcome the emotional standstill and maintain negotiations at a rational level, by managing the personality issues.

The mediator may be tempted to jump to premature conclusions. Consequently, he/she will act as an agent of reality during the common sessions and during the individual meetings with each party. He/she focuses on objective criteria, he/she stresses upon the progress, the common denominators and aspects on which the parties manage to agree.

**GENERATING OPTIONS**

*WHAT THE MEDIATOR DOES:* the mediator encourages the parties to continue negotiation in order to generate addenda for the agreement and conclusion of the dispute.

The mediator helps the parties be creative, in order to generate as many solutions to the issue. He/she does not judge and does not minimize any ideas. He/she discourages the establishing of minimum or maximum limits of negotiation and, if necessary, he/she reminds the parties of the consequences in case no agreement would be entered into.

If the parties find it difficult to come up with solutions, the mediator may help the negotiation by resolution examples in similar cases or by suggestions to direct the creativity of the parties (*Have you considered how things would be if...?*). But one must note that the parties are not compelled to accept the mediator's solutions and they must feel free to reject them without feeling threatened or without being afraid of discreditation.

E.g. *"What if...?"*; *"I was wondering if you would also like to consider this possibility..."*; *"Will this possibility seem plausible to you"*.

It is recommended that the mediator avoids making too many suggestions. **It is important that the parties come up with their own solutions.** The mediator insists that the parties come up with suggestions. He/she helps them work together to find acceptable solutions for both parties. This may also imply the acceptance of compromises. Ideally, the parties should reach to a type of *"win – win"* resolution, that would ensure maximum mutual gain.

#### **FORMULATING AN AGREEMENT**

*WHAT THE MEDIATOR DOES:* he/she congratulates each party: they worked hard to solve the issue. He/she writes down the commitment of each party and specifies each commitment. It is recommended that the mediator is as specific as possible: he/she uses the full name; he/she specifies the terms of the agreement in as many details as possible (who, what, where, how); he/she writes down the amounts of money that appear in the agreement; he/she uses formulations that are acceptable and available to both parties.

The mediator checks that the agreement is as balanced as possible. He/she recommends the parties to include provisions that would answer questions like *"But what if...?"*

## 5. Models, methods and procedures of organizing and conducting the mediation

There is a variety of ways whereby mediators may organize their intervention, and these ways are determined by the great variety of situations that they deal with in practice. On the other hand, mediator's personality and previous experience leave their mark on the way he/she chooses to organize and conduct his/her activity. These different ways are reflected in *models*, *methods* and *procedures* that each mediator uses in organizing his/her own activity.

### a. Mediation models

**Models** – the term refers to the characteristics representative to a large group of mediators who approach mediation and their own intervention, with specific objectives with respect to the result of mediation or, more exactly, of the agreement that the parties may eventually reach... Thus<sup>39</sup>, we may distinguish the “*mediator – facilitator and, so, solution creator, from the mediator – counselor, the one who offers a reasonable (correct) opinion*”.

*The counselor mediator's mission is to find solutions for the parties.* The mediator, after having heard the parties, gives a notice or advice and suggestions that he/she finds suitable, balanced, and reasonable. In some cases, the parties are free to accept or reject this point of view, to change it or adapt it, but the mediator's advice has a special weight.

*The facilitator mediator wishes that the parties find their own solutions by themselves.* This type of mediator does not propose any solutions him/herself. He/she tries to do so that the solution results from the dialogue between the parties, starting from the weight of explanations and mutual recognitions. The interested parties – who have a better control of the ground than the mediator – “give birth” to their own solutions.

By combining the two models, a third *mediation model* occurs, *that of the pathologist mediator*, who agrees to *give (issue) ideas* – and not lessons – to complete those issued by the parties. The mediator adds to the parties' ideas those resulted from his/her own experience, in

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<sup>39</sup> *Methode de Mediation – au cœur de la conciliation* – Alain Parker Lampereur, Jacques Salzer, Aurelien Corison, Ed. Dunod, Paris, 2008, pp. 20 - 22,

case the parties do not find themselves in the ideas already issued by themselves. The mediator does this, not to give a “piece of advice”, but in his/her capacity as “donor (issuer) of ideas”: he/she offers them the ideas as a gift, without prejudice to the fact that will take over these ideas or not, that these possible solutions will be perceived by the parties as they deem fit or not. To sum up, the mediator asks out loud about the opportunity of one or another of the proposed solutions, about ways of challenging them. Knowing that he/she is not “the other”, that he/she gives ideas without counseling, without insisting, without putting pressure, without claiming to be the only one who holds the key of justice and impartiality.

#### **b. Mediation methods**

**Methods** – even if they present themselves as counselors or creators, the mediator do not use the same methods. In what is now a classic typology (French & Raven, 1959), the mediator has six different methods for the parties: he/she may *reward* them; or, on the contrary, he/she may exercise a *pressure* on them; or he/she may use an *expertise* that the parties trust; or his/her *statute* may grant him/her a special legitimacy; or the parties may harness the *relationship* they have with their mediator; or, finally the mediator may use *information* that can be made available to the parties.

Within these great methods, the mediators are the ones who choose the method, namely they select rational approaches in order to reach their purpose. This what the flexibility of the case is about, and there are many choices that the mediator makes.

For *instance*, at the beginning of mediation, is there a verbal contract or a written agreement with respect to the rules of the game? Is communication in writing, verbal, face to face or by phone? How is divided the time assigned to the analysis of the past in the relation to exploring future possibilities? The final agreement, is it verbal or written, drafted by the parties, or by their attorneys or by the mediator – the latter him/herself under the control of the parties?

#### **c. Mediation procedures**

**Procedures or proceedings** – refer to the personal way of each mediator of acting in a given situation.

The style varies even in the same person, depending on the situation faced with. The manner of choosing words, the ways of welcoming the parties, choosing space and time, asked questions, using silence, using writing, using different initiatives of the mediator. All these aspects explain that no mediation will be identical to another, that the mediator has the deontological obligation of constantly adapting his/her working method to a given situation and to the particularities of the parties requesting mediation.

## **6. Specific procedural methods in cross-border mediation**

### **a. The specificity of mediation in cross-border disputes**

Cross-border disputes refer to a particular situation in which there is a foreign element, often in respect to the parties. In these situations, the parties usually domicile or reside in two different countries; irrespective if they have the same nationality or they have different nationalities. Mediation may also be used in such cases to settle the dispute, either from the parties' initiative or at the recommendation of an authority with duties in the field related to the conflicting situation. But, in all cases, the parties deal with constraints given by the additional travel and accommodation expense, the fact that they must assign an extra time for these travels, outside the mediation sessions, but also with constraints related to cultural and/or language differences.

The limited understanding of the judicial system in the country where the other party resides and even the fear or distrust in another judicial system than its own, are constraints of those faced with a cross-border dispute. The purpose of taking part in mediation is to try an amicable settlement, but it is important that the parties' understanding be recognized by either judicial system in the countries where the parties come from.

All these constraints result in a few priorities for the parties who use mediation in a cross-border dispute, namely:

- *Correct and timely information* with respect to the *legal effects of the mediation agreement* and the recognition of a potential agreement resulted from mediation
- *Timely judicious classification* of the mediation procedure and its adaptation to the particularities of the parties involved in mediation

- The *accessibility* of alternative communication channels (telephony, Internet) and the efficient use of the communication channels that the parties have access to
- *Cost estimates* related to mediation, as accurate and clear as possible
- *Correct identification of language constraints* and ensuring the parties' possibility of negotiating preferable in their mother tongue or in any other language in which they feel comfortable to express themselves, as the case may be
- The *availability of* quality mediation *services* for the field in which the dispute occurs

Unlike mediation in case of domestic disputes without a foreign element, in the case of cross-border disputes the mediator needs an extra training what would give him/her the possibility, on one hand, to take into account scheduling his/her activity in relation to the legal constraints specific to the case, and on the other hand to properly approach the cultural differences between the parties. In cross-border mediation there is a certain state of anxiety of the parties, which must be overcome, so that they are able to approach issues rationally and to think of solutions of dispute settlement or of getting over the crisis.

In all cases, thus in cross-border mediation as well, the mediator is governed in his/her activity by the same principles, namely by neutrality, fairness, confidentiality and the parties' freedom of decision-making or self-determination.

#### **b. Examples of organizing mediation in cross-border disputes**

The litigants' obligation of ensuring access to the mediation services lead to the building of an *accreditation system for mediators*, who may take over cases with respect to courts (disputes), in each Member State.

The accreditation or authorization conditions are set forth under the law, and the mediation quality standards for the training of mediator, in general, or by application areas are set forth directly by the Ministry of Justice or through an authority subordinated to it, or through any other competent authority designated by law (see the case of Romania, where the competent authority is the Mediation Council, an autonomous body, of public interest).



In *Austria*<sup>40</sup>, the law adopted in 2004 settled the accreditation conditions, and the Ministry of Justice constantly settles and adapts the training standards and grant accreditation to the mediators which it registers in the *List of accredited mediators*.

In *Belgium*<sup>41</sup>, the amendment law of the Civil Procedure Code adopted in 2005 settled the accreditation conditions, and a federal commission ensures the accreditation of mediators and sets forth the training condition by practice areas, but it **does not** draft a general list of accredited mediators.

In *Bulgaria*<sup>42</sup>, the law adopted in 2004 settled the authorization conditions and the Ministry of Justice drafts and updates the *Uniform Register of Mediators*.

In *Cyprus*<sup>43</sup>, the legislative proposal in the field of mediation sets forth the general accreditation conditions, and the *Register of mediators* is drafted and updated in a dual system, as follows: the Register, drafted by the Chamber of Commerce, includes its members who wish to practice mediation; and the Register drafted by the Bar Association includes only professionals in the legal field, with at least two years of seniority in legal activity, and who wish to practice mediation.

In the *Czech Republic*<sup>44</sup>, the legislative proposal under debate settles the general accreditation conditions and the Ministry of Justice drafts and updates the Official List of Mediators who have been trained according to standards and have passed the examination held at the end of their training.

In *Estonia*<sup>45</sup> there are no special requirements for mediators, as this position may be taken by notaries public, jurists, natural persons or organizations within the local or national administration system that are self-proclaimed as mediation organizations.

In *Finland*<sup>46</sup>, the only requirement is to make proof of training as mediator. Currently training programs for mediations are provided through the Ministry of Justice and the Bar Association.

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<sup>40</sup> EU Mediation – Law and Practice, edited by Giuseppe de Palo and Mary B. Travor, Oxford University Press, 2012, page 15

<sup>41</sup> Idem 17, pp. 29-30

<sup>42</sup> Idem 17, pp. 39-40

<sup>43</sup> Idem 17, pp. 55-56

<sup>44</sup> Idem 17, pp. 65-66

<sup>45</sup> Idem 17, pp. 90-91

<sup>46</sup> Idem 17, page 106

In *France*<sup>47</sup>, the amendment law of the Civil Procedure Code settled the general accreditation conditions for mediators, but no authority whatsoever is designated to set forth quality conditions in the training and accreditation of mediators. Mediators make known their availability only in relation to a court, by making proof that they abide by the terms of the law. Nevertheless, in certain areas, such as mediation in cases of family law, the mediators must take an examination held by the state, and those who wish to act in work disputes must make proof of relevant experience in the field of work.

In *Germany*<sup>48</sup>, a law was adopted in 2012 to regulate the conditions of being admitted as a mediator in civil and commercial matters, in compliance with Directive EC/52/2008, which also provides a unitary system of accreditation and registration in the list of mediators. There are several organizations that are partners of the national or local authority in different fields and operate in the field of mediation.

In *Greece*<sup>49</sup>, the law adopted in 2010 settled the accreditation conditions for mediators, and the Ministry of Justice, by a specialized department, drafts the *official list of accredited mediators*.

In *Hungary*<sup>50</sup>, the law was adopted in 2004 and conditions of being admitted as mediator were set forth, and the Ministry of Public Administration and Justice drafts and updates the *official list of accredited mediators*.

*Ireland*<sup>51</sup> has not adopted yet a law with respect to the means of accreditation for mediators, and there is no official list of mediators who may take over cases with respect to the court. The same situation exists in *Latvia*<sup>52</sup>, where the law gives the possibility of using mediation, but it does not impose conditions for the accreditation of mediators and for the drafting of an official list of mediators. On the other hand, in *Lithuania*<sup>53</sup>, a law was adopted in 2008, which allowed only judges to act as mediators, and subsequently this law was amended and so other persons who make proof of their training as mediators may be registered as well in the

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<sup>47</sup> Idem 17, pp. 122-125

<sup>48</sup> Idem 17, page 142

<sup>49</sup> Idem 17, pp. 154-155

<sup>50</sup> Idem 17, page 168

<sup>51</sup> Idem 17, pp. 182-183

<sup>52</sup> Idem 17, pp. 211-213

<sup>53</sup> Idem 17, pp. 231-234

*List of judicial mediators.* Also, in *Luxembourg*<sup>54</sup>, the Ministry of Justice ensures the accreditation of mediators who may act in cases where there is a litigious action, and this list of mediators is made available to the general public.

In *Italy*<sup>55</sup>, the normative act adopted in 2010 settled the accreditation conditions for mediators, as well as the way they train so that their qualification is recognized, and the General Director of Civil Justice within the Ministry of Justice is responsible for the accreditation and drafting of an *official list of accredited mediators*.

The mediation center in *Malta*<sup>56</sup> ensures accreditation and registration of the persons who make proof of certain conditions set forth under the law for judicial mediators.

In *Poland*<sup>57</sup>, although there is a general legal provision with respect to the condition someone should meet in order to be a judicial mediator, there is no unique accreditation system. The mediators are accredited at the level of NGOs in the field or universities, and the list of mediators who may act in cases with respect to the court is submitted to the courts of law.

In *Portugal*<sup>58</sup>, judicial mediators are trained through programs carried out by the Ministry of Justice, which also drafts an *official list of mediators accredited* to work with respect to the courts of law.

In *Romania*<sup>59</sup>, prior to the adoption of the Directive, an autonomous body of public interest was created under the law, as a regulatory authority in the field of mediation, referred to as the Mediation Council. Its purpose is to verify the fulfillment of certain conditions set forth under the law, concerning the recognition of the capacity as mediator, the drafting and updating of the *Table of authorized mediators* and ensuring the visibility of the mediation services available, via Internet or in collaboration with other institutions. The table of mediators includes all authorized mediators, irrespective of their field of practice, and it is published at least once a year in the Official Journal of Romania, Part I. The Mediation Council is also the authority establishing the training standards of mediators; it

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<sup>54</sup> Idem 17, pp. 241-242

<sup>55</sup> Idem 17, page 195

<sup>56</sup> Idem 17, page 250

<sup>57</sup> Idem 17, pp. 264-266

<sup>58</sup> Idem 17, pp. 282-283

<sup>59</sup> Idem 17, pp. 297-298

authorizes and keeps the record of the training providers who provide specific training programs.

In *Slovakia*<sup>60</sup>, the law adopted in 2004 settled the conditions that a person must meet in order to become mediator, as well as the accreditation conditions. The Ministry of Justice drafts and published the *Register of authorized mediators*.

In *Slovenia*<sup>61</sup>, the law adopted in 2008 settled the accreditation conditions only for mediators who may act in cases with respect to the courts of law. The compliance with the conditions is verified by the courts of law and they draft their own list of accredited mediators.

In *Spain*<sup>62</sup>, the Royal Decree adopted in 2012 settled the general conditions for the accreditation as mediator in civil and commercial matters. The Ministry of Justice is the authority designated to set forth the training conditions for the mediators who may be accredited/authorized to act with respect to the courts of law, as it allows has the obligation of drafting a *Register of Mediators* accredited under the law.

In *Sweden*<sup>63</sup>, the law adopted in 2010 designated the Swedish National Courts Administration to ensure the accreditation of mediators and their registration in the *List of mediators*.

In *the Netherlands*<sup>64</sup>, under the auspices of the Ministry of Justice, the Dutch National Institute (NMI) was established, acting both as a representation association of the mediators' interests, and as a regulatory authority with respect the quality of the mediation services, by setting forth and verifying the observance of the quality standards by the mediators. NMI drafts the *list of mediators* who may act in cases with respect to the courts of law. A Distinct list of mediators who may act in cross-border disputes is underway. In the case of child abductions, the Ministry of Justice developed a training program for mediators specialized in cross-border mediation in cases with children.

*Great Britain*<sup>65</sup> considers the market of mediation services as a free market, and "accreditation" is only seen as an availability to act as

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<sup>60</sup> Idem 17, pp. 308-309

<sup>61</sup> Idem 17, pp. 322

<sup>62</sup> Idem 17, pp. 336-337

<sup>63</sup> Idem 17, pp. 352-353

<sup>64</sup> Idem 17, pp. 365-366

<sup>65</sup> Idem 17, pp. 386-388

mediator, notified to the courts of law or local authorities, without establishing accreditation conditions under the law. The *Civil Mediation Council* (CMC) drafts and maintains the *list of mediators* who wish to practice mediation, by fields, with respect to the courts of law, and the registration is made just by their declaration of intent. CMC is responsible for the accreditation of providers of training programs for mediators, considering that in this way the quality of services and the recognition of the mediators' training are ensured.

## **7. Conclusions**

By giving a unique definition of mediation and an operational framework based on a set of clearly formulated and generally valid set of principles, Directive EC/52/2008 caused legislative modifications in all the member states of the European Union.

The most important legislative modifications with respect to mediation at the level of each Member State of the European Union aimed at the conditions required for someone to act as mediator, as well as the way these conditions are verified and their observance is established, by building proper accreditation/authorization systems for mediators. Sometimes the accreditation/authorization is valid only for the mediators who wish to practice with respect to a dispute, other times they are generally valid for the profession as mediator. In most cases, at the level of the member states, lists or unique registers of accredited/authorized mediators are drafted, thus ensuring the access to mediation services by publishing these lists at the level of the courts of law or at a national level. In all cases, the ministries of justice or authorities with similar attributes are those that provide the general public with the lists or registers of accredited/authorized mediators.

The quality standards for the training of mediators are still different. The greatest differentiation between the quality of mediation services in various states is given by the content and the length of the training programs for mediators. Nevertheless, there is a constant concern to adapt these standards to the market demands, inasmuch as the mediation becomes a service increasingly present in the judicial systems of every state.

Cross-border mediation causes a constant need for mutual knowledge of the mediators and for overcoming differences with respect to the quality of their training. Relating mediation to the

needs of the courts of law to be relieved of cases that may be settled amicably, leads to a constant reaffirmation of the principles that mediators' activity is based on, and to a greater concern for the observance of these principles. The models and procedures specific to mediators thus become more carefully known and analyzed by all interested parties, both from the perspective of mainly observing mediation, and the organization of the mediators' activity.



## **CHAPTER 5**

### **PROMOTING AND APPLYING CROSS-BORDER MEDIATION. LEGISLATIVE ASPECTS. PRESENT PUBLIC AUTHORITIES**

**Sanda Elena Lungu**

#### **1. Introduction**

The increase of the number of disputes in the European area, and all over the world, led to a change in the justice concept, which starts evolving from classic trial (court of law – courtroom) towards alternative solutions, prior to or concomitant with the court of law.

In 1999, the chiefs of state and government of the European Union Member States convened in Tampere and requested the creation of alternative out-of-court procedures, for dispute resolution, in view of improving access to justice in Europe.

As a result of ample public debates, in October 2004, the Commission adopted a directive proposal related to certain aspects of mediation in civil and commercial matters.

This Directive was preceded by other Community regulations with respect to mediation, in fields ranging from consumer protection to the criminal, civil or administrative law.

But the recognition and guarantee of mediation as an alternative dispute resolution method is not enough for it to be accepted by the general public, used to the settlement of disputes in the courtroom.

For this reason, in order that mediation becomes an efficient alternative procedure, it must be promoted among the European citizens in general, the litigants in particular, but also among the law experts: judges, prosecutors, attorneys, counselors, registrars, etc.

No matter how efficient is the promotion of mediation, it would be without result if not applied correctly by all direct or indirect participants in the trial or mediation procedure.

The legislative process is also important, as it is responsible, on one hand, for full and correct transposition of the European bylaws into



the internal legislation, and for ensuring a mediation-related uniform national legislation.

Considering this rationale, on 21<sup>st</sup> May 2008, in the Official Journal of the European Union, was published Directive no. 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters. Within this directive, the obligation of the states to involved and promote cross-border mediation is expressly guaranteed.

## 2. Promoting cross-border mediation

### a. Information subject to promotion

Alternative dispute resolution methods, in general, and mediation, in particular, are, in many member countries of the European Union, still in their initial phase. The great experience of other states of the world resulted in the fact that mediation is an efficient dispute settlement method. For these reasons, the **existence and availability** of mediation on a large scale, as well as the **advantages** of this alternative dispute resolution method must be brought to the attention of European citizens.

Mediation is much **faster** and it implies fewer expenses than regular legal proceedings. The settlement of cases through mediation is usually made in 2-3 mediation sessions.

According to a study performed by the ABC Mediation Dutch foundation, 72% of mediations were completed in a maximum of 16 hours, which means a 4-session mediation, 4 hours each. Moreover, 14% of the mediations were concluded in a single mediation session (the study referred to mediations carried out in the Netherlands during 1998-2004)<sup>66</sup>.

As far as the **costs** are concerned, they vary from one country to another, from one mediator to another, as the mediator's fee may be incurred by the state/court of law, in full or in part (where mediation services are organized and operate within the courts of law)<sup>67</sup>, or by the parties.

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<sup>66</sup> "Toolkit Generating Outcomes", Manon Schonewille, Sdu UITGEVERS, The Hague, 2009, page 90.

<sup>67</sup> Especially in the case of family conflicts, the mediator's fee is not the parties' responsibility, as they benefit from free of charge mediation (Ireland, Latvia, Malta),

For instance, in Romania, where mediation is organized as a liberal profession, the mediator's fee is negotiated directly with the said, as it may be incurred by one party or it may be divided between the participants in the mediation session. Usually, the fee is charged for the entire mediation procedure<sup>68</sup>.

**Confidentiality** of the procedure is a strong argument in favor of using this method.

The obligation to keep the confidentiality is applicable both to the mediator, and to other persons taking part in mediation, such as experts, counselors, secretaries, etc. Also, the parties may agree that the discussions held during mediation are confidential, as the information provided on this occasion may not be subsequently used in court, except as otherwise provided by the parties or the law.

Implicitly, the use of mediation helps the parties avoid the bad image created by a lawsuit and a sentence.

Another advantage is the fact that, through mediation, confrontation between the parties involved in the judicial system is avoided and it allows them to ***maintain their professional or personal relationships*** after the conflict resolution.

Mediation also gives the parties the possibility to find ***creative solutions*** to their disputes, as they could not get such solutions in the court. In mediation, unlike the courtroom, there is no chance of "losing the trial", because the jointly accepted solution meets the parties' needs and interests. In case the parties are not happy with the way the mediation is conducted, they may leave it at any time in favor of the classic trial.

A series of ***guarantees*** are ensured, aimed at increasing the trust and safety in using mediation, such as: the quality of the mediators' training, their continuous training, their specialization in certain

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according to "Overview of judicial mediation in the world", Beatrice Brenneur (coordinator), L'Harmattan, Paris, 2010, page 176, page 184, page 190.

<sup>68</sup> According to art. 45, letter f in Law no. 192/2006 on mediation and organization of the mediator profession, the mediation contract must include, under sanction of annulment, provisions related to the "obligation of the conflicting parties to pay the fee due to the mediator and the expenses incurred by the latter during mediation to the interest of the parties, as well as the methods of advance payment and payment for these amounts, including in case of waiver of mediation or failure of the procedure, as well as the extent to be incurred by the parties, considering, if necessary, their social status. Unless otherwise agreed, these amounts shall be equally incurred by the parties".

matters, the suspension or interruption of the limitation and prescription periods so that the access to justice is not hindered.

**Mediators are professionals** specially trained to conduct the mediation process. When promoting mediation, it is very important that the parties are informed on the fact that mediators are specialized persons, specially trained to carry out this profession.

For instance, in Romania, the training standard provides courses and a minimum duration of 80 hours, 70% of which consisting in practical training and 30% in theoretical training<sup>69</sup>.

The initial training period varies depending on each country's legislation, starting from 36 hours in Italy<sup>70</sup> to 2 days in Finland<sup>71</sup>, as well as from 120- 300 hours in Switzerland<sup>72</sup> to 400-500 hours of training in Spain<sup>73</sup>.

It is very important that the parties know that, by trying the dispute resolution through mediation, they **do not lose the right of access to justice**, the limitation and prescription periods being suspended or interrupted.

Finally, the use of mediation helps **decrease the number of cases on the dockets of the courts** and **reduce the judicial expense** both for the parties involved in the trial, and for the courts of law, it **increases the quality of the judicial act** by increasing the time granted by the judge to the files that may not be subject to the mediation procedure, also raising the **litigants' degree of satisfaction**.

Of a real interest in promoting mediation is the **concrete way in which an interested person may contact a mediator**, the terms of conducting mediation, guaranteeing the observance of the basic principles in the good conduct of this procedure. The information related to mediators and their specialization must be easily accessible, at any time, both during the court sessions, and to the other public or private authorities involved in promoting mediation, both in a written form, and in an electronic format.

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<sup>69</sup> According to Decision no. 12/2007 of the Mediation Council for the approval of the training standard for mediators, available on <http://www.cmediation.ro/legislatie/7/>

<sup>70</sup> According „Overview of judicial mediation in the world”, Beatrice Brenneuer (coordinator),

L'Harmattan, Paris, 2010, page 180.

<sup>71</sup> Idem 70, pp. 156

<sup>72</sup> Idem 70, pp. 229

<sup>73</sup> Idem 70, pp. 222.

## **b. Means of promoting cross-border mediation**

i. **At a European level**, mediation is promoted by audio/video or written materials, including the Internet, all over the European Union.

There are training and information programs, with public or private funding, designed for both professionals (magistrates, attorneys, mediators)<sup>74</sup>, and the general public. Information and awareness campaigns are organized, in order to promote the advantages of using mediation as well as how to use it.

The large scale use of the internet, as well as the specific needs of cross-border disputes has developed a wide information network.

Thus, on the official website of the European Union, there is information related to the alternative dispute resolution methods both at a Community level, and at a national level<sup>75</sup>.

Also, there is information available by specialized subjects, such as the area of consumer disputes. The Commission published on its website a list of a large number of organizations providing alternative services for the settlement of disputes involving consumers in all the member states. In this list, one may find the practical information may need in order to decide on using one of these methods alternative to classic justice: structure, scope, type of procedure it follows, cost and other details<sup>76</sup>.

In addition, in case of financial disputes, there is helpful information in the FINNET network<sup>77</sup>.

Public information, accessible to all European citizens, are found on other specialized websites, with a global, European, national or local nature<sup>78</sup>.

Many publications are available, from national to international ones (books, articles, papers).

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<sup>74</sup> Such as, for instance, the project "Promoting mediation in cross-border cases", funded by the European Union, during the "Civil Justice" Specific Programme, within which this paper is also elaborated,  
<sup>75</sup> [http://ec.europa.eu/civiljustice/adr/adr\\_ec\\_en.htm](http://ec.europa.eu/civiljustice/adr/adr_ec_en.htm)

<sup>76</sup> This list may be referred to at the following internet address:  
[http://ec.europa.eu/consumers/redress/out\\_of\\_court/database/index\\_en.htm](http://ec.europa.eu/consumers/redress/out_of_court/database/index_en.htm)

<sup>77</sup> Available at the address: <http://finnet.jrc.it/en/>

<sup>78</sup> For instance, <http://www.mediationworld.net/>, <http://www.scottishmediation.org.uk/>,  
<http://www.europemediation.eu/>, <http://www.imimmediation.org/>,  
<http://www.mediation.com.sg/>, <http://www.mediationeurope.net>.

ii. **At a national level**, promoting cross-border mediation must be adapted to the specificity of each country and region.

Generally, the promotion is carried out by actions of informing the general public (radio/TV, press), by actions of students' information, in general from those at the faculties with legal specialization, through master's degree type programs or compulsory/optional study subjects, through training and information programs for professionals in legal fields: attorneys, magistrates (judges and prosecutors), other professionals.

Of special importance is the national legislation, which must recognize and include cross-border mediation among the alternative dispute resolution methods, it must ensure national and cross-border efficacy and application, to include incentive methods for the citizens in using it and of sanctions when ignored.

There are many national, public or private websites that include information related to mediation, in general, but also to the way mediators are chosen/designated, their specializations and, very important in cross-border disputes, known foreign languages.

For instance, in Romania, a full list of mediators with the right to exercise this profession, their specializations, as well as known foreign languages is found on the Mediation Council website.<sup>79</sup>

Specifically and with a direct impact is the parties' information by the magistrate (judge or prosecutor) or the information by other judicial or arbitrary bodies that may recommend the parties involved in a dispute the use of mediation as an alternative dispute settlement method or only the participation in an information session whereby a specialized person, usually a mediator, shows them the advantages of mediation in general and the specificity of cross-border mediation, in particular.

There is the possibility of submitting this information also in written form, either directly with a subpoena, or as a document (brochure) attached to the subpoena, so that, together with the party's notification on the trial, it also receives the information related to the settlement of the case by alternative methods.

Cross-border mediation may also be promoted directly to the courts of law, by bulletin boards, on-screen video messages or at info

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<sup>79</sup> Available in both Romanian and English, at the address: <http://www.cmediation.ro/mediatori/>

kiosks, brochures accessible to the general public in the waiting rooms or by direct discussions with a specialized person within the court.

One must disregard the specialized literature, articles or conferences in the field.

There are states that chose the variant of free phone services, where any interested person may find out information related to mediation and mediators.

### **c. Difficulties in promoting cross-border mediation**

Although significant progress has been made, supported by the European legislation, one of the main difficulties in promoting cross-border mediation results from the **insufficient information** of the litigants, attorneys, magistrates, citizens in general with respect to mediation and its advantages. The habit of using the traditional justice system, and the insufficient knowledge of the alternative dispute resolution methods leads to high costs and a significant waste of time.

According to a study of ADR Center, established by the European Commission ( *The Cost of Non ADR – Surveying and Showing the Actual Costs of Intra- Community Commercial Litigation*) for a commercial dispute with an average value of EUR 200,000, the time spent by not using mediation and the direct request of the court to settle the dispute is between an average of 331 and 436 additional days, and the additional legal expense range from EUR 12,471 to 13,738/case<sup>80</sup>.

These figures outline the advantages of using alternative dispute resolution methods and they are a strong argument for the national states, but also for European citizens, with respect to using alternatives to the court of law.

Another difficulty in promoting cross-border mediation comes from the **low number of mediators specialized** in this field. The mediation of a cross-border dispute requires a special training of the mediator, good knowledge of the aimed legislations, the possibility of a potential co-mediation, adapting the mediation style to the cultural

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<sup>80</sup> Details on [http://www.adrcenter.com/jamsinternational/civil-justice/Survey\\_Data\\_Report.pdf](http://www.adrcenter.com/jamsinternational/civil-justice/Survey_Data_Report.pdf)

specifics of each participating party. The relatively new introduction of mediation in the legislations of certain states leads to a still small number of professional mediators.

For instance, in Romania, on 1<sup>st</sup> November 2012, the total number of authorized mediators was 2334, according to the official data of the Mediation Council<sup>81</sup>.

There are law systems in which mediation is organized separately from the courts of law, as a liberal profession exercised by independent mediators, associations or NGOs.

In case the mediation is not organized within or next to the courts of law and it is regulated as an **independent profession** (as in the case of Romania), the communication between the new profession, mediators and magistrates is hardened, especially if there is not tradition of using alternative dispute resolution methods.

One should not ignore the **opposition of attorneys** either, who, at first sight, consider mediation as an “enemy”, without being willing to support it and avoiding advising their clients to try the settlement of their conflict, first through this method.

Better promotion of mediation through the means presented above requires continuous **financial funds** in order to perform campaigns or to support mediation, within the courts of law.

Among the difficulties in promoting mediation, we note the **confidentiality principle** that governs the mediation procedure.

The impossibility of promoting mediation by disseminating famous “cases”, with an impact on the public opinion, turns this principle in a disadvantage, with respect to promoting mediation.

### 3. Applying cross-border mediation

#### a. Particularities of cross-border mediation

Cross-border mediation may be carried out in any field: family conflicts, work, civil, commercial conflicts, consumer conflicts and in many other cases.

The specificity of cross-border mediation leads to the use of special techniques, specific to the cases in this category.

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<sup>81</sup> Details on <http://www.cmediation.ro/>

First of all, the parties are likely not to meet face to face at all.

Legally, mediation may be carried out not only by bringing the parties in the same office and making them sit around the same table, but the procedure may also be carried out without the parties seeing each other at all, either because they are staying in different rooms, or because they are in different locations. Sometimes, if a party is present at the mediator's office, other times the mediator travels and summons the parties in a neutral place.

This is why effective, remote mediation is carried out in case of cross-border disputes, by modern communication techniques, such as the Internet (web cam, Skype, go to meeting, e-mail), by phone, more seldom by fax or registered mail.

Many times, given the difference in legislation, language and tradition, co-mediation is practiced in cross-border disputes, each mediator knowing the specifics of one party.

Thus, there are countries with different legislation for national mediations than cross-border mediations. There are situations where the parties present before the mediator come from different countries, from different continents and they all wish the conclusion of a valid mediation agreement. The mediator must know these legislations and apply the legal bylaws governing the respective mediation.

The language difficulties may be overcome by the presence of a translator/interpreter who shall be held, like the mediator, by the obligation of keeping the confidentiality of the discussions.

The cultural differences must be considered when mediating certain types of conflicts like family conflicts. Moreover, the principle of watching over the best interest of the child must be considered irrespective of any particularities of cross-border mediation.

The mediators specialized in cross-border disputes have a thorough training in the field, broad knowledge of language, culture and traditions; when in need, the mediators may perform a co-mediation (to persons mediating the dispute concomitantly), each mediator having specific knowledge or being able to request an interpreter/expert to take part in the mediation.

The mediation agreement shall be drafted, as per the understanding of the parties, in a common language or for each party in their known language, which is why the presence of the translator is extremely useful.



Given that the mediator does not always have legal knowledge, the presence of the parties' attorneys in some cases is essential. Mediation does not exclude the presence of the attorney assisting either party, but, on the contrary, his/her participation is useful.

#### **b. Persons involved in applying cross-border mediation**

First of all, applying cross-border mediation is performed by **mediators** specialized in such disputes. In general, due to the complexity of language, legislation and culture, cross-border requires a special thorough training, which is why not all mediators may mediate such disputes.

The **parties** involved in a cross-border dispute, who decide on a voluntary basis or, according to the national legislation, are compelled to try the conflict resolution first through an alternative method, prior or concomitant to the court of law, are the main "beneficiaries" of cross-border mediation.

Also, the application of cross-border mediation is indirectly carried out by the parties' **attorneys, counselors**, natural or legal persons, who recommend their clients to use mediation or who assist their clients in such a procedure. Knowing the specifics of cross-border mediation grants them an extra value in the good management of the assistance they give to their clients.

The **magistrates**, either acting themselves as mediators (in countries where this is allowed, like Germany, Norway), or just recommending the use of mediation, must know in detail the rules applicable to cross-border mediation, in order to provide the parties with correct and competent information in the field.

Cross-border mediation and its application rules must be also considered by the various **national or transnational institutions** (such as the children protection institutions), which must support European citizens in finding the best solution for the settlement of a conflict.

#### **c. Difficulties in applying cross-border mediation**

i. **Language** difficulties – due to the language difficulties between the member states of the European Union, a series of barriers occur in the application of cross-border mediation.

The mediator must know very well the language spoken by the parties, in order to understand exactly their needs and interests and help them to reach an agreement.

The use of the translator/interpreter, which is allowed, for instance, in the Romanian legislation, also implies a series of obligations for the former, such as the confidentiality obligation, as he/she signs the mediation agreement together with the parties.

ii. **Legislative** difficulties – although *Directive no. 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters* outlines a series of directions to follow in order to unify the legislation with respect to cross-border mediation, the internal legislations are different both with respect to the methods of promotion, stimulation or the sanctions applicable for not using these methods.

Thus, according to the *European Parliament resolution of 13 September 2011 on the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by the courts 2011/2026(INI)*<sup>82</sup>, most member states have a procedure in order to grant agreements resulted from mediation the same authority as the judicial decisions; it observes that the agreement acquires this authority either by its authentication by a notary public and that some national legislations seem to have chosen the latter solution, whereas, on the contrary, in many member states, notarial authentication is also an option made available on the grounds of national legislation. Thus, for instance, in Greece and Slovenia, the legislation provides that an agreement resulted from mediation may be enforced by the courts, whereas in the Netherlands and Germany, agreements may acquire enforcement as notarial documents; in other member states, such as Austria, agreements may become enforceable as notarial documents according to the existing judicial situation, without the express provision by the national judicial act of this possibility.

Also, besides financial incentives, certain member states whose judicial systems are overloaded, have chosen bylaws granting mediation a compulsory nature, in the way that, in such cases, the sue petitions may not be filed at the competent court until the parties have not tried to settle the dispute first through mediation.

All these differences may create a hesitant attitude of the parties, in default of proper information.

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<sup>82</sup> Available on <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0361+0+DOC+XML+V0//RO>

Moreover, there are countries where the internal legislation related to mediation differs from the one related to cross-border disputes, and could thus raise confusions among those who wish to try mediation of a dispute with a foreign element.

iii. Difficulties caused **by distance** – in general, the use of the classic mediation methods are costly in case the participants in the procedure come from different member states at great distance from one another. This implies a series of additional costs such as travel, accommodation-related costs, current expenses, absence from work. These cumulated expenses may exceed the level of the disputed amount, and the interested party may tend to give up mediation and even the trial.

For this reason, in such cases, mediation through modern means is recommended: telephone, internet, videoconference, etc.

iv. Difficulties caused by the **mediation style used**.

From this point of view, European legislation is different: there are systems in which mediation is of a facilitative type (the mediator does not provide solutions, does not provide a settlement of the dispute, his/her role being only to lead the parties to an understanding, so that, within it, the mediator is conducting the mediation procedure, but the mediation belongs to the parties and the solution is exclusively theirs<sup>83</sup>), it may be of an evaluative type (based on the mediator's experience in a certain field) or of a transformative type (where the mediator gets involved in the transformation of the relationship between the parties, so that they move from a tensed relationship, to a collaboration relationship, even if, for that, the mediator could willingly cause an amplification of the conflict in order to create a total unlock of communication).

Where there is a habit of using alternative dispute resolution methods, in general, and of mediation in particular, these different approaches of the mediator may raise distrust and/or disappointment with respect to the parties' expectations in the mediation procedure.

v. Difficulties caused by the **small number of magistrates and cases** in which mediation is recommended.

In general, litigants will not give up, on their own initiative, to the classic trial procedure.

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<sup>83</sup> Law no. 192/2006 on mediation and exercising the mediator profession regulates, in Romania, facilitative mediation.

Especially in the countries where there is no tradition of using alternative dispute resolution methods prior to trial, nobody will resort, on their own initiative, to mediation.

For this reason, the recommendation of the court (especially in the countries where compulsory mediation is not regulated), is extremely important, given the authority that the judge represents.

The small number of magistrates recommending mediation is due, in certain situations, to not knowing the institution of mediation and its advantages, and in other cases to the large number of cases on the dockets of the court, which leads to the impossibility of recommending mediation in each case file or in the formal recommendation.

For instance, in the Romanian legislation, in order to compensate for these difficulties, the solution of parties' participation was approached, in a large number of disputes, in an information sessions with respect to the advantages of mediation, under sanction of dismissing the action as inadmissible.

The information is provided by the mediator and it is free of charge (provision effective as of 1<sup>st</sup> February 2013)<sup>84</sup>.

vi. Other difficulties in applying the mediation law are due to the **lack of special legal provisions** in the field, which would represent an instrument accessible to the participants in the procedure or to magistrates.

There are legislations (for instance in the Netherlands) that do not have a mediation law, and the provision on this matter is found in various normative acts that also regulate mediation, among others.

In the same way, there are legislations (for instance, in Romania), where there is a mediation law little known to the general public and even to magistrates.

Only after its inclusion in the Civil Procedure Code and the Criminal Procedure Code did the mediation become an instrument used by the magistrates.

vii. In **default of magistrates' training** with respect to the way of information and recommendation of mediation, difficulties occur in

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<sup>84</sup> According to art. 60<sup>1</sup> in Law no. 192/2006 that regulates mediation in Romania, this information procedure shall be compulsory in disputes such as consumer protection, family law, neighborhood relationships, malpractice cases, work disputes, civil disputes with a value less than RON 50,000, certain crimes.

its application. Thus, too vague information leads to dealing superficially with the possibility of extinguishing the dispute through mediation, whereas incorrect information may depart the parties from the possibility of mediating the conflict.

In Romania, the only courses that include topics related to the way the parties should be informed with respect to mediation, exclusively aimed at magistrates, are organized, within the Centralized Continuous Training Programme, by the Judiciary National Institute.

In the Netherlands, such courses are held for all judges, with manuals specially designed for this purpose<sup>85</sup>.

#### **4. Legislative aspects concerning the promotion and application of cross-border mediation**

##### **a. Legislation prior to Directive no. 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters.**

Cross-border mediation was subject to several European regulations, as there is an increasing interest in promoting and applying this alternative method. As shown before, European legislation initially focused on dispute settlement with respect to consumer right so that, in time, it evolved towards other fields and towards the actual mediation.

*\* Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes and Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes.*

These two recommendations provide the minimum quality criteria that out-of-court bodies, in charge with the consensual resolution of consumer dispute must provide to their users. These criteria are essential to the application and promotion of cross-border disputes in consumer matters.

Commission Recommendation 2001/310/EC, applicable to third-party bodies responsible for out-of-court settlement of consumer disputes that, irrespective of their name, try to settle a dispute by

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<sup>85</sup> Such as, for instance, the "Referral to Mediation" work by Machteld Pel, Sdu Uitgevers Publishing House, The Hague, 2008.

bringing the parties closer together in order to convince them to find a joint solution, they present the principles applicable to them: fairness, transparency of the procedure, which must also include information related to the development of the procedure, the types of accepted disputes and any limitation of the procedure; the rules related to the prerequisites that the parties must meet, as well as other procedure rules, especially those related to the development of the procedure and the languages in which the procedure shall be conducted; the potential costs for the parties; the procedure calendar, corresponding to each type of dispute; any basic rule that may be applied (legal provisions, good practice in the industry area, fairness, code of conduct); the role of the procedure in the dispute resolution; the value of any agreement whereby the dispute is settled. Also, the principles concerning the efficacy of the procedure are outlined, as it needs to be accessible, free of charge for the consumer, quick and direct, and the principle concerning the fairness of the procedure.

\* *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').*

Article 17 (1) and (2) of this Directive on the out-of-court settlement of disputes concerns the access, including the electronic one, to the alternative dispute resolution methods.<sup>86</sup>

\* *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*

Article 55 of this text, regulating the parental authority and divorce, expressly states the obligation of the central authority of facilitating the conclusion of agreements between the holders of parental

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<sup>86</sup>Art. 17 „(1) Member States shall ensure that, in the event of disagreement between an information society service provider and the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.

(2) Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned”.

responsibility, by using mediation or other means and the facilitation of cross-border cooperation to this end<sup>87</sup>.

\* *Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes*, also encourages the use of alternative dispute resolution methods by the provisions stating that legal aid must be granted under the same conditions, both in the case of traditional judicial proceedings, and in the case of out-of-court proceedings, such as mediation, when the legislation imposes the use of such proceedings or a court sends the parties to such proceedings<sup>88</sup>.

\* *Recommendation No. R (99) 19 of the Committee of Ministers to Member States concerning mediation in penal matters* (adopted on 15 September 1999 at the 679<sup>th</sup> meeting of the Ministers' Deputies);

\* *Recommendation no. (98) 1 of the Committee of Ministers to Member States on family mediation* (adopted on 21 January 1998 at the 616<sup>th</sup> meeting of the Ministers' Deputies). This recommendation contains express bylaws related to the promotion and application of cross-border mediation.

The contents of this Recommendation indicates mediation as the best dispute resolution method in family matters, as compared with the increasing number of family disputes, especially of those generated by separation or divorce, and considering the damaging consequences of such conflicts on the families. High costs, social and economic costs are also considered, which the states must incur, given the need to ensure the protection of the best interest and welfare of the child, considering especially the situations related to the custody and visitation right, arising as a separation or divorce; having regard the development of ways of settling disputes in a

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<sup>87</sup> Art. 55 "The central authorities shall, upon request from a central authority of another Member State or 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:(...) (e) facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end".

<sup>88</sup> Article 10 shows that "legal aid shall also be extended to extrajudicial procedures, under the conditions defined in this Directive, if the law requires the parties to use them, or if the parties to the dispute are ordered by the court to have recourse to them".

consensual manner and the recognition of the necessity to reduce the conflict to the interest of all family members.

By reminding the specificity of this type of disputes, namely the fact that in family disputes are involved persons between which there are, by definition, continuous relationships of interdependence, that family disputes occur in an unhappy emotional context and they may escalate it or that separation or divorce has a strong impact on all family members, especially on children, and also by referring to the provisions of the European Convention on the Exercise of Children's Rights<sup>89</sup>, and especially to article 13 of this Convention, which provides the use of mediation or other means to resolve conflicts involving children, and also outlining the extent of the phenomenon of internationalizing the family relationships and specific issues arising thereof. The Committee of Ministers states that they are convinced of the necessity to use family mediation as often as possible.

By taking into account the results of research on using mediation and the experiences of several countries in the field, which show that the use of mediation may: improve communication between family members, reduce the conflict between conflicting parties and lead to a consensual settlement, ensure the continuity of the ties between parents and children, contribute to a reduction in economic and social costs caused by separation or divorce, both for the parties, and for the states, but also reduce the time period required to settle the conflict, the Committee of Ministers "governments and member states:

- to introduce or promote family mediation or, where necessary, strengthen it;
- to take or strengthen all actions required for the implementation of the following principles of promoting or using family mediation, as an appropriate method for family dispute resolution".

The principles that the recommendation refers to concern:

1. The scope, as family mediation may be applied in any disputes between members of the same family, whether related by blood or marriage, and to those who are living or who have lived in family relationships as defined by national law.

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<sup>89</sup> The convention was adopted in Strasbourg on 25<sup>th</sup> January 1996.



2. The organization of mediation, which must not be compulsory, as mediation may be exercised either through the public or private sector. But, the quality of mediators is stressed upon, both by the selection and training method, and by guaranteeing conduct by abiding by codes of "good practice".
3. The mediation process, which must guarantee the observance of certain principles such as: fairness, neutrality, equal treatment, self-determination of the parties, confidentiality, full information on the parties about the procedure, the child's best interest, the existence of abuse cases or, when necessary, the mediator should inform the parties of the possibility for them to use an attorney or another professional.
4. The possibility of granting enforceability to agreements acquired through mediation;
5. The states' obligation of recognizing the autonomy of the mediation process and the possibility that it is conducted before, during or after a judicial proceeding;
6. The promotion of and access to mediation, which must be carried out by general information programmes to the public and specific programmes, such as facilitating the meeting between the parties and the mediator to receive full information about mediation;
7. The applicability of principles related to mediation in case of other alternative dispute resolution methods;
8. Organization of mechanisms in order to support and ensure access of the parties to international mediation.

*\*Recommendation Rec(2001)9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties* (adopted on 5 September 2001 at the 762<sup>nd</sup> meeting of the Ministers' Deputies), recommending member states to promote the use of alternative dispute resolution methods between the administrative authorities and private persons, by following, in legislation and in practice, the principles found in the attachment to this recommendation.

*\* Recommendation (2002)10 of the Committee of Ministers to member States on mediation in civil matters* (adopted on 18 September 2002 at the 808<sup>th</sup> meeting of the Ministers' Deputies).

Considering the advantages of mediation, member states are recommended to facilitate, whenever appropriate, to take or reinforce, as the case may be, all measures which they consider necessary with a view to the progressive implementation of the "Guiding Principles concerning mediation in civil matters". These principles include, besides the definition of mediation and its scope, the way mediation is organized (public or private sector, within or outside court procedures, means of reducing the conflict duration, no delay tactics in its settlement, lower costs, free of charge mediation and public legal aid).

Another principle concerns the development of mediation, which comprises the essential principles of mediation: fairness, neutrality, equal treatment, self-determination of the parties, confidentiality, as the member states also have the obligation of training and qualification of trainers, especially in the case of cross-border disputes. As regards the mediation agreements, they must be concluded between the parties after giving a time of reflection, they must include provisions that are not contrary to public policy and they must be enforceable.

The states should provide the public and the persons with civil disputes with general information on mediation, including those related to costs and efficiency of mediation, information aiming at professionals involved in the functioning of justice and they recommend taking measures according to national practice and law, in order to create a network of regional and/or local centers, where individuals can obtain impartial advice and information on mediation, including by telephone, correspondence or e-mail. Not in the least, the states should promote co-operation between existing services dealing with mediation in civil matters with a view to facilitating the use of international mediation.

We also consider worth reading the provisions contained in *Opinion no 6 (2004) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers on fair trial within a reasonable time and judge's role in trials taking into account alternative means of dispute settlement*, as adopted by the CCJE at its 5th meeting in Strasbourg, 24 November 2004.

This document states that it is necessary to encourage the development of alternative dispute resolution methods and to

increase public awareness on their existence, of the way they function and related expenses.

It is outlined that, both in criminal and civil-administrative matters, the alternative dispute resolution methods must be closely associated with the court system; appropriate legal provisions or court practice should confer the judge the power to direct the parties to appear before a judicially appointed and trained mediator, who can prove that he/she relevant qualifications and capacities, as well as the fairness and independence required for such a public service.

CCJE, by Opinion no. 6, shows that it is possible for judges to act as mediators themselves, as this allows judicial know-how to be placed at the disposal of the public; nevertheless, it is essentially to preserve their fairness, especially by providing that they will perform this task in disputes other than those they are required to hear and decide.

In the opinion of CCJE, settlement agreements should be subject to confirmation by a judge, especially where the enforcement of this agreement has to be considered. In this case, the judge must enjoy substantial supervisory powers, especially concerning the observance of equality between the parties, the reality of their consent to the measures provided for by the agreement and the observance of the law and public policy; as for specific aspects concerning criminal mediation, further guarantees should apply.

**b. Directive no. 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters**

As resulted from its title, the Directive does not regulate the entire series of issues subject to mediation, but it sets forth rules of procedure ensuring the close connection between mediation and judicial proceedings.

The Directive was adopted on 21<sup>st</sup> May 2008 and it was published in the Official Journal no. L 136/3 of 24<sup>th</sup> May 2008.

**The purpose of the Directive is to facilitate access to the settlement of dispute and to promote consensual settlement of disputes, by encouraging the use of mediation and ensuring a balanced relationship between mediation and the judicial proceedings.**

#### i. Application areas

##### □ *Temporal*

The Directive entered into force, according to art. 13, on the 20th day following its publication in the Official Journal of the European Union (24<sup>th</sup> May 2008), and its transposition, namely the ensuring by the State Members that they shall the laws, regulations, and administrative provisions necessary to comply with this Directive before 21<sup>st</sup> May 2011, according to art. 12 (1) – with the exception of provisions related to the information on competent courts or authorities in rendering enforceability to mediation agreements (art. 10), for which the date of compliance should have been 21<sup>st</sup> May 2010 at the latest.

##### □ *Material*

The provisions of Directive 2008/52/EC shall 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, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority ("acta iure imperii").

Although the Directive only regulates the situation of cross-border mediation, there is nothing preventing the Member States from adopting the same provisions in the internal law. In fact, this is actually recommended, considering the practical difficulties that the citizen of a member state would be faced with, which, depending on the nature of the dispute or the cross-border characteristic of it, it should comply with different rules.

##### □ *Territorial*

The Directive is binding to all Member States of the European Union, except for Denmark.

#### ii. Definitions

The Directive defines the notions of "mediation" and "mediator" in article 3, and art. 2 also explains the way of establishing a dispute as a cross-border dispute.

The domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001 of the Council of 22<sup>nd</sup> December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

iii. Essential provisions contained in the Directive and the way these are reflected in the Romanian internal legislation

The Directive comprises the following provisions that must be considered by the Member States of the European Union when promoting and/or applying cross-border mediation:

*A. Compels Member States to encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties. Also, the member states are compelled to encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organizations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services (art. 4).*

As shown before, the quality of initial and further training of mediators represents an argument used for the purpose of promoting mediation and an argument concerning the mediators' professionalism at the time of recommending the use of this alternative dispute resolution method.

With respect to the way that these requirements are reflected in the Romanian legislation, we show that Law no. 192/2006 on mediation and organization of the mediator profession, provides, in Chapter II on the Mediation council, that its main duties are to elaborate the training standards in the field of mediation, based on the international good practice in the field, and authorizing initial and further professional training programmes, as well as the specialization training programmes for mediators (art. 20 letters b and c).

On the other hand, Chapter IV of the Law, entitled "Rights and obligations of the mediator", in Section 2, "Obligations of the mediator", provides that he/she is compelled to constantly improve his/her theoretical and technical skills of mediation, following to this end further training courses, under the terms set forth by the Mediation Council.

Moreover, considering the obligation set forth by art. 20 letter j in Law no. 192/2006, the Mediation council adopted, on 17<sup>th</sup> February 2007, the *Mediator's code of professional ethic and deontology*.

Among the duties under the law of the Mediation Council is also taking measures for the observance by mediators of the provisions comprised in the Mediator's code of professional ethic and

deontology and applying the bylaws on their disciplinary liability (the conditions of mediators' disciplinary liability are regulated in Chapter IV, Section 3 of the Law, in art. 38-41).

All these provisions support the efficient promotion of cross-border mediation, as they are a strong argument concerning the efficiency and application of these alternative dispute resolution methods.

*B. The Directive gives to every judge in the Community, in any stage of the procedure (on any level of the court), the right to invite the parties to use mediation, when appropriate and having regard to all the circumstances of the case.*

*The judge may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available (art. 5).*

In other words, during the process of applying cross-border mediation, the judge plays a direct role in guiding the parties to mediation.

In view of transposing the provisions of the Directive in the internal legislation, Law no. 192/2006, in art. 6, comprises information related to the obligation of judicial and arbitrary bodies of informing the parties on the existence of this alternative dispute resolution method, on the advantages of mediation and the recommendation of using it, when appropriate. These provisions were also taken over in the Civil Procedure Code.

Law 192/2006 was amended by Law no. 115/2002 and by Government Emergency Ordinance on 12.12.2012. By these modifications, it was set forth that, in certain cases, the parties are compelled to attend an information session with respect to the benefits of mediation prior to filing a sue petition or after the trial has started, until the deadline given by the court to this end, under sanction of dismissing the action as inadmissible. The participation in this information session is free of charge<sup>90</sup>, thus complying with the principle of free access to justice.

Even if the Directive does not grant too many powers to the courts in order to impose the actual mediation procedure, it does not prevent

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<sup>90</sup> This preliminary information state is free of charge, according to art. 26 (3) in Law no. 192/2006, art. 614<sup>1</sup> (2) and art. 720<sup>7</sup> (2) in the Civil Procedure Code, both for the situation of compulsory information, and for the one of facultative attending to such a session;

member states from adopting procedural bylaws in order to render mediation compulsory, as well as to establish incentives or sanctions in case mediation is not used.

In the Romanian legislation, there is a provision that may be appreciated to have a sanctionary nature, namely art. 16 (2) in GEO no. 51/2008 on the judicial public aid in civil matters, according to which the judge may dismiss the request of granting judicial public aid if the applicant is proven to have refused, prior to the beginning of trial, to follow a mediation procedure or any other alternative resolution method of the case.

Also, in GEO no. 51/2008, we find incentive provisions, namely those included in art. 20 on the possibility of reimbursing the amount pay as a fee to the mediator, if, prior to instituting proceedings, mediation was attempted, but it did not result in any understanding, just like the case where mediation was attempted after instituting the proceedings, but prior to the first day of appearance.

Incentive provisions are also considered the provisions included in art. 59<sup>2</sup> and art 63 (2) in Law no. 192/2006<sup>91</sup>, showing that, in case the parties present the mediation agreement before the court prior to having a case file on the dockets or if, with a case file on the dockets, the conflict was settled through mediation, the parties are exempt from payment, namely they may request the reimbursement of the judicial stamp charge paid to the court to deal with the case<sup>92</sup>.

All these provisions are arguments for promoting and applying cross-border mediation.

On the other hand, *art. 9 of the Directive provides the obligation of Member States to encourage, by any means which they consider*

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<sup>91</sup> Law no. 192/2006 on mediation and the change of the mediator profession was amended by Law no. 115/2012, effective as of 1st October 2012 (except for art. 60<sup>1</sup>, effective as of 1st February 2013).

<sup>92</sup> Art. 59<sup>2</sup>: "The request filed to the court on the ruling of a decision that would approve the understanding of the parties results from the mediation agreement, is exempt from the payment of the judicial stamp charge, except as when the mediation agreement refers to the transfer of ownership on another real property, of other real rights, partitions and successor proceedings".

Art. 63 (2) "At the same time with the issuance of the decision, the Court of Instance shall dispose, on the request of the interested party, on the reimbursement of the judicial stamp charges paid to the court to deal with the case, except as when the conflict settled through mediation is connected to the transfer of ownership, the establishment of another real right on a real estate, partitions and successor proceedings".

*appropriate, the availability to the general public, in particular on the Internet, of information on how to contact mediators and organizations providing mediation services.*

This obligation is complied with in Romania by displaying the table of authorized mediators on the website of the Ministry of Justice<sup>93</sup>.

Also, the website of the Mediation Council<sup>94</sup> displays the contact data of mediators, associations of mediators and the mediation service providers.

*C. The Directive compels the Member States to ensure that it is possible for the parties that agreements resulted from mediation be made enforceable, if the parties so wish it. (art. 6)*

This may be carried out, for instance, through courts of law or the mediation agreement may be authenticated by a notary public.

Choosing the appropriate mechanism is an obligation of the member states.

The provisions of the Directive give the possibility of rendering an agreement resulted from mediation a similar statute to a court order, without compelling the parties to use judicial proceedings.

This possibility, which is not comprised in the legislation of all Member States of the European Union, may encourage the parties to use mediation, instead of taking the case to court.

Currently, in the Romanian legislation, the provision is that the parties to enter into a mediation agreement may appear in court without ruling an order that approves their understanding, even if they do not have a case file on the dockets (art. 59 (2) in Law no. 192/2006).

The order by which the court approves the understanding between the parties shall have in its operative part the contents of the agreement. This order is the enforcement order (art. 59 thesis III in Law no. 192/2006).

In case of a dispute on the dockets of the courts, the order shall also be ruled based on the rules in the Civil Procedure Code, that aims at the ruling of an order that approves the understanding between the parties (art. 438-441 in the Civil Procedure Code) and this order is the enforcement order (art. 63 (3)).

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<sup>93</sup> <http://www.just.ro/>

<sup>94</sup> <http://www.cmediation.ro/>



Moreover, bringing the mediation agreement before the notary public or the court is *imposed* by certain situations. Thus, in case the mediated conflict aims at the transfer of ownership for private real property concerning real estates or whenever imposed by the law, under sanction of nullity, the fulfillment of material and formal conditions, the parties are compelled to present the document drafted by the mediator before the notary public or the court (art. 58 (4) and (5) in Law no. 192/2006 amended).

Why is it necessary to render enforcement to mediation agreements, where the law does not impose this?

A possible answer would be that, although the parties, in most cases, voluntarily observe the terms of the agreement acquired through mediation, the possibility to obtain an enforcement order may be preferred in undertaking certain obligations, such as a maintenance pension, which implies repeated payments throughout an extended period of time, during of which the debtor's wish of voluntarily fulfilling his/her obligation may diminish.

Consequently, the possibility of acquiring the enforcement title is also an argument for using this alternative method.

*D. The Directive compels Member States to make sure the conditions that mediation takes place in a confidentiality context and make sure that the information provided or obtained during mediation may not be used against that party in a subsequent judicial proceeding, if mediation fails (art. 7).*

This provision is essential to give trust to the parties involved in mediation and to encourage them to use this alternative dispute resolution method. To this end, the Directive provides that neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except where this is necessary to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person, or where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

The obligation to keep the confidentiality of information that he/she takes note of during the mediation activity and concerning the documents drafted during mediation, even after the termination of

his/her function is also provided in Law no. 192/2006 (art. 32), but also in the Mediator's code of professional ethic and deontology.

Moreover, the breach of the obligations of confidentiality, fairness and neutrality by the mediator entails his/her disciplinary liability or even civil liability under the terms of art. 42 in the law.

As regards the possibility of hearing the mediator as a witness, the provisions of Law no. 192/2006 are in the sense that the mediator may not be heard as a witness in connection with the deeds or acts that he/she took note of during the mediation procedure. In penal matters, the mediator may be heard as a witness only if he/she has the prior express and written approval of the parties and, if necessary, of the other interested parties. The capacity as witness precedes that of mediator, with respect to the deeds and circumstances that he/she was faced with before becoming a mediator in that case. In all cases, after having been heard as a witness, the mediator may no longer carry out the mediation activity in that respective case (art. 37 in Law no. 192/2006).

An exception to the obligation of keeping confidentiality is provided in Chapter VI – “Special provisions on the mediation of conflicts”, namely in Section I – “Special provisions on family conflicts”, where, in art. 66

(2) it is provided that, during mediation, the mediator takes note of the existence of certain deeds that endanger the normal raising and development of the child or severely prejudices his/her best interest, and he/she is compelled to notify the competent authority.

*E. The Directive also comprises provisions related to limitation and prescription periods, as the states are compelled to 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 (art. 8).*

Just like the rule related to confidentiality, this provision encourages the use of mediation by ensuring the parties' access to court in case the mediation is not successful.

In Romania, provisions related to the suspension of the prescription period were introduced since 1st October 2011, once with the enforcement of the new Civil Code, namely in art. 2532, items 6 and 7.

The Commission closely monitors the transposition of the Directive by the Member States and ensures that its provisions are fulfilled.

According to *European Parliament resolution of 13 September 2011 on the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by the courts (2011/2026(INI))*<sup>95</sup>, in order to stimulate the promotion of cross-border mediation, it believes that there is a need for increased awareness and understanding of mediation, and calls for further action relating to education, growing awareness of mediation, enhancing mediation uptake by businesses and requirements for access to the profession of mediator.

For an efficient application of cross-border mediation, it considers that national authorities should be encouraged to develop programmes in order to promote adequate knowledge of alternative dispute resolution; and it considers that those actions should address the main advantages of mediation: cost, success rate and time efficiency, and should concern lawyers, notaries and businesses, in particular SME's, as well as academics.

The European Parliament acknowledges the importance of establishing common standards for accessing the profession of mediator in order to promote a better quality of mediation and to ensure high standards of professional training and accreditation across the European Union.

## **5. Public authorities present in the promotion and application of cross-border mediation**

In order for mediation to be an efficient method, an alternative to the court, an active involvement of public authorities is required, both at European and national level. This involvement must aim at actions to promote and apply mediation, both among specialists and the general public.

If, as shown, at an European level, the **European Parliament and the Commission** show a constant interest in mediation, whereas at a national level various public authorities may involve in a different manner.

First of all, the legislator – the **Parliament** – is responsible for a coherent legislative policy, adapted to the current needs of litigants,

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<sup>95</sup> Available on: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0361+0+DOC+XML+V0//RO>

with the observance of European legislation and of its effective and efficient transposition in the internal legislation.

The **government** has essential duties in the activity of supporting money policies corresponding to the needs of promoting and applying legal provisions related to mediation.

Whether mediation is held within/in connection with the courts and the funding of these activities is imposed in order to ensure its functioning, or whether it is organized irrespective of the courts, the Government should assign the required funds for the application and/or promotion of mediation, as the case may be.

The **Ministry of Justice** is the one that has legislative initiative, it may take surveys, research, it develops training and information programmes of both magistrates, specialists in law, and of the general public, with respect to cross-border mediation.

For instance, the Romanian Ministry of Justice acquired funding after having launched a request for quotations of the Civil Justice programme for 2010, for project "Promoting mediation in cross-border cases in civil matters"<sup>96</sup> for the purpose of promoting mediation in cases with foreign elements.

The specific objectives of this project aimed at:

- Professional training of judges and mediators in the field of cross-border mediation;
- Improving the ties and information exchange between the practitioners in partner states;
- Informing the citizens in the partner state with respect to the benefits of using mediation in cases with a foreign element.<sup>97</sup>

Also, the Romanian Ministry of Justice was partner in the organization of several international conferences for magistrates, attorneys, other specialists in the field<sup>98</sup>.

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<sup>96</sup> Partners in this project were: the Ministry of Justice in the Netherlands, the Ministry of Justice in Bulgaria, the Mediation Council – Romania, the European Association of Judges for Mediation – GEMME, the MIKK non-governmental organization, Germany, the Ministry of Justice in the Republic of Moldova (associate partner).

<sup>97</sup> The specific activities of this project consisted in, besides organization of conferences and workshops and in elaborating a guide to good practice – this one – for the specialists in the field.

<sup>98</sup> The "Justice and mediation" international conference, held by GEMME – the Romanian Section, the Ministry of Justice, the Judiciary National Institute, the Craiova

The **Superior Council of Magistracy**, besides the development of specific programmes on mediation (organizing conferences, seminars, surveys, projects), supports the promotion and application of cross-border mediation by the way these activities are organized within the courts.

The Superior Council of Magistracy in Romania is actively involved in both the activity of mediation-related data collection, and in the organization of conferences addressed to magistrates and other specialists in the field of mediation<sup>99</sup>.

The **National Judiciary Institute**, both within the initial training of magistrates, and within further training, organizes or supports organization of courses, seminars and conferences in order to train magistrates on the alternative dispute resolution methods in general and mediation in particular (both national and cross-border mediation).

Correct promotion and application of cross-border mediation may not be carried out by magistrates without a specific training in fields related to internal and international mediation, legal practice, identification of differences, of advantages and disadvantages of the various ways of conflict-dispute resolution.

In order to meet these purposes, the National Judiciary Institute in Romania holds seminars within the centralized further training programme for magistrates<sup>100</sup>, publishes information on the webpage and takes part in the organization of conferences<sup>101</sup>.

The **courts of law** play an essential part in promoting and applying the legislation of national and cross-border mediation. Even if

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Appellate Court, the Mediation Council and the University Publishing House in Craiova, 23rd September 2011,

The “Mediation in European Union. Stage and perspectives” international conference, held by GEMME – the Romanian Section, the Judiciary National Institute, the Mediation Council, the Romanian Academy, the Bucharest Dimitrie Cantemir Christian University and the University Publishing House in Bucharest, 29th October 2010.

<sup>99</sup> See 26 above.

<sup>100</sup> The National Judiciary Institute held, in partnership with the Mediation Council and GEMME-the Romanian Section, in 2001, within the programme of further training of magistrates, the “Mediation-challenge and solution in the context of Romanian judicial system”, (Bucharest, 17th-18th October 2011), and in 2012, within the same programme, the National Judiciary Institute held, in partnership with GEMME – the Romanian Section, two seminars entitled “Mediation – an alternative dispute resolution method” (Bucharest, 18th -19th June and 1st – 2nd November 2012).

<sup>101</sup> See 26 above,

mediation is organized within the courts, out of courts or independent of them, they are those that may significantly contribute, by the way of approaching the problematic related to mediation, its promotion and application, to the success of this alternative dispute resolution method, with the consequence of decreasing the number of cases on the dockets and, implicitly, to the increase of the quality of the justice act and the litigants' degree of satisfaction.

As regards promotion, the provisioning of informative materials to the general public (on the internet<sup>102</sup>, video messages or on paper), the display of the mediators' table, organization of information desks within which the parties may get information related to mediation, mediators, advantages, consequences, etc. All these are just as many methods of supporting mediation and of fulfilling the recommendations comprised in the European law of cross-border mediation.

As regards the way that the specific legislation on cross-border mediation is applied, the courts may organize training and information activities for both the magistrates and auxiliary personnel<sup>103</sup>.

The **judges** directly promote and apply the law of mediation, either by acting themselves as mediators (where internal legislations allow it, such as the case with Germany, Denmark, Norway), or by duties of information and recommendation (such as the with Romania, Italy, Bulgaria, Hungary, Great Britain, Spain).

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<sup>102</sup> For instance, the Craiova Appellate Court has, on its webpage, a section dedicated to information about mediation, which includes data related to internal and European legislation, the advantages of mediation, the list of authorized mediators, the mediation procedure: <http://www.curteadeapelcraiova.eu/>

<sup>103</sup> The Romanian courts have been increasingly involved in organizing of such activities and below we provide only a small part of them: the "Justice and mediation" seminars, organized by the Craiova Appellate Court (Orșova, 15<sup>th</sup> June and 28<sup>th</sup> September 2012); the "Mediation-an alternative dispute resolution method" held by the Alba Appellate Court, GEMME-the Romanian Section, the Association of Authorized Mediators in the Alba county, the Craiova Mediation Center Association and the Alba Prefecture (Alba Iulia, 26<sup>th</sup> October 2012); the "Institution of mediation in Romanian law and in the European Union law" seminar, held at the District 3 Court and District 5 Court in Bucharest by the "Center of Professional Magistrates - Bucharest" Association, the Craiova Association of Mediation Center and the Association of Romanian Magistrates (Bucharest, 16<sup>th</sup> April 2010); the seminar on "Mediation – from Theory to Practice", held by the Oradea Appellate Court, the Craiova Association of Mediation Center and the Bihor Association of Mediators (Oradea, 5<sup>th</sup> Martie 2010).

When the judge acts as a mediator, in order to observe the principle of mediation confidentiality, but also to observe his/her fairness, he/she may no longer take part as a judge in that respective case.

When the judge may not act as a mediator, he/she has duties of training the parties, of presenting its advantages and of recommending the used of this alternative dispute resolution method.

In both cases, special training with respect to mediation and the ways of recommendation led either to the introduction of courses available to all magistrates of certain courts in order to acquire the correct skills of recommending mediation (such as the case of the Netherlands), or to the participation in the training programs in the field of mediation, held at an European, national, regional or local level, or to the individual acquiring of the theoretical and practical knowledge in the field, or to the taking of the training courses as mediators, right in the countries where judges may not act as mediators themselves.

The public authorities with duties in the field of promoting and applying cross-border mediation are also represented by other **legal bodies** (for instance, police officers, prosecutors, public servants with jurisdictional duties), but also by the **representatives of local and central public authorities** (mayors, prefects, local and county councils), which, on one hand, provide the general public with information related to mediation and mediators, its advantages, its role in the judicial system and, on the other hand, take part in the organization of events whose purpose is to disseminate the alternative dispute resolution methods.

Not in the least, the **public education system** must be referred to, which must provide the pupils/students with minimum information on the alternative conflict resolution methods, as well as ensure them the possibility of taking part in specialized courses in the field.

Consequently, the success of promoting and applying cross-border mediation depends in the concomitant involvement of all public and private authorities with duties in this field.















































