Chapter 10
Comparative Aspects Between the Nordic Countries and Austria: Court Mediation in or Out?

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Abstract This chapter concerns mediation in the Nordic countries and Austria in the framework of the Mediation Directive. The main attention is directed to those in the Nordic countries that are member states of the EU and have implemented the directive, such as Finland and Sweden. The chapter also partly addresses to Denmark, although it is not bound by the Mediation Directive or subject to it. However, legislation has been made in Denmark parallel with the directive. The writing strives to throw light on the differences and similarities of mediation in the comparison countries. Austria can be seen as one of the forerunners in the field of mediation, which creates the ground for the choice of the comparison country. The Austrian Act on Mediation in Civil Matters came into force in 2004. It contains detailed regulations concerning special registration of mediators, which means that the Act lays down basic professional duties that registered mediators need to fulfil.

10.1 Comparative Aspects Between the Nordic Countries and Austria: Court Mediation in or Out?

Alternative dispute resolution (ADR) has resulted in a revolution for dispute resolution. This is how Finnish legal scholar Risto Koulu described its importance. Undoubtedly, it has changed our understanding of the way how conflicts should be settled. ADR is one of the current legal scholarly mega-trends, concluding from the number of pages that have been used for scientific exchange of opinions on this subject. Most of the attention has been garnered by mediation.[1]

[1] Koulu (2011), p. 5.

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One reason for the high current interest in mediation is the Mediation Directive of the European Union,[2] which was laid down in 2008. The implementation of the directive, which should have been done as of 21 May 2011, has been followed with interest. Commentators also ponder whether the directive has increased the use of mediation and whether or not its targets have been achieved.

10.2 Mediation in the EU and the Nordic Countries

Although this book elaborates on litigation and mediation in the Nordic countries, it is justified to review the situation in the EU as a background. EU legislation affects the development of the legislation of the Nordic countries. Most Nordic countries belong to the EU as a member state. Only Norway has stayed out of the EU. Iceland applied for EU membership in 2009. Its membership status is now as a candidate country; accession negotiations have been underway since July 2010. A significant proportion of the EU's laws are currently applied in Iceland.[3] Denmark is a member state of the EU but has not taken part in the adoption of the Mediation Directive and is not bound by it or subject to its application.[4] In spite of that, amendments in legislation have been made in Denmark parallel with the Mediation Directive. In fact, Denmark has enacted legislation that confirms in virtually all respects the provisions of the Directive without reference to it.[5] The legislative situation of Denmark is discussed in more detail in Chap. 9. Finland, Sweden and Austria, which legislation concerning mediation is a subject of this comparative writing, became simultaneously members of the EU at the beginning of 1995.

10.2.1 Mediation in the Nordic Countries

In the Nordics, there is not any common mediation method. On the contrary, every country has its own traditions and features of mediation, which are introduced elsewhere in the book. In this chapter, attention has been paid to the comparative aspects of mediation between Austria and Finland, mainly. In the examination, attention is paid partly also to Sweden and Denmark. The comparison is restricted to these three Nordic countries, which have drafted their legislation in accordance with the Mediation Directive and are member states of the EU, such as Austria.

[2] Directive (2008)/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

[3] The membership status of Iceland. http://ec.europa.eu/enlargement/countries/detailed-country-information/iceland/index_en.htm. Accessed 18 July 2013.

[4] Recital 30 of the Mediation Directive.

[5] Flagstad et al. (2012), p. 74.

Before the handling of the main topic, the mediation system in Sweden and Denmark is briefly described.

In Sweden, the first proposal of the Swedish government[6] to transfer the legislation according to the Mediation Directive sought to incorporate all the major elements of the Mediation Directive, among others, pretrial mediation. The proposal aroused heated discussion, which resulted in delayed implementation.[7] One fundamental issue to which consensus was not achieved was court-administered mediation. The government determined not to implement a proposal for court-administered mediation where the presiding judge could serve as the mediator. Several local courts took issue of the proposal, pointing to the conflicting interests of a judge?[8]

According to another view, the Mediation Act and other legislative changes have not been subject to much discussion in Sweden. It has been thought that the lack of the discussion will be caused partly by the perception that the Mediation Act was enacted primarily to avoid accusations that Sweden was breaching its treaty obligations. Court-connected settlement procedures of two different kinds have been available in Sweden for more than 20 years. In light of Sweden's historic use of mediation, the news that the directive accompanied did not cause much debate in Sweden. Rather, Sweden was already considered on the forefront of developments in this area.[9]

According to Swedish Mediation Act, it does not apply to mediation or settlement procedures in matters before the courts.[10] This means that the Mediation Act only applies to private mediation that is conducted under an agreement to mediate without any connection to the court. In addition, the Act applies also to the enforcement of mediation agreements entered into in Sweden after private mediation and mediation agreements entered into in other member states (except Denmark). The rules governing Swedish court-connected mediation schemes and related mediation agreements are found in the Code of Judicial Procedure (CJP) (*Rättegångsbalk* SFS 1942:720). There are two different mediation or settlement procedures available to courts: special mediation and settlement negotiation (*Förlikningsförhandling*).[11]

In Sweden, judges have not acted as mediators traditionally. Instead, there are good experiences of the fact that the court has worked for the parties to reach a settlement (*Förlikningsförhandling*). According to the Swedish way of thinking,

[6] Government Memorandum, DS 2010:39 http://www.ud.se/sb/d/12846/a/156281. Accessed 21 July 2013.

[7] By enacting the Act on Mediation in Certain Civil and Commercial Disputes, which entered into force on 1 August 2011 Sweden implemented the Mediation Directive (Mediation Act).

[8] Engström and Marian (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2071935. Accessed 21 July 2013. See also Swedish Justice Department, Government Proposition 2010/11:128 http://www.ud.se/sb/d/13654/a/166631. Accessed 21 July 2013.

[9] Ficks (2012), pp. 342–344.

[10] The Mediation Act 1(2), Lag om medling i vissa privaträttsliga tvister 1(2).SFS 2011:860.

[11] Ficks (2012), pp. 342–343.

everyone has a right to expect of the court a professional manner in resolving dispute, but they did not believe that the best way would be to use court mediation, and therefore it ended up in a special mediation in the reform of the law. At the same time, the legislator made the decision of keeping the roles of mediating and adjudicating separate.[12]

If the matter at issue is amenable, the court may make a decision on a special mediation if the parties give their consent. In such a situation, the court shall arrange a meeting between the parties and the mediator that has been appointed by a court.[13] In Sweden, there is no official scheme to certify mediators.[14] The court can appoint as a mediator an expert, such as a lawyer, economist or engineer.[15] In principle, any lawyer, as well as lay persons, with specific professional knowledge relevant to the dispute may be appointed as mediator. According to a prevailing view, a judge, other than the presiding judge, who will be considered biased, may be appointed as a mediator for special mediation.[16]

In Denmark, mediation is based on this generally accepted principle: the parties themselves, with assistance from a neutral mediator, will negotiate a reasonable resolution. Chapter 27 of the Danish Justice Act covers and describes mediation that is applied only to cases that have already been initiated in court by a writ or the like. In Denmark, there is a close link between court proceedings and mediation. Private mediation is not covered by the Danish legislation. Only judges and lawyers can be appointed as mediators by the court. The court itself decides which of the court's judges can act as mediators. Both judges and lawyers must have an education authorised by either the Courts of Denmark or the Law Society in order to act as mediator. Lawyers who can act as mediators select the Danish Court Administration. In Denmark, the ethical guidelines have been created to apply to all mediators who act as court-appointed mediators. The mediation in the court needs an active role of the lawyer, who has to request mediation. The court's role is passive, without any obligations to implement mediation. If both parties stay passive on the issue, the mediation will not be used in the case.[17]

In Finland, the implementation of the directive did not cause any big discussion. ADR came to the court proceeding in the 1990s, when the regulations on achieving a settlement in the trial were taken to the Code of Judicial Procedure[18] and, after that,

[12] Government Proposition 2010/11:128, pp. 23–24.

[13] Chapter 42, Section 17(2) of the Swedish Code of Judicial Procedure (2011:861).

[14] Ficks (2012), p. 353.

[15] Ervo and Sippel (2013), p. 410.

[16] Ficks (2012), p. 355.

[17] Flagstad et al. (2012), p.75, pp. 79–80.

[18] Section 26 (595/1993):

(1) In a case amenable to settlement the court shall endeavor to persuade the parties to settle the case.

(2) When the court deems it expedient in order to promote a settlement, with consideration to the wishes of the parties, the nature of the case and the other circumstances, the court may also make a proposal to the parties for the amicable settlement of the case.

the Act concerning the mediation of civil matters in general courts at the beginning of the 2000s.[19] The new Finnish Mediation Act (Act on mediation in civil matters and confirmation of settlements in general courts, 29.4.2011/394), which implemented the Mediation Directive in Finland, did not lead to remarkable changes to the earlier legislation. The regulations of the earlier act related to court-connected mediation were transferred, mainly unchanged, to the new Mediation Act. Chapter 3 of the new Mediation Act contained amended regulations about the confirmation of enforceability of a settlement reached in out-of-court mediation. Those provisions about confirmation of enforceability apply also to a settlement reached in out-of-court mediation and in court-connected mediation in other Member States, except Denmark.[20]

In connection with the Finnish legislation, reform was added to the Code of Judicial Procedure, the regulation according to which the mediator is, in general, not allowed to testify in the trial about the matter he or she has found out in his/her task of the mediated matter. The same relates to the auxiliary of the mediator. The regulation applies with some preconditions to the person who has acted as a mediator in out-of-court mediation. The law concerning the limitation of debt was changed so that the limitation will be interrupted if the outstanding debt is handled in such a mediation procedure in which reached settlement can be confirmed enforceable. The limitation will be interrupted when a decision or an agreement at the beginning of the mediation concerning the outstanding debt is made. The limitation is considered interrupted the day as to which the handling of the matter in the mediation has ended.[21] In Finland, the regulation covers court-connected mediation that is conducted in court by a judge. Out-of-court mediation is organised by the code of conduct of the institutions that offer mediation services.

In Finland, there are two different kinds of mediation available for the parties of a civil dispute: out-of-court mediation and court-connected mediation. Court-connected mediation in Finland means that the procedure will be conducted in court by a judge of the court who has been nominated to work as a mediator in the case. In Finland, the mediator has to be a judge (other than the presiding judge of the case) in court-connected mediation. The Finnish court has nothing to do with out-of-court mediation before the possible confirmation of the reached settlement.

When comparing the main features of mediation in the three Nordic countries, one can state that mediation has its own individual features in every country. In Sweden, there is no court-connected mediation in the same meaning as in the two other countries. In Swedish "special mediation", the court arranges a meeting between the parties and the mediator, who is appointed by a court, who may usually be a lawyer, an economist, a engineer or the like. This relates to pending matters the judge considers suitable for mediation. In Finland, court-connected mediation may be

[19] Koulu (2005), p. 28.

[20] The Government Bill 284/2010, pp. 1, 15.

[21] Ibid, pp. 1, 14.

commenced upon the application of a party or the parties to the dispute. The pendency of an action before the application is not necessary. In court-connected mediation in Finland, only a judge appointed by a court may act as a mediator. In Denmark, the commencement of court-connected mediation requires that the matter is already pending in court. The mediator in court-connected mediation is appointed by a court in Denmark. An appointed mediator must have a relevant education on mediation and a legal background such as a lawyer or a judge. Unlike in Finland, in Denmark a lawyer may also act as a mediator in court-connected mediation. In both countries, Finland and Denmark, the court takes into account the parties' wish for the person who will be nominated as a mediator but is not bound to it.[22]

10.2.2 The Progression of Mediation in EU

With the creation of the internal market of the EU, the intensification of trade and citizen's mobility increased. The disputes between citizens from different Member States increased, especially because of the expansion of cross-border e-commerce. Correspondingly increased is the number of cross-border disputes brought before the courts. That kind of disputes tends to result in more lengthy proceedings and higher court costs than domestic disputes. Cross-border disputes often raise complex issues that involve conflicts of laws and jurisdiction. The significance of ADR has come out in the meeting of the European Council in Vienna 1998 and at the special meeting of the council that has been held in 1999 in Tampere.[23]

The European Commission published a Green Paper on alternative dispute resolution in civil and commercial laws in 2002. The purpose was to initiate a broad-based consultation of those involved in a certain number of legal issues that have been raised regarding the use of ADR in civil and commercial laws. In the Green Paper, the alternative methods of dispute resolution are defined as out-of-court dispute resolution processes conducted by a neutral third party, excluding arbitration proper. It states in the Green Paper that one of the political priority tasks by EU institutions is to promote alternative techniques, to ensure an environment propitious to development and to do what it can to guarantee quality.[24]

ADR relates to access to justice, which is a fundamental right, according to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to valid remedies has been determined by the Court of Justice of the European Union to be the general principle of Community law and confirmed, as such, by Article 47 of the Charter of Fundamental Rights of the

[22] Koulu (2005), p. 76.

[23] Green Paper 2002, pp. 7–9, http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0196en01.pdf. Accessed 2 Aug 2013.

[24] Ibid, p. 5.

European Union. ADRs are an integral part of the policies aimed at improving access to justice.[25]

ADR methods include features that promote achieving social harmony. In the forms of ADR in which third parties do not take a decision, the parties choose the means of resolving the dispute and play a more active role in this process in such a way that they themselves endeavour to find the solution best suited to them. This consensual approach increases the likelihood that once the dispute is settled, the parties will be able to maintain their commercial or other relations. One of the strengths of ADR is flexibility. In principle, the parties are free to decide which organisation or person will be in charge of the proceedings, to determine the procedure that will be followed and to decide on the outcome of the proceedings. Some of the points that weaken the access to justice are the proceeding times, which have lengthened, and the court costs, which have risen.[26] In a flexible procedure, the parties are able to affect, at least indirectly, the duration and costs of the procedure.

10.2.3 Mediation in Light of the Directive

The progression led to the adoption of the Mediation Directive[27] in 2008. According to Article 3, mediation means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. According to the definition, the concept covers mediation that is conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge to settle a dispute in the course of judicial proceedings concerning the dispute in question. The definition gets supplement from Recital 13, according to which mediation should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time. Recital 11 states that a directive should not apply to processes of an adjudicatory nature, such as certain judicial conciliation schemes, or to processes administered by persons or bodies issuing a formal recommendation, whether or not it is legally binding as to the resolution of the dispute.[28]

The mediation meant by the directive is facilitative, in other words helping by nature, where the essential task of the mediator is to help the parties find a resolution for their conflict. In that case, the mediator tends to contribute to the

[25] Ibid, p. 8.

[26] Ibid, p. 9.

[27] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

[28] Ibid. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF. Accessed 3 Aug 2013.

communication between the parties but does not intervene in the matter itself or direct the contents of the final result. It is significant to survey the parties' interests and needs in the finding of the resolution. That is the starting point in mediation, where a lasting and acceptable resolution by both parties is striven for. The directive does not apply to evaluative mediation, in other words, an estimating mediation for which the starting point is the parties' legal rights and legal system. In evaluative mediation, the resolution is built on the proposal by the mediator, and it is based on substantive legislation.[29] Even if the Mediation Directive is not adapted to evaluative mediation, mediation may be conducted in an evaluative or directive manner. According to *Riskin*, evaluative mediation and facilitative mediation must not be examined as separate models of mediation. 'Evaluative' and 'facilitative' describe more the orientation or behaviour of the mediator, which can vary during the mediation procedure.[30] In the mediation meant by the directive, the resolution is not striven on the basis of substantive legislation and it is not intended to reach the resolution by making a compromise. In compromising a dispute concerning an 'orange', it would be resolved by splitting the fruit and by giving each party half of the orange. When the parties' interests are clarified according to the mediation method, it may appear that one party wants to have the peel of the orange and the other its juice. A settlement that satisfies parties better can be reached through mediation. (See the example also in the last part of Sect. 10.3.)

It is noteworthy that in the mediation meant by the directive, the mediator does not have to be a legal expert or an expert in the field to mediate. In that case, the expertise of the mediator does not need to be directed to the judicial system or, for example, to construction in spite of the fact that a construction dispute is being mediated. Thus, people who have a quite different background and expertise can act as mediators. A mediator has been defined in Article 3 of the Mediation Directive as 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. However, the mediator must have expertise of a certain degree about mediation. Experts of mediation have different views on the issue as to whether the mediator must be an expert in the field to be mediated. The national regulation may set demands on the mediator's expertise. It is so, for example, in the Finnish regulation concerning the mediation of family matters. The mediator must have studied psychology for cases concerning children and families or must have studied social welfare or child protection.[31] It is noteworthy that the cases of family laws concerning especially the child's position and the best interests of the child are a special field that can be considered

[29] Sovitteludirektiivin täytäntöönpano 36/2010, p. 15. (The implementation of the Mediation Directive.)

[30] Hietanen-Kunwald (2013), p. 85, Riskin (2003), p. 30.

[31] Laki lapsen huoltoa ja tapaamisoikeutta koskevan päätöksen täytäntöönpanosta 9§.

requiring a substantial know-how of the mediator. In Austria, the legislation sets certain minimum requirements for all registered mediators.

The regulations of the directive attempt to intensify and simplify the availability of access to justice. Mediation is a free-form procedure that is based on the parties' self-determination.[32] These factors contribute to reducing the procedural obstacles. Furthermore, the parties can influence the duration and expenses caused by mediation at least indirectly by the autonomy. These features promote also access to justice. The purpose is also to promote the development of the mediation differently. The member states are requested, among others, to promote the mediators' basic and additional training.[33] The directive does not contain regulations concerning the mediation procedure, but it strives to promote the self-regulation of the field.[34] The starting point is to apply the directive only to mediation in cross-border disputes, but the Member States may apply provisions also to internal mediation processes.[35] This way, the situation has been solved in Finland in the Act within Mediation Directive that was implemented. On the other hand, in Austria, the National Mediation Act, which came into force before the directive, was adapted in internal mediation processes.

10.2.4 The Implementation of the Mediation Directive in the EU

In connection with the implementation of the Mediation Directive, many countries had a discussion on how the implementation should be arranged. Many viewpoints that should be taken into consideration were connected to implementation, such as how it should be adapted in a legislative environment in the best possible way in each country and how the separate aspects and possibilities of the directive should be utilised.

As the result of drafting of the laws, the response to the directive varies according to the country. A number of states have opted to apply the directive solely for cross-border disputes, thereby instituting a dual regulatory regime. Others have applied the directive provisions, to a varying degree, to domestic disputes. The discussion in connection with drafting of laws concerned, among other things, the use of incentives, sanctions and mandates. Only Italy has mandated participation in mediation as a prerequisite to litigation in a fairly broadly defined range of dispute. In Italy, mediation is a condition precedent to trial in a number of civil and commercial areas. France, Slovenia and Luxembourg require attendance at mediation information

[32] Hietanen-Kunwald (2013), p. 74.

[33] Article 4 of the Mediation Directive.

[34] Sovitteludirektiivin täytäntöönpano 36/2010, p. 13. (The implementation of the Mediation Directive.)

[35] Recital 8 of the Mediation Directive.

sessions for certain types of cases. Some countries have used incentives in their legislation. According to the Czech Republic Mediation Act proposal, the parties are eligible to receive an award for costs in a later trial if they participate in an introductory mediation information session. Poland, Romania and Bulgaria have implemented a full or partial refund of court filing fees to encourage participation in mediation.[36]

The general question seems to be why mediation is not used much more widely when its many advantages are apparent and its legislative support is burgeoning. Recent statistics on mediation use in almost all member states confirm that even those countries that stepped forward early to transpose the directive have seen a little increase in the use of mediation. Only Italy has seen a relevant increase in the use of mediation since the transposition of the directive. About a year after the mediation requirement became effective, the number of mediations in civil and commercial disputes had already climbed to over 13,000 per month. Before the implementation of the law, it had been less than 4,000 per year. This number is expected to reach over 80,000 mediations per month as a result of mediation becoming mandatory. [37]

According to the view of *De Palo* and *Trevor*, whether a country's dispute resolution system results in mediation use depends, more than any other factor, on whether the system has achieved an appropriate balance between the voluntary nature of the process and the necessity of public incentives for litigants to actually engage in it. They content that Article 1 of the directive has not so far received the attention it warrants. It seems, albeit implicitly, to call for the number of mediations to rise above the current level of usage by asking for a 'balanced relationship between mediation and judicial proceedings'. The balance is clearly absent in virtually all member states, if the notion of balanced relationship, as seems only logical, includes the actual number of mediations and trials in a given country. The scholars claim more target-oriented control so that the balanced relationship target number between litigation and mediation would be reached. The absence of a clear arrival point runs the risk of not reaching the goals that are designed to be attain by the directive.[38]

10.3 The General Features of Mediation

Through all ages, an attempt has been made to solve disputes with the help of the external quarter. The third party has often acted as the intermediary of parties who have gotten into a dispute and have tried to find the solution that satisfies them. Modern mediation is much more than the interceding of the dispute. It is a concrete,

[36] De Palo and Trevor (2012), p. 3.
[37] Ibid, pp. 5–7.
[38] Ibid, pp. 8, 10.

structured procedure that proceeds from the conflict to the solution of the dispute. The mediation is distinguished, as such, from other out-of court dispute resolution methods to its own procedure, which is in accordance with the principles concerning it.[39]

The starting point of mediation in Austria, as well in Finland, is the needs of the parties but not the claims. It is concentrated on the procedure to the interests of the parties instead of the positions. It is possible in the mediation procedure to extend the number of matters that can be handled. In that way, the different interests will become a concern and will be satisfied more comprehensively. Mediation includes four central features: it is process oriented, customer oriented, concentrated on communication, and interest based. It is a question of the very demanding task in which the mediator adapts special strategies and techniques such as active listening, different inquiry techniques, repeating, mirroring, questioning and think tank. It has also been stated that such procedures as reformulating, questioning of unrealistic proposals and inciting of parties to obtain more information belong to the mediation working.[40] 'It is noteworthy, even though in mediation it is not an attempted solution according to substantive law, that the opposing parties do not operate judicially in a free or independent state. The parties are often entitled and obliged by their other agreements, which affect the matter. Attention must be paid in the mediation to the possible effects of the engagements of agreements, as well as the mandatory provisions of the law. Usually, only disputes where settlement has been allowed can be solved in the mediation, so the significance of the mandatory provisions can be considered minor but possible.[41]

In order to succeed, the mediation procedure requires considerable ability to cooperate with the parties. During the procedure, the parties must uncover their interests connected to the dispute. The mediation procedure is not considered as a suitable solution for dispute if the parties are not ready for openness with regard to their interests.[42] However, it is not always a question of the parties' readiness for openness. Sometimes the real interests are identified only in a mediation process. The real reasons for the conflicts are often in the background, the so-called hidden interests, which can be clarified after a process called interest analysis. Especially when the parties have been locked to their positions and their demands, they do not always identify their interests and needs. When interests are clarified, the important questions are as follows: what does one hope to reach with mediation, what is most important to him/her, what seems to be the most difficult and the most strenuous procedure and what matters are his/her priorities and what are less important. It has

[39] Pruckner (2003), p. 17.

[40] Ervasti (2009), pp. 1076–1077.

[41] Pruckner (2003), p. 18.

[42] Pruckner (2003), p. 17. Die Offenlegung ihrer Intressen erfordert von den Konfligtbeteiligten ein hohes Maβ an Kooperationsbereitschaft, das nicht in jedem Konflikt gegeben sein mag. Nicht jeder Konflikti ist daher für mediative Lösungen geeignet.

been stated that a person's position is that which somebody wants to have. The interest, however, is why he/she wants to have it.[43]

The following simplified example represents the mediator's task and the significance of the parties' interests in the settlement of the dispute. The mediator who utilises interest-based mediation will help the parties to find the key solution to the dispute by asking the disputing parties separately about why they want to have the orange. The first one tells that he/she wants the juice from the orange, and the other tells that he/she wants the peel of the orange for making cake. The decision that satisfies both (win–win) will be reached, that is, the juice that is pressed from the fruit will be given to one party and the other party who wanted to have its peel is given the orange.[44]

10.4 Mediation in Austria Mirrored to the Finnish Mediation

Mediation has been defined in Austria before the directive was adopted. Mediation is an action based on the parties' voluntariness. A professional qualified, impartial mediator using acceptable methods systematically encourages the communication between the disputing parties, who shall achieve a mutually agreeable solution on their own.[45] According to the Finnish description, the objective of the mediation is that the parties themselves find a solution that satisfies them and, in the best case, both win. The mediator strives to create preconditions for the resolution but does not as a rule make proposal for the settlement. The procedure and the acquired solution do not need to fulfil the criteria appointed by the outsiders.[46] Later on the description has been supplemented by stating that mediation is an action that is unofficial, confidential, situation bound, flexible and that will be directed at the future and in which an attempt is made to reach the parties' needs and interests in a satisfactory solution.[47]

[43] Ervasti (2012), pp. 108–109.

[44] Taivalkoski and Wallgren (2000), p. 625.

[45] Pruckner (2003), p. 17, Falk and Koren (2005), p. 48, Frauenberger-Pfeiler (2013), p. 9. See also §1 Abs. Austrian Code of Mediation in Civil Matters. Bundesgesetz über Mediation in Zivilrechtssachen §1: (1) Mediation ist eine auf Freiwilligkeit der Parteien beruhende Tätigkeit, bei der ein fachlich ausgebildeter, neutraler Vermittler (Mediator) mit anerkannten Methoden die Kommunikation zwischenden Parteien systematisch mit dem Ziel fördert, eine von den Parteien selbst verantwortete Lösung ihres Konfliktes zu ermöglichen.

[46] Pohjonen (2001), p. 62.

[47] Ervasti (2011), p. 11.

10.4.1 Organisation of Mediation in Austria and Finland

The definitions of mediation in the comparison countries express the same principles and emphasise the same elements as significance of the parties' interests. The Finnish court-connected mediation is based on the same idea of facilitative mediation, as the regulation of out-of-court mediation in Austria. As a dispute resolution method, mediation has been placed in a distinctly different environment in the legislation and has been given an essentially different position in the comparison countries. In Finland, the mediation of civil cases is the action of the court, and out-of-court mediation has not been regulated by law except by the Act on Conciliation in Criminal and Certain Civil Cases, which stays outside this writing. The Finnish Mediation Act extends its effects indirectly also on out-of-court cases if the achieved settlement is wanted by the parties to be confirmed as enforceable.

Mediation is a dispute solution that takes place out of court in Austria. Court-connected mediation is not known in Austria, unlike in Finland. However, the connection between the court and the mediators exists in Austria. If in the judge's opinion the pending civil case is suitable for mediation, he/she can propose mediation to the parties and call a mediator, if needed, to present the procedure of mediation. If the parties agree at the start of the mediation, the court procedure will be suspended.[48] According to the Act,[49] the court may work toward a dispute settlement at any time in the proceeding. If appropriate, it may also inform the parties about institutions that are qualified to facilitate dispute settlements.[50] The court cannot oblige parties to solve their dispute by mediation.[51]

The purpose of this chapter is to give the reader a general idea about Austria's mediation system. The organisation of the mediation in Austria and Finland differs in so essential a way that a detailed comparison is nearly impossible. Next concern will be about the Austrian regulation of mediation, the procedure for mediation, the position of the opposing parties and the mediators, agreement on mediation and settlement. After that, a brief overview of the out-of-court mediation in Finland is presented as a counterbalance and, finally, the summary of the position of the mediation in the comparison countries.

[48] The information was obtained from the secretary of ÖBM (Österreichische Bundesverband der Mediatorinnen) Dr.jur. Barbara Günther 7 June 2011.

[49] Article 204 of the Austrian Code of Civil Procedure.

[50] Leon and Rohracher (2012), p. 12.

[51] Frauenberger-Pfeiler (2013), p. 26. (204§ Austrian Code of Civil procedure Law, 29§ Austrian Law on non-contentious jurisdiction in civil cases).

10.4.2 Regulation in Austria Concerning Mediation

Austria can be seen as one of the forerunners in the field of mediation. The Austrian Act on Mediation in Civil Matters *Bundesgesetz über Mediation in Zivilrechtssachen* (*Zivilrechts-Mediations-Gesetz-ZivMediatG*) came into force in 2004. The Act was path breaking when coming into force, containing detailed regulations concerning mediation. The unambiguous reason for the materialising of the legislation concerning mediation this early, particularly in Austria, cannot be found. However, there was an experienced "mediation boom" during the years preceding the enactment of the law. The huge interest in civil mediation appeared in the numerous congresses and symposiums that were arranged in different parts of the country. Also, the supply and demand of the mediation education was big. In addition to the universities, mediation education has been offered by different organisations.[52] There has been a pilot project on mediation in family matters in 1994–1995 at courts in Vienna and Salzburg. As this project had been completed successfully, mediation was embedded in family law by amending the Act of Marriage Law 1999.[53]

The Austrian legislator wanted to provide a framework that compensates the lack of strict, procedural rules through guaranteeing high-quality mediators performing mediation. That was materialised through the implementation of a registration system. The law lays down basic professional duties that registered mediators need to fulfil. The Mediation Act of Austria covers the establishment of an advisory board for mediation, the conditions and the procedure to get enlisted as a mediator, the conditions and the procedure to get enlisted as a training facility for mediators, the rights and duties of listed mediators and the suspension of time limits caused by mediation procedure. The Act applies to cases that, if referred to court, would lie in the jurisdiction of the civil courts. The legal concept of mediation is based on facilitative and transformative procedures. It focuses on the voluntariness of the parties to settle their disputes on their own, enabled through the help of a neutral, independent third person.[54]Although mediation is based on voluntariness of the parties, there are some special cases where the use of mediation before instituting legal proceedings is compulsory. For example, in neighbour disputes, the parties have to consult a conciliation committee or registered mediator before a claimant may file a legal action against his/her neighbour for obstruction of light or air by trees or plants. Legal action may be taken only after 3 months from the beginning of the mediation proceeding.[55]

The Mediation Act was complemented in 2004 by the Regulation on the Training Requirements for Admission as a Registered Mediator (*Zivilrechts-Mediations-Ausbildungsverordnung*). The decree establishes the minimum number of course

[52] Falk and Koren (2005), pp. 3, 21.

[53] Frauenberger-Pfeiler (2013), p. 4.

[54] Ibid, pp. 3, 5.

[55] Leon and Rohracher (2012), p. 14.

units to be completed and proven to the Federal Ministry of Justice in order to be registered as a mediator.[56]

Since Austria had already developed high standards concerning the requirements for registered mediators, it had to be taught how the implementation of the Mediation Directive would be carried out without lowering the demands set in Austria's national law to the mediators. The working team that prepared the implementation ended up suggesting in 2009 that only the necessary regulations would be taken to the law within the directive. Next to it would be retained the existing Mediation Act with its preconditions for the registration as mediator.[57] The directive was implemented by a separate act on certain aspects of cross-border mediation in civil and commercial matters in the EU.[58] This EU Mediation Act, which expanded the provision of minimum standards of confidentiality and statutes of limitation to all mediators, registered and non-registered alike,[59] came into effect on 1 May 2011.

The above stated means that Austria upholds a dual approach to mediation. National mediation is treated in a different way than mediation in cross-border cases because of the implementation of the Directive within EU Mediation Act. It is allowed in Austria to conduct mediation without being a listed mediator and without being bound to the high quality standards determined in the Austrian Act on Mediation in Civil Matters.[60] Finland's situation is quite different in this relation. There is only one Mediation Act that is applied to both cross-border and national disputes. There is a registration system or specific requirements set by law for mediators to guarantee high-quality mediators. In Finland, the Mediation Act relates to the court-connected mediation, where the judges act as mediators. Quite many of them have got brief education in mediation, but it is allowed for them to act as a mediator without any special education.

10.4.3 Participating in the Mediation Procedure in Austria

The bringing of the dispute to mediation procedure signifies two matters essentially from the point of view of the parties. Firstly, they have to concentrate consciously on, instead of their judicial demands, their reciprocal interests in the handling of the dispute. Secondly, they have to give up consciously the clarifying of the question of guilt and have to direct their resources for the materialisation of the resolution that will direct their future. The opposing parties have the responsibility over the

[56] Ibid, pp. 11–12.

[57] Entwurf EU-MediatG, p. 8.

[58] Bundesgesetz über bestimmte Aspekte der grentzüberschreitenden Mediation in Zivil- und Handelssachen in der Europäischen Union, EU- Mediations-Gesetz.

[59] Leon and Rohracher (2012), p. 18.

[60] Frauenberger-Pfeiler (2013), p. 7.

mediation procedure, which means that they are responsible for the materialisation of the resolution themselves. The mediator's responsibility is the finding of neither the solution nor the contents. The procedure is in the hands of the parties in many relations. The parties can decide the chronological and procedural progress of the mediation. They may agree when and how often, which theme is handled and how much time for each handling is used.[61] Because the parties are responsible for the expenses caused by mediation, it is proper that it is possible for them to agree on the points that are related to the procedure in so far as they have an effect on the materialising of a solution and costs. The costs are usually agreed upon in the mediation agreement. The mediator's task is to help at the stages of the mediation process in which the dialogical connection between the parties has broken or is under threat to break or the parties believe that they are in the situation alike. The mediator attempts with the help of his expertise in mediation and by the utilisation of different discussion techniques to direct parties to reach a dialogical connection spontaneously again and to overcome the lack of confidence known by them towards each other. Thus, the mediator tries to help parties themselves to find the solutions to the problems that come up during the process.[62]

10.4.4 The Position and Responsibilities of the Opposing Parties in Austria

The decision to start a mediation procedure means the commitment of the opposing parties to certain obligations in relation to each other. Quite irrespective of it, whether a settlement is reached or not requires a mediation in accordance with the general principle that the parties can cooperate with each other. The readiness to cooperate means that the parties should bring out all necessary information in the mediation and process this kind of information confidentially. The parties have to restrain themselves from all the high-handed measures, which may endanger the carrying out of the mediation. Likewise, they have to refrain from judicial measures of the matter in question during the mediation. The ability to cooperate, which is related to the mediation, still includes that the parties give up calling the mediator as their witness in a possible later trial. The negligent breaking of obligations leads to liability in principle. The separate matter is how the damages possibly caused by the breaking of the obligations can be proved. The parties' duty is to operate honestly in its intentions and to inform another party immediately if the party is not willing or able any more to work in the mediation to accomplish the joint solution. The duty to declare also applies to the points that may endanger or may prevent the mediation.[63]

[61] Pruckner (2003), p. 18. See also Falk and Koren (2005), pp. 66–67.
[62] Falk and Koren (2005), p 64. See also Pruckner (2003), p. 18.
[63] Pruckner (2003), pp. 26–27.

The opposing party's duties also include the readiness to process the accuracy of his/her own views in the mediation. The duty also is to bring the process to the end, which aims at amicable settlement. However, it must be remembered that the party has a right, if so desired, to discontinue the mediation. Mediation must look in this context to emphasise the parties' responsibility for its genuine aim in the reaching of a common objective. A party's misleading from essential points in the mediation so that this would not have made a mediation agreement at all, since he/she would be conscious of the real circumstances, can lead to the liability of the party who has misled. Furthermore, the procedure can entitle the misled party to require declaring the agreement invalid through litigation on the basis of the misleading.[64]

10.4.5 The Position, Tasks, and Responsibilities of the Mediator in Austria

The mediator registry maintained by the Ministry of Justice in Austria records the personal data and contact information of the mediators, in addition the special branch of the mediators. Only natural persons can register as a mediator. Mediation is a professional activity that can be freely practiced and does not require the registering of the mediator, but the Mediation Act is adapted only to registered mediators. An applicant who has turned 28 years old, is reliable and competent professionally and binds himself/herself to participate in the further trainings can be accepted to register as a mediator. Furthermore, he/she must have a valid liability insurance, the amount insured of which has to be at least EUR 400,000 per damaging event. In the law, there are also some other conditions concerning liability insurance, such as the duty to inform the registration authority of any deviation from the insurance agreement or any circumstance that would affect the validity of the insurance.[65]

The applicant should prove his/her reliability required by law with the submission of his/her criminal record. It should appear from the criminal record that the applicant has not been convicted of any act that would disprove his/her ability to act as a reliable mediator. The criminal record must not be older than three months. The applicant must shows his/her professional capacity by presenting his/her certificate of mediation education. According to the Regulation on the Training Requirements for Admission as a Registered Mediator, the accepted education is divided into theoretical and practical. The contents and length of the period depend on the basic education of the ones to be trained. If the applicant does not have a basic education on mediation, which is considered an advantage, the duration of the mediation education will be at least 365 h, of which 200 h have to be theoretical education and

[64] Ibid.

[65] The registration preconditions for the arbitrator have been listed in §9 and §20 of the Austrian Mediation Act.

165 h practical education. Occupational groups like lawyers, psychologists and psychotherapists must have mediation education the duration of which is 220 h, divided into theoretical education, which lasts for 136 h, and practical education, which lasts for 84 h.[66]

Any person, irrespective of his basic education, can be accepted as a registered mediator when he/she meets the preconditions mentioned in the law. The registration requires that the mediator makes sure that he/she meets the requirements also after the registration. The registered mediator must also complete his/her further training, which, according to the law, has to be for at least 50 h in the course of a 5-year time period.[67] Upon the completion of the training required by law, the mediator must deliver his report to the Ministry of Justice. Likewise, the mediator must notify the registrar of all the changes that took place relative to the information given by him/her in connection with the registration.[68] If it comes to the knowledge of the Ministry of Justice that the registered mediator does not any more meet the preconditions for registration, it can remove the mediator from the register. The same is true if the mediator neglects to inform of the further training or otherwise breaks the mediator's obligations roughly or in spite of the remark goes on the breaking of obligations. Before his/her removal from the registry, the Ministry of Justice must get the statement of the conciliation board in the matter.[69]

A mediator should commit to directing the mediation in a professional manner so that it will be possible for the parties to accomplish the settlement spontaneously. However, the mediator is not responsible for the materialising of the settlement and for the contents thereof. If the mediator neglects his/her obligations, the parties may to direct compensation demands to the mediator. Justifiied demands lead to the reduction of the mediator's reward in practice. The registered mediator cannot be heard as a witness in court as to any information he/she has obtained during the course of the mediation. The prohibition to be heard as a witness applies in trials involving civil cases. The prohibition to be heard as a witness or the right to refuse to testify applies only to registered mediators. The parties cannot agree otherwise.[70]

The start of the mediation, as directed by the registered mediator, prevents the running of the limitation period or interrupts it. The period of limitation is interrupted during the whole period of mediation. Likewise, the situation is by the deadlines concerning the rights and demands which are related to other matters to be mediated. The parties may agree on the interruption, the time of the mediation,

[66] 47.Verordnung des Bundesministers für Justiz über die Ausbildung zum eingetragenen Mediator (Zivilrechts-Mediations Ausbildungsverordnung-ZivMediat-AV).

[67] From the demand that is related to the further training it is adjusted in §20 of the Austrian Mediation Act.

[68] §21 the Austrian Mediation Act.

[69] §14 the Austrian Mediation Act.

[70] Pruckner (2003), p. 35.

deadlines and periods of limitation related to other legal relationships existing between them. According to the law, the mediator must document the mediation procedure, which begins when the parties have agreed on the transfer of the conflict to the mediation. The procedure will end when any of the opposing parties or the mediator informs the other or the parties that he/she no longer wishes to continue with mediation or when a settlement in the matter is achieved. The record drawn up by the mediator will serves as evidence for the interruption of the deadline. The mediator's duties include the advice duty of a certain degree towards the opposing parties. If the party, for example notifies that he/she is discontinuing with the conciliation and possibly resorting to other legal remedies, the mediator has to advise the parties of the significance of the deadlines in relation to a civil action.[71]

The mediator's primary obligations are to ensure neutrality and secrecy. It is also his/her responsibility to take care of the progress of the procedure. The mediator has a so-called mediation authority or transmission authority, on the basis of which he/she should make sure that the opposing parties observe the terms agreed upon in the mediation agreement concerning the procedure of the mediation, the general principles of the mediation and regulations of the law. The mediator is liable to the opposing parties if he/she has caused, by reason of his illegal and careless actions, damage that he/she was capable to foresee and is possible to prevent. In practice, this kind of damage usually results from an error of mediation, such as breaking of the duty of secrecy. Furthermore, the mediator can be sentenced to a fine or imprisonment for a violation of this duty.[72]

10.4.6 Agreement on the Mediation

Agreement on mediation is free-form, where parties agree together with the mediator on the carrying out of the mediation in a certain civil matter that has been individualised. It is recommended to include in the agreement the mediator's reward, the grounds for the reward, and the manner of executing it. The parties in the mediation agreement are, on one hand, the opposing parties, which may be several depending on the case and, on the hand, the mediator. In certain situations, in the agreement there may be a third party. This may happen in, for example, mediation cases involving a company, in which the company serves as the principal party in the mediation in relation to the mediator and a payer of the mediation reward. In situations of this kind, the carrying out of the mediation, the subject of the mediation and the use of time and premises, as well as the mediator's reward are usually agreed between the mediator and the company. Usually, the probable number of the opposing parties is agreed upon. It is recommended to agree also on the participation option, which will entitle, when the resolution of the dispute

[71] Ibid, pp. 25, 35.

[72] Ibid, pp. 24, 29–31.

requires it, the participation of more parties in the mediation, as estimated. It is good to agree on the report, which is possibly given to the principal company concerning the mediation, and its form. Attention must be paid to the mediator's duty of secrecy, concerning matters related to the mediation, when agreeing on a report. Except for the mediator's reward, the same matters are agreed upon by the mediator and workers who are opposing parties in the mediation. Within an agreed framework are the stipulated details related to the procedure.[73]

The parties can agree beforehand of an alternative dispute resolution by including in the agreement a clause of the mediation for possible later use. One Austrian organisation concerning commercial mediation (*Forum Wirtschaftsmediation*) has published a model of clause of mediation. The following serves as a free translation:

> The parties try to solve the disagreements caused by this agreement and its effects with mutual negotiations. If the negotiations do not lead to the result within 30 days, binding oneself parties to serious attempt to solve the conflict in the mediation. The parties make a decision jointly on the themes of conflict to be handled, on the progress of the mediation and on the choice of the registered mediator. Each agreement party may freely from the beginning of the mediation, without the sanctions interrupt the mediation in order to start possibly judicial further measures.[74]

10.4.7 Agreement on the Settlement

Agreement on the settlement is the totality of the terms of agreement reached by the parties, which means the solving of the opposing parties' conflict. Usually, it contains a concrete solution to agree that the dispute is final. At the same time, the mediation agreement terminates the mediation procedure. The reaching of the final agreement can require a long and multiphased agreement process. In the first stage, the matters that may be agreed on are further measures; matters that are taken in the settlement agreement, or the supplementary agreements that are attached to it; and the schedule of the process. It is recommended for the parties to test during the agreement process, in a suitable way, the permanence and validity of the emerging alternative solutions. In commercial disputes between companies, it may be reasonable before the final decision making to go through solution alternatives involving different quarters of the company organisation, such as a production group and management team. If the parties' attorneys do not participate in the agreement process, it is recommended to have the agreement by lawyers checked before final acceptance. It may be that the mediator would participate in the follow-up, subsequent to the agreement of the adapting stage or the carrying out stage of the agreement, in which the results of the mediation are estimated. In that case, the

[73] Ibid, pp. 19–22.

[74] http://www.wirtschaftsmediation.at/index.php?option=com_content&view=article&id=122:mediationsklausel&catid=44:kurzmeldungen. Accessed 14 August 2013.

mediation will end only after this so-called post-meditative stage. Opposing parties can decide the date on which mediation will end.[75]

It is recommended to draw up the settlement agreement in written form, even though the law, the mediation of civil matters, does not require it. However, Austria's legislation requires a written form in certain settlement agreements of family laws.[76] The settlement agreement cannot be enforceable as such; it would require the decision of the competent *Bezirksgericht* court, which is called *Prätorischer Vergleich*. It is capable of giving a fast decision on the matter. The judge of the court gives the decision irrespective of the character or economic value of the settlement agreement. In *Bezirksgericht*, the courts hear at first instance the civil matters involving interest that does not exceed EUR 15,000. Irrespective of the value of the dispute, these courts are competent to handle certain types of legal matters, especially family law and tenancy law matters. Furthermore, their authority extends to offence punishable by a fine or imprisonment of not more than one year.[77] Mediation does not always end in settlement and agreement. It is clear that a resolution cannot always be reached on the conflicts that are the subject of the mediation. As a final result, the mediation may jointly state that an amicable settlement was not reached in the process. The opposing parties always have the right, without stating the reasons therefor, to withdraw from the mediation because the procedure is based on the voluntariness of the opposing parties. Mediators have to commit to carry through to the end of the mediation and to make himself available at the parties' disposal. Therefore, the mediator must present justifiable grounds if he/she withdraws in the middle of the mediation. It is acceptable to interrupt the mediation if it is impossible to continue with it because the opposing parties neglect their obligations or are deeply offended by the conduct of the mediator. In practice, such grounds include repeated irrelevant appearance by a party in the mediation, violence or intimidation. If a mediator perceives that the condition of the mediation will be of such nature that it is not possible to carry through the mediation according to the basic principles set in the mediation procedure, he/she can interrupt the mediation.[78]

[75] Pruckner (2003), p. 52.

[76] The determinations are included in Familienlastenausgleichsgesetz 1967 (FLAG).

[77] Die Bezirksgerichte sind im Zivilrechtsbereich zur Entscheidung in erster Instanz für alle Rechtssachen mit einem Streitwert bis 15.000 Euro sowie (unabhängig vom Streitwert) für bestimmte Arten von Rechtssachen (insbesondere familien- und mietrechtliche Streitigkeiten) zuständig. Die Bezirksgerichte sind weiters im Strafrechtsbereich zur Entscheidung über alle Vergehen, für die eine bloße Geldstrafe oder eine Freiheitsstrafe angedroht ist, deren Höchstmaß ein Jahr nicht übersteigt, zuständig (z. B. fahrlässige Körperverletzung, Diebstahl). http://www.justiz.gv.at/internet/html/default/8ab4a8a422985de30122a924323c630f.de.html. Accessed 14 August 2013.

[78] Pruckner (2003), p. 53.

10.4.8 Out-of-Court Mediation in Finland

Out-of-court mediation in Finland, which is facilitative by nature, represents mediation by the Finnish Bars Association (FBA). It confirmed its own rules of mediation in 1998.[79] The parties can agree on the mediation of possible disputes, which are created in the future from their agreement, or of disputes that have already arisen. The rules of mediation are considered as part of the agreement to mediate. In principle, it is possible to use this mediation in all nonmandatory civil matters. A mediator acts as an advocate, who has received education on mediation and who is marked to the mediator list of the board of mediation of the FBA.[80] According to Section 4 of the rules, the mediator has to be impartial and independent. Before acting as a mediator, he/she must inform the parties about the facts that can cause reasonable doubts as to his/her impartiality or independence. The members of the FBA are bound to good advocate practice and to the rules of mediation of the association. According to good advocate practice, mediators have to take into consideration the benefits of all clients equally. This rule has been interpreted from the starting point so that the mediator will be responsible for the propriety and impartiality of the procedure but not for the fairness of the contents.[81]

Until now, the FBA is, in practice, the only organisation in Finland that serves out-of-court mediation services in civil and commercial areas, which are purely facilitative by nature. In the autumn of 2012, two students of the Turku University of Applied Sciences, in concert with the FBA, drafted a questionnaire study to the members of the FBA about their experiences and attitudes towards mediation. Only 52 of the 1,900 members answered the survey. This may possibly reflect the amount of current interest towards out-of-court mediation among the advocates, which is rather low. The number of cases that have been mediated pursuant to the mediation rules of the FBA is very low, only a few cases yearly.

The Finnish Association of Civil Engineers (RIL) offers RIL conciliation services. RIL conciliation focuses on dispute resolution and risk management of construction projects. It is a private out-of-court 'mediation,' whose procedure is official and based on material law. RIL conciliation has its own specific Code of Conciliation,[82] which came into force in 2007. The purpose of this is to standardise and intensify the conciliation and to guarantee the impartiality and transparency of the conciliation. In their application, the party or parties can request a recommendation, statement or decision. The latter requires a prior agreement to conciliate, which is actually an arbitration agreement, and the procedure, which is based on this kind of an agreement is a matter of arbitration. A statement is usually given

[79] The rules of mediation by the Finnish Bar Association, http://www.asianajajat.fi/asianajotoiminta/sovintomenettely/sovintomenettelysaannot. Accessed 6 August 2013.

[80] Taivalkoski and Wallgren (2000), p. 626.

[81] Ibid, pp. 629–630. See also Ervo and Sippel (2013), pp. 388–389.

[82] The code of RIL conciliation http://www.rilsovittelu.fi/web/files/saannot.pdf. Accessed 6 Aug 2013.

when only one of the parties asks for the conciliation. A recommendation is nonbinding. The conciliation that leads to recommendation can be based on the term of agreement, in other words on the clause of conciliation by RIL conciliation. Usually, the parties make an agreement according to recommendations made by the conciliator. The fact that the parties reach a settlement with the assistance but without any proposal made by the conciliator is probably not excluded. In that case, the procedure is nearly mediation, because of that, RIL conciliation is justified in this context. The difference between mediation and conciliation is not a very well-discussed topic in Finland. It is not always obvious what kind of procedure is in question. In Finnish language, there is only one word, *sovittelu*, for conciliation and mediation, which does not express what type of procedure (mediation or conciliation) is in a question.[83]

10.5 The Position of Mediation in the Comparison Countries Now and in the Future

The methods that have been created for the mediation of civil matters in the comparison countries differ. They deviate also from the starting points concerning the mediation of the EU. In a Green Paper, mediation is defined as an out-of-court dispute resolution process,[84] like in Austria. On the other hand, the Mediation Directive requires member states to promote the creation of voluntary procedural rules and quality control methods, not to produce legislation, as in Austria. However, the Mediation Directive allows mediation of civil cases in the courts, as in Finland, even though it has probably been thought that the mediation will be performed out of court. Development of this kind of mediation has been left mainly to non-governmental organisations in Finland. In this field, the activity is represented by the Finnish Forum for Mediation.[85]

In Austria, the statistics are available only for government-funded mediation, which includes only mediation about custody rights, visitation rights, alimony disputes and separation of property after divorce. From 1 May 2005 until 1 April 2012, there were 2,504 government-funded mediations, of which 1,616 were divorce settlements, 210 were divorce proceedings, 614 were separations, and 64 were not specified. Family conflict mediation has become a more common practice. Concerning mediation in commercial matters, there is a lot of promotion to be done. That is still in a very early stage but has a lot of development potential in Austria.[86]

[83] Ervo and Sippel (2013), pp. 361–362.

[84] GREEN PAPER on alternative dispute resolution in civil and commercial law, 2002, p. 6. http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0196en01.pdf. Accessed 22 August 2013.

[85] Finnish Forum for Mediation http://www.sovittelu.com/. Accessed 22 August 2013.

[86] Leon and Rohracher (2012), pp. 17–18.

In Finland, out-of-court mediation will probably not increase significantly, at least in the short run. Instead, clear signs can be perceived from the increase in court-connected mediation. At the beginning of 2011, a 2-year experiment was started in Finland about an expert helper's use of court-connected mediation for a dispute involving child custody, visitation rights and support payable to a child Furthermore, could 'expert helper' rather mean 'professional assistant'. It was started in four district courts (Helsinki, Espoo, Oulu and Pohjois-Karjala),[87] but the results were so good that it extended in autumn 2012 to seven new courts.[88] The activation of the court-connected mediation system was chosen as a quality theme of the year 2012 in the Court of Appeal of Rovaniemi.[89] The number of court mediation matters differ considerably in different courts. Some courts have promoted an affirmative trend with their development operations to mediation. The District Court of Oulu, for example, has invested in court mediation with different measures such as education, organising of the mediation activity and documentation of good practices. In 2012, in the District Court of Oulu, 63 civil matters were conducted in court mediation, which was 30 % of the mediation matters of the whole country.[90]

Confidence in the fact that the position of mediation will be stable in the future in Finland is perceived. It has been stated that it is only a matter of time before mediation will be the third established method of dispute resolution in civil and commercial matters, in addition to litigation and arbitration.[91] It remains to be seen if this concerns both court-connected mediation and out-of-court mediation.

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[87] See more about the experiment in Ervo and Sippel (2013), p. 418.

[88] Kuuliala (2012), p. 1108. The new courts were Pirkanmaan, Kanta-Hämeen, Etelä-Karjalan, Keski-Suomen, Pohjanmaan, Kemi-Tornion ja Lapin käräjäoikeudet.

[89] Ibid.

[90] 'Experiences of the practical possibilities in the mediation', Presentation in the event of the Finnish association for lawyers on 28 January 2013 by the District Court Judge Antti Savela.

[91] Taivalkoski (2012), p. 111.

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