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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2 The Notion of Mediation

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

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

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

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

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

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

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

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

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

[18] Art. 372 CPC.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.1 Mediation and Party Autonomy: General Rule

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

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

[26] Art. 2 MA.

[27] Art. 2 MA.

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

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

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

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

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

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

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

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

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

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

[34] S. 18(1) MA.

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

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

[37] Art. 3 MA.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.2.1 General Schemes of Compulsory Mediation

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

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

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

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

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

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

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

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

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

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

2.2.2 Special Mediation Schemes

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

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

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

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

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

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

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

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

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

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

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

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

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

[57] Arts. 269–273 Labour Act.

[58] Arts. 44–52 Family Act.

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

[60] Art. 238 Cc.

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

[62] Arts. 270–272 Cc.

[63] Art. 243 ff. CTravail.

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

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

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

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

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

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

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

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

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

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

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

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

[72]Arrêté ministériel n° 02256 of 2.3.2009.

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

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

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

[76]38 of 2005.

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

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

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

2.3 "Wild" Mediations

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

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

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

3 The Legal Framework of Mediation

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

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

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

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

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

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

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

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

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

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

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

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

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

3.1 National Legal Framework for Mediation and Its Scope

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

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

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

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

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

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

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

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

3.2 Monistic/Dualistic Approach

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

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

[83] Arts. 117 & 118.

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

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

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

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

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

[85] MA, Additional Provisions §1.

[86] Art. 1251–4 NCPC.

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

3.3 Areas of Law Covered

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

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

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

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

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

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

[90] Art. 1(1) MA.

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

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

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

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

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

[94] Art. 1(1) MA.

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

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

[97] Art. 1251–1 (1) NCPC.

[98] Art. 11.° Act No. 29/2013.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.1 Out-of-Court Mediation

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

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

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

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

4.1.1 Mediation Clause

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

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

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

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

[113] Art. 6(2) MA.

[114] Art. 6 MA.

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

[116] Arts. 1251–5 (1) & 1251–8 NCPC.

[117] P. 7(2) MA.

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

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

[120] Art. 2(7) MA.

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

4.1.2 Agreement to Mediate

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

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

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

[121] Art. 2 MA.

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

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

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

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

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

[124] Art. 1251–9 (2) (6) NCPC.

[125] Note, Art. 1251–23 NCPC.

[126] Art. 2 MA

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

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

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

[130] Art. 8 MA.

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

[132] Art. 14(2) MA.

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

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

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

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

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

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

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

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

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

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

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

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

4.1.3.1 Effects Upon the Parties

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

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

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

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

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

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

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

[136] Art. 1731 CPC.

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

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

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

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

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

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[137] Art. 6(2) MA.

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

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

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

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

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

4.1.3.2 Effects on the Mediator

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

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

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

[143] Note 5.1.4. *infra*.

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

4.2 Court-Annexed Mediation

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

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

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

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

[145] Arts. 151.14 – 151.23 CPC.

[146] Art. 20(2) MA.

[147] Art. 399 CPC.

[148] Art. 9(2) CPC.

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

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

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

[149] Art. 60 CPC.

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

[151] Art. 3 CPC.

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

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

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

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

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

[157] Art. 214B CPC.

[158] Art. 169 CPC.

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

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

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

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

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

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

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

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

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

[164]Art. 15(1) ZARSS.

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

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

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

4.3 Mediation and Prescription and Limitation Periods

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

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

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

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

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

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

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

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

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

[168] Art. 1731(4) CPC.

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

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

[171] S. 27A MA.

[172] Art. 1251–5 (2) NCPC.

[173] Art. 273(2) CPC.

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

[175] Art. 16 MA.

[176] P. 6 MA.

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

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

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

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

[178] Art. 273(2) CPC.

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

[180] Art. 17 MA.

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

[182] S. 100(2) CPC.

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

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

5 Participants in the Mediation

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

5.1 The Mediator

5.1.1 Selection of the Mediator and Party Autonomy

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

[183] § 278(a) ZPO.

[184] S. 18 MA.

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

[186] Art. 273.°(1) CPC.

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

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

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

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

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

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

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

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

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

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

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

[193] Art. 1251–3 NCPC.

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

5.1.2 Personal Traits

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

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

[194] Art. 7(1) MA.

[195] Art. 7 MA.

[196] Art. 9 MA.

[197] SS. 19 & 20 MA.

[198] Art. 183^2 § 1 k.p.c.

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

[200] P. 3 MA.

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

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

[203] Art. 1251–8 NCPC.

[204] Art. 9 MA.

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

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

5.1.3 Registered and Non-registered Mediators

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

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

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

[205] Rule 86 Mediation Rules.

[206] Arts. 9 & 22 MA.

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

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

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

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

[207] Art. 11(1) MA.

[208] Art. 183^2 § 1 k.p.c.

[209] Art. 1533(1) CPC.

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

[211] Art. 4 MA.

[212] Art. 183^2 § 2 k.p.c.

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

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

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

5.1.4 Mediator's Obligations

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

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

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

[214] See § 3 BRAO.

[215] See § 24 (1) (1) BNotO.

[216] Art. 10 MA.

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

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

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

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

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

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

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[219] § 4 MA.

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

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

[222] Art. 2(2) MA.

[223] Art. 9(1) MA.

[224] Art. 8(3) MA.

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

[226] Arts. 10 & 12 MA.

[227] Art. 2 ADR Act.

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

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

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

5.1.4.2 Duty of Disclosure

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

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

[230] Art. 10(1) MA.

[231] S. 7(2) MA.

[232] Art. 14(1) MA.

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

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

[235] Art. 8(4) MA.

[236] Art. 10 MA.

[237] Art. 9 MA.

[238] Art. 4(4) MA.

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

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

5.1.4.3 Confidentiality

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

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

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

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

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

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

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

[242] Art. 9 MA.

[243] Art. 7 MA.

[244] Art. 7(4) MA.

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

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

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

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

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

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

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

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

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

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

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

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

[249] Art. 7 MA.

[250] § 5 MA.

[251] S. 23 MA.

[252] Arts 1251-6(1) & 1251–7 NCPC.

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

[254] Art. 183^4 § 1 k.p.c.

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

[256] Art. 9 MA.

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

[258] Art. 8 MA.

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

[260] P. 5 MA.

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

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

5.1.5 Responsibility of the Mediator

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

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

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

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

[263] § 4(3) MA.

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

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

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

5.1.6 Existence of Codes of Conduct for Mediators

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

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

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

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

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

[266] Art. 1457 Cc.

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

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

[269] S. 3 ff. MA.

[270] Art. 12 MA.

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

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

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

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

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

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

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

[272] Art. 10 MA.

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

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

[275] Art. 18(1) MA.

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

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

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

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

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

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

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

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

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

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

5.2 The Parties

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

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

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

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

[281] Art. 103 § 2 k.p.c.

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

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

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

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

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

6 The Mediation Proceeding

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

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

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

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

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

[288] Art. 19 MA.

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

[290] Art. 151.17 CPC.

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

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

6.1 Flexibility of the Mediation Proceeding

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

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

[291] Art. 11 MA.

[292] Art. 3 MA.

[293] See 5.1.4. *supra*.

[294] Arts. 4–8 MA.

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

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

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

6.2 Venue

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

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

[297] Art. 9(1) MA.

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

[299] Art. 1251–9 and 1251–10 NCPC.

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

[301] Art. 5 MA.

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

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

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

6.3 Duration of the Mediation

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

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

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

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

[305] S. 19 & 20 MA.

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

[307] Art. 13 MA.

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

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

[310] Art. 15 MA.

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

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

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

6.4 Costs

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

[312] Art. 23(1) MA.

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

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

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

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

[317] Art. 314(3) CTravail.

[318] Art. 18(2) MA.

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

7 Termination of the Mediation

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

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

7.1 Unsuccessful Termination

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

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

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

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

[321] Art. 14 MA.

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

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

7.2 Successful Termination

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

[322] Art. 12 MA.

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

[324] Art. 6 MA.

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

[326] Art. 14 MA.

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

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

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

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

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

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

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

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

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

7.2.1 Formal Conditions of the Settlement Reached

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

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

[334] Art. 14(1) MA.

[335] Rule 82 Mediation Rules.

[336] Art. 14(2) MA.

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

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

7.2.2 The Law Applicable to the Substance of the Dispute

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

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

[339] P. 15(1) MA.

[340] Art. 1251–10 NCPC.

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

[342] S. 30(1) MA.

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

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

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

[346] Art. 27 MA.

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

[348] Art. 12 MA & 160 Cc.

7.2.3 Enforceability of the Settlement Reached

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[353] Art. 12 MA & 39 CPC.

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

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

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

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

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

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

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

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

[357] Art. 9 MA.

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

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

[360] Art. 18 MA.

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

[362] S. 148 CPC.

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

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

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

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

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

[365] Arts. 2044 & 2052 Cc.

[366] Art. 516 Code des Procedures.

[367] Art. 65 § 2 Cc.

[368] S. 10 MA.

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

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

[371] Art. 18 MA.

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

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

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

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

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

[372] S. 23 MA.

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

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

[375] § 433a CPC.

[376] Art. 15(2) MA.

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

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

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

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

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

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

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

[379] Art. 1733 CPC.

[380] Art. 1724 CPC.

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

[382] Art. 16(2) MA.

8 Cross-Border Mediation in Civil and Commercial Matters

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

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

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

8.1 The Legal Framework on Cross-Border Mediation

8.1.1 The Situation Existing in the EU

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

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

[383] Recital 8, 2008 Directive.

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

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

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

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

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

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

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

8.1.2 The Situation Existing Outside the EU

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

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

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

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

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

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

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

8.3 The Law Applicable to the Content of the Settlement Reached

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

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

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

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

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

8.4 Enforcement of Foreign Settlements

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

8.4.1 The Situation Existing in the EU

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

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

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

[389] Art. 1112 Cc.

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

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

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

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

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

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

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

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

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

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

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

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

8.4.2 The Situation Existing Outside the EU

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

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

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

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

[397] Art. 425 CPC.

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

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

9 Final Approach

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

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

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