Mediation of Legal Disputes in Norway. Institutionalized, Pragmatic and Increasingly Popular

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Abstract Mediation plays an increasingly important part as a dispute resolution mechanism for civil law disputes in Norway, and the Norwegian legislator has taken several steps to facilitate the use of mediation. However, regardless of incentives to increase the use of private, out-of-court mediation, most mediation is provided by publicly funded mediation institutes, and there is still a very small market for private mediators. Several of the most commonly used mediation institutes are closely connected to the court system, either as mandatory steps before the instigation of legal proceedings, or in the form of in-court mediation institutes. Especially rettsmekling (judicial mediation) has been successful. The approach to mediation in Norway has for the most part been fairly pragmatic, recognizing the benefits of amicable settlement of disputes, but with a rather eclectic view of mediation, sometimes including procedures and techniques that blur the line between mediation and other dispute resolution mechanisms. For instance, an evaluative mediator role is allowed for several mediation institutes, and some mediation institutes are integral parts of or mixed with other dispute resolution mechanisms, for instance adjudication. For parental court disputes concerning custody and visitation rights, evaluation is especially prominent. The approach to mediation is often fairly outcome-oriented. In this chapter, the most important Norwegian mediation institutes will be explored and compared, and the overall picture of mediation in Norway will be discussed.

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1 The Existing Situation of ADR in Norway

In Norway, the awareness of alternative dispute resolution (ADR) seems to have risen considerably in recent years among politicians and legislators, as well as jurists, businesses, and in public debate.

For commercial contracts, arbitration has traditionally been the ADR mechanism of choice. However, this has begun to change during the last decade or so. Mediation clauses have become more common, and some industries develop their own hybrid processes. In large contracts in the building industry there are sometimes clauses prescribing mediation during the contract period, with the aim of avoiding large, costly, time-consuming, highly escalated conflicts.[1] Oslo Chamber of Commerce has its own mediation institute.[2]

For other disputes, the use and awareness of ADR has varied considerably, largely depending on the type of dispute. Where ADR mechanisms have been used, institutionalized forms of ADR have been by far most common, offered either by the state – sometimes even mandated by law – or by specific industries for consumer contracts. In other words, the market for private dispute resolution businesses has been small.

Since 1795 the *conciliation boards* have been a mandatory first step in legal proceedings in most types of civil lawsuits. The conciliation boards consist of three lay members, who attempt facilitating settlement and also have the power to adjudicate the disputes, under certain conditions.[3] For divorcing couples with joint children, and for former spouses wanting to bring their custody dispute to court, mediation is mandated by law.[4]

For other types of civil disputes, as well as for some types of criminal offences, the *National Mediation Service* is the most commonly used mediation institute.[5]

Apart from these institutes, the only common ADR mechanisms for non-business contracts, are those offered by different industry boards or tribunals, and the Norwegian Consumer Council and Consumer Disputes Commission. The procedures of these institutions vary, but generally speaking they review complaints from consumers concerning breach of contract, due to defective goods or services. Most commonly, they provide a non-binding opinion, which the parties may choose to use as basis for settlement of the case. The Norwegian Consumer Council acts as

[1] Anne Austbø og Geir Engebretsen, *Mekling i rettskonflikter* (Mediation of Legal Disputes) 2nd edition Oslo 2006, p. 31.

[2] http://www.chamber.no/Arbitration+and+Dispute+Resolution.9UFRjO1K.ips (English).

[3] Mediation at the conciliation boards will be described and discussed in further detail throughout this article.

[4] For further details on this requirement, see Sect. 2.2.1. The mediation institute is described and discussed in further detail throughout this article.

[5] Mediation at the National Mediation Service is described and discussed in further detail throughout this article.

a mediator between the parties,[6] but the cases are normally handled in writing.[7] The Consumer Disputes Commission adjudicates disputes on the request of a party when mediation at The Consumer Council has been unsuccessful, and their decisions will have the same binding effect as a judgment.[8]

In 2005 the Norwegian parliament (*Stortinget*) enacted a new Dispute Act.[9] This was based on a proposal drafted by an expert committee (*Tvistemålsutvalget*).[10] The committee's report emphasized the importance and benefits of ADR, and several steps were taken to facilitate the use of such mechanisms. Firstly, the committee was inspired by recent British reforms of civil procedure, where so-called pre-action protocols were introduced.[11] A simplified version was introduced for Norwegian civil procedure, comprising chapter 5 of The Dispute Act. The parties are mandated to have certain communication before filing their lawsuit, regarding the matters of the dispute and key evidence, c.f. sections 5-2 and 5-3. Furthermore, the parties are mandated to consider and inquire whether an amicable solution can be reached, and to attempt ADR if appropriate, c.f. The Dispute Act section 5-4. The failure to follow these pre-action protocols will not lead to the dismissal of the lawsuit, but it may influence the court's decision on legal costs.[12] As a main rule, the winner of a lawsuit is ordered to pay the other party's legal costs (including lawyer fees et cetera), c.f. The Dispute Act section 20-2 (1) and (2). There are exceptions to this rule, for example when the winning party can be reproached for the dispute not being settled out of court, c.f. section 20-1 (3) b.

Secondly, to promote out-of-court settlement a set of (non-mandatory) statutory rules for out-of-court mediation were enacted, c.f. The Dispute Act chapter 7.

Thirdly, The Dispute Act section 8-1 states that the court has a duty, at every stage of the court proceedings, to assess the possibility of reaching an amicable settlement of the dispute as a whole, or parts thereof, through mediation or judicial mediation, unless the characteristics of the case or other circumstances render mediation unsuitable.

For court cases, 1997 was a watershed year, due to the introduction of *rettsmekling*, hereafter referred to as *judicial mediation*, a specific in-court mediation institute, as a trial project in some Norwegian courts. Judicial mediation was

[6] Act on the Handling of Consumer Disputes (The Consumer Disputes' Act) 28 April 1978 no. 18 section 5.

[7] An English presentation of The Norwegian Consumer Council and Complaints' Board is provided at http://www.forbrukerradet.no/forside/other-languages/complain-to-forbrukerr%C3%A5det .

[8] The Consumer Disputes Act 28 April 1978 no. 18 sections 1, 4, 6 and 11. An English presentation of The Norwegian Consumer Disputes Commission is provided at http://www.forbrukertvistutvalget.no/xp/pub/hoved/english/489330.

[9] Act Relating to Mediation and Procedure in Civil Disputes [The Dispute Act] 17 June 2005 no. 90.

[10] NOU 2001: 32 Rett på sak.

[11] NOU 2001: 32 p. 208–211.

[12] NOU 2001: 32 p. 209.

gradually introduced to all district and appellate courts, and became a permanent mediation institute in The Dispute Act. The introduction of judicial mediation meant that more judges and legal counsel became familiar with mediation as a method of dispute resolution.

In 2004 considerable amendments were made to The Children Act, with particular focus on the preparatory stages of the trial in parental disputes concerning custody and visitation rights. A main goal was to facilitate settlement, and a specific mediation institute was introduced, where the presiding judge mediates, most often together with a psychologist, c.f. The Children Act sections 59 and 61.[13]

Summing up, there has been considerable development in the field of ADR in Norway in recent years, especially for in-court mediation. For out-of-court dispute resolution there is still considerable room for growth. Firstly, the use of private, non-institutional mediation is very limited, and secondly, the variety of ADR mechanisms commonly used is fairly limited.

2 The Basis for Mediation in Norway

2.1 The Notion of Mediation

In Norway, mediation has traditionally not been a topic for legal doctrine, and there has been little legislation. In recent years, particularly since 1997, the awareness of mediation as a method of conflict resolution for civil law disputes has grown immensely among lawyers, following the introduction of *judicial mediation*, where cases are mediated by another neutral than the presiding judge, normally another judge from the court in question. The introduction of a specific in-court-mediation procedure in parental disputes concerning custody and visitation rights in 2004 was similarly significant, and this mediation institute has been much debated since.

However, the introduction of these and other mediation institutes has happened fairly pragmatically, recognizing the benefits of mediation for parties, courts and the community, but applying a rather eclectic approach to the concept of mediation. Therefore, some of the Norwegian mediation institutes allow for a great variety of mediation techniques and approaches, for instance allowing fairly extensive evaluation from the mediator(s), in some instances blurring the line between mediation and other ADR processes, such as Early Neutral Evaluation. No code of conduct for mediators exists. Furthermore, the requirements for mediator training are fairly limited.

With the exception of cases concerning custody and visitation rights, for which there is mandatory out-of-court mediation, mediation of civil law disputes is most

[13] Act relating to Children and Parents. [The Children Act] 8 April 1981 no 7. This mediation institute, as well as judicial mediation, will be described and discussed in further detail throughout the article.

common after the instigation of legal proceedings. As mentioned, so far out-of-court mediation of legal disputes has not grown particularly popular among the general public and lawyers, and there are very few people who are able to make a living as a mediator. In-court mediation is however quite popular and often successful – at least when assessed by looking at the settlement statistics in mediated cases. For instance, the settlement rates for *judicial mediation* pursuant to The Dispute Act sections 8-3 to 8-7 are in the range of 70–80 % of the mediated cases.[14]

There is only very limited statistical information available about mediation. Certainly, no general statistics measuring the number of mediations or the settlement percentages in Norway in total exist. There are also very few statistics for individual mediation institutes. For instance, the yearly report of the Norwegian courts in 2013 does not include an overview of the number of mediations or settled cases.[15] For mediations at the *family counseling offices*, which is the main forum for the mandatory custody mediations, Statistic Norway reports that 19,600 mediations took place in 2013, but in 61 % of the cases mediation only amounted to the mandatory 1 h. Interestingly, the statistic does not include information about the settlement percentage.[16]

2.2 The Existing Legal Basis for Mediation in Norway[17]

2.2.1 Out-of-Court Mediation

As mentioned, The Dispute Act of 2005 chapter 7 introduced a set of non-mandatory rules for out-of-court mediation. The Dispute Act entered into force 1 January 2008. The rules were introduced to increase awareness of out-of-court mediation as a viable dispute resolution mechanism for civil law disputes, and serve as an incentive to settle out of court. When a dispute is mediated in accordance with these not very detailed rules, it is exempt from the rules of mandatory mediation at the conciliation boards, cf. The Dispute Act section 6-2 (2) b. The conciliation boards are not defined as courts in The Courts Act section 1, but they are in practice a first instance of court in most civil cases concerning assets of a value of less than 125,000 NOK (Norwegian kroner), i.e. approximately 14,500 Euros, c.f. section 6-2. The main task of the conciliation boards is mediation, but they also have limited judicial powers, c.f. section 6-10. The conciliation boards are intended to provide swift and affordable dispute resolution, and consequently the mediation process in

[14] http://www.domstol.no/en/Civil-case/Sakstyper/Judicial-mediation/.

[15] http://aarsmelding.domstol.no/.

[16] http://www.ssb.no/en/sosiale-forhold-og-kriminalitet/statistikker/meklingfam/aar/2014-06-26 (English).

[17] English translations of several of the acts referred to in this country report can be found at the following webaddress: http://www.ub.uio.no/ujur/ulov/english.html.

most cases is very simplified, perhaps often too simplified to qualify as mediation in the common meaning of the word in mediation theory.

As mentioned, there is a specific out-of-court mediation institute for parental disputes on custody and visitation. Mediation is a requirement for all separating couples with children under the age of 16, and for all parents who wish to instigate legal proceedings concerning custody or visitation rights. However, the mandatory mediation is limited to 1 h.[18] In addition the parents may be offered up to 6 h of voluntary mediation.[19] The role of the mediator is described in a circular from the Ministry of Children, Equality and Social Inclusion: The goal is to help the parents reach an amicable settlement. This also includes providing the parents with information about rights and obligations of parents and children, for instance the legal implications of different custody arrangements, and knowledge about the reactions of parents and children to the breakdown of the parents' relationship etc.[20]

Another out-of-court mediation institute is The National Mediation Service. This mediation institute offers mediation of both criminal cases and civil disputes, c.f. The National Mediation Service Act section 1.[21] The criminal cases are referred to The National Mediation Service by the prosecuting authority, c.f. The Criminal Procedure Act section 71a, and if a settlement is reached, the prosecuting authority can only instigate criminal proceedings against the offender if there is a significant non-performance on part of the offender, c.f. The National Mediation Service Act section 21, second paragraph.

2.2.2 In-Court Mediation

There are three mediation institutes within the courts: Firstly, the settlement efforts of the presiding judge, which are sometimes referred to as mediation or *ordinary mediation* ("ordinær mekling"). These mediation efforts can take place at any stage of the process, either during the preparatory stage or during the main hearing. Since the mediator is the presiding judge, the mediator has to abide by the rules and principles of fair trial. Therefore, caucuses are not allowed, c.f. The Dispute Act section 8-2 (1). Furthermore, the judge cannot propose settlements and evaluate the case in a manner that may impair his or her impartiality as a judge, c.f. The Dispute Act section 8-2 (1). There has been a growing awareness of the limits this

[18] Mediation for separating spouses and cohabitants is prescribed in The Marriage Act of 4 July 1991 no 47 Section 26, cf. Act relating to Children and Parents. [The Children Act] 8 April 1981 no 7 section 51 and the Family Allowance Act of 8 March 2002 no 4 Section 9, fifth paragraph. As regards the requirement for mediation before the commencement of legal proceedings, see The Children Act Sections 51 and 56 second paragraph.

[19] C.f. The Children Act section 54.

[20] Rundskriv Q-02/2007 p. 4.

[21] The Act relating to the mediation by the National Mediation Service [National Mediation Service Act] 20 June 2014 no. 49.

implies – and should imply – for the settlement efforts of the judge, and it was underlined in the preparatory works of The Dispute Act that when a more thorough mediation process is needed, this should take place in the form of *judicial mediation* ("*rettsmekling*").[22]

Judicial mediation is a mediation process, in which the mediator may be – and in most cases *is* – one of the judges of the court in question, but not the presiding judge. However, the mediator may also be another person with mediation experience and qualifications, for instance a lawyer, or another person with a different profession and education relevant to the case in question, c.f. The Dispute Act section 8-4.[23] Judicial mediation is, next to mediation at The National Mediation Service the Norwegian mediation process with the most comprehensive statutory regulation, c.f. The Dispute Act section 8-5. The rules are however not rigid, and the mediation process is very flexible. Firstly, it is stated that the mediator determines the method of the mediation together with the parties, and he may have caucuses with them. Furthermore, it is stated that the mediator shall behave in an impartial manner and seek to clarify the interests of the parties in the dispute, with the aim of reaching an amicable settlement. The mediator can point to possible options for settlement, and may discuss strengths and weaknesses in the reasoning and arguments of the parties. This means that the mediator is allowed to evaluate the case. In the preparatory works the Ministry of Justice has emphasized that the mediator should be careful with using evaluative techniques, since this may cause ambiguity for the parties on whether the court or the parties are responsible for the content of the settlement. The mediator should as a main rule not act as a guarantor for the fairness of a settlement. Furthermore, it is underlined that the mediation process is not designed for determining legal disputes, particularly not such disputes requiring evidence.[24]

The Dispute Act section 8-5 (4) states that the mediator may allow the hearing of evidence in the mediation process. However, to my knowledge, hearing witnesses in the course of judicial mediation is rare. In some instances experts on the disputed issues partake in the mediation, but most commonly, the only evidence presented is various documents, maps and photographs. Any presentation of evidence in judicial mediation is in any case very informal.

As a consequence of the flexible legal framework for the judicial mediation process – which allows evaluative mediator behavior as well as caucuses – a judge who has served as a mediator in judicial mediation cannot preside over the case in a subsequent hearing, should the mediation efforts not lead to a settlement of all issues in dispute, c.f. The Dispute Act section 8-7 (2). This statute states that the judge may only partake in further proceedings in the case after mediation when the parties ask him or her to do so, and the judge does not consider it imprudent. It is emphasized

[22] Bernt 2011 chapter 9, with further references.

[23] C.f. Tvistelovforskriften (Supplementing subordinate legislation to The Dispute Act) 21 December 2007 no. 1605 sections 8 and 9 for further details on the qualifications and experience required for judicial mediators.

[24] Ot.prp. nr. 51 (2004–2005) p. 390 and 126. See also p. 124–125.

in the preparatory works that this is an exception, that the parties must explicitly ask for it, and that the judge should never suggest it. Rather, the judge should inform the parties at the commencement of mediation that another judge will be assigned to preside over the case, should the mediation not lead to settlement of the dispute as a whole, unless the parties specifically request that the mediating judge stays on the case.[25] The function of the exception must be to allow for the judge to continue as a mediator when the mediation efforts fail in a mediation process where the judge has had no caucuses with either party, and has not expressed any opinions on the subject matter of the case that may impair his or her impartiality. Particularly when the mediation efforts are abandoned at an early stage of the mediation process, this may be the case. Norway has many small district courts with very few judges, which means that a failed mediation may lead to a delay of the further proceedings in the case if another judge is not readily available.[26] However, to my knowledge, the exception is rarely used.[27]

Norway has almost no specialization of the court system, but there are nevertheless courts of special jurisdiction that handle disputes and other matters concerning real estate; the *land consolidation courts*. In these courts many of the same procedural rules and practices apply as for the courts of general jurisdiction. Settlement efforts by the presiding judge are common, and since 2007 there has been *judicial mediation* in the land consolidation courts.[28] With few exceptions, the same rules apply to this judicial mediation institute as for the equivalent institute in the courts of general jurisdiction. The few differences that exist are a consequence of the special features of these specialized courts and their subject-matter jurisdiction, which extends beyond the traditional adjudicative jurisdiction in disputes that characterizes the jurisdiction of courts of general jurisdiction. Given the format of this article, these differences will not be further explored.

The third mediation institute within Norwegian courts is a mediation process for parental disputes concerning custody and visitation, provided by The Children Act sections 59 and 61. The mediation takes place at the preparatory stages of the trial, during court sessions. The presiding judge acts as a mediator, normally together with a court appointed expert, most often a psychologist with expertise on parental disputes, and/or child psychology. The psychologist may meet with the parents prior to the mediation and may caucus with them during the process, whereas the judge

[25] Ot.prp. nr. 51 (2004–2005) p. 391–392.

[26] Bernt 2011 p. 468–473.

[27] Richard Knoff, «Evaluering av prøveordningen med rettsmekling" ("Evaluation of the Judicial Mediation Pilot Scheme") in *NOU 2001*: *32 Rett på sak. Lov om tvisteløsning* (*tvisteloven*) p. 1133–1207 on p. 1136 and 1179–1182 found in his study in 2000 that in only 3 of 102 cases the judge kept the case after failed judicial mediation.

[28] Administrative Regulation on Judicial Mediation in The Land Consolidation Courts 22 January 2007 no. 80 established a pilot scheme, and this will be a permanent mediation institute when the new land consolidation courts' act enters into enters into force 1 January 2016, c.f. Act relating, c.f. Act relating to Land Consolidation etc. [The Land Consolidation Act] 21 June 2013 no. 100 section 6-1 second paragraph, c.f. The Dispute Act chapter 8, and section 6-18.

cannot do so. The judge must not act or evaluate the case in a manner that may impair his or her impartiality, cf. The Dispute Act section 8-2 (1), c.f. The Children Act section 59, third paragraph.

In many cases the psychologist will conduct some investigations prior to the mediation. In addition to talking to the parents, he or she will frequently talk to the children and may also observe the interaction between each parent and the children. This means that the psychologist in many cases not only has the role of a mediator, but rather a hybrid role combining mediation with evaluation.

The Children Act section 61 no. 7 provides that the parties may enter into interim settlements. This is common. This enables settlement of disputes where the parties are not ready to commit more permanently to a certain custody and visitation arrangement. The certainty that they can renegotiate the arrangement enables parents who are unsure of the feasibility of the arrangements, or who are afraid to lose face when agreeing to another arrangement than the one they have claimed, to find amicable solutions in the best interest of the child. The idea is that it is easier to commit to an arrangement permanently after experiencing the pros and cons of the temporary settlement. Furthermore, it may be useful to have the opportunity to test whether a certain arrangement is in the best interests of the child. The court appointed expert will often be given the task to serve as a mentor for the parents during the interim settlement period, for example helping them to handle issues of conflict. This mentorship may serve as an incentive to enter into temporary custody arrangements, and may increase the chances of more permanent settlements.[29]

As mentioned, The Dispute Act section 8-2 (1) applies to custody and visitation mediations. This means that the legislator has intended that the judge who mediates normally should preserve his impartiality and therefore also preside over a subsequent main hearing and adjudicate the case, when a settlement is not reached.[30] However, the preparatory works recognize that in some cases the judge's impartiality may be impaired.[31]

A psychologist or other expert who has served as a mediator and/or mentor during the preparatory stages of the trial will in many cases also serve as a court appointed expert during the main hearing, providing the court with an expert evaluation on the quality of care each parent has to offer and the best interests of the child. Whether a new expert is appointed or not, is a question about whether the expert's involvement during the preparatory stages is liable to impair the expert's impartiality. The Dispute Act section 25-3 (3) states that the standard of impartiality for experts is the same as for judges.[32] Some judges and psychologists regard the combination of the role of court appointed expert with a prior engagement as a mediator and mentor in the same case inappropriate, and some psychologists never

[29]NOU 1998: 17 p. 48 and Ot.prp. nr. 29 (2002–2003) p. 45.

[30]C.f. Ot.prp. nr. 29 (2002–2003) p. 43.

[31]Ot.prp. nr. 29 (2002–2003) p. 88. See Bernt (2011) p. 208–209.

[32]C.f. The Courts of Justice Act sections 106-108.

agree to combine these roles in a case. This skepticism is supported by mediation theory. The combination of the role of mediator and mentor on one hand, and evaluating the parents as part of adjudication on the other, is not only in conflict with the theoretical stand that mediators should not evaluate.[33] It also blurs the line between the role of helper (mediator/mentor) and the role of decision-maker. Although it is the judge, not the appointed expert, who decides on the matter of custody and visitation, the opinion of the expert is given considerable weight in most cases. *Katrin Koch* found in a survey in 2000 that the judgments were in accordance with the expert opinion in 70 % of the cases.[34]

In another survey conducted by Kathrin Koch in 2008 she found that a new expert was appointed in only 16 out of 101 cases where the mediation efforts did not lead to settlement.[35] The number of cases where the case was assigned to a new judge was similarly low; 15 out of 101 cases.[36]

Some courts prefer judicial mediation to the mediation procedure prescribed in The Children Act. The reasons for this may vary, but ensuring a clear separation of the roles of mediator and judge in each case seems likely to be a main reason. However, the ability for the mediating judge to participate in caucuses with the parties is probably equally important. Some judges are uncomfortable with a mediation procedure where they are not able to participate in all parts of the mediation process, having to leave important parts of the process to a psychologist or other expert. Looking at the procedure from a mediation theory point of view, this skepticism seems well founded.

2.2.3 Areas of Law Covered by the Mediation Institutes

Apart from the specific mediation procedure in The Children Act, and some limitations on the subject-matter jurisdiction (competence) of the conciliation boards,[37] the mediation institutes described above apply to all types of civil law legal disputes where the parties have freedom of contract. There is no specific legal framework for cross-border mediation, and the mediation institutes therefore apply similarly to both cross-border and internal mediation. Whether a cross-border

[33] See for instance Kimberly K. Kovach & Lela P. Love, "Mapping Mediation: The Risk of Risikin's Grid", *Harvard Negotiation Law Review*, Volume 3, Spring 1998, p. 71–110 and Vibeke Vindeløv, Mediation. A Non-Model, Djøf Publishing, Copenhagen 2007.

[34] Katrin Koch, "Når mor og far møtes i retten – barnefordeling og samvær», («When mother and father meet in court – custody arrangements and visitation») *NOVA-rapport* 13/2000.

[35] Katrin Koch, *Evaluering av saksbehandlingsreglene for domstolene i barneloven – saker om foreldreansvar, fast bosted og samvær*, (*Evaluation of the procedural rules of courts in cases pursuant to The Children Act – cases concerning parental responsibility, custody and visitation*) Oslo 2008 p. 23.

[36] Koch 2008 p 23.

[37] C.f. The Dispute Act section 6-2.

dispute can be mediated according to Norwegian rules, therefore depends wholly on the rules of jurisdiction and international private law.

3 The Mediation Agreement/Agreement to Submit the Dispute to Mediation in Norway

The Dispute Act section 7-1 has a provision for the mediation agreement in out-of-court mediation. It does not apply to all out-of-court mediation, only mediation according to the rules in chapter 7. The agreement must be in writing and provide that the rules in The Dispute Act for out-of-court mediation shall apply to the mediation. The requirement of a written agreement is to be interpreted liberally. If the parties have sent a joint request to the district court asking that a mediator is appointed, this will satisfy the requirement of written agreement. There is a specific rule protecting consumers from being pressured to mediate by stronger counterparts: A mediation agreement which is entered into before the dispute occurred, is not binding on a consumer.[38]

There are no further requirements regarding form or content of the mediation agreement. However, it is stated in section 7-1 (2) that each of the parties can at any stage decide to end the mediation.

The significance of the limitation of the scope of section 7-1 to mediation according to the rules in chapter 7 is that when the mediation agreement does not satisfy these requirements, the mediation will not have certain legal implications it would otherwise have had. Firstly, the exception from the requirement of mandatory mediation at the conciliation boards, c.f. section 6-2 (2) b, will not apply.

Secondly, when there is a valid mediation agreement according to chapter 7, this may have influence of the court's decision on legal costs. As mentioned above, as a main rule, the winner of a lawsuit is ordered to pay the other party's legal costs (including lawyer fees et cetera), c.f. The Dispute Act section 20-2 (1) and (2). However, when the winning party can be reproached for the dispute not being settled out of court the court may rule differently, c.f. section 20-1 (3) b. If the parties have entered into a binding agreement to mediate according to section 7-1, and a party has failed to participate in mediation, this exception is of course applicable. However, when the agreement to mediate does not satisfy the requirement of written form, or when a consumer has entered into such an agreement before the dispute arose, the preparatory works state that the failure to participate in mediation according to the agreement shall not have any consequences for the question of legal costs.[39]

Out-of-court mediation does not in itself suspend prescription and limitation periods. The instigation of a lawsuit however has this effect, meaning that in-court mediation and mediation at the conciliation boards will suspend prescription and

[38] Ot.prp. nr. 51 (2004–2005) p. 385–386 has further details on the provisions.

[39] C.f. Ot.prp. nr. 51 (2004–2005) p. 386.

limitation periods.[40] This effect occurs regardless of whether there is a written mediation agreement or not. Most often, such an agreement does not exist for in-court mediations.

4 The Mediator in Norway

4.1 Who Can act as a Mediator?

There is no specific authorization for mediators in Norway. The different mediation institutes have different rules and practices for the selection of mediators. Generally, fairly limited mediation training is required. There are however other requirements for some of the mediation institutes, for instance concerning profession, experience and personal qualities. Whether the role of mediator is limited to certain professions varies. In Table 1, a brief overview is given.

Table 1 Who can be mediators?

Mediation institute	Who can be mediators?	Legislation
The National Mediation Service	Men and women 18 years of age or older, regardless of occupation, may apply to be appointed as members of the National Mediation Service. They must be personally suitable and reside within the same municipality as the mediation service. There are detailed rules excluding persons with serious or newer offences on their criminal records from appointment. The mediator in each case is appointed by the The National Mediation Service.	The National Mediation Service Act, 20 June 2014 no 49 sections 4, 5 and 6.
Conciliation boards	Men and women 25 years of age or older, regardless of occupation, can be elected as conciliation board members by the municipal council. Those appointed as members must be especially suited for the task and have a good command of both written and oral Norwegian. In practice, former politicians are often elected as conciliation board members. The parties are not able to choose their mediators.	Courts of Justice Act, 13 August 1915 no. 5, sections 27, 56 and 57.

(continued)

[40] Act relating to the Limitation Period for Claims 18 May 1979 no. 18 section 15.

Table 1 (continued)

Mediation institute	Who can be mediators?	Legislation
Family Counseling Offices	Primarily professionals employed by the Family Counseling Offices, clergymen (and women), professionals employed by public health and social institutions or by the Pedagogic Psychological Services. When needed, authorization may be given to psychologists, psychiatrists and advocates in private practice. Regardless of profession, a mediator must have a sound knowledge of adult and child reactions in relation to the break-up of the parents' relationship, and should be well-informed on professional and legal issues relevant to these cases, such as child and family psychology, research, mediation methodic, legislation etc. The County Governor decides which training is required. The parties do not have any say in the choice of mediator of their dispute.	Administrative regulation regarding mediation pursuant to The Marriage Act and The Children Act 18 December 2006 no. 1478, section 4.
"Advocate Mediation" according to the Rules of The Norwegian Bar Association	Advocates who are included on the list of approved mediators. The inclusion on this list requires that the advocate either has completed the training offered by The Norwegian Bar Association, or has other reciprocal education or training, or documented experience.	Guidelines for mediation with advocates as mediators, The Norwegian Bar Association 24 November 2000, section 11.
	Approval as a mediator according to this mediation institute is given by The Norwegian Bar Association's Mediation Committee, which is authorized to formulate more detailed requirements for authorization. The mediator is chosen by the parties. The parties may also request that a mediator is appointed by the district court from their list of judicial mediators.	Guidelines for mediation with advocates as mediators, section 3, c.f. The Dispute Act section 7-2 (1).

(continued)

Table 1 (continued)

Mediation institute	Who can be mediators?	Legislation
Mediation according to The Dispute Act chapter 7	Any person the parties choose, or a person appointed by the district court from the list of judicial mediators on the request of the parties. The mediator must however be impartial and have no connections with either party. Furthermore, he or she must be qualified to act as a mediator. For further details on the qualifications and experience required for mediators appointed from the court's selection of judicial mediators, see "Judicial Mediation" below.	The Dispute Act section 7-2, c.f. section 8-4.
The judge's settlement efforts	A judge or assistant judge, presiding over the case in question. All judges and assistant judges are expected to complete a course including different topics relevant to the role as a judge. Mediation is one of these topics, amounting to 2 days of training for judges, and 1 day for assistant judges[a].	The Dispute Act section 8-2. (For the regulation of the authority of assistant judges, see Courts of Justice Act section 23, c.f. sections 53-55, with further details in the Administrative Directive on the Conditions for Employment of Assistant Judges G-46/1999 chapter 5.)
Judicial mediation	(a) A judge or assistant judge (b) A person from the court's panel of approved judicial mediators (c) Another person to whom the parties consent The mediator must be impartial. The standard of impartiality is the same as for judges. The court appoints the mediator. Predominantly judges act as mediators. A main reason for this is that the parties must pay the fees of an external mediator, c.f. chapter. 8 below.	The Dispute Act section 8-4, c.f. Courts of Justice Act sections 106-108.
	To be included in the court's selection of external mediators, the mediator must fulfill four cumulative conditions: • Have personal qualities that makes him or her suited for the role • Competency regarding judicial mediation or a similar mediation institute • Experience from judicial mediation or a similar mediation institute • Special insights in such subject matters needed by the court for the purpose of judicial mediations	Administrative Regulation relating to The Dispute Act 21 December 2007 no. 1605 section 9.

(continued)

Table 1 (continued)

Mediation institute	Who can be mediators?	Legislation
	The criteria are discretionary, and approval therefore relies on a concrete evaluation of his or her personal qualities, qualifications and experience. Rather than an isolated evaluation of each criterion, the court must look at the totality of the person's qualities, qualifications and experience. The reason why there is not a general requirement of a certain type of training for external judicial mediators is that there is currently no authorization for mediators in general – or for judges who mediate[b].	
Judicial mediation in the land consolidation courts	The land consolidation courts' judge and/or an engineer employed by the court may act as a mediator. He or she is allocated by the court, without input from the parties.	The Land Consolidation Courts' Act 21 June 2013 no. 100 section 6-18
Mediation in parental court disputes on custody and visitation rights	A judge or assistant judge presiding over the case in question, most often together with a court appointed expert. There is no specific regulation determining which professions who may act as experts in this capacity, but psychologists are most commonly used[c]. There are no specific requirements regarding mediation training and experience for the experts. For the required training for judges, see "The judge's settlement efforts" above. There are no specific provisions regarding personal qualities and mediation experience, but it is underlined in the preparatory works that cases concerning custody and visitation rights should be assigned to judges who are particularly interested in such cases, thus enabling the judges who work with these cases to obtain experience and maintain their knowledge and skills relating to such cases[d].	The Children Act section 61 no. 1.

[a]Bernt 2011 p. 264–265, c.f. information collected from executive officer Anita Singsaas, Domstoladminstrasjonen, Enhet for kompetanse (The Norwegian Courts' Administration, The Competence Unit) by phone call 17 June 2010

[b]Bernt 2011 p. 261–262, with critical remarks on p. 272

[c]Bernt 2011 p. 282–283, c.f. Ot.prp. nr. 29 (2002–2003) p. 43, cf. p. 88

[d]Bernt 2011 p. 281, c.f. Ot.prp. nr. 29 (2002–2003) p. 43 and 76, and NOU 1998: 17 p. 67 and 71

4.2 Duty of Disclosure for the Mediator?

The question of duty of disclosure only arises when the mediation takes place behind closed doors, thus enabling confidentiality. The regulation of the duty of disclosure varies for different mediation institutes. For some mediation institutes there are specific statutes addressing the issues, or some of them. Some questions must be determined based on non-statutory law, and since the question of duty of disclosure rarely has been an issue in Norwegian case law, the law is not always clear.

For *The National Mediation Service* it is stated in The National Mediation Services Act section 9, fourth paragraph that the court cannot admit evidence from a mediator that he or she cannot give without violating his or her duty of confidentiality, which is described in chapter 5.1.3.3 below, "unless the court, after weighing the importance of observing the duty of confidentiality against the importance of obtaining information in the case, decides by court order that the witness shall nevertheless give evidence". It is added that "Unless both parties consent, the witness may not give evidence concerning what the parties have acknowledged or offered during mediation". In relation to confidentiality and disclosure, the essence of this statute is that as a testimony from the mediator on what took place in mediation requires a court order, and such an order must be based on the court's discretional evaluation that the importance of the information outweighs the importance of observing the duty of confidentiality. And under no circumstances may the mediator disclose the parties' admissions or offers against the wishes of a party.

It is emphasized in the preparatory works that when a mediator through mediation becomes aware of circumstances that give him or her reason to believe that a child is being severely neglected etc., he or she has a duty to report this.[41] Furthermore, it is stated that if a settlement is presented as evidence in a court case, the mediator is allowed to give evidence on whether the parties' agreement during mediation is correctly recorded in the settlement.[42]

Furthermore, upon conclusion of the mediation, The National Mediation Service has a duty to report to the prosecuting authority on the fact that an agreement has been entered into and approved. Secondly, the mediation service must notify the prosecuting authority if the offender breaches the agreement. Thirdly, when the agreement is fulfilled, confirmation of this must be sent.[43]

For mediation at the *family counseling offices*, there is a duty for mediators and other personnel to report to child protective services when there is reason to believe that a child is being abused at home, or subject to other forms of serious neglect, or when a child has shown lasting serious behavioural problems, c.f. The Family

[41] Prop. 57 L (2013–2014) p. 83, c.f. Act of 17 July 1992 No. 100 Relating to Child Welfare Services (The Child Welfare Act) section 6-4.

[42] Prop. 57 L (2013–2014) p. 84.

[43] The National Mediation Service Act sections 20 and 21.

Counseling Offices Act section 10. The mediators and other personnel are also obliged to provide information on the request of the child protective services.[44]

For *judicial mediation*, The Dispute Act section 8-6 (2) states that the mediator is only allowed to provide evidence on the question of whether the settlement is in accordance with the agreement reached by the parties in the mediation. These rules also apply to *out-of-court mediation* pursuant to The Dispute Act chapter 7 and "advocate mediation".[45] For these mediation institutes there is no regulation – statutory or otherwise – on the issue of information about probable serious child neglect, etc. There is however a non-statutory principle of *necessity* in Norwegian law, and this is applicable under such circumstances, overriding the rules of confidentiality.[46] Whether this rule places a *duty* of disclosure on all mediators, is however unclear.

For *in-court mediation of custody disputes* pursuant to The Children Act section 61 no. 1, section 50 states that the rules in The Family Counseling Offices Act sections 9 and 10 apply correspondingly for a court appointed expert that has been assigned as a mediator etc. Although it seems natural that the judge has the same duty of disclosure as court appointed experts, the wording of the statute, i.e. use of the term "the assignment", suggests that judges are not included. However, as mentioned above, the non-statutory principle of *necessity* overrides the duty of confidentiality in such instances.

4.3 The Responsibility of the Mediator

The question of responsibility of the mediator for malpractice is not commonly discussed in Norway, and there is no specific legislation on this matter in particular. Furthermore, there are no precedents, and to my knowledge this issue has not arisen in any published court decisions. It is not discussed in Norwegian legal doctrine. The latter is however not surprising, as mediation until recent years has not been dealt with in Norwegian legal science. Furthermore, as mentioned, apart from the settlement efforts of some judges, mediation was until 1997 largely limited to conciliation boards, The National Mediation Service and the Family Counseling Offices. In these three types of mediation parties often, or in the case of The

[44] In addition, The Family Counseling Offices Act section 9 states that the mediators and other personnel have a duty to report to the Public health and care services and Social services – and on these authorities' request provide information – if there is reason to believe that a pregnant woman is abusing intoxicating substances in such a manner that it is more likely than not that the child will be born with injuries.

[45] C.f. The Dispute Act section 7-3 (6) and Guidelines for mediation with advocates as mediators section 6, c.f. section 1.

[46] Bernt 2011 p. 297–298, c.f. Ørnulf Rasmussen, *Kommunikasjonsrett og taushetsplikt i helsevesenet* (The right of communication and the duty of confidentiality in the health services) Ålesund 1997 p. 606–622.

National Mediation Service: always, negotiate without the aid of an advocate, which is probably a main explanation for the lack of focus on the issue of mediator responsibility.[47] Another probable explanation is that the question of mediator malpractice seems more likely to be in focus when the dispute concerns substantial amounts of money. The abovementioned mediation forums rarely handle such cases. However, as a result of the increase of mediations within the court system, where parties more often than not have legal counsel present, more focus on mediator liability might follow in the future.

Since there is no specific legislation on mediator liability, the question of liability depends on the mediator's profession and the mediation institute. Generally, the question of liability for damages is a fault-based liability. The standard of due care is generally speaking stricter for professionals than for others,[48] but for judges the threshold for liability has nevertheless been higher rather than lower than the general norm, c.f. Courts of Justice Act sections 200-201. It is, however, unclear whether this liability is supplemented with a master-servant liability for the state as an employer, and, if so, whether the threshold for liability is lower than for the personal liability for the judge.[49]

4.4 Code of Conduct for Mediators?

There is no general code of conduct for mediators in Norway, and most mediation institutes do not have ethical codes.[50] Consequently, in most cases which ethical rules a mediator is bound by depend on his or her profession.

For instance, there is a specific set of ethical principles for judges, which were passed 1 October 2010 by The Norwegian Judges' Association. These include a couple of provisions relevant to mediation. In Sect. 3, fourth paragraph, it is stated that the judge shall actively facilitate amicable settlements. However, it is then underlined that the parties shall not be pressured into settlement. In Sect. 3, second paragraph, it is stated that a judge must not express his opinion on cases that he is handling or cases that he is likely to handle in the future. These two ethical principles are significant for judges who mediate. Both case law and The Disciplinary Board for Judges have until the last decade been fairly accepting of pressure during the course of mediation or other settlement efforts, and of evaluations or prognoses

[47] C.f. The National Mediation Services Act section 15.

[48] Nils Nygaard, *Skade og ansvar* (*Damage and Liability*) 6th edition Bergen 2007 p. 194–195. For the question of liability for advocates, see p. 483–490. Liability for mediators is however not addressed.

[49] A brief overview is given in Bernt 2011 p. 26–27, c.f. NOU 2001: 32 p. 543–544.

[50] An exception is the National Mediation Services. They have a set of ethical principles. These principles are brief and fairly general. C.f. Konfliktrådet (The National Mediation Service), *Håndbok for meglere* (*Handbook for mediators*) chapter 4.

regarding the issues in dispute. The reasoning behind the acceptance of some degree of pressure has been that settlement generally is in the best interest of the parties. Evaluative statements have been accepted because one has considered that the parties in most cases are able to understand that the views expressed are preliminary, and that the judge will be able and willing to change his mind when necessary after hearing all the evidence and legal argumentation. Case law, both national and international on the issue of impartiality, as well as the preparatory works for The Dispute Act of 2005, has led to a more critical approach towards pressure and prognoses.[51] Whereas the ethical principle prohibiting pressure applies to all three mediation institutes within the courts, the principle addressing opinions only prohibits such evaluation in mediations where the mediator is, or at a later stage may be, the presiding judge. This means that in judicial mediation, a mediating judge may state his opinion on the case, since judicial mediators as an overriding main rule cannot preside over a case they have attempted to mediate, c.f. The Dispute Act section 8-7 (2). As mentioned in Sect. 2.2.2 above, the Ministry of Justice have stated in preparatory works of The Dispute Act that mediators should be careful with such statements.

The ethical code for attorneys does not have any specific regulation regarding the role of mediator.[52] Neither does the ethical principles for psychologists.[53]

5 The Process of Mediation in Norway

5.1 Basic Principles in Mediation

5.1.1 Introduction

As mentioned earlier, the approach to mediation as a method of dispute resolution in Norway has traditionally been fairly pragmatic and eclectic. Furthermore, it has been quite fragmented, in the sense that different mediation institutes have developed independently and at different times, based on different needs and ideologies. For this reason, it varies to some extent which principles apply to each mediation institute, and how strictly they are adhered to. The institutional context of a mediation model certainly also influences how the mediation principles apply. Below, I will describe how different mediation principles apply to mediation in Norway, and show which differences exist between the different models. Given the number of different mediation institutes, each governed by different legislation

[51] I have analyzed these issues thoroughly in Bernt 2011 p. 46 and chapter 9.

[52] C.f. The Advocate Administrative Regulation 20 December 1996 no. 1161 chapter 12.

[53] The Ethical Principles for Psychologists, The Norwegian Psychologists' Association 1998 (http://www.psykologforeningen.no/Fag-og-profesjon/For-fagutoevere/Etikk/Etiske-prinsipper-for-nordiske-psykologer/(language)/nor-NO).

and/or other rules, a comprehensive account for all mediation institutes in relation to each principle will not be possible within the scope of this publication.[54]

5.1.2 Voluntariness and Party Autonomy

The question of voluntariness in mediation can be divided into three elements: Firstly, the question of whether the parties *choose to mediate*, or whether they are obliged to accept mediation. The second question is whether the parties can *decide freely to abandon* the mediation attempts. The third question is whether the parties have *full autonomy to determine the content of the settlement*.

If none of the three elements of voluntariness are in place, it is hard to imagine that anyone would regard the procedure in question as mediation. However, limitations connected to one or a couple of the elements do exist for some of the Norwegian mediation institutes. Nevertheless, it is not disputed in Norwegian legal theory that these dispute resolution processes are mediation processes. A brief overview of how the concept of voluntariness applies to different mediation institutes will be given in Table 2.

Table 2 Voluntariness and party autonomy in different mediation institutes

Mediation institute	The decision to mediate	The decision to settle or abandon mediation efforts	The content of the settlement
The National Mediation Service	In criminal cases the prosecution authorities decide whether to offer mediation. The consent of offender and victim is required. C.f. The Criminal Procedure Act section 71a.[g] In civil disputes, normally one or both parties initiate mediation, and mediation is voluntary.	The offender and/or the victim/ the parties in a civil dispute may decide to abandon mediation efforts at any time during the process.	In criminal cases: The offender and the victim decide the content of the settlement, but the mediator is obliged to ensure that the settlement is not unreasonable. If the settlement is unreasonable or other weighty concerns render the settlement unsuitable, the mediator will refuse to approve it, The The National Mediation Service Act section 14. In civil disputes the parties have full autonomy over the content of the settlement

(continued)

[54]There are other out-of-court mediation institutes in addition to those mentioned in this report. Apart from the family counseling offices and The National Mediation Service, which are responsible for a large portion of Norwegian mediations, I have excluded institutes that are limited to certain subject matters/fields of law.

Table 2 (continued)

Mediation institute	The decision to mediate	The decision to settle or abandon mediation efforts	The content of the settlement
Conciliation Boards	Mediation is mandated by law in many cases, c.f. The Dispute Act section 6-2 and Sect. 2.2.1 above.	The parties decide freely whether to abandon mediation efforts at any time during the process.	The parties have full autonomy over the content of the settlement, but they will not be able to enter into an in-court settlement (enforceable settlement) if the contents are contrary to *ordre public* or peremptory rules of law (a rule of law, the operation which cannot be dispensed with by private parties[a]). C.f. The Dispute Act section 19-11 (3), c.f. section 6-8 (6).
Family Counseling Offices	Mediation is mandated by law for separating couples with children under the age of 16, and parents wishing to instigate legal proceedings on the matters of custody and visitation rights[b].	Only 1 h of mediation is mandatory. Thereafter, the parties decide freely whether to abandon mediation.	The parties have full autonomy over the content of the settlement.
"Advocate Mediation" pursuant to the Rules of The Norwegian Bar Association	Mediation is voluntary, c.f. Guidelines for mediation with advocates as mediators sections 2 and 6.	The parties decide, c.f. section 6.	The parties have full autonomy over the content of the settlement.
Mediation pursuant to The Dispute Act chapter 7	Mediation is voluntary, c.f. section 7-1 (1).	The parties decide, c.f. section 7-1 (2).	The parties have full autonomy over the content of the settlement.
The judge's settlement efforts[c]	The judge initiates it during the preparatory stages or the main hearing of the case.	The parties decide whether to settle.	The parties have full autonomy over the content of the settlement, but will not be able to enter into an in-court settlement if the content is contrary to *ordre public* or peremptory rules of law, see *The conciliation boards* above, c.f. The Dispute Act section 19-11 (3).

(continued)

Table 2 (continued)

Mediation institute	The decision to mediate	The decision to settle or abandon mediation efforts	The content of the settlement
Judicial mediation[d]	The court decides, but the parties' consent is required as a main rule, c.f. The Dispute Act section 8-3. It is underlined in the preparatory works that mediation without the consent of both parties can only be decided under exceptional circumstances, for instance in disputes between close relatives, where adjudication would only cement the conflict between the parties[e].	The parties decide.	See "The judge's settlement efforts" above.
Mediation in parental court disputes on custody and visitation rights	The court decides.	The parties decide.	The parties decide the content of the settlement, but they cannot enter into an in-court settlement that is contrary to *ordre public* or peremptory rules of law, c.f. The Dispute Act section 19-11 (3). The court cannot approve a settlement that is clearly contrary to the best interests of the child[f].

[a]Definition by Ronald L. Craig, *Stor norsk-engelsk juridisk ordbok* (Large Norwegian-English Law Dictionary) Oslo 1999 p. 185

[b]The Marriage Act 4 July 1991 no. 47, section 26, cf. The Children Act of 8 April 1981 no. 7 Section 51 and The Family Allowance Act 8 March 2002 no. 4 Section 9, fifth paragraph. As regards the requirement for mediation before the commencement of legal proceedings, see The Children Act sections 51 and 56, second paragraph

[c]Includes the judge's settlement efforts in the land consolidation courts

[d]Includes judicial mediation in the land consolidation courts

[e]Ot.prp. nr. 51 (2004–2005) p. 388–389

[f]This is not clearly stated in statutory law, but it is recognized in the preparatory works of The Dispute Act, c.f. Ot.prp. nr. 51 (2004–2005) p. 438 and NOU 2001: 32 p. 725, as well as in legal doctrine. C.f. Bernt 2011 p. 415–417 with further references

[g]The Criminal Procedure Act 22 May 1981 no. 25

5.1.3 Confidentiality

5.1.3.1 Overview

Confidentiality consists of several different aspects: Firstly, the question of whether the mediation happens behind *closed doors*, without access for others than the parties, the mediator(s) and other persons specifically invited and approved by the parties, and secondly the question of *whether the mediator is bound by confidentiality*, and – if so – whether there are any exceptions to this. Thirdly, there is a question of *whether – and, if so, to which extent – the parties are bound by confidentiality*. This is raises a more specific question of whether the mediator or a party can give evidence in court on what took place in the mediation. The question of disclosure for the *mediator* in has already been addressed in Sect. 4.2 above. The question of whether the *parties* can disclose information from the mediation in court proceedings will be addressed below.

5.1.3.2 Does the Mediation Take Place Behind Closed Doors?

Whether mediation takes place behind closed doors, depends on the mediation institute. Out-of-court mediation is confidential. This is also the case for judicial mediation and mediation in parental court disputes on custody and visitation rights.[55] Since the judge's settlement efforts occur in course of the normal proceedings of the case, mediation normally takes place during court sessions, either the main hearing or during a court session at the preparatory stages of the trial. This means that the presiding judge in most cases does not mediate behind closed doors, with the above mentioned exception for custody disputes etc.[56]

Mediation at the conciliation boards is in a sense a hybrid of out-of-court and in-court mediation because the conciliation boards function as a first instance of court in many cases, c.f. The Dispute Act section 6-2 and chapters 2.2.1 and 5.1.2 above. As a main rule, the mediation therefore takes place in meetings that are equivalent to court sessions, and these are public.[57] However, if the parties have declared that they do not wish the case to be adjudicated in case the mediation does not lead to settlement, c.f. The Dispute Act section 6-8 (1), the mediation will take place behind closed doors on the request of both parties, c.f. section 6-9 (1).

[55]The Dispute Act section 8-5 (1), c.f. The Courts Act section 124 and section 125 second paragraph, c.f. section 122.

[56]Convention for the Protection of Human Rights and Fundamental Freedoms article 6, 1 and The Courts' Act section 124, c.f. section 122.

[57]The Dispute Act section 6-9 (1), c.f. Courts of Justice Act chapter 7.

5.1.3.3 Mediator Confidentiality

The issue of *confidentiality* for mediators and parties arises when mediation takes place behind closed doors. In these cases, the *mediators* will always be bound by confidentiality. However, the extent of confidentiality varies. For mediators at the family counseling offices, the duty of confidentiality applies to information of a private nature.[58] The same rule applies for The National Mediation Service, but with the addition that the mediator cannot, against the express wishes of one or more parties give evidence on the parties' admissions and offers during the mediation.[59] For mediations according to The Dispute Act chapter 7, or "advocate mediation" the same rules applies as for judicial mediation. These rules will be addressed below.[60]

For in-court mediations of disputes concerning custody and visitation rights, the court appointed expert may reveal any information to the judge, but is otherwise bound by confidentiality.[61]

For judicial mediation the issue of mediator confidentiality is addressed in The Dispute Act section 8-6 (2). The mediator is bound by confidentiality concerning everything that was said and done during the mediation. As mentioned in Sect. 4.2 above, the mediator is nevertheless allowed to give evidence on the question of whether the settlement is in accordance with the agreement reached by the parties in the mediation.

5.1.3.4 Party Confidentiality

The extent of *party confidentiality* depends on the mediation institute. For judicial mediation, The Dispute Act section 8-6 first paragraph states that parties – in other contexts than in a court proceeding – are bound by confidentiality only for such information that was given under the condition of confidentiality. In other words: Unless such a condition was stated, the information is not confidential. In the preparatory works information of a strict personal nature and trade or business secrets are mentioned as examples. It is also underlined that information that is included in other confidentiality rules and exceptions from the duty to give evidence, c.f. The Dispute Act chapter 22, c.f. section 21-5, is also confidential.[62]

It must however be underlined that this rule of fairly limited confidentiality does not address the question of which information may be conveyed in legal proceedings in the dispute in question or another dispute. Disclosure of information in this context is limited by a much more far-reaching rule of confidentiality. The Dispute

[58]The Family Counseling Offices' Act 19 June 1997 no. 62 section 5a.

[59]The National Mediation Service Act section section 9, fourth paragraph.

[60]C.f. The Dispute Act section 7-3 (6) and Guidelines for mediation with advocates as mediators section 6, c.f. section 1.

[61]The Children Act section 50.

[62]Ot.prp. nr. 51 (2004–2005) p. 391.

Act section 8-6 (1) states that the parties cannot, either in the same or a different court case, give evidence on what was revealed during the mediation. There are, however, two notable exceptions: Firstly, the parties can provide information on specific evidence which was communicated or revealed during the mediation, and which has not been communicated outside the mediation. This rule is inspired by US judicial mediation institutes, and according to the preparatory works, the purpose is to avoid that parties use the mediation to "immunize" evidence that they want to avoid being presented in court.[63] Secondly, the parties can reveal settlement proposals that have been protocolled according to section 8-5 (5). According to section 8-5 (5), a party's settlement offer shall be protocolled on his or her request.

The rules of party confidentiality in court and on other arenas apply for out-of-court mediation pursuant to The Dispute Act chapter 7, c.f. section 7-3 (6). It is not clear whether these rules also apply when mediation in the conciliation boards have taken place behind closed doors. There is no provision on this matter in The Dispute Act. However, when the mediation itself happens behind closed doors, it seems reasonable that the mediation is protected by the same confidentiality as judicial mediation and out-of-court mediation according to The Dispute Act chapter 7.

As mentioned in Sect. 2.2.1 above, the mediation institute in The Dispute Act chapter 7 is non-mandatory. This means that unless the parties have agreed to mediate in accordance with these rules, they do not apply. A consequence of this is that the prohibition to provide evidence on what took place in the mediation does not apply to out-of-court mediations in general, only when the parties have agreed to mediate according to the rules in chapter 7. When there is no specific exception, the general duty to give evidence in court applies, c.f. The Dispute Act section 21-5. For the purpose of "advocate mediation", this issue has been resolved by stating in the guidelines section 1 that the rules in The Dispute Act section 7 apply, unless the parties and mediator explicitly state otherwise in the form of a written agreement.

The National Mediation Service Act does not address the issue of *party* confidentiality. However, the rules on confidentiality in The Public Administration Act applies, c.f. The National Mediation Service Act section 8, c.f. the Public Administration Act section 13b, last paragraph. This means that information of a personal nature is confidential.[64] Furthermore, a party can, prohibit the mediator from giving evidence in court on the parties' admissions and offers in mediation, c.f. section 9 paragraph, *in fine*.

There is no specific regulation of party confidentiality regarding the contents of mediations at the family counseling offices. However, the rules on confidentiality in The Public Administration Act applies, c.f. The Family Counseling Offices Act section 13.

[63] Ot.prp. nr. 51 (2004–2005) p. 391.

[64] The Public Administration Act. Act relating to procedure in cases concerning the public administration 10 February 1967.

5.1.4 Neutrality and impartiality

All Norwegian mediation institutes that have been described in this chapter have in common that the mediator is a neutral and impartial third party. The usages of these terms vary, and sometimes they are treated as synonyms. In Norway the latter is generally the case. In some definitions the principle of *neutrality* refers to the mediator's interest in the dispute and prescribes that a mediator should not act in a dispute if he or she has a financial or personal interest in the outcome, whereas *impartiality* refers to the requirement that the mediator is not biased.[65]

It must of course be noted that the principle of *neutrality*, according to the definition above, does not apply to all mediations, for instance in mediation at a workplace or in an organization, where the mediator is a superior mediating a conflict between subordinate colleagues.

For the mediation institutes described in this chapter, neutrality and impartiality are safeguarded with rules stating that there must not be any circumstances present that are liable to impair the mediator's impartiality or neutrality.[66] However, as shown in Sects. 2.1 and 2.2, several of the mediation institutes allow or include evaluative mediator behavior, and in some parts of mediation theory it is then argued that this compromises *impartiality* in mediation.[67] In my opinion, this may be the case for some forms of evaluation under some circumstances. I find that evaluation is particularly likely to compromise impartiality in situations where the mediator has other roles in the same case, for instance when a judge mediates, or when a court appointed expert is assigned both to mediate and write a recommendation to the court, for instance on the questions of custody and visitation rights for children. For the judge, the most critical issue is whether he or she can be viewed as an impartial and neutral *judge* after having voiced his opinions during the mediation, before evidence has been heard. The parties may also fear that the judge's suggestions and evaluation are motivated by a strong wish to settle the case – to avoid another case on a full case docket. The latter would compromise his *neutrality* as well as impartiality according to the definition above.

For the court appointed expert, typically a psychologist in a custody dispute, there are two questions; firstly whether he or she is neutral and impartial in the role

[65] Bernt 2011 p. 300–305 with examples and further references. For an English text written by a Nordic expert, see Vindeløv 2007 p. 205–208.

[66] For the National Mediation Service and the family counseling offices the rules on impartiality and neutrality in The Public Administration Act, sections 6 to 9 apply, c.f. National Mediation Service Act section 8 and The Family Counseling Offices Act section 13. For in-court mediation the regulation in The Courts of Justice Act sections 106-108 apply for judges, judicial mediators and court appointed experts, c.f. The Dispute Act section 8-4 (2) (judicial mediators) and section 25-3 (3) (court appointed experts). For mediation according to The Dispute Act chapter 7, section 7-2 (2) states that the mediator must be "impartial and independent of the parties", and when a mediator from a district court's selection of external judicial mediators is requested, the rules in The Courts of Justice Act sections 106-108 apply, c.f The Dispute Act section 8-4 (2).

[67] See for instance Vibeke Vindeløv 2007 p. 99 and 160–161.

as mediator, or coloured by findings from his or her evaluative work, and secondly whether he or she is impartial in the role as an expert after having related to the parties in the role of mediator. A party may fear that an unwillingness to settle in mediation may affect the expert's opinion of him or her unfavorably.

5.2 *Existing Bases for the Development of the Procedure: Timeframes Etc*

The framework conditions are not the same for all mediation institutes. For *out-of-court mediation* pursuant to The Dispute Act chapter 7, and several other out-of-court mediation institutes, the parties decide the timeframes and the procedure. The only legal impediments on this freedom are prescription and limitation periods. As mentioned in chapter 3 above, out-of-court mediation cannot suspend prescription and limitation periods. Another impediment may be limited financial resources, when the parties must pay the mediator's fees.

For The National Mediation Service, there is no legislation limiting the length of mediation, or other legislation limiting the mediator's freedom to adapt the mediation to the parties' needs. For the *family counseling offices* there are rules on the length of mediation in situations where such mediation is mandated by law, c.f. Sect. 2.2.1 above. As mentioned, the mandatory mediation is limited to *one hour*, c.f. The Children Act section 54. However, parents who have not come to an agreement after 1 h "shall be encouraged to continue mediating for up to 3 h more", and "They may be offered mediation for a further 3 h if the mediator considers that this may result in the parties reaching an agreement". This means that the maximum duration of mediation in these cases is 7 h. In the preparatory works it is stated that whether the parties are offered more mediation after the 4 first hours, is a discretionary decision for the mediator, based on his assessment of the likelihood that the parties reach an amicable solution as a result of 3 more hours of mediation. It is underlined that these 3 h should not be offered automatically, but should be based on a case-by-case decision by the mediator.[68] It is needless to say that for cases where there is a high level of conflict between the parents 7 h in total is not much time, which means that many such disputes end up as lawsuits.

For *in-court mediation of custody disputes*, the procedure allows for several meetings, each lasting for several hours.[69] The parties may enter into interim settlements,[70] with a few months' duration, and then the parties reconvene at another meeting to determine whether to make the arrangement permanent, or renegotiate.

[68] Ot.prp. nr.103 (2004–2005) p. 57.

[69] C.f. The Children Act section 61 no. 1.

[70] C.f. The Children Act section 61 no. 7.

For *judicial mediation*, it is stated in the preparatory works that the duration of mediation will vary from a few hours in a normal case, to a couple of days in large cases.[71]

The settlement efforts of the presiding judge occur as an integrated part of the proceedings of the case, either at the preparatory stages or during the main hearing. The timeframes therefore vary, but generally it is a fair assumption to make that during the main hearing it would be difficult to set aside much time for mediation, as there has to be sufficient time for the hearing of evidence etc. if the mediation efforts fail and the case has to be adjudicated. In some cases, the judges set aside a few minutes before a break in the main hearing to raise the issue of settlement with the parties, and then the parties and counsel are given the task, during a break (for instance during lunch) to negotiate. When the court reconvenes after the break, the judge will raise the question of settlement again, and hear from the counsel and parties whether they attempted to negotiate, and where they are at now. Whether the judge will pursue the issue of settlement further in course of the main hearing depends on the feedback combined with the judge's preferences and the time available.

5.3 The Relationship Between the Mediation and Public Authorities During the Mediation Procedure

Whether there is a relationship between the mediation and public authorities, and the nature and extent of such a relationship, depends on the mediation institute. Some of these aspects have already been touched upon in other parts of this article. As shown, several mediation institutes in Norway are closely connected to public authorities. There are three in-court mediation institutes, where judges (often) serve as mediators. In two of these, the mediator is also the presiding judge, whereas in judicial mediation, this is almost out of the question.[72] Furthermore, Norway has two mandatory out-of-court mediation institutes: Firstly; mediation at the conciliation boards is required before the commencement of legal proceedings in many cases, c.f. The Dispute Act section 6-2. Secondly; for separating couples with children under the age of 16, mediation at the family counseling offices is mandatory. Such mediation is also mandatory before the commencement of legal proceedings on custody and visitation rights.[73] There is also a provision in The Children Act section 61 no. 2 that a judge may mandate that a custody case where legal proceedings have been instigated, is subject to out-of-court mediation. However, this provision is rarely used.

[71] NOU 2001: 32 p. 723.

[72] See sections 2.2.2 and 4.1 above, with references.

[73] See section 2.2.1 above, with references.

Another mediation institute closely connected to public authorities is the The National Mediation Service. As mentioned, The National Mediation Service mediate criminal cases which have been referred to it by the prosecuting authority, c.f. The Criminal Procedure Act section 71a. And if a settlement is reached, the prosecuting authority can only instigate criminal proceedings against the offender if there is significant non-performance on part of the offender, c.f. The National Mediation Service Act section 21, first paragraph in fine. To enable the enforcement of this rule, the The National Mediation Service report to the prosecuting authority both on the issue of whether a settlement is reached and whether the terms of the settlement have been fulfilled or breached, c.f. section 20 second and third paragraph and section 21.

6 Failure of the Mediation and Its Consequences in Norway

The consequences of no settlement – or only a partial settlement – in a civil law dispute depend on the mediation institute. After out-of court mediation, it is naturally the parties' decision how to deal with (the remainder of) the dispute.

After in-court mediation, the dispute (or remaining parts of it) will automatically be subject for adjudication. Since judicial mediation does not take place in court sessions, but at separate mediation meetings, it is expressly stated in The Dispute Act section 8-7 (1) that the court proceedings continue when the case is not settled. It is also stated that "The court shall, as far as possible, seek to ensure that unsuccessful judicial mediation does not cause delay in the progress of the case." To this end, the date of the main hearing is scheduled before the mediation commences, c.f. The Dispute Act section 9-4 (2).

For the mediator personally, both in out-of-court and in-court mediation, the outcome has no legal consequences. The success or failure of mediations of course may influence the mediator's reputation, and thereby have financial consequences if the mediator's services are paid for by parties, or he or she is appointed by court or other authorities on a case-by-case basis. However, other than that, he or she will still receive his or her fees in full unless the mediation efforts are considered a defective performance of the mediation contract. For a judge who mediates, and does so in a manner that is clearly defective, the parties may make a formal complaint to The Disciplinary Board for Judges, c.f. The Courts of Justice Act section 236. The disciplinary board has two types of sanctions; critique and warnings. The latter is the most severe reaction, and it is rarely used. To my knowledge, no successful complaints have been made, where the parties have claimed that the mediator's faulty performance has led to the failure of the mediation, and the threshold for disciplinary reactions on such grounds, would – and in my opinion should – undoubtedly be high.

7 Success of Mediation and Its Consequences in Norway

7.1 Meaning and Consequences

Whether mediation is considered a success or a failure in each case depends on the purpose of the process and the expectations of the parties. In general, for most of the mediation institutes described in this report settlement seems to be regarded as the main success criteria, at least in the sense that settlement is the main *purpose* of these mediation institutes. In other words, mediation is generally not based on the ideology of the transformative mediation model, where the main goal is to change the parties' ability – and the ability of society at large – to handle conflict.[74] With such a goal, settlement in itself is not the main success criteria.

A notable exception from the main focus on settlements is The National Mediation Service, which is strongly inspired by the famous article "Conflict as Property" written by professor Nils Christie in 1976, where he argues that the handling of conflicts has become far too professionalized, and that society has thereby been robbed of the ability of involvement, and thereby also of the opportunity to debate the established norms.[75] The influence from Christie was for example very clear in the wording of the former Administrative Regulation relating to the National Mediation Service section one, which stated that the parties themselves should actively contribute to the resolution of the conflict, and that the settlement should be based on the interests of both parties. Furthermore, it was stated that the national mediation service shall "strengthen the local community's ability to deal with minor crime and other conflicts, and thereby also contribute to the prevention of crime" (my translation). In the current administrative regulation, the influence from Christie is not so evident in the wording. However, this influence is still clear when reading the preparatory works to the current National Mediation Service Act.[76]

Although settlement is the main purpose of most Norwegian mediation institutes, the mediations may be considered successful without settlement of the dispute as a whole. For instance, *judicial mediation* can be considered a success in situations where the case is not settled. This is evident in the provisions on judicial mediation in The Dispute Act. In section 8-3 (2) it is stated that the court, when deciding whether to mediate, must consider "the likelihood of reaching a settlement *or simplifying the case*" (my emphasis). The preparatory works state that the court must consider not only the likelihood of settlement, but also whether judicial mediation can contribute to simplification of the case, for example partial settlement, or that

[74]Bush, Robert A. Baruch og Joseph P. Folger, *The Promise of Mediation. The Transformative Approach to Conflict*, Revised edition San Francisco 2005 p. 13 and 21–22.

[75]Christie, Nils, "Conflict as Property", *The British Journal of Criminology* (1) 1977 p- 1–15. (It was however first published in 1976 in Norwegian at The University of Oslo.)

[76]C.f. Prop. 57 L (2013–2014).

parties may decide to abandon certain positions or evidence that they have planned to submit (typically – reducing the number of witnesses).[77]

7.2 *Enforcement of the Settlement Reached by the Parties*

The requirements for the settlement's form and content depend on the mediation institute. Generally, there are no other formal requirements for an out-of-court settlement, than those which apply to any contract. It can be oral or written, detailed or brief, like any other contract.

For settlements in criminal cases mediated at The National Mediation Service, however, The National Mediation Service Act section 17 has some requirements. Firstly, there is a requirement that the settlement is set out in writing. Secondly, if a party is a minor or declared to be without legal capacity, the agreement must be approved by his or her guardian. Thirdly, an agreement based on the assumption that a payment or service will be rendered to the injured party must determine the amount of the payment or extent of the service and when it is due. Furthermore, it must also be determined whether the agreement represents the final settlement between the parties. It is reasonable that specific requirements are set out for settlements of criminal cases, since settlement is an alternative to criminal prosecution.

In Norway, a settlement of a dispute can be either an *out-of-court* settlement; "utenrettslig forlik", or an *in-court* settlement; "rettsforlik". An out-of-court settlement has the same legal status as any other contract, meaning that as a main rule execution requires a court decision determining – depending on the nature of the disagreement between the parties – the validity of the contract, the issue of whether the other party is in breach of contract, and/or the amount etc. In-court settlements, on the other hand, have the same effects as court judgments in relation to execution, meaning that they can be executed without further legal proceedings, with the aid of the enforcement authorities.[78] According to Norwegian law in-court settlements are available for in-court mediation (all three mediation institutes) and at the conciliation boards. But, because in-court settlements are public, some parties choose out-of-court settlements when mediating in court. Doing so however means that execution without further legal proceedings is not available.

[77] Ot.prp. nr. 51 (2004–2005) p. 388.

[78] C.f. The Execution Act 26 June 1992 no. 86 section 4-1. The first paragraph states that there must be grounds for execution for a claim to be executed, and in the second paragraph such grounds are listed. One such ground is a judgment; another is an in-court settlement. Another is promissories where the parties have explicitly stated that payment can be enforced without prior legal proceedings, c.f. section 7-2 (a). An out-of-court settlement in itself cannot fulfil the requirements for such a promissory, because it is normally reciprocal and refers to circumstances outside of the document itself, i.e. the dispute between the parties, c.f. for example Advokatfirmaet Ruv, "Gjeldsbrev" (Promissories), *Jusinfo.no*, http://jusinfo.no/index.php?site=default/721/1699/1702/1703, with further references.

For an agreement to be entered into in the form of in-court settlement, Norwegian law has certain requirements regarding form and content. Firstly, as mentioned in Table 2 above, the parties will not be able to enter into an in-court settlement if the contents are contrary to *ordre public* or peremptory rules of law, i.e. a rule of law, the operation which cannot be dispensed with by private parties, c.f. The Dispute Act section 19-11 (3). Secondly, the settlement must be in writing, signed by all parties and the mediator(s), and must be included in the court record, c.f. section 19-11 (1) and (2). Furthermore, before entering into the in-court settlement the parties must be informed of its effect, c.f. section 19-11 (3), c.f. section 11-5.

Although there are very few restrictions on the parties regarding the content of the in-court-settlement, it must be noted that the effect of direct enforceability is limited to those issues that were included as subject matters of the lawsuit. Should the parties choose to include other elements in the settlements, these must be enforced through a lawsuit, similar to out-of-court settlements.[79]

8 Costs of the Mediation

The costs of mediation vary. One significant factor is of course whether the parties have legal counsel. This is an option for all mediation institutes, except at The National Mediation Service, c.f. The National Mediation Services Act section 15.

Another significant factor is whether the parties have to pay the mediator's fees. Whereas the mediation services of The National Mediation Service and The Family Counseling Offices are free of charge, mediation pursuant to The Dispute Act chapter 7 and "advocate mediation" require that the parties pay the mediator's fees. Mediation at the conciliation boards, in-court mediation pursuant to The Children Act section 61 and the judge's settlement efforts pursuant to The Dispute Act section 8-2 do not incur any other fees than the court fees that incur when filing a lawsuit.

In judicial mediation pursuant to The Dispute Act sections 8-3 to 8-7 the parties only have to pay the mediator's fees if an external mediator is appointed, c.f. section 8-4 (3). Judges as mediators are free of charge, as for other in-court mediation institutes.

Legal aid will cover the cost of legal counsel for those entitled, and it can also cover the costs of an applicant's portion of a mediator fees. There is a general requirement in The Legal Aid Act section 1 that the costs are necessary for a satisfactory solution of the applicant's problem. When deciding whether legal aid for mediator fees will be granted, it will also be considered whether public mediation

[79]This has been established by the Norwegian Supreme Court in Rt. 2005 p. 985, c.f. Bernt 2011 p. 446–447 with references to other authors.

services are a satisfactory alternative.[80] For some types of cases legal aid can be granted to those with an income and fortune under certain amounts,[81] for instance for parental disputes on custody and visitation rights, disputes between divorcing spouses concerning the division of property, cases concerning compensatory damages for personal injury and cases where an employee is suing an employer for wrongful termination, c.f. The Legal Aid Act section 11 no. 7. For other types of cases, legal aid can be granted for those with incomes and fortunes lower than the limit, when the case "seen from an objective point of view is especially pressing for the applicant", c.f. section 11, third paragraph. This means that for instance for such common areas of conflict as contractual disputes concerning real estate, or property disputes between neighbours, the right to legal aid is limited to situations where the case is considered "especially pressing".

9 Cross-Border Mediation

9.1 Notion and Main Features of Cross-Border Mediation in Norway

As mentioned in the beginning of this chapter, arbitration has traditionally been the chosen ADR mechanism for commercial contracts. However, there has been some development in recent years, and mediation of such matters is more common than it used to be. It is a fair assumption to make that the desire to avoid expensive, complicated and lengthy litigation or arbitration is particularly strong in cross-border conflicts, with parties from different jurisdictions. It can therefore be assumed that mediation and similar ADR mechanisms can be particularly useful in such instances.

As mentioned in chapter 3 above, The Dispute Act section 7-1 (1) states that contracts with *consumers* cannot validly mandate mediation as a dispute resolution mechanism. An agreement to mediate must be entered into after the dispute has arisen, which renders it a fair assumption to make that out-of-court mediation seldom occurs in cross-border disputes involving consumer contracts, at least when governed by Norwegian law.

[80] C.f. Act relating to Free Legal Aid (The Legal Aid Act) 13 June 1980 no. 35 section 14, c.f. Administrative Regulation regarding Legal Aid, 12 December 2005 no. 1443 section 3-3, c.f Circular from The Ministry of Justice and Police G-12/2005 chapters 5.2.1, 5.2.3, 6.2.1 and 6.2.2.

[81] The maximum income is currently NOK 246,000 (29,000 €) for singles and NOK 369,000,- (43,000 €) for married couples and others with joint finances. The maximum fortune is NOK 100,000,- (12,000 €), c.f. Administrative Regulation regarding Legal Aid section 1.

As mentioned in Sect. 2.2.3 above, there is no specific statutory regulation for cross-border mediation in particular. Whether the mediation institutes are applicable for cross-border cases therefore wholly depends on the rules of jurisdiction and international private law.

9.2 *Recognition and Enforcement of Foreign Mediation Settlements in Norway*

Which effects a foreign settlement has in Norway depends on several factors: *Firstly*; the content of the settlement. These are matters of contract law that cannot be explored here, but generally speaking, in most cases the content of the settlement does not serve as an obstacle for recognition.

Secondly, the effects depend on whether Norway has entered into a treaty with the country on the issue of enforceability of settlements.[82]

Thirdly, the *type* of settlement also influences whether the settlement in itself serves as grounds for execution, or whether a lawsuit to determine the validity of the claim is required. If the latter is the case, the settlement will be viewed as any other foreign contract by the courts, and the issue of enforceability will therefore depend on whether the contract is valid, and on the contents, i.e. the first factor described. As mentioned in Sect. 7.2, Norwegian law distinguishes between in-court and out-of court settlements for the purposes of enforcement.

The Execution Act section 4-1 second paragraph litra f states that a foreign *public* settlement ("offentlig forlik") can be enforced in Norway when it is agreed in a treaty with a foreign nation that such settlements shall be binding and enforceable in Norway. The meaning of the term *public* settlement is not explained in the preparatory works, but it undoubtedly includes in-court settlements. A main characteristic of an in-court settlement is, as mentioned in Sect. 7.2 above, that it is in fact public. The Dispute Act section 19-16 states that foreign *in-court* settlements are binding in Norway to the extent determined by law or by treaty with the state in question, as long as they are not contrary to peremptory law or *ordre public*.

Norway is a party to *The Lugano Convention*,[83] which includes most civil and commercial disputes, c.f. article 1. The convention article 58 states that a settlement entered into before the court during legal proceedings, and which is enforceable in the state in which it was entered into, can be executed without further proceedings in the receiving state. To enable execution in Norway a party with legal interest must make a request to his or her local district court that the settlement is declared enforceable, c.f. articles 38 and 39, c.f. Attachment II. There is an exception from the right to execution if the settlement is deemed contrary to *ordre public*.

[82]The Execution Act section 4-1, second paragraph, litra f.

[83]The Lugano Convention 30 October 2007.

10 E-Justice

The term e-justice seems quite unknown in Norway. Searches on the internet sites of The Norwegian Bar Association, The Norwegian Courts and The Norwegian Jurist Association of the term "e-justice" do not produce any hits.[84] Searches in the databases for the most common Norwegian legal journals do not produce any results either. And regardless of terminology, the application of e-justice instruments to mediation has not been much discussed in Norway.

For some mediation institutes the application of e-justice instruments seems out of the question. For mediation at the family counseling offices and at The National Mediation Service, face-to-face meetings, where all parties are present together with the mediator, are particularly important. For other out-of-court mediation, such as mediation of business disputes with highly professionalized parties, or disputes where the relationship between the parties will end when the dispute is settled, the application of e-justice instruments could be an option, depending on the nature of conflict and the parties' needs and interests.

For judicial mediation it is required that the parties are personally present, c.f. The Dispute Act section 8-5 (2). For mediation efforts by the presiding judge, and in-court mediation of custody disputes etc., party presence is as a main rule not a requirement.[85] However, in many cases, for instance custody disputes etc., mediation without the personal presence of the parties is contradictory to a main feature of mediation: the positive effects on conflicts that the face-to-face meetings of mediations often have. Generally, if the relationship between the parties – for instance as neighbours, co-parents, close relatives or business relations – has to continue on some level after the dispute is settled, mediation should predominantly take place in meetings where parties and mediator(s) are all personally present.

[84] Searches conducted 9 September 2013 by the author.

[85] C.f. The Dispute Act section 23-1.