The Courts and Bar Association as Drivers for Mediation in Finland

Petri Taivalkoski and Annika Pynnä

Abstract Finnish dispute resolution landscape is characterized by the predominant position of arbitration on the one hand and the endeavour to settle disputes amicably on the other hand. The exceptional feature as to mediation is that in Finland it is the Bar Association that has been at the forefront in developing mediation as an alternative for general civil and commercial matters. Mediation is now gaining ground through the court-annexed mediation that is starting to establish itself as a dispute resolution method.

The Finnish Mediation Act (394/2011) constitutes the essential legislative framework for mediation in civil and commercial matters in Finland. As a matter of Finnish law, mediation is always voluntary. The conduct of the mediation proceedings is not regulated in detail but is consequently left to be agreed in each case by the mediator and the parties. However, for court-annexed mediation the Mediation Act includes certain general procedural provisions.

As to settlement agreements reached by mediation, obtaining a title for enforcement is available in both court-annexed and out-of-court mediations, under certain conditions.

1 The Existing Situation of ADR

Finland has a strong tradition of using arbitration as an alternative to court litigation. The legislative framework and the courts in Finland have generally been very supportive of arbitration, and the Arbitration Institute of the Finland Chamber of Commerce has been administering arbitrations since its establishment in 1911, making it one of the oldest functioning arbitration institutes in the world. In Finland, arbitration has long been the standard dispute resolution mechanism for commercial disputes. In 1962 Finland ratified the New York Convention of 1958, and the current Finnish Arbitration Act of 1992 broadly reflects the main principles of the UNCITRAL Model Law on International Commercial Arbitration.

P. Taivalkoski (✉) • A. Pynnä
Dispute Resolution, Roschier, Attorneys Ltd., Helsinki, Finland
e-mail: petri.taivalkoski@roschier.com; annika.pynna@roschier.com

© Springer International Publishing Switzerland 2015

C. Esplugues, L. Marquis (eds.), *New Developments in Civil and Commercial Mediation*, Ius Comparatum - Global Studies in Comparative Law 6,
DOI 10.1007/978-3-319-18135-6_8

As for the development of mediation in Finland, it should be noted that the Finnish mediation trajectory differs somewhat from that of various other European countries, e.g., those of continental Europe. Unlike in some other countries, in Finland it is the Bar Association that has been at the forefront in developing mediation as an alternative for general civil and commercial matters. The Bar Association launched its Mediation Rules as early as 1998 and initiated public discussion of alternatives to the traditional win-lose methods of dispute resolution, i.e., litigation and arbitration. The Finnish Bar Association is in all likelihood one of the first bar associations in the world to include mediation in its program.[1]

Finland does, however, have a longer tradition of using mediation in certain specific areas of law and for particular types of cases, such as collective labor disputes. There is also a dedicated mediation scheme for certain criminal matters and minor civil matters, whereby municipalities offer the services of a neutral mediator to facilitate a meeting between the victim and offender to seek an agreement about restitution for the consequences of an offence. However, for civil and commercial matters generally, the use of mediation in Finland is still in its initial stages.

It is customary in commercial matters to try to resolve disputes amicably through negotiations between the parties (potentially assisted by counsel) before proceeding to litigation or arbitration. Thus, there is a culture of seeking settlement that does not include a structured mediation process. Although parties do not have a duty to consider mediation prior to litigation or other types of ADR, their counsel are required by the Bar Association's Code of Conduct to consider whether the dispute could be settled or resolved by use of ADR. This evaluation must be carried out before and during the assignment that the counsel has received from the client. Counsel has a duty to facilitate the best possible solution for a client. In making this evaluation, counsel should consider also several non-legal aspects, from economics to the emotional impact on the client.

2 The Basis for Mediation

2.1 The Notion of Mediation

Mediation always refers to the intervening of a third party, which distinguishes it from negotiating. For the purposes of this Chapter, mediation is defined as a voluntary process, in which an independent and impartial third party – a mediator – seeks to assist the parties to resolve their differences through negotiation. Therefore, the "end-product" of mediation, when successful, is a settlement agreement. Various evaluative processes thus fall outside of the scope of this Chapter.

[1]P. Taivalkoski & C. Wallgren, 'Asianajajan eettiset säännöt ja sovintomenettely' (2000) 4 *Defensor Legis* 625.

Under Finnish law, there are no requirements for parties to participate in mediation. Because mediation is voluntary, the parties must always agree on mediation irrespective of whether it is undertaken in or out of court.[2] A precondition for mediation is that the matter is amenable to mediation and a settlement is appropriate in view of the claims of the parties.[3] This means that mediation is, as a general rule, available in all cases in which the civil rights involved are those on which the parties are free to agree. An example of a civil right that is not amenable to mediation and settlement because the parties are not free to agree on the outcome is the establishment of paternity. For matters concerning the status and rights of a child, court-annexed mediation is possible but the Mediation Act requires that the interests of the child are protected and that due notice is taken of certain provisions in substantive law.[4]

Court-annexed mediation was first introduced in Finland in 2006 and has gained ground after a somewhat hesitant start. By the end of 2010, some 600 completed court-annexed mediations had been reported to the Finnish Ministry of Justice. The popularity and case number of court-annexed mediation depends largely on how active particular district courts have been in incorporating mediation in their services. The conduct of the judge and counsel, including their awareness of the possibilities of mediation and their activity in proposing mediation, also has a significant impact on whether a particular case ends up in mediation.[5]

Between the years 2006 and 2009, court-annexed mediation grew from 90 cases a year in 2006 to 130 in 2009 for the whole county. During that period mediation applications represented a total of 1.3 % of the case load in civil matters. Court-annexed mediation was most often applied for in disputes concerning realty, rental relations or chattels, and family law disputes. Court-annexed mediations were most often commenced between private persons, and the median value of each case was approximately EUR 16.000.[6] After 2009 the number of mediation applications has risen further: 219 for 2010 and 311 for 2011, while the number of settlements achieved was 96 in 2010 and 222 in 2011.[7]

The Finnish Bar Association has not compiled statistics regarding mediation under its rules, which would be the main out-of-court structured mediation option in Finland. Gathering such information is difficult since there is no obligation on mediators to inform the Bar if they have acted as a mediator in a dispute. However, based on information received in 2012, at least 21 cases came to the Bar

[2] Mediation Act, Section 4(3).

[3] Mediation Act, Section 3(2).

[4] Mediation Act, Section 10(1).

[5] K. Ervasti, 'Court Mediation in Finland', (2011) Tutkimuksia-sarja No 254, Oikeuspoliittinen tutkimuslaitos, p. 62.

[6] K. Ervasti, 'Court Mediation in Finland', (2011) Tutkimuksia-sarja No 254, Oikeuspoliittinen tutkimuslaitos, p. 58.

[7] Ministry of Justice, *Yleiset tuomioistuimet ja työtuomioinstuin vuonna 2011*, p. 42.

Association's attention that year. Parties to these cases have more than often been companies and the disputes concerned, e.g., building contracts, company law and information technology.[8]

2.2 The Existing Legal Basis for Mediation

The Act on Court Mediation and Confirming Settlements in Courts (394/2011) (the 'Mediation Act'), which entered into force 21 May 2011, constitutes the essential legislative framework for mediation in civil and commercial matters in Finland. The unofficial English translation of the Mediation Act prepared by the Finnish Ministry of Justice is available online.[9]

Finland implemented the EU Mediation Directive 2008/52/EC (the 'Directive') through the Mediation Act. Although the Directive applies only to cross-border disputes, Finland opted for a broader scope of application in the Mediation Act, which consequently covers, as a general rule, cross-border and domestic disputes alike.[10] The Mediation Act mainly addresses court-annexed mediation but also includes rules relating to the enforceability of settlement agreements that result from out-of-court mediation. Thus, large parts of out-of-court mediation remain unregulated.

The implementation of the Directive in Finland resulted in two other legislative changes that are worth mentioning. First, to protect the mediator's duty of confidentiality, a new provision was inserted in the Finnish Code of Judicial Procedure (4/1734), which concerns the admission of evidence in judicial proceedings and provides that the mediator or mediator's assistant may not testify about knowledge gained in the course of the mediation on the subject matter of the mediation, unless particularly compelling reasons require the admission of such testimony. Such particularly compelling reasons could be deemed to exist, e.g., if the mediator's testimony is necessary to prevent the conviction of a person of a criminal offence that he or she did not commit. Second, the Finnish Act on Statute of Limitations (728/2003) (the 'Limitations Act') provides that the commencement of a mediation procedure falling under the scope of application of the Mediation Act will suspend any period of limitation in the same manner as the filing of a court claim. These aspects are discussed further under Sects. 5 and 6.

---

[8]Based on an interview with Ms. P. Kivikari, Deputy Secretary General of the Finnish Bar Association, in 2012.

[9]See http://www.finlex.fi/en/laki/kaannokset/2011/en20110394.pdf (visited 14 October 2014).

[10]Mediation Act, Section 1.

3 The Mediation Agreement/The Agreement to Submit Disputes to Mediation

In the case of out-of-court mediation under the Mediation Rules of the Finnish Bar Association, the agreement to commence mediation in case of a dispute is often entered into at one of two stages: either in the original substantive contract, for example as part of a so-called multi-tier dispute resolution clause or other dispute resolution clause involving mediation, or when the dispute has already arisen as a stand-alone mediation agreement. The Bar Association provides a brief model agreement on its website for the latter type of agreement.[11]

Finnish law does not require a mediation agreement or clause to be in written form. Nor are the legal consequences of the mediation process dependent on the form in which the agreement was concluded. However, in practice mediation agreements are generally made in writing. A specific feature with regard to court-annexed mediation is that the mediation commences by an application submitted by one or both parties. It is recommendable to include voluntary and optional mediation as a first stage in any contractual dispute resolution mechanisms. Once the dispute has arisen, the threshold to suggest mediation may be higher for reasons of bargaining psychology. On the other hand, a purely optional mediation step does not prevent the parties from resorting directly to legal proceedings in a situation where attempting to mediate would not make any sense.

4 The Mediator

Under the Mediation Act, enforceability of a mediated settlement agreement requires that the mediator be trained in mediation.[12] Thus, it is not mandatory to have a mediator that has received training, but it would be necessary if one wants to ensure the possibility of confirming enforceability under the Mediation Act. It is notable that the Mediation Act does not specify the necessary training.

In court-annexed mediation, judges of the relevant district court act as mediators. In practice, judges who act as mediators must undertake the mediation training provided by the Ministry of Justice. The purpose of the training is to ensure that the quality of the mediation is guaranteed, and that the mediation is 'efficient, unbiased and skilled'. The training comprises both a theory part and practical exercises. The training is based on the philosophy of facilitative mediation and it was originally developed in cooperation with mediation specialists from CEDR/MATA in London. Other requirements on the judge-mediator under court-annexed mediation are that

[11] See http://www.asianajajat.fi/asianajopalvelut/sovintomenettely/sovintomenettelysopimus (visited on 14 October 2014).

[12] Mediation Act, Section 18.

he/she be independent and impartial vis-à-vis the parties, and the same general rules apply to a judge's independence as for other types of court proceedings. In addition, it is important to note that the judge-mediator may not act as judge in potential subsequent proceedings regarding the same matter should the mediation be unsuccessful.[13]

For bar members acting as mediators in out-of-court mediation, it is the Bar Association that provides the mediation training. The Bar Association's training is based on the same philosophy and developed by the same specialists as the training of judges, and it is designed to give practical skills to advocates acting as mediators. According to the Bar Association Mediation Rules, the mediator shall be impartial and independent and notify the parties in advance of any circumstances that may give cause for doubt as to his/her impartiality and independence.[14] Under the conflict of interest rules in the Code of Conduct of the Bar Association, a bar member acting as mediator cannot subsequently act as counsel for one of the parties in court proceedings regarding the same matter should the mediation be unsuccessful.

Furthermore, it should be noted that both in court-annexed and out-of-court mediation the mediator is subject to certain confidentiality requirements. This duty of confidentiality by the mediator is discussed further in Sects. 5 and 6 in connection with other confidentiality issues that concern mediation processes.

5 The Process of Mediation

In essence, the process of mediation is a structured negotiation process lead by the mediator. Mediation can further be characterized as an informal, confidential, flexible and future-oriented procedure, which adapts to each individual situation. Mediators are encouraged to use various techniques that help the parties understand and identify their needs and interests. Thus, the mediator doesn't normally make settlement proposals to the parties but rather creates the framework in which the parties can themselves conclude a settlement.[15] The "tool-box" of the mediator typically includes the use of open questions, summaries, paraphrasing and reality-testing.

Court-annexed mediation is commenced mainly in two ways: one of the parties or both together file an application for mediation with the court prior to or during legal proceedings, or alternatively, if the proceedings are already pending, the court might also suggest mediation on its own initiative. Once the parties have agreed to mediate in court, the court decides when mediation will start. The parties in principle have the opportunity to request that a particular judge at the relevant court be their mediator. In any mediation, which is a purely voluntary procedure, it is of course

[13] Mediation Act, Section 14.

[14] Mediation Rules, Article 4.

[15] K. Ervasti, 'Court Mediation in Finland' (2011) Oikeuspoliittisen tutkimuslaitoksen tutkimuksia No 256, Oikeuspoliittinen tutkimuslaitos, p. 9 and 11.

key that the parties are fully satisfied with the person who acts as the mediator. The appointment of the mediator takes effect when the mediation begins, and the mediator must be a judge of the appointing court. The mediator-judge may use an assistant where needed if the parties consent to the appointment of an assistant. Therefore, in matters requiring specific expertise the mediator-judge may, if the parties agree, be aided by an assistant who has the relevant expertise.[16]

As stated above, in the case of out-of-court mediation under the Mediation Rules of the Finnish Bar Association, the agreement to commence mediation in case of a dispute is often entered into either in the original substantive contract or when the dispute has already arisen as a stand-alone mediation agreement. In the agreement the parties can mention the name of a member of the bar whom they have agreed to appoint as mediator or request that the Bar Association's Mediation Board proposes or appoints a mediator. Mediation is then commenced either by the parties directly approaching the mediator whom they have chosen or by a written application to the Mediation Board, with the above mentioned agreement appended.[17]

Under Finnish law, a pending mediation process also has an effect on the running of limitation periods. Simultaneously as the Mediation Act came into force on 21 May 2011 the Limitations Act was changed accordingly. The relevant change was that as of 21 May 2011 also out-of-court mediation has suspended the running of the period of limitations.[18]

Under the Limitations Act the suspension of the running of the limitation period starts from when the mediation proceedings become pending. In court-annexed mediation, the relevant point in time is when the court decides upon the commencement of mediation. Thus, mere delivery of the application documents to the district court does not trigger the suspension. In out-of-court mediation, the agreement between the parties and the mediator resulting in the commencement of the mediation has the effect of triggering the suspension. The suspension then lasts as long as the proceedings continue. On the day the mediation proceedings conclude, the suspension of the limitation period ends.[19]

The actual and specific conduct of the mediation proceedings are mainly left to be agreed in each case by the mediator and the parties. However, for court-annexed mediation the Mediation Act includes certain general provisions. According to the Mediation Act, mediation shall proceed promptly, even-handedly and impartially. The mediator shall hear the parties and consult with them. With the consent of the parties, also other persons may be heard and other information submitted. The mediator may consult with a party without the other parties present, if all the parties

[16]Mediation Act, Section 5.

[17]Mediation Rules, Article 3.

[18]K. Ervasti, 'Court Mediation in Finland' (2011) Oikeuspoliittisen tutkimuslaitoksen tutkimuksia No 256, Oikeuspoliittinen tutkimuslaitos, p. 27.

[19]Limitation Act, Section 11.

consent to this. The mediator decides, after consultation with the parties, on how the mediation shall otherwise be arranged.[20]

For out-of-court mediation under the Bar Association's Mediation Rules some general stipulations are likewise included in the rules. According to the Mediation Rules, the process shall primarily be conducted based on the agreement between the parties. In case there is no such specific agreement, the mediator determines the process after hearing the parties. In any case the proceedings shall be fair and efficient and the parties shall strive to cooperate with the mediator in order to appropriately contribute to attempting to reach settlement. Unless otherwise agreed the mediator may also hold separate caucus meetings with the parties.[21] In the bar mediation training the emphasis is on the use of a structured process allowing for sufficient time for the exploration of the parties interests.

In Finland, out-of-court mediation, for example mediation conducted in accordance with the Mediation Rules of the Bar Association, is as a rule confidential.[22] In contrast, court-annexed mediation is as a general rule public, following the general rule of the public nature of court proceedings. However, the parties may request that the proceedings be conducted behind closed doors unless the credibility of the mediation or other compelling reason demands openness. In addition, the public is excluded from caucus sessions that are held with only one party present.[23] Following the general rule of court proceedings being public, court documentation is also public unless specifically classified or ordered confidential. Therefore, any settlement agreement confirmed by a court will be a public document unless the court specifically grants confidentiality upon application. The court may only grant confidentiality based on certain limited criteria.[24]

Despite the public nature of court-annexed mediation, the Mediation Act does include provisions regarding the mediator's duty of confidentiality, as is required by the Directive. Hence, the Mediation Act provides that neither the mediator nor his/her assistant may reveal what they have learned regarding the mediated matter, unless the person benefitting from the confidentiality obligation consents to disclosure or disclosure is otherwise provided by law.

In the case of out-of-court mediation under the Mediation Rules of the Finnish Bar Association, the mediator must keep all matters relating to the mediation confidential.[25] If a third party is to be heard during the mediation process, the parties can require the third party to sign a confidentiality agreement. In addition, the parties themselves must keep the mediation process confidential.

---

[20] Mediation Act, Section 6.

[21] Mediation Rules, Article 7.

[22] Mediation Rules, Article 9.

[23] Mediation Act, Section 12.

[24] The Mediation Act refers in this respect to the Act on the Publicity of Court Proceedings in General Courts.

[25] Mediation Rules, Article 9.

6 Failure of the Mediation and Its Consequences

Both court-annexed mediation and out-of-court mediation are entirely voluntary and consequently end whenever a party decides not to continue it. Generally a party may inform of his/her will to discontinue the mediation free of form. It is not necessary for the parties to provide any explanation for this decision to step back from mediating. In this situation the mediation ceases despite the other party's willingness to continue the process.[26]

Either type of mediation can also end when the mediator determines that continuing the mediation has no purpose. According to the preparatory works of the Mediation Act such a situation might be at hand where the parties fail to follow the mediation procedure or fail to actively take part in the mediation and thus the mediator sees no foundation for the mediation to continue.[27] On the other hand, a situation where one of the parties appears to be trying to benefit from the other party's inability to protect their interests may also lead to the decision of the mediator to discontinue the process. Finally, situations may occur in which the mediator considers continuing the mediation procedure impractical due to the fact that the process simply is not progressing as desired and therefore decides to end it.[28]

In any case the mediator should not end the mediation in a manner which would lead to this decision coming as a surprise to the parties. It follows that the mediator must first hear the parties in regard to the decision to discontinue mediation. This hearing may be conducted informally. Despite the free form of the hearing process it is required that the mediator must inform the parties of his/her view that the mediation process should be ceased and the reasoning behind this request. The parties must also be given an opportunity to present their views of the matter at hand. If during the hearing of the parties the actual cause for ending the mediation process actually ceases to exist, the mediation may be continued as from the standing of the process prior to this hearing.[29]

An unsuccessful mediation raises the issue of confidentiality in any subsequent legal proceedings. In 2011, to further emphasize the mediator's duty of confidentiality in court-annexed mediation, a new provision was inserted in the Finnish Code of Judicial Procedure[30] concerning the admissibility of evidence in judicial proceedings. According to the said provision, the mediator or mediator's assistant may not testify on matters that have come to their knowledge in the course of the mediation, unless this is required by important reasons. Such an important reason

[26] K. Ervasti, 'Vaihtoehtoinen konfliktinratkaisu ja tuomioistuinsovittelu' published in 'Conflict Management – Riidanratkaisun uusi maailma' (2005, edited by S. Turunen), Edita, p. 257.

[27] Government Bill 114/2004, p. 38.

[28] K. Ervasti, 'Vaihtoehtoinen konfliktinratkaisu ja tuomioistuinsovittelu' published in 'Conflict Management – Riidanratkaisun uusi maailma' (2005, edited by S. Turunen), Edita, p. 257–258.

[29] K. Ervasti, 'Vaihtoehtoinen konfliktinratkaisu ja tuomioistuinsovittelu' published in 'Conflict Management – Riidanratkaisun uusi maailma' (2005, edited by S. Turunen), Edita, p. 258.

[30] Chapter 17, Section 23.

may for example be where the testimony is necessary to ensure the best interest of a child or to prevent violations of a person's mental or bodily integrity. Furthermore, the Mediation Act contains an additional provision on confidentiality applicable to the parties.[31] To enable the conduct of settlement negotiations in good faith without fear of adverse consequences if a settlement is not reached, the use of statements made in the course of mediation for the purposes of reaching a settlement as evidence is prohibited in later judicial proceedings.

In practice, the confidential nature of out-of-court mediation entails the same duty that the Mediation Act applies to court-annexed mediation: the parties are not permitted to disclose any offers made for the purpose of reaching settlement during the mediation, any admissions of the other party, or any opinions expressed by the mediator during the mediation. Under the Finnish Code of Judicial Procedure, the parties are prevented from naming the mediator as witness in any proceedings relating to the issue at dispute.

7 Success of Mediation and Its Consequences

7.1 Meaning and Consequences

Mediation can end in several different ways, some of which lead to enforceability determinations. Both court-annexed mediation and mediation out-of-court end when:

1. the parties reach settlement (but do not request subsequent confirmation),
2. the parties have their settlement agreement confirmed by the court, or
3. the parties inform the mediator that a settlement has been reached.

The end result of a successful mediation procedure is a settlement agreement. If one of the parties does not act in accordance with the concluded settlement, the other party may be forced to seek for a basis for the enforcement of the settlement at hand. However, as mediation settlements are based on the parties' free will, the parties are usually willing to follow the settlement agreement also without having it confirmed or enforced.

Under Finnish law only mediation settlements that have been confirmed have direct procedural impact with regard to a court proceeding on the same dispute. The confirmation of a settlement agreement has an immediate effect on any pending judicial proceedings as any pending judicial proceedings cease immediately upon such confirmation. In addition to the fact that confirmation is generally not necessary, it should be noted that often the parties specifically do not want the settlement to be confirmed by a court. A reason behind this might be that the parties don't want the settlement to become public through a court proceeding concerning the confirmation of the settlement at hand. Although unconfirmed

[31] Mediation Act, Section 16.

settlement agreements do not have direct procedural impact on a court proceeding on the same dispute, they often still lead into the same end result. If the parties decide not to confirm the settlement, the court proceeding is usually in any case ended by a joint request of the parties.

If a confirmed settlement only concerns a part of the dispute in progress, a court procedure on the same matter continues in regard to the parts that have not been confirmed through the settlement. Respectively, if only a part of the dispute is settled, the mediation process can be continued with respect to the parts of the dispute that the parties have not reached settlement on.[32]

7.2 Enforcement of the Settlement Reached by the Parties

When the parties do reach a settlement of their dispute through mediation, they can have their settlement agreement confirmed as enforceable irrespective of whether the mediation was court-annexed or out-of-court. The situation for enforceability of out-of-court settlements has significantly improved as a result of the Mediation Act. Before the Mediation Act, out-of-court settlement agreements were valid and binding as such, but they were not enforceable without initiation of litigation on the merits. In contrast, under the Mediation Act confirmation can be sought upon application.[33]

In practice, the confirmation takes place by delivering an application to the district court with jurisdiction. The application must contain the mediated settlement agreement with the relevant details, i.e. the names of parties and the mediator, the matter in mediation, and the contents of the mediated agreement. The court confirms the settlement agreement in writing.

However, the Mediation Act sets certain criteria for an out-of-court settlement agreement to be eligible for confirmation. The mediation must have been organized on a basis of an agreement, a set of rules, or a similar arrangement in which the parties have themselves voluntarily sought to settle their dispute. It follows that only settlement agreements achieved in a structured, facilitative mediation process may be confirmed as enforceable.[34] The Mediation Act explicitly provides that it does not apply to processes in which a third party makes decisions or recommendations as an expert, irrespective of whether such decisions or recommendations are binding on the parties. Consequently, different types of evaluative alternative dispute resolution methods used commonly, for example, in the construction industry, fall outside of the scope of the Mediation Act.[35]

[32] K. Ervasti, ‘Court Mediation in Finland’ (2011) Oikeuspoliittisen tutkimuslaitoksen tutkimuksia No 256, Oikeuspoliittinen tutkimuslaitos, p. 42.

[33] Mediation Act, Sections 18–26.

[34] Mediation Act, Section 18.

[35] Mediation Act, Section 18.

The Mediation Act also incorporates certain substantive limitations on the confirmation of settlement agreements resulting from both court-annexed and out-of-court mediation. The court cannot accordingly confirm a settlement that is (1) against the law, (2) clearly unfair, or (3) breaches the right of a third party.[36] A settlement agreement is likely to be against the law if it contains stipulations that are contrary to the fundamental principles of the legal system, *ordre public*, or contrary to an explicit (mandatory) statutory provision. However, it is clear that such is not the case when the court would simply have decided the matter differently. Likewise, it is irrelevant whether the parties' demands would have no basis in law or would not be in accordance with contract law principles: within the general limits set, it is entirely for the parties to decide what terms they voluntarily accept.

The second criterion for non-confirmation, clear unfairness, is difficult to evaluate and needs to be determined on a case-by-case basis. In any case, the unfairness should be apparent and the threshold for proof thereof set high. The general principles under Finnish law regarding the adjustment of unfair contract terms might provide assistance in interpreting fairness in the given situation. In the third instance, a court cannot confirm a settlement agreement that interferes with the rights of a third party, because the settlement agreement – as with any other private law agreement – is made solely between the parties to the agreement.

In conclusion, there are a few, exhaustively-listed grounds on which the confirmation of a settlement agreement may be refused. However, in practice, enforcement will not be necessary in most cases since the settlement agreement is complied with voluntarily. Furthermore, the parties may not want their settlement agreement to become public and therefore will opt for not confirming their out-of-court settlement in court. In such a case, the settlement is nevertheless valid and binding on the parties as a contract.

8 Costs of the Mediation

The costs of court-annexed mediation consist of the service charge of the court (at present EUR 122) and the costs of an assistant to the mediator-judge (if utilized). The parties do not need to pay any fees for the services of the judge-mediator, because those services – just as in litigation – are provided as a public service. Court-annexed mediation charges are thus fairly modest. The party making the application for mediation pays the service charge and the parties mutually pay for the assistant (if utilized). The parties each bear the costs of their potential own counsel. The costs cannot be claimed as legal costs in possible court proceedings following the mediation.[37]

[36] Mediation Act, Section 23.

[37] Mediation Act, Section 27.

In private out-of-court mediation the mediator generally charges a fee for his/her services. The fees of the mediator may be freely agreed between the parties and the mediator. For example, where the mediation is carried out under the Mediation Rules of the Bar Association, the mediator charges an hourly fee, which is split equally between the parties according to the main rule.[38] The Bar Association does not charge an administrative fee for nominating the mediator or proposing a mediator to the parties. The Arbitration Institute of the Finland Chamber of Commerce on the other hand charges a fee of EUR 2.000 for nominating a mediator.[39] Cost efficiency is therefore a factor in favor of court-annexed mediation.

How the potential legal costs of the parties' counsels are divided between the parties is a matter of agreement in the settlement. However, in the absence of an agreement the presumption under the Mediation Rules of the Bar Association is that each party bears its own costs. Finally, it should be mentioned that the costs incurred in out-of-court mediation may not be claimed as legal costs in possible court proceedings following the mediation in matters where the monetary interest at stake is not significant.

9 Cross-Border Mediation

9.1 Notion and Main Features

The Directive applies to cross-border disputes in civil and commercial matters. It covers disputes in which at least one of the parties is domiciled in a Member State of the European Union other than that of any other party on the date on which they agree to use mediation or on the date mediation is ordered by a court.

Although the Directive only applies to cross-border disputes, Finland opted for a broader scope of application for its implementation in the Mediation Act. Within its scope of application the Mediation Act, hence, covers as a general rule cross-border and domestic disputes alike. Besides the Mediation Act, Finnish law does not regulate cross-border mediation. Thus, the above presented parameters of the Mediation Act apply likewise to cross-border mediation conducted in Finland.

As the national regulation concerning cross-border mediation is based on EU legislation, it is necessary to keep in mind the main goals of the underlying Directive when assessing domestic regulation on the matter. Initially, the Directive's aim was to improve the accessibility of dispute resolution procedures in cross-border disputes by encouraging the use of mediation in Member States.[40] Moreover, it is pursued under the Directive to reassure a practical relationship between mediation

[38] Mediation Rules, Article 11.

[39] See http://arbitration.fi/en/appointment-of-conciliators/ (visited 14 October 2014).

[40] Government Bill 284/2010, p. 4.

and other dispute resolution procedures. For this to be accomplished, the Directive sets certain requirements for the framework of cross-border mediation in each Member State. As mentioned, in Finland these requirements are addressed by the Mediation Act, which does not make a difference between rules to be applied to domestic and cross-border mediation.

9.2 Recognition and Enforcement of Foreign Mediation Settlements

According to the Directive, for a confirmed settlement to be enforceable in another Member State it is required that the settlement is confirmed as enforceable in a separate procedure also in the other Member State in accordance with relevant national provisions.[41]

The international scope of the provisions in the Mediation Act relating to confirmation of settlement agreements is limited to settlements reached in the Member States of the European Union. However, the provisions do not apply to a settlements reached in Denmark or to settlements from EU Member States which do not pertain to a cross-border dispute as defined in the Directive.[42] With these restrictions, mediation settlements reached in other EU Member States are confirmed in Finland according to the same rules as domestic mediation settlements.

As discussed above in Sect. 7.2, the Mediation Act sets out certain conditions based on which it is possible to leave a settlement unconfirmed despite a party's application for confirmation. These conditions concern settlement agreements resulting from both court-annexed and out-of-court mediation. The court cannot accordingly confirm a settlement that is against the law, clearly unfair, or breaches the right of a third party.[43] It should be noted that although a mediation settlement can be denied confirmation in situations where it contradicts with Finnish legislation, this does not mean that for the settlement to be enforced it must be correct from a material point of view.[44]

10 E-justice

No particular initiatives in relation to e-justice and mediation in the Finnish courts or in out-of-court mediation have been published in Finland. However, there are various specific and ongoing projects in relation to developing electronic

[41] Government Bill 284/2010, p. 7.

[42] Mediation Act, Section 1.

[43] Mediation Act, Section 23.

[44] Government Bill 284/2010, p. 5–6.

communication in the courts in general. In 2010, the Finnish Ministry of Justice initiated an extensive project to develop the electronic system of general courts. Although the project does not directly concern mediation, it will surely have an impact on the e-justice possibilities of court-annexed mediation as well.

In practice, the personal and physical presence of the parties and the mediator in one room together is often considered a significant contributing factor to successful mediation. However, for example a meeting by video link in case that would be more practical and efficient might work in some cases. It all depends on the specific circumstances of the case and what the parties and mediator consider suitable.