

Legal instruments and procedures applicable in cross-border family mediation



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A GUIDE FOR MAGISTRATES
AND OTHER LEGAL PRACTITIONERS

Developed under the EU funded project JUST/2013/JCIV/AG/4628
“Judicial Intercultural Communication in Family Mediation”

Craiova Court of Appeals, Romania

2014

ISBN _____

This Guidebook was developed by a group of international experts through a project supported by the European Commission, project number JUST/2013/JCIV/AG/4628.

1. **Chapter 1** - Mediation and alternative dispute resolution in the European Union.
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2. **Chapter 2** - Legal framework including: Directive 2008/52/EC, the Regulation (EC) 2201/2003 and their implementation into national legislation.
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3. **Chapter 3** - Intercultural character of cross border mediation.
Alessandro Bruni, Italy
4. **Chapter 4** - Communication skills that are necessary to the magistrate and other legal practitioners in order to overcome difficulties that appeared in the process of recommendation of cross-border mediation.
Inka Miškulin, Croatia
5. **Chapter 5** - Solving family cases through mediation and judicial proceedings.
Adrian Pop, Romania
6. **Chapter 6** - The impact of judicial proceedings over the family, in general and over children, in particular.
Sevdalina Aleksandrova, Bulgaria
7. **Chapter 7** - Recommendation of mediation by a judge, application of Art. 5 from the Directive 2008/52/EC.
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Contents

Glossary of abbreviations	7
Chapter 1: Mediation and alternative dispute resolution in the European Union	8
1.1. Introduction.....	8
1.2. Alternative Dispute Resolution (A.D.R.)	8
1.2.1. A.D.R. in time.....	8
1.2.2. What is ADR?	10
1.2.3. Criteria for choosing A.D.R. processes	11
1.2.4. Examples of ADR processes.....	13
1.2.5. Continuum of dispute resolution options	18
1.2.6. A successful case-study of ADR implementation - the “multi-door” concept	18
1.3. Mediation	18
1.3.1. Definitions of Mediation	19
1.3.2. The Role of the Mediator	20
1.3.3. Confusions about Mediation. What Mediation is Not.	20
1.3.4. Principles of Mediation	21
1.3.5. Differences between Mediation and other forms of A.D.R.	24
1.3.6. The stages of the mediation process	25
1.3.7. Benefits of Mediation.....	26
Chapter 2: Legal framework including: Directive 2008/52/EC, the Regulation (EC) 2201/2003 and their implementation into national legislation.....	28
2.1. Introduction.....	28
2.2. Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000	29
2.3. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.....	36
2.4. Implementation of Directive 2008/52/EC by EU member states	41
Chapter 3: Intercultural character of cross border mediation.....	47
3.1. Introduction.....	47
3.2. Cross border mediation.....	48

3.2.1 Advantages of cross border mediations.....	50
3.2.2 Limits and potential risks in cross border mediations.....	51
3.2.3. Skills of mediators in mediating cross border disputes.....	53
3.2.4 Cultural aspects affecting cross border mediation process	62
3.2.5 Cultural complexities affecting cross border mediation process.....	63
3.3. Multiparty cross border mediations.....	65
3.4. A real case of B2B cross-border mediation	67
Chapter 4: Communication skills that are necessary to the magistrate and other legal practitioners in order to overcome difficulties that appeared in the process of recommendation of cross-border mediation	70
4.1. Introduction.....	70
4.3. Communication	73
4.3.1. Barriers to communication.....	74
4.3.2. Communicational skills.....	75
Chapter 5: Solving family cases through mediation and judicial proceedings.....	95
5.1. Introduction	95
5.1.1. Defining divorce	95
5.1.2. Evolution of divorce rates	95
5.2. Family law across the European Union.....	96
5.2.1. Harmonizing the family legislation.....	97
5.2.2. National regulations on divorce and legal separation	97
5.2.3. The divorce process.....	99
5.3. Family mediation in European Union.....	100
5.3.1. Defining family mediation	101
5.3.2. The evolution of family mediation in Europe.....	101
5.3.3. Variation of family mediation according to national law.....	102
5.3.4. Courts and family mediation	104
5.3.5. The family mediation process	106
5.4. Mediation and judicial proceedings in family matters	107
5.4.1. The advantages of mediating family conflicts	108
5.4.2. Limitation of family mediation	110
5.5. Conclusions.....	112
Chapter 6: The impact of judicial proceedings over the family, in general and over children, in particular	113
6.1. Current regulation of family law and judicial proceedings in the EU.....	113

6.2. Justice as a purpose of the judicial proceedings	114
6.3. Who “owns” the conflict and its resolution?	115
6.4. The judicial proceedings enabling parties’ “model of justice”	116
6.4.1. How are values and needs related to the perception of justice?	117
6.4.2. Which are the fundamental human needs?.....	117
6.4.3. Which are the needs of partners involved in a divorce conflict and their children?	118
6.4.4. How can the significant relationships be improved in the context of a divorce?	120
6.4.5. How suitable are the judicial proceedings for the purpose of transforming the confrontational relationship of spouses into a cooperative relationship of parents?	120
6.4.6. Which are the most efficient dispute resolution approaches for transforming the confrontational relationship into a cooperative one?	121
6.5. Legal framework of parental responsibility in the EU	122
6.5.1. The concept and definition of “Parental responsibility” in the EU	122
6.5.2. Examples of national legal frameworks governing parental responsibility	123
ITALY	123
6.5.3. What are the concepts underlying the global shift from sole-custody to joint custody?	124
6.5.4. What should be the task of the judicial proceedings given the latest developments towards joint custody?	125
6.6. Cooperation between judicial proceedings and facilitative dispute resolution methods	125
6.6.1. The need to acquaint parties with mediation and the significant role of the court in this endeavor.....	126
6.6.2. What would be the main functions of a court willing to provide parties with a full spectrum of dispute resolution methods?	126
6.6.3. Participation of children in judicial proceedings	133
6.6.4. How mediation and judicial proceedings reinforce each other’s impact	133
6.6.5. Cases, where mediation is not suitable.....	134
6.6.6. The real-life impact – a party’s point of view of mediation and judicial proceedings	135
6.7. Conclusions.....	135
Chapter 7: Recommendation of mediation by a judge, application of Art. 5, Directive 2008/52/EC.....	137
7.1. Introduction.....	137
7.2. Regulation to Court Referral to mediation in EU Member States.	140
7.2.1. Austria	140
7.2.1. Belgium.....	140
7.2.3. Bulgaria.....	140
7.2.4. Croatia	141

7.2.5. Cyprus.....	141
7.2.6. Czech Republic.....	141
7.2.7. Denmark	142
7.2.8. Estonia	142
7.2.9. Finland	142
7.2.10. France	143
7.2.11. Germany	143
7.2.12. Greece	144
7.2.13. Hungary:	144
7.2.14. Ireland	144
7.2.15. Italy.....	145
7.2.16. Latvia	145
7.2.17. Lithuania	146
7.2.18. Luxembourg.....	146
7.2.19. Malta	146
7.2.20. Poland.....	146
7.2.21. Portugal	146
7.2.22. Romania.....	147
7.2.23. Slovakia.....	147
7.2.24. Slovenia	147
7.2.25. Spain	147
7.2.26. Sweden	147
7.2.27. United Kingdom.....	148
7.2.28. The Netherlands	148
7.3. Court Referral system at family disputes	148
7.4. How the judge can be successful in the process of recommending mediation?	152
Conclusions.....	156
The Context of the Guidebook	156
Conclusions of the project.....	157
Bibliography.....	161
Information about authors.....	167

Glossary of abbreviations

ADR	Alternative Dispute Resolution
BATNA	Best Alternative To a Negotiated Agreement
CEDR	Center for Effective Dispute Resolution
ENE	Early Neutral Evaluation
EU	European Union
ICC	International Chamber of Commerce
ODR	Online Dispute Resolution
SMC	Singapore Mediation Center
WATNA	Worst Alternative To a Negotiated Agreement
WIPO	World Intellectual Property Organization

Chapter 1: Mediation and alternative dispute resolution in the European Union

1.1. Introduction

The internationalization of the families, the technology revolution that enables people to travel and communicate at a far more superior level than just very recently, are notable features of globalization and have determined an increased number of disputes in family matters to be registered worldwide and in the European Union (EU). Some of them, the cross-border family disputes, involve parties with different nationalities that add by structure a powerful cultural component to the already existing family dispute.

This context creates a difficult environment for applying in due time justice that best serves the needs of the children, of the spouses and of the other members of the family. It is known that although the marriage ends, the ex-spouses continue to be and act as the parents of the children and therefore, a consensus based decision is more likely to be assumed, accepted and freely implemented by the parties.

Alternative Dispute Resolution (ADR) refers to a variety of processes that help parties resolve disputes without a trial. These processes are generally confidential, less formal, and less stressful than traditional court proceedings. Some examples of ADR are negotiation, mediation, facilitation and arbitration.

Alternative dispute resolution, in general, and mediation in particular, are more and more part of the European Union's legislation, practice and policy.

According the Article 1 (Objective and scope) of Directive 2008/52/EC, of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, *"The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings."*

1.2. Alternative Dispute Resolution (A.D.R.)

1.2.1. A.D.R. in time

One can find various references to Alternative Dispute Resolution processes in the most ancient times. Communities would always look for different methods to address conflicts in the way that fits best their needs and feelings. Diplomacy, negotiation, mediation and other forms of ADR were used by ancient Mari Kingdom, Egyptians, Phoenicians, Indians, and other ancient cultures.

A century ago, in early 1900s, Nathan Roscoe Pound, Dean of Harvard Law School from 1916 to 1936 and one of the most cited scholars of the 20th century, according to *The Journal of Legal Studies*, famously exhorted the legal profession to transform its

institutions of justice and adjust its principles “to the human conditions they are to govern”, “putting the human factor in the central place”.

In his address to annual address to the American Bar Association’s winter convention, Los Vegas (February 12, 1984), Warren Earl Burger, Chief Justice of the United States from 1969 to 1986 said that *“the entire legal profession - lawyers, judges, law teachers - has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers - healers of conflicts. Doctors, in spite of astronomical medical costs, still retain a high degree of public confidence, because they are perceived as healers.”*.

During the same address, Chief Justice Warren E. Burger added *“For some disputes, trials will be the only means, but for many claims, trial by adversarial contest must go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, and too inefficient for a truly civilized people.”*

After 1970s, a general concern was expressed by many people in United States of America, that the traditional method for resolving disputes by conventional litigation becomes more expensive, slower and more painful. Moreover, a high caseload was registered in the court dockets, as more time was needed for many lawsuits in order to be processed through the judicial system.

This concern contributed to the creation of the need for new processes, alternatives to litigation, which could be used by the parties in order to resolve their disputes quicker, more privately, without wasting resources, in short, more effectively. These alternative dispute resolution (ADR) methods or processes were created to improve by complementation the judicial system in a constructively and not to replace the traditional litigation. For example, the parties can use ADR before and during litigation in order to prevent a lawsuit or to prevent a decision that will not be accepted by one party, at least.

Between 1994 and 1996, Lord Wolf (*Master of the Rolls from 1996 until 2000 and Lord Chief Justice of England and Wales from 2000 until 2005*) reviewed the civil courts’ rules and procedures in England and Wales. At the bottom of this review there were similar concerns like limited access to justice due to high costs of litigation, too complex and traditional terminology, unnecessary distinctions of practice and procedure. In the final report that was published in 1996, Lord Wolf considered that for particular areas of litigation, the civil justice system was not meeting the needs of litigants. The fundamental issues identified in the Report were cost, delay and complexity. The Report included recommendations *“as to the adoption of pre-litigation protocols to encourage a more co-operative approach to dispute resolution, to promote fair settlements and to avoid litigation wherever possible”*.

The National Alternative Dispute Resolution Advisory Council (NADRAC), Australia, an independent non-statutory body was established in October 1995 in order to provide policy advice to the Attorney-General on the promotion of use and development of mediation and ADR.

On 23 April 2008, the European Parliament formally approved, without amendments, the Council’s position on the new Mediation Directive. Following its signature by the

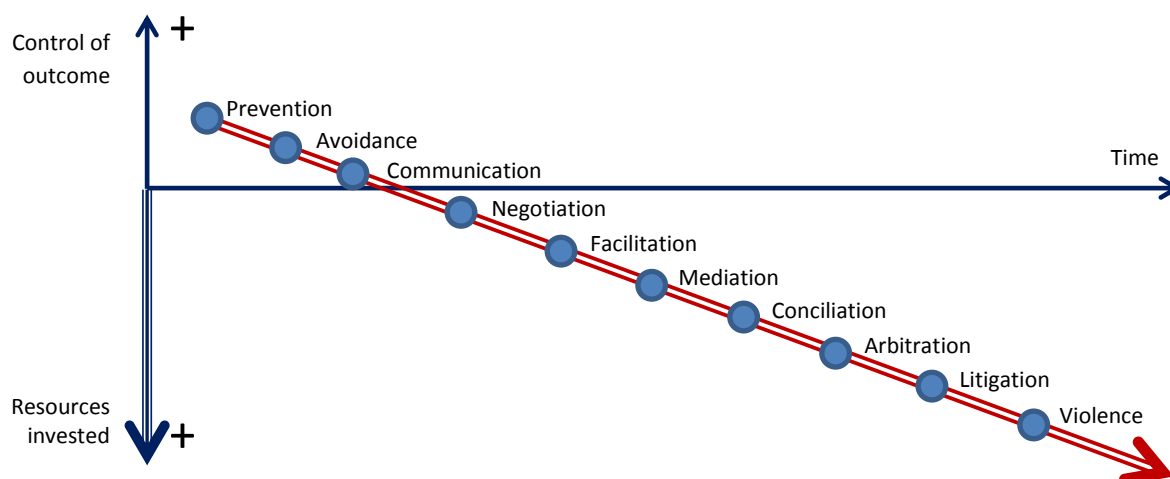
President of the European Parliament and by the President of the Council, the DIRECTIVE 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters was published in the Official Journal of the European Union. As stated above, the purpose of the Directive is to facilitate access to dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a sound relationship between mediation and judicial proceedings.

All of the above are examples of how the global culture of dispute resolution can be enriched by new approaches, meant to enhance the judicial system's capacity to fulfill the people's needs in the best way possible. These approaches are as various as people and their needs and for any given situation, a continuum of ADR processes can stay at the bottom of any robust strategy for addressing conflict effectively, non-violently and constructively.

1.2.2. What is ADR?

Alternative Dispute Resolution is a system of methods and processes that can be used to resolve disputes. Some definitions of ADR refer to processes that are alternatives to litigation.

The ADR processes develop a spectrum, called ADR continuum, defined by the level of intervention, resources invested and control of outcome criteria. Therefore, the ADR spectrum starts with minimal level of intervention, minimal resources invested and maximal control over outcome, i.e. negotiation. The last stages of the ADR spectrum involve a maximal level of intervention, maximal resources invested and minimal control over outcome, i.e. litigation, violence (see figure below).



As stated above, the ADR processes were naturally created in order to respond to specific needs of people and businesses; most of them didn't even have legal framework. For example, the facilitation process is recognized as an ADR process but doesn't have a specific legal framework in most countries. However, professional facilitation services can be provided in the European Union. So, the importance, the existence and more important the benefits of these methods and processes are independent of their legal framework that can sometimes be useful, but not essential.

Created as an acronym for Alternative Dispute Resolution, A.D.R. gained different meanings in time. One of them, Appropriate Dispute Resolution, refers to the fact that based on thorough analysis, at a certain moment, a certain method of dispute resolution offers the best prospects of effective resolution, therefore is more appropriate than the others in that particular moment. For example, this is the case with litigation that in some cases may be the most appropriate to be tried first, while in other cases, other ADR processes may be the most appropriate to be used first.

1.2.3. Criteria for choosing A.D.R. processes

There are many ADR processes that were created in time. In attempting to have a comprehensive approach to the analysis of some of the ADR processes, one can look at the following criteria:

1. Participation	(voluntary	/ imposed)
2. Third party intervention	(yes	/ no)
3. Procedural flexibility	(informal	/ formal)
4. Privacy status	(private	/ public)
5. Confidentiality status	(confidential	/ non-confidential)
6. Nature of outcome	(interest based	/ imposed, legal based)
7. Cost	(low	/ high)
8. Physical presence	(online	/ physical)

The first criterion, **Participation**, refer to the fact that for some ADR processes, the participation is voluntary and for some others is imposed by contractual or legal obligations. Depending on the parties and the situation, either voluntary or imposed participation can be in the parties' best interest. The contractual obligation may be contained in a dispute resolution clause and a few examples are listed below.

W.I.P.O. (World Intellectual Property Organization) [Switzerland, Geneva] *"Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to mediation in accordance with the ICOM-WIPO Mediation Rules. The place of Mediation shall be [specify place]. The language to be used in the mediation shall be [specify language]."*

I.C.C. (International Chamber of Commerce) [Paris, France] *"In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, such dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration."*

S.M.C. (Singapore Mediation Center) [Singapore] *"All disputes, controversies, or differences arising out of or in connection with this agreement shall first be submitted to*

the Singapore Mediation Centre for resolution by mediation in accordance with the Mediation Procedure for the time being in force. The parties agree to participate in the mediation in good faith and undertake to abide by the terms of any settlement reached.”

Chartered Institute of Arbitrators [United Kingdom]

“The parties shall attempt to resolve any dispute arising out of or relating to this contract through negotiations between senior executives of the parties, who have authority to settle the same.

If the matter is not resolved by negotiation within 30 days of receipt of a written 'invitation to negotiate', the parties will attempt to resolve the dispute in good faith through an agreed Alternative Dispute Resolution (ADR) procedure, or in default of agreement, through an ADR procedure as recommended to the parties by the President or the Deputy President, for the time being, of the Chartered Institute of Arbitrators.

If the matter has not been resolved by an ADR procedure within 60 days of the initiation of that procedure, or if any party will not participate in an ADR procedure, the dispute may be referred to arbitration by any party. The seat of the arbitration shall be England and Wales. The arbitration shall be governed by both the Arbitration Act 1996 and Rules as agreed between the parties. Should the parties be unable to agree on an arbitrator or arbitrators, or be unable to agree on the Rules for Arbitration, any party may, upon giving written notice to other parties, apply to the President or the Deputy President, for the time being, of the Chartered Institute of Arbitrators for the appointment of an Arbitrator or Arbitrators and for any decision on rules that may be necessary.

Nothing in this clause shall be construed as prohibiting a party or its affiliate from applying to a court for interim injunctive relief.”

The second criterion, **Third party intervention**, refers to the fact that in some cases, the ADR process needs to be established with the assistance or with the intervention of a third party, which is usually called **neutral**. For example, in negotiation, although consultants may join the process in order to assist the parties, the process is not assisted by another party or side (*Fisher, Ury, Patton, Getting to Yes, Penguin Group*), while in conciliation, the process is assisted by a neutral third party, the conciliator.

According to criterion number three, **Procedural flexibility**, some ADR processes are more open than others to parties' suggestions for procedural flexibility. For example, in some cases, where the early stages of their differences, the parties may look for more informal ADR processes that are more procedurally flexible. In others, however, the parties that are experiencing advanced stages of differences may have look for more formal ADR processes with more formal and rigid rules.

Other important criteria can be **Privacy status** and **Confidentiality status**. The privacy refers to the private or the public character of specific ADR processes. Also, in some private ADR processes, parties will have the possibility to choose if they want to give beforehand a confidential status to the whole process. This may be of assistance for them as the non-confidential status may become a barrier to trust, transparency and full disclosure of information.

The parties may also be interested into a process that can provide interest-based outcomes or can fail to do so. In some other cases, they may look for processes where the solution will be certainly found by a third party neutral and imposed by the process. Therefore, pending the needs of the parties, **Nature of outcome** may be important criterion while contemplating the most appropriate ADR process.

The **Cost** is another important criterion that proves that while choosing the most appropriate ADR process parties can always use a business orientated approach and look at ADR as to an investment. In some cases, ADR may be provided by the courts of law or by the other sponsored programs (*e.g. community centers, governmental ADR centers*). Other ADR services can be provided fee for service by private professional neutrals.

Another criterion refers to the need for **Physical presence** of the parties or of the other participants, if any, to that certain ADR process. Due to latest technology progress, new ADR processes were developed under the name of Online Dispute Resolution (O.D.R.). This process presents the benefit of making ADR available to parties that have to invest significant resources in order to meet in person. It appears that in the future, more ODR processes will be made available, in accordance with the growth of online communication (*i.e. online shopping*).

1.2.4. Examples of ADR processes

For the purpose of this Guidebook, we describe a selection of Alternative Dispute Resolution processes. Out of them, negotiation, mediation and arbitration are probably the most known and used by the parties worldwide and in the European Union.

1.2.4.1. Negotiation

The negotiation process was approached from many perspectives. According to one of them, negotiation is a communication process between two or more parties that are looking for solutions to common problems.

Henry Kissinger defined negotiation as, “a process of combining conflicting positions into a common position, under a decision rule of unanimity” (*Kissinger, 1969*).

Negotiation was also defined as “Back-and-forth communication designed to reach an agreement between two or more parties with some interests that are shared and others that may conflict or simply be different. Negotiation is an intrinsic part of any kind of joint action, problem solving, and dispute resolution, and may be verbal, nonverbal, explicit, implicit, direct, or through intermediaries.” (*Michael L. Moffitt and Robert C. Bordone, eds., Handbook of Dispute Resolution [Program on Negotiation / Jossey-Bass, 2005], 279*)

Characteristics: Participation: *voluntary** (* means with exceptions); Third party intervention: *no*; Procedural flexibility: *informal*; Privacy status: *private*; Confidentiality status: *confidential**; Nature of outcome: *interest based*; Cost: *low*; Physical presence: *yes**.

The negotiation process can be either distributive or integrative. The distributive negotiation process, parties are looking for a compromised based solution where one party's gain is equal with the other one's loss and the other way around. The integrative negotiation process (or the principled negotiation or interest based negotiation) is based on the harmonization of the parties' needs as a base for new and creative options that can collaboratively address the issues that the parties want to resolve. The integrative negotiation requires the parties to follow four basic principles in order to obtain a mutually beneficial outcome. According to Fisher, Ury and Patton (Getting to Yes, 1981), the principles are Separate the people from the problem, Focus on interests not positions, Invent options for mutual gain and Insist on objective criteria.

1.2.4.2. Facilitation

Facilitation is a process in which the parties (usually a group), with the assistance of a dispute resolution practitioner (the facilitator), identify problems to be solved, tasks to be accomplished or disputed issues to be resolved. Facilitation may conclude there, or it may continue to assist the parties to develop options, consider alternatives and endeavor to reach an agreement. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation. (See *Australian Commercial Disputes Centre (ACDC)*, www.acdcltd.com.au).

Characteristics: Participation: *voluntary** (* means with exceptions); Third party intervention: *yes*; Procedural flexibility: *informal*; Privacy status: *private**; Confidentiality status: *confidential**; Nature of outcome: *interest based*; Cost: *low**; Physical presence: *yes**.

The facilitator has three fundamental roles – designs the process, guides the parties through the process and ensures that the key points resulting from the process are pinned down and properly dealt with. In a more simple way, the facilitator's role is to help a group to achieve its goals. In order to achieve this result, the facilitator needs both process and substantial (content) skills.

1.2.4.3. Mediation

According to article 3, let. A of the EU Directive 2008/52/CE, "*mediation means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State*".

The Romanian mediation law (Article 1, Law 192/2006) defines mediation as following. "Mediation represents a way of amicable settlement of conflicts, with the support of a third party specialized as a mediator, in terms of neutrality, impartiality, confidentiality and with the free consent of the parties."

Mediation is a negotiation process facilitated by a trusted neutral person having no power of decision. (Chereji, Gavrilă <http://kluwermediationblog.com/2014/01/04/defining-mediation/>)

Characteristics: Participation: voluntary* (* means with exceptions); Third party intervention: yes; Procedural flexibility: informal*; Privacy status: private*; Confidentiality status: confidential*; Nature of outcome: interest based; Cost: low*; Physical presence: yes*.

1.2.4.4. Conciliation

Conciliation is a facilitation of communication process meant to lower tensions and improve the relationship of two or more disputants, by a third party, called conciliator. Conciliation is the least formal of ADR processes and can pave the way for a later mediation process. Sometimes, the conciliation can result in a settlement.

Conciliation may also be called the process managed by the judge and focused on the exploration of different alternatives that parties can have and use in order to try reaching a settlement before going to trial.

Characteristics: Participation: voluntary* (* means with exceptions); Third party intervention: yes; Procedural flexibility: informal; Privacy status: private*; Confidentiality status: confidential*; Nature of outcome: interest based; Cost: low*; Physical presence: yes*.

1.2.4.5. Early Neutral Evaluation (ENE)

Early neutral evaluation is an ADR process in which parties look and receive an assessment of their case from a neutral expert, attorney or other professional, called evaluator, having knowledge of the subject matter of the dispute.

This evaluator provides a “reality check” for clients and their lawyers and enhances settlement communications between the parties. However, the evaluator has no power to impose the assessment to the parties and the process is confidential is agreed otherwise by the parties.

Usually, the evaluator is agreed by the disputant parties and has process competence in addition to subject matter expertise.

Characteristics: Participation: voluntary* (* means with exceptions); Third party intervention: yes; Procedural flexibility: informal; Privacy status: private*; Confidentiality status: confidential*; Nature of outcome: interest based; Cost: low*; Physical presence: yes*.

1.2.4.6. Arbitration

Arbitration is the most traditional form of private dispute resolution. Arbitration is a binding procedure. It is often "administered" by a private organization that maintains

lists of available arbitrators and provides rules under which the arbitration will be conducted. Such organizations can also manage the arbitration in whole or in part. Parties often select arbitrators on the basis of substantive expertise. (*Judicial Arbitration and Mediation Services*, <http://www.jamsadr.com/>)

The arbitration decision is, unless otherwise agreed, legally binding for the parties and non-appealable, except in very limited circumstances.

Parties choose arbitration over litigation because of the additional flexibility, process neutrality (arbitration can take place in a country, other than the ones of the parties), possibility to select the arbitrators, time and costs, confidentiality, binding decisions and recognition and enforcement of the awards.

Characteristics: Participation: imposed* (* means with exceptions); Third party intervention: yes; Procedural flexibility: formal; Privacy status: private*; Confidentiality status: confidential*; Nature of outcome: imposed/legal based; Cost: high*; Physical presence: yes.

1.2.4.7. MiniTrial

The Minitrial is an ADR Process in which a neutral party assists to parties in evaluating their case for the purpose of providing an advisory opinion on the likely outcome of the dispute.

As the name suggests, the Minitrial is clearly different from a trial. Although, the neutrals are usually retired judges, they are focused on developing a settlement process in which the parties present highly abbreviated versions of their respective cases.

In some cases the neutral is working with senior representatives of the parties in order to group into a minitrial committee that tries to develop a settlement after the parties have presented their cases.

Characteristics: Participation: voluntary* (* means with exceptions); Third party intervention: yes; Procedural flexibility: informal; Privacy status: private*; Confidentiality status: confidential*; Nature of outcome: interest based; Cost: high*; Physical presence: yes.

1.2.4.8. Settlement Day (Week)

The Settlement Day of Settlement Week is an ADR process that consists in setting aside a day or a whole week to schedule cases for mediation and other ADR processes in order to settle as many cases as possible. A mediation session can last several hours with additional sessions held as needed.

This ADR process can be scheduled once per year by the courts in order to make a public statement towards the development a culture of understanding and settlement.

Characteristics: Participation: voluntary; Third party intervention: yes; Procedural flexibility: informal; Privacy status: private* (* means with exceptions); Confidentiality

status: confidential*; Nature of outcome: interest based; Cost: low*; Physical presence: yes.

1.2.4.9. Hybrid processes

ADR processes can be combined in what is called “Hybrid processes”. The new resulted processes remain in the field of ADR as they are meant to help parties bring their disputes to a resolution. They can also be seen as alternatives to traditional litigation.

Two examples of hybrid processes are Med-Arb and Arb-Med.

In Arb-Med, parties try to reach a settlement first through mediation and if this process doesn't succeed an arbitration process takes over. Often, the parties reach an agreement as the alternative of an imposed solution is not preferable. However, when the second process (arbitration) takes place, the arbitrator and the mediator are different people in some cases. In other cases they are a single person, a neutral third party trained in med-arb.

Arb-Med is also a two phase process. During the first phase a third-party, the arbitrator, listens to evidence, testimonies and all the other parts of arbitration. Then, the Arbitrator may render a decision and put it in a sealed envelope. During the second phase, the mediator manages the mediation process between the parties in order to assist reconciliation and settlement. Parties may agree beforehand that if mediation doesn't concludes with a settlement in a given period of time, they may open the envelope and the decision will be binding.

Characteristics: Participation: voluntary* (* means with exceptions); Third party intervention: yes; Procedural flexibility: informal / formal; Privacy status: private*; Confidentiality status: confidential*; Nature of outcome: binding / interest based; Cost: high*; Physical presence: yes.

1.2.4.10. Litigation

Litigation is the traditional form of dispute resolution, based on taking legal action through the courts of law. A judge sits and listens to parties' arguments on the interpretation of the relevant law as applied to the particular case and then decides as to who wins and who loses the case.

In the context of ADR, litigation is the gatekeeper of access to justice. Without litigation, rather than promoting the rule of law, the ADR system would prove detrimental to human rights and the good functioning of the judiciary.

Characteristics: Participation: voluntary; Third party intervention: yes; Procedural flexibility: formal; Privacy status: public* (* means with exceptions); Confidentiality status: non-confidential; Nature of outcome: binding / legal based; Cost: low/high*; Physical presence: yes*.

1.2.5. Continuum of dispute resolution options

In the context of Alternative Dispute Resolution, based on analysis, a dispute can be resolved by using a strategic sequence of ADR processes. This can be accomplished by listing all processes from the less formal ones that require minimum of resources invested and offer maximum control over process and outcome, to the most formal ones that require many investment of resources and offer limited control over outcome. All these ADR processes can be called “*The continuum of dispute resolution options*”. Then, the parties can choose certain ADR processes to use in order to achieve the best outcome possible with minimum of resources invested, namely an effective outcome.

1.2.6. A successful case-study of ADR implementation - the “multi-door” concept

An internationally recognized as a successful case study of ADR implementation is the concept of “multi-door” court that was developed in United States of America starting with late 1970.

The concept of the multi-door courthouse is said to have originated with a paper given by Professor Frank Sander of Harvard University in 1976 (Sander, “*Varieties of Dispute Processing*”, in Levin and Wheeler, *The Pound Conference: Perspectives on Justice in the Future* (1979)).

The essence of the concept of the multi-door court, as Professor Sander explained it in 2008, was “*to look at different forms of dispute resolution – mediation, arbitration, negotiation, and med-arb, (a blend of mediation and arbitration). I tried to look at each of the different processes and see whether we could work out some kind of taxonomy of which disputes ought to go where and which doors are appropriate for which disputes. That is something I have been working on since 1976, because the thing about the multi-door courthouse is that it is a simple idea, but not simple to execute, because to decide which cases ought to go to what door is not a simple task. That is something we have been working on.*” (Hernandez-Crespo, op cit, at 8).

The multi-door courthouse concept was implemented in European Union and Slovenia and the northern European countries are a good example in this regard.

1.3. Mediation

The Mediation procedure is one of the most used forms of Alternative Dispute Resolution because it involves a natural relationship between process and subject matter skills of the mediator, within a systemic approach that is aiming for helping the parties to decide upon the future of their shared difficulties. In short, the mediator facilitates a negotiation without having power to make any decisions regarding both the process and the outcome.

Mediation is used since thousands of years, for example, in 1.800 B.C. Mari Kingdom (today, the modern Syria) used mediation and arbitration in disputes with other kingdoms. (*A History of Alternative Dispute Resolution: The Story of a Political, Social, and Cultural Movement*, Jerome T. Barrett, Joseph P. Barrett, Wiley, 2004)

Other examples can be found in the religion. In the New Testament, three different passages refer to Jesus as the mediator between God and people. First Timothy 2:5 shares, *"For there is one God, and there is one mediator between God and men, the man Christ Jesus."*

"Wassatah" is the common term for mediation, and is used in Islamic law. Al-Jahshiary (331A.H-943 A.D) in his book "kitab al-wuzaraa" (The Book of Ministers), has used "tawasut" in the case of the mediation of Muhammad Ibn Muslim to end the hardship of land tax (kharaaj) payers, and also the Mediation of Yahya between a man and the Abbasside Khalifah Harun al-Rashid (198 A.H- 814 A.D). Nevertheless the common word for mediation in Islamic law is "walking between the disputants". (Dr Said Bouheraoua, *Foundation of mediation in Islamic law and its contemporary application*).

Following a similar path pattern with other traditions and institutions, in present days, mediation became more norm-based, professionalized and structured. Formal training, adherence to codes of conduct and accreditation are now required from mediators in order to provide mediation services in most countries, including European Union.

1.3.1. Definitions of Mediation

According to article 3, let. A of the EU Directive 2008/52/CE, *"mediation means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State"*.

One can read many other definitions of mediation both in European Union and worldwide. Actually, some of the largest ADR providers define mediation quite differently, which can add confusion for users and providers that need a clear definition of what mediation is. The differences often come from the fact that while some definitions of mediation concentrate on what mediation is, other definitions focus on what is not, how is being made, what the mediator is.

Here are a few examples of mediation definitions.

According to Center for Effective Dispute Resolution (United Kingdom), *"Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution"*.

The International Chamber of Commerce (International Centre for ADR, Paris) defines mediation as *"a flexible settlement technique, conducted privately and confidentially, in which a mediator acts as a neutral facilitator to help the parties try to arrive at a negotiated settlement of their dispute."*

Also, according with the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO, Geneva), *"Mediation is an informal procedure in which a*

neutral intermediary, the mediator, assists the parties in reaching a settlement of the dispute. (Depending on the parties' choice, mediation may be followed, in the absence of a settlement, by arbitration, expedited arbitration or expert determination.)."

In short, "Mediation is a negotiation process facilitated by a trusted neutral person having no power of decision". (Chereji, Gavrilă, kluwermediationblog.com).

1.3.2. The Role of the Mediator

The mediator's three main competencies are the following: conflict analysis, support for communication and negotiation and process control.

Subsequently, the roles of the mediator can be drawn from the competencies. First, the mediator is a **conflict resolution specialist** able to analyze a conflict by applying certain conflict analysis models over a certain situation. The mediator is also a **facilitator** as he/she may assist the parties to design the mediation process and its goals and then to help them go through the process and achieve the goals. Very often if not always, the mediator has the role of parties' **host** as the mediation sessions are organized at their professional offices. The mediator has also the role of an **educator** because he/she presents the parties with information about the mediation process, in order for them to consider, design and use mediation in the most effective manner. The mediator is also a **process advisor** that suggests procedures for making progress in mediation discussions, which may include caucus meetings, consultation with outside legal counsel and consultation with substantive experts. The mediator is also a **reality agent** by discussing with the parties about alternatives to a negotiated agreement, opportunities, risks and safety. A key role of the mediator is to be **the details person** and to keep track of all the information relevant for the parties. In this capacity, the mediator may also assist the parties in putting their agreement in writing. Since mediation services can be offered in exchange of a fee, the mediator can be also looked at as a **consultant**. In conclusion, the mediator is the **manager** of the mediation process while the parties remain the decision makers regarding both the process and the outcome.

1.3.3. Confusions about Mediation. What Mediation is Not.

Regardless of the slight differences in the mediation definitions, there is a more unitary approach in European Union and worldwide regarding what mediation and the mediator are not.

The mediator is not a judge or a decision maker. The mediator can't impose decisions to the parties. Moreover, in most cases the mediator is not a subject matter expert; therefore he/she can't even usually suggest solutions to the parties.

The mediator is not a legal expert of the parties. Even if the mediator is a trained or practicing lawyer, he/she must refrain from offering legal services to the parties. Moreover, this will require another type of contractual relationship between the mediator and the parties.

The mediator is not the parties' psychotherapist. The goal of mediator is not to provide the treatment of the parties' mental health problems but to rather pave the way so that the parties have a clear understanding of their needs and feelings in order to make informed decisions about the issues they want to resolve. As mediation manages to heal the relationship of the parties and therefore transform their approach towards one another, for the better, yet, the mediator is not the parties' psychotherapist.

The mediator is not a fact finder or a prosecutor. His role is not to find or unveil the truth, regardless of his/her personal opinions on the merits of the case.

1.3.4. Principles of Mediation

Another way of understanding about mediation is to learn about the fundamental pillars that determine it, namely its principles. The following principles are intended to apply to all types or styles of mediation; however it is named of recognized. In some cases their application may be affected by the law, rules or contractual agreements.

The principles of mediation are voluntary participation, neutrality (conflict of interest), impartiality, confidentiality, self-determination, informed consent and welfare of children (family mediation).

1.3.4.1. Voluntary Participation

The principle of voluntary participation refers to the fact that the parties' will to participate in mediation is unconstrained. This can be seen from a number of perspectives – information, initiation, participation.

First, the *information* perspective refers to the fact that the parties may freely ask for information about mediation and its benefits or may be "invited" to do so. According to EU Directive 2008/52/CE, Article 5, "(1) A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available. (2) This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system."

For the purpose of expanding the availability of the mediation, some countries developed legislations containing mandatory mediation provisions. For example, Romania, introduced in 2013 information sessions regarding mediation benefits that were mandatory for the plaintiff, before filing a lawsuit, under case inadmissibility sanction. The Romanian Constitutional Court found in June 2014 that this was preventing the parties from exercising their right of access to the judicial system.

The second perspective of the principle of voluntary participation, *initiation*, refers to the parties' faculty to actually initiate the mediation process. This may be done by signing

some form of a mediation contract or agreement to mediate and/or by paying some amount of money.

Italy introduced an attempt of mediation in civil and commercial cases that is considered by the law (Law Decree no. 69/2013) as *mandatory* for some matters and for an experimental period of four years, during which the Italian Ministry of Justice will have to carry out a follow up on the results concretely detected in the practice. This example of “opt-out” model of mediation legislation is challenging the principle of voluntary participation in mediation as the parties have to pay an amount of 40 Euro to be able to go through this process. There are at least two perspectives to this. According to the first one, in which the collective good is addressed, the parties are free from walking out of mediation after this first mandatory session with the mediator; therefore, the mediation is still voluntary as parties are not forced into the process or worst, into settling the dispute. The second perspective is simply stating that the process includes coercion, therefore is losing its voluntary character.

The third perspective is participation. Regardless of the lively debate from within the mediation profession and not only, mediation is a voluntary process concerning the fact that the parties are free to leave the process at any time, without being damaged.

1.3.4.2. Neutrality (Conflict of interest)

Mediation relies on the trust which the parties invest in the mediator, as a person capable to facilitate negotiations between them and to provide them with support for the settlement of the conflict, by reaching to a mutually convenient, efficient and durable solution (Article 1 al.2 Romanian Mediation Law 192/2006).

This is fundamental for the principle of neutrality as parties will trust the mediator and the process pending the mediator’s neutrality. The mediator’s neutrality can be defined by the lack of connections between the mediator and the parties or the subject matter being mediated in the way that disables the mediator from having any interest in the matter.

Any connection between the mediator and the parties may corrupt the mediator’s motivation for equal chances for the parties and mutual gain or at least the parties’ perception about it.

Therefore, it is important for the parties to clarify any perception of the parties regarding the mediator’s lack of neutrality. The mediator’s neutrality is to be first affirmed by the mediator, proven by his/her behavior but also perceived and understood by the parties.

The fulfilment of the neutrality principle depends on the mediator’s capacity to position at equal conceptual distances from the parties from the beginning of the mediation. The distances are to be long enough that the mediator will be in a zone that will not interfere with the parties’ interests. However, the mediator’s neutrality can vary during the mediation process as new information and dilemmas can intervene.

1.3.4.3. Impartiality

If by neutrality, the mediator gains a median position, the impartiality principle refers to the mediator's capacity to maintain his/her median position. This needs to happen in both the reality and the perception of the mediator and of the parties.

Therefore, the principle of impartiality in mediation is the mediator's ability to treat both parties equally and to offer them equal chances during the process.

The concepts of neutrality and impartiality are often mistaken with one another. In order to avoid confusions, the neutrality can be statically linked to the lack of any **interest**, while the impartiality can be dynamically linked to the mediator's **conduct**.

If any party is under the assumption that the mediator is not neutral, the impartiality suffers subsequently. If, by contrast, a party thinks that the mediator is neutral but feels bothered by what the mediator does, the principle of impartiality is endangered.

1.3.4.4. Confidentiality

The principle of confidentiality can be simply summarized as following. What happens in mediation stays in mediation. Although this may look as simple as that, the principle of confidentiality supports many perspectives.

First, the mediation process is private. The confidentiality creates a powerful context for trust, openness and disclosure. When knowing that what they say is not going to be used against them because it's just impossible, the parties are more likely to be sincere and direct. This can be achieved when the process is private and when the process' confidentiality is formalized.

Second, the confidentiality is to be treated different by the different categories of participants in mediation. For example, the mediators may be compelled by the law to keep all information confidential, while the parties may decide upon the confidentiality status of all the information circulated within the mediation process. Other participants in mediation (experts, friends, relatives, consultants) may have to be invited to sign confidentiality agreements.

There are limits, however, to the principle of confidentiality. Some of them may regard the protection of the best interests of children, the prevention of harm to the physical or psychological integrity of a person or disclosure of the content of the agreement resulting from mediation that may be necessary in order to implement or enforce that agreement.

1.3.4.5. Self-determination

Self-determination stays probably at the essence of mediation and is the awareness of the parties' freedom regarding the content and the process.

Self-determination is based on the individual's ability to make their own informed decisions based on their knowledge of their needs and the best interests of their children. (*Robert D. Bordett, CFP, CDFA*)

Given the intercultural character of cross-border mediation, the need to focus on self-determination is more acute than ever. When the parties have different cultural backgrounds, mediation will succeed with a level of procedural justice that supports and encourages natural self-determination and true informed consent.

This principle is the foundational moral and ethical principle that respects the autonomy and the independence of the parties in mediation.

1.3.4.6. Welfare of children

Mediators must have special attention to the welfare of the children and their right to protection. They should encourage participants to focus on the needs and interests of the children as being superior to their own ones.

Making the justice system more child-friendly in Europe is a key action under the EU Agenda. It is an area of high practical relevance where the EU has, under the Treaties, competences to turn the rights of the child into reality by means of various instruments, such as EU legislation and support measures for Member States. (<http://ec.europa.eu/justice/fundamental-rights/rights-child/friendly-justice/>)

1.3.5. Differences between Mediation and other forms of A.D.R.

Mediation has enjoyed increasing popularity as one of the most important and used ADR process. For a better understanding of the mediation concept, is important to differentiate from mediation and other forms of ADR.

(Mediation / Negotiation) The difference between mediation and negotiation is that the mediation is a negotiation process that is facilitated by the mediator.

(Mediation / Facilitation) In both facilitation and mediation, a neutral is designated to manage the communication and decision making process; however, while facilitation aims to help parties reach an agreement from the beginning of the process, even before a conflict arises, mediation is used when a conflict exists, negotiations were unsuccessful and a solution couldn't be reached.

(Mediation / Conciliation) The mediation process is more formal than conciliation that is focusing on the reestablishment of the parties' communication. Conciliation can be useful pave the way for a mediation process. In mediation, the mediator and the parties set a much more formal agenda compared with conciliation.

(Mediation / Early Neutral Evaluation) Although both processes are aiming for a settlement, their approaches differ fundamentally. While the mediator is a process manager, the ENE neutral has substantial expertise in addition to the process competencies.

(Mediation / Arbitration) Arbitration and Mediation are two ADR processes and their fundamental difference is that since the Mediation is a consensus building private process, the Arbitration is a private process based on making fair judgments that are binding for the parties.

(Mediation / Litigation) The difference between Mediation and Litigation is similar to the difference between mediation and arbitration with the exception that litigation is a public process.

1.3.6. The stages of the mediation process

The EU Directive on mediation defines mediation as a structured process. The structure of the mediation process focuses on principled negotiation theory (*Fisher and Ury, Getting to Yes, 1981*), which requires compliance with four basic principles for efficient use of negotiation. These are (a) separate people from problems, (b) focus on interests and not positions, (c) use objective criteria and (d) generate options for mutual gain. The structure of the mediation process follows the same mantra, positions - interest - options.

According to the author of "Getting to Yes", most negotiations are positional (positional bargaining). The parties realize a consecutive communication of positions or their tenders in a process that is based on accepting the idea of partial failure or compromise which generates another compromise by the other party. A classic example of this process is haggling.

According to the authors, a more efficient process is principled negotiation. This involves identifying a "wise agreement" by using a different process than positional bargaining. The process is called integrative negotiation (or principle, or based on interests) and by complying with the four main principles, seeks those solutions that integrate all parties' interests.

Mediation is a structured process and its structure is based on the development of collaboration between the parties or the transformation of these negotiations in an integrative negotiation. An example of the stages of the mediation process is as follows:

1. Preliminary Arrangements
2. Mediator's initial statement
3. Exchange of information between the parties
4. Identifying problems (Setting the mediation agenda)
5. Establish initial positions
6. Exploring the parties' needs
7. Identify parties' interests
8. Generation of options for settlement
9. Negotiation
10. Mediation Agreement
11. Closure of mediation

The stages of the mediation process can be also looked at from the perspective of time. This way, the mediation process starts by focusing on the identification of the issues in the past (identification of circumstances). Then, it continues by assessing the impact created by the issues in the present and how important is for the parties to resolve the

issues (identification of criteria). Finally, the mediator and the parties will look in the future for options that will resolve the circumstances from the past and meet the criteria in the present.

Another approach of the mediation stages involves two simple stages for the mediation process that, if treated separately, may enhance the chances for consensus. The two stages are “a discussion about the problem” followed by “a discussion about the solutions” (*Bogdan Matei, Craiova Mediation Center, 2013*)

1.3.7. Benefits of Mediation

The mediation process offers many benefits to the parties and to many other stakeholders that can be positively influenced by the increasingly use of mediation. Below are some major benefits of mediation, broadly considered.

Benefits for the parties:

- Improved parenting;
- Risk and safety management;
- Better control of the outcome;
- Time effective;
- Procedural simplicity;
- Self – determination;
- Cost – effectiveness;
- Flexibility of the process and in shaping the process;
- Direct involvement in the dialogues;
- Procedural privacy;
- Procedural confidentiality;
- Potential to maintain relationships;
- High success rate;
- High rate of compliance;
- Decisions that hold up over time;
- Parties can be assisted by other people;
- The parties choose their mediator(s);
- Focus on parties needs and interests;
- Create mutual understanding and mutual gain;

Benefits for the courts and governments:

- Unburden courts of a significant number of cases;
- Increasing the quality of justice by offering longer periods of time for magistrates to study cases that can't be mediated;
- Decrease the costs of public budgets for organizing the trials that can be otherwise mediated;
- Decrease the number of appeals, as parties voluntary comply with the mediation agreements;
- Ability to effectively process “complex” cases (e.g. highly emotional matters);
- Simplicity in processing cases from the “unresolved” status to “resolved by consensus” status, verified legality and converted into a judgment;

Benefits for the legal profession:

- The combative spirit can be unleashed during mediation without constraints or penalties as in the court;
- A negative verdict the court can mean loss of clients and potential clients, while, in mediation a case can't be lost;
- A successful mediation, faster and cost-effective for the client can bring new clients in;
- The mediation fee can be competitive, as negotiation are made according to the relations cost in court/chances to win/duration of a trial, for all procedural cycles and even execution of a judgment;
- If parties settle in mediation, both lawyers can receive success fees;
- Mediation is a process that provides the clients and their lawyers with control over outcome, which is not the case in the court of law;
- Avoids public courts of law in favor for private mediation offices;
- Manages a case in a far shorter period of time as compared with the average timeframe of the litigation;
- Some lawyers refuse low value cases as the costs for handling the case in the court may be equal or even larger than the actual claim. Those cases can be much more effectively handled through mediation;
- No urgent documents to produce, terms and procedures to follow etc.;
- Offers at least as much satisfaction as the winning a case in the court of law;

Chapter 2: Legal framework including: Directive 2008/52/EC, the Regulation (EC) 2201/2003 and their implementation into national legislation

2.1. Introduction

The establishment of the European project, embodied first by the European Economic Community set up by the 1957 Rome Treaty, had at its core the principle of free movement of goods, capitals and persons within the limits of the community's territory. It created the bases for the Single European Act of 1986 that transformed the European common market into a single market of goods, capitals, services and labor and then the European Union by the Treaty of Maastricht in 1993. All of this facilitated the creation of the European citizenship, by which every citizen belonging to one of the EU member states became, basically, a citizen of any one of them, enjoying full rights on the territory of the residence state, no matter her/his nationality.

The free movement of persons, together with the rights associated with it, has had a direct and complex effect upon the jurisdiction of the courts over the settlement of disputes between European citizens and organizations, especially over those disputes that qualify as „cross-border“, i.e. disputes taking place between entities (persons or organizations) located in different member states at the time of occurrence. The complexity of the jurisdiction issues has directly contributed to the exponential increase in duration and costs of legal procedures of litigation and it has called upon the European law-makers to address it through regulation at the highest level possible.

Nowhere have these cross-border disputes touched a more sensitive chord than the family issues, especially regarding the protection of the child rights and superior interests. The free movement of people within the European Union has generated an increase in marriages between citizens belonging to different member states – as a consequence, an explosion of litigations concerning family matter has occurred across the Union's territory. The duration and the costs grew as well, jeopardizing the idea of free access to justice (a core principle of any functional democracy) and the effectiveness required for such sensitive cases as those concerning children.

Taking in consideration the principle of subsidiarity, as set out by the article 5 of the Treaty establishing the European Community, it was up to the European institutions to address the issue of jurisdiction in family matters in cross-border disputes. The European Council took the initiative by drawing up, in May 28th 1998, a Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and recommended it for adoption by the Member States in accordance with their respective constitutional rules. This Convention was then embedded into a more comprehensive text of law, the Council Regulation (EC) No 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, also known as „Brussels II Regulation“. In its preamble, it called the EU member states „to adopt, among others, the measures in the field of judicial cooperation in civil matters needed for the proper functioning of the internal market“. Taking in consideration the „objective of maintaining and developing the Union as an area of freedom, security and justice, in which the free

movement of persons is assured”, the Council regarded the the need to improve and simplify the „free movement of judgment in civil matter” as a sine-qua-non condition for the proper functioning of the single market.

The Regulation 1347/2000 entered into force by March 1st 2001 and it was considered a consistent step forward in addressing the issue of cross-border disputes in family matters concerning the recognition and enforcement of judgments in matrimonial matters and parental responsibility. It took precedence over the provisions of the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children or Hague Convention 1996, which established a framework for coordination of legal systems regarding children’s property and welfare, but excluded parental responsibility. 25 out of 27 (by the time) member states were signatories of the Hague Convention, but all agreed that the provisions of the Brussels II Regulation were „at least as favorable as the rules laid down in the Convention”, as stipulated by the 2008/431/EC: Council Decision of 5 June 2008 authorizing certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorizing certain Member States to make a declaration on the application of the relevant internal rules of Community law – Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children.

By 2003, given the need to incorporate both the provisions of the Hague Convention and the improvements recorded by reports of the implementation of Regulation 1347/2000, a new Regulation was issued by the Council, a text of law also known as Brussels IIA or IIbis, as an obvious continuation of the previous Convention. The new one, its official title being Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, represent the most comprehensive set of provisions regarding family matters accepted and uniformly implemented by all EU member states, with the notable exception of Denmark.

2.2. Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

The Regulation 2201/2003 was adopted in November 2003. It entered into force in August 1st 2004 and applied from March 1st 2005 in matrimonial matters and the matters of parental responsibility. This law brought together, into a single, unified text, the matrimonial matters and the matters of parental responsibility.

The Regulation is directly applicable in the Member States and prevails over national law. Regarding the implementation of the Regulation provisions by EU member states, the Regulation applies in its entirety, after 1 March 2005 (as per Article 64/1), to relevant

legal proceedings instituted and documents formally drawn up or registered as authentic instruments and also to agreements concluded between parties.

As transitional provisions, the rules on recognition and enforcement of the Regulation apply, in relation to legal proceedings instituted before 1 March 2005, to three categories of judgments:

- Judgments given on and after 1 March 2005 in proceedings instituted before that date but after the date of entry into force of the Brussels II Regulation (Article 64/2);
- Judgments given before 1 March 2005 in proceedings instituted after the date of entry into force of the Brussels II Regulation in cases falling under the scope of the Brussels II Regulation (Article 64/3);
- Judgments given before 1 March 2005 but after the entry into force of the Brussels II Regulation in proceedings instituted before the date of entry into force of the Brussels II Regulation (Article 64/4).

Regarding the ten “new” Member States which joined the European Union on 1 May 2004, the relevant date to determine the entry into force of the Brussels II Regulation is 1 May 2004. Judgments falling under the transitional provision are recognized and enforced pursuant to Chapter III of the Regulation under certain conditions:

- the court that handed down the judgment founded its jurisdiction on rules which accord with the Regulation, the Brussels II Regulation or a convention which is applicable between the Member State of origin and the Member State of enforcement;
- and, for judgments given before 1 March 2005, provided they relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings.

The provisions of Chapter III on recognition and enforcement apply in to these judgments.

The Regulation 2201/2003 begins by clearly defining the objects of its provisions, the scope of the Regulation, as stipulated by Art. 1, is the application of its provisions, whatever the nature of the court or tribunal, in civil matters relating to:

- (a) divorce, legal separation or marriage annulment;
- (b) the attribution, exercise, delegation, restriction or termination of parental responsibility.

Further on, the Art. 2 refines the civil matters included at Art. 1 (b) as:

- (a) rights of custody and rights of access;
- (b) guardianship, curatorship and similar institutions;
- (c) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;
- (d) the placement of the child in a foster family or in institutional care;
- (e) measures for the protection of the child relating to the administration, conservation or disposal of the child's property.

This list is not exhaustive, but merely illustrates the possible content of the term „civil matters”.

Also, to leave no place to confusions, Art. 3 sets up the limits of the Regulation application, excluding the following issues:

- (a) the establishment or contesting of a parent-child relationship;
- (b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;
- (c) the name and forenames of the child;
- (d) emancipation;
- (e) maintenance obligations;
- (f) trusts or succession;
- (g) measures taken as a result of criminal offences committed by children.

It is important to note that the Regulation gives a wide definition of the term “parental responsibility”, as provided by Art. 2/7:

- the term "parental responsibility" shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access;

As such, the term covers all rights and duties of a holder of parental responsibility relating to the person or the property of the child. This encompasses not only rights of custody and rights of access, but also matters such as guardianship and the placement of a child in a foster family or in institutional care. The holder of parental responsibility may be a natural or a legal person (Art. 2/8).

From the point of view of our work on best practices in using mediation for solving cross-border family matter, it is of relevance that the term "court" shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1 (Art. 2/1) and also that the term "judgment" shall mean a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision (Art. 2/4). This definitions provide the space for using alternative methods of dispute resolution such as mediation, which is expressly provided for at Art. 55 (e).

The core of the Regulation is located in Chapter II Jurisdiction (Art. 3 to 20) and Chapter III Recognition and Enforcement (Art. 21 to 52). These chapters include all the rules and procedures considered necessary and mandatory by the Council in order to accomplish the objectives set up by the EU fundamental treaties regarding the establishment of a single, integrated market based upon the principle of free movement of goods, capitals, services and persons.

The articles of Chapter II structure the assignation of jurisdiction in matrimonial matters and matters of parental responsibility. As such, Art. 3 sets up the general rules regarding jurisdiction, as follows:

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

- (a) in whose territory:

- the spouses are habitually resident, or
- the spouses were last habitually resident, insofar as one of them still resides there, or
- the respondent is habitually resident, or
- in the event of a joint application, either of the spouses is habitually resident, or
- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there;

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the "domicile" of both spouses.

2. For the purpose of this Regulation, "domicile" shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland.

Further on, Art. 8 to 14 develop a complete set of rules of jurisdiction to determine the Member State whose courts are competent. Important note: the Regulation determines only the Member State whose courts have jurisdiction, but not the court which is competent within that Member State, which is left to domestic procedural law. It is the consequence of the fact that EU and member states have a shared competence over all these matters and decisions have to be taken at the most appropriate level.

The Parental Vademecum, a Practice Guide for the application of the new Brussels II Regulation, drawn up by the Commission services in consultation with the European Judicial Network in civil and commercial matters, has come up with the following scheme to help users understand the analysis that courts have to make in order to establish jurisdiction:

Do I have jurisdiction pursuant to the general rule (Art. 8)? **YES**

If NO Do I have jurisdiction pursuant to Art. 9-10,12 or 13? **YES**

If NO Does a court of another Member State have jurisdiction under the Regulation (Art. 17) ?

If YES I must declare of my own motion that I do not have jurisdiction under the Regulation

If NO Where no court is competent, I can (Art.17) exercise any jurisdiction available under my national law ("residual jurisdiction") (Art. 14)

According to these provisions, the basic rule for establishing the relevant court of the Member State for matters of parental responsibility is of the habitual residence of the child. However, "habitual" do not refer to any concept based on national law, but as it is a notion related to Community law. It means that "if a child moves from one Member State to another, the acquisition of habitual residence in the new Member State, should, in principle, coincide with the "loss" of habitual residence in the former Member State.

Consideration by the judge on a case-by-case basis implies that whilst the adjective “habitual” tends to indicate a certain duration, it should not be excluded that a child might acquire habitual residence in a Member State the very day of the arrival, depending on the factual elements of the concrete case.” (Parental Vademecum).

There is also not only the issue of space involved in determining the jurisdiction, but also of time, as the habitual residence is determined “at the time the court is seized”. It is to be noted that, once the jurisdiction is acquired by a court, it retains it even if the child habitual residence changes during the period of court proceedings.

Articles 9 to 13 set up the exceptions of the general rule. Courtesy to the Parental Vademecum, the way the exceptions included in Art. 9 is illustrated by the following logical scheme:

Has a decision on access rights been issued by the courts in the Member State from which the child moved (“the MS of origin”)?

If NO Article 9 does not apply, but the courts of the other MS become competent once the child acquires habitual residence there according to Article 8.

If YES Has the child moved **lawfully** from the MS of origin to another Member State (“the new MS”)?

If NO If the removal is unlawful, Article 9 does not apply. Instead, the rules on child abduction apply.

If YES Has the child acquired habitual residence in the new MS within the 3 months period?

If NO Article 9 does not apply. If the child still has habitual residence in the MS of origin after 3 months, the courts of that MS remain competent according to Article 8.

If YES Does the holder of access rights still have habitual residence in the MS of origin?

If NO Article 9 does not apply.

If YES Has the holder of access rights participated in proceedings before the courts of the new MS without contesting their competence?

If YES Article 9 does not apply

If NO Article 9 applies.

The lawmakers have also left open the procedures of establishing the jurisdiction, in certain situations stipulated at article 15, leaving the final decision to the courts in order to devise a flexible approach to be adapted to specific cases. This innovative rule allows, as exception, that a court which is seized of a case transfers it to a court of another Member State if the latter is better placed to hear the case. The court may transfer the entire case or a specific part of it. Art. 15/3 enumerates the situations where this exception is possible:

(a) has become the habitual residence of the child after the court referred to in paragraph 1 was seized; or
(b) is the former habitual residence of the child; or
(c) is the place of the child's nationality; or
(d) is the habitual residence of a holder of parental responsibility; or
(e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.

This exception is set in motion by application from a party, of the court's own motion or upon application from a court of another Member State with which the child has a particular connection, in accordance with Art.15/3. A transfer made of the court's own motion or by application of a court of another Member State must be accepted by at least one of the parties (Art. 15/2)

Chapter III concerns the rules necessary for the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility. Articles 21 and 23 to 29 describe these rules and their functioning. Generally speaking, a decision made by a court in a member state should be recognized or not and declared enforceable at the request of any interested party. This request has to be made to the competent court of the member state where recognition and enforcement is sought. There is a special list of courts designated for this purpose by every member state. These courts will declare without any delay if they recognize the decision and make it enforceable. No one can submit observations to the court.

Non-recognition can be based upon the followings:

- this would be manifestly contrary to the public policy in the Member State addressed;
- the child has not been given the opportunity to be heard except in case of urgency;
- the judgment was given in the absence of a person who was not served with the documents instituting the proceedings in sufficient time and in such a way as to enable him or her to arrange for his or her defense, unless it is determined that he or she has accepted the judgment unequivocally;
- the person claiming that the judgment infringes his or her parental responsibility has not been given an opportunity to be heard;
- the judgment is irreconcilable with another judgment, in the conditions set out in Article 23(e)(f);
- the case concerns the placement of a child in another Member State and the procedure prescribed in Article 56 has not been complied with.

The parties can appeal against the non-recognition decision, and the appeal will be judged by courts specially designated by the member states.

As one of the main objectives of the Regulation is to ensure that a child can maintain contact with all holders of parental responsibility after a separation even when they live

in different Member States, articles 40, 41 and 43 deal with access rights. Of crucial importance concerning the access rights is the right to take the child to a place other than the habitual residence, for a limited period of time. Of course, access rights include all form of contact and other persons, including by telephone or e-mail, and they can be granted to the family member with whom the child does not reside, or to other family members like grandparents, within the limits of national laws.

Recognition and enforceability of judgments regarding access rights are governed by the new rules designed by the Regulation. Such a judgment granting access rights is directly recognized and enforceable if it is accompanied by a certificate issued by the judge of origin who made the judgment (Art 41/1). Article 41, paragraph 2 specifies the conditions needed for a certificate to be issued:

2. The judge of origin shall issue the certificate referred to in paragraph 1 using the standard form in Annex III (certificate concerning rights of access) only if:

(a) where the judgment was given in default, the person defaulting was served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defense, or, the person has been served with the document but not in compliance with these conditions, it is nevertheless established that he or she accepted the decision unequivocally;

(b) all parties concerned were given an opportunity to be heard;
and

(c) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity.

The certificate shall be completed in the language of the judgment.

The practical effect of the fact that a judgment is directly recognized and enforceable in another Member State is that the mentioned judgment it is to be treated as a “national” judgment and be recognized and enforced under the same conditions as a judgment issued in that Member State. If a party does not comply with such a judgment, the other party will directly request the authorities in the Member State of enforcement to enforce it. The enforcement procedure is governed by national law.

The provisions of subsequent articles of Chapter III regard the regime of authentic instruments and agreements, the enforcement procedures, the costs and the legal aid provisions, including legalization and other similar formalities.

Chapter IV of the Regulation deals with cooperation between central authorities in matters of parental responsibilities, establishing the rules and procedures concerning this cooperation. In order to assist with the application of the present Regulation provisions, member states are required to set up one or more central authorities and to specify the geographical and functional jurisdiction of each of them. To fulfill their role of facilitating cooperation in matters of parental responsibilities, these central authorities are mandated to (Art. 55):

(a) collect and exchange information:

(i) on the situation of the child;

(ii) on any procedures under way; or

(iii) on decisions taken concerning the child;

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

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

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

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

The rest of the Chapter deals with the procedures regarding the assistance given by central authorities to other similar entities or to the parties themselves. It also specifies that this assistance should be free of charge and the central authorities shall bear their own costs.

Chapter V operates the connections between the present Regulation and other legal instruments (like the Treaty with the Holy See in Rome), whether Chapter VI contains the transitional provisions, including the entrance into force of the Regulation.

All in all, the Regulation 2201/2003 provides a simplified path to establish jurisdiction in matrimonial matters and matters of parental responsibilities, with the aim of a uniform application on the territory of the entire European Union. It also structures the mechanism of recognition and enforceability of judgments made in matters of parental responsibilities, adopting as a general rule the fact that judgment made in one of the member states should be recognized and enforced in any other member state involved in the case, with certain exceptions regarding particular situations.

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

As we have already noted above, Regulation 2201/2003 contains an important provision regarding the possibility of resolving disputes on family matters by mediation, through Art. 55 paragraph (e): facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end.

Experience has shown that addressing and solving cross-border disputes is not an easy matter. Even with the help of EU regulations like 2201/2003, establishing jurisdiction still remains a time consuming and financially burdensome enterprise, having negative consequences upon the parties involved, especially upon the children and their protection of interests, property and welfare. To this end, encouraging parents to solve their differences regarding parental responsibilities through alternative means of resolution as mediation has long been seen as a way of saving both time and money and, more so, of safeguarding the superior interests of the child. Together with the expansion and deepening of the cross-border commercial relationships related to the advance of the single market, all these motivated the lawmakers of the European Union to draw the general lines of using mediation as a more time- and cost-saving method of dealing with cross-border disputes. The Directive 2008/52/EC was the direct result of these efforts.

Using mediation as an alternative to courts was not a new European advent. Mediation had been tried for decades (if not more, in some cases like Denmark) in various member states, with varying degrees of success. England and Netherlands had been pioneers of implementing mediation within their national justice systems, under the form of functional pilot programs designed to test the method and its reception by public. The results were deemed worth of pursuing these policies and proved contagious, as other countries started to experience different models of alternative dispute resolution mechanisms.

As with other practices, mediation in Europe was implemented piecemeal and rather chaotic, with member states using a wide range of strategies to make mediation attractive for their citizens, with big variations in degree of implementation and inconsistent results. As courts became more and more overwhelmed, as public budgets shrunk and cross-border disputes grew in number exponentially, it became clear that a new, more coordinated approach would be needed if mediation (and other alternative dispute resolution methods) was to succeed. Directive 2008/52/EC was intended to be such an approach. Even if it focuses on the wide domains of civil and commercial matters, it is of no limited interest for family matters, especially those regarding matrimonial matters and matters of parental responsibilities.

It has to be noted that the Directive is not the first European document concerning alternative methods of dispute resolution. It is based upon the Conclusions on alternative methods of settling disputes under civil and commercial law, adopted by the Council in May 2000, a document stipulating that the establishment of basic principles in the area of alternative dispute resolution is essential for the development and operation of extrajudicial procedures for the settlement of civil and commercial disputes and to improve access to justice.

In April 2002, the European Commission presented a Green Paper on ADR in civil and commercial disputes, taking into account the present situation and enabling consultations between member states and interested parties concerning possible measures of implementing and promoting mediation. This process opened the road towards Directive 2008/52, a document seen as contributing to the proper functioning of the internal market as part of the policy of the European Union to establish an area of freedom, security and justice, which encompassed access to judicial as well as extrajudicial dispute resolution methods.

In its preamble, the Directive stipulates that “mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements.” All these are elements pleading for the wide use of mediation as a mainstream method of dispute resolution, on equal foot with traditional judicial procedures.

Key to understanding the importance of the Directive as a turning point in mediation implementation and promotion in the EU is paragraph (8) of the preamble, saying “the provisions of this Directive should apply only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal

mediation processes". This paragraph became the instrument of pressure used by EU bodies, notably the Commission, to nudge the member states to implementing and promoting mediation more boldly within their own judiciary systems.

The Directive strikes to set up a proper balance between mediation and judicial procedures by asking the member states to make agreements resulted from mediation enforceable in cross-border disputes, as it was the case with the Regulation 2201/2003 provision about recognition and enforceability. The Directive recommends that an agreement resulted from mediation in one member state should be recognized and enforced in another member state (if the case requires), except is its provisions contravene national legislation of the enforcing state. It also forbids the use of mediation agreements enforceability rules to circumvent the limitations imposed by Regulation 2201/2003 on the recognition and enforceability of judgments on parental responsibilities.

The Directive's preamble also takes note of the decision of England and Ireland to take part to the adoption and application of the Directive and of Denmark to use its opt-out right and not take part in the process.

The provisions of the Directive concern the definition of mediation and mediators, the definition of cross-border disputes, the quality and access to mediation, the enforceability of mediation agreements, the voluntary and confidential nature of the process, its effects on the limitations and prescription periods and rules regarding the information of public and on competent courts and authorities.

Regarding the definition of mediation as a process, the Directive had to take into account the wide range of definitions present in the body of literature available on the matter. As there is no universally recognized definition of mediation (against all efforts done by institutions like the International Mediation Institute to deliver one), the Directive had to come up with one that can broadly cover all visions, even if this approach is not necessarily contributing to clarifying the issue. Art. 3 (a) says:

"‘Mediation’ means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question."

This definition contains a number of elements of importance to the understanding of mediation as a process. First of all, mediation refers only to those processes where two or more parties (in person or represented) attempt to settle their dispute with the assistance of a mediator. Decision to settle rests with the parties and cannot be forced upon them by the mediator. Therefore, mediation excludes negotiation made by the lawyers of the parties themselves in order to settle the matter out of court, or by judges or courts seized to make a decision through judicial proceedings. A judge can play the

role of mediator only in disputes where she/he is not the person making the judgment (as in the notable example of France, where judges regularly play the role of mediators). Mediation is, by a large, a negotiation between the parties where they benefit from the support of a third party (preferably neutral and impartial), no matter how this third party is called. The decision is retained by the parties, and they can proceed or stop the proceedings of mediation on their own will.

The term “voluntary” included in the definition presides over the whole understanding of mediation as an alternative to courts in settling disputes. It signifies that, by no means, mediation is not a replacement of the courts – the principle of free access to justice is fundamental to any proper democracy and cannot be infringed by ordering the parties to use mediation and deny their “day in court” if they not oblige. The voluntary principle of mediation means that courts or other authorities can suggest or even order the parties to attend mediation, but they cannot deny their right to use the courts venue to settle their dispute based on their non-compliance with the court suggestion or order. This principle is also based on common-sense: as long as mediation is defined as a special negotiation process (assisted or facilitated by a third party), it is only logical that parties cannot be forced to negotiate and settle if they do not want to.

Another fundamental elements necessary to make mediation an attractive way of solving disputes out of court are embedded in the definition of the mediator (Art. 3 (b)) and the recommendations for ensuring the quality of mediation process (Art. 4). The entire body of literature on mediation stipulates that neutrality and impartiality of the mediator are essential for the success of mediation. Neutrality is defined as the absence of any conflict of interests (the mediator should not have any proverbial horse in the dispute she/he is called to mediate). Impartiality refers to the need to treat the parties equally and without unilateral favor and also, more controversially, to uphold the balance of power between the parties. This last provision is contested by some schools of thought as contrary to the principle of self-determination of the parties – the decisions regarding the flow of the mediation process and the settlement rest entirely with the parties, so it's up to them to decide how to devise the terms of the agreement, no matter the opinion of the mediator about the fairness of them.

The competence of the mediator is also of concern for the Directive. There is no chance of making mediation an attractive and effective way of solving disputes out of court if quality of the process of mediation is not guaranteed in a way or another by lawmakers. The experience of countries where mediation is considered a simple activity (not a profession) and is not regulated (or very lightly regulated) shows that quality of mediation process varies on a wide scale and this contributes to the marginalization of mediation. As such, the Directive recommends:

1. Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organizations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.

2. Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties.

Further on, the articles 5 to 8 contain provisions concerning the characteristics of the mediation process. First, it is important to note the recommendation for courts to send the parties to mediation, whenever the courts deem appropriate (Art. 5/1). More, the Directive does not oppose member states decisions to adopt legislation making recourse to mediation compulsory or “subject to incentives and sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system” (Art. 5/2). It means that, as long as the free access to justice is not affected, member states can introduce rules making the recourse to mediation mandatory. This provision contradicts the principle of voluntary access to mediation and also the principle of self-determination and it generated heated disputes following the implementation of these kind of measures in countries like Italy or Romania. The contradiction has not been solved to-date, highest courts in these countries striking down the mandatory measures as unconstitutional.

The use of mediation in cross-border disputes would be of no consequence if agreements reached in one member state would not be recognizable and enforceable in any other one. Accordingly, article 6 of the Directive stipulates that “Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.” The courts of the member states or any other competent authority designated by them are responsible for making the agreements enforceable.

Confidentiality of mediation is universally considered a key aspect of this method of dispute resolution. It is seen as one of the most attractive characteristics of the process and is consequently guaranteed by law in any country implementing it. For this reason, the article 6 of the Directive provides that “Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process”.

Confidentiality is limited by to exceptions. First, confidentiality cannot be claimed in cases where the testimony of mediators is “necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person”. Second, confidentiality is forfeited in cases where “disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement”, a rather logical provision made by the creators of the Directive.

Of no small matter is the effect of mediation (or the recourse to mediation, to be more precise) on the limitation and prescription periods. As mediation is not to be considered a substitute of the judicial procedures and as recourse to mediation should not forfeit

the right of the parties to “have their day in court”, the Directive recommend that member states should make sure that recourse to mediation shall not in any form prevent the parties to initiate judicial procedures by the expiration of limitation or prescription periods. The intention of the lawmakers when adopting the Directive was not to replace judicial procedure with mediation in a n “or/or” type of option, but as an “and/and” process, whereas mediation complements the courts in helping settle the disputes cost- and time-effectively.

The Directive 2008/52 aimed to create a common denominator for the implementation of mediation by EU member states, without infringing on national legislations already doing it. That’s the reason for the relative vagueness of the Directive recommendations and for leaving a lot of space for particular approaches to be taken by national legislators. As the practice of mediation vary a lot from country to country and it is strongly affected by national culture in general and national juridical culture, with consistent differences between, for example, Northern and Southern European states, the task of the Council was not to standardize the practice of mediation in the EU, but rather to make agreements resulted from mediation recognizable and enforceable across borders. With this objective in mind, a minimal correlation of implementation, promotion and practice of mediation by member states, resting on a common set of principles, was considered essential for the success of this ambitious enterprise.

These minimum standards were to be implemented by member states in their legislation by no later than May 21st 2011. Also, the member states were required to communicate to the Commission the measures taken to implement the recommendations of the Directive. By that date, all EU member states have proceeded to the task, with various degrees of success and compliance.

2.4. Implementation of Directive 2008/52/EC by EU member states

By July 15th 2011, the Committee on Legal Affairs has published the Report on the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by the courts, a document that sums up the efforts of the EU member states to transplant into their national legislation of the recommendation of the Directive 2008/52/EC.

As expected, the results were far from being uniform. Some of the member states were praised by the Report for their diligence whether others were nominated for their apparent lack of enthusiasm for the implementation of the recommendations.

The Report noted that all member states had dutifully implemented the recommendations regarding confidentiality and the effects of mediation upon the limitations and prescription periods. Also, progress had been made by the majority of the states regarding the procedures needed to give mediation agreements the same weight as a judicial decision but noted that, whereas some national legislators opted for the variant of submitting the agreement to courts, many other chose for the notarization of the agreement, as an option already existent in their national law. Slovenia and Greece are nominated as examples of the former variant (submitting to the courts) whether in Germany or the Netherlands agreements can be rendered enforceable as

notarial acts (according to law provision). In Austria, agreements become enforceable as notarial acts even if this provision does not exist in Austrian law explicitly.

In terms of incentives and sanctions to render recourse of mediation by public wider, the Report notes that some member states had chosen to go far beyond the recommendations of the Directive. A number of states opted to include incentives in their laws for attracting the public to the use of mediation. In Bulgaria, parties received a refund of 50% of the state fee already paid for filing the dispute in court if they had successfully resolved a dispute in mediation. Hungary has similar provisions and in Italy “all mediation acts and agreements are exempt from stamp duties and charges”.

Other states opted for sanctions, such as the impossibility of filing disputes into courts before the parties have first attempted to resolve the issues by mediation. Italy was given as a singular example for its Legislative Decree 28 “which aims in this way to overhaul the legal system and make up for the notoriously congested Italian courts by reducing caseloads and the nine-year average time to complete litigation in a civil case; observes that, not surprisingly, this has not been well received by practitioners, who have challenged the decree in court and even gone on strike”. (To be noted: the Decree has already been struck down by Italy’s Supreme Court of Cassation as unconstitutional).

The Report took note of the positive effects the mandatory measures apparently had upon the de-congestion of overwhelmed courts in various countries, but, nonetheless, recommended that “mediation should be promoted as a viable, low-cost and quicker alternative form of justice rather than a compulsory aspect of the judicial procedure”. There is still an ongoing dispute, involving scholars, practitioners and lawmakers, over the positive/negative effects of the mandatory measures in mediation, all parties citing all sorts of statistics to support their respective point of view. The contradiction between the voluntary character of mediation and the principle of self-determination, on one hand, and the mandatory measures taken to enforce the use of mediation on a wider scale, on the other hand, will not be easily solved in the near future, especially as solid, reliable data about the use of mediation and its impact on the judicial systems is conspicuously absent. Research done by the author of this chapter during the years 2013-2014 have revealed that there is almost impossible to find out, with a decent degree of precision, how many mediation cases occur in most of the member states. Establishing the number of mediators in EU is also a futile attempt (there are very few countries keeping accurate, if at all, national rosters), which makes unthinkable the measuring with any degree of accuracy and reliability the impact of mediation and mediators upon national judicial systems or of the success of mediation itself. As such, coming up with solid arguments in favor or against mandatory measures is a daunting task, possible may be in a faraway future, when professional national bodies of mediators or institutions mandated to supervise and regulate the activity of mediators will begin collecting data in regularly and systematically manner. Just citing the increase of numbers of people coming to mediation following the introduction of mandatory measures (a rather tautological, circular argumentation) does not constitute credible evidence for the success of these measures.

The Report considered that there is a clear need to increase the awareness of the public regarding mediation, lack of knowledge about this procedure having a significant

negative effect upon the recourse to mediation. The Report, in its final provisions, recommended that member states should step up their efforts of promoting mediation, considering that “those actions should address the main advantages of mediation – cost, success rate and time efficiency – and should concern lawyers, notaries and businesses, in particular SMEs, as well as academics”. The focus of these actions should be the benefits of mediation for users, the fact that, in the words of the Report, “mediation is more likely to produce a result that is mutually agreeable, or ‘win-win’, for the parties; notes that, as a result, acceptance of such an agreement is more likely and compliance with mediated agreements is usually high” and “parties who are willing to work toward resolving their case are more likely to work with one another than against one another; [...] therefore these parties are often more open to consideration of the other party’s position and work on the underlying issues of the dispute”.

A detailed analysis of the strategies adopted by each EU member state for the implementation of Directive 2008/52 in their national legislation was done by a team coordinated by professor Giuseppe De Palo, president of the ADR Center, member of JAMS International, international professor of ADR Law and Practice, Hamline University School of Law, Minnesota and professor Mary B. Trevor, Director of Legal Research and Writing Department, Hamline University School of Law, Minnesota, in a book published in 2012 by Oxford University Press and called “EU Mediation Law and Practice”. This collective work present how the member states of the EU have decided to address the requirements of the Directive 2008/52, grouped in 9 major directions:

1. Court Referral to Mediation
2. Protections Provided to Ensure Confidentiality of Mediation Proceedings
3. Enforceability of Mediation Agreements
4. The Impact of Mediation on Statutes of Limitation
5. Requirements for Parties and Lawyers to Consider Mediation as a Dispute Resolution Option
6. Requirements for Parties to Participate in Mediation
7. Accreditation Requirements for Mediators
8. Mediator Duties
9. Duties of Legal Representatives and Other Professional Mediation Participants

As a presentation, even brief and overly-general, of all member states would be far beyond the dimensions and the scope of this chapter, there is still a need to understand how the recommendations of the Directive 2008/52 were translated at the level of national legislation. Consequently, and because the 2011 Report had praised Romania as an example of how it transposed the Directive into its own national legislation and how it built a functional mediation system from scratch, it is only natural to give this country closer look. This analysis will use a slightly different set of categories than the work of de Palo and Trevor, for reasons related to the structure itself of the Romanian Law of Mediation and the relevancy of certain aspects of the Romanian strategy of implementation.

Mediation has been brought within the Romanian judicial system through the Law 192 on mediation and the profession of mediation, law adopted by the Parliament in May 2006. The Law provided the general framework for the organization and the practice of mediation in Romania. It has been amended several times (in 2009, 2010 and 2012) to incorporate the recommendations of the Directive 2008/52 but also the experience

gained during the period by the practitioners and the lawmakers in the field of mediation.

The core principles of mediation are embedded in the very first article of the Law which defines mediation “a way of amicable settlement of conflicts, with the support of a third party specialized as a mediator, in terms of neutrality, impartiality, confidentiality and with the free consent of the parties”, reflecting the definition adopted by the Directive, but going beyond it to nominated all the pillars of mediation process: neutrality and impartiality, confidentiality, voluntary nature and self-determination.

Court referral to mediation has been stipulated by article 6 of the Law, which originally provided that “judicial and arbitration bodies, as well as other authorities with jurisdictional powers may inform the parties on the possibility and on the advantages of using the mediation procedure and may advise them to resort to this recourse in order to settle conflicts between them”. Later on, the expressions “may inform” and “may advise” were transformed into “shall inform” and “shall advise”, adding an element of compulsion and making information by courts about mediation imperative.

A hugely controversial element of compulsion in the recourse to mediation was added in 2012, when mandatory attendance to information session prior to filing a dispute in court was introduced in the body of the Law. It required the parties (especially the aggrieved party) to attend an information session about mediation and to obtain certificate of attendance from the third party making the information. This certificate became a required condition for the registration of a suit in court – the court would refuse to register the case in the absence of this certificate. Article 2 of the Law was modified to make reference to these mandatory information sessions and the types of disputes that required a certificate prior to registration in courts:

1) Unless the law provides otherwise, the parties, natural or legal persons, shall be bound by the obligation to attend the information session on advantages of mediation, including, if necessary, after the onset of a trial before the competent courts, in order to settle this way the conflicts on civil, family, criminal matters, as well as on other matters, under the terms provided by law.

(1[^]1) The proof of attendance in the information session on advantages of mediation shall be given by an informative certificate issued by the mediator that has made the information. If one of the parties expresses in writing the refusal to attend the information session, does not respond to the invitation provided in Article 43 (1) or does not appear at the date set for the information session, a minutes shall be prepared, which shall be enclosed to the court file.

(1[^]2) The court shall dismiss the request for summons as inadmissible in case the applicant does not meet his obligation to attend the information session on advantages of mediation, prior to filing the request for summons, or after the onset of the trial by the time limit set by the court for this purpose, for disputes arisen on matters provided in Article 60[^]1 (1) a) - f).

(1[^]3) The carrying out of the information procedure on advantages of mediation may be performed by the judge, prosecutor, legal adviser, lawyer, notary, in which case it shall be attested in writing.

(1⁴) The services provided according to the provisions of paragraphs (1) and (1¹) shall be free of charge, being forbidden to charge fees, duties or any other amounts, regardless of the title under which they might be requested.

(2) The provisions of this Law shall also be applicable to conflicts in the field of consumers' protection, in case the consumer invokes the existence of injury as a result of having purchased defective products or services, of failure to comply with the contract clauses or with the securities provided, of existence of certain abusive clauses included in the contracts concluded between the consumers and the economic operators or of infringement of other rights provided by the national law or the European Union law in the field of consumers' protection.

The “mandatory information clause” became an element of discontent and harsh disputes occurred between mediators, lawyers, notaries, judges and lawmakers regarding various aspects of this clause and the practice of these sessions. Even more questionable was the effect of this clause upon the recourse to mediation by parties, with no significant data to prove an increase in the use of mediation compared to the period prior to the introduction of the clause. Eventually, in 2014, the Constitutional Court stroke down the clause as un-constitutional. Work is ongoing now in the Parliament to find a replacement of this clause with a more amenable and less divisive set of provisions regarding the recourse to mediation.

To ensure the quality of the mediation process (keystone of making mediation attractive to public), the Law provided that mediation cannot be practiced but by authorized mediators required to fulfill a number of conditions in order to be accredited. The accreditation body was designated the Council of Mediation, an independent organism, made of mediators and elected by mediators, in charge with all aspects regarding mediation in Romania. The conditions to become an authorized mediator were stipulated by article 7 of the Law:

The persons who meet all the following conditions may become mediators:

- a) they have full capacity of exercise;
- b) they have university education;
- c) they have at least 3-year length of service;
- d) they are fit, medically speaking, to pursue this activity;
- e) they enjoy a good reputation and have not been finally convicted for an offence committed by ill intention, likely to prejudice the prestige of the profession;
- f) they have graduated from mediator training courses, under the terms of the law, or a post-university master-based program in the field, accredited according to the law and endorsed by the Mediation Council;
- g) they have been authorized as mediators, under the terms of the law.

Also, provision were made by the Law in order to ensure the professional development of mediators after authorization and the observance of them of a Code of Conduct able to guarantee the parties a fair and effective mediation process.

There are several provisions with special reference to the safeguard of confidentiality.

First, article 37 stipulates that:

(1) the mediator can't be heard as a witness in relation to the facts or acts that he became aware of during the mediation procedure. In criminal cases the mediator may be heard as a witness only if it has obtained the prior, express and written consent of the parties and, where appropriate, of the other parties concerned.

(2) The status of witness takes precedence over that of mediator, as regards the facts and circumstances of which he was aware before becoming a mediator in that case.

(3) In all cases, after being heard as a witness, the mediator may no longer conduct mediation in that case.

Second, the agreement to mediate, signed by the parties and the mediator prior to the mediation sessions, must specifically point to the fact that the mediator has the obligation to keep the confidentiality about all matters concerning the mediation process (Art. 45 (d)).

In terms of enforceability of the agreement, as required by Directive 52, the Law provides at article 59:

(1) The parties may request authentication from the notary public of their understanding, under the terms of the law and in compliance with the legal procedures

(2) The parties to the mediation agreement may go to court to request, in compliance with the legal proceedings, to give a decision to legalize their understanding. Competence shall lay with the court in whose jurisdiction any of the parties have their domicile or residence or, where appropriate, the head office or the court of first instance in whose jurisdiction is located the place where it has been signed mediation agreement. The decision whereby the court consents on the understanding between parties shall be delivered in the Council Hall and shall be an enforcement order under the law. The provisions of Article 438 - 441 of the Law No 134/2010 of the Civil Procedure Code, republished, as amended, shall apply accordingly.

As incentives for the parties to give preference to settlement through mediation rather than by judicial decision, the Law provides that, if the parties of a lawsuit solve their dispute using mediation, they will be fully refunded, upon request, for all fees they have to pay to fill the lawsuit.

Concluding the analysis, it is clear that Law 192/2006 and its subsequent modifications brought by the Laws 370/2009, 202/2010, 76 and 115/2012 can be considered a model of transposing the recommendations of the Directive 2008/52 in the legislation of Romania. What is not so clear is how this transposition positively influenced the recourse to mediation in this country, where the use of mediation remains (as in all Europe) extremely limited, especially if compared with the recourse by public to judicial procedures. There is still an overwhelming bias of the public towards to courts of justice. Bringing mediation at equal stature and status is a matter of time and commitment of all stakeholders.

Chapter 3: Intercultural character of cross border mediation

3.1. Introduction

The progresses in trade and technology have highly contributed to increased interactions between different countries, and this has really resulted in expansion of cross border disputes.

Unfortunately, cross border disputes are often very much complicated owing to the involvement of diverse national laws, language barriers, cultural differences, different ways of thinking and acting, different religious and ethnic creeds, and presence of disputants at different geographical locations.

In this regard, it is true and objective that the advantages of mediation, if compared to court proceedings, are enormously positive and in favor of the disputants, especially in cross border cases.

On this way, mediation is really useful not only for any internal legal system, but also for cross border and cross cultural litigations.

Cross border mediation can become a must especially for its strategic importance in civil and commercial relations between EU Countries' citizens.

In fact, mediation is a flexible and powerful tool that can concretely facilitate effective resolution of cross border disputes, and it can be considered as a "social procedure" for resolving conflicts, for a social pacification on a large scale. Mediation, as well as to resolve conflicts between the litigants, exerts a positive pressure, attracting positivity, peace, respect, within the community in which litigants operate, live and fight. To a greater extent, then, where mediation is cross border, the positive effect of attraction pours on the broader impact of the mediation, which manages a conflict that crosses borders and broadens its range of negative impact if it is not positively managed.

Besides, the use of mediation in cross border cases can definitively break down all the juridical and geographical boundaries, and ideological and cultural barriers, that often make up the real causes of conflicts between people, or exacerbate the conflict in itself.

The use of mediation in cross border cases can really overcome these problems, helping the parties to reach a quick and cheap agreement, and of mutual satisfaction.

Often, then, the negotiation process (especially in a cross border mediation) is facilitated by the use of tools of online dispute resolution (programs of audio-video teleconferencing), in which parties and mediator sit around a single virtual table for negotiations; connecting themselves to the same electronic platform from multiple different physical locations. In this latter case, then, one can just admit that physical barriers are virtually fully exceeded. It is not unlikely that each party of a cross border mediation, managed by the use of the internet, is located in a different country. Staying each party "at home", sometimes makes negotiating in mediation softer and creates opportunities. This, because each party, staying at home, feels to have the same position of power of the counterparty, and he is not forced to give in on some point.

In this way, mediation reach the point to be a equilibrated solution, in which each party can truly express himself, freely and without prejudices and behavioral masks.

Since cross border mediation appears to be very complicated to manage, it needs to be handled by a professional mediator very prepared, who knows the legal frameworks of the parties' countries, culturally sensitive and open, with a great degree of psychological preparation, sociological, and a thorough understanding of the different beliefs and habits of the disputants.

3.2. Cross border mediation

Cross border mediation is a process where a mediator (or more than one) assists two or more parties to manage and, hopefully, resolve a multi-jurisdictional dispute within the European Union.

Cross border mediation can be used in cases where the parties have voluntarily agreed to try to settle their dispute amicably and mutually, where a court has referred the parties to mediation, or where the law of a country compels parties to use mediation.

Cross border mediation was introduced by the European Parliament and the Council of the European Union under Directive 2008/52/EC, which came into force in the EU member states on 20 May 2011, and covering certain aspects of mediation in civil and commercial matters.

Above others, Directive 2008/52/EC aims to

- (1) simplify and facilitate better access to justice;
- (2) adopt measures in the field of judicial cooperation in civil matters necessary for the proper functioning of the internal market;
- (3) provide a cost-effective and quick resolution of disputes through a process that is tailored to the needs of the parties; and
- (4) promote mediation throughout the EU within a quality controlled and predictable legal framework.

What is a cross border dispute?

In order to ensure judicial security, the Directive provides criteria to determine the cross border nature of a dispute.

According to art. 2 of the Directive, cross border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which:

a) the parties agree to use mediation.

The fact that the parties agree to use mediation can occur in two circumstances:

- (i) before the onset of the dispute, by specific contractual agreement (for example, by providing a separate "mediation clause"); or
- (ii) once a dispute has arisen and the parties decide to start a mediation process.

b) mediation is ordered by a court.

c) an obligation to use mediation arises under national law.

Provisions under b) and c) are confirmed by considering No.12 and No. 14 of the Directive according to which, respectively, *"This Directive should apply to cases where a court refers parties to mediation or in which national law prescribes mediation (...)"* and *"Nothing in this Directive should prejudice national legislation making the use of mediation compulsory or subject to incentives or sanctions provided that such legislation does not prevent parties from exercising their right of access to the judicial system (...) "*.

d) for the purposes of Article 5 of the Directive an invitation is made to the parties.

It's also qualified as cross-border mediation that kind of mediation in which the court has jurisdiction to decide the dispute calls on the parties in order to resolve the conflict, leaving the mediation process to a neutral subject other than the court.

A cross border dispute shall also be one in which judicial proceedings or arbitration following mediation between the parties are initiated in a member state other than that in which the parties were domiciled or habitually resident on any of dates referred to above.

The objective of Directive 2008/52, as described in Article 1, is to *"facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and ensuring a balanced relationship between mediation and judicial proceedings"*, albeit under the objective that European Community has set itself *"to maintain and develop an area of freedom, security and justice, in which both the free movement of persons"* (considering no.1 of Directive 2008/52).

Directive 2008/52 applies, as stated in article 1, only to cross border "in civil and commercial matters", where rights are freely available by the parties. Directive 2008/52 does not concern disputes in revenue, customs or administrative matters or the liability of the state for acts or omissions in the exercise of state authority (*"acta iure imperii"*).

It is not relevant, then, the venue of the mediation, although it is likely to imagine this place located in the territory of one of the member states concerned by the cross border dispute, especially if the use of mediation is ordered by a court, or descended from an obligation imposed by law (under the meaning of Art. 2, letter b) and c) of the Directive). Also, in analogy with the contractual freedom of the parties, the only case in which mediation is managed into the territory of another different member state respect to the member states for which the lawsuit is relevant as "cross border" is represented by the choice of the parties (art. 2, letter a)) to have voluntarily recourse to mediation, in their freedom, to start the mediation process in a state other than their own, or from that

identified according to the criteria laid down in articles 59 and 60 of Regulation 44/2001, as recalled by Directive 2008/52.

Of course, as it is known, except that Directive 2008/52 concerns only disputes having the character "cross border" as defined above, the EU legislator has taken care to specify, already in considering n. 8, that this does not prevent the national legislator to apply the same rules for the internal mediation processes (i.e.: concerning internal quarrels to their country).

3.2.1 Advantages of cross border mediations

Cross border mediations are extremely advantageous in terms of money and time saving, if considering that a cross border lawsuit may have high costs and may last a lot of time, especially when the case is complicated, and there is the necessity to analyze many controversial juridical aspects in different jurisdictions.

Besides, it is not always simple to apply the laws on international private law, and the experts in cross border disputes are not so common.

Cross border mediation can overcome many difficulties and obstacles because, a part from the necessity to be under the law, and not against it, the parties have the duty and the obligation to observe a unique mediation rules, the one of the chosen mediation provider.

Cross border mediation provides a useful framework to enable parties to explore the issues, the needs, the interests and the underlying conflicts; developing realistic and fair options, and making sustainable agreements, if they are able and willing to do so, with the help of a third, impartial mediator, with great ethical, juridical and professional values.

Mediation deescalates conflicts and deals with the relationship level: it helps the parties to learn to communicate with each other in a civil manner during the mediation process and for the future, for the good of their relations. This advantage qualifies mediation as a "social" tool, for the growth of a common sense of justice, peace and reconstruction of broken relations.

Linked to the above mentioned advantage, the use of mediation may prevent future litigation, helping people to understand the value of a mutual accord, chosen directly by the litigants, who become authors of the reconstruction of their rapports, relations and future developments.

In fact, in any mediation the mediator helps the parties to look at a possible future together, to restore and increase (if it is possible) their relationships, and he tries to solve the problem that has arisen in the past between them, making them assume a possible future together (relational, entrepreneurial, rather than anything else, according to the matter of the dispute).

Although the parties are far apart (for culture, language, manners and ways of feeling, habits, beliefs, etc.), a cross border mediation unifies intent, as it helps the parties to

find a solution that emanate from themselves, and not by a decision imposed by the mediator, who is not acting as a judge or an arbitrator, but maintaining its impartiality, merges his soul with those of the parties, breathing in a unique with the parties, in order to support them, never pressing them, and directing them to achieve in a joint agreement that meets the needs and interests of all parties, without exception.

There is more. According to Article 6 of Directive, the agreement has the possibility to become enforceable, helping the entire mediation process to be viewed by citizens and enterprises, as an effective and useful tool of dispute resolution. In fact, member states shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. Naturally, the content of such an agreement shall be made enforceable unless, either the content of that agreement is contrary to the law of the member state where the request is made, or the law of that member state does not provide for its enforceability.

These are just some of the advantages of cross border mediation that for brevity of this paper cannot be expanded.

Concluding the paragraph, it is to say that the best advantage of cross border mediation (and of mediation in general) lies in the mediation itself, because mediation is the advantage. And only by practicing it, it is possible to discover all its irrepressible energy. The best advice, then, is to try mediation without delay, especially in cases that appear complex, and not inclined to be resolved in a courtroom.

Of course, it is necessary that each party, along with his trusted lawyer, spend some time to choose the mediation provider and (together with the counterparty, if it is possible) the mediator that best suits the specific matter of the dispute; this must be done in order to have the best chances of success.

3.2.2 Limits and potential risks in cross border mediations

Like every voluntary and consensus-based procedure, even cross border mediation presents some limits and potential risks that may arise before or during the process.

In regard to the limits, it is possible to try to explain how the mediation and the mediator can overcome them, for a better solution.

- Parties too emotionally involved to be able to understand the other's perspective. Sometimes feelings drive one party more than the other, especially when there are strong emotions involved in the dispute, and one party suffers for the behaviours and the externalizations of the other party, becoming frustrated and closing himself to every possibility to see a way of solution.

In this situation a well prepared mediator can make the difference.

In fact, although feelings, emotions and inner states and behaviors are very important in a cross border mediation in which there are often strong inner differences among the parties, the mediator knows the importance of helping each party to be honest and

transparent with himself, the mediator and the other parties. And when feelings take over, a mediator can initiate the activity of caucusing with the parties in private meetings, in order to analyze the problem with the party from whom that problem comes, without the presence of the other party.

This way of acting, helps each party to live mediation without masks, being extremely direct and open to respect and to try to understand the other party's necessities and feelings.

In fact, when there is the possibility for a party to stay alone with the mediator, without the presence of the counterparty, it creates an intimacy and a direct inner communication made of words, thoughts, non-verbal communications, which helps the party in caucus to see all the things in a different way, more constructive than ever.

- Extreme beliefs of the parties. One party may be convinced (by himself or by his lawyer) that he will win in a court proceeding and, for this reason, he is not willing to give or to try to find a compromise in mediation.

In this case the mediation process may itself be the mirror of the situation, especially when the mediator will act as "agent of reality" or as "prophet of the defeat" (as it is said among mediators).

In fact, one of the analysis that the mediator realizes with the parties, separately during the respective caucus (ie: private meeting), is to make reflect the party on the so called "best alternative to a negotiated agreement (B.A.T.N.A.) and "worst alternative to a negotiated agreement" (W.A.T.N.A.).

It is quite obvious that if the party reflects to have one (or more) B.A.T.N.A., that is a better chance outside mediation and respect to a mediated agreement, he will remain at the mediation table the less time is possible, making an accord with the counterparty only if the counterparty will satisfy all the requests done.

-But if the party is aware of having only WATNA, namely worse alternatives outside the agreement to be reached in mediation, surely he will remain at the negotiating table, even though he have the feeling that, in a court proceeding, he'd get more.

- Lawyers do not support mediation. It is not so strange that this situation from happening. In many member states, lawyers are opposed to mediation for bias; because they consider mediation as a loss of power, time and money for their activities.

Once again, only during the mediation process the mediator can change the situation, making the lawyers happy to be in mediation with their clients, and giving to the lawyers all the space they need (in terms of slots of time to speak and to represent their clients in mediation, possibility to do not lose their face in front of the clients, etc...).

Naturally, the mediator knows how to manage the discussions among the parties and their lawyers, he knows the right timing and he will do all the possible to do not have the situation in which the lawyers monopolize the negotiation process: first the parties then the lawyers, this is, generally speaking, the rule to keep in mind by a wise mediator!

- Lack of funds. In this case the language of mediation, which tries to find mutual and creative solutions, not only based on monetary requests, will have the better. One advantage of a mediation is that there is not the necessity to remain - during the bargaining - linked to the initial requests (as in the judicial proceedings where usually there is the principle of the "*petitum*"): the creative functions of mediation render the parties free to "enlarge the cake" (as the mediators say), making reflections "out of the box", for finding solutions which suit better to the real conditions and status of the parties. If the lack of funds is an objective obstacle for a real accord, it can be overcome by moving the focus of the bargaining on other scopes, non-monetary or not only monetary, based on other interests and needs which the parties may have or may discover to have during mediation.

- Difficulties putting agreement into practice. This last analyzed point is very important because all the efforts done during a mediation procedure can be destroyed or vanifed if - at the end of the negotiation positively done by the parties with the help of the mediator - there is not the possibility to write a precise written agreement, composed by valid contractual clauses, recognized by the law of the member state (or states) in which the agreement will need to come into force.

In support of a true valid accord it is needed that the mediation agreement is composed by the parties' lawyers with all the necessary characteristics to be considered valid and enforceable in the member state of execution of the contract clauses. Every mediation agreement may be composed also by a "monetary clause" that impose, in case of breach of the obligations contained in it by one party, to pay a defined sum of money to the counterparty.

3.2.3. Skills of mediators in mediating cross border disputes

The skills and characteristics for a mediator who deals with cross border mediations need to be very precise and high profile (theoretically and practically).

Because there is not a European recognized accreditation's level and/or an ability certification of cross border mediators, it is very important the role played by the training centers all around the EU.

In this way, it could be interesting to try to find a common training route, or a unified frame into which create training programs, for the best result of the training courses.

At large levels, only the International Mediation Institute (IMI) set up a Task Force in April 2010 to develop criteria for inter-cultural mediator trainings and IMI Certifications.

The IMI Inter-Cultural Task Force identified six Cultural Focus Areas (CFAs) that mediators may consider when mediating inter-culturally.

1. Relatedness and Communication Styles

Formal-Informal

Direct-Indirect

Emotional: High-Low

Emotional Expressiveness

Physical - Non-physical

Verbal, Para-verbal and Non-verbal

Personal-Impersonal

Sequential-Circular Reasoning

2. Mindset Toward Conflict

Negotiation Attitude (how participants may prefer to negotiate)

Attitudes to conflict: Positive - Negative

Risk taking: High - Low

Relationship building -Task orientation

3. Mediation Process

Expectations about:

Roles of Mediator and Participants

Predictability of Process

Need for an agenda

Social protocols

Separate or identifiable phases during the process

Fairness

Goals or Outcomes

4. Orientation Toward Exchanging Information

Transparent – Non-transparent

Legal or other norms or social conventions

Broad – Narrow

Non-specific - Contextual

Fact related – Non-fact related

5. Time Orientation

Polychronic – monochronic

Long Term-Short Term orientation

Past-Present-Future (facts, needs or interests)

Deadlines, Deliverables, Punctuality

Duration and Frequency (of joint and/or separate meetings)

Expected timelines for reaching outcomes

Time Pressure-No Time Pressure

6. Decision-making Approaches

Norms-based – Subjective interests-based

Mediator as norms-generator, norms-educator or norms-advocator

Individualist, Majority-led or Collectivist

Compromising-Non-compromising

Problem-solving-Outcome generating

Structured – Unstructured

Relationship oriented – Outcome-oriented

Participant driven – Constituency driven

General-Specific Forms of Agreement (oral, written, behavioral)

Inductive-Deductive Reasoning

Measurable – Non-measurable

More information on the project can be found at: www.imimmediation.org.

Because there is the implication of (potential) more jurisdictions, the mediator needs to have an **understanding of the legal situations** of the countries of parties involved in the cross-border dispute. Thus, it is important for mediators to be close familiar with the legal aspects of the dispute, but it is also paramount that parties receive adequate legal

counsel to inform them of their right and duties and the legal consequences of any decisions.

That said, the professional background of a cross border mediator should be juridical, in order to understand and not to underestimate juridical situations, potentialities and limits of each litigant.

Cultural differences play an important role as well; infact they can be able to modify the outcome of a possible agreement, or they can make possible a disagreement based upon cultural behaviors, ethnical belonging, religious or political beliefs, etc...

It is fundamental for every cross border mediator to understand that culturally relevant behaviors and expectations may help to explain parties' different perspectives, and to understand possible pauses or blocks that these perspectives may create during the negotiation process.

However, it is important that the mediator try to avoid considering cultural behaviors as a fixed concept valid to explain all behaviors that individuals may manifest during mediation. Those behaviors, in fact, may not always be group-related, but often can be linked to single party considerations (under the basis of: age, gender, sex, residence, etc.).

To this extent, cross border mediators should make every effort to apply their professionalism and understanding of culture as a tool valid to understand and (hopefully) foresee possible patterns of behavior, helping people from different cultures to communicate optimally with one another; finalizing their communications to a better accord.

Another important issue upon which cross border mediators need to be acquainted, is **the role of language** and the possibility of working with interpreters, together with **language barriers and misunderstandings** that may often be caused by different cultural patterns of behavior.

The resolution of these problems during a cross border mediation is crucial, for the research of a shared agreement, to the smallest details.

Often parties speak different languages, and even if they can speak a common one (as English, for instance) this may be the mother tongue of one party and not the other. In this last case, the non-mother tongue party may feel at a great disadvantage and uncomfortable, and may wish to speak his own language in the mediation.

Also, when strong feelings come up parties tend to speak their mother tongue, it is a natural and comprehensible behavior, and there is nothing strange.

The mediators should be aware of the language issue, dealing with it flexibly, and, for example, if one party says something in his own language that his counterparty doesn't understand, the mediator, who also must speak and understand that language, can interpret for all the others.

If parties wish to speak different languages (even if only to put a barrier between the one and the other), and a mediator doesn't know those peculiar languages, a professional interpreter is needed.

A part from different languages problem, a similar situation might arise when the parties, even if they are mother tongue of the same language, speak different dialects. In this sense the mediator should be able to study in advance how to keep the attention of the parties and how to manage different expression coming from dialects.

Of course, making use of an interpreter, the negotiation could lose the immediacy of "give and take", as the interpreter should first listen then translate, unless the interpretation is done simultaneously.

Moreover, it is not always true that each party enjoys the presence of a third person (the interpreter) to the negotiating table. Infact the presence of an extra person in the mediation process might changes the dynamics of the situation.

When there is the necessity of translations during mediation, the mediators must necessarily prepare the interpreters to their role, insuring that they do not become, for instance, advocates of the party being interpreted. That situation is very dangerous, because if the interpreter takes up the defense of one of the parties, he might also avoid translating some passages of the speech just heard, or even edit the translation unconsciously in favor of one party.

Finally, if the mediation agreement needs to be formulated in both languages, this operation is usually done by the mediator, with the help of the parties' lawyers, if present, and with the assistance of the secretariat of the mediation provider under the umbrella of which the mediation is attempted.

Once again, therefore, it is crucial the choice of a provider that is up to the expectations of the parties, and that it is able to handle all requests that can gradually come to light in cross-border mediation.

Another main role of a mediator is to **provide a simple structure** which allows the parties to communicate more effectively.

If one party interrupts the other, as they did prior to mediation, the mediator can remind them that they will have their opportunity to speak, also uninterrupted, to be able to respond to what the other side is saying.

A mediator may say "Just because you listen to what they have to say from the beginning to the end of a sentence, or thought, doesn't mean you agree with them".

Simply having the mediator there to guide the discussion helps open the lines of communication, which helps get the matter resolved. When someone gets the opportunity to say what they want to say, without interruption, from the beginning to the end, they finally feel heard and they feel better about the situation. When the other person has the opportunity to hear what has been said, without interruption, they learn and understand more of the other's perspective than they have allowed themselves to hear, perhaps for the first time in a long time. When that person then gets to say what

they want to say, without interruption, the same thing happens, they feel better and the other person understands better.

The lines of communication begin to reopen, each side feels heard, each side begins to understand the other side's position a little better and the dispute is on its way to being resolved. It is truly amazing to see.

A mediator is also a bridge between the parties: he constantly acts as an **understanding facilitator**, in order to make it possible for the disputants to understand their different needs and interests and their different stances on the problem.

However, in this informality, the mediator has to act also for helping the parties to eliminate false expectations and unrealistic or impossible assumptions of agreements.

To do this, the mediator helps the parties to think in terms of agreements really attainable, which meet their interests and needs (at least the primary).

Reality-testing (or checking) is a great part of the mediator's responsibility to help parties to reach a settlement, even if parties may not like being put in this position. In this way the mediator acts as the devil's advocate and challenges the parties' positions in an effort to add a much-needed air of reality to the proceedings.

Another important skill of a mediator who deals with cross border disputes is the **ability to actively listen** to what a party is saying and to note what the party is not saying, acquiring an awareness of what they consciously and subconsciously leave out.

It is a very fundamental principle that a mediator must not prejudge the case nor impose his/her own prejudices on the parties.

Furthermore, a mediator must have the ability to tune into "where the speaker is coming from" and read the "sub-text" or hidden messages given out by the disputants.

The mediator needs to "investigate" the dispute with the parties and to question them if he/she is helping the parties to bring the conflict to an effective settlement.

The mediator must have a picture of the case, the more complete as possible, especially when he/she helps to explore methods of dispute resolution with the parties.

To do this the mediator must ably use the art of questioning, to listen to and examine the responses, to hear what the parties are saying and to look at what they are not saying (but probably they would like to say).

The skill lies in identifying the parties' needs, not in dealing with what the mediator considers the parties' dispute to be about and to then encourage them to address those needs rather than their stated wants and stances.

Listening enables the mediator to get "on top of" the case. Active listening is not inherent.

It is not necessarily an easy skill to acquire, but it is essential. It is a skill that can be both learnt and cultivated.

A good mediator is well prepared to listen to what the parties have to say without interrupting or taking over the conversation.

Good listening means hearing what is being said and demonstrating that the listener has heard correctly. In correct listening it is also very important to leave periods of silence in order to reorganize ideas and to make a check of what the listener has heard.

A well-trained mediator must also create an atmosphere that is comfortable and relaxing to the disputants, demonstrating interest for what the parties want to say to him/her and demonstrating understanding of the vicissitudes that occurred to the parties.

A trained **mediator knows that questions are very important** in a negotiation process under the umbrella of mediation and that the best questions have to be formulated in a simple and short way.

Above all, the mediator has to know that there are some types of questions that are rarely appropriate in a mediation procedure.

These include leading questions, where the questioner indicates the expected answer, and multiple questions where the questioner asks the same question in several different ways, which risks confusing the listener.

Throughout the mediation process, but especially during the caucuses, the mediator acts by asking questions, rather than through the use of incontrovertible facts or instructions drawn from his/her professional experience.

With questions, the parties acquire responsibility, because they must be able to respond correctly, whereas with experiential or principle statements dictated by the mediator, the parties would tend to agree merely because the statements came from the mediator. There are many kinds of different questions a mediator can use throughout the mediation process. Some of them are:

- **open questions**: they are especially appropriate in the exploring phase. Open questions started with question words or phraseology like: “How....?”, “What.....?”, “Why...?” or “Tell me about....”. These kind of questions invite the listener to speak at length about his/her case, feelings, needs, etc...

- **closed questions**: they are formulated after the open ones to invite the parties to a defined answer, a “Yes” or “No” provides little information, but makes the parties take responsibility for their answer.

- **hypothetical questions**: they are used by the mediators when it is necessary to explore possible solutions. Their purpose is to open up options, stimulating creativity and problem solving between the parties. An example of hypothetical question can be: “What if....?”, or “Have you ever thought about ...?”, or “Do you think it might be possible to...?”.

- direct questions: they are aimed at obtaining information necessary for the mediator to assess a given situation (e.g.: "How many contracts did you sign?").

- clarification questions: are used to clarify ambiguous or vague statements that the parties make when they may want to be evasive (e.g., "Could you please be a bit more detailed?").

- relational questions: to understand what kind of relations there are between the parties (e.g., "How long have you known each other?", or "What do you think happened to your relationship?").

- circular-type questions: they help to create a connection between the parties, putting one "in the shoes" of the other and view the issues from that perspective (e.g.: "Mr. Smith, if you were in Mr. White's shoes, what would you do to settle this controversy?"). With this kind of question the parties may see the dispute in a new light, and may accept that the other's position may not be as unreasonable as first assumed.

The technique of summarizing and reframing. The mediator summarizes when he/she wants to:

Focus on key issues

Check understanding

Demonstrate that the listener has heard

Organize an otherwise disorganized statement

Allow parties to change what they have said

Buy time

Change the direction of a conversation

Reframing is adjusting, reordering or changing the words of a statement to give it a more positive meaning, eliminating invectives, criticism, negative, aggressive and adversarial language. The mediator reframes, using a language that is at least neutral, and ideally positive.

So summarizing and reframing can provide the litigants with real opportunities for progress in mediation and can help to overcome blockages, save face and enable parties to adjust their positions.

Persistence and patience. These two qualities, along with the skill of listening, are seen as the core requirements of mediator competence (far more than any others mentioned in this writing).

Throughout the mediation procedure the mediator must maintain a soft tone, a sincere smile, and an open, friendly, responsive attitude. He/she must speak clearly and respectfully to the parties, inspiring the disputants with confidence. To do this the

mediator's body-language is very important: the way he/she is placed "bodily" before the parties.

The mediator must also verbally express persistence and patience. The use of "no" or "never" should be limited, if not avoided by a mediator. No eliminates options and limits creativity; compromising the chance for the parties to create added value.

The mediator in mediation acts as a guide, a conduit and a catalyst for imaginative thinking by the parties, in order to connect with their inner thoughts and hopes, to facilitate mutual comprehension in conflict.

The parties place a lot of their hopes on the mediator. When the mediator has created empathy with the parties, certain "awe" for the mediator then characterizes the entire procedure.

So the mediator has a big responsibility, because the parties see him/her as their only lifeline, as the leader who will take them to safety, as the only one who can help them to put the fire out in a negative situation.

If the mediator is serene, the parties will be serene, if the mediator is exacerbated, the parties will be exacerbated; if the mediator is positive and realistic, the parties will be positive and realistic; and so on...

We may say that the mediator is a professional "all-rounder", with skills and qualities that belong to the fields of the psychological sciences, sociology and ethics.

Schematically, we can summarize the other skills/abilities of the cross border mediator in the following manner:

- Build rapport.
- Analytical problem-solving skills – the ability to identify and separate the issues involved and frame these issues for resolution or decision making.
- Use clear, simple and neutral language in speaking, and if written opinions are required, in writing.
- Sensitivity to strongly-felt values of the disputants including gender, cultural and ethnic differences.
- Ability to deal with complex factual materials.
- Honesty, dignified behavior, respect for the parties, and an ability to create and maintain control of critical and conflict situations. The ability to separate personal values from the issues under consideration to maintain neutrality.
- Ability to understand power imbalances.

The ability to:

- earn and develop trust to maintain acceptability;
- screen out those issues that cannot be mediated;
- convert parties' positions into needs and interests;
- invent (and help the parties to invent) creative options;
- identify principles and criteria that will guide decision-making;
- assess the feasibility of agreements;

- assess non-settlement alternatives.

3.2.4 Cultural aspects affecting cross border mediation process

As briefly said above, it is very important, for a mediator involved in a cross border mediation, to know and recognize how cultural differences manifest themselves during the mediation process.

In fact, intercultural dimension is one of the most crucial aspect to be considered, and positively manage by the mediator, in order to have the possibility to maintain balanced, tranquil and relaxing relations among the parties.

Not always the nationality of a person necessarily determines the behavior during the mediation process, but a careful mediator may investigate on attitudes that parties put in place, in order to better understand the other party's position and to develop a different perspective, avoiding misunderstandings and communicating more effectively; this, in order to avoid a failure of negotiation, or for a better use of problem solving strategies that are actually positive in the real context.

Mediator's role in cross border mediations is really challenging and extremely significant. The cross border mediator has to deal with the ability to try to manage cultural labyrinths of parties, that not always are over their eyes, but sometimes are covered and under the ground; all this, conquering trust of the different parties and (if present) the attorneys representing them.

Being mediation also a sort of "cathartic" process, acknowledgment of differences among parties is one of the most important communication skills in effective mediation, especially when there are at the mediation table many different cultures and backgrounds, being one of the most important and effective means to breaking the vicious cycle of human conflict.

Generally, who deals with cross border mediations involving cultural differences, has a general assumption that there are some fixed habits to develop, as – for instance - not to offer the left hand to an Arab, or understand the way to offer a refreshment to a Turkish counterparty, or understand the necessity of moving hands for an Italian while he is negotiating, etc..

It is fundamental to keep in mind that culture is a relatively superficial overlay that covers the universal human nature, but when there is a real necessity (for example during a mediation) all persons are fundamentally the same, above all when it comes to reasoning about emotions, desires, and needs. This is caused by a generic human culture which covers practically every human being, being the Homo sapiens an adaptive one.

But a well prepared mediator cannot avoid to remember that there are also local cultures, very deeply inserted in the individual behaviors, which may deeply influence the mediation process, because they were created, shared, and transmitted (in a certain sense: socially inherited) by individuals in particular social groups.

In this way a cross-border mediation with hard cultural aspects (but also in soft cases) needs the research of every cultural aspect, both general and specific of each party at the mediation table.

3.2.5 Cultural complexities affecting cross border mediation process

In order that cross border mediation is a successful tool of dispute resolution for all the parties, and their attorneys, it is necessary that all the attorneys and the mediator have a correct and deep understanding of each other's cultural nuances and behaviors.

Culture is a notoriously difficult term to define. In 1952, the American anthropologists, Kroeber and Kluckhohn, critically reviewed concepts and definitions of culture, and compiled a list of 164 different definitions.

Trying to develop a definition, culture may be said as the shared assumptions, values, and beliefs of a group of people which result in characteristic behaviors.

As it was said previously, the general character of a culture may change and adapt, especially through contacts with other different cultures (see, as example, the effects of globalization which flatten and mix together many different aspects in a unique way of feeling and doing).

But when it is necessary to investigate the deep structure of a culture, it is important to remember that values and beliefs tend to be reluctant to any changes persisting from generation to generation.

It is important that a mediator, using caucusing if necessary, understand and take in high consideration especially the second type of culture, the deep and inner one.

Doing that, each culturally different party may feel considered, understood, helped, and cuddled; and may open his mind and soul to the other parties, because someone, the mediator, used with him all the best possible opening, not contrasting any desire or thought coming from him, but encouraging the expressions of differences, to create a common vision of the problem and a concrete possibility of rapprochement.

Culture is not just at one level. Human beings live multiple levels of culture: from family, professional or workplace, or regional, to gender and generational, etc.... These stratifications of cultural affiliations influence everything one does; including the way to try to solve conflicts for oneself, and how it is better that others should resolve conflict.

The understanding of cultural phenomenon is mandatory for the right management of cross border disputes, whether they have social, business or economic nature. It is a must for the mediator to sense issues involving all cultures represented at the mediation table.

Another great important concept, linked to cultural, to be considered during cross border mediations is the one that is defined as power distance. The power distance index is a measure of hierarchy in a culture.

With a measurement scale that goes from the bottom upwards, power distance refers to the extent to which the less powerful members of a group expect, thus accept, that power is unequally distributed.

In a low power distance culture, the parties generally will openly work towards resolving any dispute by stating their own points of view and desires; there is a high degree of collaboration among individuals, and discussion and consultation are desirable in case of difference of opinion.

On the other hand, in a high power distance culture the relationship between bosses and subordinates is made of dependence. People from a high power distance culture accept inequalities like a normal fact of life.

People from low power distance culture consider like positive words as: rights, complaints, fairness in negotiations, necessity, codetermination, common objectives, criticize and ask question, while – on the contrary – people from high power distance culture consider positive words as: respect, father, older brother, master, servant, wisdom, protect, order, mandatory, etc...

High power distance cultures (as countries from Asia, Latin and South America and Arab countries) will manage mediation with senior people as negotiators, and will expect that the opposing negotiator and the mediator will be likewise of senior status or higher. If they have to negotiate with counterparty or a mediator of an inferior position, they presumably will think that this behavior is a lack of respect for the senior. To this extent, It might be important to have a mediator (who will treat the high status party with high sense of respect) that is of the same or higher status level as the parties.

On the opposite, parties from a low power distance culture (as in USA, Canada, New Zealand, Australia, many European Countries) will often attempt to treat everyone equally, because they believe that all of them are equal and should be treated in the same way.

The role of the mediators in all these cases is crucially important, making the difference between mediation and transaction (a negotiation without the third mediator).

In fact, if the parties were left alone to negotiate, presumably, the more powerful party would try to impose the supremacy against the less powerful party.

The presence of a mediator serves to equilibrate the power and to redistribute it equally to the parties, by reducing the power of the powerful party, and increasing the negotiation power of the counterparty, till to the reaching of a point in which the parties are on the same level; and at this point, they are more free to negotiate with similar prerogatives. Usually, the mediator's presence makes the mediation table a place where different cultures can meet to create a new culture that is comfortable for all.

The mediator, for example, might take in consideration the real role that the less powerful parties can play in influencing the stronger parties, by appealing to common values, and to the fact that in mediation if a party does not agree to a solution, this situation goes in disfavor of all the parties (comprised the more powerful ones), because the agreement won't be realized.

The mediator could make use of co-mediation, taking assistance of co-mediators who have a cultural similarity with the parties. In this way all the process may realize a positive impact during all negotiations, because the perception of similarity that the parties perceive between them and the co-mediator can be important to establish trust in the process and the mediator.

All this strategic tools will lead the parties to a coherent understanding of respective cultures, and to an appreciation of their mutual intolerance, and effectively will facilitate the mediation process.

3.3. Multiparty cross border mediations

Multiparty mediation is where the number of parties (more than two) makes the discussion more complex, and each party is domiciled or resident in a different country respect to the others.

It is necessary in this case, that a mediator can manage the situation in which multiple factors can overlap and mix together and, if he is not well prepared, the degree of conflict may become irresistible, breaking down seriously every possibility of agreement.

Successfully mediating a large, complex multiparty case requires a commitment from each participant in the mediation process, and a highly professional mediator.

Very important tools for mediating cross border disputes are pre-mediation meetings. The mediator can convene one or more “process design conference” among parties' lawyers and, if it is possible, clients, on a separate day in advance of the actual mediation session.

So doing, some preliminary controversial situations may be discussed and clarified in advance respect to mediation, helping all the participants not to waste their energies and time during the mediation process, because more aspects would have been prior solved.

This approach has some advantages:

- Getting the parties' buy-in to the process and a greater commitment to reach a settlement.
- Enabling the mediator to see how each party behaves during only “process negotiations,” which is a real indicator of how they will conduct themselves during the cross border mediation process, and how to deal with them when the process has some obstacles;
- Functioning as a good “ideal location” for identifying “affinity groups”.

Besides, during the process, a pre-mediation session may be very useful to reach some good points as:

1. Identify the negotiating groups, determining the relationships between the various parties to the dispute and the issues on which certain parties may be aligned.

At least, a general consensus can be reached among the negotiating teams, before a positive mediation can be achieved by the various stakeholders and their teams.

Because of the members of each negotiation team often have divergent interests, a pre-mediation session can help to firstly identify these teams and then help for a successful resolution.

2. See how much agreement may be achieved among the various groups.

A pre-mediation session has the advantage to help parties to be less angry each other, when the mediation procedure will start; helping to see what can be reached and what can't.

3. Recognize the "stabilizers" and the "destabilizers" among the parties.

Most teams contain both "stabilizers", members who are committed to the mediation process and want to possibly achieve a negotiated resolution, and "destabilizers", members who want to fight until the end, and attempt to present every kind of block to a mediated solution.

Especially after the identification of any "destabilizers" it is really important to take affirmative steps to minimize their disruptive impact.

4. Identify the real leader of any group. An important early goal of the multi-party cross border mediation is the identification of the leader within each negotiating team. Usually this person is the ultimate decision maker, who has the habit to wait for to see the moves of the others.

5. Arrive to the end of the mediation procedure with an high percentage of possibilities to solve the problems.

In fact, all of the key participants must be present for a large, complex mediation. It's in the same nature of multi-party cross border mediation the necessity to address and include all necessary parties, (eventually) insurance representatives, consultants or experts as appropriate to the case, and consistent with the wishes of the parties and their counsel doing so.

Other important "pros" of a cross border multi-party mediation may be:

1. Possibility to order flexible caucus with parties and their representatives.

The mediator's willingness to develop an initial phase that respected the needs of parties and their representatives' help create parties' willingness to reciprocate when it will be time to accelerate things. Positive actions recall positive reactions!

2. Possibility to identify "affinity groups" of parties with enough overlapping interests to make some joint caucus with all members of the group.

Also, if the mediator has found some affinities, while the group members interact with each other can arise consensus on many aspects, during mediator's caucuses with other parties.

During their wait, parties are able to act as "cake enlarger", thinking and sharing more solutions to offer (as money to exchange) to other parties.

3. Possibility to use a flip chart to develop ideas (with the use of brainstorming process, or mind mapping process, etc...), possible solutions (even if partial), and what percentage of the total each party see for itself and for the others.

After making the rounds in individual caucuses (sometimes affinity group caucuses), mediator can convene a plenary session to present everybody's solution, and facilitate dialogue about the results (maybe with brainstorming sessions).

4. In the process, mediator can assume all kinds of information about who's cooperative, who's not, and the reaction of the others.

In other words, he can try to arrive at an initial consensus, among all parties with affinities as a unique group on what they think the other groups should take, or accept.

In conclusion, it can be said that multiparty mediations are really full of benefits - if well managed by prepared mediators - for parties, attorneys and assistants in general.

Consider that in just one mediation multiple parties, allegations, defenses, and interests can be resolved in lieu of multiple motions, trials, and appeals, not to mention the time and expense of those processes.

3.4. A real case of B2B cross-border mediation

The Alfa Company - based in Italy - ordered a supply of electronic components to the Beta Company, with which is collaborating since some time, headquartered in Spain. The previous orders were all gone to successful.

After the new supply was terminated, all the components were shipped, by Beta Company to its Portuguese plant, where the electronic components had to be assembled to create the final goods to be sold by the Alfa Company. The Portuguese office communicated to the Italian Company that components were defective but that there was not time to address this aspect, getting a new supply; for this reason the components had to be adapted and assembled anyway.

The work was more difficult than expected, and some components were not usable at all.

The Alfa Company, then, sent a challenge to the Beta Company, reserving the right to quantify damages in a subsequent action.

Sometime later, the Beta Company sent the invoice for the work done in producing and delivering the technical supply to the Alfa Company which opposed the request and refused to pay. The Beta Company, some weeks later deposited, to an ADR provider, a mediation request against the Alfa Company.

The Alfa Company, after receiving the request for mediation, adhered to the mediation procedure.

The mediator agreed with the parties that mediation might have been held in English, as English was known by all parties.

The Alfa Company, called to speak first, announced that the poor delivery obtained was an unfortunate situation that would not have ever expected from the Beta Company, with which Alfa was working since some years. Alfa couldn't afford to enter the market shoddy products. In this case, in fact, Alfa would have risked losing customers, and to avoid such loss Alfa had decided to give up using most of the components. Clearly, Alfa did not want to pay what was requested by the Spanish company.

At most, Alfa declared available to pay the cost of the components used, less what it was paid to make them suitable for use; and wanted to take away a sum by way of compensation for damage caused by the company Beta.

After the end of the caucus of mediator with the Alfa Company, the Beta Company, called to speak in caucus, reported that there weren't tangible evidence of the damage. In fact, Alfa have disputed the supply only generically, without the Beta Company could have had the possibility to verify the magnitude of the damages.

To this end Beta insisted in request for payment of the amount due.

The controversial issue increased and exacerbated the tones, and the behaviors of the parties were harder and harder. At this point there was also a certain sort of the national belonging, in the sense that the rivalry between the Italian company and the Spanish company grazed very bright tones. Nobody wanted to divest from its own position, it would have been like to lose a battle between two nations: Italy and Spain!

Given the stalemate, the mediator decided to conduct caucusing with the parties separately.

Alfa admitted to be very upset and angry about how things have gone; also because they had found a product with good value for money and a supplier (Beta) up to their expectations. Now, however, Alfa would have had to search for a new supplier, and the time would have been greatly elongated.

Alpha did not understand why the supply of Beta was defective, it had never happened before! Indeed, Alfa reported as Beta was a company which has always been very precise and accurate, except for the last delivery!

That said, Alfa wanted Beta had assumed its responsibilities, without letting them fall on Alfa itself.

If Beta had wanted, it could recover unused items, because Beta said that the electronic elements were suitable for use!

As for future relations, Alfa referred to mediator that it didn't know whether it would have still used Beta as provider of electronic components, even though Alfa knew that Beta was one of the best companies on the market, and have proposed to Alfa very competitive prices.

During the caucus with the mediator, Beta admitted that the electronic components actually have had some problems, caused by the malfunction of a machine. Certainly, however, damages were minimal and not as serious as Alfa said.

Beta was very sorry and worried about losing customers as Alfa, also because Beta was not in a good economic condition, and - therefore - Beta would have wanted to keep an important customer as Alfa.

Besides, maintaining Alfa among its clients, Beta would have had the chance to better conquer the Italian market.

On the other hand, Beta could not have been able to afford a delay on payments by Alfa.

Eventually, after many separate meetings between the mediator and each party, the agreement seemed to be found, as indeed was later found.

Alfa would have paid to Beta the monetary sum already offered in mediation. This payment would have closed the issue on the supply object of the mediation process.

For any future contract, the components supplied by Beta would have been checked in advance by an officer of Alfa, before shipment. The price of these components would have been discounted by 15% compared to the price charged until that moment.

Alfa would have been engaged to better introduce Beta in the Italian market.

Alpha and Beta would have created some joint press releases, in order to advertise their commercial partnership.

Chapter 4: Communication skills that are necessary to the magistrate and other legal practitioners in order to overcome difficulties that appeared in the process of recommendation of cross-border mediation

4.1. Introduction

In the context of modern mediation practice, a mediator plays a role as process manager where s/he manages the process and guides the parties to a settlement of their dispute. A mediator is educated to mediate in disputes between parties, as a neutral, third person, appreciating ethical principals in directing communication professionally to gain a settlement, taking account of parties' common interests. A separate but related role is the substantive one where the mediator assists the parties in charting through the content of their dispute and to explore substantive solutions to their problem. A mediator does it by mediating; a process by which compromise or agreement is reached while avoiding argument and dispute. In any disagreement, individuals understandably aim to achieve the best possible outcome for their position. However, the principles of fairness, seeking mutual benefit and maintaining a relationship are the keys to a successful outcome.

It is clear that implicit in the fulfillment of these roles is the indispensable communicative function. When a dispute goes for mediation, it generally means that communication between the parties has broken down. The mediator has the responsibility of opening the channels of communication and getting them to talk to him/her and one another. This communication between the mediator and the parties is often done through the written and spoken word. There are communicational skills which every mediator should be skillful in.

Mediation is the involvement of an impartial third party to support and help those involved in a conflict to find a resolution. The key difference between negotiation and mediation is that in negotiation, the parties involved work out their own agreement. In mediation, they have the support of the third party, the mediator, to help them come to an agreement. A key aspect of mediation is that the mediator does not „sort things out“ or make any decisions for the parties involved. Instead, he or she helps the parties involved work together to develop their own agreement.

Cross-cultural disputes are always going to be hard to mediate, because what is acceptable behavior in one culture may be totally unacceptable in another. A good mediator will always try to be aware of what else is going on, trying to understand any hidden agendas and barriers to effective problem solving. An effective mediator will, at the same time, be able to distance themselves from the problem.

Mediation involves:

- Voluntary participation
- Face-to-face discussions between the parties in conflict
- An unbiased mediator without any decision-making power who helps those involved to understand each other's point of view and come to an agreement

- Equal opportunities for all participants to speak and explain their perspective
- All relevant information being shared
- A shared agreement between the parties

A mediator should take into account that people who want/seek the help of mediators:

- want to work out their disagreement themselves,
- want to decide for themselves what is important in the matter and what is extraneous
- want not to be pushed towards a solution that they do not want / cannot accept
- believe in talking things out
- believe in a better understanding despite the emotional upheaval
- believe in eventually overcoming differences without having to give up what is important to them

Mediators give them guidance in the process.

1. acknowledge the emotional aspects and the content of the dispute, disagreements,
2. help the parties to manage the emotional part of the conflict without getting the content of the conflict out of sight
3. provide a holding environment for everyone involved
4. care that no important voice is left out
5. pay attention to all aspects that feed the conflict

4.2. The Mediation Process

Although every conflict and every mediation process will be slightly different, there are a number of steps which you will need to consider in every case, and points to take into account.

1 - Preparation

The mediator will need to lay out the 'ground rules' for the mediation process. Usually some basic rules of communication and confidentiality will be essential, but there may also be others pertinent to that situation. For example, the mediator might want to set out that only one person talks at a time, and while someone is talking, the others listen in silence, that there is to be no verbal abuse at any time, and that all that happens

remains confidential unless both parties agree to speak about it outside mediation. The mediator may also wish to set out the mediator's role: to be impartial and help the parties to reach their solution, but also to protect the parties from each other if necessary. The mediator should also consider whether s/he should have separate meetings with each party to develop a better understanding of the issues before mediating a joint meeting.

2 - Reconstructing and Understanding the Conflict

The mediator's task at this stage is to listen to the participants' stories, whether together or separately, and clarify what they want to achieve from the process. If the mediator is meeting both participants together, it is helpful to summarize the main points of conflict in a neutral way that both can agree upon, and propose an agenda for the discussion: an order in which issues should be discussed. It can also be helpful at this stage to name the emotions that participants are feeling, to show that they have been recognized and understood.

3 - Defining Points of Agreement and Dispute

During this stage, the mediator's role is to help the parties to move towards a position where they start to understand each other's point of view, and can then begin to resolve a shared problem. One way to do this is to think of it as moving from a focus on the past to one on the future. It can also be helpful to use paraphrasing and summary in neutral terms to help the parties identify areas of agreement, and to check understanding. It's extremely powerful to reflect feelings back to the parties, as it shows both that they have been heard. Good strategy could be adjournment to another day if you think things are getting a bit heated. „Time out“ is a valuable reflection opportunity for everyone.

4 - Creating Options for Agreement

A useful starting point for this stage is to identify the simplest area, or the one on which there is most agreement, and suggest resolving that first, to give a „quick win“. Useful techniques for developing options include brainstorming. At this stage, „anything goes“! The mediator need to help the parties to develop evaluation criteria, which should ideally be objective and in order of importance. The role of the mediator here is chiefly to make sure that all parties are equally involved in generating options and developing evaluation criteria, and that they cover all parts of the problem, and to make sure that opinions that are reflected are made by parties and not by the mediator. The mediator can point out linkages between options and/or problems. Once the options have been evaluated, the mediator will need to guide them to a single solution that suits all parties, and help them to fine-tune it if necessary.

5 - Developing an Agreement

Like objectives, an agreement should be SMART, that is Specific, Measurable, Attainable, Realistic and Time-bound. The mediator can help the parties to achieve this by:

- Writing down the proposal in neutral language, and reading it back to them.
- Writing down individual points so they are clear and understood.

- Clarifying any general or vague points, for example, by asking the parties to agree concrete behavioral changes with deadlines for achievement.
- Avoid legalistic language, and keep everything simple.
- Summarize progress and next steps, including setting a deadline for any future meetings, and identifying any remaining areas of difficulty, and options for their resolution.
- Being positive about progress and the fact that everyone has remained engaged.
- Offering continued support as a mediator if required.
- Ensuring both parties sign the agreement then and there, and close the meeting once agreement is reached.

A mediator needs a range of skills, including:

- Active listening skills
- Questioning and clarifying skills to grasp both the facts and the areas of controversy;
- Emotional intelligence to understand the underlying emotions.
- Summarizing skills to set out the main points of controversy, and underlying emotions, and also to help the participants to reframe issues in less emotive language.
- Empathy to help each party to stand in each other's shoes and understand each other's point of view.

Perhaps most importantly, a mediator must not take sides, or be seen to be acting unfairly. A mediator will therefore need to acknowledge points made by both parties, and spend equal time with each person or on their issues. It's never going to help to point out that someone is being unreasonable, but a mediator can help them take a „reality check“ by asking what they would consider a reasonable outcome, and then asking whether they think the other party would agree.

4.3. Communication

A message or communication is sent by the sender through a communication channel to a receiver, or to multiple receivers. The sender must encode the message (the information being conveyed) into a form that is appropriate to the communication channel, and the receiver(s) then decodes the message to understand its meaning and significance. Misunderstanding can occur at any stage of the communication process. Effective communication involves minimizing potential misunderstanding and overcoming any barriers to communication at each stage in the communication process.

There are many reasons why interpersonal communications may fail. In many communications, the message (what is said) may not be understood the way speaker intended. It is, therefore, important that the communicator seeks feedback to check that their message is clearly understood. It is especially important in cross-cultural mediation.

The skills of active listening, clarification and reflection may help but the skilled communicator also needs to be aware of the barriers to effective communication and how to avoid or overcome them. There are many barriers to communication and these may occur at any stage in the communication process. Barriers may lead to speaker's message becoming distorted and mediator therefore has to be skillful enough to recognize confusion and misunderstanding in a conversation. Effective communication involves overcoming these barriers and conveying a clear and concise message.

4.3.1. Barriers to communication

Common barriers to effective communication are:

- The use of jargon. Over-complicated, unfamiliar and/or technical terms. Language and linguistic ability may act as a barrier to communication. However, even when communicating in the same language, the terminology used in a message may act as a barrier if it is not fully understood by the receiver(s). For example, a message that includes a lot of specialist jargon and abbreviations will not be understood by a receiver who is not familiar with the terminology used. Regional colloquialisms and expressions may be misinterpreted or even considered offensive.
- Emotional barriers and taboos. Some people may find it difficult to express their emotions and some topics may be completely 'off-limits' or taboo.
- The psychological state of the communicators will influence how the message is sent, received and perceived. For example, if someone is stressed they may be preoccupied by personal concerns and not as receptive to the message as if they were not stressed. Anger is another example of a psychological barrier to communication, when one is angry it is easy to say things that s/he may later regret and also to misinterpret what others are saying. More generally people with low self-esteem may be less assertive and therefore may not feel comfortable communicating - they may feel shy about saying how they really feel or read negative sub-texts into messages they hear.
- Lack of attention, interest, distractions, or irrelevance to the receiver.
- Differences in perception and viewpoint.
- Physical disabilities such as hearing problems or speech difficulties.
- Physical barriers to nonverbal communication. Not being able to see the non-verbal cues, gestures, posture and general body language can make communication less effective.

- Expectations and prejudices which may lead to false assumptions or stereotyping. People often hear what they expect to hear rather than what is actually said and jump to incorrect conclusions. Attitudinal barriers are behaviors or perceptions that prevent people from communicating effectively. Attitudinal barriers to communication may result from personality conflicts, poor management, resistance to change or lack of motivation. Effective receivers of messages should attempt to overcome their own attitudinal barriers to facilitate effective communication.
- Cultural differences. The norms of social interaction vary greatly in different cultures, as do the way in which emotions are expressed. For example, the concept of personal space varies between cultures and between different social settings.

4.3.2. Communicational skills

Effective communication helps us better understand a person or situation and enables us to resolve differences, build trust and respect, and create environments where creative ideas, problem solving, affection, and caring can flourish. The process of interpersonal communication cannot be regarded as phenomena which simply „happens“, but should be seen as a process which involves participants negotiating their role in this process, whether consciously or unconsciously. Senders and receivers are of course vital in communication. In face-to-face communication the roles of the sender and receiver are not distinct as both parties communicate with each other simultaneously. As simple as communication seems, much of what we try to communicate to others—and what others try to communicate to us - gets misunderstood, which can cause conflict and frustration in relationships. Communication is both, the source of understanding and in the same time a source of misunderstanding.

4.3.2.1. Active listening

The mediator should be a good listener. Listening is one of the most important aspects of effective communication. Successful listening means not just understanding the words or the information being communicated, but also understanding how the speaker feels about what they're communicating. Active listening is a communication technique used in counselling, training and conflict resolution, which requires the listener to feed back what they hear to the speaker, by way of re-stating or paraphrasing what they have heard in their own words, to confirm what they have heard and moreover, to confirm the understanding of both parties. The proper use of active listening results in getting people to open up, avoiding misunderstandings, resolving conflict, and building trust. In the context of mediation benefits may include increased resolution satisfaction, improved cross-cultural communication and improved outcomes. To use the active listening technique to improve interpersonal communication, one puts personal emotions aside during the conversation, asks questions and paraphrases back to the speaker to clarify understanding.

The two main types of listening - the foundations of all listening sub-types are:

- Discriminative listening is first developed at a very early age – perhaps even before birth, in the womb. This is the most basic form of listening and does not involve the understanding of the meaning of words or phrases but merely the different sounds that are produced. In early childhood, for example, a distinction is made between the sounds of the voices of the parents – the voice of the father sounds different to that of the mother. Discriminative listening develops through childhood and into adulthood. As we grow older and develop and gain more life experience, our ability to distinguish between different sounds is improved. Not only can we recognize different voices, but we also develop the ability to recognize subtle differences in the way that sounds are made – this is fundamental to ultimately understanding what these sounds mean. Differences include many subtleties, recognizing foreign languages, distinguishing between regional accents and clues to the emotions and feelings of the speaker. Being able to distinguish the subtleties of sound made by somebody who is happy or sad, angry or stressed, for example, ultimately adds value to what is actually being said and, of course, does aid comprehension. When discriminative listening skills are combined with visual stimuli, the resulting ability to ‘listen’ to body-language enables us to begin to understand the speaker more fully – for example recognizing somebody is sad despite what they are saying or how they are saying it.
- Comprehensive listening involves understanding the message or messages that are being communicated. Like discriminative listening, comprehensive listening is fundamental to all listening sub-types. In order to be able use comprehensive listening and therefore gain understanding the listener first needs appropriate vocabulary and language skills. Using overly complicated language or technical jargon, therefore, can be a barrier to comprehensive listening. Comprehensive listening is further complicated by the fact that two different people listening to the same thing may understand the message in two different ways. This problem can be multiplied in a group setting, like a classroom or business meeting where numerous different meanings can be derived from what has been said. Comprehensive listening is complimented by sub-messages from non-verbal communication, such as the tone of voice, gestures and other body language. These non-verbal signals can greatly aid communication and comprehension but can also confuse and potentially lead to misunderstanding. In many listening situations it is vital to seek clarification and use skills such as reflection aid comprehension.

Discriminative and comprehensive listening are prerequisites for specific listening types. Listening types can be defined by the goal of the listening. The listening types most common in interpersonal relationships are:

- Informational listening (listening to learn)- Although all types of listening are „active“ – they require concentration and a conscious effort to understand. Informational listening is less active than many of the other types of listening. When we’re listening to learn or be instructed we are taking in new information and facts, we are not criticizing or analyzing.
- Critical listening (listening to evaluate and analyze). We can be said to be engaged in critical listening when the goal is to evaluate or scrutinize what is

being said. Critical listening is a much more active behavior than informational listening and usually involves some sort of problem solving or decision making. Critical listening is akin to critical reading; both involve analysis of the information being received and alignment with what we already know or believe. Whereas informational listening may be mostly concerned with receiving facts and/or new information - critical listening is about analyzing opinion and making a judgment. It is often important, when listening critically, to have an open-mind and not be biased by stereotypes or preconceived ideas. By doing this we will become a better listener and broaden our knowledge and perception of other people and their relationships.

- Therapeutic or empathetic listening (listening to understand feeling and emotion)- Empathic listening involves attempting to understand the feelings and emotions of the speaker – to put yourself into the speaker's shoes and share their thoughts. Empathy is a way of deeply connecting with another person and therapeutic or empathic listening can be particularly challenging. Empathy is not the same as sympathy, it involves more than being compassionate or feeling sorry for somebody else – it involves a deeper connection – a realization and understanding of another person's point of view. This type of listening does not involve making judgments or offering advice but gently encouraging the speaker to explain and elaborate on their feelings and emotions. Skills such as clarification and reflection are often used to help avoid misunderstandings.
- Rapport listening- When trying to build rapport with others we can engage in a type of listening that encourages the other person to trust and like us. This type of listening is common in situations of negotiation and is very important for mediators' communicational skills.
- Selective listening- This is a more negative type of listening; it implies that the listener is somehow biased to what they are hearing. Bias can be based on preconceived ideas or emotionally difficult communications. Selective listening is a sign of failing communication – one cannot hope to understand if has filtered out some of the message and may reinforce or strengthen his or her bias for future communication.

Effective listening can:

- Make the parties feel heard and understood which can help build an effective connection between the mediator and the parties.
- Create an environment where the parties feel safe to express ideas, opinions, and feelings, or plan and problem solve in creative ways.
- Save time by helping clarify information, avoid conflicts and misunderstandings.
- Relieve negative emotions. When emotions are running high, if the speaker feels that he or she has been truly heard, it can help to calm them down, relieve negative feelings, and allow for real understanding or problem solving to begin.

4.3.2.2. Reflecting

Reflecting is the process of paraphrasing and restating both the feelings and words of the speaker. The purposes of reflecting are:

- To allow the speaker to 'hear' their own thoughts and to focus on what they say and feel.
- To show the speaker that you are trying to perceive the world as they see it and that you are doing your best to understand their messages.
- To encourage them to continue talking.

Reflecting does not involve asking questions, introducing a new topic or leading the conversation in another direction. Speakers are helped through reflecting as it not only allows them to feel understood, but it also gives them the opportunity to focus their ideas. This in turn helps them to direct their thoughts and further encourages them to continue speaking.

Two main techniques of reflecting are mirroring and paraphrasing.

Mirroring is a simple form of reflecting and involves repeating almost exactly what the speaker says. Mirroring should be short and simple. It is usually enough to just repeat key words or the last few words spoken. This shows we are trying to understand the speaker's terms of reference and acts as a prompt for him or her to continue. A mediator should be aware not to over mirror as this can become irritating and therefore a distraction from the message.

Paraphrasing involves using other words to reflect what the speaker has said. Paraphrasing shows not only that we are listening, but that we are attempting to understand what the speaker is saying. It is often the case that people 'hear what they expect to hear' due to assumptions, stereotyping or prejudices. When paraphrasing, it is of utmost importance that we do not introduce our own ideas or question the speaker's thoughts, feelings or actions. A mediator response should be non-directive and non-judgmental. It is very difficult to resist the temptation to ask questions and when this technique is first used, reflecting can seem very stilted and unnatural. One needs to practice this skill in order to feel comfortable.

How to practice reflecting:

- Be natural.
- Listen for the basic message - consider the content, feeling and meaning expressed by the speaker.
- Restate what you have been told in simple terms.
- When restating, look for non-verbal as well as verbal cues that confirm or deny the accuracy of your paraphrasing. (Note that some speakers may pretend you

have got it right because they feel unable to assert themselves and disagree with you.)

- Do not question the speaker unnecessarily.
- Do not add to the speaker's meaning.
- Do not take the speaker's topic in a new direction.
- Always be non-directive and non-judgmental. Judging or arguing hinders the ability to be able to listen closely to what is being said.

4.3.2.3. Clarification

Clarification in communication, involves offering back to the speaker the essential meaning, as understood by the listener, of what they have just said. Thereby checking that the listener's understanding is correct and resolving any areas of confusion or misunderstanding. The purpose of clarification is to ensure that the listener's understanding of what the speaker has said is correct, reducing misunderstanding and to reassure the speaker that the listener is genuinely interested in them and is attempting to understand what they are saying. Clarification is important in many situations especially when what is being communicated is difficult in some way. Communication can be 'difficult' for many reasons, perhaps sensitive emotions are being discussed - or we are listening to some complex information or following instructions. As an extension of reflecting, clarifying reassures the speaker that the listener is attempting to understand the messages they are expressing.

Clarifying can involve asking questions or occasionally summarizing what the speaker has said. A mediator can ask for clarification when s/he cannot make sense of the speaker's responses. Sometimes, the messages that a speaker is attempting to send can be highly complex, involving many different people, issues, places and/or times. Clarifying helps us to sort these out and also to check the speaker's priorities. Through clarification it is possible for the speaker and the listener to make sense of these often confused and complex issues. Clarifying involves genuineness on the listener's part and it shows speakers that the listener is interested in them and in what they have to say. Clarification is the skill we use to ensure that we have understood the message of the speaker in an interpersonal exchange. When using clarification a mediator should follow these guidelines to help aid communication and understanding.

- Admit if s/he is unsure about what the speaker means.
- Ask for repetition.
- State what the speaker has said as s/he understands it, and check whether this is what they really said.
- Ask for specific examples.
- Use open, non-directive questions - if appropriate.

- Ask if s/he has got it right and be prepared to be corrected.

Some examples of non-directive clarification-seeking questions are:

"I'm not quite sure I understand what you are saying."

"I don't feel clear about the main issue here."

"When you said what did you mean?"

"Could you repeat ...?"

Clarifying involves non-judgmental questioning and summarizing and seeking feedback as to its accuracy.

Clarification Questions

A mediator as a listener is in a sensitive environment, the right sort of non-directive questioning can enable the parties to describe their viewpoint more fully. Asking the right question at the right time can be crucial and comes with practice. The best questions are open-ended as they give the speaker choice in how to respond, whereas closed questions allow only very limited responses.

- **Open Questions**

A mediator role is to assist parties to talk about an issue, often the most effective questioning starts with 'when', 'where', 'how' or 'why'. These questions encourage speakers to be open and expand on their thoughts. By contrast, to closed questions, open questions allow for much longer responses and therefore potentially more creativity and information. There are lots of different types of open question; some are more closed than others! For example:

"When did you first start feeling like this?"

"Why do you feel this way?"

- **Closed Questions**

Closed questions usually elicit a „yes“ or „no“ response and do not encourage speakers to be open and expand on their thoughts. Such questions often begin with „did you?“ or „were you?“. Closed questions invite a short focused answer- answers to closed questions can often (but not always) be either right or wrong. Closed questions are usually easy to answer - as the choice of answer is limited - they can be effectively used early in conversations to encourage participation and can be very useful in fact-finding scenarios such as research. Closed questions are used to force a brief, often one-word answer. Closed questions can simply require a „Yes“ or „No“ answer. Closed questions can require that a choice is made from a list of possible options, for example. Closed questions can be asked to identify a certain piece of information, again with a limited set of answers.

For example:

“Did you always act like this?”

“Were you aware of feeling this way?”

- Leading or ‘Loaded’ Questions

A leading question, usually subtly, points the respondent’s answer in a certain direction. Asking a party: *„How are you getting on with the new situation?“* This question prompts the person to question how they are managing with a new situation in the life. In a very subtle way it raises the prospect that maybe they are not finding the new situation so good.

„Tell me how you’re getting on with the new situation!“ is a less leading question – the question does not require any judgment to be made and therefore does not imply that there may be something wrong with the new situation.

- Recall and Process Questions

Questions can also be categorized by whether they are „recall“ – requiring something to be remembered or recalled, or „process“ – requiring some deeper thought and/or analysis. For example: *„What is your suggestions to resolve the problem?“*

Questioning

Gathering information is a basic human activity. We use information to learn, to help us solve problems, to aid our decision making processes and to understand each other more clearly. Questioning is the key to gaining more information and without it interpersonal communications can fail. Questioning is fundamental to successful communication. We all ask and are asked questions when engaged in conversation.

The main reasons questions are asked in mediation process are:

- The primary function of a question is to gain information
- To help maintain control of a conversation
- Express an interest in the other person
- To clarify a point
- To explore the personality and or difficulties the other person may have
- To encourage further thought

Being an effective communicator has a lot to do with how questions are asked. Once the purpose of the question has been established you should ask yourself a number of questions:

- What type of question should be asked?
- Is the question appropriate to the parties?
- Is this the right time to ask the question?
- How do I expect the respondent will reply?

Responses

As there are a myriad of questions and question types so there must also be a myriad of possible responses. Theorists have tried to define the types of responses that people may have to questions, the main and most important ones are:

- A direct and honest response – this is what the questioner would usually want to achieve from asking their question.
- A lie – the respondent may lie in response to a question. The questioner may be able to pick up on a lie based on plausibility of the answer but also on the non-verbal communication that was used immediately before, during and after the answer is given.
- Out of context – The respondent may say something that is totally unconnected or irrelevant to the question or attempt to change the topic. It may be appropriate to reword a question in these cases.
- Partially answering – People can often be selective about which questions or parts of questions they wish to answer.
- Avoiding the answer – When asked a ‘difficult question’ which probably has an answer that would be negative to a party, avoidance can be a useful tact. Answering a question with a question or trying to draw attention to some positive aspect of the topic are methods of avoidance.
- Stalling – Although similar to avoiding answering a question, stalling can be used when more time is needed to formulate an acceptable answer. One way to do this is to answer the question with another question.
- Distortion – People can give distorted answers to questions based on their perceptions of social norms, stereotypes and other forms of bias. Different from lying, respondents may not realize their answers are influenced by bias or they exaggerate in some way to come across as more „normal“ or successful.
- Refusal – The respondent may simply refuse to answer, either by remaining silent or by saying, „I am not answering“.

Listening is an active process that constructs meaning from both verbal and nonverbal messages. The more we practice active listening, the more successful communication and interactions with others will become. Nonverbal communication is seen as important component to active listening.

4.3.2.4. Nonverbal communication

However, verbal communication is only one way by which humans communicate and it is trite that nonverbal communication forms a significant component of the entire package of communication. While there is some disagreement as to the exact figures, the extent to which nonverbal communication plays a role in communication ranges from a conservative estimate of 65% to as high as 93%. Taking the true contribution to lie somewhere within this range, it is clear that nonverbal communication does play a significant role in the process of communication. Unfortunately, even though many are cursorily aware of this fact, few people consciously assess and apply nonverbal communication. Instead, most people go through an unconscious process of trial and error which often leads to unreliable results.

As a starting point, let us briefly consider two distinctions between verbal and nonverbal communication. The first distinction is that verbal communication relies on a shared arbitrary system of coding known as language. In contrast, nonverbal communication does not rely on a shared arbitrary system of coding. Although certain generalizations about the meanings of certain body movements or positions can be drawn, these do not have universal application. One must be careful not to mistake the map for the territory. The second distinction is that the meaning one derives from verbal communication necessarily comes from the language used. If spoken or written words are not used, there can be no verbal communication. Nonverbal communication on the other hand, is a continuous process because nonverbal communication never stops. Even the absence of verbal communication has communicative potential.

While it is true that sometimes, people can and do intentionally use a specific body movement to communicate a certain message, most of the time nonverbal communication is subconscious and not consciously intended by the sender to be communicative. However, it would be fair to say that the nonverbal communication manifested by the sender has communicative potential. This potential is realised when the observer receives and interprets the nonverbal communication.

Physiological movements or signals can be condensed into the sometimes overlapping subcategories of body movements, posture, facial expression, gaze and spatial behavior. Looking at these sub-categories briefly, body movements involve head, hand, arm and leg movements and positions which are sometimes used alone or in conjunction with each other. Posture is a subset of body movements. It refers to how a person is sitting or standing and is made up by the various positions the body can take. Facial expression plays a large role in nonverbal communication as a lot of the time, speakers look at each other's' faces. This subcategory consists of eye, mouth, nose and brow movements which, like body movements, can occur singly or with each other. Gaze deals with the direction and intensity of a look at something or someone and also includes the perception of any pupil dilation. Finally, spatial behavior encompasses proximity, body contact or orientation of one's body in relation to another. Physiological movements play a large role in the interpretative function of nonverbal communication.

One may very easily get the idea that all there is to do is to "read" a body language by observing the movements of other people and giving those movements a meaning as set by some previously set explanations. This superficial approach ignores the nuances

that every language, including body language, has. The underlying assumption is that every movement or set of movements has a meaning to it and that we just need to ascertain this meaning. One must surely question the assumption that movements have a specific meaning. Are we to accept that in a creature as subjective, complex and individual as a human, a particular gesture or movement will mean the same thing? While some movements may be hard-wired, these speak more to the systemic function rather than the interpretative one. One could also say that specific meanings are attached to certain movements often enough for broad generalizations to be drawn. But by definition, this means that there are exceptions. The difficulty is determining with any sort of accuracy whether the rule or the exception applies.

To minimize this difficulty, conventional literature on body language suggests a number of considerations to take into account. First, one is cautioned about the impact of culture. Different cultures may have different signals. For example, a nodding of the head may be taken to mean “yes” in many western cultures but may only indicate understanding in some eastern ones. Further, the message “yes” may be indicated by a shaking of the head in yet other cultures.

Secondly, context has to be taken into account. An often-used example is that one may be crossing his/her arms because of the cold and not because of one being defensive. Another example is that a person seated in a chair with no arms may cross their arms simply because it is a comfortable way to configure the body. Finally, one is reminded to interpret “gesture clusters” instead of individual gestures. Presumably, this means that one should give that cluster the meaning supported by the majority of the movements in that cluster.

These considerations point to a more sophisticated analysis incorporating an anti-assumption control which requires one to check one’s interpretation before acting on it. This is important as human-beings are meaning making creatures and we often subconsciously fill in gaps in the communication package with our own assumptions.

We do not really know what any movement or posture means. Unless one has had a chance to “calibrate” to the subject’s moods by associating these moods with certain nonverbal signals, any attempt at interpretation would still be a guess. And even when one has calibrated to the nonverbal signals of a particular person, this calibration is not transferable to another. Therefore, rather than seeking an interpretation of the nonverbal signals, we can use these signals to systemically improve the process of communication by developing rapport. Developing the ability to understand and use nonverbal communication can help you connect with others, express what you really mean, navigate challenging situations, and build better relationships with the parties. The mediator can enhance effective communication by using open body language—arms uncrossed, standing with an open stance or sitting on the edge of the seat, and maintaining eye contact with the person s/he is talking to. Nonverbal communication should reinforce what is being said, not contradict it. If a speaker says one thing, but his or her body language says something else, a listener will likely feel a speaker is being dishonest. It is important to adjust nonverbal signals according to the context by taking into account the emotional state and cultural background of the person one is interacting with. To enhance communication a mediator can use body language to convey positive feelings even when s/he is not actually experiencing them. When we interact with others, we continuously give and receive wordless signals. All of our

nonverbal behaviors—the gestures we make, the way we sit, how fast or how loud we talk, how close we stand, how much eye contact we make—send strong messages. These messages don't stop when one stops speaking either. Even when one is silent, s/he is still communicating nonverbally. In order to become a better communicator, it's important to become more sensitive not only to the body language and nonverbal cues of others, but also to our own.

Nonverbal communication cues can play five roles:

- Repetition: they can repeat the message the person is making verbally.
- Contradiction: they can contradict a message the individual is trying to convey.
- Substitution: they can substitute for a verbal message. For example, a person's eyes can often convey a far more vivid message than words do.
- Complementing: they may add to or complement a verbal message. A boss who pats a person on the back in addition to giving praise can increase the impact of the message.
- Accenting: they may accent or underline a verbal message. Pounding the table, for example, can underline a message.

The following nonverbal signals and cues communicate one's interest and investment in others.

- Facial expressions

The human face is extremely expressive, able to express countless emotions without saying a word. And unlike some forms of nonverbal communication, facial expressions are universal. The facial expressions for happiness, sadness, anger, surprise, fear, and disgust are the same across cultures.

- Body movements and posture

Our perceptions of people are affected by the way they sit, walk, stand up, or hold their head. The way somebody moves and carries himself communicates a wealth of information to the world. This type of nonverbal communication includes a posture, bearing, stance, and subtle movements.

- Gestures

Gestures are woven into the fabric of our daily lives. We wave, point, beckon, and use our hands when we're arguing or speaking animatedly—expressing ourselves with gestures often without thinking. However, the meaning of gestures can be very different across cultures and regions, so it's important to be careful to avoid misinterpretation.

- Eye contact

Since the visual sense is dominant for most people, eye contact is an especially important type of nonverbal communication. The way someone looks at someone else

can communicate many things, including interest, affection, hostility, or attraction. Eye contact is also important in maintaining the flow of conversation and for gauging the other person's response.

- Space

We all have a need for physical space, although that need differs depending on the culture, the situation, and the closeness of the relationship. People can use physical space to communicate many different nonverbal messages, including signals of intimacy and affection, aggression or dominance.

- Voice

It's not just what somebody says, it's how s/he says it. When we speak, other people "read" our voices in addition to listening to our words. Things they pay attention to include a timing and pace, how loud one speaks, a tone and inflection, and sounds that convey understanding.

Evaluating nonverbal signals

- Eye contact

Is eye contact being made? If so, is it overly intense or just right?

- Facial expression

What is their face showing? Is it masklike and unexpressive, or emotionally present and filled with interest?

- Tone of voice

Does their voice project warmth, confidence, and interest, or is it strained and blocked?

- Posture and gesture

Are their bodies relaxed or stiff and immobile? Are shoulders tense and raised, or slightly sloped?

- Intensity

Do they seem flat, cool, and disinterested, or over-the-top and melodramatic?

- Timing and pace

Is there an easy flow of information back and forth? Do nonverbal responses come too quickly or too slowly?

- Sounds

Do you hear sounds that indicate caring or concern?

It is commonly accepted that the notion of rapport forms the basis of good communication and relationship. Rapport is the instinctive closeness to others whom we perceive as similar. When one experiences rapport, there is a feeling of trust and perhaps even bonding with the other person. This is not an unfamiliar notion. Techniques such as active listening and empathy capitalize on this need for familiarity. There are two ways in which one can create rapport through physiological movements. The first is through full body mirroring. This is the process by which you match or mirror some or all of the other party's body movements. This would include gestures, posture, facial expression and even breathing rates. The second, more subtle way is through cross-over mirroring. This is where you match the other party's body movements with a pattern which is similar to their movement. For example, one could match their rate of breathing or tapping foot with rhythmic sways of your finger. Either way, the message being conveyed to the other person's unconscious is that "we're cut from the same cloth". These processes of matching, mirroring and cross-over mirroring are generically referred to as "pacing". Once this "familiar-ness" is achieved, then one can lead the other party to what might be considered a more open posture by changing one's own body movements. If sufficient rapport has been achieved, the other party will begin to unconsciously mirror your movements. It is important to note that the process of "pacing" and "leading" does not and should not seek to mimic the other person. It should be done subtly and with respect for the other person.

A key way in which nonverbal communication can be used in mediation is in the building of trust and rapport. The challenge of building rapport with the parties through matching and mirroring is that the mediator must, at all times, be or at the very least appear neutral and impartial. It would therefore not do if the mediator were to adopt very similar postures to one party or the other (unless of course, both parties are in the same posture). Hence, using physiological movements and vocal behavior to build rapport requires a bit more subtlety. The mediator can pace a party by matching the gestures and breathing rate of the parties. Matching these elements are more transient and therefore less obvious than the matching of a body posture.

Secondly, parties can be paced through vocal behavior. The easiest way to do this is to match the pace at which they speak. Since the mediation will involve direct communication between the mediator and the parties, it would be very easy for the mediator to utilize gestures and pace of speech when summarizing, paraphrasing, reflecting, reframing, etc. Despite all the interpretational pitfalls that surround the discernment of meaning, either verbal or otherwise, nonverbal communication can also be used to enhance the meaning of communication. As long as we acknowledge the assumptions that will inevitably exist and build in a mechanism to deal with the, we can use nonverbal cues to ensure clarity of communication. At every point in the mediation process, parties will be communicating either to the mediator or to one another.

Apart from sorting for cognitive content e.g. facts, positions and interests, from a nonverbal communication perspective, it is also important for the mediator to look for incidences of incongruence and transition. In terms of the former, it was mentioned earlier that one should attribute meaning to clusters of physiological movement rather than single movements. Looking for incidences of incongruence involves identifying incongruence within any cluster of communication, both verbal and nonverbal. The idea is that where the sender is not fully comfortable with whatever is being communicated,

there will be contradictory signals. Nonverbal communication should reinforce what is being said. Is the person saying one thing, and their body language something else? For example, are they telling “yes” while shaking their head no? It is important to look at nonverbal communication signals as a cluster. It is not recommended to read too much into a single gesture or nonverbal cue, but to consider all of the nonverbal signals we are receiving, from eye contact to tone of voice and body language. Taken together the nonverbal cues could be consistent - or inconsistent – with what their words are saying?

Nonverbal communication is a rapidly flowing back-and-forth process requiring your full concentration and attention.

Emotional awareness

In order to send accurate nonverbal cues, we need to be aware of our emotions and how they influence us. We also need to be able to recognize the emotions of others and the true feelings behind the cues they are sending. This is where emotional awareness comes in.

Emotional awareness enables us to:

- Accurately read other people, including the emotions they’re feeling and the unspoken messages they’re sending.
- Create trust in relationships by sending nonverbal signals that match up with your words.
- Respond in ways that show others that you understand, notice, and care.

Emotions play an important role in the way we communicate. The way somebody reacts to emotionally driven, nonverbal cues, affects both how s/he understands other people and how they understand him or her. If s/he is out of touch with his or her feelings, and doesn’t understand how s/he feels or why s/he feels that way, will have a hard time communicating his or her feelings and needs to others. This can result in frustration, misunderstandings, and conflict. Emotional awareness provides the tools needed for understanding both ourselves and other people, and the real messages they are communicating to us. Although knowing our own feelings may seem simple, many people ignore or try to sedate strong emotions like anger, sadness, and fear. But our ability to communicate depends on being connected to these feelings. If we’re afraid of strong emotions or if we insist on communicating only on a rational level, it will impair our ability to fully understand others, creatively problem solve, resolve conflicts, or build an affectionate connection with someone.

Emotional awareness - the consciousness of our moment-to-moment emotional experience—and the ability to manage all of our feelings appropriately is the basis for effective communication.

Emotional awareness helps to:

- Understand and empathize with what is really troubling other people

- Understand ourselves, including what's really troubling us and what we really want
- Stay motivated to understand and empathize with the person we're interacting with, even if we don't like them or their message
- Communicate clearly and effectively, even when delivering negative messages
- Build strong, trusting, and rewarding relationships, think creatively, solve problems, and resolve conflicts
- Effective communication requires both thinking and feeling

When emotional awareness is strongly developed, we'll know what we're feeling without having to think about it - and we'll be able to use these emotional cues to understand what someone is really communicating to us and act accordingly. The goal of effective communication is to find a healthy balance between our intellect and our emotions, between thinking and feeling.

Emotional awareness is a skill that, with patience and practice, can be learned at any time of life. We can develop emotional awareness by learning how to get in touch with difficult emotions and manage uncomfortable feelings, including anger, sadness, fear, disgust, surprise, and joy. When we know how to do this, you can remain in control of our emotions and behavior, even in very challenging situations, and communicate more clearly and effectively.

The role of the mediator is to help others resolve their problems in a mutually agreeable way without getting bogged down in the problem themselves.

Communicating in Difficult Situations

There are two main factors that make communication seem difficult: emotion and change.

Emotions are a natural response to situations that we find ourselves in, and the only time that we need to be concerned is when we consistently feel emotions inappropriate to our current situation. Emotions are therefore not positive or negative but appropriate or inappropriate. If we need to communicate information which may have an emotional effect on another person, it is helpful to anticipate what that effect might be and to tailor what we say accordingly. Tact and diplomacy are skills centred around an understanding of other people and being sensitive to their opinions, beliefs, ideas and feelings.

Effective use of such skills comes from being able to sense accurately what another person is feeling or thinking at any given time and then responding in such a way as to avoid bad feelings or awkwardness, whilst at the same time asserting or reflecting your own ideas and feelings back in a delicate and well-meaning fashion. All people and all communication situations are unique. Developing effective tact and diplomacy skills requires practice and good judgment.

As well as a level of common sense, good judgment and practice in various situations, the effective use of tact and diplomacy relies on these key skills:

- **Attentive listening:** One needs to be able to listen to not just what is being said but also how it is being said in order to understand, and react appropriately to, others.
- **Emotional intelligence:** People with higher emotional intelligence can usually use tact and diplomacy more naturally in communication. Emotional intelligence is a measure of how well we understand our own emotions and the emotions of others. People with higher emotional intelligence find it easier to form and maintain interpersonal relationships and to „fit in“ to group situations. Some people have high IQs and low emotional intelligence and vice-versa; some people score highly on both and some do not. Both IQ and EI attempt to measure different forms of human intelligence, these measures along with personality make up an individual's psyche. Emotional intelligence is the one part of the human psyche that we can develop and improve by learning and practicing new skills. Ultimately emotional intelligence can only be measured by how an individual progresses through life - developing meaningful relationships with others, their interpersonal skills and understanding and managing their own emotions, intra-personal (or personal) skills. Emotional Intelligence is split between our personal and interpersonal skills, these are sometimes also referred to as personal and social competencies.
- **Showing empathy:** As an extension to emotional intelligence, empathy is your ability to see the world from another person's perspective. Empathy is a selfless act, it enables us to learn more about people and relationships with people - it is a desirable skill beneficial to ourselves, others and society. Being empathetic requires two basic components - effective communication and a strong imagination. In addition to effective communication good powers of imagination are required to empathize with others. Everybody sees the world differently, based on their experiences, their up-bringing, culture, religion, opinions and beliefs. In order to empathize with another person we need to see the world from their perspective and therefore need to use some imagination as to what their perspective is based on, how they see the world and why they see it differently from us. Many people find it easier to empathize with people who are closer to them and have more shared experiences and views. There is an important distinction between empathy and sympathy. We offer our sympathy when we imagine how a situation or event was difficult or traumatic to another person.
- **Assertiveness:** The reason for using tact and diplomacy is very often to persuade or influence others to think or behave in a certain way. Assertiveness is fundamental to this process and a skill that many people lack. assertiveness means standing up for what you believe. Assertiveness is expressing your thoughts, emotions, beliefs and opinions in an honest and appropriate way. As assertiveness should be encouraged in others it is also important to remember that we should always respect the thoughts, feelings, opinions and beliefs of other people. Assertiveness allows individuals to assert their personal rights without undermining the rights of others. Assertiveness is considered a balanced response, being neither passive nor aggressive, with self-confidence playing an

important part. An assertive person responds as an equal to others and aims to open in expressing their wishes, thoughts and feelings. Two key techniques that can aid assertiveness are known as "Fogging" and the "Stuck Record" technique.

1. Fogging is a useful technique if people are behaving in a manipulative or aggressive way. Rather than arguing back, fogging aims to give a minimal, calm response using terms that are placating but not defensive, while, at the same time, not agreeing to meet demands. Fogging involves agreeing with any truth that may be contained within statements, even if critical. By not responding in the expected way, in other words by being defensive or argumentative, the other person will cease confrontation as the desired effect is not being achieved. When the atmosphere is less heated, it will be possible to discuss the issues more reasonably. Fogging is so termed because the individual acts like a 'wall of fog' into which arguments are thrown, but not returned.

2. The Stuck Record technique employs the key assertive skill of „calm persistence“. It involves repeating what you want, time and time again, without raising the tone of your voice, becoming angry, irritated, or involved in side issues. Continually repeating a request will ensure the discussion does not become side-tracked and involved in irrelevant argument. The key is to stay calm, be very clear in what you want, stick to the point and not give up. Accept a compromise only if you are happy with the outcome.

Some ways to demonstrate that we value the other person's contribution:

- We encourage contribution through open questioning, by asking opinions, and by drawing people into the discussion in group situations.
- We listen closely to what someone has to say before continuing the conversation.
- We show that we are interested in what someone has to say through appropriate questioning, reflecting, clarification and summarizing skills.
- We show that we value the other person's contribution through the use of appropriate verbal and non-verbal communications such as nodding, smiling, good eye contact and encouraging language.
- We encourage people to be more open in voicing their feelings, wishes and ideas.
- We do not allow ourselves to take responsibility for decisions that should be made jointly.
- Rapport: Rapport is closely linked to tact and diplomacy as well as emotional intelligence and good manners. The first task in successful interpersonal relationships is to attempt to build rapport. Building rapport is all about matching ourselves with another person. For many, starting a conversation with a stranger is a stressful event; we can be lost for words, awkward with our body language and mannerisms. Creating rapport at the beginning of a conversation with

somebody new will often make the outcome of the conversation more positive. However stressful and/or nervous we may feel the first thing we need to do is to try to relax and remain calm, by decreasing the tension in the situation communication becomes easier and rapport grows. We create and maintain rapport subconsciously through matching non-verbal signals, including body positioning, body movements, eye contact, facial expressions and tone of voice with the other person.

- Politeness: Being polite and courteous, respecting other people's view-points and cultural differences is important in many interpersonal relationships.

Change- different people handle change in different ways, some respond very positively to a change in circumstances whereas others may only be able to see problems and difficulty at first. If possible it is beneficial to think about the positive side of the change and the potential opportunities that it may bring. It is better for an individual's well-being if they are able to embrace change as positively as possible, thus helping to minimize stress and anxiety. Communication becomes easier when we are calm, take some deep breaths and try to maintain an air of calmness, others are more likely to remain calm if we do.

Managing stress

In small doses, stress can help us perform under pressure. However, when stress becomes constant and overwhelming, it can hamper effective communication by disrupting our capacity to think clearly and creatively, and act appropriately. When we're stressed, we're more likely to misread other people, send confusing or off-putting nonverbal signals, and lapse into unhealthy patterns of behavior. It's only when we're in a calm, relaxed state that we'll be able to know whether the situation requires a response, or whether the other person's signals indicate it would be better to remain silent. By learning to quickly reduce stress in the moment, though, we can safely face any strong emotions we're experiencing, regulate our feelings, and behave appropriately. When we know how to maintain a relaxed, energized state of awareness—even when something upsetting happens—we can remain emotionally available and engaged.

In order to deal with stress during communication a mediator should take a moment to calm down before deciding to continue a conversation or postpone it. The efficient tactic is to agree, to disagree, if necessary, and take time away from the situation so everyone can calm down or to take a quick break.

Poor **conflict management** can lead to higher production of the stress hormone cortisol. Learning to deal with conflict in a positive and constructive way, without excessive stress, is therefore an important way to improve our communicational skills.

Interpersonal conflict has been defined as: "An expressed struggle between at least two interdependent parties who perceive incompatible goals, scarce resources, and interference from the other party in achieving their goals". For a disagreement to become a conflict there needs to be:

- Some element of communication: a shared understanding that there is a disagreement;
- The well-being of the people involved need to depend on each other in some way. This doesn't mean that they have to have equal power: a manager and subordinate can be equally as interdependent as a married couple;
- The people involved perceive that their goals are incompatible, meaning that they cannot both be met;
- They are competing for resources; and
- Each perceives the other as interfering with the achievement of their goals.

There are three types of conflict, Personal or relational conflicts, instrumental conflicts and conflicts of interest:

- Personal or relational conflicts are usually about identity or self-image, or important aspects of a relationship such as loyalty, breach of confidence, perceived betrayal or lack of respect.
- Instrumental conflicts are about goals, structures, procedures and means: something fairly tangible and structural within the organization or for an individual.
- Conflicts of interest concern the ways in which the means of achieving goals are distributed, such as time, money, space and staff. They may also be about factors related to these, such as relative importance, or knowledge and expertise.

There are five main strategies for dealing with conflicts (*Thomas-Kilmann, Conflict Mode Instrument (TKI)*):

- 1) Compete or Fight- This is the classic win/lose situation, where the strength and power of one person wins the conflict. It has its place, but anyone using it needs to be aware that it will create a loser and if that loser has no outlet for expressing their concerns, then it will lead to bad feeling.
- 2) Collaboration- This is the ideal outcome: a win/win situation. However, it requires input of time from those involved to work through the difficulties, and find a way to solve the problem that is agreeable to all.
- 3) Compromise or Negotiation- This is likely to result in a better result than win/lose, but it's not quite win/win. Both parties give up something, in favor of an agreed mid-point solution. It takes less time than collaboration, but is likely to result in less commitment to the outcome.
- 4) Denial or Avoidance- This is where everyone pretends there is no problem. It's helpful if those in conflict need time to 'cool down' before any discussion or if the conflict is unimportant, but cannot be used if the conflict won't just die down. It will create a

lose/lose situation, since there will still be bad feeling, but no clearing the air through discussion, and results.

5) Smoothing Over the Problem- On the surface, harmony is maintained, but underneath, there is still conflict. It's similar to the situation above, except that one person is probably all right with this smoothing, while the other remains in conflict, creating a win/lose situation again. It can work where preserving a relationship is more important than dealing with the conflict right now, but is not useful if others feel the need to deal with the situation.

In handling conflict both as a direct participant and as a potential mediator, is important to know your limitations. If you reach a point where you don't feel confident that your intervention is going to help, then it's all right to step back and ask for help. This could help to fulfil the role of a mediator as a neutral and multi-partial and to take care that nothing is forgotten that needs to be considered for the long run. Important is not to fall for fast solutions and be sure that nobody is excluded.

Chapter 5: Solving family cases through mediation and judicial proceedings.

5.1. Introduction

5.1.1. Defining divorce

Divorce has become a normative event in today's society. Defined as the **dissolution of a marital union**, divorce requires, in most countries, the sanction of a court or another public authority, following a legal process (Divorce, n.d.). Apart the termination of the marriage, a divorce may also imply child custody, child visitation, spousal and/or child support and division of property (Legal, n.d.).

Though divorce laws may vary between countries, there are two basic types of divorce: fault based and no-fault based. The first one, "is a judicial termination of a marriage based on marital misconduct or other statutory cause requiring proof in a court of law by the divorcing party that the divorcee had done one of several enumerated things as sufficient grounds for the divorce" (Bullock, n.d.). A no-fault divorce "is one in which neither party is required to prove fault, and one party must allege and testify only that either irretrievable breakdown of the marriage or irreconcilable differences between the parties makes termination of the marriage appropriate" ("Lancaster Attorney Family Law-Custody, Adoption, Criminal," n.d.).

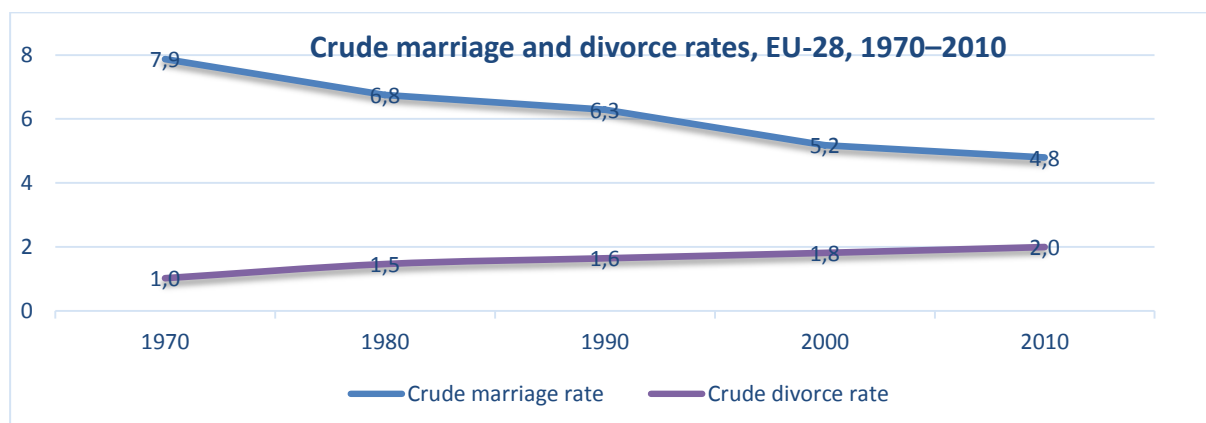
Most scholars acknowledge that divorce is not just a legal event marked obtaining a decree, but "a complex social phenomenon as well as a complex personal experience" (Roberts, 2008, p. 30). In these terms, Bohannan describes "the six stations of divorce" as an overlapping experience, varying in order and degrees of intensity (Bohannan, 1971, p. 33):

1. the *emotional divorce* characterized by feelings of hurt, anger, loss of attraction and trust;
2. the *legal divorce*, which creates re-marriageability;
3. the *economic divorce* which marks the re-organization of the financial and property arrangements;
4. the *'co-parental' divorce* which involves matters of residence of and contact with children and which produces, in his view, the most enduring pain of divorce; for example, in the way parents have to come to terms with the realization that there can be no 'clean break' where there are children, and that, bar situations of moral and physical danger, the relationship between one parent and the child ceases to be any business of the other parent;
5. the *community divorce*, which covers the impact of divorce on the social life of divorcees, for example the way married friends treat divorcees and the organizations available to meet the needs of information and friendship of divorced people;
6. the *'psychic' divorce*, which describes the means by which individual autonomy is recovered. This is thought to be the most difficult yet the most constructive achievement of all.

5.1.2. Evolution of divorce rates

Since 50 years ago, there has been a strong increase in the number of divorces all over the European countries. Basically, divorce rate has doubled across Europe, while the

marriage rate dropped by half. There are variations between countries, and there are also some short-term variations in national trends, but the overall trend is upwards. Among the EU Member States, the highest crude divorce rates in 2012 were recorded in Latvia (3.6 divorces per 1 000 inhabitants) and Lithuania (3.5), ahead of Denmark (2.8) and the lowest crude divorce rate was recorded in Ireland (0.6). Italy (0.9), Malta (1.1), Greece (1.2), Slovenia (1.2) and Croatia (1.3) also recorded relatively low crude divorce rates. Analyzing this data, we should take into consideration that divorce was not possible, by law, in Italy until 1970, in Ireland until 1995 and in Malta until 2011 (Eurostat, n.d.).



Source: Eurostat

The rise in divorce must be seen in the context of the many changes that now affect the traditional family life. There is also an increasing numbers of couples living together outside marriage. Then the European society is increasingly secular, pluralistic, multi-cultural and ethnically diverse. Moreover, same-sex relationships can have some sort of legal recognition, and the average age of the first time parents has increased due to the technological advances in reproductive science (Munby, 2005).

There has been a growing interest in the European countries in using mediation as an alternative to or as a part of the legal process as a consequence of the growing pressure that such increasing trends of divorce rate have put on judicial systems. There was a struggle to manage the rise in litigation and the accordingly increasing costs, and not only the individuals but also the governments became more aware of the limitations of law as a mechanism for resolving family problems that are often complex and highly emotional (James & Haugen, 2010).

5.2. Family law across the European Union

The European Union has small influence in family law matters. Each Member State can set its own rules about divorce, separation, child custody, maintenance of spouses and other matrimonial issues. The role of the EU is generally concerned with ensuring that court decisions made in one country can be implemented in another and trying to identify the right jurisdiction for particular family legal cases.

There are currently no provisions on applicable law in divorce, across the EU, because the Treaty does not provide a real legal fundament for developing a substantive family law. "This means, the EU is neither competent to unify substantive family law, nor currently empowered to legislate by regulation or directive in this field, since the family

branch of civil law does not fall under the exclusive or even peripheral jurisdiction of the Community institutions in accordance to Article 3 and 5 of the Treaty” (Ardeleanu, 2013, p. 53).

5.2.1. Harmonizing the family legislation

The development of the European Family Law appeared in the context of the continuing growing number of member states. Every time, when family matters cross national borders it is necessary to determine which particular national family law will be applicable. This is a substantial challenge to law practitioners who give legal advice on disputes involving cross-border family situations. The same applicable to the courts if they have to decide on lawsuits and for the administrative bodies who must apply the law. Currently, the judge has to choose and to indicate the rule of law which will be applicable to the case (Cimpoeru, 2007).

So far, there was little effort made in harmonizing the family law. Actually, “the Council of Europe attempts to encourage the Member States to cooperate without compelling them to adopt the uniform laws, which might give rise to internal political and social resistance” (Ardeleanu, 2013). By Council Regulation 1347/2000 (Brussels II) EU rules in relation to establishing jurisdiction and recognition in divorce, separation or annulment and enforcement of judgments in matrimonial (mainly custody and access). Starting with 1st of March 2005, a new regulation on marital matters and parental responsibility came into effect (Council Regulation 2201/2003 (New Brussels II). This did not involve any significant change, leaving the rules on matrimonial matters almost unchanged. It did involve only some minor modification in governing parental responsibility.

The pressure for unified family rules, particularly in rules-on-conflict, is rising. A step forward in this direction was the establishment of the Commission on European Family Law (CEFL) in 2001, aimed at elaborating some common non-binding principles for family law in Europe. In 2004 CEFL published the first Principles of European Family Law regarding Divorce and Maintenance between Former Spouses:

“The Principles regarding divorce aim at a dédramatisation of divorce without neglecting the interests of the children and the weaker spouse. The Principles clearly favour consensual divorce above unilateral divorce. In the case of a divorce without the consent of the other spouse they provide a simple objective test – the expiry of a one-year period of factual separation – and thereby avoid an undesirable investigation into the state of the marriage. The irretrievable breakdown principle has been rejected. As to the consequences of divorce, the Principles also encourage the spouses to come to an agreement. Such an agreement, however, is not a prerequisite for the divorce” (Ardeleanu, 2013, p. 55).

5.2.2. National regulations on divorce and legal separation

A common attitude towards a harmonization of family law is developing, but there should be no expectations for spectacular results in the nearby future. Some samples of national legal framework regarding family matters illustrate the difficult task of accommodating all the different perceptions, mostly the result of cultural constraints:

Austria

"Divorce by consent requires that that the 'matrimonial partnership' (eheliche Lebensgemeinschaft) must have ceased to exist for at least six months (Sec. 55 a Austrian Marriage Act), the irretrievable breakdown of the marriage, a joint application for divorce and a written agreement with regard to the consequences of the divorce in case of a non-mutual divorce the litigious proceedings will be initiated by the claim of one spouse. Sec. 177(1) Austrian CC provides that the parental responsibilities of both parents continue after divorce unless the parents agree otherwise, namely that one parent's parental responsibilities are restricted or completely revoked. However, if, in fact, the parents want to continue joint parental responsibilities, they must submit an agreement to the court naming the parent with whom the child will primarily reside. This will ensure that continuity of child-rearing will be maintained to the greatest extent possible. The so-called domicile parent must always be entrusted with all parental responsibilities (Sec. 177(2) Austrian CC). The court will approve the parents' agreement if it is in the best interests of the child (Sec. 177(3) Austrian CC). If the parents fail to reach an (approvable) agreement on the primary residence of the child or the attribution of parental responsibilities within reasonable time, the court will entrust one parent with sole parental responsibilities based on the best interests of the child - after having unsuccessfully tried to reach an amicable solution with the parents (Sec. 177a(1) Austrian CC). The same applies if the exercise of joint parental responsibilities later fails: either parent may petition the court to end joint parental responsibilities without substantiation at any time. Then the court will entrust one parent with sole parental responsibilities based on the best interests of the child unless a reconciliation between the parents may be brought about (Sec. 177a(2) Austrian CC)" (*Council of Europe Family Policy Database. SOCIAL POLICY AND FAMILY LAW: MARRIAGE , DIVORCE AND PARENTHOOD*, 2009).

Denmark

"Grounds for divorce are separation, living apart for two years due to incompatibility, adultery, violence, bigamy and child abduction. If the spouses apply for a divorce together they may obtain a divorce by consent through an administrative procedure at the regional state administration. If only one of the spouses applies for divorce, he/she can only obtain the divorce through a judicial process. If the spouse applies for divorce on the ground of separation, the spouses must have been separated for at least one year.

Maintenance obligations between the spouses ends with legal separation or divorce, unless the spouses agree to continue maintenance obligations or the court decides that one spouse must provide maintenance for the other for a certain period. The amount of maintenance is decided by the regional state administration, unless the spouses make an agreement. Joint custody continues after divorce, but one spouse may apply for sole custody" (Ibid.).

Greece

"Divorce can be granted on the ground of the irretrievable breakdown of the matrimonial bond (Article 1439 §§ 1 and 2 Greek CC), on the ground of consensual separation (divorce by consensus) and in the case of an officially declared absence. - Art. 1510 para. 1 Greek CC provides that the parents exercise parental care jointly, without

referring to the relations between them (i.e. if they cohabit, if they are factually separated, if their marriage has been annulled, or if they are divorced). Thus, the parents continue to exercise joint parental care also after divorcing, unless they submit a petition to the court to regulate parental care. In this last scenario, the court has a wide range of possibilities: It may grant the exercise of parental care to one of the parents, or to both parents jointly, or it may distribute it between the parents, or attribute it to a third party (Art. 1513 Greek CC). Independent of the court decision on the exercise of parental care, both parents will continue to engage in parental care” (Ibid.).

Slovenia

”A law on divorce does not exist. The Law on Marriage and Family Relations (Official Gazette of the RS, No. 14/98 -clarified text) in case of divorce (legal separation) or annulment, stipulates that the parent who has been entrusted with the care and education of the child implements the parent right. In cases where one of the parents is dead or unknown, or the right has been taken away from him/her, or he/she been denied business capacity, the parent right is maintained by the other parent. In the above-mentioned cases, when one person implements the parent right, the term `single parent family` is used” (Ibid.).

Spain

”Possibility of legal separation by court decision (Art. 81-84 Spanish CC) - specific grounds for divorce do not exist (Art. 86 Spanish CC) - divorce is granted by unilateral or mutual application, if the requirements of Art. 81 Spanish CC are complied - an agreement on the consequences of divorce has to be reached (Art. 90 Spanish CC) - divorce has no impact on joint attribution of parental responsibilities, but an agreement of their exercise has to be reached (care of the children under the parental authority of both parents, communication regime and stay of children with the other parent)” (Ibid.).

5.2.3. The divorce process

The regulations on matrimonial matters vary among the Member States, but there are some common steps that a couple must follow when pursuing a divorce. In terms of duration, the full process can take from as little as a few weeks or months, to as long as several years, depending on the willingness to cooperate of the parties and on the particular national family law provisions.

Usually a divorce starts when one of the spouses gets a lawyer, who writes up a petition (also known as a complaint), a legal document that puts the grounds for the legal separation. Such document may contain various requests (Obringer, n.d.), like:

- temporary custody of minor children and for temporary child support;
- exclusive use of the marital home;
- injunction to make sure neither party can access a joint bank account until the further order of the court;
- award of attorney's fees, meaning one spouse pays the other's fees;
- spousal support or alimony.

The lawyer files the petition (complaint) with the court and then the lawyer or the court makes sure that the document is served on the other spouse and that an answer (also called a response) is requested.

Within the given time allowed for an answer the other spouse can agree with the requests or can indicate how he or she would prefer to deal with divorce decisions. As a wide spread rule, if a response is not provided, the court assumes that the served spouse agrees with the terms.

Then the lawyer will gather information from their clients and the opposing spouse (the discovery stage). The divorcing couple can exchange information and documents on issues such as income and property. Upon examining this information, the court and the couple can decide how to divide property and debts and how to deal with child support and spousal support (“A Divorce Timeline,” n.d.).

In some cases, the couple can voluntarily agree on all their issues through mediation or other form of settlement. Some countries even require that divorcing couples go through this process, before a trial is initiated. If a settlement is reached, the agreement can be presented to a judge at an informal hearing where the judge will ask a few basic factual questions in order to appreciate if each party understands and is willing to sign the agreement. If the judge approves the final agreement, he gives the couple a divorce decree. If the judge does not approve it, or if the couple does not reach an agreement, the case will go to trial.

During trial, lawyers present arguments and evidence for each side, and the judge decides on the unresolved issues. Because many of the issues that must be addressed during this process are interrelated, there is sometimes a specific order to how things are addressed (Obringer, n.d.):

- Establishing entitlement to a divorce
- Arranging child custody and visitation rights
- Settling property distribution and financial aspects
- Arranging child support
- Arranging spousal support

Once a decision has been reached, the judge grants the divorce. If not pleased with the outcome, either or both spouses have the right to appeal the judge’s decision to a higher court.

5.3. Family mediation in European Union

There has been an increasing acceptance of the fact that the traditional adversarial system does not meet the needs of families in conflict, especially when children are involved. Since the early 1980s other alternative approaches have been developed to deal with relationships during separation and divorce, commonly referred to as alternative dispute resolution processes. They fall on a continuum from simple negotiations between the spouses at one end of the spectrum, passing through mediation and arbitration and arriving to litigating the dispute at the other end.

5.3.1. Defining family mediation

It is well known that "family mediation" is a dispute resolution process, alternative to judicial or administrative decision-making, in which the spouses are assisted by an neutral and impartial professional (the mediator). The process of mediation involves analyzing the situation starting from the spouses' wish to be divorced and reaching an agreement, based on the spouses best interests and needs, with regard to some or all the matters under dispute.

"Family mediation" as opposed to "divorce mediation" deals with the entire area of conflicts "that that may arise between family members, such as maintenance among relatives, establishing links with biological parents, contact rights of grandparents with regard to their grandchildren, step-parent adoption or any other conflict between relatives" (Casals, 2005). In contrast, "divorce mediation" is not inclusive enough, as a term defining an ADR process, because it focuses mainly on the crisis in which a married couple finds itself when their marriage breaks down, leaving apart the children's perspective.

5.3.2. The evolution of family mediation in Europe

"Although mediation is at varying stages of development across Europe, in general, family mediation has taken similar steps in all the European countries"(Pali & Voet, 2012). "In very broad and general terms, family mediation follows similar steps in all European countries: 1) First, it is discovered with enthusiasm by professionals who deal with family conflicts; 2) next these professionals organise themselves into associations for the promotion and the practice of mediation; 3) in a further step, the national legislature refers occasionally to mediation as a useful mechanism for the resolution of conflicts arising out of separation or divorce, a process that is considered preferable to adjudication in adversarial proceedings and 4) finally, family mediation obtains more detailed legal regulation as such or within the broader framework of rules dealing with mediation in civil and commercial matters" (Casals, 2005).

Mediation in civil matters within the European Union has had generally three separate strands: (a) civil and commercial disputes, (b) consumer rights, (c) family disputes including, in particular, disputes involving children. The basic framework for the establishment and regulation of alternative processes for the resolution of family disputes (particularly in the area of divorce matters and custody cases of children) is contained in Recommendation No R (98)1 of 1998. This instrument was the first to establish the main directions and basic principles concerning family mediation and it covers a range of critical spheres (including the objective of mediation, organisation, promotion, the relationship between mediation and judicial and other proceedings and international family mediation, status of mediated agreements). The intention of this Recommendation is not only to decrease the workload of the courts, but it is also meant to create a better solution for the parties and to better protect the welfare of children.

The Recommendation to governments is two-fold: "first, to introduce and promote family mediation or where necessary strengthen existing family mediation; and secondly, to take or reinforce all measures they consider necessary with a view to the implementation of a number of principles for the promotion and use of family mediation as an appropriate means of resolving family disputes" (Pali & Voet, 2012, p. 66)(Pali & Voet, 2012). All these principles refers to matters that affect professional conduct and standards. It is stated unequivocally that mediation should not in principle be compulsory. Detailed recommendations go to qualifications, experience, training

(including the teaching of theoretical and specialist substantive knowledge) and practice under expert supervision, as part of the provision of standards.

"The European Council has issued several directives and recommendations that contain guidelines, addressed to national governments or conventions that outline obligations that are binding on contracting States. For example, in 1999, the European Council meeting in Tampere called for alternative extra-judicial procedures to be created by the Member States. In 2000 the Council of Europe recommended that an alternative dispute resolution (ADR) in civil and commercial matters could simplify and improve access to justice. Moreover, over the last three decades, the European Ministers of Justice have examined a number of family laws and child rights issues at several conferences, including, one in Strasbourg in 1998, which was devoted to "family mediation in Europe". Subsequently, a Contact Convention was adopted regarding trans-frontier access to children and safeguards for the return of children after access was accomplished. This treaty also encourages member states to adopt similar provisions in their national legislation to standardize the process on domestic levels, thereby facilitating international cooperation" (Ibid, p.68).

In 2002 the European Commission launched the so-called Green Paper on Alternative Dispute Resolution in Civil and Commercial Matters that became the foundation of a European Code of Conduct for Mediators. In this document, the European Commission makes a significant distinction between ADR conducted by the court or entrusted by the court to a third party and emphasizes the function of ADR "as a means of achieving social harmony and its political priority" (Ibid., p. 69). This was the preparative work for the Directive on certain aspects of mediation in civil and commercial matters, adopted on 21 May 2008.

The EU Mediation Directive (2008) applies when two parties who are involved in a cross-border dispute agree to settle their dispute using a mediator. EU Member States are to make sure mediated agreements can be enforced. Furthermore, the Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters puts into place a set of minimum regulations for cross-border mediation in civil and commercial matters and has entered into force in 20 Member States in May 2011. This Directive on cross-border mediation states in article 4, 2 that Member States should encourage the training of professional mediators in order to ensure that the mediation process is conducted in an effective and competent way.

"The general opinion in the Commission is that cross-border legal disputes among the EU-28 member states are best resumed through mediation rather than through courts. The European Commission reiterated at the end of August 2010 the potentials of existing EU-rules on mediation in cross-border legal disputes; the Commission reminded that these measures can only be effective if put in place by all the member states at national level. If mediation fails, disputes can always revert to traditional court proceedings"(Ibid, p.70) .

5.3.3. Variation of family mediation according to national law

"A picture of mediation in Europe would resemble a constantly changing patchwork quilt or mosaic. The pieces making up this patchwork have recurring patterns and colours, but they are not uniform and they are not woven to a single design. There are many missing pieces and the patchwork has gaps in it. A variegated patchwork that recognises cultural differences is preferable to uniformity" (Parkinson, 1997).

Austria

"There are no requirements as to attempts at conciliation or mediation, nor any information meetings. - However, section 223 Non-contentious Proceedings Act

provides for a maximum six-month stay in the proceedings if the court finds that there is any possibility of restoring the marital relationship. In such a case the court must adjourn the proceedings ex officio. After the expiry of this period the procedure can only be resumed at the request of the spouses. However, this form of adjournment is rarely used by the Austrian courts. Besides, the judge must draw the spouses' attention to mediation and conciliation services, if this seems appropriate. However, it is up to the parties whether to make use of such alternative procedures. If they wish to do so the court must adjourn the divorce proceedings upon their joint request, sections 460(7a) Code of Civil Procedure and 222(1) Non-contentious Proceedings Act. To facilitate the access to mediation in case of separation or divorce the federal government is funding family mediation. Couples only have to pay an according to their income reduced fee. The rest is covered by the subvention" (*Council of Europe Family Policy Database. SOCIAL POLICY AND FAMILY LAW: MARRIAGE , DIVORCE AND PARENTHOOD*, 2009).

Denmark

"In Denmark family mediation is always voluntary. Since 2001 the regional state administration has offered mediation in e.g. cases regarding custody and access. From January 2007 the regional state administration also offers mediation regarding separation and divorce. From April 2008 it is also possible to receive family mediation in court cases" (Ibid.).

Germany

"The actual court proceedings are often preceded by a mediation session at the court, where the possibilities of an agreement are looked into. Also, the court may interrupt the divorce proceedings, if it arrives at the conclusion that a continuation of the marriage is still possible. Such an interruption shall not occur against the wishes of both of the spouses where their separation has lasted for more than three years" (Ibid.).

Hungary

"Conciliation is - without exception - an obligatory part of divorce proceedings; it is a legal duty for the judge. In the majority of divorce proceedings the main function of the first hearing is to attempt conciliation but, according to the rules of Civil Procedure, the judge has the authority to conciliate at any other stage of the proceedings as well. - Divorce mediation exists in Hungary, but it is not yet widely available. The spouses can take advantage of this service voluntarily, either before initiating the divorce proceeding, or during the proceeding itself" (Ibid.).

Norway

"Spouses with children under 16 years of age must attend mediation proceedings before a separation or divorce case can be proceeded with. As from 1 January 2007, cohabitating parents must also mediate when they are separating. The reason for the amendment is that children's needs must be treated equally, independent of whether the parents have chosen marriage or cohabitation. Mediation must also take place before a case concerning parental responsibility, residence or right of access can be brought before the court. The purpose of mediation is to enable parents to arrive at an

agreement concerning parental responsibility, right of access and where the child is to live permanently.

From 1 January 2007, the mediation arrangement is amended. The parents are obliged to mediate for one hour (previously three). Simultaneously, the offer concerning voluntary mediation was extended so that the parents now may receive mediation up to seven hours if the mediation can result in an agreement being reached. The aim with the alteration of the amount of hours is to make the mediation arrangement more flexible and adjusted to the individual cases so that less time of the parents will be used which cannot have benefited from mediation, and more time on parents with bigger conflicts” (Ibid.).

Sweden

”The municipalities in Sweden are responsible for providing counselling services for spouses and cohabitantes e.g., for people considering divorce or separation. A more important role, also on a voluntary basis, (Social Services Act, Chapter 5, Section 3), is played by what is termed ‘cooperation talks’ on matters concerning custody, residence and contact in connection with separation. Such talks are offered by the municipal social services and are voluntary. They can result in legally binding agreements. Cooperation talks can also be initiated by the court, in which case they are compulsory for the parents as they are part of the court process”(Ibid.).

Within the European Union, mediation is spread differently throughout the Member States. For example, in the United Kingdom or the Netherlands mediation has become an essential part of the conflict resolution system. “De stand van Mediation in Nederland”, a 2011 study of the Netherland Mediation Institute (NMI) estimates that 51,690 mediations have been conducted by mediators affiliated with the NMI in 2001. In the same year, reports from Bulgaria, count only 100 mediations (Steffek, 2012).

The legal and cultural environment in which mediation is developing can explain these differences. As an example, the data from first instance courts in civil and commercial matters shows an average duration of a case starting with 129 days in Austria until 533 days in Italy (*European judicial systems Edition 2010 (data 2008): Efficiency and quality of justice*, 2010). As a consequence, parties in a dispute might be more inclined to try an alternative to traditional conflict resolution procedures in Italy than in Austria (Steffek, 2012).

5.3.4. Courts and family mediation

Mediation represents an alternative to judicial proceedings, but at the same time, it constitutes a legal instrument for promoting better access to justice. A correct functioning of the mediation process should result in the decrease of new disputes being brought before court and, as a consequence, even in a reduction of the duration of judicial proceedings (Marzocco & Nino, 2012).

Article 5 of the Mediation Directive describes the relationship between court proceedings and mediation. Accordingly, the court can invite the parties to attend an information session on the use of mediation or to use mediation in order to settle their

dispute. The Directive does not force mandatory mediation within the European Union, but allows Member States to choose the use of mediation compulsory, from developing incentives to use mediation or from imposing sanctions. However, such measures cannot deny the parties the right of access to the judicial legal system. That is also the only general prohibition that the Mediation Directive provides for in the mediation process (in addition to the general limitation concerning the rights not at disposal of the parties).

The relation between mediation, as an extra-judicial tool for conflict resolution, and the courts of justice is not clearly regulated by the Mediation Directive. All Member States are free to establish the place of mediation inside their judicial proceedings i.e. mediation as a condition for the admissibility of an action before the courts or even a necessary condition to proceeding in court. Different countries have chosen different means in support of the mediation procedure: binding court orders to try mediation (Norway), financial assistance to use mediation in family matters (Austria) or possible cost sanctions for rejecting mediation without a good reason (United Kingdom) (Steffek, 2012).

According to the same Mediation Directive, the judge can have the following role in mediation procedures (*DIRECTIVE 2008/52/EC*, 2008):

- *Article 3 (a) Definition.* Mediation may be "suggested or ordered by a court". Mediation may be "conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question"
- *Article 5. Recourse to mediation.* A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available.
- *Recital 13.* It should be possible under national law for the courts to set time limits for a mediation process.
- *Article 6 (2). Enforceability.* The content of the agreement may be made enforceable by a court (or other competent authority) in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.

The functions of the judges regarding the use of mediation can expand in legal systems where mediation is part of the court-annexed schemes (Trossen, Komitova, & Aleksandrova, 2012, pp. 82–83):

- *decide on suitability of mediation* for each particular case;
- *mention the option for mediation* – judges may refer to a specific court-connected mediation program or to mediation in general;
- *inform parties about the advantages of mediation* – it has been proven in practice that by mentioning the advantages of mediation judges are better able to motivate parties to use mediation. Parties tend to follow judge's encouragement to use mediation, especially when they see that the judge believes in mediation and recommends it as an opportunity for positive outcome for both parties;

- *discuss with the lawyers the opportunities offered by mediation* – talking to lawyers and encouraging them to use mediation is very important as they are usually the people who will decide whether to use mediation – in most cases parties would follow their advice;
- *schedule an informative session about mediation* – this would be possible where the applicable law provide such opportunity;
- *schedule a date for mediation obliging parties to try at least one mediation session* – only when such an option is allowed by the applicable legislation or by court rules;
- *reflect the results of mediation in a court judgment or ruling* – when parties reach a settlement agreement judges would approve it provided that the legal requirements for such an approval are met.

The Mediation Directive provides the possibility for judges to assist parties in reaching a mediated agreement, but only within the limits of every national legal system provisions and the cases where he or she is not involved in any judicial proceeding concerning the dispute in question.

Even in the Member States where judges have not such authority, they are allowed to invite or encourage parties to reach a settlement, though conciliation or mediation, if appropriate. Therefore, many European judges have the experience in dealing with alternative dispute resolution techniques, and can be proactive in helping parties settle their case by moderating a constructive discussion between parties.

5.3.5. The family mediation process

The family mediation procedure varies across the European Union along with the different national regulations on family matters. Mediation can be chosen voluntarily by one of the spouse in order to reach an agreement or can be court referred. The mediator can have a private practice, can be affiliated to a professional organization or can be court annexed. However, the guiding rules of the mediation procedure are, more or less, the same, not only within the EU-28 legal system, but all over the world.

To start the process, at least one spouse must express an interest in mediation. Mediation can be initiated at any stage of the dispute, even after the judicial has begun. All parties must agree upon the mediator and the procedural issues. If needed, the lawyers can be involved, either as legal advisers or as representatives of the parties.

Usually, mediations start with a joint session used to set the agenda and the ground rules. The joint session also helps define the issues and determines the parties' positions. At certain stages, during mediation, parties can be asked to move to caucuses. Also, most mediators do not allow children to participate in mediation.

Most formal mediations are as a six steps process (Stepp, 2003): 1) introductory remarks, 2) statement of the problem by the parties, 3) information gathering time, 4) identification of the problems, 5) bargaining and generating options, and 6) reaching an agreement. During these stages, the mediator will try to build a calm and comfortable framework, will encourage direct communication between the spouses, will help the couple to deal with emotional outbreaks and will help the parties to structure and share

the information and data available. The mediation can have one or more sessions and can extend from several hours to several days and only in exceptional cases, the duration of the entire process is counted in weeks.

When an agreement is reached, the mediator will help the parties to record the settlement in writing. While mediation is non-binding, the written settlement agreement is final and enforceable (in some EU countries the agreement must be presented to a notary or in court, in order to become enforceable). In family situations, usually the mediated agreement must be presented to a judge for approval, especially when children are involved.

Since mediation is a non-binding procedure, there are times when the spouses do not settle. In those situations, the parties can proceed with an existing judicial procedure or initiate one.

5.4. Mediation and judicial proceedings in family matters

The mediator and attorney may both produce an agreement, but they differ in the process used. The mediator helps the parties negotiate their settlement, while in the traditional legal process the two attorneys advise and negotiate a settlement on behalf of their clients. Attorney negotiations are based on the assumption that an adversarial, competitive approach to conflict allows the attorney for each spouse to argue and compete for the best result. The attorneys define the most common divorce issues in a way that reflects the basic assumptions inherent in the adversarial court process, in terms of competitive, win-lose outcomes. In contrast, mediators define divorce issues in mutual, cooperative terms (Folberg & Milne, 1988, pp. 106–107).

In most cases the mediation and adversarial systems share exactly the same goal: present the court with a settlement agreement. Therefore, both systems urge settlement. Another similarity between the mediation and legal processes is that they both require full disclosure in the discovery process, use experts (law practitioners, accountants, appraisers), and make sure all essential issues are discussed and included in the agreement (Shaw, 2010).

The processes are the one that differentiate these two systems, mediation and litigation, from one another. Furthermore, they produce different kinds of agreements. In litigation, the lawyer acts as an interpreter to the client about what is fair in the eyes of the court, whereas mediation asks parties to create their own laws of fairness. Thus mediation often produces unique agreements that deviate from the norm because they are tailor-made by the couple to fit their interests and desires. In contrast, the court uses a standard set of procedures that produce very similar outcomes because it does not have the time or the knowledge to customize agreements for every divorcing couple. These differences distinguish mediation from litigation and contribute to mediation's increasing acceptance.

Mediation is a useful option and can serve divorcing couples in ways that the adversarial process cannot. Many studies indicate that mediation had a more positive effect on spousal relationships, as well as increasing the parents' understanding of the children's needs (Shaw, 2010). It seems that a child's adjustment is positively affected by a cooperative and supportive relationship between spouses during divorce (Everett, 1985). While the adversarial process leads to adjustment, mediation assists the adjustment process during divorce, increasing the long-term relation and welfare of divorcing spouses.

5.4.1. The advantages of mediating family conflicts

There is generally consensus that mediation offers a number of advantages over adversarial judicial approaches to the resolution of family conflicts, particularly where children are concerned. The traditional adversarial system encourages competitive rather than cooperative attitudes. Communication through a third parties (attorney, judge), the transformation of the client's interests and desires into legal categories, the translation of everyday language into legal discourse, the win-lose nature of the court judgment are processes that hinder free expression, and a lasting solution (Pali & Voet, 2012).

The mediation process aims to **avoid further hostility and complication** between the parties by facilitating direct communication and data in order to exchange reduce conflict and encourage long lasting cooperation. As an example, research are demonstrating the effectiveness of mediation in child-support orders. Emery (1994) found fathers who mediated were more likely to comply with child-support orders. In addition, couples found suitable for mediation and those participating in the mediation process have been found more likely to pay their child support (Tishler, Meyers, & Bartholomae, 2003).

Research shows that reaching an agreement in mediation is a vital component in the making and maintaining of positive relationships between divorcing parents (McCarthy & Walker, 1996). During mediation, the spouses can learn how to **effectively negotiate**, and therefore, manage future misunderstandings and differences or making new arrangements in accordance with changes in their lives.

The mediation process is **forward-looking**. Whereas in the court the parties are stimulated to look backwards to past events and makes a judgment in terms of the legal norms connected with them, the mediator encourage them to look forwards to future action and to evaluate their consequences. That is what makes the mediation process appropriate to solve family conflicts concerning children, where future child support has to be determined over several years, arrangements which require constant cooperation between the parents.

A major advantage for family conflicts is that the **decisions in mediation are made by those who have to live with them**. Maintaining control over their own affairs can assist the spouses to recover and maintain self-respect and dignity. The undamaged family usually makes decisions without interference from other third parties. Family break-down should not become an excuse for external agencies to interfere and take control of intimate family matters. In mediation the parties strive to find common ground, and work to develop mutually agreeable solutions with without any exterior imposition or influences. A mediated agreement is more likely to be adhered to by the parties precisely because it is **voluntary** (Emery, 1994).

Mediation enables separating parents to decide the best **arrangements to suit their family's needs**. It also better take into account the **multi-dimensional aspects of family disputes** – legal, ethical, emotional and practical. Emotions of the parents and the interests of the child are directly expressed during mediation, and have a better reflection into the final agreement. Mediation seeks to generate an agreement that is also realistic, based on the financial condition of the parties as well as on other relevant

circumstances. Mediation allows the parties to set up their own agendas and define their own terms, incorporating what might be important to them, ethically or emotionally, however irrelevant these may be in law. In comparison, the judicial process recognizes only legal norms and cannot therefore fully satisfy the psychological or ethical requirements of the parents and their children (Pali & Voet, 2012). Positive findings associated with mediation include individuals who mediated reporting less anger with their former spouse and greater parental cooperation. Mediation has also been associated with a greater probability of parents consulting and communicating on important child-related issues and increased contact between the noncustodial parent and child. Furthermore, parents who reached a parenting plan arrangement through mediation were more satisfied in terms of quality and helpfulness compared to when they reached an agreement through the courts. In addition, families who entered into mediation had fewer custody hearings (Tishler et al., 2003).

A further advantage concerns the consideration of the **costs and time efficiency** of resolving disputes. Several studies of custody and private comprehensive mediation have found mediation parents reached resolution of their disputes more quickly than did litigation parents, with mediation taking less time (less than half the time) and at less cost. Mediation fees may vary in accordance with the rates of the mediator and the duration of the mediation process and the parties usually share them equally. At the end, mediation proceedings are always cheaper than ordinary judicial proceedings. Even when parents failed to reach agreement in mediation, they were more likely to settle prior to trial than were litigation parents (Emery, 1994). Although data is difficult to find and expensive to collect and evaluate, it would appear that custody and comprehensive mediation in the public sector also saves the government money (Hahn & Kleist, 2000).

When considering compliance and relitigation, most studies report **higher rates of compliance with mediated agreements when compared with agreements reached in the adversarial process** (Emery, 1994). This includes visiting, child support, spousal support, division of property. Factors unique to the mediation process, such as active participation, clients' sense of fairness of the mediation process, and satisfaction with the mediation process have all been identified as contributing to the increased compliance rates and decreased occurrences of relitigation after mediation (Ibid).

There are a variety of mediation techniques, suitable for all kinds of family conflicts. Mediation is more **flexible process** than litigation, and can be easily adapted to the parties' best interest. One unique feature of mediation is that the process is voluntary; therefore any party can decide to stop the mediation at any time if they believe the mediation does not produce expected results. All studies of divorce mediation in all countries and settings indicated that client satisfaction with the mediation process was quite high, in the 60% to 85% range, even when the outcome was not the anticipated one (Richardson, 1988).

The mediation process is strictly confidential. Confidentiality is paramount to the effectiveness of the mediation process as it creates an atmosphere where all parties feel comfortable to discuss their dispute without fear of judgment. Confidentiality facilitates and promotes open communication about sensitive issues and is especially important in family dispute matters (Pali & Voet, 2012).

Recently, the potential for mediation has been recognized in the context of parental **child abductions**. In this context „the aim of the mediation is to secure a negotiated agreement between the parents in the exclusive interests of the child(ren) involved. In such cases, the mediator’s main task is to ensure, by means of an out-of-court procedure, that the child’s best interests are served while sparing the children and their parents the emotional and psychological strain that would result from legal proceedings that are often both lengthy and costly” (*INTERNATIONAL PARENTAL CHILD ABDUCTION HANBOOK*, 2011, p. 13). There are strong incentives for mutually agreed outcomes that could limit damage on relationships and children: avoid delay of returning children and resolving family conflicts; avoid expenses and costs for everyone, including public funds; avoid disruptive physical relocations; and reduce continuing conflict and trauma, especially for children (reunite Report, 2006). Additionally an agreement between parents obtained through mediation could obligate and empower parents to actively and purposefully address the issues affecting the future of their family (Pali & Voet, 2012).

5.4.2. Limitation of family mediation

5.4.2.1. Power imbalance

Power is a complex phenomenon that pervades all human relationships, including intimate relationships between men and women. Within a mediation, power can be defined “simply as the ability to bring about desired outcomes” (Semple, 2012, p. 212). In a typical family law dispute, some of the desired outcomes are financial - paying less or receiving more money. However, most family law disputes also include child related issues, with each party seeking more parenting time or parental decision-making authority. The relative power of the parties may fluctuate during mediation, depending on which issue is being discussed and the course of the interaction (Ibid).

Studies suggests that the man will usually have more power than the woman after the dissolution of the average marital relationship (Bryan, 1992). On average, men possess more property and earn higher incomes than women do, making them wealthier at the time of the divorce. Wealth became power in mediation because the poorer spouse may be more willing to settle for less due to a greater fear judicial costs or a immediate need for the financial settlement. Empirical research with divorcing parties found that spouses who are more impatient to settle in mediation often sacrifice financial entitlements in order to do so. Many women entitled to child or spousal support are in this position (Semple, 2012).

Victims of abuse may also have an interest in a less satisfying settlement, in order to allow them to put the relationship behind them as quickly as possible. Men are more likely to bring into family mediation “resources” such as dominance, status, self-esteem, and reward expectation. In contrast, women may be more likely to arrive with psychological impediments such as guilt, fear of achievement and even depression.

5.4.2.2. Domestic violence

One area of particular concern is appropriateness and effectiveness of mediation in cases where parental conflict involves family violence, since the negative impacts of

parental conflict are higher when family violence is present. Domestic violence has emerged as one of the world's most pressing issues, with the United Nations estimating that between 20% and 50% of all women worldwide have experienced some form of physical violence at the hands of family members ("United Nations Population Fund: The state of world population. Lives together, worlds apart: men and women in a time of change.," n.d.).

With domestic violence, "intimate partners attempt to control or manipulate behavior through physical, emotional, sexual, or economic abuse" (American Bar Association Commission, 2000). Other studies have differentiated between various patterns of domestic violence (Cleak, Schofield, & Bickerdike, 2014):

- *common couple violence* which arises from a specific incident and is not likely to escalate over time;
- *violent resistance* refers to a woman fighting back at her aggressor;
- *mutual violent control* where both partners are violent;
- *intimate terrorism* where the violence is part of a general pattern of control and is likely to escalate over time, is less likely to be mutual, and is more likely to result in serious injury.

Arguments against the use of mediation in cases of domestic violence include issues of safety, fairness, effectiveness, power imbalance, and the decriminalization and privatization of domestic violence. Several scholars have argued that mediators are unable to identify domestic violence, let alone equalize power imbalances (Hart, 1990).

Like other dispute resolution processes without an authoritative decision maker, mediation may also allow criminal violence to go unpunished. The reality of the abuse may become merely a fact or claim to be traded against others within the negotiation. Finally, if mediation occurs in an environment that is less secure than a courthouse, it may expose victims to a higher risk of actual physical harm from the perpetrators (Semple, 2012).

5.4.2.3. Mediator's bias

The experimental psychology literature has found that gender stereotypes, defined "as expectations of differential behavior from men and women in negotiating contexts", are much stronger than the actual differences in behavior (Semple, 2012, p. 13). Although only few studies had analyzed the specific family mediation context, it is plausible that mediators can hold gender stereotypes. For example, N. Zoe Hilton has suggested "that a family mediator might expect the woman to be more conciliatory and therefore strategically focus efforts on obtaining concessions from her in order to maximize the prospects for settlement" (Hilton, 2004). A biased mediator expectation that a woman has to prioritize child related issues could inhibit her ability to obtain desired financial outcomes. The same mediator gender stereotype could, in contrast, favor the woman over the man in a parenting dispute. Making mediator, unlike a judge, enters a "risky relationship of informality and apparent intimacy with the parties," which can foster bias in decision making (Grillo, 1998). Moreover, a judge can also be biased or hold gender stereotypes. However, adjudication provides procedural safeguards against judicial bias, such as cross-examination and appeal.

5.5. Conclusions

The highly increasing rate of divorces across European countries calls for new approaches in dealing with family disputes to be developed. In the last years, family mediation has rapidly developed, proving to be an effective alternative to the traditional judicial procedure.

At the EU-28 level, there are different approaches in employing family mediation and a more harmonized legislation in family matters is needed. The Mediation Directive draws only some general guidelines for future development of the mediation procedure, allowing member states to decide the status of mediation in their own national judicial systems.

In the current European legislation framework the relationship between family mediation and judicial procedures is not clearly defined. In order to have a congruent procedure for family disputes, at a national and cross-border level, family mediation needs to find its rightful place in the judicial system. To this end, decision-making actors should focus to a greater extent on the already existing European good practice models.

Chapter 6: The impact of judicial proceedings over the family, in general and over children, in particular

6.1. Current regulation of family law and judicial proceedings in the EU

The European Union has developed clear **rules regulating divorce and parental responsibility** to help disputing parties navigate between the different systems of family law by the adoption of the Brussels IIa Regulation" (*Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [See amending act(s)], called "Brussels IIa Regulation" http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33194_en.htm*). One of the biggest achievements of this Regulation is that it **established automatic recognition** of judgments on rights of access among Member States, helped determine **which court is responsible for each case involving cross-border family disputes** and provided **rules on child abduction**.

An implementation report issued by the European Commission in 2014 year shows that the Brussels IIa Regulation has been working well so far. However, the report also points to some **shortcomings** (*Protecting children in cross-border family conflicts, International Child Abduction in the European Judicial Space Conference, Martine Reicherts, Justice Commissioner http://europa.eu/rapid/press-release_SPEECH-14-711_en.htm*):

1. "First, whereas in some areas of family law, such as access rights, simplified procedures already exist, **obstacles remain for the recognition and enforcement of decisions on the custody of children**. This causes unnecessary complications and delays for parents who legitimately expect a judgment to take immediate effect.
2. Second, **differences in national rules on the right of the child to be heard cause serious problems**. In matters of custody rights for example, the **recognition of a judgment is frequently opposed on the ground that the judgment was delivered without the child being given an opportunity to be heard**. Similarly, an order for the return of an abducted child will only be enforced automatically if the court certifies that safeguards have been applied. In practice this means that **the court must confirm that the child has been heard before the child can be returned**.

Other inconsistencies in the operation of the Regulation across Member States are caused by a lack of clarity in the Regulation and by inadequate application. One example of inconsistency is mentioned again and again in the consultation:

1. First, both parents and practitioners pointed the difficulties related to the provision stating that **judgments have to be issued no later than six weeks after the application for the return of the child is lodged**. This is interpreted **differently in different Member States**, which in turn causes insecurity for judges and practitioners, whereas parents' hopes of receiving a decision within six weeks are often disappointed.

2. Second, many judges argue for a specialization of courts, as it already exists in Germany, for instance, where only a limited number of courts handle cases of child abduction. In this kind of system, cases can be determined more quickly and with a better chance of consistent outcomes.

This public consultation has also confirmed an issue flagged already in the Commission's report: **the enforcement of a return order is not as straightforward as it should be**. There are still cases in which parents get stuck in lengthy proceedings even when they have obtained an enforceable return order.”

Despite the shortcomings, the current legal regulation of family law in the EU gives disputing parties in family cases a lot of guarantees for their rights.

In addition to the legal framework, this material will explore the very **concepts** underlying the family law and proceedings and the **contemporary shift** of their **impact on families and children** – where disputing parties are turned from “consumers” of justice to main actors actively participating in the process of establishing “justice” in a mutually satisfactory way.

6.2. Justice as a purpose of the judicial proceedings

Under the doctrine of the separation of powers, the judiciary is the system of courts entrusted with the function to interpret and apply the law in the name of the state. The judiciary also provides a mechanism for the resolution of disputes and is tasked with ensuring equal justice under law. Judicial proceedings are the established mechanisms for performing the functions of the judiciary. Thus, **judicial proceedings are intended to ensure** the application of law, the resolution of disputes and in the end – **equal justice**. (<http://en.wikipedia.org/wiki/Judiciary>)

And what is justice? Justice is defined by many philosophers as “the proper ordering of people and things.” The very origin of the word refers to “righteousness, equity”. Justice is also defined as sound reason; rightfulness; validity. Of course, it includes the notion of upholding the law. And in any case, behind the concept of justice lies the notion of balance - that people get what is right, fair and appropriate.(*The origin of the word “justice” is from Middle English justice, from Old French justise, justice (Modern French justice), from Latin iustitia 'righteousness, equity', from iustus "just", from ius 'right', from Old Latin ious, perhaps literally "sacred formula", <http://www.yourdictionary.com/justice>)*

How would this rightfulness, fairness and equity be achieved in family matters?

When it comes to family matters, the function of the judicial proceedings in providing justice to the parties involved and the persons affected by the proceedings exceeds far more the allocation of materials resources in a fair way. It determines what is right and fair in a way that *significantly impacts the whole life* of the people involved – the way one person will live, with whom, where, in what environment, e.g. surrounded by love and support or living in the midst of a battlefield. And in most cases that very person is a *child* who is not able to protect himself/herself, but is someone who needs appropriate care. And this care has to be appropriately designed and provided, because it impacts the whole way this child is going to grow and the person he/she is going to be in the

future. This means that family judicial proceedings often determine to a high extent whether the child affected by it will become a future confident person well progressing in society (due to the support received in the childhood, regardless of the family separation), or a marginalized individual unable to positively interact with society (due to the lack of support and conflict-free environment).

So, if the purpose of the judicial proceedings in family matters seems to be providing justice and proper care to a child affected by such proceedings and to his/her parents, then, how could this be ensured?

6.3. Who “owns” the conflict and its resolution?

The first significant question in this regard would be “**Who**” could possibly determine what is just for the parties involved in the family judicial proceedings, and what kind of care is needed for their children?

To define that, let’s look at the road parties took to go to the court. How did they get there? Two people met and decided they liked each other so much that they would like to live together, to create a family and possibly raise children. And they did so. Then, differences in opinions started to emerge, and as the time passed, these differences became fights, one or both of them felt hurt and suffered actual damages in almost all the fields of their life – affecting them on psychological, material and social level. Thus, one of the partners, or both of them, decided that they could not continue this destructive pattern, and that they had to separate and/or to divorce.

And here is where the judicial proceedings traditionally, almost automatically, step in. **People in conflict often automatically** or driven by the inertia of tradition, or the lack of various choices, **go with their problem to a professional advisor** – a lawyer to help them “get rid” of the problem. And **the lawyer brings them to court**, because this is what the lawyer is taught to do. And in this process **the conflict and the control over it, and the “ownership” over it, are lost**. The right and the inherent human need to take part in the decisions significantly affecting one’s life are “breached”. **The very people, who created the conflict as part of their relationship, were deprived of the opportunity to overcome or to finish their conflict.**

The revolutionary concept of conflict being “stolen” was developed by Nils Christie, who first represented the **conflict as a “value”, “property” not to be lost**. He saw **conflict “as a potential for activity, for participation.”** And explained how lawyers’ focus on an agreement on what is relevant in a case does not let the parties decide what *they* think is relevant.

“Conflicts are not necessarily a “bad thing”. They can also be seen as something of value, a commodity not to be wasted. They are in danger of being lost, or often stolen. ...This loss is first and foremost a loss in opportunities for norm-clarification. It is a loss of opportunities for a continuous discussion of what represents the law of the land. ... Lawyers are, as we say, trained into agreement on what is relevant in a case. But that means a trained incapacity in letting the parties decide what they think is relevant.” (*Conflict as Property, Nils Christie, the British Journal of Criminology, January 1977, <http://publiccommons.ca/public/uploads/literature/Conflicts-as-Property-by-Nils-Christie.full.pdf>*)

He also pointed that conflicts are not just “stolen” from the parties who created it. As a result of the “smaller extent to which individuals in contemporary society are linked to each other in *close* social networks, they know less about other people and get limited possibilities both for understanding and for prediction of their behavior. Thus, if a conflict is created, people are less able to cope with the situation. **Not only are professionals there, able and willing to take the conflict away, but we are also more willing to give it away.**”

The concept of the conflict “belonging” to the parties who created it in the process of their relationship (with its inevitable up’s and down’s) would **place the resolution of the conflict in the very same hands who created it**. It is true that separation and divorce have social consequences exceeding the circle of the family and therefore the law takes over in case of a dispute and defines how to regulate the relationship of parties who seem to be incapable of doing it themselves. However, the law and the judicial proceedings enabling the proper application of this law are just providing an opportunity, a tool, to be used by the disputing parties in crisis situations, where nothing else could work, to regulate the broken relationship between the partners and the consequences from the “dissolution” of their marriage or concubinage. And in no case can judicial proceedings be considered a first step in the dispute resolution process, but they should rather be used as a last resort.

The concept and tradition of “handing over” the problems to be resolved by someone else (officially this is the state, to which we have granted the power to regulate the order in society by law) have a long story in society. And, as stated above in the quote of Nils Christie, **the inability to cope with conflicts is still present in the modern society**, due to the smaller extent of connection between individuals and the limited possibilities for understanding and for prediction of others’ behavior.

On the other hand, in the last decades of the 20th century and even more obviously in the first decade of the 21st century **another trend emerged** – of “emancipation” of citizens feeling more and more aware of their power to control their own lives. And this trend not only resulted in the drop down of political and social systems making large groups of people dependent (such as those in the Central and Eastern Europe and in the Former Soviet Union), but also lead to continuous and growing **“movement” for taking back the decision making power regarding one’s own life in peoples’ own hands** – even if that meant confronting authorities trying to “ignore” or “steal” this power. And this phenomenon occurred both on the level of the individual willing to define his/her own decisions, and on the level of society (where massive protests against state policies which citizens found incompliant with the social moral and interests were visible all over the world in the past few years).

In such a social context, **the judicial proceedings are operating in a new environment** which gives it a new meaning and **requires a different approach** in the dispute resolution process – **not just “giving” people justice** by interpreting and applying the law to their case, but rather **enabling them to participate in the process of elaborating a “model of justice”** which they see fit to their own lives.

6.4. The judicial proceedings enabling parties’ “model of justice”

6.4.1. How are values and needs related to the perception of justice?

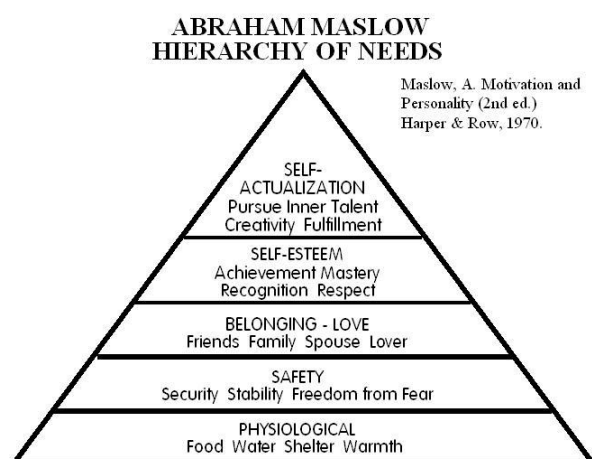
As the main focus of this material is the impact of the judicial proceedings on family and children, the general strategies discussed herein will address exactly **the way in which judicial proceedings are able to empower and support parties in family cases to elaborate their own “model of justice”** adjusted to their needs and especially the needs of their children.

A “model of justice” created by parties supported by the judicial proceedings may only bring justice, if it can ensure that parties’ vision of what is right and fair is fulfilled in the real world. What is right and fair for parties is defined by their values. As Johan Galtung, the “founding father” of peace research in Europe, states, “values are part of our identity, and the choice of values is part of our freedom. But **our values are impossible to exist, if our basic human needs** – for survival, welfare, freedom, identity – **are not satisfied.** Human needs are not a matter of choice – if they are not met, human life and dignity are impossible. The satisfaction of these human needs makes us possible. If we refuse to satisfy our own or other peoples’ basic needs, we are committing violence. **And while it is possible to negotiate for goals and values, needs are not negotiable.**” (*Transcend and Transform: An Introduction to Conflict Work*, Johan Galtung, June 2004)

Therefore, in order for the people to be able to experience something as being just and fair, they must have their human needs met. And this is especially valid in family disputes.

6.4.2. Which are the fundamental human needs?

There is a widely accepted (and also criticized by some) hierarchy of human needs, developed by Abraham Maslow (http://en.wikipedia.org/wiki/Maslow%27s_hierarchy_of_needs), that give a very good idea of the basic human needs. Despite of the critics of his concept, stating that only if the lower level of needs is satisfied, a person is able to move to the next level of needs, the general classification of these needs proved to be valid for all people. Maslow represented the hierarchy of needs in a pyramid.



- Physiological needs (air, water, food, sleep, sex, clothing, shelter)
- Safety and Security needs, including: personal security, financial security, Health and well-being, Safety net against accidents/illness and their adverse impacts.
- Love and belonging (social connections with family members, intimate partners, mentors, colleagues, and within larger social groups, such as clubs, co-workers, religious groups, professional organizations, sports

teams, and gangs.)

- Esteem (the need to have self-esteem and self-respect.)

- Self-actualization (“the desire to accomplish everything that one can, to become the most that one can be.”)

In every conflict at least one of the above needs is compromised and in order to resolve the conflict the need would have to be satisfied.

6.4.3. Which are the needs of partners involved in a divorce conflict and their children?

Basically, the same human needs as those described above would be adversely affected by divorce and will have to be “repaired”, at least to some extent, in order to resolve the conflict and help the parties experience again a situation which they consider “fair and just” – which is the purpose of judicial proceedings.

Partners’ needs in divorce would be very similar to the above stated needs. In particular, **divorcing parties are seriously concerned** with the issues of where they will live, how they will pay their bills (which are now becoming their sole responsibility), how they find will a new partner and experience again fulfilling relationship, how they will restore their self-esteem, usually damaged by the feeling of failure to preserve the broken relationship, and how they will continue their life in the future, etc.

Children’s needs in the context of divorce or separation would be the following:

- physical – to have appropriate and secure place of living and sufficient funds (child support),
- security – to live in a safe environment, e.g. without being involved in a parental “war” as an agent, liaison person, mediator, “advisor” of the “weak” parent needing someone to comfort him/her, a person involved in blackmailing or just a victim of some kind of exchange (of material and other resources) between parents,
- love and belonging – to live with people who are willing and able to respond to the needs of the child to be loved and to feel accepted and appreciated,
- self-esteem – to be respected as a person, and supported to go through the parental conflict with the self-image of a good and worthy person, ideally having the appreciation and affection of both parents, and
- self-actualization – to be encouraged to develop his/her unique strengths.

What do children need when they are placed in the situation of divorce-related conflict is very movingly expressed in the “**Parent’s Promise**”, **written by children of divorce for children of divorce**, which requires from parents very specific actions in order meet the needs children feel most important.”

“For the greatest good of my child _____ I hereby agree that:

- I will not speak negatively about my child’s other parent to my child.
- I will not say to my child “that (insert negative behavior or characteristic) is just like your father/mother”.
- I agree to not put my child in the middle of issues with their other parent (esp. child support).
- I agree to not use my child as a pawn to get back at their other parent.
- I agree that if my child’s parent has a new relationship that I will not speak negatively of this other person to my child.
- I will not expect my child to support my emotional health.

- I will periodically ask my child how they are doing.
- I will do my best to fully support my child during this process.
- I will allow my child to be a child during this time.
- I will seek outside professional counseling if I need to speak with someone about this situation or if I am having difficulty maintaining this agreement.
- I agree that if I do not uphold the above promises that I personally am not acting in the best interest of my child's physical and emotional health.
- I will speak with my child's coach/counselor once a month to gain further insight.

By agreeing to the Parent's Promise I am accepting responsibility as a parent to provide the best environment possible during this transition for my child. Honestly and with much love, I commit to this for my child. (Signed, _____)". (*Parenting, Mediation, and Divorce: Meeting the Needs of Our Children* by Shannon Rios Paulsen <http://www.mediate.com/articles/RiosPS5.cfm#bio>)

A lot of studies continuously show that **one of the most significant need of children** of divorce is to live in a receptive and amiable environment, with the highest value put on the **relationship** between the child and the parents and between both parents. In this regard, "the number one determinant of divorce negatively impacting children is **the amount of conflict** between the parents before, during, and after the divorce." (*Parenting, Mediation, and Divorce: Meeting the Needs of Our Children* by Shannon Rios Paulsen). **The parental conflict proved to have the most salient influence** on children's adjustment to divorce, much higher than the parent absence and the economic disadvantage as other consequences of divorce.

"In a recent meta-analysis, Amato and Keith (1991) compared the relative efficacy of three variables (parental absence, economic disadvantage, and parental conflict) to mediate the effects of divorce on children's adjustment. Although moderate effect sizes were found for both parental absence and economic disadvantage, parental conflict accounted for more of the negative consequences of divorce." (*Children of Divorce*, Daniel S. Shaw & Erin M. Ingoldsby http://www.pitt.edu/ppcl/publications/chapters/children_of_divorce.htm)

"Studies involving between-family comparisons support the notion that separation per se is not necessarily as important to children's later development as **the quality of the parents' relationship with one another** (*"First, comparisons between two-parent and conflict-free, divorced families consistently have reported that children in the latter group have fewer emotional difficulties (Gibson, 1969; Hetherington, Cox, & Cox, 1979; McCord, McCord, & Thurber, 1962; Rutter, 1979). Second, several investigators have reported children from divorced families to experience more behavioral problems than children from families where a father has died (Douglas, Ross, Hammond, & Mulligan, 1966; Glueck & Glueck, 1950; Gregory, 1965)." Children of Divorce*, Daniel S. Shaw & Erin M. Ingoldsby http://www.pitt.edu/ppcl/publications/chapters/children_of_divorce.htm). Furthermore, there is a clear consensus among researchers and clinicians that **"the child's best interests are served by maintaining a relationship with both parents**, except in cases of severe marital conflict and abuse". (*Children's reactions to parental separation and divorce*, Catherine M Lee, PhD and Karen A Bax, BA, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2817796/#b1-pch05217>)

These conclusions suggest that **improving the relationship** between the divorcing or separating parents and **ensuring that the child will be able to maintain a meaningful relationship with both parents**, are the major conditions to having the “best interest” of the child served and the needs of the child of divorce met.

6.4.4. How can the significant relationships be improved in the context of a divorce?

If, based on the above research and evidence, we agree that the **conflict**, which led to a divorce was **created** by the partners and should **be resolved with their active participation**, and that at the same time the parental conflict is the number one harmful factor for a child of divorce and the **preservation of the relationship** between former family members is of significant importance for serving the best interest and the needs of the child, **then it is obvious that the needs and best interest of the child require the active participation of the parents.**

Indeed, if parents started raising their child together, what is the reason to withdraw from their very natural function to take care of their child and from deciding how to meet the needs of the child? It is true that when they are in conflict, they are far more challenged to properly exercise their parental function and might even be unable to reach consent on how to continue taking care of their child and how to distribute the responsibility for that among them. **However, the fact that they are in conflict and put an end to their relationship as spouses does not mean that they stop being parents**, and does not deprive them of the right to get through the conflict (in their own way) and to develop a solution best serving the needs of their child and their own needs.

Thus, when partners are in conflict, they **need help to overcome it and design a future plan on how to continue their parenting functions in a way that meets the needs of their child.**

Therefore, they would **need a dispute resolution process to help them transform their currently confrontational relationship of spouses into a cooperative relationship of parents** (similar to business partners having a joint priority).

6.4.5. How suitable are the judicial proceedings for the purpose of transforming the confrontational relationship of spouses into a cooperative relationship of parents?

Let's examine a case of a couple, where one of the partners filed a divorce claim. In the traditional case the spouses will have to go through an adversarial process (which may also include examining the fault of one of the spouses, e.g. if this is requested by the other), with the court having to decide on the sole-custody to be assigned to the parent having “higher parental capacity”. (It must be mentioned however, that in many states, such as Germany, Italy, United States, Australia, sole-custody is no more the rule). And although the child is a human being naturally psychologically connected to both parents, the court has to “choose” one “capable” parent. Thus, the family judicial proceedings could become not only an adversarial process and a battlefield for the “prize” of “getting the child” (and other material benefits coming along with the parental rights), but a punitive process “sentencing” the parent identified as “less capable” to have limited access to his/her child, and in the same proportion **depriving the child of**

the opportunity to have sufficient contact and maintain a meaningful relationship with the non-custodial parent.

Such judicial proceedings leave everyone a loser. Undoubtedly, the biggest loser is the child, who is not only no longer able to maintain the natural connection of love and affection with both parents, but in fact, has to live “trapped” in the continuous parental conflict. And very **often the parental conflict leads to a deep inner conflict of the child** – a damaged self-image due to the possible identification with the parent who “did wrong”, or a conflict resulting from the requirement to take part in the conflict and choose between parents in various situations, and the need to prove loyalty to the one with whom the child lives.

As the studies mentioned above suggest, one of the most efficient ways **to diminish the adverse impact of the parental conflict on the child is to reduce the pressure over the parents**, because they are the main people who are able to give the child the stability, and support he/she needs in order to pass through the difficult time of adjusting to the life with separated parents. And **the main way to lower the pressure on the parents and thus, on the child, is by supporting them to resolve their conflict in a cooperative way**, leaving them if not completely satisfied, at least able to communicate on the important issues about their child’s life and to create a friendly environment for the child (based on mutual respect and clear priorities and rules).

6.4.6. Which are the most efficient dispute resolution approaches for transforming the confrontational relationship into a cooperative one?

As evident from the above, **the judicial proceedings per se are not designed to resolve the conflict between parents**, which continues “smouldering” in the years.

This leads to **two important conclusions**.

First, that **family judicial proceedings need to be rearranged** in a way better serving the actual interest and needs of the child and the divorcing or separating parents.

And second, that **facilitative dispute resolution approaches might provide the sought resolution of the parental conflict** and actual opportunity for the divorcing parents to **design an arrangement** which best serves theirs and their children’s needs and interests. Mediation and the other facilitative ADR methods are able to help because they provide a protected private environment for discussing children’s needs and the way parents will continue taking care of their joint child after the divorce or separation.

As regards the first conclusion, the mentioned “rearrangement” of the family judicial proceedings is currently occurring. In fact, since the late 70’s of the 20th century **the blame-based past-oriented single-custody paradigm in divorce has been continuously evolving into a no-fault future oriented co-parenting paradigm** in divorce, mostly focused on the best interest of the child (*Bargaining in the Shadow of the Best Interest Standard: The Close Connection between Substance and Process in Resolving Divorce-Related Parenting Disputes*, Jana B. Singer, p.178-180 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2325356). This change is visible in

Germany, USA, Australia, Canada, where it has already become a continuous trend followed in the legislation and in the case-law.

Furthermore, **“the erosion of custody as a legal concept and recharacterization of parenting disputes as non-legal events”** (*Bargaining in the Shadow of the Best Interest Standard: The Close Connection between Substance and Process in Resolving Divorce-Related Parenting Disputes*, Jana B. Singer, p.193), which was raised as an issue in the legal doctrine, in fact **recognized the “ownership”** of divorcing partners over their conflict and consequently, their **active role in shaping the arrangements** about their child, elaborating their “model of justice”.

It was also recognized in the legal doctrine that, the **adjudicative regimes** “construct disputed issues as legal events requiring third-party judgment and allocation of rights, and **mediative regimes approach those same questions as forward looking opportunities for planning and problem solving** – preferably **by the disputants themselves**” (*Bargaining in the Shadow of the Best Interest Standard: The Close Connection between Substance and Process in Resolving Divorce-Related Parenting Disputes*, Jana B. Singer, p.193). Therefore, the suitability and efficiency of the latter approaches for resolving the divorce-related disputes in a way that is better able to respond to the needs of parties in divorce and their child, gave rise to another significant **shift “from adjudicative to a mediative regime for resolving divorce-related disputes”** (*Bargaining in the Shadow of the Best Interest Standard: The Close Connection between Substance and Process in Resolving Divorce-Related Parenting Disputes*, Jana B. Singer, p.193), which is happening globally in the past two decades.

Further below, we will discuss **how judicial proceedings and facilitative dispute resolution methods should cooperate** in helping the divorcing or separating parties solve their problems and plan a parenting model which best suits the needs and interest of their child, given the existing legal framework of parental responsibility.

6.5. Legal framework of parental responsibility in the EU

6.5.1. The concept and definition of “Parental responsibility” in the EU

Parental responsibility is defined as “the responsibility to ensure that the child has shelter, food and clothes as well as a responsibility for the child's upbringing. It includes the responsibility to look after the child's property, if any. It also includes the right to represent the child legally”. (http://ec.europa.eu/civiljustice/parental_resp/parental_resp_gen_en.htm) In all EU countries, a mother automatically has parental responsibility for her child, as does a married father (the rules regarding the unmarried father vary in the different EU member-States). (http://europa.eu/youreurope/citizens/family/children/parental-responsibility/index_en.htm)

When parents divorce or split up, they need to decide how this responsibility will be exercised in the future. The parents may decide that the child shall live alternatively with both parents or with one parent. In the latter case, the other parent usually has a right to visit the child at certain times. The parents may decide these matters by a mutual agreement or by going to court.

The rules on custody and visiting rights are unique to each country. National laws determine who will have custody, whether custody will be single or shared, who will

decide on the child's education, who will administer the child's property and similar issues. All EU countries recognize that children have the right to a **personal relationship** and **direct contact** with both parents, even if the parents live in different countries.

An extensive analysis of the legislation and practice in the field of parental responsibility in 22 EU member States is contained in *European Family Law in Action: Parental Responsibilities*, edited by **Katharina Boele-Woelki, B. Braat, Ian Sumner** (http://books.google.bg/books?id=8goedbtjWnwC&pg=PR5&lpg=PR5&dq=European+Family+Law+in+Action+-+parental+responsibility&source=bl&ots=_XOeetVXu1&sig=tJBpGNYhcDnjqwgBwkHG5T5-JeM&hl=bg&sa=X&ei=wpGAVMXtIsvEygP1n4CQAQ&ved=0CDIQ6AEwAg#v=onepage&q=European%20Family%20Law%20in%20Action%20-%20parental%20responsibility&f=false)

6.5.2. Examples of national legal frameworks governing parental responsibility

The countries participating in the project, for the purposes of which the current Guide is prepared, have the following legal regulations regarding parental responsibility:

ROMANIA

"The court intervenes only to grant **sole-custody** of a child to one of its parents at the time of a divorce decision (for a minor born in marriage) or together with the settlement of an application relating to the custody of the minor (for a child born out of marriage). The parent to whom custody is not granted is not responsible for guarding and supervising the child, retaining instead only the right to monitor the raising, education, schooling and occupational training of the child. That parent has the right to personal links with the child but does not have the right to determine where the child will live or to demand that the child be returned to him/her, under the conditions set out in Article 103 of the Family Code, by a person wrongfully holding the child." (http://ec.europa.eu/civiljustice/parental_resp/parental_resp_rom_en.htm)

ITALY

"The court granting the divorce will **award joint custody of minor children; only in exceptional cases are the children placed in one parent's exclusive custody**. The court also establishes the rules on the time to be spent by the minor children with the non-cohabiting parent. It gives instructions regarding the administration of the children's property and sets the contribution towards the minor children's maintenance to be paid to the cohabiting parent." (https://e-justice.europa.eu/content_divorce-45-it-en.do?member=1#toc_3_3)

CROATIA

"**Shared parental custody** is a rule, **but courts still do not emphasize** this principle in their decisions as they should." (*Council of Europe Family Policy Database, Social policy and family law: marriage, divorce and parenthood, Divorce and parenthood, Custody of children and child support/maintenance* http://www.coe.int/t/dg3/familypolicy/Source/4_2_ii%20Child%20custody%20and%20maintenance.pdf)

BULGARIA

“If in case of divorce parties are not able to reach an agreement regarding the upbringing and nurturing of minor children from the marriage, the court shall rule ex officio on the following issues: **which parent the children will live with, which parent will exercise parental rights**, the measures for the exercise of these rights, as well as the regime of personal relations between children and parents and the maintenance of the children.

The court shall rule on the above issues after having assessed all circumstances in the best interests of the children, such as: the nurturing capabilities of the parents, the care of and attitude to the children displayed, the willingness of the parents, the closeness of the children to their parents, the gender and age of the children, the opportunities for assistance by third parties who are kin to the parents, the social environments and the financial capabilities.

The establishment of the regime of personal relations between parents and children shall include the specification of a period or a day when the parent may see and take the children, including school holidays, public holidays and personal holidays of the child, as well as at other times.” (Art. 59, par.2, 3, 4 of the Family Code)

As we can see, the EU Member-States have **different framework** of parental responsibility, **varying from the legal opportunity of joint custody** (not always put in practice), **to sole-custody** as a rule, which may or may not have exceptions.

6.5.3. What are the concepts underlying the global shift from sole-custody to joint custody?

The shift from a sole-custody regime to a shared-parenting paradigm started with “the legal and social movement for gender equality in the 1970s, which **undermined both the tender-years doctrine and the sole-psychological-parent model**. At the same time, **prevailing psychological theory shifted** away from Goldstein, Freud, and Solnit's emphasis on a single psychological parent, and **toward the view that even young children were capable of forming close emotional attachments to more than one parent**. These new theories coincided with growing research on the importance of fathers in children's' lives. This research fueled an emerging mental-health consensus that **children generally do best if they are able to maintain ongoing relationships with both parents** following divorce or parental separation - a result the prevailing sole-custody model failed to facilitate. **Thus, a custody-decision-making regime that was designed to effectuate the best interests of children was now subject to widespread critique as failing to serve children's needs.**” (*Bargaining in the Shadow of the Best Interest Standard: The Close Connection between Substance and Process in Resolving Divorce-Related Parenting Disputes*, Jana B. Singer, p.183-184 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2325356)

“Already uncomfortable making custody determinations, **judges increasingly looked to mental-health professionals** for expertise and assistance in resolving the increasing number of contested custody cases. (*For a general discussion of these developments, see Fineman, supra note 9. For a thoughtful critique of the legal system's reliance on MHPs in custody cases, see Elizabeth S. Scott & Robert E. Emery, Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests*

Standard, 77 LAW & CONTEMP. PROBS., no. 1, 2014 at 69). The doctrinal response to these developments was the widespread acceptance of joint custody.”

“Currently, **joint physical custody remains controversial**, and only a minority of postdivorce-parenting arrangements involve an equal (or substantially equal) sharing of day-to-day caretaking responsibilities. (See *Scott & Emery, supra note 30, at 80. Scott and Emery report that only a few have statutory presumptions favoring shared physical parenting, while several others favor joint legal custody but not equal residential time. Id. at 80 n.62*) **Joint legal custody**, or equally shared decisionmaking authority, **is much more common** and has become the norm in many jurisdictions.(See *Singer, Dispute Resolution and the Post-Divorce Family, supra note 4, at 365-66*)” (In interesting contemporary overview of the effects of shared parenting can be seen in this video, <https://www.youtube.com/watch?v=36Hwn26KXoY&feature=youtu.be>)

6.5.4. What should be the task of the judicial proceedings given the latest developments towards joint custody?

“Under a postdivorce-coparenting regime, the task of the dispute-resolution system is no longer to make a one-time custody allocation, but rather to **supervise the ongoing reorganization of a family**. As Professor Andrew Schepard has written, a custody court in a co-parenting regime “can be analogized to a bankruptcy court supervising the reorganization of a potentially viable business in current financial distress. The business is raising children and the parents - the managers of the business - are in conflict about how that task is to be accomplished. The court's aim is to get the managers to voluntarily agree on a parenting plan rather than impose one on them. (*Schepard, Evolving Role, supra note 26, at 396*)

Neither adjudication nor adversary procedures are well suited to accomplishing these ongoing managerial tasks. Rather, to manage the transition from spouses to parenting partners, **divorcing parents need processes that are forward looking, collaborative, and capacity building**. Mediative regime helps divorcing parents develop and implement an individualized plan to carry out their ongoing parenting responsibilities. The concept of such **an individualized “parenting plan”** was introduced by the American Law Institute which defined it as “an individualized and customized set of custodial and decisionmaking arrangements for a child whose parents do not live together.” (*Principles of the law of family dissolution: analysis and recommendations 7 (2002)*). In the US, divorcing and separating parents who seek judicial intervention (including the termination of their marital status) must file, either jointly or separately, a proposed parenting plan that designates the parent with whom a child will reside on given days of the year and that allocates decision making responsibility for significant matters affecting the child. The parenting plan must also contain a provision that addresses how the parties will resolve future disputes arising under the plan; a key purpose of such a provision is to minimize the need for future judicial involvement.”

6.6. Cooperation between judicial proceedings and facilitative dispute resolution methods

6.6.1. The need to acquaint parties with mediation and the significant role of the court in this endeavor

Since judicial proceedings are designed to adjudicate, parties referring a case to a judge are expecting to “receive” justice in the form of a judgment. Therefore, they cannot just be redirected to another procedure with the explanation that it would better serve their interests and will help them pass through the divorce proceedings in a much more satisfactory way. Parties could only be “redirected” with the assurance that not only will they receive justice, but will be able to shape their own model of justice that suits the interests of both partners and the interests of their child – as described above in details. Therefore, **parties must be well acquainted with the opportunity that mediation could provide to them for the elaboration of a parenting plan or similar arrangement reflecting the needs of their child and their own interests, as well as for mitigating their conflict** in order to reduce the pressure associated with divorce both for them and for their child.

When and how divorcing or separating partners should be acquainted with mediation is a matter of national legislation. As a result from the implementation of Directive 2008/52 of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (“Directive 2008/52”) (*Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008L0052&from=EN>*) almost all EU member states have adopted mediation legislation providing for that **court could inform or refer parties** to mediation in a way that generally gives the referring judge flexibility to decide which cases should be referred, when and by what kind of intervention (e.g. the judge mentioning mediation, or explaining to parties its benefits, or strongly recommending mediation, etc.).

The indisputable opportunities mediation can provide to divorcing partners and the low level of awareness about mediation in society, gives the court an **additional very important social function – of informing and referring disputing parties** to mediation when suitable. **This expands the “traditional” role of the court as purely adjudicative authority to an authority providing parties with a wider spectrum of opportunities to resolve their dispute** and receive justice, including by shaping their own “model of justice” in their agreement.

The fact that mediation is most spread in countries where courts refer to it as a rule or provide practical opportunities for parties to use mediation during pending court proceedings (US, UK, Netherlands, Norway, Sweden, etc.), proves that the court is able to successfully serve society by implementing **both adjudicative and referring function** enabling parties to elaborate their own settlement.

6.6.2. What would be the main functions of a court willing to provide parties with a full spectrum of dispute resolution methods?

6.6.2.1. Provision of information

Many courts establish Court-annexed or Court-connected dispute resolution programs, which generally provide information to disputing parties – either before a lawsuit is filed

or immediately after that. Information can be provided in various ways – at information sessions or by phone, by court employees, mediators, or by judges in the courtroom.

6.6.2.2. Referral

Referral is different than pure information as it contains the process of encouraging parties to make an attempt to use mediation, by explaining how mediation could help them in their specific situation. Referral contains **the recommendation of the judge for the parties to take action towards mediation**. Referral often includes questions by the judge to the parties, such as “Have you considered mediation?”, “If not, what stopped you from doing that?”, “What would you like to achieve as an outcome of divorce?”, “What are your priorities about your children?” “How do you expect the judicial proceedings to help your children?”, “If you were able to reduce the pressure from divorce on yourself and your child, would you make an effort to do that?”, “If you had the opportunity to learn more about what your ex-spouse thinks and to safely discuss with him your own thoughts with the help of the mediator, how would be that for you?”, etc. All these questions are intended to help the judge understand what the parties’ interests and intentions in this case are and whether mediation is suitable for them, and at the same time to give the parties another perspective for their dispute – allowing them to see and choose another tool to resolve their dispute, if that is important for them. (It would be fair to mention that some parties just need judgment, because they do not want to have the dispute resolved, but to see the other party punished or forced to do whatever they find suitable. Such cases are discussed below).

Referral also involves one very important component – **the assessment by the judge of the suitability of the case for mediation** (examples of suitable and unsuitable cases are given below). The assessment of the suitability of a case would include a determination whether divorcing parties are able to autonomously take decisions regarding the future of their child and their own. And to the extent, to which the exercising of the free will of any of the parents is not hindered by threat or violence, and the primary goal of any of the parents is not to obtain a court decision limiting the participation of the other parent in the life of the child for a good reason (such as history of a parent neglecting the child or putting the child at risk, etc.), then mediation would be appropriate.

The significance of the role of the judge referring parties to mediation and the effect of such referral can be illustrated by plenty of cases.

In a case recently referred to mediation the parents of a child were both claiming the parental rights. In mediation it became clear that the father would not be able to exercise the parental rights because of his working duties, but he wanted to be treated as a parent having equal rights to participate in the life of his child as much as possible. The parents were encouraged to discuss how do they see the daily needs of their child and some priorities for his future, such as what the desired schools would be, how often the child should be able to travel abroad, what kind of out-of-school art, sport and scientific activities the child should engage in, etc.

By focusing on the future, they outlined the priority activities in taking care of their child and started distributing the responsibilities for these activities among themselves. They decided who would bring the child to piano lessons, football,

language lessons, etc.; then discussed a set of criteria to use for the selection of appropriate school for the child; and made a detailed arrangement regarding the traveling issues - how often the child would travel abroad, and under what conditions each parent would give the other a permission to travel abroad with the child.

In addition to that, parents discussed how each of them would participate in the daily routine of their child –e.g. on which days the father would bring the child to school and take him home, on which days the father would take care of the child (including overnight), and what part of the vacations the child would spend with each parent. Thus, the parents elaborated an arrangement allowing them to participate in the daily life of their child as equally significant parents, thus enabling the child to have a lifestyle with both parents actively present.

The parents also discussed which decisions would be taken together (such as regarding education and medical treatment) and which separately, and how they would communicate in order to avoid misunderstandings and quarrels (e.g. one of them preferred e-mails, while the other phone-calls, so they had to decide which were the important decisions, on which both methods would be used).

They also discussed the usual expenses of the child and allocated them among themselves.

In this way, they developed a parenting plan, which contained arrangements of big importance for them and their child, which could not be regulated in such a way by a court judgment, e.g. because the court could not examine in such details the daily schedules of the parents and the child and could not decide which decisions would be taken jointly and which separately instead of the parties.

Given the court practice of ordering sole-custody, which is still wide spread within the EU countries, in the above case the court would have to determine in the judgment which of the parents had “higher parental capacity” and should exercise sole-custody. (In some EU Member-States, such as Italy, joint custody appears to be the rule, while in many others sole-custody is still prevailing. For example, in Bulgaria, parents could decide on joint custody in their agreement and the court has the discretion to choose whether to approve it or not (court practice is not consistent), but when the court decides on the custody, the law obliges it to decide for sole-custody.)

Referral to mediation is one of the most significant actions judges may take to support divorcing or separating partners in reaching an agreement designed by themselves in a way that meets to a high extent the needs and interests of their child.

An illustration of the positive and highly-effective role of referral appropriately made is **a case where 3 pending cases were resolved and 1 future litigation was avoided in one single mediation procedure.**

The case involved a couple where both partners had filed domestic violence cases, and a divorce case. The judge hearing one of the domestic violence cases referred them to mediation after assessing the suitability of the case for mediation. (Parties in domestic violence cases may be very vulnerable and may need special judicial

protection and therefore referral to mediation is only practiced either when parties feel free to express their own will or in cases of “fake” domestic violence. The latter cases are sometimes filed in order to give advantage to the parent filing the domestic violence case in a future divorce case, where the other parent will be presented as an “offender” not capable of exercising parental rights, even if he/she was not found guilty under the domestic violence case (which may also take a lot of time, during which the contacts between the “offender” and the other parent and the child may be restricted or even prohibited).

In the mediation concerned, parties discussed the domestic violence issues, where insulting mails containing discrediting information were spread by one of the partners to the colleagues and relatives of the other, and various threats were made that specific actions would be taken if the offended partner attempted to dissolve the marriage. During mediation it appeared that before filing all the claims both parties had discussed possible divorce, but could not reach an agreement on all issues, and referred to lawyers, who advised them to follow the strategy of filing the domestic violence cases (In mediation parties appeared with new lawyers. It is also important to mention that in practice lawyers proved to be the most influential persons regarding the outcome of mediation. In most cases lawyers cooperate to the process of mediation and contribute a lot towards an agreement. In cases when lawyers are not cooperative, parties rarely reach an agreement). Obviously, the parties had some history of insulting and maybe some elements of psychological violence, but they agreed in mediation that they had abandoned these patterns in the recent months and that they undertook to abstain from any abusive actions towards the other partner and agreed that both would like to proceed with the divorce as soon as possible. In the second mediation meeting they concluded two settlement agreements regarding the consequences of divorce with respect to the children and the distribution of their joint property (which otherwise would have to be resolved in a new case for distribution on the joint property). Thus, four cases were resolved in one mediation procedure in a way that parties found suitable for their needs. And the referring judge had a crucial role by establishing the parties’ priorities and recommending them to use mediation as a better approach to handling these specific priorities.

The referral function of the court also proved to have an additional, preventive social effect. In the 5 year practice of the Court Settlement Center at the Sofia Regional Court (<http://srs.justice.bg/>) it appeared that more and more parties were searching for mediation even before filing a case, or before the first court hearing. In the last two years more than 1/3 of the citizens participating in mediations in the Court Settlement Center approached the center on their own initiative after reading the recommendation for mediation in the subpoena or in the initial judicial report (issued before the first court hearing). We also have information of cases, where parties had their divorce dispute mediated on the recommendation of their lawyer motivating them (among others) by mentioning that the court has established a practice to refer such cases to mediation, so going to mediation earlier could only bring additional benefits.

6.6.2.3. Legal supervision and protection of children’s rights and interests

After referring a case to mediation, the judge would continue exercising an important function as an authority supervising the protection of children’s rights and interests and

parties' compliance with law. As referral to mediation would take place in pending judicial proceedings, **the result from mediation would have to be brought back to the court.** Different national legislations might have different provisions, but in any case parties would have to inform the judge whether an agreement was reached or not and whether they would like the agreement approved, the case dismissed, or the case continued by the court on all or some of the disputable issues brought in the initial claim.

The national legislations and the case-law of the national courts contain as a rule very clear requirements as to the content of the custody agreement between divorcing or separating parents, as well as criteria assessing whether the interest of the child is served. In most cases, the agreement elaborated by the parents would be approved without the court intervening on its content, provided that it complies with the legal requirements regarding its content. Generally, parents would be free to decide with whom the child will live and how will the parents distribute the parental responsibility among themselves, including the daily care and the decisions regarding the child. However, most likely the parents would not be allowed to agree that the child would not have any contacts with one of the parents, or that no child support would be paid (national legislations may contain some limited exceptions from these general rules).

The important supervising and protective function that the judge might have with regard to the children's rights and interests in a mediated agreement is illustrated by the following case:

A divorcing couple, referred to mediation by a second instance court was attempting to negotiate a custody agreement. One of the parties had foreign nationality and intentions to move back to this party's own country of origin, which brought specific challenges to resolving the issue of custody. The case was complicated by the fact that the parent with foreign nationality originated from a country classified as "showing patterns of noncompliance" (*Non-compliance with the Hague Convention is based on the official annual reports of the U.S. Department of State Office of Children's Issues listing "non-compliant" countries and countries showing "patterns of non-compliance".* <http://www.hcmmlaw.com/blog/2014/05/17/international-divorce-hague-convention-abduction-report-issued/>) with the 1980 Hague Convention on the Civil Aspects of International Child Abduction. After series of meetings in mediation, the parties agreed that the custody will be exercised by the parent originating from the country "showing patterns of non-compliance" with the Hague convention, and also agreed on a visitation schedule suitable for the child and both parents and on a child support amount. However, they could not agree on the wording of the place of living, which according to the Bulgarian law might say that the child will live with parent X, and may omit to specify the city and country. Such a wording would allow the custodial parent to move with the child, including to his/her country of origin, thus leaving the other with very low or no prospects of maintaining regular contacts with the child. In this case the need for intervention of the court for the purposes of preventing possible child abduction was obvious. And although the parties reached an agreement on almost all of the disputable issues, it was reasonable to leave to the court to decide on the issue about the place of living, thus allowing the court to ensure the interests of the child and minimize the risk of abduction.

6.6.2.4. A framework for negotiation (reality check)

In addition to the important role of the judge in referral, legal supervision and protection of children's interest, one of the most significant roles of the judicial proceedings, and especially the case-law, is to provide disputing parties with a **framework for their negotiation**. The concept that "the rules and procedures used in court for adjudicating disputes affect the bargaining process that occurs between divorcing couples *outside* the courtroom" was profoundly explored and substantiated by the Harvard Professor Mnookin and his coauthor Lewis Kornhauser in their analysis of the process of divorce bargaining (*Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951 (1979) (*emphasis in original*)). This would mean that **parties negotiating a divorce agreement would willingly agree on something if they know** (with high certainty) **what their alternative would be**, and namely **what they could expect from the court** on this issue. And they would agree if they could negotiate a better deal than what could be reasonably expected from the court.

E.g. if a father who is willing to have shared custody and take care of his child as much as the mother, is aware that according to the case-law of the Bulgarian courts the chance to have such shared custody approved by the court is very low, he would be motivated to sign an agreement stating that the majority of decisions regarding the child (specified in details) will be taken jointly, and the visitation schedule will enable him to take care of his child as much as possible (e.g. 10 of 30 days monthly and almost half of all vacations, as it happened in one of our recent cases).

In the same way, a mother, who is aware of the average amount of the child support determined by the court in cases where father had similar income and the child had similar costs, would more easily agree on an arrangement providing her with 2-3 times higher child support, even if this would mean to agree that the child would spend more time with the father (compared to the case-law, allowing 4-6 days a month to the non-custodial parent (in Bulgaria)).

6.6.2.5. Making mediated agreement enforceable and enforcing court settlement agreements issued by foreign jurisdictions

The court has also the important function to make parties agreement enforceable, if parties request so. Although mediated agreements are often voluntarily executed as they reflect parties' interests and mutual consent on the outcome of their dispute, the opportunity for ensuring enforceability of the settlement agreement provides serious guarantees for parties' interests in mediation in specific cases, where parties need such guarantees (e.g. in cases with relatively low level of mutual trust).

The EU Mediation Directive 2008/52 explicitly bound Member States to ensure that parties should be able to request that the content of a written agreement, resulting from mediation, be made enforceable.

The following rules of the EU apply to making an agreement enforceable:

According to Article 6 (1) of the Mediation Directive Member States should ensure the opportunity for "parties, or one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable.

The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to *the law of the Member State where the request is made* or the law of that Member State does not provide for its enforceability". According to recital 19 of the Directive "This could be the case if the obligation specified in the agreement was by its nature unenforceable". In short, **the contents of the settlement agreement would have to comply with the requirements of the legislation of the Member State, where the request for enforceability would be made.**

"The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument **in accordance with the law of the Member State where the request is made"**. (Article 6 (2)).

"The Member States will determine and inform the Commission of the courts or other authorities competent to receive requests for enforceability" (Article 6 (3)).

The recognition of settlement agreements made enforceable by one member state in other member states is governed by the following rules:

The content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognized and declared enforceable in the other Member States in accordance with applicable Community or national law. For family cases, this could be done on the basis of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (OJ L 338, 23.12.2003, p. 1. Regulation as amended by Regulation (EC) No 2116/2004 (OJ L 367, 14.12.2004, p. 1) (Recital 20 of the EU Mediation Directive).

Regulation (EC) No 2201/2003 specifically provides that, in order to be enforceable in another Member State, agreements between the parties *have to be enforceable in the Member State in which they were concluded*. Consequently, if the content of an agreement resulting from mediation in a family law matter is not enforceable in the Member State where the agreement was concluded and where the request for enforceability is made, this Directive should not encourage the parties to circumvent the law of that Member State by having their agreement made enforceable in another Member State. (Recital 21 of the EU Mediation Directive).

6.6.2.6. Direct involvement of judges in the dispute resolution process

There is a debate whether and to what extent judges should be allowed to facilitate the resolution of a dispute between parties, instead of just rendering a judgment on it. Many national legislations provide, in one way or another, either an opportunity for a judge to encourage divorcing parties to settle, or some flexibility to facilitate the dispute resolution process in the court room. Even Directive 2008/52 provides for the opportunity for a judge to mediate cases provided that the same judge "is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question." (Article 3 (a))

However, the majority of national legislations of the EU Member-States implementing Directive 2008/52 preferred to avoid the direct involvement of a judge in mediation. (*For more information about the different legislative solutions, see EU Mediation Law and Practice, edited by Giuseppe De Palo and Mary B. Trevor, Oxford Press, October 2012*)

Thus, the judge would be free to facilitate the dispute resolution process between parties within the functions provided for by the law. In any case, many judges report that they are able to facilitate the conflict resolution process between parties and render a judgment based on the declared interests of the divorcing/separating partners and their child. Often asking neutral questions intended to find out how parties see their priorities is a key to resolving a dispute. The judge may ask parties what would they like to ensure for their child and how could each of them contribute to the priorities stated by them. In case of an intensive parental conflict the judge may find it appropriate to ask the parents if they have noticed how their conflict influenced their child, what would they need to reduce the conflict in order to release the pressure on their child (who is proved to suffer most from the parental conflict, as stated above), etc. Many judges trained in mediation techniques report that they increased the level of settlement agreements achieved by the parties in their courtrooms.

6.6.3. Participation of children in judicial proceedings

Whether in the adjudicative setting or in the (still much more rare) facilitative setting of the judicial proceedings, the question of participation of a child may arise. The national legislations usually determine the age at which a child should be heard by the court in divorce or custody proceedings in order to express his/her preferences with whom and where the child would like to live and what kind of a relationship he/she would like to maintain with the non-custodial parent.

The opinions on whether and under what conditions a child is to be heard in the judicial proceedings (within the legal provisions regulating that issue) largely vary. On the one hand, hearing a child in a court session would respect his/her right to participate in the decision making process, and thus it may contribute to the child well-being, as a judgment compliant with the expressed needs and preferences of the child heard during the case would be rendered. However, the child will not always be able to freely express his/her true will in the effort not to hurt one or both of his/her parents, or in order to avoid some kind of psychological punishment afterwards.

Undoubtedly, hearing the child during the case can be used to determine the child's best interest. And the hearing may effectively accomplish this task, provided that it is accompanied by measures encouraging parents or requiring from them to work on overcoming their interpersonal conflict with the help of psychologists, mediators, or other suitable experts (otherwise the child's opinion will be heard by the court, but he/she will continue living in a high-conflict environment).

6.6.4. How mediation and judicial proceedings reinforce each other's impact

As seen from the analysis above, judicial proceedings and mediation successfully supplement each other in the process of helping parties resolve their divorce-related disputes.

Mediation provides the environment and the tools for the disputing parties to elaborate a settlement which best suits the interests of their child and their own interests and reduces the level of their interpersonal conflict, **while judicial proceedings encourage** parties to make use of mediation, **supervise** the results of mediation for the purposes of protecting children's interests, and **make the reached settlement enforceable**.

This symbiosis between judicial proceedings and mediation usually provides parties with the highest chance of receiving justice the way they see it (by shaping their agreement with the support of mediators, judges and lawyers). However, it is necessary to clearly determine **when mediation would not give the expected results** and the judicial proceedings in their purely adjudicative role should be preferred.

6.6.5. Cases, where mediation is not suitable

As a general rule mediation most likely would not be suitable in case **when any of the parties is prevented from freely expressing his/her will and from taking own decision** regarding the outcome of the dispute. In particular, mediation would not be appropriate in the following cases (including, but not limited to them), and the judge should make reasonable preliminary examination of the presence of any of the factors below:

- in cases where there is history of violence or reasonable doubt for such, or in cases of threat, or when the free will of any of the parties is compromised in any other way (even by significant power imbalance, or just fear from the other party);
- when protection is needed (e.g. an infringement of the rights of any of the partners or the child must be stopped);
- if any of the parties is not able to take responsibility for the resolution because of not having personal capacity to take decisions or to comply with such;
- when there is another person influencing the decisions of the couple (very often these are the parents of the couple. Our personal experience shows that in more than a half of the separating or divorcing couples there is strong influence of parents, which continues during mediation or judicial proceedings. As these third parties are not present at the mediation table, they remain out of the cooperative discussion and even when the couple is able to achieve agreement on some issues, going back in the environment of the influential third parties usually undermines the vulnerable agreement);
- when mediation is used by any of the parties in bad faith, e.g. only with the purpose to present a positive image before the court – such as willingness to cooperate for achieving an agreement in the best interest of the children, or in order to present oneself as a victim who is making big compromises and therefore deserves court's benevolence.
- when the purpose of any of the parties is not a solution, but punishment for the other party, e.g. in cases of willingness for revenge overriding all other priorities regarding the resolution of the dispute, or
- when any of the parties experiences serious psychological traumas arising from the separation or divorce, neither mediation, nor judicial proceedings would be appropriate methods for resolving the dispute. The party facing psychological challenges, will first need appropriate psychological support in order to overcome

his/her own vulnerable state and be able to form a free will focused on solutions for the future, and not on the negatives of the past.

It is important to mention that **mediation often produces much better results when it is accompanied by psychological counselling** for both parties going through divorce and for their child. The counselling provides personal support for each of the persons involved and helps him or her to better handle the conflict and to choose cooperative and amiable actions towards the other at the same time protecting one's own boundaries and needs. When allowed by the law, a judge may recommend psychological counselling to be used along with the judicial proceedings or mediation in order to help parties overcome the conflict.

6.6.6. The real-life impact – a party's point of view of mediation and judicial proceedings

This is a summary of a party's feedback on the experience with the judicial proceedings and mediation. This party was able to reach an agreement with the ex-partner during the second court instance after long and highly adversarial divorce proceedings.

"You experience the judicial proceedings as something very uncertain – you are fighting for your child and trying to prove that you are the better parent, you are afraid that your child can be taken away from you, you feel helpless, because you are in a procedure the rules of which you cannot understand. You do not know how to help your child go through the psychological expert examinations and the hearing in the court – the child has nightmares after the tests and the meetings with the experts and you feel guilty because the child had to be part of the battle between the parents. The judicial proceedings escalate the conflict with the other parent and complicate the relationship with the child: you have to support him, but you are under such a pressure that you are not able to be as receptive, supportive and calming as the child needs.

In mediation you feel security. You feel relief that the child will not have to suffer in further expert examinations and court hearings. You see clear rules. You feel hope that things will be resolved – as you see the other party coming, which could mean that he/she may also want to put an end to the fight and find a reasonable solution. You feel that you may express what is important for you, and that you will be heard. You are better able to understand what the other party wants and what you can give in order to reach an agreement. You feel supported by your lawyer, who helps you with the legal part."

6.7. Conclusions

As evident from the contemporary developments in the legal doctrine, the concepts about the "ownership" of conflict and the trends of emancipation of citizens in society, **the judicial proceedings operate in a new social environment which requires a different approach** in the dispute resolution process – **not just "giving" people justice** by interpreting and applying the law to their case, but rather **enabling them to participate in the process of elaborating such a "model of justice"** as they may deem fit for their own lives.

In order for the people to experience something as "just and fair", they must have their human needs met.

If we agree that the **conflict** which led to divorce was **created** by the partners and therefore should **be resolved with their active participation**, and that at the same time the parental conflict is the number one harmful factor for a child of divorce and the **preservation of the relationship** between former family members is of significant importance for meeting the needs of the child, **then it is obvious that the needs and best interest of the child require the active participation of the parents.**

The judicial proceedings per se are not designed to resolve the conflict between parents and to provide the opportunities for a resolution shaped by the parties themselves.

Therefore **family judicial proceedings need to be rearranged** in a way better serving the actual interest and needs of the child and the divorcing or separating parents. Such rearrangement is already happening. Since the late 70's of the 20-th century **the blame-based past-oriented single-custody paradigm in divorce started continuously evolving into a no-fault future oriented co-parenting paradigm** in divorce, mostly focused on the best interest of the child.

In order to manage the transition from confronting spouses to cooperating parenting partners shaping their own "model of justice", **divorcing parents need processes that are forward looking, collaborative, and capacity building.** Mediative regime helps divorcing parents develop and implement an individualized plan to carry out their on-going parenting responsibilities.

In order to make use of the mediative regimes, parties must be well acquainted with them. The need to acquaint divorcing partners with mediation and the low level of awareness about it in society, gives the court an **additional very important social function – of informing and referring disputing parties** to mediation when suitable.

As seen from the analysis above, **judicial proceedings and mediation successfully reinforce each other's impact** in the process of helping parties resolve their divorce-related disputes. Mediation provides **the environment and the tools** for the disputing parties to elaborate a **settlement** which best suits the interests of their child and their own interest and reduces the level of their interpersonal conflict, while **judicial proceedings encourages** parties to make use of mediation, **supervise** the results of mediation for the purposes of protecting children's interests, **and make the settlement reached enforceable.**

Chapter 7: Recommendation of mediation by a judge, application of Art. 5, Directive 2008/52/EC.

„The fairness lives on floor to which justice does not always has access“ - unknown author.

7.1. Introduction

On 21 May 2008 the European Parliament and the Council of the European Union have adopted Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters. Member States intended to improve judicial cooperation and access to justice in civil matters, because it is essential for proper functioning of internal market. European legislator believes that mediation provides a lot of benefits such as cost-effective and quick extrajudicial resolution of disputes and at the same time this process is tailored to the needs of the parties. What is more, the parties maintain an amicable and sustainable relationship. As it is stated in article 1 of the Directive, the objective is to 'facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings'.

Mediation is now incorporated in many EU Member States legislation thanks to the recently adopted EU Mediation Directive which standardizes the practice and implementation of mediation. Judges are confronted more and more with the question of how to ensure access to justice for the parties in their courtroom, especially through the use of mediation. They play a crucial role in ensuring that mediation is actually used by inviting the parties to participate in mediation (*Article 5 of the Directive*). The more judges are comfortable with referring litigants to mediation, the better off the litigants will be. A court may invite the parties to use mediation after considering all circumstances of the case and if it is appropriate.

It is also indicated that judge has a possibility to invite the parties to attend information session on the use of mediation on condition that such session are held and easy available. Further, there will be reduced costs, less judicial time wasted, and better quality dispute resolution overall.

The directive indicates, with the ambiguities stressed above, that mediation can be not only merely suggested, but also imposed on the parties by courts. In fact, if we look at national regulations we may observe that the referral is subject to parties' consent (this is the case of Italy, Belgium, Finland, France, Germany, Greece and Romania). The directive removes from its definition of mediation the settlement of disputes assisted by the trial judge, but it includes the settlement made by other judges not involved in the proceedings. It therefore includes not only traditional figures like the Italian conciliations by Justice of the peace, but also the new figure of the so-called judge-mediator, already present in the practice and legislation of other European countries. At the turn of the millennium, the emergence of modern mediation has led some jurisdictions to provide for the referral to private mediators, not connected to the proceedings in addition to the existing amicable settlements by the judge in the trial.

The Directive recognizes that many Courts encourage parties to disputes to seek to settle them by Mediation under Article 5.1 in the following terms:

A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available.

And also includes the following important provision in article 5.2:

This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.

Having in mind this general framework of judge's role and the practical functions that judges exercise in legal systems where mediation is applied in court-annexed schemes, the most common tasks of judges performed in support of mediation (ordered by extent of judge's activity in the referral process) are:

- **to decide on suitability** of mediation for each particular case – when reviewing the case or later in the court room where parties' and lawyers' attitude may also be taken into account;
- **to mention the option for mediation** – judges may refer to a specific court-connected mediation program if such exists at their court, or to mediation in general. Usually judges do so in their initial written communication to parties as provided in procedural legislation of their country, as well as in the court room – in the first court hearing or in any subsequent hearing;
- **to inform parties about the advantages** of mediation – it has been proven in practice that by mentioning the advantages of mediation judges are better able to motivate parties to use mediation. Parties tend to follow judge's encouragement to use mediation, especially when they see that the judge believes in mediation and recommends it as an opportunity for positive outcome for both parties;
- **to discuss with the lawyers** the opportunities offered by mediation – talking to lawyers and encouraging them to use mediation is very important as they are usually the people who will decide whether to use mediation – in most cases parties would follow their advice;
- **to schedule an informative session** about mediation – with a mediator or a court clerk – this would be possible where special court rules governing referral or the applicable law provide such opportunity;
- **to schedule a date** for mediation obliging parties to try at least one mediation session – only when such an option is allowed by the applicable legislation or by court rules.

- **to reflect the results** of mediation in a court judgment or ruling – in compliance with the respective procedural law. When parties reach a settlement agreement judges would approve it provided that the legal requirements for such an approval are met. If parties have reached an agreement on additional issues which are not within the scope of the pending court proceedings, in most legal systems judges would not be able to approve such an agreement. If parties do not reach a settlement agreement or reach a partial agreement the judge will continue the court proceedings dealing with the unresolved issues. If parties do not need court's approval for the execution of the agreement or do not present the agreement to the court, the court proceedings would be dismissed.

When in an informal environment, enable the parties to make their concerns, fears, doubts, etc. problems is much more likely to be found good and fair solution, ruled the Court, than they would under all the weight and respect of the judiciary.

And it should be borne in mind that it is through respect of the Court of Justice, recommending a judge to use mediation has much greater power than a lawyer, consultant or other institution.

It is important to mention that judges' support for mediation expressed before the parties – in courtroom and in the court documentation, has proven to be one of the best incentives for parties to use mediation as it increases their confidence in the procedure.

Judges may assist parties in reaching a settlement agreement within mediation proceedings only in countries where the law provides for such an authority for them.

The Mediation Directive sets forth that a judge may conduct mediation in case he/she is not responsible for any judicial proceedings concerning the dispute in question. Therefore it is expected that the number of countries where judges will be allowed to conduct mediations will increase in the near future.

Even in countries where judges cannot conduct mediations as such they have other powers allowing them to support parties in reaching settlement. In the legislation of many EU countries (belonging to the continental legal system) judges have the general authority to invite or encourage parties reach a settlement, eventually to conciliate. Rarely this general rule contains any specifics about the methods or techniques that judges may use for this purpose. Therefore, many judges all around Europe more or less have the practice to be proactive in helping parties settle their case by asking appropriate questions, moderating a constructive discussion between parties, etc.

Another option for helping parties reach settlement agreement are settlement conferences which may be initiated through either party (usually by the conveyance of a settlement offer) or ordered by the court as a preliminary step to holding a trial. Settlement conferences are usually held by judges who facilitate the discussion between parties, meets with them jointly and privately, and after hearing all facts, interests and options may propose a settlement.
(http://en.wikipedia.org/wiki/Settlement_offer)

7.2. Regulation to Court Referral to mediation in EU Member States.

7.2.1. Austria

The court may (and in family and estate matters, must) assist parties with dispute settlement at any time during the proceedings and when appropriate, may inform the parties about institutions which are qualified for ADR. The implementation of the Directive was not used as an occasion to introduce broad mandatory use of mediation. The Austrian legal framework, overall, does encourage dispute settlement at any time in the proceedings. Whether a judge works with the parties toward settlement or offers information about the institutions offering mediation services depends, with the exceptions noted above, on the personal approach of the judge in question.

7.2.1. Belgium

The Directive leaves it to the member states to determine whether mediation may be made mandatory, and, in Belgium mediation remains by and large a voluntary affair, even if it is ordered by a judge. Courts may refer a case to mediation at each stage of the proceedings until final arguments have concluded. Referral may be done on judge's own initiative if the parties consent; the parties may also decide to petition for mediation.

As mentioned above, in divorce proceedings the judge is obliged to inform the parties on the possibility of mediation and has the right, on his own initiative, to stay the proceedings in order to allow the parties to consider mediation.

If a contract includes a clause for mediation in cases of possible conflict, and one of the parties directly sues the other party, the judge can stay the proceedings only if the interested party raises this exception (*art.1725*) (*The judge cannot stay the proceedings on his own initiative in these cases.*)

7.2.3. Bulgaria

The court has the general authority and discretion to propose that parties attempt mediation. The court is obliged to propose mediation in divorce cases (parties are not obliged to accept).

Court referral to mediation was subject to legal regulation in Bulgaria before the implementation of the Mediation Directive because it was part of the Mediation Act in 2004. The use of such referrals was bolstered by procedural measures for referral provided in the 2008 Civil Procedure Code and by a series of educational measures to increase judges' awareness of mediation.

The current regulation of court referral to mediation, and its implementation by judges, is completely in line with the concept as adopted by the Mediation Directive: a court before which an action is brought may, when appropriate and in light of all the circumstances of the case, invite the parties to use mediation in order to settle their dispute. Certain aspects of the Mediation Directive concerning court referral were, however, not

implemented when the National Assembly made the spring 2011 legislative revisions to implement the Directive. (e.g. preliminary information sessions)

No changes were made in the legislation in terms of court referral after the Directive. A court has the general authority, in its own discretion, to “propose to parties that they use mediation for resolving their dispute.” (*Article 11 of the Mediation Act*) The timing and method for the referral, as well as the consequences of the referral, are regulated by the Civil Procedure Code.

In civil and commercial proceedings, the court has the general authority “to refer the disputing parties to mediation when scheduling the first hearing of the case in public session.” (*Article 140, par. 3 and Article 374, par. 2 of the Civil Procedure Code.*) The parties may be referred to mediation at that time or decide to use it later on at any time during the proceedings. If the parties agree to use mediation the case may be postponed or stayed, depending on their wishes. (*Article 229, par.1, item 1 of the Civil Procedure Code.*) In practice, parties are usually able to conduct mediation sessions in the period between two court hearings.

In divorce proceedings, during the first hearing for examination of the case, the court shall be bound to direct the parties to mediation or another procedure for voluntary resolution of the dispute. If the parties agree to use mediation, the divorce case will be

7.2.4. Croatia

According to the 2008 Law on Civil Procedure, all Croatian courts may organize mediation programs, and judges may refer cases to mediation within their courts or to outside mediation centers. Mediation is voluntary. Therefore, judges cannot make mediation mandatory for parties, and there are no consequences for those parties who refuse a mediation referral.

7.2.5. Cyprus

The 2012 Law states that only voluntary recourse to mediation is allowed. Courts cannot coerce parties into mediation. Their coercive power is limited to calling the parties to a ‘directions’ hearing, in order to be informed about the possibility of mediation.

Unlike Article 5 (1) of the Directive, section 21(1) of the Bill (*Cyprus Mediation Bill*) does not make express reference to information sessions on the use of mediation. It imposes a lesser requirement on courts to inform the parties of the purpose of mediation as defined in section 3(1)

7.2.6. Czech Republic

Code of Civil Proceedings states that the presiding judge in a court proceeding may, when practical and appropriate, refer the parties to attend a three-hour introductory meeting with a registered mediator.

According to the existing provisions of the Code of Civil Procedure, the court may order the parties to participate in the out-of-court settlement negotiation or mediation or a family therapy if the matter pertains underage children. If the parties agree to participate in the out-of-court settlement, the court will adjourn the proceedings as long as it is not contrary to the purpose of the said proceedings. The court may determine the conditions of prolonging the adjournment, e.g. the court may order the parties to provide information on the development and outcome of the settlement negotiations or mediation. The parties do not have to provide information that was communicated during mediation or settlement negotiation and that is not reflected in the outcome (agreement).

According to the current draft of the Mediation Act, the court may order a first meeting with a mediator of 3 hours and for this purpose temporarily suspend the proceedings at most for 3 months.

At this first meeting the mediator informs the parties about the possibilities of mediation. The costs of the compulsory meeting are considered costs of proceedings and are paid by the parties. The amount of costs is limited as well as the extent of the meeting (3 hours). The mediation itself is completely voluntary and the parties to a dispute may enter into a contract with the mediator and settle the price for its services.

7.2.7. Denmark

Parties are invited by the judge to hear his opinion in an optional conciliation procedure after the hearing or trial when the court presents its likely judgment.

Court Mediation: After parties have commenced a dispute, the court will give the parties an informative memorandum on the court mediation rules. Here after it is up to the parties to begin a mediation procedure. The judge can refuse the parties' request for mediation in particular situations, but this can be appealed.

7.2.8. Estonia

Under Estonian law, recourse to mediation is generally voluntary. Article 11 of the Conciliation Act directs that mediation may only be a mandatory precondition to court proceedings when such a precondition is specifically stated in the law.

There is no regulation compelling parties to mediate before court proceedings, encouragement by the court and legal representatives for disputing parties to use mediation.

7.2.9. Finland

Since 2006 judges have acted as mediators in court mediation. As opposed to simply referring the parties to mediation by a mediator or other organization. Court mediation starts in two main ways: one of the parties files an application for mediation with the court before or during legal proceedings, or, if the proceedings are already pending, the court suggests mediation on its own initiative.

Judge has duty to explore possibility that parties could settle dispute. Mediation conducted by judge of court and now parties may request particular judge.

7.2.10. France

Judge can refer dispute to mediation at any time in course of judicial proceedings until decision made by court. In some areas which require a preliminary conciliation phase, such as labor or family, judge may order parties to meet with mediator to be informed about how mediation works. They are not required to mediate afterwards.

The 2011 Decree now governs court referral to mediation, in conjunction with other laws. Article 22 of the 2011 Decree and the CCP sets out the conditions under which civil courts may refer matters to a mediator, the length of the mediator's mission and the termination of the mediation process. Pursuant to Article 22 of the 1995 Law, a judge appointed for a civil or commercial case can, after having obtained the consent of the parties, appoint a judicial mediator. Only the Court de cassation is not permitted to refer a dispute to mediation, since the role of that court is not to resolve a dispute but to review the law's application by inferior courts.

7.2.11. Germany

Courts may refer a case to mediation but only with the consent of the parties. Art. 278 paragraph 2 of the code of civil procedure (ZPO) obliges the civil courts to begin the hearing with a conciliatory hearing in which the judge has to discuss the issues of fact and of law with the parties and to put questions, if appropriate. According to Art. 278 paragraph 1 of the Code of Civil Procedure (ZPO) the judge shall in every situation of the lawsuit strive for an amicable settlement.

Art. 15 a of the Introductory Law to the Code of Civil Procedure entitles the regional legislator to prescribe that lawsuits on small claims / valued at or up to EUR 750.00/, lawsuits against neighbors and libel suits are admissible only after a prior extrajudicial attempt of conciliation. In addition, a provision in the German Code of Civil Procedure (ZPO) has been amended by providing for court referrals to ADR with the consent of the parties (*Sec. 278 para. 6 ZPO*).

Pursuant to art. 135 of the Code of Family Procedure the court can oblige the parties to participate at an information session about mediation. In appropriate cases the court shall propose an extrajudicial settlement. Pursuant to art. 156, in cases concerning children the court shall indicate in appropriate cases to mediation or other forms of extrajudicial dispute resolution.

According to an amendment of Sec. 253 (3) Civil Procedure Code, the statement of claims (*Klageschrift*) has to inform the judge on the parties' efforts to resolve the dispute in mediation before bringing the action in court and whether there are any reasons excluding mediation.

The amendment of Sec. 278 (5) ZPO include the possibility to transfer the parties to another judge who is acting as conciliator (*Güterichter*) for a conciliation hearing. Such

conciliation hearing must not be confused with the court-annexed mediation. The relegation to a “conciliator-judge” remains in the pure discretion of the court and cannot be declined by the parties. The “conciliator-judge” has the power to schedule a binding hearing date which is not possible in court-annexed mediation. In addition, the “conciliator-judge” has the right to read the records of the case without the prior approval of the parties.

Furthermore, the amendment of Sec. 278a ZPO provides for the proposal of court-annexed mediation. The court proceeding shall be suspended for the time of the mediation proceeding. In the case of court-annexed mediation, the parties have the right to choose the mediator. If the mediator is a judge, he must consider all statutory requirements, e.g. confidentiality, duties of disclosure, training and education. Parties can, furthermore, bind themselves by all sorts of contracts not to go to court before having tried an amicable settlement of their dispute. Such a contract has to be respected by the courts and if there are no exceptions or reasons for nullity the contract, the court has to reject the lawsuit as inadmissible. The Federal Constitutional Court decided that it is no violation of due process if courts consider mediation clauses as binding contract provisions which must be followed-up before the court proceeding can be started.

7.2.12. Greece

Court may request parties participate in mediation at any stage in court proceedings. Court referral may also be initiated by foreign court. The Mediation Act opens several paths to the mediation process. First, under Article 3(1), mediation may begin on the parties’ initiative before or after notice of a pending lawsuit (*lis pendens*) is given. Second, pursuant to Section 2 of the same Article, mediation may begin if the court asks the parties to seek recourse to mediation. This request may happen at any stage of the proceedings, depending on the case and taking into account the particulars of the subject matter.

7.2.13. Hungary:

If court feels dispute may be successfully resolved in mediation, judge may suggest mediation to parties at any point in judicial proceedings. Also, at first hearing in a labor dispute, court will invite parties to consider amicable settlement. In divorce proceedings, court is required to attempt to reach a settlement (is save marriage) at first hearing.

7.2.14. Ireland

Regulation 3(1) of the Mediation Regulations exactly mirrors the wording of Article 5(1) of the Directive. Court may, on application of party or its own motion, invite parties to use mediation to settle dispute or direct parties to attend an information session on use and operation of mediation. Court should consider whether mediation has reasonable prospect of success and whether it is likely to assist parties in resolving dispute.

An increasing number of court rules and legislative provisions have been enacted empowering a court, acting either on its own initiative or at the request of a party, to adjourn proceedings to allow parties to consider using mediation or conciliation.

7.2.15. Italy

On June 21, 2013, the Italian Government approved the Law Decree 69, and these new mediation rules were converted into law by the Parliament on August 9, 2013. On September 20, 2013, the new rules came into force.

The mandatory mediation rules were reintroduced in Article 5, 1bis, Legislative Decree 28. Article 5, 1bis is in effect for four years, ending in September 2017. Also, after two years from its introduction, in September 2015, the Ministry of Justice will conduct a mid-term review of the rules.

The following cases are subject to mandatory mediation: tenancy, land rights, partition of property, hereditary succession, leases, loans, rental companies, medical and sanitary malpractice, defamation by the press or other means of advertising, contracts, insurance and banking and finance. The new legislation also introduces new rules for mediation, and introduced a non-mandatory procedure which applies to any civil and commercial litigation regarding matters other than those listed above.

Pursuant to the new rules, judges now have the power to order parties to mediation at any stage in the dispute. In evaluating the nature of the case, the judge may invite the parties to proceed with mediation, even during appeal. Lawyers have the duty to inform clients about the option of mediation and specify all tax benefits of the procedure. Should the lawyer fail to inform the client about mediation, the attorney-client contract may be voided by the client. The information must be provided in writing and signed by the client. If the document is not joined to the writ of summons, the judge will inform the party about mediation.

The mediation procedure must not last more than 4 months. If the parties do not reach an agreement, the mediator, upon request of the parties, has to provide them with a proposal, which they are free to adopt in order to settle the dispute. This proposal has to be sent to the parties in writing and, if they do not respond, their silence is considered to be a refusal of the proposal (*Art. 11*), with negative consequences for the allocation of process fees (*Art. 13*). The party who prevails in a trial but has not accepted the mediator's proposal, may be ordered by the judge to pay the fees to the counterpart.

7.2.16. Latvia

Currently under Civil Procedure Law court is authorized to generally propose to the parties to use mediation. When Mediation Law comes into force, courts will have power to refer cases to mediation by suggesting appointment of mediator from list of certified mediators.

7.2.17. Lithuania

In accordance with principles in Article 5 of the Directive, Article 3(3) of the mediation Law allows a court hearing in civil case judge to suggest that the parties to a dispute attempt to resolve the dispute by way of conciliatory mediation. Parties may choose judicial or non-judicial mediation. Referral to judicial mediation may be by court suggestion or by request of party. Not clear whether judge required to respect party request for mediation.

7.2.18. Luxembourg

Judge may, any time during proceedings, invite parties to use mediation on judge's initiative (with consent of parties) or at request of both parties. Law provides specialized judicial mediation in family law area: divorce, separation of property, and related issues.

7.2.19. Malta

Court has authority to refer parties to participate in mediation. Referral may occur by joint request by parties, or by court if judge determines dispute may appropriately be resolved through mediation.

Under Article 18(1) and (2) of the Mediation Act, referral may occur by a joint request by the parties or court referral if the judge determines that the dispute may appropriately be resolved through mediation.

7.2.20. Poland

Court may issue order to mediate on its own initiative or at request of parties. If parties want to mediate during the case, they may submit joint request to the court.

According to Article 10 of the CCP, all civil matters in which a settlement agreement is permissible may be referred to mediation. This rule results in almost all civil cases, including family, labor and commercial cases, being referable to mediation. Polish law does not provide for any specific criteria for how the cases shall be selected for mediation.

There are, however, certain limitations as to how often and when the court may order the case to mediation. For example, the court may refer the case to mediation only once during the proceedings, and the court may only order the case to mediation up until the end of the first hearing. Thereafter, the court may send a case to mediation only upon a joint request of the parties.

7.2.21. Portugal

Judge in civil case has discretion to refer parties to mediation unless one or more parties expressly object. In pre-mediation phase, judge acts essentially as mediator,

informing parties of benefits and disadvantages of mediation. Law is silent as to parties ability to start private mediation after dispute has been filed in court.

7.2.22. Romania

Under Article 6 of Law No 192 of 16 May 2006 on mediation and organization of the profession of mediator, judicial and arbitration bodies, as well as other authorities with jurisdictional powers shall inform the parties on the possibility and on the advantages of using the mediation procedure and shall advise them to resort to this recourse in order to settle conflicts between them.

Court may refer appropriate case to mediation. Judges has discretion, considering circumstances, to recommend mediation to parties at any stage of lawsuit. To this end, judge can refer parties to mediation information session.

7.2.23. Slovakia

Court may recommend that parties attempt to settle through mediation and may invite parties to information session on mediation. Court may make suggestion any time before and during proceedings.

7.2.24. Slovenia

Under the Judicial ADR Act, the court must directly offer the option of alternative dispute settlement to the parties in each case unless the judge deems this approach to be inappropriate for a particular case. The act imposes an obligation on all courts of first instance and courts of appeal to offer mediation to parties in civil, commercial, family and labour disputes. In addition, courts may choose to offer other types of alternative dispute resolution. The judge may refer the case to a court-annexed mediation program or to any other mediation program in accordance with the parties' wishes.

7.2.25. Spain

Court is required to inform parties about possibility of solving dispute by ADR, including mediation. If parties do not wish to pursue ADR, judge may still invite parties to mediate, urging them to attend information session.

7.2.26. Sweden

Court must advise parties about ADR to facilitate settlement of dispute. Courts take active part in promoting settlement during pre-trial proceedings.

In light of Sweden's historic use of mediation, therefore, the news that the Directive was to be implemented did not cause much debate in Sweden. Rather, Sweden was already considered to be at the forefront of developments in this area.

7.2.27. United Kingdom

Although courts are to encourage parties to use ADR when appropriate, courts are generally reluctant to go further and compel an unwilling party to mediate, due to fear that doing so would violate a party's right of access to the courts under the European Convention on Human Rights. However, this argument seems misconceived. First, even if a judge were to compel a party to mediate, that would not mean that the party would also be compelled to settle at mediation. Second, because the mediation process is voluntary, and is conducted on a 'without prejudice' basis, the parties enjoy the 'privilege' of being able to explore the possibility of settlement without their communications subsequently becoming known to the court if they fail to reach agreement, or either party declines to settle. The case then returns to litigation, without adverse consequences. Imposing mediation would not replace a litigant's right to trial, but would merely offer the litigant an additional option.

The possible introduction in the county courts of a mandatory system for claims of up to £100 000 met with a strong adverse reaction from the judiciary in 2011, which felt that 'the essence of mediation is that it should be voluntary'. While the MOJ recognized that there was no immediate prospect of introducing any form of compulsory mediation for claims of up to £100 000, it was nevertheless hopeful that judges may be willing to make referrals more of a default position in small claims court.

7.2.28. The Netherlands

The Netherlands judiciary has installed a referral to mediation faculty in all courts of first instance and in all courts of appeal. This means that a system is in place to assure the possibility of referral to mediation in cases that seem suitable for mediation.

The history of this development starts in 1999. In that year, the Ministry of Justice published a letter to Parliament— More paths to justice — to outline the new policy views on mediation in the Netherlands for the period 2000–02. Combined with a major reform program of the judiciary (Judiciary of the 20th century program), the policy letter resulted in nationwide experiments with court-annexed mediation. The conclusion of the experiment was that there is room for negotiation both before and during court proceedings. The implementation of referrals was realized in 2004, when the former Minister of Justice announced his support for introducing mediation at a national level. Based on these conclusions and the minister's support, the implementation of the referral faculty started in 2005, and from 2007 onwards all courts have had a referral faculty. Since 2007, all courts may refer cases which they consider suitable for mediation, albeit not on a mandatory basis.

7.3. Court Referral system at family disputes

The practice shows that most disputes which are resolved through mediation are those related to divorce. These disputes tend to have a tremendous impact on the personal lives of the spouses, and, particularly, their children. Deep emotions, workable arrangements with regard to the children, the family house and other financial matters such as alimony, all need to be addressed in divorce cases. Where historically, family

mediation was aimed at saving the marriage where possible, modern family mediation is primarily concerned with the consequences of divorce. The outlook is no longer paternalistic. The purpose is to assist parties in terminating their relationship in an acceptable way, without unnecessary damage and bitterness, thereby facilitating the negotiation of necessary, future arrangements.

Judge can recommend to anyone who is involved in a divorce to consider mediation as an option. Mediation can work for almost all couples and has a long list of benefits:

- Mediation is much less expensive than a court trial or a series of hearings.
- Most mediations end in a settlement of all of the issues in your divorce.
- Mediation is confidential, with no public record of what goes on in your sessions.
- Mediation allows you to arrive at a resolution based on your own ideas of what is fair in your situation, rather than having a solution imposed upon you based on rigid and impersonal legal principles.
- You can still have a lawyer give you legal advice if you wish.
- You and your spouse -- not the court -- can control the process.
- The mediation process can improve communication between you and your spouse, helping you avoid future conflicts.

In 2014 the UK Government urged to accept Mediation Task Force recommendations by National Family Mediation. The Report of the Family Mediation Task Force notes the following:

Many countries have reported low take-up of mediation over the years and have expressed disappointment about the difficulties they have encountered in encouraging couples to settle disputes consensually and away from courts. But there are some indications of what we might hope to achieve. When the Norwegian Government introduced mandatory mediation for couples with dependent children in the 1990s, it found that that around a third could actually benefit from mediation; while the remainder either sorted things out for themselves or were in such high conflict or had other issues that they needed to resort to court. Australia, New Zealand and Canada have all had success in promoting mediation and their experience reinforces the hypothesis that the potential for out of court dispute resolution is around 30% of divorcing and separating couples. In achieving that level Canada has seen a reduction in couples resorting to using the court from 10% to 5%, Australia has seen a 32% reduction in the number of final hearings in children's cases; and New Zealand has seen an increasing reduction in family matters needing court disposal. Norway estimates that fewer than 10% of cases now go to court.

The Government and Judiciary in UK have been advocating the benefits of mediation for many years and have come up with a number of initiatives to encourage people to use the services of a mediator:

- **In Court Mediation**

This term refers to the use of mediators within the court setting. There are a number of schemes across the UK where mediators have been invited into the court on the days when family cases are being heard to assist individuals to make arrangements for their children instead of having the court make those decisions for them.

The judge will carefully review cases he/she considers may be suitable for In Court Mediation and will invite the parties to meet with a mediator. The parties will then spend up to two hours with a mediator within the court setting to discuss issues. If agreement can be reached the mediator can prepare a brief summary of the arrangements that have been agreed upon so that the Judge can decide whether a Court Order would be appropriate.

In court mediation is quick and can provide an effective means of resolving conflict on the day of your court hearing without having to rely upon a judge to make decisions concerning your children.

- **Court Referred Mediation**

Court referred mediation can be used to assist parties resolve issues surrounding the care of the children and resolution of property and finance issues as part of the divorce process. Where an application has been made to the court as part of divorce proceedings to deal with property and finance or upon an application in respect of children, the Judge may decide that mediation would be helpful. In such cases he/she would request that the parties attend mediation before the date of their next court appearance. Whilst this is not mandatory, it is a clear message to the parties to encourage them to resolve issues between themselves, thus giving the parties ownership of their agreement so that they can take their futures in their own hands.

A court referred mediation application would proceed in much the same way as any other mediation referral and meetings would take place at the offices of the Mediation Service. The parties would initially meet with the mediator to find out about mediation and then, if they wished to proceed, a number of appointments would follow at which issues can be discussed, options explored and hopefully resolution found. It would then be open to the parties to report back to the court on the agreement reached or to have a Consent Order prepared setting out the agreement, thus relieving the parties of the need to return to the court for a further hearing.¹

The mediation and the role of the judge to recommend it plays a very important factor in all family cases of parental child abduction.

As mentioned in some documents of the European Parliament, families are the bedrock of society in the EU Member States and must be defended by the institutions, through *ad hoc* measures, including when relationships begin to break down. In particular, protecting the best interests of children must be a top priority for the institutions.

According to the latest Eurostat data, some 2 million marriages are contracted each year in the EU, 300.000 of which involve binational couples. In addition, there are

approximately one million divorces each year, 140.000 of them involving binational couples.

In response to the steady increase in these figures, in 1987 the European Parliament established the post of *European Parliament Mediator for International Parental Child Abduction*. The role of the Mediator is to help find mutually acceptable solutions in the exclusive interests of the child when, following the separation of spouses of different nationalities or who live in different countries, a child is taken away from one of the parents.

International family mediation should be given a specific framework under a law that takes proper account of the characteristics and requirements of such mediation.

Recital 10 of the directive specifies that the directive should not apply to “rights and obligations on which the parties are not free to decide themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family law and employment law”.

The role of the Mediator is particularly valuable in this regard. And it's therefore desirable to develop and further strengthen its role.

In keeping with this approach, in its communication of February 2011 entitled “An EU Agenda for the Rights of the Child”, the Commission highlighted the need for cooperation with the Member States, in order to keep updated factsheets on national legislation concerning maintenance obligations, mediation and recognition and enforcement of decisions on parental responsibility. As regards parental child abduction, the Commission stated that it will pay particular attention to the information provided by the European Parliament Mediator for International Parental Child Abduction.

Parliament itself has also expressed similar views. In its resolution of September 2011 on the “Directive on mediation in the Member States, its impact on mediation and its take-up by the courts”, it stressed that:

– *“parties who are willing to work toward resolving their case are more likely to work with one another than against one another; believes that therefore these parties are often more open to consideration of the other party's position and work on the underlying issues of the dispute; considers that this often has the added benefit of preserving the relationship the parties had before the dispute, which is of particular importance in family matters involving children”.*

In its resolution of October 2011 on “alternative dispute resolution in civil, commercial and family matters”, Parliament drew attention to ‘the work of the European Parliament.

Mediator for International Parental Child Abduction’ and also emphasized ‘the crucial role of types of ADR (Alternative Dispute Resolution) in family disputes, where it may reduce psychological harm, can help the parties to start talking again and thereby, in particular, help ensure the protection of children’ Mediation is an alternative means of resolving disputes that is geared to positive conflict management. Its aim is to provide the parties with support in finding a solution that is acceptable and satisfactory to both, through the assistance of a third party: the Mediator.

In cases of international parental child abduction, the aim of the mediation is to secure a negotiated agreement between the parents in the exclusive interests of the child(ren) involved. In such cases, the mediator's main task is to ensure, by means of an out-of-court procedure, that the child's best interests are served while sparing the children and their parents the emotional and psychological strain that would result from legal proceedings that are often both lengthy and costly.

7.4. How the judge can be successful in the process of recommending mediation?

Judges play a crucial role in fostering a culture of amicable dispute resolution. It is essential therefore that they have a full knowledge and understanding of the process and benefits of mediation. This may be achieved through information sessions as well as initial and in-service training programs which include specific elements of mediation useful in day-to-day work of courts in particular jurisdictions.

Even if the parties are not inclined to agree for mediation, the referral judge may try to ascertain the reason for such disinclination in order to persuade and motivate them for mediation.

The referral judge should explain the concept and process of mediation and its advantages and how settlement to mediation can satisfy underlying interest of the parties. Even when the case in its entirety is not suitable for mediation a Referral Judge may consider whether any of the issues involved in the dispute can be referred for mediation.

According to the survey done the Dutch Ministry of Justice and summarized by R. Jagtenberg and A. de Roo, there are four possible variations of referral to external mediation: the parties may come up with the idea of mediation (1), the judge proposes it simply (2a) or accompanied with professional explanation (2b), the judge makes the referral and the parties may refuse without any consequences (3a) or with financial sanctions (3b) and mandatory mediation which deny access to the court if it is not attempted (4). The most effective way were 2b or 3a, where high percentage of cases referred were settled. The authors of the summarizing conclude in their article that making mediation compulsory may take away the most significant advantage of mediation: the autonomy of the parties about their dispute.

To be successful a judge, in the process of referral to mediation must have the necessary knowledge and training. First of all, it is necessary the judge knows very well the mediation procedure Mediation Training for judges and a prerequisite in order to be successful in the procedure of reference countries.

The judge needs to know what exactly encourage the parties to the dispute.

If really knows the procedure, principles and benefits of mediation, the judge would have been much more convincing and will be with a lot more confidence to recommend mediation.

We all know that it is very difficult, almost impossible, to sell food that we never tried.

Exactly, and the judge would not be dealt with recommending mediation, if he does not know the procedure well enough.

The judge must know mediation as to know what are the benefits for the parties why this is an appropriate method to resolve a dispute.

Certainly not all disputes which relate to the Court are suitable to solve them through mediation. The judge is required to consider the following circumstances:

- Are there lasting relationship between the parties / they are parents, they are spouses, they are relatives, neighbors, long-standing partners, affiliates, etc. /;
- Does there is more than one problem to solve the dispute between the parties;
- Is it important for the parties involved to maintain their relationship in the future;
- The legal norm cannot meet the real needs of worldly justice.

If the answers to these questions are positive, then it is really useful and properly judge to recommend to the parts to resolve the dispute among them outside the Court.

When we are faced with the hypothesis of a dispute between parties who are in a lasting relationship, extrajudicial and friendly way to solve this dispute is of course the best way.

When in an informal environment, enable the parties to make their concerns, fears, doubts, etc. problems is much more likely to be found good and fair solution, ruled the Court, than they would under all the weight and respect of the judiciary.

It should be borne in mind that respect by the Court recommended by the judge to use mediation has much more power than a lawyer, consultant or other institution.

The judge should have the following knowledge in connection with the mediation as an alternative means of dispute resolution:

- The principles of mediation
- The structure of the procedure,
- What should be the necessary professional training and experience of a Mediator,
- What can the parties agree to Mediation.

If the judge is convinced of the benefits and advantages of a dispute to be resolved out of court, he would have no obstacles to be convincing in a process of recommending and referral to Mediation.

Conversely, if the judge doesn't have the faith and the belief that mediation would be useful for the resolution of legal disputes, would be better if he is not trying to refer to mediation.

In the EU Members, the governments, where the legislation provides for the power of the judge to oblige the parties to attempt to resolve the dispute through mediation, he will have a better appreciation for each case, if received training in mediation.

The role of the judiciary in promoting mediation and other forms of out of court dispute resolution at every stage of the litigation process is also crucial not only so that appropriate cases move out of litigation into mediation but also so that the general public and legal profession is constantly reminded by the judiciary itself that the court may not be the best option.

Therefore, training judges in mediation referral skills along with specific awareness-raising programs is necessary.

To be successful one judge in the procedure of referral is very useful to use some popular techniques of persuasion that are very easy and at the same time extremely useful. Here's what we can do when we want to convince anyone of anything :

1. **Focus on what's in it for them** — In 99% of all situations, people will care more about what they have to gain than what you have to gain. So direct most of your communication efforts on them and their needs.
2. **Give an example of how your idea worked for someone else who's just like them** — People are more likely to be persuaded by your offer if they know it was beneficial to someone else who shares their characteristics. Once they know it's helpful to others who are just like them, they will have adequate "social proof" to assume that it must be beneficial to them.
3. **Emphasize things that you know they will agree with and then move on to your proposition** — When you persuade someone to agree to enough small and safe ideas, they will gain trust in your bigger and more ambitious ideas. Once you introduce the proposition that you really want to talk about, they'll be more likely to agree with it because they'll already be in an agreeable state of mind.
4. **First talk about what interests them** — One of the best ways to persuade people is to first talk about what pumps them up. Ask intelligent questions about their interests, talk about why those interests interest you, and that person's mind will be more receptive to what you want to express to them.
5. **Talk about the benefits and the advantages before you talk about the proposition** — If you go straight to the proposition, people will naturally build resistance to what you're saying because you're expressing something that they haven't gotten used to. Instead, talk about the benefits and the advantages

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appropriate cases move out of litigation into mediation but also so that the general public and legal profession is constantly reminded by the judiciary itself that the court may not be the best option.

Mediation may become mainstream in civil and commercial dispute settlement within the EU only if awareness is enhanced and if new skills are taught to the legal profession at large.

The practice proves that with his authority, the court is the most powerful and reliable source for recommending mediation as an alternative means of dispute resolution.

Conclusions

The Context of the Guidebook

This Guidebook reflects the experience of several activities conducted within the project JUST/2013/JCIV/AG/4628 “Judicial Intercultural Communication in Family Mediation” that aims at improving judicial cooperation in civil matters between national judges and overcome the difficulties arising in practice in relation to family mediation in cross-border proceedings, by organizing a series of workshops addressed to judges and other legal practitioners, that provided the opportunity to identify the main common difficulties that legal practitioners encounter in practice and identified viable solutions for a better enforcement of the legal instruments adopted at the European level.

One major objective of the project was to identify the specific problems arising from cultural and psychological differences, diversity of traditions and mentality between European citizens. As a result, the project meets the need of magistrates and other legal practitioners to determine and to overcome the main issues and problems encountered in family cross-border mediation matters.

The partnership is formed of Craiova Court of Appeal, Romania (Co-ordinator), Cluj Court of Appeal, Romania (Co-beneficiary 1), Timisoara Court of Appeal, Romania (Co-beneficiary 2), County Court of Rijeka, Croatia (Co-beneficiary 3), Differenza Donna, Italy (Co-beneficiary 4) and Regional Court of Sofia, Bulgaria (Associate partner) as partners.

The implementation period of the project was 12 months and consisted in:

- organizing of four workshops, one in Romania, one in Bulgaria, one in Croatia and one in Italy, where judges learned about mediation referred to in Directive 2008/52/EC and family mediation referred to in Regulation (EC) 2201/2003, concerning divorce and parental custody matters "Brussels IIa Regulation";
- creating the current guidebook for magistrates and a brochure for promoting mediation among European citizens.

Each workshop lasted for four days, it was conducted by international experts (one moderator and two speakers) and it was divided into a theoretical module and an intensive practical one. The first module focused on theoretical aspects of Directive 2008/52/EC, the Regulation (EC) 2201/2003 and their implementation into national legislation, difficulties, methods, solutions and proposals for improvements in the field. Presentations have been made on statistic data on mediation in general and mediation in family disputes in particular, which was analyzed by specialists: sociologists, judges, lawyers, mediators. The practical module focused on: Mutual learning, exchange of good practices on the quality of mediation services, in general, and guarantee of fair procedures, recognition and enforcement of mediation agreements signed into a different state and of the court orders they are based on, in particular; Presentations and analysis of actual situations regarding the implementation and promotion of cross-border mediation; Presentations of specific situations based on the expertise of sociologists, mediators, lawyers; Roll-plays on mediation in cross-border cases, simulated hearings with the purpose of recommending the parties to try mediation or going to an information session; debates; case studies; video presentations.

The target group was formed of approximately 100 judges and other legal practitioners (25 persons / workshop). In practice, the target group was expanded, as many participants expressed interest in participating and learning from this project.

The topics discussed during the seminars and the results (outcomes) obtained from the training, special attention being held on the active participation of the beneficiaries, are summarized in this practical "Guidebook" which will be edited in 5 languages: Romanian, Italian, Bulgarian, Croatian and English, and distributed among the project partners and among other courts of justice from EU Member States. The guide will be published on the applicant's website (<http://www.curteadeapelcraiova.eu/>) and will be made available for download by specialists or any other interested person.

Conclusions of the project

The family mediation procedure for cross-border cases is a specialized form of mediation that receives a growing attention from EU policy makers, providers and users.

Mediation is part of the Alternative Dispute Resolution field, together with many other processes that can be used to resolve disputes, such as facilitation, mediation, conciliation, early neutral evaluation (ENE), arbitration, mini trial, settlement day (Week), med-arb, arb-med or litigation.

The general benefits of Alternative Dispute Resolution processes are simplicity, cost-effectiveness, process confidentiality, neutral involvement, party autonomy and time efficiency.

In the context of Alternative Dispute Resolution, based on analysis, a dispute can be resolved by using a strategic sequence of ADR processes. This can be accomplished by listing all processes from the less formal ones that require minimum of resources invested and offer maximum control over process and outcome, to the most formal ones that require many investment of resources and offer limited control over outcome.

All these ADR processes can be called "*The continuum of dispute resolution options*". Then, the parties can choose certain ADR processes to use in order to achieve the best outcome possible with minimum of resources invested, namely an effective outcome. This strategic approach is needed as context for the family mediation procedure for cross-border cases.

According to article 3, let. A of the EU Directive 2008/52/CE, "*mediation means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State*".

The principles of mediation are voluntary participation, neutrality (conflict of interest), impartiality, confidentiality, self-determination, informed consent and welfare of children (family mediation).

The mediator is not a judge or a decision maker. The mediator can't impose decisions to the parties. Moreover, in most cases the mediator is not a subject matter expert; therefore he/she can't even usually suggest solutions to the parties.

Also, the mediator is not a legal expert of the parties. Even if the mediator is a trained or practicing lawyer, he/she must refrain from offering legal services to the parties. Moreover, this will require another type of contractual relationship between the mediator and the parties. Also, the mediator is not the parties' psychotherapist, fact finder or prosecutor. His (her) role is not to find or unveil the truth, regardless of his/her personal opinions on the merits of the case but to rather help them make informed decisions, even if they see the facts through different lenses.

The cross border mediation is a process where a mediator (or more than one) assists two or more parties to manage and, hopefully, resolve a multi-jurisdictional dispute within the European Union.

Cross border mediation can be used in cases where the parties have voluntarily agreed to try to settle their dispute amicably and mutually, where a court has referred the parties to mediation, or where the law of a country compels parties to use mediation.

Cross border mediation was introduced by the European Parliament and the Council of the European Union under Directive 2008/52/EC, which came into force in the EU member states on 20 May 2011, and covering certain aspects of mediation in civil and commercial matters.

Cross border mediations are extremely advantageous in terms of money and time saving, if considering that a cross border lawsuit may have high costs and may last a lot of time, especially when the case is complicated, and there is the necessity to analyze many controversial juridical aspects in different jurisdictions.

The understanding of cultural phenomenon is mandatory for the effective management of cross border disputes, whether they have social, business or economic nature. It is a must for the judge or the mediator to sense issues involving all cultures represented in the dispute.

Cross-cultural disputes are always going to be hard to mediate, because what is acceptable behavior in one culture may be totally unacceptable in another. A good mediator will always try to be aware of what else is going on, trying to understand any hidden agendas and barriers to effective problem solving. There are many reasons why interpersonal communications may fail. In many communications, the message may not be understood the way speaker intended. It is, therefore, important that the communicator seeks feedback to check that their message is clearly understood. It is especially important in cross-cultural mediation. The skills of active listening, clarification and reflection may help especially in cross-cultural mediation. The mediator should be a good listener. Listening is one of the most important aspects of effective communication. Successful listening means not just understanding the words or the information being communicated, but also understanding how the speaker feels about what they're communicating. A skilled mediator also needs to be aware of the barriers to effective communication in cross-cultural context taking an account of cultural

differences. The norms of social interaction vary greatly in different cultures, as do the way in which emotions are expressed.

The Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility provides a simplified path to establish jurisdiction in matrimonial matters and matters of parental responsibilities, with the aim of a uniform application on the territory of the entire European Union. It also structures the mechanism of recognition and enforceability of judgments made in matters of parental responsibilities, adopting as a general rule the fact that judgment made in one of the member states should be recognized and enforced in any other member state involved in the case, with certain exceptions regarding particular situations.

Family judicial proceedings need to be rearranged in a way better serving the actual interest and needs of the child and the divorcing or separating parents. Such rearrangement is already happening. Since the late 70's of the 20-th century the blame-based past-oriented single-custody paradigm in divorce started continuously evolving into a no-fault future oriented co-parenting paradigm in divorce, mostly focused on the best interest of the child.

In order to manage the transition from confronting spouses to cooperating parenting partners shaping their own “model of justice”, divorcing parents need processes that are forward looking, collaborative, and capacity building. Mediative regime helps divorcing parents develop and implement an individualized plan to carry out their on-going parenting responsibilities.

In order to make use of the mediative regimes, parties must be well acquainted with them. The need to acquaint divorcing partners with mediation and the low level of awareness about it in society, gives the court an additional very important social function – of informing and referring disputing parties to mediation when suitable.

As seen from the analysis above, judicial proceedings and mediation successfully reinforce each other's impact in the process of helping parties resolve their divorce-related disputes. Mediation provides the environment and the tools for the disputing parties to elaborate a settlement which best suits the interests of their child and their own interest and reduces the level of their interpersonal conflict, while judicial proceedings encourages parties to make use of mediation, supervise the results of mediation for the purposes of protecting children's interests, and make the settlement reached enforceable.

The highly increasing rate of divorces across European countries calls for new approaches in dealing with family disputes to be developed. In the last years, family mediation has rapidly developed, proving to be an effective alternative to the traditional judicial procedure.

At the EU-28 level, there are different approaches in employing family mediation and a more harmonized legislation in family matters is needed. The Mediation Directive draws only some general guidelines for future development of the mediation procedure, allowing member states to decide the status of mediation in their own national judicial systems.

In the current European legislation framework the relationship between family mediation and judicial procedures is not clearly defined. In order to have a congruent procedure for family disputes, at a national and cross-border level, family mediation needs to find its rightful place in the judicial system. To this end, decision-making actors should focus to a greater extent on the already existing European good practice models.

The Court is the institution that is given the power to administer justice. In human history, however, there are many famous cases that show how justice and fairness sometimes do not coincide.

All legal professionals know that the worst agreement is better than the best sentence. In the modern world citizens are looking at different incentives to solve their disputes out of court. In our culture we assume that when we have a dispute we have to solve it in court. Our goal today is to change this attitude - people should be first encouraged to try to resolve their disputes out of court. To create this new culture judges play a leading role. By virtue of their power and respect, they are the most influential mechanism to motivate the parties to seek a different way of resolving their disputes.

Finally, here is what a judge once said to a couple of parents who wanted him to resolve their dispute over custody: *“You can’t ask me to decide how your children should live for one very simple reason – I don’t love you children. You love them and therefore you know what is best for them.”*

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