

STUDII

MEDIATION IN MATTERS CONCERNING PARENTAL  
RESPONSABILITY AND INTERNATIONAL CHILD ABDUCTION.  
RECOGNITION AND ENFORCEMENT OF AGREEMENTS  
CONCLUDED DURING RETURN PROCEEDINGS

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*“Overlooked through lenses that accent utility and orderliness, beauty and natural metaphors introduce a range of sensual, embodied ways that our human thirst for belonging and for feeling moved is implicated in mediation. When these ideas are introduced to the corpus of work on mediation, mediation becomes more vivid and compelling. Possibilities appear that were unavailable via more analytic ways of imagining mediation processes; opportunities to move beyond fragmentation and towards congruence emerge.”*

*(Alexander, Nadja Marie, Mediating Beautifully: The Alchemy of Aesthetics in a Fragmented Age (September 12, 2016) – Singapore Management University School of Law Research Paper No. 12/2017.*

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**Abstract:** Mediation, as an alternative means of dispute settlement, is an assisted decision-making process which typically takes the form of facilitated negotiation. The mediator assists the parties in making decisions concerning the issues of their dispute and about the appropriate norms for the regulation of future relationships. This article examines the implications of mediation in international child abduction cases.

It begins with the analysis of mediation, as a means of dispute settlement, in general (2). Then, it reviews the Romanian Law no 192/2006 on "mediation and the organisation of the mediator's profession" (3). We then address the importance of mediation in family matters (4); we define the concepts (5), present the advantages (6) and disadvantages (7) of mediation in the international and national context. Afterwards, we discuss the implication of internal mediation, in the national context, in relationship with settlements of family-related disputes (8). We address the law applicable to mediation settlements and the choice of law in related cases especially in cross-border mediation cases, pointing out the difference between the law applicable to the mediation agreement and the one applicable to the parental agreement (9). Lastly, we present the practices considered to be effective in child abduction cases, taken into account the Malta process and Declarations, and discuss the recognition and enforcement of the agreement concluded during return proceedings (10).

**Keywords:** international private law; mediation; cross-border family disputes; ECHR; Rome I Regulation; Hague 28; Malta process, Malta IV Conference; international child abduction; enforceable title; parental agreement.

## 1 Introduction

Although its roots could be considered as being ancient<sup>1</sup>, the institution of mediation, as an alternative form of dispute settlement, is quite recent. It has made its way into the Romanian legislation by the adoption of Law no. 192/2006 on mediation and mediator profession (*Romanian Mediation Act – RMA*), as amended and further supplemented.

Mediation is not an institution by itself, but rather one that “provides assistance”, aimed at performing the functions and finality of judicial institutions that it serves.

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<sup>1</sup> Form a historical point of view, mediation can be traced back to ancient civilisations. In Roman times, mediators were belonging to diverse social groups, and were known under different names, such as *internuncios*, *medium*, *intercessor*, *conciliator*, *interlocutor*, *interpolator* (N. Alexander, *International and Comparative Mediation. Legal Perspectives*, Kluwer Law International, 2009, p. 51). Also, numerous ancient communities in Africa, America, Asia, Australia, Pacific, New Zealand, united by strong kinship ties throughout community, experienced mediation as of form of conflict mitigation, based on a *communitarian approach*, having as benchmark for the settlement of disputes the superior interest of the community. In many archaic communities' mediation was exercised in close connection with the religious element, seeking to promote religious values and ideals. For Muslims, mediation (*wasata*), conciliation (*tawfik*, *solh*), reconciliation (*tahkim*) or arbitration (*tahkim*) were also encountered, such terms being used interchangeably, according to circumstances. (v. N. Antaki, “*Cultural diversity and ADR Practices in the World*”, in J. Goldsmith, A Ingen-Housz and G. Pointon (eds), *ADR in Business*, Kluwer Law International, 2006, p. 1; M. Alberstein, “*Forms of Mediation and Law: Cultures of Dispute Resolution*”, (2007) 22 *Ohio State Journal on Dispute Resolution*, p. 321.

There is a technique and a secret of mediation, which, on one hand, it enhances, lifting it over the mediated judicial situation, while, on the other hand, it touches the kernel and particularity of the dispute that it tries to solve.

Placed in the semi-darkness of international judicial competence rules, the international mediation treads on a thin balance between judicial and non-judicial, national and international.

## 2 About mediation in general

Mediation as defined as being “a structured process 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 the mediator, who is the third person asked to conduct the mediation in an effective, impartial and competent way.”<sup>2</sup>

From the standpoint of those involved in a dispute, whatever its nature, mediation appears as an alternative form of settling the dispute, and the very call to mediation evokes openness to dialogue, the idea of readiness to negotiate by the parties, their positions being less clear cut. From the point of view of the mediator (mediators), mediation can be qualified as a provision of service, aimed at facilitating the reaching of an agreement in order to settle a dispute.

Article 3 (a) 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 – defines **mediation** as “a structured process, however

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<sup>2</sup> P. O. Prieto de los Mozos, “*The Law Applicable to International Mediation Contracts*”, in InDret No. 1/2011, p. 3.

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 **mediator** is defined as being “any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation” (Article 3 (b) of Directive 2008/52/EC).

Put it in simple terms, **mediation** was defined as “an assisted decision-making process, which typically – but not invariably – takes the form of a facilitated negotiation or dialogue. The mediator assists parties to make decisions about the issues in dispute between them and about the appropriate norms for the regulation of future relationships. Generally, mediation is based on principles such as party autonomy, client-centeredness and choice, confidentiality and *a focus on interests and needs rather than rights and positions*”<sup>3</sup> (s.n., DAP).

3 Romanian Mediation Act, No. 192 of 22.5.2006 – about mediation and organising the mediation profession.

From the Romanian point of view, mediation:

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<sup>3</sup> N. Alexander, *International and Comparative Mediation. Legal Perspectives*, Kluwer Law International, 2009, p. 15.

- 1) is a form of alternative dispute resolution (ADR); It is a way of amicable settlement of conflicts, with the support of a third party specialised as a mediator;
- 2) relies on the trust which the parties invest in the mediator and its capabilities: “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” (Art. 1, par. (2) of Romanian Mediation Act – RMA);
- 3) is of public interest. Public interest requires some alternative forms of dispute resolution, contributing, on one hand, to reduce court backlogs, but also to speeding up decision making, on the other hand: “mediation does in fact reduce time and costs involved in dispute resolution” (N. Alexander, *op. cit.*, p. 55, note 139);
- 4) imposes obligation to advise parties, without having decision: the mediator does not have decision power as regards the contents of the understanding reached by the parties, but he may advise them to examine the lawfulness thereof (Art. 4, par. (2));
- 5) no mandatory mediation procedure. Unlike the previous form of the law, which required, unless otherwise provided, the compulsory nature of mediation, currently such a procedure is, in principle, voluntary, optional. However, the parties have to provide evidence as to their participation to a briefing on the advantages of mediation, in the following areas:

- a) consumer protection;
  - b) family law (the instances provided under art. 64);
  - c) disputes with regard to land possession, delimitation, repositioning of land signs and other disputes resulting from neighbourhood relations;
  - d) professional liability (malpraxis);
  - e) labour relations, on conclusion, performance and termination of individual employment agreements;
  - f) civil litigation where claims are capped at 50,000 lei, except those where a binding decision has been delivered on opening up insolvency proceedings, claims referring to the Trade Register and low value claims.
- 6) absence of competence rules in terms of mediation. Mediators can participate in any dispute related to rights that the parties can enjoy by agreement, regardless of the territorial jurisdiction of the competent court and regardless of the domicile or habitual place of residence of the parties<sup>4</sup>;

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<sup>4</sup> C. Menkel-Meadow, *"The Future of Mediation Worldwide: Legal and Cultural Variations in the Uptake of or Resistance to Mediation"* in *Essays on Mediation. Dealing with Disputes in the 21st Century (I. Macduff Ed.)*, Walters Kluwer, 2016, p. 40: "As mediation is less formally rule and procedure based than litigation or arbitration, less homogenization of the rules and processes is required. Nevertheless, the use of mediation remains somewhat dependent on the specifics of local legal and social culture and also dependent on the charismatic leadership of various legal innovators in particular systems. From my own experience in mediating or teaching in many different countries (now over twenty-five countries on six continents), it might be somewhat useful (if a bit arbitrary) to characterize some social-legal cultures as more or less likely to use mediation as a dispute resolution mode, depending on whether they are more or less "argumentative," "adversarial," "conversational or

- 7) absence of strict rules for the mediation procedure. We speak, therefore, of a very flexible procedure meant to take into account the particular matter and the specificity and circumstances of each concrete case. Such a procedural approach allows the mediator to highlight his/her experience and expertise. According to article 27, (1) of Romanian Law on Mediation, “each mediator is entitled to apply its own organisational model to the mediation procedure, consistent with the statutory provisions and principles stipulated under this law.” In addition, “methods and techniques that are being used by the mediator must exclusively serve the legitimate interests and the objectives contemplated by the parties in dispute” (article 50, (2)).

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*dialogic*,” “*face saving*” or “*hybrid- cosmopolitan*” cultures. Ordinarily I quite deplore the systematic and stereotypic descriptions of “civilizations” or cultures and even so-called elements of “disputing cultures” that tend to homogenize and reify what may be quite complex and varied combinations of cultural factors (professional status, class, education, function, etc.), but in viewing the variations of mediation usage around the world, I have come to believe that something like these cultural formations deeply influence both legislation– rule–making and the actual practice of mediation as a form of dispute resolution (while in turn being affected by case types within particular legal systems). Thus, both “law on the books” and “law in practice” in the ADR arena are quite variably dependent on social, not only legal, factors.” The author rightly points out “that the uptake of mediation will not likely be a unitary development or follow a clear trajectory throughout the world. Different forms of mediation have been and will be developed within and across different legal systems and types of disputes, often responding to different motivations and goals” (*Ibidem*). See also J. Brett, *Negotiating Globally: How to Negotiate Deals Resolve Disputes and Make Decisions Across Boundaries*, Jossey-Bass 2001; J. Salacuse, *The Global Negotiator: Making, Managing and Mending Deals Around the World in the 21st Century*, St. Martin’s Press 2003. .



- 8) In case of judicial proceedings, if the matter has been settled by means of mediation, the court shall deliver, at the request of the parties and in compliance with the requirements of law, an expedient decision, which shall be enforceable order (“*titlu executoriu*”);
- 9) Mediation is an important tool for improving access to justice in accordance with Article 47 of the Charter of Fundamental Rights of the European Union<sup>5</sup>. In the case *Centre public d’action sociale d’Ottignies-Louvain-la-Neuve v. Moussa Abdida*, C-562/13, European Court of Justice (ECJ) held that Art. 47 of the Charter “constitutes a reaffirmation of the principle of effective judicial protection.”<sup>6</sup>

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<sup>5</sup> See F. Krenc, in F. Picod, S. Van Drooghenbroeck avec la collaboration de C. Rizzcallah, *Charte des droits fondamentaux de l’Union européenne. Commentaire article par article*, Bruylant, 2018, p. 983: “l’article 47 de la Charte relève désormais du droit primaire de l’Union et constitue un instrument à l’aune notamment duquel la validité des actes pris par les institutions de l’Union est contrôlée.” Also see S. Peers, T. Hervey, J. Kenner and A. Ward (Ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford and Portland, Oregon, Hurt Publishing, 2014, pp. 1197-1275.

<sup>6</sup> Judgment of the Court (Grand Chamber), 18 December 2014, C-562/13, ECLI:EU:C:2014:2453, no. 45. Also see, to that effect, judgments in *Unibet*, C-432/05, EU:C:2007:163, paragraph 37, and *Agrokonsulting-04*, C-93/12, EU:C:2013:432, paragraph 59, providing that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article.

## 4 Mediation in family matters

According to Art. 64 of Romanian Mediation Act, marital disputes that can be resolved by *mediation* cover issues such as:

- a) continuation of marital relations;
- b) liquidation of marital property;
- c) exercise of parental responsibility;
- d) determining the residence (domicile) of children;
- e) child support;
- f) any dispute that occurs during marital relations with regard to rights that they could be granted under the *law*.

Agreements reached by *mediation* by the parties, in the matters (conflicts) that relate to the exercise of parental responsibility, child support and determining child residence, come under the form of a court settlement certifying consent award resulting from the mediation procedure. The agreement of spouses in relation to a dissolution of marriage and settlement of issues accessory to the divorce will be filed by the parties with the competent court to issue a divorce ruling.

According to Art. 65 of Romanian Mediation Act, the mediator will monitor the effects and the result of the mediation procedure making sure that *mediation* will not infringe the superior right of the child. He will encourage the parents to focus primarily on the needs of the child and that parental responsibility, legal separation and divorce will not adversely affect the education and development of the child.

## 5 Terminology. Mediation – Conciliation – Arbitration

Often, terms such as “mediation”, “conciliation” and “arbitration” are used interchangeably, having the same meaning. Confusion stems from the different way in understanding the concepts, due, mainly, to the different cultural environment that often ascribes different meanings to such concepts<sup>7</sup>.

*Conciliation* presupposes a procedure in which the third party involved has a much more active role, an interventionist role. As it has already been noted “a conciliator may move beyond the process-focused role of a mediator and provide advice to the parties regarding the underlying issues in dispute, the legal merits of the situation and an appropriate outcome for the dispute, even going so far as to suggest terms of settlement”<sup>8</sup>. In other words, *conciliation* is a more directive procedure, whereas *mediation* is a facilitative process which promotes party autonomy and confidentiality.

*Guide to Good Practice Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Mediation (2012)*<sup>9</sup>:

*“conciliation is generally characterised as a more directive process than that of mediation. Conciliation will therefore be understood for the purposes of this Guide as a dispute resolution mechanism in which an impartial third party takes an active and directive role in helping the parties*

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<sup>7</sup> v. H. Astor and C. Chinkin, *Dispute Resolution in Australia*, Sydney, Butterworths, 2002, p. 93, *apud* N. Alexander in *op. cit.* p. 15, note 32.

<sup>8</sup> v. N. Alexander, *op.cit.*, p. 16.

<sup>9</sup> Available at [http://www.hcch.net/upload/guide28mediation\\_en.pdf](http://www.hcch.net/upload/guide28mediation_en.pdf).

and an agreed solution to their dispute. *Mediation* can be proactive but cannot be directive. For mediation, emphasis has to be placed on the fact that the mediator him or herself is not in a position to make a decision for the parties, but only assists the parties in finding their own solution. Conversely, the conciliator can direct the parties towards a concrete solution.” (s.n., DAP).

Sometimes, the term conciliation is understood in a broader sense, including all non-determinative dispute resolution (mediation and conciliation). (For that purpose, a see UNCITRAL’s Model Law on International Commercial Conciliation (MLICC) adopted in 2002<sup>10</sup>).

Unlike mediation, *arbitration* represents a determinative procedure where the arbiter (arbiters) has/have full decision-making powers over the material issues of the dispute that has been referred to them, decision that is issued in the form of an arbitral award. As mentioned, “arbitration is a rights-based determinative process in which the parties agree to be bound by the decision of an arbitrator or arbitral panel.”<sup>11</sup>

In spite of having common principles such as neutrality and confidentiality, the two procedures are fundamentally different.

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<sup>10</sup> A. W. Rovine (Ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2011*, Martinus Nijhoff, Leiden – Boston, 2012, p. 392.

<sup>11</sup> N. Alexander, *op. cit.*, p. 27.

## 6 Advantages of mediation.

Mediation, especially in matters of parental responsibility and international child abduction cases, presents, undoubtedly, distinct advantages:

- an accessible and flexible procedure, stimulating understanding between holders of parental responsibility;
- can be used before the start of disputes or while they are ongoing;
- allows for a broad understanding and choice of competent jurisdiction in matters dealing with parental responsibility (article 12, par. (3) of 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, repealing Regulation (EC) No 1347/2000 – *Brussels Ibis Regulation*)<sup>12</sup>;

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<sup>12</sup> According to par. (3) of Art. 12 Brussels Ibis Regulation, in relation to parental responsibility proceedings a Member State Court shall also have jurisdiction where (a) “the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State” and (b) “the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child.” Article 12 (3) can be regarded as a notable exception. It can be seen as an extension of the party autonomy in matters of parental responsibility. The doctrine suggested a very restrictive interpretation to be given to this text, which should be seen only as an extension of the divorce forum, when jurisdiction for divorce is not fulfilled on Art. 3, but on residual jurisdiction on Art. 7. See on this restrictive interpretation, B. Ancel, H. Muir Watt, “*L’intérêt supérieur de l’enfant dans le concert des juridictions – Le règlement Bruxelles Ibis*”, in RCDIP, 2005, 569 at 588. On the contrary, other authors have favored an extensive

- determine the habitual place of residence of the child in a much easier way and stimulate agreement on the details of custodial rights – except for child abduction cases. The habitual residence is an autonomous concept distinct from the one used by the national legislators, which shall be construed in a uniform manner. The European Court of Justice (ECJ) has repeatedly set the milestones of the habitual residence, stating that it is "the place where the interested person has established, with the intention of conferring a stable character, the permanent or habitual center of his interests, being understood that, in order to determine this residence, it is important to take account of all its constitutive factual elements"<sup>13</sup>. The Court also held that, in order to establish the habitual residence of a person, they have to take into account the continuity of residence before the person concerned to be moved, the length and purpose of the absence, the nature of the

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interpretation of Article 12 (3), "giving the court the possibility to have an extremely comprehensive understanding on its own jurisdiction, as long as the parties agree on it" (É. Pataut, E. Gallant, in *European Commentaries on Private International Law. Brussels IIbis Regulation* – U. Magnus/P. Mankowski Ed., Otto Schmidt Verlag, Köln, 2017, p. 163, no. 50). Also, E. Gallant, "Responsabilité parentale et protection des enfants en droit international privé", in Defrénois, Coll. Droit et Notariat, t. 9, 2004 at 132. This extensive interpretation was embraced by the ECJ. The European Court has held that the jurisdiction of a court belonging to a Member State, other than that of the child's habitual residence, may be based on Art. 13 par. (3) "even where no other proceedings are pending before the court chosen" (ECJ, 12 November 2014, C-656/13). This more liberal interpretation evokes the tendency of the moment, stimulating the reaching of agreements between the owners of the parental authority. These agreements can equally be the fruit of mediation. As the mediation procedure does not have strict rules of competence, it is trying to extend this flexibility also to the judicial procedures.

<sup>13</sup> CJCE, Decision of February 17<sup>th</sup>, 1977, in case C-76/76, Di Paolo, CJCE April 23<sup>rd</sup>, 1991, European Court Reports 1977 -00315.

occupation in another Member State, and the intention of the person concerned, as it appears from all the circumstances: „*and the intention of the person concerned as it appears from all the circumstances*”<sup>14</sup>

- avoidance of sanctions (of civil or criminal nature) inherent to judicial procedures in international child abduction cases;
- entails reduced costs;
- psychologically have a lower emotional impact on the child.

It is true that sometimes it is used contrary to its purpose, as a tactical delay and prevarication of ongoing judicial procedures.

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<sup>14</sup> *Ibidem*. In another case, in the application of the *Brussels IIbis* Regulation<sup>14</sup> in the parental responsibility matter (art. 8, para. 1), the European Court established that the concept of habitual residence “must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family’s move to that State, the child’s nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.” In the *Mercredi* case, the Court established, in the context of art. 8 and 10 of the *Brussels IIbis* Regulation application that the habitual residence “corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State – other than that of her habitual residence – to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother’s move to that State and, second, with particular reference to the child’s age, the mother’s geographic and family origins and the family and social connections which the mother and child have with that Member State. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case.”

## 7 Rebooting the EU Mediation Directive and national legislation as well

In 2014, the JURI Committee of the European Parliament published a research study on their concern for the lack of interest in mediation<sup>15</sup>. The reported difficulties are the following:

- judges don't refer to mediation;
- lawyers refuse to refer to mediation for financial reasons;
- parents don't want to mediate, because they want to be proven right, they want to win, they want revenge;
- international child abduction cases are very specific and demand specific skills and knowledge from the mediator;
- the speedy return procedure obliges mediators to work within a very strict time-frame. The Hague Child Abduction Convention obliges the courts to take a decision within 6 weeks;

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<sup>15</sup> <http://www.europarl.europa.eu/cmsdata/122603/juri-committee-mediation-directive.pdf> - Main Conclusions (2): "Deplores the fact that only three Member States have chosen to transpose the directive with respect to cross-border cases only, and notes that certain difficulties exist in relation to the functioning of the national mediation systems in practice, mainly related to the adversarial tradition and the lack of a mediation culture in the Member States, the low level of awareness of mediation in the majority of Member States, insufficient knowledge of how to deal with cross-border cases, and the functioning of the quality control mechanisms for mediators". See also the Commission report to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters (COM(2016)0542), p. 4.



- the inherent difficulties of the mediation process involving international elements: different languages; different cultures and legal traditions<sup>16</sup>.

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<sup>16</sup> F. Fleerackers, *The Role of Lawyers in Interaction: Mediation, ADR and Legal Thinking*, in *The new EU-directive on Mediation*, Maklu 2008, pp. 25-34. Numerous criticisms have been made by judges from different Member States in particular about the complicated and unsystematic nature of procedural rules, which considerably hampers the confidence of the participants in the act of justice. As has been shown, “(t)his critical assessment is borne out in business circles, where the view is that case-law is often erratic, particularly in the civil courts, which pay very little attention to precedent. The task of judges is not made any easier by the diversity of sources of regulation and the very technical nature of some laws, so that they no longer or can no longer intuitively arrive at the correct solution. (...) Even assuming that judges are well-informed and reasonably competent, they are often dealing with laws whose purpose is at odds with both their own sense of justice and the common good. More and more laws are enacted to protect a special interest of some kind. Paradoxically, when the legislature is unable to formulate a clear and consensual rule it sometimes gives way to the temptation to delegate to judges the responsibility for arbitrating between different interests by drawing up laws embodying vague concepts such as reasonableness, fairness, proportionality or good faith. This reference to vague concepts has given judges greater discretion but, at the same time, it creates doubt and considerably increases legal uncertainty and transaction costs and encourages more litigation. In most civil law countries the procedural rules are extraordinarily complex. The codes of civil procedure developed on the pretext of protecting the rights to a fair hearing require strong control and are a distraction from the matter at issue in proceedings” (I. Verougstraete, *Lessons learned from implementation of the Mediation directive. the judges’ point of view* – PE 453.169, 2011, pp. 8-9, available here: [http://www.europarl.europa.eu/RegData/etudes/note/join/2011/453169/IPOL-JURI\\_NT\(2011\)453169\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2011/453169/IPOL-JURI_NT(2011)453169_EN.pdf)).

## 8 Mediation in Romanian legal practice

*In Romanian legal practice we could not identify relevant cases in cross-border mediation. In internal mediation procedures, the courts have generally summarized to verify the formal aspects of mediation agreements. The best interests of the child was also reflected in Romanian legal practice, courts taking into account all the concrete and particular circumstances of the case.*

*By application registered in Galați Local Court on 12.02.2013, the applicant G. D. R. applied against the defendant T. Ș. in order to establish the domicile of the minors T. S. G. and T. A. V. at the applicant's domicile.*

*In its statement, the applicant stated that after the dissolution of their marriage, in 2002, the custody of the minors was settled to the defendant. As a result of the fact that the applicant did not find work in Romania, she went to France and took the minors to live with her. As the applicant wishes to settle definitively in France and the minors to live with her in France, the applicant states that she has reached an settlement with the defendant and has entered into a mediation agreement.*

*The parties have asked the court to take note of the mediation agreement between them.*

*“In relation to the provisions of art. 400 first paragraph of the Romanian Civil Code, seeing the consent of the parties expressed through the mediation agreement and before the court, and last but not least the best interest of the child, the court will establish the domicile of the minors T. A. V. and T. S. G. at the applicant's domicile in France.*

*Consequently, the court will admit the action under the terms of the mediation agreement.”<sup>17</sup>*

However, there is a significant number of judgments in national mediation, with no foreign elements. Most of the time, the courts have only limited to find out the parties' consent, which they have included in their decisions<sup>18</sup>.

*“Through the mediation agreement dated March 1, 2011, the parties reached an agreement regarding the amount of the maintenance obligation, the court finding the incidence of the provisions of art. 2 par. 1 and 4 of Law no. 192/2006 on the mediation and organization of the profession of mediator on the basis of which the parties can conclude to mediation on a voluntary basis, agreeing to resolve any conflicts in civil, commercial, family, in criminal matters, as well as in other matters, under the conditions provided by the present law, except those situations that can not be mediated, such as those regarding the status of the person, as well as any other rights which the parties, according to the law, can not by convention or by any other means permitted by law.*

*Considering these legal provisions, and also the provisions of art. 64 of the same normative act, on the basis of which mediation can be used in matters including the disagreements between spouses concerning the continuation of marriage, the exercise of parental rights, the establishment*

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<sup>17</sup> Galați Local Court, Civil Sentence No. 2630 of 19.03.2013.

<sup>18</sup> Brăila Local Court, Civil Sentence No. 2988 of 16.04.2015; Bacău Regional Court, Civil Sentence No. 562 of 26.09.2016; Pitești Local Court, Civil Sentence No. 3345 of 15.04.2015; For more court decisions, see *Culegere de hotărâri judecătorești pronunțate în materia medierii, cu note și comentarii*, Ed. A II-a, Ed. Universitară, București, 2012.

*of children's homes, the parents' contribution to child care, and any other misunderstandings that arise in spouses' rights that they may have according to the law, ascertaining that the outcome of the mediation of the parties in relation to this issue is not contrary to the best interests of the child, but likely to encourage parents to focus primarily on the needs of the child (...), pursuant to art. 63 of Law no. 192/2006 the court shall pronounce, at the request of the parties, a decision, according to the provisions of art. 271 of the Code of Civil Procedure. (...) Admits the application registered under no. 19864/231/2010, formulated by the applicant X. , residing at V. , in conflict with Y. , resident in V. , having as subject a maintenance pension. As a consequence, the court takes note of the mediation agreement signed by the parties.”<sup>19</sup>*

It can be seen that the court has checked whether the content of the mediation agreement corresponds to the best interests of the child.

“The applicant X, residing in Râmnicu Sărat, Buzău County, against Y, domiciled in A city, Buzău County, requested that the judgement which would be pronounced to grant him the custody of the minor Z for growth and education and to order the termination of the maintenance obligation established by civil sentence no. 34 of January 11, 2007, pronounced by the Râmnicu Sărat local Court.

In the substantive reasoning of the action, the plaintiff shows that through civil sentence no. 34 of 11.01.2007, pronounced by the Râmnicu Sărat local Court, the custody of the minors Z and W was conferred to the respondent. The interest in promoting this action is justified by the fact that

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<sup>19</sup> Focsani Local Court, Civil Sentence No. 2937 of 05.05.2011.

it is impossible for the respondent to provide the minor with the necessary conditions for a correspondingly material development.

Both minors are pupils and the expenses for raising and education for the two minors have increased substantially, so that in this situation maintaining the measure ordered by the aforementioned decision would have harmful consequences on the physical development and education of the minors.

As a matter of law, the plaintiff based his action on the provisions of art. 44 of Family Code. In evidence, the applicant filed the civil divorce sentence no. 34/2007 pronounced by Râmnicu Sărat Court, the birth certificate of minor Z and applicant's identity card.

On March 18, 2011, the complainant made evidence that a mediation agreement had been concluded between the parties, requesting to the court to take into account this agreement and to pronounce an Agreed Order (*hotărâre de expedient*).

Verifying the content of the mediation agreement under art. 271 Romanian Civil Procedure Code, and art. 67 of Law No. 192/2006, the court will admit the action and will take note of the mediation agreement whose content will be part of the sentence.”<sup>20</sup>

The case was brought by the applicant C. V. M. with domicile in T, no 15, county G. against the defendant B. N. having domicile in T, No. 15, county G. , for concluding mediation agreement - minors.

“On the grounds of the action, the applicant states that the minor B. G. D. , born on 24.12.2004, was the result of the concubinage relationship of the parties. They lived together at the home of T. , No. 15, county G, where the

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<sup>20</sup> Râmnicul Sărat Local Court, Civil Sentence No. 662 of 18.03.2011.

minor also presently lives. Because the defendant has left home, they have been separated for about two years. He gone abroad and is no longer involved in family life. Because before all the institutions it is required the consent to any decision on the rights of the minor, they have agreed that it is in the minor's best interest that the parental authority would be exercised exclusively by the mother. So, the child's dwelling remains with the mother and the defendant contributes according to possibilities.

According to art.438 of the Civil Code and art. 63 of Law 192/2006, the Court decide to enforce the settlement of the parties C. V. M. , with domicile in T No. 15, county G. , and B. N. , domiciled in T. , No. 15, county G. , materialized in agreement of mediation, concluded on 06.10.2015 at the Bureau of Mediators B. A. L. , this agreement being part of the judgment.”<sup>21</sup>

In another decision, the court exercised control over the content of the mediation act: the “reason for rejecting the application is the fact that the mediation agreement does not meet all the legal conditions for the court to be able to take note of the agreement established by this document. Thus, there is confusion between the institution of the exercise of parental authority and the establishment of the residence of the child after divorce.”<sup>22</sup>

## 9 Law to be applied to mediation settlements

From the legal point of view, mediation settlements are contracts having their object the prestation of services. It has a plurality of parties, an onerous and an sinallagmatic character. As has been pointed out in the

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<sup>21</sup> Tecuci Local Court, Civil Sentence No. 2656 of 29.10.2015.

<sup>22</sup> Local Court Onești, Civil Sentence No. 127/C of 21.01.2014.

doctrine, “(t)he mediator’s performance is the one which characterizes the contract, and it is a services’ provision. As has been pointed out before, the mediator undertakes to use her/his best efforts to channel the communication between the disputants, so that they may conclude their own arrangement on the conflict. On their part, the disputants are obliged to pay for the services rendered, even if the fees may be assumed by third parties, namely the State or charities, notwithstanding the fact that mediation expenses may also be considered a part of legal aid.”<sup>23</sup>

Of course, the subjects involved in mediation contracts have the legal possibility to choose the applicable law according to art. 3 of the Rome I Regulation.

Their choice “shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract” (Art. 3, 1 Rome I Regulation).

However, it is difficult to imagine, in our opinion, a partial choice of law exercised by the parties in mediation contracts. This is because the subject of choice of law is limited to matters having an obligational nature between the parties involved. All aspects related to the exercise of parental rights and custody of the child are subject to the law of protection (*lex protectionis* – usually the law of the habitual residence of the child), regardless of the law chosen by the parties of the mediation contract.

The law chosen by the parties will govern the formation of the mediation contract (e.g. as regards the consent, or the formal requirements),

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<sup>23</sup> P. O. Prieto de los Mozos, “*The Law Applicable to International Mediation Contracts*”, in *InDret, Review on the Analysis of Law*, No. 1/2011, pp.3-4.

and also the nature of an agreement entered into by the parties, should be answered by the law applicable to contractual obligations<sup>24</sup>.

Mediation is often international in its nature. Internationality of mediation contracts involves one or more foreign elements. For example, the parties to the contract are foreign nationals or they have their habitually resident abroad; the contract is signed abroad<sup>25</sup>; in child abduction cases, the child has his/her habitual residence abroad; or the obligations of the parties need to be performed in a foreign country. In complicated family matters, there are often used two or more mediators having their professional seat in different countries.

What law should be applied if mediation is carried out by two mediators, having their headquarters in different countries? Of course, we consider the hypothesis in which the parties to the mediation contract did not choose the law applicable, according to art. 3 of the Rome I Regulation. In principle, the contract shall be governed “by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence” (Art. 4, 2 *fin*, Rome I Regulation). It is obvious that the characteristic performance in the case of a mediation contract is that of the mediator's performance<sup>26</sup>.

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<sup>24</sup> C. Esplugues; J. L. Iglesias, “*Mediation and private international law: improving free circulation of mediation agreements across the EU*”, p. 10.

<sup>25</sup> P. O. Prieto de los Mozos, *op. cit.*, p. 6.

<sup>26</sup> “The determination of the performance which is characteristic of the contract could be fundamental for the determination of the law applicable to the mediation contract in absence of choice. Such performance is said to be the performance that reveals the legal and economic function of the contract, i.e., the one that “gives a name” to the contract” (P. O. Prieto de los Mozos, *op. cit.*, p. 3, note 4).



In the absence of the choice of law, in cases of international mediation with several mediators, from different countries, we consider that the principle of the closest links should be applied: “(w)here the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected” (Art. 4, 4 Rome Regulation). We are talking here about a rule of residual conflict norm, which takes over the mechanism of the escape clause. If the escape clause acts severely, leading to the replacement of the rule of conflict, thus fulfilling a corrective role, the residual clause is part of the conflict rule, allowing flexibility by applying it differently according to the concrete circumstances of the legal relationship. In both cases the role of the judge is a major one, he being the one who assesses the circumstances and, on this basis, establishes proximity according to the intensity of the links with the respective legal systems. The mechanism of the two instruments is very similar, in both situations the issue of assessing the factual circumstances which lead to the closest links is posed. In terms of predictability, the residual clause is "milder", with a considerably lower surprise effect, being part of the rule of conflict known to those legally bound. Instead, the exception clause often surprises, the parties being taught to relate to the norm of conflict (choice of law norm), ignoring the escape clause almost completely<sup>27</sup>.

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<sup>27</sup>-The purpose of the escape clauses is to induce certain flexibility when the abstract rule of the norm of conflict would lead to unjust results related to the location of the considered legal case. In other words, it represents an exceptional correction to the norm of conflict, considering the variability of the daily reality. Its finality is to contribute to the conflicts justice, as part of it (“*conflicts justice*” or “*kollisionsrechtliche Gerechtigkeit*” / “*internationalprivatrechtliche Gerechtlichkeit*” – Kegel/Schurig, *Internationales Privatrecht*, 8<sup>th</sup> Auflage, 2000, p. 114), aimed at assuring equity in the determination of legal proximity. This

In conclusion, despite the fact that EU national legal systems on mediation are silent as regards the law applicable to the mediation contract<sup>28</sup> (with the only exception of Greece), the law applicable to the settlement reached by the parties will be determined in accordance with the existing rules

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*internationalprivatrechtliche Gerechtlichkeit* also has its own soul and specific method, seeking all the time the legal system which is the most “closest” to the parties of the legal relationship (generally speaking), and not necessarily geographically, but from the point of view of the elements of legal integration. The conflicts justice aims at identifying the centre of life (interest) of the person, the “premise of the legal relation” establishing the applicable jurisdiction, depending on the circumstances and on the nature of the envisaged institutions. It operates with the concept of legal proximity, setting up the determination criteria and methods, being a *rechtsanwendungsrecht* which should act “without peeping” to the substantial content of the laws to which the respective relation shows connections. Regarding the escape clause in private international law, see A. Bucher, “*La clause d’exception dans le contexte de la partie générale de la LDIP*” în 21<sup>e</sup> Journée de droit international privé – 20 mars 2009; T. Hirse, *Die Ausweichklausel im Internationalen Privatrecht*, Tübingen 2006; P. Rémy- Corlay, *Mise en oeuvre et régime procédural de la clause d’exception dans les conflits de lois*, Rev.crit. 2003, p. 37-76; H. Gaudemet-Tallon, “*Le pluralisme en droit international privé : richesses et faiblesses (Le funambule et l’arc-en-ciel)*”, RCADI 312 (2005), p. 9-488 (327-338); J. D. González Campos, “*Diversification, spécialisation, flexibilisation et matérialisation des règles de droit international privé*”, RCADI 287 (2000), p. 9- 426 (253-262, 297-303); P. Lagarde, “*Le principe de proximité dans le droit international privé contemporain*”, RCADI 196 (1986-I), p. 9-237 (97-126); U. Blaurock, *Vermutungen und Ausweichklausel in Art. 4 EVÜ*, în Festschrift für Hans Stoll, Tübingen 2001, p. 463-480. The escape clause is not subsidiary to the conflict norm, but exceptional to this (D. A. Popescu, *Guide on international private law in succession matters*, Bucharest, 2014, p. 43-44, note 96).

<sup>28</sup> N. Alexander, “*Introducing Regulatory Robustness Ratings for Mediation Regimes in the EU*”, in N. Alexander, S. Walsh, M. Svatos (Ed.), *EU Mediation Law Handbook. Regulatory Robustness. Ratings for Mediation Regimes*, Kluwer Law International, The Netherlands, 2017, Ch. I., pp. 1-33.

of private international law<sup>29</sup>. Having a contractual nature, mediation agreements are regulated, as regarding the law applicable, by Rome I Regulation. When the parties have chosen the applicable law, the law chosen will apply (Art. 3 Rome I Regulation). However, there are certain limits of autonomy, stemming, on the one hand, from the exclusions of the Rome I Regulation, and, on the other hand, from the mandatory application of EU Standards in matters of mediation. Matters that are excluded by the Rome I Regulation will be governed by the national private international rules:

- the capacity to enter into a mediation clause or a mediation agreement falling outside the scope of the Regulation – *lex patriae* principle<sup>30</sup>;
- the law applicable to the content of the agreement is directly dependent on the nature of the dispute or of the settlement reached by the parties. “Depending on the specific obligations agreed upon, and their nature and legal enforceability, the applicable law will vary” (P. O. Prieto Mozos, op. cit., p. 8). If mediation agreement is related to succession matters, the rules of EU Succession Regulation must be

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<sup>29</sup> C. Esplugues; J. L. Iglesias, *Mediation and private international law: improving free circulation of mediation agreements across the EU*, p. 10; C. Esplugues, in *Encyclopedia of Private International Law* (J. Basedow, G. Rühl, F. Ferrari, P. de Miguel Assensio – Ed.), Edward Elgar Publishing, Vol. 2, 2017, p. 1252-1253.

<sup>30</sup> Art. 1, p. 2 Rome I Regulation: “The following shall be excluded from the scope of this Regulation: (a) questions involving the status or legal capacity of natural persons, without prejudice to Article 13”. For more details, M. McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations*, Oxford, 2015, pp. 717-723; Magnus/Mankowski, *European Commentaries on Private International Law. Vol. II, Rome I Regulation – Commentary*, Otto Schmidt Verlag, 2017, pp. 681-683; p. 735; G.-P. Calliess (Ed.), *Rome Regulations*, Second Edition, Wolters Kluwer, 2015, pp. 58-59; F. Ferrari (Ed.) 2015, *Rome I Regulation. Pocket Commentary*, Sellier, pp. 42-43.

observed. If it is related to the custody of the child, the best interest of the child principle have to be respected, taking into account all the circumstances of the case;

- we must distinguish between the law applicable to the mediation agreement, generally subject to the provisions of the Rome I Regulation, and the law applicable to the parental agreement. The validity of the latter must comply with the provisions of the law governing parental responsibility, usually the law of the child's habitual residence<sup>31</sup>.
- the role played by the mediator will be in principle governed by the national rules of the country where mediation procedure is taking place. This national law will also determine the legal status of mediators, being they national or foreign and their duties on confidentiality. It is important to emphasize that, "as a matter of principle no discrimination by reason of nationality is envisaged in the Member States, even in some countries in relation to non-EU citizens. The application of the national general legal framework regarding

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<sup>31</sup> I. Verougstraete, *op. cit.*, p. 19, 7.1.: "The validity of a mediation clause must be assessed independently, i.e. separately from the question of the validity of the contract whose execution, validity or interpretation constitutes a problem. This solution is consistent with EU legislation and is actually common sense. The effectiveness of such a clause has been challenged – the directive is silent in this respect. The question is whether the party, which, notwithstanding the mediation clause, is being sued directly in court, may enter a dilatory plea or claim the inadmissibility of the action. Opinions are divided, and some courts have concluded from the voluntary nature of mediation that it would serve no purpose to deny an application summarily on that basis. This view is opposed by others who believe that contract law should not focus on the outcome of the agreed procedure."

foreign mediators also relates to countries which distinguish registered and non-registered mediators”<sup>32</sup>;

- the mediators liability in cross-border mediation should be established, in principle, according to the rules of the applicable law to the content of the mediation settlement. The contractual nature of the liability will prevail whenever the mediator's conduct will not embrace a delictual form. In the latter case, the law applicable to the mediator's liability shall be determined in accordance with the Rome II *EU Regulation on the law applicable to non-contractual obligations*. The national law of the place of mediation process and national law of the mediator will also play an important role as regarding the mediation standards (confidentiality, mediator independence, appreciation of mediator professional conduct etc);
- the mediation procedure will be regulated, in principle, by the law of the place of the mediation process. The role of the agreement of the parties to the mediation agreement may not be neglected. So, “it would be for them to fix the rules of the proceeding, venue, language or seat in accordance with the law of the place where the mediation takes place. The only limits stressed are those related to the preservation of same basic principles like the maintenance of confidentiality, impartiality, equal treatment of the parties and so on, in accordance with the law of the seat of the mediation. Because of the monistic position maintained in many EU Member State, these principles are

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<sup>32</sup> C. Esplugues, in *Encyclopedia...*, p. 1252.

applicable both to internal and cross-border mediations in that country.”<sup>33</sup>

## 10 Efficient mediation of child abduction cases. Malta process. Recognition and enforcement of agreements concluded during return proceedings

According to the Hague Mediation “Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction”, adopted in 2012, mediation agreements “should not be seen as a complete substitute for judicial procedures, but as a complement” (45). In other words, the possibility of appealing to the court can not be ruled out even if the parties have entered into a mediation agreement.

An efficient mediation of child abduction cases without a proper understanding of the Hague Convention of 1980 is not possible. In child abduction cases, mediation needs to be conducted on short time. There are drastically limits the timeline of mediation, often to a couple of days. That means pressure of the parties (and on mediators) to get results in a relatively short period of time and focuses the initial attention on the return or retention<sup>34</sup>.

In many cases there is an imbalance of power between the two sides, such as, for instance, the left-behind parent assumes being the one that most probably will win the case. It thus impacts the mediation momentum and

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<sup>33</sup> C. Esplugues, *Ibidem*, p. 1253.

<sup>34</sup> Z. D. Şuştac, J. Walker, C. Ignat, A. E. Ciucă, S. E. Lungu, *Best Practice Guide on the use of Mediation in Cross-border Cases*, Bucharest, 2013, p. 19-23.

mediators need to be aware of that and be able to move swiftly from the strictly legal aspects of the case to interpersonal ones. The left-behind parent is not always truly wishing that the child be returned<sup>35</sup>. There are several reasons as to why parents submit applications based on the Hague Convention, such as: the left-behind parent wishes that his/her spouse return; the left-behind parent does not trust the legal system of the country where the abducted child was brought to and is afraid of losing contact with the child; the father is angry with his wife because she took the child away without his consent and could be willing to make her accountable or even resort to revenge by initiating the process<sup>36</sup>.

One of the essential factors when mediating such cases is to determine whether the child or children was/were abducted from a functional marriage or relationship or whether the parents were already separated or even divorced and each lived separately<sup>37</sup>. If the relationship was still intact – at least from the point of view of the left-behind parent – the mediation is dealing most likely with issues concerning the relationship.

According to the **Hague Mediation Guide**, the experience has shown that the return proceedings need to be followed, where possible, by stay of proceedings for mediation. This can give you many advantages:

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<sup>35</sup> *Ibidem*.

<sup>36</sup> *Ibidem*.

<sup>37</sup> N. Gonzáles Martín, “*International Parental Child Abduction and Mediation: An Overview*”, in *Family Law Quarterly*, Vol. 48, No. 2 (Summer 2014) pp. 333-337.

“a) It may positively affect the taking parent’s motivation to engage in finding an amicable solution when otherwise faced with the concrete option of court proceedings.

b) The court may be able to set a clear timeframe within which the mediation sessions must be held. Thus the misuse of mediation as a delaying tactic is avoided and the taking parent is not able to gain any advantages from the use of Article 12(2) of the 1980 Hague Child Abduction Convention.

c) The court may take necessary protective measures to prevent the taking parent from taking the child to a third country or going into hiding.

d) The left-behind parent’s possible presence in the country to which the child was abducted to attend the Hague court hearing can be used to arrange for a short sequence of in-person mediation sessions without creating additional travel costs for the left-behind parent.

e) The court seised could, depending on its competency in this matter, decide on provisional contact arrangements between the left-behind parent and the child, which prevents alienation and may have a positive effect on the mediation process itself.

f) Funding for court-referred mediation may be available.

g) Furthermore, the fact that the parties will most likely have specialist legal representation at this stage already helps to ensure that the parties have access to the relevant legal information in the course of mediation.



h) Finally, the court can follow up the result of mediation and ensure that the agreement will have legal effect in the legal system to which the child was abducted.”<sup>38</sup>

One of the most stringent aspects of mediating cross-border family disputes consists in the intercultural dimension<sup>39</sup>. When bi-national couples meet and fall in love<sup>40</sup>, they are often fascinated that their new partner comes from a different cultural background<sup>41</sup>. When the relationship breaks down,

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<sup>38</sup> Hague Mediation “Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction”, (61).

<sup>39</sup> N. Marie Alexander, “*Mediating Beautifully: The Alchemy of Aesthetics in a Fragmented Age*”, in Singapore Management University, School of Law, Research Paper No. 12/2017.

<sup>40</sup> E. Heikkilä, D. Rauhut (eds.), *Marriage Migration and Multicultural Relationships*, Institute of Migration, 2015, pp. 5-14.

<sup>41</sup> S. P. Huntington, “The Clash of Civilizations?”, *Foreign Affairs*, 72, 1993, pp. 22-49; See also Ch. von Bar (Ed.), *Islamic Law and its reception by the Courts in the West / Le droit islamique et sa réception par les tribunaux occidentaux*, Cologne, 1999; Edward H. Hall, *Understanding Cultural Differences: Germans, French and Americans*, Intercultural Press 1990; H. van Loon, “*The Accommodation of Religious Laws in Cross-Border Situations: The Contribution of the Hague Conference on Private International Law*”, in Cuadernos de Derecho Transnacional (Marzo 2010), Vol. 2, No 1, p. 262, no. 4: “As a result of massive migration and other movements of people to the West, in particular from countries within the Islamic tradition, the need to accommodate the differences between such systems and those of Western countries has increased considerably in recent years. And, given the political overtones of the public debate on cultural and religious differences in Western societies, it has become even more critical to develop legal strategies to protect the rights of persons and families caught in such “conflicts of laws”. No wonder, then, that this has become an increasing concern of the Hague Conference, in addition to its many other activities”; Bruce E. Barnes, “*The Roles of Culture: Muslim Country Leaders, NGOs, and European Small-Country Leaders as International Mediators in Southeast Asia*”, in *Essays on Mediation. Dealing with Disputes in the 21st Century* (I. Macduff Ed.), Walters Kluwer, 2016, p. 125 et seq.

however, the same differences can get to be perceived as threatening, and the parties can return to traditional thinking<sup>42</sup>. Therefore, mediators<sup>43</sup> need to take into account the cultural and religious considerations that could affect the situation (according to the Hague Conference on the Permanent Bureau for Private International Law 2012: 62)<sup>44</sup>.

The legal best interests of the child and its protection requires respect for the child's right to maintain contacts with both parents. In the case of *Blaga v. Romania*, European Court of Human Rights (ECHR) held, on 1 July 2014: “The Court reiterates that the mutual enjoyment by parents and children of each other’s company constitutes a fundamental element of family life and is protected under Article 8 of the Convention [...] In this area the decisive issue is whether a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order – was struck,

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<sup>42</sup> R. Schuz, *The Hague Child Abduction Convention. A Critical Analysis*, Oxford and Portland, Oregon, 2013, pp. 146-173.

<sup>43</sup> See *Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters* – European Commission for the Efficiency of Justice (CEPEJ), adopted on 7 December 2007, Strasbourg (CEPEJ(2007)14): “Even if mediation is available and accessible to all, not everyone is aware of mediation. Responses to the questionnaire show that lack of awareness among judiciary, legal professionals, users of justice system and the general public is one of the main obstacles to the advancement of mediation. Member states and mediation stakeholders should keep in mind that it is hard to break society’s reliance on the traditional court process, as the principal way of resolving disputes” (37).

<sup>44</sup> T. Kruger, *International Child Abduction*, Oxford and Portland, Oregon, 2011, pp. 156-161.

within the margin of appreciation afforded to States in such matters [...]” – point 64<sup>45</sup>.

On 24 March 2014 The Permanent Bureau of the Hague Conference on Private International Law announced the 10th Anniversary of the **Malta Process**, a dialogue involving both Contracting States to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and 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*, and non-Contracting States whose legal systems are based on or influenced by Islamic law (“Shariah”)<sup>46</sup>.

The *Malta process*<sup>47</sup> was launched at a Judicial Conference on Cross-Frontier Family Law Issues in St. Julian’s, Malta, in March 2004 and “brought together judges from Algeria, Belgium, Egypt, France, Germany, Italy, Lebanon, Malta, Morocco, the Netherlands, Spain, Sweden, Tunisia, the United Kingdom, and experts from the European Commission and Council, as well as from NGOs. They adopted a Declaration in which they affirmed the principles of the 1989 *UN Convention on the Rights of the Child* as a basis for

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<sup>45</sup> For more details, see Dr. L. Heckendorn Urscheler, Dr. I. Pretelli, *Cross-border parental child abduction in the European Union*, Study, available here: [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510012/IPOL\\_STU\(2015\)5100\\_12\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510012/IPOL_STU(2015)5100_12_EN.pdf).

<sup>46</sup> H. van Loon, *op. cit.*, p. 262-263, no. 4-5.

<sup>47</sup> W. Duncan, “*Towards the Malta Process*”, in Hague Conference on Private International Law, The Judges’ Newsletter, Vol. VIII, autumn 2004, Special Focus, Malta judicial conference on cross-frontier family law issues involving certain Hague and non-Hague States, National Reports by 14 States and the Conclusions of the Judicial Conference, pp. 4-8, at p. 6.

action, and agreed that efficient and properly resourced authorities should be established in each State to co-operate in securing cross-frontier rights of contact and in combating the illicit transfer and non-return of children. It was further agreed that common rules were needed to specify which country's courts are competent to make decisions concerning custody and contact, and that such decisions made by a competent court in one country should be respected in other countries.”<sup>48</sup>

The success of the first judicial conference led to a subsequent conference in 2006 and a third conference took place in 2009, each of the them concluding with a “Malta Declaration”. In response to a recommendation made at the Third Malta Conference in 2009<sup>49</sup>, the Council on General Affairs and Policy of the Hague Conference approved the establishment of a Working Party on Mediation in the context of the Malta Process. The objective of the Working Party is to promote the development of mediation structures to help resolve cross-border family disputes concerning custody of abducted children, from states where the 1980 Hague Child Abduction Convention does not apply<sup>50</sup>.

Malta IV Conference on Cross-Frontier Child Protection and Family Law took place from 2-5 May 2016. “The experts recognised that the 1980 Child Abduction Convention, the 1996 Child Protection Convention and the 2007 Child Support Convention support a number of key principles expressed in the 1989 *United Nations Convention on the Rights of the Child*,

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<sup>48</sup> H. van Loon, “*The Accommodation of Religious Laws in Cross-Border Situations: The Contribution of the Hague Conference on Private International Law*”, in *Cuadernos de Derecho Transnacional* (Marzo 2010), Vol. 2, No 1, pp. 265-266, no. 17.

<sup>49</sup> *Ibidem*, p. 266, no. 18-19.

<sup>50</sup> *Ibidem*.

all in the best interests of children. The experts noted that these Hague Children's Conventions are designed to be global in reach and to be compatible with diverse legal traditions. Experts underlined the important benefits of the Hague Children's Conventions for States Parties."<sup>51</sup>

In order to promote internationally family agreements involving children, the Hague Experts' Group meeting on recognition and enforcement of agreements in family matters – 14-16 June 2017 – considers the necessity of adopting a new Hague binding instrument in family matters. The benefits of such instrument would be:

- “enabling package agreements to be made legally enforceable in one Contracting State and then recognised and enforced in other Contracting States cost effectively;
- establishing a simplified and prompt procedure, which may include concentrated jurisdiction, to render a package agreement legally binding and enforceable in one Contracting State and for simple and prompt recognition and enforcement of the decision of that court or authority in other Contracting States;
- whilst protecting the best interests of the child, enabling party autonomy by giving parents the possibility of selecting a legal system which has a substantial connection with the child to render the agreement enforceable.”<sup>52</sup>

There is ***no authentic enforceability*** of the settlement reached by the parties within a mediation proceeding. Enforceability depends on its homologation by a public authority. This may be a court that takes note of the

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<sup>51</sup> <https://www.hcch.net/en/news-archive/details/?varevent=486>.

<sup>52</sup> <https://assets.hcch.net/docs/1c688fd7-631d-4bb3-9597-e2c7a975839a.pdf>.

mediation agreement or a notary public authenticating the document in the presence of the parties.

The European Parliament encourages Member States to take steps to facilitate the recognition and enforcement of mediation agreements in accordance with citizens' fundamental rights, facilitating free movement of mediation settlements: “despite the voluntary nature of mediation, further steps must be taken to ensure the enforceability of mediated agreements in a quick and affordable manner, with full respect for fundamental rights, as well as Union and national law; recalls in that respect that the domestic enforceability of an agreement reached by the parties in a Member State is, as a general rule, subject to homologation by a public authority, which gives rise to additional costs, is time consuming for the parties to the settlement, and could therefore negatively affect the circulation of foreign mediation settlements, especially in cases of small disputes.”<sup>53</sup>

Recently, following a legislative change, Romanian legislation has been granted the enforceable title for parental agreements. Law no. 17/2017 – regarding the approval of Government Emergency Ordinance no. 1/2016 for the amendment of the Law no. 134/2010 on the Code of Civil Procedure, as well as related normative acts – amended (in article IV<sup>1</sup>) the Romanian Notaries Public Law, No. 36/1995, introducing a new paragraph (2) to art. 100, which explicitly establishes that the parental agreements authenticated by the public notary are *ex lege* enforceable titles. Obviously, such parental

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<sup>53</sup> Report on the implementation 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 ‘Mediation Directive’). Motion for a European Parliament Resolution, 10: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2017-0238+0+DOC+XML+V0//EN>.

agreements may be the result of a prior mediation procedure, as the holders of the parental authority can reach a direct agreement with the notary without having followed a prior mediation procedure.

According to the new paragraph (2) of article 100 of the Notaries Public Law,

*“(i)t is also an enforceable title a parental agreement made before a notary public on the occasion of divorce procedure or thereafter, where, in exercising jointly the parental authority, parents agree on aspects such as determining the child’s residence, ways to keep personal links with the child by the parent who doesn’t live with the child, as well as other measures on which parents can agree in the conditions set forth under art. 375 (2) of the Civil Code, republished, with subsequent modifications.”*

After article 100 a new article was introduced (article 100<sup>1</sup>), with the following wording: “For the validity of the parental agreement concluded in the divorce proceedings or in any other situation, the notary public shall obtain the psycho-social inquiry report and proceed with hearing the child in the conditions set forth under art. 264 Civil Code, republished, as subsequently amended.”

Finally, to article 136, after paragraph (4) a new paragraph is being added, paragraph (5), with the following wording: “(t)he document authenticated by the notary public, which establishes the parental consent, is an enforceable title under the conditions of art. 100 par. (2).”

Several observations are necessary in order to clarify the meaning of the new provisions in relation to the traditional competencies of notaries public, as they are recognized in the Member States of civil law:

First of all, it should be noted that notaries do not exercise jurisdiction within the meaning of the Brussels IIbis Regulation in parental responsibility

matters. However, the notary is assimilated to the notion of court in international divorce proceedings where, under the domestic law of that Member State, the notary enjoys such powers. In these procedures, if the rules of international competence provided for in art. 3 of the Brussels IIbis Regulation are met, the notary will expand its jurisdiction, pursuant to Art. 12 of the Regulation, also on issues related to the exercise of the parental authority;

If the notary does not exercise an international divorce procedure, the authentication of parental agreements may have not the meaning of a judicial decision on custody of the child. In these case, the notary will authenticate the parental agreement under its general competence of authentication, regardless of the nationality or the habitual residence of the child or his/her parents<sup>54</sup>;

Parental agreements may or may be not the result of mediation process. Notary's competence to authenticate such agreements is also expresly provided for in art. 59, par. (1) of the Romanian Mediation Act<sup>55</sup>;

So, if parental agreements are results of the mediation procedures, there is a difference reflected in the nature of the national authority that takes note of this agreements. If parental agreements are authenticated by notaries, outside the divorce procedure, there are no limitations on international

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<sup>54</sup> Andrae, in *Nomos Kommentar BGB I Art. 46*, note 4; Rauscher (Ed.), in *Brussels IIbis Regulation*, Art. 46, note 6; U. Magnus, in Magnus/Mankowski (Ed.), *European Commentaries on Private International Law. Brussels IIbis Regulation*, Otto Schmidt Verlag, Köln, 2017, Art. 46, p. 415: "In any event, the nationality and habitual residence of the persons of the persons seeking the authentication are irrelevant."

<sup>55</sup> According to this article of law, "(t)he parties may request the notary to authenticate their agreement" (par. (1)). .



competence, because in these procedures notaries are not assimilated to the courts. If, by the contrary, the courts takes note of mediation agreements, they must have international competence according to Brussel IIbis rules;

The notary has the obligation of hearing the child<sup>56</sup>. According to art. 264 of the Romanian Civil Code, in the administrative or judicial proceedings

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<sup>56</sup> See Art. 12 of the *United Nations Convention on the Rights of the Child* (CRC) of 20 November 1989 (entered into force on 2 September 1990): (1) “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.” (2) “For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.” In this context, it must be pointed out that, in the same way, the *Hague 1980 Convention on the Civil Aspects of International Child Abduction* explicitly states in Art. 13 (2) as follows: “The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.” The Explanatory Report on this Convention mentions that “[s]uch a provision was absolutely necessary given the fact that the Convention applies, *ratione personae*, to all children under the age of sixteen; the fact must be acknowledged that it would be very difficult to accept that a child of, for example, fifteen years of age, should be returned against its will. Moreover, as regards this particular point, all efforts to agree on a minimum age at which the views of the child could be taken into account failed, since all the ages suggested seemed artificial, even arbitrary. It seemed best to leave the application of this clause to the discretion of the competent authorities” (E. Pérez-Vera, “Explanatory Report on the 1980 Hague Child Abduction Convention”, in *Proceedings of the Fourteenth Session (1980), Tome III, Child abduction*, The Hague, Imprimerie Nationale, 1982 (“Explanatory Report”), par. 30). Also under the *Hague 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* recognition of protective measures taken in respect of the child may be refused “if the measure was taken, except in a case of urgency, in the context of a judicial or

that concern him, it is mandatory to hear the child who has reached the age of 10. However, a child who has not reached the age of 10 may also be heard if the competent authority considers it necessary to settle the case. The right to be heard implies the possibility for the child to request and receive any information, according to his or her age, to express his / her opinion and to be informed of the consequences this may have, as well as the consequences any decision that concerns him (art. 264, par. (2) Romanian Civil Code)<sup>57</sup>;

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administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State” – Art. 23 (2) b).

<sup>57</sup> Prof. M. Henaghan, “*The voice of the child in international child abduction cases – Do judges have a hearing problem?*”, in *The Judges’ Newsletter on International Child Abduction*, Volume XXII, Summer Fall, 2018, pp. 14-15: “It is essential that we listen to children. Children understand their own world better than anyone else. Each child is unique and sees their world in their own particular way. Giving the child an opportunity to express their views therefore leads to more workable arrangements about their care. (...) Further, it is important to have respect for the dignity of the person the decision is about. Allowing the child to express their views is democratic and inclusive. Most children want to have a say. Research carried out with Nicola Taylor and Megan Gollop in our relocation study shows that children want to be heard. (...) The child objection defence is totally out of tune with a children’s rights framework. It shows a lack of understanding of children’s viewpoints and how important it is to incorporate a child’s general point of view, rather than narrowly focusing on whether they want to stay or leave. It also fails to put the child’s perspective into the context of the child’s everyday life. What is at stake here is ensuring that courts are fully informed as to what is happening to the child, how they are experiencing it, and what is really important to them in terms of their everyday life. Judges have a hearing problem when it comes to younger children and, given the narrow scope of the child objection defence, that further exasperates their ability to hear what is going on for the particular child. The time for reform is now.” (*Ibidem*, p. 16). See also S. Calvert, “*What happens to children in high conflict parenting disputes. How should we think of their “voice”?*”, in *The Judges’ Newsletter on International Child Abduction*, Volume XXII, Summer Fall, 2018, pp. 16-19; C. Houston, N. Bala and M. Saini, “*Crossover Cases of High Conflict Families Involving*

Parental agreements authenticated by notaries outside the divorce proceedings are subject to the control of the competent court, in accordance with art. 8 and following of the Brussels Ibis Regulation;

Parental agreements authenticated by the notaries are enforceable titles (art. 136, par. (5) Romanian Notary Public Law, No. 36/1995, as amended). And, being enforceable in the Member State of origin<sup>58</sup>, shall be also declared enforceable in other Member States, under the same conditions as judgments. Art. 46 of Brussels Ibis Regulation expressly mentions that “(d)ocuments which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also agreements between the parties that are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments.” As pointed out in the literature<sup>59</sup>, “Art. 46 applies also to any private agreement on matters covered by the Regulation if this agreement is enforceable under the law of the Member state of origin. Enforceability means again that the agreement serves as a title and can be immediately enforced (...). Agreements comprise court settlements’ – which will regularly fulfil the requirements of an authentic instrument as well – but also out-of-court settlements if they are granted direct enforceability”;

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Child Protection Services: Ontario Research and Suggestions for Good Practice”, *Family Court Review*, vol. 55 no. 3, 2017, pp. 362-374; M. Freeman, *Parental Child Abductions: The Long-Term Effects*, London, International Centre for Family Law, Policy, and Practice, 2014; L. Blake, “*Parents and Children Who Are Estranged in Adulthood: a review and discussion of the literature*”, *Journal of Family Theory and Review*, vol. 9, 2017, pp. 521-36.

<sup>58</sup> U. Magnus, in Magnus/Mankowski (Ed.), *op. cit.*, Art. 46, p. 415: “the law of the state of origin would decide on the enforceability of an agreement.”

<sup>59</sup> *Ibidem*, pp. 415-416.

Parental agreements concluded in the mediation procedure are not *per se* enforceable titles, except to the extent they are authenticated by a notary public or are included in a court settlement<sup>60</sup>. Art. 6 (2) of the 2008 EU Mediation Directive clearly states that, in order to be enforceable, the mediation agreement must be incorporated in the content of a judgment or in an authentic instrument: “(t)he 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”;

Located behind the fixed rules of international jurisdiction of courts, mediation is an institution with a fundamental role, especially in international family law matters, encouraging private autonomy<sup>61</sup> and respect for identity and choice of the parties. As pointed out by Ruth Lamont, “(t)he central aspect of mediation is to enable the parties to reach a decision for themselves without the formal decision of a court, representing an expression of autonomy. (...) Providing scope for autonomy of decision-making away from the court has

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<sup>60</sup> See also art. 59, par. (2) Romanian Mediation Act: “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 agreement. 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 title under the law. The provisions of Article 432 - 434 of the Civil Procedure Code, republished, as amended, shall apply accordingly.”.

<sup>61</sup> This autonomy was called “autonomy of process”, having as purpose a very flexible and individualized form of justice determined by the parties for themselves (A. Diduck, “*Autonomy and Family Justice*”, in *Child and Family Law Quarterly*, 2016, 28, p. 134).

been a developing aspect of European private international family law. Mediation has been encouraged in family law for a number of reasons including speed of dispute resolution, cost saving in avoiding court proceedings, flexibility of procedure and confidentiality”<sup>62</sup>;

Facilitating the recognition and enforcement of parental agreements obtained in the mediation procedure is a necessity of the moment. To this end, we welcome the suggestion of Professors C. Esplugues and J. L. Iglesias to introduce, according to the model of other European regulations, a European Mediation Certificate. Such a certificate will attest the fulfilment of the conditions of validity in the country of origin, including enforceability, facilitating enforcement in another Member State. According to the authors, “(t)he EU could also explore the possibility of creating an EU Mediation Settlement Certificate, to be granted by certain public authorities in the country of origin. This solution is more ambitious than the previous one. Yet, although it is in line with existing solutions already adopted in Union law, it may generate some opposition in some Member States. The creation of this EU Mediation Settlement Certificate would be in line with the philosophy underlying some existing EU legal instruments: for instance, the abovementioned Regulation 805/2004 creating a European Enforcement Order for uncontested claims, and Regulation (EU) No 650/2012 on succession and on the creation of a European Certificate of Succession. This EU Mediation Settlement Certificate would definitely foster the circulation of foreign mediation settlements by laying down some minimum standards to

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<sup>62</sup> R. Lamont, “*Mediation in EU Cross-border Family Law*”, in P. Beaumont, M. Danov, K. Trimmings and B. Yüksel (Ed.), *Cross-Border Litigation in Europe*, Volume 20 in the series *Studies in Private International Law*, Oxford and Portland, Oregon, Hurt Publishing, 2017, p. 788.

be complied with in the country where the settlement was reached and would therefore ensure its enforceability.”<sup>63</sup>

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<sup>63</sup> C. Esplugues, J. L. Iglesias, *Mediation and private international law: improving free circulation of mediation agreements across the EU*, p. 19, 3.2.2.2.: SSRN-id2874952.pdf.