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## E-Book

# «Mediation in Civil and Criminal Cases to Foster European Wide Settlement of Disputes»

## Chapter III

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### Introduction

The boom of Alternative Dispute Resolution (ADR) initiatives and regulations in Europe has been marked by a slow progress in achieving their potential, even, and apparently more so, in the countries that first implemented the European Union (EU) Directive 2008/52/EC: Portugal, Italy, France and Estonia<sup>1</sup>. The (Mediation) Directive prompted work on the Estonian “Conciliation Act” that was passed on the 18th of November, 2009<sup>2</sup>. The expected increase in the use of ADR and mediation did not follow, as evidenced in the Mediation Country Report published on Estonia by JAMS International ADR Center (drafted by Liina Naaber-Kiviso), and the studies by the Directorate General for Internal Policies on Cross-Border Alternative Dispute Resolution in the European Union that assessed the impact of the Mediation Directive and legislation relevant for consumer redress published in 2011<sup>3</sup>. This situation can be easily be associated to the lack of a consolidated ADR culture in the country, as well as to the actual shortage of experts and/or enthusiasts that could promote mediation as the expedite, effective and non-intrusive assisted negotiation procedure that it could be. Among the observable challenges for a rapid and genuine implementation of ADR methodologies are: opting for associating assisted negotiation with conciliation by ignoring (or disregarding) the fundamental differences that separate the two; a general inclination to trust more authoritative and regulated conflict resolution schemes; low awareness of the availability of alternative conflict resolution methods and their merits; absence of experienced professionals and practitioners with credentials regarding specific methodologies; insignificant availability of training at any level of the existing educational system; and lack of customer empowerment and proactiveness in the pursuit of their own interests<sup>4</sup>. Like with

<sup>1</sup> Discussed in G. DE PALO, M.B. TREVOR (eds.), *EU Mediation Law and Practice*, Oxford, 2012, p. 85.

<sup>2</sup> Access to the original text of the law preparatory works at: <https://www.riigiteataja.ee/akt/13240243> and <http://www.riigikogu.ee/tegevus/eelnoud/eelnou/2dcc0573-54ff-b47f-4b6e-e4b3c8d3862a/> respectively.

<sup>3</sup> Find the texts online at: [http://www.adrcenter.com/jamsinternational/civil-justice/Mediation\\_Country\\_Report\\_Estonia.pdf](http://www.adrcenter.com/jamsinternational/civil-justice/Mediation_Country_Report_Estonia.pdf), and [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/imco/dv/adr\\_study/\\_adr\\_study\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/imco/dv/adr_study/_adr_study_en.pdf).

<sup>4</sup> See *infra*, note 24. Recommended readings with reference content on this are: C. HODGES, I. BENÖHR, N. CREUTZFELDT-BANDA, *Consumer ADR in Europe*, London, 2012; J.M. NOLAN-HALEY, *Evolving Paths to Justice: Assessing the EU Directive on Mediation*, in *Proceedings of the Sixth Annual Conference on International Arbitration and Mediation*, Fordham University Law School, <http://ssrn.com/abstract=1942391> (October 11, 2011); I. BENÖHR, *Alternative dispute resolution for consumers in the EU. Consumer ADR in Europe*, Oxford, 2012.

most regulatory efforts, the effective implementation of the mediation directive as well as all subsequent acts on the same regard require not only the enactment of a compliant legal framework but also social readiness founded on an strong – *informal* – institutional environment<sup>5</sup>.

According to Ginter, the *travaux préparatoires* of the Conciliation act show that two were the purposes of the legislature: the promotion of alternative dispute resolution methods and facilitating access to justice on one hand, and on the other to create a unified set of guidelines applicable to all the providers of those services<sup>6</sup>. His article also suggests that ADR systems already functioned prior to this legal act but no statistics or testimonial evidence of these activities can be clearly certified, and considering the very few formal courses and trainings on conflict management for law students and legal experts, where mediation may be marginally mentioned, it could be said that no such practice was established at least by then. The first formal conflict management course focusing on negotiation and mediation of the whole spectrum of ADR possibilities was offered at a higher educational institution in 2002, and was resumed in 2009 as a master level mandatory course in a comparative and international law program in Tallinn<sup>7</sup>. Other schemes such as conciliation and arbitration received more attention in Tartu, where a course of ADR started being taught by the law faculty much more recently<sup>8</sup>. Outside of the legal sphere, it should be admitted that mediation-like activities, even if without this denomination, have been performed in various fields by psychologists, social workers, teachers, doctors and other counsellors. An association of mediators was established more than a decade ago in an effort to provide support and information on family mediation with some success in consolidating its reputation and linking with foreign groups and institutions engaged with the same practice<sup>9</sup>. Consequently, it can be expected this organization to aim at handling the practice of mediation on a deeper level than merely to facilitate the settlement of cross border disputes, which could be used to integrate all uncoordinated efforts into one general and multidisciplinary to focus on the improvement of the conflict management and dispute prevention competences across all society sectors. The Association expects to become the primary provider of training and certification for mediators and it has been working to achieve this status in the near future. Therefore, to argue that mediation was created by a legal act is not correct in as much as it would not be correct to say that the promotion and strengthening of mediation practices can be caused by legislative developments. Effective conflict management competences are the result of personal and social development, cooperation, civil society activism and customer empowerment. The Estonian state could surely play a beneficial role in supporting awareness initiatives and training public administration officers and civil servants in ADR methodologies. It is likely to do so now for at least three reasons: to overcome the poor results reported by the EU Commission on the use of ADR methodologies; because with the ODR regulation and the European platform for mediating cross border disputes the technology component becomes much more attractive; and, due to the increased number of Estonian lawyers exposed to the international legal practice and those that have returned to the country after having received training abroad and obtained ADR certifications from reputable institutions. Great opportunities await the future of ADR and ODR for a country like Estonia where mediation is still in its infancy.

## 1. Normative sources of mediation regulation

A combination of supranational legislation and domestic legal provisions is supposed to provide the predictability intended by the European Commission (The Commission) to effectivize civil and commercial affairs within the EU. The specific Directive 2008/52/EC of the European Parliament and

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<sup>5</sup> Informal institutions for the purposes of this text refer to regulations that have no binding force and do not follow the doctrine of the rule of law, such as cultural and social phenomena, traditions, customs, self-regulatory schemes, voluntary codes of conduct, etc.

<sup>6</sup> See *supra*, note 1.

<sup>7</sup> Conflict resolution and ADR was a course offered by the law faculty at Concordia International University Estonia (CIUE) first, then in Tallinn University of Technology, at the Tallinn Law School of the faculty of Social Sciences. The current curriculum can be found online at: <http://www.ttu.ee/faculty-of-social-sciences/tallinn-law-school/studies-8/> by clicking on 'program'.

<sup>8</sup> Information on the courses available in Tartu University Faculty of Law is linked and up to date online at <http://www.ut.ee/en/courses-taught-english>.

<sup>9</sup> More on the non-profit organization MTÜ *Eesti Lepitajate Ühing* below, para. 2.

of the Council of 21 May 2008 on “certain aspects of mediation in civil and commercial matters” could be seen as just one part of a wider movement towards the creation of a new ADR or conflict management and dispute resolution culture in Europe. This institutional development has achieved different degrees of success in member states and has had sector and field specific impact<sup>10</sup>. This asymmetry continues to create tensions and paradoxes within the Union but they could begin to resolve with the implementation of technological solutions prompted by the implementation of the unified Online Dispute Resolution platform<sup>11</sup>. The Commission has been promoting ADR as an ideal tool to overcome the difficulties of cross-border exchange and smooth integration but underlying only the importance of at least attending very specifically to the needs of European customers and traders<sup>12</sup>, in a way restricting the practice. The policy work of the Commission and the information on ADR available in the EU website is located under the directory “Consumer Affairs”<sup>13</sup>. The Green Paper on “Consumer Access to Justice in the Internal Market” mentioned ADR methods in 1993, and led to the adoption of a communication on the “Action plan on consumer access to justice and the settlement of consumer disputes in the internal market”, suggesting the difficulties that exist with access to courts and therefore to justice<sup>14</sup>. As far ago as in 1998, the Commission, via its recommendation, proposed to establish standards and principles applicable to the settlement of consumer disputes outside the court system<sup>15</sup>. The most recent supranational normative sources of ADR regulations are: «*Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR)*»<sup>16</sup> and «*Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)*»<sup>17</sup>.

Already in 2004, the European Commission’s Directorate of Justice and Home Affairs had adopted a non-binding Code of Conduct for European Mediation Services and a legislative proposal in view of achieving uniform practices and setting minimum standards (SEC 2004/0251) (COD)<sup>18</sup>.

On the domestic level, the “Conciliation Act” corresponds to the legislative development of the EU regulatory framework on ADR and most specifically to the Directive 2008/52/EC. It comprises the only rules that could be linked to the concept of mediation until now. The Estonian Conciliation Act was passed in November 2009 and entered into force on January 1, 2010. Provisions connected to the practice of ADR methods in general and conciliation in particular, allow claims of consistency as

<sup>10</sup> *Supra* note, 4. Read the following report for details on the implementation and impact of the directive:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2011-0275+0+DOC+XML+V0//EN&language=ga> and also see *infra*, note 26.

<sup>11</sup> The platform is to become operational on the fifteen of February of 2016. Consult all related documents at: [http://www.europarl.europa.eu/meetdocs/2014\\_2019/documents/imco/dv/odr\\_ppt\\_/odr\\_ppt\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2014_2019/documents/imco/dv/odr_ppt_/odr_ppt_en.pdf).

<sup>12</sup> This could be seen as the most intuitive way to overcome resistance and incursion into the regulatory systems accustomed and largely attached to traditional legal procedures.

<sup>13</sup> Consult online at: [http://ec.europa.eu/consumers/archive/redress\\_cons/adr\\_policy\\_work\\_en.htm](http://ec.europa.eu/consumers/archive/redress_cons/adr_policy_work_en.htm).

<sup>14</sup> Consult the corresponding explanatory statement online at: <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A4-1996-0355&language=EN#Contentd33903e480>.

<sup>15</sup> Recommendation of 30 March 1998 on the out-of-court settlement of consumer disputes. The European Commission has adopted two Recommendations (98/257/EC and 2001/310/EC) which have established principles for ADR schemes. For more on this consult the timeline published at [http://ec.europa.eu/consumers/solving\\_consumer\\_disputes/non-judicial\\_redress/calendar/index\\_en.htm](http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/calendar/index_en.htm) by the Commission.

<sup>16</sup> Available online at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R0524>.

<sup>17</sup> Consult online at: [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2013.165.01.0063.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2013.165.01.0063.01.ENG).

<sup>18</sup> The English version is available online at: [http://ec.europa.eu/civiljustice/adr/adr\\_ec\\_code\\_conduct\\_en.pdf](http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf).

reflected for instance in articles § 4(4) on the disposal of procedural rights<sup>19</sup>, and § 371(1)(3) on the grounds for refusal to accept civil action, from the Civil Procedure Code<sup>20</sup>.

## 2. Mediation organizations in Estonia

At present three ADR bodies are endorsed by the European Commission as compliant with its principles and standards, notwithstanding the existence of the use of ADR schemes in other fields and using a diversity of methodologies: The Consumer Complaints Committee (CCC) or *Tarbijakaebuste komisjon* that also has been assigned the competences on the EU ODR platform and its projection to the public<sup>21</sup>, The MTPL Insurance Dispute Committee or *Liikluskindlustuse vaidluskomisjon* concerned with traffic related insurance claims<sup>22</sup>; and The Insurance Mediator (IM) or *Kindlustuse lepitusorgan*<sup>23</sup>, an organization founded by the Estonian Insurance Association to help settle disputes arising from contracts. In addition, the Estonian Association of Mediators or «*Eesti Lepitajate Ühing*» (ELÜ) offers family mediation services, information about mediation and training opportunities<sup>24</sup>. The ELÜ expects to be the entity responsible for the coordination of the mediation professionalization and certification in Estonia, issuing standards in cooperation with the Estonian standards agency. This can be a positive sign that shows the importance given to the matter but also can be regarded as a creation of a restrictive scheme where all non-formal mediation activities actually performed in the natural exercise of many other professions could become discouraged. In addition, it is of the nature of ADR methods to bring benefit because of their flexibility, informality and detachment from the legal standards, so it is not straight forward whether there should be a very formal and strict structure or an exclusive one. The leadership of the ELÜ has primarily focused on matters outside the realm of the Mediation Directive; however, it is within this context where the most advancement can be detected in regard to personal competences and the understanding of the philosophy of ADR. During the last five years, it has become clear that laws such as the Conciliation act in Estonia have pursued pragmatic goals, for example a swift compliance with EU legislation, rather than the development of a genuine, collaborative ADR culture<sup>25</sup>. The Estonian Ministry of Justice concerted the implementation of the Directive 2008/52/EC and is interested in all matters concerning dispute settlement and resolution and access to justice. This Ministry would be competent to observe subsequent directions dictated by the EU seeking to reboot the Mediation Directive as well, in order to resolve what has been called the ‘Mediation Paradox’<sup>26</sup>. The Estonian Ministry of Social Affairs, on the other hand, has taken upon itself the task of assisting the development of family mediation activities within local communities in order to provide it as a social service. In the field of Collective Labour Disputes, the country designates a ‘public Conciliator’ that is considered to be an impartial expert. The Conciliator should help all parties to overcome or handle the intractability of their disputes and reach a proper settlement, which in the terms of the legal act in question is called a “compromise”<sup>27</sup>.

<sup>19</sup> Available online at <https://www.riigiteataja.ee/en/eli/513122013001/consolide> § 4. Disposal of procedural rights... «4) During proceedings, the court shall take all possible measures to settle a matter or a part thereof by a compromise or in another manner by agreement of the parties if this is reasonable in the opinion of the court. For such purpose, the court may, among other, present a draft of a compromise contract to the parties or request that the parties appear before the court in person, or propose that the parties settle the dispute out of court or call upon the assistance of a conciliator. If, in the opinion of the court, it is necessary in the interests of adjudication of the matter, considering the circumstances of the case and the process of the proceedings, it may order the parties to participate in the conciliation proceeding provided for in the Conciliation Act» [RT I 2009, 59, 385 - entry into force 01.01.2010].

<sup>20</sup> *Ibid.*, § 371. Grounds for refusal to accept action... «3) an interested party who has taken recourse to the court has failed to comply with the mandatory procedure provided by law for prior extra-judicial adjudication of such matter...».

<sup>21</sup> For more on its structure, objectives, activities and competences, see <http://www.tarbijkaitseamet.ee>.

<sup>22</sup> Detailed explanations are available at their webpage: <http://www.lkf.ee>.

<sup>23</sup> <http://www.eksl.ee>.

<sup>24</sup> <http://www.lepitus.ee/>.

<sup>25</sup> Read more in M.C. SOLARTE-VASQUEZ, *The institutionalization process of alternative dispute resolution mechanisms in the European Union. The Estonian Legal Developments Experience*, in *L'Europe Unie*, No. 7-8, 2014, p. 94 ff.

<sup>26</sup> See the study performed on behalf of the Directorate General for Internal Policy Department: Citizens' Rights and Constitutional Affairs, with the title: ‘Rebooting’ the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU, available online at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI\\_ET\(2014\)493042\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf).

<sup>27</sup> More details on the role of the ‘Public Conciliator’ are available (only in Estonian) online at <http://www.riikliklepitaja.ee/>.

The Chamber of Notaries lists 41 out of a total of 96 notaries active by July 2015, willing to act as mediators according to the terms of the Conciliation act<sup>28</sup>. Better efforts have been made most recently at advertising private mediation and other ADR services in the catalogues of major law firms inspired by both a growing exposure to the need for these options, and the practice models of the most prestigious law offices around the world, some of which partner and work with the local ones. The Estonian Bar Association or *Eesti Advokatuur* publishes a separate list of their affiliated conciliators/attorneys at law<sup>29</sup>. Some academic interest has been awakened with more attention being paid to mediation, conciliation and other ADR/ODR mechanisms to manage disputes, in this context, a growing number of studies are being conducted and articles written on the subject.

### 3. Basic terms and definitions

The supranational system offers a wide array of resources and information on ADR, ODR and mediation, as well as definitions in secondary legislation about terms and explanations that can be found online in the EUR-Lex domain<sup>30</sup> and/or by using the European Union Thesaurus EUROVOC<sup>31</sup>.

The definitions that the Estonian Conciliation Act contains do not apply to ADR or ODR in general but only relate to the activities that concern the application of this law and the scope of the Mediation Directive. This clarification is especially important considering that the terminology that was chosen does not correspond to the long standing doctrine and theory on ADR but could be even said to contradict it. In the absence of any explanation on the selection of the use of conciliation rather than mediation, lawyers and officials have opted for clarifying via a proposal of interpretation that by conciliation, the Act intends to regulate mediation<sup>32</sup>. There is no further discussion as to why the institution was then also given characteristics that belong to conciliation schemes, such as the transactional nature of the issues that are subject to the process, and the possibility of the ADR agent to propose and promote an outcome (so-called “solution”) to a given dispute. These are tasks foreign to what has been long considered an assisted negotiation process where the mediator only facilitates communication and legitimizes procedures<sup>33</sup>.

In the General Provisions section, under §1, on the Scope of Application of the Act, (2), conciliation is described in terms of mediation but assigned additional capacities of a standard conciliation procedure reading as follows: «...*conciliation proceedings means a voluntary process in the course of which an impartial third party, defined in section 2 of this Act (hereinafter, ‘a conciliator’ or ‘the conciliator’), facilitates communication between parties to conciliation proceedings with the purpose of assisting them in finding a solution to their dispute. A conciliator may, on the basis of the facts of conciliation and the progress of conciliation proceedings, propose to the parties his or her own solutions to the dispute*». The definition of conciliator follows in § 2 where is stated that any person entrusted with the activity described in the corresponding section of the same act is a conciliator.

The article mentions notaries, sworn advocates, and governmental bodies and local authorities as instances provided in Chapter 4 of the same act, or by the law. No other legal categories were created via legislative development, so no further misrepresentation of mediation as assisted negotiation has taken place. To pass onto the Estonian legal system the benefits of the ADR philosophy, no further

<sup>28</sup> The list was available only in the Estonian version of the site at <https://www.notar.ee/20269> when last accessed on 21.10.2015.

<sup>29</sup> <https://www.advokatuur.ee/est/advokaadid/vandeadvokaatidest-lepitajad>.

<sup>30</sup> Note for instance: [http://europa.eu/rapid/press-release\\_MEMO-13-193\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-193_en.htm); [http://ec.europa.eu/consumers/archive/redress\\_cons/adr\\_policy\\_work\\_en.htm](http://ec.europa.eu/consumers/archive/redress_cons/adr_policy_work_en.htm); and [https://e-justice.europa.eu/content\\_eu\\_overview\\_on\\_mediation-63-en.do](https://e-justice.europa.eu/content_eu_overview_on_mediation-63-en.do). Additionally, most legal acts contain a glossary of terms. All European legislation can be reached at: <http://eur-lex.europa.eu/homepage.html>.

<sup>31</sup> See <http://eurovoc.europa.eu/>.

<sup>32</sup> The same imprecision exists in the German development of the Mediation Directive. It cannot be excluded that during preparatory works, drafts were prepared following the examples of these.

<sup>33</sup> Among the recommended literature on the theoretical basis of mediation and conflict management are M. KAMIL KAZAN, *Culture and conflict management: A theoretical framework*, in *International Journal of Conflict Management*, 8(4), 1997, p. 338 ff.; L.E. DRAKE, W.A. DONOHUE, *Communicative framing theory in conflict resolution*, in *Communication Research*, 23(3), 199, p. 297 ff.; and, emphasizing the value of self-determination of the parties, K.K. KOVACH, L.P. LOVE, *Mapping Mediation: The Risks of Riskin’s Grid*, in *Harvard Negotiation Law Review*, Vol. 3, 1998, p. 71 ff.

normative constraints should be created. The ADR's informal, flexible and self-regulatory character provides the very alternative they represent and the value they contribute with to the legal system.

#### 4-5. Initiation of mediation and the regulation of mediation process

Issues of suitability of mediation as those of other ADR mechanisms are matters of theoretical and practical choice. An abundance of articles have been written on the options available for processes involving the prevention and resolution of disputes and the management of conflicts in the field of international affairs and peace theory, and within domestic systems. Most authors coincide in that mediation being a non-intrusive process equals to effective assisted negotiation and there should be no hindrances - regulatory or otherwise - for its practice at any level in which it could bring the incumbent parties to a better relationship. If a dispute should not be removed from its natural context and the vitality of a primary institution (family, organization, community) must be preserved, then mediation is an adequate mechanism to attempt in the first place. No law deters the use of mediation in the EU or the Estonian legal system. However, there might be instances when the parties seek the benefits of an authoritative declaration of rights and determination of duties, in which case, adjudication is the most fit. Mediation results from a contract and the exercise of the parties' free will and consequently, the general rules of contracts and obligations also apply. Civil, mainly family and commercial mediation are the most common in domestic systems and among the ADR methods arbitration in international trade and mediation in diplomacy are very well known.<sup>34</sup> When experts suggest problem solving processes over the settlement-centred legal procedure they often talk of some situations that seem amenable to mediation: when communication, perception or emotion related problems are more pressing than the particular object of the dispute; when the relationship between the parties can be severely damaged by a lengthy and costly adjudication procedure; when the standards of the law do not suffice to resolve the underlying conflicts that are represented in the dispute; when the dispute is polycentric and confronting a multiplicity of structures and stakeholders; when the parties so prefer; when confidentiality is necessary, the resolution of the dispute should be fast and the costs associated with litigation, including excessive attorney fees can be avoided; when the parties appreciate having control over the outcome, and when they do not want to set any precedent. Outside of the realm of mediation should be only those matters that the law reserves in the exclusive competence of the judiciary, for instance constitutional cases<sup>35</sup>.

The Estonian Conciliation Act, in its third Chapter on the Course of Conciliation Proceedings states the beginning and end of conciliation processes in § 11. The law clearly refers to the contractual origin of Conciliations and Mediations adopting the principle of voluntariness; Mediation is/ought to be a voluntary process. The Mediation Directive does not address aspects on education, advocacy and training, that are admitted to be among the greatest challenges for disseminating the use of ADR methods, and this may be perceived to be one of the reasons why the demand for mediation in member states (and not only regarding cross border disputes in civil and commercial matters) continues to disappoint. Therefore, across Europe, it is believed that to produce a meaningful increase in the use of mediation, the introduction of mandatory elements would be needed. This is supported by case studies, such as the Italian regulatory experience and other evidence collected by the recent study conducted by the legal affairs department of the Directorate General for Internal Policies<sup>36</sup>. The Estonian group of respondents who answered the call for consultations for this study enthusiastically support the introduction of mandatory rules and consider that they will have a positive effect on the number of mediations in certain categories of cases. They also appear to be the strongest supporters of introducing

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<sup>34</sup> Consult the following texts for more insights: M. LIEBMANN, *Mediation in context*, London, 2000; C. BÜHRING-UHLE, L. KIRCHHOFF, G. SCHERER, *Arbitration and Mediation in International Business*. The Hague/London/Boston, 2006<sup>2</sup>; P.L. MURRAY, *Privatization of Civil Justice*, in *Willamette J. Int'l L. & Dis. Res.*, 15, 2007, p. 133; L. NADER, *Globalization of Law: ADR as Soft Technology*, in *The Am. Soc'y Int'l L. Proc.*, 93, 1999, p. 304; A.K. SCHNEIDER, *Building a Pedagogy of Problem-Solving: Learning to Choose Among ADR Processes*, in *Harvard Negotiation Law Review*, Vol. 5, 2000, available at SSRN: <http://ssrn.com/abstract=1295585>.

<sup>35</sup> *Ibid.*

<sup>36</sup> See *supra*, note 25. Read Annex 1, from page 166 onwards.

non-legislative proposals such as the development and implementation of pilot projects to encourage the use of civil and commercial mediation<sup>37</sup>.

Referral by court order or court annexed conciliation may happen according to the Code of Civil Procedure that in § 4. on the disposal of procedural rights in its fourth numeral states the following: «(4) During proceedings, the court shall take all possible measures to settle a matter or a part thereof by a compromise or in another manner by agreement of the parties if this is reasonable in the opinion of the court. For such purpose, the court may, among other, present a draft of a compromise contract to the parties or request that the parties appear before the court in person, or propose that the parties settle the dispute out of court or call upon the assistance of a conciliator. If, in the opinion of the court, it is necessary in the interests of adjudication of the matter, considering the circumstances of the case and the process of the proceedings, it may order the parties to participate in the conciliation proceeding provided for in the Conciliation Act. [RT I 2009, 59, 385 - entry into force 01.01.2010]».

In addition the same code contemplates that only by legal prescription, conciliation and mediation could be considered preconditions to civil action proceedings in § 371 on the grounds for refusal to accept action, numeral (1), 3) that reads: «an interested party who has taken recourse to the court has failed to comply with the mandatory procedure provided by law for prior extra-judicial adjudication of such matter».

The code also contains provisions on ADR applicable to family law cases in article § 563 on the Conciliation procedure in case of violation of ruling regulating access to child or agreement<sup>38</sup>. Finally, the Code of Administrative Court Procedure<sup>39</sup>, in its Chapter 14, Division 5, has included 5 articles on conciliation proceedings assisted by the court but still following the voluntariness principle<sup>40</sup>. It should be noted that being the mediation and conciliation methods considered by the Estonian Conciliation Act as voluntary, and in the absence of specific requirements for providing these services, any natural or legal person could legitimately adopt special rules for the initiation of proceedings, for as long as they do not contradict any valid law, and follow the principles that the prevalent doctrine, public policies and the legislation have established. The enforceability of ADR clauses and agreements to mediate is comparable to that of any contractual provision.

## 6. Recognition, credentialing and accreditation of mediators

The accreditation of ADR professionals and other providers is entrusted by the EU to the individual member states. It was mentioned above that prior to the Mediation Directive several other legislative efforts and policies addressed the issue of ADR and among those, in 2004 the European Code of Conduct for Mediators<sup>41</sup>.

In Estonia, special requirements seem to apply only to lawyers (they should be members of the Estonian Bar Association and be listed as practising mediators) and public notaries, who should belong to Chamber of Notaries and apply for a registration in the mediators' list. No special license is issued to the applicants and listed individuals by any authority or organization<sup>42</sup>. The existing scheme would be clearly closer to conciliation if further limitations were included such as having to hold a degree in law or having to abide by detailed rules of a single type of procedure determined by the law. General guidelines and principles suffice (or exceed the real needs) for several organizations to self-organize and coexist and serve the population in specialized areas of practice: family disputes, trade, inheritance, employment law, etc. In all other instances of ADR and mediation referred to, currently in place in Estonia, the requirements to hold position are determined in the corresponding legal acts. Mediation is

<sup>37</sup> *Ibid.*, Annex 1, p. 154.

<sup>38</sup> See *supra*, note 19.

<sup>39</sup> Consult the text of the code online at: <https://www.riigiteataja.ee/en/eli/ee/527012014001/consolide>.

<sup>40</sup> The rules that regulate the conciliation through the offices of the Chancellor of Justice are available in sections 35(5)-35(15) of the Chancellor of Justice Act; In regard to the resolution of collective labour disputes, (and the role of the Public Conciliator and the rights and obligations of the parties) the process is regulated by the Collective Labour Dispute Resolution Act; and, the initiation and ending of mediation and conciliation processes according to the scheme established by the Estonian Insurance Association are published in the site: <http://www.eksl.ee>. See *supra*, note 23 too.

<sup>41</sup> Consult *supra*, note 18.

<sup>42</sup> See *supra*, note 27.

not considered a role exclusive to a specific profession and informally is performed by a variety of specialist and practitioners. Nowadays it can be said that often, the day to day work of a legal counsellor is a facilitative, transforming and mediating one, so the impact of a legal dispute is minimized for the clients<sup>43</sup>. Accreditation is likely to influence the practice by way of professionalization and informal institutionalization of the activity. The ELÜ in cooperation with the Estonian Standardization Agency, the Ministry of Social Affairs and The ministry of Justice, has created standards for the qualification of mediators interested in family affairs. Because this association has been the main agent in the promotion of mediation, and incessantly active in the serious establishment of the practice, it will be also likely to become the competent body to award professional qualifications and issue the professional certificates to other mediators.

New business and professional opportunities will arise for legal experts that are already confronted to the many changes imposed by contemporary trends and technologies. It is likely that a more entrepreneurial legal service, focusing mostly in a more proactive association with public and private economic agents would lead to an increased use of ADR schemes. A significant obstacle for this development is the disproportionate cost of mediation versus the option of litigation. According to studies, to resort to mediation and ADR methods in Estonia is more costly than to resort to courts and this expense is hard to justify, taking into account the lack of expertise of mediators and conciliators in the country<sup>44</sup>. If this problem is not adequately addressed; the Conciliation Act will be defeated in its purpose as well as all ADR efforts that the government might intend to carry out. Accreditation so far does not have any influence on the practice of mediators and conciliators and therefore it does not affect the status of the service provider. All mediators and conciliators with international accreditations, credentials and expertise are subject to the same regulatory directions.

## 7. Confidentiality and admissibility of mediation evidence

Confidentiality is one of the most important features of ADR and in particular of mediation processes. It is a common denominator together with impartiality and independence in all common rules and legal acts that regulate this field and in particular in the European Code of conduct for Mediators. Mediators shall keep confidential any information arising out of (or in connection with) the process, its current status and even the fact that it is being conducted or had been attempted or concluded. In the Estonian Conciliation Act the second Chapter establishes the duties of mediators and conciliators.

A violation of those duties may result in contractual liabilities and affect the enforceability of the mediated/conciliated outcome, if any. §4 (1)-(8) state the duty of confidentiality and its scope that can extend to third parties with access to the proceedings' records (these have to be kept for five years, and in the case of notaries and attorneys in law, the requirements for the drafting, compiling and filing of these should follow the prescriptions that apply to their profession; this creates higher demands from people that are more likely to hold expertise in conflict management than from any natural person or organization providing mediation and conciliation services, a situation that needs a more balanced approach).

## 8. Mediated outcomes and enforceability

In general, the outcome of a mediation and conciliation agreement is a contract when binding and just a text with no legal affordabilities in the case of non-binding mediation, at the choice of the parties. The enforceability of mediation agreements deriving from the guidelines set forth by the EU ADR and Mediation sets of policies and legislation is of paramount importance as the whole ADR movement seeks to improve the efficiency of trade and cross-border transactions. Trust in the efficacy of the system and guarantees on the binding nature of outcomes are equally important to ensure an increase in the use of these alternative methods. A conciliation agreement in the terms of the Estonian

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<sup>43</sup> More on the transformation of the legal profession in time can be found in Chapter V, in this *Volume*.

<sup>44</sup> *Supra*, note 35.

Conciliation Act is enforceable when it has been concluded by a listed notary or a registered attorney at law and if it is authorised by the courts. To obtain permission a petition must be filed according to the rules of civil procedure<sup>45</sup>. Pursuant to the provisions of the Conciliation act, only pecuniary claims can be transacted via mediation or conciliation. The court may refuse to grant enforceability authorizations if the conciliation agreements are illegal, against the public order (morals) and the public interest<sup>46</sup>. This corresponds to the general theory on conciliation that limits the validity of the outcomes resulting from such procedure to transactable goods or things that are in the commerce and can be transferred. In contrast mediation should be possible even on things that are of no proprietary value, as the main purpose of a negotiation is understanding and not compromising or a settlement<sup>47</sup>. The outcome of the conciliation conducted by notaries and Attorneys at law is called “settlement agreement”, whereas the outcome of conciliation that takes place pending a court dispute is called a “compromise agreement” as stated in § 14 (1) and (6) of the Conciliation Act<sup>48</sup>. Mediation and Conciliation processes in this context are considered negotiation processes and pre-trial proceedings in terms of the Code of Civil procedure § 160 (2) and (4); and § 167. The statutes of limitation therefore apply with the commencement of the mediation and conciliation processes and until it ends as established by the law or via settlement.

## 9. Duties and obligations during mediation

Besides the principles of confidentiality, impartiality and independence already mentioned and explicit in the theory and the various codes of conduct available, including the European one, the Estonian Conciliation Act brings about the following:

1. Extended confidentiality in the communication with the parties if they decide to request so.
2. Acting conciliators should not represent the parties in litigation over the same issue that has been conciliated or mediated about.
3. The conciliators have the duty to inform and instruct the parties over the course of the proceedings their legal relevance and effects of any possible act therein performed, and to discuss the details of the cost of the service.
4. Strict records should be kept of the proceedings clearly establishing the beginning and end of the mediation or conciliation process (this would mark the beginning and end of the suspension of the statute of limitations period).
5. If a party decides to discontinue the use of conciliation proceedings, the conciliator should issue a certificate of unsuccessful conciliation, which should have the effect of putting an end to the suspension of the statute of limitations.
6. Conciliators and mediators can only terminate a process once it has been started with a good reason and giving motivation for this decision.

The breach of these duties entails liabilities represented in contractual damages but limited to the violation of these rules. This is to say that mediators and conciliators are not responsible on the success of the outcome of the negotiation or share responsibilities with any party if the settlement or compromise agreement is violated. However, if a conciliator or mediator acts on behalf on an organization, joint responsibilities on the damages resulting from violation of the duties can configure according to § 10 (1) of the Conciliation Act.

## 10. Available statistics on mediation

The organizations that have kept reliable statistics on the number of ADR proceedings are the mediation organizations mentioned in section 2.3.3. For example, the *Tarbijakaitseamet* reportedly

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<sup>45</sup> § 627 of the Code of Civil Procedure.

<sup>46</sup> *Ibid.*

<sup>47</sup> Consult Chapter 5 on ADR methods in this *Volume*.

<sup>48</sup> See *supra*, note 37. Also consult § 430 of the Estonian Code of Civil Procedure.

detects a rise in the number of disputes submitted to their commission<sup>49</sup>. According to an interview conducted with the organization, the Consumer Complaint Committee is reputable among business and consumers alike, and «*up to 80% of the decisions it issues, although not binding for traders, are complied with*» «*This percentage is considered comparable to the available from other Nordic Countries where the ADR culture is known to be long standing and strong*»<sup>50</sup>. «*The Commission has made 259 decisions in 2012; 279 decisions in 2013 and the forecast for this year (2014) is ~300*». The same interview mentioned that «*The majority of these decisions are made in favour of consumers (58,8%/2012; 68,1%/2013; 62%/2014 so far.*» Estonian is the working language of the Commission, but it also accepts a growing number of claims in Russian, as well as some in English and Finnish. «*Most of the claims are still qualifying as regular retail claims - mobile phones, lap-tops, shoes, but also agreements for furniture making, car repair services, etc.*». In the past years, it is recorded that the e-commerce claims share has rapidly risen.

No other combined statistical repository exists yet in the country in regard to ADR, mediation or conciliation in particular. Each provider holds its own records and abstains from releasing detailed information in this respect to the general public.

Other data on the amount of disputes that have been submitted to mediation or arbitration and even that are claimed to have been reported to the studies conducted by the EU (on the impact of the Mediation Directive for instance) are unavailable. But the data that was collected is telling of the challenges that Estonia faces in advancing with the development of its ADR tradition. The cost of ADR proceedings and services outside the system of the *Tarbijkaitseamet* (where the process is free of charge) should be studied and addressed when it has become clear that the mediation and conciliation services available in the country (unlike in any other EU member state) are more costly than resorting to litigation for the settlement of disputes (both the cost of legal counsel and court expenses), as mentioned above, in spite of the lack of expertise and credentials of most of the professionals offering such services<sup>51</sup>.

## 11. Expected developments in mediation regulation

Like in all other regulatory respects, the ADR landscape in Europe appears to require harmonization via integration and standardization. Mediation is a swift and simple, non-intrusive method to resolve disputes and since it is on focus for boosting the single digital market it will thrive and probably evolve into an effective pan European system at least in cross-border trade and family affairs. The practice has yet to take hold in Estonia where scepticism has prevailed due to the lack of advocacy and engagement of legal practitioners and governmental organizations in its solid establishment. The domestic court system may not be so slow and expensive as for costs and speed to be the primary sources of concern, but the internationalization of the legal practice and the rise in the number of companies and people moving in and out of the country might be. Rather than an explicit resistance against the use of ADR methods, the Estonian public remains unaware of their merits. With the proper financial and technological incentives, training, public campaigns and education (consumer empowerment and educational opportunities for providers) ADR is likely to find its place in the Estonian conflict management landscape. Besides, the EU, as explained earlier, is leaning towards the introduction of compulsory elements so that parties to certain disputes, before resorting to courts, must try to settle via amicable assisted negotiation.

Commercial mediation is expected to continue to experience a steady growth all over the world. Chambers of commerce are common forums to disseminate the knowledge of ADR processes and kick-start their practice. The efforts that should follow should focus in the correct application of ADR styles, the development of effective conflict management and negotiation styles and the application of persuasive technologies (and recommender systems) to ODR schemes.<sup>52</sup>

<sup>49</sup> An interview of 21 questions was conducted with this institution. The research instrument was drafted for the completion of a wider research on the awareness on ADR and the usability of ODR tool (Annex A).

<sup>50</sup> *Ibid.*, response provided by the interviewee January 2015.

<sup>51</sup> See *supra*, note 43.

<sup>52</sup> Consult *supra*, note 24.