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

Chapter VIII

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International and EU Perspective on Mediation: The 2008/52 Directive on Mediation on Civil and Commercial Matters

SUMMARY: 1. The EU's intervention in the field of alternative dispute resolution methods. – 2. The Directive's scope of application *ratione materiae*. – 3. The mediation model deriving from Directive 2008/52. – 4. Recognition and enforcement of mediation agreements within the EU judicial area.

1. The EU's intervention in the field of alternative dispute resolution methods

The so-called *alternative dispute resolution methods*, also known through the acronym ADR, shall be defined as procedures aimed at solving conflicts through the agreements of the parties involved.

It was in particular in conflicts where a weaker party is involved that the need for such instruments arose as in the case of the consumer in the relationship with the person producing/distributing or trading goods. But, more generally, the need arises every time a party of a conflict is not in position to bear the costs and the length of an ordinary judicial procedure or is forced to renounce to start a procedure, for the difficulties connected to the procedure itself, such as, for example, the cross-border character of the conflict or the fact that the costs are higher than the claim.

In this context, the ADR plays the important role of balancing the different positions of the parties involved in a conflict. From the weaker party's perspective, two are the main advantages of ADR: the first is that access to such procedures is easy and the second is that the conflict is defined through the agreement of the parties involved, who freely negotiate on their rights and interests.

The European Union started to consider the ADR in the 90s with some initiatives specifically devoted to consumers¹.

However, thanks to the so-called “communitarization” of the competence in the field of civil justice accomplished by the Amsterdam Treaty, the EU's perspective has changed significantly: the EU has started to consider the institution and promotion of extrajudicial and alternative methods for the resolution of conflicts as an instrument complementary to the traditional judicial procedures and capable of granting to the European citizens a better access to justice².

¹ Reference is made to (i) Green Paper on access of consumers to justice and the settlements of consumer disputes in the single market, COM (93) 576 def. 16.11.1993; (ii) Directive 97/7/EC of the European Parliament and of the Council of 20.5.1997 on the protection of consumers in respect of distance contracts in OJ L 144, 4.6.1997, p. 19-27; (iii) Communication from the Commission of 30.3.1998 on the out-of-court settlement of consumer disputes, COM (1998) 198; (iv) Commission Recommendation 98/257/EC of 30.3.1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, in OJ L 115 of 17.4.1998 (v) Recommendation of 4.4.2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, in OJ L 109 of 19.4.2001, p. 56.

² See the Presidencies' conclusions at the Tampere European Council 15 and 16 October 1999 where for the creation of a genuine European area of justice, the Council invited Member States to create alternative, extra-judicial procedures. Following this trend, in May

As a consequence, the EU has progressively abandoned the perspective of the protection of consumers and has adopted a wider approach, considering the ADR as instruments for favoring access to justice and, therefore, as a strategic goal of the EU policy in the field of civil justice.

This evolution occurred without any significant change in the legislative framework of reference which, at that time, consisted essentially of art. 61-65 of the TEC; no explicit reference to the promotion of ADR or to favoring access to justice was to be found in the Treaty.

Such purposes are expressly mentioned since 2009, after the entry into force of the Lisbon Treaty.

By virtue of art. 81 TFEU (the provision which takes the place of the former art. 65 TEC), for the first time the EU has obtained the competence to adopt measures aimed at granting (i) effective access to justice and (ii) the development of alternative methods of dispute settlement (together with support for the training of the judiciary and judicial staff)³.

With this in mind, the Directive 2008/52 was adopted before the entry into force of the Lisbon Treaty and, thus, even when the EU did not enjoy a specific competence on ADR, it had anticipated the spirit and purposes of the new art. 81 TFEU.

Following the so-called “mercantilist” EU approach, aimed at ensuring – also through the exercise of the existing powers in the field of civil justice – the proper functioning of the internal market, litigations are an obstacle to be reduced as much as possible through measures favoring access to justice as well as through the ADR.

The purpose of the EU in the field of mediation is clearly aimed at facilitating access to ADR and at promoting the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings (art. 1), considering that such aims fall within the wider purpose of facilitating access to justice⁴.

In the Green paper of 2002, by virtue of which the Commission started a consultation on the possibility to adopt an EU act in the field, mediation was conceived as an instrument aimed at complementing judicial procedures and therefore contributing to facilitating the exercise of the fundamental rights of access to justice (enshrined in art. 6 of the ECHR and in art. 47 of the Charter of Fundamental Rights of the EU). Reference was made to the difficulties arising from the increasing volume of disputes brought before courts, the length of the judicial proceedings and the increasing related costs⁵, which tend to be even higher in cross-border disputes⁶.

Similar comments have been made by the Economic and Social Committee, which did not hesitate to define the ADR as a complementary way of resolving disputes which calls on the responsibility of economic and social players from organized civil society and, therefore, an instrument of “functional subsidiarity”⁷.

2000, the Council adopted the conclusions on ADR under civil and commercial law, considering the establishment of basic principles in this area as an essential step towards enabling the appropriate development and operation of extrajudicial procedures for the settlement of disputes in civil and commercial matters so as to simplify and improve access to justice and in 2002 the Commission launched a public consultation on ADR in civil and commercial law (Green Paper 19.4.2002, COM (2002) on alternative dispute resolution in civil and commercial law). After some years, the Directive 2008/52 was adopted. On the Directive, see *Développer la médiation dans le cadre de l'Union européenne. Etude adoptée par l'Assemblée générale du Conseil d'Etat le 29 juillet 2010*, available at the official website of the Conseil d'Etat or at the following address <http://www.ladocumentationfrancaise.fr/rapports-publics/104000625/index.shtml>; M.F. GHIRGA, *Strumenti alternativi di risoluzione della lite: fuga dal processo o dal diritto? (Riflessioni sulla mediazione in occasione della pubblicazione della Direttiva 2008/52/CE)*, in *Riv. dir. proc.*, 2009, p. 357 ff.; E. MINERVINI, *La direttiva europea sulla conciliazione in materia civile e commerciale*, in *Contratto e impresa – Europa*, 2009, p. 41 ff.; G. ROSSOLILLO, *I mezzi alternativi di risoluzione delle controversie (ADR) tra diritto comunitario e diritto internazionale*, in *Diritto dell'Unione europea*, 2008, p. 349 ff.; J. TOULMIN, *Cross-border mediation and civil proceedings in national courts*, in *ERA Forum*, 2009, p. 551 ff.; E. STORSKRUBB, *Civil Procedur and EU law. A Policy Area Uncovered*, Oxford, 2008, p. 181 ff.; O. LOPES PEGNA, *L'incidenza dell'art. 6 della Convenzione europea dei diritti dell'uomo rispetto all'esecuzione di decisioni straniere*, in *Riv. dir. int.*, 2011, p. 33 ff.

³ On the new art. 81 TFEU, see P. BIAVATI, *Il futuro del diritto processuale di origine europea*, in *Riv. trim. dir. proc. civ.*, 2010, p. 859 ff. The Author points out that the new goals provided by art. 81 TFEU show a radical change in the EU action in the field of civil justice: whilst in the past the EU procedural rules were aimed at realizing the movement of litigation and of the related decisions, today EU law tends to “dematerialize” the litigation by moving from paper to electronic devices and more radically by trying to prevent the litigation or to mediate it.

⁴ See recital No. 5 stating: «The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extrajudicial dispute access methods. This Directive should contribute to the proper functioning of the internal market, in particular as concerns the availability of mediation services».

⁵ See Green Paper on alternative dispute resolution in civil and commercial law, COM (2002) 196 final, p. 7.

⁶ See Green Paper of 9 February 2000 “Judicial cooperation in civil matters: the problems confronting the cross-border litigant”, COM (2000) 51 final.

⁷ See Opinion of the Economic and Social Committee on the “Green Paper on alternative dispute resolution in civil and commercial law” (COM (2002) 196 final) (2003/C 85/02), in OJ C85, 8.4.2003, p. 8-13, point 2.1.1.

In the view of facilitating the alternative resolution of disputes, the Directive is aimed at promoting extrajudicial mediation as an autonomous instrument for the resolution of conflicts and, therefore, as an instrument alternative to justice essentially based on the common will of the parties and at granting a satisfying coordination between extrajudicial mediation and judicial procedures. To this purpose, whilst out-of-court mediation is granted a privileged position, the Directive expressly provides instruments to coordinate judicial and extrajudicial mediation. Indeed, it was necessary to avoid considering mediation as a poorer alternative to judicial proceedings, in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties⁸. In this respect, on one side, art. 6 expressly provides that mediation agreements shall be made enforceable, unless either (i) the content of that agreement is contrary to the law of the Member State where the request is made or (ii) the law of that Member State does not provide for its enforceability. On the other hand, art.8 imposes on Member States the duty to ensure that parties who choose mediation are not subsequently prevented from initiating judicial proceedings or arbitration due to the expiry of limitation or prescription periods during the mediation process⁹.

It is worth noting that in exercising the competences in the field of civil justice, the EU institutions traditionally adopt regulations, which grant uniformity¹⁰. In the case at stake, the Directive has been chosen with the purpose of asking to Member States to realize a minimal harmonization of the rules on mediation (as, by the way, expressly results from the title of the Directive itself, which regulates – only – certain aspects of mediation in civil and commercial matters)¹¹.

The Directive is, therefore, a “*de minimis*” discipline on mediation, composed by twelve articles providing the fundamental rules and leaving the aspects related to the structure and the functioning of the mediation itself to the discretion of the Member States.

Furthermore, the choice made by the EU institutions is surely justified also by the need to strictly respect the principle of subsidiarity in the exercise of their competence in this new field of action. But such a choice also reflects the specific features of mediation itself: as clearly results from recital n° 16 and n° 17, the EU’s cautious approach is grounded in the need to provide rules strengthening mediation but, at the same time, respecting its intrinsically informal and voluntary nature¹².

As a matter of fact, however, the more relevant problems encountered in the implementation of the mediation Directive derive from the fact that it is a real framework directive¹³.

On one side, the mediation model provided by the Directive is not clearly defined and too wide margins of discretion are granted to Member States. As a consequence of this, mediation proceedings not having the same quality and efficacy risk to be created within the EU judicial space¹⁴. On the other side, the relationship of the Directive with the other instruments adopted by the EU in the field of civil judicial cooperation - mainly with Brussels I (now Brussels I *bis*) and Brussels II *bis* Regulations - are not clear and problems may therefore arise as for the “free movement” of the mediation agreement.

The paper is aimed at focusing on such problems in order to verify whether the EU rules on mediation are effectively capable of granting access to justice in particular to the weaker parties.

⁸ See recital No. 19.

⁹ In this respect, it is important to point out that under recital No. 24 and art. 8.2, the rules on limitation and prescription provided by the international agreements to which Member States are party shall be respected. Specific attention shall be paid to the international treaties in the field of transport.

¹⁰ In the field of civil judicial cooperation, the instrument of directive has been preferred to the regulation only in the case of the Directive 2003/8/EC of 27 of January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, in O.J. L 026, 31.1.2003, p. 4. See A. BONOMI, *Il diritto internazionale privato dell’Unione europea: considerazioni generali*, in A. BONOMI (ed.), *Diritto internazionale privato e cooperazione in materia civile*, Torino, 2009, at p. 10 and 11.

¹¹ It shall be also noted that recital No. 28, justifying the EU’s action in this field, contains very short and tautological statements and no reference is made to the quantitative and qualitative indicators which, after the entry into force of the Treaty of Lisbon, should be pointed out anytime the EU exercises the concurrent competences.

¹² See F. CUOMO ULLOA, *La mediazione nel processo civile riformato*, Bologna, 2011, p. 182, where the Author points out that a more rigorous and punctual discipline at EU level would have provided a more homogeneous discipline at national level. The lack of an homogeneous discipline on mediation at national level clearly appears when looking at the choices made with reference to its binding or voluntary character, the procedure, the criteria envisaged in order to become a mediator. For example, both Italy and Germany decided to extend the rules on cross-border mediation adopted in order to implement the Directive also to merely national mediation procedures. However, whilst Italy decided to do so in order to diminish the number of judicial procedures, the reason behind the choice made by the German legislator is to promote judicial mediation, given the successful consolidated practice existing between the courts and the parties.

¹³ The national rules implementing the Directive 2008/52 are available at the following address: http://ec.europa.eu/justice_home/judicialatlascivil/html/me_documents_en.htm.

¹⁴ See para. 5 and the following ones.

2. The Directive's scope of application *ratione materiae*

A first issue to be considered is the Directive's substantial scope of application, which may be problematic with reference to the definition of mediation itself as well as to the relationships with other instruments adopted by the EU in the field of civil justice.

In coherence with the necessary cross-border character of the EU's action in the exercise of the competences in the field of civil justice (see art. 81 TFEU), the Directive envisages an instrument for the settlement of cross-border disputes, which, due to their costs and to the time necessary for their conclusion, have an impact on the proper functioning of the internal market¹⁵.

Reference is made to the disputes among parties having their domicile or habitual residence in a Member State different from the one of any other party of the dispute at the time when the mediation proceeding has started by virtue of (i) the spontaneous decision of the parties, (ii) a judicial order or (iii) the application of internal law.

The Directive points out that as regard the notion of domicile, it is necessary to refer to articles 59 e 60 of the Brussels I Regulation (now article 62 and 63 of the Regulation n° 1215/2012) making reference respectively to the domicile of persons and of companies, associations and other legal persons (as also interpreted by the EU Court of Justice's case-law)¹⁶.

No mention is made of the notion of habitual residence, which, therefore, shall be interpreted following the EU Court of Justice's case law applying the EU Regulation n° 2201/2003¹⁷ as well as the definitions provided by art. 19 of the Rome I Regulation and by art. 23 of the EU Rome II Regulation respectively¹⁸.

Even if the Directive applies to cross-border disputes, Member States are not prevented to extend the EU mediation model also to merely internal disputes (not having a cross-border character)¹⁹.

The Member States' choices have been ambivalent: those States (such as, for example, France) already having specific rules on mediation decided to implement the Directive by adopting specific rules for cross-border disputes. This gives rise to a double regime for mediation on the basis of the merely internal or cross-border character of the dispute.

In the absence of specific rules, other Member States decided to adopt a legislative framework for mediating all kinds of disputes. This is, for example, the solution adopted by the Italian legal order as well as by the German one²⁰.

It is, however, just for the cross-border disputes that Member States are bound to respect the Directive's rules on (i) guarantees and quality of mediation in terms of training of mediator and confidentiality; (ii) the executive character of the agreements reached in the course of mediation; (iii) the effects of the mediation proceeding on the judicial proceeding.

¹⁵ In this light, the Commission has pointed out that: «One concomitant of increasing use of the Treaty rights of free movement of persons, goods and services is an increase in the potential number of cross-border disputes. Such disputes are not necessarily between large companies; they may affect small business or individuals, who may be of modest means. For example, individuals may be involved in an accident while on holiday or while making a shopping trip abroad, or they may buy goods, which later turn out to be faulty or dangerous. Their spouse may have left the matrimonial home with the children of the marriage and settled in another country. They may need to pursue the matter in the country in which the dispute arose or, worse still may be threatened with proceedings there. A small company might sell goods abroad and later be threatened with proceedings in the purchasers' country. A consumer may order, over the Internet, goods from abroad which are never dispatched or which turn out to be faulty.» See Green Paper from the Commission - Legal aid in civil matters: the problems confronting the cross - border litigant COM (2000) 51 final.

¹⁶ On the domicile's notion in the EU Regulation 44/2001, see S.M. CARBONE, *Lo spazio giudiziario europeo in materia civile e commerciale. Da Bruxelles I al regolamento CE n. 805/2004*, Torino, 2009, p. 31-38.

¹⁷ In the absence of a rule defining the notion of habitual residence, the EU Court of Justice (decision 2nd of April 2009, C-523/07, A, para. 39 and 44, in *Reports*, p. I-02805; decision 27 November 2007, C-435/06, C, in *Reports*, p. I-10141; decision 22 December 2010, C-497/10 PPU, *Mercredi*, in *Reports*, p. I-14309) has followed a factual approach, looking at the degree of integration that the person has with a place and taking into consideration the duration, regularity, conditions and reasons for the stay on the territory of a Member State, the linguistic knowledge and the family and social relationships. On the notion of habitual residence within the Regulation 2201/2003, see C. CAMPIGLIO, *Il foro della residenza abituale del coniuge nel regolamento (CE) n. 2201/2003: note a margine delle prime pronunce italiane*, in *Cuadernos de derecho transnacional*, 2010, p. 242-249.

¹⁸ See E. D'ALESSANDRO, *Il conferimento dell'esecutività al verbale di conciliazione stragiudiziale e la sua circolazione all'interno dello spazio giudiziario europeo*, in *Riv. trim. dir. proc. civ.*, 2011, p. 1157 ff.

¹⁹ See recital No. 8: «The provisions of this Directive should apply only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes».

²⁰ An analysis of the EU Member States (with the exception of Denmark) enforcing the Directive 2008/52 has been made within the research project financed by the EU JUST/2010/JCIV/AG/0001, "Removing obstacles to access to (e)Justice through mediation in Europe: ensuring enforcement and a smooth cooperation with judicial and non-judicial authorities". See C. ESPLUGUES MOTA, J.L. IGLESIAS BUHIGUES, G. PALAU MORENO (eds.), *Civil and Commercial Mediation in Europe*, Cambridge, 2012.

The Directive applies to cross-border disputes on civil and commercial matters²¹ and, therefore, as a matter of principle, to the same matters covered by the Brussels I bis Regulation²² as well as by the Regulation n° 805/2004. As a consequence, it shall not apply neither to revenue, customs or administrative matters, nor to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)²³

However, the Directive's scope of application is not perfectly coincidental with the above-mentioned notion of civil and commercial matters of the Brussels I bis Regulation and of the Regulation on the enforcement order²⁴: the Directive does not mention subjects which are traditionally excluded from the above notion and, namely, the status or legal capacity of natural persons, the rights of property arising out of a matrimonial relationship, wills and succession; bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; social security; arbitration²⁵. In the absence of an express exclusion of the above-mentioned subjects, doubts may arise with regard to the possible extension of mediation also to (some) of them.

In this respect, the only further explanation is provided by art. 1.2 of the Directive, stating that it shall not apply to matters regarding rights and obligations which are not at the parties' disposal under the relevant applicable law. As explained in recital 10, such rights and obligations are particularly frequent in family law and employment law. The reason for such exclusion is that party autonomy plays a relevant role in mediation proceedings²⁶.

The distinction between rights which are at the parties' disposal and rights which are not may vary depending on the national law applicable by virtue of the conflict of laws rules.

Furthermore, the above distinction is particularly difficult to draw in the field of family law, characterized by a clear tendency in favour of the privatization of relationship and by a correspondent increase of party autonomy, recently relevant also in the area of private international law²⁷.

From the wording of art. 7.1 lit. a) of the Directive, making reference to the best interests of the children, it seems that the aspects related to the exercise of parental responsibility and to the need of the child to keep regular contacts with both parents fall within the scope of application of the Directive.

This is not surprising since in the field of parental responsibility, for cross-border disputes, mediation is a well-known remedy. Reference is made, for example, to the role recognized to Central

²¹ See recital No. 10 «*This Directive should apply to processes whereby two or more parties to a cross-border dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator. It should apply in civil and commercial matters. However, it should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family law and employment law*».

²² See decision 28th of April 2009, *Apostolides*, C-420/07, in *Reports*, p. I-357.

²³ With specific reference to the exclusion of the administrative matters from the scope of application of Regulation 44/2001 and of the Directive on mediation, it is worth pointing out that the EU Court of Justice in its case-law follows a strict interpretation by taking into account (not the public or private nature of the parties involved or the competence of the court or the relevance of private or administrative law, but) the nature of the relationship among the parties involved in the dispute at stake. See decision 14 October 1976, *Eurocontrol*, C-29/76; decision 16 December 1980, *Ruffer*, C-814/79, decision 21 April 1993, *Sonntag*, C-172/91, paragraphs 21 and 22, decision 19 January 1994, *Eurocontrol*, C-364/92 paragraph 28. Following the 2010 report of the French Conseil d'Etat (*Développer la médiation dans le cadre de l'Union européenne. Etude adoptée par l'Assemblée générale du Conseil d'Etat le 29 juillet 2010*, p. 31) many are the administrative matters "non régaliennes" to which the Directive might be applied. Reference is made, for example, to public markets, to public services, to the cases of damages deriving from public activities.

²⁴ See *Développer la médiation dans le cadre de l'Union européenne. Etude adoptée par l'Assemblée générale du Conseil d'Etat le 29 juillet 2010*, p. 28.

²⁵ See art. 1.2 of Regulation 44/2001.

²⁶ See art. 2.1 of the Directive 2008/52.

²⁷ Since the 21st of June 2012, by virtue of Regulation 1259/2010, within the 14 States of the EU, the spouses may choose – among a number of different relevant laws – the one applicable to separation and divorce. The choice of the applicable law to separation or divorce – even if subject to some limitations – is therefore to be considered as a right on which the parties are free to decide themselves. It shall be further considered that in the recast of Brussels II-bis Regulation it is likely that the Commission is going to propose the introduction of choice of court agreements. In that case, therefore, also the choice of the competent court to decide on separation, divorce and annulment of the marriage might be soon recognized as a right on which the parties are free to decide. A similar reasoning is to be extended also to cross-border succession as regulated by the Regulation 650/2012.

Authorities in applying the 1980 Hague Convention and the Brussels II-*bis* Regulation, but also to the role of the Mediator of the European Parliament in international child abduction proceedings²⁸.

3. The mediation model deriving from Directive 2008/52

Mediation is defined by the Directive as «*a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator*», process which may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State (art. 3 lit. a). On the other hand, the mediator is defined as «*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*».

From the above definitions, it seems that the Directive envisages a mediation procedure (i) which tends to facilitate the agreement, (ii) grounded in party autonomy and, therefore, basically voluntarily, (iii) extra-judicial and (iv) which is a high quality service, meaning that it should not be regarded and envisaged by the States as a poorer alternative to judicial proceedings.

As for the first aspect, the Directive seems to prefer “facilitative” mediation, where the mediator plays an auxiliary role and the parties keep their decisional powers on one side as opposed to “evaluative” mediation, where the mediator plays a more relevant role, being able to propose to the parties transactional solutions (the non-acceptance of which may affect the final definition of the litigation).

This may be inferred not only from the definition of mediation and mediator provided in art. 3, but also from recital 13 where it is stated that mediation should be considered as «*a voluntary process in the sense that the parties are themselves in charge of the process and may organize it as they wish and terminate it at any time*».

The parties to the disputes are, therefore, envisaged as the main actors of the mediation proceeding, whilst the mediator should conduct the procedure and should assist the parties.

The Directive does not offer further information in this regard and, therefore, Member States are free to provide the mediator with stronger powers. As a consequence, it may happen that, within the EU judicial area, the mediator has powers and features different from one Country to another, depending on the national law implementing the Directive.

Assuming that the agreement deriving from the exercise of party autonomy is more likely to be observed and to ensure an amicable and sustainable relationship among the parties to the dispute²⁹, the Directive stresses the voluntary nature of mediation. And, in the same light, it limits its scope of application to *out-of-court mediation*: within in-court mediation, the parties are not free in the exercise of their party autonomy, since the judge trying to mediate is the same person that, when the parties do not reach the agreement, will pronounce a decision on the dispute.

For this reason, *in-court mediation* is excluded from the sphere of application of the Directive, whilst *court-annexed mediation* is included: under art. 5 of the Directive, the court before which the action is brought is entitled to invite the parties to use mediation for the settlement of the dispute or only to attend an information session on the use of mediation, when such sessions are held and easily available.

Court-annexed mediation is grounded, on one side, on the need to avoid the same judge mediating and deciding the same dispute, therefore affecting in such a way the party autonomy and, on the other, on the idea that it is easier to find an agreement once the judicial proceeding is started.

Even if the Directive stresses the importance of the voluntary character of mediation, national legislation may make the use of mediation compulsory or subject to incentives or sanctions, provided that such legislation does not prevent the parties from their right of access to the judicial system³⁰.

²⁸ The Mediator, created in 1987, is charged to try to find an agreement between the abducting parent and the other parent in compliance with the best interests of the child. Those parents who spontaneously decide to start a mediation proceeding are asked to appear before the European Parliament or before the habitual residence of the child, depending on the specific circumstances of the case, in order to openly discuss, outside of a judicial proceeding. If the parents reach an agreement, the latter may be brought before a court, which may transform it in a decision to be recognized in the other Member States of the European Union.

²⁹ See recital 6.

³⁰ See recital 14 and art. 5.2 of the Directive.

The issue regarding the admissibility of compulsory mediation has been already considered by the Commission in the 2002 Green book with specific reference to the contractual clauses making reference to ADR methods, capable of affecting the right of access to justice and, therefore, of violating art. 6 of the ECHR and art. 47 of the Charter of fundamental rights of the EU. At that time, a further issue regarding contractual terms envisaging compulsory mediation was explored and, more precisely, the resulting imbalanced relationship between the parties. Having regard to the latter, it was considered that the contractual terms envisaging compulsory mediation could be qualified as an unfair term under the Directive 93/13 (according to which *«a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer»* and, among the above terms, those having *«the object or effect of: (...)excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract»* are expressly enlisted).

It seems that the solution provided by Directive 2008/52 – i.e. to stress (and protect) the voluntary character of mediation and to leave, however, open the possibility for national law to envisage compulsory mediation – is coherent with the approach expressed by the EU Court of Justice in the decision of 18 of March 2010³¹ regarding the Italian rules on mandatory mediation with regard to telecommunication services. In that case, the Court recognized that the mandatory attempt at settlement envisaged by the Italian law on electronic communications services was an additional step for access to court capable of affecting the principle of effective judicial protection³², nevertheless, the Court further pointed out that *«fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed»*³³. In applying this principle, the Court stated that the Italian provisions introducing compulsory mediation were aimed at pursuing the quicker and less expensive settlement of disputes relating to electronic communications and at lightening of the burden on the court system, which were to be considered legitimate objectives of general interest.

It follows that the legitimacy of compulsory mediation shall be evaluated on the basis of the specific national rules regulating it and shall be admitted when (i) it does not impede access to justice and (ii) it is regulated as an ADR method, easily available to the parties of a dispute.

In this view and in order to avoid mediation to be considered as a poorer alternative to judicial proceedings, the Directive tries to ensure the quality of mediation.

For this purpose, Member States (i) are encouraged to develop voluntary codes of conduct as well as other effective quality control mechanisms concerning the provision of mediation services, (ii) are also asked to encourage the initial and further training of mediators³⁴ and (iii) to ensure the confidentiality of mediation³⁵.

Notwithstanding the fact that mediation is envisaged as an alternative to judicial proceedings for the settlement of disputes, under the Directive mediators do not need to have neither specific knowledge of law, nor the assistance of a lawyer during the mediation proceeding.

The only reference to persons having specific skills in the field of law is made under recital 25, where it is stated that Member States should encourage legal practitioners to inform their clients of the possibility of mediation.

³¹ See the EU Court of Justice, decision 18 of March 2010, C-317/08, C-320/08, *Rosalba Alassini and others v. Telecom Italia SpA and others*, in *Guida al diritto*, 3 April 2010, No. 14, p. 18 ff.

³² See the EU Court of Justice, decision 18 of March 2010, C-317/08, C-320/08, *Rosalba Alassini and others v. Telecom Italia SpA and others*, para 61-62.

³³ *Ibid.*, para 63.

³⁴ See art. 4 of the Directive, together with recital 17 and 18, stating that mediators should be aware of the existence of the European Code of Conduct for mediators and that, in the field of consumer protection, a Recommendation has been adopted, establishing minimum quality criteria which out-of-court bodies involved in the consensual resolution of consumer disputes should offer to their users. See Recommendation 2001/310/CE on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes of 4 April 2001, in *OJ L* 109, 19.4.2001, p. 56.

³⁵ See art. 7 of the Directive.

If, on one side, it is true that mediation may work more easily when the parties do not have a precise knowledge of their legal arguments in the dispute, on the other side weaker parties facing a mediation procedure should benefit of some legal assistance, but the Directive is silent in this regard.

4. Recognition and enforcement of mediation agreements within the EU judicial area

As already pointed out, the Directive is aimed at providing common rules for cross-border mediation and, therefore, is applicable to the case of two or more parties having their domicile or habitual residence in different Member States who decide to settle their dispute on civil and commercial matters having arisen among them through mediation.

Despite the fact that such a situation necessarily implies the solution of private (procedural) international law issues, the Directive does not provide specific rules in this regard. This is first of all due to the fact that the Directive wants to offer *de minimis* rules on mediation in order not to affect party autonomy in the out-of-court settlement of the dispute. On the other hand, it shall be also considered that mediation is a service and, therefore, is subject to the rules on free movement of services provided by the TFEU (art. 56-66).

In this respect, the Directive does not determine the court of the State or the mediator where the mediation proceeding shall be started. It may therefore happen that two parties, having their domicile or habitual residence in two different Member States, decide to settle their dispute through mediation in one of the two mentioned States. But the parties may also decide to start the mediation procedure in a third State, taking into account the specific national rules on the mediation service, its costs and speed.

The content of the mediation agreement is the result of the negotiations made by the parties involved. As a matter of principle, the parties may reach an agreement which does not take into any consideration the legal situation of the parties under the relevant applicable law. This seems to be the underlying principle inspiring the Directive, as it results from the fact (already pointed out) that the mediator shall not necessarily have specific knowledge of law. If, however, the parties – being assisted by a lawyer or being however aware of the legal consequences of the dispute – have chosen a mediator having specific knowledge in the field of law, it may happen that, in the settlement of the dispute through mediation, the relevant conflict of law rules need to be applied (and, among them, in particular the relevant EU private international law regulations or, residually, the conflict of law rules of the State where mediation has been started).

Crucial in granting mediation a real alternative character to judicial proceedings for the settlement of disputes is the issue of the executive character of mediation agreements and, consequently, of their movement in the EU judicial area. For this purpose, it is necessary to avoid leaving the observance of the mediation agreements just to the parties and to their good faith, since this would effectively make mediation a less appealing instrument (in comparison with a judicial proceeding).

For this reason, the Directive, on one side, regulates the executive character of the agreement resulting from mediation and, on the other, recalls (in a recital) the relevant EU and national rules on the movement of the agreement itself.

As for the enforceability of mediation agreements, art. 6 of the Directive asks Member States to grant to (all) the parties (or even to just one of them with the explicit consent of the others) the possibility to request that the content of a written agreement resulting from mediation be made enforceable, unless it is contrary to the law of the State where the request is made or that law does not provide for its enforceability³⁶.

Art. 6 further points out that the agreement may be made enforceable in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made³⁷.

It clearly appears that Member States enjoy a wide discretion in regulating the enforceability of agreements resulting from mediation.

First of all, Member States are free to decide who are the persons entitled to request the declaration of enforceability. More precisely, even if the rule seems to provide that the enforceability is granted when all the parties to the mediation proceeding agree, under art. 6 Member States may recognize the possibility to make the request of enforceability just to one party of the mediation proceeding.

³⁶ See art. 6.1 of the Directive.

³⁷ See art. 6.2 of the Directive.

It seems that the latter is the situation more likely to happen in practice: the need to render the mediation agreement enforceable in another Member State arises generally when the agreement itself is not complied with and the rights and interests of one of the parties are affected.

There is a chance to avoid the above situation during the mediation proceedings: mediators may suggest to the parties to express their consent for the enforceability of the agreement.

However, if such consent from all the parties does not expressly result from the content of the mediation agreement – aided by the fact that the Directive does not envisage the assistance of a lawyer and does not ask for mediators to have a specific knowledge of the law – but is not possible to exclude that the national rules implementing the Directive consider the agreement enforceable even when the request comes from just one of the parties to the dispute.³⁸ The above construction seems coherent with the principle under which mediation should not be considered as a poorer alternative to the judicial proceeding.

The Italian law, for example, has followed the above solution³⁹.

A second aspect in relation to which the Directive could have provided more punctual suggestions, is the possibility to ask for enforceability in a Member State different from the one where the agreement has been reached.

Following the wording of art. 6.1 of the Directive, the above situation seems to be not only possible but even implied when it is stated that an agreement may not be made enforceable when it is contrary to the law of the Member State where the request is made.

Even if, as a matter of principle, it is likely that the parties will make a request for their agreement to be made enforceable in the State where the mediation proceeding took place, it is not possible to exclude that – having regard to the cross-border character of the proceeding – the agreement will be declared enforceable in a State different from the one where the agreement was reached.

Under the Directive, the court or public authority receiving such a request has to make a double check: on the substantial level, it is necessary to consider whether the agreement is in compliance with national law (including the private international law rules, as pointed out in recital 19) and on the procedural level, it is necessary to see whether under national law such an agreement may be declared enforceable⁴⁰.

Once the above check is concluded, within the EU judicial area it is possible to have national rules more or less convenient in terms of granting the enforceability to mediation agreements. Also from this perspective, the national legal system are concurrent.

As for the act through which it is possible to make the mediation agreement enforceable, the Directive makes express reference to a judgment or a decision of the court, or to an authentic instrument of a body, expressly authorized to decide the matter by the Member States.

Among the instruments through which it is possible to make the mediation agreement enforceable, art. 6.2 does not envisage (i) in-court settlement (see Regulation 1215/2012) (ii) nor the agreements in family matters, which are enforceable in the Member State in which they were concluded and which, under art. 46 of the Regulation 2201/2003, are free to be recognized as decisions and authentic instruments.

Even if it is true that the latter agreements are expressly mentioned in recital 21⁴¹, in the view of enhancing mediation in civil and commercial matters, it seems reasonable to extend the interpretation of art. 6.2 of the Directive so as to include both the agreements enforceable under the Regulation No. 2201/2003 as well as the in-court settlements under Brussels I *bis* Regulation.

The rule considered here is a clear example of the imperfect coordination of the Directive with the other instruments adopted by the EU in the field of civil judicial cooperation (as mentioned in para. 1). Once the mediation agreement is enforceable, problems related to its movement within the European judicial area arise.

³⁸ See E. D'ALESSANDRO, *above*.

³⁹ See art. 12 of D. Lgs. No. 28/2010.

⁴⁰ As pointed out in recital 19, it might happen that it is not possible for the obligations agreed in the mediation agreement to be executed.

⁴¹ Recital 21 is aimed at avoiding that the mediation Directive becomes a tool through which are abused the rules on recognition provided by Regulation 2201/2003 as for the agreement regarding family relationships. For this purpose, it states that if the content of an agreement resulting from mediation in a family law matter is not enforceable in the Member State where the agreement was concluded and where the request for enforceability is made, this Directive should not encourage the parties to circumvent the law of that Member State by having their agreement made enforceable in another Member State.

It is possible that a dispute among three persons having their habitual residence in three different Member States is settled through the use of the mediation services rendered in a fourth Member State. In such case, once the agreement is reached (and expressly stating the will of the parties to grant it executive character), one of the parties asks to the courts of the Country of his/her habitual residence to make the agreement immediately executable (under art. 6.1 of the Directive) and then starts the enforcement proceeding *vis-a-vis* the party who does not fulfil his/her obligations deriving from the agreement.

It is at this last stage that the problems of recognition of the act (i.e. decision, public act) which has granted executive character to the mediation agreement appear.

The Directive does not expressly regulate it but for recital 20 according to which «*The content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognised and declared enforceable in the other Member States in accordance with applicable Community or national law. This could, for example, be on the basis of Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters or Council Regulation 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility*»⁴².

Even if not expressly mentioned, reference should be made also to Regulation 805/2004 creating a European enforcement order for uncontested claims⁴³ and to Regulation 4/2009 on maintenance obligations⁴⁴.

Both Regulations govern subjects falling within the notion of civil and commercial matters under the Brussels I (and now I *bis*) Regulation and, therefore, also under the mediation Directive. However, whilst Regulation 805/2004, already in force when the Directive was adopted, is alternative to the Brussels I Regulation and this might be the reason why the Directive does not mention it expressly; Regulation 4/2009 could not be expressly considered by the Directive, since it has been adopted after it.

The rules regarding the movement of the mediation agreements deriving from the above-mentioned European regulations do not apply when the mediation agreement has been declared executable in a State not member of the EU and, therefore, not bound by the principle of mutual trust underpinning the EU acts in the field of civil judicial cooperation.

In such cases, reference should be made to domestic legal orders. With specific reference to Italy, the relevant provisions are to be found in articles 64-67 of the Law n° 218/1995, which have been built on the basis of the rules on recognition and execution of the 1968 Brussels Convention.

⁴² On the Italian rules on recognition and execution, see F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale. Parte generale e obbligazioni*, Milano, 2011, p. 277-370.

⁴³ Regulation 805/2004 of the European Parliament and of the Council, of 21st of April 2004, creating a European enforcement order for uncontested claims in O.J. L 143 of 30/04/2004, p. 15-39.

⁴⁴ Regulation 4/2009 of the Council, of 18 December 2008, on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations in OJ L 7 of 10.1.2009, p. 1-79.