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Chapter XI

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International and EU Perspective on Mediation: Common Principles in Cross-Border Family Mediation

SUMMARY: Introduction. – 1. Supra-national principles in family mediation matters. – 2. Family mediation: comparative perspectives. – 3. Conclusions.

Introduction

Substantive family law remains nowadays a field in which states retain competences[1], being the regulatory power of family matters deeply connected with the very idea of state sovereignty[2]. Nonetheless, globalization creates not only connected markets, but people as well: family schemes also moved across Europe and the world, to settle in places where family institutions were in the past consolidated and uniformly accepted by the local society.

Amongst other reasons, with the emergence of a multi-cultural society, an increase in the recourse to judicial intervention in family matters followed: non-state institutions (schools, spiritual and community leaders, families themselves) lost their capacity to contribute in the non-judicial management and solution of familiar conflicts[3].

Mediation in family matters can contribute to ease the work overloaded of tribunals and courts[4] and help individuals in the personal management of their conflict. Nonetheless, the regulation of mediation in family matters, this procedure being able to influence substantive aspects of the families and their legal relationships, has not reached uniform solutions between states, not even between EU Member States.

In spite of the lack of common rules on family mediation, it seems possible to infer, from a different range of supra-national instruments, some common principles, even though the very definition of family mediation is challenged[5]. Mediation, in general, can be conceived: i) as an alternative method to settle

[1] Cf. I. QUEIROLO, L. CARPANETO, *Considerazioni critiche sull'estensione dell'autonomia privata a separazione e divorzio nel regolamento Roma «III»*, in *Rivista di diritto internazionale privato e processuale*, 2012, p. 61.

[2] In the context of the EU integration, see Bundesverfassungsgericht, **Urteil vom 30. Juni 2009 - 2 BvE 2/08, at para. 249.**

[3] M.L. MARCUS, *Judicial Overload: the Reasons and the Remedies*, in *Buffalo Law Review*, 1979, p. 111, and S. DOMINELLI, *La mediazione familiare nel diritto comparato: problemi della mediazione obbligatoria alla luce dei principi di diritto sovranazionale*, in A. CAGNAZZO, F. PREITE, V. TAGLIAFERRI (eds.), *Il nuovo diritto di famiglia: profili sostanziali, processuali e notarili, Vol IV, Tematiche di interesse notarile, Profili internazionalprivatistici*, Milan, 2015, p. 1293 ff. On this point, cf. more recently, H.G. MAEHLER, G. MAEHLER, *Familienmediation*, in F. HAFT, K. GRAEFIN VON SCLIEFFEN (eds.), *Handbuch Mediation*, Munich, 2016, p. 669. In more general terms, noting how the contemporary society is strongly linked to litigation, see C. ESPLUGUES, *General Report: New Developments in Civil and Commercial Mediation – Global Comparative Perspectives*, in C. ESPLUGUES, L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation Global Comparative Perspectives*, Heidelberg, 2015, p. 1, at p. 2.

[4] On the negative effects, also in terms of access to justice, following a non-manageable work overload, see C. ESPLUGUES, *General Report: New Developments in Civil and Commercial Mediation – Global Comparative Perspectives*, cit., p. 2.

[5] D. SPENCER, M. BROGAN, *Mediation Law and Practice*, Cambridge, 2006, p. 4.

disputes[6]; ii) as a therapeutic process where the parties acquire knowledge of the reasons of the conflict[7]; iii) as a form of assisted negotiation[8]; iv) as a procedure where a third party deals with strong emotional relationships, rather than only with economic aspects[9].

There is little doubt that "mediation" is a polysemous word[10] expressing legal, sociological, and psychological aspects of a complex phenomenon. However, for the purposes of this work, family mediation can be defined as a procedure where an impartial third party intervenes to ease the communication between the conflicting parties, in order to give them the chance to settle – out of court and by agreement – their dispute. Such intervention bears general positive outcomes, such as the implementation of direct administration of justice (which raises the perception of justice) and the reduction of in-court-proceedings[11].

1. Supra-national principles in family mediation matters

Some supra-national instruments deal with family aspects and contain principles on family mediation, even though the focus of such international cooperation is, rather than on aspects of substantive law, on the protection of individual rights, and, in particular, on the protection of the rights of children[12]. A change of focus, which allowed states to create common human rights principles in familiar contexts, without renouncing their sovereignty in the subject matter[13].

The first relevant principle to determine the boundaries of party autonomy in family mediation is the principle of the protection of the best interests of the child. The principle was at first affirmed[14] in a number of heterogeneous sources[15], whose aim was to make sure decisions concerning minors were taken for – and functional for – minors' physical and psychological health. In spite of the importance of the principle, this was only codified in a binding treaty in the late '80es, with the New York Convention on the Rights of the Child[16], to eventually become part of customary international law[17].

According to the 1989 New York Convention, individuals and entities have to take into consideration and respect the best interests of the child (art. 3 (1)), which has to be understood, in the first place, as the right of the child to have contacts with both the parents, save the case where these contacts are detrimental for the health and the growth of the child (art. 9 (1)).

All in all, it is not easy to determine what, in single and specific cases, the best interest of a given child is: the principle is intended to be independent from specific definitions so to allow parents, guardians, public bodies, and courts, an evaluation of all the relevant elements, in order to take the most appropriate decision for the case at hand[18].

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[6] M. MALAGOLI TOGLIATTI, A. LUBRANO LAVADERA, *Il modello strutturato e il modello terapeutico*, in A. CAGNAZZO (ed.) *La mediazione familiare*, Milano, 2012, p. 111 ff.

[7] J.M. HAYNES, I. BUZZI, *Introduzione alla mediazione familiare. Principi fondamentali e sua applicazione*, Torino, 2012, p. 26 ff.

[8] *Ibidem*, p. 61.

[9] E. RESTA, *Giudicare, conciliare, mediare*, in F. SCAPARRO (ed.), *Il coraggio di mediare*, Milano, 1996, p. 48 ff.

[10] J. BONAFE SCHMITT, *La médiation: une justice douce*, Paris, 1992, p. 198.

[11] S. DOMINELLI, *La mediazione familiare nel diritto comparato: problemi della mediazione obbligatoria alla luce dei principi di diritto sovranazionale*, cit., p. 1293 ff.

[12] F. MOSCONI, *Europa, famiglia e diritto internazionale privato*, in C. CAMPIGLIO (ed.), *Franco Mosconi. Scritti di diritto internazionale privato e penale, Tomo I*, Milano, 2009, p. 359.

[13] I. QUEIROLO, *Globalizzazione e sottrazione internazionale: rapporti tra norme e «tensioni» applicative e di coordinamento*, in *Scritti in onore di Giuseppe Tesauro*, Napoli, 2014, p. 2825 ff.

[14] L. CARPANETO, *Il diritto di visita nel diritto dell'Unione europea*, in F. PREITE, A. GAZZANTI PUGLIESE DI COTRONE (eds.), *Atti notarili nel diritto comunitario e internazionale, Vol. IV, Diritto Comunitario*, Padova, 2011, p. 86.

[15] Cf. Geneva Declaration of the Rights of the Child, Adopted 26 September, 1924, League of Nations; Declaration of the Rights of the Child, G.A. res. 1386 (XIV), in 14 U.N. GAOR Supp. (No. 16), p. 19, U.N. Doc. A/4354 (1959), and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly. See S. DOMINELLI, *La mediazione familiare tra autonomia privata e tutela dell'interesse superiore del minore nel diritto europeo ed internazionale*, in I. QUEIROLO, A.M. BENEDETTI, L. CARPANETO (eds.), *Le nuove famiglie tra globalizzazione e identità statuali*, Roma, 2014, p. 275.

[16] Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989.

[17] A. CANNONE, *L'interesse del fanciullo nelle convenzioni dell'Aja*, in *Studi in onore di Francesco Capotorti. Divenire Sociale e adeguamento del diritto, Vol. II*, Milano, 1999, p. 553.

[18] On the issue, see F. POCAR, *Verso lo Statuto del minore*, in *I diritti dell'uomo. Cronache e battaglie*, 2, 1992, p. 41; C. FOCARELLI, *La convenzione di New York sui diritti del fanciullo e il concetto di «best interest of the child»*, in *Rivista di diritto internazionale*, 2010, p. 986 ff., and S. PARKER, *The Best Interests of the Child: Principles and Problems*, in *International Journal of Law, Policy and the Family*, 1994, p. 26.

The 1989 New York Convention does not expressly take into consideration family mediation. However, the preamble of the convention acknowledges the social importance of the family, and states that families should be afforded the necessary protection and assistance to fully assume their responsibilities within the community for the growth and well-being of children. If one considers family mediation as a procedure which is instrumental in the fulfilment of the goals of the convention, one could argue that the promotion of family mediation services falls within the duties of states to render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities (art. 18 (2)).

In the field of international child abduction, other instruments become relevant in the context of family mediation[19]: even though the 1980 Hague Convention on Civil Aspects of International Child Abduction[20] does not expressly take into consideration mediation in family matters, the Hague Conference encouraged recourse to family mediation[21], subject to the respect of the child's best interests[22]. The more recent 1996 Hague Convention on Parental Responsibility and the Protection of Children[23], takes into consideration the procedure of mediation, prescribing that central authorities take appropriate steps to facilitate agreed solution between the parties also by way of mediation (art. 31 (1) (c)). Some courts have argued the opportunity to settle disputes by way of mediation, if possible and if consistent with the best interests of the child, during the proceedings for the immediate return of the child, since an extra-judicial settlement of the case would solve the conflict between the holders of parental responsibility, rather than the case and the single issue of the collocation of the child[24].

In addition, in the European region, the Council of Europe promoted a number of international conventions which are of relevance in family matters and mediation[25]. The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 005; hereinafter ECHR) has been interpreted as to impose onto courts an obligation to make sure the relationship of the minor with the parents is not detrimental for his/her growth and health[26], being required that – in balancing the interests of the parents and of the child – the best interests of the child amounts to paramount importance[27].

Furthermore, the Council of Europe promoted the European Convention on the Exercise of Children's Rights (CETS No. 160; hereinafter Strasbourg Convention) to reaffirm the supremacy of the best interests of the child by way of recognizing to children enforceable procedural rights. Art. 13 of the Strasbourg Convention requires the promotion of mediation in family matters, at least where this is deemed desirable. Even though there is no express provision on how mediation in family matters should be carried out, and what are the limits to the parents' party autonomy, art. 6 (1) (a) of the Strasbourg Convention requires judicial authorities to consider whether they have enough information to determine

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[19] On which see N. ALEXANDER, *International and Comparative Mediation. Legal Perspectives,* Alphen aan den Rijn, 2009, p. 57 ff.

[20] Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

[21] HCCH, *Mediation. Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, The Hague, 2012, p. 12.

[22] *Ibidem*, p. 31, para. 69.

[23] Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

[24] Tribunale, dei Minorenni di Bologna, ordinanza 05/03/2015 (available at http://www.aiaf-avvocati.it/files/2015/04/Trib.Min_.-Bologna.pdf), where it can be read that «[c]*iò deve fare senza adottare misure stereotipate o automatiche (c. Corte Eur. Dir. Uomo, sez. II, sentenza 29 gennaio 2013, Pres. Jočienė - Affaire Lombardo c/ Italia). Nel corso dell'udienza del 5 marzo entrambe le parti – sia il signor X sia la signora Y – hanno dimostrato di essere ancora aperti a una riconciliazione, il primo dicendo testualmente "sarei disponibile a tentare di riconciliarmi con mia moglie" (pur sottoponendo tale disponibilità ad alcune condizioni, e in particolare quella di continuare a vivere a [America]) e la seconda dichiarando di amare ancora il marito, nonostante quello che sta succedendo. In effetti, non sfugge all'odierno giudicante che di fronte a tale disponibilità si impongano, al Tribunale, tutti gli sforzi necessari per far sì che si possa giungere a una risoluzione bonaria della controversia. È evidente che una decisione nel merito circa la sussistenza o meno della sottrazione internazionale comporterebbe, in caso positivo, l'ordine di ricondurre immediatamente i minori negli Stati Uniti (se ciò fosse conforme al loro interesse, come ha più volte sottolineato la Corte di Cassazione), e in caso negativo un non luogo a provvedere che lascerebbe comunque insoluti i conflitti tra i coniugi, conflitti che si riverbererebbero in maniera del tutto negativa sui due minori "oggetto" della controversia. La decisione definirebbe la lite ma non chiuderebbe il conflitto. Tali immediate conclusioni del procedimento, pur senz'altro rispettose della normativa vigente, rischierebbero invece di violare uno dei principi immanenti del nostro ordinamento, faro che orienta il giudice minorile nell'adottare le sue decisioni, che è quello del superiore interesse del minore, dal momento che, attesa la disponibilità dei coniugi nel senso di tentare un percorso di mediazione familiare, impedirebbe al giudicante e alle parti in causa di mettere in campo tutte le strategie idonee a far sì che le differenti visioni delle parti possano essere ricomposte, in via stragiudiziale, proprio nel superiore interesse dei minori*».

[25] On the Council of Europe and family law, see in general T. RAUSCHER, *Familienrecht*, Heidelberg, 2008, p. 29 ff.

[26] Interpreting art. 8 of the ECHR, see in the case law of the European Court of Human Rights (hereinafter ECtHR), *Olsson* v. *Sweden*, App. n. 13441/87, 27 November 1992, para. 90, and *Hokkanen* v. *Finland*, App. n. 19823/92, 23 September 1994, para. 58.

[27] ECtHR, *Johansen* v. *Norway*, App. n. 17383/90, 7 August 1996, para. 78, and *Yousef* v. *The Netherlands*, App. n. 33711/96, 5 February 2003, para. 73.

the best interests of the child before taking any decision, as the homologation of a mediation agreement might be.

More in general, soft law of the Council of Europe takes a clearer stand on how mediation in family matters should be conceived and regulated. Other that the introduction and promotion of family mediation, the Council of Europe emphasised that family mediation should be a procedure voluntary in nature (parties should not be obliged at any cost to go through an entire mediation procedure, nor be obliged to settled their dispute out of court), carried out by a mediator who makes sure that the parties understand that the dispute has to be settled bearing in mind the interests of children first[28].

In addition to the principles that can be derived from international law, which requires i) states to promote – but not to impose – family mediation, and ii) courts not to homologate mediation agreements in family matters if they do not respect the best interests of the child, EU Member States are bound also by EU law. Even though the EU has no (direct[29]) competence in the filed of substantive family law[30], and even though it appears to focus on mediation in commercial matters[31], it has taken into consideration mediation in family matters. In particular, in the 1998 Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice[32], the possibility of taking measures of drawing up models for non-judicial solutions to disputes with particular reference to transnational family conflicts had already been considered[33], acknowledging though that – in some circumstances – mediation in family matters might lose any utility if strong conflicts arise between the parties[34].

Implementing the 1998 Plan, the Brussels II *bis* Regulation[35] states that, in cases concerning parental responsibility, central authorities of the Member States shall, upon request from a central authority of another Member State or from a holder of parental responsibility, facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end (art. 55 (e))[36]. The Brussels II *bis* Regulation, whose provision limiting the action of central authorities to specific requests confirms the voluntary nature of the procedure[37], does not order the mediation procedure to be carried out in the best interests of the child. Nonetheless, the principle informs the Regulation[38]: as a matters of general rule, in all actions relating to children, whether taken by public

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[28] *Recommendation No. R (98)1 on family mediation, Adopted by the Committee of Ministers on 21 January 1998 at the 616th meeting of the Ministers' Deputies*, in *Texts Adopted by the Committee of Ministers of the Council of Europe 1998*, Strasbourg, 1999, p. 14. See S. ROBERTS, M. PALMER, *Dispute Processes. ADR and the Primary Forms of Decision-Making*, Cambridge, 2005, p. 189, and M. ROBERTS, *Mediation in Family Disputes. Principles of Practice*, Adelrshot, 2008, p. 96.

[29] The EU has indeed indirectly influenced familiar realities when exercising competences in other fields, such as the fighting discrimination at workplaces between men and women. Also, on the relationships between free movement and family, see I. QUEIROLO, M.E. DE MAESTRI, *La libera circolazione delle persone*, in F. PREITE, A. GAZZANTI PUGLIESE DI COTRONE (eds.), *Atti notarili nel diritto comunitario e internazionale – Vol. III, Diritto comunitario- Principi generali: Riflessi sull'attività notarile*, Padova, 2011, p. 649 ff.

[30] I. QUEIROLO, *Regolamento (CE) 27 novembre 2003, n. 2201 del Consiglio relativo alla competenza, al riconoscimento e all'esecuzione delle decisioni in materia matrimoniale e in materia di responsabilità genitoriale*, in F. PREITE, A. GAZZANTI PUGLIESE DI COTRONE (eds.), *Atti notarili nel diritto comunitario e internazionale – Vol. IV, diritto comunitario*, Padova, 2011, p. 305; I. QUEIROLO., *La sottrazione internazionale di minori tra disciplina europea ed internazionale*, in I. QUEIROLO, A.M. BENEDETTI, L. CARPANETO L. (eds.), *La tutela dei soggetti deboli tra diritto internazionale, dell'Unione europea e diritto interno*, Roma, 2012, p. 444; R. BARATTA, *Verso la "comunitarizzazione" dei principi fondamentali del diritto di famiglia*, in *Rivista di diritto internazionale privato e processuale*, 2005, p. 573; S. BARIATTI, *Lo sviluppo delle competenze comunitarie in materia di diritto internazionale privato*, in S. BARIATTI (ed.), *Casi e materiali di diritto internazionale privato comunitario*, Milano, 2009, p. 49, and A. BONOMI A., *Il diritto internazionale privato della famiglia e delle successioni: un sorvolo*, in A. BONOMI (ed.), *Diritto internazionale privato e cooperazione giudiziaria in materia civile*, Torino, 2009, p. 487.

[31] For further references see S. DOMINELLI, *La mediazione familiare nel diritto comparato: problemi della mediazione obbligatoria alla luce dei principi di diritto sovranazionale*, cit., p. 1312 f. Recently, on mediation and the digital agenda, see A. BANASZEWSKA, *Recent Developments in Consumer Dispute Resolution Systems in the European Union*, in M.E. DE MAESTRI, S. DOMINELLI (eds.), *Party Autonomy in European Private (and) International Law, Tome II*, Rome, 2015, p. 33 ff.

[32] *OJ* C 19. 23.1.1999, p. 1.

[33] *Ibidem*, p. 10.

[34] Green Paper on alternative dispute resolution in civil and commercial law, COM(2002) 196 final - Not published in the Official Journal, point. 48.

[35] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, in *OJ* L 338, 23.12.2003, p. 1 ff.

[36] Cf. also Council Regulation (EC) No 4/2009 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, 10.1.2009, p. 1 ff., art. 51.

[37] S. DOMINELLI, *La mediazione familiare tra autonomia privata e tutela dell'interesse superiore del minore nel diritto europeo ed internazionale*, cit., p. 263.

[38] See Recital 12, and 33. Cf., on the importance of the principle of the best interests of the child in the Brussels II *bis* Regulation, A. BORRÁS, *Artt. 3-9*, in U. MAGNUS, P. MANKOWSKI (eds.), *Brussels II bis Regulation*, Munich, 2012, p. 110 ff.; P. DE CESARI, *Diritto internazionale privato dell'Unione europea*, Torino, 2011, p. 182 ff.; P. MCELEAVY, *Brussels II Bis: Matrimonial Matters, Parental*

authorities or private institutions, the child's best interests – understood as the right of the child to have contacts with both the parents, save the case such relationships are detrimental to his/her well-being[39] – must be a primary consideration[40].

The Brussels II *bis* Regulation also helps understand other limits to party autonomy, and, in particular, what parties can agree upon. According to a joint reading of art. 2, and 46 of the Regulation, it is clear that the parties can agree upon the terms of parental responsibility and visiting rights. If these agreements are enforceable in the Member States of origin, they shall also be recognised and enforced in those states bound by the Regulation.

Other than the law on the books which sets the principles and the limits of party autonomy in family matters where the parties are free to decide themselves under the relevant applicable law[41], the principle of the best interest of the child is strengthen by the action of the European Parliament Mediator for International Parental Child Abduction, whose work, praised by the EU Parliament[42], is to help parents reach an amicable solution in light of the needs and necessities of the abducted child.

Even though the EU intervention in the field of family matters has been limited, it remains to be seen in what terms the EU Parliament will approach and develop the subject matter, since it takes the view that any approach to ADR should go beyond consumer disputes so as to include also family disputes[43].

All in all, from the systematic analysis of the principles that can be inferred from both international and EU law, it can be said that states i) must introduce family mediation and inform families about the existence of ADR methods; ii) preserve the voluntary nature of family mediation, and iii) assure that the result of mediation procedure conforms to the best interests of the child. This being said, it has to be evaluated to what extent these common principles of international and EU law are respected by domestic legislations regulating family mediation.

2. Family mediation: comparative perspectives

States do not follow the same approach when regulating family mediation; there are states who strongly encourage family mediation for those parties who wish to seek justice in court, and others that promote knowledge of family mediation.

Family mediation is mandatory in Norway for cases of dissolution of marriage where children of the couple, younger than 16 year, are involved. The purpose of the mediation is to reach an agreement concerning parental responsibility, right of access or where the child or children shall permanently reside, with due emphasis on what will be the best arrangement for the child. When an attempt at mediation has been made, a certificate shall be issued to that effect[44]. Similar provisions are given for proceedings in parental responsibility[45], where parents with children of the relationship under the age of 16 must attend mediation before bringing an action concerning parental responsibility. In any case, if the parties reach an amicable solution, the best interests of the child shall receive particular regard[46]. In addition, Section 54 becomes relevant to evaluate the voluntary nature of mediation: after the entry into force of new rules[47], a mediation certificate is issued when the parties have attended one hour of mediation with a mediator. If the parents fail to reach agreement, they shall be encouraged to continue mediating for up

Responsibility, Child Abduction and Mutual Recognition, in *International and Comparative Law Quarterly*, 2004, p. 503 ff., and I. QUEIROLO, L. SCHIANO DI PEPE, *Lezioni di diritto dell'Unione europea e relazioni familiari*, Torino, 2014, p. 317 ff.

[39] Charter of fundamental rights of the European Union, in *OJ* C 83, 30.3.2010, p. 389, art. 24 (3).

[40] *Ibidem*, para. 2.

[41] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, in *OJ* L 136, 24.5.2008, p. 3 ff., Recitals 10, and 21. In general, on the directive, see I. QUEIROLO, L. CARPANETO, S. DOMINELLI, *Italy*, in C. ESPLUGUES MOTA, J.L. IGLESIAS, G. PALAO (eds.), *Civil and Commercial Mediation in Europe. National Mediation Rules and Procedures*, Cambridge, 2012, p. 245 ff., and L. CARPANETO, *La Direttiva n. 2008/52 sulla mediazione civile e commerciale*, in I. QUEIROLO, A.M. BENEDETTI, L. CARPANETO L. (eds.), *La tutela dei soggetti deboli tra diritto internazionale, dell'Unione europea e diritto interno*, Roma, 2012, p.547, in part. p. 557 f.

[42] European Parliament resolution of 25 October 2011 on alternative dispute resolution in civil, commercial and family matters, para. 25.

[43] *Ibidem*, para. 2.

[44] *The Marriage Act*, 1991-07-04 N. 47; *Marriage Act, Part I, Chapter 5, Section 26*. For the exceptions to mediation in family matters, see *Part IV, Chapter 17, Section 93*.

[45] *Act No. 7 of 8 April 1981 relating to Children and Parents (The Children Act), Chapter 7, Section 51*.

[46] *Ibidem, Section 55, and Section 48.*

[47] A.K. SPERR, *Mediation in Norway: Faster, Cheaper and more Friendly*, in K.J. HOPT, F. STEFFEK (eds.), *Mediation. Principles and Regulation in Comparative Perspective*, Oxford, 2013, p. 1154.

to three hours more. They may be offered mediation for further three hours if the mediator considers that this may result in parties reaching an agreement. The very limited amount of mandatory time the parties have to spend in mediation (just one hour), does not seem enough to argue that the result of mediation, *i.e.*, the agreement, is not the result of party autonomy, nor that the parties are obliged to go through a whole mediation procedure.

Finland knows no mandatory family mediation for separation or divorce, but the legislation encourages recourse to mediation, prescribing that disputes and legal matters arising in a family should primarily be settled in negotiations between the family members and decided by agreement[48]. Should this be the case, domestic courts are called to assure that the agreements involving children respect their best interests[49]. Some[50] have though detected a possible mandatory element in the Finnish system: if the homologation of the agreement is contested by one of the parties, the court will usually first defer the question to the welfare board to act as a mediator[51].

Denmark knows mandatory mediation in some fields, such as labour law[52], but has repealed mandatory mediation in family matters, which was present in the system until 1989[53]. Nonetheless, in parental responsibility matters, courts must offer mediation services in case of disagreement about custody, residence or contact involving the child, save mediation is contrary to the best interests of the child[54].

Also in Germany there is no mandatory mediation in family matters: attempts to reach amicable solutions must be mentioned in the writ of summons, and the court can order the parties to take part in mediation meetings[55] and suggest them to start mediation procedures[56]. Parental responsibility must be exercised in conformity with the best interests of the child[57], and courts must take appropriate measures to ensure its respect[58]: in other words, no homologation of mediation agreements contrary to the best interest of the child is permitted.

In Italy there is no mandatory family mediation, even though the President of the Tribunal has a duty to seek conciliation between the parties[59], and courts are free to evaluate the opportunity to request the parties to start a mediation procedure. To that end, courts, if necessary, may stay proceeding involving children[60]. Nonetheless, it is currently debated whether or not mandatory mediation meetings[61] should be introduced in matters involving children. In any case, where the parties settle their dispute with an agreement, courts will not homologate them if these agreements are contrary to the best interests of the child[62].

The French system shares traits with the Italian one: courts have an obligation to seek conciliation[63], and the power to suggest[64] to the parties to take part in a mediation procedure. In addition, to disseminate knowledge on mediation, the parties have to attach to the writ of summons a copy of the statutory provisions related to mediation, so to make sure that the parties are "obliged to know"[65]. As foreseeable,

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[48] *Marriage Act* (234/1929), *Section 20*.

[49] *Ibidem, Section 32*.

[50] M.M. CASSALS, *Divorce Mediation in Europe: An Introductory Outline*, in *Electronic Journal of Comparative Law*, 2005, p. 5, at. p. 9.

[51] *Act of the Enforcement of a Decision on Child Custody and Right of Access, Chapter 2*.

[52] V. VINDELOV, *Mediation in Danish Law: In Retrospect and in Prospective*, in N. ALEXANDER (ed.), *Global Trends in Mediation*, Alphen aan den Rijn, 2006, p. 132.

[53] H.V. GODSK PEDERSEN, I. LUND-ANDERSEN, *Family Law in Denmark*, Alphen aan den Rijn, 2011, p. 77; cf. COUNCIL OF EUROPE FAMILY POLICY DATABASE, *Social Policy and Family Law: Marriage, Divorce and Parenthood*, 30 April 2009.

[54] *Danish Act on Parental Responsibility, Article 32.*

[55] *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit, Artikel 1 des Gesetzes vom 17.12.2008 (BGBl. I S. 2586), in Kraft getreten am 29.05.2009 bzw. 01.09.2009, zuletzt geändert durch Gesetz vom 31.08.2013 (BGBl. I S. 3533) m.W.v. 01.01.2014 , Artikel 135*, and *Artikel 156*.

[56] P. TOCHTERMANN P., *Mediation in Germany: The German Mediation Act – Alternative Dispute Resolution at the Crossroads*, in K.J. HOPT., F. STEFFEK (eds.), *Mediation. Principles and Regulation in Comparative Perspective*, Oxford, 2013, p. 521 ff., and I. BACH, U.P. GRUBER, *Germany*, in C. ESPLUGUES MOTA, J.L. IGLESIAS, G. PALAO (eds.), *Civil and Commercial Mediation in Europe. National Mediation Rules and Procedures*, Cambridge, 2012, p. 445 ff. See *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*, cit., *Artikel 23 (1).*

[57] BGB, art. 1627.

[58] BGB, art. 1666.

[59] Code of civil procedure, artt. 706 ff.

[60] Cass. 29 March 2012, n. 5108, in *Foro it.*, 2012, 5, 1373, and Trib. Bari 21 November 2000, in *Dir. Famiglia*, 2001, 1501.

[61] DDL 957, and DDL 2454.

[62] Cass. 20 June 2012, n. 10174, in *Giust. civ. Mass.*, 2012, 6, 819.

[63] K. DECKERT, *Mediation in France: Legal Framework and Practical Expertise*, in K.J. HOPT, F. STEFFEK (eds.), *Mediation. Principles and Regulation in Comparative Perspective*, Oxford, 2013, p. 486.

[64] Code civil, art. 255, and art. 373-2-10.

[65] K. DECKERT, *Mediation in France: Legal Framework and Practical Expertise*, cit., p. 487.

also in France no homologation is granted to agreements which are contrary to the best interest of the child[66].

Spain, even though the regulation of family mediation is fragmented between state and local laws[67], attains the same results: family mediation is conceived as a voluntary procedure, whose result must conform to the best interest of the child[68].

In Portugal, family mediation acquired importance after a pilot project, whose positive results induced, in 2007, the Portuguese lawmaker to introduce family mediation in the whole territory for all family matters (where before that date, family mediation was only available in the area of Lisbon for parental responsibility matters[69]). Before proceedings are commenced, the parties are informed of the possibility to engage in mediation[70]; courts can suggest the parties to resort to mediation[71] and must ensure that mediation agreements respect the best interest of the child[72].

Not only continental states share the idea that mandatory family mediation should not be pursued, or that only mandatory meetings on mediation should be pursued: also countries traditionally associated with ADR have doubts on the introduction of a mandatory regime in family matters[73]. In the United Kingdom, some courts opposed mandatory mediation, or referred mediation. Lord Justice Dyson argued that «[e]*ven if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it. We would adopt what the editors of Volume 1 of the White Book (2003) say at para 1.4.11: The hallmark of ADR procedures, and perhaps the key to their effectiveness in individual cases, is that they are processes voluntarily entered into by the parties in dispute with outcomes, if the parties so wish, which are non-binding. Consequently the court cannot direct that such methods be used but may merely encourage and facilitate*»[74].

Assuming an human rights law perspective, it has also been argued that «[i]*t is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court*»[75].

Notwithstanding this opposition and statistics that were against mediation[76], recent reforms have introduced an obligation to take part in mediation meetings before the seizure of the court is allowed[77]. The importance of mediation is also emphasised by the fact that the criteria according to which it is to be decided whether to fund (or continue to fund) services as part of the Community Legal Service for an individual reflect the principle that in many family disputes mediation will be more appropriate than court proceedings[78].

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[66] Code civil, art. 232; cf. Code of civil procedure, art. 1099 ff.

[67] On which see J.L. IGLESIAS BUHIGUES, C. ESPLUGUES MOTA, G. PALAO MORENO, R. ESPINOSA CALABUIG, C. AZCÁRRAGA MONZONÍS, *Spain*, in C. ESPLUGUES MOTA, J.L. IGLESIAS, G. PALAO (eds.), *Civil and Commercial Mediation in Europe. National Mediation Rules and Procedures*, Cambridge, 2012, p. 445 ff., and C. AZCÁRRAGA MONZONÍS, P. QUINZÁ REDONDO, *Mediation in Spain: Novelties Derived from the Boost of the European Legislator*, in C. ESPLUGUES, L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation Global Comparative Perspectives*, Heidelberg, 2015, p. 693 ff.

[68] Law 5/2012 6 July on mediation in civil and commercial matters, in BOE 7 July 2012, art. 10 (2).

[69] A. PATRÃO, *Portugal*, in C. ESPLUGUES MOTA, J.L. IGLESIAS, G. PALAO (eds.), *Civil and Commercial Mediation in Europe. National Mediation Rules and Procedures*, Cambridge, 2012, p. 332.

[70] Civil code, art. 1774.

[71] Decree of the Secretary of State for Justice n. 18778/2007, art. 6.

[72] A.M. MAIA CONCALVES, T. GAULTIER, *Portugal*, in G. DE PALO, B. TREVOR MARY B. (eds.), *EU Mediation. Law and Practice*, Oxford, 2012, p. 286.

[73] E.B. CRAWFORD, J.M. CARRUTHERS J.M., *United Kingdom*, in C. ESPLUGUES MOTA, J.L. IGLESIAS, G. PALAO (eds.), *Civil and Commercial Mediation in Europe. National Mediation Rules and Procedures*, Cambridge, 2012, p. 521.

[74] *Halsey* v *Milton Keynes NHST* [2004] 4 All ER 920, 9.

[75] *Ibidem*. On the human rights approach, see A. HILDEBRAND, *The United Kingdom*, in G. DE PALO, B. TREVOR MARY B. (eds.), *EU Mediation. Law and Practice*, Oxford, 2012, p. 379. However, one must necessarily remember that – as noted by C. ESPLUGUES, *General Report: New Developments in Civil and Commercial Mediation – Global Comparative Perspectives*, cit., p. 2, an overload in tribunal dockets bears negative consequences on the right to access a court of law, and on the overall quality of the judicial system of the country.

[76] In the past, only 4% of the people who took part to interviews of a pilot project after mediation agreements were effectively considering the possibility to seek out of court settlement. See. J.M. SCHERPE, B. MARTEN, *Mediation in England and Wales: Regulation and Practice*, in K.J. HOPT, F. STEFFEK (eds.), *Mediation. Principles and Regulation in Comparative Perspective*, Oxford, 2013, p. 412, and S. DOMINELLI, *La mediazione familiare nel diritto comparato: problemi della mediazione obbligatoria alla luce dei principi di diritto sovranazionale*, cit., p. 1330 ff.

[77] *Children and Families Act 2014, Chapter 6, Part 2, Section 10*, and *Family Procedure Rules (FPR 2010), Practice Direction 3a – Pre-Application Protocol For Mediation Information And Assessment*.

[78] *Access to Justice Act 1999, Part. I, Community Legal Service, Section 8 (3).*

Courts have the power to suggest mediation to the parties, and eventually stay proceedings if they agree to go through mediation[79], whilst for matters concerning children, the parties will have to attend a *First Hearing Dispute Resolution Appointment*, where the court will try to seek conciliation between the parties[80]. Should the parties reach an amicable solution, the courts will have to make sure that the best interests of the child, which is of paramount importance, is respected[81].

If mandatory family mediation is encountering resistances in the United Kingdom, Australian courts can order the parties to take mediation proceedings[82], imposing fines where the order is not respected[83]. Moreover, ever since 2007, mediation is a pre-condition to seise the court in parental responsibility matters, save were there are alleged child abuses[84]. Should the parties reach an agreement[85], no homologation is granted if the best interests of the child is not respected[86].

Of particular interest are the tendencies in Canada[87]: there is no mandatory family mediation, but in some provinces, such as Ontario, some advocate for the introduction of such a regime[88].

3. Conclusions

In general terms, it appears that domestic systems do respect principles in family mediation that stem from supra-national law. However, the trends towards mandatory family mediation raise both the issue of the protection of the weaker spouse in compulsory mediation proceedings from accepting unfair agreements due to a lack of bargaining power, so to avoid going before a court as the "party who made mediation impossible", and the dogmatic issue on whether "mandatory family mediation" is a contradiction in terms, since a proceeding conceived as voluntary in nature is imposed upon the parties.

[79] FPR Part. 3, art. 3.3.

[80] FPR, *Practice Direction 12b – The Revised Private Law Programme*, art. 14.1 ff.

[81] FPR, *Practice Direction 12b – The Revised Private Law Programme*, art. 11.1.

[82] *Family Law Act 1975, Part IIIB – Court's powers in relation to court and non-court based family services.*

[83] *Ibidem*, 13C, and 13D, read together with *Family Law Act, Part XIIIA – Sanction for Failure to comply with orders, and other obligations, that do not affect children, Division 2 – Sanction for Failure to comply with orders.*

[84] *Family Law Act, Part VII – Division 1, Introductory – Subdivision E – Family dispute resolution, 60I*, and *60I (9)*.

[85] *Ibidem, Division 4 – Parenting Plans, 63B (e)*.

[86] *Ibidem, 64E (3)* ff.

[87] R. ELLGER, *Mediation in Canada: One Goal – Different Approaches to Mediation in a State with Federal and Provincial Jurisdictions*, in K.J. HOPT, F. STEFFEK (eds.), *Mediation. Principles and Regulation in Comparative Perspective*, Oxford, 2013, p. 909 ff.

[88] HONOURABLE W.K. WINKLER, *Civil Justice Reform - The Toronto Experience*, in *Ottawa Law Review*, 2007-2008, p. 113 ff. Cf., BALA N., *Reforming Family Dispute Resolution in Ontario: Systemic Changes and Cultural Shifts*, in M. TREBILCOCK, A. DUGGAN, L. SOSSIN (eds.), *Middle Income Access to Justice*, Toronto, 2012, p. 271, at p. 288.