Mediation in the European Union: An Introduction

By Dr Felix Steffek LLM (Cambridge), June 2012

I. Mediation

1. Definition and Characteristics

Mediation is one of a variety of procedures to solve a conflict. Mediation is based on the *voluntary participation* of the parties. It is a procedure, in which an *intermediary without adjudicatory powers* (the mediator) systematically facilitates communication between the parties with the aim of enabling the parties themselves to take responsibility for resolving their dispute. Additional core characteristics are the *confidentiality* of the procedure and the *neutrality* of the mediator.

While court proceedings are authoritative, formalised and claim-oriented, mediation offers a *flexible, self-determined approach* in which *all aspects of the conflict*, independent of their legal relevance, may be considered. Against this background, mediation in contrast to court proceedings is described as alternative dispute resolution (ADR).

Considering the relationship between court proceedings and mediation, three types of mediation are to be distinguished: (1) *Private mediation* is completely independent from judicial proceedings. Indeed, it often takes place without any subsequent court proceeding. (2) *Court-annexed mediation* is initiated by the court, but then takes place without any further involvement of the court. (3) *Judicial mediation* is more intensely connected with the court as an institution in terms of venue and personnel. However, even judicial mediation is not performed by a judge with adjudicatory competence in the specific case.

2. Differentiation from Other Dispute Resolution Procedures

Mediation can be differentiated from other types of alternative dispute resolution, among them arbitration, ombudsman procedures, conciliation and structured negotiation. Good guidelines to distinguish these procedures from mediation are the characteristic features of

mediation: the *voluntary and flexible nature*, the mediator's *lack of adjudicatory competence* and the *self-determination of the parties*. Whereas, for example, arbitrators and ombudsmen have the competence to issue (at least partly) binding decisions, in mediation it is up to the parties and not the mediator to decide whether and how to solve the conflict. A conciliator has greater influence on the outcome than a mediator as well, by, for example, announcing a (non-binding) conciliation decision. The mediator, instead, tries to empower the parties themselves to solve their conflict.

3. Purposes and Advantages of Mediation

The purpose of mediation is to allow the parties to find a resolution to their conflict in a sustainable and self-determined way. The procedure is *constructive* and involves the chance for *personal development* and *social growth* for the parties of the conflict. The principle of voluntariness and the development of the solution by the parties themselves carry with them the expectation of *substantive justice*. It is expected that the results agreed with benefit both parties or, at least, avoid that anyone is worse off after the mediation.

Additionally, mediation holds the promise of *cost-efficient* and *faster* dispute resolution compared with other methods of dispute resolution. For example, the parties might opt for mediation because they expect mediation to be quicker and cheaper than court proceedings. Additional reasons to prefer mediation over court proceedings may be confidentiality and the wish to preserve a good relationship with the other party, for example in cases of commercial long-term relationships or in family disputes. It should be noted, however, that each conflict needs to be evaluated on an individual basis for which dispute resolution mechanism it is best suited.

In addition to the substantive strengths of mediation the legislature, treasury and court administrations aim to *lighten the heavy case loads of the judiciary* and to *reduce the expenses for the court infrastructure* through a privatisation of dispute resolution. The future challenge for the legislatures in Europe and beyond will be to develop differentiated mechanisms to allow the right dispute to be dealt with by the adequate dispute resolution mechanism. This entails an even better understanding of the roles and responsibilities of the state and the citizens in solving social conflicts.

4. Methods of Mediation

One of the advantages of mediation is the *procedural flexibility* which allows the parties and the mediator to tailor the mediation procedure to the needs of the individual conflict. Hence, legislatures across the world have wisely abstained from regulating the methods of mediation as such. Instead, parties, practitioners, mediation associations and academics are in the process of developing best practice standards while leaving enough procedural freedom for the particularities of specific conflicts. The mediation of a family dispute may require a different approach than the mediation of a shareholder conflict or the mediation of community disputes emanating from the plan to build an airport extension.

Against this background the following presentation of a *five phase model* should be understood to be just one example of the stages mediation can take:

(1) *Introduction and commencement*: information of the parties, clarification of the procedure and the roles of the participants, determination of the mediator remuneration and particular issues (confidentiality, etc.);
(2) *Gathering information*: investigation and clarification of the negotiation subject matter, the issues and the conflict;
(3) *Clarifying interests*: investigation of the interests the participants have in connection with the dispute and its solution;
(4) *Developing solutions*: solution attempts by the parties, the mediator may help by facilitating the discussions or even giving evaluative feedback;
(5) *Conclusion by settlement*: settlement agreement is recorded and legally implemented.

The continuous evolution of mediation techniques is reflected in the different roles the mediator can fulfil. In the *facilitative mediation* approach the mediator restricts him or herself to promoting the communication between the parties. As a consequence the mediator does not propose solutions to the parties. In contrast, under the *evaluative mediation* approach the mediator goes beyond fostering the communication between the parties by proposing concrete solutions and sometimes even giving legal advice. There are good reasons to leave it to the discretion of the mediator and the parties, which approach corresponds best to the dispute situation at hand.

II. Types of Mediation, Suitability for Mediation and Examples

1. Possible Fields for Mediation

Today, mediation is used in *all fields* and a *large variety of constellations*. Historically, mediation was often first used in the fields of family and labour disputes. By now, however, it is understood that its sustainable, flexible, cost and time efficient nature is suited to a wide array of conflicts, for example: small claims disputes, consumer conflicts, commercial disputes, trade conflicts, building controversies, family breakdowns, workplace conflicts, patent and trade mark disputes, bankruptcy, public sphere conflicts, tax disputes, offender-victim conflicts and e-commerce quarrels. Mediation can take place in a bilateral relationship, e.g. between two shareholders, or between a multiplicity of parties, e.g. in a conflict regarding the extension of an airport.

Modern conflict resolution tries to manage conflicts with a *holistic approach*. That means moving away from the idea that there is not much between negotiation and (arbitration) courts. Instead the quality of the solution together with other factors such as conflict control, relationship value, monetary costs, time investment, reputation and long term consequences are valued against the wide array of conflict resolution mechanisms available.

2. Assessing the Suitability of a Conflict for Mediation

Each conflict is unique. When choosing the suitable resolution technique parties might consider the following *characteristics of resolution procedures* such as court proceeding, arbitration, ombudsman procedure, mediation and negotiation: party autonomy, flexibility of procedure, confidentiality, enforceability, impact on relationship with conflict party, sustainability of the conflict resolution, material quality of the solution, duration of procedure, direct and indirect procedure costs. This could be the first part of the conflict resolution assessment.

The second part of the conflict resolution assessment could be to evaluate the suitability of the individual conflict in relation to the available dispute resolution mechanisms. The following issues could be considered in evaluating the material *suitability of a conflict for mediation*:

- Nature of the conflict;
- Possibility of a consensual solution;

- Reasonable and desired success/outcome;
- Methods already tried to solve the conflict;
- Probable costs of different procedures to solve the conflict;
- Probable duration of different procedures to solve the conflict including the consideration of a failure of the procedure tried;
- Importance of an on-going relationship with the conflict party/parties;
- Importance of control over the conflict solution;
- Extent to which communication problems have contributed to the conflict;
- Desire to solve further problems in connection with the conflict.

3. Examples

a) Family Mediation

The first example of a conflict that is well suited for mediation is the breakdown of a family. Wife and husband have been married for 12 years with three children aged 10, 8 and 2. One of them has found a new partner and considers moving out of the family home into a new home with the partner. One question is whether the three children stay in the old family home, move into the new home or are split up. Closely connected to this issue are the question of the allocation of the child custody rights and the problem of how exactly visiting rights for the other spouse should be designed. These questions cannot, however, be separated from other open points. Depending on the child custody rights, monetary consequences have to be considered. The spouse taking care of the children might not be in a position to earn enough income and, as a result, might require support for him/herself and the children. The spouse that is left behind is hurt and might be tempted to express the hurt feelings by going into a court battle over the custody rights. The children are suffering under the separation and the spouses are exhausted by the situation in limbo. While both spouses do not see a potential reunion for their marriage, they share a lively interest in the well-being of their children.

This classical divorce conflict is suited for mediation for a variety of reasons. Just to name a few: Mediation is flexible in terms of timing and procedure. Hence, it allows the parties to discuss possible solutions, go into discussions between one party and the mediator only in times of conflict escalation and use various forms of communication, such as mediation sessions, email exchanges, consultation with their lawyers and short phone conversations. Party

autonomy allows the parents to search for the solution they feel best fits the needs of their children instead of giving the decision away to a court that needs to decide on the basis of the court file, oral hearings and expert statements. The same is true for the monetary solution. Instead of the one option offered by statutory law, the parties might find a more creative solution that would allow keeping the family home as a continuing basis for the children instead of selling it. Also, mediation offers the chance of finding a sustainable and relatively quick solution that will bring lasting peace to the family instead of a court battle that might continue for years.

b) Commercial Mediation

The second example of a dispute which could well be solved by mediation plays in the commercial arena. A middle-sized family company is in the process of transferring the reign from the older to the younger generation. Both, the daughter and the son are already part of the board of directors. Their father is a director as well, but has expressed the wish to leave the management soon due to health reasons. His daughter and son have never worked together smoothly, but in recent weeks the conflict has escalated to a degree that both, son and daughter, threaten to leave the company completely. While the son prefers a more risky, but also potentially more rewarding expansion, the daughter proposes a more conservative strategy. The conflict has become apparent to customers of the company who are getting mixed messages from the different directors and are wondering whether the company is still a good business partner. The father worries about the desired retirement, since selling the company is not an option. This would be a breach of the long-standing family tradition and would – at least at the moment – probably not bring fair value.

There are many reasons why this conflict might be much better placed in a mediation than in a court proceeding. The open structure of mediation allows dealing with the two dimensions of this conflict: the family dimension and the business dimension. In a court proceeding, only the business dimension would be fought through. A purely rights based approach, i.e. a court proceeding based on company and commercial law, limits the number of possible solutions. The shareholders could exert their control rights and determine the future directors, but this might be impossible to reconcile with the family interest to keep the business within the family members. A multi-year shareholder/director court proceeding might further diminish the market value of the company. Mediation instead might open the possibility to formulate, e.g., a

value and strategy code on the basis of which son and daughter can work together. Of course other solutions are also possible. For example, one child could leave the family business to start something new with the help of the others, thereby allowing the company to be handed on to the other child. This would allow the interests of the father to be realised and be a solution that is both sustainable and in line with family values.

III. EU Mediation Directive

1. Overview

In the European Union "Directive 2008/52/EC of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters" (in the following: *Mediation Directive* or just Directive) provides a framework for cross-border mediation. The Mediation Directive dates from 21 May 2008, has been in force since 13 June 2008 and requires the European Member States (except Denmark) to implement the necessary laws, regulations and administrative provisions by 20 May 2011 at the latest.

The Mediation Directive covers the following topics:

- Scope of application (Art. 1 – 3);
- Quality of mediation (Art. 4);
- Courts and mediation (Art. 5);
- Enforceability of agreements resulting from mediation (Art. 6);
- Confidentiality (Art. 7);
- Effect of mediation on limitation and prescription periods (Art. 8);
- Information on Mediation (Art. 9 – 10).

The extent and the precise nature of the Articles of the Mediation Directive reflect the different regulatory approaches of the Member States and the fact that mediation as a dispute resolution mechanism is still in the process of development. Some Articles contain concrete and hard rules for the Member States to transpose into their national laws, such as Art. 6 on the enforceability of settlement agreements developed in mediation or Art. 7 on confidentiality. Other Articles are formulated rather softly and express rather a desire than clear rules to implement, such as Art. 4 on ensuring the quality of mediation and Art. 5 on the relationship between court proceedings and mediation. Finally, some issues are not directly dealt with by the regulatory part of the Directive at all, for example the liability of mediators or the regulation of professional mediator associations.

2. Scope of Application

The application of the Mediation Directive is restricted in three general ways. *Firstly*, only *mediation* as defined in Art. 3 is covered. The definition in Art. 3(a) reads:

> "Mediation means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator."

In line with the functional definition offered above and according to Art. 3(b):

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

Secondly, the Directive only applies to *civil and commercial matters* and excludes rights and obligations which are not at the *parties' disposal* under the relevant applicable law (Art. 1(2)). If, for example, the applicable Member State law requires a court decision for the divorce as such but allows for private autonomy in other fields of family law, such as the pecuniary effects of a divorce, only the latter is dealt with in the Directive.

Thirdly, the Directive only applies to *cross-border disputes* as defined in Art. 2. This is a dispute in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which (a) the parties agree to use mediation after the dispute has arisen; (b) mediation is ordered by a court; (c) an obligation to use mediation arises under national law; or (d) for the purposes of Article 5 an invitation by a court to use mediation or attend an information session is made to the parties. While the Directive only applies to cross-border disputes, it does not restrict the Member States to enact laws that cover cross-border as well as purely national mediations. Generally, one set of rules for national and international mediations is desirable, as this fosters the understanding and practice of mediation and avoids arbitrarily different regulation.

3. Quality of Mediation

Ensuring the quality of mediation is certainly a policy all Member States would subscribe to. However, there are different opinions within the European Union whether the *market* or the *state* is best equipped to do so. As a consequence the Mediation Directive reflects the common aim without prescribing concrete measures to the Member States. Art. 4(1) requires the

Member States to encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services. A good example is the *European Code of Conduct for Mediators* (http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf) to which some mediators and mediation organisations commit themselves in their mediation practice. Art. 4(2) additionally requires the Member States to encourage the training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties. But again, the Directive does not specify how this "encouragement" should exactly look like.

4. Courts and Mediation

The difficult *relationship between court proceedings and mediation* is dealt with in Art. 5 of the Mediation Directive. Accordingly, the court can invite the parties to use mediation in order to settle the dispute or to attend an information session on the use of mediation. Hence, the Directive does not go so far to implement compulsory mediation orders by the courts within the European Union. Instead it gives priority to party autonomy and the principle of voluntariness. However, Art. 5(2) of the Directive expressly does not keep the Member States from making the use of mediation compulsory, from developing incentives to use mediation or from imposing sanctions for not using mediation. Certainly, such measures may not prevent the parties from exercising their right of access to the judicial legal system. Examples for incentives and sanctions used in the Member States are: binding court orders to try mediation (Norway), financial assistance to use mediation (Austria: family matters) or possible cost sanctions for rejecting mediation without a good reason (United Kingdom).

5. Enforcement of Mediation Settlements

Agreements resulting from mediation have a higher chance of performance compared with court decisions. Mediation settlements are based on party autonomy instead of an authoritative third party ruling. That means parties only agree if they really want the solution, hence the higher performance rates. Also, mediation settlements are rather apt to taking into account financial difficulties of the parties. Still, it might be necessary for the parties to *create an en-*

forceable agreement. This might be the case if the obligations agreed on are far in the future or if the parties have specific financial or emotional security needs.

According to Art. 6 Mediation Directive the Member States have to ensure that the content of a written agreement resulting from mediation can be made enforceable with the consent of the parties. This requires the content of the agreement not to be contrary to the law and to be enforceable under the law of the Member State where the request is made. The Directive leaves some choice of the competent institution (court or other competent authority) and form (judgement, decision or authentic instrument) to the Member States. Additionally, the *general rules on cross-border and national enforcement* apply. Hence, if a mediation agreement leads to a settlement in court, it is enforceable under the national rules and Art. 58 Brussels I (Regulation 2001/44/EC). If a mediation agreement is fixed as an authentic instrument, it is enforceable under the national rules on such instruments and Art. 57 Brussels I.

6. Confidentiality

The willingness of the parties to *disclose information* which then forms the basis for a solution favourable to all involved in the conflict is *key to the success* of mediation. The caucus, that is the discussion between the mediator and only one party, is employed to offer an opportunity to convey sensitive information which the mediator may use to develop solution scenarios. Statutory and contractual confidentiality rules intend to avoid that the parties are overly reluctant to disclose information out of fear that the information might be used against them in subsequent court or arbitration proceedings.

According to Art. 7(1) Mediation Directive the Member States have to ensure that neither the mediators nor those involved in the administration of the mediation process (translators, legal counsel, experts, etc.) shall be compelled to give evidence in judicial proceedings or arbitration regarding information arising out of or in connection with a mediation. This shall not apply if the parties agree otherwise, where public policy so requires or where disclosure is necessary in order to implement or enforce the mediation settlement. Art. 7(2) allows Member States to enact stricter measures to protect the confidentiality of mediation. Such measures could be rules that limit the rights of the parties to testify and introduce evidence in court proceedings.

7. Suspension of Limitation and Prescription Periods

Art. 8 Mediation Directive demands the Member States ensure that parties who choose mediation to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process. Hence, similarly to the confidentiality rules the parties shall be equipped with a legal *framework* in which they can concentrate on the search for mutually beneficial solutions *without the worry of suffering disadvantages* from the mediation attempt.

8. Information

At the moment, mediation does not achieve its potential in Europe since the relevant groups – especially judges, lawyers, in-house counsel and, of course, the parties themselves – often take their decisions under a *lack of information* about its characteristics, potential, requirements and practical implementation. In order to solve this information deficit, Art. 9 of the Mediation Directive requires the Member states to encourage the availability to the general public, particularly on the Internet, of information on how to contact mediators and organisations providing mediation services. In addition, Art. 10 of the Directive asks the Commission to make publicly available information on the courts and authorities competent to make mediation agreements enforceable cross-border.

IV. Mediation in the EU Member States

1. Development and Legal Evolution of Mediation

Mediative techniques have been used in Europe for many centuries. The *institutionalisation of mediation* as a mechanism of dispute resolution in the European Member States, however, dates back only a few decades, in some cases only a few years. Hence, mediation as a method of dispute resolution is still developing and legislatures are in the middle of the process of establishing adequate rules. Some Member States have embraced mediation longer or quicker than others, for example the United Kingdom and the Netherlands. They offer valuable insights on the success factors for mediation as an institution as well as in the individual case. Other Member States have a rather short history of mediation legislation, but have prepared their rule-making by extensive comparative research and exchange with stakeholder groups, for example Austria and Germany. The preparatory works of these Member States are a good knowledge source for the state of the art of mediation regulation.

The larger picture of the evolution of mediation regulation in the European Union shows a trend towards a more extensive and more intensive regulation. A strong regulatory impetus has emanated from the Mediation Directive. Many Member States reacted by not only regulating *cross-border mediations* as required, but extended their law reforms to cover purely *national mediations* as well. Member States that have come forward with a comprehensive reform of mediation law since June 2008, when the Mediation Directive came into force, are, for example France, Germany, Greece, Italy and Spain. The development towards more intensive regulation of mediation seems to follow the example in the USA, the pioneer jurisdiction of mediation, which has seen a regulatory increase over the years.

2. Comparison of Mediation Laws and Different Legal Cultures

Comparative knowledge on regulatory approaches of other jurisdictions promises to be helpful since almost all countries *share the same goals as regards mediation*. They have been presented above and shall only be summarised here: Mediation promises sustainable and just solutions, a flexible procedure that strengthens the parties personally and socially as well as savings for the parties and the state in terms of costs and time. In addition, the comparison of

laws is also promising since all European Member States and many countries across the world share the core functional definition of mediation presented above.

However, it is to be noted that *best practices* cannot be transferred without a closer second look from one jurisdiction to another. Firstly, even within the European Union mediation is spread differently throughout the Member States. In the Netherlands or the United Kingdom, for example, mediation has become an accepted and essential part of the system of conflict resolution. The 2011 study of the Netherland Mediation Institute (NMI) "*De stand van Mediation in Nederland*" estimates that a total of 51,690 mediations have been conducted by persons affiliated with the NMI in the year 2011. Reports from Bulgaria, on the other hand, convey that mediation is still in its infancy stage with a few 100 mediations per year.

Secondly, the *legal and cultural environment* in which mediation is developing can differ substantially between jurisdictions. A good example is the average duration of litigious cases before the first instance courts. According to data published by the European Commission for the Efficiency of Justice in 2010 for the year 2008 the average duration of litigious cases in civil and commercial matters at first instance courts was the following: in Austria 129 days, in Norway 148 days, in Poland 166 days, in Hungary 170 days, in France 286 days, in Spain 296 days, in Portugal 430 days and in Italy 533 days. As a consequence, parties in a dispute and in need of a fast resolution might be more inclined to try out-of-court resolution procedures in Italy than in Austria.

3. Regulatory Approaches

The *regulatory approaches* as regards mediation *differ substantially* in Europe and beyond. This can be explained with the young regulatory history, the differing acceptance rates and the flexible nature of mediation that – in certain aspects – goes beyond the law. The different regulatory approaches start with the question whether, and if so, to which degree mediation needs state regulation in the first place.

Some countries, such as Austria, have opted for a *high regulatory density*. Arguments for this approach are consumer protection, the need for state promotion of mediation, legal certainty and the necessity to draw a line between mediation and professional legal services. The Austrian Civil Mediation Act (Zivilrechts-Mediations-Gesetz) contains detailed rules on a Media-

tion Advisory Council, a register of mediators, the rights and duties of registered mediators, the suspension of limitation periods, education institutions and the education of mediators. In addition a Regulation on the Training of Mediators (Zivilrechts-Mediations-Ausbildungsverordnung) lists in detail the contents of the education for registered mediators.

In contrast, other countries, such as the United Kingdom and the Netherlands, prefer *very few legislatory stimuli*, if at all, in order to avoid suffocating the creativity and flexibility needed for a discipline that is still developing. The English Civil Procedure Rules, for example, are limited to just a few rules, e.g. on costs. Important issues such as the course of the mediation procedure, as well as the education of mediators and the regulation of the mediation profession, are left to private associations and the self-regulating forces of the mediation market.

A third group of countries tries to solve the tension between the voluntariness of mediation and the abuse of freedom by some market actors through *selected regulation*. The first drafts of a new German Mediation Law (Mediationsgesetz) were heading in this direction. However, in recent times there have been discussions to add more regulation on the education of mediators similar to the Austrian model.

A comparative view reveals that the success of mediation is not clearly linked to a certain regulatory approach. Mediation has found success in jurisdictions with a less intensive regulatory approach (e.g. the Netherlands and the United Kingdom) as well as in jurisdictions with more intensive regulation (e.g. the USA). However, comparative research has revealed success factors which help mediation reach its potential. These are summarised in the following part.

4. Success Factors

a) Costs and Time

In sum, mediation offers potential *cost and time advantages* compared with other dispute solution mechanisms. Just to name one example, the study "Legal Aid and Mediation for People Involved in Family Breakdown (2007)" of the National Audit Office (UK) has collected statistical data for family disputes in the years 2004 to 2006. According to the study the costs of mediation were on average £ 752, while court proceedings accounted on average for more

than twice as much, namely £ 1,682. Under the condition that the state provides financial assistance for mediation as well as for court proceedings this meant aggregate costs of ca. £ 74,000,000 for the taxpayer caused by not using mediation in appropriate cases. In addition, the mediations covered by the study were more time efficient than court proceedings. On average the mediations were conducted over a time span of 110 days, whereas the court proceedings lasted 435 days.

b) Institutional Integration of Mediation

Traditionally most, if not all, European conflict resolution laws are focused on conflict resolution by the courts. While court proceedings are certainly a very valuable and important part of dispute resolution, the future challenge is to build dispute resolution institutions that guide the disputes to those solution mechanisms that are best suited to solving the individual dispute. For some conflicts that is the court, for others mediation, again for others arbitration or an ombudsman procedure. Part of this challenge is to devise a structure that *channels disputes to the best suited procedure* at the entry stage, that is when the parties realise that bilateral negotiation will not lead to a solution. Also, the institutional conflict structures have to make sure that disputes are transferred to another mechanism when the parties choose the "wrong door" at the entry stage. For example, legislatures have to devise mechanisms to transfer a dispute to mediation, if the parties wrongly end up in court instead of in mediation.

A good example for integrating mediation institutionally can be found in the Netherlands. Incoming cases there are screened by the judges as regards their suitability for mediation. In order to do this all judges have been trained for one or two days to become familiar with mediation. The judges receive the necessary specific information for each case especially through a short questionnaire which the parties receive at the start of the civil court procedure. The questionnaire asks the parties questions which will reveal so-called mediation indicators. Mediation indicators are facts related with the dispute that indicate whether mediation is likely to be successful and will offer a better solution to the conflict than a litigious court decision. If the court considers a case to be suitable for mediation, it will issue a proposal to the parties to try mediation.

c) Enabling Mediation Law

While comparative research does neither show a clear preference for intensive nor for reluctant regulation and different legal cultures and development stages of mediation have to be considered, some enabling rules are often helpful. Firstly, these rules are to be found in the category of rules that provide those involved in mediation with a *reliable framework* without negatively limiting the flexibility and voluntariness of mediation. Examples, most of which have been dealt with above, are: reliability of mediation clauses, securing confidentiality of mediation, avoiding disadvantages due to limitation and prescription periods and allowing for the enforceability of agreements resulting from mediation. Secondly, regulation can be helpful to put mediation on an equal footing, so that it can reach its potential similar to other dispute resolution mechanisms such as court proceedings. Examples are rules on the institutional integration of mediation, especially those which regulate differentiated entry and transfer procedures which make sure that conflicts are dealt with by adequate conflict resolution mechanisms.

d) Information of Stakeholder Groups

The experience of many pilot mediation schemes throughout Europe is that many stakeholders suffer under information deficits as regards the adequate choice of dispute resolution mechanisms. Stakeholders are not only the parties of a conflict, but all those who professionally or institutionally are part of dispute resolution services, namely lawyers, judges and in-house legal counsel. Information does not mean twisting someone's arm. Instead, what is necessary is a *more thorough understanding of the advantages and disadvantages of the many conflict resolution mechanisms* and how to allocate individual conflicts to the mechanism suited best. The Mediation Directive is certainly right to require information action in Art. 9. However, in most European Member States activities beyond those required by the Directive are necessary.

e) Impulses to Overcome Information Deficits

Some countries have had good experience with *legislatory impulses to overcome information deficits* and to change encrusted conflict resolution behaviour. One example is a duty for lawyers to discuss the suitability of a non-court related dispute resolution with their clients. Another example is to subsidise the first hour(s) of a mediation session to help the parties reconsider whether the costly court proceeding is really in their best interests. In the long run, many

legislatures will have to answer the question whether a state that subsidises a court infrastructure should also subsidise non-court dispute resolution mechanisms. Some empirical research such as the National Audit Study mentioned above indicates that subsidising mediation might in the end be cheaper than only subsidising courts.

V. Online Information on Mediation and Alternative Dispute Resolution at EU Level

1. European Judicial Network in Civil and Commercial Matters: Alternative Dispute Resolution

- http://ec.europa.eu/civiljustice/adr/adr_gen_en.htm
- Information on ADR institutions and legal rules in the Member States

2. Summaries of EU Legislation: Alternative Dispute Resolution: Mediation

- http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33251_en.htm
- Presents EU legislation on mediation
- Includes background information, e.g. the European Code of Conduct For Mediators

3. European Judicial Atlas in Civil Matters

- http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm
- Information on judicial cooperation in civil matters
- Identifies competent courts and authorities
- Online forms

4. European Commission for the Efficiency of Justice (CEPEJ)

- http://www.coe.int/cepej
- Information and studies on the efficiency and functioning of justice in the Member States

5. Hague Conference on Private International Law

- http://www.hcch.net/index_en.php
- Inter-governmental organisation that develops and services multilateral legal instruments

6. EUR-Lex

- http://eur-lex.europa.eu/en/index.htm
- Free access to European Union law and other public documents

VI. Legal Sources with Relevance for Mediation at EU level and beyond

1. 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 (Official Journal L 136, 24.5.2008, 3 ff.).
2. Regulation 2001/44/EC of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Official Journal L 12, 16.1.2001, 1 ff.).
3. UNCITRAL Model Law on International Commercial Conciliation, A/RES/57/18 (2002).
4. Recommendation R (98) 1 of the Committee of Ministers to member states on family mediation of 21 January 1998.
5. Recommendation Rec (2002)10 of the Committee of Ministers to member states on mediation in civil matters of 18 September 2002, https://wcd.coe.int/ViewDoc.jsp?id=306401&Site=CM
6. Council Directive 2002/8 of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (Official Journal L 26, 31.1.2003, 41 ff.).
7. 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, repealing Regulation 1347/2000 (Official Journal L 338, 23.12.2003, 1 ff.).
8. Commission Recommendation 98/257 of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (Official Journal L 115, 17.4.1998, 31 ff.).
9. Commission Recommendation 2001/310 of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (Official Journal L 109, 19.4.2001, 56 ff.).
10. European Code of Conduct for Mediators, http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf

VII. Bibliography

1. Books and Articles (selection)

Harold Abramson, *Mediation Representation* (2nd edn, 2011).

Nadja Alexander (ed), *Global Trends in Mediation* (2nd edn, 2006).

Nadja Alexander, *International Comparative Mediation: Legal Perspectives* (2009).

Klaus P Berger, *Private Dispute Resolution in International Business – Negotiation, Mediation, Arbitration* (2nd edn, 2009).

Eileen Carroll and Karl Mackie, *International Mediation – The Art of Business Diplomacy* (2nd edn, 2006).

Giuseppe De Palo and Mary B Trevor, *Arbitration and Mediation in the Southern Mediterranean Countries* (2007).

Stephen Goldberg, Frank Sander, Nancy Rogers and Sarah Cole, *Dispute Resolution* (5th edn, 2007).

Jean-Claude Goldsmith, Arnold Ingen-Housz and Gerald H Pointon (eds), *ADR in Business* (2006).

Klaus J Hopt and Felix Steffek (eds), *Mediation – Principles and Regulation in Comparative Perspective* (forthcoming 2012).

Arnold Ingen-Housz (ed), *ADR in Business – Practice and Issues across Countries and Cultures, Volume II* (2011).

Lars Kirchhoff, *Constructive Interventions: Paradigms, Process and Practice of International Mediation* (2008).

Michael McIlwrath and John Savage, *International Arbitration and Mediation – A Practical Guide* (2010).

Nicola Neuvians, *Mediation in Familienunternehmen [Mediation in Family Enterprises]*, Zeitschrift für Konfliktmanagement 2011, 93 – 94.

Gary P Poon, *The Corporate Counsel's Guide to Mediation* (2010).

Felix Steffek, *'Mediation',* in: *Max Planck Encyclopaedia of European Private Law* (2011), on which this article is partly based.

2. Studies (selection)

ADR Center (Rome), *The Cost of Non ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation* (2010),

http://www.adrcenter.com/jamsinternational/civil-justice/Survey_Data_Report.pdf

Council of Europe: European Commission for the Efficiency of Justice, *European Judicial Systems, Edition 2010 (data 2008): Efficiency and Quality of Justice* (2010),

https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1694098&SecMode=1&DocId=1653000&Usage=2

Demolin, Brulard, Barthelemy, *Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union* (2007),

http://ec.europa.eu/civiljustice/publications/docs/costs_civil_proceedings/cost_proceedings_final_report_en.pdf

National Audit Office, *Legal Aid and Mediation for People Involved in Family Breakdown* (2007),

http://www.nao.org.uk/publications/0607/legal_aid_for_family_breakdown.aspx

PWC/Europa-Universität Viadrina Frankfurt (Oder), *Commercial Dispute Resolution – Konfliktbearbeitungsverfahren im Vergleich* (2005),

http://www.europa-uni.de/de/forschung/institut/institut_ikm/publikationen/Studie_Commcercial_Dispute_Resolution_2005.pdf

Vogels, R.J.M., *De stand van Mediation in Nederland* (2011),

http://nmi-mediation.nl/over_mediation/bibliotheek/rapporten_verslagen_en_brieven.php