ENFORCEMENT OF FOREIGN MEDIATION SETTLEMENTS IN THE EUROPEAN UNION

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Summary:

I. THE DIRECTIVE 2008/52/EC ON MEDIATION IN CIVIL AND COMMERCIAL MATTERS: BACKGROUND, GOALS AND SOLUTIONS.

Modern societies are very much linked to the idea of litigation. A hidden rule seems to exist: the more advanced a society is, the more litigation it suffers. This increase in the level of litigation amounts to a sort of "litigation explosion",[1] which puts the whole judicial system under pressure because as the volume of disputes brought before State courts increases, the proceedings become more and more lengthy and the costs incurred by the parties in such proceedings also greatly increase.[2] This development entails growing concerns over whether the level of quality of the judiciary system in Europe can be maintained in the future and the principle of access to justice preserved.[3] Despite budgetary efforts of many years by several European governments in order to improve their justice system,[4] existing figures of litigation reflect the difficult situation that exists

[1] W.K. OLSON, *The Litigation Explosion What Happened When America Unleashed the Law Suit,* Truman Talley Books, New York, 1991.
[2] EUROPEAN COMMISSION, *Green Paper on Alternative Dispute Resolution in Civil and Commercial Law*, Brussels, 19.04.2002, COM(2002) 196 final, p. 7, No 5 (available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0196en01.pdf, accessed 10.03.2014).
[3] Note as regards this concept, W. DAVIS & H. TURKU, "Access to Justice and Alternative Dispute Resolution", (2011) *J. Disp. Resol.* (*Journal of Dispute Resolution*), p. 47, pp. 48-50.
[4] Note EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), *European Judicial Systems. Edition 2010 (data 2008): Efficiency and Quality of Justice*, 2010, pp. 279 ff. (available at: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1694098&SecMode=1&DocId=1653000&Usage=2, accessed 10.03.2014).

in Europe as regards dispute resolution before State courts,[5] and the cost that to litigate before them implies for the parties.[6]

This hard situation can impair the full implementation of the principle of access to justice.[7] That is especially risky in Europe, a truly integrated area, not only because this fact encourages the increase in number of cross-border disputes,[8] but also because all the difficulties so far mentioned tend to be even greater when the claim at stake is cross-border.[9] In an attempt to tackle this difficult situation, support for ADR devices has increased in recent decades in many parts of the world.[10] This trend is also visible in the European Union[11] with special emphasis on mediation. Mediation is broadly considered to be "cost-effective tool(s) that provides increased access to justice"[12] in a much quicker

[5] Statistics refer to 2008, prior to the current financial crisis. Figures for Germany or Ireland are not available in the study of the CEPEJ (*ibid*.) and those related to the UK are not complete. As to Spain, figures of 2011 are available at: GENERAL COUNCIL OF THE JUDICIARY/CONSEJO GENERAL DEL PODER JUDICIAL, *The Spanish Judiciary in Figures 2011. Judicial Statistics*, p. 45 (available at http://www.poderjudicial.es/cgpj/es/Temas/Estadistica_Judicial/Analisis_estadistico/La_Justicia_dato_a_dato/La_justicia_dato_a_dato___ano_2011, accessed 10.03.2014).

[6] Percentages of the total value, available at ADR CENTRE, *The Cost of Non ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation*, Rome, 2010, p. 49 (available at: www.adrcenter.com/jamsinternational/civil-justice/Survey_Data_Report.pdf, accessed 10.03.2014).

[7] Note, C. ESPLUGUES MOTA, "Access to Justice or Access to States Courts' Justice in Europe? The Directive 2008/52/EC on Civil and Commercial Mediation", (2013) *Revista de Processo* 221(July), p. 303, p. 307 ff.

[8] The Netherlands is a good example of this fact. A survey published in 2012 shows a significant increase in the number of cross-border mediations: from around 2,600 in 2010 to 4,200 in 2011. Of them, 44% involved family related conflicts, 22% referred to disputes in the field of employment relations and 19% involved disputes between businesses. Note, A. VAN HOEK & J. KOCKEN, "The Netherlands", in C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe Cross-Border Mediation*, Cambridge, Intersentia, 2014, p. 451.

[9] EUROPEAN COMMISSION, *supra* n. 2, p. 7, No 5. Note, C. ESPLUGUES MOTA, "El régimen jurídico de la mediación civil y mercantil en conflictos trasfronterizos en España tras la Ley 5/2012, de 6 de julio", (2013) XLVI/136 *Boletín Mexicano de Derecho Comparado*, p. 166, p. 167.

[10] S. BARONA & C. ESPLUGUES, "ADR Mechanisms and Their Incorporation into Global Justice in the Twenty-First Century: Some Concepts and Trends", in C. ESPLUGUES & S. BARONA (eds.), *Global Perspectives on ADR*, Cambridge, intersentia, 2014, p. 7 ff.; S. BARONA VILAR, "La mediación: mecanismo para mejorar y complementar la vía jurisdiccional. Ventajas e inconvenientes tras la aprobación de la Ley 5/2012, de 6 de julio, de mediación en asuntos civiles y mercantiles", in J.F. ETXEBERRÍA GURIDI (Dir.), *Estudios sobre el Significado e Impacto de la Mediación: ¿Una Respuesta Innovadora en los Diferentes Ámbitos Jurídicos?*, Cizur Menor, UPV/Kutxa/Thomson Reuters Aranzadi, 2012, p. 29; K.J. HOPT, "Mediation. Eine Einführung", (2010) 74 *RabelsZ* (*Rabels Zeitschrift für ausländisches und internationales Privatrecht*), p. 723, pp. 725 ff. As regards specifically to the US, note, R.A.B. BUSH & J.P. FOLGER, *The promise of mediation: The Transformative Approach to Conflict*, San Francisco, Jossey-Bass, 2004, pp. 7-8.

[11] Note J.M. NOLAN-HALEY, "Is Europe Headed Down the Primrose Path With Mandatory Mediation?", (2012) XXXVII, *N.C. J. Int'L L. & Com. Reg*. (*North Carolina Journal of International Law and Commercial Regulation)*, p. 981, p. 982.

[12] G. DE PALO, A. FEASLEY & F. ORECCHINI, *Quantifying the Cost of Not Using Mediation – A Data Analysis*, European Parliament, Directorate-General for Internal Policies. Policy Department Citizen's Rights and Constitutional Affairs, Brussels, 2010, p. 3 (available at: http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf, accessed 10.03.2014)

and more affordable way for the parties[13] and that, at the same time, "alleviate the burdens on over-crowded court systems"[14] thus improving the efficiency of the judiciary in resolving disputes arising both in domestic and cross-border disputes[15] and making access to justice more effective.

Despite all its benefits and the growing support it receives, the use of ADR devices, mainly of mediation, is still very scarce in Europe. In the EU, the percentage of business disputes referred to mediation is said to range from 0.5% to 2% of the total amount.[16] The situation is deemed even worse in cross-border disputes: mediation is used in less than 0.05% of European business conflicts.[17] These dramatic figures reach another dimension if we take into account that around 25% of all commercial disputes in Europe are left unsolved because citizens refuse to litigate.[18]

The European Commission, like other institutions,[19] accepts the relevance of mediation and at the same time shares the concern regarding the low impact that it still

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[13] N. ALEXANDER, *International and Comparative Mediation Legal Perspectives*, Alphen aan den Rijn, Wolters Kluwer, 2009, p. 49, n. 118. As regards the comparison between mediation and arbitration, note E. CARROLL & K. MACKIE, *International Mediation – The Art of Business Diplomacy*, Alphen aan den Rijn / West Sussex, Kluwer Law International / Tottel Publishing, 2nd ed., 2006, pp. 69-70.

[14] G. DE PALO, A. FEASLEY and F. ORECCHINI, *supra* n. 12, p. 3. An interesting comparative study focused in Germany may be found at: R. GREGER, *Mediation und Gerichtsverfahren in Sorge- und Umgangsrechtskonflikten Pilotstudie zum Vergleich von Kosten und Folgekosten (erstellt im Auftrag des Bundesministeriums der Justiz von Prof. Dr. Reinhard Greger)*, 2010 (available at: http://www.reinhard-greger.de/ikv3.pdf, accessed 11.03.2014). With a much broader scope, note Ch. HODGES, S. VOGENAUER & M. TULIBACKA, *The Costs and Funding of Civil Litigation*, Oxford/Portland, Hart, 2010.

[15] Note, THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT / THE WORLD BANK, *Doing business in a more transparent world*, IBRD/WB, Washington, 2012, p. 56 (available at: http://www.doingbusiness.org/~/media/fpdkm/doing%20business/documents/annual-reports/english/db12-fullreport.pdf, accessed 11.3.2014)

[16] V. TILMAN, *Lessons Learnt From the Implementation of the EU Mediation Directive: The Business Perspective*, Directorate General for Internal Policies. Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Brussels, 2011, p. 4 (available at: http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19584/20110518ATT19584EN.pdf, accessed 09.03.2014).

[17] *Ibid*., p. 4.

[18] *Ibid*., p. 4.

[19] The Council of Europe has stood in favour of mediation since long. See, G. PALAO MORENO, "La mediación y su codificación en Europa: Aspectos de Derecho internacional privado", in J.L. GÓMEZ COLOMER, S. BARONA VILAR & M.P. CALDERON CUADRADO (eds.), *El Derecho Procesal español del Siglo XX a golpe de tango Juan Montero Aroca Liber Amicorum, en homenaje y para celebrar su LXX cumpleaños*, Valencia, Tirant lo blanch, 2012, p. 1339 ff.; G. DE VEL, "Opening Speech", in COUNCIL OF EUROPE, *1st EUROPEAN CONFERENCE OF JUDGES "Early settlement of disputes and the role of judges" (CONF/JUGES (2003) PROCEEDINGS)*,pp. 14-15 (available at: http://www.coe.int/t/dghl/cooperation/ccje/meetings/conferences/litiges/Actes_en.pdf, accessed 11.03.2014); E. BATTISTONI, "Mediation and Conciliation European and International Regulations European Standards", in B. BRENNEUR, *Overview of Judicial Mediation in the World. Mediation, the Universal Language of Conflict Resolution*, Paris, L'Harmattan, 2010, pp. 19-20. Note also, EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ). WORKING GROUP ON MEDIATION (CEPEJ-GT-MED): *Analysis on Assessment of the Impact of Council of Europe Recommendations Concerning Mediation*, Strasbourg 3.5.2007, CEPEJ (2007) 12, p. 23 ff. (available at:

has on citizens' daily lives. Consequently, the Commission has supported for a long time the creation of a flexible and clear legal frame in the field of mediation.[20] Consistently with this goal, the Commission has maintained a longstanding position in favour of increasing the resource to ADR mechanisms in Europe as a way to facilitate full access to justice for citizens in the European Union.[21] This trend finally led to the enactment of Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (hereinafter 2008 Directive).[22]

Mediation is a legal institution that has historically been present in many legal systems of the world and particularly in many countries of Europe.[23] However, specific solutions embodied and the extension of its acceptance vary -and traditionally have varied - from country to country.[24] Additionally, in too many cases mediation overlaps both as regards its definition and regulation with other institutions embodied in European national legal systems, mainly with "conciliation" and "transaction".[25] The enactment of

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https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2007)12&Language=lanEnglish&Ver=original&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6, accessed 09.03.2014).
Also UNCITRAL developed broad activity in favour of mediation which led to the approval of the Model Law on International Commercial Conciliation (available at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf, accessed 10.03.2014). As The Hague Academy of Private International Law has done in the field of family mediation since 2006 until 2009 (Note: http://www.hcch.net/index_en.php?act=search.result, accessed 11.03.2014).

[20] EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), *European…*, *supra* n. 4, p. 290.

[21] Note CONSEIL D'ETAT, *Développer la médiation dans le cadre de l'Union européenne. Étude adoptée par l'Assemblée générale du Conseil d'État le 29 juillet 2010*, Direction de l'information légale et administrative, Paris, 2010, p. 9 ff.; J.M. NOLAN-HALEY, *supra* n. 11, pp. 982-984.

[22] *DO* L 136, of. 24.5.2008. The enactment of a "Directive on Alternative Dispute Resolution (ADR) – mediation" was foreseen for 2006 by No 4.3 of the *Communication from the Commission to the Council and the European Parliament - The Hague Programme: Ten priorities for the next five years. The Partnership for European Renewal in the Field of Freedom, Security and Justice* (COM/2005/0184 final), *OJ* C 236, of 24.9.2005.

[23] Note, F. STEFFEK, "Rechtsvergleichende Erfahrungen für die Regelung der Mediation", (2010) 74 *RabelsZ (Rabels Zeitschrift für ausländisches und internationales Privatrecht)*, p. 841, pp. 842-843; A. DE ROO and R. JAGTENBERG, "ADR in the European Union: Provisional Assessment of Comparative Research in Progress", in L. CADIET (Dir.), TH. CLAY and E. JEULAND, *Médiation et arbitrage. Alternative dispute resolution. Alternative à la justice ou justice alternative? Perspectives comparatives*, LexisNexis Litec, 2005, p. 181; J.M. NOLAN-HALEY, *supra* n. 11, p. 987 ff.

[24] Note K.J. HOPT & F. STEFFEK, "Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues", in K.J. HOPT & F. STEFFEK (ed.), *Mediation Principles and Regulation in Comparative Perspective*, Oxford, OUP, 2013, p. 2.

[25] Consider, Ch. BÜHRING-UHLE, *Arbitration and Mediation in International Business, Alphen aan den Rijn, Kluwer,* 2006, p. 176.

the 2008 Directive reflects the quest to reach a common minimum legal framework in Europe as a necessary tool for enhancing the use of mediation by EU citizens.[26]

The final goal of the 2008 Directive is twofold. On the one hand, the Directive aims to foster recourse to mediation by citizens in the European Union in relation to civil and commercial disputes. That requires the introduction of "framework legislation addressing, in particular, key aspects of civil procedure".[27] On this basis, different key issues are covered and developed by the 2008 Directive: specifically, voluntariness of the mediation, enforceability of the agreement reached by the parties, confidentiality of the mediation and mediation process, and effect of mediation in limitation and prescription periods. Besides, certain rules as to the training of mediators and publicity regarding this institution are also included in the 2008 Directive.[28] Nevertheless, as the 2008 Directive's title makes clear, not all aspects of mediation are covered. It only deals with "certain aspects of mediation in civil and commercial matters". This implies that this framework legislation only covers matters considered to be essential by the EU legislator.[29]

Cross-border litigation has increased steadily in recent years in Europe in accordance with the consolidation of the European unification process. It is obvious that promoting the use of mediation in civil and commercial disputes will directly encourage a growing number of settlements to be reached within cross-border mediation. Consequently, the second goal of the Directive is to ensure the enforceability of the agreement reached in one Member State throughout the EU.[30] Voluntary fulfillment of settlements reached is said to be high. Nevertheless, as the number of mediations rises, an increase in the amount of litigation that arises from mediation seems "inevitable"[31] and multiple different reasons may encourage this situation.[32] In a purely ideal scenario, no reference to any law or private international law rule should be made insofar as the settlement reached by the parties would be honoured on a voluntary basis. Nevertheless the Directive seems to be more realistic than that, as it wants to stress that mediation is

[26] P. PHILLIPS, "European Directive on Commercial Mediation: What It Provides and What It Doesn't", in A.W. ROVINE (ed.), *Contemporary Issues in International Arbitration and Mediation. The Fordham Papers 2008*, Leiden, M. Nijhoff, 2009, p. 311.
[27] Recital 7, 2008 Directive.
[28] A general approach to these principles may be found at: consider S. BARONA VILAR, *Mediación en asuntos civiles y mercantiles en España*, Valencia, Tirant lo Blanch, 2013,p. 157 ff.
[29] PH. BILLIET and E. KURLANDA, "An Introduction to the Directive on Certain Aspects of Mediation in Civil and Commercial Matters", in Association for International Arbitration (A.I.A.) (ed.): *The New EU Directive on Mediation. First Insights*, Maklu, Apeldoorn, 2008, p. 21.
[30] Recitals 19 & 20, 2008 Directive.
[31] E. SUSSMAN, "Final Step: Issues in Enforcing the Mediation Settlement Agreement", in A.W. ROVINE (ed.), *supra* n. 26, p. 344.
[32] *Ibid*., p. 344.

not a second class justice device and, therefore, considers it necessary to ensure the enforcement of the agreement reached.[33] This approach is sound, taking into account the growing litigation in relation to mediation that exists in other jurisdictions.[34]

II. THE COMMON LEGAL FRAMEWORK DESIGNED BY THE 2000 DIRECTIVE REGARDING CROSS-BORDER MEDIATION.

1. Introduction.

Most of the EU Member States have upheld the possibility offered by the Directive[35] to develop a common legal system for internal and cross-border mediation. The choice to foster this "monistic" approach instead of drafting two separate legal regimes for domestic and cross-border mediation –the "dualistic" approach-[36] has usually been based on different grounds, for example the unreasonable fragmentation of the law on mediation, the unequal treatment to which this fragmentation would lead,[37] or the unjustified restriction of the number of cases which could consequently benefit from mediation.[38]

The analysis of EU national legislations shows that irrespective of whether a monistic or dualistic approach has been supported by the legislator, some Member States now enjoy rules specifically designed to deal with cross-border mediations (the UK or the Netherlands - countries which take a dualistic approach - or Greece, Portugal and Spain, which support a monistic one).

Whereas, other countries that take a monistic approach have not drafted any specific rules on cross-border mediation and they have simply opted to apply the general mediation legal framework enacted with the implementation of the Directive to both internal and cross-border mediations indiscriminately. Furthermore, the application of the general regime of mediation to cross-border disputes as well has meant in many cases that this general regime governs internal and international – both, EU and purely

[33] Recital 19, 2008 Directive.
[34] Note, J. COBEN & P. THOMPSON,"Disputing Irony: A Systematic Look at Litigation about Mediation", (2006) 11 *Harvard Negotiation Law Review*, p. 43,p. 43 ff.
[35] Recital 8, 2008 Directive.
[36] As regards the meaning of "monistic" and "dualistic" note… C. ESPLUGUES…
[37] U.P. GRUBER & I. BACH, "Germany", in C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe Cross-Border Mediation*, Cambridge, Intersentia, 2014, p. 158; E. GUINCHARD, « France », in C. ESPLUGUES (ed.), *supra*, p. 146.
[38] E. GUINCHARD, *supra* n. 37, p. 145.

international – mediation: e.g. Baltic countries (Estonia and Lithuania),[39] Hungary,[40] Poland[41] or Slovenia.[42] A step further is reached in Portugal where no definition of cross-border mediation is provided and the existing legal system as regards both public and private mediation applies to internal and international mediation.[43]

Moreover, the EU Member States that have specific rules governing cross-border mediation – irrespective of whether they have been enacted within a monistic or dualistic approach - differ as to the scope provided to the legal framework developed.

(a) In many countries the legislation implementing the Directive is limited to purely EU cross-border mediations, thus referring any other mediation to the pre-existing legal regime on mediation. The UK[44] and the Netherlands[45] are good examples of this situation.

(b) On the contrary, other countries -e.g. Bulgaria,[46] Finland, [47]Greece,[48] Italy[49] or Luxembourg-[50] refer the legislation enacted to both internal and purely EU cross-border mediation. That is of the types of cross-border mediation, only EU cross-border mediation is explicitly covered, whereas a grey area exists for non-EU cross-border, insofar as no solution is provided in relation to them.

(c) Conversely, other countries implementing the Directive have explicitly granted a broader scope of application to the legislation enacted, thus covering both EU and non-EU mediation: Spain[51] or Cyprus.[52]

This picture shows the existence of relevant differences between the several EU Member States regarding the transposition of the 2008 Directive. A *chiaroscuro* final picture may be ascertained. Implementation of the 2008 Directive has put mediation on the legal agenda in many countries. Much has been done but at the same time many issues seem to still remain open, mainly regarding cross-border mediation. The 2008 Directive is silent on very many important issues affecting

[39] V. NEKROŠIUS & V. VĖBRAITĖ, "Baltic Countries", in C. ESPLUGUES (ed.), *supra* n. 14, p. 1.
[40] V. HARSÁGI, C. GERGELY & N. ZOLTÁN, *supra* n. 907, pp. 201-202.
[41] M. ZACHARIASIEWICZ, "Poland", in C. ESPLUGUES (ed.), *supra* n. 14, p. 275.
[42] R. KNEZ & P. WEINGERL, *supra* n. 935, p. 399.
[43] D. LOPES, *supra* n. 389, p. 309.
[44] Section 8(b) of the Cross-Border Mediation (EU Directive) Regulations 2011, clearly states that '"cross-border dispute" has the meaning given by article 2 of the Mediation Directive;…". The same solution is found at Section 2 (1) of the The Cross-Border Mediation (Scotland) Regulations 2011 which states: `"relevant cross-border dispute" means a cross-border dispute to which the Directive applies.' E.B. CRAWFORD & J.M. CARRUTHERS, "UK", in C. ESPLUGUES (ed.), *supra* n. 37, p. 464. In fact no specific regulation as regards fully international mediations is said to exist in the UK (*Ibid*., p. 464).
[45] A. VAN HOEK & J. KOCKEN, "The Netherlands", in C. ESPLUGUES (ed.), *supra* n. 37, p. 444.
[46] N. NATOV, B. MUSSEVA & V. PANDOV, "Bulgaria", in C. ESPLUGUES (ed.), *supra* n. 14, p. 57.
[47] L. SIPPEL, "Scandinavian Countries", in C. ESPLUGUES (ed), *supra* n. 14, p. 362.
[48] V. KOURTIS, "Greece", in C. ESPLUGUES (ed), *supra* n. 14, p. 184.
[49] I. QUEIROLO & CH. GAMBINO, "Italy", in C. ESPLUGUES (ed.), *supra* n. 14, p. 222.
[50] S. MENÉTREY, "Luxembourg", in C. ESPLUGUES (ed.), *supra* n. 14, pp. 255-256.
[51] J.L. IGLESIAS BUHIGUES, G. PALAO MORENO, R. ESPINOSA CALABUIG & C. AZCÁRRAGA MONZONIS, *supra* n. 746, p. 421.
[52] A.C. EMILIANIDES & N. CHARALAMPIDOU, *supra* n. 581, p. 105.

cross-border mediation. It is very much focused on ensuring the enforcement of settlements reached in a foreign mediation. Nevertheless the rules provided in this respect are very limited - they basically consist of Article 6.

In general terms, the Directive has been successful in raising a general awareness of the necessity of ensuring the free circulation of settlements arising out of mediation in the EU. The institution is now in the legal arena. Nevertheless, this growing concern has not been accompanied by the designation of a comprehensible and clear common legal framework for cross-border mediation in the Member States. Certainly before the enactment of the Directive, no Member State had rules on cross-border mediation and these rules now exist in some of them. However, where rules have been enacted the scope of the legal framework designed is usually limited and solutions provided tend to differ from country to country.[53]

As stated, mediation is not yet a widely used instrument in Europe.[54] In this situation of growing cross-border litigation and of a foreseeable increase in the use of mediation to solve this kind of dispute, the absence of common private international law rules on the institution in the EU could have negative consequences for citizens and impair achievement of the final objectives of the Directive.[55] Problems will surely arise in the future and they will be specially complicated in cross-border situations. The Directive itself is silent on very many important issues affecting cross-border mediation and is very much focused on ensuring the enforcement of settlements reached in a foreign mediation. Nevertheless the rules provided in this respect are very limited - they basically consist of Article 6.

Certainly, it could be said that already existing EU legal instruments on private international law and on recognition and enforcement can be useful for accomplishing the goals of the Directive in relation to cross-border disputes. However, there are still many uncertainties and many issues that remain open in the EU Member States in relation to the institution. Furthermore, existing legal instruments are limited in scope and do not always provide for a flexible and comprehensive response to the questions raised.[56]

The legal framework arising out of the implementation of the Directive as regards solutions provided for cross-border mediation in the Member States shows many

[53] C. ESPLUGUES… GENERAL REPORT…
[54] Consider, EUROPEAN COMMISSION, *Business-to-Busines…*, *supra* n. 118.
[55] Note, X. KRAMER, M. DE ROOIJ, V. LAZIĆ *et al.*, *A European Framework for private international law: current gaps and future perspectives,* European Parliament, Directorate-General for Internal Policies. Policy Department C: Citizen's Rights and Constitutional Affairs, Legal Affaris, Brussels, 2012, p. 20.
[56] Recital 20, 2008 Directive.

significant differences and, what is more worrying, a lack of clear responses to some issues that are key for the achievement of the Directive's goals.

Most of the EU Member States have upheld the possibility offered by the Directive[57] to develop a common legal system for internal and cross-border mediation.[58] The choice to do so has usually been based on different grounds, for example the unreasonable fragmentation of the law on mediation, the unequal treatment to which this fragmentation would lead,[59] or the unjustified restriction of the number of cases which could consequently benefit from mediation.[60] Additionally, some Member States have enacted legislation that deals only with cross-border mediation – England and Wales, Scotland and the Netherlands[61] - and in some isolated cases countries have not implemented legislation on cross-border mediation at all – the Czech Republic.[62] There are also examples of countries which considered it not necessary to implement specific legislation, for instance Belgium.[63]

Leaving aside the question of the specific scope awarded to national laws implementing the Directive regarding cross-border mediation, EU national legal systems on mediation are habitually silent as regards the law applicable to the mediation clause or the agreement to mediate in cross-border mediation. In fact, it is said to be a topic that has not been studied very much in many Member States so far.[64] Greece could be an exception to this situation as far as Article 2(b) MA explicitly states as regards the agreement to mediate that "The agreement between the parties to recourse to mediation [...] is to be governed by the substantive law rules on contracts".[65] The existence of a monistic approach would consequently foster the application of private international law rules on contracts to the clause in cross-border situations.

National rules on mediation tend to make the development of the proceeding dependent on the will of the parties in cases of private mediation. As a matter of principle, most legal systems provide some limited and basic rules governing the mediation proceeding[66] and no individual reference to the law applicable to the specific

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[57] Recital 8, 2008 Directive.
[58] See 2.2.3.1. *supra*.
[59] U.P. GRUBER & I. BACH, "Germany", in C. ESPLUGUES (ed.), *supra* n. 14, p. 158; E. GUINCHARD, *supra* n. 783, p. 146.
[60] E. GUINCHARD, *supra* n. 783, p. 145.
[61] xxx
[62] xxx
[63] XXX
[64] E.g. the Netherlands, note A. VAN HOEK & J. KOCKEN, *supra* n. 14, p. 448.
[65] V. KOURTIS, *supra* n. 1829, p. 187.
[66] See 5.1. *supra*.

situation of mediation proceedings in cross-border cases is made. That means that it would be for them to fix the rules of the proceeding, venue, language or seat in accordance with the law of the place where the mediation takes place.[67] In some countries, the parties are considered to be totally free to decide these factors as they wish – as regards out-of-court and court-annexed mediation - since no legislation whatsoever exists on this issue.[68] Other countries tend to apply different legal regimes to out-of-court and court-annexed mediation.[69] The rule on limitation and prescription periods should also come into play irrespective of the nature of the mediation undertaken.[70]

The only limits stressed are those related to the preservation of some basic principles like the maintenance of confidentiality, impartiality, equal treatment of the parties, and so on, in accordance with the law of the seat of the mediation.[71] Because of the monistic position maintained in many EU Member States, these principles are applicable both to internal and cross-border mediations in that country.[72] This is even clearer for court-annexed mediation.[73]

Finally, settlements reached by the parties will deeply vary depending on the specific dispute at stake. In certain cases the agreement will be limited to the detailed factual outcome without any reference to, even any room for, the law. In other cases, it may be necessary to determine the applicable law and here choice-of-law rules may have a role to play in cross-border disputes. Nothing is said as regards the law applicable to the agreement reached in most EU national legislations, in relation to either its existence or content. In fact, there is some debate as to the nature awarded to the formation of the settlement and its admissibility (e.g. in Germany)[74] although seemingly it has a limited practical relevance.[75] As a matter of principle, the response to the question of which law

[67] What this law is and means is something open to interpretation. In some cases it entails a reference to the procedural law of the place where mediation takes place (J.L. IGLESIAS BUHIGUES, G. PALAO MORENO, R. ESPINOSA CALABUIG & C. AZCÁRRAGA MONZONIS, *supra* n. 746, p. 435). No choice of a different or foreign law is said to be accepted, this is the case of Slovakia: note, C. CHOVANKOVÁ, *supra* n. 1865, p. 393. A plain reference to private international law rules may be found in Slovenia: R. KNEZ & P. WEINGERL, *supra* n. 935, p. 409.

[68] Baltic countries, V. NEKROŠIUS & V. VĖBRAITĖ, *supra* n. 1840, p. 34; Bulgaria, N. NATOV, B. MUSSEVA & V. PANDOV, *supra* n. 1827, pp. 73-74; Croatia, D. BABIĆ, "Croatia", *supra* n. 1861, pp. 96-97.

[69] " this should be the law of the place of mediation in case of out-of-court mediation, and the *lex fori processualis* of the court seized with the jurisdiction over a particular subject matter, in case of court-annexed mediation", M. ZACHARIASIEWICZ, *supra* n. 1838, p. 294.

[70] Xxx.

[71] See 5.2. *supra*.

[72] E.g. as regards Hungary, V. HARSÁGI, C. GERGELY & N. ZOLTÁN, *supra* n. 907, p. 210.

[73] Note as regards the UK, E.B. CRAWFORD & J.M. CARRUTHERS, *supra* n. 1821, p. 479.

[74] Note U.P. GRUBER & I. BACH, *supra* n. 1818, p. 174, nn. 54 & 55.

[75] *Ibid*., p. 175.

will govern the formation of the settlement – consent, formal requirements - reached by the parties – which has the condition of an agreement entered into by the parties - should be determined by the law applicable to contractual obligations.[76] Conversely, the law applicable to the content of the agreement is directly dependent on the nature of the dispute at stake and the content of the settlement reached by the parties. Depending on the specific obligations agreed on by them and their nature and legal enforceability, the law applicable will vary. This law will be relevant for the determination of the availability of the rights upon which a claim exists, the formation of the content of the settlement and its admissibility and effects.

The law applicable to the settlement reached by the parties will be determined in accordance with the existing rules of private international law in relation to the merits of the dispute at stake, not those applicable to the mediation - either EU law, or national law in the absence of the former.[77] This is broadly understood as meaning that in those cases falling fully or partially within the scope of the Regulation "Rome I", this Regulation will be applicable to those issues to be settled that are covered by it.[78] Some isolated national case law upholds this possibility.[79] In the case of disputes over family matters or successions, relevant EU instruments on private international law should also be taken into account. Otherwise national private international law rules will apply as regards the determination of the law governing the merits of the settlement, if any such a law exists or is necessary, taking into account the specific settlement reached by the parties. In the case of a settlement embodying a plurality of obligations, this could lead to different private international law rules being referred to and several national systems applied.

III. Enforcement of foreign settlements in the EU.

The settlement reached by the parties is a contract that is expected to be voluntarily honoured by them. In the event of a lack of fulfilment by the parties, the settlement is

[76] Note as regards Spain, J.L. IGLESIAS BUHIGUES, G. PALAO MORENO, R. ESPINOSA CALABUIG & C. AZCÁRRAGA MONZONIS, *supra* n. 746, p. 428.
[77] As to Belgium, M. TRAEST, *supra* n. 1842, pp. 48-49; Italy, I. QUEIROLO & CH. GAMBINO, *supra* n. 1832, p. 239 ff.; the Netherlands, A. VAN HOEK & J. KOCKEN, *supra* n. 14, p. 456.
[78] As regards the Czech Republic, note M. PAUKNEROVA, J. BRODEC & M. PFEIFFER, *supra* n. 1844, pp. 134-135; Italy, note I. QUEIROLO & CH. GAMBINO, *supra* n. 1830, p. 240; Poland, M. ZACHARIASIEWICZ, *supra* n. 1838, pp. 295-296; UK, note, E.B. CRAWFORD & J.M. CARRUTHERS, *supra* n. 1821, p. 479.
[79] In France, note Cour de cassation, Soc., 29.1.2013, n°11-28041 (http://legimobile.fr/fr/jp/j/c/civ/soc/2013/1/29/11-28041/, accessed 3.9.2013). Note E. GUINCHARD, *supra* n. 783, p. 152, n. 51.

unanimously considered in the Member States to be a contract binding on the parties that will have to be ensured through court actions. No direct enforceability is sought as a general rule.

Within the EU legal instruments on recognition and enforcement, a single reference to the direct enforcement of settlements reached in the framework of a mediation proceeding may be found at Article 55(e) of Regulation 2201/2003 in relation to the cooperation between central authorities in matters of parental responsibility. The provision states that central authorities shall, upon request from a central authority of another Member State or from a holder of parental responsibility, cooperate in specific cases to achieve the purposes of this Regulation. To this end, they shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to: "facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end." Consistently therewith, Article 46 of Regulation 2201/2003 explicitly states that "agreements between the parties that are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments."[80]

This facilitative position towards settlement (not necessarily just settlements reached via mediation) is found in other EU Regulations, although no direct enforceability– that is, not endorsed by a public authority - of settlements is foreseen:

a) Article 51(2) of 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 clearly endorses the obligation of the central authorities to take all necessary measures in order "to encourage amicable solutions with a view to obtaining voluntary payment of maintenance, where suitable by use of mediation, conciliation or similar processes".[81] Article 45(a) allows the provision

[80] Note Recital 21, 2008 Directive: "Regulation (EC) No 2201/2003 specifically provides that, in order to be enforceable in another Member State, agreements between the parties have to be enforceable in the Member State in which they were concluded. Consequently, 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."

[81] See also Article 34 of the 2007 Hague Convention on the international recovery of child support and other forms of family maintenance: "Contracting States shall make available in internal law effective measures to enforce decisions under this Convention. Such measures may include […] the use of mediation, conciliation or similar processes to bring about voluntary comp*liance*".

of legal aid in order to cover "pre-litigation advice with a view to reaching a settlement prior to bringing judicial proceedings".[82]

b) Article 8 of Regulation 650/12 on successions[83] also manifests the obligation of the court which has started succession proceedings of its own motion under Articles 4 or 10 to close them "if the parties to the proceedings have agreed to settle the succession amicably out of court in the Member State whose law had been chosen by the deceased pursuant to Article 22". The Regulation cannot be an argument to prevent the parties from settling the succession amicably outside court, "for instance before a notary, in a Member State of their choice where this is possible under the law of that Member State. This should be the case even if the law applicable to the succession is not the law of that Member State."[84]

A similar positive attitude towards mediation - and also to the enforceability of the settlement achieved by the parties - is envisaged in some Hague Conventions to which several EU Member States are parties, to which references has already been made.[85]

The direct enforceability of the settlement reached by the parties within a mediation proceeding is usually made dependent on its homologation by a public authority, generally notaries or judges. In addition, the possibility of having the agreement embodied in an arbitral award is available. For the settlement to be enforceable, its homologation by these authorities will be necessary. This is a general rule in the EU, although, the authorities that can grant this homologation vary from country to country. In some cases the judge,[86] in some other the judge and other public authorities.[87]

This fact is very relevant in cross-border disputes in relation to agreements entered into in an EU Member State for which enforcement is sought abroad. As a matter of fact, only settlements that are considered enforceable in the country of origin will be recognised and enforced abroad. Logically, the legal regime applicable to this recognition will vary if the enforcement is sought in another EU Member State or outside the EU.

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[82] Note Recital 4, 2008 Directive.
[83] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4.7.2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, *OJ* L 201, of 27.7.2012.
[84] Recital 29, Regulation 650/12. Note Recital 36 regarding parallel out-of-court settlements developed in different EU Member States.
[85] See 3.1.1.3.1. *supra*.
[86] xxxx
[87] xxxx

And of course, a different situation will exist when recognition of settlements reached outside the EU is sought in a specific EU Member State. Additionally, a different legal regime will exist in relation to those settlements that are finally embodied in an arbitral award.

1. Recognition and enforcement of a settlement reached in an EU Member State in another Member State

Enforcement of foreign settlements is broadly made dependent on the participation of national courts. No direct enforceability is envisaged as a general rule. An isolated exception to this position is found in Portugal, where Article 9(4) of Act 29/2013 recognises direct enforceability – "without the necessity of homologation by the court"[88] - of the settlement reached via a mediation in another EU Member State "which respect letters a)[89] and d)[90] of paragraph 1 of this Article in so far the legal rules of that State grants it enforceability". The provision is fully in line with Article 6 of the 2008 Directive.[91]

Leaving aside this unique case, as regards the recognition and enforcement in one Member State of a settlement reached in another Member State, there are two options depending on whether or not an EU legal instrument exists that covers the subject matter of the dispute and taking into account the specific legal instrument in which this settlement has been embodied.

A. Existence of an EU legal instrument

In the case of settlement reached in a certain EU Member State enforcement of which is sought in another Member State, the object and content of the settlement will be decisive in making applicable any of the existing EU instruments on recognition and enforcement

[88] Article 9(1) Act No. 29/2013.
[89] The dispute can be submitted to mediation and no homologation for the settlement reached is necessary in accordance to the law.
[90] The content of the settlement is not against public policy.
[91] Consider Recital 22, 2008 Directive. Note D. LOPES, *supra* n. 389, p. 333. Prior to the enactment of the new CPC in 7.2013 this solution was said to refer not only to settlements reached in another EU Member State but also, on the basis of Article 46/c CPC to those entered into outside the EU. This possibility does not exist any longer. The enforcement of settlements from outside the EU is not so easy any more: the new CPC of 2013 has eliminated Article 46/c and private documents are no longer enforceable. There is no correspondent article in the new CPC.

of foreign judgments. Indirect reference to these instruments and any existing international convention is made in some EU Member States, e.g. Portugal[92] and Spain.[93]

The settlement reached by the parties on a topic covered by the existing EU legal instruments on recognition and enforcement of judgments which is embodied in a judgment, an authentic instrument –e.g. a notarial deed- or a court-settlement which are enforceable in accordance to the law of the country where these instruments have been rendered will be subject to the flexible system designed by the EU in this area. As previously stated, the enforceability of the agreement reached by the parties is, as a general rule, subject to its homologation by a public authority – e.g. a judge or notary - in the Member States.[94] Therefore in most cases the settlement reached will be embodied in any of these instruments and, consequently, will be subject to the existing Regulations on recognition and enforcement if they fall within their scope.

These regulations are essentially Regulation 44/2001 and Regulation 2201/2003, to which the Directive itself refers.[95] But also of relevance are Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims,[96] 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,[97] and even Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.[98] In addition, any future text to be enacted will be applicable: this reference to the texts to come is relevant insofar as some instruments on the economic aspects of marriage[99] and partnership[100] are in the pipeline in Brussels.

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[92] Article 9(4) Act No. 29/2013.
[93] Article 27(1) MA.
[94] See 6.3.4. *supra*.
[95] Recital 20, 2008 Directive.
[96] *OJ* L 143, of 30.4.2004.
[97] *OJ* L 7, of 10.1.2009.
[98] *OJ* L 201, of 27.7.2012.
[99] Note, Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes COM(2011) 126/2, Brussels, 16.03.2011, 2011/xxxx (CNS) (available at: http://ec.europa.eu/justice/policies/civil/docs/com_2011_126_en.pdf, accessed 27.8.2013).
[100] Note, Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM(2011)

If the settlement reached by the parties is fully or partially covered by any of these EU texts or any other that could be enacted by the EU, they will be applied and a full or partial recognition of the settlement will be granted. It is relevant at this point to remember that availability of rights in some areas of law – e.g. family law - is under discussion in some Member States and that this may entail its lack of enforceability in the country of origin.

The general framework created by these instruments would satisfy the mandate of Article 6 of the 2008 Directive. In fact the enforceability would be seemingly granted in more flexible and broader terms than those foreseen in Article 6(1) *in fine* of the 2008 Directive.[101] The reference made by this provision to the agreement reached by the parties as being "contrary to the law of the Member State where the request is made" as grounds for the rejection of its enforceability is restricted by the several Regulations insofar as they combine a general reference to the manifest contradiction with "public policy" with a rule prohibiting review on the substance,[102] thus favouring the circulation of these agreements throughout the EU.

A special situation will exists for settlements reached in mediations in Denmark. Although the 2008 Directive does not apply to Denmark, those settlements that fulfil the conditions set forth in Regulation 44/2001 will be able to circulate in other EU Member States in accordance with this Regulation.[103]

B. Absence of an EU legal instrument

127/2, Brussels, 16.03.2011, 2011/0058 (CNS) (available at: http://ec.europa.eu/justice/policies/civil/docs/com_2011_127_en.pdf, accessed 27.8.2013).

[101] Article 6(1) *in fine*: "… The content of such an agreement shall be made enforceable unless, in the case in question, either the content of this agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability".

[102] Regulation 44/2001 (Articles 34(1) & 36); Regulation 2201/2003 (Articles 22(a), 23(a), 25 & 26) and Regulation 650/2012 (Articles 40(a) & 41). Because of their own nature, solutions provided by Regulations 4/2009 and 805/2004 are even more flexible. Article 42 Regulation 4/2009 prohibits on general grounds - "(U)nder no circumsntances"- the revision of the decision –whatever its origin- given in a MS in the MS where recognition, enforceability or enforcement is sought, and reference to public policy is made as regards the rejection of recognition of decisions given in a MS not bound by The Hague Protocol of 2007 (Article 24(a)). These solutions are also applicable as regards court-settlements and authentic instruments (Article 48). Article 21 (2) Regulation 805/2004 clearly prohibits the revision of the European Enforcement Order as to its substance in the MS where enforcement is sought.

[103] Note Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters of 2005, *OJ* L 299, of 16.11.2005. In the future this will be also applicable to Regulation 1215/2012, in accordance to the same agreement (Note *OJ* L 79, of 21.3.2013).

If the settlement fully or partially falls outside the scope of any of the existing EU Regulations, international conventions and national rules on recognition and enforcement of foreign judgments and decrees existing in every EU Member State would be applicable. In most cases not only judgments but also other authentic documents are covered by these provisions; this is the case for example in Austria,[104] Belgium,[105] Bulgaria,[106] Croatia,[107] Germany,[108] Hungary,[109] Italy,[110] Poland,[111] Portugal,[112] Slovakia,[113] Slovenia[114] or the UK[115]

2. Recognition of settlements reached outside the EU in an EU Member State

As far as EU Regulations on recognition and enforcement refer solely to judgments, authentic documents and court transactions rendered in an EU Member State, recognition and enforcement of settlements reached outside the EU that fall outside the scope of application of the Lugano Convention of 2007,[116] would be governed by the international or national legislation applicable in every Member State in the specific area of law at stake. Because most of the Member States have enacted legislation on cross-border mediation as a consequence of the implementation of the 2008 Directive,[117] the scope of application of this legislation tend to be limited to purely EU cross-border situations and therefore no special rules as regards the recognition of non-EU settlements exist. Logically the general rules on recognition and enforcement applicable in the country where enforcement is sought will apply: this is the situation in Austria,[118] the Baltic countries,[119] Belgium,[120] Croatia,[121] Cyprus,[122] Czech Republic,[123] Germany,[124] Luxembourg,[125] Portugal,[126] Romania[127] and UK.[128]

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[104] U. FRAUENBERGER-PFEILER, "Austria", *supra* n. 1848, p. 23.
[105] M. TRAEST, *supra* n. 1842, pp. 50-51.
[106] N. NATOV, B. MUSSEVA & V. PANDOV, *supra* n. 1827, pp. 75 & 79.
[107] D. BABIĆ, "Croatia", *supra* n. 1861, pp. 99-101.
[108] Only as regards international conventions and not in accordance with German procedure law, note U.P. GRUBER & I. BACH, *supra* n. 1818, pp. 175-176.
[109] V. HARSÁGI, C. GERGELY & N. ZOLTÁN, *supra* n. 907, p. 215.
[110] I. QUEIROLO & CH. GAMBINO, *supra* n. 1830, p. 243 ff..
[111] M. ZACHARIASIEWICZ, *supra* n. 1838, p. 300 ff.
[112] D. LOPES, *supra* n. 389, p. 335.
[113] C. CHOVANKOVÁ, *supra* n. 1865, p. 394 ff.
[114] R. KNEZ & P. WEINGERL, *supra* n. 935, p. 413 ff.
[115] E.B. CRAWFORD & J.M. CARRUTHERS, *supra* n. 1821, p. 480 ff.
[116] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30.10.2007, *OJ* L339, of 21.12.2007.
[117] ESPLUGUES… XXX
[118] U. FRAUENBERGER-PFEILER, "Austria", *supra* n. 1848, p. 24.
[119] V. NEKROŠIUS & V. VĖBRAITĖ, *supra* n. 1840, p. 36.

Moreover, even in cases of enactment of specific legislation on the recognition and enforcement of settlements reached outside the EU (of which Spain is a good example),[129] this fact logically does not alter the scope of application of the existing EU instruments and a reference to national solutions is made.

3. The special situation of settlements lacking enforceability in their countries of origin

As stated, the settlement reached by the parties is considered to be a contract that is binding on them. In the event of lack of fulfilment of a settlement reached in cross-border mediation (carried out within or outside the EU), any of the parties may at any time lodge a claim for breach of contract before the competent court of any EU Member State and ask for its compulsory enforcement. The jurisdiction of that court will be determined in accordance with the existing EU Regulations, basically of Regulation 44/2001 or, as the case may be, following national rules.[130]

Other cases may exist in which the parties want to enforce in one Member State an agreement entered into in another Member State, or indeed outside the EU, that has not been homologated by any public authority and that consequently lacks enforceability. Some EU Member States approach this matter explicitly (e.g. Spain),[131] but most extrapolate the approach in purely domestic disputes to such cross-border situations.

Responses provided tend to be similar. The settlement should gain enforceability in the country where enforcement is sought and this should generally be done either by way of having the settlement notarised or by having it embodied in a judicial resolution in accordance with the law of the place where this is done (although some countries like

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[120] M. TRAEST, *supra* n. 1842, pp. 50-51.
[121] D. BABIĆ, "Croatia", *supra* n. 1861, p. 100.
[122] A.C. EMILIANIDES & N. CHARALAMPIDOU, *supra* n. 581, p. 123.
[123] M. PAUKNEROVA, J. BRODEC & M. PFEIFFER, *supra* n. 1844, pp. 137-138.
[124] U.P. GRUBER & I. BACH, *supra* n. 1818, p. 178 ff..
[125] S. MENÉTREY, *supra* n. 1826, p. 269 ff.
[126] D. LOPES, *supra* n. 389, p. 335.
[127] R.G. MILU & M. TAUS, *supra* n. 1832, p. 356 ff.
[128] E.B. CRAWFORD & J.M. CARRUTHERS, *supra* n. 1821, p. 481 ff.
[129] J.L. IGLESIAS BUHIGUES, G. PALAO MORENO, R. ESPINOSA CALABUIG & C. AZCÁRRAGA MONZONIS, *supra* n. 746, p. 438.
[130] As regards Germany, note U.P. GRUBER & I. BACH, *supra* n. 1818, pp. 176 & 179; UK, E.B. CRAWFORD & J.M. CARRUTHERS, *supra* n. 1821, p. 481; the Netherlands, A. VAN HOEK & J. KOCKEN, *supra* n. 14, pp. 458-459.
[131] Spain explicitly admits the possibility of notarizing the settlement reached by the parties in case of foreign non enforceable agreements, Article 27(2) MA. See, C. ESPLUGUES MOTA, "El régimen…", *supra* n. 15, p. 171; J.L. IGLESIAS BUHIGUES, G. PALAO MORENO, R. ESPINOSA CALABUIG & C. AZCÁRRAGA MONZONIS, *supra* n. 746, p. 422 & 438.

Croatia maintain a much more flexible position).[132] In Austria, for instance, these two possibilities are envisaged: either the parties have a notarial deed drawn up or they conclude a mediation agreement in front of a civil court in accordance with Article 433a ÖZPO (*Mediationsvergelich*).[133] Estonia and Lithuania,[134] Hungary,[135] Poland,[136] Romania[137] and Slovenia[138] also admit both options in general terms. Germany also accepts them but their viability seems to be rather difficult in cross-border cases insofar as a link to Germany is required.[139]

On the contrary, countries like Bulgaria,[140] Cyprus,[141] Finland,[142] Greece,[143] Luxembourg[144] and Portugal[145] only allow homologation by State courts. In Portugal there are differences between internal and cross-border mediation: in cross-border mediation the consent of all parties is required, something that is not requires in internal disputes.[146] Italy requires homologation by the competent court in accordance with Italian law: after this homologation the settlement becomes an enforceable instrument.[147]

Finally, in Belgium there are important differences between mediation undertaken by accredited and non-accredited mediators. As a general rule, only settlements achieved in mediations directed by an accredited mediator are open to homologation by the court. In the case of settlements reached in another Member State in a mediation conducted by a mediator accredited in the country where the mediation took place but not in Belgium, homologation should be made feasible on the basis of mutual recognition.[148] Nevertheless no case law is said to exist so far.[149]

4. Settlements embodied in an arbitration award

[132] D. BABIĆ, "Croatia", *supra* n. 1861, pp. 99-100.
[133] U. FRAUENBERGER-PFEILER, "Austria", *supra* n. 1848, p. 24.
[134] V. NEKROŠIUS & V. VĖBRAITĖ, *supra* n. 1840, p. 36.
[135] V. HARSÁGI, C. GERGELY & N. ZOLTÁN, *supra* n. 907, pp. 214-215.
[136] M. ZACHARIASIEWICZ, *supra* n. 1838, p. 298.
[137] R.G. MILU & M. TAUS, *supra* n. 1832, p. 355.
[138] R. KNEZ & P. WEINGERL, *supra* n. 935, p. 413.
[139] U.P. GRUBER & I. BACH, *supra* n. 1818, pp. 176-177.
[140] N. NATOV, B. MUSSEVA & V. PANDOV, *supra* n. 1827, p. 79.
[141] A.C. EMILIANIDES & N. CHARALAMPIDOU, *supra* n. 581, p. 122.
[142] L. SIPPEL, *supra* n. 1828, p. 381.
[143] V. KOURTIS, *supra* n. 1829, p. 197.
[144] S. MENÉTREY, *supra* n. 1826, p. 268.
[145] D. LOPES, *supra* n. 389, p. 386.
[146] Article 1251-22(1) NCPC.
[147] I. QUEIROLO & CH. GAMBINO, *supra* n. 1830, p. 242.
[148] M. TRAEST, *supra* n. 1842, pp. 49-50.
[149] *Ibid*., pp. 49-50

Finally, settlements reached within a mediation proceeding may be embodied in an arbitral award. In this case, irrespective of the seat of the arbitration, the New York Convention on the recognition and enforcement of foreign arbitration awards or, in accordance with Article VII of the Convention, any other convention that may be more favourable to the recognition of foreign arbitration awards, will be applicable.