Procedural and Substantive Issues of Mandatory Mediation and its Limits in Cross-Border Cases – The Example of the Greek Legislation

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‘By its very nature, an obligation to mediate is simply an obligation to attempt, with the aid of a third party neutral, to resolve a dispute in good faith. It is an agreement to try to agree.’

Court of Chancery of Delaware
CertainTeed Corp v Celotex

1. Introduction

At the center of dispute resolution remain the individuals who know the dispute and their interests best. Hence, they should be the starting point and focus of designing and producing cost-effective and time-limited dispute resolution mechanisms. It follows that the parties and not state entities should choose the resolution mechanism (so called principle of self-determination or party choice of process). While peaceful and consensual dispute resolution is to be preferred over resolution forced on (one of) the parties, consensual dispute resolution requires the consent of all involved, which is not always available.

The advancement and institutionalization of dispute resolution mechanisms displays a remarkably creative development and diversity. Common forms are negotiation, mediation, conciliation, arbitration and court procedures. However, additional forms and variants of these procedures have been developed. Additional types are, for example, fact-finding procedures,
mini-trials, judgment proposals and hybrid court procedures. Variants include devices such as mandatory negotiation, mandatory mediation and combinations such as mediation-arbitration and conciliation-court proceedings.

In alternative dispute resolution mechanisms which the parties do not initiate (mandatory ADR), the right of access to justice requires that the costs of alternative dispute resolution not be prohibitive, so that the parties would be hindered in their access to the courts.\(^1\) In every case, mandatory extrajudicial dispute resolution may not impose costs to a degree that hinders access to the courts.\(^2\)

Cross-border disputes are often complex, involving different laws, languages and costs. The initial success of mediation in Europe and the enthusiasm of numerous proponents of alternative dispute resolution led to the harmonization of mediation legislation in EU Member States by the Directive on Certain Aspects of Mediation in Civil and Commercial Matters (2008/52/EC), which was adopted on 23 April 2008 and came into force on 13 June 2008. The Directive was enacted with the objective of facilitating access to alternative dispute resolution.\(^3\) It required Member States (with the exception of Denmark)\(^4\) to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 21

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1 For the various forms of ADR schemes see Papanastasiou T, ‘The institution of mediation in Japan’ (2016) Epitheorisi Politikis Dikonomias 522 [in Greek].
3 Although there are various types of mediation, including private mediation, court-annexed mediation and judicial mediation, the Mediation Directive is primarily concerned with private mediation and court-annexed mediation. Private mediation takes place with no judicial intervention and the process is voluntary and facilitated by an impartial mediator. Court-annexed mediation arises where a court initiates the mediation, directing the parties to settle the dispute outside of the judicial setting. Once the mediation begins, there is no further input from the court. On the other hand, judicial mediation occurs with the mediation taking place in the court and using court personnel. See Antich F, ‘Enforcing the mediated settlement and the need for an appropriate legal framework: Some reflections from within the EU and beyond’ in Roth M and Geistlinger M (eds.), Yearbook on International Arbitration and ADR, Vol V (NWV Verlag 2017) 326 ff.
May 2011. Though intended to deal with cross-border disputes, the Directive expressly states that ‘nothing should prevent Member States from applying such provisions also to internal mediation processes’.

No objections have been raised concerning the so-called privatization of justice. This is not surprising, as the mediation proceedings stay in the judicial ambit. No violation of the constitution or of the human rights conventions derived from this judicial policy has been mentioned in legal literature. In this regard, the European Directive 2008/52/EC does not infringe on the European Convention on Human Rights (ECHR) or on Article 47 of the Treaty on the Functioning of the European Union. The legislator has been very reluctant to restrict access to the courts in general, even long before ADR schemes became popular or even before the European Court of Human Rights stressed the importance of free access to an impartial judge.

This paper will firstly present issues of the recent Greek legislation on mandatory mediation within the European legal framework, together with the other existing ADR schemes. Secondly, mandatory Regulation in other Member States will be presented. International jurisdictional issues and the threat of forum shopping in case of the fora providing for mandatory mediation will be briefly discussed in the next section. The following section analyses issues of recognition and enforcement of foreign mediation agreements. Finally, the last section presents the applicable law in cross-border mediation. This paper closes with some final remarks.

2. Issues of Greek Legislation on Mandatory Mediation within the European Legal Framework

2.1. A view of ADR schemes in Greece

Alternative dispute resolution and mediation mechanisms are becoming a priority for Greek legislators. Recently, Greek Law 4335/2015 introduced a

5 For such a case in Germany see Hess B, Pelzer N, ‘Regulation of Dispute Resolution in Germany: Cautious Steps towards the Construction of an ADR System’ in Steffek and Unberath (eds.), note 2, 223.
6 In the case of Momcilovic v Croatia, no 11239/2011, Judgment of 26.3.2015, the ECTHR found the following provision of the Civil Procedure Act of Croatia ‘A person intending to bring a civil claim against the Republic of Croatia shall first submit a request for settlement to the competent State Attorney’s Office’ compatible with Art. 6 ECHR.
new general principle in Art 116A of the Greek Code of Civil Procedure (GrCCP) according to which, the judge encourages at any time in the course of proceedings the achievement of compromise, the choice of mediation and supports relevant initiatives of the parties and can set out compromise proposals.  

GrCCP now provides for both in court and out of court ADR devises afforded both prior and during *lis pendens*. However, litigants are still quite reluctant to resort to ADR of some type. Greece is still a country with a traditionally strong court system. Therefore, ADR schemes have played a rather small role for a long time. Nevertheless, a variety of ADR mechanisms exist in Greece. There are specific dispositions in Greek Law that regulate several ADR processes, such as out-of-court dispute resolution, judicial/court settlement, judicial mediation and mediation for resolving disputes in an amicable and time-effective way. Disputes under private law can be submitted to mediation provided that the parties involved have free disposition over the object of the dispute and can settle by any means of a compromise. As has been said, ‘mediation is an alternative solution to justice and not an alternative justice’.  

2.1.1 Court-connected conciliation  
The Greek legislator has assigned wide conciliatory tasks to judges, since Justices of the Peace can conduct voluntary conciliation upon request of the parties in civil law cases falling inside their competence (Art 209

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7 Diamantopoulos G, Koumpli V, ‘Mediation as a way of dispute resolution in private cases in Greek Law’ (2015) *Nomiko Vima* 2184, 2188 [in Greek].
8 From the moment the judge balances the interests, the limits between judicial and conciliatory resolving of a case are very close, see Cadiet L, ‘I modi alternativi di regolamento dei conflitti in Francia, fra tradizione e modernità’ in V. Varano (a cura di), *L’altra giustizia* (Giuffrè editore 2007) 234.
9 Polyzogopoulos K, ‘Mediation: myths and reality’ in *Legal studies II* (Sakkoulas 2011) 265 ff, 269 [in Greek].
10 Conciliation avoids judicial contest and promotes peace as a principal ideal of justice. The denomination of the lowest civil tribunal which is at the same time the main conciliatory organ as “Justice of the Peace” is but an expression of this deliberate mission, see Kerameus K, ‘The function of conciliation as a means of avoiding litigation and settling a dispute’ in *Studia Juridica III* (Sakkoulas 1995) 167 ff. [in Greek].
11 The request for conciliation, when filed, brings about the same effects, both procedural and substantive, as the formal commencement of an action, provided that
Only disputes subject to conciliation according to the provisions of substantive law fall within the scope of the conciliatory task of the courts (Art 213 GrCCP). The parties’ power to dispose freely of the disputed claim constitutes a main substantive prerequisite. In performing his conciliatory mission, be it permissive or mandatory, the Justice of the Peace is entrusted under Art 210 GrCCP with full discretion to use any method leading to a settlement of the dispute. In cooperation with the parties, he examines the whole litigious affair, not being bound to observe either procedural or substantive rules of law. In particular, he establishes the controversial facts and orders, the appropriate means of proof, etc. However, this evidentiary proceeding is only a means to the end of facilitating the parties’ conciliatory approach to the affair in dispute.

A conciliation achieved as a result of the conciliatory mission of the court produces under article 212 (4) GrCCP the same legal effects as a judicial conciliation. On the one hand, it causes the immediate termination of the pending proceedings. As a result, no judgment is given by the court and, according to the opinion prevailing in Greek legal theory and jurisprudence, because no judgment has been delivered, a res judicata effect cannot be produced: the judicial conciliation deriving its legal effect mainly from the parties’ agreement, is not an act of judicial authority such action will be brought within a term of three months after the failure of the conciliatory attempt according to Art. 214 GrCCP. This condition is regarded as a regulatory one. Thus, after the request for conciliation is filed and the defendant is served with a copy of it, the litigation is considered as already pending and the running of the statute of limitations is interrupted. These effects are, however, retroactively revoked, if an action is not finally brought within the aforementioned term. See Yessiou-Faltsi P, Podimata E, ‘Preliminary or Summary Proceedings: Scope and Importance in Greek Civil Procedure’ (2004) Revue hellénique de droit international 383, 384.

12 It is a form of court-connected facilitated amicable ADR process prior to litigation. According to Art 212 (4) GrCCP conciliation under Art 209 GrCCP has the same effect with court settlement. The Greek legislator has traditionally regarded conciliation as the best ADR method. The worst settlement equals the best judgment. See Diamantopoulos G, Koumpli V, ‘Mediation: The Greek ADR Journey Through Time’ in Esplugues C and Marquis L (eds.), New Developments in Civil and Commercial Mediation (Springer 2015) 313, 314.

13 Yessiou-Faltsi, Podimata, note 11, 387.

14 Ibidem, at 388.

and it is, therefore, incapable of producing a binding legal effect similar to res judicata.16

2.1.2 Extrajudicial conciliation

Particular mention should be made of the out-of-court procedure for dispute resolution that was introduced by Art 214A GrCCP17 being amended by Law No 3994/2011 providing for optional conciliation18 on the parties initiative.19 In the current form of Art 214A GrCCP, the parties are no longer obliged to attempt an out-of-court dispute resolution, but rather they are encouraged to settle their dispute after the initiation of lis pendens and before the court delivers its final decision.20 This amendment has enlarged the importance of such conciliation21 by giving this a universal character and giving the minutes of such conciliation an effect similar to a notarial act according to Art 293 (1) GrCCP. The minutes of the agreement

16 Yessiou-Faltsi, Podimata, note 11, 389.
17 According to Art 214A GrCCP, after the occurrence of lis pendens and until a final decision is reached, litigants may attempt to reconcile through negotiation efforts regardless of the standing stage of the trial and by acting out of its proceedings (with or without the engagement of a third person).
18 The whole institution of conciliation goes hand in hand with the fundamental consideration that the parties are dominis litis, i.e. the masters of the proceedings and therefore free either not to begin them at all or to terminate them at their convenience. See Orfanidis G, ‘Alternative Dispute Resolution – Conciliation – Mediation’ in Gottwald P (ed), Aktuelle Entwicklungen des europäischen und internationalen Zivilverfahrensrechts (Gieseking-Verlag 2002) 61 ff.; Stamatopoulos S, Giannopoulos P, ‘Conclusion of mediation clause in a works contract and its consequences on the judiciability of the parties’ claims, opinion’ (2016) Armenopoulos 950-52 [in Greek]; Kerameus, note 10, 167 ff.
should be recorded in writing and undersigned. A litigant can unilaterally submit the original undersigned minutes to be ratified by the judge or presiding judge before whom the case is pending. Ratification is given provided that the judge ascertains that: a) the dispute qualifies for settlement by means of a compromise, b) the minutes have been lawfully undersigned and c) the nature of the right which was acknowledged, as well as the amount of the consideration due and the terms of its fulfillment clearly arise out of the submitted minutes. Following the ratification process and depending on the nature of the claim, the minutes accordingly constitute an enforceable title or merely evidence of entitlement and result in abolition of proceedings.

2.2. Mediation in general

In Greece, although conciliation is regarded as the best ADR method, mediation has been officially included in available ADR methods since the enactment of the Greek Mediation Act in 2010. The written form of mediation only has the role of documentary evidence, with no particular form being required for the validity of the agreement to mediate. It can take place in the following ways: a) When the parties have agreed in writing to mediate under a mediation clause relating to a specific legal relationship by means of a commercial contract before a dispute arises. b) At every stage of litigation at which point the parties have agreed in writing to mediate. c) When parties comply with the Court’s invitation/suggestion to consider mediation. d) When ordered by another EU Member State’s court. e) When the law mandates it, as recent Law 4512/2018 does.

2.2.1 Voluntary judicial mediation

According to Laws No 4055/2012, 4139/2013 and 4335/2015, parties can have recourse to judicial mediation both prior to litigation and after the occurrence of lis pendens for cases applicable both before the Court of First

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22 Diamantopoulos G, ‘Equivalent exchange of the minutes of dispute resolution under Art. 214A GrCCP with the form of notarial act and possible use of it as a deed to be registered, when the conciliation involves the creation, transfer, alteration or abrogation of real rights on immovable property’ (2013) Elliniki Dikaiosini 72 ff. [in Greek].

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Instance and the Court of Appeal. The judicial mediation procedure is confidential. The multi-door scheme has been enriched and gives from now on access to resolution through many procedures within the Courts (Art. 214B GrCCP).

More specifically, Law No 4055/2012 introduced to Art. 214B GrCCP a judicial mediation (mediation ex iudicio) procedure for private law disputes. This ADR scheme is also voluntary and conducted by judges. The referral of the case to another judge – who may act sometimes as mediator and sometimes as judge, depending on his appointment as full-time or part-time mediator – cannot be easily justified. It is noted in this respect that such a mixed role for the judge may give rise to constitutional law concerns, given that the referral of the case to judicial mediation during lis pendens may put into question the principle of natural justice (Art 8 of the Constitution; Art 108 GrCCP), undermine personal and functional guarantees concerning the administration of justice and lead to delays.

Recourse to judicial mediation may take place before filing a suit or during lis pendens. The parties or their attorneys shall file the relevant application in writing. During lis pendens, the court, when it considers it appropriate having taken account of all circumstances of the case (e.g. nature of the dispute, evidence difficulties), may invite the parties at any stage of the proceedings to use judicial mediation. Once the parties agree, the court shall adjourn the case for a hearing to be held shortly, within six months. The procedure of judicial mediations contains separate and joint hearings and discussions among the attorneys of the parties and the mediator judge, who may offer the parties non-binding suggestions as regards the resolution of the dispute. Mediation shall be conducted in such a way as to respect confidentiality, unless the parties agree otherwise. See Diamantopoulos, Koumpli, note 19, 369.

At every court of first instance and court of appeal of the country, one or more of the presidents or senior judges shall be appointed as full-time or part-time mediators for two years, which may be extended. For an overview, see Thanou-Christofilou V, ‘Judicial mediation (Art. 214B CCP)’ (2013) Elliniki Dikaiosini 937 ff. [in Greek].

Diamantopoulos, Koumpli, note 19, 369.


Regarding the question of the appropriateness of the judge acting as mediator, given the concurrence of conciliatory and decisive competence in the same person in case of failure of a mediation attempt, see Orfanidis G, ‘ADR- conciliation, mediation’ (2006) Deltio AE and EPE 453 ff. [in Greek].
Settlements reached by court mediation are enforceable titles according to Art 904 (2) c GrCCP. It should be noted that court mediation is more evaluative in its style than private mediation because it takes place to a larger extent in the “shadow of the law” and of the judiciary than private mediation.

Finally, Law No 4335/2015 introduced new Art 214C GrCCP, exhorting the judge to encourage mediation procedures (mediation ex iudicio). This means that judicial mediation exists both as in-court mediation and court-annexed mediation.

2.2.2 Voluntary extrajudicial mediation

In order to implement Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, concerning mediation in cross-border disputes, the Greek legislature enacted Law 3898/2010 – known also as the Greek Mediation Act (GrMA) which provided for optional media-
tion (mediation ex voluntate). According to Art 4 GrMA, ‘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.’ Initially, it was provided that in domestic disputes mediators should be attorneys accredited pursuant to Art 7 GrMA. After the amendment of the GrMA by the first Article of Law No 4254/2014, it is provided that also in domestic disputes the parties are allowed to appoint any person accredited according to the GrMA, as this has been extended to include cross-border disputes. If the mediation is unsuccessful, the mediator is to draw up minutes of failure, which may be signed only by the mediator. The successful outcome of mediation means that the parties reached an agreement in relation to their dispute and the mediator draws up minutes of mediation. According to Law No 3898/2010 the minutes of a mediation agreement constitute enforceable titles. That legislation provided a solid framework for a non-mandatory mediation in civil and commercial matters whereby any private legal dispute concerning such matters may be referred to and resolved by mediation, provided that the parties have the power to dispose freely of the subject of the dispute and agree to submit it to a mediator of their choice. That Law was abolished by the recent Law No 4512/2018, which succeeded it. The new law introduced both the above-mentioned optional mediation and mandatory mediation, as set out below.

36 Such ADR processes are based on the principle of private autonomy and freedom of contract according to Art. 5 (1) of the Constitution and Art 361 of the Greek Civil Code (GrCC), see Diamantopoulos, Koumpli, note 19, 361 ff.
37 It is correctly pointed out by Diamantopoulos and Koumpli, note 19, 367, that mediation differs from any other out-of-court or conciliatory dispute resolution process due to the mandatory participation of the mediator, namely a third person in relation to the parties, who is asked to conduct mediation.
38 Diamantopoulos, Koumpli, note 12, 324.
39 The original minutes signed by all parties will be filed by the mediator with the clerk of the one-judge first instance court of the district where the mediation took place, provided that at least one of the parties requested the mediator to do so. See Kourtis, note 20, 212.
2.2.3 The Greek Law on Mandatory Mediation

Recently, Law 4512/2018\textsuperscript{41} introduced mandatory mediation (\textit{mediation ex lege}). Mandatory mediation prior to a court hearing is introduced for certain domestic and cross-border cases. Disputes submitted to mandatory mediation are: family law disputes (care of a child, maintenance, participation in acquisitions etc.), condominium disputes, disputes arising from medical malpractice, disputes concerning trademarks, patents and industrial designs, disputes concerning damages resulting from car accidents, disputes concerning professional fees and disputes concerning stock exchange contracts. This is required for the admissibility of the hearing before state courts. In other words, for such disputes, mediation is prescribed as a condition for the continuation of the trial. More specifically, for the cases that fall under the scope of the above-mentioned legislation, an introductory mediation session is required to take place prior to the trial. But still the provisions of Law No 4512/2018 do not impose on the parties an obligation to resolve their dispute through mediation, but only to participate in it. If a party refuses to participate in the introductory mediation session, although it was invited, a penalty can be imposed by the court before which the case is pending. During the time required for a successful attempt at mandatory mediation, any periods of prescription and limitation applied by courts are suspended.\textsuperscript{42}

If the mediation is unsuccessful, the mediator is required to draw up minutes of failure. If it is successful, the mediator shall draw up minutes of mediation signed by all the interested parties, which become enforceable following a simple procedure of filing a copy of the minutes with the secretariat of the competent court for the handling of the case for which the mediation took place.\textsuperscript{43}

\textsuperscript{41} Greek Law No 4512/2018 (FEK A 5/17.1.2018).
\textsuperscript{42} See Giannopoulos P, \textit{The attempt of out-of-court resolution of disputes through mediation as a condition for the admissibility of the hearing according to Law 4512/2018} (Sakkoulas 2018) 69 ff.
\textsuperscript{43} \textit{Ibidem}, at 147.
2.2.4 Compatibility of Greek Legislation on Mandatory Mediation with European Jurisprudence

Compulsory mediation as condition for court proceedings also raises the question of its compatibility with Art 6 ECHR and EU law. The English Court of Appeal in ‘Halsey v Milton Keynes General NHS Trust and Steel’ responded in the negative. An enquiry on this issue has also been made by Italian judges before the European Court of Justice for a preliminary ruling and also before the Italian Constitutional Court for a national ruling to verify the compatibility of the Italian mediation legislation with EU law and with the Italian Constitution, respectively.

Still, the main issue that arises is the compatibility of the Greek legislation providing for mandatory recourse to a mediation procedure with the European legal framework on ADR procedures. According to case C-75/16 of the Court of Justice, Directive 2013/11/EU must be interpreted as not precluding national legislation which prescribes recourse to a mediation procedure as a condition for the admissibility of legal proceedings relating to those disputes, to the extent that such a requirement does not prevent the parties from exercising their right of access to the judicial system. On the other hand, the above-mentioned Directive must be interpreted as precluding national legislation which provides that, in the context of mediation, parties must be assisted by a lawyer.

However, a particular feature of mandatory mediation in Greece is that the parties are required to personally attend mediation sessions with their respective attorneys for the cases that fall under the scope of the applicable law, excluding only consumer disputes and small claims. It is mandatory.

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44 In favor of the compatibility, see Orfanidis G, ‘Mediationsvereinbarungen’ (2015) ZZPInt 129.
50 See Christodoulou, note 33, 2197.
and hence mediation cannot take place unless the parties or their legal representatives (for legal entities) proceed to mediation with their lawyers throughout the duration of the procedure. It is pointed out here, that the personal appearance of the parties during mediation sessions is unnecessarily and disproportionately required especially for old and disabled people. Furthermore, mandatory representation by a lawyer gives rise to costs\(^{51}\) together with the additional fees associated with the mediation, which shall be examined under the scope of the ECJ’s decisions in Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08.\(^{52}\)

The judgment rendered by the ECJ on the above-mentioned Joined Cases, ‘Rosalba Alassini and Others v Telecom Italia SpA and Others’ deals with the interpretation of the principle of effective judicial protection in relation to national legislation under which an attempt to achieve an out-of-court settlement in certain disputes between providers and end-users required a pre-trial mediation in accordance with the procedural rules for the settlement of disputes between telecommunications operators and end-users of 2007 before lodging a claim before State courts.

According to the Court of Justice, neither the principles of equivalence and effectiveness nor the principle of effective judicial protection\(^{53}\) preclude national legislation which imposes an out-of-court settlement procedure, provided that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period the time-barring of claims, and that it does not give rise to costs –or gives rise to very low costs- for the parties.\(^{54}\)

Advocate General Kokott concluded that procedures for out-of-court dispute resolution must be transparent, simple and inexpensive. The principle of effective judicial protection does not preclude such procedures for out-of-court dispute resolution from being mandatory, provided they pur-


\(^{53}\) Procedural rules governing actions for safeguarding individual’s rights under EU law shall take into account the principle of equivalence (they cannot be less favourable than those governing similar domestic actions) and effectiveness (they cannot make the exercise of rights conferred by EU law impossible or excessively difficult), CJEU, joined cases C-371/08 to C-320/08, note 52, para 48.

\(^{54}\) De Luca A, ‘Mediation in Italy: Feature and Trends’ in Esplugues and Marquis (eds.), note 12, 351.
sue legitimate objectives in the general interest and are not disproportionate with regard to the objective pursued.\footnote{Joined cases C-317/08 to C-320/08, note 52, Opinion of AG Kokott, para. 58.}

The exclusion of small claims and consumer disputes from the scope of the Greek legislation on mandatory mediation speaks currently for its compatibility with the above-mentioned European legal framework regarding the extra fees for lawyers attending mediation sessions.\footnote{See Giannopoulos, note 42, 27-30.} It should be noted here that the Plenary of Areopag (Decision 34/2018) has recently decided that the new Greek Mediation Law No 4512/2018 is not compatible with Art. 20 of the Greek Constitution providing for the right of access to justice and with Art. 6 EMRK hindering the access to it due to the mandatory personal appearance of the parties accompanied by their legal representatives and subsequently due to the costs of mandatory mediation.\footnote{Areopag (Plenary), Judgment of 28 June 2012, No 34/2018.} It still remains to be seen what the fate of that law will be and if the inferior courts are going to follow the opinion of Areopag, thus rendering the legislation on mandatory mediation inapplicable.

3. **Mandatory Mediation Regulations in the other Member States**

Mediation is a voluntary process and judges have shown reluctance to compel parties to mediate.\footnote{In the case of CertainFeed Corp, Court of Chancery of Delaware, \textit{CertainFeed Corp v Celotex Corp and Celotex Asbestos Settlement Trust}, Judgment of 24 January 2005, No. Ci. A 471, para 14 stated: ‘The only possible relief CertainFeed could receive for any failure of Celotex to mediate is an order of specific performance’.} Exploring the possibility of a settlement out of court before going to court is not mandatory as a rule. This is true for all kinds of alternatives. It is even more true for mediation. Mediation remains a fundamentally voluntary process. The legislator views mediation as a totally optional operation and –according to the actual provisions of the law- estimates that it would be against the fundamental principles of mediation to force the parties to enter into mediation.

Fostering ADR by restricting access to the judge- for instance, by making pre-adjudication mediation or conciliation mandatory, or by imposing a financial penalty on those who would unreasonably refuse mediation or attempt a settlement- is pointless. Judges might allocate the costs of proceedings in an astute way when a party clearly abuses its rights, but the
abuse must be obvious and serious. Convincing the parties of the advantages of ADR is probably more promising than imposing on them the duty to take part in a compulsory pre-trial procedure which will not be suited to all kinds of dispute. Only a limited number of mandatory mediation schemes are encountered now in the Member States. They are envisaged solely for certain disputes or areas of law, or types of persons involved in disputes.

3.1. Italy

In Italy, Legislative Decree 28/2010 specifically enacted mandatory pre-trial mediation for specific types of civil and commercial cases. However, in December 2012 the Italian Constitutional Court sent down a decision condemning Article 5 (1) of Legislative Decree 28/2010, which described the provisions for mandatory mediation. However, this decision was not

60 Ferrand F, ‘Regulation of Dispute Resolution in France: Evolutions and Challenges’ in Steffek and Unberath (eds.), note 2, 175, 204.
61 Italy has gone further than many other Member States, not only by extending the scope of the EU mediation rules to cross-border and domestic disputes, but also by making mediation a pre-requisite to access the courts in a wide range of cases, Antich, note 3, 338 ff.
62 Italian Constitutional Court, Judgment 272, 6 December 2012.
63 Art. 5 (1) Legislative Decree No. 28/2010: Mediation was mandatory in relation to disputes involving: rights in rem, the division of assets, inheritance, family estates, leases of real property or going concerns, gratuitous loans for use, medical liability, defamation in the press or other media, insurance, and banking and other financial agreements. In 2012, mandatory mediation was extended to disputes involving common tenancies and road and shipping accidents. See Antich, note 3, 339.
64 On 9 August 2013, the Italian Parliament finally converted into law the new mediation rules approved by the Government with the Law Degree 69 of 21 June 2013. Parliamentary approval of the mediation rules, including the controversial mandatory mediation requirement, resolves the constitutionality issue that led to the quashing of the mediation rules contained in Legislative Decree 28/2010 and as a consequence to the virtual cessation of mediation in Italy. The new rules essentially confirm the regulatory framework introduced with Legislative Decree 28/2010 with some significant changes, the most important of which are as follows. First, the mediation mandate was limited to a four-year trial period that ended September 2017. Second, car accident disputes are exempted from mandatory mediation. Third, parties must be assisted by counsel in mediation. Last,
based on the finding that mandatory mediation per se infringed some constitutional principles. Actually, the substantive challenges to mandatory out-of-court mediation were not even considered by the Court, because the first issue it had to decide was the alleged violation of the constitutional rules on delegation of the legislative function. Article 84 of Legislative Decree 69/2013 restored mandatory out-of-court mediation. The main feature of this provision is that the parties are required to attend only an information session before the mediator designated by their chosen mediation body. While much of Legislative Decree 28/2010 was left intact, the removal of Article 5 (1) and various related provisions throughout the decree has resulted in a sharp decline in the utilization of mediation, which was quickly becoming the front runner of ADR options in Italy.

The 2013 provisions retain the exequatur procedure but add an interesting option, as a mediation settlement agreement (MSA) may become enforceable per se, that is without making an application to the president of the competent court, when the agreement is drawn up and signed by all parties and their assisting lawyers, who declare that the agreement is not against public policy or peremptory rules. In Italy, a mediated settlement agreement can be either enforced by the court or is automatically enforce-

judges are granted the power, at any stage in the dispute, to order the parties to mediation, not just to invite them. The 21 June 2013 version of the mediation rules did not include the four-year time limit, nor the need for mediating parties to be assisted by counsel. These changes were vigorously advocated for by a sector of the Italian bar during the process of converting the Government decree into law, and the Parliament eventually accepted these changes. However, the regulatory history of mediation in Italy is far from finished. For instance, the legal requirement to be assisted by counsel in mediation runs contrary to Art 8 (b) EU Directive on Consumer ADR Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC. See De Palo G, Oleson A E, ‘Regulation of Dispute Resolution in Italy: The Bumps in the Road to Successful ADR’ in F. Steffek and H. Unberath (eds), note 2, 239, 240.

65 See De Luca, note 54, 345, 350.
66 This sort of opt-out clause for parties who feel that mediation is not suitable for their dispute, would allow them to go to court without participating in the mediation beyond that information session. A nominal fee is payable where the opt-out clause is used and no other money is due to either the mediation body or the mediator. See Antich, note 3, 339.
67 Between March 2011 and June 2012 there were 143,324 mediation filings. All of this data indicates that the provisions contained in Legislative Decree 28/2010 were having positive effects, not just by increasing mediation filings, but by also reducing the burden on the court system. See De Palo, Oleson, note 64, 241.
able, as if it was a binding legal decision, thus being treated in the same way as a final judgment. However, judgments and mediated agreements receive different treatment when non-compliance occurs. Italian law provides for compulsory measures under its Code of Civil Procedure to coerce a debtor to perform its duties in relation to non-compliance with a judicial decision. However, where a debtor fails to perform its duties in relation to a MSA the other party may be able to seek a remedy for non-compliance under contract law. A settlement agreement resulting from a mediation process thus remains a contact between two or more parties to a dispute.68

3.2. England

In England it was argued that a pilot compulsory mediation scheme should be set up. Although Lord Woolf’s enthusiasm for ADR led to critical changes in civil procedure and the development of common law rules promoting mediation, he had not been in favour of compulsory mediation. In March 2004, a one-year mandatory pilot scheme was set up in Central London County Court, where the voluntary scheme had been running for some years. Cases were automatically referred to mediation (so called: ARM) and, while it was possible for parties to object to the referral, any unreasonable refusal to mediate would lead to costs sanctions.

Unfortunately, the launch of the scheme coincided precisely with a ruling by the Court of Appeal in the case of ‘Halsey’69 that the courts had no power to compel parties to enter a mediation process. It is difficult to assess precisely what impact the Halsey judgment had on the behaviour of those who were automatically referred to mediation during the course of the pilot, but there can be little doubt that the judgment did not help. In the ARM pilot, about 80 per cent of those referred to mediation objected to the referral and following the Halsey judgment the court seemed to be uneasy about forcing people to mediate against their will. Indeed, it was a

68 To better understand this, in a recent decision of the Trial Court of Rome, it was stated that the contractual nature of a MSA ‘(...) is reflected in the fact that the provision of the norm limits its scope to matters concerning available rights, thus corroborating the freedom of contract of the parties and their negotiating autonomy. That agreement can adopt many forms in order to resolve the dispute, and constitutes the expression of the parties’ bargaining power pursuant to Article 1321 of the Italian Civil Code, because, through it, it is governed their substantial legal situation.’ See Antich, note 3, 340.

classic example of policies colliding and of the danger of extrapolating from one culture to another. Here, it was correctly pointed out that the applicability across jurisdictions of procedural innovations depends, among other things, on the culture of litigation, the formal court structure for dispute resolution, the characteristics of disputes and the costs rules.\textsuperscript{70}

3.3. Germany

Several models designating ADR as a compulsory pre-trial procedure, – for example the German model based on section 15a (1) of the Act Introducing the Code of Civil Procedure (EGZPO) – have failed. A mandatory mediation scheme also exists in Germany, though its scope is rather limited. Germany is one of the few countries in Europe in which mandatory pre-trial mediation serves as condition for subsequent litigation. § 15a EGZPO, referring to certain aspects of small civil law disputes, permits mandatory pre-trial mediation. This may apply to: financial disputes coming under the jurisdiction of a local court (Amtsgericht), where the amount of the claim in dispute does not exceed 750 euros; certain disputes relating to the law concerning neighbours; and disputes relating to defamation claims, where the derogatory remarks were not made via the press or broadcasting media\textsuperscript{71}. Only when this mandatory mediation is completed may a dispute be brought before a court. If this requirement is not fulfilled, it will be dismissed by the court. It is therefore designed as a requisite for the commencement of a lawsuit. If no agreement is reached, parties may commence a suit before a court. Settlements reached before legally recognized conciliation entities are enforceable titles according to § 794 (1) ZPO.\textsuperscript{72} Also, if there has been an attempt at extra-judicial dispute settlements before a private sector conciliation body in response to a customer

\textsuperscript{70} Genn H, Riahi S, Pleming K, ‘Regulation of Dispute Resolution in England and Wales: A Sceptical Analysis of Government and Judicial Promotion of Private Mediation’ in Steffek and Unberath (eds.), note 2, 146 ff. According to them, despite the failure of the ARM pilot, the appetite for mandatory mediation for civil disputes continues among mediators, the judiciary and the Ministry of Justice.


complaint, the participants can bring the case before the court if they have not accepted the conciliation offer.

As far as mandatory ADR is concerned, experience has shown that this experiment was not successful in Germany, especially concerning the undifferentiated approach towards small claims. Nevertheless, compulsory conciliation has been relatively successful in neighbour and libel disputes. Here, greater regard has been paid to the mediability of the subject matter. However, the best solution is still the targeted application of mediation on a case-to-case basis in court-annexed or in-court mediation. It should probably be distinguished in respect of the nature of the dispute. Given the fact that in Germany the court system is neither expensive nor subject to delay, the idea of transplanting common law mediation patterns can be a challenge. The subjects of the German legal system have not suffered the same level of barriers to access to justice as did their Anglo-American counterparts where mediation was a reaction to an expensive, long litigation process.

3.4. France

Also France is a good example of this situation. The French Labour Code envisages reference to conciliation in Art. R 1454-12 in limine – which states that should the applicant fail to appear, without good reason before the conciliators, his claim will be rejected – and in Art. R 3252-12 which requires conciliation as a prerequisite for the order rendered to be enforced.

Also in family law, preliminary conciliation is compulsory on certain occasions: in the case of divorce, when the claim is not by mutual consent; and in the case of legal separation, the judge makes an attempt to reconcile the parties.

73 Benöhr, Hodges, Creutzfeldt-Banda, note 71, 78.
74 In that direction Hess, Pelzer, note 5, 236.
75 Esplugues, note 72, 583.
4. International jurisdictional issues regarding mandatory mediation and forum shopping

According to Directive 2008/52/EC (EC Directive on Mediation), a cross-border dispute shall mean the dispute in which at least one of the parties is domiciled or habitually resident in an EU Member State other than that of any other party or parties the former is in dispute with. The resolution of cross-border conflicts by mediation may be carried out at the initiative of the parties involved, at the request of the court in cases when the latter requests the parties to use mediation, or when the national law provides mandatory mediation. Only in the first case is mediation a voluntary procedure, whereas in the other two cases it is not.

Council Regulation (EC) No 1215/12 (the Brussels Ia Regulation) lays down bylaws establishing which courts are competent to rule a certain cross-border case, which can apply here.\(^76\) Although the EC Directive on Mediation does not explicitly address the relationship between the Brussels I Regulation (44/2001) and Mediation,\(^77\) one cannot conclude that this Regulation in its current form does not apply to cross-border cases involving mediation proceedings.

The problem of forum shopping may arise, as in cross-border disputes the forum that imposes mandatory mediation (i.e. Greece or Italy) can be avoided if it does not establish an exclusive but concurrent jurisdiction. Forum shopping is when a person involved in an international dispute takes his case to the court of a particular country not because it is best placed to hear the dispute but only because, under its rules on conflict of laws or its procedural rules (lex fori)\(^78\) it would apply the law giving the most advantageous result for this person.\(^79\)

The Brussels Ia Regulation contains a number of options enabling the claimant to choose between this or that court. The risk is that parties will

\(^76\) This Regulation is considered to be the most successful instrument on judicial cooperation in the European Judicial Area and its aim is to facilitate cross-border litigation in the European Judicial Area by providing a system of comprehensive rules on jurisdiction. See Hess B, in Hess B, Pfeiffer T and Schlosser P, *The Brussels I Regulation 44/2001, Application and Enforcement in the EU* (C.H. Beck 2008) 17.

\(^77\) According to Hess, *ibidem*, 41, including mediation proceedings in the Regulation 44/2001 would be premature.


opt for the courts of one Member State rather than another simply because voluntary mediation schemes instead of mandatory mediation in this state would be more favourable to them. This forum-shopping\textsuperscript{80}, can result in the exclusion of particular fora providing for mandatory mediation according to the preference of prospective litigants in cross-border cases.

5. Recognition and enforcement of foreign settlements reached in cross-border mediation

The settlement reached by the parties after completion of mediation (including mandatory mediation) is a contract that is expected to be voluntarily honoured by them. In the event of a lack of fulfillment by the parties, the settlement is unanimously considered 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.\textsuperscript{81}

A binding and enforceable agreement is of particular importance for cross-border mediation. Directive 2008/52/EC provides that the party that took part in a mediation finalized with a written mediation agreement, with the written consent of the other party, has the possibility to request that it becomes enforceable. The Mediation Directive enshrines a right to the enforceability of Mediation Settlement Agreements (MSA), where all parties agree, in Art. 6:

Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of the 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.

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\textsuperscript{80} Lord Simon of Glaisdale indicated in its decision ‘The Atlantic Star, Atlantic Star (owners) v Bona Spes (owners)’ [1973] 2 All ER 175, [1974] AC 436, 461: ‘If you offer a plaintiff a choice of jurisdiction, he would naturally choose the one in which his case can be most favourably presented; this should be a matter neither for surprise nor for indignation.’

Parties can therefore request that the MSA is enforceable at the end of mediation, provided that this does not conflict with existing national legislation, and provided that the agreement is in writing. All parties must explicitly consent to the request. However, because mediation is a voluntary process and there may be concerns that enforcing the MSA rests on the goodwill of the parties. To allay these fears, the Mediation Directive provides for judicial enforcement of the MSA in Art. 6 (2):

The content of the agreement may be enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.82

5.1. Enforceability of the mediated settlement agreement

The enforcement of mediated agreements is an extremely important part of the mediation process. The parties will seek to enforce the MSA either through the law of contract or by way of judicial order (judgment). The Mediation Directive is silent on the issue of which method of enforcement should be preferred, instead leaving this open for the individual Member State to decide. The ways by which the content of the agreement resulting from the mediation may become enforceable are as follows: the ruling of a court decision in this respect; the issuing of a decision by a competent authority; the transformation in an authentic instrument.

In some Member States, the enforcement of the MSA is achieved through the principles of contract. Successful mediation results in a legally binding, enforceable contract. As the MSA is a contract, remedies may be sought in the same way as in any other breach of contract. It is thought that oral mediation settlements will not be enforceable as binding contracts and, therefore, it is important that the mediated settlement is in writing and signed by all the parties to the mediation. The Mediation Directive only refers to written settlements. It must be proven that the MSA is a valid contract. The parties must show that there was an agreement, contractual intention and consideration. The courts take a holistic view of the negotiation process and where it is shown that the three essential elements of contract formation have been satisfied, the MSA will be an enforceable contract. For cross-border disputes, the enforcement of the contract will be

82 Antich, note 3, 331.
determined by the court of the country in which the mediation took place, unless the MSA provides otherwise. Given that the MSA is a contract, the normal defenses that are available under contract law could be used to invalidate a mediation agreement. Such defenses include unconscionability, fraud, mistake, incapacity and duress. If one party can prove any element of wrongdoing in the negotiation process, the MSA will either be void or set aside. In the absence of national or international legislation, the common law principles of contract will play an important role in the enforcement of the MSA.\textsuperscript{83}

In France, Art. 1535 CCP states that when a settlement has been made enforceable in another Member State of the European Union in accordance with Art 6 of the Directive, it is recognized and declared enforceable in France under the conditions provided for in Art 509-2 to 509-7 CCP. Article 1541 CCP states that when conciliation performed by a judicial conciliator settles a cross-border dispute, the application for homologation of the statement of agreement reached by the parties to the County Court must be made by all of them or by one of them with the explicit consent of the other parties.\textsuperscript{84}

In Germany, the requirement set out in Art 6 of the Mediation Directive that the Member States must ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable, is satisfied through particularly § 796a ZPO and § 796c ZPO.\textsuperscript{85}

In Greece, settlements reached within the EU which lack enforceability in the country of origin cannot be declared enforceable. Enforceability is governed by the law of the country of origin. Hence, an instrument is enforceable in Greece even if it incorporates a claim that cannot be materialized through enforcement in Greece.\textsuperscript{86} In particular, mediation settlement agreements, which have been concluded within the EU and are not enforceable in another Member State, can be enforced according to Art 904 (2 GrCCP in the following ways: a) if they are contained in a notarized document, b) if an order of payment is issued if the agreement includes

\textsuperscript{83} Antich, note 3, 331.
\textsuperscript{84} Guinhchard E, ‘National Report of France’ in Esplugues (ed.), note 72, 139, 149 ff.
\textsuperscript{85} Gruber U P, Bach I, ‘National Report Germany’ in Esplugues (ed.), note 72, 177.
\textsuperscript{86} Settlements reached in another EU Member State which have been recorded in an authentic document or homologated by a court should be declared enforceable in Greece under Art 57 and 58 of Brussels Regulation respectively provided that their object falls within the scope of this Regulation and their declaration of enforceability is not contrary to Greek public policy. See Kourtis, note 20, 197.
the recognition of a monetary claim concern, c) if they are incorporated in the minutes of the Greek court which contain the compromise according to Art 293 (1) GrCCP.  

Focusing on Italy, Art 12 of Legislative Decree 28/2010 provides that all mediation settlement agreements can be made enforceable when they are presented to, and approved by, the court. More specifically the agreement reached by the parties at the end of the mediation procedure, can acquire enforceability if homologated by the President of the Tribunal, in whose district the mediation agreement is to be performed. To be exact, if the cross-border mediation agreement is to be performed in Italy, the President of the Tribunal will proceed to the homologation of the agreement, if, on the one hand, the formalities required for the record of the procedure are met and, on the other hand, if its content is in keeping with public order and Italian mandatory provisions. Comparable to other court orders, the agreement is entered as an official record by the mediator and subsequently becomes a writ of execution, permitting the placement of a judicial lien on the parties’ assets. Additionally, the agreement can be included in the judicial register of mortgages and claims. However, the agreement cannot be made enforceable by this procedure if it contradicts public policy or mandatory regulations. With respect to cross-border disputes, Art 12 (1) states that the President of the Court in the jurisdictional area of enforcement is required to approve the written agreement, ensuring compliance with Directive 2008/52/EC. 

In England, even if an MSA has been declared enforceable by the president of the competent court, afterwards it may be challenged on the grounds of invalidity (unlawful contract) or contestability (mistake, undue influence, duress, fraud). To combat this sort of weakness of titles in the case of a failure of spontaneous performance, the parties may negotiate and include a penalty clause in the MSA and could compel the debtor to satisfy its undertaking, should the debtor decide to default on his/her obligations. The enforcement of an MSA under English law is regulated by the law of contract. Traditionally, an MSA would be enforceable only if

87 Diamantopoulos, Koumpli, note, 7, 2210.  
89 De Palo, Oleson, note 64, 260.  
90 However, this solution will not hinder or solve the eventual defect of consent, especially in cases where the victim is unable to present his/her own interest, due to the improper pressure exercised or the false representation carried out by the other party, or due to the misbehaviour or undue pressure carried out by the mediator. See Antich, note 3, 342.
that agreement was considered to be a valid contract. For some time, there was uncertainty as to whether or not a mediated agreement would be enforceable in the UK courts. However, in 2002, it was decided that a mediated settlement is an enforceable contract. If the parties have undergone court-annexed mediation, the scheme can be enforced by the court as a consent order. Although the UK does not have a specific act regulating mediation law and practice, the UK has enacted the Civil Procedure Rules 2011 and the Cross-Border Mediation Regulation 2011. Under part 78.24 CPR, the parties may agree to request a mediation enforcement settlement order from the court. In the UK, an MSA is enforceable through the law of contract. Where the MSA satisfies the requirements for a contract, a party will be entitled to legal remedy if that contract is breached.

As stated above, some Member States allow for MSAs to be enforced as binding contracts through the courts, but in other Member States the MSA is given effect through the authorization of the domestic court and there is no need to prove the MSA is a valid contract. Where a mediated settlement is given effect through judicial enforcement, this will have the same effect as a judgment: a binding decision of the court.

In other Member States (i.e. Slovenia, Sweden) the parties may request that the settlement is granted by way of arbitral award. In such case, if the mediation is without result, the parties may revert to arbitration where an arbitral award may be given. It is noted here, that although arbitral awards are final and binding, they are not directly enforceable.

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91 Consent orders, also known as Tomlin orders, are recognized by Part 40.6 of the Civil Procedure Rules. Tomlin orders are confidential between the parties, and in the schedule attached to the court order, the parties will outline the agreed terms on which the proceedings are to be stayed. The parties submit the order to the court, and a judge declares it binding. Where the MSA can be made into a Tomlin order, the parties do not need to prove the contract before enforcing it. The court can refer to the schedule and check what the agreed terms between the parties were when they agreed to stay the proceedings. If either party is in breach of the terms of the MSA, the court can enforce the Tomlin order and the defaulting party must remedy the breach. See Antich, note 3, 341.

92 Antich, note 3, 342.

93 For example, the Italian legal framework provides for the enforcement of an MSA through court order, see Antich, note 3, 334.

94 Ibidem, 334.
5.2. Enforcing transnational mediated settlement agreements in the EU

In the case of settlements 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 to it any of the existing EU instruments on recognition and enforcement of foreign judgments. 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 – i.e. a notarial deed – or a court settlement, which are enforceable in accordance with 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. These regulations are essentially Regulation 1215/2012 and Regulation 2201/2003, to which the Directive itself refers. 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, 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, 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.95

Although the Mediation Directive promotes the establishment of common principles on cross-border mediation, challenges to the enforcement of cross-border settlement agreements remain. The requirement that both or all parties to the mediation request the MSA to be enforceable places a higher threshold on consent than in some national mediation frameworks. Still, in all Member States the court will not enforce an MSA that conflicts with public policy and, in some cases, the morals of that country. Their approaches diverge in relation to the method through which an MSA is enforceable.96

Where one party withholds its consent, it is questionable whether the agreement will be enforced. It will then be for the interested parties to seek enforceability in accordance with the national laws of the jurisdiction in which the mediation was held. The scope of the Mediation Directive is

95 Esplugues, note 81, 78 ff.
96 Antich, note 3, 334.
therefore drawn into question: in the case that the explicit consent of all parties is not given, can the MSA be enforced anyway? Two legislative instruments could be employed to provide an answer to that question: Regulation (EC) No 805/2004 and Regulation (EC) No 1215/2012.97

The first Regulation deals with the enforcement of an MSA in relation to pecuniary claims. Specifically, Art 24 of Regulation No 805/2004 deals with court settlements.98 The wording of the provision states the settlement shall be enforceable if certified as a European Enforcement Order, and although it requires the involvement of a court it does not provide any detail on how the original settlement should have been obtained. From this, it may be further inferred that a cross-border MSA that does not have the explicit consent of all parties could nevertheless be made enforceable across all Member States. This appears to be one legal route that could overcome the difficulties presented by the requirements of Art 6 of the Mediation Directive. It may also be a more efficient method of enforcing an MSA where there are a number of parties involved, in different Member States. Again, by virtue of Art 25 of Regulation (EC) No 805/2004, a cross-border MSA involving a pecuniary claim will be enforceable, if notarized, in the Member State in which the dispute was settled and in any other Member State as an authentic instrument.99

However, the more recent Regulation 1215/2012100 provides a much more simplified procedure for obtaining an executive title than the older one. When a cross-border dispute arises in relation not just to the uncontested payment of a certain sum of money, but another obligation, like the delivery of a specific performance, the parties will need to rely on Regu-

97 Ibidem, 335.
98 This Article provides that: ‘1. A settlement concerning a claim within the meaning of Art. 4(2) which has been approved by a court or concluded before a court in the course of proceedings and is enforceable in the member state in which it was approved or concluded shall, upon application to the court that approved it or before which it was concluded, be certified as a European Enforcement Order using the standard form in Anex II. 2. A settlement which has been certified as a European Enforcement Order in the member state of origin shall be enforced in the other member states without the need for a declaration of enforceability and without any possibility of opposing its enforceability. A judgment that has been certified as a European Enforcement Order will have the same legal effect as a judgment issued in the national jurisdiction.’
The Mediation Directive explicitly referred to the application of Regulation No 44/2001. Article 57 of the last Regulation provided that notarized agreements involving the delivery of specific assets were enforceable. However, where the enforcement of an MSA relating to the delivery of specific assets was sought, and the agreement had not been notarized, it fell outside of the scope of the Regulation. The referral now is made to Regulation No 1215/2012 which recently recast the Brussels Regulation. It provides a much-simplified procedure to enforce executive titles in the Member States. The key change in the new legislation is the abolition of exequeatur (the need to obtain a court order before enforcing a foreign judgment) for judgments in civil and commercial matters. The automatic enforcement is also provided with regards to authentic instruments and court settlements that are enforceable in the Member State of origin.\footnote{Antich, note 3, 337.}

Notarized agreements involving the delivery of specific assets – like documents which have been formally drawn up or registered as authentic instruments in the Member States of origin – are enforceable. However, where the enforcement of an MSA relating to the delivery of specific assets is sought, and the agreement has not been notarized, it falls outside of the scope of the Regulation. While the recast Brussels Regulation does not directly deal with MSAs, per se, Art 59 states that a court settlement which is enforceable in the Member State of origin shall be enforced in the other Member States under the same conditions as authentic instruments. The parties would therefore need to assert that the MSA is a settlement within the meaning of this provision. With the entry into force of the recast Brussels Regulation, there are fewer formalities and requirements to ensure that executive titles can be performed outside the borders of the Member State in which they were delivered. Authentic instruments and court settlements, which are executed in the Member State of origin, can be enforced in another Member State, without having to obtain a prior declaration, which was essential for the validity in Regulation No 44/2001. Article 2 of the revised Regulation No 1215/2012 refers to ‘a settlement which has been approved by a court of a Member State or concluded before a court of a Member State in the course of proceedings.’ This should therefore include mediation agreements, which have been declared enforceable, albeit this
may not necessarily be in the Member State where the mediation took place.\textsuperscript{102}

It is proposed that it seems advisable to link Art 59 and 58 of Brussels Ia Regulation to the European instruments on ADR. Article 59 should apply when the settlement is confirmed by a court order (consent judgment), while Art 58 should apply when the agreement is notarized.\textsuperscript{103}

Mediation settlements notarized by a notary of an EU Member State can be enforced according to Art 58 of the Brussels Ia Regulation\textsuperscript{104} or by making use of a European Enforcement Order pursuant to Art 25 of the EEO Regulation.\textsuperscript{105} An enforceable settlement among attorneys may not itself be considered an authentic document, but a declaration of enforceability of this settlement by a court or a notary falls under the scope of Arts 58-59 Brussels Ia Regulation.

Court mediation settlements may still be considered to be settlement contracts, but they are not automatically enforceable in this event. Within the EU, court mediation settlements fall under the scope of Art 59 of Brussels Ia Regulation and can be declared enforceable. There is some disagreement as to whether Art 59 of the Brussels Ia Regulation applies to foreign mediation settlements confirmed by courts. The question should be answered positively\textsuperscript{106}: the term ‘settlement approved by a court’ should be widely interpreted in order to ensure the free movement of enforceable instruments especially in the field of consensual dispute resolution.\textsuperscript{107} In any case, Art 2 (b) Brussels I Regulation will bring clarity to this question.\textsuperscript{108}

Furthermore, foreign court mediation settlements – as well as mediation settlements that have been declared enforceable by a court of another EU Member State – may be enforced by means of a European Enforcement Order.\textsuperscript{109} Regulation No 805/2004 expressly states that it shall not affect the possibility of seeking recognition and enforcement of a judgment, a

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\textsuperscript{102} Antich, note 3, 338.
\textsuperscript{103} Hess, note 76, 40.
\textsuperscript{104} Hess B, Europäisches Zivilprozessrecht (C.F. Müller Verlag 2010) para 6 no 261 ff.
\textsuperscript{106} Hess, note 104, para 6 no 258.
\textsuperscript{108} See Hess, Pelzer, note 5, 308.
\textsuperscript{109} Art. 24 of the EEO Regulation, note 105.
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court settlement or an authentic instrument on an uncontested claim in accordance with Regulation No 44/2001.

In this respect, foreign mediation agreements that have been made enforceable in a Member State of the EU shall be recognized and declared enforceable in another Member State as follows: a) by virtue of Art 58 and 59 of Regulation EC No 1215/2012, b) by virtue of Art 46 of the Brussels II Regulation, c) by virtue of Art 48 of Regulation EC No 4/2009, d) by virtue of Art 59-61 of Regulation EU No 650/2012, e) by virtue of Art 24 of Regulation EC No 805/2004. However, in the latter case a foreign mediation agreement may be recognized and enforced even when it would be inadmissible if reached in another Member State, given that its courts shall not be able to invoke the public order clause to prevent enforcement in such cases. That means, that the public order clause can be invoked only in the case of Regulation No 1215/2012, Regulation No 2201/2003 etc.

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

110 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. Therefore, in most cases the settlement 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. See Esplugues, note 72, 763.

111 Art. 46 explicitly states that ‘agreements between the parties that are enforceable in the Member State in which they were concluded shall be recognized and declared enforceable under the same conditions as judgments.’ Regarding the dissolution of marriages, Greek legal theory was opposed to the general application of Art 46 of Brussels II bis Regulation and supported the view that marriages dissolved by private agreements shall not be covered by Regulation 2201/2003. See Kourtis, note 20, 198.


116 De Luca, note 54, 363.
granted. If the settlement fully or partially falls outside the scope of any of the existing EU Regulations, then international conventions and national rules on the recognition and enforcement of foreign judgments and decrees existing in every EU Member State would be applicable. It is relevant at this point to remember the availability of rights in some areas of law – e.g. family law\footnote{See note 111.} – is under discussion in some Member States and that this may entail its lack of enforceability in the country of origin.\footnote{See Esplugues, note 72, 765.}

6. Applicable Law

Particular mention should be made of certain conflict of laws issues that may arise concerning cross-border mediation. This situation is applicable both to mandatory mediation and to contracts that are related to the mediation procedure, such as: a) the agreement to mediate, b) the agreement between the mediator and the parties and c) the agreement settling the dispute between the parties. In a cross-border mediation, the law applicable to the relevant contracts – particularly to an agreement under (a) or (b) – shall be governed by the Rome I Regulation.

As to agreements that escape the ambit of Rome I Regulation – which might be an agreement under (c) – provisions of the appropriate laws of the Member States are still applicable.\footnote{In Greece, Art 25 GrCC is still applicable, see Diamantopoulos, Koumpli, note 12, 334.} If damages are concerned due to the breach of a pre-contractual duty of disclosure by the mediator, the Rome II Regulation contains the relevant rules.\footnote{Art 4 (1) Rome II as a general rule designates the law of the country where the actual damage occurs, i.e. the lex loci damni. Art 4 (2) and (3) Rome II provide two exceptions to subsection 1’s general rule. Under Art 4 (2) Rome II, when the mediator and the party claiming damages have their habitual residence/seat in the same country, this country’s law shall apply. Under Art 4 (3) Rome II, where the tort is manifestly more closely connected with a country other than that indicated in subsections 1 or 2, this country’s law shall apply. The provision names a pre-existing relationship as an example of a manifestly closer connection. In the context of a mediator’s liability, such as a pre-existing relationship obviously exists: the contractual relation between the mediator and the parties. Therefore, the law applicable to the mediator’s contractual liability should also be applied to tort claims. See Gruber, Bach, note 85, 174.} The 2008 Mediation Directive produced a framework trying to harmonize the most essential...
elements of a cross-border mediation without touching upon the issues of conflict of laws. This is left to the laws of the Member States although many uniform rules can already be found in the Rome I, Rome II and Brussels Ia Regulation.

6.1. The Law applicable to the mediation clause or agreement to mediate

The mediation agreement, i.e., the agreement to submit disputes to mediation, can either be concluded in a mediation clause in a contract before the dispute arises or ad hoc after a dispute has arisen. The agreement to mediate has to be considered a contractual obligation under the Rome I Regulation.

As a matter of principle, the mediation clause and the agreement to mediate are broadly considered in the several EU Member States to have a contractual nature; consequently, it is accepted that rules on determination of the law applicable to contracts should be applicable to them. That implies a direct reference to Regulation (EC) No 593/2008 (Rome I).

The Regulation would be applicable in order to fix the legal regime; it will govern the law applicable to the consent to mediate, the substantive and formal validity of the settlement or settlements reached, the contractual responsibility arising out of the lack of fulfillment of the obligations entered into (i.e. the obligation by the parties to submit the dispute to mediation), and any other aspects of the agreement falling under its material scope of application. Conversely, that means that all those issues not covered or dealt with by the Regulation will be governed by the existing national private international law rules, whatever their origin – international or domestic – may be: i.e. capacity to enter into a mediation clause or agreement to mediate or the regulation of a situation falling outside the scope of the Regulation would be left to be determined by national private international law rules.

EU national legal systems on mediation are silent regarding the law applicable to the mediation clause or the agreement to mediate in cross-border mediation. Greece is an exception to this situation, as far as explicitly stated in Art 180 of Law No 4512/2018 as regards the agreement to

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122 Ibidem, 306.
123 See Esplugues, note 72, 745.
mediate that: ‘The agreement between the parties to have recourse to mediation […] is to be governed by the substantive law rules on contracts.’

The Greek Mediation Law only determines the law applicable to formal validity of mediation agreements concluded after the dispute has arisen. The formal validity of mediation clauses not falling within the scope of the Mediation Law, is governed by Art 11 of the Rome I Regulation. Greek courts were led, when determining the law applicable to arbitration agreements, to infer the law governing them from the law expressly chosen by the parties to govern their main contract or the place chosen by the parties to arbitrate.

As a matter of principle, the mediation clause and the agreement to mediate are considered in the several EU Member States to have a contractual nature. Consequently, it is accepted that rules on determination of the law applicable to contracts should be applicable to them. That

124 See Kourtis, note 20, 187. Legal theory here supports the view, that where a party to a dispute does not perform his/her obligation to attempt to settle the dispute, the other party has a defensive right of substantive law, which has a temporary effect leading to the suspension of his own performance, see Christodoulou, note 33, 293-294.

125 Other matters such as the material validity of mediation agreements and the capacity and consent of the parties, as an effect of the contractual nature of the relationship between the mediating parties, shall be governed by the conflict rules on contractual obligations. See Kourtis, note 20, 188.


127 A mediation clause is considered a separate contract within the main contract and is independent from it. The parties are bound to mediate a dispute that may eventually arise in the future from the main contract. An expansion of such a mediation clause to also cover disputes with merely a connection with or relating to the main contract appears to be rejected by the legal theory. See Kourtis, note 20, 187.

128 In 1971, Areios Pagos –the Greek Court of Cassation- refused to recognize procedural effect to a mediation clause. The case is reported by Orfanidis G. note 18, 459, who has expressed the following opinion: ‘the agreement of the parties to submit their dispute to mediation must have procedural effects in the field of dispute resolution. The procedural effect will be the temporary prevention of the state courts from entertaining jurisdiction and, consequently, the violation by a party of its contractual obligation to submit a mediation –overlooking the mediation and addressing the courts directly- constitutes a ground for a procedural objection’. This opinion is based on the argument that the agreement of the parties to have their dispute submitted to mediation is an expression of the parties’ self-determination.

129 Tsikrikas, note 99, 283 ff.
implies a direct reference to Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I).

A controversy exists in Greece regarding the legal nature of the agreement to mediate. According to one point of view, it is considered to be a procedural agreement, which is however subject to substantive law regarding its validity.\textsuperscript{130} The mediation agreement is subject both to substantive and procedural law.\textsuperscript{131} Another view is in favour of its nature as an agreement of substantive law.\textsuperscript{132} Breach of the mediation agreement can result in a breach of contractual duty.\textsuperscript{133}

In Italy, the procedural nature of mediation clauses could be argued from the exclusion from the scope of application of the Rome I Regulation of arbitration agreements and agreements on the choice of court, if understood as embodying an authentic interpretation of the notion of contractual obligations. As a consequence, the law governing the substance of the clause would be Italian law, in compliance with the principle of territoriality of the rules governing procedure. On the other hand, according to a second opinion, the mediation clause should be considered substantive in nature even though apt to produce procedural effects, therefore implying that the law applicable should be the \textit{lex causae} and the one governing the substance of contractual obligations. The same considerations which were described above concerning the identification of the law applicable to the substance of the mediation clause also apply for the purposes of the determination of the law according to which the existence and the validity of the agreement are to be assessed. The identification of the law applicable to such issues also depends on the nature – procedural rather than substantial – accorded to the mediation clause. If the mediation clause is considered substantive in nature, the law applicable to the consent of the parties corresponds to the one governing its substance.\textsuperscript{134}

In Germany, it is also accepted that the law applicable to mediation agreements must be determined pursuant to Rome I. According to its Art 1(3), Rome I does not apply to evidence and procedure.\textsuperscript{135} Regarding the nature of mediation agreements, some scholars have argued that they

\textsuperscript{130} Orfanidis, note 44, 163 ff.
\textsuperscript{132} Tsikrikas, note 99, 283 ff.
\textsuperscript{133} Christodoulou, note 33, 293-94.
\textsuperscript{134} Queirolo, Gambino, note 88, 226 ff.
\textsuperscript{135} Gruber, Bach, note 85, 163.
should be classified as procedural, pointing to the complex structure of mediation procedures and to the orientation of procedural rules towards ensuring just and impartial proceedings. Thus, they argue, an agreement to mediate should be classified the same way as an agreement to arbitrate, i.e. as procedural. According to the German Federal Supreme Court, however, even an agreement to arbitrate is substantive in nature (substantive contract on procedural matters). It stands to reason that the Supreme Court will classify an agreement to mediate in the same way (as a substantive contract). Some views have, however, identified some procedural terms contained in mediation agreements – such as the pactum de non petendo (i.e. the agreement not to sue in court) – or the covenant not to offer information obtained during mediation as evidence in later court proceedings.

Further, the mediation clause has some effects that are procedural and here an important problem may also arise, even if it is accepted that the substantive dimension of the clause prevails over its procedural one: the effect of the clause per se on the capacity of a court or arbitral panel to begin a process or arbitration is directly dependent on the validity of the mediation clause or the agreement to submit the dispute to mediation, but it cannot be approached as a purely material effect of this. Although the effects of the mediation clause or the agreement to mediate are not as strong as those arising out of a choice of jurisdiction clause or an arbitration clause, there are many similarities between them. It could be thought here that the reference to arbitration and jurisdiction clauses embodied in Art 1 (2) (e) of the Rome I Regulation should be extended to also include mediation clauses and consequently national private international law rules should be applicable.

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137 Note that a classification as procedural, does not lead to an automatic application of the lex fori of the courts before which a later lawsuit is brought. A mediation’s procedural nature does not derive from later state court proceedings, but directly form the mediation itself. Therefore, the lex fori of the mediation would govern the mediation agreement. See Tsikrikas, note 99, 288.
138 BGHZ 40, 320, 322.
140 Esplugues, note 72, 747.
Even when contractual status is finally awarded to the clause, the hybrid nature granted to the mediation clause could, in certain countries, affect the regulation of the parties’ consent to enter the agreement to submit their dispute to mediation, the effects arising out of the clause, or the form of the clause, thus granting a special relevance to the *lex fori*. Even as to the matters that can be subject to mediation: their availability or non-availability. It can also be the case because the agreement to mediate tends to be considered a procedural agreement whose goal is to organize the mediation proceeding and/or as being the first step of the mediation proceeding.\textsuperscript{141}

Regarding the question of which nation’s law Rome I designates as governing a mediation agreement, one must differentiate between several factual starting points. In many cases there will be a choice of law by the parties, which is generally admissible under Art 3 Rome I. In consumer cases, however, the choice-of-law agreement must not deprive the consumer of those mandatory rules provided by the law in his country of habitual residence (see Art 6 (2) Rome I). In the absence of a choice-of-law agreement, the applicable law must be determined under Art 4 Rome I (in consumer cases, Art 6 (1) Rome I). If mediation agreements do not fall under Art 4 (1) Rome I and neither party is required to effect the characteristic performance (Art 4 (2) Rome I), the courts must determine the applicable law by the closest connection test under Art 4 (4) Rome I.\textsuperscript{142} The law governing the mediation clause’s formal validity must be determined by virtue of Art 11 (1) Rome I.\textsuperscript{143} In some Member States, in the event of the parties’ silence as to the law applicable, a position favourable to the existence of a tacit choice in favor of the *lex loci* is supported on the basis of Recital 12 of the Rome I Regulation.\textsuperscript{144}

\begin{itemize}
\item[\textsuperscript{141}]\textit{Ibidem}, 748.
\item[\textsuperscript{142}] According to Gruber and Bach, note 85, 161, a mediation agreement is most closely connected to the country where the mediation will have its seat. This seat may either be agreed upon by the parties or –in the absence of such agreement– must be determined from the circumstances of the concrete case. Criteria may be the seat of the chosen mediator or mediation organization or also the law applicable to the obligation in dispute.
\item[\textsuperscript{143}] \textit{Ibidem}, 162.
\item[\textsuperscript{144}] See Esplugues, note 72, 751.
\end{itemize}
6.2. The Law applicable to the proceeding

Most legal systems provide some limited and basic rules governing the mediation proceeding and no individual reference is made to the law applicable to the specific situation of mediation proceedings in cross-border cases. 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.145

As we have already stated above, although the agreement to mediate can be classified as a substantive contract under Rome I, it must be taken into account, that it is (in part) a substantive contract on procedural matters. In particular, the pactum de non petendo, and a possible covenant not to offer information learned through mediation as evidence in a later proceeding are meant to directly influence later state court proceedings. Courts may, of course, disregard these procedural terms – even if they are validly concluded under the law designated by Rome I – if their procedural rules (i.e., the lex fori) do not permit such agreements.146

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. The rule on limitation and prescription periods should also come into play irrespective of the nature of the mediation undertaken. This dependence on the lex fori is here emphasized.147 For example, in Italy, the law applicable to the procedure of cross-border mediation will correspond to Italian law if the chosen mediation centre is located in Italy, regardless of where the meetings between the mediator and the parties are held.148

In the United Kingdom, if parties in their agreement to mediate do not specify a concrete law, it is to be expected that, the locus of mediation having been agreed by the parties in an out-of-court context and having been determined by a court in a court-annexed scenario, procedural matters will be governed by the lex loci mediationis, which, in the case of court-annexed mediation, might be expected to coincide with the lex fori.149

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145 In that direction Tsikrikas, note 99, 291.
146 Gruber, Bach, note 85, 162.
147 Esplugues, note 72, 759.
148 Queirolo, Gambino, note 88, 237.
149 Crawford E B, Carruthers J M, ‘United Kingdom’ in Esplugues, note 72, 479.
6.3. The Law applicable to the content of the settlement reached

The settlement reached at the end of the mediation must be clearly distinguished from the initial mediation agreement. In cross-border disputes, the question of which law governs the settlement will certainly arise.

Nothing is said regarding the law applicable to the settlement agreement reached in most EU national legislation, in relation to either its existence or content. As a matter of principle, the response to the question of which law will govern the formation of the settlement – i.e. consent, formal requirements – should be determined by the law applicable to contractual obligations. 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 liability of the rights upon which a claim exists, the formation of the content of the settlement and its admissibility and effects.150

The law applicable to the agreement 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. In the EU 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).151 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 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 being applied.152

A court settlement is considered to have a double nature with a contractual element and a procedural element. As far as the contractual side of the court settlement is concerned, the law applicable is the law of the original claim that has been settled.

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150 Esplugues, note 72, 759.
151 Mainly as regards the consideration of obligations arising out of the clause as precontractual, and that subjected to Regulation (EC) No 864/2007 (Rome II) or purely contractual and then subject to Regulation (Rome I). See Esplugues, note 81, 77 ff.
152 Ibidem, 78.
In Germany, a large number of authors propose a distinction between the formation of the settlement on the one hand and the general admissibility of a settlement in the field and its legal consequences on the other hand. Under this distinction, settlement formation should always be classified as contractual in nature, whereas only the results of such settlement should be governed by the law applicable to the object of the settlement. Other authors opt for a monistic approach: the entire settlement should be governed by the law applicable to the object of the settlement.\footnote{According to Gruber and Bach, note 85, 175, however, both qualifications will lead to the same results. If settlements are classified as partly contractual, the law applicable to their contractual portion must be found in accordance with the rules of Rome I, Art. 4 (3) and (4) Rome I provide that the law of the country to which the contract is most closely connected applies. This leaves room for an accessory connection to the law applicable to the settlement’s object.}

In France, it is accepted that the settlement is a contract and as such subject to Rome I, provided it falls within its scope of application (\textit{ratione materiae}, \textit{ratione loci} and \textit{ratione temporae}). Rome I applies to both the law governing the merits and the formal validity of the settlement. Regarding the merits, party autonomy prevails (Art 3 Rome I), subject to the traditional limitations on party choice, notably in consumer contracts. In other words, the parties may normally choose the law applicable to the settlement.\footnote{Guinhchard, note 84, 152.}

Greek law contains no provision on the law applicable to the merits of the case referred to mediation. In conformity with the principle of party autonomy governing mediation, the parties are free to choose the rules that they wish to govern the issues arising from their dispute. These may either be the rules of a judicial system or non-State rules or \textit{lex mercatoria}.\footnote{Kourtis, note 20, 196.}

7. Final remarks

The Mediation Directive has provided a minimum level of harmonization and almost everything has been left up to the discretion of the regulatory power of Member States. The Directive aims to reach a minimum common legal framework for mediation in the Member States with the goal of ensuring and guaranteeing circulation of mediation settlement agreements across the EU. Although mediation is currently on the legal agenda in all...
Member States, differences in their legal systems are important, affecting key aspects of mediation. Divergences exist between national legislation in relation to the availability of disputes subject to mediation, the nature and effects of mediation clauses and agreements to submit the dispute to mediation and their interaction with national courts, or the enforcement of the settlement reached by the parties.

While the Mediation Directive marks a positive shift towards common policies on mediation, there is still a long way to go. While the goal of the Mediation Directive is stated as ensuring a balanced relationship between mediation and judicial proceedings, it provides no guidance as to how this balance is to be achieved and implemented. Although mediation law and practice still differentiate widely in the EU, it will be interesting to see what effect the Mediation Directive has on the further development of mediation schemes and mechanisms in the individual European countries. The 2008 Mediation Directive must be approached as a first, but not last, and small step towards the evolution of the institution as a real complement to State courts in Europe. But for the institution to obtain full endorsement by citizens in the future, at least regarding cross-border disputes, full and free circulation of the settlement reached in the Member States across the Union should be ensured. Moreover, since cross-border disputes are likely to emerge increasingly in the forthcoming future, the enforcement of mediation settlement agreements needs to be at the top priority of the agenda policy within the EU.