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Vassiliki KOUMPLI[1]

The regulation of mediation in cross-border disputes: The model of Greece

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Abstract

Cross-border disputes have been traditionally resolved in Greece through recourse to litigation or arbitration. Following the international trend, however, and in compliance with the obligation to implement Directive (EC) No 52/2008, the Greek legislator enacted the Mediation Act of 2010, introducing a coherent legal framework for the regulation of mediation in both domestic and cross-border civil and commercial disputes. The paper aims to explore such legal framework, providing an overview of its historical and legal underpinnings and illustrating its content concerning the regulation of the mediation process from its commencement to its termination. The paper ends with some concluding remarks of the author in an attempt to explain the so-called "mediation paradox" from the Greek point of view.

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I Introduction

Cross-border disputes have been traditionally resolved in Greece through recourse to litigation or arbitration, which is still the prevailing ADR method. Mediation has been officially included in the ADR methods provided by Greek law since the enactment of the Mediation Act of 2010,[2] which introduced a coherent legal framework for the regulation of mediation in both domestic and cross-border civil and commercial disputes. Having the honor and pleasure to accept the kind invitation of Professor Michael Geistlinger to contribute to this special issue, the author aims to provide insight into the current legal framework in Greece concerning the regulation of mediation in cross-border disputes. Following this brief introduction (I), the present paper explores the historical and legal underpinnings of mediation regulation (II) and succinctly illustrates its content from the commencement to the termination of the mediation process (III). The paper ends with some concluding remarks of the author in an attempt to explain the so-called "mediation paradox" from the Greek point of view (IV).

II Underpinnings of mediation regulation in cross-border disputes

Mediation as a way of resolving disputes with the participation of a third neutral person in principle can be considered a philosophical concept known to almost all civilizations. However, its promotion nowadays, in particular at EU level, is based on a certain political choice about the governance of the state and the function of justice. This chapter analyses the historical (A) and legal (B) underpinnings of this new institution in Greece.

A Historical underpinnings

Amicable dispute resolution is not new in the Greek tradition. Various conciliatory schemes, often with the intervention of a third party, have been recognized since ancient times. In the Archaic period (800 B.C. to 459 B.C.), high status citizens called "conciliators" (in Greek: *συμβιβαστές*) were entrusted with proposing conciliatory solutions to the parties. During the Classical period (459 B.C. to 323 B.C.), negotiating parties used to assign to servants (in Greek: *θεράποντες*) the confidential transmission of proposals and counterproposals between them. Methods of compromise and conciliation were also applied during both the Byzantine and the post-Byzantine period.[3] Particular mention should be made of

2 Law 3898/2010. Mediation in civil and commercial matters, Government Gazette A 211.

3 Spiros Antonelos/Eleni Plessa, Mediation in civil and commercial cases, Athens/ Thessaloniki 2014, 3-8 [in Greek].

Held: by the Swiss Federal Tribunal, that (at least for international arbitrators sitting in Switzerland) the DAB procedures under the FIDIC contract must be treated as mandatory. An arbitration may not be initiated without first going to the DAB, if the contract provides for this. However, in the particular circumstances of this case, where an *ad hoc* DAB had not been constituted 18 months after it was requested, R was ultimately found to be unable to continue to rely upon the mandatory nature of the DAB procedure, so as to prevent the resolution of the dispute by arbitration. The decision contains helpful analysis of the relevant FIDIC provisions, which could be applied equally in other jurisdictions. As part of this analysis, the Swiss Supreme Court considered the wording of sub-clause 20.8, the words "or otherwise" being described by it as a "very vague expression", although it further stated:

> "[…] interpreting it literally and extensively would short-cut the multi-tiered alternative dispute resolution system imagined by FIDIC when it came to a DAB ad hoc procedure because, by definition, a dispute always arises before the ad hoc DAB has been set up, in other words, at a time when 'there is no DAB in place', however such interpretation would clearly be contrary to the goal the drafters of the system had in mind."

2 Peterborough City Council v. Enterprise Managed Services Ltd.[1]

Facts: C began court proceedings in the London Technology and Construction Court, arguing that it was effectively entitled to opt out of the requirement in sub-clause 20.2 of the FIDIC Silver Book, when it did not wish to have a dispute resolved by a DAB and, instead, to refer the dispute directly to court (which had been chosen by the parties as the final determination procedure, rather than arbitration). C relied upon sub-clause 20.8 and, in particular, the "or otherwise" wording. C's position was that the parties could not be under a mandatory obligation to achieve the appointment of a DAB and that the phrase "or otherwise" was wide enough to include a state of affairs where a DAB was not in place, because a dispute adjudication agreement had not been concluded as between the parties and the DAB.

Held: by Edwards-Stuart J, that the clause should be interpreted so that the words "or otherwise" should be construed narrowly, with the effect that sub-clause 20.8 did not give either party:

> "[…] a unilateral right to opt out of the [DAB] process, save in a case where, at the outset, the parties have agreed to appoint a standing DAB and that, by the time when the dispute arose, that DAB had ceased to be in place, for whatever reason."

The court proceedings commenced by C were therefore stayed, so as to enable the parties to "resolve their dispute in accordance with the contractual machinery", i.e. by the DAB.

Edwards-Stuart J further rejected the proposition that sub-clauses 20.4 to 20.7 inclusive of the FIDIC contract were unenforceable for lack of certainty. A

1 England and Wales High Court, *Peterborough City Council v. Enterprise Managed Services Ltd.*, [2014] EWHC 3193 (TCC) [2014] 2 All ER (Comm) 423; [2014] BLR 735.

This initiative at EU level was a consequence of the increasing concern about court costs and workload as well as other obstacles to cross-border dispute resolution in the single market.[12] By establishing a core framework for cross-border mediation in Europe, which can also be applied to domestic disputes,[13] the Mediation Directive aims at promoting its use for all disputes concerning civil and commercial matters, "ensuring a balanced relationship between mediation and judicial proceedings".[14] In order to avoid conceptual ambiguities, the Mediation Directive states that mediation shall be understood as

> "a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator".[15]

The key issues embodied in the Mediation Directive concern the voluntary[16] and confidential[17] character of the mediation process, its effect on limitation and prescription periods[18] and the enforceability of the agreements reached by the parties.[19]

At national level, Greece was among the first member states to implement the Mediation Directive. In regulating the new institution, the Greek Mediation Act adopted the monistic approach, establishing a uniform system for both domestic and cross-border mediation. After repeating the definition of mediation as stated in the Mediation Directive,[20] the Mediation Act delimitates its scope of application to private law disputes, which can be referred to mediation upon agreement of the parties provided that they have the right to dispose of the relative rights and obligations;[21] revenue, customs or administrative law matters as well as matters concerning the liability of the state for acts or omissions in the exercise of state authority (*acta iure imperii*) are currently excluded from the scope of the mediation regulation in Greece.[22] Regulating in essence the core elements of the process, the Mediation Act is accompanied by secondary legislation, which provides for specific details of its application.[23]

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12 For a thorough analysis, see, instead of others, Carlos Esplugues, Civil and Commercial Mediation in the EU after the Transposition of Directive 2008/52/EC, in: Carlos Esplugues (ed.), Civil and Commercial Mediation in Europe. Cross-Border Mediation – Volume II, Cambridge/Antwerp/Portland 2014, 485 (at 501 et seq.).

13 Recital 8 of Directive 2008/52/EC.

14 Article 1 of Directive 2008/52/EC.

15 Article 3(a) of Directive 2008/52/EC.

16 Article 3(a) of Directive 2008/52/EC.

17 Article 7 of Directive 2008/52/EC.

18 Article 8 of Directive 2008/52/EC.

19 Article 6 of Directive 2008/52/EC.

20 Article 4(b) of Law 3898/2010.

21 Article 2 of Law 3898/2010.

22 Explanatory Report to Law 3898/2010.

23 Presidential Decree 123/2011. Determination of terms and conditions for the authorization and operation of training bodies for mediators in civil and commercial disputes, Government Gazette A 255; Decision of the Minister of Justice, Transparency and Human Rights Nr. 109088 οικ./12.12.2011. Procedure for recognition of mediators' accreditation – Adoption of Code of Conduct for Accredited Mediators and Determination of sanctions for infringements thereof, Government Gazette B 2824; De-

At the same time, reference to mediation is made by the provisions of the Greek CCP, which are applicable also when recourse to litigation concerns cross-border disputes. In general, it is stated that the seized court shall encourage the option of mediation as a way of extrajudicial dispute resolution and support relevant initiatives of the parties.[24] The court shall suggest recourse to mediation under the Mediation Act if it considers this appropriate based on the circumstances of the case. On acceptance of such proposal, as well as when recourse to mediation takes place on the parties' initiative during a pending lawsuit, the hearing of the case shall be adjourned for a period of three months or cancelled, depending on the nature of the dispute.[25] The CCP provides, moreover, for a judicial mediation procedure for private law disputes, which is also voluntary and conducted by judges. Recourse to mediation may take place before filing a suit or during *lis pendens*, either upon suggestion of the court or on the parties' initiative. The court shall adjourn the case for a hearing on a short date, which shall not exceed six months. The procedure of judicial mediation contains separate and joint meetings among the attorneys of the parties and the mediator judge, who may offer the parties non-binding suggestions for the resolution of the dispute. The process shall be conducted in such a way as to respect confidentiality, unless the parties agree otherwise.[26]

III Content of mediation regulation in cross-border disputes

The Greek Mediation Act, on which this paper focuses, applies to mediations taking place in Greece as long as a domestic or a cross-border dispute arises. It provides a definition of the term "cross-border dispute", from which one can also deduct the notion of "cross-border mediation" in the Greek legal order. A cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a EU member state other than that of any other party on the date on which: (a) the parties agree to use mediation after the dispute has arisen; (b) mediation is ordered by a court of a EU member state; (c) an obligation to use mediation arises under national or foreign law; or (d) an invitation is made to the parties by the court before which an action is already brought. It is further stated that a cross-border dispute shall also be one in which judicial proceedings or arbitration following mediation between the parties are initiated in a member state other than that in which the parties were domiciled or habitually resident on the date on which the circumstances mentioned above under (a)-(c) occurred.[27] This does not mean, however, that a mediation process cannot take place in

cision of the Minister of Justice, Transparency and Human Rights Nr. 1460/ οικ./27.1.2012. Determination of mediator's fees, Government Gazette B 281; Decision of the Ministers of Finance and Justice, Transparency and Human Rights Nr. 85485 οικ./18.9.2012. Determination of administrative fees for mediation, Government Gazette B 2693.

24 Article 116A CCP.

25 Article 214C CCP.

26 Article 214B CCP. For an overview, see among others, Vassiliki Thanou-Christofilou, Judicial mediation (Art. 214B CCP), Elliniki Dikaiosyni (Hellenic Justice) 2013, 937 et seq. [in Greek]; Katerina Fragkou, Judicial mediation, in: Athanassios Kaissis (ed.), Problems and aspects of mediation, Thessaloniki 2014, 15 et seq. [in Greek].

27 Article 2 of Directive 2008/52/EC; Article 4(a) of Law 3898/2010.

Greece when one of the parties is, for instance, domiciled outside the EU. Such process may of course be defined as "cross-border mediation"; yet, it remains essentially unregulated and, depending on the particular agreement of the parties, it may constitute either an institutional mediation or simply a "wild mediation".[28] It should be highlighted that in the latter case no formal requirements concerning the qualities and the duties of the mediator are applicable.

The present chapter provides a succinct illustration of the regulation of mediation in cross-border disputes, dealing consecutively with the commencement (A), the conduct (II) and the termination (III) of the process.

A The commencement of the mediation process

1 Recourse to mediation

According to the Mediation Act, the parties may in principle agree to have recourse to mediation before or during *lis pendens* (mediation *ex voluntate*). They may also be invited by the court to do so during the pendency of a suit (mediation *ex juditio*). In this case, the recourse to mediation is registered in the record of the court. Mediation may further be ordered by another EU court as well as be imposed by another provision of law (mediation *ex lege*).[29] Yet, it is not specified what "recourse to mediation" means and, subsequently, when the mediation process begins. In an attempt to deal with this question, legal doctrine suggests that

> "what is critical is the time when the mediation procedure actually begins, i.e. the time when the parties appoint a mediator in order to start the mediation procedure to solve their dispute".[30]

In order to protect and ensure the validity of the parties' claims, the compatibility with rules regarding limitation and prescription periods is required, so that the parties will not be discouraged from referring to mediation due to the risk of extinction of such claims. In this respect, it is provided that the recourse to mediation interrupts the statute of limitations and the prescription period for as long as the mediation procedure lasts. Limitation and prescription period that has been interrupted, restarts once the report of failure is drafted or a party serves the statement abandoning the mediation to the other party and the mediator or the procedure is in any other way terminated.[31]

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28 Unless, for instance, the dispute can be referred to judicial mediation under Article 214B CCP. See supra.

29 Article 3 of Law 3898/2010.

30 Nikolaos Klamaris/Calliope Chronopoulou, Mediation in Greece: A Contemporary Procedural Approach to Resolving Disputes, in: Klaus Hopt/Felix Steffek (eds), Mediation. Principles and Regulation in Comparative Perspective, Oxford 2013, 585 (at 593).

31 Article 11 of Law 3898/2010. As to the interpretative difficulties of this provision, see Konstantinos Polyzogopoulos, Außergerichtliche Streitschlichtung: Die griechische Lösung, in: Alexander Burns (ed.), Festschrift für Rolf Stürner zum 70. Geburtstag, 2. Teilband, Tübingen 2013, 1745 et seq. (at 1758). As to the issue whether the interruption applies both to claims of parties involved in the mediation process (*inter partes*) and those of third parties (*erga omnes*), see in detail Konstantinos Christodoulou, Directive 2008/52 on mediation in civil law disputes, Nomiko Vima 2010, 287 (at 303); and Apostolos Anthimos, Greece, in: Giuseppe de Palo/Mary Trevor

2 The agreement to mediate

The commencement of the mediation process presupposes the existence of an agreement to mediate. Such agreement is evidenced by virtue of a written document or the court records and is governed by the provisions of substantive contract law,[32] as this is determined by the provisions of the Rome I Regulation.[33] The agreement to mediate can be concluded either separately or jointly, in the same document with the main contract as mediation clause. Even in the latter case, it constitutes an autonomous agreement, distinguished from the main contract. This means that the judge or the arbitrator deciding on a case where a mediation clause applies only has to verify the validity of such clause and not the validity of the entire contract.

The Mediation Act does not specify the content of the agreement to mediate. There is no doubt that a clear commitment to mediation constitutes the minimum requirement for the validity of such an agreement. At transnational level, mediation will often be chosen as one of several successive ways of resolving a dispute, following negotiation and before commencing litigation or arbitration proceedings. In order to avoid complications, it is advisable that in such cases the mediation clause should also nominate a mediation provider or a particular mediator as well as provide for the place and language of the mediation.

At this point, particular mention should be made of the statement of the Explanatory Report to the Mediation Act, under which

> "The principle of freedom of the parties in mediation presupposes that they have full knowledge of the merits and the legal dimension of their dispute in order to agree on its referral to this process. […] This does not exclude the contractual provision of referral to mediation, through relevant clause, of future disputes. However, due to the importance of the voluntary recourse to mediation for the successful outcome of the process, it has been considered that the relevant agreement to mediate should be also repeated after the dispute has arisen."[34]

It is to be noted that such requirement of repetition of the agreement to mediate after the dispute has arisen is not explicitly provided by the Mediation Act or the CCP.[35] Nor does the Mediation Directive impose such an obligation to the

(eds), EU Mediation. Law and Practice, Oxford 2012, 148 (at 156); both arguing that the interruption due to the recourse to mediation has an *erga omnes* effect.

32 Article 2 of Law 3898/2010. Under the wording of this provision, the written form appears to only have the role of documentary evidence, with no particular form being required for the validity of the agreement to mediate. See in this respect Vassilios, Kourtis, Greece, in: Carlos Esplugues/José Luis Iglesias/Guillermo Palao (eds), Civil and Commercial Mediation in Europe. National Mediation Rules and Procedures. Volume I, Cambridge/Antwerp/Portland 2013, 193, 203. However, under the wording of recently enacted Article 214C(2) CCP stating that "the agreement of the parties to mediate is valid as long as it is evidenced by virtue of a written document", the written form appears to be a condition for the validity of such agreement.

33 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ L 177, 4.7.2008, 6, in force since 17 December 2009.

34 Explanatory Report to Law 3898/2010 (Article 3).

35 Article 3 of Law 3898/2010 provides that "the parties may in principle agree to have

implementing member states.[36] Of course this statement reflects the legislator's will to ensure the voluntary character of the process; it contravenes, nonetheless, the purpose of promoting mediation as suggested by the Mediation Directive. In this direction it should also be borne in mind that, even though so far there is no provision of law imposing mediation, mandatory mediation is not foreign to the Greek legal order given that the Mediation Act explicitly provides for such possibility.[37] If the repetition of a mediation clause after the dispute has arisen constituted a condition for its validity, this should be expressly provided by the law. A different approach necessarily insinuates that it is pointless to conclude any agreement to mediate future disputes.

Mediation remains a voluntary affair in the way that no negative consequences are linked to the decision of a party to stop mediation.[38] In fact, the mediation clause does not entail procedural effects as those arising in case of an arbitration clause and cannot prevent recourse to state justice once the dispute arises.[39] If a case is brought directly to court despite the existence of an agreement to mediate, either party can raise an objection under substantive law referring to the legality of the claim (and not to the admissibility of the filing of the lawsuit or the hearing).[40] Given that the agreement to mediate entails an obligation to renegotiate the dispute, the parties should at least appoint a mediator and attend the first meeting. However, once the mediation process has started, they are free to withdraw at any time and without justification.

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recourse to mediation before or during *lis pendens*". Therefore, the agreement to mediate can be concluded at any time before *lis pendens*, even before the dispute has arisen.

36 Article 2(1)(a) of Directive 2008/52/EC states that "For the purposes of this Directive a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which: (a) the parties agree to use mediation after the dispute has arisen;[…]". This provision, nevertheless, only refers to the definition of the concept of 'cross-border dispute' and does not introduce conditions for the validity of the agreement to mediate.

37 Article 3 of Law 3898/2010.

38 Article 8(3) of Law 3898/2010.

39 Explanatory Report to Law 3898/2010 (Article 2). As to the legal nature of the agreement to mediate, see Konstantinos Christodoulou, Directive 2008/52 on mediation in civil law disputes, Nomiko Vima 2010, 298; Apostolos Anthimos, Greece, in: Giuseppe de Palo/Mary Trevor (eds), EU Mediation. Law and Practice, Oxford 2012, 156, 157; Nikolaos Klamaris/Calliope Chronopoulou, Mediation in Greece: A Contemporary Procedural Approach to Resolving Disputes, in: Klaus Hopt/Felix Steffek (eds), Mediation. Principles and Regulation in Comparative Perspective, Oxford 2013, 597, 591, 592, Stavroula Aggoura, Legal nature of the agreement to mediate, in: Athanassios Kaissis (ed.), Problems and aspects of mediation, Thessaloniki 2014, 23 et seq. [in Greek].

40 See Georgios Diamantopoulos/Vassiliki Koumpli, On mediation law in Greece, Revue hellénique de droit international 67 (2014), 361, at 374-375; Georgios Diamantopoulos/Vassiliki Koumpli, Mediation: The Greek ADR Journey Through Time, in: Carlos Esplugues/Louis Marquis (eds), New Developments in Civil and Commercial Mediation, Switzerland 2015, 313 (at 321-323).

3 The appointment of the mediator

The Mediation Act defines the mediator as

> "a third person in relation to the parties, who is asked to conduct mediation in an effective, competent and impartial way, regardless of the way in which that third person has been appointed or requested to conduct the mediation",

providing also that he shall be accredited by the Ministry of Justice, Transparency and Human Rights.[41] The appointment of the mediator may be based on a contract between him and the parties (governed by the law applicable under Rome I Regulation), on a public law instrument (judgment) or even *de facto*, without any existing relationship with the parties.[42] The Mediation Act refers to only one mediator (singular) and never to mediators; nor is the term co-mediation found anywhere in the relevant provisions. It cannot be ruled out, however, since no such exclusion is explicitly made.[43]

The mediator is not obliged to accept his appointment;[44] once he accepts it, however, he has to act in compliance with the powers and duties given to him by the parties. Before accepting his appointment, the mediator must verify that he has the appropriate expertise and premises to conduct the mediation and, upon request, he must disclose information concerning his expertise and experience to the parties.[45] The mediator is also obliged to ensure that prior to the beginning of the mediation the parties have understood and expressly agreed on the terms and conditions of the agreement to mediate, including any provisions relating to obligations of confidentiality of the mediator and the parties.[46]

The selection of the mediator constitutes the most important part of the mediation and it would not be an exaggeration to say that the success of the whole process depends on it. Unfortunately, in Greece to date there is no adequate access to objective information for assessing the suitability of a mediator for a specific dispute, particularly at cross-border level, where a series of complications may occur. On finding a mediator one has to rely mainly on directory listings or unofficial recommendations, which may prove unreliable. In this respect,

41 See Article 4(c) of Law 3898/2010. Articles 5-7 of Law 3898/2010, Presidential Decree 123/2011 and Decision of the Minister of Justice, Transparency and Human Rights No. 109088 οικ./12.12.2011 determine the terms and conditions for the authorization and operation of training bodies for mediators in civil and commercial disputes and the procedure for the mediators' accreditation. It is reminded that in case of judicial mediation under Article 214B CCP, mediators are judges of the court of first instance or the court of appeal, provided that they have not been involved in the particular dispute. See supra.

42 Georgios Diamantopoulos/Vassiliki Koumpli, On mediation law in Greece, Revue hellénique de droit international 67 (2014), 377; Georgios Diamantopoulos/Vassiliki Koumpli, Mediation: The Greek ADR Journey Through Time, in: Carlos Esplugues/Louis Marquis (eds), New Developments in Civil and Commercial Mediation, Switzerland 2015, 324.

43 Nikolaos Klamaris/Calliope Chronopoulou, Mediation in Greece: A Contemporary Procedural Approach to Resolving Disputes, in: Klaus Hopt/Felix Steffek (eds), Mediation. Principles and Regulation in Comparative Perspective, Oxford 2013, 598.

44 Article 8(4) of Law 3898/2010.

45 Article 1.2 of the Code of Conduct for Accredited Mediators.

46 Article 3.1 of the Code of Conduct for Accredited Mediators.

training requirements as well as the enactment of the Code of Conduct for Accredited Mediators are certainly the first step towards counterbalancing such risk.

B The conduct of the mediation process

1 Principles of the mediation process

The mediation process is regulated in a spirit of flexibility, given that the relative details are to a large extent determined by the mediator after consultation with the parties: the parties are free to agree with the mediator on the manner in which the mediation is to be conducted either by reference to a set of rules or otherwise.[47] The lack of formality should not, however, be considered as introducing an out-of-law process. In an attempt to ensure the fairness of the process, there are framework provisions and basic principles governing its conduct.

In this respect, it is provided that (a) the mediator shall be appointed by the parties or a third person of their choice; (b) the parties shall attend the mediation process accompanied by authorized attorneys; (c) the mediator can communicate and meet in private each party; (d) no records are kept during the mediation process; (e) the parties are free to terminate the mediation procedure whenever they wish.[48] The Mediation Act does not exclude the application of e-justice instruments to the mediation process. The use of online technology may facilitate the mediator and the parties when direct meetings are not possible due to geographic distance or other barriers. In this sense, it could be an advantage in case of certain cross-border mediation processes, when the value of the dispute does not justify the costs of physical presence (such as in cross-border consumer disputes).[49]

The principle of confidentiality constitutes a fundamental element of the mediation process. Mediation shall be conducted in such a way as to respect confidentiality, unless the parties agree otherwise. The parties may bind themselves in writing to maintain confidentiality as to the contents of any agreement reached between them, unless the disclosure of its content is necessary for the enforcement of such an agreement. None of the persons involved in the mediation procedure (e.g. mediators, parties, their attorneys etc.) shall be heard as witness in the future. Nor shall they be compelled to disclose information concerning the mediation procedure in subsequent court or arbitration proceedings, unless it is imposed by public policy rules and in particular when it is required in order to

47 Article 3.1 of the Code of Conduct for Accredited Mediators.

48 Article 8 of Law 3898/2010. Similar provisions are introduced by Art. 214B(3)(a) CCP as regards judicial mediation. Given that the parties shall have full control over the result of the mediation (i.e. reaching of an agreement), while the mediator shall have full control over the procedure, the "termination of the mediation procedure by the parties" shall be interpreted as a declaration that they are not willing to reach an agreement and, so, the mediator shall terminate the procedure without delay. See Vassiliki Skordaki, Mediation under Law 3898/2010, Athens 2012, 187 [in Greek].

49 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, OJ L 165, 18.06.2013, 63 has been transposed to the Greek legal order by Joint Decision No. 70330οικ./2015 of the Minister of Economy, Development and Tourism and the Minister of Justice, Transparency and Human Rights, Government Gazette B 1421.

ensure the protection of children or to prevent harm to the physical or psychological integrity of a person.[50] The mediator, in particular, shall keep confidential all information arising out of or in connection with the mediation (including the fact that the mediation is to take place or has taken place), unless compelled by law or grounds of public policy to disclose it. Moreover, any information disclosed in confidence to mediators by one of the parties must not be disclosed to the other parties without permission, unless compelled by law.[51]

The existing legal framework, furthermore, introduces the principle of independence and impartiality of the mediator.[52] If there are any circumstances that may, or may be seen to, affect a mediator's independence or give rise to a conflict of interests, the mediator must disclose those circumstances to the parties before acting or continuing to act – this duty being a continuing obligation throughout the process of mediation. Such circumstances include any personal or business relationship with one or more of the parties, any financial or other interest, direct or indirect, in the outcome of the mediation, as well as the mediator or a member of his firm having acted in any capacity other than as mediator for one or more of the parties. In such cases the mediator may only agree to act or continue to act if he is certain of being able to carry out the mediation in full independence in order to ensure complete impartiality and if the parties explicitly consent. Mediators are also obliged at all times to act – and endeavour to be seen to act – with impartiality towards the parties and be committed to serve all parties equally with respect to the process of mediation.

In case of breach of his duties the mediator is only liable for fraud[53] (by contrast with arbitrators, who are also liable for gross negligence[54]). Furthermore, the Minister of Justice, Transparency and Human Rights can impose the sanction of temporary or permanent suspension of the mediator's accreditation.[55]

2 Costs of the mediation process

The law provides that the mediators' remuneration is to be calculated on an hourly basis and their occupation cannot exceed 24 hours, including preparation time. The parties and the mediator, however, can agree otherwise as regards the mediator's remuneration method.[56] The mediator's remuneration shall be borne by the parties in equal shares, unless otherwise agreed by them. The parties shall also bear the fees of their attorneys.[57] Apart from the mediator and attorney's fees, when the mediator submits the original document of the settlement agreement to the court (so as to become an enforceable title) the interested party shall pay a relevant fee.[58]

50 Article 10 of Law 3898/2010.
51 Article 4 of the Code of Conduct for Accredited Mediators.
52 Article 4(c) of Law 3898/2010; Article 2 of the Code of Conduct for Accredited Mediators.
53 Article 8(4) of Law 3898/2010.
54 Article 881 CCP.
55 Article 5 of the Code of Conduct for Accredited Mediators.
56 Article 12 of Law 3898/2010. By virtue of Decision of the Minister of Justice, Transparency and Human Rights No. 1460/ οικ./27.1.2012, the mediator's hourly based remuneration has been determined at the amount of 100,00 Euros.
57 Article 9(2) of Law 3898/2010.
58 Article 9 of Law 3898/2010. Decision of the Ministers of Finance and Justice, Trans-

Neither the Mediation Act nor other special legislation contains provisions dealing with legal aid for the mediation process in particular. The general provisions of Articles 194 et seq. CCP on the "benefit of poverty" and Law 3226/2004 on legal aid in civil and commercial disputes[59] could only be applicable to mediation where recourse to it is required by the law or ordered by the court.[60] In this case, legal aid could cover all the costs of mediation, including the remuneration of attorneys and mediators. If mediation is conducted on a totally voluntary basis, legal aid cannot be granted under the existing legal framework.

Particular mention should be made of Article 10(c) of Law 3226/2004, which provides that

> "in case of cross-border disputes legal aid may also consist in the appointment of a legal adviser to assist with the settlement of the dispute before the commencement of a court proceeding".

It has been argued that this provision could be understood as also covering the attorney's remuneration in case of mediation, but it could not be considered as covering the mediator's remuneration and other costs of mediation.[61] One should take into account, nonetheless, that this legal aid scheme aims at covering out-of-court procedures (such as mediation) only "where recourse to them is required by the law or ordered by the court". In this sense, a provision on granting legal aid for pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings could hardly be understood as also covering the attorney's remuneration in case of voluntary mediation.[62]

That said, it should be clear that under the current regime in Greece, legal aid can be granted in mediation proceedings only when recourse to it is ordered by the court (since there is no law requiring recourse to mediation so far) as well as in case of judicial mediation. Of course, there is no doubt that legal aid can be

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parency and Human Rights No. 85485 οικ./18.9.2012 has set the relevant fee at the amount of 100,00 Euros.

59 Law 3226/2004. Legal aid to citizens with low income etc., Government Gazette A 24, has been promulgated to implement Directive 2002/8/EC of the Council of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating legal aid for such disputes, EE L 26, 31.1.2003, 41. It introduced a complete system of legal aid for civil and commercial matters covering both internal disputes as well as disputes with cross-border implications when the parties are citizens of a member state of the European Union or have their domicile or residence in a member state. After its enactment, the application of the provisions of Articles 194 et seq. CCP in case of civil and commercial disputes has been limited to legal entities as well as to individuals who are not citizens of a member state of the European Union and have their domicile or residence outside the European Union.

60 Given that such provisions also apply to actions that do not constitute "trial" (Article 196(1) CCP; Article 8(1) of Law 3226/2004), but their operation should be required by the law (e.g. in case of enforcement processes) or ordered by the court.

61 Apostolos Anthimos, The advent of a 'new' institution: mediation, Armenopoulos 2010, 469 et seq. (at 480-481) [in Greek]; idem, Greece, in: Giuseppe de Palo/Mary Trevor (eds), EU Mediation. Law and Practice, Oxford 2012, 154; idem, Financial aspects of mediation, in: Athanassios Kaissis (ed.), Problems and aspects of mediation, Thessaloniki 2014, 45 et seq. (at 45) [in Greek].

62 See Recitals 11 and 21 and Article 10 of Directive 2008/52/EC.

granted under the provisions of Articles 194 et seq. CCP and Law 3226/2004 for the enforcement of authentic instruments embodying a mediation agreement.

C The termination of the mediation process

1 Outcome of the mediation process

As already mentioned, the parties can finish the mediation process at any time they wish, meaning that they can declare their will not to reach an agreement; the mediator, thus, shall proceed immediately to the termination of the procedure, drawing up and signing the relevant minutes alone.[63] From a procedural point of view, following an unsuccessful mediation, the prescription period that was interrupted shall be renewed. When the mediation was ordered by the court, the latter continues the proceedings after summons by any of the interested parties. When the parties referred to mediation before the commencement of the court proceedings, they can file a lawsuit concerning their claim.[64] Of course, no judicial review procedures are provided in case of failure; at the same time, no second attempt to mediate is prohibited.[65] Admittedly, even in case of failure, the parties will have obtained the benefit of at least discussing their dispute and trying to understand each other's positions.[66]

After the successful conclusion of the mediation process, the mediator, the parties and their attorneys sign the relevant minutes. Upon request of at least one of the parties,[67] the mediator shall submit the original document of the minutes to the court of first instance of the jurisdiction where the mediation took place. Since their filing to the clerk of the court of first instance, the minutes recording a mediation agreement concerning a claim subject to enforcement constitute an enforceable title.[68] The law governing the mediation agreement is in principle determined by the Rome I Regulation. As to agreements that may escape its ambit, the old provision of Article 25 CC is still applicable.

2 Recognition and enforcement of foreign mediation agreements

Resolving a specific dispute by a binding and enforceable agreement is of particular importance at the level of cross-border mediation, where the effectiveness of a given enforcement regime for foreign mediation settlements may be one of the decisive factors for the success of the institution of mediation.

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63 Article 9(2) of Law 3898/2010. He shall not, however, mention the cause of such failure and the party responsible for it. See Nikolaos Klamaris/Calliope Chronopoulou, Mediation in Greece: A Contemporary Procedural Approach to Resolving Disputes, in: Klaus Hopt/Felix Steffek (eds), Mediation. Principles and Regulation in Comparative Perspective, Oxford 2013, 596.

64 Nikolaos Klamaris/Calliope Chronopoulou, Mediation in Greece: A Contemporary Procedural Approach to Resolving Disputes, in: Klaus Hopt/Felix Steffek (eds), Mediation. Principles and Regulation in Comparative Perspective, Oxford 2013, 596.

65 Explanatory Report to Law 3898/2010 (Part A).

66 Ibid.

67 However, Article 6(1) of Directive 2008/52/EC requires both parties' consent even in this case.

68 Article 9(2) of Law 3898/2010.

Foreign mediation agreements that have been made enforceable in a member state of the European Union shall be recognized and declared enforceable in Greece as follows:[69] (a) by virtue of Articles 58-60 of the Brussels I *bis* Regulation,[70] which applies to authentic documents and court settlements respectively in civil and commercial matters; (b) by virtue of Article 46 of the Brussels II Regulation,[71] which applies particularly to authentic instruments and agreements in matrimonial matters and matters of parental responsibility; (c) by virtue of Article 48 of Regulation (EC) No. 4/2009,[72] which applies particularly to authentic instruments and court settlements relating to maintenance obligations; (d) by virtue of Articles 59-61 of Regulation (EU) No. 650/2012,[73] which applies particularly to authentic instruments in matters of succession; (e) by virtue of Regulation (EC) No. 805/2004,[74] which provides for the issuance of a European Enforcement Order in case of uncontested claims. In the latter case, in fact, a foreign mediation agreement may be recognized and enforced even when it would be inadmissible if reached in Greece, given that Greek courts shall not be able to invoke the public order clause to prevent enforcement in such cases.[75] Mediation agreements reached within the European Union, which have not been recorded in an authentic instrument and are not enforceable in a member state, can be made enforceable according to Article 904 CCP, namely: (a) by being incorporated in a notarial act; (b) after the issuance of an order of payment when the agreement concerns the recognition of a money claim; (c) when they are incorporated in the minutes recording court proceedings embodying the settlement of the parties under Article 293(1) CCP.

Foreign mediation agreements reached outside the European Union, which are registered as an authentic instrument and are enforceable according to the law of the country of origin, shall become enforceable in Greece in accordance with the provisions of Article 57 of the Lugano Convention of 2007[76] (with regard

69 See Recitals 20 and 21 of Directive 2008/52/EC.

70 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, 1, which replaced as of 10 January 2015 Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, 1.

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

72 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, OJ L 7, 10.1.2009, 1.

73 Council Regulation (EU) No. 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, 107.

74 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, OJ L 143, 30.4.2004, 15.

75 The public order clause can be invoked in the case of the Brussels I Regulation, Brussels II Regulation etc.

76 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30.10.2007, OJ L 339, 21.12.2007, 1.

to Norway, Switzerland and Iceland) or any existing bilateral treaties, otherwise in accordance with Article 905(a) CCP, provided that they are not contrary to good morals and the Greek public order. If such agreements have not been recorded in an authentic instrument, they can be made enforceable according to Article 904 CCP, as mentioned above, i.e. (a) by being incorporated in a notarial act; (b) after the issuance of an order of payment when the agreement concerns the recognition of a money claim; (c) when they are incorporated in the minutes recording court proceedings embodying the settlement of the parties under Article 293(1) CCP.[77]

IV Concluding remarks: The "mediation paradox"

The adoption of the current legal framework has admittedly contributed to the creation of a strong "ADR Movement" in Greece, as shown by the increased number of mediation centres, trainings, publications and conferences. In practice, however, the application of mediation in civil and commercial matters remains extremely limited so far, despite its undisputed benefits.[78] Such disconnect between the benefits of mediation and its current use, known as the "Mediation Paradox",[79] could be explained through the fear before the unknown or even the famous mediterranean mentality.[80] As happened in other jurisdictions too, many lawyers in Greece regarded ADRs as ways of "*A*ccelerated *D*ecrease of *R*evenue". Given also the relatively low court costs, claimants have not been prevented from referring to court proceedings even when the possibilities of winning the case are limited. Similarly, significant delays in the administration of justice, at both the stage of hearing a case and the stage of execution of judgments, prevent defendants from agreeing to submit a dispute to mediation, particularly after it has arisen. In this context, mediation appears to be preferable in cross-border disputes where an arbitration clause already exists.

The promotion of mediation in Greece depends on the awareness of its advantages as an innovative tailor-made process that allows the parties to discover the core of their conflict and reach solutions that satisfy their interests, but could not be obtained in a courtroom. In this sense, a curriculum reform in law schools

77 As to the recognition and enforcement of foreign mediation agreements, see Georgios Diamantopoulos/Vassiliki Koumpli, On mediation law in Greece, Revue hellénique de droit international 67 (2014), 390-392; Vassilios Kourtis, Greece, in: Carlos Esplugues (ed.), Civil and Commercial Mediation in Europe. Cross-Border Mediation. Volume II, Cambridge/Antwerp/Portland 2014, 181 et seq. (at 198); Georgios Diamantopoulos/Vassiliki Koumpli, Mediation: The Greek ADR Journey Through Time, in: Carlos Esplugues/Louis Marquis (eds), New Developments in Civil and Commercial Mediation, Switzerland 2015, 334-336.

78 See European Parliament – Directorate General for Internal Policies, 'Rebooting' the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU. Study, Brussels 2014, available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf, at 6 (15 November 2015).

79 Ibid., at 7.

80 Konstantinos Polyzogopoulos, Außergerichtliche Streitschlichtung: Die griechische Lösung, in: Alexander Burns (ed.), Festschrift für Rolf Stürner zum 70. Geburtstag, 2. Teilband, Tübingen 2013, 1759.

seems to be necessary. Furthermore, the quality of the mediators' training as well as the compliance with high ethical standards will definitely play an important role. Providing incentives to parties who choose to mediate shall also contribute to the development of the institution of mediation. With respect to certain categories of disputes, the establishment of compulsory elements with opt-out possibilities could have the desired effect too: mediation could be either mandatory by virtue of law or ordered (not just suggested) by the judge.[81]

A first step towards a positive familiarization with mediation processes in practice is being made through judicial mediation due to the institutional authority and reliability of judges in the minds of the parties in Greece. This is a great advantage, which, at least at the moment, significantly contributes to the emergence of mediation as a mainstream dispute resolution technique, outweighing disadvantages such as the burdening – or the failure of disburdening – of courts and the lack of mediation training requirements as regards judges-mediators.

81 See also European Parliament – Directorate General for Internal Policies, 'Rebooting' the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU. Study, Brussels 2014, available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf, at 7, 19, 26 (15 November 2015).