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Mediation on the Matter of Parental Responsibility, the Concern of the European Judicial System of the New Millennium

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Abstract: In today's society, given the countless litigations involving minors and arduous litigation that is difficult to manage for the parties involved, all heavily burdening the work of the courts, at European level and not only specialists insist on alternative, non-contentious conflict resolution procedures. One of these effectively proven procedures is mediation. Given the very high mobility of citizens, both nationally and crossborder, the number of cases involving minors is steadily rising, thus cross-border mediation is giving proof of its increasingly effective role.

Keywords: mediation; cross-border; minor; litigation; family; child; legislation

Despite the fact that the institution of mediation, as an alternative method of resolving disputes is quite recent, according to historical annals, mediation dates back to antiquity. During the Roman civilization mediators were part of various social groups holding different titles such as: medium, conciliator, interlocutor, and others (Alexander, 2009, p 51).

In ancient times, in Africa, Asia, Australia, America, New Zealand, within the communities there were strong kinship ties where for conflict mitigation, mediation was the method by law (Alberstein, 2007, p. 321).

At present, on European level, legislation stimulates the use of mediation, which is considered essential as far as access to justice is concerned, making an appreciable contribution to the protection of human rights, avoiding crises and resolving conflicts in a non-contentious and lasting way. This consolidates and develops a corridor of freedom, security and justice.

In essence, mediation is not an institution, in the true sense of the word, it provides assistance aimed at fulfilling the functions of judicial institutions. Existing in the subsidiary of the limits of national and international judicial competence, mediation is situated at the fragile border between judicial and extrajudicial fields.

From the perspective of the parties involved in a dispute, without specifying its nature, mediation is required to be an alternative in resolving the case. The approach of a mediator clearly shows the

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orientation of the parties towards facilitated dialogue, negotiation, less harsh attitudes towards the litigious one.

Mediation has developed differently in the EU. Member States have different attitudes towards mediation. While the legislation of some states provides clear directives for mediation, others' legislation does not explicitly express their inclination towards this procedure, while others' have made a true art out of mediation (https://e-justice.europa.eu/content_mediation_in_member_states-64-en.do - "The mediation process in the Member States").

A major concern at the moment is cross-border mediation. Cross-border mediation can be successfully applied to family conflicts. This type of mediation is based on the use of methods specific to family cases, especially those involving minors.

This procedure can be carried out even remotely, without requiring the parties to be present in the same office, as they have the opportunity to mediate even in separate locations, thus creating protection for the minor. There is even the possibility of moving the mediator to a location that is neutral to the parties. The problems that arise due to not speaking the language are solved by using the services offered by translators and interpreters, who are bound by the obligation to maintain the confidentiality of the information provided during the mediation.

The great advantage of cross-border mediation lies in its realization due to the advanced technology of online mediation - communication. This method is very effective if the parents are in different parts of the world and do not have the opportunity to perform face-to-face mediation, or a mediation started in the physical presence of both parents could not be completed before the departure of one of the parties.

First and foremost, given the differences in legislation, co-mediation is preferred in resolving cross border conflicts. This proves to be the most appropriate method of mediating family cross-border differences, considering that bi-cultural linguistic mediation is used.

The mediator needs to know and correctly apply the mediation legislation of the parties, even if they come from different countries, even continents.

If we refer to the international abduction of minors, especially situations when children are from mixed families, for example a child abducted in the Arab state, with cultural and religious differences where the authorities are very reluctant to return due to the above mentioned differences, cross-border mediation bilateral agreements) can be a lifeline for parents and minor children, as the values that are emphasized in the exercise of parental rights in education may be completely different in mixed families (Kovach, 2003, pp. 55-56).

Family mediation always considers the best interests of the minor, and the mediation process must emphasize the needs of the child, highlighting the discussions with the minor throughout the mediation. Mediation involving the presence of the child can only be done if both the parent and the child agree.

According to the provisions of Regulation (EC) no. 2201/2003, hearing the child has an important role. It is based on the child's need for his parents to resolve their differences, to satisfy the child's need for safety and to establish a close relationship with both parents, to establish custody and the right to visit, minimizing the proportions of the conflict. Mediation is the recommended method in family disputes, given that their number in the new Millennium is alarmingly high. These disputes are the result of factual separations or divorces that produce harmful consequences for children and not only, disputes arising from continuous relays and interdependence in an unhappy emotional context.

It is recommended that parents have access to legal information throughout the mediation. This is done by keeping specialized legal representatives or by replacing them by the mediator who has legal studies.

Mediation in Belgium

In Belgium, mediation is provided in art. 78 of the Constitution and is within the competence of the Federal Mediation Commission.

Even if it does not itself carry out mediation activities, it is the Federal Commission that regulates this profession and updates the records of persons who are authorized as mediators. Considering the fact that we are talking about authorized mediators, the Federal Commission for Mediation is the one that guarantees the act of mediation both from the point of view of quality and from the point of view of good conduct.

Mediation can be used in various law branches. Most cases of mediation are in civil cases, especially in family law. In view of the new provisions of family law, the judge is obliged to inform the parties of the possibility of using the mediation procedure.

According to the provisions of the European Directive no. 2008/52/EC, it is necessary to have the possibility to request the forced execution of a written agreement, which is concluded following the mediation. Member States shall specify which authorities or courts have jurisdiction to receive such requests. However, Belgium has not communicated who these authorities in charge of receiving them are.

Even in these conditions, in accordance with the provisions of art. 1733 and 1736 of the Judicial Code, there is the possibility of recognizing the mediation agreement by the court, giving it the character of authenticity and enforceability, an agreement that takes the form of a court decision.

Conditioned by the agreement of the parties, there is also the option of transposing the mediation agreement into a notarial deed that makes the mediation agreement an enforceable title.

Mediation in Italy

By Legislative Decree no. 28/2010 and according to the Ministerial Order no. 180/2010, a mediation system has been implemented in Italy with the aim of resolving disputes against any right that the parties are free to waive or may transfer. Mediation is done through mediation organizations - which can be from both the public and private sectors.

In 2013, the Italian Government issued a decree implementing mandatory mediation as prior to the judicial process in both civil and commercial matters. By taking this measure, it was estimated that the courts would be relieved of a minimum of 1 million cases in a period of 5 years.

Mediation is mandatory in family conflicts that also entail those involving minors.

Only after the mediation procedure is completed, if the result is a negative one, the legal action is resorted to.

Mediation in the Czech Republic

Law no. 202/2012, as well as, Law no. Regulation (EEC) No 257/2000 on the Probation and Mediation Service of the Czech Republic regulates this procedure. Mediation, through the Probation and Mediation Service, is provided to citizens at no cost.

Recourse to mediation is allowed in any legal field, apart from the cases where the law excludes it. The areas most frequently used are family law, commercial law and criminal law.

Depending on its usefulness, the court may order that the parties attend an initial mediation hearing lasting for three hours. In this case, the proceedings pending before the court may be suspended for a maximum period of three months.

Directive 2008/52 / EC allows the parties to a dispute to request that a written agreement resulting from the mediation process become enforceable. Such an agreement shall be communicated to the court for approval.

Mediation in Spain

"Law no. 5/2012 of 6 July 2012 on mediation in civil and commercial matters", transposes Directive 2008/52 / EC of the European Parliament and of the Council of 21 May 2008 into the Spanish law.

Law no. 5/2012 brings an essential change in this field of law, given that mediation is mandatory, an extrajudicial procedure for settling disputes in court. In the Spanish legal system, the greatest development and structuring is in the family law.

This institution was given the title of legal peace, with the aim of inducing the perception of litigation in court as a last resort.

Law no. 15/2005 represents a significant evolution, stating that mediation is an alternative solution left to the discretion of the parties, to end family conflicts that proclaim freedom as a superior value of the Spanish legal system.

In Spain, a real cult of family mediation has been created in cases involving minors. When we talk about the legal solution to the problems of minors aged between 14 and 18, we automatically think of mediation as a way to rehabilitate the minor. The General Council of the Judiciary of Spain together with local authorities or associations, autonomous communities, supports and regulates the mediation of cases with minors.

Catalonia and the Basque Country have established the supremacy over the large number of mediations in cases with minors.

Mediation in France

In French law, mediation applies to all areas of law, especially in family law cases and minor disputes.

The French Code of Civil Procedure regulates the amicable settlement of disputes since 2012 in "Book V", providing for judicial but also conventional mediation.

Family mediation has a privileged status in France that respects the professional ethics established by the MFA Code of Ethics of the family mediator and which is a reference for all practitioners. Family mediation is categorized as a binder of construction or reconstruction, based on dialogue and balance.

This procedure under the French law facilitates the work of the courts, but gives weight to the act of mediation.

Although considerable progress has been made, sustained by the European law, one of the main difficulties in promoting cross-border mediation results from insufficient information of litigants, lawyers, magistrates, citizens in general about mediation and its benefits. The habit of using the traditional justice system and insufficient knowledge of alternative means of dispute resolution leads to high costs and a considerable loss of time. The courts should use the common procedure of consecration of the agreement of the parties and include in the judgment of the case the verification of the support of the mediation agreement of the parties[1].

According to a study conducted by the ADR Center funded by the European Commission, for a litigation, the time lost by not using mediation and going directly to court to resolve it is on average between 331 and 436 additional days, and additional legal costs range from 12,471 euros to 13,738 euros / case. These figures highlight the advantages of using alternative dispute resolution methods and are a strong argument for nation states, but also for European citizens, to use alternatives in court.

All things considered, in the new Millennium, on the European level mediation is configured not only as a modern, innovative and educated tool for resolving the blockages generated by conflicts of any kind, but also as an alternative, unique method of relaunching interpersonal relations even in extreme, difficult conditions, hard to manage by classical legal methods. Mediation resolves both the main dispute, exposed by the parties in sight, but it can also prevent a series of related conflicts that often arise on an additional level, against the background of deepening crises.

When the sanctioning measure of a court decision disappears, when the way of negotiation is opened and the rigid barriers of the judicial system are broken (procedural rules, expertise, evidence, long mandatory deadlines, public exposure) the parties are brought together to the negotiating table, accepting consensus much easier, a consensus guided by the impartiality, neutrality and confidentiality of a specialist (mediator).

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