



## INFORMATIVE GUIDE CONCERNING CROSS-BORDER MEDIATION IN CIVIL MATTERS IN THE EUROPEAN UNION

*Project “Promoting mediation in cross-border cases in civil matters”*

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### 1. INTRODUCTION

The multitude of legal relationships arisen due to free movement of persons and merchandise in the European Union also led to an increase of disputes between persons domiciled in different member states, in other words of cross-border disputes.

Supporting a trial in other member states than the state of residence may be discouraging, due to high expense, language differences, uncertainty related to the recovery of claims, etc. For this reason, a first step in the conflict resolution is the attempt to settle it amicably.

An efficient tool of amicable dispute resolution is cross-border mediation, as a type of mediation. Mediation, together with other similar means, may overcome the disadvantages of a trial, as listed above. This adds to its expedient nature and the adaptability of the procedure to the dispute (commercial, family, etc.). Not in the least, due to its specificity, mediation does not only settle the conflict, but it extinguishes or diminishes it, by encouraging the parties to willingly observe the agreements resulted from mediation and maintain the relationship between them.

The concern with regulating this procedure at the level of European law has its beginnings in 1999. This is due to the wish of simplifying and improving access to justice, but also of completing the legislative framework on cross-border disputes, mainly the competence and enforcement of decisions in the member states, including: the “Brussels I” Regulation (no. 44/2001), the “Brussels II bis” Regulation (no. 2201/2003), the European order for payment procedure (Regulation no. 1896/2006), the European Enforcement Order (Regulation no. 805/2004) and the European small claims procedure (Regulation no. 861/2007).

In this way appeared Directive no. 2008/52/EC of the European Parliament and of the Council of 21<sup>st</sup> May 2008 on certain aspects of mediation in civil and commercial matters (the Mediation Directive).

According to art. 3 letter a) in the Directive, “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. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.”



## 2. THE APPLICATION AREA OF DIRECTIVE NO. 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 21<sup>ST</sup> MAY 2008 ON CERTAIN ASPECTS OF MEDIATION IN CIVIL AND COMMERCIAL MATTERS<sup>1</sup>

The declared **objective** of the Directive is “to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.”

**In terms of matter**, the Directive is applicable to a wide range of cross-border disputes, adapting itself to all civil and commercial matters, except for the conflicts related to rights and obligations on which the parties may not decide in compliance with the appropriate applicable legislation<sup>2</sup>. The most frequent disputes in which of cross-border may be used successfully are those related to family conflicts or those arisen between traders.

Also, the directive does not apply to precontractual negotiations and quasi-judicial proceedings, such as certain systems of judicial conciliation, systems of consumer complaint resolution or the bodies leading the procedure issue a formal recommendation that may be binding or not, concerning the dispute resolution.

### **In terms of object of regulation, the Regulation includes:**

- Definitions;
- Minimum rules on the mediation procedure;
- The missions of the European Commission and of the authorities of the member states with respect to awareness raising of mediation.

### **Why a regular domicile or residence and why not citizenship?-to settle the cross-border nature of the dispute**

In the context of increased mobility of the persons within the European Union, the situations in which the members of a family do not have the same nationality or not residing in the same member state is no longer an exceptional case. For this reason, as a criterion for determining the cross-border nature of the dispute was established the existence of the regular domicile or residence of either party in another member state than that of any other party. The criterion is in compliance with that of other Regulations in the matter, namely “Brussels I”<sup>3</sup> and “Brussels II bis”.

The regular residence is a factual notion, which will have to be proven from case to case. Generically, it may represent the place where a person normally spends his/her daily activity, disregarding the temporary absences for vacations, visits to friends and relatives, medical treatments or, in absence of the information, the legal or registered place of residence.

<sup>1</sup> Effective in all member states of the European Union, except for Denmark.

<sup>2</sup> The Directive does not apply especially to matters related to taxes, customs or administration or to state’s responsibility for its acts or omissions in exercising the public authority (“*acta iure imperii*”).

<sup>3</sup> The determination of domicile takes place according to art. 59 and 60 in this Regulation.



### **What is a cross-border dispute?**

In order to ensure judicial security, the directive provides criteria to determine the cross-border nature of a dispute.

According to art. 2 in the Directive, cross-border disputes 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;
- b) mediation is ordered by a court;
- c) an obligation to use mediation arises under national law; or
- d) for the purposes of Article 5 an invitation is made to the parties.

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 any of the dates referred to above.

### **I want to use mediation. How do I find a mediator?**

If the parties, on their own initiative or on the initiative of the court where the trial is conducted, consider that the dispute may be settled amicably, they may request a mediator.

According to art. 3 letter b) in the Directive, “mediator means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation”.

Based on the Directive, each Member State should encourage, especially through the administrative and judicial authorities, the provision of information to the general public on how to contact mediators and organizations providing mediation services.

Another obligation is to encourage legal practitioners to inform their clients of the possibility of mediation.

## **3. SOME ASPECTS CONCERNING THE MEDIATION PROCEDURE.**

### **Is the information relevant during mediation held as confidential?**

Confidentiality in the mediation process is of the essence of this instrument, which is why, by art. 7, the Directive guarantees the protection of mediation confidentiality within all judicial or arbitrary proceedings previously carried out. With certain exceptions expressly provided, neither the mediators, nor those involved in the mediation procedure may be compelled to bring evidence during the mentioned procedures, as regards information resulted from or in connection with the mediation process.

### **If I use mediation, will the right to action be time-barred?**

In order to encourage the parties to use mediation and to ensure the compatibility of mediation with the proceedings with which it is in close connection, the member states are compelled to give to the parties that choose mediation the guarantee that will not be subsequently prevented from



initiating a judicial or arbitrary proceeding concerning that dispute, by the expiry of limitation or prescription periods during the mediation process.

Nevertheless, the aforementioned article 8 in the Directive does not affect the provisions concerning the limitation or prescription periods in international agreements, as enforced in the member states, for instance in the field of transportation law.

**I got a mediation agreement in another member state of the European Union. How can I benefit from its effects in another member state? Procedure.**

One of the main attractiveness elements of mediation is the possibility of getting a written agreement resulted from the mediation, which becomes enforceable.

Subsequently, the content of such an agreement may be recognized and declared as enforceable in the other member states, in compliance with the applicable Community or national law. This may be carried out on the grounds of the “Brussels I” Regulation (no. 44/2001) or the “Brussels II bis” Regulation (no. 2201/2003).

**4. FAMILY CONFLICTS**

A wide applicability of cross-border mediation is in the matter of family conflicts, especially the conflicts related to parental responsibility.

**The Hague Convention in 1980 on the civil aspects of international child abduction. What do I need to know if I wish to move in another country with my child?**

The Hague Convention in 1980, effective in all the member states of the European Union, is applied when a child under 16 years of age is moved from the state of his/her habitual residence to another state, or is being retained in the second state by violation of the rights that one of the holders of parental responsibility. Usually, the situation occurs when the parents of a child or when between parents and grandparents, one of the party is the one who illegally moves/retains a child in another place than the place of his/her habitual residence.

When the custody right is jointly exercised by both parents of a child (according to the law of the state on whose territory they have their habitual residence), neither parent will be able to decide on his/her own on the matter of changing the child’s residence to another state; it is usually required the express agreement of the other parent or by the approval of the competent court of law.

In such conflicts, mediation plays an important role. By the agreement entered into following the mediation by the involved parties, it will be avoided the occurrence of traumas on the child, caused by the procedure of forced execution of a potential court order. The advantages of mediation are outlined by the fact that, in a potential mediation agreement, more aspects related to parental responsibility may be settled, beside those related to the child’s return to the habitual residence.

**I want to benefit from a visitation right of my child who has the habitual residence in another member state of the European Union.**

In case the child moves legally in another member state and acquires a new habitual residence, the disagreements related to exercising the visitation right may be efficiently settled through mediation.



The forced execution procedure of a court order often proves its limitations, by not ensuring the regular exercising of the visitation right. In return, an amicable settlement of the existing disagreements, through mediation, shows a sustainable nature.

#### Useful Internet addresses:

- [www.just.ro](http://www.just.ro);
- <http://ec.europa.eu/civiljustice/> (the European Judicial Network in civil and commercial matters);
- [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/index\\_ro.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/index_ro.htm) (the European Judicial Atlas in Civil Matters);
- [www.cmediere.ro](http://www.cmediere.ro)  
The Mediation Council

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