

MEDIATION, MORE PARTICULARLY, CROSS-BORDER AND JUDICIAL MEDIATION¹

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Abstract: *The implementation of the Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters has triggered interest in the concept of mediation in the Czech Republic that has no long tradition of mediation in civil and commercial disputes to build on. Since the adoption of Mediation Act in 2012, apart from arbitration, mediation is the only form of ADR that is regulated by special legislation; however the Mediation Act regulates exclusively mediation carried out by mediators that are registered with the Czech Ministry of Justice. Mediation is voluntary; if considered efficient and adequate, it is at the discretion of the court to order the parties to meet with a mediator for a three-hour informative session. Pursuant to the Mediation Act mediation commences upon the execution of Mediation Agreement and if successful, it results in the conclusion of Mediation Accord expressing the will of all the parties that are ready to voluntarily fulfil their obligations thereof. Under the Czech Mediation Act, Mediation Accords are not directly enforceable.*

Keywords: *mediation, Czech Mediation Act, cross-border mediation, Czech Republic*

I. THE BASIS FOR MEDIATION

1. The concept of Mediation

Until recently hardly any attention was paid to mediation in civil and commercial disputes in the Czech Republic. Family mediation, provided mostly by non-lawyers (professionals such as psychologists, sociologists, teachers etc.) has so far been the main form of mediation in the field of private law. Commercial mediation has been perceived as a concept of international law and Czech legal entities have only been confronted with it in rare cases of cross-border mediation. The situation changed with the adoption of Directive 2008/52/EC of the European Parliament and Council on the 21st of May 2008 on certain aspects of mediation in civil and commercial matters (hereinafter ‘the Directive’)² and the obligation of the Czech Republic as a EU Member State to implement it by May 21, 2012. Its implementation became the driving force for preparatory work on the Government Bill on Mediation and has triggered interest in the concept of mediation. Intensive interest has been shown particularly on part of legal practitioners who have seen good prospects for mediation within their legal practice. Unlike some other European countries, there is, however, no long tradition of mediation in civil and commercial disputes in the Czech Republic to build on.

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² [2008] OJ L136/3.

In the field of criminal law, the situation is different. The out-of-court mediation process is regulated by the Act on Probation and Mediation Services adopted in 2000.³ This Act defines mediation in its Sec. 2 (2) as ‘out-of-court intermediation aimed at the resolution of conflicts between the accused and the injured party and an activity directed towards the settlement of the conflict carried out in relation to criminal proceedings. Mediation may be carried out only upon the express agreement of both the accused and the injured.

In the field of private law the notion of mediation is defined in one of the respected Czech textbooks on civil procedure as a method of dispute settlement, where the resolution of disputes between two parties is mediated by a third impartial party, which may be of a varying nature. The intervention by a third party may be of a different extent and it may consist in finding conditions for the interaction of the parties with any assistance in the course of interaction of the parties, in the provision of an impartial assessment of a particular contractual position, in the formulation of proposals for settling the dispute in the form of a conciliation, or in the issuance of a non-binding unequivocal recommendation – should the recommendation be binding upon parties it would be a matter of arbitration. The terms ‘mediation’ and ‘conciliation’ are used as synonyms where conciliation stands for mediation when the intervention of a third party has been justified by the specific nature of an activity, in particular when the third party is a person knowledgeable of law dealing primarily with the legal aspects of the dispute.⁴

Apart from mediation, which is sometimes considered to be equal to conciliation, Alternative Dispute Resolution (ADR) traditionally encompasses negotiation (as bargaining between the parties); intermediation; conciliation; mini-trial; self-executing decisions; technical arbitration; expert opinion; expert consideration; interaction concluded by an enforceable agreement; med-arb (a combination of mediation and arbitration); medalao (mediation and last offer arbitration); and arbitration.⁵ Relatively new is collaborative law, where the parties are represented by lawyers whose role and commitment is to facilitate an amicable solution for the clients, a settlement, without resorting to any form of litigation. Collaborative law uses an interest-based negotiation model where clients and their lawyers work together to resolve a dispute without going to court. The aim is to reach a settlement while minimising costs, delays and stress.

Within the broader concept of ADR, arbitration is considered to be one form of ADR, yet it shows a number of differences, for example their different goals (an arbitral award in case of arbitration versus a settlement in case of other forms of ADR). Arbitration is a widely used form of dispute resolution in the Czech Republic, including arbitration of both international and national disputes. Apart from mediation, arbitration is the only form of ADR that is regulated by special legislation.⁶ Czech law also regulates the specialized institution of a financial arbitrator under the Financial Arbitrator Act.⁷ A financial arbitrator shall resolve disputes arising from money transfers between persons executing

³ Act No. 257/2000 Coll., on Probation and Mediation Services, as amended.

⁴ WINTEROVÁ, A. et al. *Civilní právo procesní*. 6th ed., Praha: Linde, 2011, p. 645.

⁵ RABAN, P. *Alternativní řešení sporů, arbitráž a rozhodci v České a Slovenské republice a zahraničí*. C. H. Beck: Praha, 2004, pp. 3–47.

⁶ Act No. 216/1994 Coll., on the Arbitration and Enforcement of Arbitration Awards, as amended.

⁷ Act No. 229/2002 Coll., on Financial Arbitrator.

those transfers and their clients, unless the competence to decide such disputes is entrusted with a Czech court. The role of a financial arbitrator is to work out an amicable settlement of the dispute.⁸

There are isolated provisions in other legislation regulating special procedures similar to mediation. The Czech Act on Collective Bargaining,⁹ which regulates collective bargaining between trade unions and employers or their organizations, possibly in cooperation with the state, in the process of concluding a collective contract, regulates the role of an intermediary, who is to consider the situation and propose at a fixed date, to the parties what s/he believes to be the optimal alternative of how to resolve the situation. Under the Copyright Act, mediators may be used in order to facilitate the bargaining of collective and multiple agreements too.¹⁰

In addition, soft law, such as the Rules of Procedure of institutional arbitration courts may be also applied. In particular, the Rules of the Arbitration Court attached to the Czech-Moravian Commodity Exchange in Kladno, also regulate mediation within ADR apart from conciliation procedures.¹¹ The new ICC ADR Rules, the European Code of Conduct for Mediators as well as other rules enabling mediation, to which the parties may refer to in their Mediation Agreement may apply.

2. Existing legal bases for mediation in the Czech Republic

As mentioned above, given the adoption of the Directive, the Czech Republic, as well as other Member States of the EU, was faced with the obligation to implement it into its national legal system. Despite the fact that the Directive regulates mediation of cross-border disputes only, it did not prevent Member States from adopting concise regulations for mediation, including national, local mediation (Recital 8 of the Preamble of the Directive).¹² The Czech Republic belongs to the countries that opted for the adoption of a general legal regulation for mediation. The Government draft of the Bill on Mediation was presented to the Czech Parliament on July 7, 2011 and with various amendments was adopted on May 2, 2012.¹³ Due to lengthy parliamentary procedures, the Czech Republic did not quite meet the deadline set by the European Union for the implementation of the Directive. The Czech Mediation Act became effective as of September 1st, 2012.¹⁴ The Explanatory Report to the Bill on Mediation states that the main reason for the introduction of the bill is an attempt to allow everyone to choose an alternative resolution to their conflicts by means of a speedy and cultivated out-of-court settlement. Other reasons include the disburdening of courts, the possibility to avoid litigation in resolving a conflict without having to wait, not having to pay unnecessary fees and avoiding long-lasting stress for

⁸ Sec. 1 of the Financial Arbitrator Act.

⁹ See Act No. 2/1991 Coll., on Collective Bargaining, as amended.

¹⁰ Sec. 102 Act No 121/200 Coll., the Copyright Act, as amended.

¹¹ Rules available on the webpage of the Court, <http://www.rozhodcisoud.cz/en.html>, retrieved on August 17, 2013.

¹² “The provisions of this Directive should apply only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes.”

¹³ Bill on Mediation, a Government Draft, published in Czech on the webpage of the Parliament, at <<http://www.psp.cz/sqw/text/tiskt.sqw?O=6&CT=426&CT1=0>>, retrieved August 8, 2013.

¹⁴ Act No. 202/2012 Coll., on Mediation and on Amendments to some other Acts.

both parties. According to the Explanatory Report, the bill also focuses on the interests of a child in cases when the functioning communication between parents in family disputes is of crucial importance and mediation may significantly contribute to their smooth interaction.¹⁵ The Explanatory Report considers mediation to be a fast and sophisticated method of resolving disputes out of court with the assistance of a third neutral party directing the negotiations of the parties towards the conclusion of mutually acceptable agreement. The Act on Mediation regulates only mediation carried out by registered mediators and is restricted to the regulation of basic procedural principles, the commencement and closing of the mediation proceedings. It builds upon the idea that mediation is more of an informal procedure, different from judicial or any other type of proceeding.

The Mediation Act exclusively regulates mediation carried out by mediators that are registered with the Czech Ministry of Justice (so called registered mediators). The mediation process provided by mediators that are not registered with the Ministry of Justice is excluded from the scope of the Mediation Act, but it does not prevent mediators that are not registered with the Ministry of Justice from pursuing their mediation activities in accordance with general Czech legislation. They are allowed to provide mediation as a free trade pursuant to the provisions of the Czech Trade Licensing Act¹⁶ with no special training, evidence of the length of experience or licence required. As a result, the adoption of the Mediation Act led to a legal regime duality in the regulation of mediation in Czech Republic.

This article deals predominantly with the mediation process provided by registered mediators under the Mediation Act.

The material scope of the Mediation Act is stipulated in its Sec. 1: it regulates the mediation procedure and its effects provided by mediators registered with the Czech Ministry of Justice (registered mediators). Sec. 2 letter a) of the Mediation Act defines mediation for the purpose of the act as “a process, to resolve a dispute, in which one or more mediators take part, encouraging communication among the conflict parties in order to assist them in reaching a settlement by concluding a Mediation Accord”. As is apparent from the wording of the legal definition of mediation, the notion of mediation within the Mediation Act is not limited explicitly to civil and commercial matters. The scope of the Czech Mediation Act is rather broad, covering all non-criminal matters. Disputes in matters of civil, family, labour and commercial law can be subject to mediation under the Mediation Act, including, to a limited extent, disputes in matters of administrative law, where the mediation process can be applied in cases of private-law nature, when the administrative body is not exercising public authority but acting as party in terms of private law, all parties being in an equal position.¹⁷

In connection with the Mediation Act, secondary legislation was adopted in order to guarantee the professional qualities of registered mediators. Decree No. 277/2012 Coll., on the Examinations and Remuneration of a Mediator stipulates in detail the examinations that have to be passed in order to become a registered mediator.

¹⁵ Explanatory Report to the Bill on Mediation, p. 21.

¹⁶ Act No. 455/1991 Coll., Trade Licensing Act, as amended.

¹⁷ DOLEŽALOVÁ, M. et al. *Zákon o mediaci. Komentář*. 1st ed. Prague: C. H. Beck., 2013, p. XI.

3. The mediation agreement / agreement to submit the dispute to mediation

Pursuant to Sec. 4 of the Mediation Act the mediation process is initiated by the conclusion of a Mediation Agreement. Mediation commences upon its execution. The Mediation Act stipulates legal requirements as regards the form and contents of the Mediation Agreement. Pursuant to Sec. 2 letter e) of the Mediation Act this agreement shall be concluded in writing. Pursuant to Sec. 4 letters a) to e) it shall include, at a minimum, the following provisions: the names of the parties to the dispute, name(s), surname(s) and place of business of the mediator(s), the definition of the dispute, which is the subject of mediation, the amount of remuneration of the mediator or a provision that mediation will be carried out without any fee for the mediator(s), the period of time over which the mediation process shall last or a provision stipulating that mediation shall be carried out over an indefinite period of time.

The conclusion of a Mediation Agreement and the commencement of the mediation process upon its conclusion do not affect the right of parties to plead before national courts or to go to arbitration. It does not prevent the parties to mediation to seek protection of their rights and legitimate interests in court, i.e. mediation does not constitute *lis pendens*. According to Sec. 3 (4) of the Mediation Act, the mediator has a legal obligation to inform the parties to mediation of the fact that their right to go to court is by no means affected by mediation. Even if there is a pending mediation procedure, the parties to the dispute still may claim their rights in court. The fact that the Mediation Agreement was concluded cannot withhold any of the parties to mediation from initiating court proceedings if they wish to. Even if there is a valid mediation clause concluded by the parties, the court will not, unlike in case of an arbitration clause, decline jurisdiction. At the same time, the litigating parties are not prohibited from initiating mediation while the dispute is pending in court.

One of the effects arising out of the conclusion of Mediation Agreement is the suspension of the prescription and limitation periods. Pursuant to the Sec. 647 of the Civil Code¹⁸ the limitation and prescription periods are suspended during the mediation process. Therefore it is very much advisable for the parties to include the date of the execution of the Mediation Agreement and to precisely define the subject of mediation in the Mediation Agreement to avoid possible disputes in the future. If the subject of mediation changes in the course of mediation, the Mediation Agreement shall be amended in writing accordingly and the respective limitation or prescription periods are suspended upon the conclusion of such an amendment.¹⁹

As mediation is considered entirely voluntary, there are no consequences arising from breaching the Mediation Agreement for either party to the dispute or the mediator envisaged in the Mediation Act. It is, of course, at the discretion of the parties to stipulate contractual sanctions in case there is a breach of the Mediation Agreement.

¹⁸ Act No. 89/2012 Coll., the Civil Code.

¹⁹ DOLEŽALOVÁ, M. op. cit., note 17, p. 24.

4. The mediator

The above stated dual legal regulation of mediation in Czech Republic brings about the existence of two categories of mediators.

In one category there are mediators who are not registered with the Ministry of Justice and who carry out mediation in accordance with the stipulations of the Trade Licensing Act and relevant general legislation. The services of the mediator can be rendered by any natural person with full legal capacity. There are no special legal requirements regarding training, experience or licence. The Czech doctrine generally defines certain minimal principles for the performance of a mediator: a) respecting the autonomy of the parties: a mediator shall not urge any party to do anything during the procedure; b) the result shall be an agreement of free will of the parties attained without any external pressure; c) the mediator shall be impartial; d) the mediator shall inform the parties of all issues which may constitute a conflict of interests; e) mediation shall be confidential; e) the mediator shall maintain a high level of conduct in the procedure, i.e. to preserve justice, diligence and respect for the principle of autonomy of the parties.²⁰

In the other category there are mediators who are registered with the Ministry of Justice (registered mediators) and who provide mediation under the Mediation Act. According to Sec. 2 (c) and Sec. 14 of the Mediation Act, only an authorized natural person registered on the list maintained by the Ministry of Justice is allowed to provide the services of a mediator under the Mediation Act and carry the title of registered mediator. If a person that is not listed with the Ministry of Justice uses the title of registered mediator, s/he commits an administrative offence and pursuant to Sec. 26 (1) and (3) of the Mediation Act may be subject to a fine of up to 100,000 CZK (approx. 4,000 EUR).

Pursuant to Sec. 16 of the Mediation Act, the Ministry of Justice that administers the official list of registered mediators, shall, upon request, register anyone who meets the legal requirements for registration. The applicant should have full legal capacity, a clean criminal record, a Master's degree recognised in the Czech Republic (or an equivalent university degree recognised abroad, if an international treaty binding the Czech Republic approves the institution), pass an exam organized by the Ministry of Justice or the Czech Bar Association (with the exception of cases when her/his qualification is recognized under other legislation),²¹ and has not been deleted from the official list of registered mediators in the last 5 years. In the case of attorneys, their education and exams in the field of mediation are provided by the Czech Bar Association, pursuant to Sec. 49a of the Legal Profession Act.²² The Mediation Act also stipulates the requirements for a visiting mediator to temporarily or occasionally provide mediation services in the Czech Republic. A visiting mediator is a person who is a citizen of another EU Member State in which s/he is authorized to pursue activities comparable with those of a mediator. The permission to perform this activity as a visiting mediator in the Czech Republic is subject to a record on the list of registered mediators. For the registration, it is necessary to provide the required docu-

²⁰ WINTEROVÁ, A. et al., *op. cit.*, note 4, pp. 645–646.

²¹ Act No. 18/2004 Coll. On the Recognition of the Professional Qualifications and Other Competences of EU Citizens.

²² Act No. 85/1996 Coll., the Legal Profession Act, as amended.

ments stipulated in Sec. 19 (2) of the Mediation Act, such as a certified copy of a document confirming that, in accordance with the law of another Member State, the visiting mediator carries on business activities comparable with those of a mediator. The visiting mediator is entitled to provide mediation services under the Mediation Act in the Czech Republic on submission of all documents required by Sec. 19 (2) of the Mediation Act to the Ministry of Justice. There are more than 150 mediators registered with the Czech Ministry of Justice, about 14 of them authorized to mediate also in family matters.

The Mediation Act imposes a number of duties on a registered mediator in its Sec. 8 and 9. The fundamental obligations and responsibilities of the mediator resulting from the conclusion of a Mediation Agreement are stipulated in Sec. 8 (1) of the Mediation Act. The mediator is obliged to conduct mediation in person, independently, impartially and with due professional care [letter a)], to respect the views of the parties to the dispute and create conditions for mutual communication and for finding a solution that respects the interests of both parties [letter b)], to inform, without undue delay, the parties to the dispute about all the facts which could challenge his/her impartiality [letter c)], to sign the Mediation Accord that was concluded by the parties to mediation and indicate the date when the Mediation Accord was concluded [letter d)], to issue upon request a confirmation to the parties that mediation has ended and to record the date when the statement was delivered to them [letter e)], to issue a certificate that the parties fulfilled their duty to meet with the mediator, if mediation was ordered by a court [letter f)], to issue upon request a certificate that the parties to the dispute have concluded a Mediation Accord [letter g)], to deliver to the other party/ies to the dispute a written statement by one of the parties that they will not continue with mediation [letter h)], to systematically expand his/her knowledge and to deepen the expertise necessary for his or her proper performance of activities as a mediator [letter i)]. In accordance with Sec. 8 (2), a mediator is not entitled to render legal services in matters that are subject to mediation provided by her/him, even if otherwise authorized to provide them under other legislation. This provision applies primarily to attorneys and notaries. However, a legal opinion of the mediator given during mediation to the parties to the dispute is not considered a legal service.

Sec. 9 of the Mediation Act stipulates the confidentiality duty of the mediator, which is considered to be one of the basic principles of mediation. In compliance with Sec. 9 of the Mediation Act the mediator shall maintain all facts obtained in mediation confidential (even if there is no Mediation Agreement signed) unless all parties to mediation waive this confidentiality requirement. The mediator's duty of confidentiality is broken only in cases stipulated by law. Pursuant to Sec. 9 (3) of the Mediation Act the mediator is not bound by confidentiality if there is litigation between the mediator and the parties regarding mediation, e.g. in case of liability claims. The duty of confidentiality also applies to other persons who assist the mediator during mediation (such as interpreters, assistants, experts). If a mediator violates her/his legal duties specified in Sec. 26 (2) of the Mediation Act, especially the duty of confidentiality, s/he commits an administrative offence and in accordance with Sec. 26 (3) and (4) may be subject to a fine of up to 100,000 CZK (approx. 4,000,-EUR) depending on the nature of the violation. Mediators who are attorneys are supervised by the Czech Bar Association that imposes sanctions of its own on mediators for breaching duties. According to Czech law, the confidentiality duty does not apply to the parties. Parties to mediation are not bound by the Mediation Act to maintain confiden-

tiality. They may agree to do so on a contract basis by including a respective provision on confidentiality stipulating sanctions in the case of a breach into the Mediation Agreement.

The selection of the mediator is left entirely to the discretion of the parties to the dispute with one exception. In the case of court-annexed mediation, pursuant to Sec. 100 (2) of the Czech Civil Procedure Code,²³ if no agreement on mediator is reached by the parties without undue delay, the court shall designate the mediator from the list of registered mediators administered by the Czech Ministry of Justice. The question is whether within the court-annexed mediation the parties may select as mediator a person who is not registered.²⁴ In case the mediator selected by the parties has doubts about her/his impartial or unbiased approach, s/he may pursuant to Sec. 5 (1) of the Mediation Act decline an offer by the parties to conclude Mediation Agreement.

5. The procedure of mediation

Mediation Act does not regulate the procedure of mediation in an extensive detailed manner. Its stipulations regarding procedure are reduced to basic procedural principles; the rest is left to the parties. Pursuant to Sec. 4 of the Mediation Act, the mediation procedure commences upon the execution of the Mediation Agreement. Before initiating the procedure of mediation, pursuant to Sec. 3 (4) of the Mediation Act the mediator shall advise the parties to the dispute of their role in mediation, of the purpose and principles of mediation, of the effects of the Mediation Agreement, of their option to terminate mediation at any time, of the remuneration of the mediator and the costs of mediation. The mediator shall explicitly advise the parties that the commencement of mediation will not affect their right to seek protection of their rights and legitimate interests in court. The mediator shall also advise the parties to the dispute that the parties are responsible for the content of their Mediation Accord, not the mediator. In the case that a mediator was suspended or removed from the list of registered mediators at the Ministry of Justice, s/he shall without delay inform parties to the dispute of that fact. The effects of the commencement of the mediation procedure persist until the parties to the dispute become aware of such a fact, but no longer than 3 months.

One of the most significant principles of mediation is its voluntary nature. However, under the Special Judicial Proceedings Act,²⁵ in order to protect the interest of the child, the court has discretion to order mediation procedure for the maximum period of three months [see Sec. 474(1) of the Act]. According to Sec. 100 (2) of the Czech Civil Procedure Code, in the course of court proceedings, it is at the discretion of the court (if considered efficient and adequate) to order the parties to meet with a mediator only for a three-hour informative session. The court cannot order this session in cases in which an interim measure in matters of protection against domestic violence has been issued. If the parties are not able to agree on who the mediator should be, the mediator shall be designated by the court. The court may stay proceedings for a maximum of three months. After three

²³ Act No. 99/1963 Coll., Code of Civil Procedure, as amended.

²⁴ See JELÍNKOVÁ, P. K vybraným problémům nařízeného prvního setkání se zapsaným mediátorem. *Právní rozhledy*. 2014, No. 22, pp. 790–791.

²⁵ Act No. 292/2013 Coll., on Special Judicial Proceedings.

months the proceedings are resumed. Pursuant to Sec. 503 (1) a) of the Czech Special Judicial Proceedings Act, the court also has the discretion to order a three-hour session with a mediator in cases of non-compliance with an agreement approved by the court on the custody of minors or with a court's decision on the return of a child.

None of these provisions authorizes the court to order the parties to conclude a Mediation Agreement and subject their dispute to mediation; the court is authorized to order the parties to meet the mediator only for an introductory session, not to mediate. There is no adequate awareness of mediation among the public and the purpose of this provision is to make the parties aware of the possibility to solve their dispute through mediation. The purpose of the first session is purely informative. The parties should get enough information about mediation from the mediator in this three-hour session to be able to decide if they want to commence mediation or not.²⁶ The parties to litigation can be penalised on costs when they unreasonably refuse to take part in the introductory session with the mediator ordered by the court. Pursuant to Sec. 150 of the Civil Procedure Code courts have discretion not to award to the successful party the costs that it would otherwise be entitled to recover from the unsuccessful party or to reduce them. In opinion of some judges, expanding the use of court-annexed mediation should be supported because, from the perspective of a judge, it really may be efficient.²⁷

There is no provision in the Mediation Act that determines the venue of mediation or a way to determine it. It is at the discretion of the parties to choose the venue.

Sec. 3 (1) of the Mediation Act is another provision referring to mediation procedure. This provision stipulates that if there is a transfer of rights, which are the subject of mediation, during the mediation process, the effects of the commencement of mediation persist. A party to a dispute, which has transferred its rights, is required to notify the other party to the dispute about this fact without delay.

The Mediation Act enables the mediator to decline an offer of the parties to mediate their dispute or to terminate the ongoing mediation process. Pursuant to Sec. 5 (2) and 6 (2) a mediator may refuse to sign the Mediation Agreement or may terminate the mediation process, respectively, if the necessary trust between her/him and either of the parties has been disrupted. Mediator may also terminate the mediation process if a party does not pay the agreed deposit in time.

The Mediation Act does not contain any provision that would restrict the duration of the mediation process. In the Mediation Agreement, the parties shall either specify the time period of their mediation or state that mediation shall be carried out for an indefinite period. Given the effect that the mediation process has on the limitation and prescription periods and to prevent parties from being inactive, Sec. 6 (2) of the Mediation Act stipulates that the mediator shall terminate the mediation if the parties do not meet with her/him for more than one calendar year.

Sec. 6 (2) letters a) – h) of the Mediation Act regulates the termination of mediation process. The Mediation is terminated: a) by the conclusion of the Mediation Accord (settlement); b) by the delivery of a declaration in writing by the mediator that the mediation

²⁶ DOLEŽALOVÁ, M. *op. cit.*, note 17, p. 149.

²⁷ See in particular GRYGAR, J. *Zákon o mediaci s komentářem*. Praha: Leges, 2014, p. 105 ff.

has been terminated for reasons of lack of her/his impartiality or because of the parties being inactive for more than one calendar year; c) by the delivery of a party's declaration about abandoning mediation with the other party; d) by statement of all the parties to the mediation about its termination, signed by the mediator; e) when the time limit set in the Mediation Agreement expires; f) when the authorization of the mediator is suspended or when the mediator is removed from the list of registered mediators at the Ministry of Justice; g) by death of one of the parties to the dispute or h) by death of the mediator. The limitation and prescription periods only begin to run again once mediation has been terminated.

6. The failure of the mediation

The Mediation Act does not define the failure of mediation. Logically, the mediation fails if the parties to the dispute do not find an amicable solution, do not reach a settlement and the mediation process ends without a conclusion of a Mediation Accord. Sec. 3 (3) of the Mediation Act explicitly stipulates that only the parties to the dispute, not the mediator, are responsible for the content of the Mediation Accord. The only obligation envisaged by the Mediation Act in regard to the Mediation Accord is that of the mediator to verify that the Mediation Accord has been reached in the process of mediation. The failure to reach a Mediation Accord in the mediation process has no legal consequences either for the mediator or the parties.

7. Success of the mediation procedure

The Mediation Act does not define the success of mediation either. A successful mediation shall result in the conclusion of a clearly articulated, understandable and practically feasible Mediation Accord expressing the will of all the parties that are ready to voluntarily fulfill the obligations arising from such a Mediation Accord.

The formal requirements for the Mediation Accord are stipulated in Sec. 7 of the Mediation Act. The Mediation Accord shall be concluded by all parties to a dispute. A Mediation Accord is defined in Sec. 2 letter f) of the Mediation Act as, a written agreement between the parties to the dispute, concluded in the framework of mediation, regulating their rights and duties. Pursuant to Sec. 7 of the Mediation Act the Mediation Accord must be signed by all parties to the dispute as well as signed and dated by the mediator on the day of its execution. The signature of the mediator certifies that the Mediation Accord was reached in the process of mediation.

The mediation process is terminated on the day of the execution of the Mediation Accord (Sec. 6 (2) letter a) of the Mediation Act). As noted above, the mediator is not responsible for its content, only the parties to the dispute are responsible for the obligations stipulated in the Mediation Accord.

Under Czech legislation, Mediation Accords are not directly enforceable instruments. The Mediation Act does not envisage their direct enforceability. There is no special legal provision regulating the enforcement of settlements reached through mediation. Mediation Accords are agreements in the area of substantive law and are subject to the same legal regime as contracts.

However, parties to a Mediation Accord may take further legal steps to ensure the enforceability of the concluded Mediation Accord. There are provisions in Czech legal system that allow for the enforceability of mediation accords/settlements. The parties have a number of options how to proceed in making the Mediation Agreement enforceable. They can go either to a notary or to an executor. Pursuant to Sec. 71b of the Code of Notary Practice,²⁸ notaries, on request of the parties, convert an accord/settlement into a public/notary deed designed as an enforcement order (title) and pursuant to Sec. 78 (a) of the Execution Order²⁹ executors, on the request of the parties, convert an accord/settlement into a deed of execution designed as an enforcement order (title). The Mediation Accord can also be approved by a court either as a praetorian settlement or as a judicial settlement. Pursuant to Sec. 67 (2) of the Civil Procedure Code the court shall approve of the Mediation Accord, concluded under the Mediation Act and presented by the parties, within 30 days. Pursuant to Sec. 9 of the Czech Special Judicial Proceedings Act and Sec. 99 (1) of the Civil Procedure Code the court shall advise the parties in the course of the court proceeding, when appropriate in regard to the matter of the dispute, of the possibility to use mediation in accordance with the Mediation Act. In such a case the Mediation Accord might be concluded parallel to the court proceeding and the parties can submit it to the court with a request for approval.

8. Costs

Pursuant to Sec. 10 of the Mediation Act, a mediator is entitled to receive the agreed upon remuneration for mediation performed, and the compensation of agreed cash expenses connected with mediation (such as travel expenses, postage, etc.). The Mediation Act does not stipulate the exact amount of the mediator's fees; the fee is of a contractual nature. In accordance with the Mediation Act, a provision stipulating either the agreed upon remuneration sum or the method of determining it, is an obligatory part of the Mediation Agreement. If not provided otherwise in the Mediation Agreement, the remuneration for the mediation services and the compensation of agreed upon cash expenses shall be equally shared between the parties to the dispute.

In case of the introductory session with a mediator of a maximum of three hours ordered by a court in the course of a court proceeding, if the parties do not agree otherwise with the mediator, there is a fixed remuneration for the mediator set in secondary legislation³⁰ in the amount of 400 CZK per hour (approx. 16 EUR per hour). Pursuant to Sec. 10 (3) of the Mediation Act this remuneration shall be shared equally between the parties. Pursuant to Sec. 140 (3) of the Civil Procedure Code in case of a party that has been granted a waiver for court fees the respective part of the remuneration of the mediator is paid by the state.

²⁸ Act No. 358/1992 Coll., the Code of Notary Practice, as amended.

²⁹ Act No. 120/2001 Coll., the Execution Order, as amended.

³⁰ Decree of Ministry of Justice No. 277/2012, on Exams and Remuneration of Mediator, Sec. 15.

II. CROSS-BORDER MEDIATION***

1. The notion of cross-border mediation

To a Czech lawyer, international or cross-border mediation is yet to become a well-known term. Neither the Mediation Act, nor other Czech legislation distinguishes between domestic and international mediation, EU mediation, European Economic Area mediation or full international mediation. Mediation with an international element is included in the concept of “mediation” under the Mediation Act and no specific provisions are presumed for cross-border mediation. Mediation Act applies to both domestic and cross-border mediation (both EU and non-EU mediations).

Despite the fact that the Directive shall expressly apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties’ disposal under the relevant applicable law,³¹ neither the Czech Mediation Act nor any other regulation of Czech national law defines the term “cross-border mediation”; therefore, no distinction whatsoever is made between domestic and international, or cross-border, mediation.

The content of the notion of “cross-border mediation” must be therefore derived from the Directive itself. It is a well-known fact that Directives also contain interpretation rules for the interpretation of legislation adopted by the Member States to implement the Directives – and, of course, this also applies to Czech law.³² 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; (b) mediation is ordered by a court; (c) an obligation to use mediation arises under national law; or (d) an invitation by a court is made to the parties.³³

Czech law does recognize the term “cross-border dispute”, defining it in Act No. 624/2004 Coll., on legal aid in cross-border disputes within the European Union, which implements Council Directive 2002/8/EC on justice in cross-border disputes.³⁴ Article 2 of this Directive defines a “cross-border dispute” as a dispute where the party applying for legal aid in the context of this Directive is domiciled or habitually resident in a Member State other than the Member State where the court is sitting or where the decision is to be enforced; however, under the aforementioned Czech Act, a cross-border dispute within the EU under the Act is a dispute arising from civil or commercial relations where a party resides in another EU Member State than the state of the court that resolves the dispute.³⁵ The Czech legislator, instead of using the terms domicile or habitual residence, uses the term residence as the decisive criterion.

*** This Chapter is based on PAUKNEROVÁ, M., PFEIFFER, M. International Aspects of Mediation (from a Czech Law Perspective). In: *Liber Amicorum Spyridon Vrellis*. Athens 2014, Nomiki Bibliothiki S. A., Athens 2014, pp. 763–775.

³¹ Art. 1 para. 2 of the Mediation Directive.

³² PAUKNEROVÁ, M. *Evropské mezinárodní právo soukromé*. 2nd ed., Praha: C. H. Beck, 2013, p. 63 ff.

³³ Art. 2 para. 1 of the Directive.

³⁴ Council Directive 2002/8/EC of 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, [2003] Official Journal L 26, 31.1.2003; L 32, 7. 2. 2003, p. 15.

³⁵ Sec. 1 para. 1 Act No. 629/2004 Coll., on securing legal aid in cross-border disputes within the European Union.

Cross-border mediation is a method of out-of-court resolution of private-law disputes that contain an international element, usually constituted by the fact that the parties are domiciled or habitually resident in different states. However, one cannot rule out situations where the international element will ensue from the fact that the parties will have different nationalities, or where the subject of the dispute itself will have a cross-border dimension. The international aspect may also appear in an entirely national mediation at a later stage when recognition or enforcement of the respective mediation accord is requested on the territory of a state other than the state where the accord was executed. Private-law relations with an international element are governed in the Czech Republic by Act No. 91/2012 Coll., on Private International Law³⁶ (hereinafter “PIL Act”), which became effective along with the new Civil Code as part of a comprehensive re-codification of Czech private law on January 1, 2014.³⁷

To define cross-border relations, and thus cross-border mediation, the most important terms undoubtedly include habitual residence and domicile. Past decisions of Czech courts do include the definition of the term domicile,³⁸ which is understood as the municipality or, as the case may be, the district where an individual lives with the intention to reside there on a permanent basis. It is, in particular, a place where the individual has her or his apartment, family or, as the case may be, where s/he works if s/he also lives there. The domicile remains unaffected by temporary circumstances: hospitalization, study abroad, military service etc., unless they are accompanied by circumstances that indicate beyond doubt that the individual resides at the originally temporary domicile with the intention to reside there on a permanent basis. Under a very recent judgment of the Czech Supreme Court, individuals may reside or be domiciled at multiple places.³⁹ Czech law understands “domicile” as the place of factual residence, combined with the intention to reside there permanently.⁴⁰ Therefore, this term corresponds, to a point, to “habitual residence” as interpreted by the Court of Justice of the European Union.⁴¹ To determine domicile, Art. 2 para. 2 of the aforementioned Directive on justice in cross-border disputes refer to Art. 59 of the Council Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter “Brussels I Regulation”), which makes further reference to the definitions or interpretation of “domicile” in the national laws of the individual EU Member States. A similar reference is lacking in the Mediation Directive. The question thus remains whether the determination of domicile for the purposes of the Directive or, as the case may be, in cases of cross-border mediation, may also rely on Art. 62 of the Brussels I bis Regulation.⁴² With the legal definition of habitual residence lacking in EU and international law, the factual nature of this autonomous term must

³⁶ Act No. 91/2012 Coll., on Private International Law.

³⁷ Act No. 89/2012 Coll., Civil Code.

³⁸ Decision of the Supreme Court of the Czech Republic, No. 30 Cdo 444/2004.

³⁹ Decision of the Supreme Court of the Czech Republic, No. 32 Cdo 1401/2011.

⁴⁰ Resolution of the District Court in Cheb 15 C 45/2006 and Pauknerová, *op. cit.*, note 32, p. 98.

⁴¹ ECJ Decision C-97/90 Robin Swaddling.

⁴² Regulation of the European Parliament and of the Council No. 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast), [2012] Official Journal, EU L351/21, applicable as of January 10, 2015 (hereinafter Brussels I bis Regulation).

constitute the starting point for any deliberation, and the establishment of habitual residence must be ascertained at all times with regard to specific circumstances of each particular case.

As hinted above, Czech law, just like many other legal systems, does not make any difference between national and international mediation, be it EU mediation, mediation within the European Economic Area, or full international mediation. So far – and perhaps also because the Czech Republic has not amassed sufficient experience in international mediation – it appears that there are no areas that could be subject only to national mediation but would be excluded from cross-border mediation. As mentioned above, the Mediation Act makes express reference to the European Union only in relation to a “visiting mediator”.⁴³ These provisions also contain the one and only conflict-of-laws rule in the Mediation Act, setting the Czech law as the applicable law for the activities of the visiting mediator.⁴⁴ Nevertheless, the fact alone that the mediator has a citizenship other than Czech does not mean that the mediation procedure held thereby would be deemed to constitute international mediation.

Conflict-of-laws issues are not addressed at all, save for the aforementioned conflict-of-laws rule providing for the activity of the visiting mediator. Regarding the effect of the mediation process, the additionally inserted Section 29 of the Mediation Act stipulates that both the limitation and prescription periods are suspended during a mediation conducted in another Member State under the legislation of that state.

Except of the two above mentioned cases, the Mediation Act does not contain any other specific provision in regard of cross-border mediation. The rules of national private international law, stipulated in the PIL Act (unless there is an application priority of European law) shall apply. As both the Mediation Agreement and the Mediation Accord are of a purely contractual nature, conflict-of-law rules stipulated in the Rome I Regulation No. 593/2008 of 17th June 2008 on the law applicable to contractual obligations⁴⁵ are relevant as they are applicable universally, i.e. irrespective of whether or not the determined applicable law is the law of a Member State. In the case of a Mediation Accord concluded in the area of family law, the Rome I Regulation cannot be applied. Obligations arising out of family relations, including maintenance duties, as well as obligations resulting from property relations between spouses are explicitly exempt from the material scope of Rome I Regulation (Article 1(2) (b)). Questions of applicable law as regards the validity of these Mediation Accords should be subject to the relevant European legislation or to the domestic regulation of private international law.

As for soft law, the initiatives of non-governmental organizations may also be relevant to international mediation. In 1998, the Council of Europe adopted a recommendation for family mediation Rec (98)1E/21 January 1998, and in 2002 a recommendation on civil mediation Rec (2002)10E/18 September 2002. In 2011 the Hague Conference on Private International Law published a draft of the Guide to Good Practice on the use

⁴³ Sec. 19 of the Mediation Act.

⁴⁴ Sec. 19 para. 3 of the Mediation Act.

⁴⁵ [2008] OJ L177/6.

of mediation in the context of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.⁴⁶

2. Recognition and enforcement of foreign mediation settlements

Pursuant to Article 6 (1) of the Directive, 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 to be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that 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.

Mediation Accords are not directly enforceable in the Czech Republic. Ensuring enforceability of accords resulting from mediation is one of the obligations imposed upon the Member States by the Directive.⁴⁷ Therefore, if a Mediation Accord is concluded in the Czech Republic, to become enforceable, it must be approved by court or executed in the form of a notary or execution deed. However, if it were to be made enforceable, it must be concluded in compliance with Czech law. This is also a condition for the Mediation Accord's enforceability in another Member State, as mentioned in Recitals (20) and (21) of the Directive's Preamble. These circumstances contest the parties' freedom to choose the law applicable to a certain conflict in the mediation procedure. The applicable law should be the law of the state on whose territory the request for the content of the Mediation Accord to be made enforceable is submitted.

Foreign Mediation Accords concluded in a Member State of the EU that have been made enforceable in the country of its origin by a court or as an authentic instrument shall be recognized and enforced in Czech Republic in compliance with the respective EU regulations (Brussels I bis Regulation, Brussels II bis Regulation, Maintenance Regulation). In terms of international civil procedural law, a certain distinction between EU mediation and international mediation, arising from the provisions of the Brussels I bis Regulation, Brussels II bis Regulation, and the Maintenance Regulation, must be observed. In addition, the regime of Regulation No. 805/1994, creating a European Enforcement Order for uncontested claims, can be considered in cases where the preconditions of its application are met. On the other hand, recognition and enforcement provisions of Regulation No 861/2007, establishing a European small claims procedure, and Regulation No 1896/2006, creating a European order for payment procedure, would not apply to enforceable mediation accords at all, as these provisions apply to court decisions awarded within the framework of these regulations only.

A Mediation Accord concluded in Denmark and approved as a judicial settlement, or executed in the form of an authentic instrument, shall be subject, in case it falls within its substantive scope, to the regime of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters concluded in 2005. In matters falling beyond the

⁴⁶ Draft Guide to Good Practice under the Hague Child Abduction Convention, Part V - Mediation (Prel. Doc. No 5 of May 2011) available at the webpage of the HCCH, <http://www.hcch.net/index_en.php?act=publications.details&pid=5422&zoek=mediation>, accessed on August 15, 2013.

⁴⁷ Art. 6 of the Directive.

scope of the subject-matter applicability the of this Agreement, the recognition and enforcement of such Mediation Accord shall be governed by the relevant provisions of Czech private international law (Sections 14-16 PIL Act).

A Mediation Accord concluded within the EEA and approved as a judicial settlement, or executed in the form of an authentic instrument, shall either be subject to the regime of the Lugano Convention of 2007, or, in matters which fall beyond the scope of subject-matter applicability of this international convention, its recognition in the territory of the Czech Republic shall be governed by the relevant provisions of Czech Private International Law (Sections 14-16 PIL Act). As the case may be, such Mediation Accords would not be recognized within the territory of the Czech Republic on the grounds of a conflict with the public order.

Unlike the conflict-of-laws, rules that are based on the principle of the universality of the European private international law, the EU international civil procedure rules are linked to the territories of the Member States. Mediation Accords concluded outside of the Brussels-Lugano regime, which were either approved as a judicial settlement or executed in the form of a notary deed (i.e. in countries that are not members of the EU or the EEA), shall not be recognized and enforced in the Czech Republic under EU regulations; their recognition and enforcement shall be governed by relevant provisions of the PIL Act or the applicable international treaties. The multilateral international treaties worth mentioning in this context include the Hague Convention on the International Protection of Adults of 2000; the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children of 1996, and the Hague Convention on the Civil Aspects of International Child Abduction of 1980. Foreign Mediation Accords enforced in the Czech Republic shall always be in compliance with the public order of the Czech Republic.

A foreign Mediation Accord of a purely contractual nature, that is directly enforceable in compliance with foreign national legislation, shall not be (in most cases) recognized and enforced in the Czech Republic unless further legal steps are taken. Such a Mediation Accord, if not approved as a judicial settlement, or not made in the form of an authentic instrument would be of the same binding nature as any other legal obligation as in the case of any other private law contract concluded abroad. Foreign, directly enforceable Mediation Accords in the area of family law concluded in a Member State of the EU in line with the national law within the material scope of the Brussels II bis Regulation constitute an exception to this rule. In compliance with Art. 46 Brussels II bis, these private agreements, enforceable in the country of their origin, shall be recognized and declared enforceable under the same terms and conditions as judgments.

The European Commission did consider the inclusion of agreements concluded in the out-of-court dispute resolution, i.e. together with mediation, in the provisions for the enforcement of authentic instruments in the proposal of the European Parliament during the discussions of the draft of the Brussels I Regulation (Art. 55a). However, the Commission has not approved this proposal.⁴⁸

A Mediation Accord that has been concluded abroad and is to be made enforceable in the Czech Republic, either by being approved by court in line with the Czech Civil Proce-

⁴⁸ COM (2000)689 final, p. 6.

dure Code and receiving the status of a court decision, or by being drafted in the form of notary or execution records and constituting an authentic instrument, shall be in compliance with Czech law. If the parties wish to make a foreign Mediation Accord enforceable in the territory of the Czech Republic, the Mediation Accord, including questions of its validity, shall always correspond to Czech law. A notary shall not write a deed with the consent to enforcement unless the respective agreement is concluded in compliance with Czech law. In the Czech Republic, the parties to the dispute can make a settlement agreement (Mediation Accord) – i.e. a contract in the form of notary deed with consent to direct enforcement – if the subject-matter of contractual performance is a monetary claim.⁴⁹ Consequently, also a foreign Mediation Accord could be made in the Czech Republic in the form of a notary deed with direct enforcement, if the requirements under the Notary Code have been met. A foreign Mediation Accord, which is to be made in the Czech Republic in the form of a notary deed with direct enforcement, must be made in the Czech language and in accordance with the Czech legal order. The Mediation Act does not explicitly stipulate that the Mediation Accord must comply with the law, but it follows from the nature of the matter, as well as from the facts, that neither a notary nor an executor will draft or confirm a deed which is contrary to Czech law, nor will a court approve such conciliation. Thus the content of the accord shall correspond to the legal order of the place where such accord has been concluded, or where its enforceability is sought.⁵⁰

III. IN CONCLUSION

The Czech experience shows that the European Mediation Directive has not yet resolved many problems connected with mediation, which was meant to provide a cost-effective and quick extrajudicial resolution of disputes.⁵¹ The results in the Czech Republic, as well as in some other EU Member States are rather modest so far. A recent study of the European Parliament, Directorate General for Internal Policies, on ‘Rebooting’ the Mediation Directive, tries to assess the impact of its implementation and proposes measures to increase the number of mediations in the EU.⁵² The study shows that a ‘mitigated’ form of mandatory mediation might be appropriate, combined with the ‘Balanced Relationship Target Number’ creating a certain balance between mediation and litigation.

⁴⁹ See Section 71a, Act No 358/1992 Coll., the Notary Code.

⁵⁰ Theoretically, the parties could only make a so-called material choice of law, which means that the chosen law must not collide with mandatory rules of law which would be used in the absence of choice. It is, however, hardly conceivable in practice.

⁵¹ See Recital (6) of the Preamble to the Directive.

⁵² Rebooting the Mediation Directive: Assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU
http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/execsummary_/execsummary_en.pdf
retrieved 30 December 2014.