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MEDIATION AND THE LEGAL SYSTEM

EXTRACTING THE LEGAL PRINCIPLES OF CIVIL AND COMMERCIAL MEDIATION

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ACADEMIC DISSERTATION

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Conflicts are part of our life. They emerge at all levels of society. They are the engine for societal development questioning old boundaries and testing both a society's and an individual's ability to deal with conflicting positions, interests, needs and change. As a person who has spent most of her professional life outside the academic world, I found that this work was about testing various boundaries – some boundaries I did not know that they existed, some boundaries I accepted, others I was prepared to cross. This journey was not always an easy one, and it would not have been possible without the support of others.

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Porthania, 3 September 2018
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ABSTRACT

It is common to perceive mediation as a social practice, a practice that takes place outside the law and is unrestricted by legal rules. The subject of my dissertation is the normative dimension of mediation. I seek to sketch the relationship between mediation and the legal system, to discern, interpret and systematize the legal rules and principles within the framework of the European Mediation Directive 2008/52/EC and to develop them further. I consider mediation to be a decision-making mechanism that is in many respects functionally equivalent to litigation, a view that is based on systems theory. As mediation is one pillar of access to justice within European dispute resolution, I place my research in the field of European civil procedural law – without disregarding its connection to other areas of law, such as contract law.

In my research I adopted the view that mediation has a double existence, namely a social existence and a legal existence. Mediation is connected to the legal system by a network of contracts which constitute an instrument of *structural coupling* between different operationally closed (but cognitively open) systems – a view that has its roots in systems theory. I used these contracts and contract theory as a research method to examine how mediation is reproduced within the legal system and how the binding force of the mediated outcome is justified. My systemic approach allows for account to be taken of fundamental principles and concepts developed within mediation theory, hence conflict resolution in the social system, while examining how these principles have been reproduced within the legal system. In this respect, my approach is multi-disciplinary.

I concluded that several legal principles have emerged in the legal practice of mediation that determine the aim of mediation, the role of the participants, the procedure and the decision-making. Impartiality as the guiding principle of mediation, together with the requirement that the parties are equally involved in the process are not only values that arise in procedural justice research, but they also depict a principle of fairness that constitutes the minimum requirement of due process in Civil and Commercial Mediation. On the basis of the principles that started to emerge in the legal practice of mediation, I propose a set of procedural principles that can be used to consolidate and restate the general principles of Civil and Commercial Mediation.

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1 INTRODUCTION

1.1 Law – facilitator or threat to mediation

Mediation is a form of informal justice. According to *Abel*, informal institutions of justice exhibit some distinctive characteristics. Informal institutions of justice “define, modify, and apply norms in the course of controlling conduct or handling conflict.”¹ They are detached from state power, are non-coercive and decentralized. Their substantive and procedural rules are imprecise and unwritten, they are flexible and *ad hoc*. What unites the different institutions of informal justice is that they are less a positive ideal, than a “set of loosely associated aversions to characteristics attributed to formal justice.”² Mediation is driven by the attempt to reach a solution outside the constraints of formal law and is based on the interests and needs of the parties and their subjective understanding of what is to be considered just. The characteristics of informal justice show up in mediation in the form of a consensual, flexible, interest-based dispute resolution mechanism that takes place between private individuals, established procedural principles and fundamental procedural rights of fair trial do not apply.³

Mediation constitutes dispute resolution outside the law. It has been described as an antibody in state law that creates its own constitution, doctrine, process and institutions.⁴ Lawyers have argued that the parties act within their private autonomy, hence in a legal vacuum. Advocates of mediation fear that the regulation of mediation endangers the informality and flexibility of mediation and interferes with the individuals’ freedom to solve their own disputes outside the legal system and in accordance with their subjective understanding of what is just.⁵ In their view, mediation must remain a social practice outside the legal system, an alternative unregulated form of dispute resolution.

Mediation is a response to the deficiencies of the judicial system.⁶ National courts have not only been the visible symbol for the existence of the rule of law,

1 Abel 1982, p. 2.

2 Ibid.

3 For the application of Article 6 of the European Convention on Human Rights to court mediation: Lindell 2007, pp. 342-243.

4 Schlieffen 2009, pp. 212- 213.

5 On the danger of juridification: Nolan-Haley 2012b. On the diversity – consistency dilemma and the need to regulate: Alexander 2008a, pp. 1–2. There is neither agreement on whether there should be regulation, nor on the method of regulation: Against a regulation of the procedure apart from regulation by mediators themselves: Pel 2013, p. 325. In favour of a Model Law to *protect* the core values of mediation: Adrian 2013, pp. 130–131.

6 See Genn, Riahi and Fleming 2013, p. 139.

they have also been the instrument through which the sovereigns exercise their monopoly on the legitimate use of physical force (*Gewaltmonopol*). It has been observed, though, that courts do not necessarily have the best capacity to solve conflicts. This is especially the case in cross-border disputes that involve several jurisdictions and languages. Also, from an access to justice point of view, the channelling of cross-border disputes to the traditional court system has proved problematic, which is due to the high costs of cross-border litigation and the length of civil proceedings.⁷ The consequence is that there is a trend to transferring the enforcement of rights to organizations and bodies outside the formal justice system of the state.⁸ This trend shows up in the ever-growing number of cases that are brought before arbitral tribunals.⁹ It shows up also in the re-emergence of other forms of alternative dispute resolution and the promotion of institutions outside the formal legal system.¹⁰

In the view of social contract theories, the monopoly on the legitimate use of physical force enables the sovereign to ensure social peace. Where the nation state retreats from law enforcement and regulation, this monopoly on the legitimate use of physical force fades. Consequently, there is a vacuum that is likely to be filled by other forces. One may therefore ask whether it is here in the privacy of dispute resolution that we meet what *Hobbes* has described as the state of nature. In this state of nature, every person is considered equal and every person has a natural right or liberty to do anything necessary to preserve one's own life. In this state of nature, there is no coercive power and no injustice as there is no law, except for natural precepts discovered by reason.¹¹ Or are there any principles inherent in our legal order that are so fundamental that they apply even outside formal state law and outside formal state enforcement within private dispute resolution? The question is quite simple: will there be a return to pre-modern law or has the legal system been able to establish instruments that address these developments?

The ADR¹² movement has an ambiguous relationship to the law. Often it perceives the law as an intruder that interferes with the freedom of the individual and the individual's capability to resolve conflicts. Self-determination and the belief in the equality of the individuals and their capacity to resolve their disputes without

7 EC Green Paper on alternative dispute resolution COM (2002) 196, pp. 7. On the costs of not conducting ADR: De Palo, Feasley and Orecchini 2011.

8 Edgeworth 2003, p. 160.

9 Regarding the development of cases in arbitration, see Born 2014, pp. 93–95.

10 *Micklitz* has noted that the European Union engages in building institutions outside European treaties: *Micklitz* 2017, p. 264.

11 *Hobbes* 1994, Chapters XIII–XIV.

12 It is common to use ADR as an acronym for *alternative dispute resolution*. On alternative dispute resolution within European dispute resolution, see Chapter 2.3.2.1. In recent research ADR has also been used as an acronym for *appropriate dispute resolution*: see fn 543.

state intervention are therefore central values in ADR. These values are not specific to the ADR ideology. Self-determination, the equality of the citizens and the desire to create a private sphere that is protected from the interference of the legislative, executive and judicative power of the state are values that can be found in the liberal thinking and the classical doctrine on the rule of law (*Rechtsstaat*). The liberal idea of the rule of law perceives the law as a set of norms adopted by a legislator with legislative power to maintain social order. Interference with the freedom of the individual by means of legislation or the exercise of judicial or administrative power must be based on the law. The basic assumption is that all citizens are equal and are capable of pursuing their own interests in their own way. State intervention by means of regulation is to be kept at a minimum as it may interfere with the citizens' freedom to create and determine their own relationships.¹³ The liberal thinking of the rule of law stresses the liberty of the individual. As a result, a "consistent thrust underlying liberal thought is fear, fear of impositions by others, and especially fear of the state".¹⁴ The primary task of the law is the protection of the freedom of the individual to guarantee the individual's self-fulfilment. Within the sphere so created, individuals may fulfil their true self. Based on conscious or unconscious liberal thinking, the ADR movement starts from the dichotomy of an individual sphere that is outside the law and a legal sphere that is inside the law and the constraints of the state.

Another line of reasoning can be discerned in ADR. Not only must there be a *private* sphere, but the need for the ordering force of the law is questioned. In respect of public international law *Koskenniemi* has described the arguments as follows: the quest for informal dispute resolution mechanisms goes along with a description of society that is no longer characterized by Hobbesian egoism, but by natural altruism and he continues that "*the background idea is something like this: as society becomes more integrated the (artificial) egoism of individual actors cedes more room to their (natural) altruism so that the need of law diminishes until at some imaginary point ethics and natural love allow the (now fully) integrated community to govern itself without formalism.*"¹⁵ The anthropologist *Nader* referred to the emergence of alternative forms of dispute resolution in the United States as "*a movement to replace justice and rights talk with what I call harmony ideology*" and she continued, that "*in any period of history, harmony ideology is accompanied by an intolerance for conflict. The intention to prevent the expression of discord rather than to deal with its cause takes on prominence*".¹⁶

13 On the liberal idea of the rule of law, see Tamanaha 2004, pp. 36, 45.

14 Tamanaha 2004, p. 33.

15 Koskenniemi 2005, p. 599 (*Epilogue*).

16 Nader 1993, p. 3.

The question of whether there is an *outside the law* depends on the concept of law that is adopted. If one perceives the law as the coercive commands of a sovereign, then private dispute resolution is outside the law.¹⁷ However, this does not correspond to contemporary concepts of law. *Kelsen* has already argued that norms created by the state, and norms created by individuals are within the legal system. Individually-created norms differ only in the way they are created, not in respect of their validity. While state-created law imposes the norms on the individual, the individual norms are created by the individuals themselves. The validity of the norm and not the creator of the norm is therefore relevant for determining whether the norm belongs to the legal system or not.¹⁸ In addition to law created by the state and individuals, there are other bodies that adopt rules which may be considered valid within the legal system.¹⁹ Contracts, for instance, have been considered part of a multi-layered system of governance.²⁰ In the light of the growing legal pluralism, the argument that ADR takes place outside the legal system is difficult to maintain. Also, the claim that society or the individual has become more altruistic and that the law eventually loses its ordering function lacks evidence. It is true that different forms of consensual decision-making have been adopted within the courts and litigation has decreased in some jurisdictions. However, this does not prove that the individual or society has become more altruistic. The development may have occurred for many other reasons, such as poor access to the courts, a general trend to foster consensual forms of decision-making within the courts and the aim to improve the economic efficiency of judicial systems.

In order to understand the relationship between ADR and the law, it is important to understand the function of the law in a modern society. In systems theory, the function of the law is neither seen in the protection of individual rights or property, nor in the creation of an individual sphere that is protected from outside interference, but the function of the law is the general stabilization of normative expectations. Normative expectations are not to be understood as a state of consciousness of an individual, but as a stabilization of the meaning of legal communications over time.²¹ The law has the function to protect the normative expectations of certain selected interests, even in cases in which these expectations are frustrated. Such a frustration may occur if a certain rule is not followed. One can therefore conclude that the protection of normative expectations is essential for the functioning of a society. The existence of normative expectations

17 This is the definition given, for instance, by *Austin*: see Cotterrell 2003, p. 56.

18 Kelsen 1960, pp. 283–285. On *validity* as the symbol of unity of the legal system: Luhmann 1995, p. 100.

19 On self-regulation: Tuori 2010, pp. 293–296.

20 Collins 2005, p. 29.

21 Luhmann 1995, p. 125. On legal communications, see Chapter 2.4.

enables communication; individuals may rely on the existence of certain rules and determine their behaviour accordingly.²²

A change in the paradigm from adjudicative justice that is symbolized by decision-making in the courts to consensual justice that is symbolized by mediation is not possible without a stabilization of normative expectations. Without doubt, there are expectations other than normative ones that may emerge, such as spontaneous local expectations within a certain institution, within a certain group or professional community, which can be stabilized within the group. However, such rules require that there is sufficient consistency within a certain group and that the group shares common goals and values.²³ If the group becomes larger or if there is more than one group, the expectations will become more diverse. Outsiders who are not part of the group will not be able to build on the expectations of the group. When it comes to alternative forms of dispute resolution within a multicultural, global society, the stabilization of normative expectations requires some normative order. Parties that have recourse to mediation to achieve a settlement that may serve as an enforcement title must be able to rely on a normative procedural framework that sets common rules and principles. In contrast to the ADR movement I hold the view that the law is not a threat to mediation nor an intruder into the individual sphere that must be defied. Rather, I perceive the law as an order that protects or may protect the normative expectations of the individuals, and therefore works as a facilitator of the process and guarantor for its consistency.

1.1.1 Purpose of this research

This research examines mediation in the legal system. I claim that mediation has not only a social existence, but also a legal existence. In its social existence, it is a human behaviour that takes place in all areas of society: parents mediate conflicts between children; employers mediate conflicts in their teams; teachers mediate conflicts in schools; and companies seek to refer conflicts to mediation to have access to scarce resources. In its social existence, mediation involves different forms of third party interventions that range from minimum interventions by the mediator, such as establishing the communication between the parties, to a directive intervention that may take the form of an evaluation of alternatives for the settlement or the recommendation of a solution. While it has been observed that a certain stereotype of mediation practice is emerging, the social practice

22 *Luhmann* defines communication as a synthesis of three selections: utterance, information and understanding of the difference between utterance and information: *Luhmann* 1992, p. 252. *Communication* is used in this connection in a wider sense embracing also behaviour.

23 On the significance of moral norms and values for mediation in non-industrial societies, see *Merry* 1982, pp. 30.

of mediation remains only a vague label for a wide range of dispute resolution activities.²⁴ The regulatory activities of the last few decades are a sign that mediation is starting to evolve into a legal practice and that the period of experimentation is about to fade out.²⁵

My research is based on the view that *de-legalized* forms of conflict resolution only suppress the question of law.²⁶ The law forces its way back, when the outcome of an alternative dispute resolution mechanism is implemented within the legal system and the law defines a mechanism in which this outcome is reached. This is the case for mediation introduced by the European legislator within the framework of the Mediation Directive. The purpose of the Mediation Directive is to improve access to justice within the European Union.²⁷ The outcome of the mediation is a contract that terminates the dispute between the parties and may be declared enforceable. The Mediation Directive has introduced a distinct mediation concept and has harmonized several procedural aspects of mediation. This framework legislation has been complemented by soft law and self-regulatory instruments that introduce several principles that in other dispute resolution processes are referred to under concepts such as fairness or due process. This is also the case for the instrument on the direct enforcement of international commercial settlement agreements resulting from conciliation that is under preparation at UNCITRAL. The instrument currently being prepared by the UNCITRAL Working Group II (Arbitration and Conciliation) has been modelled on the New York Convention on the recognition and enforcement of foreign arbitration awards of 1958.²⁸ The instrument seeks to introduce the direct enforceability of a mediated outcome in the country of enforcement. In order to secure the legal position of the defendant, a set of challenges to the enforcement of the mediated outcome in the state of enforcement is discussed including the defence that the mediated outcome does

24 Avruch 2016, p. 10. Moffitt 2005, p. 78. Roberts and Palmer 2005, p. 153.

25 For the US, *Kovach* distinguishes between the phase of experimentation driven by community-based programs, the phase of implementation, where courts started to adopt mediation programs and the phase of regulation: *Kovach* 2006, p. 389.

26 “... if one bears in mind the unity and the function of the legal system, one is obliged to reflect on how delegatized alternatives propose to implement their schemes for the anticipation and avoidance of litigation, which brings us back to the question of law, a question merely ‘repressed’. The question of law invariably forces its way back, unless it is argued that one must accept the arbitrariness of those in power or the moral pressures of well-meaning fellow citizens.”: Luhmann 1988, p. 30.

27 *Cappelletti* distinguishes between three waves of access to justice: the first wave towards access to justice is legal aid for the poor, the second wave addresses the representation of *diffuse* interests and the third wave constitutes a broader approach to access to justice by means of alternative dispute resolution: *Cappelletti* 1976, p. 682. *Cappelletti* 1993, p. 288. *Cappelletti et al.* have also expressed concerns as regards the limits of the third wave of access to justice, especially where there is an imbalance in bargaining power and therefore a risk that it results in a retreat from the achievement of the first and second wave: *Cappelletti, Garth and Trocker* 1982, p. 698. For a critical view on the third wave: *Lindblom* 2008, p. 70.

28 See on the work of the UNCITRAL Working Group II (Arbitration and Conciliation): http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html.

not constitute a valid agreement and that the mediator has failed to maintain a fair treatment of the parties or has acted in breach of objective standards of mediation.²⁹ These examples show that the law re-emerges and shows in the question, whether there is a valid agreement that may be enforced and whether the mechanism that has led to the outcome is mediation. In its legal existence, mediation is a legal construct that is to be seen as part of a legal rationality. Within this legal rationality rules and principles develop within the legal system and a distinct legal mediation doctrine is in the process of emergence.

The purpose of this research is to examine the *normative dimension of mediation*. I seek to sketch the relationship between mediation and the legal system and to discern, interpret and systematize the legal rules and concepts as well as the principles that form the basis of mediation.³⁰ This comes close to the knowledge interest of legal-dogmatic research which consists of producing arguments on the systematization and interpretation of legal rules and the weighing and balancing of legal principles which enjoy institutional support and acceptance by society.³¹ However, it is not confined to this. The interpretive branch of legal science requires that there is an existing body of law that constitutes the material for the systematization and interpretation.³² It therefore deals with the rearrangement and system building of an established body of law. Its purpose is to produce arguments that are in line with the normative premises of the collective judiciary regarding the legal sources and theory of argumentation or to reflect critically on these premises.³³ Therefore, there is a common understanding of what is to be seen as prevalent general doctrine in a given field. This is not the case in the field of mediation, where legal rules and principles are still part of a flow and are only in the process of emerging.

The paradigm shift from adjudicative forms of dispute resolution to consensual forms of dispute resolution brings about a change in the way the rules and principles need to be interpreted and systematized. Account must also be taken of the practice of mediation and the background theory in which the consensual form of dispute resolution is embedded. To understand Civil and Commercial Mediation³⁴, there is

29 There is an ongoing debate on the content of this defence securing the due process of mediation. On the discussion, see Report of Working Group II 2017, pp. 9–11.

30 On juridification: Blichner and Molander 2008, pp. 36. The core element of juridification is the expansion of the law into a sphere that has formally not been regulated. On the different dimensions of juridification: Blichner and Molander 2008, p. 38. On the juridification of mediation in England and Wales: Brooker 2013, p. 260. *Alexander* employs a narrower meaning and defines juridification as the development of a body of court decisions and case law on aspects of mediation: Alexander 2013, p. 166.

31 Siltala 2003, p. 137. Different terms are used for this branch of research, such as legal-dogmatic or doctrinal research: Smits 2017, p. 210.

32 An essential feature of doctrinal research is that it systematizes present law: Smits 2017, p. 212.

33 On the difference between critical and established doctrine: Siltala 2003, p. 138.

34 Regarding the terminology, see Chapter 1.1.2.

also a need to understand the mediation discourse that takes place outside the legal system and to discern the way the law may or may not take account of this discourse. My interest is therefore in the *identification, interpretation, systematization and development of rules and principles in the light of this paradigmatic change that has taken place*. My second interest is more critical in nature. The question is whether mediation can sufficiently take account of the possible shortcomings that critics have identified as the central questions of mediation research, namely the issue of legal certainty, the question of whether a mediator always needs to be neutral and the imbalance of power between the parties.³⁵

One difficulty in mediation research is a lack of clarity of the research subject. Mediation may be broadly described as a form of consensual dispute resolution with the assistance of a third party. However, mediation is not a concise concept and it has a different meaning within and outside the legal system.³⁶ In addition to the ambiguity of the concept, an incoherent use of terminology within the scholarly and practice field has added to the confusion about mediation and what it actually means. Besides this, mediation is often perceived as a flexible practice, which may take many different forms depending on the context, the participants and the field of application. At first glance, mediation is a more suitable research subject for the social sciences than for the legal sciences.

In the social sciences, there has been extensive research on conflict resolution processes and mediation.³⁷ However, in the social sciences, the purpose of the research and the theoretical framework for mediation research has been questioned. For any research that seeks to analyse, categorize and optimize mediation endangers the flexibility of the process and the openness of the decision-making.³⁸ The heterogeneity of the practice field and the reluctance of some practitioners to open up to the scholarly discourse has added to the lack of transparency of mediation and limited research into it.³⁹ The absence of a common theoretical framework has led to a pluralism of research approaches, methods and discourses. A recent collection of research approaches in Germany can be used as an illustration for the present status of mediation research. The collection is a compilation of 43 contributions from research in 12 disciplines as a snapshot of present mediation research without claiming that this represents a comprehensive picture. The compilation

35 An early fundamental critique has been expressed by Fiss in his famous article 'Against Settlement. He was critical that a process based on bargaining accepts "*inequalities of wealth as an integral and legitimate component of the process*": Fiss 1983, p. 1078. See for a mythical account of this criticism: Coben, 2004.

36 On the different ways to understand mediation and its impact on practice and research: Kreuser 2017, pp. 18, 27.

37 For an overview: Mayer and Busch 2012, pp. 13. Wall and Dunne 2012.

38 On the challenges of mediation research in the social sciences and a historic review of the research: Mayer and Busch 2012, p. 8.

39 Busch 2012, p. 139.

deals with the fundamental question of how mediation may be established as an independent field of science and seeks to systematize and categorize existing research approaches. The editor notes in her introduction that mediation research is still on its way to establishing itself as an independent field of science. In her view this may take place in the next ten years, when mediation starts to become an integral part of institutions and specialized university chairs, which are currently an exception, will be established.⁴⁰ The intensity of research and the question of whether mediation is to be considered as an independent field of science varies in different countries.⁴¹ In Finland, research has been conducted in some fields of mediation, including court mediation and mediation in child custody disputes⁴², while there is little research in the field of Civil and Commercial Mediation. There is also no specialized university chair in Finland and mediation is not regarded as an independent field of science.

Also, in the legal sciences there is neither agreement on the purpose of the research nor on the approach that might be employed.⁴³ At the bottom of the discussion again is the question about what mediation is. Some consider mediation to be a specific negotiation technique and therefore a practical skill rather than a framework that can be the subject of (legal) research. This view is often advocated by mediation practitioners as well as by lawyers who use mediation as an additional conflict management tool. Others deny the normativity of mediation. They consider mediation to be a social fact and not a process that is guided by legal rules and principles, and they advocate empirical sociological research rather than a dogmatic- legal approach.⁴⁴ The view on mediation as a subject of legal research also depends on the extent to which mediation is formally regulated. Where formal mediation statutes have been enacted there is little debate regarding the question of whether mediation is part of the legal system, but it is common to speak of mediation law and to interpret and systematize the legal rules and principles that are specified in the statutes that regulate mediation.⁴⁵ The situation is different when mediation is not regulated by a statute or where the regulation of mediation is fragmentary and consists only of a definition of the concept of mediation. In

40 Kriegel-Schmidt 2017, pp. 1–2.

41 For a recent collection of contributions to mediation research in the Nordic countries: Nylund, Ervasti and Adrian 2018. In the Nordic countries there appears to be a trend to focus on *public-sector mediation in highly institutionalized settings* and therefore on court mediation, family mediation and victim-offender mediation: Nylund, Ervasti and Adrian 2018a, p. 4.

42 See for instance: Salminen and Ervasti 2015.

43 For court mediation an empirical approach has been prevalent: Adrian 2014. Ervasti 2014 pp. 129. On the Finnish debate between the different research schools compare: Ervasti 2004, p. 9. Koulu 2006, p. 450. Koulu 2007, p. 239. Ervasti 2009, pp. 33–37.

44 Ervasti 2009, p. 37.

45 For instance, in Germany, where a mediation statute has been enacted, several legal commentaries and books have been published, such as Eidenmüller and Wagner 2013.

the absence of a formal regulation of the process, the research concentrates on the interface between mediation and the court system, while the normative dimension of the mediation process itself is more readily denied.

To start with, it is necessary to identify the assumptions that will underlie this research.⁴⁶ These assumptions do not arise from established paradigms and I will therefore develop them further in Chapter 2. For the moment, I only seek to sketch the assumptions as follows: 1) there is a shift towards consensual self-determined decision-making which runs in parallel and is not exclusive of adjudicative forms of decision-making 2) mediation and adjudicative decision-making are in many respects *functionally equivalent*, which is shown in three ways: a) the settlement is functionally a decision that settles a dispute b) the mediation process is a system for rationalizing and legitimating decision-making, and c) the decision may be declared enforceable and is in this respect equivalent to a judgment. That is, it is guaranteed by the monopoly on the legitimate use of physical force of the nation state. These assumptions lead to the necessity of considering the relevance of the legitimation of the outcome of mediation and the fairness within mediation.

1.1.2 Research questions and scope of Civil and Commercial Mediation

In research on mediation, a distinction has been made between different fields of mediation, such as mediation in civil and commercial disputes, mediation in labour disputes, mediation in family disputes and victim offender mediation. In addition, there is community mediation, school mediation, and neighbour mediation. I do not seek to develop a comprehensive theory for all social practices that could possibly figure under the label of mediation. The variety therefore requires that the subject of the research is defined more carefully. This may take place according to the function of the process, the parties involved, the subject matter of the dispute or conflicts that are mediated and the level of the institutionalization of the procedure.

The subject of this research is mediation that is conducted within the framework of the European Mediation Directive. In the first place, this signifies a restriction in respect of the conflict at stake. Not all conflicts will therefore be included, but only conflicts that to some extent involve a *disagreement on civil and commercial matters*.⁴⁷ Secondly, this means that I will examine mediation as a *European* dispute resolution mechanism and I therefore seek to stress the function of mediation within the European area of justice as a mechanism to

⁴⁶ Van Hoecke 2011, p. xi.

⁴⁷ On the meaning of *civil and commercial*, see Chapter 3.3.2.

resolve *cross-border* disputes. This has an impact on the research questions, but also on the material and on the interpretation of the material.

This research focuses on the normative dimension of mediation. The normative dimension of mediation finds its tangible shape in the mediated outcome that the parties seek to implement within the legal system. According to the Mediation Directive “*the Member States should (therefore) ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable.*”⁴⁸ This requires the parties to reach a valid agreement and for that agreement to be such that its enforceability may be confirmed by a court. The normativity of the process is further closely connected to the concept of mediation adopted and the role of the mediator who, according to the Mediation Directive, is a third person who conducts the mediation *in an effective, impartial and competent way.*⁴⁹

Starting from these assumptions, I will examine *the normativity of mediation and the rules and principles that have started to emerge* on the basis of the following sub-questions:

- a. *What is the nature of mediation within and outside the legal system and how does mediation relate to the legal system?* By means of this first sub-question I seek to develop the theoretical framework for the normative dimension of mediation. Mediation is often perceived as a social practice that takes place outside the legal system and has its own rationality. The question is what this rationality is, how the practice of mediation is connected to the legal system and how it is determined within the legal system.
- b. *What is the outcome of mediation and how is it reproduced within the legal system?* By means of this second question, I seek to examine the normative dimension of mediation in respect of the mediated outcome. In the social practice of mediation, the outcome of mediation is the resolution of a conflict and may take various forms. Within the legal system the nature changes and usually takes the form of a binding contract. The question is how the mediated outcome is reproduced within the legal system and whether the circumstance that the mediated outcome is the result of a mediation affects the existence and validity of the mediated settlement agreement.
- c. *What is the procedure and what are principles that justify the mediated outcome?* By means of this third question I seek to examine

48 Mediation Directive 2008/52/EC, Recital 19, Article 6.

49 Mediation Directive 2008/52/EC, Article 3.

the normative dimension of the mediation process itself. There are a number of social practices that may qualify as mediation and also national legal practices may differ. But what is the distinct practice and what are the general principles and legal minimum procedural guarantees that justify the outcome of mediation?

My research focusses on mediation that is conducted outside the court system. I will exclude from my research mediation that is court annexed or is conducted within the courts.⁵⁰ While the European Mediation Directive does not make a difference between these two forms of mediation, court mediation takes place at the very centre of the legal system and may be regarded as a form of the administration of justice by the state, while mediation that is conducted outside the courts is considered to be a private form of dispute resolution. In general, court mediation is regulated in more detail and is to comply with certain requirements of the administration of justice. Mediation conducted outside the courts is considered to be a private process that is governed entirely by the parties.

The purpose of this research is not to examine the rules and principles of mediation conducted by a distinct professional group, but to examine the normative dimension of mediation in general. It excludes forms of mediation in which the mediation is conducted by a mediator who is not only a mediator but is also a member of a distinct professional group as is the case for mediators who are members of the bar association or mediators who are public notaries. These professions typically regulate the rights and duties of their members in detail and their duties may be more stringent than the duties of a mediator that does not belong to this group.

Another exclusion that I have made are disputes in family matters and especially disputes regarding child custody. Family mediation is a distinct form of mediation that focusses more than other forms of mediation on the psychologic aspects of the conflict and requires the interests of the child to be taken into account. As a consequence, some Member States may have excluded or restricted the applicability of the Mediation Directive or have introduced specific requirements to secure the interests of the child.

I have used the term Civil and Commercial Mediation to depict the subject matter of the research. The term 'civil and commercial' links mediation to certain types of conflicts and therefore to a certain field of application. The term has been used in the literature on the implementation of the Mediation Directive in the European Union which applies to civil and commercial matters.⁵¹ It has also been

⁵⁰ For a recent discussion of trends in court mediation in a selection of European countries, see Adrian 2016.

⁵¹ See for instance: De Palo and Trevor 2012, p. 1. Esplugues 2014a. The concept of conflict in Civil and Commercial Mediation will be examined in Chapter 3.3.2.

used for mediation that relates to disputes that might be dealt with in the civil and commercial courts.⁵² I have used the term in a narrow sense as a practice of mediation that constitutes the second pillar of access to justice within European dispute resolution and seeks to achieve an outcome that – on request of the parties – may be confirmed as enforceable by a court. Commercial mediation is therefore not to be understood in a broad sense as mediation in a *commercial context or business* mediation. Such a broad understanding of mediation would start from a broad concept of conflict and include intra-company conflicts and conflicts at the workplace amongst others. It would result in a broad concept of mediation that may include preventive mediation, supervisory mediation, facilitative mediation, transformative mediation and shuttle mediation.⁵³ Civil and Commercial Mediation in the narrow sense in which it will be used in this research constitutes mediation within the context of the Mediation Directive and the enforcement mechanism envisaged by the Mediation Directive. It does not comprise practices of mediation that are conducted by arbitration institutes with the aim to obtain a settlement in the form of an arbitral award.⁵⁴

Civil and Commercial Mediation is used to depict mediation as a legal practice. Mediation as a legal practice does not mean *legal mediation*. Legal mediation has been used in the US to describe a form of mediation that is considered to be a substitute for arbitration and is characterized by evaluative practices, the involvement of lawyers by the parties and the use of adversarial arguments.⁵⁵ Unlike legal mediation Civil and Commercial Mediation does not refer to a legal form of decision-making⁵⁶ that constitutes a substitute for decision-making mechanisms, such as arbitration, but refers to a mediation practice that is in some respects functionally equivalent to judicial proceedings.

52 Brown and Marriott 2011, p. 205.

53 See for this broad understanding amongst Austrian mediators: Filler 2015, p. 36.

54 On the mechanism to use arbitral awards for the confirmation of mediated outcomes: Alexander 2009, p. 310.

55 *Nolan-Haley* criticizes that “*Legal mediation has taken on many of the features traditionally associated with arbitration: adversarial posturing by attorneys in the name of zealous advocacy, adjudication by third party neutrals, whether implicitly through mediator evaluations or explicitly in the med-arb process and the practice of mediator spinning.*”: Nolan-Haley, Jacqueline 2012b, p. 63. Pappas 2015, p. 162.

56 On the essence of decision-making outside the law, see Chapter 2.3.3.

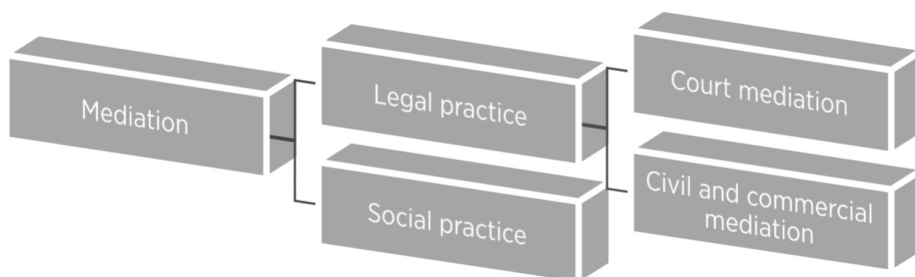


Figure 1. The systemacy of mediation as a legal practice

1.2 Research method and relation to previous research

Legal research is characterized by a pluralism of research methods.⁵⁷ There is therefore a need to make choices and to find an appropriate method, an enterprise which often proves difficult in respect of new societal developments. The circumstance that European law is not a system in the sense of “*a coherent and pyramid-like state-made legal order*” increases the challenge to find an appropriate research method.⁵⁸ It is therefore no surprise that the arsenal of instruments that has traditionally been used in procedural law does not offer a method that can be adopted for the research on the normative dimension of mediation.⁵⁹ The researcher is therefore confronted with the dilemma that she uses an established method that in respect of the research interest, produces unsatisfying results, or alternatively that she uses a method or a set of methods that is new and therefore not yet generally accepted in the legal community. I will illustrate this point by first comparing two approaches that have frequently been used in procedural research: the empirical method and the traditional legal dogmatic method, before sketching my own approach.⁶⁰

1.2.1 Traditional research approaches: the empirical method and the legal dogmatic method

Legal sociologists perceive the law as a fact and claim that its causalities can be examined by methods comparable to those used to examine the causalities of

⁵⁷ Van Hoecke 2011, p. v. Smits 2017, p. 13. *Minkkinen* pleads for multidisciplinary methodological pluralism to study law in its social, political, economic and cultural context: *Minkkinen* 2017, pp. 917–923.

⁵⁸ Micklitz 2017, p. 264.

⁵⁹ See also Koulu 2007, p. 242.

⁶⁰ Of course, there are other methods, which I do not explore any further here, such as the anthropological, historical or comparative method.

natural science. In their view, science that does not use a method that can objectively be falsified or verified is not a science. Sociological approaches to the law are not new, neither are debates on the knowledge interest and theory building. According to the knowledge interest, two lines may be distinguished: the first challenges the concept of (positive) law and seeks to build a sociologist ontology of the law, the second examines the effects of legislation on society and is therefore confined to legal institutions. It provides legal science and politics with data.⁶¹

An early representative of the first line of research is *Eugen Ehrlich*. His works on the divergence between state law and real law have been rediscovered in the discussion on legal pluralism.⁶² In the view of *Ehrlich*, law not only consists of a set of positive norms, but also of usage that governs the organisation of social associations and establishes rules for the future.⁶³ These rules are social facts, the *living law* that exists independently of the positive law and can only be revealed by means of an empirical study of the usage. *Ehrlich* used an empirical method with the purpose of discovering the law that is actually lived in society as opposed to the law set by the state.⁶⁴ In his view, the main legal developments take place outside state law, namely within society and not in legislation or jurisprudence.⁶⁵

Using interviews and questionnaires to analyse and establish the rules of the living law, *Ehrlich* stressed that the empirical method was the only scientific method to gain insight into the living law.⁶⁶ In his view, this living law was no uniform law, but different associations could have a different living law.⁶⁷ *Cotterrell* questioned the usefulness of the concept of the *living law* in research, as living law can only be studied in relation to the categories established by *lawyer's law*.⁶⁸ His observation goes to the point that studying different forms of conflict resolution in society through a legal prism requires the conceptualization of the living law in legal terms and necessarily involves the question, how the living law relates to positive law. Studying conflict resolution in society provides data on the social practices that are used to resolve a conflict. Empirical studies have been conducted to assess whether

61 Regarding the subject of legal sociological research see the debate between *Ehrlich* and *Kelsen*. *Ehrlich* considered that the subject of legal sociological research was what society considered as law and therefore the facts of law (*Tatsachen des Rechts*). *Kelsen* considered that legal sociology was confined to the research on the formation and impact of positive law and the subject of the research was therefore social behaviour that was governed by legal norms: Kunz and Mona 2006, pp. 116. On the debate between *Kelsen* and *Ehrlich*: Kunz and Mona 2006, pp. 112–116. Antonov 2011.

62 On Eugen Ehrlich and legal pluralism, see Teubner 1997.

63 Ehrlich 1989, pp. 81–83.

64 Röhl 1987, pp. 38, 29.

65 Ehrlich 1989, p. 12 (the author's preface).

66 Kunz and Mona 2006, p. 114. Röhl 1987, p. 29.

67 Ehrlich 1989, pp. 47.

68 Cotterrell 1992, p. 34. See also Cotterrell 2008, p. 61.

ADR is used and for what reason.⁶⁹ The studies provide data on the practices or preferences for certain practices. For instance, from empirical studies conducted in the US it is known that the use of evaluative mediation has increased in the US.⁷⁰ This is a social fact, but can this empirical data be used as evidence of the living law in mediation? Does it allow the conclusion that the mediator is permitted to evaluate or that Civil and Commercial Mediation must be evaluative?

Unless the research interest is of a descriptive nature, the data need to be categorized. If such categorization is made with a legal knowledge interest, at some point there arises the question of how the legal system deals with the social facts that constitute the *living law* and how the law defines its boundaries. The alternative would be to deny that a distinction between norms and facts existed and to perceive all law as a matter of fact. However, an examination of the law from a sociological external perspective without taking account of the law as described by lawyers fails to take account of the nature of the legal system, and its self-descriptive character.⁷¹ As a consequence, the subject of the research becomes blurred and incongruent.⁷²

Empirical research may not only be used to uncover the living law, but it may also be conducted for the purpose of assessing whether the actual behaviour corresponds to the behaviour prescribed by law, to assess the effect of legislation or to gather material for rule-making or training. So-called evaluation studies have been used to assess the functioning of the court system, the independence of judges and relate therefore in one way or another either to legal institutions, such as the court system, or to positive law. In the field of dispute resolution, an empirical method may also be used to examine whether state-organized dispute resolution fulfils its function. The framework for empirical research on the effect of legislation or the functioning of a legal institution is the positive law or legal institutions, not the living, unwritten law. For instance *Ervasti's* research related to court mediation falls into this category. In his work he used an empirical method to assess how the statutory introduction of a settlement process in the *courts* worked in practice.⁷³ He conducted interviews with lawyers and judges and used questionnaires, statistics and court records.

An empirical method has also been adopted to assess the efficiency of a dispute resolution mechanism by measuring the settlement rate and disputant

69 For an empirical study on the use of ADR in corporations: Stipanowich and Lamare 2014. For conflict management in German companies: PricewaterhouseCoopers/Europa-Universität Viadrina 2016. See also Autio 2014.

70 Stipanowich and Lamare 2014, p 62.

71 Luhmann 1995, p. 18.

72 Also, *Tuori* doubts that an external view that is detached from a concept of law is even for the socio-legal scientist possible: Tuori 2002, p. 296.

73 *Ervasti* considered his empirical work on court mediation to be an evaluation and assessment research on the effects of legislation on settlement: Ervasti 2004, p. 40.

satisfaction.⁷⁴ The *contents* of the mediated settlement agreement has been studied to assess whether settlement agreements reached in court mediation are creative.⁷⁵ The study confirmed that court mediation produced creative solutions to disputes, and suggested that the texts of highly creative agreements should be examined and used in training curricula. The study recommended further research to determine practices that promote creativity.⁷⁶ But does the result of the research lead to the conclusion that there is a legal requirement that settlement agreements are to be creative, or that the mediator has an obligation to use practices that favour creative settlements?

Alternative dispute resolution and mediation in particular may be considered to be an expression of the *living law* that is created within and as part of society. If applied in accordance with the ideas of Ehrlich, the discovery of the living law would complement the state law system and would be considered to be a source of law whenever needed in legal decision-making. Discovering the living law in mediation conducted outside the courts would require interviews with the members of society who practice the living law, hence with mediators as well as observing mediation in practice. The empirical method is not likely to provide insights into the legal principles inherent in Civil and Commercial Mediation. This has to do with the lack of homogeneity in the practice of mediation that is conducted outside the courts. There is no uniform mediation concept, but there are different mediation styles and models that may vary from one mediator to the next. Interviews with mediators or questionnaires sent to lawyers and parties may provide insights on the practice of a specific mediator or the mediation practice of a specific group, but it does not provide general insights on the mediation practice or the law that evolves from this practice.⁷⁷ It further has to do with the circumstance that mediation conducted outside the courts is less accessible than court mediation. There is little empirical knowledge about the actual contents of the mediated settlement agreements that are reached in out of court mediation. What is available are model settlement agreements that provide an insight into the general nature of the settlement agreement reached.⁷⁸ Furthermore, the living law can only be studied in relation to a certain concept of law. If it is uncertain what the normative concept of mediation is, insights gained from the practice cannot fill the *lacunae* of a normative concept of mediation. For these reasons, the empirical method does not appear useful in respect of my knowledge interest.

74 Wall and Dunne 2012, pp. 239-232.

75 Adrian and Mykland 2014, p. 422.

76 Adrian and Mykland 2014, p. 436.

77 *Stipanowich* notes that the understanding of what mediators do rests heavily on anecdote and that only major trends can be observed: Stipanowich 2015, p. 1203.

78 See for instance: CEDR Model Settlement Agreement 2017.

Traditional procedural research does not offer an appropriate research method either. Traditional procedural research uses an interpretive dogmatic method, hence the interpretation and systematization of formally legal valid rules, and the weighing and balancing of legal principles.⁷⁹ In the framework of this traditional approach, the interpretation of legal texts that have been codified in procedural law and a systematization of the interpretation so achieved has been used to serve in the first place a practical legal interest. The method used for the interpretation has primarily been a text analytical method. In the last few decades, there has been an increasing principle-based and human rights-based approach in procedural law that builds upon the weighing and balancing of established procedural principles.

Mediation is codified in legal statutes only to a limited extent. Depending on the jurisdiction, the regulation may be limited to the basic definitions of mediation.⁸⁰ As a consequence, a method that limits itself to the analysis of national legal procedural statutes would quickly come to its limits. Also, a principle-based approach encounters limits if the analysis of the legal framework of mediation is solely derived from the point of view of established procedural principles. This is because mediation does not follow the paradigm of traditional court proceedings that is based on adjudicative decision-making. Established legal principles and fundamental rights of a fair trial, such as the right to be heard or the equality of arms that are enshrined in Article 6 of the European Convention on Human Rights and embodied in Title 6 of the Charter of Fundamental Rights of the European Union cannot be applied straightforwardly to mediation.

However, legal rules – even though they may be limited to definitions – provide the framework for further interpretation and theory building. I claim that any dispute resolution process is based on principles, which may be of a legal, moral or ethical nature. Mediation therefore follows its own set of principles – its own morality as *Fuller* has stated.⁸¹ To take a principle based approach in mediation would therefore mean that there is a need to identify the essential elements of the process and to differentiate it from other processes. But this is not enough. The search for the normativity of mediation requires a recognition of the principles that are legal in nature.

79 Siltala 2003, p. 137. On the aim of legal dogmatic research in general and the need for a broader approach see, Smits 2017.

80 See for examples Chapter 2.3.2.2.

81 Fuller 1963, pp. 23. On the *morality* of mediation as used by Fuller, see below Chapter 4.3.

1.2.2 Towards a systemic research approach

Sociologists view the law from an external perspective, as external observers, while legal researchers tend to adopt an internal perspective.⁸² These differences in the perspective have led to controversies and misunderstanding between different schools of mediation research in law, which can be observed in the discussions conducted between advocates of the empirical approach to mediation and advocates of the legal approach to mediation.⁸³ The empirical approach emphasizes that an external approach is needed to describe and understand the law and its external reality as well as trends in the development of their relationship.⁸⁴ It has been used to study the usage of mediation. The legal approach to mediation is concerned with examining the normative dimension of mediation, the general principles and norms regulating mediation and the role of soft law in mediation.⁸⁵ The divergent views lead to the question of whether an approach that does not make a difference between social norms and legal norms should be adopted (I have called this an *integrative* approach). Or whether an approach should be taken that makes a distinction between the legal system as a subsystem of the social system on the one hand and the social system on the other hand. I have called this latter approach a *systemic approach*.

An integrative and systemic approach in research on mediation reflects different approaches to law and society, to the way society interacts with the law and penetrates the legal system. It also marks a difference regarding the internal and external perspective that is taken. An integrative approach denies the importance of a distinction between an internal and external perspective of the law. The law is not analysed as a normative order from the view of a participant, but just as another social behaviour that is discernible in society and that is part of social life. This understanding goes along with a broad sociological concept of law that Cotterrell articulates as “*a myriad of diverse practices loosely arranged around certain continually reformulated practical problems of government and social control*”.⁸⁶ The integrative approach would view mediation as a social practice that may create social norms. The difficulty with this approach, however, is that social and legal practice cannot be distinguished from each other, nor is there any established social or legal standard against which such behaviour could be measured. This situation might satisfy adherents of communitarian mediation who believe in self-regulation and a self-ordering society. It is less satisfactory if

82 On the internal and external aspect of rules, see Hart 1961, pp. 55, 86. Critical regarding this distinction: Tamanaha 1999, p. 181.

83 Compare Ervasti 2009.

84 Ervasti 2004, p. 18.

85 Koulu 2006, pp. 46-47, 50-51.

86 Cotterrell 1995, p. 95.

one considers mediation to be a form of dispute resolution that is meant to be an alternative to court proceedings, but not a poorer form of seeking justice.

Another approach to mediation would be an approach that seeks to make a distinction between the legal system and the social system based upon the *difference* in the communications. This view would require a systemic approach to society as represented by *Luhmann*. *Luhmann's* systems theory is characterized by differentiation into different subsystems and differentiation based on different communications. This would mean that the subject matter is approached from a systemic point of view that makes a distinction between legal communications that operate according to the legal/illegal code and communications that cannot be allocated to the code of the legal system. If one builds on this difference, the question is, how the legal system reproduces the dispute resolution that takes place in society.

A systemic approach thus provides an opportunity to obtain an understanding of mediation as a conflict resolution practice on one hand, and the normative dimension of mediation on the other. This is to differentiate between principles that are considered to be the guiding principles within mediation theory on the one hand, and legal principles on the other. It also provides a tool for reconsidering the (emerging) legal principles inherent in mediation against the principles that are regarded as part of a due process requirement in other proceedings, that is, to measure the mediation principles against standards that are perceived as inherent in the legal system.

The knowledge interest of my research is the identification, interpretation, systematization and development of legal rules and principles of Civil and Commercial Mediation. I have adopted a systemic approach and therefore distinguish between communications that take place within and outside the legal system to identify what *Fuller* has referred to as the 'morality' of the process and to examine its reproduction with the legal system. The systemic approach, however, does not deny that social reality has an impact on the legal system. Social practices may have an influence on the legal system at various levels. However, *there is no causal relationship between society and legal order*. The law does not mirror what happens in society but differentiates and reproduces the external order into the internal legal order by means of its own communications.

This research is not limited to the elaboration of a distinction between mediation as a social and a legal practice. It seeks to systematize the law and to develop the general doctrines of the law pertaining to mediation, an enterprise that is referred to as theoretical legal dogmatics.⁸⁷ This systematization requires a prior interpretation

87 Compare Tuori 2002, p. 290.

of concepts, which according to *Tuori* also implies “a certain view of the social processes and relationships constituting the object of legal regulation.”⁸⁸

1.3 Method outline of the systemic approach and terminology

The subject of my research is the normative dimension of mediation, which I understand as the reproduction of mediation in the legal system and the identification, interpretation, systematization and development of legal rules and principles that govern mediation within the legal system.⁸⁹ Mediation is no longer reduced to a social practice that has an existence outside the legal system nor does it exist only in the shadow of the legal system. It has crossed the border into the legal system and now seeks its place. *Westerman's* house metaphor may be used to illustrate this point.⁹⁰ In *Westerman's* view, the legal system shares several characteristics with a house. The legal system may be fragmented and have different wings, but it is still to be regarded as one identifiable entity. The legal system, like the house, is built on a solid foundation, referred to as legal principles and rights. The legal system, like the house, requires an internal ordering with a certain degree of consistency for its proper functioning. This metaphor can be developed further. A new development, a change of legislation or a change in the paradigm does not lead to the demolition of the house. Rather, one needs to assess whether the windows are to be kept open or closed and whether and how the internal order is to be rearranged.

The above reference to the house makes it clear that there is a border between the legal system and its environment. The house metaphor also visualizes the distinction between the external and the internal perspective: the perspective of the outside observer and the inhabitant. As mentioned earlier, legal doctrine in general adopts an internal viewpoint, while legal sociologists generally adopt an external viewpoint.⁹¹ In my research I will not use the external point of view that has been predominant in the research on mediation. The change in approach is based on several reasons: the external point of view perceives the law as a social fact that determines the individual's behaviour. According to this view, law is a form

88 *Tuori* 2002, p. 302.

89 On the meaning of *juridification*, see fn 30.

90 *Westerman* 2013, pp. 47.

91 *Tuori* 2010, p. 8. The distinction between an internal and external point of view on the law was elaborated by *Hart*. According to *Hart*, rules may be observed from an external viewpoint, that is, from outside the legal system, or from an internal viewpoint that is from within the legal system. The external viewpoint focusses on observable patterns of behaviour and is therefore descriptive, while the internal viewpoint involves an evaluation of the behaviour and is therefore normative: *Hart* 1961, pp. 86.

of social ordering that focusses on the factual enforceability or general acceptance of a certain behaviour.⁹² A sociological concept of law may therefore perceive rules and principles as *law* that have been established within a social group. However, there are different kinds of rules: the rules established within a family, a social, religious or professional group, a community or a state, all constitute a form of social ordering. The same is true for the rules established by the mafia or other criminal organizations. All these rules are followed and accepted within the group and non-compliance with the rules may be sanctioned by the group in different ways. The external point of view provides no explanation of how social rules and legal rules can be distinguished from each other, or it may only do so by reference to a normative concept of law.⁹³

Most descriptions in handbooks on conflict resolution and mediation provide an external view of mediation. They describe structures, rules and principles in detail. Due to their external approach, they rarely seek to analyse whether a rule or principle is binding, how the bindingness of a rule is determined and how failure to comply with a rule will be sanctioned. In order to examine the normative dimension of mediation, an internal – hence – legal approach must be adopted. This approach starts from the self-description of the legal system and examines how the legal system reproduces and describes mediation through its own operations. This approach reflects the idea of the systems theory developed by *Luhmann*, that the law is an autonomous self-referential system that reproduces itself by means of communications that from the law's internal perspective are attributable to the legal system. *Luhmann's* systems theory allows for distinctions to be made between communications that are communications of the legal system and other communications, based on a binary code.

According to systems theory, law as an autonomous system defines its borders itself. It is self-descriptive. This has two consequences. First, it means that there is no single established conception of law, but the law has to be considered to be a system of communications that follows a certain code and thereby establishes its own boundaries. What belongs to the system or remains outside the legal system is therefore to be described by means of the legal communications in a system. If a communication is considered to be *legal* by the legal system, it will be part of the

92 Also, social science needs to define law in order to build a framework for the research. This working model is not a normative order, but a working concept or scientific framework for the research of practices related to law or other normative orders: Cotterrell 1992, pp. 38-39. Within social science, there are therefore different concepts of law that may or may not be consistent with the concept used from within the system. On sociological concepts of law, see Cotterrell 1995, pp. 28.

93 *Luhmann* has pointed out that the use of an external description has the advantage that it is not bound by internal norms. Nevertheless, the research subject of social legal theory may only be the law as understood by the lawyers and therefore needs to start from the self-description of the system: *Luhmann* 1995, p. 18. It follows that there is a need to distinguish social and legal rules and principles from each other and these distinctions may only be made from inside the legal system.

legal system. However, this observation does not provide an answer to the question of what is to be held as a legal communication, and indeed, the classification of a communication as *legal* may differ from one (national) legal system to another.

Tuori's theory of the multi-layered legal system can be seen as a theory of the self-description of the legal system. *Tuori* shares with *Luhmann* the view that the modern legal system is fundamentally a positive legal system.⁹⁴ This system is produced and reproduced by legal operations, which *Tuori* defines as legal practices.⁹⁵ *Tuori's* theory on critical legal positivism allows taking account not only of the legal practices that are on the surface level of the legal system, but also of the deeper structures of the system and the way general legal principles may develop. In examining the normative dimension of mediation, I perceive the law as an autonomous normative multi-layered order that is built on a normative structure of rules and principles.

Secondly, self-description means that there is a borderline between the legal system and its environment. The systems theory represented by *Luhmann* holds that this borderline is cognitively open, but operationally closed. The legal system obtains inputs from its environment that is from outside the system. However, it is operationally closed, which means that the system operates only through its own operations. Also, according to *Westerman*, there is a borderline between the house and its environment. She maintains that the autonomy of the house is preserved even if one leaves the windows open. In her view, the legal system can therefore be an open system even though there is a dividing line and an internal rearrangement. It is this borderline that requires attention and I will discuss the operational closure of the system in more detail in Chapter 2.

If one accepts that there is a borderline between the law and other subsystems, the question inevitably arises about whether this borderline may be crossed and how the environment might have an impact on the legal system. *Luhmann* suggests that *structural coupling*⁹⁶ causes irritations to the legal system which the legal system recognizes as irritations from the point of view of its own structures and its own systemic history.⁹⁷ The legal system may also learn and this learning may be either internally or externally induced.⁹⁸ The legal system is therefore cognitively open, it is able to react to changes in society, but it does this only by means of its own operations and the processing of these irritations will take place by system

94 *Tuori* 2002, p. 29.

95 *Tuori* 2002, p. 131. *Tuori* 2010, p. 6.

96 On structural coupling, see below Chapter 2.2.1.

97 *Luhmann* 1995, p. 442.

98 *Luhmann* 1995, p. 81.

internal operations. The system reproduces itself by means of its own operations and reproduces external facts as system internal operations.⁹⁹

The methodological prism through which I have examined the reproduction of mediation within the legal system is based on the contracts between the parties involved. Several contracts may be distinguished. The terminology used may vary, however. First, there is the agreement between the parties that triggers mediation, for which I have used the term *agreement to mediate*.¹⁰⁰ Agreements to mediate are agreements on the initiation of mediation as a dispute resolution mechanism. They have also been described as a path into mediation.¹⁰¹ The agreement to mediate is “*a contractual agreement to refer the matter to mediation*”.¹⁰² It may be embedded in a dispute resolution clause and as such be part of a commercial or other agreement between the parties.¹⁰³ It may also be separate or included in the mediation agreement.

In respect of the mediation one may distinguish between the mediation agreement and the mediator agreement. The *mediation agreement* constitutes an agreement between the parties on the conduct of the mediation. It sets out the rights and duties of the parties in the mediation and the principles of mediation and may contain a reference to the procedural rules of an institute.¹⁰⁴ In the mediation agreement, the parties may also agree on the procedural effects of the mediation and confidentiality. The mediation agreement has been described as *the basic law as between the parties*.¹⁰⁵ It provides the framework on the basis of which the parties conduct the mediation.¹⁰⁶ The *mediator agreement* is an agreement entered into between the parties and the mediator. This agreement sets forth the obligations of the mediator in the mediation and the mediator’s right to be remunerated. The mediator agreement may be a separate agreement entered into by the parties with

99 Luhmann 1995, p. 85.

100 Similarly, Hopt and Steffek 2013, p. 29. The agreement to mediate has also been referred to as ‘*mediation clause*’: Alexander 2009, p. 171.

101 Eidenmüller 2001, p. 8. The agreement to mediate is one path into the mediation in addition to the initiation of mediation by means of a court referral or by means of a mediation request made by one party to a mediation institute.

102 Hopt and Steffek 2013, p. 29.

103 On the enforceability of the duty to mediate: Hopt and Steffek 2013, pp. 30-31. Alexander 2009, pp. 174. Alexander notes that there is a trend to recognize and enforce mediation clauses in many countries. For an in-depth analysis of the enforceability of mediation clauses in English law: Allen, Tony 2013, pp. 154–165. Regarding an example for dispute resolution clauses: CEDR International ADR Contract Clause 2017.

104 For a list of the possible contents of a mediation agreement: Alexander 2009, pp. 212. Alexander refers to the mediation agreement as ‘*agreement to mediate*’. For examples of tripartite model mediation agreements concluded between the mediator and the parties, see EUIPO Mediation Agreement, CEDR Model Mediation Agreement 2017, MfN Sample Mediation Agreement 2017. For procedural rules, see for instance EUIPO Rules on Mediation. CEDR Model Mediation Procedure 2017. MfN-Mediation Rules 2017. On self-regulation, see Chapter 2.5.6.

105 Eidenmüller 2001, p. 8.

106 Eidenmüller 2001, p. 34. Alexander 2009, p. 212. Esplugues 2014b, p. 596.

the mediator, but it may also be incorporated in the mediation agreement. When the mediation is administered by a mediation institute, a further distinction may be drawn between the mediator agreement and the agreement entered into between the parties and the mediation institute.¹⁰⁷ This further distinction takes account of the circumstance that institutional forms of mediation are administered by mediation institutes. The mediation institute does not only adopt rules in respect of the conduct of the mediation administered by the institute that become part of the mediation agreement. It may also administer the mediation and appoint the mediator.¹⁰⁸ In many cases the mediator agreement will be included in the mediation agreement and these agreements may therefore be examined as one agreement.

The *mediated settlement agreement* is entered into between the parties and it sets forth the outcome of the mediation.¹⁰⁹ The mediated settlement agreement settles the dispute and creates, amends or terminates the legal rights and obligations of the parties. The *confirmed mediated settlement agreement* is an agreement that has been confirmed as enforceable by a court or similar upon request of the parties in accordance with a national procedure. In general, the mediated settlement agreement is not directly enforceable, but a homologation by a court or comparable public authority is needed.¹¹⁰ The homologation procedure is not contractual in nature but is subject to the procedural law of the Member States. The procedure varies between Member States and remains outside the scope of this research.¹¹¹ The confirmed mediated settlement agreement is an enforcement title that may be circulated in accordance with the Brussels I Regulation (EU) No 1215/2012 (recast).¹¹²

107 Koulu 2006, p. 145.

108 When the mediation is administered by a mediation institute, the mediator appointed by the mediation institute may enter into a direct contractual relationship with the parties. Alternatively, the mediator may be nominated by the mediation institute that appoints the mediator. This latter situation resembles the appointment of an arbitrator by an arbitration institute. In this case it is doubtful whether a contract exists between the mediator and the parties, or whether the contractual relationship remains confined to the parties and the mediation institute. *Norros* considers that the legal situation is comparable to an assignment agreement between a law firm and its client: *Norros* 2005, p. 469. Even though the assignment is carried out by an individual lawyer of the law firm, the assignment agreement becomes binding on the law firm and not on the individual lawyer.

109 Alexander 2009, p. 304. For a model settlement agreement, see CEDR Model Settlement Agreement 2017.

110 The term *homologation* depicts the procedure in which the mediated settlement agreement is confirmed as enforceable: Esplugues 2014b, p. 719.

111 The national procedures in which the mediated settlement agreement may be enforced vary and include approval by notaries, lawyers, mediation organizations and courts: Study for an evaluation and implementation of Directive 2008/52/EC 2016, pp. 51, 111. Esplugues 2014b, p. 719.

112 The creation of an enforcement title is one of the main aims of the Mediation Directive. See Chapter 2.5.3.

Table 1. Table 1 describes the various contracts pertaining to mediation.

Agreement to Mediate	<ul style="list-style-type: none"> • agreement between the parties to start mediation • triggers mediation • may be included in a dispute resolution clause or in the mediation agreement or be separate 	Mediation Agreement	<ul style="list-style-type: none"> • agreement setting forth the framework of mediation • basic regulation of mediation as between the parties • may include the mediator agreement 	Mediator Agreement	<ul style="list-style-type: none"> • agreement regarding the rights and duties of the mediator in the mediation • may be incorporated in the mediation agreement 	Mediated Settlement Agreement	<ul style="list-style-type: none"> • outcome of the mediation • settles the dispute • creates, terminates or changes legal rights 	Confirmed Mediated Settlement Agreement	<ul style="list-style-type: none"> • enforcement title • may be circulated in accordance with the Brussels I Regulation
Homologation Procedure									
<ul style="list-style-type: none"> • procedure to confirm the enforceability of the mediated settlement agreement • subject to national procedural law 									

I have used the contracts that constitute the framework and outcome of mediation as instruments of *structural coupling* between different operationally closed, but cognitively open systems as I will further elaborate in Chapter 2.2. These contracts connect mediation to the legal system and constitute the framework for the legal practice of mediation. The contracts may therefore be used to study mediation within the framework created within the legal system. As a means of structural coupling, the contracts open mediation to the rationality of the legal system. The systemic approach allows the principles and concepts developed within mediation theory and conflict theory to be taken into account, hence conflict resolution in the *social system*, while examining how these principles have been reproduced within the legal system and whether and how the system has reacted to this irritation. In this respect my approach will be multi-disciplinary.

I have used contract law and theory as a research method. The use of contract law in mediation is not new. Contracts that constitute the basis of mediation have been used to analyse the rights and duties of the parties and the mediator within a jurisdiction in the absence of detailed statutory regulation.¹¹³ Also, in comparative studies on mediation, the duties of the parties and the mediator are often described as contractual duties.¹¹⁴ My approach differs from previous research. In contrast to previous research, I do not seek to analyse the contracts within a specific national legal system, nor to achieve a comparison between different European legal mediation systems or forms of regulation, but to study the transition from the social to the legal practice of mediation and to examine general concepts and principles that have started to emerge and determine mediation within the legal system. I have used the contracts as a common framework for the legal practice of mediation. I have used legislation, statutes and instruments of self-regulation as material to extract the principles that have emerged in mediation. This method allowed me to detach mediation from the national legal system in which the level and intensity of the regulation of mediation may vary¹¹⁵ and to build a synthesis between the social practice and the legal practice of mediation as well as between contract and procedure.¹¹⁶ References to national legal systems are therefore to be seen as examples of the interaction between mediation and the law, rather than a comprehensive analysis of the subject matter in a national system.

Mediation does not yet have an established place as a separate field of law nor has it found a place within a certain area of the law.¹¹⁷ In fact, mediation has

113 See for instance: Eidenmüller 2001. Koulu 2006, 50. Marsh, Oddy and O'Neill 2017, p. 222.

114 Alexander 2009, pp. 209–210. Hopt and Steffek 2013, pp. 73–75.

115 On the mediation concept and its national implementation, see Chapter 2.3.2.2.

116 On the need to address the interaction between the mediated settlement agreement and mediation in order to achieve a systematic overview, see Caponi 2015, p. 118.

117 Wendland 2017, p. 172. Koulu 2006, p. 450.

points of contact with several fields of law. Mediation conducted outside the courts is in general based on a set of contracts and it could therefore be claimed that it belongs to the area of contract and commercial law, and in cross-border dispute resolution, to private international law. On the other hand, it cannot be denied that mediation is not a contract on the exchange of goods and services, but provides for a procedure, hence, a set of rules that determine the behaviour of the various parties that participate in the settlement of the dispute. As regards court mediation, the procedural character has been rather obvious, as court mediation is linked to the institution of the court. But mediation that is conducted outside the courts is also procedural in nature. Within the European Union, mediation is considered to be an alternative method of dispute resolution that should further the access to justice and thereby the participation of European consumers and businesses in the internal market. The legal basis for the regulation of Civil and Commercial Mediation by the European Union lies in the judicial cooperation in civil matters and therefore an area that is referred to as European civil procedural law.¹¹⁸ Also, the function of mediation as an alternative to litigation supports the procedural character of mediation.

It may be claimed that the distinction between different fields of research as well as the classification of an area as civil, procedural or other is more a question of politics and tradition than of rational reasons and has therefore no significant impact on the research itself.¹¹⁹ On the other hand, each area of law deals with typical questions and has developed principles of its own. For procedural law, these are the principles of due process; in consumer law and employment law, the protection of the weaker party; and in contract law, the principle of private autonomy. The classification connects an area to the doctrine of a certain area of law. It helps to systematize the questions that are related to a field and to apply, adapt or develop the principles and concepts that have been developed. It ultimately serves the systemic approach to a new process or contract. My purpose is to examine mediation as a European dispute resolution mechanism. By locating my research in the field of European civil procedural law, I seek to stress the function of mediation within European dispute resolution and the need to develop procedural principles of mediation.

I will use European and national legislation as well as soft law as material to identify how mediation principles are reproduced within the legal system and to develop principles of mediation. The research material includes sources from the European institutions and comparative research that has been conducted within the field of mediation, as well as material from selected Member States of the

¹¹⁸ Wagner 2012, pp. 94–97, Storskrubb 2008, pp. 10–11, 181.

¹¹⁹ Compare Ervasti 2004, p. 8.

European Union, and self-regulatory instruments, such as procedural rules of mediation institutes and model contracts. The different sources will be described in more detail in Chapter 2.5. Regarding the social practice of mediation, I have included mediation literature and literature on conflict and dispute resolution to the extent that it is necessary to sketch the social practice of mediation, the environment of the dispute resolution process and its socio-psychological aspects. In respect of the mediation literature, I will rely to a significant extent on US literature that constitutes a major original source for the further development of mediation theory in Europe.

1.4 The structure of this research

The Introduction sets out the research questions and outlines the theoretical approach. The purpose of the research is to examine the normative dimension of mediation, and therefore the reproduction of mediation in the legal system. I claim that distinct legal principles determine mediation within the legal system and seek to develop these further. In Chapter 2 I develop the theoretical foundation and embed it into systems theory: I examine mediation as a decision-making mechanism outside the legal system and its connection to the legal system. The social practice and the legal practice of mediation have several connection points and I seek to establish the contracts that constitute the framework of mediation as a connection point and research method. In this Chapter, I also seek to clarify the subject matter of my research. I sketch the social practice of mediation, place this practice within the context of European dispute resolution, and examine the function and rationality of mediation within the European context. Chapter 2.5 sets out the normative environment of mediation that may be used within the legal system to determine mediation within the legal system. It describes the Mediation Directive as well as other regulatory regimes.

Chapters 3 and 4 constitute the practical applications of the theoretical framework developed in Chapter 2. Chapter 3 of my research is dedicated to the outcome of mediation. I use the mediated settlement agreement and liberal contract law doctrine to examine the reproduction of the mediated outcome within the legal system. I examined the nature of the mediated outcome and the conditions for the existence and validity of the mediated settlement agreement. The Chapter seeks to establish the grounds on which the validity of the mediated settlement agreement may be challenged on the basis of values that are considered crucial in mediation, such as interests and needs, uncertainties that are characteristic for settlements, as well as on the basis of abusive behaviour by the parties. I also studied the extent to which the agreements may be challenged or adjusted on the

ground of unfairness and the standard and restrictions to the declaring a mediated settlement agreement enforceable.

Chapter 4 focusses on the normative dimension of the mediation process. I introduce the idea that mediation may serve as a legitimation for the bindingness of the mediated outcome. I use the mediation agreement and contract theory to examine the essential elements of mediation in the framework of the European concept of mediation. In Chapter 4.3 I analyse the essential elements of mediation: the form of third party intervention, the aim of third party intervention and the structure of third party intervention. In Chapter 4.4 I examine the external justification (deep justification) of the mediated settlement agreement and how this external justification shows within legal communications. The aim was to identify and structure the principles that have emerged within the legal system in order to further develop procedural principles of mediation. In Chapter 4.5 I examine the nature of confidentiality, its function within the mediation and the effect it has on the communication between the parties. The Conclusions summarize my findings and propose distinct procedural principles.

2 THEORETICAL FRAMEWORK AND NORMATIVE ENVIRONMENT

In 1964, Berthold Goldman drew the legal community's attention to the fact that international economic business acted in an area outside state law. The hypothesis formulated was that the international business community developed its own transnational rules which were recognized and refined by arbitral tribunals.¹²⁰ Since then, there have been discussions about the question of whether an independent transnational legal order exists, the law merchant, and whether this law merchant constitutes an *autopoietic*, quasi-legal system that is independent of any control by the state and has its own legal centre that is symbolized by arbitral tribunals.¹²¹ In the shadow of arbitration, another method of dispute resolution, mediation, almost unnoticed at first, started to find its place in international dispute resolution. Mediation does not claim to be legal or to be quasi-legal in nature as this is the case for arbitration, but rather, it seeks to stress its informality and that it is independent of any legal reasoning. What mediation shares with arbitration is that both seek to resolve disputes unfettered by the constraints of the national legal order.

2.1 Decision-making outside the legal system

Two factors appear to have fostered the emergence of mediation in cross-border dispute resolution: the first concerns the inadequacy of a dispute resolution system that is confined to the boundaries of the nation state. The second relates to the inadequacy of dispute resolution that is confined to the rationality of the legal system. I will examine these two aspects from the perspective of *Luhmann's* systems theory as further developed by *Teubner*. The basic distinction in *Luhmann's* theory is the distinction between system and environment.¹²² In *Luhmann's* view society is a social system that consists of several functionally differentiated subsystems. These subsystems are *autopoietic* which means that each system produces and reproduces itself the elements that constitute the system and thereby differentiates and accumulates complexity in relation to its environment. The operations used to produce and reproduce the social system or partial social system are meaningful

120 On the rediscovery of the law merchant: Goldman 1980, pp. 221-222. Goldman 1964.

121 Calliess 2002, p. 2 (186). On the debate: Gaillard 2001. Teubner 1997, p. 6.

122 Luhmann 1987, pp. 22, 242.

communications, hence communications that produce sense only within the specific system.¹²³ For the legal system, this means that only communications that refer to the binary code legal/illegal can produce further legal communications and therefore produce and reproduce the legal system.¹²⁴ As the elements of the system are produced and reproduced by the operations of the elements already belonging to the system the system is operationally closed.¹²⁵ However, communications that are not legal communications are not nonsense or insignificant, but they are part of the environment of the legal system.

In addition to the legal system there are several other functionally differentiated subsystems of the social system, such as the economic system and the political system that operate by reference to their own binary code. These social systems differ in respect of their ability to act across national borders. The economic system using *money* as its means of communication, and payment/non-payment¹²⁶ as a code is an *autopoietic* system that has developed into a global system and is confined to national states or controllable by means of political power or the law only to a limited extent.¹²⁷ As regards the legal system, one may claim that there is a universal code to define communications that differentiate legal communications from communications attributed to other systems. A world law therefore exists at the level of the operations if one assumes that legal communications are differentiated from other communications.¹²⁸

However, the situation is different at the level of norms. With norms or values, one cannot speak of a world law, but a further internal differentiation within the legal system exists. This internal differentiation of different national legal systems into partial systems of the legal system follows a segmental form of differentiation, i.e. differentiation according to the national jurisdiction of a nation state based on differences in the program.¹²⁹ The legal system of one nation state may communicate with the legal system of another nation state, but the legal norms that enable the communication of the systems allow only for selective communication or

123 In German “*sinnhafte Kommunikation*”: Luhmann 1995, p. 35. Baraldi, Corsi and Esposito 1998, pp. 29. Teubner 1988, p. 3.

124 Luhmann 1995, p. 67. The code legal/illegal (in German: “*Recht/Unrecht*”) is a rule of attribution and determines whether a communication belongs to the legal system or not: Luhmann 1991, p. 1428. Luhmann 1995, p. 70.

125 For a system to acquire complexity, the system requires operational closure: Luhmann 1995, p. 43. Teubner 1988, p. 4.

126 In German: “*Zahlen/Nicht-zahlen*“. See Baraldi, Corsi and Esposito 1998, pp. 210.

127 Luhmann 1995, p. 572.

128 World law is used here in the sense of an *autopoietic* system consisting of all worldwide communications that are oriented towards the legal/illegal code: Callies 2009, p. 63. On the law of the world society and the primacy of functional differentiation: Luhmann 1995, pp. 572-573. See also Fischer-Lescano and Teubner 2007, p. 42. Fischer-Lescano and Teubner 2006, p. 43. Regarding differences in the globalization of social systems, see Lieckweg 2003, pp. 11-13.

129 Callies 2009, p. 64.

communication in certain segments. Communication between national legal systems is only possible if the law enables such communication.¹³⁰ While some systems cross national borders and constitute themselves globally, the segmental differentiation of the legal system does not develop at the same pace, in the same direction or in parallel with other systems. There appears to be a gap between partial (national) legal systems and other social systems. While some systems are globalized, to a significant extent, the legal system remains confined to the (partial system) of the nation state.

Especially when it comes to dispute resolution, global systems such as the economic system are confronted with state litigation that is restricted to its national boundaries.¹³¹ The traditional national systems of dispute resolution are state powered, and court centred. National courts apply national law that is determined according to a system of references, not a transnational or global law. The state dispute resolution system cannot communicate without barriers with the legal system of another state. A judgment rendered by one national court is not automatically recognized in the jurisdiction of another state. On the contrary, the recognition of a judgment in another state requires specific legal provisions that enable such communication. A judgment rendered by the court of one state needs to be *recognized* in order for the judgment to be accepted within the system of another state. This communication problem is common for the international recognition and enforcement of judgments rendered by national courts. It also applies within the European Union, although the recognition and enforcement procedure has been simplified by specific regulations to foster the integration of the internal market.¹³² However, this does not change the basic situation that national legal systems do not communicate with each other, unless the law enables such communication.

Another characteristic of the legal system is the way in which it handles conflicts. Decision-making in the legal system occurs by means of a reduction of complexity by using the code that depicts the legal system. The code legal/illegal is applied to reduce possible alternatives with the aim of increasing the rationality of (legal) decision-making.¹³³ Consequently, lawyers tend to view conflicts from a legal perspective and *filter* reality accordingly. In litigation, lawyers reduce the complexity of their environment to fit a bundle of facts into a legal cause of action. Only by means of this *artificial* reduction of the environment, are courts in the

130 Callies 2009, p. 65.

131 On the fragmentation of national orders and the law merchant: Callies 2015, p. 8.

132 See for instance Brussels I Regulation (EU) No 1215/2012 (recast). On the recognition and enforcement of judgments, see below Chapter 3.5.2.

133 *Luhmann* notes that the law does not always solve the conflict, but only conflicts that it can itself re-construct: *Luhmann* 1995, p. 159.

position to make a judgment. The terminology used in legal language already illustrates the mechanism. Courts do not settle *conflicts*, they resolve *disputes*.¹³⁴ Only a dispute can be brought before a court, or an arbitral tribunal, while the resolution of conflicts is left outside the reality of the traditional legal system. As a consequence, the parties must squeeze their story into the narrow reality of the legal system.

Because of the rationality of legal decision-making, the legal system reproduces social conflicts autonomously as legal disputes, which alienates the parties from their conflict.¹³⁵ Due to the *operational closure* of the legal system and the legal/illegal code used within the legal system, other systems are forced to submit to the rationality of decision-making within the legal system and to translate their codes into the code of the legal system. Within their system, the decision-making may remain incomplete, or even *irrational*. All conflicts outside the reduced complexity of legal decision-making remain unresolved. This is what has been criticized by mediation scholars as the binary approach of the legal system that in the words of *Menkel-Meadow* is not only inadequate, but “*indeed dangerous, for satisfying a number of important goals of any legal or dispute resolution system*”.¹³⁶

As a consequence, global social systems are confronted with two characteristics of the legal system that render decision-making from their point of view difficult or even irrational. First, there is no European (global) state-centred form of dispute resolution. State courts are bound to the nation state. Second, conflicts produced in a system need to be reformulated to be understood by the (national) legal system. Both circumstances bring about a distortion of the economic and other subsystems, since the economic and other social partial systems find it difficult to canalize their conflicts.

Teubner has noted that globally many courts, quasi-courts and other conflict resolution mechanisms exist that are independent of the nation state. These courts are both courts that have been created by different international legal instruments, and bodies created by private regimes.¹³⁷ The existence of these courts and quasi-courts is a sign of the fragmentation of the legal order. “*This fragmentation of global law is not simply about legal norm collisions or policy conflicts, but rather has its origin in contradictions between society-wide institutionalized rationalities, which the law cannot solve.*”¹³⁸ In the European Union, the incapacity of the national legal (enforcement) system to keep pace with European market integration has been identified as a significant barrier to the internal market. National courts

134 Ervasti 2000, p. 1238. Ervasti 2009, p. 22.

135 Teubner 1989, p. 74.

136 Menkel-Meadow 1996, p. 6

137 Fischer-Lescano and Teubner 2003, pp. 1000, 1009.

138 Fischer-Lescano and Teubner 2003, p. 1004.

are not considered to be well-equipped for solving cross-border conflicts, which has led to the political interest in the development of alternative forms of dispute resolution.¹³⁹

Mediation differs from legal decision-making in that it does not use the legal/illegal code to reduce alternatives in the decision-making process. In mediation, it does not matter, whether the settlement achieved by the parties is in accordance with the law of a nation state or whether the argumentation used in the processing of the dispute is a legal argument. Instead, other mechanisms are used to increase the rationality of the decision-making process.¹⁴⁰ Mediation is therefore a dispute resolution system that is independent of the legal order of the nation state. It canalizes conflicts and thereby provides a performance that is in this respect functionally equivalent to the conflict resolution provided by the law.¹⁴¹ As mediation is independent of the correctness of the decision and the legal/illegal code of nation states, it may serve as a transnational conflict resolution system for other systems. This independence from the legal code and national programs will exist as long as mediation does not enter the legal system.

The view that mediation operates outside the legal system, that there is a border to be crossed, is based on the idea that social systems or subsystems are autonomous; that is, the systems do not directly communicate with each other. As earlier noted, *autopoietic* systems are operationally closed. It means that the systems produce and reproduce themselves only by operations that are part of the same system. This does not mean that the legal system has no connection to the societal system or other social system. The legal system is a subsystem of the societal system and it reproduces society by communication. A connection to society is necessary for the continuation and further differentiation of the legal system. Only through the exercise of defining, challenging, and changing the borders of the system by means of the systems' own operations, can the legal system accumulate complexity and differentiate. However, due to the operational closure, the system reproduces society by recursively connecting *legal* operations to *legal* operations.¹⁴²

139 The European Commission noted that in addition to the length of the proceedings, and the high costs of cross-border legislation, the quantity, complexity and technical obscurity of the legislation makes access to justice more difficult: EC Green Paper on alternative dispute resolution COM (2002) 196, pp. 7.

140 See Chapter 2.3.3.

141 *Luhmann* distinguishes between *performances of law and functions of the law*. Performances of law are functions for which other systems may provide functional equivalents. Conflict resolution and the guidance of behavior are performances of law for which there exist functional equivalents. The function of the law is the stabilization of normative expectations for which no such functional equivalent exists: *Luhmann* 1995, p. 157.

142 *Luhmann* 1995, p. 57. *Luhmann* 1991, p. 1425. The system is said to be cognitively open and operationally closed. The theory of operational closure therefore opposes the idea that moral values are *directly* valid within the legal system: *Luhmann* 1995, p. 78.

The difference in the operations between system and environment that follows from the operational closure allows us to make a distinction between the social practice of mediation and the legal practice of mediation. A dispute resolution system that is recognized as part of the operations of the legal system will be reproduced within the legal system. This reproduction may reflect the values that mediation has within the social practice of mediation. It may also fall below these values or then reproduce values that are different from the values of the social practice of mediation. Within the legal system, mediation therefore differentiates and becomes a dispute resolution system of its own.

2.2 Contracts as the starting point for mediation research within the legal system

As mentioned earlier *de-legalized* forms of conflict resolution only suppress the question of law. Also, alternative forms of conflict resolution need to rely on the legal system and the monopoly on the legitimate use of physical force of the nation state that is connected with the recognition by the legal system to implement and enforce their solutions.¹⁴³ By means of the settlement constituting a contract, the interactions that precede the settlement come under the scrutiny of the law, for instance, when the question is raised as to whether the mediated settlement agreement is the result of an intention to enter into a valid agreement, but also when the question is raised as to whether the interactions between the parties constitute mediation. Indeed, Civil and Commercial Mediation takes place within a network of contracts.

2.2.1 The contract as an instrument of structural coupling¹⁴⁴

These contracts constitute a point of connection between the legal system and its environment. In the terminology of systems theory, this bridge is referred to as *structural coupling*. The legal system is open to changes in society, i.e., it takes notice of these changes, but inside the legal system these irritations are reproduced or neglected by means of the operations of the legal system itself. Therefore, structural coupling depicts the operation that connects autonomous operationally closed (sub)systems with each other. Structural coupling does not

¹⁴³ Luhmann 1988, p. 30.

¹⁴⁴ On the contract as an instrument of structural coupling in systems theory, see Luhmann 1995, pp. 463.

directly introduce environmental information into the system but it forms an irritation of the system.¹⁴⁵

The existence of the contract allows other social subsystems, such as the economic system, to interact with the legal system and gives the legal system the opportunity to reproduce the contract in accordance with its own requirements. In this way, other social subsystems may make transactions without being restricted by a typology of contracts that needs to be followed.¹⁴⁶ The economic system is free to perform its transactions across borders; it only needs to take account of possible prohibitions. The parties may therefore agree on the settlement of their dispute without having regard to the question of how the legal system reproduces this transaction at first. While the contract secures the expectations and transactions of the economy, the legal system preserves its freedom to reproduce the contract within its own system, i.e. within its own *autopoiesis*.¹⁴⁷

Within the legal system, the contract is a legal act that entails legal consequences and changes the legal situation. Within the legal system, the contract is reproduced by means of interpretation. The contract may be amended by including elements that have not expressly been taken into account by the parties. Contractual provisions may be considered void as contrary to the public order, against the law or unfair. By means of this reproduction, the legal system regains control that it has given up by accepting the freedom of contract, a control which in the last instance, is exercised by the courts.¹⁴⁸ The structural coupling therefore enables the legal system to evaluate the contract in accordance with its own rationality.

The contract being a connection point between separate highly differentiated social systems reappears not only in the legal system, but also in other systems. While the contract is evaluated within the legal system from a position of legal rationality, it will be evaluated differently in other social systems. In the economic system, for example, values other than those that are relevant in the legal system will be important. Within the economic system, the mediated settlement agreement may be considered in terms of the transaction costs, the mediation agreement may be assessed with regard to its efficiency and the valuation of the costs and risks connected with the mediation will guide further communication. Economic arguments are also often used in the political discourse on mediation. It is claimed that mediation is a flexible, inexpensive way to provide access to justice. These arguments are communications of the political system and therefore part of a

145 Luhmann 1995, p. 445. There are other mechanisms of structural coupling in addition to the contract. Property is one mechanism coupling the legal system and the economic system; the constitution couples the political and the legal system: Luhmann 1995, pp. 454, 468. See also Luhmann 1992. On the structural coupling between psychic systems and social systems: Baraldi, Corsi and Esposito 1998, pp. 187.

146 Luhmann 1995, p. 464.

147 Callies 2009, p. 61.

148 Luhmann 1995, p. 464.

political discourse which have a limited impact within the legal system. In the reproduction of these arguments within the legal systems, these communications may be transformed into legal principles and rules. Alternatively, the legal system may omit them as not being relevant.

2.2.2 Contract law and theory as a method to examine two aspects of mediation

Civil and Commercial Mediation is based on a network of contracts that connect mediation with the legal system and bring mediation within the rationality of the legal system. The legal reproduction of the contracts takes place from the internal view of the legal system and occurs in accordance with the communications recognized by the (national) legal system. According to its own rationality, the legal system will determine whether the mediated outcome is binding and recognized by the legal system. The legal system will also determine whether a practice may be considered mediation or whether there is some other social interaction at hand and whether the interaction has complied with the requirements set out in the legal system.

The question of whether the mediated settlement agreement is binding is determined in accordance with (national) contract law. The question of whether the interaction between the parties is considered to be mediation is assessed on the basis of national and European legislation. What constitutes Civil and Commercial Mediation is defined in a legal instrument, the Mediation Directive which has been implemented in the national laws of the Member States. The application of this definition and the regulatory framework adopted varies in the Member States from a comprehensive statutory regulation to a limited regulation that confines itself to the definition of what mediation is.¹⁴⁹ When legal statutes confine themselves to the mere definition of the concept of mediation, one may claim that the process is not determined by legal rules or principles and that the process takes place outside the legal system. This view does not take account of rules and principles that exist outside formal procedural regulation on mediation, but nevertheless, may shape the process.

Even the absence of (detailed) statutory regulation does not mean that no legal framework exists. On the contrary, it is obvious that rules and principles, often unwritten, exist in a field of law that is as established as contract law. One may therefore examine Civil and Commercial Mediation from the point of view of contract law and contract law doctrines. For instance, a reproduction of the social practice of mediation in accordance with liberal contract law doctrine starts from

¹⁴⁹ On the mediation concept and its national implementation, see Chapter 2.3.2.2.

the validity of the contract by reason of the consent of the parties, formal equality and formal concepts of contractual justice.¹⁵⁰ The liberal contract law doctrine may be used to examine how the mediated outcome is reproduced within the legal system and how the circumstance that the mediated outcome is the result of mediation may affect the validity of the mediated outcome. This aspect will be further elaborated in Chapter 3 of this research.

It is another question though, whether the liberal contract law doctrine is sufficient to take account of the procedural nature of mediation and its function as a dispute resolution mechanism. The mediation agreement between the parties and the agreement with the mediator constitute a framework for the legal practice of mediation. They are embedded into a system of norms, rules and principles embodied in legal or quasi-legal instruments that not only define the concept of mediation, but also set out the terms of the procedure and may be used to interpret the agreements and as such, reproduce mediation within the legal system. These instruments include national statutes, codes of conduct, model agreements and procedural rules adopted by mediation institutes. These instruments can be distinguished from each other according to their scope, nature, degree of validity and the body which has enacted them. They do not form a hierarchy, but they represent different forms of legal communications that steer the practice of mediation.¹⁵¹ The interaction between these regulation mechanisms and the contract is not an automatism, but rather it is legal doctrine that might ensure that different regulatory regimes are coordinated with contract law. For instance, *Collins* suggests that the courts should pay attention to new sources of law in their legal reasoning, such as rules created in collective self-regulation, in order to implement broader political and social values.¹⁵² The different instruments may also be used to identify and examine the principles of Civil and Commercial Mediation that find institutional support in legal communications¹⁵³

150 On formal and substantive concepts of contractual justice: Ganner 2003.

151 *Luhmann* argues that the schema of a hierarchy of norms is replaced by a schema of centre and periphery. The courts are at the centre of the legal system, while all other areas of law, such as the conclusion of contracts and legislation belong to the periphery of the legal system. In connection with contract law, private legal regimes may emerge, such as the rules of private organizations and general terms of contract. The change from a schema of hierarchy to a schema of centre and periphery is likely to result in a parallel production and networking of legislative and contractual validity. This does not mean that there is no difference in the form and effect of contracts and legislation: Luhmann 1995, pp. 321–325. For a definition of transnational law as the third order: Fischer-Lescano and Teubner 2006, p. 43. See for the *lex merchant*: Calliess 2002, pp. 192. *Collins* considers contracts as part of a multi-layered governance regime and collective self-regulation as type of governance mechanism that seek to secure social objectives: Collins 2005, pp. 29.

152 Collins 2005, pp.30.

153 On the principles of mediation, see Chapter 4.4.

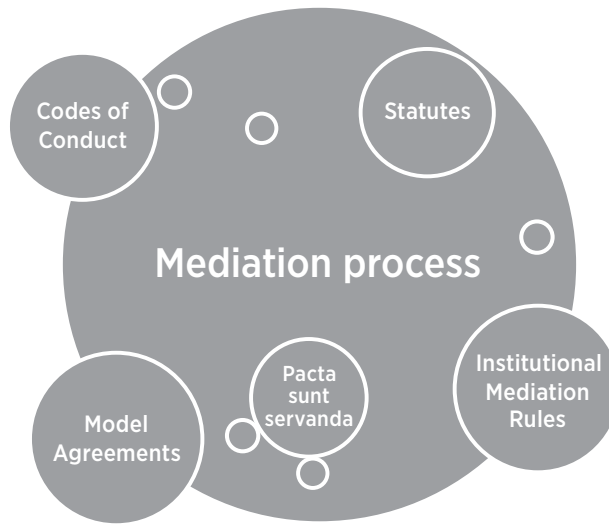


Figure 2. Environment/mediation agreement (law)

Figure 2 shows mediation within the framework of the mediation agreement and the different instruments and communications that embody rules and principles and may determine the mediation, its aim and the form of intervention by the mediator. These principles may be used to interpret the mediation framework agreements and such to reproduce mediation within the legal system.

In a field of law that can be described as pre-paradigmatic, the development of general rules and principles within the law allows for different methods to be used, different experiments to be conducted, and also leaves room for different theoretical points of view that may or may not be confirmed by the courts.¹⁵⁴ *One may claim that the procedural nature of mediation requires that the outcome of the mediation is not seen in isolation from the mediation process, but as the result of the process.* As the result of a process, it requires a distinct justification. From the point of view of contract theory, one may then ask whether consent is sufficient to justify the bindingness of the mediated settlement agreement or whether the bindingness of the mediated settlement agreement requires additional justification. This additional justification may be found in the process that is conducted in accordance with certain procedural rules and principles. The normative dimension of mediation may therefore be studied by examining how the process is reproduced within the framework of the mediation agreement and what principles show up in the surface material of the legal system and may justify the mediated settlement agreement. This aspect will be further elaborated in Chapter 4.

¹⁵⁴ The pre-paradigmatic period of research is characterized by a lack of consensus over legitimate methods, problems and standards of solution and therefore debates are used to define schools of thought rather than to produce agreement: Kuhn 1970, p. 48.

The oscillation of mediation between contract and procedure can be compared to the theoretical development in the theory on commercial arbitration, in which a distinction is made between contractual and jurisdictional theories of arbitration. The jurisdictional theory is reflected in the immunity of the arbitrators, the power of a tribunal to carry on proceedings, even in the event of default by one party, and the bindingness and finality of the arbitral award.¹⁵⁵ The jurisdictional theory stresses the function of the arbitrator that is compared to a *private* judge and the role of the national law in conferring such power. It stresses the primary role of national law in the arbitration that may also limit the parties' autonomy.¹⁵⁶ The contractual theory emphasizes the parties' autonomy.¹⁵⁷ It considers arbitration to be a process that is based on contractual arrangements and that both agreement and award have a contractual character which also means that the award is enforced as a contract. Even though the contractual theory has been heavily criticized and has finally led to a hybrid theory that combines elements of these two theories, modern arbitration doctrine has been developed on the basis of contractual theory.¹⁵⁸ In view of the increasing rigidity of mediation, a growing use of evaluative mediation, and the adversarial involvement of lawyers in mediation, mediation has already been described as the 'New Arbitration' in US literature.¹⁵⁹ The European development has not yet reached this point, and it is doubtful whether this will ever be the case. In my study I do not seek to establish that mediation is a surrogate form of arbitration, but rather that mediation has differentiated into a distinct dispute resolution process *within* the legal system that is based upon contract and determined by procedural principles that are *normative* in character.

155 Lew, Julian D. M, Mistelis and Kröll 2003, p. 76.

156 Born 2014, p. 214.

157 Born 2014, p. 213.

158 Lew, Julian D. M, Mistelis and Kröll 2003, p. 78. On the effect of the contractual theory on the responsibility of the arbitrator, see Alessi 2014.

159 Nolan-Haley 2012b.

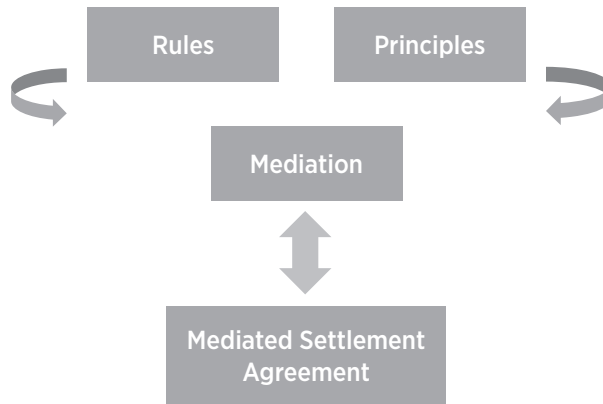


Figure 3. Figure 3 illustrates the mediated settlement agreement as the outcome of a mediation process that is guided by legal rules and principles justifying the mediated settlement agreement.

2.3 Clarifying the subject of the research

Earlier I introduced the idea that mediation has a social existence and a legal existence. In what follows I sketch mediation as a social practice and then place it within the legal system. Mediation is often described from the point of view of what the speaker depicts as mediation or mediators hold themselves out to do.¹⁶⁰ *Avruch* uses the metaphor of the *Heffalump*, an imaginary elephant, to express that there is a lack of understanding of what the social practice of mediation is. He reasons that there is no need to have a universal concept of mediation, but it may be sufficient to think of mediation as “*as comprising a set of practices connected via ‘family resemblance’, which emerge, in practice, from a combination of situations (contexts) and goals (pretexts).*”¹⁶¹

2.3.1 The social practice of mediation

A mediator may mediate and therefore engage in the social practice of mediation without defining mediation. Nevertheless mediators adopt an inner understanding of what mediation means for them and act accordingly.¹⁶² In the absence of a common framework, mediators tend to construct their own lay theories by relying either on mythology, imported theories, or skills and techniques that are presumed to be theory-free.¹⁶³ It belongs to the myth of mediation that it is

¹⁶⁰ Moffitt 2005, pp. 77-78.

¹⁶¹ *Avruch* 2016, p. 11.

¹⁶² *Kreuser* 2017, p. 18.

¹⁶³ *Noce, Bush and Folger* 2002, p. 42.

an informal process that can be shaped to the individual needs of the parties, that the mediator is a neutral and powerless third party and that the process is voluntary and produces better non-binding voluntary outcomes.¹⁶⁴ Mediators may draw their understanding of mediation from different background theories. So-called problem-solved mediation is based on negotiation theory while other forms of mediation may rely on therapeutic theories.¹⁶⁵ The skills and techniques of mediation suggest that mediation may be conducted as a value-free practice of conflict resolution.

In mediation research, mediation has been defined as “*assistance to two or more interacting parties by a third party who – at that time – has no power to prescribe agreements or outcomes.*”¹⁶⁶ Wall and Dune consider that most definitions of mediation are consonant with this basic definition.¹⁶⁷ Noce *et al.* have argued that definitions of mediation are rarely value-free.¹⁶⁸ In a similar way, Alexander has noted that the concepts used to define mediation often shape the mediation practice.¹⁶⁹ Indeed it makes a difference for the mediation, its purpose and the methods used, if mediation is defined as “*a social process in which a third party helps people in conflict understand their situation and decide for themselves what, if anything, to do about it*”¹⁷⁰ or as a “*form of social order.... a discourse that carries legal meaning and which can be used to enforce and implement the Rule of Law encompassing its highest values*”¹⁷¹ or as “*a process in which an impartial third party acts as a catalyst to help others constructively address and perhaps resolve a dispute, plan a transaction or define the contours of a relationship*”.¹⁷²

Bush and Folger have articulated models of mediation that are based on distinctions in their underlying values and premises.¹⁷³ These models have become widely known as the problem-solving model and the transformative model.¹⁷⁴ Bush and Folger argue that each model rests on different values and assumptions about fundamental elements of mediation and that the mediator’s understanding of the conflict and the aim pursued in the mediation has an impact on the practice

164 Silbey 1993. For a critical account of this mythology: Coben 2004.

165 Menkel-Meadow on negotiation as the foundation of mediation: Menkel-Meadow, Love and Schneider 2006, pp. 37.

166 Wall and Dunne 2012, p. 219.

167 Ibid.

168 Noce, Bush and Folger 2002, p. 55. In this sense also Kreuser 2017, p. 1.

169 Alexander 2009, p. 12.

170 Noce, Bush and Folger 2002, p. 39.

171 Alberstein 2006, p. 322.

172 Menkel-Meadow, Love and Schneider 2006, p. 91.

173 Bush and Folger 2005, pp. 9–18.

174 Noce, Bush and Folger 2002, p. 48-51.

of mediation.¹⁷⁵ In an analysis of the pragmatic (problem-solving) model, the transformative model, and the narrative model, in light of their ideological background, *Alberstein* draws links between philosophical and legal schools of thought on the one hand, and mediation practice on the other.¹⁷⁶ In her view the pragmatic model of mediation is based on classical liberalism and assumes a classical notion of contract law with individualism as the prevailing paradigm.¹⁷⁷ The transformative model represents a critique of liberalism and seeks to detach the mediation discussion from the rights discussion. It employs a relational concept of mediation that focusses on the internal values of empowerment and recognition. Some mediation models that have adopted the transformative model are linked to philosophical communitarianism, emphasizing the role of the community in defining and shaping individuals.¹⁷⁸ The narrative model, as the third model that has emerged in mediation, builds on social constructionism and reflects postmodernist thinking.¹⁷⁹

The differences between the models and their underlying values show in the definition of the conflict, the process, the aim of the mediation and the role that the mediator assumes in relation to the parties. The pragmatic or problem-solving model is a model that has its roots in interest-based negotiation, a concept that has been developed by *Fisher* and *Ury*.¹⁸⁰ The pragmatic model considers the conflict to be a frustration of the parties' (hidden) interests and needs that presents itself as a dispute over conflicting positions.¹⁸¹ The aim of the mediation is to reach a settlement that addresses all elements of the conflict. This is achieved in a process that uncovers the interests and needs of the parties to create options and find a solution that best satisfies the parties' interests and needs, which is referred to as *pareto* optimal. The mediator facilitates this process, but depending on the orientation adopted, may also direct the process towards the settlement. The transformative model developed by *Bush* and *Folger* perceives the conflict as a crisis in human interaction that is considered to be an opportunity for (personal) growth.¹⁸² The aim of the mediation is relational growth and constructive interaction, not necessarily the achievement

175 Regarding transformative mediation in practice: *Bush and Folger* 2005, pp. 228. *Bush and Folger* 2014a.

176 *Alberstein* 2006, pp. 325, 341

177 *Alberstein* 2006, pp. 328, 345.

178 *Alberstein* 2006, pp. 339, 347-349.

179 *Alberstein* 2006, pp. 331, 349. The narrative model is a mediation model developed by *Winslade* and *Monk*. On the model, see *Winslade and Monk* 2000.

180 *Fisher, Ury and Patton* 2011.

181 *Fisher, Ury and Patton* 2011, pp. 42-44. "Although litigants typically ask for relief in the form of damages, this relief is actually a proxy for more basic needs or objectives.": *Menkel-Meadow* 1983, p. 795.

182 *Noce, Bush and Folger* 2002, p. 50.

of a settlement.¹⁸³ The mediator's role is to follow the parties and to empower them through listening and self-reflection. The process focusses on the transformation of interaction between the conflicting parties by empowerment and recognition of the other. The narrative model¹⁸⁴ perceives the conflict as a construct of the parties' narratives that does not exist outside these narratives. The aim of the mediation is to achieve an alternative narrative of the relationship. The mediator's role is to co-author the narrative with the parties.

Mediation theorists have sought to systematize the practice of mediation beyond these basic models and to provide a more detailed theoretical framework. *Ervasti* and *Nylund* consider that the prevalent distinction into three mediation models, which they identify as facilitative, evaluative and transformative does not reflect the actual diversity of mediation practice.¹⁸⁵ They propose a framework in which a basic distinction is made between mediation models aimed at problem solving and mediation models aimed at the individual growth of the parties.¹⁸⁶ In their view, problem solving mediation is further divided into models that focus on the settlement, namely compromise seeking mediation and evaluative mediation on the one hand and models that focus on the process, namely facilitative mediation on the other. Individual growth models are further divided into therapeutic mediation models and models that seek change, which are further divided into transformative, narrative, humanistic and restorative.¹⁸⁷ The authors stress that the distinctions between the different models are sometimes difficult to draw and that the models should rather be understood as a continuum.

Alexander proposes a *meta* model of mediation that seeks to describe mediation practices based on two dimensions.¹⁸⁸ The first dimension relates to the interaction that consists of three discourses: the positional-distributive bargaining discourse, the interest-based or integrative negotiation discourse, and the transformative, restorative and healing discourse. The second dimension is based on the type of intervention by the mediator which may either be process or problem oriented. Within this *meta* model of mediation *Alexander* presents six different practices of

183 *Bush and Folger* oppose the combination of mediation models or switching between mediation models as the aims pursued by the mediation models differ from each other: *Bush and Folger* 2005, pp. 228-231.

184 This summary of the narrative model is based on the account of *Alberstein*: *Alberstein* 2006, pp. 331, 334, 341.

185 *Ervasti and Nylund* 2014, p. 139. *Ervasti and Nylund* describe three levels of mediation: mediation theory, applications of mediation and actual mediation (mediation in concrete cases): *Ervasti and Nylund* 2014, p. 139. In their view, mediation in concrete cases should be in line with the respective application of mediation and the underlying mediation theory. *Ervasti* views these different levels as a mediation system that is divided into *theoretical models of mediation*, *practical systems of mediation in context* and *mediation in action*: *Ervasti* 2018, pp. 228. The distinction between evaluative and facilitative mediation will be addressed in more detail in Chapter 4.3.1.2.

186 *Ervasti and Nylund* 2014, p. 142.

187 *Ibid.*

188 *Alexander* 2008b.

mediation: expert advisory mediation, settlement mediation, facilitative mediation, wise counsel mediation, tradition-based mediation, and transformative mediation, stressing, however, that various variations exist.¹⁸⁹

The theoretical frameworks developed are deemed to explain the when and why of intervention, they describe different practices of mediation, but do not provide a definition of mediation that is equally valid and accepted by mediation practitioners and mediation theorists. Most theorists and practitioners would possibly agree that mediation is a third party intervention that has the aim of resolving conflicts. In the widest sense, mediation can be considered to be a form of interaction that aims to help people understand, prevent and solve their conflicts. In its narrowest sense, it is a practice to settle disputes. There is also wide agreement that the third party has no power to impose a binding solution on the parties. But the spectrum of possible interventions remains large in many respects: the third party may intervene to settle or prevent a conflict, to propose a solution or alternatives, to advise the parties, to address or possibly change the relationship between two persons or to establish a dialogue within a group or between different groups. Due to the vagueness of the practice, it is difficult to differentiate mediation from other practices of third party intervention, such as adjudication, expert determination, counselling, team-building, coaching or therapy.

In the social practice of mediation, theoretical models are often ignored, either because mediation practitioners are not aware of the differences that follow from the different approaches, or because mediators prefer to “*remain in their comfort zone of lay theories*.”¹⁹⁰ As long as mediation is a social practice, there is no need to define mediation or to establish a common theoretical framework in a prescriptive way. Definitions – especially when they are prescriptive – draw boundaries between behaviour that is acceptable and behaviour that is not acceptable and may therefore unduly restrict the flexibility of mediation. In the widest sense, anybody attempting to resolve or prevent conflict between at least two other persons may consider themselves to be a mediator and any of the practices may be mediation. They may refer to it as mediation, and they may also call it something else. In the social practice of mediation, this does not matter.

A need to define mediation in a prescriptive way and therefore to determine what mediation is and to distinguish it from other practices may arise for various reasons.¹⁹¹ First, it arises when there is a professionalization of the practice. The profession then seeks to determine which activities should be considered to fall

189 Alexander 2008b, pp. 106, 118.

190 Noce, Bush and Folger 2002, p. 57. In this sense also: Ervasti 2018, p. 239.

191 *Moffit* favours prescriptive definitions only in certain limited cases namely, when it is necessary to define who is allowed to practice or where the state assigns regulatory benefits to a certain practice while withholding it from others: *Moffitt* 2005, pp. 93, 94.

within professional practice and to distinguish it from practices that are not to be considered to fulfil the requirements of the practice. The profession seeks to stabilize the expectations in respect of the profession. The professionalization requires the definition of the practice and it entails the development of professional standards and rules of conduct. A need to define mediation and to discern it from other practices arises also when the practice is assigned a distinct function by the legislator. When a certain function is assigned to the social practice of mediation, there is a need to draw a boundary between practices that fulfil the function, and practices that do not fulfil the function. Also, in this case, the practice needs to be recognizable and determinable and practices that do not fulfil the function need to be excluded. The practice becomes normative in character.

2.3.2 The legal practice of mediation

Legal practices are usually classified, and returning to *Westerman's* house metaphor, they are assigned a place in the house. In legal terms, one speaks of different normative concepts. In order to clarify the place of Civil and Commercial Mediation within European dispute resolution, it is useful to examine mediation within the context of *alternative dispute resolution* (ADR) and to examine the function of mediation within the legal system.

It is widely accepted that mediation is an alternative form of dispute resolution and that it differs from conventional dispute resolution mechanisms, hence litigation. However, there is less agreement about how alternative dispute resolution is to be defined.¹⁹² If one considers the courts to be the centre of the legal system and therefore the centre of legal decision-making, all decision-making taking place outside the courts is alternative dispute resolution, and this is irrespective of the decision-making mechanism that is applied and irrespective of the form in which the decision is taken. If one considers that conventional dispute resolution mechanisms must follow the binary legal/illegal code of the legal system, then all dispute resolution that does not use the binary code of the legal system is alternative in nature, while all forms of dispute resolution that follow the binary code are conventional dispute resolution. The border between ADR and conventional dispute resolution is amorphous and subject to gradual changes as courts engage in compromise-seeking and conduct mediation. In fact, the conventional full-length court proceedings in which the parties argue their case constitutes an exception and is not the main form of proceedings in the courts. On the other hand, there are bodies outside the state courts that take decisions according to the binary code

192 Ervasti 2009, p. 20.

of the legal system as this is the case with arbitration, but also with a number of other quasi-judicial bodies.

2.3.2.1 The function of mediation within European alternative dispute resolution

Within the European Union the term *alternative dispute resolution* is used in several ways. For the purpose of the Green Paper the European Commission defined ADR as “*out-of-court dispute resolution processes conducted by a neutral third party, excluding arbitration proper.*”¹⁹³ While confining the Green Paper to out-of-court ADR, the Commission recognized in the Green Paper that ADR could also be conducted by the court or entrusted by the court to third parties, and refers to this form of dispute resolution as “*ADR in the context of judicial proceedings.*”¹⁹⁴ This broader concept of ADR is adopted later on by the Mediation Directive, which applies not only to out-of-court mediation, but also to court mediation and makes no distinction between these two forms of mediation.¹⁹⁵ The usage of the term ADR suggests that within the European Union, ADR *comprises all dispute resolution mechanisms that constitute an alternative to court proceedings that follow the binary code.* ADR therefore includes mediation within and outside the courts.

The approach taken by the European Union for mediation is different from the approach originally taken by the ADR movement in the United States.¹⁹⁶ Dissatisfaction with the judicial system is not the main purpose for promoting mediation within Europe. Instead mediation is considered to be a means of improving access to justice which is part of the European Union’s policy to establish an area of freedom, security and justice. This aim finds its expression in the preamble of the Mediation Directive according to which the “*The objective of securing better access to justice... should encompass access to judicial as well as extrajudicial dispute resolution methods.*”¹⁹⁷ Especially in cross-border disputes, disputants face significant barriers due to the high costs of cross-border litigation, uncertainty about the substantive law as well as language barriers. The introduction of alternative forms of dispute resolution – and especially mediation – serves the integration of the European internal market.¹⁹⁸

Within the European Union, mediation is a dispute resolution mechanism that in many respects serves as a functional equivalent to the conflict resolution

193 According to the Green Paper on alternative dispute resolution arbitration is excluded from the definition due to its quasi-judicial character: EC Green Paper on alternative dispute resolution COM (2002) 196, p. 6.

194 Ibid.

195 Mediation Directive, Recital 12.

196 On the history of mediation in the United States, see Kovach 2006. On mediation as an ideological movement: Nader 1993.

197 Mediation Directive, Recital 5. EC Green Paper on alternative dispute resolution COM (2002) 196, pp. 7.

198 On market integration and procedural law, see Storskrubb 2008, pp. 78–79.

provided by the law.¹⁹⁹ According to systems theory, conflict resolution and the guidance of behaviour are performances of law for which there are functional equivalents outside the law.²⁰⁰ Mediation and litigation both canalize conflicts.²⁰¹ Conflict resolution as a functional equivalent does not require that a reference is made to the legal/illegal code. Even in the absence of such a reference, the functionally equivalent mechanism relies on the ordering function of the law. The alternative dispute resolution system is conducted with a view that the parties may have recourse to litigation in case the mediation fails and the law may be used to admit or to refute the claims made by the parties or to increase their bargaining power.²⁰² Moreover, the purpose of Civil and Commercial Mediation is to achieve a mediated settlement agreement and therefore an outcome that is valid within the legal system.²⁰³ This system theoretical view corresponds to the observation made by Galanter who has noted that “[m]ost ADR is not located in autonomous institutions that operate independently of the norms and the sanctions of the legal system. Instead, ADR is typically situated near legal institutions and dependent upon legal norms and sanctions”.²⁰⁴

The performance provided by Civil and Commercial Mediation is not only functionally equivalent, but to a certain extent there is also a *formal* equivalence in respect of the outcome of Civil and Commercial Mediation and conventional dispute resolution. The formal equivalence of mediation within European dispute resolution is expressed in the recitals of the Mediation Directive stating that “mediation should not be regarded a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties. Member States should therefore ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable.”²⁰⁵ This equalisation of Civil and Commercial Mediation and judicial dispute resolution reflects the political intention to increase access to justice which encompasses two pillars – access to judicial and access to extrajudicial methods.

One criticism of mediation is that it fails to fulfil the main functions of judicial dispute resolution, which has traditionally not only been seen in the enforcement of substantive law, but also - from a broader societal perspective – in the guidance

199 See on the distinction between the function of law and the performance of law fn 141. Callies and Renner 2009, p. 266.

200 Luhmann 1995, p. 157.

201 In modern procedural doctrine, the canalization of conflicts is regarded the main function of litigation: Ervo 2014, pp. 391–392.

202 Korobkin 2005, p. 254.

203 The outcome of mediation is a form of the valid law: Luhmann 1995, p. 161.

204 Galanter 1986, p. xiii.

205 Mediation Directive, Recital 19. Regarding bindingness, enforceability and *res iudicata*, see Chapter 3.5.

of future behaviour.²⁰⁶ It has also been noted that mediation pursues objectives different from judicial dispute resolution: namely the self-determination of the parties in the sense of an empowerment of the parties, the transformation of the parties' relationships and the exercise of social control.²⁰⁷ If one compares these objectives of mediation with the traditional functions of judicial proceedings, the two dispute resolution systems cannot be compared to each other. The view changes, however, if one takes into consideration that the function of judicial proceedings is not necessarily confined to the enforcement of substantive law. In procedural law, many see the function of judicial proceedings in the resolution of conflicts in a broader sense.²⁰⁸ There is no doubt that there are differences in the way the canalization of the conflicts takes place and that the two dispute resolution mechanisms are not equivalent in all respects. However, this does not mean that there is *no functional* equivalence between these two forms of access to justice: they both serve to canalize conflicts and may create a binding outcome within the legal system that is enforceable and serves as a premise for the parties' future behaviour. In these respects, the mechanisms are functionally equivalent.

As my approach is embedded in systems theory and its understanding of functional equivalence, I will not elaborate functions of the judicial dispute resolution in detail or compare these functions with the aim pursued by mediation in general. This would be beyond the scope of this work.²⁰⁹ I only seek to make a few observations regarding this critique: while it is true that mediation does not perform a guiding function for future behaviour in the sense that it produces precedents or guides social behaviour beyond the parties, one should not forget that the role of the courts in the guidance of social behaviour has changed and other forms of regulation of social behaviour have evolved. Modern theories of regulation suggest that guidance of social behaviour takes place in the form of multiple layers of regulation and control and not in the form of precedents or legal rules.²¹⁰

It can also be discussed whether the enforcement of substantive law or the search for a correct decision is still the main function of a court procedure. This is especially the case if one considers that full length proceedings are in decline and that the decision taken by the courts may be wrong. *Luhmann* has claimed that the search for the correct decision is not the purpose of court proceedings; rather court proceedings have the purpose of providing an arena for dispute resolution

206 For an early criticism on settlements in the courts, see Fiss 1983, pp. 1085. *Fiss* stresses the function of the court in the production of precedents. On traditional and modern functions of court proceedings: Ervo 2014, p. 391.

207 Alexander 2006, pp. 8.

208 Ervo 2014, p. 391.

209 For a critical comparison of the functions of ADR and conventional dispute resolution: Lindblom 2008, pp. 74.

210 Hodges pp. 4, 700.

and to legitimate the outcome that they produce.²¹¹ According to his view, court proceedings are a means for ensuring that the parties accept the outcome as legitimate, even in cases where the outcome would not be favourable to the parties involved or in cases where the outcome fails to enforce substantive law, because the decision is wrong. If the function of dispute resolution is reduced to the legitimization of the outcome, one may claim that mediation fulfils a function that is equivalent to judicial proceedings also in this respect – mediation provides an arena for dispute resolution and serves to increase the acceptability and acceptance of the outcome of the mediation by the parties, a view that I will further elaborate in Chapter 4.

The purpose of Civil and Commercial Mediation is to produce a mediated settlement agreement that can be declared enforceable upon request by the parties. Within the European Union, the function of mediation is therefore not only to canalize conflicts, but it is also to produce an outcome that is equivalent to the outcome of judicial proceedings in respect of its enforceability. With regard to this equivalence, it is difficult to maintain the view that mediation can produce results within the legal system, while the process itself remains a social practice that is outside the legal system. So-called private dispute resolution mechanisms are also negotiations towards a settlement agreement and therefore fall within the legal system.²¹² If the mediation is to produce an outcome that is equivalent to a judgment, the question is whether rules and principles have started to emerge that justify the bindingness and enforceability of the mediated settlement agreement. This brings us back to the basic question of whether there are any principles or minimum guarantees for Civil and Commercial Mediation.

2.3.2.2 The concept of mediation under the Mediation Directive and its national implementation

As mediation has been allocated a distinct function within European dispute resolution, the practice has been defined. This definition narrows the social practices that may be considered to be Civil and Commercial Mediation. Social practices must comply with the definition provided by the Mediation Directive.

According to Article 3 of the Mediation 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.”*

²¹¹ Luhmann 1983, pp.17-18. See in more detail Chapter 4.3.2.

²¹² In this sense also Korobkin 2005, pp. 254.

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.”

The definition of mediation given in the Mediation Directive is broad as it seeks to maintain the flexibility that is characteristic of mediation.²¹³ Nevertheless, the definition contains some restrictions regarding the social practice of mediation. Mediation according to the Mediation Directive means that a) the parties settle the dispute by themselves with the assistance of the mediator; b) the aim of the process is to reach an agreement on the settlement of a dispute and c) the process is structured. Also, the mediator must meet normative criteria to be considered a mediator. The process itself, however, is not regulated in the Mediation Directive nor does the Mediation Directive prescribe a certain mediation model that must be applied.

Noce *et al.* have argued that if the legislator does not lay down a preference for a certain mediation model, this does not mean that the legislator has not made a policy decision in respect of a certain model that the legislator considers to satisfy certain legislative criteria.²¹⁴ Any definition or limitation of mediation is based upon a particular vision of mediation. The aim of Civil and Commercial Mediation and its impact on the process will be discussed in more detail in Chapter 4.3.2. For the moment it is sufficient to state that any legal definition of mediation has an impact on the understanding of the conflict that is the subject of the mediation, as well as the aim to be pursued and the way that aim is to be achieved.

The Mediation Directive has been transposed into the national laws of all Member States of the European Union. As the Mediation Directive provides for a minimum harmonization of key aspects only, there are differences in the definition of mediation, but also in the approaches taken by the Member States with regard to the regulation of the procedure.²¹⁵ For example, Germany has adopted a Mediation Act that provides for a distinct statutory definition of mediation that differs from the definition given in the Mediation Directive. According to the German Mediation Act, mediation is a *confidential* and structured process in which the parties, on a voluntary basis and autonomously, strive to achieve an amicable resolution of their *conflict* with the assistance of one or more mediators. In addition, the German

213 Critical regarding the lack of predictability of the European framework: Schonewille and Lack 2014, p. 21.

214 Any definition or limitation of mediation by the legislator is based on a particular value based vision of mediation: Noce, Bush and Folger 2002, p. 59.

215 There are several monographs that compare the implementation of the Mediation Directive in the national legal systems: De Palo and Trevor 2012. Hopt and Steffek 2013. Esplugues 2014a. Alexander 2017.

legislator has adopted a comprehensive regulatory approach that regulates the duties of the mediator in the process and adopts several principles set out in the European Code of Conduct for Mediators.²¹⁶ Other Member States limit statutory regulation to the key issues of the Mediation Directive and leave the mediation procedure to self-regulation. This is the case for England and Wales, where the concept of mediation and the mediator are defined in the Cross-Border Mediation (EU Directive) Regulations 2011 by direct reference to the respective articles of the European Mediation Directive, and there is no detailed statutory regulation of the process nor the mediator's duties.²¹⁷ Mediation regulation in England and Wales builds on the mediation agreement, standards developed by mediation providers and case law.²¹⁸ The Finnish legislation also adopts a definition for mediation and the mediator, but relies on self-regulation, in respect of the process and the duties of the mediator. The Finnish Mediation Act defines mediation as a structured process that is conducted on the basis of a contract or institutional rules. The mediator is defined as a person trained in mediation. The distinctive elements of impartiality, competence and effectiveness provided for in the Mediation Directive are not part of the statutory definition of the mediator in Finland, but the training requirement is considered to cover all three elements.²¹⁹

The differences in the definition and regulatory approaches as well as differences in local practices lead to differences in the *national* concepts of mediation and standards. Consequently, a practice that is considered to be mediation in one Member State may not be considered to be mediation in another Member State. A debate in the German discussion regarding so-called shuttle mediation may serve to illustrate this point. Shuttle mediation is a form of mediation in which the parties meet separately with the mediator. The mediator, moving from one room to the other, seeks to achieve a solution of the dispute by transmitting messages, proposals and counter-proposals. The parties may have few or no joint mediation sessions. Some German scholars consider that shuttle mediation is not mediation within the meaning of the German Mediation Act, as there is no direct communication between the parties that the mediator facilitates.²²⁰ According to this understanding, direct communication between the parties is an essential element of mediation. This view has been criticized from the point of view of an *Anglo-Saxon* understanding of mediation. *Eidenmüller* has pointed out that separate meetings between the mediators and the parties are a common instrument in the *Anglo-Saxon* practice

216 German Mediation Act 2012.

217 The Cross-Border Mediation (EU Directive) Regulations 2011.

218 Marsh, Oddy and O'Neill 2017, pp. 210–214. On the controversies regarding the definition of mediation in England and Wales: Allen 2013, pp. 19–23.

219 Finnish Mediation Act (394/2011), Chapter 3 Section 18.

220 Greger 2015, pp. 172.

of mediation and are especially valuable in commercial mediation. He argues that the German Mediation Act does not require direct communication, but only a structured process of negotiation. As the private meetings are one form to structure the mediation and the German Mediation Act expressly allows the parties to have private meetings, mediation when the parties meet separately with the mediator constitutes mediation within the meaning of the German Mediation Act.²²¹ This latter understanding of mediation therefore considers that the structure constitutes the essential element of the mediation, not the form of communication.

Another example constitutes so-called evaluative mediation, where the mediator may make a proposal for the settlement of the dispute at some point of the process or evaluate the possible outcome of court proceedings. In mediation theory, it has been controversial, whether evaluative mediation is compatible with the ideal of mediation.²²² In legal practice the question is whether evaluative mediation is still Civil and Commercial Mediation or whether an evaluation by the mediator turns the mediation into an adjudicative process. Also in this respect, the national legal and social practice and philosophy may shape the understanding: for instance, in Austria mediation is considered to be a facilitative process, an understanding which has its roots in the Austrian Civil Law Mediation Act 2003, mediation legislation that has been adopted prior to the Mediation Directive and which sets out the duties of the mediator in the process.²²³ While the later Austrian EU-Mediation Act transposing the Mediation Directive adopts the definitions of the Mediation Directive and leaves the duties of the mediator with the exception of confidentiality unregulated, evaluations by the mediator are not considered to be part of a usual mediation process.²²⁴ In Italy, by contrast, the mediator may put forward a proposal for the resolution of the dispute, even though in Italy there is a general requirement to use a facilitative style.²²⁵

2.3.3 The core of mediation as a decision-making process outside the legal system

I have claimed that the process of mediation becomes part of the legal system and that several connecting points exist between the legal system and its environment: mediation is based on a network of contracts, it is defined by legal instruments and

221 Eidenmüller 2016, p. 20. In England and Wales caucuses (private meetings) are considered to be an important element for the success of mediation: Allen 2013, p. 42.

222 Kovach described 'evaluative mediation' as an 'oxymoron': Kovach and Love 1996. *Nolan-Haley* considers that mediator evaluation turns the process into a substitute for arbitration: Nolan-Haley 2012b, p. 83. On the debate, see further Chapter 4.3.1.2.

223 Mattl, Prokop-Zischka and Ferz 2006, p. 67.

224 Lentz and Risak 2017, p. 44. Austrian EU Mediation Act, Section 2. para. 1. and Section 2. para.2.

225 De Luca 2015, p. 357. Mastellone and Ristori 2017, pp. 471, 491.

it has a function within the European dispute resolution system. It is a decision-making mechanism that results in a legally binding outcome that may be declared enforceable and in this respect is then equivalent to the judgment of a court. However, this does not mean that the rationality in which the decisions are taken are the same. On the contrary the rationality is different, and this is what *decision-making outside the law* actually means. The mediated outcome is a decision taken by the parties, which settles the conflict, stabilizes the parties' expectations and serves as a premise for future behaviour. Decision-making requires a choice between different causalities and values that are interdependent. The more alternatives there are, and the higher their interdependence is, the more the complexity of the decision-making situation will be. Rational decision-making requires that different options are compared, information is introduced in the decision-making process, and alternatives are eliminated.²²⁶

Dispute processes serve the reduction of complexity in decision-making. In legal decision-making, the mechanism is obvious: the legal system separates information that is legally relevant from information that is legally irrelevant to reduce the complexity within the legal system. In litigation, lawyers reduce the complexity of their environment further, in order to fit a bundle of facts into a legal cause of action. Only by means of this *artificial* reduction of the environment are courts in the position to make a judgment. By means of court procedures, the reality is filtered, and conflicts are converted into disputes that can be handled within the legal system. In this way, the decision-making by the judge becomes rational from the point view of the legal system. The terminology used in legal language already illustrates the mechanism. Courts do not settle *conflicts*; they resolve *disputes*. Only a dispute can be brought before a court, or an arbitral tribunal, while the resolution of conflicts is left outside the reality of judicial dispute resolution. The parties must squeeze their story into the narrow reality of the legal system.

Mediation does not use the legal/illegal code to reduce complexity and therefore it differs in this respect from conventional dispute resolution that is based upon the legal/illegal code. The conflict is not reproduced as a legal dispute. On the contrary, the parties are required to solve their conflict in accordance with criteria that are not legal in nature, such as the interests and needs of the parties. The process requires that the parties articulate their positions, interests and needs, make selections and put them into relation with the positions, interests and needs of the other party. Mediation may therefore be perceived as a decision-making situation, in which adding alternatives that would otherwise be filtered by means of the legal/illegal code of the legal system may potentially increase the rationality of the decision-making. These alternatives permit the development of a rationality

²²⁶ Luhmann 2009, p. 5.

that is different from the legal rationality, a characteristic that makes this form of conflict resolution valuable to other (sub)systems of the social system. The decision-making situation is complex in that it offers different options and alternatives.

As the legal filter is missing, the question is how joint decision-making in mediation copes with the complexity of the decision-making situation, and how the rationality of the decision-making is finally achieved. *Luhmann* considers that an increased complexity and rationality requires abstract criteria for the decision-making and suggests that these criteria arise from the institutionalization of differentiated symbolic codes.²²⁷ Universal institutionalised criteria that would rationalize the decision-making in a similar way as the legal/illegal code do not exist. This leaves us with two main alternatives. Either mediation is irrational decision-making or the mediation process itself serves the reduction of complexity. It is this second alternative that is tested in this research.

As pointed out earlier, the complexity is reduced in processes that are distinct communication systems that filter information from the environment. There is no doubt that mediation is to be considered a communication system that serves to reduce the complexity of the decision-making in that it differentiates itself from its environment and uses a structure. The process is designed to increase the rationality of the decision-making of the parties by adding information other than legal information. The process thereby helps the parties to increase contingency (alternatives) by leading them behind their basic positions and focussing on the parties' interests and needs. In a second step, the parties introduce criteria for their decision-making, alternatives are filtered and tested and finally eliminated.²²⁸ In this way, the decision-making of the parties becomes rational in accordance with the criteria used by the parties within the process. This does not mean that the decision is rational from the point of view of other systems, such as the legal system. In other words, the outcome of the decision taken by the parties – even though it is rational – may differ from the outcome that would have been achieved in legal decision-making. *As the outcome is to be recognized within the legal system, mediation introduces its own rationality into the legal system.*

2.3.4 Disputes as the subject matter of Civil and Commercial Mediation

Mediation has the function to canalize conflicts in the social system. There are different forms and dimensions of conflict in a social system. There are intrapersonal and interpersonal conflicts, individual and social conflicts, intragroup

²²⁷ Luhmann 2009, p. 15.

²²⁸ See for an example of the rationalization process in the practice of mediation: Moore 2014, p. 186.

and intergroup conflicts and international conflict. There is no universal definition of conflict, but the concept of conflict obtains meaning only because it is given a meaning within a specific theoretical framework.²²⁹ One can therefore say that the conflict is a social construct.²³⁰ At the level of communication, a conflict is defined as a contradiction to a communication by which expectations are communicated. A conflict therefore arises if expectations are communicated and the non-acceptance of these expectations is communicated in return.²³¹ Such conflict may emerge without any clear objective reason. It is sufficient that a contradiction is communicated. Once the conflict has started, the conflict develops its own integrative undertow which means in other words that the conflict escalates.²³²

Felstiner et al. have described conflict as a social process that may or may not evolve into a dispute.²³³ A conflict starts if someone perceives that the other has frustrated, or is about to frustrate, some concern of his or hers. The emergence of a conflict therefore requires that there is a perceived injury and somebody that he or she blames for the perceived injury. According to a broad understanding of conflict, a conflict does not necessarily have to be openly communicated but may also be hidden. A further transformation of the conflict occurs when the grievance is communicated to the person or body considered to be responsible and a claim is made. The conflict is transformed into a dispute when a claim is rejected in whole or in part by the other person or group.²³⁴ The disputes so described have several characteristics: they are subjective, which means that the transformations occurs in the mind of the disputant. The disputes are unstable as the transformation is related to perceptions of wrongdoing that may change when they are processed and not objective events that happened in the past and the disputes require and induce a reaction, hence they are characterized by reactivity.²³⁵

It is relatively easy to draw a line between conflicts and legal disputes. Legal disputes are conflicts that involve a reference to the legal/illegal code.²³⁶ They involve a claim that is based on legal positions. It is more difficult to develop a distinction between conflicts on the one hand and disputes on the other. Some

229 Menkel-Meadow, Love and Schneider 2006, p. 5. In the social sciences there is no generally accepted concept of conflict. Anything from a disagreement between children to a nuclear war may be considered to be a conflict: Röhl 1987, p. 448. For a distinction between conflicts of interests and conflicts of values, see Aubert 1963, p. 27.

230 Felstiner, Abel and Sarat 1980, pp. 631.

231 Luhmann 1987, p. 530. On the conflict in systems theory: Simon 2015, p. 7.

232 For a model on the escalation of a conflict: Glasl 2013, p. 238.

233 This is described as a process of naming, blaming and claiming: Felstiner, Abel and Sarat 1980, p. 636.

234 Felstiner, Abel and Sarat 1980, pp. 635-636.

235 Felstiner, Abel and Sarat 1980, pp. 637-638.

236 *Ervasti* draws, for instance, a distinction between conflicts and juridified conflicts (disputes) *Ervasti* 2009, p. 22.

scholars see the turning point at the moment the conflict is reacted to.²³⁷ The conflict turns into a dispute when somebody else is blamed for the wrongdoing and reacts to being blamed. In contrast to a conflict, a dispute is always shown openly. However, it is still connected to the subjective perception of wrongdoing and may be connected to values, reputation as well as other resources the disputants consider themselves to be entitled to. According to this view, it would be necessary to distinguish between a conflict, a dispute and a legal dispute. *Luhmann* on the other hand considers the contradiction to be an element of the conflict itself. For him, the transition from a conflict to a dispute is made when the topic of the conflict attracts communications and the communications start to turn around this new topic.²³⁸

The distinction between conflicts and disputes is also often expressed by the distinction between conflict resolution and dispute resolution. Dispute resolution has been described in a narrow sense as the resolution of a legal dispute, while conflict resolution has been described as the resolution of the conflict at large.²³⁹ Whenever there is an intervention mechanism, the conflict changes and is reformulated (and with it, the subject matter of the conflict). In order for a conflict or dispute to be resolved in a conflict or dispute resolution mechanism, it must be reproduced. In judicial proceedings the conflict is reproduced as a dispute over legal positions. Such reproduction can also be observed in different mediation models. As noted earlier, the understanding of the conflict varies according to the mediation model used.²⁴⁰ The pragmatic model developed by *Fisher and Ury* presents the conflict as a frustration of needs and interests that is presented through a fight over positions. The transformative school represented by *Bush and Folger* considers the conflict to be an interactional crisis between the parties.²⁴¹ This determination of the conflict has an impact on the way the intervention process develops and communication proceeds, and *vice versa*. The dispute resolution mechanism determines how the conflict is to be perceived.

Civil and Commercial Mediation that is functionally equivalent to court proceedings uses a concept of conflict of its own. Conflicts between different classes of society or a disturbance regarding the relations between the parties are not the subject of Civil and Commercial Mediation. They would also not be the subject of court mediation. The question then, is whether the conflict must have a legal element, whether there must be a conflict over legal positions or regarding facts that are legally relevant to be handled in Civil and Commercial Mediation. It is

237 Menkel-Meadow, Love and Schneider 2006, p. 5.

238 Luhmann 1980, p. 101.

239 Koulu 2006, p. 63. Ervasti 2009, p. 23.

240 Alberstein 2006, p. 333.

241 Bush and Folger 2005, p. 46.

obvious that a mediation that seeks to achieve an outcome that is binding and may be declared enforceable requires legal positions to be asserted or formulated at some point of the process. This does not have to take the form of a formal statement of claim, hence the parties do not have to formulate a legal position in the narrow sense, but the assertion must include a position that creates, changes or terminates a legal right and that may be declared enforceable, if requested by the parties. A process that is meant to be an alternative to litigation necessarily involves a dispute that could alternatively be operated in accordance with the legal/illegal code of the legal system, which does not mean that the dispute is reduced to legal positions as it is the case in litigation. Taking into account the transformative process of the disputes and dispute resolution and the subjective elements of the conflict, one may reformulate the subject matter of Civil and Commercial Mediation as a *dispute that consists of legal positions and subjective perceptions of frustrations of interests and needs*.

2.4 Policy statements and legal communications

Discourses may have mediation or alternative dispute resolution as their subject matter or a conversation may itself be mediation. They take place at several levels within society and in various contexts. There is a political discourse on mediation that is expressed in policy statements regarding the objectives of mediation. These statements underline the need to increase the efficiency of dispute resolution and the aim to improve access to justice and to decrease the workload of the courts. In the European Union, the desire to integrate the single market is expressed and access to mediation is proclaimed as a means to enhance alternative forms of dispute resolution. Within society there are also various other discourses on mediation. Numerous handbooks on the practice of mediation, internet pages of service providers and teaching manuals describe different forms of mediation. The discourse stresses the advantages of mediation, such as the flexibility of the process, the low costs and the self-determination of the parties. It also seeks to underline the distinctiveness of justice that parties will obtain in the mediation procedure and the disadvantages of traditional adjudicative forms of dispute resolution. Most of these discourses take place outside the legal system and do not determine the normative dimension of mediation.

In order to examine the normative dimension of mediation, one needs to identify communications that may be operated within the legal system and such determine the normative dimension of mediation. *Tuori* defines legal discourses as a series of speech acts that have a legal theme, namely the existence, validity and interpretation of legal norms. He distinguishes between speech acts that have an institutional nature, such as legislation or judicial acts of the courts, and speech acts that have

no institutional nature, such as the contributions of legal science. In his view, the status of a speech act and its weight within the legal discourse depends on the prevailing legal culture.²⁴² If the other participants of the discourse recognize the speech act as a legal speech act, the speech act is part of the legal discourse. Whether this is the case depends not only on the rules or principles that are on the surface level of the law, but also on general legal principles and concepts; doctrine on legal sources and methods of legal argumentation that belong to the deeper structures of the law.²⁴³

Luhmann perceives a communication as legal communication, if the communication is oriented towards the legal/illegal code. Whether the legal code is applied or not is not to be decided by the one acclaiming the legal code but is to be determined on the basis of a second order observation.²⁴⁴ In *Luhmann's* view, the unity of the legal system is produced by the symbol of validity. Validity cannot be produced by all legal communications but only by legal communications that have an effect in the legal system. These are all legal communications that change a legal position.²⁴⁵ This means that it is not decisive whether a legal communication is a source of law within its traditional meaning, but validity may also be produced by contracts, for example. Consequently, not only legal communications made by formal institutions, such as courts or the legislators, but also contracts entered into between the parties or general terms of contracts, may produce validity which leads to the parallel and interwoven production of validity within the legal system.²⁴⁶

There is no need to explore the differences between these two theories here.²⁴⁷ What is important is to see what can be gained from these theories. Both theories allow for a broad understanding of what constitutes a legal communication.²⁴⁸ Legal communications are not confined to formal statutes enacted by a national legislator. In the case of *Tuori*, the legal discourse is connected to the legal culture and deep structure of the law and not restricted to communications that are on the surface level of the law, such as statutes and decrees. *Luhmann*, on the other hand, allows for inclusion of legal communications made by private actors, provided that these communications are legal communications according to the binary code applied.

242 Tuori 2010, p. 12.

243 Tuori 2010, p. 7.

244 Luhmann 1995, pp. 67, 70.

245 Luhmann 1995, p. 107.

246 Luhmann 1995, p. 324.

247 On the differences, see Tuori 2010, p. 16.

248 In favour of the use of private regulation as well as law of supranational origin in the material used for legal doctrine research, see Smits 2017, p. 13.

What does this mean for the legal mediation discourse? Firstly, it enables an approach that goes beyond the examination of formal legal sources.²⁴⁹ An approach based on legal communications provides an indication of what might be recognized as valid by the legal system. Decentralized private forms of law-making, such as the law-making of different institutions as well as European and international forms of law-making may therefore be taken into account under the umbrella of legal communication.²⁵⁰ These legal communications rest on rules and principles that are inherent in the deep structures of a legal culture and the understanding of an area of law.

In respect of international mediation, it is widely recognized that mediation may be regulated in various ways.²⁵¹ The absence of a formal national statute does not mean therefore that there is an absence of regulation. Rather it means that other forms of regulation have been adopted. Two regulation models have been distinguished that constitute two opposite approaches to regulation.²⁵² The first model is characterized by a comprehensive legislative regulation of mediation that includes not only mediation, but also regulates the mediator's professional duties. The second model provides for minimal legislative intervention and relies on the self-regulation of institutional bodies and the self-regulation of the market. This latter model does not stand for a lack of regulation, rather it means that the regulation of mediation is shaped by different non-state related institutions and actors.²⁵³ The circumstance that no formal legislation has been adopted does not therefore mean that there is no tendency to regulate the social practice and to provide consistency with regard to the practice of mediation.²⁵⁴ Mediation, when used as one of the pillars of access to justice, requires that there is a certain consistency in the social practice of mediation. While it is obvious that legislative regulation is formally valid, rules developed by bodies other than the national legislators are not. Their validity must be established separately.

249 *Teubner* notes that rules lose their strategic position they once had: *Teubner* 1997, p. 9. See also *Fischer-Lescano and Teubner* 2006, p. 41. *Callies and Renner* identify the function of stabilizing normative expectation as the crossing line between legal and non-legal forms of regulation: *Callies and Renner* 2009, p. 268.

250 On the inclusion of private regulation as a methodological choice in legal doctrine: *Smits* 2017, p. 14. In favour of the adoption of a broad understanding of law: *Alexander* 2017, p. 4.

251 *Alexander* 2008a, p. 3. *Alexander* 2017, pp. 3.

252 *Hopt and Steffek* 2013, pp. 17-19.

253 *Alexander* describes four approaches to the regulation of mediation: the market-contract regulation, the self-regulatory approach, the formal framework approach, and the formal legislative approach: *Alexander* 2008a pp.3.

254 On the consistency- diversity dilemma: *Alexander* 2008a, p. 2.

2.5 Legal instruments

As noted above, the contracts that constitute the framework of Civil and Commercial Mediation are legal communications that produce validity, but they are also an interface between the legal system and the social system and between the different national systems. The contracts stabilize the normative expectations of the parties and serve as a premise for future behaviour. However, the contracts do not stand by themselves, but are embedded into a system of rules and principles embodied in legal or quasi-legal instruments that exist on several levels. Mediation is therefore characterized by diverse multi-level regulation the bindingness of which depends on the place of jurisdiction. This makes it difficult to apply the different instruments in the same way as national legislation. The focus in Civil and Commercial Mediation in a European context must therefore be on the common principles that can be discerned from the different instruments and find sufficient institutional support in the regulation. While this Chapter describes the variety of instruments, I will examine the principles of mediation that have started to emerge in Chapter 4.4.

2.5.1 International instruments

Initiatives to build a framework for mediation and to provide for rules in the mediation process have taken place at international, European and national levels in public and private regimes. The United Nations Commission on International Trade Law (UNCITRAL) has adopted two instruments: the UNCITRAL Model Law on International Commercial Conciliation in 2002 (UNCITRAL Model Law on Conciliation) and the Conciliation Rules (1980). They constitute the first initiative to harmonize the rules on conciliation conducted in different states in order to provide for legal certainty in international trade. The first harmonization attempts started in 1978 when the UNCITRAL Commission decided to put conciliation and its relationship with international arbitration on its agenda. In 1999 UNCITRAL began its work on the UNCITRAL Model Law which was adopted on 28 June 2002. Ninety states, 12 intergovernmental organizations and 22 non-governmental organizations took part in the deliberations.²⁵⁵

The purpose of the UNCITRAL Model Law on Conciliation was to promote national legislation on conciliation, an umbrella term that is used to define different techniques of mediation, conciliation and other forms of non-adjudicative forms of third party intervention.²⁵⁶ The underlying purpose of the UNCITRAL Model Law is to foster international trade by means of a harmonization of national legislation

²⁵⁵ On the legislative history: Sekolec and Getty 2003 p. 183. For an analysis of the UNCITRAL Model Law, see Van Ginkel 2004.

²⁵⁶ UNCITRAL Model Law on Conciliation 2002, Article 1.

on non-adjudicative dispute resolution. The UNCITRAL Model Law was inspired by the Conciliation Rules that were adopted by UNCITRAL in 1980. In many respects, the regulatory approach resembles the regulatory approach that has been taken in the field of arbitration. The UNCITRAL Model Law on Conciliation does not only seek to provide guidance on how conciliation is to be anchored in the national legal systems, but it also regulates the conciliation procedure itself. It is therefore an example of a comprehensive formal legislative approach on the regulation of mediation. The UNCITRAL Model Law on Conciliation has not been as influential as the UNCITRAL Model Law on Arbitration and has therefore not formally achieved the envisaged harmonization. In fact, few states have formally adopted the UNCITRAL Model Law on Conciliation.

The UNCITRAL Model Law on Conciliation can be outlined as follows: In the first Article, the UNCITRAL Model Law sets out its scope of application and provides for legal definitions. It adopts a broad concept of international commercial conciliation that consists of evaluative as well as facilitative forms of dispute resolution through which a third person assists the parties in finding an amicable settlement to their dispute. The third person does not have the authority to *impose* on the parties a solution to the dispute (Article 1 para. 3). Article 2 provides for principles of interpretation. Article 3 and Article 6 para. 1 enshrine the parties' self-determination: The parties are free to make changes to the law and the rules set out therein. They are also free to determine the manner in which the conciliation is to be conducted. However, there is one significant exception to this right of self-determination which can be seen as the first expression of what is to be considered *fair* in conciliation. According to Article 6 par. 3 "*... the conciliator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.*" This provision is formulated as a rule that determines the conduct of the conciliator from which the parties may not deviate. Articles 4 to 8 and 11 regulate the formal procedural aspects: the commencement and termination of the proceedings, the number and appointment of the conciliators, which can be more than one, and the conduct of conciliation itself. Article 7 introduces the option to hold caucuses. Article 8 is closely related to Article 7 and regulates the procedural flow of information that has been disclosed during the caucuses. Articles 9, 10, 13 and 14 regulate the interface between conciliation and the surrounding environment: they regulate the confidentiality of the proceedings, the admissibility of evidence, the enforceability of the mediated settlement agreement and the effect of conciliation on other proceedings. Article 12 deals with the question of bias of the conciliator in respect of subsequent arbitration.

The UNCITRAL Model Law on Conciliation is an optional legislative instrument with an international scope of application. Such an instrument loses its general significance when it is superseded by more specific legislation. Such specific legislation has been enacted within the European Union for cross-border mediation.

The scope of the two legal instruments is not congruent. The Mediation Directive regulates the interaction between mediation and the legal system but leaves the regulation of the procedure to self-regulation. The UNCITRAL Model Law on Conciliation is a full legislative approach that also regulates the conduct of the procedure. The regulation of the UNCITRAL Model Law on Conciliation is also wider in other respects. It encompasses both facilitative and evaluative forms of dispute resolution as conciliation is a much broader term than the concept of mediation used by the Mediation Directive.

The interaction between mediation and the legal system has been superseded by the Mediation Directive and the UNCITRAL Model Law on Conciliation can therefore be seen as outdated in this respect. Aspects that relate to the conduct of the procedure have been superseded by other instruments that complement the Mediation Directive. The principles enshrined in the UNCITRAL Model Law, such as confidentiality and self-determination, have been altered and differentiated in subsequent law and soft law. However, it is important to note that the UNCITRAL Model Law contains one mandatory minimum procedural standard that is to be applied to every conciliation process, regardless of whether it is evaluative or facilitative. It is the fair treatment of the parties that must be maintained by the conciliator.²⁵⁷

Debates as to the concept and principles of conciliation were revived when the UNCITRAL Working Group II (Arbitration and Conciliation) started to prepare an instrument on the direct enforcement of international commercial settlement agreements in 2015. The instrument under preparation is being modelled on the 1958 New York Convention on the recognition and enforcement of foreign arbitration awards and should enhance the direct enforcement of the mediated settlement agreement in the country of enforcement.²⁵⁸ In the course of the preparatory works, safeguards on the position of the defendant were discussed. There are proposals that the position of the defendant should be protected by means of a set of challenges to the recognition and enforcement of the mediated settlement agreement. One central issue in the discussions is the impact of the conciliation process and the conduct of the conciliator on the enforcement procedure. So far there have been suggestions about admitting a defence based on the conciliator's (serious) misconduct, for instance, if conciliators have failed to maintain fair treatment of the parties, have failed to disclose circumstances that are likely to give rise to justifiable doubts as to their impartiality or independence or have acted in

²⁵⁷ UNCITRAL Model Law on Conciliation 2002, Article 6 para. 3.

²⁵⁸ See for a discussion of the proposed instrument: Deason 2015.

breach of objective standards of the conciliation.²⁵⁹ The debate therefore turns on the question of what is considered to be due process in conciliation.

2.5.2 The European dimension of mediation

The meeting of the European Council in Tampere in 1999 on the creation of an area of freedom, security and justice in the European Union provided a clear political mandate for the establishment of extrajudicial procedures to develop the European Union as such an area.²⁶⁰ Consequently, the Council (Justice and Home Affairs) adopted conclusions on alternative dispute resolution in civil and commercial matters and called for the preparation of a Green Paper.²⁶¹ The Council directed the attention to the establishment of the general principles it considered necessary to ensure that methods of alternative dispute resolution would have the standard of *reliability that the administration of justice requires*. In 2002, the European Commission published a Green Paper on alternative dispute resolution.²⁶² The purpose of the Green Paper was to review the existing situation of alternative dispute resolution and to start a consultation process with the Member States and other stakeholders on possible measures to be taken to promote mediation. In 2004, the European Commission presented its first proposal for the Mediation Directive, which was adopted in May 2008.²⁶³

Alternative dispute resolution mechanisms are considered to be the area of European civil procedural law that is particularly suitable for European regulation. This is due to the circumstance that alternative dispute resolution mechanisms are a construct that is independent of the procedural law of the national states and that little national legislation exists, in contrast to procedural law, which is deeply rooted in the legal order of the national law.²⁶⁴ The regulatory competence of the European legislator is based on Article 81 TFEU which restricts the scope of the Mediation Directive to cross-border disputes. In practice, the scope is broader: most Member States have expanded the scope of the Mediation Directive to cover

259 UNCITRAL Working Group II, 16.2.2017, pp. 9–11.

260 The Presidency Conclusions of the Tampere European Council 1999 mention several measures to improve access to justice within Europe including extrajudicial procedures: Presidency Conclusions 1999, paragraph 30.

261 Council Meeting (Justice and Home Affairs) 2000. On the legislative history, see Storskrubb 2008, pp. 181–186.

262 EC Green Paper on alternative dispute resolution COM (2002) 196.

263 Proposal for a Mediation Directive COM (2004) 718.

264 Wagner 2012, p. 113. *Wagner* suggests that a reason for the popularity of alternative dispute resolution mechanisms in the European Union is that they are independent of national concepts and can therefore be used more easily to enforce substantive rights: Wagner 2012, p. 113. He notes though, that the European goal of enforcement of legal rights (EU law) and the goal of encouraging alternative dispute resolution mechanisms are incompatible: Wagner 2012, p. 117. He holds the opinion that claims for breach of consumer law are particularly unsuited for alternative dispute resolution: Wagner 2012, p. 117.

domestic disputes also.²⁶⁵ In addition, the concepts of mediation adopted in the Mediation Directive are repeated in various soft law instruments that are used in the national practice of mediation.

Several monographs²⁶⁶ have compared national legislative frameworks that have been implemented in the Member States following the Mediation Directive, while the European dimension of mediation takes a backseat. This raises questions about whether mediation may and should be examined from the point of view of the European Mediation Directive, and whether there is a common European mediation concept or many national mediation concepts. Indeed, the European Mediation Directive is addressed to the Member States of the European Union. The directive is therefore binding on the Member State only, and this bindingness is restricted to the goal to be achieved while leaving the method and form of implementation as choices for the Member States to make. In order to have legal effects in relation to individuals, the Mediation Directive needs to be transposed by the Member States into national law. Only under limited circumstances has the Court of Justice recognized the direct effect of a directive. Furthermore, such a direct effect is only recognized in vertical relationships between a Member State and individuals to protect the rights of the individual in relation to the state. According to the Court of Justice, directives are not capable of a direct horizontal effect and cannot be relied upon in actions between two individuals or between two companies.²⁶⁷ Does this mean that the Mediation Directive loses its effect once it has been transposed into national law and the concepts of mediation and the mediator should be studied from the point of view of national law only?

Despite the lack of a direct horizontal effect, the Mediation Directive remains a legal communication that is referred to by other European legal instruments and therefore produces subsequent legal communications. This shows up when subsequent directives and regulations build on the Mediation Directive and the definitions and principles enshrined therein. Furthermore, the Court of Justice has developed different doctrinal approaches to qualify and reduce the consequences of the basic rule that directives do not produce any direct horizontal effect. According to the principle of harmonious interpretation, the national courts are required to apply national law in the light of the wording and purpose of a directive.²⁶⁸ This principle was confirmed in subsequent case law and applied even in cases in which the directive did not meet the requirement of clarity, precision or unconditionality

265 Study for an evaluation and implementation of Directive 2008/52/EC 2016, p. 46.

266 De Palo and Trevor 2012. Hopt and Steffek 2013. Esplugues 2014a. Alexander, Walsh and Svatos 2017.

267 The basic rule has been developed in the case 152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723.

268 Craig and Búrca 2011, pp. 200–202. Case 14/83, *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891 para. 26.

that was otherwise required for the directives' direct effect.²⁶⁹ The principle of harmonious interpretation applies to directives that are poorly implemented as well as to directives that were not implemented at all.

The principle of harmonious interpretation is a principle of European law. It remains incumbent on national doctrine to incorporate this requirement into its general doctrine of legal sources and methodologies.²⁷⁰ The national doctrine determines how this principle is applied in the methodological canon of interpretation and the extent to which national courts are permitted to apply a *contra legem* or *praeter legem* interpretation. This is what the Court of Justice expressed in the *Marleasing* case, when it found that the national courts have to interpret the directive “as far as possible in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter...”²⁷¹ There is no general principle that the directive and the principles enshrined therein would be granted supremacy over national legal concepts. A rule of supremacy would interfere deeply with the national legal system and the regulatory powers of the Member States. The principle of harmonious interpretation as developed by the Court of Justice is therefore the only means for achieving a harmonization of rules governing the interface and at the same time respecting the regulatory powers of the Member States.

This result is unsatisfactory as regards the rules that define mediation and the mediator itself. Having different normative concepts on the foundations of Civil and Commercial Mediation is contradictory to the Mediation Directive's aim of improving access to justice in cross-border disputes. Access to justice would require the disputants to be able to rely on the fundamental framework of the process. In order to achieve legal certainty in cross-border dispute resolution, the parties need to know whether they are entering into a mediation or some other dispute resolution process. They need to be able to determine what the legal consequence might be and make changes, when necessary. This would only be achieved by adopting a principle of supremacy in respect of the fundamental concepts and principles arising from the Mediation Directive.

However, the principle of harmonious interpretation has not only been seen as a principle of interpretation, but also as a powerful instrument of private law harmonization. According to *Amstutz*, the principle of harmonious interpretation has three implications.²⁷² First, it triggers a legal process that does not harmonize

269 For a general discussion of the principles and the case law, see Craig and Búrca 2011, pp. 190–216.

270 It can be seen as a method of interpretation; see for instance Ehrlicke 1995. *Siltala* considers directives as a source of law. However, he does not specifically address the distinction between horizontal and vertical effect: *Siltala* 2004, p. 417.

271 Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I – 4135 para. 8.

272 *Amstutz* 2005, p. 769.

the national legal systems in the way of subordinating them under a hierarchy, but one that sets out a compatibility formula that connects the systems to one coherent order of actions. Second, the principle of harmonious interpretation also triggers an evolutionary process that leads to institutional learning of the national legal systems by means of a trial and error method. In his view, a directive therefore constitutes a sort of irritation to a subsystem on which the national legal system reacts. This corresponds to a schema that describes the interaction between the system and its environment. Third, in the view of *Amstutz*, the principle of harmonious interpretation is a meta-law that works on methodological doctrines rather than to seek a harmonization of substantive law.

This evolutionary approach of harmonization describes the way in which the system tends to respond to the harmonization by directives. As mediation is based on contracts and is complemented by private regulatory instruments, it is likely that the directive triggers an institutional learning process within the private laws of the Member States and has an influence on the way mediation contracts are concluded or private regulatory instruments are shaped. This development in contract law will not lead to a harmonization of the contracts that form the basis of mediation or the classification of the contract in national contract law, but rather to a steady form of interaction. As the learning process is autonomous and self-reflective, it remains uncertain whether contracts will build upon the definitions contained in the European Mediation Directive or on the contrary start from the concepts that have been adopted in the national laws transposing the Mediation Directive. The evolutionary account explains that there will be additional legal communications. It does not in itself support the development of a European mediation procedure.

It would nevertheless be wrong to adopt a national approach to the Mediation Directive or to view mediation only through the national legislation transposing the Mediation Directive. The directive is a legal instrument that sets out the basic definitions of Civil and Commercial Mediation and is complemented by the European Code of Conduct for Mediators that has been widely adopted. It is a legal communication that will be used as a reference in further legal instruments adopted by the European legislator and might be used within regulatory instruments of the Member States and private legal instruments, but also the European institutions. The concepts adopted in the Mediation Directive will be subject to the interpretation of the Court of Justice under Article 267 of the Treaty on the Functioning of the European Union.²⁷³

273 So far, the cases handled before the Court of Justice have dealt with cases of access to justice. On mandatory mediation and access to justice: *Joined cases C-317/08, C-318/08, C-319/08 and C-320/08, Rosalba Alassini v Telecom Italia SpA (C-317/08), Filomena Califano v Wind SpA (C-318/08), Lucia Anna Giorgia Iacono v Telecom Italia SpA (C-319/08) and Multiservice Srl v Telecom Italia SpA (C-320/08)* [2010] ECLI: EU:C:2010:146. *Case C-75/16, Livio Menini and Maria Antonia Rampanelli v Banco Popolare – Società Cooperativa* [2017] ECLI: EU:C:2017:457.

2.5.3 The Mediation Directive and the European Code of Conduct for Mediators

The Mediation Directive is the European Union's basic legal instrument that provides for the general framework of mediation in civil and commercial matters. The Mediation Directive introduces two basic definitions: the concept of mediation and the concept of the mediator (Article 3 of the Mediation Directive). The Mediation Directive does not seek a comprehensive regulation of mediation but confines itself to harmonizing certain key aspects of civil procedure which are considered crucial for the further development and acceptance of mediation within the European Union. The harmonization is restricted to three issues: the enforceability of the agreements resulting from mediation (Article 6 of the Mediation Directive); the confidentiality of mediation in subsequent court proceedings and arbitration (Article 7 of the Mediation Directive); and the effect of mediation on limitation and prescription periods (Article 8 of the Mediation Directive).

Creating an instrument that is equivalent to the judgment of a court or an arbitral award in respect of its enforceability is the central aim of the Mediation Directive. This aim is also reflected in Recital 19 of the Mediation Directive stating, that *“Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties.”* The Mediation Directive requires the Member States to ensure *“that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable* (Article 6 of the Mediation Directive).”

The mediated settlement agreement is not directly enforceable, but its enforceability needs to be confirmed by means of a procedure that is subject to national procedural law. The mediated settlement agreement may be declared enforceable by a national court or other competent authority in the form of a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made (Article 6 par. 2 of the Mediation Directive). The Mediation Directive does not harmonize the national procedures, but limits the grounds on which the declaration of enforceability can be denied.²⁷⁴ Once made enforceable in one Member State, the mediated outcome is an enforcement title subject to European enforcement regulations.²⁷⁵ The confirmed mediated settlement agreement may be enforced in another Member State in accordance with Articles 58 and 59 of the Brussels I Regulation (recast) regulating the enforcement

²⁷⁴ On the enforceability, see Chapter 3.5.

²⁷⁵ On instruments of recognition and enforceability: Esplugues and Iglesias 2016, p. 13.

of authentic instruments and court settlements.²⁷⁶ Authentic instruments and court settlements are enforceable in another Member State without any declaration of enforceability being required. Enforcement in the other Member State may only be refused if such enforcement would manifestly violate public policy in the Member State addressed.²⁷⁷

Article 7 of the Mediation Directive seeks to provide for minimum harmonization as regards the protection of confidentiality by means of a procedural confidentiality provision. This provision obliges the Member States to introduce a legal right to refuse to give evidence in respect of information arising out of mediation to mediators and persons involved in the administration of the mediation process. The mediator may rely on this right to refuse to give evidence in subsequent civil court proceedings or arbitration proceedings, but not in criminal proceedings.

The third matter of harmonization concerns the effect of mediation on limitation and prescription periods and is set out in Article 8 of the Mediation Directive. The purpose of this provision is to prevent the actions or claims of the parties becoming time-barred due to their starting mediation, or to prevent parties using mediation maliciously in the hope that the claims become time-barred. Article 8 obliges the Member States to ensure that the parties who have initiated mediation and trusted its success are not prevented from initiating judicial proceedings or arbitration in relation to the dispute for which the mediation was initiated.

The Mediation Directive embeds mediation into the legal system and it introduces common definitions of mediation and the mediator. However, it fails to regulate the mediation procedure itself or to provide standards for the quality of mediation or to express procedural minimum guarantees. Instead, the Mediation Directive seeks to ensure the quality of mediation by two different measures. It requires the Member States a) to encourage the development and adherence to codes of conduct by mediators and mediation organisations and b) to encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties (Article 4 of the Mediation Directive).

The Mediation Directive is a framework approach to regulation which does not mean that mediation is not regulated. Rather, it means that the directive is complemented by other regulatory or self-regulatory instruments. At the European level, the European Commission has not only initiated the Mediation Directive, but also stimulated a self-regulation process, which culminated in the adoption of the European Code of Conduct for Mediators, a set of rules to which

²⁷⁶ Regulation (EU) No 1215/2012, the so called Brussels I Regulation (recast). For the definitions of authentic instruments and court settlements, see Article 2 (b) and Article 2 (c) of the Brussels I Regulation (EU) No 1215/2012 (recast).

²⁷⁷ Fitchen and Kramer 2015, pp. 530, 536.

mediators or organizations offering mediation may commit voluntarily.²⁷⁸ This regulatory approach has been referred to as the double strategy of the European Commission.²⁷⁹ The Code of Conduct for Mediators has been developed by interest groups with the assistance of the European Commission who considered regulation by self-regulation as the appropriate instrument to harmonize procedural standards of mediation. Due to the active role in the preparation of the European Code of Conduct for Mediators, the European Code of Conduct for Mediators can be seen as an example of self-regulation from *above*, which certainly differs from the ideal of self-regulation of a bottom-up movement. However, the European Code of Conduct for Mediators is not considered to be an official act of the European institutions. This has been made clear in the Council's Common Position, in which the request of the European Parliament to publish the European Code of Conduct for Mediators in the Official Journal was rejected and replaced by an obligation to publish it on the Internet.²⁸⁰

The European Code of Conduct for Mediators applies to all kinds of mediation in civil and commercial matters and leaves it to the organizations offering mediation services to develop more detailed codes in order to take account of specific areas, such as consumer mediation (Preamble of the European Code of Conduct for Mediators). The European Code of Conduct for Mediators is divided into four sections. The first deals with the competence and appointment of the mediator. Competence is one element of the definition of the European concept of a mediator and it is described in the European Code of Conduct for Mediators as the mediator's duty to be competent and knowledgeable in the process of mediation. According to the European Code of Conduct for Mediators, relevant factors of competence include the mediator's "*proper training and continuous updating of education and practice of mediation skills, having regard to any relevant standards and accreditation schemes.*" (Section 1.1. of the European Code of Conduct for Mediators).

The second section of the European Code of Conduct for Mediators specifies the impartiality of the mediator. Unlike the Mediation Directive it draws a distinction between independence and impartiality. The independence of the mediator is expressed as a duty to disclose any conflict of interest that may affect the mediator's independence. Impartiality, on the other hand, requires the mediator to act with impartiality and to endeavour to be seen to act with impartiality towards the parties and to serve the parties equally. The third section of the European Code of Conduct for Mediators provides a rudimentary description of the procedure,

278 European Code of Conduct for Mediators. More than 100 organizations and bodies have subscribed to the European Code of Conduct by 2018.

279 Koulu 2006, p. 133.

280 Council's Common Position on the adoption of the Mediation Directive 2008.

its commencement, conduct and end and the mediator's role therein. According to the European Code of Conduct, the mediator educates the parties regarding the process and seeks to ensure that they understand the mediation agreement, including any applicable provisions relating to the obligations of confidentiality. The contents of such mediation agreement are not laid down in the European Code of Conduct for Mediators nor is there a European model agreement that would determine the terms of the mediation agreement. However, the reference to the mediation agreement shows that the mediation agreement is to be seen as the foundation of the mediation between the parties.

The European Code of Conduct for Mediators imposes a set of obligations upon the mediator. The mediator conducts the process in an appropriate way, taking into consideration a possible imbalance of powers, the wishes of the parties, the rule of law and the need for a prompt settlement of the dispute (Section 3.1.4. of the European Code of Conduct for Mediators). The mediator ensures the fairness of the process by giving the parties an equal opportunity to be involved and by informing the parties, if the settlement appears unenforceable or illegal (Section 3.2. of the European Code of Conduct for Mediators). At the end of the process, the mediator must take all appropriate measures to ensure that any agreement is reached by all parties through knowing and informed consent and that all parties understand the terms of the mediated settlement agreement (Section 3.3. of the European Code of Conduct for Mediators). Section 4 of the European Code of Conduct for Mediators specifies the mediator's obligation of confidentiality.

The European Code of Conduct for Mediators creates the ideal picture of a Hercules mediator who is well trained, wise and has full information of the parties' dispute, the power relations between the parties and an understanding of the law. Further, the mediator is seen to be in the position to balance the self-determination of the parties, with the protection of the weaker party, the fairness of the outcome, the fairness of the process and the efficiency of the process, an ideal that will hardly be achieved in the practice of mediation. Despite its unofficial character, the European Code of Conduct for Mediators has had an influence on the national legislation of several Member States as well as on the rules adopted by mediation institutes.²⁸¹ A study on the evaluation and implementation of the

²⁸¹ For instance, the German Mediation Act incorporates some of the provisions of the European Code of Conduct for Mediators: Government Bill for the German Mediation Act p. 14. The Civil Mediation Council in the UK has approved the European Code of Conduct for Mediators and requires for registration adherence to this code or a similar code: <http://www.civilmediation.org/join-cmc/38/organisations>. The Notes on the 2016 Edition of CEDR's Model Mediation Documents and Rules expressly mention that the CEDR Code of Conduct has been adapted to correspond to the European Code of Conduct for Mediators. Also, the Austrian Code of Conduct for Mediators is modelled on the European Code of Conduct for Mediators: Austrian Code of Conduct for Mediators 2017. In Sweden the National Court Authority refers to the European Code of Conduct on its homepage which has been considered to be a sign of its wide recognition and endorsement: Lindell 2017, p. 769.

Mediation Directive that was commissioned by the European Commission in 2013 and updated in 2016 noted that the European Code of Conduct for Mediators was used by national organizations and had inspired national and sectoral codes of conduct and legislation.²⁸² It recommended that Member States should impose an obligation to adopt codes of conduct on all mediation organizations and recommended the European Code of Conduct for Mediators as a ‘source of inspiration’.²⁸³ In its report on the application of the Mediation Directive, the European Commission noted that some Member States prescribed adherence to the European Code of Conduct for Mediators by law, while other Member States applied the European Code of Conduct for Mediators in practice which underlined the key role of the European Code of Conduct for Mediators.²⁸⁴ The impact of the European Code of Conduct for Mediators goes far beyond what one would expect from an informal recommendation. In light of its purpose and the way it influences legislation and other codes, the European Code of Conduct for Mediators is therefore a communication that cannot be neglected within the legal system, but it provides institutional support for basic legal principles of Civil and Commercial Mediation.

In its report on the application of the Mediation Directive, the European Commission noted that there was a great variety in respect of quality standards and control mechanisms for mediation. There was no agreement between stakeholders as to whether there should be a European-wide quality standard. In an online consultation conducted by the European Commission, respondents in favour of a European wide-quality standard considered that a harmonized standard would increase the take-up of mediation and the consistency of the procedure. Opponents to the development of a European-wide quality standard considered that European-wide quality standards were not necessary for the success of mediation, that national standards were too different, that the development of these standards should be left to Member States, or that self-regulation in each national market was sufficient. There was also disagreement regarding the level of the quality standard. Stakeholders in favour of a European quality standard considered that a minimum standard was sufficient to improve consistency, while others support the development of a standard based on the highest national standard.²⁸⁵ At the moment, the European Commission does not see a need for a further revision of the Mediation Directive.²⁸⁶ This is despite the fact that the use of mediation has so far remained below its expectations which has led to calls for mandatory mediation

282 Study for an evaluation and implementation of Directive 2008/52/EC 2016, pp. 57, 58.

283 Study for an evaluation and implementation of Directive 2008/52/EC 2016, Executive Summary.

284 Commission Report 2016 p. 5.

285 Commission Report 2016, pp. 5, 6.

286 Commission Report 2016, p. 5.

to solve the so-called mediation paradox.²⁸⁷ The European Parliament in turn has recently taken another initiative to address the question of quality and called for the development of minimum standards. The European Parliament considers that additional actions need to be taken to ensure the enforceability of the mediated agreement in a quick and affordable manner, “*with full respect for fundamental rights, as well as Union and national law.*” The European Parliament calls upon the European Commission to assess the need to develop minimum standards and to put safeguards in place to limit the risk for weaker parties.²⁸⁸

2.5.4 Mediation in European Institutions – mediation at the European Union Intellectual Property Office

The mediation process at the European Union Intellectual Property Office (EUIPO) provides an example for the adoption of the mediation concept introduced by the Mediation Directive within a European agency and the interaction between different instruments in a comprehensive regulatory framework. Mediation at the EUIPO is based on Decision No 2013-3 of the Boards of Appeal of 5 July 2013 on the amicable settlement of disputes, and Rules on Mediation adopted by the Boards of Appeal.²⁸⁹ Prior to the commencement of the mediation, the parties and the mediator are required to sign a formal mediation agreement that incorporates the Mediation Directive, the European Code of Conduct for Mediators and the EUIPO’s provisions on mediation (the Decision on Mediation as well as the Rules on Mediation) into the mediation agreement.²⁹⁰ The outcome of a successful mediation is a mediated settlement agreement. All instruments refer expressly to the European Code of Conduct for Mediators and the Mediation Directive as the basis of the mediation.

The purpose of mediation at the EUIPO is to achieve a friendly settlement of a dispute in *inter partes* proceedings that have reached the appeal stage.²⁹¹ Mediation at the EUIPO requires that there is a dispute regarding trademarks and design matters, that it involves rights and obligations of the parties that are at the disposal of the parties under applicable law, and that an appeal has been

²⁸⁷ The mediation paradox describes the circumstance that mediation is not used by potential users, notwithstanding the numerous advantages it is considered to bring about in terms of flexibility, efficiency and self-determination. In a study commissioned by the European Parliament in 2014, the authors recommended some form of mandatory mediation as a means to increase the use of mediation within the European Union: De Palo, D’Urso and others 2014, pp. 9, 163-164.

²⁸⁸ Resolution of the European Parliament 2017.

²⁸⁹ EUIPO Decision on Mediation 2013. This decision replaces the Decision on Mediation 2011. EUIPO Rules on Mediation 2013.

²⁹⁰ EUIPO Mediation Agreement.

²⁹¹ EUIPO Decision on Mediation 2013, Recital 2 and Recital 3.

filed against a decision of the EUIPO. Mediation is excluded in respect of absolute grounds for refusal of a European Union trademark or design application.²⁹² Such absolute grounds for refusal is a conflict of the trademark or design with public order and accepted principles of morality. Mediation at the EUIPO is not limited to the subject matter of the appeal proceedings but may include other disputes between the same parties regarding trademarks, designs or any other IP rights.²⁹³

Mediation at the EUIPO has an ambivalent position between private and public. The process is not conducted within national courts or under the surveillance of a national court. The EUIPO has no competence to confirm the enforceability of the mediated settlement agreement but will close the suspended appeal proceedings once it has been informed by the parties of the settlement of the dispute (Section 8.6. of the EUIPO Rules on Mediation). The process is not entirely outside the public sphere, as the EUIPO has the competence to take a binding decision regarding the dispute, if mediation fails. Despite its public function, the EUIPO has adopted a mediation framework that is modelled on the procedural framework known from institutional mediation that is conducted outside the courts. The EUIPO mediators who are elected from a list of the EUIPO staff are trained by private institutional trainers, such as the Centre for Effective Dispute Resolution and the Chartered Institute of Arbitrators.²⁹⁴

The EUIPO Decision on Mediation sets out the conditions for the commencement of the mediation and provides for a suspension of the appeal proceedings during mediation (Article 1 and 2). In respect of the mediator, it seeks to separate the roles of the mediator from other members of the staff that may be involved in the case by introducing several grounds for the disqualification of the mediator (Article 3). It further introduces a confidentiality provision that extends the personal scope to all persons involved in the mediation and therefore exceeds the minimum confidentiality requirement of the Mediation Directive. The EUIPO Decision on Mediation further clarifies the contents of the confidentiality obligation with regard to the concept of information and the mediator (Article 5). The parties must not only refrain from calling the mediator as a witness, but also from requiring him/her to produce in evidence records or notes relating to mediation in any subsequent formal processes. The EUIPO Decision on Mediation provides for an exclusion of the mediator's liability. According to the Mediation Decision, the mediator should neither be liable for the outcome, compliance by the parties with the settlement, nor the legality, nor the enforceability of the mediated settlement agreement (Article 6).

292 EUIPO Decision on Mediation 2013, Recital 4

293 EUIPO Mediation Instructions to the Parties, Section 1.

294 EUIPO FAQ.

The EUIPO Rules on Mediation complement the EUIPO Decision on Mediation and define the principles that govern mediation and the role of the mediator in the mediation at the EUIPO more clearly. The EUIPO Rules on Mediation refer to principles laid out in the European Code of Conduct for Mediators and list several characteristics of the mediation process. According to the mediation rules these are the “*neutrality and impartiality of the mediator, the interest-based not rights-based procedure, the voluntary participation of the parties, the flexibility and confidentiality of the proceedings and the autonomy and attendance of all parties.*” (Recital 4). In addition to confirming the requirement of independence and impartiality that is somehow misleadingly referred to as independence and neutrality, the EUIPO Rules on Mediation clarify the role of the mediator and the parties within the mediation. According to Section 5, the mediator’s role is to assist the parties in achieving a settlement but the mediator has no authority to settle the case nor should the mediator give legal advice or represent a party. The mediation is guided by the mediator who conducts the mediation in accordance with a stage-model. On the other hand, the parties have a duty to cooperate with the mediator to reach an amicable settlement (Section 6). The successful termination of the mediation requires that a settlement agreement that covers the dispute at least partially is signed by the parties (Section 8). In contrast to the European Code of Conduct for Mediators, the mediator is not responsible for ensuring that the parties agree on the terms of the settlement agreement through knowing and informed consent, nor has the mediator a duty to inform the parties if the settlement appears unenforceable or illegal.

2.5.5 Mediation in consumer disputes – the ADR Consumer Directive

In the Green Paper, the Commission had already stressed the importance of ADR in building up the confidence of the consumer in cross-border commerce and especially in relation to e-commerce.²⁹⁵ In 2001 and therefore long before the Mediation Directive entered into force, the European Commission had adopted the Recommendations 2001/310/EC that set out principles for the resolution of consumer disputes in consensual forms of dispute resolution and applied to separate bodies responsible for dispute resolution.²⁹⁶ The recommendations took a principle-based approach to regulation instead of regulating the course of the process in detail.

²⁹⁵ EC Green Paper on alternative dispute resolution COM (2002) 196 p. 6.

²⁹⁶ Commission Recommendation (EC) 2001/310/EC.

The Consumer ADR Directive was adopted on 21 May 2013.²⁹⁷ The purpose of the Consumer ADR Directive was to create a network of ADR entities that meet high quality criteria and allow for an efficient dispute settlement outside the courts. It is an umbrella directive that covers all mechanisms of extrajudicial dispute resolution irrespective of whether they are consensual or adjudicative in nature. The Consumer ADR Directive is not confined to mediation as defined in the Mediation Directive but also covers adjudicative forms of alternative dispute resolution. The personal scope, but also the substantive scope, are restricted to disputes between consumers and traders. In addition, the disputes must have arisen from sales or service contracts. The health and education sector, for instance, are excluded altogether.²⁹⁸

The Consumer ADR Directive imposes upon the Member States an obligation to facilitate access to ADR entities and ADR procedures that fulfil the quality requirements set forth by the directive.²⁹⁹ The directive does not require that all ADR needs to fulfil these quality standards, but rather that the consumer has access to an entity or procedure that fulfils these standards. The directive therefore focuses on the institutions rather than on the procedure itself, and on the entity providing ADR in whatever form rather than on the way mediation is to be conducted.

The Consumer ADR Directive does not provide for rules or principles that would apply directly to every mediation conducted by a mediator, not even mediation in consumer disputes. The quality requirements have no universal validity. They apply only to the ADR entities that are certified as ADR entities under the directive. However, these quality criteria indicate the European legislator's view of principles that should ideally guide ADR in consumer disputes. These principles confirm some of the principles that had been set out in the earlier Recommendations 2001/310/EC and provide a (non-binding) minimum standard for the harmonization of quality criteria.

The parties' right to access ADR has priority. This cannot only be seen from the efforts to introduce a network of ADR entities that meet the required minimum standards and the main principle that the thresholds should be low. The directive has also reversed the usual basis on which the contract between the ADR entity and the parties is concluded. Access to the ADR entity does not follow the principle of offer and acceptance. On the contrary, there is an abstract assumption of acceptance and special reasons need to be given, if an ADR entity refuses to deal with the case.

297 On a critical view regarding the ADR Consumer Directive and its tension with mediation: Wagner 2014, p. 180, Eidenmüller and Engel 2014. On the incompatibility of the goal to enforce consumer rights and the goal of improving access to justice by means of ADR, see Wagner 2012, pp. 115.

298 Directive on Consumer ADR, Article 2

299 Directive on Consumer ADR, Article 5

Such reasons must be provided for in the legislation and by the rules that are to be drafted by the ADR entities.³⁰⁰

Article 6 sets out the principles of expertise, independence and impartiality. Independence and impartiality are themes that recur in most texts on mediation as guiding principles. Also, expertise is a requirement that can be found in other legal instruments. Most often it is a reference to ADR practice, and this is also the case here. The European legislation however, introduces an additional criterion for expertise that is surprising in the context of consensual ADR. An expert in ADR does not only need to have the skills for the respective ADR process but must also have a general understanding of law.

Article 7 deals with transparency requirements that relate not only to the entity itself, but also to the procedure and the post-evaluation of the dispute resolution process. The ADR entity will need to publish information on itself and also on procedural rules that govern the resolution of disputes as well the types of rules the ADR entity may use as a basis for the dispute resolution. The entity also needs to publish information on the legal effect of the outcome of the proceedings as well as the enforceability. Article 8 deals with the effectiveness of the dispute resolution process. The effectiveness concerns the access to the dispute resolution process: the process must be easily accessible, free of charge or available at a nominal fee for consumers and must allow for direct access without lawyers. Effectiveness is also required in respect of the time within which the outcome must be available.

Requirements regarding the fairness of the procedure are introduced in Article 9. According to the Consumer ADR Directive, there are general requirements that relate to all ADR processes irrespective of whether they are consensual or adjudicative in nature. This general standard of fairness includes the parties' right to submit their view of the case and being entitled to comment on the arguments and evidence submitted by the other party. In addition, the parties must be informed that they can seek advice or assistance from a third party, although there is no general obligation to be represented by a lawyer. Furthermore, the parties need to be notified of the outcome of the procedure. These fairness requirements appear to be inspired by requirements of due process of an adjudicative advisory procedure, in which it is a crucial that the parties' submissions and evidence are presented to the other party.

Article 9 also introduces some specific requirements of fairness that apply only to ADR procedures which aim at resolving the dispute by means of proposing a solution. The parties must have the right at any time to withdraw from the procedure and to be informed of that right. In addition, the parties have the right to be informed about their choice to agree to the proposed outcome, the possibility

300 Directive on Consumer ADR, Recital 25.

of bringing the dispute before a court and in particular, the circumstance that the outcome before the courts may differ from the proposed outcome. The parties also need to be informed about the legal effects of agreeing to a proposed solution and be given time for reflection before accepting the proposed solution. No similar safeguards or guarantees of fairness apply to ADR procedures when no solution is proposed.

2.5.6 Self-regulation and other forms of legal communications

Recommendations, codes of conduct or best practices are considered to be instruments of self-regulation. They are not attributable to the legal system unless they have been adopted by the legal system by means of explicit transformation or by being introduced by reference. In the absence of such transformation, they are therefore not automatically part of the *autopoiesis* of the legal system. This follows from the distinction between morals and the law and the circumstance that the legal system is a system that is operationally closed.³⁰¹ However, there are no distinct criteria a transformation needs to fulfil for a communication to become part of the legal system. The validity of these instruments within the legal system may result from legislation, but also from private law-making.³⁰²

For Civil and Commercial Mediation, two forms of self-regulation can be distinguished.³⁰³ First there is self-regulation that is initiated by the European legislator. Within the European Union, self-regulation is considered to be an instrument by which the approximation of national laws can be more easily and readily achieved than by formal legal instruments that need to go through a complicated legislative process of co-decision and cooperation between national states. An example of the self-regulation process initiated by the European legislator is the European Code of Conduct for Mediators that has been describe above.³⁰⁴ In fact, the Mediation Directive also requires the Member States to encourage the development and adherence to codes of conduct for mediators in general. In particular, mediators should be made aware of the existence of the European Code

301 *Luhmann* does not consider social or moral norms to be part of the legal system unless the legislator has expressly referred to such external sources or unless they have been endorsed by the court taking them as a basis for its decisions. However, he does not appear to exclude other forms of transformation. In fact, he does not formulate general abstract criteria or a rule of recognition which would make it possible to recognize such explicit transformation. By insisting that law processes morality by its own operations he opposes the idea that morality is directly valid within the legal system: *Luhmann* 1995, pp. 78, 85.

302 On legislative and contractual production of validity: *Luhmann* 1995, pp. 324.

303 On different forms of self-regulation in general: *Tuori* 2010, pp. 293–296.

304 On co-regulation and self-regulation in the European Union: *Senden* 2005. On the regulatory strategy of the European Commission in the field of mediation: *Korkea-Aho* 2009, p. 282. *Koulu* 2006, p. 133.

of Conduct for Mediators that should also be made available to the general public (Recital 17 of the Mediation Directive).

In addition to the self-regulation initiated by the European legislator, national mediation institutes have adopted model agreements, rules of procedure and codes of conduct. One example is the mediation framework developed by the Centre for Effective Dispute Resolution (CEDR), a London-based mediation institute. CEDR uses a model mediation agreement signed by the mediator and the parties. The CEDR Model Mediation Agreement makes an explicit reference to the CEDR Model Mediation Procedure and the CEDR Code of Conduct for Third Party Neutrals. Both become an integral part of the mediation agreement and the parties explicitly agree to participate and the mediator agrees to conduct the mediation in accordance with these instruments.³⁰⁵ Another example of a comprehensive self-regulatory approach is the mediation framework developed by the Netherlands Mediation Federation (MfN), an umbrella organisation of all Netherlands mediation institutions.³⁰⁶ It consists of a model agreement entered into between the parties and the mediator.³⁰⁷ The MfN Sample Mediation Agreement makes explicit reference to the rules of procedure adopted by MfN which become an integral part of the agreement.³⁰⁸ The mediator is obliged to conduct the mediation according to the Code of Conduct for MfN-registered mediators.³⁰⁹ Similar model mediation agreements and rules of procedures have been adopted by most mediation or arbitration institutes.³¹⁰ The nature of this private self-regulation is quite different from the nature of the self-regulation steered from above.

According to contract law doctrine, procedural rules and codes of conduct adopted by private organizations are considered to be general terms of contract. They therefore become part of the agreement between the mediators, because they are expressly referred to in the mediation agreement or because their acceptance by the parties is implied.³¹¹ The validity of their terms needs to be assessed in the light of general contract law doctrine, hence terms that are not unusual or surprising or otherwise against the law become part of the agreement between the parties. One may also argue that the rules are more than mere contractual provisions, that they constitute law and that their classification as contracts is only a means to disguise the existence of multiple (legal) orders. Such a line of thinking

305 CEDR Model Mediation Agreement 2017. CEDR Model Mediation Procedure 2017. CEDR Code of Conduct 2017.

306 Pel 2017, p. 567.

307 MfN Sample Mediation Agreement 2017.

308 MfN Mediation Rules 2017.

309 MfN Code of Conduct 2017.

310 See for instance: Austrian Code of Conduct for Mediators 2017. EUCON Mediation Rules 2013.

311 Koulu 2006, p. 148. Eidenmüller 2001, p. 16.

is represented by *Lon Fuller*, who claims that the body of law that is created by private organisations, such as trade association or clubs, should be considered to be a branch of (constitutional) law rather than as part of the law of contract.³¹² He argues that various bodies have been allocated legal power and the authority to enact rules and reach decisions that will be regarded as binding on those affected by them.³¹³ Procedural rules and codes of conduct adopted by mediation institutes are comparable to codes of procedure and may provide for detailed procedural rules. As such, they may be considered to be the “*enterprise of subjecting human conduct to the governance of rules.*”³¹⁴

Even if one does not adopt *Fuller’s* view, uncertainty remains about the validity and effect of the rules adopted by private mediation institutes. Are they to be classified as general terms of contracts that are only legally valid when incorporated in the mediation agreement, or are they to be considered as the expression of procedural mediation principles that are to be respected, even though they would not have been incorporated in the mediation agreement? Or are they to be seen as an expression of the *state of the art* of mediation that a competent mediator is required to comply with. And how do these private regimes relate to principles that arise from the European Code of Conduct for Mediators? A further problem with the self-regulation adopted by private institutes is that the instruments are difficult to compare and may have been adopted with regard to a mediation model that is different from the mediation the European legislator seeks to promote, or relate to other hybrid forms of dispute resolution as is the case for mixed mediation-arbitration procedures.

A distinction must certainly be made between mediation rules that have been adopted by arbitration institutes and regulatory frameworks that have been developed by mediation institutes. In the first case, the mediated settlement may be confirmed in the form of an arbitral award and the process remains therefore outside the scope of application of the Mediation Directive. Mediation frameworks adopted by mediation institutes are different. They often consist of a comprehensive set of instruments, such as model agreements, mediation rules and codes of conduct and make reference to the European regulatory instruments. This is the case for the framework developed by CEDR, but also for the Austrian Code of Ethics for mediators, to take two examples. Even though their place in the hierarchy of the legal order remains open, they are part of the multi-level regulatory system that has come into existence and such embody rules and principles that determine Civil and Commercial Mediation.

312 Fuller 1969, p. 128.

313 Ibid.

314 This is the definition of *law* given by *Fuller*: Fuller 1969, p. 106.

2.6 Dispute resolution at the periphery of the legal system

Mediation has a double existence: as a social practice, mediation is an umbrella term for several forms of third party interventions and shows an indefinite variety of interaction that may have different aims, depending on the mediation model and the background theory used. Within the legal system, the nature of mediation changes. It becomes a legal construct that is determined by principles that are normative in character. Civil and Commercial Mediation is based on a network of contracts that connect mediation with the legal system and bring mediation within the rationality of the legal system. The contracts are a form of structural coupling that I use as a research method for mediation within the legal system. The contracts do not stand by themselves but are embedded in a set of rules and principles that emerge from a set of legal communications.

In the European Union, Civil and Commercial Mediation is considered to be one pillar of access to justice that comprises access to judicial and extrajudicial dispute resolution methods. Mediation is a dispute resolution mechanism at the periphery of the legal system that provides a performance that in many respects is functionally equivalent to the performance of courts.³¹⁵ In contrast to litigation, mediation does not use the binary code of the legal system to rationalize the conflict, nor does the settlement take the form of a decision that is imposed on the parties. Civil and Commercial Mediation is a decision-making process in which the complexity of the decision-making is reduced not by reference to the legal/illegal code, but by the mediation process itself. This distinct rationality of the decision-making process is the core of dispute resolution outside the law. The subject matter of Civil and Commercial Mediation is not confined to legal disputes and is not static as it is the case in litigation. In mediation, the dispute may change in scope and form and therefore has a dynamic nature. As a construct of the legal system, the dispute that is the subject matter of the mediation has a legal element. This means that the parties are to assert a position that results in a change in the legal situation (if it is achieved).

Civil and Commercial Mediation is based on the mediation agreement and a set of rules and principles that are inherent in various legal communications, European legislation, national legislation and self-regulatory instruments. The Mediation Directive and the European Code of Conduct for Mediators have had an influence on national legislation and self-regulatory instruments and they may therefore be used to examine principles that have emerged in Civil and Commercial Mediation.

³¹⁵ On the term *performance* see fn 141.

3 THE MEDIATED OUTCOME AND THE LEGAL SYSTEM

In Chapter 2.2.1 I argued that the mediated settlement agreement connects mediation to the legal system and brings mediation within the rationality of the legal system. In the following sections, I examine the normative dimension of the mediated outcome and whether the legal system takes account of the circumstance that the mediated settlement agreement is the outcome of a mediation. I will therefore examine the nature of the mediated outcome, the conditions for the existence and validity of the mediated settlement agreement and the grounds on the basis of which the validity of the settlement agreement can be challenged. I will examine these questions from the point of view of contract law doctrine. The main focus is the interface between the legal practice and the social practice of mediation. Before I start, I will recapitulate the main promises of the social practice of mediation. As a social practice mediation is an informal, flexible and voluntary process in which the parties can determine the process and its outcome by themselves. The promise of mediation is that the outcome resolves the parties' conflicts and does not only take account of their (legal) positions, but of the parties' subjective perceptions, interests, needs and emotions. The process balances the interests of the parties and uses a rationality that is different from legal rationality.³¹⁶

3.1 The nature of the mediated outcome

Not all mediation models consider the settlement of a dispute to be a successful outcome of mediation. *Alberstein* identifies three forms of success, depending on the mediation model used.³¹⁷ The transformative model perceives that a successful outcome of mediation is not the resolution of a dispute, but a change in the interaction between the parties that marks relational growth, empowerment and recognition. Narrative mediation offers a change in the language which reflects the move from the dominant to a different narrative as success in mediation. In the pragmatic or problem-solving mediation model, a *pareto* optimal solution of

316 According to *Fisher and Ury*, the basic problem in a negotiation lies not in conflicting positions, but in the conflicts between each side's needs, desires, concerns and fears. Such desires and concerns are interests. Interests motivate people; "*They are the silent movers behind the hubbub of positions*": Fisher, Ury and Patton 2011, p. 43.

317 See Alberstein 2006, p. 335, 341.

the dispute that addresses the parties' interests and needs is seen as a successful outcome. *Alberstein's* analysis may be criticised as being too rigid. Also, pragmatic mediation seeks to achieve recognition and empowerment of the parties and may directly or indirectly lead to a change in the narrative used by the parties. However, the analysis carves out the primary aim of the respective mediation model. This aim can be compared with the aims envisaged when adopting the Mediation Directive. One aim does not exclude other aims, but it sets the framework for the mediation model to be pursued.

The ideal goal of mediation is that it achieves an outcome that both settles the parties' positions and integrates their interests and needs.³¹⁸ This means that the parties do not only achieve a compromise in respect of their positions, but also an outcome that is creative in that it meets the parties' needs and provides for a tailored, comprehensive and sustainable solution of the conflict.³¹⁹ The ideal outcome of a mediation does not only include a settlement of the parties' positions which are often expressed as monetary claims, but also seeks to structure the parties' future relationship, takes account of the parties' interests and needs and addresses the parties' emotions.³²⁰ From this it follows that the mediated outcome may take various forms. It may involve or be limited to an apology, acknowledgement of the feelings, change in the communication styles and the intention to improve the interaction between the parties or a common understanding of the parties to change their behaviour, in addition to an agreement on the parties' positions.

In a workplace mediation the parties, for instance, may agree that they will treat each other respectfully and that they intend to hold regular meetings to discuss their future course of action. Such promises seldom constitute a legal communication as the parties do not intend to create, terminate or change their legal position. The document signed may be referred to as an agreement.³²¹ Such an agreement constitutes a successful outcome of a workplace mediation that seeks to achieve a change in the interaction between the parties. As the obligations entered into by the parties are not clearly defined and the parties lack the intention to bring about a change in their legal position, such an agreement will not constitute a binding settlement agreement that can be enforced by a court. If the parties fail to comply with this promise, the underlying conflict may continue. The parties may have

318 For a taxonomy on the different ways to handle conflicts, see Thomas 1992, p. 266.

319 On a classification of integrative agreements to resolve a social conflict: Carnevale 2014, pp. 418–420. From the perspective of negotiation theory, the creation of settlements may involve the following: addressing the parties' needs, expanding resources and efficient or just solutions: Menkel-Meadow 1983, pp. 804. In an empirical study the creativity of court settlement agreements was measured by examining whether the settlement agreement contained elements beyond the claims identified in the court filings. For the study, see Adrian and Mykland 2014, p. 434.

320 For examples of creative solutions that take account of the parties' needs in personal injury and product liability cases, see Menkel-Meadow 1983, pp. 804.

321 See for a sample workplace agreement Boule and Nesic 2010, p. 521.

recourse to another mediation or negotiations or they may simply deny the existence of the conflict. In the absence of a binding promise, the mediated outcome does not exist in the legal system and the promise is not enforceable within the legal system. Such a non-binding promise may be contrasted to an outcome under which the parties agree in the course of a mediation on changes in the employee's salary or the termination of the employment due to restructuring measures. A promise in which the parties agree on the change of their legal rights and obligations will be recognized by the legal system as a legal communication. Such a promise may require compliance with mandatory laws protecting the rights of the employees. The promise is also enforceable as a binding agreement. It becomes part of the legal system.

It is the ideal vision of mediation that compliance with the mediated outcome is voluntary and not based on the enforcement of the mediated outcome by means of the power instruments of the nation state. In mediation, the non-bindingness of the mediated outcome is not considered to be a deficiency of the process. Especially in fields in which mediation is used to improve the interaction between persons, such as workplace mediation, family mediation or school mediation, an enforceable outcome is not an outcome that is desired by the parties.³²² Mediation has therefore also been considered to be a continuous learning process rather than a dispute resolution mechanism.³²³ When the parties do not comply with the outcome of mediation, they may return to mediation or negotiation or counselling and therefore remain outside the legal system.

When mediation is compared to adjudicative forms of dispute resolution, the lack of legal bindingness and enforceability is sometimes regarded a distinctive feature of mediation. It has also been claimed that the mediated outcome lacks *ex-definitione* a legal effect or that the parties need to agree separately on the legal bindingness of the mediated outcome in order for the legal outcome to be valid.³²⁴ In China, agreements reached in mediation in the past were not considered to be binding and enforceable due to the principle of voluntariness inherent in mediation, a view that has changed only recently.³²⁵ Bindingness and enforceability collide with the ideal of voluntary compliance that is prevalent in mediation theory. Voluntary compliance is one of the foundations of the mediation *paradigma*. It is claimed that the parties comply with the mediated outcome because they have agreed on the solution by themselves, and not because they are obliged to do so. The clash between the legal bindingness of the outcome and voluntary compliance entails an encounter between the principles that are inherent in mediation on

322 Rau, Sherman, Peppet and Murray 2006, p. 493.

323 Pehrman, p. 23.

324 An example is given in Chapter 3.2. See for instance: Ervasti and Nylund 2014, p. 74.

325 Pissler 2013, p. 973.

the one hand, and principles that are inherent in the legal system on the other. When compliance becomes an obligation, the principles of voluntariness and self-determination that constitute the basic values of mediation are superseded by the principles of contract law.

In Civil and Commercial Mediation, the parties enter into the mediation with the intention of settling a civil or commercial dispute that has arisen. It is the parties' intention to create, terminate or change their relations regarding their civil or commercial rights and obligations. These relations are legal in character and any change in the legal relations requires a legal act. An intention to settle a dispute that has arisen in a civil or commercial matter involves the parties' expectation that the mediated outcome becomes legally binding.³²⁶ While the parties enjoy the freedom to start, continue and terminate mediation at any time, they expect that the mediated outcome once achieved constitutes an agreement that will solve their legal dispute in a legally binding way. Such a legal dispute may only be settled within the legal system and requires that the parties bind themselves legally. In the case of Civil and Commercial Mediation, the parties may expect that the mediated outcome will be declared enforceable, upon their request. In Civil and Commercial Mediation, the question is therefore not whether the mediated outcome is binding, but what the conditions of the bindingness are and how the bindingness affects the nature of the mediated outcome.³²⁷

In addition to the expectation that the mediated outcome settles the dispute, the parties seek to ensure compliance with promises given in the mediation that relate to the future behaviour of the parties. In this respect, it is useful to make a distinction between self-executing and non-self-executing promises, a distinction that is independent of the question whether a promise is legally binding. The mediated outcome may include promises that are self-executing and promises that are not self-executing. A self-executing agreement is an agreement that is either carried out in its entirety at the time it is accepted or formulated in such a way that the extent to which the parties comply with its terms is self-evident.³²⁸ When the parties agree to make a formal apology or to pay damages for an injury the dispute will be settled at the moment the parties execute this promise by actually making an apology and paying the damage. A non-self-executing agreement requires from the parties a continuing performance that relates to the future. Whether

326 This has been referred to as the enforceability expectation of the parties: Rau, Sherman, Peppet and Murray 2006, p. 493.

327 Also, in mediation in civil and commercial matters, the outcome of mediation may vary. The parties may end the mediation without signing a written settlement agreement or without entering into a binding agreement. The mediated outcome may be recorded by the mediator in a mediation record or even be left unrecorded. It is also possible to end a mediation in the form of a non-binding memorandum of understanding that will be elaborated by the parties or the lawyers as a post-mediation issue: Boule and Nesic 2010, p. 128.

328 Young 1972, p. 58.

the parties comply with their non-self-executing promises cannot be measured unless the promises made are specific in nature or there are specific monitoring systems in place.³²⁹ The parties, for instance, may agree that they will meet four times during a certain period of time to improve their interaction. While one may monitor whether the parties meet, the improvement of their interaction may not be monitored by means of external objective monitoring systems. Non-self-executing promises require the establishment of revolving conflict resolution mechanisms that monitor and assist the parties in the resolution of their conflict. Such control mechanisms may consist of an intermediary that supervises the compliance with the outcome, but also in the form of legally binding obligations – subject to certain conditions and the nature of the obligation assumed.

When the parties seek to ensure compliance in respect of the parties' future behaviour *within* the legal system, they need to assume a legally binding obligation, so that the monitoring and enforcement of compliance takes place within the legal system. This may take place by means of entering into a legally binding agreement on the future cooperation, but also by introducing a legally binding monitoring system or dispute resolution mechanism. Within the legal system, the default dispute resolution mechanism – litigation – is not voluntary and revolving unless the parties agree otherwise. This change from non-bindingness to bindingness and voluntary to involuntary compliance supports the parties' confidence that the promise given by the other party will be kept and it may therefore be an element that adds to the parties' willingness to settle the dispute.³³⁰ On the other hand, as a result the parties lose the flexibility of agreeing on a revolving monitoring conflict resolution mechanism and the opportunity to adjust to changed circumstances.

3.2 The will theory as the basis of the validity and interpretation of the mediated settlement agreement

Mediation builds on self-determination.³³¹ In mediation theory, self-determination is not only the leading principle of mediation, it is also the foundation of the mediation process and is used to justify the mediated outcome. Self-determination means that the parties are in charge of the settlement of the dispute. Broadly understood, self-determination means that the parties determine their conflict, the process and the outcome of the dispute resolution and also whether they wish to comply with the mediated outcome. As mediation is about finding a solution

³²⁹ Ibid.

³³⁰ *Young* has pointed out the parties' conflict resolution may fail, because the parties do not trust that the other party will comply with its obligations: Young 1972, p. 58.

³³¹ Menkel-Meadow, Love and Schneider 2006, p. 94.

according to the standards of justice that the parties consider relevant,³³² a solution that is based on the self-determination of the parties is considered to be just. In the absence of any other requirements for the bindingness of the mediated outcome, no further justification is needed.³³³

When the mediated outcome becomes part of the legal system, compliance with the agreement is no longer within the self-determination of the parties. A binding agreement may be enforced against the will of one party. Agreements reached in a mediation are usually not perceived as a specific type of agreement, but general doctrines of contract law apply.³³⁴ As a consequence, the legal concept of free will supersedes the principle of self-determination and voluntariness as the leading values of the mediation paradigm. Within the legal system, self-determination is reproduced and turns into a liability. The switch becomes visible when the parties reach an agreement in the mediation and consent to a solution, but one party changes his or her mind subsequent to the mediation and finds out that voluntariness has its limits after all.³³⁵

The following example described by *Thompson*³³⁶ illustrates this point even though it relates to a settlement agreement reached in court mediation in the US: a US court had to examine the question of whether a settlement agreement signed by the defendant's lawyer with full authorization from the defendant was binding and came to the conclusion that in light of the mediation principle of voluntariness, general contract law was *inapplicable* and consequently, a mediated settlement agreement was not binding until reduced to writing, agreed upon and signed by both parties. On appeal, the court of appeal held that there was no reason to treat settlement agreements reached in mediation differently from settlement agreements reached in other settings and came to the conclusion that general contract law and the law of agency applied and that the contract was binding. The Finnish courts took a similar stance in the case of a settlement that was not the outcome of mediation in the strict sense, but concerned a settlement reached and confirmed in a court subsequent to lengthy negotiations. The applicant requested the invalidation of the confirmation of enforceability of the settlement on the ground of the invalidity of the settlement. The applicant claimed that the applicant's lawyer's consent to the settlement –

332 Bush 1989, p. 267.

333 Self-determination and the justification of the mediated outcome will be elaborated in Chapter 4.4.1.

334 Thompson 2004, p. 521.

335 It is not unusual that one party changes his or her mind, once the immediate pressure of mediation has fallen off. In such cases there is actual, but fleeting consent: Coben and Thompson 2006, p. 78.

336 Thompson 2004, p. 521.

that was made in the absence of the applicant who had suffered an attack of illness during the negotiations – did not correspond to the applicant’s true intention. The Court of Appeal – examining the validity of the settlement – held that general principles of contract law were applicable and that the addressee of the declaration of intent had the right to rely that the declaration of intent expressed by the applicant’s lawyer corresponded to the applicant’s intention. The Supreme Court confirmed the view of the Court of Appeal and noted that the circumstance that a confirmed settlement agreement was directly enforceable showed that the confirmed settlement agreement was even more clearly binding than a judgment given by a court of first instance.³³⁷ The view that general contract law applies and not the mediation paradigm of voluntariness appears to be the prevalent view in most jurisdictions.³³⁸

This raises the question about what bindingness means in respect of mediated settlement agreements and how the bindingness of the mediated settlement agreement is justified. One prism to examine these questions through is contract models (or contract *paradigma*). In the view of Pöyhönen, contract models are background assumptions for the analysis of contractual relations.³³⁹ They may be used in interpreting and structuring the surface material of the legal order and in determining the relations between different contractual principles. They serve to explain and justify the binding force of a contract in the light of values that are external to the legal order. Changes in the *paradigma* are linked to changes in the values that are inherent in a society. Changes evolve first in the society and are only slowly either restructured and confirmed or ignored and rejected by the legal order. It is not my intention to develop the theoretical foundations of a new contract model or to restructure contract law or certain types of contracts. Rather, I will use a contract model as an instrument to examine the bindingness of the mediated outcome.

As for mediated outcomes, there are basically two options: One may adopt a mediation-based approach and claim that the bindingness in mediation needs

337 *Case KKO 2012:35, Settlement – Appeal*. On the confirmation of enforceability of a settlement agreement in Finland, see Chapter 3.5.2.

338 See for example for Austria: Roth and Gherdane 2013, pp. 273. For Germany: Tochtermann 2013, p. 544.

339 Pöyhönen 1988, pp. 80, 113, 381. Contract models consist of basic concepts, dogmas and constructions. Basic concepts include the concept of contract, the will and the declaration of will, reliance, and related concepts, such as the interpretation of the contract. Dogma determines the background rule a contract model presupposes to exist: Pöyhönen 1988, pp. 82–83. Dogma determines the rules that are strict in a certain contract model, the rules that form the main rule and the exception. Dogma is linked to the deep justification. The deep justification provides the legitimacy of the bindingness of the contract by reference to values that are external to the legal system: Pöyhönen 1988, pp. 98, 99. Contract models may be used to interpret and structure the surface material of the legal order and to determine the relations between different contractual principles: Mäkelä 2010, p. 17.

to follow the mediation paradigm of mediation with self-determination and voluntariness as the external values that justify the (non-) bindingness of the mediated outcome. The application of the mediation paradigm would then mean that there are no strictly binding agreements as this would be contrary to the principle of voluntariness and self-determination. A consequence of this is that the mediated outcome could be adapted, or updated, whenever the parties come to the conclusion that the conflict resolution required amendment. It would also mean that interests and needs that have guided the decision-making of the parties would override the declarations of intent made by the parties. Motives, hence the reason for entering into the agreement, would then matter.

The second alternative is to adapt a classical contractual paradigm and for the moment, this appears to be the only alternative. Within the legal system, a contract model that perceives self-determination and the non-bindingness as its paradigm is a *paradoxon* – it does not exist. As noted earlier, the legal system reproduces communications within its own system. A communication that is not binding would be classified as non-legal, hence not belonging to the legal system. It therefore remains only to reproduce self-determination within the legal system. Within the legal system, self-determination means *will*. The contract model that perceives a person's free will as the reason for the bindingness of the contract is the will model.³⁴⁰ The parties' free will, hence the belief that each person has the capability to make free choices, constitutes the deep justification for the bindingness of the contract.

The validity, interpretation and effect of the mediated settlement agreement depends on the type of contract and the nature and subject matter of the agreement. International mediated settlement agreements require the applicable law to be determined, and formal and substantive requirements may vary in different jurisdictions.³⁴¹ An agreement on the transfer of real property or shares in some countries may require a notary act to be valid. The mediated outcome may also need to fulfil specific requirements of substantive law. The renouncement of a right, for instance, may be considered to be a donation or could be interpreted as a renewal of a debt. But these specific requirements that may arise from the subject matter of the mediated settlements or different classifications and their consequences are not the subject matter of my research. The more important question is whether

³⁴⁰ The will theory and the reliance theory are the prevalent theories in contract law. They do not exist in a pure form as the reliance has been developed on the basis of the will theory. The need to protect the addressee's reliance can be taken into account by adding the respective elements to the will model or by developing a separate contract model – the reliance model: Pöyhönen 1988, p. 141. Zimmermann 1996, p. 585. Mäkelä uses the term *will centered theories* as an umbrella term for the will theory and the reliance theory: Mäkelä 2010, p. 48. In this work I will not make a distinction between these two theories but will use the term will theory to underline the value of the parties' private autonomy and the parties' consent as a justification for the bindingness of the agreement.

³⁴¹ Alexander 2009, p. 304.

there are specific conditions for the validity of an agreement that is the result of a dispute resolution mechanism that is in many respects functionally equivalent to judicial proceedings.

3.3 Conditions for the validity of the mediated settlement agreement

If the parties seek to create, terminate or change their legal relations, they need to make a legal communication. Whether the legal communication is binding and how it needs to be interpreted will then be assessed within the legal system. Under general contract law, the validity of an agreement requires the parties to have the legal capacity to enter into the agreement, that the contents of the agreement is sufficiently determinate and that the parties have given their consent to the agreement.³⁴² If the parties have complied with possible formal requirements, the agreement will be held to be valid and enforceable. If the mediated outcome is perceived as an ordinary contract, its validity may be challenged on the same grounds as any other agreement.³⁴³

3.3.1 Legal capacity and consent requirements

There are no specific requirements as regards the legal capacity of the parties to enter into a mediated settlement agreement. Persons who enjoy the legal capacity to enter into a contract in respect of the subject matter under general contract law are also capable of entering into a mediated settlement agreement.³⁴⁴ As general principles of contract law apply, the parties may also assign the authority to enter into the mediated settlement agreement to another person. But are there any specific requirements to guarantee the seriousness of the parties' intention to bind themselves to settle the dispute, for instance, in respect of the form in which consent is to be given? Legal rules imposing additional requirements would ensure the

342 There are different contractual doctrines on the bindingness in different jurisdictions, such as the doctrine of consideration, or the requirement of *causae*: Lando and Beale 2000-2003, pp. 140–150. These national doctrines will not be addressed here. Apart from national doctrines, the Principles of European Contract Law (PECL) may be used as a reference for their authority *imperii rationis*: see on the value of the Principles of European Contract law Eidenmüller, Faust, Grigoleit, Jansen, Wagner and Zimmermann 2008, p. 660. The PECL consider that a contract is concluded if the parties intend to be legally bound and reach sufficient agreement: Article 2:101 PECL.

343 For the purpose of this research, it is not necessary to make a difference between agreements that are void and agreements subject to being challenged by the parties.

344 See on the question of self-determination and legal capacity within mediation Chapter: 4.4.1.2.

seriousness of the declaration and give the parties the opportunity to reconsider the declaration and as such, prevent surprise.³⁴⁵

In classic Roman law, a binding obligation was only created if the parties adhered to a solemn form of declaration that included the word *spondeo* – I promise. In contrast, modern contract law does not generally require a solemn declaration that indicates the seriousness of the promise given by the parties but builds on the consent of the parties, regardless of the form in which it is expressed.³⁴⁶ Modern contract law therefore does not require the parties to agree separately on the bindingness of an agreement or confirm the bindingness of their promise. What is decisive is that the parties have expressed their intention to legally bind themselves. This is likely to be the case when one of the parties promises to pay a certain amount in damages. It is not the case when the parties agree to meet during the next year at monthly intervals for discussions. Such promises will most likely not be regarded as an intention to bind oneself, and will therefore not constitute a legal, but only a social obligation. A failure to comply with the obligation will not entail any legal sanctions.³⁴⁷

As the bindingness of an agreement by reason of express or implied consent constitutes the main rule, formal requirements or other exceptions to the main rule must be either enacted by a statutory provision or by agreement between the parties. A statutory exclusion of the bindingness of an agreement entered into between the parties is rare. Legislators are also reluctant to introduce formal requirements to limit the parties' freedom of contract. Such a requirement is only introduced when the legislator intends to achieve a specific purpose. Formal or specific requirements for the parties' consent may either be justified by a need to produce evidence regarding the contents of the agreement made between the parties, or it may also be used to as a warning to the parties or a need to protect the weaker party.³⁴⁸

There are two arguments in favour of a necessity of a specific form or separate declaration of bindingness in respect of the mediated settlement agreement. The first has to do with the justification of mediation. The binding force of the mediated outcome is justified with the consent of the parties which is the justification for the bindingness of the contract according to the will model. This consent requirement appears to be insufficient when the parties act on the border between the social and

345 On indices of seriousness and their role within the legal system, see Zweigert and Kötz 1998, p. 367.

346 The classical stipulation required the characteristic repetition of a key word which indicated that the promisor intended to be bound: Zimmermann 1996, p. 69. Kötz and Flessner 1996, p. 78. Also, the PECL start from the principle that there is no formal requirement: Article 2:101 PECL.

347 A promise to meet at regular intervals is comparable to a promise to meet for a coffee or go to the cinema. It constitutes a social, not a legally binding obligation. On the distinction between legal and social obligations: Gordley 2001, p. 105. Lando and Beale 2000-2003, p. 145.

348 Kötz and Flessner 1996, p. 121.

legal practice of mediation. The requirement of express consent would specifically signal to the parties the change from the mediation paradigm to the contract paradigm and make it clear that their talks are not a social practice, but that they are about to enter into a legally-binding obligation that may potentially be declared enforceable in the court and will supersede voluntariness and self-determination. In a similar way, one could argue that the mediated outcome does not constitute an ordinary contract but is a contract that concludes the dispute in a binding way and potentially deprives the parties of using other dispute resolution mechanisms to resolve the dispute and that the consent to waive one's rights requires a specific safeguard.³⁴⁹

The second argument is of a pragmatic nature. It is built on the circumstance that mediation is confidential in nature.³⁵⁰ The confidential nature of mediation restricts or even excludes the possibility to interpret the parties' declaration of intent in the light of the parties' conduct during the mediation. Only to a limited extent can a court rely on the mediator's or the parties' testimony to assess the nature and content of the parties' intentions. In its legal assessment, a court is therefore left with the declaration of intent itself. A failure of the parties to reduce the agreement to writing or to express it in another unambiguous way will therefore have the practical consequence that there is no binding agreement. One may therefore say that in practice there is a formal or quasi-formal requirement and that it would serve the interests of the parties to make such a factual requirement visible.

However, there is no general exception to the main rule on the regulatory level.³⁵¹ The Mediation Directive has not introduced any specific requirements for the bindingness of the mediated outcome itself. A written form is required only if the parties apply for the confirmation of the enforceability of the mediated outcome. National laws implementing the Mediation Directive are not consistent with regard to their formal requirements. Austria, Germany, the Netherlands and England and Wales do not require the mediated outcome to be reduced to a written form for the mediated outcome to be binding. The same is true in Finland.³⁵² Also, the UNCITRAL Model Law on Conciliation seeks to leave the form of the settlement open, to include agreements made by electronic communication or oral contracts.³⁵³ Similarly, the Directive on Consumer ADR that is meant to specifically protect the interests of consumers does not require the mediated outcome to be concluded in writing for it to be valid. The consumer does not even need to be informed or

349 The extent to which other forms of dispute resolution are excluded depends on the effect the mediated settlement agreement is given under the *lex fori*.

350 On confidentiality, see Chapter 4.5.

351 Caponi 2015, p. 132. For a limited number of exceptions to the basic principle of freedom of form *ibid* p. 132.

352 For England and Wales: Brooker 2013, p. 86. On the different jurisdictions: Esplugues 2014b, p. 710.

353 UNCITRAL Model Law on Conciliation 2002, annotation to Article 11.

otherwise be warned of the bindingness, as information about the bindingness of the outcome is only required for ADR procedures that *impose* a solution on the consumers, but not for ADR procedures that are consensual in nature.³⁵⁴

On the other hand, several institutional rules provide for a written form as the only way to resolve the dispute in mediation. The EUIPO Mediation Agreement provides that “*any settlement reached between the parties will not be binding until it has been reduced to writing and signed by, or on behalf of, the Parties*”. According to the EUIPO Rules on Mediation, a successful mediation is terminated “*by signing a settlement agreement covering the issues in dispute between the parties either partially or totally.*”³⁵⁵ According to the mediation rules of the Mediators Federation Netherlands (MfN), any resolution of the issue needs to be set forth in writing.³⁵⁶ Also, the CEDR rules require a written form for the agreement to be legally binding.³⁵⁷ In institutional forms of mediation, the written form is therefore the main rule, and oral agreements form the exception. Nevertheless, it cannot be concluded from the institutional rules that there is a general legal principle that the mediated settlement agreement must be reduced to its written form to be valid.

Separate formal requirements apply if the parties intend to achieve the enforceability of the mediated outcome; that is, where the conditions for an enforceable title for the execution of the mediated outcome is to be created. Mediated outcomes cannot be enforced by executionary measures without being reduced to a written form. The confirmation of the mediated settlement agreement as enforceable therefore requires that the agreement has been established in a written form.³⁵⁸ In order to be executed, an obligation must be drafted in a clear and concise way. The mediated outcome must not only be laid down in writing; it also needs to specify the rights and obligations of the parties in a way that they can be enforced. According to Article 6 of the Mediation Directive, another specific requirement for the enforceability is that both parties have given their explicit consent to the confirmation of enforceability. The explicit consent of the parties can be ascertained by various requirements and the degree of formality employed by the Member States differs. The basic and simplest form of showing consent would be that the parties give their explicit consent to the enforceability when signing the mediated settlement agreement at the end of the mediation. Once the parties have given their explicit consent, according to the Mediation

354 Compare Directive on Consumer ADR, Recital 43.

355 EUIPO Mediation Agreement, Clause 7. EUIPO Rules on Mediation, Section 8.2.a.

356 MfN-Mediation Rules 2017, Article 10.

357 CEDR Model Mediation Agreement 2017, Section 7.

358 Mediation Directive, Article 6.

Directive, either of the parties may request the confirmation of enforceability of the agreement by a court.³⁵⁹

3.3.2 Agreement on the settlement of a dispute in civil and commercial matters

For an agreement to be binding the parties need to agree on the essential elements of the agreement. The PECL (*Principles of European Contract Law*) in this respect speak of *sufficient agreement*, which means that the terms have been sufficiently defined by the parties so that the contract can be enforced or that the terms can be determined under the principles (Article 2:103). The parties therefore need to agree on their main rights and duties in respect of the settlement of a dispute. A sales contract, for instance, requires the parties to agree on the object of the purchase and the price to be paid. It may even be sufficient that the object of purchase and the consideration can be determined. If the parties do not agree on the essential elements of the agreement and the subject of the agreement cannot be determined from the circumstances, the agreement does not become binding. What then are the essential elements on which the parties need to agree in the mediated settlement agreement? An agreement reached in mediation has the purpose to resolve a dispute. One can therefore claim that the essential elements of a mediated settlement agreement are first, the issues that are under dispute (this would correspond to the object of the purchase); and second, the instruments to resolve the dispute (this would be comparable to the consideration that is traded in to settle the dispute).

Comparative research has shown that there is no universal approach with regard to the essential elements of the mediated settlement agreement. Various legal systems use the traditional legal institute of a *settlement* as one instrument to legally implement the mediated outcome.³⁶⁰ The traditional settlement institute requires that the parties assert a legal right and that the existence or extent of the right is disputed or unsecure. In respect of the substantive terms of the settlement, depending on the jurisdiction, it may be required that both parties make mutual concessions in respect of the disputed rights and obligations.³⁶¹ In order to reach a settlement, the parties need both to reframe the conflict into a legal dispute regarding legal positions, and to agree on the obligations they are willing to enter

359 On the consent requirement regarding the declaration of enforceability, see Chapter 3.5.1 for more detail.

360 Traditional settlement institutes are often set forth as specific contract types: Hopt and Steffek 2013, p. 43. Roth and Gherdane 2013, pp. 273–274. Tochtermann 2013, p. 544. Deckert 2013, p. 473. Schmiedel 2013, p. 719. In France this specific settlement institute is referred to as *transaction*, in Germany as *Vergleich*: Alexander 2009, p. 305.

361 For instance, under German law a settlement requires both parties to make concessions: Eidenmüller 2001, p. 43.

into, to settle the dispute. If taken literally, they need to make mutual concessions that are legally relevant.

The traditional settlement is not the only instrument to transform the mediated outcome into a legally binding agreement. The outcome of a mediation may also take other forms: it may constitute an ordinary agreement, the validity and interpretation of which is to be assessed under general principles of contract law.³⁶² The agreement may be subsumed or be combined with other types of contract, such as an acquittal or a donation. Such an agreement may still require uncertainty or a dispute regarding a right. However, when the contract entered into between the parties is an ordinary contract, and not a settlement in the traditional sense, it does not seem necessary for the parties to articulate a distinct legal dispute or position that has been settled in the mediation. Accordingly, an agreement entered into at the end of the mediation may also be binding if the parties articulate a conflict that does not relate to legal rights or fail to articulate or define the dispute they intend to solve.

Such a general approach appears to be insufficient though, if one takes into consideration that the agreement constitutes the outcome of a dispute resolution mechanism that is intended to settle a dispute *within* the legal system. The purpose of the mediated settlement agreement is to achieve the settlement of a dispute that could alternatively be resolved in a court. The *Befriedungsfunktion* of the mediated settlement agreement, hence the function to conclude a dispute, requires that there is a dispute and that a right or the extent of a right is unsecure or disputed either in respect of its legal or factual basis. An agreement that does not determine a legal dispute with sufficient preciseness would then not be sufficiently definite to settle the dispute. This means that the parties have to articulate and determine the *legal* dispute they settle in the mediated settlement agreement.

The Mediation Directive determines the disputes that may be the subject of mediation, and thereby restricts the parties' contractual freedom to determine the contents of the mediated settlement agreement further. Article 1 of the Mediation Directive sets out the scope of application as "*civil and commercial matters except as regards rights which are not at the parties' disposal under the relevant applicable law*". *Civil and commercial matters* is a concept used in European procedural instruments and European conflicts of law rules to demark the scope of the *ratione materiae* of the respective legislative instruments.³⁶³ The concept of civil and commercial has an *autonomous* meaning and is to be construed in accordance with the law of the European Union and the case law of the Court of Justice without recourse to the *lex fori*, the *lex causae*, or *international*

³⁶² Hopt and Steffek 2013, pp. 43-45.

³⁶³ Brussels I Regulation (recast) (EU) No 1215/2012. Brussels II Regulation (EC) No 2201/2003. Rome I Regulation (EC) 593/2008. Rome II Regulation (EC) No 864/2007.

conventions.³⁶⁴ As a consequence of the autonomous interpretation, the nature of the relationship between the parties and not the court that is seized or national distinctions between public and private law are decisive for determining whether a matter is civil or commercial in nature.

In line with other European instruments, the Mediation Directive expressly excludes from its scope of application only revenue, customs or administrative matters and disputes regarding the liability of the state for acts and omissions in the exercise of state authority (*acta iure imperii*). In addition, the question of whether a right is at the parties' disposal is to be assessed in accordance with applicable substantive law. As a main rule, civil and commercial matters may be freely settled by the parties. The broad substantive scope of the Mediation Directive reflects a generic regulatory approach that takes no account of the nature and field of disputes nor different mandatory requirements within civil and commercial law.³⁶⁵ The Mediation Directive applies to all sorts of disputes ranging from disputes in the area of employment and consumer law that are characterized by a considerable level of mandatory law to commercial disputes, where mandatory law is scarce. Applicable national law may restrict the parties' opportunity to settle a dispute regarding a specific civil or commercial right. In fact, the Member States have implemented these provisions very differently³⁶⁶ with some excluding certain areas of law, such as labour law and consumer law, others excluding certain rights from the declaration of enforceability, and other Member States referring to their general contract law through which parties may mediate on all matters that are at their disposal.³⁶⁷

Contract law does not take account of elements of the dispute that are not legal in nature. It therefore does not matter whether the dispute has been suitable for mediation in the first place.³⁶⁸ Disputes may be unsuitable for mediation if a party seeks to achieve a goal that can only be granted by a court or where the dispute concerns a matter of principle.³⁶⁹ This is the case when the resolution of the dispute requires an assessment of a question of law or facts. In these cases, the parties do not seek any interest-based solution, but an examination of disputed facts or an

364 Illmer, Nuyts and Fitchen 2015, pp. 61. Hess, Pfeiffer and Schlosser 2007, p. 34. On the application of the concept of civil and commercial matters: Rogerson 2016, pp. 63.

365 The approach of the Mediation Directive is different from the approach that would have been preferred by the majority of the respondents to the Green Paper, who would have suggested a differentiation in accordance with particularities of different areas of civil and commercial law: Summary of responses to the Green Paper.

366 Esplugues 2014b, p. 551.

367 Spain excludes several areas of law: Buhigues, Moreno, Calabuig and Monzonis 2014, p. 429. Finland expressly excludes the confirmation of enforceability in respect of child custody, right of access or maintenance payable to a child: Finnish Mediation Act (394/2011), Chapter 3 Section 18. par. 4.

368 Various instruments have been elaborated to analyse the suitability of a dispute for different forms of dispute resolution in order to choose the most appropriate forum for resolving the dispute: Sander and Rozdeiczer 2006, pp. 36. Kressel 2006, pp. 731. On conflict diagnosis: Coltri 2010, p. 50. Sander and Goldberg 1994.

369 On the contra-indications to mediation: Sander and Rozdeiczer 2006, pp. 36–37.

evaluation of their legal position by an authority is required.³⁷⁰ Disputes may also be unsuitable for mediation, if there is a strong imbalance in power between the parties.³⁷¹ For instance, one party may be emotionally stressed or dependent and therefore unable to take a self-determined position. If a dispute is unsuitable for the mediation process, there is a higher risk that mediation will fail, that the parties will be unable to achieve their goals or that the outcome appears unfair. However, the suitability of the dispute for mediation does not constitute a condition for the validity of the mediated settlement agreement. The agreement is therefore valid even though the matter has not been suitable for the mediation, provided that the parties have articulated the dispute with sufficient preciseness.

3.3.3 Agreement on positions and transformation of interests and needs

The parties must not only define the legal dispute, but also the rights and duties they assume to settle the dispute. In the legal system, the settlement of a dispute means that the parties agree on their legal positions: the dispute is settled when the legal claims made by the parties are satisfied. Mediation starts from a wider concept of dispute. Mediation theory does not restrict the resolution of the dispute to the settlement of a legal position asserted by the parties but requires the mediated outcome to satisfy the parties' interests and needs which can be divided into substantive, procedural and psychological, past and future interests and needs.³⁷² A settlement of a dispute in a wider sense would require that not only the legal positions, but also that the parties' interests and needs are addressed in the settlement.

The parties' substantive, procedural and psychological interests and needs may be satisfied by substantive, procedural or psychological instruments. Substantive interests may be satisfied by paying a certain amount of money or delivering a good or service or by agreeing on specific performance terms. They may also be satisfied by entering into a cooperation agreement or selling a company. Procedural interests may be addressed by providing a dispute resolution mechanism in case of future disputes, or by introducing procedural mechanisms to monitor and solve future

³⁷⁰ Sander and Rozdeiczer 2006, p. 31.

³⁷¹ Sander and Rozdeiczer 2006, p. 29.

³⁷² *Moore* defines interests as desires, concerns or wishes that a party to a dispute wants to have satisfied, and needs as basic necessities for human survival and psychological wellbeing. He distinguishes between substantive, procedural and psychological interests and needs: *Moore* 2014, pp. 128–129. Examples of substantive interests are interests in respect of goods, services or money that a party seeks to satisfy. Procedural interests relate to the way dispute resolution takes place, settlement is implemented, and future conflicts are resolved. Psychological interests and needs are understood as the emotional and relationship needs that the parties seek to satisfy. Similarly: *Ervasti and Nylund* 2014, p. 229.

conflicts. Psychological interests may be satisfied by agreeing to hold regular talks, improving appreciation of the other party, or by receiving an apology or public announcement about a mistake. It would be wrong to draw the conclusion that the satisfaction of substantive interests always requires satisfaction by substantive means. On the contrary, a substantive interest may be satisfied by procedural means, and *vice versa*.³⁷³ For instance, the parties may agree on a fair process to deal with uncertainties and risks in respect of substantive interests or establish a procedure to monitor the implementation of the settlement. Also, psychological interests can be satisfied by providing a procedural or substantive solution.

Ideally, mediated outcomes do not only satisfy the parties' procedural, substantive and psychological interests, but are also implemented by means of compliance-inducing procedures. Mediated outcomes enjoy a high degree of voluntary compliance, because the parties are psychologically and structurally committed to the mediated result. Effective compliance requires both that the parties' various interests are satisfied, and that the mediated outcome is clearly defined and compliance easy to monitor.³⁷⁴ When reaching a settlement, mediators are advised to achieve a mediated outcome that is "*... a clear and reasonably comprehensive record of what has been agreed by or on behalf of each of the parties If a further detailed agreement is contemplated (for example, a new franchise agreement), its broad shape should be set out, and reference made to any standard form agreement to be used as a template. Advisers will be careful to avoid drafting what is merely 'an agreement to agree', which is unenforceable in law.*"³⁷⁵

In the legal system, the substantive, procedural and psychological interest and needs are only addressed to the extent that they are reproduced as legal commitments that specify the parties' rights and obligations with sufficient clarity. An effective compliance mechanism within the legal system would further require that the parties agree on a compliance mechanism that can be monitored within the legal system. Model mediated settlement agreements provide a good example of the need to transform interests and needs into legally binding obligations. They

373 Moore 2014, p. 406. A common technique for securing payment is the establishment of an escrow account and an agreement on the conditions under which the escrow agent effects the payments. The parties may also establish a permanent procedure to prevent or resolve conflicts regarding damages that are unsecure or cannot yet be quantified or a risk that cannot yet be assessed with sufficient certainty. Such a technique is common in construction projects.

374 Compliance is voluntary if the parties would not be obliged to do so but could also act differently. Compliance is involuntary, hence not depending on the will of the parties, when the parties can be forced to comply with the mediated outcome, either because they have entered into a contract or because the parties have chosen a form of a self-executing settlement: Moore 2014, pp. 455.

375 CEDR Mediator Handbook 2010. A workable mediated settlement agreement meets the criteria of being specific, measurable, achievable, realistic and timed: Hacke 2013, pp. 198. For a sample settlement agreement (for a general civil and commercial case): Boule and Nestic 2010 Appendix 4. CEDR Model Settlement Agreement 2017.

usually contain a set of legal obligations that seek to satisfy the parties' interests and needs and induce compliance.³⁷⁶ The substantive, procedural and psychological interests are reframed into legal communications that are binding.³⁷⁷

It is not a condition for the validity of the mediated settlement agreement that the dispute is resolved in its entirety and that all interests and needs are met or have been reframed into legally binding obligations. For the mediated settlement agreement to be valid, it is sufficient that the parties agree on the settlement of a dispute and an obligation that may be declared enforceable. The validity of the settlement agreement requires neither that the mediated settlement agreement provides for a compliance mechanism that is valid within the legal system, nor is there any requirement for the mediated settlement agreement to be creative or to go beyond the settlement of the positions of the parties. Consequently, the satisfaction of the parties' psychological, procedural or substantive interests and needs may remain incomplete or not effective, even though the dispute has been settled within the legal system and the mediated settlement agreement is enforceable in accordance with the Mediation Directive.³⁷⁸

Mediation serves to settle a dispute that has legal and non-legal elements. The purpose of the mediated settlement agreement is to settle a dispute within the legal system, to specify the obligations of the parties that the parties have agreed on in order for the dispute to be settled, and to induce compliance within the legal system. The mediated settlement agreement clarifies the legal relations between the parties and sets forth the parties' rights and obligations in a way

³⁷⁶ The CEDR Model Settlement Agreement is structured in three parts: The first part terminates or amends the disputed rights and obligations and deals with the resolution of the dispute itself. This part of the agreement is directed towards the parties' past relationship. In the case of a monetary debt, the parties are requested to specify the amount, day and place for the payment and to state, whether the payment is meant to exclude taxes, such as VAT or interests. The parties agree on the performance of the respective substantive obligations and the effects of the agreement with regard to an ongoing litigation. In the second part, the parties deal with their future relationship by creating a set of binding or non-binding rules and promises. Model agreements may also contain a reference to the future cooperation of the parties. Such future cooperation may consist of legally framed cooperation between the parties, such as the entering into a licensing agreement, the establishment of a joint venture which may take place by way of a reference to a contract template, or by setting out the main terms of the contemplated future agreement. Thirdly, the parties address their procedural needs in respect of future conflicts. The dispute resolution clause of the model agreement provides for a precise legal framework for future dispute resolution with mediation to be used as the primary instrument of dispute resolution and the escalation of the dispute to arbitration or litigation: CEDR Model Settlement Agreement 2017. For another example: Boule and Nesić 2010, p. 517.

³⁷⁷ Furthermore, one may distinguish between legal obligations that solve the existing legal dispute in relation to a certain right and terminate a legal relationship and norm creating obligations that concern the future relations between the parties. *Norros*, in his analysis of the mediator's liability, distinguishes between a mediation agreement that serves the resolution of the dispute and one that serves the development of the contract that has been subject to a breach: *Norros* 2005, p. 472. The commitments may also be distinguished according to commitments that are substantive in nature and commitments that have a procedural effect. The different legal commitments, substantive, procedural, norm creating and extinguishing - in their entirety - are meant to resolve the dispute at hand.

³⁷⁸ Another question is how the legal system deals with mediated settlement agreements that contain legally binding and legally non-binding rights and obligations.

that they may be enforced. In order to achieve a change in their legal relations, the parties must transform a conflict into legal terms and the mediated outcome into legal rights and obligations. The final resolution of an existing legal dispute would require all legal rights that have been asserted by the parties to be covered and dealt with in the mediated settlement agreement. The resolution of the legal dispute does not require the parties' psychological, substantive and procedural interests and needs that remain outside the legal system to have been addressed or satisfied. Consequently, the elements of the dispute that have not been reproduced within the legal system may remain ongoing. A lack of congruency cannot be resolved entirely with the instruments of the mediated settlement agreement but must be resolved within the mediation procedure or by establishing a procedural mechanism subsequent to the mediation.

3.4 Challenging the validity of the mediated settlement agreement³⁷⁹

Typically, contract defences relate to the way the contract comes into existence. When examining the validity of the mediated settlement agreement, one therefore feels obliged to ask whether the fact that the mediated settlement agreement has been agreed subsequent to mediation can remain without any attention. Some specific elements that distinguish the mediated settlement agreement in respect of its formation from an ordinary agreement are raised here.³⁸⁰ When the parties enter into a mediated settlement agreement, the parties make their declarations of intent subsequent to a procedure that is meant to increase the parties' self-determination. The aim of mediation is to explore the interests and needs of the parties. In mediation, the interests and needs of the parties are an essential part of the formation of the parties' intention. If this aim of mediation is taken seriously, settlements that do not correspond to the parties' interests and needs should always be open to challenge.

But mediation is also meant to increase the rationality of the decision-making of the parties.³⁸¹ The decision-making in mediation is a structured and conscious process that has the purpose of identifying all issues, interests and needs and coaching the parties into the solution that satisfies these issues, interests and

379 The Chapter does not seek a comparison between the legal systems or an in-depth analysis of a particular legal system, but seeks to elaborate the consequences of the 'juridification' of the dispute and the outcome of mediation within the framework of contract law.

380 Some authors deny that a difference exists between a mediated settlement agreement and an 'ordinary' agreement and consider that they both need to be construed according to the same principles of general contract law: Salminen 2012, p. 23.

381 See above Chapter 2.3.3.

needs. One may therefore claim that the declarations of intent that the parties make subsequent to a mediation differ from the declarations of intent made by parties subsequent to ordinary contract negotiations. If the assertion that mediation constitutes a process that rationalizes the parties' decision-making is taken seriously, the promises made by the parties subsequent to the mediation will correspond with the parties' intentions, interests and needs. As a consequence, the mediated settlement agreement is presumed to constitute the common intention of the parties and there is therefore a presumption of bindingness. In this respect, the mediated settlement agreement resembles a commercial agreement that results from lengthy and thorough negotiations. For these agreements it is generally accepted that the contract document constitutes the common intention of the parties and that the bindingness of the commercial contract is the guiding principle in the interpretation of the agreement.³⁸²

Another factor that characterizes the formation of the contract is the presence of the mediator. The presence of the mediator *per se* changes the interaction and communication between the parties and the dynamics of the interaction of the parties.³⁸³ The presence of the mediator also has an impact on the flow of information between the parties. The parties may share information in caucuses with the mediator without the other party being aware of it. A major contrast between mediation and ordinary contract negotiations is that the statements made by the parties and the mediator during the mediation procedure are subject to specific contractual confidentiality provisions.³⁸⁴ Confidentiality is one of the cornerstones of mediation, enabling the communication between the parties, but it also shields the outcome of the mediation process from the process itself. If the statements made by the parties and the mediator during the mediation are confidential, it no longer matters *how* the parties acted, but only *that* mediation has taken place. Due to the confidentiality obligations, the parties' statements and submissions during the mediation that might provide evidence about the parties' true intention cannot be used as a means to establish the true intention of the parties.

It is obvious that these distinctive features of the contract formation increase the bindingness of the mediated settlement agreement and the significance of the mediated settlement agreement. This is because of the presumed incorporation of the parties' intention in comparison to contracts that are not the result of a mediation. The parties' intention itself is an internal state of mind that is difficult to discern in any other way than by means of communications for which the only

382 For commercial agreements, see Pönkä 2013, p. 922.

383 Simmel 1964, pp. 145, 149.

384 On confidentiality, see in more detail in Chapter 4.5.

evidence remains the mediated settlement agreement. A party's declaration of intent, however, may not correspond to the party's true intentions. In this case the declaration of intent is deficient.

In contract law, three situations in which deficiencies may occur can be distinguished.³⁸⁵ The first group concerns deficiencies when there is an *intentional* discrepancy between the party's intention and the expressed intention. Intentional discrepancies may play a role in respect of the mediation but might appear to be of minor importance in respect of the mediated settlement agreement itself. They will therefore not be discussed here any further.³⁸⁶ The second group concerns situations in which there is an *unintentional* discrepancy between a party's intention and the *expressed* intention. In contract, law this discrepancy is examined under the error doctrine. The third group concerns situations when there are deficiencies regarding the party's formation of intention. These deficiencies occur during the decision-making process when the parties' intention is formed. The group comprises several grounds on which the validity of the agreement may be challenged: a party may make a declaration of intent under duress or has been induced to the declaration of intent by fraudulent conduct. One party may abuse the other party's imprudence or lack of understanding.

In what follows, I will discuss deficiencies in a party's intention or expressed intention that have specific relevance in mediation. My purpose is to show the tension between mediation and the legal system in relation to deficiencies in the contract formation that relate to the foundation of the parties' decision-making in mediation, namely to mistakes regarding the parties' interests and needs and mistakes regarding disputed facts and the law. Thereafter I will discuss fraud and threat as elements of abuse that may affect the outcome of the mediation.

3.4.1 Interests and needs

A mistake can be described as the difference between a declaration of intent made by one party and the true intention of the party. In the case of a mistake, the party's declaration of intent does not mirror the true intention of the party. Deficiencies in respect of the intention may emerge either at the time when the parties make up their intention, when this intention is expressed or when the

385 On the distinction of the basic situations: see, for instance, Telaranta 1990, p. 283.

386 An intentional discrepancy between the party's intention and the expressed intention may occur not only in respect of the settlement agreement, but also in respect of the mediation itself. The parties may simulate a mediation, or one party may enter into mediation without the intention of obtaining a settlement agreement and binding oneself. A simulated mediation may occur when the law prescribes a mandatory mediation and the parties comply with this obligation without being truly interested in reaching an agreement. A party may also start mediation with the intention of getting information or to prolong a process without having the intention to settle the issue. A settlement agreement will not usually be reached under these circumstances, but the parties will at some point discontinue the mediation.

intention is transmitted to the other party.³⁸⁷ Not every mistake is relevant and constitutes a ground for the invalidation of the agreement. Some mistakes are irrelevant. They are not recognized by the legal system as having an effect on the validity of the contract. According to a common distinction in contract law, errors in the motive are considered legally irrelevant while errors in the expression are considered relevant, provided that they are essential.³⁸⁸ One speaks of a mistake in motive (or error in motive) when the promisor's intention is formed incorrectly because the promisor has made wrong assumptions regarding a circumstance he or she considers relevant to the conclusion of the transaction.³⁸⁹ The intention expressed by a party may be based on different and diverse motives, interests and needs that are conscious or unconscious and may relate to past, present or future facts. The promisor is mistaken in respect of the reality on the basis of which he or she forms his or her intention. An irrelevant mistake in motive, for instance, is at hand where a person acquires shares, because he or she has a wrong perception of the development of the market value. According to the will theory, wrong assumptions regarding the reality on which the intention is based are irrelevant. This is because motives are not considered to be part of the will, but part of the decision-making process leading to the legally relevant will. As a general rule, mistakes in respect of the motive may therefore not be relied upon to request the avoidance of the contract.³⁹⁰ They may only be taken into account when there is an additional element, such as serious discrepancies in respect of the performance of the party, where the other party is aware or should have been aware of the mistake and takes advantage of it or where the motives form an essential element of the contract itself.³⁹¹ Mistakes in the expression (or errors in the expression) are errors regarding the contents of the declaration or regarding the expression of the will. Errors in the expression may occur when there is a discrepancy in the intention of the parties and the expression of the intention of the parties, hence where the

387 See for instance Telaranta 1990, p. 283.

388 The distinction between mistakes in motive and mistakes in the expression is common in continental systems. For examples: Lando and Beale 2000-2003, p. 238. Sefton-Green 2009, pp. 60–62. The reliance theory protects the addressee of the declaration of intent. According to the reliance theory, a mistake is only relevant if the addressee was or should have been aware of the mistake.

389 See for instance: Mäkelä 2010, p. 7. The differentiation between mistakes in motive and mistakes in the expression is not easy to draw and differs in different jurisdictions. Kötz and Zweigert found that the distinction between mistake in motive and mistake in expression is about 'subtle psychological considerations': Zweigert and Kötz 1987, p. 96. On motives in the will theory: Pöyhönen 1988, p. 121.

390 The distinction can be traced back to *Friedrich Carl von Savigny*. According to *Savigny* motives cannot be relevant "...das Wollen ist eine selbstständige Tatsache, die allein für die Bildung der Rechtsverhältnisse von Wichtigkeit ist, und es ist ganz willkürlich und grundlos, wenn wir mit dieser Tatsache jenen vorbereitenden Prozess so verbinden, als ob derselbe ein Bestandteil ihres Wesens wäre." Savigny, Friedrich Carl von 1981, p. 113. The legal order thereby seeks to protect the party who is not aware of the internal motives and relies on the expression of intent of the other party: Hemmo 2003, p. 391.

391 In the Nordic jurisdictions, a mistake in motive may be invoked, if it would be against honour and good faith to hold on to the contract: Mäkelä 2010, p. 153. For Germany and Austria: Zweigert and Kötz 1998, p. 414.

parties express their will incorrectly.³⁹² These errors concern situations in which the intention is formed correctly, but there are deficiencies in respect of the way this intention has been expressed. The test that has been applied to distinguish between mistakes in expression and mistakes in motive is whether the mistake relates to *what* the party wants or merely as to *why* the party wants it.³⁹³

Interests, aims and needs are motives based on which the parties make a declaration of intent. In contract negotiations, the formation of intention is usually an internal process that is not further explored. In mediation this is different. Mediation promises the parties an active and direct participation in the dispute resolution, control over the principles of fairness to be applied in the process and an opportunity to create options for a settlement in accordance with their interests and needs and to control the final outcome of the dispute resolution process.³⁹⁴ This requires the parties to be capable of identifying the issues to be solved, to create criteria they consider to be fair and are aware of the interests and needs that underlie their positions.³⁹⁵ The mediation process and diverse mediation techniques are used to uncover the parties' interests and needs and to help the parties shape their intention, improve their communication and agree on an outcome. At the end of a *successful* mediation, the parties' declarations of intent correspond to the parties' interests and needs and principles of fairness. In mediation, the parties' awareness of their interests and needs is an essential element of the parties' self-determination. Motives matter. A mediated outcome that is contrary to the interest and motives of a party can easily be considered to be contrary to the self-determination of the party.

The legal system values assumptions, interests and needs in a way that is different from the social practice of mediation. This has been described as a difference in focus: "*While the focus under contract law is on what the parties said, the focus in a mediation should be on what the parties want.*"³⁹⁶ The parties may enter the mediated settlement agreement on the basis of wrong assumptions: a party may be mistaken as regards the existence of the dispute, and wrongly assess his or her needs and interests or the information that has been exchanged during the course of the mediation.³⁹⁷ From the legal point of view, the mediation process as such does not change the nature of the party's interests and needs. In the legal system, the interests and needs remain part of the decision-making

392 Mäkelä 2010, p. 7.

393 This test has been applied by the Austrian Supreme Court: Lando and Beale 2000-2003, p. 239.

394 Welsh 2001, pp. 16-17.

395 Welsh 2001, p. 19.

396 Thompson 2004, p. 556.

397 In contrast to a unilateral mistake, a common mistake regarding undisputed facts that form the basis of the settlement is relevant in many jurisdictions: Caponi 2015, p. 136.

process on the basis of which the promisor forms and expresses his or her intention. They only become part of a party's intention when they concern the contents of the declaration of intent itself. Whether a mistake in motive is relevant will be assessed in accordance with the law of the jurisdiction that becomes applicable under the international conflict of law rules. Most jurisdictions will consider wrong assumptions regarding motives, interests and needs irrelevant, regardless of the value they have in the social practice of mediation. Exceptions may only apply when there has been an additional element of abuse.

When assessing the relevance of the parties' interests and needs to the mediated outcome, one also has to take into account that they may not be revealed or that they may change during the mediation. The needs and interests that form the final basis of the intention of the promisor may be different from the needs and interests that have been expressed during the mediation. The parties may keep their needs and interests either to themselves or disclose them only to the mediator within the private sessions. The motives on which the communicated intention is based may therefore remain obscure to the mediator as well as to the other party. Moreover, the confidentiality obligations may restrict the mediator from sharing information with the other party and prevent an ex-post review of the interests and needs expressed by the parties in the mediation. The confidentiality restrictions further restrict the opportunity to challenge the contract, even when the declaration concerns the contents of declaration of intent itself. It follows that interests and needs will only be relevant to the validity of the outcome if they have been reproduced into legally relevant communications in the mediated settlement agreement and take the form of legal conditions or become part of the transactions itself.

3.4.2 Mistakes in relation to disputed facts and the law

Comparative research has shown a tendency to restrict defences based on mistakes when the outcome of the mediation is a traditional settlement agreement and therefore an agreement that has as its very purpose to end uncertainty and to settle a dispute.³⁹⁸ One could say that disputed facts form a distinct element of the traditional settlement agreement which means that at least one of the parties is mistaken in respect of facts that are essential to the agreement. The settlement agreement would lose its purpose if it could be challenged on the basis of a mistake

³⁹⁸ This tendency has been observed in several civil legal systems: Hopt and Steffek 2013, p. 45. There are statutory restrictions regarding the avoidance of settlement agreements, for instance, in Austria: Roth and Gerdhane, p. 274; Germany as set out in Section 779 of the German Civil Code: Tochtermann, 2013, p. 473; and the Netherlands: Schmiedel 2013, p. 473. See also Eidenmüller 2001, p. 212.

in respect of the disputed fact.³⁹⁹ There are several arguments in support of an analogous application of this principle to mediated outcomes. First, mediated outcomes are often concluded in the form of a traditional settlement agreement. Secondly, the purpose of the mediated outcome is to end a dispute in respect of the parties' controversial positions. The circumstance that there is a dispute already indicates that the parties have a divergent understanding either in respect of the objective truth or of their legal position.

While the exchange of information is considered to be an important element of the mediation process, its purpose is not to establish an objective truth or to end the uncertainty the parties may have in respect of their assumptions on legally relevant facts. In mediation, the exchange of information serves to analyse the sources and dynamics of the conflict and to find opportunities to solve the dispute. It involves the collection, analysis and interpretation of the facts that may be relevant for determining and understanding causes of a conflict and for elaborating alternatives for the solution of the conflict and agreeing on a settlement between disputing parties. While the process may increase the parties' capability of taking a self-determined decision by means of increasing the parties' understanding about the conflict and their needs and interests, the process does not necessarily reduce the parties' uncertainty in respect of disputed facts. When entering into the mediated settlement agreement, the parties accept the uncertainty of the disputed facts in the same way as when entering a traditional settlement agreement. One can therefore say that a party assumes the risk of uncertainties and that the party should therefore not be able to avoid the agreement should this risk materialize.⁴⁰⁰ As the change in perspective and not the establishment of legally relevant facts is the purpose of mediation, mediation would be without purpose if the parties were able to challenge the agreement on the basis of evidence or facts they obtained following the conclusion of the outcome in support of their own position.

A party may also be mistaken in respect of the legal position he or she has in the dispute and may therefore accept a solution that puts him or her at a disadvantage, if compared to the solution the party could have reached in a court. In this case, the party's assumption regarding the contents of the law does not correspond to the actual contents of the law in force.⁴⁰¹ One speaks of a mistake

399 Disputed facts need to be distinguished from undisputed facts that constitute the basis of the settlement according to the common understanding of the parties. According to several jurisdictions, a common mistake regarding the undisputed basis of the parties' settlement agreement may be relied on for challenging the settlement agreement: see for instance Section 779 of the German Civil Code. See also Caponi 2015, p. 136.

400 According to Article 4:103 (2) PECL "...a party may not avoid the contract if: the risk of the mistake was assumed, or in the circumstances borne, by it." Lando and Beale 2000-2003, p. 234. See also Jansen 2011, p. 648.

401 For the definition of mistakes of law: Mäkelä 2010, pp. 8–11. *Mäkelä* adopts a wide concept of mistake of law that includes mistakes regarding existing rules and principles, their interpretation and legal effect.

of law. According to the ancient principle of Roman law *error iuris nocet*, each party is itself responsible for mistakes regarding the contents of the law.⁴⁰² Errors in law have traditionally been regarded as irrelevant. The principle, however, is not absolute, and there is a growing tendency to consider mistakes of law under the same premises as mistakes regarding facts.⁴⁰³ The Principles of European Contract Law make this trend explicit in Article 4:103 on Fundamental Mistakes as to Facts and Law. Wrong assumptions regarding the legal position of the party or regarding the legal consequences the party has intended would entitle a party to request the invalidation of an agreement, if the mistake is fundamental and the other conditions are fulfilled.⁴⁰⁴

But should this rule set out in the Principles of European Contract Law also be applied in mediation? Mediation is a dispute resolution process that seeks to enhance a solution without reference to the parties' legal position in the dispute. The purpose of mediation is not to achieve conformity with the law, but to help the parties find a solution that is independent of what the law says.⁴⁰⁵ This does not exclude the parties from having assumptions regarding their relevant legal positions. In many cases, the parties will make their claims based on what they think they would achieve in a court. *Mnookin and Kornhauser* claim that the parties will not accept a result that puts them at a disadvantage in comparison with a result reached in a court. In their view, any outcome will therefore be an outcome that leaves the parties equal or better off than the outcome reached in a court. They note, however, that the parties' decision may be impaired by uncertainty, especially in cases in which the law is ambiguous and the outcome in court is uncertain.⁴⁰⁶ Uncertainty is one factor that may lead to a mistake of law. Another reason may be that a party is unaware of his or her legal position or the legal consequences of the mediated outcome due to a lack of or wrong information.

In a process that has the purpose of finding a solution independent from the law, the invalidation of a contract on the basis of a mistake of law appears to be a paradox. When the parties enter into a mediation, they take a conscious decision to find a solution in accordance with their own standard of fairness. While the parties may still use the law as an *endowment of sorts*, they take a deliberate risk

402 On the principle of *error iuris nocet* in Roman law: Zimmermann 1996, p. 604.

403 Caponi 2015, p. 135. Mäkelä 2010, p. 272. Lando and Beale 2000-2003, p. 240. Jansen 2011, p. 648.

404 See Article 4:103 PECL Fundamental Mistake as to Facts or Law.

405 "...mediation is commonly directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves.": Fuller 1970, p. 308.

406 "Divorcing parents do not bargain over the division of family wealth and custodial prerogatives in a vacuum; they bargain in the shadow of the law. The legal rules governing alimony, child support, marital property, and custody give each parent certain claims based on what each would get if the case went to trial. In other words, the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips—an endowment of sorts." Mnookin and Kornhauser 1979, p. 968.

that the outcome will not correspond to the outcome they may achieve in a court. The voluntary assumption of this risk is a factor that needs to be taken into account when assessing whether a party's mistake of law is relevant. Some jurisdictions exclude expressly defences based on mistakes in respect of disputed issues when the outcome of the mediation is a settlement agreement.⁴⁰⁷ The reasoning behind the principle of *error iuris nocet* also supports the argument that mistakes of law are irrelevant in respect of the mediated outcome. The principle of *error iuris nocet* was based on the idea that the parties knew or should know the law and acted negligently, if they failed to get acquainted with the law.⁴⁰⁸ The fact that the law is uncertain and not predictable has again been used as an argument to justify exceptions to the principle of *error iuris nocet* and has led to an approximation of mistakes of law and mistakes of fact. When the parties enter into a mediation, they deliberately – and not only negligently – either fail to get acquainted with the law or consider the law to be of little relevance to the mediated outcome. Under these circumstances, it is a party's own responsibility if he or she has misjudged his or her legal position.⁴⁰⁹

The mediated outcome may also have legal consequences that a party had not intended or lack the legal consequences the parties had intended. When agreeing on the mediated outcome, the parties may not pay attention to how the communications are reproduced within the legal system. However, in contrast to the formation of other contracts, the expression of the parties' intention in mediation is a conscious process. In theory, the entire mediation process serves the formation and expression of the parties' true intention. Mediators are trained to listen to the parties, to reframe the views expressed by each party in the process in order to explore what the party intends to express. Mediators are also trained to ensure that the mediated result corresponds to the intention of the party. In theory, mediation not only explores the intention of the parties, but also seeks to ensure that the outcome, hence the consensus reached by the parties, corresponds to a result that is satisfactory to the parties. Satisfactory does not mean anything else than that the solution reached corresponds to what the parties intended, hence corresponds to the intention of the parties.

Despite the consciousness of the decision-making process, it is possible that the mediated outcome does not correspond to the true intention of a party. First, the parties typically lack the legal knowledge to reproduce an interest or need as a legally relevant obligation or condition. As laypersons, they are not always capable of assessing the legal consequences of the mediated outcome, hence the consequences

407 Caponi 2015, pp. 135, 137. Lando and Beale 2000-2003, p. 240.

408 Mäkelä 2010, pp. 170, 192.

409 See fn 400.

that the legal order foresees irrespective of what the parties had intended. As the conflict resolution rests with the parties, the presence of the mediator does not change the situation. If self-determination is considered to be the leading principle in mediation, the mediator must refrain from actively intervening with the mediated outcome or giving legal advice. Besides that, the mediator is not necessarily a lawyer who is aware of the legal consequences the mediated outcome may have within the legal system.⁴¹⁰ Consequently, the mediated settlement agreement may not have the meaning a party had intended or may not achieve the consequences a party had intended. Such a problem may arise, for instance, when the parties fail to reproduce the parties' interest and needs as a legal obligation or as a condition precedent for the validity of the agreement. For instance, a party may be interested in an apology from the other party or in a public statement. When such interests are not reproduced as a condition precedent for the validity of the agreement, the agreement will generally be valid, even though the agreement does not correspond to the expressed intention of the party.⁴¹¹

A party may also change his or her mind after the immediate pressure of the mediation has fallen off.⁴¹² When leaving *the tunnel of the mediation*⁴¹³, a party may feel that the settled outcome is for some reason not as satisfactory as it seemed during the mediation. This may be for several reasons: parties behave differently when they enter into a formalized decision-making process. They become part of a communication process that is separate from the usual social system they belong to. They assume a role that is pre-designed. Also, the presence of the mediator adds to this formalization of the process and change of interaction. In practice, mediators may seek to keep the parties within this separate communication process to reach a solution. The change of mind that follows the change of systems does not constitute a ground for challenging the validity of the mediated settlement agreement.⁴¹⁴

Interests and needs, two elements of the conflict that mediation seeks to satisfy, lose their relevance in the legal system, unless they are reproduced as a

410 In some jurisdictions, non-lawyer mediators may be legally prevented from giving advice, as legal advice may constitute an unauthorized practice of law. For Germany: Tochtermann 2013, p. 560. It is another question whether a mediator has a general duty to ensure that the mediated outcome constitutes a binding agreement. Hacke holds the view that there is no general obligation: Hacke Andreas 2013, p. 223. *Taivalkoski and Wallgren* on the other hand consider that the lawyer-mediator has a general obligation to ensure that the mediation agreement is legally valid and works in practice: Taivalkoski and Wallgren 2000, p. 630.

411 Again, such mistake in the reproduction might be relevant, when it is a common mistake by the parties.

412 Coben and Thompson 2006, p. 78.

413 For litigation the procedural tunnel (*Trichter des Verfahrens*) has been described as a situation, when the parties assume certain roles, and create a procedural history that necessarily results in the final acceptance of the decision: Luhmann 1983, p. 115. See further Chapter 4.1.

414 A cooling-off period or a period of retraction enabling the parties to reconsider the decision without the constraints of the mediation process has been proposed as an instrument to ensure the true consent of the parties: Welsh 2001, p. 87.

legal relevant fact or obligation within the mediated settlement agreement. The mediated settlement agreement is valid even if it does not correspond to the parties' interests and needs and may only in rare cases be challenged. On the contrary, as the mediation is a process that is designed to explore the true interests and needs of the parties, the outcome expressed by the parties is *prima facie* based on their interests and needs and corresponds to the parties' true intention. A party's claim that there has been a mistake in the expression of the party's true intention therefore rarely be successful. As mediation does not have the purpose to establish the substantive truth or to determine the parties' legal position, uncertainty as regards the disputed facts and the legal positions are a typical element of a mediated settlement agreement which further decreases the parties' ability to challenge the mediated settlement agreement on the basis of a mistake as regards a fact or the law.

3.4.3 Abusive behaviour

Power increases a party's ability to succeed in negotiations. It also helps a party shape the process and the outcome of the mediation.⁴¹⁵ The bargaining power of a disputant may come from several sources. It may be based on financial resources, knowledge and information, a strong legal position, the ability to bring meritless lawsuits, moral conviction and certainty, in addition to several others.⁴¹⁶ The use or abuse of power has been addressed by critics of the mediation process who claim that the process does not sufficiently protect the interests of the weaker party.

The legal order treats power imbalances by introducing laws to protect the interests of the less powerful party.⁴¹⁷ Legislation has been enacted in the fields of consumer law, employment law and tenancy law to address the institutional imbalance between the parties. In a process that seeks to find a solution outside the law, the role of protective legislation to outweigh institutional imbalances decreases, however. Apart from institutional power imbalances, there may also exist individual imbalances that are not strictly related to the role or position of a party as a consumer, tenant or employee. Individual imbalances in the bargaining power may be corrected by means of contract defences based on flaws in the way the contract has come into being and by means of an adjustment of the contract.⁴¹⁸

There is a deficiency in the way a party has made up or expressed her intention, if a party has been coerced into making a declaration of intent and entering into a

415 Waldman 2011, p. 94.

416 Waldman 2011, p. 94.

417 Ganner 2003, p. 711.

418 According to classical contract law, contractual fairness is sought in the process of negotiating and concluding the bargain (procedural fairness). When the rules of contract formation are adhered to, there is no reason to interfere with the outcome (substantive justice): Atiyah 1995, p. 282.

contract the party does not wish to conclude. The legal order refuses to recognize declarations of intent made under physical coercion as this is incompatible with the requirement of freedom of contract.⁴¹⁹ In a mediation, physical coercion will play a role only in exceptional cases, as the presence of the mediator renders the exercise of immediate physical violence unlikely. Duress, however, may not only be exercised by physical violence. Parties may also be under psychological pressure to make a declaration of intent they would not have given, had they been truly free to decide otherwise. The legal system sanctions the exercise of certain forms of psychological pressure. Psychological pressure is considered to be duress or undue influence under certain circumstances, and such may constitute grounds for challenging the validity of an agreement.⁴²⁰ Psychological pressure, for instance, may be at hand where one party seeks to influence the intention of the other party by threatening the other party with negative consequences should the threatened party not give his or her consent to the agreement.

Many contracts are concluded not because the parties truly wish to enter into the transaction, but because a party has no better alternative and finds oneself under some sort of pressure to conclude the agreement. The exercise of psychological pressure is a common feature of contract negotiations. *Atiyah even* claims that there is no totally voluntary contract, as “*pressure and threats are implicit in the concept of exchange.*”⁴²¹ As some sort of pressure is inherent in many contractual negotiations, the line between lawful pressure and unlawful pressure is difficult to draw. Psychological pressure is considered to be duress and may be used as grounds for challenging an agreement, if the means used to exercise the pressure is unlawful.⁴²² Threatening another party’s health or life is unlawful.⁴²³ Unlawful pressure may also be exercised by threatening other than the highly protected interests of life or health, such as a person’s reputation or property. Also, threatening with the infliction of financial harm may constitute duress if the threat is considered illegitimate. Threatening through lawful means may constitute duress if a party seeks to achieve an unlawful advantage. Duress may also be at hand when the means used and the envisaged aim are lawful, but the use of a means for the particular aim is inappropriate.⁴²⁴ Also, an abusive use of a legal procedure may amount to duress

419 Promises made under physical coercion are not even considered a declaration of intent: Lando and Beale 2000-2003, p. 257.

420 Continental legal systems recognize that duress may include physical and psychological coercion. On duress in general: Kötz and Flessner 1996, pp. 318. Eidenmüller 2007, p. 111.

421 Atiyah 1995, p. 266.

422 Article 4:108 of the PECL: “*Threats “A party may avoid a contract when it has been led to conclude it by the other party’s imminent and serious threat of an act: (a) which is wrongful in itself, or (b) which it is wrongful to use as a means to obtain the conclusion of the contract unless in the circumstances the first party had a reasonable alternative.*” For examples: Lando and Beale 2000-2003, p. 257.

423 In continental systems, this is often referred to as grave duress.

424 Kötz and Flessner 1996, p. 320. Hemmo 2003, p. 355.

in some jurisdictions.⁴²⁵ A creditor who threatens to stop providing liquidity unless the debtor agrees to painful concessions exercises (psychological) pressure, as the debtor is left with the option of bankruptcy as the only alternative to a negotiated agreement. An employer, having discovered that an employee has committed a crime and caused damage, exercises (illegitimate) psychological pressure if he or she threatens to report an employee to the police unless the employee agrees to resign and pay damages. In practice, threatening with the termination or with breach of contract is often used in the renegotiations of a contract.⁴²⁶

A certain degree of psychological pressure is exercised in the mediation and this pressure will be a legitimate part of the bargaining process. In mediation, the parties typically threaten to instigate court proceedings to achieve the other party's consent to the agreement. It is also part of the mediation that the parties will evaluate their alternatives to a negotiated agreement. A party may therefore exercise pressure by changing the alternatives to a negotiated agreement to his or her own advantage or by changing the alternatives to a negotiated agreement to the disadvantage of the other party and attempt to persuade the party of the value of the other alternatives.⁴²⁷ However, there is no general normative concept when such persuasion turns into pressure and the pressure exercised becomes illegitimate.⁴²⁸ In this respect, mediation does not differ from usual contractual negotiations. When psychological pressure amounts to duress in usual contractual negotiations, it will also qualify as duress if it is exercised in mediation.⁴²⁹

Apart from the lack of a general normative concept of illegitimate psychological pressure in mediation, duress is a defence that is difficult to prove in connection with mediation. The threshold for the defence is high. The party raising the defence needs to prove that illegitimate pressure has been used and that this pressure was causal for signing the contract. In light of the procedure's confidentiality and the lack of comprehensive written records, it would be difficult to produce the necessary

425 Lando and Beale 2000-2003, p. 260 for France.

426 Lando and Beale 2000-2003, p. 258. According to *Hemmo*, a general rule according to which a threat to report a person to the police always amounts to illegitimate pressure cannot be established, but regard has to be made to the specific situation: *Hemmo* 2003, p. 357.

427 Korobkin 1999, pp. 1799.

428 *Eidenmüller* points out that there is no general normative concept of illegitimate pressure. He provides an economic analysis of illegitimate pressure and pleads in case of doubt in favour of the primacy of negotiated solutions. Only an obvious illegitimate pressure can entitle a party to request avoidance of the contract: *Eidenmüller* 2007, p. 122.

429 Brooker 2013, p. 99. Referring to the case *Farm Assist Ltd (FAL) v Secretary of State for the Environment, Food and Rural Affairs (DEFRA)* Brooker concludes that a mediation agreement may be as invalid as any other settlement agreement if coercion in the form of economic duress is exercised in order to obtain a settlement. In the *Farm Assist* case, the court dealing with an allegation of economic duress in mediation decided to call the mediator as a witness, but the case was discontinued and no decision was taken on the merits.

evidence.⁴³⁰ It has also been noted that deficiencies in the bargaining procedure cannot entirely be separated from the result of the bargaining procedure.⁴³¹ Courts are rather inclined to accept the defence of duress when the contract itself is substantively unfair or one-sided, an issue that will be explored in connection with the substantive fairness of the agreement.

The question of whether and how the mediator may interfere with illegitimate pressure is subject to controversial discussions. In most cases, the pressure will be exercised by the party that for some reason has bargaining power that is superior to the other's. Some authors claim that the mediator has a duty to interfere with imbalances in power by using different mediation techniques.⁴³² Others consider that the mediator has no duty of care with regard to the weaker party and interference in favour of the weaker party would be incompatible with the party's self-determination and the mediator's impartiality.⁴³³ As earlier stated, there is only a small difference between the use of superior bargaining power and making an illegitimate threat. Whether the line has been crossed is difficult to establish in the mediation by a mediator who is unfamiliar with a legal concept that lacks general definition. This needs to be specified on a case by case basis. As a consequence, the mediator might only intervene when such threat is serious and obvious.

Disclosure of information is crucial to the success of mediation. Success in mediation means that the parties agree on a decision that integrates their positions, interests and needs. This requires the parties to obtain information that is relevant to their positions, interests and needs. The information that is exchanged provides the basis for the communication of the parties, the parties' perception of the conflict and possible solutions as well as the outcome that will be achieved. But does this mean that the parties have an obligation to provide information that may be relevant to the other party, and if there is such an obligation, what is the extent of this obligation?

It is not uncommon in contractual negotiations for the parties to use information to their own advantage, "*puff, bluff or lie about their underlying interests and preferences*".⁴³⁴ While the legal order does not interfere with simple bluffing, telling lies may constitute fraud and the deceived party may be entitled to request

430 On confidentiality, see Chapter 4.5. A survey of US case law on mediation litigation has shown that agreements have rarely been challenged on the basis of duress. In the few cases in which the agreement has been challenged on the basis of duress, the defence was rarely successful: Coben and Thompson 2006, p. 82.

431 Atiyah 1986, p. 333.

432 Ganner considers that the duty to interfere arises from the mediator's impartiality that is to be understood as 'omnipartiality': Ganner 2003. *Ervasti and Nyland* stress that the mediator cannot interfere without losing his or her impartiality: *Ervasti and Nylund* 2014, p. 282.

433 For instance, *Eidenmüller* notes that a general duty of care cannot be deduced from the (German) Mediation Act: *Eidenmüller* 2013b, p. 165.

434 Mnookin 1992, pp. 241.

avoidance of the contract.⁴³⁵ Telling lies requires active behaviour. This is different from not disclosing facts that may be relevant to the decision-making of the other party. Also, the non-disclosure of information may amount to fraud when there has been a duty to disclose, hence to provide information on a material fact.⁴³⁶

It is widely accepted that there is no general duty of disclosure.⁴³⁷ In a liberal market society, a party has the right to use the information advantage in respect of the object of the exchange, like the market value, and opportunities to sell or buy the goods, especially if one party has gathered such information through his or her own efforts.⁴³⁸ However, there are instances when a party may have a duty to disclose information regarding the characteristics, application, and also regarding the legal circumstances pertaining to the subject matter of the contract.⁴³⁹ Such duty may arise when one party is a professional or has knowledge about relevant facts that are difficult for the other to discover. The question of whether there is a duty to disclose requires a weighing and balancing between the interests of the parties involved. A professional seller dealing with a consumer will need to disclose more information than a professional dealer dealing with another professional dealer. Also, there may be an increased duty to disclose in cases when one party has expert knowledge, has easy access to the information on material facts that the other party can only access with considerable effort or when one party had reason to trust the information given by the other party under the given circumstances.⁴⁴⁰

The circumstance that parties attend the mediation does not create a general duty of disclosure. Mediation does not have the purpose of establishing the facts in a comprehensive and objective way or to achieve informational symmetry between the parties. A general duty to disclose information would also weaken the parties' options for enforcing their rights in adjudicative dispute resolution procedures,

435 Wagner 2007, pp. 63–75 for Germany, France and the UK. Article 4:107 EPCL; Lando and Beale 2000–2003, p. 252. Hemmo 2003, p. 360.

436 Kötz and Flessner 1996, p. 302. There are major differences between the legal systems in respect of pre-contractual duties to disclose information. While continental systems are prepared to recognize that non-disclosure may amount to fraud, if a party deliberately fails to disclose a relevant fact, common law systems do not “*recognize any general duty of disclosure, even when a party knows that the other party is ignorant of a relevant fact and would not contract if he knew the truth,*” but there are exceptions when there is a confidential relationship between the parties: see Lando and Beale 2000–2003, p. 256. The PECL provide for the avoidance of the contract in case of fraudulent non-disclosure of any information which in accordance with good faith and fair dealing should have been disclosed (Article 4:107 PECL).

437 Lando and Beale 2000–2003, p. 256.

438 Kötz and Flessner 1996, p. 304. See in the light of an economic analysis: Wagner 2007, p. 76. Hemmo 2003, p. 277.

439 For Finland: Hemmo 2003, pp. 293, 360.

440 The scope of this contract defence is different in different jurisdictions. According to the PECL, several factors should be taken into account in order to assess whether good faith and fair dealing required that a party disclosed particular information: including whether a party had special expertise, the cost to it of acquiring the relevant information, whether the other party could reasonably acquire the information for itself and the apparent importance of the information to the other party (Article 4:107 (3) PECL).

in cases when mediation fails. In the context of mediation, it is therefore more appropriate to speak of a right not to disclose information than of a duty to disclose information. A general duty to disclose information would collide with the parties' right to possess and use information to their own advantage in subsequent legal proceedings.

However, a typical characteristic of mediation is that information is collected and exchanged, not for the purpose to establish a substantive truth, but for the purpose of increasing the options of the settlement. In the exploration phase, the mediator seeks to gather relevant information to develop an understanding of potential or actual sources of the dispute and possible approaches, procedures, and strategies to address and resolve them.⁴⁴¹ This changes the dynamics of the exchange of information in comparison to usual pre-contractual negotiations in which information is not exchanged or gathered in a systematic way. In the course of the mediation, the parties will be asked questions. While the parties have no general duty to disclose information, there is no right to lie either. The parties may not knowingly or actively mislead the other party.⁴⁴² Once asked the right question, the parties need to tell the truth on facts that may be material to the decision-making of the other party.

With regard to the systematic exchange of information, one might conclude that the contractual defence of fraud secures the parties' opportunity to take a rational decision based on information gathered and shared during the process. In practice, this is not the case. First, the criteria of fraud are difficult to meet: for instance, according to the Principles of European Contract Law a party must not only show that the other party made a misrepresentation as regards matters of fact or law and intended to deceive, but also that the party which was given the incorrect information relied on it. Moreover, the statements must relate to statements of law and facts existing at the time of the contract.⁴⁴³ A party may make misleading statements regarding motives and interests in the mediation. Opinions regarding future developments or assessments regarding the bottom line of the settlement proposal may be relevant to the decision-making of the other party. However, a party that relied on a misleading opinion will rarely be entitled to avoid the contract. This is because contract law does not sanction lies in respect of information other than facts or the law. Also, the lack of written

441 This is referred to as the 'exploration phase' of the mediation. See Moore 2014, p. 238.

442 Wagner 2007, pp. 72–75. *Wagner* examines in his article the right to lie in pre-contractual negotiations. He considers information is a property right which requires in his view that there should be a right to lie, where the questions are intrusive: Wagner 2007, p. 101.

443 Article 4:107 PECL. Lando and Beale 2000–2003, p. 252. For Germany: Hacke Andreas 2013, p. 213. In the US the fraud defence in mediation related litigation was successful in 9 out of 55 cases: Coben and Thompson 2006, p. 80.

records and the confidentiality of the procedure are reasons why fraud defences will only rarely be successful.

Secondly, in mediation it is fairly common to hold private meetings between one party and the mediators - so called caucuses. The fact that it is possible to hold private meetings is one reason for having recourse to mediation.⁴⁴⁴ By means of the private meetings, the parties are in a position to maintain the informational barrier that protects their interests and at the same time increase the exchange of the information that is necessary for collaborative bargaining. Consequently, the information shared with the mediator may differ from the information that is shared with the other party. The mediator may accumulate information that could be material to the mediated outcome. The mediator, however, is in general not duty-bound to disclose the information to the other party. In fact, standard mediator agreements either prevent the mediator from disclosing information to the other party, or making disclosure subject to the consent by the disclosing party. The caucus leads to different levels of truth within the mediation with the mediator having the most comprehensive picture of the information that may be material for the decision-making process without having an obligation or right to share this information.⁴⁴⁵

It is another question of whether in respect of the mediator, the parties have a duty to disclose or an obligation not to lie, when asked. The mediator does not enter into the mediated settlement agreement and therefore cannot be the deceived party. However, when a party discloses information to the mediator knowing that the mediator will disclose the information to the other party, the mediator is to be treated as a simple communication transmitter, an agent used to deceive the other party. Such a statement is likely to be seen as a statement made directly between one party to the other.

444 Mnookin considers that negotiations involve a tension between: (a) discovering shared interests and maximizing joint gains and (b) maximizing one's own gains where more for one side will necessarily mean less for the other: Mnookin 1992, p. 238. This tension leads to strategic barriers to collaborative bargaining as it is not efficient for a party seeking to maximize its gains to share information with the other party. This strategic barrier may be overcome by involving a neutral third party: Mnookin 1992, p. 248.

445 Whether the mediator under certain circumstances has a legal duty to act against his or her contractual obligations and to disclose certain information to the other party remains unclear within the context of mediation. The mediator might either disclose the truth and be in breach of the mediator's duty of confidentiality or be silent and thereby contribute to a mediated outcome that is based on wrong information. On the ethical problem: Waldman 2011, pp. 199. Waldman considers that mediators must avoid making knowingly material misstatements and correct a party's wrong material perceptions that have been induced by the mediator or the other party. At the same time, she acknowledges that "*imposing a duty to speak on the mediator is, however, a dicey business*" Waldman 2011, p. 202. On confidentiality, Chapter 4.5. See also Caponi, who considers that the mediator's failure to disclose all information might not only jeopardize the mediator's independence, but also be fraudulent: Caponi 2015, p. 139.

3.4.4 Substantive unfairness

Classical contract theory draws a systematic distinction between fairness in the way the contract comes into existence and fairness of the contract itself. It applies a procedural concept of fairness.⁴⁴⁶ It is considered that each party enjoying the formal capacity to contract is capable of deciding on the legal obligations it is willing to enter and to take the responsibility for its decision to enter into a binding relationship. Classical contract theory assumes that the process of bargaining between the parties leads automatically to a reconciliation of the interests between the parties. If the way the contract was concluded was fair and the parties agree to the bargain, the outcome is considered to be fair. According to classical contract theory, there is no substantively unfair contract as objective abstract criteria for measuring the fairness of the outcome do not exist.⁴⁴⁷ The adjustment of the contract in individual cases on the basis of considerations of substantive fairness considerations is therefore excluded.

The contract law of the welfare state follows a different dogma. According to the contract law of the welfare state, it is possible to interfere with the bindingness of the contract *in casu*, if the outcome is considered to be unreasonable. Reasonableness and not the freedom of contract constitute the guiding principle of the contract law of the welfare state. The interference with the parties' right to decide on their own contractual obligations is justified by requirements of substantive fairness. Substantive fairness is used as a corrective in respect of contractual relations that are contrary to what is considered to be just or reasonable.⁴⁴⁸ In some jurisdictions, substantive fairness finds its expression in legal provisions, such as in Section 36 of the Finnish Contracts Act, while in other jurisdictions, substantive fairness remains a matter of the case law of the courts or legal doctrine.⁴⁴⁹ Substantive fairness is also reflected in Article 4:109 of the Principles of European Contract Law regarding the invalidation or adjustment of the contract on the basis of an *Excessive Benefit* or *Unfair Advantage* and in Article 4:110 on *Unfair Terms not Individually Negotiated*.⁴⁵⁰

446 Atiyah 1995, p. 282. Ganner 2003, p. 43.

447 Atiyah 1995, p. 283. Pöyhönen 1988, p. 189.

448 Pöyhönen 1988, p. 186. *Pöyhönen* distinguishes between reasonableness of regulation (*sääntelykohtuus*) and reasonableness of adjustment (*sovittelukohtuus*). Reasonableness of regulation shows in general and is transmitted by legal rules. Reasonableness of adjustment means the contract is adjusted in order to correct *in casu* a contractual relation that is not just. Both are, however, an expression of the principle of reasonableness: Pöyhönen 1988, pp. 186, 262.

449 Lando and Beale 2000-2003, pp. 263. Ganner 2003. The approach to substantive fairness differs in the European jurisdictions and is linked to the contractual understanding adopted. On the differences between English law and Finnish law: Rudanko 2014, pp. 1008 - 1011.

450 Lando and Beale 2000-2003, pp. 261-263 and pp. 266.

Reasonableness means that the contractual exchange is in balance.⁴⁵¹ In the assessment of the reasonableness of the outcome, the contract as a whole and the way it came into existence are taken into account.⁴⁵² The imbalance of the outcome is a condition for the adjustment of the contract.⁴⁵³ In order to assess whether a contract is unreasonable, the outcome concluded by the parties needs to be compared to an external standard of reasonableness. This external standard of reasonableness can only be determined by a reference to what is generally considered to be just in a society.⁴⁵⁴ In the case of an economic contract disparity, the use of an excessively high price may be an indication of the unreasonableness of the contract. However, the external standard of justice may also be determined by reference to the protected interests of a party. Contracts may therefore be unreasonable if they are grossly one-sided or if they unduly restrict the freedom of the parties.

Also, mediation theory stresses the distinction between procedural fairness and substantive fairness.⁴⁵⁵ Procedural fairness is about the fairness of methods.⁴⁵⁶ Substantive fairness deals with the fairness of the mediated outcome. In mediation, the mediated outcome is considered fair if it satisfies the subjective standards, interests, values and beliefs of a party. The parties' subjective views of what is just and not the law become fundamental for measuring fairness in mediation.⁴⁵⁷ In addition to the parties' subjective notion of justice, a range of factors may play a role, whether a party wishes to settle a dispute. Although the solution may not be just according to the parties' subjective perception of substantive justice, the parties may consider a solution fair if all factors are taken into account. These other factors that may have an influence on the parties' sense of fairness range from the availability of financial resources to a simple wish to move on with one's life instead of prolonging the conflict in a court. Whether the mediated outcome is fair is for the parties to decide. The consent of the parties is an indication that the parties consider the agreement to be fair. By giving their consent, the parties communicate their standard of fairness. The parties' subjective standard of fairness does not necessarily need to reflect external concepts of justice, legal or social norms. The

451 Pöyhönen 1988, pp. 262.

452 According to Section 36 of the Finnish Contracts Act "*regard shall be had to the entire contents of the contract, the positions of the parties, the circumstances prevailing at and after the conclusion of the contract, and to other factors.*"

453 Pöyhönen 1988, p. 287.

454 Finding an external standard is a problem in the practical application of the principle of reasonableness: Pöyhönen 1988, p. 266.

455 Waldman 2011, pp. 4-6. Hyman and Love 2002.

456 Substantive and procedural fairness in mediation will be examined in more detail Chapter 4.4.

457 The term *substantive fairness* will be used here to describe an agreement that satisfies the parties' interests and needs and is not unjust. *Hyman* notes that the parties may also want to enter into an agreement that does not correspond to their private sense of justice: Hyman and Love 2002, p. 164.

standard of fairness applied may differ from the standard of the courts or lawyers or even from the standards of fairness of the mediator.

The controversial discussion regarding the accountability of the mediator in environmental mediation illustrates the difficulties of finding an objective standard that measures whether a mediated settlement agreement is to be considered fair. *Susskind* asserted that success in mediation should not only be judged from the point of view of procedural fairness for the parties, but also in terms of the fairness and stability of the agreement at large. He considered that a mediator mediating an environmental dispute was accountable for achieving a fair result that took account of the impact of the mediated outcome on unrepresented parties, public interest and the outcome of similar future disputes. In his view, outside environmental mediation or mediation involving public interests, the mediator was not accountable for achieving a fair result, as procedural fairness and the ethical behaviour of the mediator combined with the self-interest maximizing behaviour of the participants were presumed to be sufficient to produce just and stable agreements.⁴⁵⁸ The argument is therefore that fair mediation results in fair outcomes. This presumption may only be overcome when the mediated outcome is obviously contrary to public policy or against the law.⁴⁵⁹ For this reason, mediation has been considered to be unsuitable in areas in which it could be used to circumvent the law or reinforce existing power relations.⁴⁶⁰

The adjustment of an unreasonable mediated outcome would require the court to develop an objective standard of fairness, assess whether the mediated settlement agreement is unreasonable if measured against this objective standard of fairness, and then replace the mediated settlement agreement with an outcome that satisfies this new objective standard of fairness. If legal norms and principles are replaced with considerations of effectiveness and satisfaction, the standard that may be used for measuring the fairness of the mediated outcome – and this is the standard that is often suggested in the mediation literature for the assessment of the success of

458 Susskind 1981, p. 16. The discussion took place in the context of environmental mediation. *Susskind's* view on the accountability of the environmental mediator was harshly criticized as being incompatible with the neutrality of the mediator: Stulberg 1981, p. 86.

459 Compare Waldman 2011, p. 118. *Waldman* notes that the parties may be unaware of the law. She provides as an example a case in which two women complained to their supervisor about sexual harassment at work and were given a late-night shift in retaliation. A mediation was started with the purpose to agree on a more suitable day shift. The question was whether the mediator had a duty to inform the women of their rights under anti-discrimination law: Waldman 2011, p. 131.

460 Grillo 1991, p. 1561. *Fiss's* critique arguing that mediation is a menace to public values is more general in nature. He criticizes that parties “*might settle while leaving justice undone*”, as for instance in cases of racial inequality: Fiss 1983, p. 1085.

a mediation – is the extent to which the agreement is *pareto optimal*.⁴⁶¹ Pareto efficiency describes in economics a state of allocation of resources in which it is impossible to make any one individual better off without making at least one individual worse off. In order to assess whether an agreement is *fair* one would therefore have to ask whether another distribution of the resources would have better satisfied the interests of one party without making the situation of the other party worse.

Courts are poorly equipped to assess the *pareto* efficiency of an agreement and to apply it as a standard for the adjustment of an unreasonable agreement.⁴⁶² Courts assess unreasonableness with reference to their own standard of fairness that is based on legal argumentation.⁴⁶³ Courts seek to apply similar cases as similar and different cases as different. Courts will therefore have reference to principles that are inherent in the law or in respect of general clauses to principles that are inherent in society. They find it difficult to rationalize the decision-making in accordance with economic concepts. The assessment is not only beyond their line of argumentation, they also lack knowledge on the factors that are necessary to measure *pareto* effectiveness. Having recourse to standards that are inherent in the law, however, is contrary to the purpose of a dispute resolution mechanism that seeks to satisfy the parties' view of what is to be considered fair. Interfering with the contract with reference to an external standard of substantive justice therefore does not guarantee that the contract will satisfy the considerations of fairness the parties had when they entered into the mediated settlement agreement.

As it is difficult - if not impossible - to establish an objective abstract criterion to measure substantive unfairness, there are no substantively unfair mediated settlement agreements. In this respect, the mediation paradigm resembles the classical contract model that does not leave a place for the adjustment of a contract on the basis of substantive fairness considerations. If one excludes the adjustment or invalidation of the mediated settlement agreement on the basis of unfairness that relates to the private interests of the parties, the mediated settlement agreement may only be adjusted or invalidated when it is contrary to protected public interests or mandatory laws or affects the interests of third parties: when either the sphere of the state or the sphere of a third party are concerned. This is the case, for instance,

461 Alberstein defines the *pareto* optimal solution as a measurement for the success in pragmatic mediation: Alberstein 2006, p. 341. Also, *Ervasti and Nylund* consider with regard to negotiations that a good result is a result that is *pareto* efficient: *Ervasti and Nylund* 2014, p. 125. According to Susskind, *pareto efficiency* is one criterion that the environmental mediator needs to pursue: Susskind 1981, p. 17.

462 It is doubtful whether *pareto* efficiency constitutes a workable standard in mediation. It is even difficult for the parties themselves to assess whether their agreement is *pareto* efficient. Also, the mediator generally lacks the expertise and information to assess the efficiency of the agreement. For the environmental mediator, see Stulberg 1981, pp. 112, 113.

463 Luhmann 1995, p. 315.

when the mediated settlement agreement restricts or distorts competition and therefore contradicts competition laws. It is also the case when the parties agree on illegal tax or other arrangements, such as the establishment of an off-shore trust to evade taxes or to engage in illegal money laundering. The agreement may also be adjusted or invalidated if the parties agree on discrimination against certain groups or persons or where the agreement is in breach of the fundamental values of a liberal society.

There is another argument that supports the application of more stringent criteria for the adjustment of the mediated settlement agreement on the ground of substantive fairness considerations. If the mediated settlement agreement could be adjusted or invalidated as any other agreement, mediation as a process that reconciles the parties' positions, interests and needs would lose its purpose. It would make no sense for a party to enter into mediation and to seek a solution on the basis of its interests and needs, if the party had to fear that the mediated settlement agreement reached would be exposed in an adjudicative procedure to an adjustment on the basis of external fairness considerations. Mediation as a dispute resolution mechanism is designed to create an outcome that does not necessarily reflect an ideal economic balance in the exchange, but that takes into account the wider interests and needs of the parties for which no externally measurable value may exist. When the parties enter the mediation, they consciously seek to apply a standard of fairness that is subjective and not objective. They further choose to resolve their dispute in accordance with the mediation paradigm – hence they choose to resolve their dispute in a process that seeks for a solution that is independent of the law and that will most likely differ from the solution achieved in an adjudicative procedure.⁴⁶⁴ This choice is made once a dispute has arisen and therefore at a point of time when the parties have an increased freedom to dispose of rights that they would otherwise have under mandatory laws.⁴⁶⁵ In addition, the mediated outcome is individually negotiated in a conscious process of negotiating and decision-making. The situation can be compared to auctions, in which an adjustment of the price on the basis of its economic inadequacy is not considered possible as it would be contrary to the auction as an institution.⁴⁶⁶ The adjustment of the mediated settlement agreement on the basis of external fairness

464 Koulu 2006, p. 393.

465 In general, mandatory laws that seek to protect the interests of the weaker party or substantive fairness may not be excluded in advance. There is, however, a difference between the parties' general contractual autonomy and the parties' autonomy once the dispute has arisen or litigation has been initiated (procedural autonomy). On the parties' procedural autonomy to waive a right once the dispute has arisen: Rudanko 2016, p. 883. On the degree and scope of mandatory provisions and the parties' procedural autonomy: Vaitoja 2014, pp. 258, 262.

466 *Pöyhönen* argues, for instance, in respect of auctions that an auction would not be an auction, could the price be adjusted on the basis of its economic inadequacy: *Pöyhönen* 1988, p. 340. For the adjustment of mediated settlement agreements, see Koulu 2006, p. 393.

considerations would be a contradiction to the very ratio of the mediation process that is designed to find a balance between the positions, interests and needs of the parties through the process itself and independent of criteria that are beyond the subjective interests of the parties.

The assessment of the fairness of contracts that are concluded subsequent to the mediated settlement agreement has to be distinguished from the assessment of the mediated settlement agreement itself. Unlike a judgment, a mediated settlement agreement is not limited to the resolution of a legal dispute, it not only terminates rights and obligations but may also be constitutive in character. It may create rights and obligations that have previously not existed between the parties or substitute old rights and obligations with new ones. Complex disputes may require complex ways to solve these disputes. A mediated settlement agreement may therefore include an obligation to perform an act or make a payment, but it may not be limited to that. In practice, it is quite usual for the parties to agree as part of the settlement on a contract regarding their future cooperation. Sometimes only the main terms of this contract are set forth in the mediated settlement agreement or the parties may only agree to enter into an agreement regarding their future cooperation. If the parties conclude a contract regarding their future cooperation, the fairness principle to be applied to this continuous relationship may differ from the fairness principle applied to the mediated settlement agreement itself. While the mediated settlement agreement may not require an adjustment, the contract setting forth the future legal relationship between the parties may contain provisions that are unfair or unreasonable if only assessed from the point of view of the cooperation contract.

The criteria that are to be applied for the adjustment or invalidation of a mediated settlement agreement are different from the criteria applied to contracts that have not been concluded subsequent to a mediation. This has two consequences: if the argument is followed that a fair process combined with the self-interest maximizing behaviour of the parties produces a fair result, one needs to ask what procedural fairness means in the context of mediation and how the fairness of the mediated settlement agreement may be guaranteed. Secondly, the criteria on the basis of which the mediated settlement agreement may be challenged or adjusted, need to be determined. The difficulties in determining an external standard of substantive fairness does not mean that the adjustment or invalidation of the mediated settlement agreement is excluded altogether. A mediated settlement agreement may be contrary to public interests or mandatory laws, or the imbalance may be so evident that it cannot reasonably be considered that it can be compensated for by the subjective interests and values of the parties.

3.4.5 Procedural unfairness⁴⁶⁷

A mediated settlement agreement is binding on the parties as is any other contract. In general, a mediator's failure to comply with professional obligations under the mediator's agreement or the infringement of the principles of mediation is not seen as grounds for challenging the mediated settlement agreement.⁴⁶⁸ This has to do first, with the strict separation of the different agreements from each other. Not only are the agreements that form the process separated from each other, but they are also separated according to the parties involved. Consequently, the breach of obligations under the mediator agreement has no direct legal effect on the subsequent agreement. On the contrary it must be separately analysed, whether the breach of one agreement may be seen as a ground for the invalidity of the second agreement. Secondly, this has to do with the justification of mediation. It is argued that in mediation, unlike in adjudication, the parties retain control of the outcome. Once the parties give their consent to the mediated settlement agreement, procedural flaws become irrelevant.⁴⁶⁹

The loose connection between the mediated settlement agreement and the mediation does not reflect the actual situation. The mediated settlement agreement constitutes the end of a structured dispute resolution process and not the result of ordinary contract negotiations. The settlement is entered into not only to sell or purchase goods or services, but also to resolve an existing dispute. The dispute is settled subsequent to a structured process. One may therefore claim that the parties – when entering into the mediated settlement agreement – have concluded the agreement on the basis of the assumption that there was a dispute which they attempt to solve and that the process used to solve the dispute was a mediation. In a step further, one may also claim that the parties have concluded the mediated settlement agreement on the basis of the assumption that the mediation process

467 The invalidation or adjustment of the mediated settlement agreement on the grounds of a lack of procedural fairness is not generally addressed in the national laws implementing the Mediation Directive: Esplugues 2014b, p. 716.

468 Only in rare cases will a party be able to challenge the settlement agreement on the basis of acts or failures of the mediator. As the mediator is not a party to the mediated settlement agreement but remains an outside party in respect to the settlement agreement challenging the mediated settlement agreement based on fraud or threat requires that the other party knew or should have known about the threat or fraud in most jurisdictions. Some collusion between the mediator and the party is therefore necessary in order to challenge the settlement agreement on the grounds of an act or omission of the mediator. On the invalidation of contracts on the basis of actions made by third persons in general: Lando and Beale 2000-2003, p. 272. See for Finland: Norros 2005, p. 476. *Caponi* considers an invalidation of the mediated settlement agreement on the grounds of failures of the mediator under certain circumstances possible but calls for separate new rules instead of an application of general principles of contract law: *Caponi* 2015, pp. 138–139. *Eidenmüller* holds that the validity of the settlement agreement may not be challenged on the basis of errors regarding the characteristics of the mediator, such as the neutrality of the mediator, unless these characteristics were causal to the conclusion of the settlement agreement or '*verkehrswesentlich*': *Eidenmüller* 2001, p. 43.

469 *Caponi* notes that institutional settings and public oversight should replace the judicial control of single mediation processes and reduce the risk of mass instances of unlawful mediation processes: *Caponi* 2015, p. 134.

has taken place in accordance with certain standards of fairness. If a party had known that the mediator would act in favour of one party or disclose information that should not be disclosed, this party would not have started the mediation or would have requested a different process. Without any prospect of a fair and structured mediation, the parties may not have entered into the mediated settlement agreement.

One may argue that the parties have the choice to withdraw from a process that does not correspond to their assumptions. The argument is based on the principle of voluntariness. The parties' right to withdraw from mediation is unrestricted. In reality, the parties may not be in a position to do so, because they may be unaware of the nature or boundaries of mediation, or they have a wrong assumption regarding the process itself. The parties may also be unaware of what is going on in the mediation. This is especially the case when the mediation takes place in private meetings between the mediator and one of the parties.

In contract law, assumptions regarding the circumstances under which a contract is concluded may be examined under the *doctrine on the basis of the transaction*. The doctrine extends the facts that contract law considers relevant to the circumstances that constitute the basis of the parties' formation of will.⁴⁷⁰ According to this doctrine, the parties have subjective assumption of the circumstances that form the conscious basis of the mediated settlement agreement. If these subjective assumptions are wrong, the basis for entering into a transaction may not exist. The purpose of the transaction may also become meaningless due to an objective change in the circumstances or the circumstances may objectively cease to exist.⁴⁷¹ If the circumstances forming the basis of the assumptions are non-existent or cease to exist, the parties may be entitled to challenge an agreement that is based on these assumptions or the agreement may be adjusted to correspond to the assumptions of the parties. As regards the mediated settlement agreement, the parties' assumptions may relate to the existence of the dispute, the nature of the process, the fairness of the process, the efficiency of the procedure in respect of the enforceability of the outcome or the person of the mediator, who may lack the required independence.⁴⁷² These assumptions may form the subjective basis

470 See for instance: Häyhä 2004, p. 1438.

471 The doctrine on the basis of the legal transaction has been developed by the German scholar Windscheid: Zweigert and Kötz 1998, p. 519. For Finland see: Häyhä 2004, p. 1438. Different jurisdictions use different instruments in order to deal with a change of circumstances. On the comparative perspective: Zweigert and Kötz 1998, p. 533.

472 Wrong assumptions of one party regarding the independence or impartiality of the mediator may also constitute an error regarding the person of the mediator. According to *Tochtermann* errors regarding the independence and impartiality of the mediator are not of the essence to the mediated settlement and therefore irrelevant mistakes in motive: *Tochtermann* 2008, p. 221.

of the parties' transactions and therefore relate to the motives that the parties had when entering the agreement.

Tochtermann has examined the question of whether the lack of independence and impartiality of the mediator constitutes a ground for challenging or adjusting the mediated settlement agreement on the basis of the German doctrine of interference with the basis of the transaction.⁴⁷³ In order to challenge or adjust the agreement on the basis of this provision, the parties must have had subjective assumptions regarding the independence and impartiality of the mediator. The assumptions forming the basis of the mediated settlement agreement must have turned out to be incorrect and they must have guided the later decision-making in a way that they were essential for the conclusion of the mediated settlement agreement. Hence, the parties would not have concluded had they known that these assumptions were wrong or not existent or would have concluded the contract differently. The agreement may only be adjusted or invalidated when a party cannot reasonably be expected to hold to the agreement.

Tochtermann distinguishes between court-related mediation and mediation that is conducted outside the courts. For court mediation, he considers that the independence and impartiality of the mediator is part of the administration of justice and the requirement of due process. The lack of independence and impartiality of the mediator therefore constitutes an infringement of an objective quality requirement that is an essential element of the basis of the transaction.⁴⁷⁴ He argues that the parties could not be reasonably expected to hold on to a mediated settlement agreement that has been concluded subsequent to a procedure that lacked the required procedural integrity. If the mediator lacks independence, a party consequently has a right to challenge the agreement, irrespective of whether there is an imbalance in the economic equivalence of the mediated outcome. In his view, the invalidation of the contract constitutes the only remedy for the procedural deficiency. An adjustment of the mediated settlement agreement is not possible, because the impact of the mediator's lack of independence and impartiality on the economic equivalence of the mediated outcome cannot be measured.

473 Section 313 of the German Civil Code (BGB) incorporates the general doctrine on the basis of the transaction and can therefore be used as an illustration of the mechanism. Section 313 BGB on the "Interference with the basis of the transaction" provides that (1) *If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration. (2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect. (3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke.*"

474 *Tochtermann* 2008, pp. 233–237.

Tochtermann draws different conclusions for mediation that is conducted outside the courts. He finds that the mediation agreement forms the basis of the latter transaction as it provides a procedural framework and a guarantee that the process is conducted in accordance with objective quality standards.⁴⁷⁵ However, the independence and impartiality of the mediator is not part of the administration of justice and the constitutional requirement of due process, but it constitutes only a set of legal obligations that arise from the agreement with the mediator. For this reason, in his view, a lack of independence and impartiality of the mediator constitutes an essential element of the basis of the transaction only in exceptional cases.⁴⁷⁶ For the same reason, the lack of independence and impartiality does not make it unreasonable for a party to hold on to the agreement.⁴⁷⁷

Tochtermann raises three criteria that are relevant for assessing the question, whether the lack of independence and impartiality may lead to interference with the basis of the transaction. First, he mentions the constitutional requirement that the administration of justice is to be based on the principle of fairness. In his view, out-of-court mediation does not constitute administration of justice by the *Rechtsstaat*, hence the rule of law, and therefore out-of-court mediation does not need to comply with the principles of due process that constitute the basis of the rule of law.⁴⁷⁸ Secondly, *Tochtermann* claims that the out-of-court mediator uses a rather facilitative mediation style and therefore has less influence on the outcome of the mediation. In contrast, the court mediator's approach is rather evaluative in nature and the mediator's impact on the mediation may be significant.⁴⁷⁹ Moreover, court mediators adhere to an objective code of conduct that obliges them to be independent and impartial.⁴⁸⁰

If one perceives the mediator agreement in accordance with the prevalent doctrine as an ordinary agreement, the circumstance that the mediator has not complied with his or her obligations under the mediator agreement does not yet constitute an essential change in the circumstances that would justify the invalidation or adjustment of the settlement agreement. If the mediator fails to comply with the mediator's duties under the agreement to mediate, the parties

475 *Tochtermann* 2008, p. 232.

476 *Tochtermann* 2008, p. 234.

477 *Tochtermann* 2008, p. 237.

478 Also, *Ervasti and Nyland* stress that the advantages of court mediation in comparison to other forms of mediation is that the courts enjoy independence, impartiality and are trusted: *Ervasti and Nyland* 2014, p. 400.

479 The view that court mediation is evaluative rather than facilitative in nature is controversial. The Mediation Directive makes no distinction between out-of-court mediation based on the mediation model used. While judges may have the tendency to guide the process actively and may also be entitled to make a proposal, the ideal mediation model is also in court mediation the facilitative model. For Finland: *Salminen and Ervasti* 2015, p. 595.

480 *Tochtermann* 2008, p. 233.

would need to address this infringement within the contractual relationship between them and the mediator. For the doctrine on the basis of the legal transaction to be applicable, one would need to assume that the parties viewed the mediation and certain procedural guarantees as an essential basis of their decision-making. While the parties may have certain expectations regarding the nature of the process and the mediator, the expectations in most cases will be too vague to be objectively ascertained or to be considered essential in relation to the mediated outcome. This is, for instance, the case in respect of whether the mediator has influenced the mediated outcome by means of an evaluative style. Evaluative mediation is not a form of mediation that is not to be considered mediation *per se*.⁴⁸¹

The circumstance that the mediated outcome evolves into an equivalent to a judgment in terms of its enforceability may change this assessment. Where the parties assume that the mediated outcome can be confirmed by a court, they assume that the mediation is conducted in accordance with the requirements that enable the confirmation of the mediated outcome. This assumption forms the basis of the later transaction. If the mediation has not been in line with the objective requirements that are necessary for the confirmation of the mediated outcome as an enforceable title, the parties are deprived of the benefits they sought to achieve in the mediation. They may therefore claim that they might not have concluded the mediated settlement agreement at all, had they known that it was not enforceable. In that sense, the mediation procedure may be an essential basis of the transaction. One may therefore argue that the parties may not reasonably be expected to hold to an agreement that does not solve the legal dispute due to a lack in the procedure.

It is another question, though, whether and what elements a mediation must have to provide the parties the benefits they seek to achieve within the mediation. For court mediation, *Tochtermann* holds the view that the infringement of objective quality criteria may jeopardize the integrity of mediation and justify the invalidation of the mediated settlement agreement. This is irrespective of whether there has been a lack of economic equivalence in respect of the outcome. While it is true that mediation outside the courts is not formally part of the administration of justice, the assumptions that the parties have with regard to a mediation (that is meant to be functionally equivalent to judicial proceedings in significant respects) are not fundamentally different from the assumptions the parties may have in respect of a court mediation. In both procedures, the parties may assume that the procedural integrity is maintained, and that the mediator does not act in favour of one of

⁴⁸¹ Some authors consider that evaluative forms of mediation do not constitute mediation: Kovach and Love 1996. See in more detail Chapter 4.3.1.2.

the parties. Moreover, the confirmation of enforceability brings the agreement ultimately within the administration of justice.

As regards the style of the mediator, it should be noted that court mediators may pursue a more evaluative style. This does not mean that court mediation is always evaluative, while out-of-court mediation is always facilitative. Furthermore, it would be wrong to underestimate the influence of the facilitative mediator on the outcome of the mediation. Ideally, the facilitative mediator assists the parties in the negotiations by using different mediation techniques. In practice, the facilitative mediator may have a considerable impact on the outcome. This, for instance, may be the case if the facilitative mediator adopts a directive style, without however making an express proposal.⁴⁸² It would therefore be wrong to conclude that the impartiality of the facilitative mediator is less important than the impartiality of the evaluative mediator or that facilitative mediation does not need to meet any objective quality requirements. The question is therefore, what objective quality criteria have evolved that can be seen as a minimum guarantee in out-of-court mediation, a question that will be discussed in more detail in Chapter 4.

3.5 From bindingness to enforceability

The confirmation of the mediated settlement agreement as enforceable changes the nature of the mediated settlement agreement. The confirmed mediated settlement agreement becomes equivalent to the judgment of a court, in terms of its enforceability.⁴⁸³ The mediated settlement agreement not only concludes the legal dispute between the parties, but it stabilizes the legal relations between the parties and serves as a basis for future legal communications. The confirmed mediated settlement agreement is an enforcement title and may be enforced with the power instruments of the state. Once confirmed, the mediated settlement agreement can be circulated in the European Union and may be enforced in other Member States of the European Union in accordance with the rules on the recognition and enforcement of judgments.⁴⁸⁴

The procedure in which the mediated settlement agreement is declared enforceable is subject to national law and varies between Member States and I

482 On the mediator's orientation, see Chapter 4.3.1.2.

483 Mediation Directive, Recital 19.

484 Mediation Directive, Recital 20. The main instrument for the circulation of confirmed mediated settlement agreements is Regulation (EU) No 1215/2012, the Brussels I Regulation (recast). For a proposal to improve the recognition and enforcement of mediated settlement agreements: Esplugues and Iglesias 2016, p. 19-22. On the different instruments: Esplugues and Iglesias 2016, pp. 13.

will not analyse it in more detail.⁴⁸⁵ I only seek to make some general observations from the point of view of the Mediation Directive to illustrate the bindingness and enforceability of the mediated settlement agreement. As a main rule the mediated settlement agreement is not directly enforceable,⁴⁸⁶ but requires its enforceability to be confirmed by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.

3.5.1 Consent requirement in respect of the confirmation of enforceability

The confirmation of enforceability requires consent by the parties. In this respect, the Mediation Directive provides that the Member States ensure “*that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable*”.⁴⁸⁷ The wording of the Mediation Directive suggests that the parties may either file a common request or one party may request the confirmation of enforceability alone provided that the other party has given his or her prior explicit consent. This would mean that parties that have given their express consent to the declaration of enforceability at the end of the mediation are not required to provide separate consent at the time when the confirmation of enforceability is actually requested. As the confirmation procedure is subject to national regulation, the actual consent requirements and the methods of confirmation vary. I will illustrate the possible mechanisms with two examples. In England and Wales, the parties or one of them with the explicit consent of the others, may file an application for a mediation settlement enforcement order (MSEO) according to the CPR (Practice Direction 78.24).⁴⁸⁸ In the application, the parties must provide evidence that explicit consent has been given. A party is deemed to have given explicit consent to the application for the mediation settlement order and no separate consent is needed if a party to the mediated settlement agreement “*... has agreed in the mediation settlement agreement that a mediation settlement enforcement order should be made in respect of that mediation settlement.*”⁴⁸⁹ Where a party consents in the mediated settlement agreement to seeking a mediation enforcement order,

485 Study for an evaluation and implementation of Directive 2008/52/EC 2016, p. 42. Also, the national procedures vary and include approval by notaries, lawyers, mediation organizations and courts: Study for an evaluation and implementation of Directive 2008/52/EC 2016, pp. 51. 111. Esplugues 2014b, pp. 719-727.

486 Esplugues and Iglesias 2016, pp. 12-13.

487 Mediation Directive, Article 6.1.

488 Civil Procedural Rules, Practice Direction 78.24 implementing the Mediation Directive.

489 Practice Direction 78.24 (7). Marsh, Oddy and O'Neill 2017, p. 234.

the court may declare the mediated settlement agreement enforceable without a hearing.⁴⁹⁰ By contrast, in Austria it is required that the contents of the mediated settlement agreement concluded by the parties outside the court is made enforceable in the form of a court settlement and therefore before a judge.⁴⁹¹ In the Austrian literature, the lack of a procedure to make a mediated agreement enforceable upon request by only one party with the explicit consent of the other party or parties has been criticized and it has been claimed that the Mediation Directive has not been fully implemented in this respect.⁴⁹²

Once the parties have given their consent to the confirmation of enforceability, the grounds for a refusal of the declaration of enforceability by the courts are limited. According to the Mediation Directive, the courts may refuse the confirmation of enforceability of the mediated settlement agreement on two grounds: first, if the content of the agreement is contrary to the law of the Member State, including rules of private international law; and second, if the law of the Member State does not provide for its enforceability. This is the case if an obligation under the agreement is not enforceable under relevant law.⁴⁹³ The grounds for refusal set out in the Mediation Directive are similar to the grounds of refusal set out in *exequatur* proceedings pertaining to the recognition and enforcement of foreign judgments and arbitral awards. The purpose of these provisions is to restrict the review by the courts to the minimum. There is little room for a review of the contents of the agreement, the actual position of the parties and the refusal of the confirmation on grounds other than those set out in the Mediation Directive. A comprehensive review by the courts would undermine the purpose of the Mediation Directive to provide an extrajudicial method of dispute resolution *in addition* to a judicial method of dispute resolution.⁴⁹⁴

3.5.2 Grounds for refusing the confirmation of enforceability

Despite what the wording of the Mediation Directive suggests, the grounds for refusal are not uniformly applied in the Member States. What contrary to the law means has been interpreted differently in the Member States, and the concepts are embedded in the national legal culture and remain ambiguous.⁴⁹⁵ For Finland,

490 Brooker 2013, p. 111.

491 Section 433a Austrian Code of Civil Procedure.

492 Frauenberger-Pfeifer and Risak 2012, p. 802. See also: Lentz and Risak 2017, p. 53.

493 Mediation Directive, Article 6, Recital 19.

494 Mediation Directive, Recital 5.

495 On the interpretation of the public policy exception in EU instruments of private international and procedural law: Hess and Pfeifer 2011. Hess notes that public policy is “*often invoked, but seldom applied*” as ground for the non-recognition of a foreign judgment or the non-application of foreign laws: Hess and Pfeifer 2011, p. 13.

contrary to the law means that confirmation of enforceability may be refused if the contract is against the law, clearly unreasonable or infringes on the rights of third parties. In Italy, the court examines whether the settlement is against public policy or against mandatory rules.⁴⁹⁶ In Sweden, confirmation is refused when the obligation is not enforceable either due to the nature of the obligation, or because it is clearly in conflict with fundamental principles of the legal system.⁴⁹⁷ In France, the *Cour de cassation* ruled that a settlement agreement (*transaction*) may only be reviewed with regard to the nature of the agreement and the compliance with *ordre public* and morality, hence whether there was a settlement and whether it had the appearance of regularity and complied with *ordre public* and good morals.⁴⁹⁸ In the judgment, the *Cour de cassation* rejected the applicant's request to withdraw the confirmation of enforceability of a settlement agreement on the grounds that the settlement agreement had allegedly come into existence by way of blackmail and threat and that the applicant had filed a claim for the rescission of the settlement agreement with the competent court.

Although the concept of contrary to the law is ambiguous, the general tendency appears to be obvious. The courts exercise a limited formal review of the mediated settlement agreement. The standard for the review is a minimum standard of substantive fairness as the reference to fundamental principles of the legal system, public policy or clear unreasonableness suggests. Moreover, the mediation procedure creates a presumption in favour of the fairness of the mediated settlement agreement. This presumption may only be rebutted if protected fundamental public values are at stake or if the agreement is prohibited by the law. The protection of individual interests or the protection of the interests of the weaker party only rarely constitute fundamental values of the legal system. Legislation protecting the weaker party is often not applicable when the parties enter into an agreement once a dispute has arisen.⁴⁹⁹ In practice, the courts will therefore rarely refuse the confirmation of enforceability, where the formal requirements are met. This circumstance has already been noted in respect of the public policy exception that

496 It is, however, uncertain what 'public policy' means: Marinari 2012, p. 192.

497 Ficks 2012, p. 349.

498 *Case 06-19527, Transaction - Homologation - Compétence*, Bulletin 2011, II, n° 120. The case concerned the confirmation of enforceability of a traditional settlement agreement ('transaction') subsequent to Article 1441-4- of the French Code of Civil Procedure that applies also to the confirmation of the enforceability of a mediated settlement agreement, if the settlement has been established as a 'transaction'. It is controversial, whether the same principles apply also for mediated settlement agreements that have not been established in the form of a 'transaction'. See further: Deckert 2013, pp. 473, 475.

499 For instance, in consumer law a difference is made between terms that have been individually negotiated and so-called standard terms that have not been individually negotiated. A standard term is regarded as unfair if "*contrary to good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer*": Directive on unfair terms in consumer contracts, Article 3. The terms of mediated settlement agreement are always individually negotiated and therefore not standard terms.

constitutes a ground for the non-recognition of foreign judgments in *exequatur* procedures: “*public policy is often invoked, but seldom applied.*”⁵⁰⁰

Against the law is not equal to *against principles of mediation*.⁵⁰¹ There is therefore no procedural public policy exception. The courts do not engage in a review of the procedural fairness of mediation. The circumstance that there has been a mediation is a condition for the declaration of enforceability. The courts must therefore ensure that mediation has formally taken place and that the mediator meets the statutory requirements. Once this has been established, there are few grounds that would entitle a court to refuse the declaration of enforceability as being against the law or against public policy. This is due to the vagueness of the concept of mediation. It is also due to a lack of understanding what the essence of mediation is. There is still no answer to the question about what the principles are that are so fundamental to the procedure that a lack of compliance with these principles would be contrary to the very concept of mediation and such be comparable to fundamental values of other procedures, such as the independence and impartiality of the judge, the right to be heard or the ability to present one’s case.⁵⁰²

The courts’ ability to review the fairness of mediation is further limited by the nature and principles that are inherent in the mediation. Mediation is an oral and confidential procedure. Detailed minutes are rarely kept.⁵⁰³ The mediator may take notes, but the taking of notes is kept to a minimum. The mediator has no obligation to record what the parties have stated or what evidence they have discussed. Extensive note taking would also distract the mediator from actively communicating with the parties. Mediators may use notes in private meetings as an instrument to control the information that they pass on to the other party. These notes constitute the mediator’s personalized tool to manage the process and therefore do not provide an objective summary of the contents of the discussions or the course of the procedure. Moreover, the notes taken in the private meetings may be subject to a contractual confidentiality obligation.

500 Hess and Pfeifer 2011, p. 13.

501 The question of whether a court may refuse the enforcement of a mediated settlement agreement on the basis of deficiencies in the mediation is an issue that is the subject of controversial discussion in the UNCITRAL Working Group II on the preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation. The draft proposal of the secretary suggests the following as grounds for denying enforcement: a manifest failure by the conciliator to maintain fair treatment and the conciliator’s failure to disclose circumstances likely to give rise to doubts as to the conciliator’s impartiality or independence (UNCITRAL Working Group II, 29.11.2016, Draft provisions 4 (d) and 4 (e)). The Working Group could not find an agreement on the issue and the view was expressed that such defence would be contrary to the objective of the instrument or problematic as it would require an authority to investigate domestic standards on the conduct of the conciliator or the conciliation process: UNCITRAL Working Group II, 16.2.2017, p. 10.

502 For arbitration see: Kurkela and Turunen 2010, p. 37.

503 The EUIPO Rules expressly provide that no recording should be made, and that the mediator should return, destroy or delete materials obtained for the purpose of mediation after mediation: EUIPO Rules on Mediation, Section 7.3. In Italy, a record of the outcome is made: Marinari 2012, p. 192. *Ervasti and Nylund* consider that one page of notes is usually sufficient: *Ervasti and Nylund* 2014, p. 332.

In addition to the orality of the procedure, confidentiality is a central value of mediation. The parties may overcome the lack of trust that they encounter in negotiations only in an environment that allows them to exchange their views and make settlement proposals without having to fear that they may jeopardize their position in possible later litigation or arbitration or that confidential information will be disclosed to the other party without their consent. The confidentiality of the proceedings collides with the court's capacity to review the mediated settlement agreement. The court's power to take oral evidence to exercise the review is limited: it is a fundamental corner stone of the Mediation Directive that the mediator and other persons participating in the administration of the mediation should not be obliged to give evidence regarding "*information arising out of or in connection with a mediation process.*" Exceptions should only apply if this is necessary for the sake of public policy or when disclosure of the contents of the agreement is necessary to implement or enforce the mediated settlement agreement.⁵⁰⁴

The second ground for refusing the confirmation of enforceability relates to the nature of the obligation. An obligation may not be confirmed as enforceable if the obligation is not enforceable under applicable law. An obligation may lack enforceability if the obligation fails to fulfil the requirement of specificity. This is the case when the mediation agreement does not specify what a party needs to perform or to refrain from doing. An obligation may also be unenforceable when rights are not at the disposal of the parties or when obligations do not constitute legal obligations, but only a moral duty.⁵⁰⁵ The mediated settlement agreement may contain a set of obligations: obligations to pay or refrain from doing so, obligations to discontinue court proceedings, obligations to monitor compliance with the agreement, obligations to enter into an agreement, obligations to adjust the agreement, or an obligation to apologize. Only some of these obligations will constitute an enforceable obligation under the law of the respective Member State. If contractual principles were applied, the combination of enforceable and unenforceable contract provisions would be examined as a question of severability. One would then ask if the invalidity of one provision had an impact on other provisions in a way that would make the entire mediated settlement agreement invalid, whether the parties would need to honour the provisions of the agreement that are valid or whether some of the contractual provisions need to be adjusted. In the procedure for the declaration of enforceability, the court is not given the power to determine questions of severability. The court only has the option of declaring the entire agreement unenforceable or of declaring the mediated settlement agreement enforceable in respect of the obligations that may be enforceable.

⁵⁰⁴ Mediation Directive, Article 7. On confidentiality, see Chapter 4.5.

⁵⁰⁵ In general, enforcement requires a legal obligation to be specific: see, for instance, Wiczorek 2013, p. 373. Lindfors 2011, p. 63.

A general refusal to confirm the enforceability of agreements that contain unenforceable provisions does not appear to be an option. Such refusals would have as a consequence that the mediated settlement agreement needed to be drafted in a way that it contains exclusively legal and enforceable obligations. The need to draft the mediated settlement agreement as concisely as possible to be able to monitor compliance has also been stressed in mediation theory.⁵⁰⁶ However, mediation would lose its distinct character if the mediated settlement agreement was only to contain legally enforceable obligations. It is part of the nature of mediation that the settlement is not confined to legally enforceable obligations, but also contains obligations that are directed to future rights and obligations, or are not legal by their very nature. The denial of a declaration of enforceability on the ground that the mediated settlement agreement contains legally enforceable and unenforceable provisions would therefore amount to denial of the enforceability of most mediated settlement agreements.

The only alternative appears to be that one accepts a partial declaration of enforceability of the mediated settlement agreement.⁵⁰⁷ This means that obligations that are legally enforceable under the respective law of the Member State are declared enforceable, irrespective of whether the remaining agreement is legally enforceable. The partial declaration of enforceability mirrors the ambiguous nature of the mediated settlement agreement. The legal order recognizes and reproduces different obligations, while it leaves other obligations without attention. The parties may give the obligations a value different from that given by the legal system, but the reproduction within the legal systems will mirror the parties' values, interests and needs only to an insufficient extent, unless the parties are able to reproduce these values and interests as legally enforceable obligations.

From the (contractual) bindingness and the enforceability of the confirmed mediated settlement agreement, the finality of the confirmed mediated settlement agreement is to be distinguished. The question is whether the confirmed mediated settlement agreement is *res iudicata*. While the bindingness of the mediated settlement agreement as between the parties and its enforceability is generally accepted, there are different approaches regarding the question of whether the confirmed mediated settlement agreement is to be considered as having a *res iudicata* effect.⁵⁰⁸ Some jurisdictions recognize that a confirmed mediated settlement agreement is *res iudicata* while others consider that it has only certain substantive effects. The confirmed mediated settlement agreement is then not final

506 Moore 2014, pp. 479-481.

507 Finnish courts, for instance, may declare those parts of the settlement agreement enforceable that can be enforced: Government Bill 2010 for the Finnish Mediation Act p.18, 29.

508 On a comparative study of court settlements: Atteslander-Dürrenmatt 2006, p. 17.

(*res iudicata*) but may be used as a defence in later litigation on the basis of an *exceptio rei transactae*.⁵⁰⁹

The question of *res iudicata* arises also within the framework of the Brussels I Regulation (EU) No. 1215/2012 (recast). It may be asked, whether the enforcement of a confirmed settlement agreement in another Member State in accordance with the Brussels I Regulation (recast) implies the recognition of a *res iudicata* or equivalent effect. It appears to be the generally accepted view that authentic instruments are private acts and cannot be recognized in any manner equivalent to a judgment in respect of their finality.⁵¹⁰ Also in respect of court settlements approved by a court, it is the prevalent view that they lack the effect of *res iudicata*.⁵¹¹ Nevertheless, the enforcement of the confirmed mediated settlement agreement has been regarded by some authors as the implied recognition (within the sense of international procedural law) of the private aspects of the settlement.⁵¹² Even though the confirmed mediated settlement agreement may not be regarded as *res iudicata*, its enforcement constitutes a recognition of the contractually agreed status between the parties.⁵¹³ It can therefore be concluded that the confirmed mediated settlement agreement is equivalent to a judgment in that it terminates the dispute between the parties, serves as an enforcement title, and recognizes the contractually agreed status between the parties.

509 Another question is whether the further disputes concern the same matter. This can only be determined by means of an interpretation of the mediated settlement agreement.

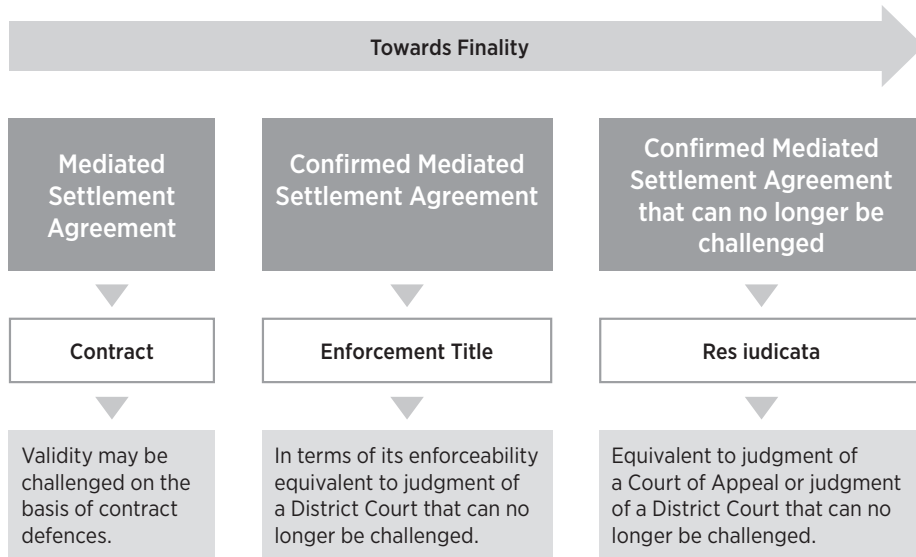
510 Fitchen and Kramer 2015, pp. 532, 537.

511 Fitchen and Kramer 2015, p. 537, 538. Kramer 2016, p. 988.

512 In this sense Fitchen and Kramer 2015, p. 538.

513 Kramer 2016, p. 988.

Table 2. Table 2 shows an example of the transition of the mediated outcome from a binding agreement to an enforcement title to finality in comparison to court proceedings. The Finnish law recognizes the *res iudicata* effect of a confirmed settlement agreement if the period for the appeal against the confirmation of the settlement agreement as enforceable has expired or the parties have declared that they will not seek to appeal the confirmation of the settlement agreement granted by the District Court.⁵¹⁴ An appeal against the confirmation of the settlement agreement as enforceable may be sought on the basis of the invalidity of the mediated agreement, or if the mediated agreement is contrary to the law, clearly unreasonable, or if it violates the right of a third party.



3.6 From voluntariness to compulsion

The settlement of a dispute is the aim of Civil and Commercial Mediation. The parties seek to settle a legal dispute which requires the parties to terminate, create or change their legal rights and obligations. The outcome of Civil and Commercial Mediation is an agreement. This agreement will not be assessed under principles of mediation, but under general principles of contract law. The transformation of the mediated outcome into a legally binding contract therefore has as a consequence that the mediation principle of self-determination is replaced with the concept of free will. Self-determination is then understood as the freedom to choose, but also as the responsibility to comply with the solution chosen. Once the mediated outcome has entered the legal system, it is not for the parties to decide whether to comply with their legal obligations, but compliance will be enforced according to the rationality of contract law. When the parties enter a mediated settlement

⁵¹⁴ Frände, Dan et al 2017, p. 740. Finnish Mediation Act (394/2011) Chapter 3 Section 24; Finnish Code of Judicial Procedure (4/1734) Chapter 20. Finnish Enforcement Code (705/2007) Chapter 2, Section 12. Linna and Leppänen 2014, p. 133.

agreement, voluntariness gives way to compulsion and the contract paradigm supersedes the mediation paradigm.

With the transition into the legal system, the conflict is reproduced as a legal dispute and the solutions are transformed into obligations. The reproduction of the mediated outcome within the legal system does not constitute a mirror image of the outcome reached in mediation. Not all obligations entered by the parties within the mediation will be reproduced as legal obligations. Consequently, the satisfaction of the parties' psychological, procedural or substantive needs and interests may remain incomplete, even though the legal dispute has been settled. Within the legal system, motives do not matter. Whether the mediated outcome satisfies the interests and needs of the parties and therefore fulfils the promises of mediation is not relevant. An interest or need will only be recognized within the legal system if it has been transformed in a legally binding obligation. As interests and needs do not matter, the conflict may continue, while the legal situation changes.

Within the legal system, parties that are not satisfied with the mediated outcome cannot have recourse to another mediation. They need to challenge the mediated outcome by means of contract defences. The capacity to challenge a mediated settlement agreement on the basis of contract defences of general contract law is an "*uphill battle*",⁵¹⁵ While interests and needs matter in mediation, they may only be rarely used to challenge the validity of a mediated outcome. Mistakes regarding the legal positions or legal consequences are irrelevant in the context of a process that seeks a solution that is independent of the law. Mistakes regarding disputed facts will rarely be successful when challenging the mediated outcome as mediation is not meant to establish a material truth and the parties accept uncertainty. The thresholds for proving duress and fraud are high: pressure is a typical element of contract negotiations which makes it difficult to draw a distinction between legitimate and illegitimate pressure. Fraud, on the other hand, relates only to facts and law, but does not include assessments or opinions. In addition, the confidentiality of mediation, the prevailing orality of the proceedings and the use of caucuses turn the mediation into a *terra incognita* that renders a review by an independent court difficult.

Also, the adjustment of the contracts on the basis of a lack of substantive fairness is unlikely to succeed as it is difficult to establish an external standard of substantive fairness that may be applied to assess whether the outcome is unreasonable. The mediated settlement agreement may therefore only be adjusted if the unreasonableness is manifest. The move from flexibility to finality continues further when parties consent to the confirmation of enforceability. Once consent is given, a court may only review whether the agreement is contrary to the law, public

515 This expression was used by *Thompson* for court mediation: Thompson 2004, p. 523.

policy or is otherwise unenforceable. The term *against the law* has been interpreted differently in the different Member States, but the common denominator is that the courts' power to review the outcome is limited. A comprehensive review of the outcome would also be contrary to the idea of mediation as a dispute resolution mechanism that constitutes the second pillar of access to justice within European dispute resolution.

A failure to adhere to the principles of mediation usually has no impact on the validity of the mediated settlement agreement. This is due to the separateness of the agreements and the prevalent contract law doctrine: the mediated settlement agreement is not considered to be the outcome of a dispute resolution mechanism, but as a separate mediated settlement agreement that is independent from the process. The circumstance that in mediation, the parties aim to achieve a binding mediated settlement agreement that may serve as an enforcement title changes this assessment. If the parties assume that the mediated outcome will become binding and enforceable, it is also probable that the parties will assume that the mediation has been compliant with objective quality criteria. One could then argue that such objective quality criteria that guarantee the integrity of the process become an essential basis of the transaction. I will not go that far for the moment. This is because in contrast to court mediation, the criteria that guarantee the procedural integrity of out-of-court mediation have only started to emerge. In the next Chapter I seek to identify these essential elements of mediation and principles of Civil and Commercial Mediation.

4 THE MEDIATION PROCESS AND THE LEGAL SYSTEM

4.1 The mediation process as justification

In Chapter 3 I examined the normative dimension of the mediated outcome and I have concluded that mediated settlement agreements are enjoying increased bindingness. In this Chapter I examine the normative dimension of the mediation process as a justification for the bindingness of the mediated outcome from the point of view of contract theory. I will first sketch the legitimating effect of procedures within systems theory. Thereafter I will examine the fundamental nature of Civil and Commercial Mediation within the legal system. I will establish the principles that are considered to constitute the deep justification of the bindingness of the mediated outcome and study how they are reproduced within the legal system. I will use the mediation agreement and contract theory as a research method to show both the inside and outside of the law. The focus is on the interface between the legal practice and the social practice of mediation.

As explained earlier, mediation – as a social practice – is a rather vague umbrella term for several forms of third party intervention than a procedure that complies with rules or principles that have been set out in advance.⁵¹⁶ Where mediation is perceived as a social practice, a failure to abide by the values of mediation may have some significance in the interaction of the group. The conflict may persist, and the parties may be dissatisfied with the performance of the mediator. However, there will be no sanction unless there is a common understanding of the aim of the mediation, the way this aim is to be achieved, and the rules and principles that are to be observed. In other words, there must be certain expectations as regards the aim and the rules of the game.

In Civil and Commercial Mediation, the outcome is a mediated settlement agreement. One may therefore ask two fundamental questions: The first is why the mediated settlement agreement produces a binding effect. The second is how the mediated settlement agreement justifies the terms that it produces.⁵¹⁷ In contract theory, these questions are fundamental to the understanding of different approaches to the bindingness of a contract.⁵¹⁸ Is consent sufficient to create

⁵¹⁶ See Chapter 2.3.1.

⁵¹⁷ Pöyhönen 1988, p. 88. Regarding the justification of the bindingness of the contract in moral philosophy: Sandel 2009, p. 142.

⁵¹⁸ Mäkelä 2008, p. 20.

obligations or must there be another element that justifies the bindingness of the contract? According to classical contract theory and the laissez-faire principle of the nineteenth century, an agreement produces binding effects, because the parties have agreed to bind themselves. In fact, the entire function of the civil law was seen as the realization of the parties' free will in the liberal thinking of the 19th century.⁵¹⁹ The enforcement of the contract according to the terms agreed by the parties was considered to be just, because it realized the free will of the parties. Judges, therefore, were not concerned with the question of whether a contract was substantially fair, but explored whether the contract corresponded to the free will of the parties. In later contract theory, the exploration of the free will was replaced by the objective assessment of the parties' intention as understood by a third party or according to commercial practice.⁵²⁰ However, the basic justification for the bindingness of a contract and its justification remained the consent of the parties. Only the welfare state brought about a different line of thinking. It was argued that consent alone was no longer sufficient to justify the bindingness of the contract, but there needed to be substantive fairness in the exchange.

When the outcome of the mediation is a mediated settlement agreement, the question arises as to whether the parties' consent to the outcome is sufficient to produce and justify the bindingness of the mediated settlement agreement or whether additional elements are needed. It is generally accepted that authoritative decisions by the state, such as court judgments, call for their legitimation. Lawyers tend to argue that court decisions are legitimate because they are based on generally accepted rules and principles.⁵²¹ One may speak of a legitimation by means of the substantive correctness of the decision. If the correctness of the decision is the reason for the legitimacy of court decisions, then the court procedure constitutes a means to attain the substantive correctness of the decisions.

The correctness of the decision is not the only way to legitimate the decision. *Luhmann* argues that legitimacy cannot be solely based on the consensus about what is right. Complex societies need to ensure that decisions will be accepted as premises for future behaviour, even though a decision is wrong. In *Luhmann's* view the participants in a procedure do not accept a decision as legitimate, because they are convinced that the decision is correct, this is only one factor of legitimation. They accept the decision because there is a social climate that institutionalizes the acceptance of binding decisions.⁵²² In his view, it is not the substance of the decision, but the procedure entails the legitimation of the outcome irrespective of

519 Atiyah 1995, p. 8.

520 Atiyah 1995, pp. 8. Kötz and Flessner 1996, p. 11.

521 For the basic concept of legitimation, see Weber 1972, pp. 19, 122. On the psychological aspects of legitimacy with regard to social arrangements that do not constitute authoritative decision-making, see Tyler 2006.

522 Luhmann 1983, pp. 32, 34.

the specific result. When the correctness of the decision loses its importance, the procedure does not constitute an instrument to achieve a correct result, but it is a process in which the participants change their expectations by means of a factual communication process that takes place according to legal rules.⁵²³ The system entails a learning process that leads ultimately to an acceptance of the decision.

It was earlier noted that structured systems may be used as a means to reduce complexity in decision-making.⁵²⁴ In legal decision-making, the complexity of the decision-making is reduced within court proceedings that constitute structured systems and handle the conflict in a distinct way, thereby excluding other ways of handling the conflict. The structure of a procedural system is characterized by the existence of procedural rules that stabilize the expectations of the parties and guide their conduct.⁵²⁵ When the court proceedings start, the parties submit to these rules and act accordingly. The parties need to make claims and provide evidence in accordance with these rules which obliges them to make choices when telling their story. This choice becomes a premise for the parties' future behaviour and limits other alternatives within the procedure. In this way, the system produces its own *procedural history* that further reduces complexity.⁵²⁶ At the end of the procedure, the parties accept the decision, because it is the outcome of their procedural history. Another differentiation that contributes to the legitimation takes place at the level of the role of the parties.⁵²⁷ The participants in court proceedings can act only in accordance with the role they have in the procedure and not in the role they have outside the procedure. A teacher may become a defendant, a mother a judge. This allocation of roles forces the parties into a certain form of behaviour that is specific to the process. They act according to this role that is distinct from their role outside the structured system.

Also, mediation uses some mechanisms and differentiations that are characteristic of structured systems to reduce complexity and legitimate the outcome of the procedure. Mediation is a procedure whereby the parties need to make choices and these choices constitute a premise for their future behaviour within the mediation. For instance, this is the case when the parties communicate their interests and needs or communicate their subjective criteria of justice. These interests and criteria of justice will constitute a premise for the parties' decision to the exclusion of other alternatives. Mediation enhances the parties' acceptance of the premises of their decision and as a consequence, the acceptance of the decision.

523 Luhmann 1983, pp. 34, 37.

524 See Chapter 2.3.1. Zippelius notes that the structure is based on classical principles of procedural justice and claims that procedural justice ultimately legitimates the decision: Zippelius 1973, p. 298.

525 Luhmann 1983, p. 42.

526 Luhmann 1983, pp. 40, 43.

527 Luhmann 1983, pp. 48, 91.

The decision may not be considered to be correct by the parties, but it is accepted as a consequence of an acceptance of the decision-making premises. In this way, it can be claimed that the procedure legitimates the choices made by the parties within the procedure. Mediation serves to rationalize the decision-making process, to increase the acceptance of the decision made by the parties and to justify the finality of the decision taken by the parties.⁵²⁸

Also, mediation can be perceived as a learning process in which the expectations of the parties undergo a change so that they ultimately *achieve and accept* a decision. If the mediation system is sufficiently separated from its environment, mediation creates its own sphere of communications – hence its own extract of the reality. Consequently, information is processed and guided within its structures in accordance with its own rules and decisions. The influence of society on the procedure is reduced by the allocation of roles: the parties are attributed the roles of *active decision makers* or negotiators. The mediator takes the role of the neutral. Through their interaction, the parties change their attitudes and position. Once they have entered mediation and taken on a role, they accept the *rules* of a procedure that is designed to alter their perception towards the result they are willing to achieve. They find themselves in a procedural tunnel that changes their perceptions, which finally enables them to achieve a decision they consider appropriate. In many cases, mediation also involves a power element that is the knowledge that the non-achievement of a settlement may lead to court litigation, which may increase the parties' willingness to take a decision as well as the acceptance of the decision.⁵²⁹ In contrast to court proceedings, (legal) rules and principles that stabilize the parties' normative expectations and guide the communication process and as such legitimate the outcome of mediation are only in the process of emerging. A structured procedural system can only be achieved if the parties agree in advance on their roles, separate their communications within the dispute resolution process from other communications in society and agree on the rules and principles that guide their communications. The parties therefore need to create a framework that establishes mediation as a separate structured system.

528 Empirical research has shown that it is not the decision, but the difference in the decision-making process that leads to the parties' satisfaction with the mediated result: *"The more likely source of disputants' satisfaction with mediation is that it provides a fundamentally different kind of settlement process. Parties gain several benefits from participating in mediation that are independent of the ultimate terms of the agreement. These include the opportunity to tell their story directly to the other side, express painful emotions and perhaps receive an acknowledgement, negotiate in a civil manner, hear clearly the reasons why compromise is necessary, and reconcile themselves gradually to outcomes short of victory."*: Golann 2002, p. 335.

529 Luhmann notes that conciliation and mediation rely in modern societies on the function of the law to stabilize normative expectations. The threat of litigation is always present in the mediation and the settlement takes the form of a legal instrument: Luhmann 1995, p. 161.

4.2 The mediation agreement as the framework of Civil and Commercial Mediation

In what follows, I will use the mediation agreement to examine the essential elements of Civil and Commercial Mediation, its aims and principles. The mediation agreement creates the normative framework for the mediation and brings the process into the rationality of the legal system. The mediation agreement constitutes the foundation and framework of a separate structured system and therefore a communication process that follows certain rules. The mediation agreement separates the legal practice of mediation from the social practice of mediation.

For a mediation agreement to come into existence, the parties are required to make a legal communication, hence a communication that is recognized by the legal system. The participants' intention to enter mediation must constitute an intention to create a legal relationship and to enter into legal obligations.⁵³⁰ A mere invitation to mediate – even if expressed by all parties – does not necessarily include such an intention to bind oneself. It may just constitute a socially binding, but legally irrelevant, invitation to work on the resolution of a conflict. Also, the participation of a third party that holds itself out to be a mediator does not as such mean that the parties intend to create legal relations. For instance, mediation at school or in a work place does not generally involve the participants' intention to terminate, create or change their legal relations. An invitation to participate in a school mediation may create a social but not a legally binding obligation to mediate in accordance with certain rules and principles. The conclusion of a mediation agreement by the parties, on the other hand, involves the parties entering into a legal obligation to mediate in pursuance of a specific aim in accordance with a structure that guides their communication.

The intention of the parties and therefore also the question of whether the parties wish to enter a legally binding obligation to conduct Civil and Commercial Mediation is a matter of interpretation. According to contract theory, the parties do not have to conceptualize their declarations of intent legally. Whether the parties intend to bind themselves and achieve legal consequences requires an interpretation of the parties' declaration of intent. The question of the validity of the mediation agreement is therefore intermingled with the interpretation of the declaration of intent itself.⁵³¹ In contract law, declarations of intent are generally evaluated *ex post* based on the agreement and the conduct of the parties. In the absence of a specific legal requirement, the parties do not need to conclude a written agreement or include specific terms for a contract to be considered valid. However, *ex post* it

⁵³⁰ There is a difference between social and legal obligations: on a comparative analysis of the binding force of an invitation for dinner: Gordley 2001, p. 105.

⁵³¹ In relation to commercial agreements, see Pönkä 2013, p. 921.

may be concluded that there was no agreement, as the parties' declaration of intent was indeterminate, that there was a dissent, hence no congruent declarations of intent or that there was an error that was legally relevant.

In respect of agreements that seek to achieve certain legal consequences, an ex-post assessment of the declaration of intent generally entails the risk that the parties' agreement fails to fulfil the criteria that are required for achieving the desired consequences. This problem has been referred to as placement risk.⁵³² A placement risk may arise in contract types that protect the weaker party, but also in respect of all contracts if the parties seek to avoid certain legal consequences or seek to achieve certain legal consequences. One can therefore speak of a general drafting risk. In Civil and Commercial Mediation, the parties run the risk of their conduct not being considered to be mediation or that their agreement does not constitute a mediation agreement. From a legal point of view, the parties' intention to achieve an outcome that is equivalent to a court judgment requires that the agreement they are about to conclude meets the requirements of the law. The parties' freedom to determine the contents of an agreement is therefore limited when the subject matter of the agreement is not a physical object or service but is defined in legal terms. If the parties wish to achieve the legal consequences provided for by the Mediation Directive, there must be mediation and the mediation needs to fulfil the criteria set forth by the law.⁵³³

The mediation agreement serves to separate the process from its environment. Also, the establishment of a separate structured system requires the parties to be aware that they find themselves in a specific system of communication and that they submit to the rules and principles that are characteristic of this system. This requires again that the parties agree on the essential elements of the dispute resolution mechanism prior to starting the dispute resolution mechanism. An ex-post assessment of the question of whether the parties intended to mediate or whether they intended to resolve their dispute in another dispute resolution

532 A placement risk emerges if a party seeks to avoid a contract being classified as a contract type that triggers mandatory provisions protecting the other party, or on the other hand, seeks to achieve certain legal consequences. The party seeking to escape from the mandatory provisions in such a case bears the risk that the court adopts the same line of thinking in its ex-post evaluation: see, for instance, Aurejärvi 1976, pp. 214–218. Specific contract types are common in company law, where the main characteristics of companies are determined by legislation which serves to distinguish them from other legal entities in the market. This is considered necessary in order to protect the interest of third parties. The parties may choose between different types of companies and agree on certain deviations, but the opportunity to change or amend the main characteristics of a company or create new forms of companies is limited. See, for instance, Larenz 1987, p. 52.

533 In the Proposal for the Mediation Directive, the legal definition of mediation was general in order to achieve a broad application of the Mediation Directive: Proposal for a Mediation Directive COM (2004) 718, Article 2. It was the purpose that the application of the Mediation Directive was triggered by the nature of the process and that no qualifying criteria were applied. This general definition was abandoned later and the requirement that the process must be structured was introduced.

procedure does not sufficiently support the specific way of canalizing the parties' conflict.

The Mediation Directive defines mediation but does not specify any formal or substantive criteria the mediation agreement needs to fulfil in order to be valid. Also, national legislation is inconsistent: while several Member States neither set forth the minimum contents of the mediation agreement nor expressly require the parties to enter into a mediation agreement, other countries have enacted a detailed regulation on the terms a mediation agreement is to set out.⁵³⁴ Even if the parties are not pushed into the narrow framework of a regulated mediation agreement they are bound to act within the boundaries set by the legal definition of what constitutes Civil and Commercial Mediation. If the parties exercise their freedom of contract without having regard to the legal requirements, they risk the dispute resolution failing to fulfil the criteria set out by the Mediation Directive when evaluated ex-post. The parties therefore need to agree in advance on a specific dispute resolution mechanism and on what they seek to achieve.

It should also be mentioned that not all jurisdictions consider that the parties' interaction has taken place within the framework of a mediation agreement. While there is a common understanding that there is a contractual relationship between the mediator and the parties, the relationship between the parties may also be perceived of as a pre-contractual reality and not a legal agreement.⁵³⁵ Depending on the classification of the mediator's agreement in the respective jurisdiction, the mediator is then obliged to provide a service, fulfil an assignment or act under a mandate while the parties' behaviour is considered to be a social practice.⁵³⁶ The reason for the difference in the conceptualization is not the subject of this research. One may only speculate as to whether the circumstance that the relationship between the parties is not regarded as being a mediation agreement relates to a non-specific concept of mediation and correlates with an increased level of statutory regulation of the mediator's practice.

For Civil and Commercial Mediation, when the parties intend to establish a structured system for the resolution of their dispute, it is inevitable that the parties agree in advance on the dispute resolution, the mechanism and the aim to be pursued, and the rules that will guide the conduct within the mediation.

534 Esplugues 2014b, pp. 597, 598. The Finnish Government Bill requires the parties to agree in advance on the main terms of the mediation, but leaves open what the essential elements of the agreement are: Government Bill 2010 for the Finnish Mediation Act, p. 17.

535 Esplugues 2014b, pp. 603.

536 The qualification of the agreement between the mediator and the parties within legal terms varies in the different jurisdictions. Some jurisdictions consider the agreement with the mediator as the purchase of services or a mandate: Hopt and Steffek 2013, pp. 55.

4.3 The essential elements of Civil and Commercial Mediation

The understanding of what constitutes mediation differs in the social practice of mediation and the legal practice of mediation. The mediation concept may also differ from one Member State to the next, which is due to differences in the implementation of the mediation concept introduced by the Mediation Directive in national legislation.⁵³⁷ In what follows, I seek to detach mediation from national concepts and from concepts developed in the social practices that have led to a diversity and differentiation of mediation and to extract the essential elements of Civil and Commercial Mediation. To this end I will return to some original writings on mediation: On the one hand to *Lon Fuller* who has been referred to as the *jurisprudent of ADR*⁵³⁸ and on the other hand to *Georg Simmel* and his classical description of the dyad and the triad.

Lon Fuller has claimed that every process has a distinct morality.⁵³⁹ Morality is not to be understood as a reference to morals, though. It is not an assessment on acceptable or unacceptable behaviour but refers to the *ratio operandi* or the inner logic of a procedure. The morality of the process could also be translated as the essence – *das Wesen* – of the procedure. But what is the essence of mediation? Despite the functional equivalence of mediation and litigation, there is a difference in the extent to which the procedures have been differentiated from other social or legal practices. It is usual for the parties to have an understanding about what they could expect when they start litigation. They are aware that they are required to file a claim, to plead their legal positions, to support these positions by arguments and evidence, that the process will be contradictory and that at the end of the litigation there will be a judgment that is based on the law. They have an understanding that the process is conducted in accordance with certain principles of a fair trial and that compliance with these principles is secured by the legal system. The same is true for arbitration. When starting arbitration, commercial parties have an understanding of what they may expect.

In mediation, the parties' understanding of what constitutes mediation and the parties' expectations in respect of the procedure may be vague. It is therefore

537 See Chapter 2.3.2.2.

538 Menkel-Meadow 2005, p. 17. For an analysis of *Fuller's* approach to dispute resolution: Menkel-Meadow 2000, pp. 14–22. Recently, the works of *Lon Fuller* have been used to develop a dogmatic model for alternative dispute resolution: see *Wendland* 2017.

539 In *Fuller's* view “*The morality of mediation lies in optimum settlement, a settlement in which each party gives up what he values less, in return for what he values more. The morality of arbitration lies in a decision according to the law of the contract. The procedures appropriate for mediation are those most likely to uncover that pattern of adjustment which will most nearly meet the interests of both parties. The procedures appropriate for arbitration are those which most securely guarantee each of the parties a meaningful chance to present arguments and proofs for a decision in his favor.*”: *Fuller* 1963, p. 23.

not sufficient for the parties to agree to have a ‘mediation’ as the expectations they have in respect of the procedure are not stabilized. On the other hand, it is not necessary for the parties to call the dispute resolution mechanism they seek to have recourse to ‘mediation’. The parties, however, must agree on the essential elements (*essentialia negotii*) of mediation. In the absence of specific legislation regarding the contents of the mediation agreement, the parties must determine themselves the dispute resolution mechanism they are intending to conduct and allocate their roles. When the parties fail to agree on the essential elements, they risk that the mediated settlement agreement may not be declared enforceable by the courts and that they will not be granted the other benefits that are attached to Civil and Commercial Mediation, namely the suspension of limitation periods and the confidentiality privilege.

When lawyers speak of the essence of an agreement, they refer to the constituent elements of an agreement – how it comes into existence and how it has to be interpreted. An agreement is only valid if the parties agree on the essential elements. However, what the essence of mediation is, is controversial. This is due to the differences in the legislation implementing the Mediation Directive, a different *national* understanding of what mediation is, and differences in the local mediation practice. What mediation means within the legal system is defined in legal terms. For Civil and Commercial Mediation, the essence of mediation is to be derived from the Mediation Directive. Mediation according to the Mediation Directive means that a) the parties settle the dispute by themselves with the assistance of the mediator; b) the process has the aim to reach an agreement on the settlement of a dispute and c) the process is structured. This means that the parties need to agree on a distinct form of third party intervention, on a distinct aim and on a distinct procedural structure, three criteria that will be examined in more detail below.

4.3.1 The form of intervention as an essential element

According to Recital 11 of the Mediation Directive, the Mediation Directive does not apply to pre-contractual negotiations nor to processes of an adjudicatory nature.⁵⁴⁰ The essence of the agreement can therefore be examined by seeking to establish the criteria that differentiate Civil and Commercial Mediation from other primary forms of dispute resolution processes and conflict management. Civil and Commercial

⁵⁴⁰ According to Recital 11 of the Mediation Directive the directive “*should not apply to pre-contractual negotiations nor to processes of an adjudicatory nature such as certain judicial conciliation schemes, consumer complaint schemes, arbitration and expert determination or to processes administered by persons or bodies issuing a formal recommendation, whether or not it be legally binding as to the resolution of the dispute.*”

Mediation may therefore be determined by referring to what it is not.⁵⁴¹ *Roberts and Palmer* distinguish between three basic forms of dispute resolution: umpiring, mediation, and negotiation.⁵⁴² They constitute decision-making processes that can be distinguished by the degree and form of the third party intervention (evaluative/facilitative), the formality of the process (formal/informal), the structure of the process (structured/unstructured) and the outcome of the dispute resolution mechanism (consensual/imposed). Distinctions between different dispute resolution mechanisms have been made for the purpose of developing criteria for choosing the most appropriate dispute resolution mechanism in a dispute, but recently also to develop a framework for regulating dispute resolution.⁵⁴³ For the purpose of dispute resolution and regulation design, it has been deemed necessary to provide for a comprehensive description of the dispute resolution mechanisms and their advantages and disadvantages. My mission is different. I will not seek to provide a description of the main characteristics, but will analyse and capture the essential elements of the process.

4.3.1.1 Mediation is not negotiation and not umpiring.....

Negotiation and mediation have many aspects in common.⁵⁴⁴ Both are consensual informal processes of dispute resolution. As a matter of fact, mediation is assisted negotiation and the theoretical background of mediation is negotiation theory.⁵⁴⁵ The difference between mediation and negotiation appears to be rather obvious: Negotiation is a two-party dispute resolution mechanism while mediation takes

541 This differentiation method is also a common instrument to describe the characteristics of mediation in comparison to other forms of dispute resolution or to characterize the most efficient and appropriate way to resolve a dispute. For examples see: Menkel-Meadow, Love and Schneider 2006, p. 17, Alexander 2009, pp. 25–38, Steffek 2013, p. 37. Ervasti and Nylund 2014, p. 74.

542 See on the primary forms of decision-making: Roberts and Palmer 2005, p. 87. Based on *Fuller's* doctrine of social ordering also *Wendland* distinguishes between three primary processes of dispute resolution (negotiation, mediation and adjudication): Wendland 2017, p. 174. See also: Goldberg, Sander, Rogers and Cole 2012, p. 2. Some authors distinguish between private and public primary forms of dispute resolution processes and therefore between four different dispute resolution processes: adjudication, arbitration, mediation and negotiation. In addition, there are countless hybrid forms of dispute resolution processes: Goldberg, Sander, Rogers and Cole 2012, p. 3. Regarding an analysis of the appropriate dispute resolution mechanism: Sander and Goldberg 1994. Lack 2011. Regarding a matrix according to the nature of the institution and the process: (public/private and official/unofficial): Ervasti 2012, p. 142.

543 Research on the regulation of dispute resolution has led to the development of a taxonomy of dispute resolution mechanisms. *Steffek* uses the following criteria to classify dispute resolution mechanisms for the purpose of regulation: the extent to which the parties have initiation control, procedure control, result-content control, result-effect control, neutral choice control, information control, whether the procedure is interest- or right-based and whether the procedure includes an intermediary: Steffek 2013, p. 41. Research in ADR using ADR as an acronym for *appropriate dispute resolution* seeks to describe the main characteristics of the different dispute resolution mechanisms and to assess the advantages and disadvantages of a specific dispute resolution process: see, for instance: Lack 2011, p. 351.

544 See for instance: Goldberg, Sander, Rogers and Cole, p. 2.

545 This is at least the case for the pragmatic model. On negotiation theory: Fisher, Ury and Patton 2011.

place in the presence of a third party that assists the negotiation.⁵⁴⁶ According to this simplified view, negotiation constitutes a two-sided communication process where two parties exchange information, offers and counter offers with the aim of arriving at a consensual solution. The absence of a third party or third parties is then what distinguishes negotiation from mediation. The fundamental two-party nature of negotiation does not yet change, when the parties are represented by lawyers or negotiate in teams.⁵⁴⁷ Representatives advance the parties' interest in the outcome and negotiating teams advance the interests of their side, even though the interests of the team members may not be homogenous. As long as all parties are negotiating with the aim of agreeing to a solution in the subject matter and pursuing the position of their side, the nature of their interaction remains unchanged.

The difference between mediation and negotiation starts to blur in negotiations with more than two participants - one may speak of multiparty negotiations - in which one participant does not negotiate as an aligned party. A bank or consultant may participate in the development of a solution to a dispute and, for instance, assist the parties in the restructuring of debts or assist them in entering into a deal. But does this intermediary function make such an assistant a mediator? In his studies on social groups, *Georg Simmel* pointed out that a move from a group of two to a group of three changes the interaction between the parties. In a group of three, dissent may emerge between the parties and the group may form more or less stable alliances. The interest of the parties involved in the subject matter may then be taken as the element that distinguishes negotiation from mediation.⁵⁴⁸ *Simmel* distinguishes between the interests of the non-aligned (non-partisan) mediator and the interests of a third person who does not participate in a mediating role. In his view, the mediator as a non-partisan party stands above the parties' contrasting interests and opinions or has an equal interest in both. In the first case, the mediator has no personal interest in the objective aspects of a party's position but must have a subjective interest in the parties as persons to be able to carry out the function of the mediator. In the second case, the mediator participates equally in the interests of conflict, a situation that may occur if the mediator belongs to two different interest groups, one local and the other professional.⁵⁴⁹ The negotiator's interests differ from the interests of the non-aligned mediator. The negotiator is partisan and has a personal interest in the objective aspects of the dispute itself.

546 *Roberts and Palmer* note that most ADR literature is based on the simplified bilateral model: Roberts and Palmer 2005, p. 119.

547 *Ibid.*

548 Compare Roberts and Palmer 2005, p. 154.

549 *Simmel* 1964, p. 149. *Simmel* mentions as an example for the second constellation a bishop who mediates between the church and the secular ruler of his diocese: *Simmel* 1964, p. 150.

The actual interest of the party alone is not a reliable criterion for distinguishing mediation from negotiation. The intermediary may have a bridging, consulting or directing function. This function does not necessarily involve an interest in the parties' objective positions in the dispute and may therefore— according to the criteria set out by *Simmel* – count as a non-aligned function. In this case the intermediary is not partisan but may still have an interest in the outcome that is different from the interests of the parties, but so may the mediator who has an interest in achieving a settlement. The bridging function, however, does not fulfil the expectations the parties may have with regard to the non-aligned mediator in terms of neutrality and competence. A third non-partisan person may therefore intervene or participate in negotiations without turning the negotiations into mediation.

There is also another reason why the interest of the intermediary alone is not a reliable criterion for distinguishing between negotiation and mediation. The interest of a person is typically an internal motive. The parties are therefore not in the position to discern this interest unless this interest has been communicated.⁵⁵⁰ The distinctive element between mediation and negotiation is therefore a different one. In order for the dispute resolution procedure to become mediation, it is necessary for the participants to participate in the dispute resolution in a role that corresponds to a distinct conceptual form of dispute resolution. Regardless of the number of participating parties, there is to be a party that intervenes in the role of the neutral, impartial third party. The role is the non-aligned and impartial mediator, who intervenes without any self-interest in the outcome of the mediation. The allocation of the role as the mediator stabilizes the expectations of the parties – the interaction becomes stable. The participation of the intermediary in the *role* of the neutral is therefore an essential element of the mediation and the parties need to agree on the distribution of their roles prior to starting the mediation.⁵⁵¹

The degree to which the dispute resolution procedure follows a structure is another criterion that distinguishes mediation from negotiation. Mediation, unlike negotiation, has a structure that goes beyond the structure created by the parties.⁵⁵² A negotiation that is not structured may therefore still be a negotiation, while

550 Simmel 1964, p. 151.

551 In comparative legal research, the neutrality of the mediator has been identified as an indispensable basis for mediation: Hopt and Steffek 2013, p. 76. *Eidenmüller* considers for the German law that the neutrality of the mediator is a constitutive element of the mediation: Eidenmüller 2013b, p. 133. On impartiality as a principle of mediation, see Chapter 4.4.3. Not all forms of mediation require the same degree of impartiality: see Moore 2014, pp. 28, Table 2.1.

552 This difference shows also in respect of the enforceability of a duty to mediate in comparison to the enforceability of a duty to negotiate. A mere duty to negotiate is not enforceable, while a duty to mediate may be enforceable in some jurisdictions, such as England and Wales. The difference is well expressed in the quote referred to by *Allen*: “*What is enforced is not co-operation and consent, but participation in a process from which co-operation and consent might come.*”: Allen, Tony 2013, p. 161.

mediation requires a structure to be considered Civil and Commercial Mediation, an aspect that will be more closely addressed in Chapter 4.3.3. For the moment, it is sufficient to state that negotiations differ from Civil and Commercial Mediation in that the parties assume distinct roles, namely the role of the parties and the role of the neutral, and that mediation follows a distinct structure. The structure of mediation is characterized by the stabilization of the parties' expectations regarding the conduct of the mediation, hence a certain degree of predictability in respect of the principles and rules that will be followed.

Arbitration is the main form of umpiring outside the courts. It shares with mediation the contractual framework that is characterized by an agreement to exclude the dispute resolution from the jurisdiction of the state courts and the view that the parties agree on the procedural framework of the procedure. Arbitration doctrine considers that the principle of self-determination is a guiding principle of arbitration— as does mediation doctrine. In practice, the parties' ability to determine the procedural framework of the arbitration procedure is, however, reduced by the strong influence of institutional rules and by a growing body of international and national legal instruments and case law.

The characteristic element that distinguishes arbitration from mediation is that arbitration is adjudicative in nature, while mediation is consensual in nature. Adjudication in a narrow sense refers to decision-making that is comparable to the exercise of judicial power by the state courts. Adjudication in a broad sense covers all forms of dispute resolution, where a third person is entrusted to determine a dispute or assumes the role of an umpire. In order to be considered adjudicative in a broad sense, it is not necessary that the decision is taken in accordance with the law or principles of equity. Even the decision of a parent on a dispute between their children over a toy or a decision taken by a referee in a football game is adjudicative in nature.⁵⁵³ In its broadest meaning, adjudication includes a social practice.

According to *Fuller*, the essence of adjudicative forms of dispute resolution shows in the way the parties participate in the decision.⁵⁵⁴ In an adjudicative dispute resolution process, the parties participate in the decision-making by means of presenting evidence and making reasoned arguments in support of their position. Adjudication is therefore a forum in which the presentation of reasoned arguments is taken into account when a decision is achieved. In the framework of the legal practice of adjudication, this participation requires that a party raises arguments that are based on rights or general principles. According to this view the neutrality of the judge or arbitrator are a consequence and not the essence of adjudication. *Simmel* sees the distinctive feature not in the framework that provides

553 Fuller 1978, p. 353.

554 Fuller 1978, pp. 365, 369.

the opportunity to present arguments, but in the extent to which the non-aligned neutral is entrusted with the option to determine the dispute on behalf of the parties. This transfer of power requires the parties' subjective confidence in the objectivity and therefore neutrality of the third party.⁵⁵⁵ The difference between consensual and adjudicative forms of decision-making shows in the extent to which the parties transfer decision-making power. In consensual forms of dispute resolution, the final decision remains within the parties, while in adjudicative forms of decision-making the final decision-making power is exercised by an outsider.⁵⁵⁶

If one perceives mediation as a structured communication system, the formal retention of the right to consent to the mediated outcome is not sufficient to distinguish mediation from adjudicative processes. As earlier pointed out, the distinct procedural system is created when the parties allocate roles and submit to certain rules and principles that guide their conduct. The allocation of roles, which shows in the parties' role to act as an active decision-maker and the role of the mediator to facilitate instead of imposing a decision, shows formally in that the parties transfer to the mediator only the limited power to facilitate their decision-making. The parties' role as active decision-makers, however, also involves the parties engaging in communications that are not characterized by legal claims and arguments that seek to convince the neutral third party of their position, but by an active and collaborative communication that is facilitated by the mediator. The parties' expectations in respect of the roles therefore guide the parties' conduct in the process and result in a distinct communication process. The parties' formal right to consent is no substitute for this distinct form of communication and can therefore not be used as the sole criteria for distinguishing between adjudication and mediation. Instead, mediation and arbitration differ in that in mediation, the decision-making is consensual and takes place in a communication process that supports the role of the parties as active decision-makers and not in a communication process that seeks to convince the neutral of a position.

4.3.1.2 Grey areas between adjudicative and consensual forms of intervention

In mediation theory, the distinction between adjudicative and consensual forms of dispute resolution has been discussed with regard to the mediator's behaviour or orientation in the mediation, hence the distinction between evaluative and

555 Simmel 1964, p. 151.

556 Ibid.

facilitative mediation.⁵⁵⁷ Mediators that adopt an evaluative style by either directing the parties towards an outcome, by making a proposal on the settlement of the disputes, or by evaluating the position of the parties assume a role that comes close to the role of a judge, even though they do not impose a decision based on a legal assessment of the dispute. This role has an impact on the behaviour of the parties who will seek to participate in the evaluations or proposals made by the mediator. The parties' behaviour is likely to move from an exchange of information and bargaining to a presentation of reasoned arguments and principles, which renders the communication adjudicative in nature, even though the formal decision-making power remains with the parties. The mediator's evaluative orientation has therefore often been criticized as incompatible with mediation⁵⁵⁸ or 'troublesome' as evaluative forms of mediation start to become a surrogate for arbitration, but do not meet the requirements of due process applicable to arbitration.⁵⁵⁹

The distinction between evaluative and facilitative forms of mediation is not only a matter of style that has divided the mediation community. The existence of so-called evaluative forms of mediation raises the question of whether evaluative mediation constitutes Civil and Commercial Mediation within the meaning of the Mediation Directive, or whether it is an adjudicative form of dispute resolution and therefore not mediation at all. The distinction between adjudicative and consensual is relevant in assessing whether the parties have the intention to enter into Civil and Commercial Mediation or whether they have chosen some other form of

557 The distinction between evaluative and facilitative was described by *Riskin* in an article that had a significant influence on the conceptualization of mediation theory. In his article, *Riskin* proposes a grid that divides mediation into four quadrants, each defined by the mediator's orientation with respect to two continuums: the mediator's *evaluative* or *facilitative* role and the *narrow* or *broad* problem definition: *Riskin* 1996, p.25. *Riskin's* grid was heavily criticized in particular regarding the mediators' evaluative role: Kovach and Love 1996. Kovach and Love 1998. Following this criticism, *Riskin* revisited the grid, refined the old grid and replaced *evaluative* with *directive* and *facilitative* with *elicitive* to emphasize the continuum and the focus on party self-determination: *Riskin* 2003, pp. 30, 31. Despite this clarification, it is still common to divide mediation into evaluative and facilitative mediation, instead of directive and elicitive. In *evaluative mediation*, the mediator may make a proposal, or make an assessment of the parties' proposals. Evaluative mediation therefore involves an evaluation by the mediator, but not a determination of the dispute by the mediator. In *facilitative mediation*, the mediator does not make any recommendations regarding the solution, but the mediator supports the parties by communication, negotiation and other techniques. In figurative terms, the difference between facilitative and evaluative has been expressed as the difference between directing the traffic vs. driving the bus: Boulle and Nestic: 2010, p. 117 or orchestrators vs. dealmakers: *Moore* 2014, p. 41. See also: Eidenmüller and Wagner 2013, p. 31. When looking at its respective pure forms, the evaluative and facilitative models could be seen as a dichotomy. Between these ideal forms of mediation, however, there is a grey area. On the different forms of evaluative mediation: *Riskin* 1996, pp. 29. *Ervasti and Nylund* 2014, pp. 155. Regarding the international legislative role models: *Hopt and Steffek* 2013, p. 58 who consider that the philosopher's stone has not yet been found. For the European Union: *Esplugues* 2014b, pp. 657. *Esplugues* notes that several approaches exist in Europe in respect of the mediator's degree of involvement in the settlement and his power to advice as regards the mediated outcome. In some jurisdictions, an evaluation of the dispute by the mediator may be restricted by legislation monopolizing the lawyers' right to give legal advice.

558 Kovach and Love 1996. Kovach and Love 1998. Also, *Riskin* holds the view that the expectation that the mediator will make an evaluation will render the process more adversarial: *Riskin* 1996, p. 45.

559 Nolan-Haley, Jacqueline 2012b, p. 84. On due process in arbitration, see *Kurkela and Turunen*, 2010.

dispute resolution or other form of mediation. Two different situations may be distinguished from each other. In the first situation, upon the conclusion of the mediation agreement, the parties are aware that at some point of the process, the neutral may make a recommendation in respect of the outcome of the dispute or make an assessment and they accept and agree to this role model. In this case, they do not formally agree to a transfer of decision-making power to an outsider and one may therefore claim that the process is a form of consensual decision-making and not adjudication. However, the circumstance that the parties know and agree that the mediator will at some point of time make a proposal will affect the parties' role in the participation of the decision-making and their communication and this will turn the process essentially into an adjudicative process.

In the second case, when entering into the mediation agreement, the parties do not expect and therefore do not agree that the neutral party will eventually make a recommendation. The parties' expectations regarding their role and the role of the mediator therefore are stabilized. However, at some point of the mediation the mediator may start to assume an evaluative role. This change in the mediator's role will gradually change the parties' behaviour who may start an argument that seeks to influence the future behaviour of the mediator. Formally the mediator's role remains unchanged, as the parties do not agree to the mediator's evaluative role. If one perceives mediation as a structured communication system the distinction between evaluative and facilitative mediation can only be made on the basis of the parties' normative expectations in respect of the roles they have assumed under the mediation agreement and not on the parties' actual behaviour. It is another question whether the parties will then actually meet this role, but this cannot have an influence on the parties' normative expectations in respect of the basic structure of the process.

The Mediation Directive does not provide a clear guideline. According to Recital 11 of the Mediation Directive, the directive does not apply to “... *processes of an adjudicatory nature such as certain judicial conciliation schemes, consumer complaint schemes, arbitration and expert determination or to processes administered by persons or bodies issuing a formal recommendation, whether or not it be legally binding as to the resolution of the dispute.*” According to the Mediation Directive, the formality of the recommendation appears to be one element that may be used for the distinction between adjudicatory processes and Civil and Commercial Mediation. If this is taken literally, Civil and Commercial Mediation may be evaluative, and the mediator may issue recommendations as long as the recommendations are not the outcome of a formal process and is not legally binding. This would mean that the directive considers as adjudicatory only dispute resolution mechanisms that provide for a certain degree of institutionalized and formalized decision-making, such as ombudsman systems, but considers evaluative mediation not as adjudicatory, regardless of whether the dispute resolution process

is in its essence adjudicatory or not. On the other hand, the circumstance that processes administered by persons, hence less institutionalized processes, may be considered adjudicatory in nature, indicates that the level of institutionalization does not have to be very high for a process to be considered adjudicatory within the meaning of the Mediation Directive.⁵⁶⁰

Surprisingly, the legislators of the Member States have paid little attention to the criteria that may be used for distinguishing between adjudicative and consensual forms of dispute resolution or were reluctant to introduce a definition of mediation that may exclude certain forms of mediation or mediation styles. At the legislative level, the distinction between different models of mediation may show in the statutory definition of mediation or in the way the role and power of the mediator is determined. According to comparative research, most legal systems leave the role and powers of the mediator unregulated. Few countries explicitly limit the mediator to a facilitative role.⁵⁶¹ Also the European Code of Conduct for Mediators does not address the question of whether or not the mediator may assume an evaluative role or make a proposal for the resolution of the dispute. The EUIPO Rules on Mediation set out that the mediator has no authority to settle the case and that it is not the role of the mediator to give legal advice or represent a party.⁵⁶² However, only in exceptional cases is the mediator expressly permitted to make recommendations as is the case in Italy or for the court mediator in Finland.⁵⁶³ In the absence of legislation, it appears that mediation may be evaluative and the mediator may make proposals for the settlement as long as the parties retain their decision-making power and such conduct would still be mediation within the meaning of the Mediation Directive. Another question is whether the parties may agree in advance to a framework in which the mediator issues non-binding recommendations or proposals, or whether such an agreement on the framework turns the process into an adjudicative process.⁵⁶⁴ This may be the case if the parties

⁵⁶⁰ The proposal for the Mediation Directive mentioned only processes administered by 'bodies', while the final version included processes administered by 'persons or bodies': Recital 8 of the Proposal for a Mediation Directive COM (2004) 718 and Mediation Directive. The Commission Staff Working Paper does not qualify the nature of the recommendation regarding the degree of formality: Commission Staff Working Paper SEC (2004) 1314, p. 4.

⁵⁶¹ Hopt and Steffek 2013, p. 57. Hess notes, for instance, that the German Mediation Act leaves room for both forms of mediation. Nevertheless, most commentators of the German Mediation Act consider mediation to be facilitative: Hess and Pelzer 2015, p. 294. For a critical view regarding such restrictive interpretation from the point of view of the German Mediation Act, see Eidenmüller 2013a, p. 185. A restriction to a facilitative role, for instance, can be found in Bulgaria: Esplugues 2014b, p. 657.

⁵⁶² EUIPO Rules on Mediation, Section 5.1.

⁵⁶³ For Italy see: Luca 2015, p. 357. Mastellone and Ristori 2017, pp. 471, 491. For Finland see the Finnish Mediation Act, Chapter 1 Section 7.

⁵⁶⁴ According to Article 13 of the WIPO Mediation Rules 2014 the mediator is formally only prevented from making a binding decision. On mediation associations that expressly prevent or restrict the mediator from issuing recommendations, see Hopt and Steffek 2013, p. 58.

agree to the rules of a mediation institute that expressly provide that their mediator may make a non-binding proposal for the resolution of the dispute.

In order to answer this question, it is useful to remember that the mediation agreement is an instrument that stabilizes the normative expectations of the parties. The circumstance that the parties in the mediation agreement agree on the alternative that the mediator may make a proposal or issues recommendations, establishes and formalizes an adjudicative procedure. From the point of view of the parties, it does not make any difference whether the mediator's opinion will be formal or not, or whether the mediator will actually make such a proposal. The parties' normative expectation that the mediator will make a proposal based on an evaluation will be sufficient to change the parties' behaviour from a collaborative into an adversarial style and from consensual to adjudicative decision-making. When the parties agree on a framework that allows the mediator to make a proposal, the process becomes essentially adjudicative in nature and therefore cannot be considered to be mediation within the meaning of the Mediation Directive.

When the mediator adopts an evaluative style within the mediation, the assessment is more difficult. In this case the parties' normative expectations are not changed, unless they *agree* on a change of the dispute resolution system. *Riskin*⁵⁶⁵ claims that the mediator moves along the evaluative–facilitative continuum and considers therefore that evaluative and facilitative cannot be seen as a dichotomy or as two different models. He perceives *evaluative* and *facilitative* rather as an orientation or behaviour of the mediator that may change – as practice has shown – in the course of the mediation.⁵⁶⁶ This approach makes it clear that a careful distinction needs to be made between evaluative behaviour (or rather dispute resolution) on the one hand and the role of the mediator in the mediation on the other. While the Mediation Directive does not apply to adjudicative forms of dispute resolution, it does not clearly exclude all evaluative behaviour of the mediator, or as *Riskin* would call it in his revised grid: *directive* behaviour of the mediator.⁵⁶⁷

Riskin pointed out that mediation was in its essence facilitative.⁵⁶⁸ The distinction between evaluation and facilitation is rather a matter of degree and therefore difficult to draw.⁵⁶⁹ This is because facilitative mediation also requires the mediator to assist the parties in making bargaining offers and evaluating the proposals made by the other party to be efficient. According to *Riskin*, the facilitative mediator uses

565 Riskin 2003, pp. 13. For an empirical study on legal mediation: Golann 2000. However, it should be mentioned that the study involved a limited number of cases and does not allow for general conclusions regarding the style used by mediators.

566 Riskin 1996, pp. 35, 37.

567 Riskin 2003, p. 30.

568 Riskin 2003, p. 18.

569 On the difficulties to distinguish between reality testing and evaluation: Golann and Corman 2010, p. 328. For examples see: Boule and Nestic 2010, pp. 212. Compare also Kovach and Love 1998, p. 81.

questions to help the parties evaluate the proposals, while the evaluative mediator develops and offers proposals.⁵⁷⁰ Also, the facilitative mediator may therefore assist the parties in assessing the risks of their settlement proposals, engage in a technique referred to as *reality testing* or help the parties assess their best alternatives to a mediated agreement. These techniques are considered to be an important key to settlement.⁵⁷¹ Whether they involve an evaluation by the mediator depends on the mediator's skills in framing questions in a neutral, non-judgmental and non-evaluative way and on the perceptions the parties have in respect of the role of the mediator.

It appears to be useful to consider this issue not in light of the facilitative – evaluative dichotomy, but in light of the principles of impartiality and self-determination. Techniques that are evaluative are more likely to jeopardize the impartiality of the mediator or make the mediator appear to lack the required impartiality than techniques that are facilitative.⁵⁷² A mediator who makes a settlement proposal, makes an evaluation, or directs the parties towards a specific settlement, inevitably makes a value judgment and therefore is likely to take sides or to appear to take sides. This may constitute a breach of the mediator's duty of impartiality. Similarly, techniques that impair the self-determination of the parties may equally constitute a breach of the mediator's duty to respect the self-determination of the parties.

An evaluative orientation by the mediator also encounters other difficulties. Even a non-binding recommendation needs to be based on certain objective criteria that could be of a legal, commercial or other nature. Recommendations require the parties to be aware of the basis of the recommendations and that they understand the reasoning underlying the recommendations. Where the mediator has obtained confidential information in private sessions, the mediator may be prevented from giving reasons for these recommendations. Such recommendations may remain

⁵⁷⁰ Riskin 1996, pp. 31, 34. The evaluative mediator may also urge parties to accept the mediator's proposal or another proposal or threaten to use it.

⁵⁷¹ Reality testing means that the mediator probes with the parties the strengths and weaknesses of the envisaged settlement. Moore specifies that "*He or she may generally explore with each party the benefits of finding a positive bargaining range and mutually acceptable outcomes on issues of concern, and the potential risks and costs of not finding them. To assess potential risks and costs of not reaching an agreement on any specific issue(s) or a package that addresses multiple issues, the mediator may ask, usually in a private session, whether a disputant is willing to risk losing any potential benefits provided by any of the positions or options that are currently under consideration to resolve one or more issues, if an agreement on a specific issue cannot be reached.*": Moore 2014, p. 428. In more directive forms of mediation, the reality test may also include a test of the legal consequences: for commercial mediation and the mediator's duty to assess whether the agreement is effective under applicable law, see Berger 2015, pp. 251. The mediator, however, does not provide an evaluation of the envisaged solution. Compare: Boule and Nescic 2010, pp. 120, 183.

⁵⁷² Against a general exclusion of evaluative techniques: Tochtermann 2008, p. 70. *Tochtermann* considers that the style is a question of party autonomy despite the risks involved in respect of the independence of the mediator.

incomprehensible to the parties, jeopardize the parties' perception of the mediator's impartiality and decrease the legitimacy of the decision-making.

4.3.2 The aim of intervention as an essential element

When disputants start arbitration, they are aware that the outcome of arbitration is an arbitral award. The aim of arbitration is to achieve this outcome. In mediation, the situation is different. An agreement to undertake mediation does not yet mean that the parties' aim is to achieve the settlement of a dispute. As previously pointed out, mediation as a social practice may pursue different aims. Reaching a settlement is not the only aim the parties may typically expect as the outcome of the mediation, but mediation may be directed towards the improvement of the parties' interactions, the empowerment of the disputants or a change in the narrative of their relationship.⁵⁷³ The aim of mediation is the outcome the parties and the mediator may typically expect to reach at the end of a mediation process. This aim is independent of the individual goals the parties or the mediator may pursue in the mediation.⁵⁷⁴ While individual goals may be present in the mediation, they do not determine the nature of the process. The same is true for public goals, such as the reduction of the workload of the courts, cost efficiency or the integration of markets, goals that are often voiced in the context of mediation. The public goal to improve access to justice or improve market integration is a political policy, but not an aim that determines the nature of the individual dispute resolution process.

As pointed out earlier, the aim of mediation is intermingled with the mediation model. The mediation model has not only had an impact on how the conflict is understood but also on what is to be considered as success in mediation. The primary aim of the pragmatic mediation model is to reach a settlement.⁵⁷⁵ Other aims such as the improvement of the communication and interaction between the parties are present but are not pursued as the primary aim of mediation. The primary aim of transformative mediation is to achieve an empowerment and recognition shift of the parties.⁵⁷⁶ In transformative mediation, reaching a settlement is not the primary aim of the mediation. However, subsequent to mediation, ideally the parties will also be in the position to solve specific disputes.

573 Bush and Folger 2005, p. 228. Alberstein 2006, p. 341. On the policy implications of different mediation models, see Noce, Bush and Folger 2002, p. 59.

574 Various individual goals have been identified and examined in mediation research. The parties may pursue additional individual goals, such as empowerment, cost efficiency, satisfaction, and procedural justice, while the mediator may pursue a high settlement rate or an increase in reputation: Wall, Stark and Standifer 2001, p. 381. See also: Wall and Dunne 2012, p. 226.

575 Bush and Folger 2005, p. 19. Noce, Bush and Folger 2002, p. 49.

576 Bush and Folger 2005, p. 66.

The Mediation Directive has a generic approach and does not openly opt for a specific mediation model.⁵⁷⁷ Also, national legislators leave the question of the mediation model unregulated. Formally, any mediation model may therefore be used to attain a specific aim. Most legal literature neglects the connection between aims and mediation models in favour of a general description of the legal framework of mediation.⁵⁷⁸ On the other hand, it has been claimed that any definition or limitation of mediation by the legislator is based on a particular value-based vision of mediation. The fact that the legislator has not laid down a preference for a certain model does not mean that the legislator has not made a policy decision in respect of a certain model that the legislator considers to satisfy the legislative criteria.⁵⁷⁹ The Mediation Directive envisages the settlement of a dispute that has legal elements.⁵⁸⁰ This aim arises not only from the wording of the Mediation Directive, but also from the function of mediation within European dispute resolution and this is also the aim the parties need to agree on in the mediation agreement. In institutional forms of mediation, the aim may already arise from the procedural framework. This is the case in EUIPO mediation that expressly envisages the objective of terminating the appeal proceedings as the aim of mediation and where the parties agree on the settlement of a distinct dispute in the Mediation Agreement.⁵⁸¹

What does it mean when the parties agree to mediate with the purpose of improving interactions instead of achieving a settlement of their dispute? First, the aim of the agreement determines the nature of the agreement. When the parties seek to improve their interaction, the mediator will be obliged to provide a service that consists of supporting a change in the parties' behaviour. In essence, the services of the mediator may be compared to the services provided by a therapist. The change in the parties' behaviour may lead to a change in the interaction, but it will in general not lead to a settlement of a legal dispute. The interaction between the parties will remain a social practice and will not constitute Civil and Commercial Mediation.

When the parties agree to mediate with the purpose of achieving a settlement to a dispute, they create the framework for the dispute resolution mechanism. The mediator will be obliged to facilitate the settlement of a dispute that has in the case

577 The generic approach is an expression of the prevalent 'one size fits it all approach' in mediation. On contingent mediation which involves a diagnosis of the conflict to choose the right 'treatment': Pruitt 2006, pp. 860.

578 E.g. *Eidenmüller* defends the neutral stance of the German Mediation Act regarding mediation models. He admits, however, that disputes and different mediation models require a differentiation in the regulatory framework: *Eidenmüller* 2013a, pp. 183–185. *Risse* excludes the application of therapeutic forms of mediation for commercial mediation: *Risse* 2003, p 30.

579 Noce, Bush and Folger 2002, p. 59.

580 See on the concept of dispute of Civil and Commercial Mediation: Chapter 2.3.4.

581 EUIPO Decision on Mediation 2013, Recital 8. EUIPO Mediation Agreement, Clause 1.

of Civil and Commercial Mediation legal elements. To qualify, the relationship between the parties and the mediator as a service relationship falls short of catching the procedural character of what has been created. The mediator not only provides a service but is attributed a role in the framework of a dispute resolution mechanism that has the purpose of achieving a legally binding resolution of a dispute.⁵⁸² The mediation then serves as an instrument to produce and shape the decision-making of the parties and the final outcome of the mediation.

The settlement of the dispute is not the only aim the parties may pursue in mediation. The parties may pursue other aims: common aims, personal aims or public aims. The settlement of the dispute, however, is the aim that characterizes Civil and Commercial Mediation. This is the aim the parties agree to achieve. The parties actually have no obligation to achieve the aim. On the contrary, the parties may come to the conclusion that they will not settle the dispute or that there has been no dispute to settle. The aim of the dispute resolution process can be compared to the purpose set in company legislation that characterizes the nature of a company. A company limited by shares is set up to make a profit. It does not lose its nature if it does not make a profit. It does not lose its nature if the shareholders have never intended to make a profit. Similarly, the mediation does not lose its character if the parties participate in the mediation without actually intending to settle the dispute.

4.3.3 The structure of intervention as an essential element

The first proposal for the Mediation Directive suggested keeping the legal definition of mediation general in order to achieve a broad application of the Mediation Directive. The broad legal definition should ensure that the application of the Mediation Directive was triggered by the nature of the process and not by any other qualifying criteria.⁵⁸³ This general definition was abandoned later and the requirement that the process must be structured was introduced. Civil and Commercial Mediation therefore requires a structure by definition.⁵⁸⁴

The Directive, however, does not specify what structure means. In mediation theory, the structure of the mediation is widely understood as a sequence of developmental stages through which the parties and the mediator move with the

582 The agreement between the mediator and the parties is often characterized as a service agreement or hybrid agreement: Alexander 2009, p. 210. Hopt and Steffek 2013, p. 56.

583 Commission Staff Working Paper SEC (2004) 1314. In the first Proposal for a Mediation Directive, 'Mediation' was defined as "... any process, however named or referred to, where two or more parties to a dispute are assisted by a third party to reach an agreement on the settlement of the dispute, and regardless of whether the process is initiated by the parties, suggested or ordered by a court or prescribed by the national law of a Member State."

584 This arises from the definition in the Mediation Directive and the European Code for Mediators.

purpose of resolving the dispute.⁵⁸⁵ This internal structure of the process is not a rigid set of rules that need to be followed, but different steps and activities that are taken by the parties and the mediator towards the settlement. The shift from one stage to another may be subtle and also a re-iteration or return to previous stages is not excluded, if this is required. There is no universal stage model that mediation must follow, but differences in the practices employed by different mediation associations and in the mediation literature are frequent. Besides this, there also appear to be cultural differences.⁵⁸⁶ In fact, the number of stages may vary depending on the model used and the mediation training the mediator has received. Differences are sometimes a matter of form rather than of substance, more a consequence of different presentation techniques than of different purposes and activities. A five-stage model⁵⁸⁷, for example, divides mediation into (1) a *preparation stage* where the mediator makes an initial contact with the parties, receives information on the dispute, but also seeks to agree on the procedure to be followed; (2) an *opening stage* that constitutes the start of the mediation and serves to set the framework for the interaction between the participants. This stage serves to reach agreement on the agenda, the principles of the mediation and the procedure to be followed. During this stage, the mediation agreement will be signed.⁵⁸⁸ The opening stage involves the opening statement of the mediator in which the rules and principles of the mediation are re-affirmed. The mediator's opening statement is followed by the parties' statements that gives them the opportunity to present their view. (3) The next stage is the *exploration stage* that seeks to clarify and address the substantive, procedural and emotional aspects of the dispute and prepares the ground for settlement negotiations. It is followed by (4) a *bargaining stage* during which different options for settlement are generated and the mediator coaches the parties towards a settlement and probes the parties on the solutions. This stage may also include a reality test of the solutions elaborated by the parties. The last

585 Moore 2014, p. 183. The stage model has its roots in the principled negotiations model developed by *Fisher and Ury* with a view to reaching a satisfactory agreement in an efficient way. On the structure of mediation as an essential element of mediation see also: Eidenmüller 2016, p. 20.

586 *Hopt* points out that differences exist between countries: in France a three-stage model is common, while a four-stage model is practiced in the Netherlands and a five-stage model in Germany: *Hopt and Steffek* 2013, pp. 59. The structure of the process has been described in the mediation literature and various handbooks: Moore 2014, pp. 186 - 215. *Ervasti and Nylund* 2014, pp. 195. *Brown and Marriott* 2011, pp. 174. The stage model appears to be the *state of the art* for mediators using a problem-solving model: *Noce, Bush and Folger* 2002, p. 60. For a critical view on the stage model, see *Antes, Hudson, Jorgensen and Moen* 1999.

587 Regarding a description of the different stages in mediation practice: *CEDR Mediator Handbook* 2010. *Ervasti and Nylund* adopt a similar model but divide it into seven stages: *Ervasti and Nylund* 2014, p. 197. Moore describes an 11-stage model (including preparation stages): Moore 2014, p. 186. See also: *Heikinheimo and Manninen* 2002, p. 7. *Kovach* 2005, p. 306.

588 In this stage, mediators clarify the mediation process and their roles, gain agreement on the procedure, the scope of confidentiality and disclose possible conflicts of interest: Moore 2014, pp. 199 – 201. *CEDR Mediator Handbook* 2010.

stage of the mediation is the (5) *concluding stage*, when the settlement reached during the mediation is documented.

Not all mediation models have a pre-determined structure. The transformative mediation model does not follow a linear structure but presumes that the process will evolve from the ongoing interaction between the parties. During the process, the parties “*spiral through several different spheres of activity that raise in no specified order.*”⁵⁸⁹ The activities of exploration, deliberation, and decision-making may be conducted simultaneously or consecutively depending on how the communication evolves. The mediator’s task is to support the activity and interaction between the parties and discern and create opportunities for shifts in empowerment and recognition.⁵⁹⁰ A pre-determined structure is considered contrary to the ideology of transformative mediation as it deprives the parties of their opportunity to determine the order in which the conflict resolution should take place and distorts the interaction of the dispute resolution process of the parties.

The legislator does usually not regulate the internal structure of mediation.⁵⁹¹ The internal structure of the mediation is part of the *ars mediandi* of the mediator. The procedural structure depends to a significant extent on the mediator and is closely connected to practices developed by mediation associations and institutes.⁵⁹² It has therefore been considered to be essential for the mediation that the mediation is not an unreflected form of negotiation, but that the mediator pursues a certain method in the mediation.⁵⁹³ The Mediation Directive’s requirement for a structured process is more than a reference to the mediator’s skill. It signifies that the legislator has made a choice in favour of a mediation model that reflects a structured approach towards the settlement of a dispute. This effect of the structure is of particular importance if one considers that the stage model has a specific purpose in exploring systematically the interests of the parties and reducing complexity with the aim of increasing the rationality of the parties’ decision-making.

But structure can also be understood to be an external structure, a definition of the system boundaries and therefore as an externally-recognizable structure that characterizes the process. *Luhmann* holds that the structure of a procedural system is characterized by legal rules that reduce the participants’ alternatives in respect of their conduct and define the theme of the conversation and the borders of the system.⁵⁹⁴ When the parties submit to these rules, they exclude other forms of conduct and assume their distinct roles. *Allen* claims that the structure of mediation

589 Bush and Folger 2005, p. 110.

590 Ibid.

591 Hopt and Steffek 2013, p. 60.

592 Allen, Tony 2013, p. 160.

593 Eidenmüller and Wagner 2013, p. 5.

594 Luhmann 1983, p. 42.

is independent from the structure generated by the parties. When the parties agree to use mediation, they submit to a “*series of objectively definable processes.*”⁵⁹⁵ This is what distinguishes mediation from negotiation. Despite its flexibility, mediation has a structure that is recognizable.⁵⁹⁶ If one searches for rules and principles that provide a structure and therefore reduce the parties’ alternatives for action, one may find those in the mediation agreements entered between the parties. In practice, though, the parties seldom agree on these rules and principles in the mediation agreement, but reference is made to mediation rules or codes of conduct adopted by a mediation institute, arbitration institute or accreditation bodies.⁵⁹⁷

The significance of the rules and principles established in codes of conduct and institutional rules goes beyond the individual contract. They are legal communications that have been adopted by a body that claims to have some sort of regulatory authority. The rules resemble procedural law with the difference that they have not been adopted by a legislator, but by a private body.⁵⁹⁸ Institutional rules reflect legal principles that emerge in mediation; they provide institutional support for the existence of legal principles. Even though the mediator does not follow specific institutional rules, the mediator will directly or indirectly refer to the *principles of mediation*. In mediation practice the mediator is not only called upon agreeing on the rules and principles in the preparation stage, but the mediator confirms the rules and principles to be followed in the opening statement. The opening statement serves to create the arena, establish the authority of the mediator and to set forth the basic rules of the mediation.⁵⁹⁹ Codes of conduct therefore require the mediators to educate the parties at the beginning of the mediation

595 Allen, Tony 2013, p. 160.

596 Allen analyses this question in respect of the enforceability of mediation clauses under English law. According to English doctrine, a contract to negotiate is not enforceable as it is too uncertain to be binding. In the case *Cable & Wireless v IBM United Kingdom Ltd* the (English) Commercial Court distinguished mediation from negotiation and found that a reference to a CEDR (mediation) procedure provided sufficient certainty to consider the agreement to mediate binding. This view was upheld in later case law: Allen, Tony 2013, pp. 154–164.

597 E.g. the CEDR Model Mediation Agreement 2017 makes reference to the CEDR Model Mediation Procedure and the CEDR Code of Conduct for Third Party Neutrals.

598 From the perspective of contract law, institutional rules constitute general terms and conditions and their validity is to be assessed against general contractual principles.

599 On the mediator’s opening statement: Boule and Nestic 2010, p. 97. In the opening statement the mediator “*informs them (the parties) about the nature of the mediation, the mediator’s role and their (the parties’ role);...explains the order of events for the rest of the mediation meeting;... deals with confidentiality issue;... confirms the mediator’s neutrality and impartiality; ... clarifies special conditions, for example, on the need for agreements to be reduced in writing....*” Also, *Ervasti and Nylund* note that one function of the mediator’s opening speech is to tell the parties about the mediation rules: *Ervasti and Nylund* 2014, p. 209. For an example of an opening statement: Boule and Nestic 2010, pp. 532.

on the essence of mediation and to ensure that the parties have understood and agreed to the principles of mediation.⁶⁰⁰

The emergence of a body of rules and principles as well as the development of a specific *ars mediandi* establishes the structure of mediation and provides for the development of a procedural framework that has been described as the proceduralisation of mediation.⁶⁰¹ The proceduralisation stabilizes the expectations of the parties in respect of the conduct of the specific procedure – the procedure, the way of acting as well as the steps that will be followed become predictable. The procedural rules in mediation adopted by different bodies vary regarding the intensity to which they regulate the procedure. Some provide for a detailed description of the process, while others set out the principles only.⁶⁰² The rules also vary in respect of the contents of the mediation procedure and the body that has issued the rules. Their function, however, is similar. They seek to establish a reliable and predictable procedural framework regarding the commencement and termination of the procedure, the requirements of the mediation, duties of the parties and the mediator. While the rules are often considered to be general terms of contracts, they regulate procedural matters.

One can summarize the essence of the mediation as follows: the essence of Civil and Commercial Mediation is not only determined by the dispute resolution mechanism the parties intend to start, but also by the parties' aims. In order to set up the process, the parties need to agree on a dispute resolution mechanism that is not adjudicative in nature. The parties further must determine the resolution of a dispute as the aim of the mediation. As for Civil and Commercial Mediation, this dispute has legal elements. The parties need to agree and submit to the principles of the mediation and allocate their roles in the mediation which means in respect of the mediation that the parties are granted the role of active decision-makers and the mediator the role of the neutral intermediary. This structure distinguishes mediation from social practices of conflict resolution and negotiations, but also from other forms of mediation. While the internal structure can be seen as a quality requirement and will be examined in more detail below, the establishment of an external structure and therefore the submission to rules and principles leads to the proceduralisation of Civil and Commercial Mediation.

600 Section 3.1. of the European Code for Mediators provides that “*The mediator must ensure that the parties to the mediation understand the characteristics of the mediation process and the role of the mediator and the parties in it. The mediator must in particular ensure that prior to commencement of the mediation the parties have understood and expressly agreed the terms and conditions of the mediation agreement including any applicable provisions relating to obligations of confidentiality on the mediator and on the parties.*” For another example: Roth and Gherdane 2013, p. 289.

601 Hess speaks of the juridification: (Verrechtlichung der Mediation): Hess 2009, p. 1062.

602 The EUCON Mediation Rules 2013 consisting of 21 Articles are an example of rather detailed regulation of the process.

4.4 Principles justifying the bindingness of the mediated settlement agreement

The rights and obligations of the parties and the mediator are specified in the agreements entered into between the parties and the mediator that allocate the roles between the participants of the mediation. The agreements entered into between the parties in general provide only for a limited set of obligations. The parties undertake to attempt to settle the dispute in the mediation, to appoint the mediator and to remunerate the mediator for his or her activities.⁶⁰³ The mediator undertakes to guide the process. In institutional mediation, there is a reference to the institutional procedural rules that the mediator and the parties agree to follow.⁶⁰⁴ In addition, the agreements usually specify a duty of confidentiality.⁶⁰⁵ Some model agreements refer also to the codes of conduct mediators must comply with. In mediation that is not conducted in accordance with institutional rules, the parties may determine the terms of the mediation themselves.

The parties' obligations in the mediation agreement do not capture the procedural nature of the mediation. The parties' agreement to settle the dispute by mediation does not yet shape the process, but the process is shaped by a set of values, principles and methods that have first been developed in the social practice of mediation. These principles are an expression of the *morality* of the process and some may legitimate the mediated outcome. Not all values that are upheld in the social practice of mediation are mirrored within the legal system. This is because values only gradually become legal principles, but also because the practice of mediation within the legal system is different from the social practice of mediation. The legal system makes choices. As not all social practices of mediation are recognized as mediation within the legal system, the principles that emerge within Civil and Commercial Mediation are not congruent with the values upheld in the social practice of mediation.

The legal system recognizes values only gradually as legal principles. In order to be recognizable within the legal system, the values need to be reproduced by operations of the legal system.⁶⁰⁶ Principles start to emerge that receive institutional support in statutes, codes of conduct, in the legal discourse, but also in the

603 Some agreements include an obligation to participate in good faith or a duty of cooperation: see Alexander 2009, p. 231.

604 EUIPO Mediation Agreement, Clause 1. CEDR Model Mediation Agreement 2017, Section 1. MfN Sample Mediation Agreement 2017, Section 2.1.

605 On the different obligations, see EUIPO Mediation Agreement, Clause 1, Clause 4, Clause 6. CEDR Model Mediation Agreement 2017, Section 1, Section 4 and Section 8. In the CEDR model agreement the mediator is a party to the model agreement. MfN Sample Mediation Agreement 2017, Section 2, 4 and 6.

606 Values can be seen as environmental facts. "*The task of the system consists of distinguishing values that are protected by the law from values that are not protected*": Luhmann 1991 p. 1430.

procedural rules developed by professional organizations. Procedural principles may be used to interpret the duties and obligations entered by the parties and the mediator. A mediation agreement then becomes an agreement to mediate in accordance with certain principles of mediation.⁶⁰⁷ Mediation principles would then override and restrict the parties' right to determine the contents of their obligations.

Pöyhönen suggests that the weight that rules and principles are given in the interpretation of an agreement depends on the deep justification of the binding force of the agreement. The deep justification of the agreement provides an explanation and legitimation of the binding force of the agreement. The values serving as deep justification are external to the legal system and in the view of *Pöyhönen*, constitute the starting point for the legal system, but also a point of reflection.⁶⁰⁸ The deep justification serves to structure rules and principles, but also to determine leading principles that may override rules or outweigh other principles. The traditional way to justify the finality of the mediated outcome is the consent of the parties, expressed as the value of self-determination in mediation. However, one may assume that parties that enter into mediation have certain expectations in respect of the process and the roles of the participants. Their consent to mediation and finally the mediated outcome is based on the assumption that these expectations are complied with. In other words, mediation needs to be mediation to justify the finality of the mediated outcome. Consent alone may therefore not be sufficient, but a different justification may be required.

What then, are the external values that may justify the finality of the mediated outcome? *Waldman* has identified three values that underlie mediation.⁶⁰⁹ The first value is self-determination or disputant autonomy, which she understands as the parties' right to make choices based on personal beliefs, free of coercion and constraint. The second value is procedural fairness which she understands as fairness of the process used to reach the mediated result. Thirdly, she lists substantive fairness, which means the acceptability of the mediated result.⁶¹⁰ These values are external to the legal system but can be seen as the values that provide a deep justification for the bindingness of the mediated settlement agreement. Within the legal system, the external values may show up as rules or procedural principles that determine the obligations of the participants in the mediation. In

607 On the difference between the analytical interpretation of an agreement and a principle based interpretation, see Helin 2012.

608 Pöyhönen 1988, p. 97.

609 Waldman 2011, p. 3.

610 These values are also referred to either directly or indirectly by other mediation academics. For instance *Menkel-Meadow* has identified values that she refers to as the central core functions of mediation: they include the understanding of mediation as a consensual, voluntary process, participation by the parties in the dispute resolution process, the facilitation by a third party, the resolution of conflicts or disputes on terms of mutual agreement and fairness to the parties and the facilitation of understanding of the other party's needs and interest: Menkel-Meadow, Love and Schneider 2006, p. 102.

the following sections, I will discuss the values of self-determination, substantive fairness and procedural fairness that are used as a legitimation for the mediated outcome in the mediation discourse and examine, how these values are reproduced in legislation and soft law. On the basis of this examination I seek to extract the principles of mediation *within* the legal system. If self-determination is the deep justification of the mediated settlement agreement as generally claimed, it is to be expected that this value shows in the form of rules and principles within legislation and soft law. If this is not the case, one needs to ask whether self-determination is a justification for the binding force of the mediated settlement agreement or whether other values have superseded the value of self-determination as a deep justification in Civil and Commercial Mediation.

4.4.1 Self-determination as deep justification

Self-determination by the parties is considered to be “*a facet of democratic process – that the voice and wisdom of people can shape outcomes responsive to particular situations.*”⁶¹¹ In the mediation literature, self-determination is described as the leading value of mediation⁶¹² that reflects the non-adjudicatory essence of mediation⁶¹³ and therefore the ideal that the parties themselves take responsibility for the dispute, the dispute resolution process and the dispute resolution outcome. In its essence, self-determination means decision-making by the parties themselves. The ideal vision of mediation considers the parties to be active, responsible decision-makers and the mediation as an instrument to empower the parties to make choices for mutual gain and free of coercion in accordance with their personal beliefs and their individual standards of justice.⁶¹⁴

The ideal vision of self-determination was most clearly represented in early community mediation programs.⁶¹⁵ According to this original vision, participation in mediation is voluntary, the process is based on active communication by the parties, the mediator’s role is to facilitate the communication and to encourage an environment in which the free will of the parties emerges; the disputants are responsible for the process which includes their responsibility to identify the issues of conflict, to generate options for their resolution and to evaluate these options. According to this ideal vision, self-determination is based on cooperation and

611 Menkel-Meadow, Love and Schneider 2006, p. 92. See also Menkel-Meadow 1994, p. 2676. Stulberg 1997, p. 944.

612 Regarding self-determination as the central value in mediation: Menkel-Meadow, Love and Schneider 2006, p. 94. Ervasti and Nylund 2014, p. 303. Bush and Folger 2014, p. 742. Regarding self-determination in mediation of international and inter-ethnic conflicts: Nolan-Haley 2005, p. 277.

613 Brown and Marriott 2011, p. 161.

614 Welsh 2001, pp. 8, 17. Kovach and Love 1998, p. 89. Critically: Waldman 2011, p. 3.

615 See in detail: Welsh 2001, pp. 18–20.

direct communication with the other party. As direct communication is considered essential, private meetings between the mediator and the parties as well as lawyers do not belong to the original vision of self-determination.⁶¹⁶

4.4.1.1 The different aspects of self-determination and limitations thereto

Although self-determination is still considered to be the leading value of mediation, the understanding of what constitutes self-determination diverges in the mediation practice and may depend on various factors such as the framework in which the mediation is conducted, the mediation model and culture.⁶¹⁷ Self-determination may be exercised at various stages of the mediation and the extent of the parties' self-determination may vary in the different stages of decision-making. The first stage concerns the participation in the mediation. Self-determination in respect of the parties' participation in the mediation is characterized by the voluntariness to participate and the voluntariness to discontinue the mediation at any time. It is also characterized by the right to choose the place where the mediation will be held, and the time. Mandatory mediation, but also a contractual duty to participate in the mediation is contrary to a strong emphasis on self-determination in respect of the parties' participation.

A distinction is often made in respect of the two further stages of decision-making, namely between self-determination in respect of the process, and self-determination in respect of the outcome of the mediation.⁶¹⁸ Self-determination in respect of the process means that the parties are in control of the process. It includes the parties' right to determine the framework and course of the dispute resolution mechanism as well as the right to take informed decisions regarding procedural steps within the process. A lack of knowledge regarding the process, but also the institutionalisation, external standards, rules and procedural guarantees or an active and directive role of the mediator in the determination of the conduct of the mediation, are contrary to a strong emphasis on the parties' procedural self-determination.⁶¹⁹

Self-determination in respect of the mediated outcome means decision-making in respect of the outcome. This can be seen as the parties' right to agree on a solution in accordance with their own standard of justice.⁶²⁰ It involves the right to

616 Welsh 2001, p. 20.

617 Nolan-Haley 2005, pp. 278-280.

618 See Shapira 2016, pp. 132.

619 *Riskin* notes that most parties and lawyers do not recognize the existence of choices about goals and characteristics of the mediation process and therefore do not have the knowledge to exercise self-determination: *Riskin* 2003, p. 10.

620 See for instance Hyman and Love 2002, pp. 160, 164. On the different standards of justice, see Chapter 4.4.2.

reject the law as the standard for substantive justice, but also the right to develop options and the right to take informed decisions in respect of the outcome free from influence or constraints. A strong emphasis on self-determination requires empowering the parties to develop the solution to their conflict by themselves. Parties that have been empowered during the process are in a position to make choices that are just in accordance with their own standards of justice. Ideally the deliberate decision-making by the parties is the result of the empowerment in the course of the process. Self-determination in respect of the mediated outcome is restricted in situations when the mediator takes a directive role in respect of the outcome, suggests options or makes proposals. It is also impaired if the parties do not have all information to make an informed decision or when one or both parties lack an understanding of the options, alternatives and the consequences related to the settlement. This would be the case when not all information is shared or when the mediation is conducted in private meetings and information is shared only with the mediator.

According to a *narrow* concept of self-determination the mediator is responsible for the process, while the parties exercise their self-determination in respect of the outcome.⁶²¹ Advocates of a *broad* concept of self-determination stress the difficulty of distinguishing between the process and the contents of the outcome. In their view, choices on the process have an impact on the conflict, how it evolves, and finally on the outcome.⁶²² They argue that a truly self-determined solution of the dispute can only arise, where the parties are also free to determine the course of the procedure. They claim that the mediator's role within the process is to empower the parties to make such choices and not to make the choices on their behalf.⁶²³ The focus on the empowerment of the parties should ensure that the parties reach their own solution and not the solution that is preferred by the mediator.

Indeed, it is difficult at times to distinguish between questions of procedure and questions of substance. For instance, pragmatic mediation models⁶²⁴ often require the mediator to ensure that the parties explore alternative options for the settlement. Moreover, the mediator may take the role of an agent of reality, which

621 Compare Shapira 2013, pp. 931, 932. On the difference between substance and procedure: Riskin 2003, pp. 34, 35. On different types of procedural decision-making grids: Riskin 2003, pp. 37. Boulle and Nestic 2010, pp. 12–14.

622 On other arguments in favour of a broad concept of self-determination, see Shapira 2016, pp. 132–134. Procedural self-determination is advocated specifically within transformative mediation: Bush and Folger 2005, p. 66. In favour of a broad concept of self-determination also Menkel-Meadow, Love and Schneider 2006, p. 94.

623 *Bush and Folger* argue that order and structure emerge from the conversations of the parties. The mediator's role is to "help the parties determine how to structure their interaction by focusing on empowerment and recognition." Bush and Folger 2005, pp. 224, 225.

624 On the terminology, see Chapter 2.2.

means that the mediator probes the options the parties have developed.⁶²⁵ Both techniques can be seen as part of the mediator's procedural competence to conduct the process with a view to achieve a rational and effective agreement. However, they may have an impact on the outcome itself and therefore impair the parties' self-determination in respect of the outcome.

Advocates of a strong emphasis on self-determination have criticized that mediators often fail to respect the parties' self-determination. They claim that mediators often lack confidence in the parties' ability of making a rational decision and understanding each other.⁶²⁶ They disapprove of a mediation practice that is captured by a professional group of experts in problem solving that concentrates on "*relieving the pain and frustration of unmet needs and applies their skills to protect their clients from both themselves and each other.*"⁶²⁷ This view implies that mediators who do not trust in the parties' ability to solve their conflicts seek to counterbalance the parties' presumed lack of capacity for rational decision-making by adhering to certain standards of fairness or optimality and using mediation techniques to create solutions. The mediator who assumes the role of a problem solver and directs the parties through the process towards the goal of a fair agreement does not empower the parties but undermines the parties' self-determination.⁶²⁸ In the view of advocates of a broad emphasis on self-determination, external standards of fairness and adherence to certain practices and principles are detrimental to the parties' self-determination, as is a mediator who follows a structure aimed at achieving a settlement.

The ideal view of self-determination is characterized by the fiction that all parties are active and equal decision-makers, understand the process, and are in a position to determine the outcome of the process themselves or that such capacity will be acquired in mediation. It is then the task of the mediator to promote self-determination through empowerment.⁶²⁹ In practice, a person's capacity to take self-determined decisions may be impaired due to physical or mental illness or when strong emotions are involved.⁶³⁰ But even individuals who enjoy full capacity and are not emotionally restricted from taking decisions may be unable to take rational decisions. Research on cognitive psychology claims that a person's capacity to

625 See for instance: Boulle and Nestic 2010, p. 212.

626 Bush and Folger 2014b, p. 743.

627 Ibid.

628 Bush and Folger 2014b, p. 744.

629 Menkel-Meadow, Love and Schneider 2006, p. 95. According to *Waldman*, the justice debate in mediation depends on how optimistically or sceptically mediation theorists view the parties' capacity to construct fair outcomes in mediation: Waldman 2005, p. 248. She argues that theorists who believe in self-determination as the justice on which mediation is based are confident that structural imbalances as well as resource constraints can be overcome in the process: Waldman 2005, p. 250.

630 Shapira 2016, p. 139. Waldman 2011, p. 27.

acquire and process information is limited, which is why people rely in negotiations on heuristics and schemas.⁶³¹

Tversky and *Kahneman* have shown that when making a judgment under uncertainty, people evaluate options and predict values in accordance with a limited set of heuristic principles that reduce the complexity of the decision to easier judgmental operations.⁶³² The heuristics that are utilized for decision-making in negotiations are availability and representativeness, anchoring and adjustment. Availability means that a person relies on the availability of information or previous occurrences as a cue for judgments on the frequency or probability.⁶³³ Representativeness means that a person relies on resembling characteristics of an object or situation and denies prior probabilities. These heuristics explain why negotiators frequently rely on historical information or analogies and fail to take account of the true state of facts.⁶³⁴ The heuristics of adjustment and anchoring – i.e. the circumstance that persons make estimations by starting from an initial value or point of reference - explain the importance the initial offer may have in negotiations, but also the reliance on prior information about pricing in buyer-seller negotiations.⁶³⁵ The reliance on judgmental heuristics leads to systematic errors in the assessment of information and the prediction of probabilities.⁶³⁶ Most often these heuristics remain unconscious and the decision-making may therefore be influenced by factors of which a person is not aware of. This means that individuals are not rational decision-makers, as a general rule.

Irrespective of the capacity of the parties, the existence or absence of certain conditions may enhance or impede the parties' free choice.⁶³⁷ Self-determined decision-making requires that parties are equal. A lack of equality results in a reduced ability to exercise autonomy and choice. Equality, however, is usually a fiction. Inequality between the parties may be due to structural inequality, such as inequality between a consumer and a company, or an employer and an employee or unequal distribution of power, unequal neediness or unequal capability to

631 *Pruitt and Carnevale* define heuristics as mental shortcuts and simplifying strategies that people use to help manage information. Schemas are cognitive structures that contain information about aspects of a particular situation or a general class of situations: *Pruitt and Carnevale* 1993, p. 83. In addition to these heuristics, judgmental biases may impair rational conflict resolution, such as a need to simplify conflict situations or an egocentric bias: see *Thompson, Nadler and Lount* 2014, pp. 245, 248.

632 *Tversky and Kahneman* 1974, p. 1124.

633 On availability: *Tversky and Kahneman* 1974, p. 1127.

634 *Carnevale and Pruitt* 1992, p. 554.

635 *Carnevale and Pruitt* 1992, p. 555.

636 *Tversky and Kahneman* 1974, pp. 1130, 1131.

637 *Waldman* speaks of external or internal conditions that threaten to influence the parties' free will: *Waldman* 2011, p. 4. *Ervasti and Nylund* mention the positive and negative dimension of self-determination. The authors note that mediator literature seldom focuses on the factors that increase self-determination: *Ervasti and Nylund* 2014, p. 303.

process complex information.⁶³⁸ However, it is wrong to assume that a party that is structurally weaker is the weaker party in the mediation or that differences in the access to monetary or other resources will automatically result in an increase of power *within* the mediation.⁶³⁹ For instance, an employer may be in a stronger position structurally, but can still be interested in a settlement in order to achieve a confidentiality agreement with the employee upon the termination of their employment agreement. The circumstance that mediation is established as a separate system will balance the parties' inequality that exists in the social system to some extent but will not remove it. In mediation, it is therefore necessary to discern specific power imbalances that exist within the mediation. A party that lacks an understanding of the dispute, the procedure, possible options for a settlement and the implications of such a settlement will be at a disadvantage in comparison to a party having such understanding or having access to expertise.

Self-determination may be limited not only due to factors that concern the parties and their relationship to each other, but also due to structural, institutional and legal factors that relate to the mediation itself. Self-determination understood in a broad sense, namely as the parties' free choice to agree on the participation, the process and the outcome, often remains a vision rather than a principle of mediation. In practice, self-determination is impeded at all stages of the mediation. It is already the case that participation in mediation is not always voluntary. Mandatory forms of mediation are used as a means to encourage the use of mediation.⁶⁴⁰ Such encouragement may include various degrees of coercion that range from the request to participate in an information session on mediation, to financial incentives or mandatory participation in the mediation. For instance, Italy has used participation in a mediation as a pre-trial requirement and in England and Wales the courts may order cost sanctions for an unreasonable refusal to attempt mediation.⁶⁴¹ The Mediation Directive allows Member States to make mediation mandatory or subject

638 *Waldman* lists as sources for power: resources, such as money, property, access to valuable contacts and expertise; knowledge, information and accurate data; merit in the eyes of the law; moral conviction and certainty; personal traits advantageous in mediation; ability to inflict pain or irritation and perception: *Waldman* 2011, pp. 94. On sources of power, see also Mayer 1987, p. 78. On equality and justice: *Montada* 2012, p. 16. On inequality in divorce mediation: *Grillo* 1991.

639 *Wendenburg* 2013, p. 121. While *Wendenburg* identifies various sources of bargaining power, in his research he focusses on certain types of structural imbalance: consumers and entrepreneurs, lessees and institutional lessors, employees and employers: *Wendenburg* 2013, p. 233.

640 On the terminology and a comparison between different schemes, see *Hanks* 2012, pp. 930–932. *Hanks* distinguishes between three categories of mandatory mediation: a) mandatory mediation schemes that provide for the automatic and compulsory referral of certain matters to mediation b) mandatory mediation schemes that provide for a discretionary referral of certain matters to mediation and c) quasi-mandatory schemes that provide for cost incentives or sanctions.

641 Regarding Italy, see *Mastellone and Ristori* 2017, p. 474. In England and Wales, the reasons that may justify a refusal to mediate were developed in the decision *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576. For a discussion of the criteria set out in *Halsey*, see *Brooker* 2013, pp. 129–134. For a summary, see *Marsh, Oddy and O'Neill* 2017, pp. 216–219.

to incentives, provided that this coercion does not prevent the parties' from having access to the judicial system. In a recent judgment, the Court of Justice has approved of mediation as a condition for the admissibility of legal proceedings subject to the condition that the parties' right of access to the judicial system is not prevented.⁶⁴² Mandatory mediation in the form of a compulsory initial mediation session has been recommended for fostering the use of mediation within the European Union.⁶⁴³ In the mediation literature, mandatory mediation is the subject of controversial debate, but is considered to be compatible with the requirement of voluntariness if it is used for the overriding goal of fostering mediation.⁶⁴⁴ Where mediation is mandatory, the right to leave mediation constitutes the only safeguard for the parties' self-determination in relation to the participation in the process.

The parties' self-determination in relation to the process is restricted by the requirement for the process to be conducted within the framework that is essential to Civil and Commercial Mediation - that is, that it has a structure that is determined by the *ars mediandi* and the aims and principles that have started to emerge. Self-determination needs to be balanced with principles that are expressed in requirements that determine the role and duties of the mediator within the process.⁶⁴⁵ The mediator's role influences the parties' self-determination in many ways. A mediator's active role in respect of the process or the outcome may restrict, enhance or modify the parties' self-determination. If the mediator has a duty to mediate in accordance with certain rules or to follow certain standards that are expected from the profession, the parties' procedural self-determination changes. For instance, in institutional forms of mediation, institutional procedural rules and codes of conduct require the mediator to adhere to specific procedural standards and to a specific practice of mediation. Procedural self-determination then becomes self-determination within the framework of the procedural rules and practices of the institute. The self-determination of the parties in respect of the process is also restricted by the aim of the process. Parties that start mediation with a view to achieving settlement of their dispute have made a choice with regard to the path they intend to follow. When the aim is settlement, as it is the case in Civil

642 Mediation Directive 2008/52/EC, Recital 13. On mandatory mediation and access to justice: *Joined cases C-317/08, C-318/08, C-319/08 and C-320/08, Rosalba Alassini v Telecom Italia SpA (C-317/08), Filomena Califano v Wind SpA (C-318/08), Lucia Anna Giorgia Iacono v Telecom Italia SpA (C-319/08) and Multiservice Srl v Telecom Italia SpA (C-320/08)* [2010] ECLI: EU:C:2010:146. *Case C-75/16, Livio Menini and Maria Antonia Rampanelli v Banco Popolare – Società Cooperativa* [2017] ECLI:EU:C:2017:457.

643 De Palo and D'Urso 2016, p. 8. De Palo and Canessa 2014. De Palo, D'Urso, Trevor, Branon, Canessa, Cawyer and Florence 2014, p. 164.

644 Sander draws a distinction between *coercion into mediation* and *coercion in mediation*: Sander, Allen and Hensler 1996, p. 886. *Coercion into mediation* is considered acceptable in view of the allegedly overriding goal of fostering the use of mediation. *Coercion in mediation* on the other hand is conceived as an unacceptable infringement of the parties' self-determination. For a critical view on mandatory mediation, see for instance Nolan-Haley, 2012a.

645 In this sense also: Shapira 2016, p. 135.

and Commercial Mediation, a problem-solving model of mediation is likely to be applied. This model determines the process and the role that the mediator and the parties will adopt within the mediation.⁶⁴⁶

The parties' self-determination in respect of the process may be impeded by a lack of understanding of the process.⁶⁴⁷ Parties that start the mediation are often not familiar with the process of mediation, the different models or mediation cultures. This is not only due to the individual party's lack of expertise in the dispute resolution process, but also to the fact that the understanding of what constitutes mediation is vague and may differ in the different jurisdictions.⁶⁴⁸ In the mediation, the parties encounter a dispute resolution professional, the mediator, who has been trained in the practice of mediation.⁶⁴⁹ The imbalance in procedural expertise strengthens the mediator's responsibility for the process and shifts the responsibility for the conduct of the mediation to the mediator. In practice, the mediator enlightens the parties about the process.⁶⁵⁰ This imbalance between the mediator and the parties also shows in the literature on mediation practice. Mediators are taught skills and techniques to manage the process, whereas there is no literature through which the parties can be trained in the skills of self-determination in the mediation and very few items from the literature that deal with the specific skills of the representatives of the parties that may be involved in the mediation process.⁶⁵¹

4.4.1.2 Self-determination in the legal practice of mediation

As self-determination plays such a crucial role in mediation, one would assume that the parties' capacity to exercise self-determination is addressed in legislation or codes of conduct. However, this is not the case. Neither legislation nor the mediators' code of conduct nor mediation rules set specific criteria for the parties' mediation capacity. There is no general requirement that would oblige the parties to meet certain age criteria or that would prevent persons from participating in

646 According to *Alberstein* the problem-solving model perceives the process as “*collaborative problem-solving, based on objective principles and operated through depersonalization*” and the mediator as a conflict manager who is process oriented and seeks to overcome the strategic and cognitive biases of the parties: *Alberstein* 2006, pp. 334,336.

647 *Nolan-Haley* notes that “*parties often enter mediation without a real understanding of the process and leave mediation without a real understanding of the result*”: *Nolan-Haley* 1998, p. 778.

648 This problem has been addressed in the MfN Explanatory note 2017 stating that in practice, the parties are not always aware of the activities that belong to the work of a mediator.

649 On expert power as one source of the mediator's power, see *Shapira* 2009, p. 545.

650 It is common practice for mediators to explain the process in the mediator's opening statement at the beginning of the mediation: *Bouille and Nestic* 2010, p. 96. The function of the opening statement is to “*inform(s) the parties about the nature of mediation, the mediator's role and their role; ... explain(s) the order of events for the rest of the mediation meeting*”. Also, the European Code of Conduct (Section 3.1. para. 1) requires the mediator to ensure that the parties understand the process and the role of the mediator and the parties.

651 On the representation of clients in mediation: *Golann and Folberg* 2011, pp. 231–292.

mediation due to their lack of capacity to understand or process information or to determine the settlement of their dispute themselves. A general requirement may be drawn from contract law, though. When the aim of the mediation is to conclude a binding agreement, the parties' capacity to resolve their dispute in mediation may be assessed under contractual principles. Contract law requires the parties to enjoy the legal capacity to conclude contracts. If a contractual theory is applied, minors or persons with diminished legal capacity may only participate in the mediation to the extent that they have the capacity to enter into a legally binding agreement on the dispute. The question of whether a party has the required capacity to exercise self-determination, hence to understand the dispute, the process, the options for settlement and also the alternatives to a settlement as well as to act according to this understanding, remains outside the concept of legal capacity, and the parties' standing in the mediation is therefore not restricted in this respect.

In view of the central value of self-determination in mediation, one would further expect that the legislator mentions self-determination as the guiding principle of mediation. Also, this is not the case: legislation rarely refers to self-determination as a principle of mediation. However, indirect references to the underlying principle of self-determination can be found in the definitions of mediation. For instance the Mediation Directive defines mediation as a process through which the parties attempt to reach a resolution *by themselves, on a voluntary basis*.⁶⁵² Recital 13 of the Mediation Directive further specifies that mediation is a voluntary process in that the parties are in charge of the process themselves, and may organize it as they wish, and terminate it at any time. The German Mediation Act defines mediation as a process in which the parties strive to achieve an amicable solution, on a *voluntary* basis and *autonomously*.⁶⁵³ The French Code of Civil Procedure defines mediation as a *structured* process whereby the parties to a dispute "*attempt to reach a settlement with the assistance of a mediator.... jointly chosen by the parties ...*"⁶⁵⁴

These statutory definitions of mediation emphasise the non-adjudicative, voluntary, consensual nature of mediation, but provide little guidance regarding the content and scope of the parties' self-determination. The codes of conduct are inconsistent: The European Code of Conduct for Mediators does not expressly refer to self-determination as the leading principle of mediation nor does the CEDR Code

652 Mediation Directive, Article 3, Recital 10.

653 For instance, the German Mediation Act defines mediation as a confidential and structured process in which the parties strive, on a voluntary basis and *autonomously* (*eigenverantwortlich*), to achieve an amicable resolution of their conflict with the assistance of one or more mediators: German Mediation Act 2012, Section 1.

654 Article 1530 of the French Code of Civil Procedure.

of Conduct for Third Party Neutrals.⁶⁵⁵ Some codes of conduct make reference to the parties' self-determination, but the content and scope of the principle in respect of the different elements of self-determination is not specified. For instance, the Code of Conduct for MfN-registered mediators requires the mediator to see that the autonomy of the parties is guaranteed.⁶⁵⁶ The explanatory note stresses that the mediator monitors the parties' commitment and voluntary participation and that the parties make their own choices and are responsible for these choices, while the mediator supports the parties in making their choices and looking for a solution. A clear boundary regarding the parties' self-determination is only drawn in respect of the outcome of the mediation, as the code expressly prohibits the mediator from making any pronouncement on the subject matter of the dispute (Section 3.2.). The Austrian Code of Conduct for Mediators provides in rather general terms that mediators should respect and enhance the autonomy and responsibility of the parties and that the parties are responsible for making requests and presenting options.⁶⁵⁷ A similar tendency can be found in institutional mediation rules. For instance, the preamble to the EUIPO Mediation Rules mentions the parties' autonomy as one characteristic of mediation, but the principle is not specified any further. The MfN Mediation Rules state that mediation is based on the voluntariness of mediation which, according to the explanatory note, is to be construed as voluntariness in respect of the participation.⁶⁵⁸

While self-determination is therefore the underlying principle of mediation, its meaning and scope in respect of the different dimensions of mediation remains vague. In order to understand the extent of the parties' self-determination within Civil and Commercial Mediation, one therefore needs to examine, how the role and duties of the mediator are determined. The core obligation of the mediator remains the impartiality of the mediator. This may either be construed as the mediators' duty to respect the self-determination of the parties and to refrain from interfering in the dispute resolution conducted by the parties, or as the mediator's duty to enhance the self-determination of the parties, with the aim of ensuring an equality of arms between the parties, of improving the parties' rational decision-making, or providing substantive fairness to the outcome.

The Mediation Directive defines the mediator as a third party "*who is asked to conduct a mediation in an effective, impartial and competent way.*"⁶⁵⁹ The

655 For US codes of conduct, it has been noted that the codes may refer to self-determination as a principle, but that there is no agreement regarding the extent of the principle's application, its meaning and the duties of the mediator stemming from it: Shapira 2016, p. 128. Coben notes that ethical codes may refer to self-determination, but there is a lack of definition: Coben 2004, p. 71.

656 MfN Code of Conduct 2017, Section 3.1.

657 Austrian Code of Conduct for Mediators 2017, Section 2.1 and 2.4.3.

658 MfN-Mediation Rules 2017, Article 5. MfN Explanatory note 2017, Article 5.

659 See Chapter 4.4.3.

European Code of Conduct for Mediators sets forth several duties. In respect of the *process*, the mediator must ensure that the parties understand the characteristics of the process, and the terms of the agreement to mediate (Section 3.1.). The mediator must also ensure that the parties have adequate opportunities to be involved (Section 3.2.). In respect of the *outcome*, the mediator has to ensure that the agreement is reached through informed consent and that all parties understand the agreement (Section 3.3. para. 1). On the basis of the European Code of Conduct for Mediators, one can conclude that the mediator has a duty to enhance the self-determination of the parties. The mediator is not only bound to make the nature of the process more transparent, but also to ensure the equality of arms between parties and their understanding of the process and the outcome.⁶⁶⁰ The European Code of Conduct for Mediators emphasizes the role of the mediator in respect of the *process*: the responsibility for the conduct of the mediation remains with the mediator who “*must conduct the proceedings in an appropriate manner, taking into account the circumstances of the case, including possible imbalances of power and any wishes the parties may express, the rule of law and the need for a prompt settlement of the dispute.*” (Section 3.1. para. 4). The EUIPO elaborates the responsibility of the mediator for the conduct of the mediation in more detail: the EUIPO Mediation Agreement provides for a clear division regarding responsibilities of the parties and the mediator (Clause 4). In the EUIPO Mediation Agreement, the parties agree that the mediator assists the parties in reaching a settlement and guides the mediation process but has no authority to settle the case. The EUIPO Mediation Rules on Mediation specify further that the mediator guides the process and define a five-stage model (Section 5.5.).

In national legislation, self-determination in respect of the process shows in the circumstance that most legislators refrain from regulating the procedure and state only the basic principles of mediation.⁶⁶¹ There are exceptions, however. The German Mediation Act is an example of a rather detailed regulatory approach that is influenced by the European Code of Conduct for Mediators.⁶⁶² As noted above, the principle of self-determination finds its expression in the definition of mediation, where it is stated that the parties strive to achieve autonomously an amicable resolution and several other provisions (Section 1 of the German Mediation Act).⁶⁶³ The parties are given the express right to choose the mediator, to decide whether a third party may attend the mediation, to give consent to their caucuses, and to

660 For an early reference to the principle of the equality of arms, see Recommendation Rec (2002)10, Section IV para. 2.

661 Esplugues 2014b, p. 694.

662 Government Bill for the German Mediation Act, p. 14.

663 On the definition see fn 653.

terminate the mediation at any time.⁶⁶⁴ Also, the recording of the settlement in the form of a final agreement is subject to the consent of the parties.⁶⁶⁵ The government bill for the German Mediation Act emphasises the voluntary nature of the mediation as well as the parties' autonomy during the entire process. The government bill expressly states that the parties remain responsible for measures that are taken in respect of the conflict resolution and for the outcome.⁶⁶⁶ At the same time, the German Mediation Act imposes several obligations on the mediator that serve to enhance informed decision-making of the parties and therefore the equality of arms: the mediator has to ensure that the parties *understand* the principles of the mediation process and the way in which it is conducted.⁶⁶⁷ In respect of the outcome, the mediator is under an obligation to ensure that the parties take their decision in awareness of the underlying circumstances and understand the contents. Unrepresented parties have to be made aware that they may request a review of the contents of the agreement by external parties.⁶⁶⁸

Rules that modify, restrict or enhance the parties' self-determination can be found in other jurisdictions in the form of institutional or professional self-regulation. Section 7 of the CEDR Model Mediation Procedure provides that *"The mediator will chair and take responsibility for determining the procedure at the mediation, in consultation with the parties."* The MfN Sample Mediation Agreement (Section 2.3.) states clearly that the mediator is responsible for guiding the process, while the parties should be responsible for the content of the resolution of their issue. Article 4.2. of the MfN-Mediation Rules provides that *"the Mediator shall decide, after consultation with the parties on the manner in which the Mediation will be conducted."*

4.4.1.3 A narrow concept of self-determination

The actual distribution of the control and competing procedural principles, as well as constraints set by the nature of the mediation over the process, leads in practice to a narrow concept of self-determination. Procedural self-determination does not mean that the parties actually take control of the procedure or determine the course of the mediation. Rather it means that the parties have the right to agree and consent to the procedural alternatives suggested by the mediator and determine the course of the procedure within the framework of the mediation model and procedural rules adhered to by the mediator. It also means that the parties have the right to leave the mediation if they do not consent to this course of action. The

664 German Mediation Act 2012, Section 2. par. 1; Section 2. para. 4, Section 2. para. 5.

665 German Mediation Act 2012, Section 2. para. 6.

666 Government Bill for the German Mediation Act, p 14.

667 German Mediation Act 2012, Section 2. para. 2.

668 German Mediation Act 2012, Section 2. para. 6.

parties need to cooperate to be able to determine the course of the procedure with the mediator. Self-determination in respect of the process may therefore be better described as a principle of voluntariness and cooperation. The cooperation pertains to agreeing on the scope of the dispute, the matters that need to be solved for the conflict to be resolved and the elaboration of a common solution.

Voluntariness may be seen as a separate value or even as a characteristic principle of the mediation.⁶⁶⁹ In fact the principle of voluntariness is just an outflow and visible element of the parties' self-determination. It means that the parties are free to agree or refuse to give their consent. Voluntariness marks also the boundaries of the parties' self-determination. In respect of their participation, the parties can be forced into the mediation, but they may terminate the mediation at their discretion. The parties' consent is also required in respect of certain procedural steps, such as the appointment of the mediator, and the procedural arrangements within the mediation. Voluntariness in respect of the process has its limits if the parties take a decision that changes the fundamental nature of the mediation agreement. This might be where the parties agree to retain a mediator that does not act as a neutral or adopts an adjudicative role, for instance. In this case, the parties agree on a fundamental change of the dispute resolution mechanism.⁶⁷⁰

The core of the parties' self-determination rests with their control over the outcome of the mediation. The contractual analysis of the previous chapter has examined the parties' self-determination from the point of view of the contractual concept of private autonomy. The result of this analysis was that the principle of free will of liberal contract law leads to an increased bindingness of the mediated outcome. Based on the assumption that the process of mediation serves to rationalize the decision-making of the parties, one may claim that self-determination means not only that the parties' choice must be free from constraints, hence is voluntary, but also that it must be based on a sufficient level of understanding regarding the basis of their decision. True self-determination is only possible when the parties are aware of the legal and factual basis of their decision.

Informed consent has been suggested as a guarantee for the parties' self-determination in mediation – a concept that can also be found in the European Code of Conduct for Mediators. Ideally, informed decision-making means that the parties disclose all relevant information and cooperate on a solution that integrates their interests and needs. In an ideal way, self-determination is the outcome of a process of cooperation and comprehensive exchange of information and knowledge.⁶⁷¹ This

669 Hopt and Steffek 2013, p. 109.

670 The exact boundaries are difficult to draw. *Hopt* for instance, considers that the parties may retain a mediator, even if the mediator's neutrality is questionable: Hopt and Steffek 2013, p. 109. On the impartiality of the mediator, see Chapter 4.4.3.1

671 Nolan-Haley 1998, pp. 787, 790.

ideal vision suffers if parties turn to mediation because they are seeking to overcome so-called strategic barriers to settle the case in negotiations and therefore do not want to disclose and share information. Separate meetings with the mediator are commonly used in order to institutionalize the right to maintain informational asymmetries. Confidentiality within the mediation and not the open exchange of information between the parties has become a common element of mediation.⁶⁷²

Informed consent – if understood as consent on the basis of all relevant information, cannot serve as a general guarantee of the parties’ self-determination. In a synallagmatic contract relationship, a party’s right to informed decision-making corresponds to another person’s duty to improve the parties’ self-determination. This may take place by providing information. An increased duty to inform may be imposed either on the other disputant or on the mediator. Under principles of general contract law, the parties have a duty not to lie and not to introduce incorrect information knowingly, but they do not have a duty to improve the other party’s ability to take informed decisions in the mediation. A duty to improve the parties’ self-determination may therefore only rest with the mediator. The mediator, however, may lack the required information or is not permitted to share the information that has been disclosed to the mediator by one party with the other party.

A general duty to ensure the parties’ informed consent therefore collides with the legal duty of confidentiality and is due to fail because of a lack of information. The parties may need to take decisions despite a lack of information and the mediator’s task is to improve the parties’ ability to determine whether they are willing to agree on the settlement of the conflict, although uncertainty remains regarding the facts and legal situation that form the basis of the decision. Informed consent, therefore, cannot be understood as consent that is based on a full disclosure of all facts that are legally relevant to the decision, hence on consent in respect of the substantive basis of the decision. Rather, informed consent must be seen as consent that is based on the awareness that the decision is to be made on the basis of a limited availability of information and a limited disclosure of interests and needs and in full understanding of the alternatives.

4.4.2 Substantive fairness as deep justification

Another value that may serve as a deep justification of the mediated result is substantive fairness, which refers to the fairness of the mediated outcome itself. What is to be understood by fairness of the mediated outcome depends on the

⁶⁷² As noted above there is a trend in the US to abandon joint sessions altogether: see Love and Waldman 2016, p. 141.

concept of justice that is adopted, a controversial question that is discussed.⁶⁷³ For mediation, *Waldman* draws a distinction between *self-determination theorists* and *social norm theorists*.⁶⁷⁴ Self-determination theorists consider that justice in mediation rests on the exercise of self-determination. This concept of justice is based on the idea that self-determination includes the parties' right to adopt their own standard of justice and that individually-agreed rules produce justice that is superior to justice achieved by legal norms of substantive law.⁶⁷⁵ Self-determination theorists believe that structural imbalances between the parties can be overcome within the mediation and are sceptical that social institutions can make rules that do justice in the individual case.⁶⁷⁶ Social norm theorists are less confident that the imbalances will be solved in the process of mediation and believe in the power of collective norms to enhance equality and equity in the individual case.⁶⁷⁷ The difference between self-determination theorists and social norm theorists shows in the different value that is given to self-determination and substantive fairness as a value that justifies the outcome of the mediation. If self-determination is the standard of justice to be applied, an outcome that has been determined by the parties is presumed to be substantively fair. The deep justification for the mediated outcome is then the self-determination of the parties that has been discussed in the previous chapter. When substantive fairness is considered to be a separate value for the justification of the mediated outcome, the outcome needs to satisfy also an external – objective - standard of justice.

In Chapter 3.4.4 I discussed whether a court may review and adjust the mediated settlement agreement on the basis of an external standard of justice, for instance, when the contract provides an unfair advantage to one party. I came to the conclusion that there is no general objective standard of fairness that the courts may use in the review of the reasonableness of the mediated settlement agreement, apart from the legal standard that has been expressly abandoned by the parties. I also came to the conclusion that the circumstance that the mediation is confidential and oral restricts the courts' capacity to review the mediated settlement

673 Regarding the lack of a distinct concept of justice and criteria for measuring justice in mediation: *Kohlhage* 2017, p. 224.

674 *Waldman* 2005, p. 250.

675 See for instance: *Hyman and Love* 2002. The authors argue that "*justice that pertains in mediation is the justice the parties themselves experience, articulate and embody in their resolution of the dispute. For individuals, public legal norms are but one factor in a constellation of norms and expectations creating a sense of correct conduct, fair procedure and a just outcome. For our discussion, the parties' own views of justice, not the views of judges and lawyers, become the key measure of justice in mediation.*": *Hyman and Love* 2002, p. 164.

676 Compare, for instance, *Stulberg* 1997, pp. 936, 944. *Stulberg* argues in favour of party self-determination in respect of the outcome but adopts a concept of pure procedural justice. If the elements of pure procedural justice are present "*standards independent of the process are not needed.*": *Stulberg* 2005, pp. 221, 245.

677 In favour of a concept of substantive justice that also includes an external standard of justice: *Waldman and Ojelabi* 2014, p. 429.

agreement. Moreover, it would be contrary to the nature of the mediation as an independent dispute resolution mechanism if the parties had to fear that the courts would review, whether the outcome satisfied an external standard of fairness. As a result, I considered that the courts would be inclined to adjust or invalidate a mediated settlement agreement only in cases of gross unfairness, for instance when the mediated settlement agreement is contrary to public policy or other fundamental principles of the legal system.

The circumstance that the review of substantive fairness of the mediated settlement agreement by the courts is restricted leads us to the question of whether a substantively fair outcome is an aim that is to be achieved by the parties and the mediator *within* the mediation.⁶⁷⁸ If substantive fairness is a separate value that justifies the mediated outcome, this value would show in the duties of the mediator and the soft law and legislation that governs the duties of the mediator. Within the legal system, the mediator would then have a duty to achieve an outcome that is also considered to be fair if measured against external standards, or at least have a duty to prevent a result that is considered unfair by external standards of fairness. Before I proceed to substantive fairness within the legal practice of mediation, I will sketch how an external standard of justice may be implemented within the mediation.

4.4.2.1 Substantive fairness and its limitations

If substantive fairness is understood as fairness that needs to satisfy an objective standard, one needs to adopt an objective standard of justice that would replace or complement the subjective standard of justice adopted by the parties. The question is then what standard to apply?⁶⁷⁹ One standard of justice that may be used is the outcome that the parties would achieve in litigation. The standard of justice to be applied in mediation would then be the standard that is reflected in substantive law. The preference for the law as an objective standard of justice is based on the idea that general legal rules also produce fair and just results in individual settlements. In the mediation literature, the circumstance that legal rules and principles may have a role in mediation is often expressed as *mediation in the shadow of the law* which means that the mediated outcome is influenced by values expressed in legal rules and principles of substantive law.⁶⁸⁰ The adoption of an objective standard of justice based on rules and principles of substantive law would mean that the

678 Ganner, for instance, argues that mediation is one instrument to achieve substantively fair outcomes and to reduce power imbalances between the parties: Ganner 2003.

679 On the difficulties to find a standard of justice: Waldman 2011, p. 6. For other standards of substantive fairness, see Chapter 3.4.4. On the need for research of the concept of justice in mediation and the lack of objective criteria: Kohlhage 2017, p. 224.

680 Mnookin and Kornhauser 1979. Kohlhage 2017, p. 217.

mediator had a duty to promote a result that comes as close as possible to the result that would have been achieved in a court.

As pointed out earlier, it is difficult to reconcile substantive law with the standard of fairness of a dispute resolution process that expressly rejects the law as its standard of justice.⁶⁸¹ Mediation is a dispute resolution mechanism that is based on a rationality other than litigation and therefore seeks to implement justice that is different from the result achieved in a court.⁶⁸² In mediation, the parties may seek to integrate interests and needs in the mediated result that cannot be measured under the fairness principles that emerge from substantive law. The purpose of mediation is not to achieve the result that can be achieved by a court, but to achieve a result that satisfies the parties' substantive, procedural and emotional interests and needs.⁶⁸³ Mediation is not meant to be a cheaper or faster mechanism to achieve the same or a similar result as litigation.

While the law may not *replace* the subjective standard of justice adopted by the parties, one may still argue that substantive justice in mediation requires the parties to take their decision after having been *informed* about the law and the rights and duties they may have under substantive law. In this way, the external objective standard of justice would complement, not replace the parties' subjective standard of fairness. The right of the parties to information would mean that within the mediation, the mediator has a duty to educate the parties on their positions under substantive law or the alternatives the parties have, if they do not reach a settlement agreement within the mediation. Alternatively, the mediator may have a duty to advise the parties to obtain legal advice prior to their taking a decision regarding the outcome of the mediation. Another endeavour to achieve a substantively fair outcome may take place if the mediator acts as a so-called *agent of reality*⁶⁸⁴ and seeks to probe the parties on their envisaged solution and face the weaknesses and strengths of their position, a technique that is frequently used in the practice of mediation. As an agent of reality, the mediator assists the parties in exploring their best alternative to a mediated agreement which is usually the outcome the

681 In this sense, also Wagner 2014, p. 180.

682 Stulberg 1997, p. 910.

683 *Menkel-Meadow* argues that individually negotiated rules are the ultimate expression of a democratic process: Menkel-Meadow 1994, p. 2676.

684 In the practice of mediation, the use of the term is imprecise and may include a variety of different interventions, such as "*providing information, advising one of the parties, expressing an opinion, asking critical or judgmental questions, asking what would happen if the matter went to trial, helping parties to test their rationale for options; considering, how proposals might affect non-parties.*": Boule and Nestic 2010, pp. 212–213. See for instance: *Nylund and Ervasti* who consider that the parties may discuss their negotiation strategies as well as their BATNA (Best Alternative to a Negotiated Agreement) and their WATNA (Worst Alternative to a Negotiated Agreement) with the mediator in private meetings: Ervasti and Nylund 2014, p. 278.

parties may expect in litigation for disputes regarding civil and commercial rights, as well as the probability to succeed and the possible costs of litigation.

Apart from the problem that substantive law may not be the appropriate standard to be used in order to implement substantive justice in mediation, there are structural matters that prevent or restrict the mediator from assessing the outcome the parties would achieve in litigation. First, mediators are not (always) lawyers. They therefore may lack the required expertise in law or – in some jurisdictions – may even be prevented from giving legal advice.⁶⁸⁵ In international mediation, there is also uncertainty about the competent forum and the law that may be applicable and therefore serve as the standard of reference. Secondly, mediators - lawyer mediators and others – lack procedural instruments that would enable them to have access to facts that may serve as a basis for a legal assessment of the dispute. Unlike in litigation, the parties are not under an obligation to make relevant submissions or provide evidence to support their position. The truth that emerges in the mediation is therefore likely to be different from the facts on the basis of which a court would take a decision. Thirdly, it is doubtful whether a mediator could give legal advice without taking sides and therefore without jeopardizing the mediator's role as a neutral facilitator.⁶⁸⁶ Providing information regarding a person's legal position, but also the probing of the positions of the parties are interventions that entail the risk that the mediator will act to the advantage of one of the parties.⁶⁸⁷

The call for substantive justice in mediation is in fact a sign that mediation does not function properly. The problem typically arises when there is a structural imbalance in power between the parties, as it is the case in consumer disputes, employment disputes, and disputes between a tenant and a landlord, hence in disputes in which it is probable that the fiction of the equality of the parties remains nothing else but a fiction. In such cases, there is a risk that the adoption of a subjective standard of justice does not create justice but re-enforces the unequal power relations that exist between the parties. For instance, in consumer (B2C) disputes it may be questioned whether it is at all in the interest of the consumer to settle the case in a dispute resolution system that is based on a subjective perception of justice and interests and needs or whether justice would not require consumers to settle their case on the basis of substantive law or after having received full

685 Such restriction may arise if the legal profession is monopolized. While mediators who are not lawyers may be allowed to provide general legal information, they may be prevented from giving legal advice. On the difference between the *practice of law* and *general legal information*: Tochtermann 2013, p. 560.

686 Waldman and Ojelabi 2014, p. 424. *Tochtermann* considers that professional rules requiring lawyers to provide their clients with comprehensive legal advice cannot be applied to the lawyer-mediator, as such obligation would be in contradiction to the mediator's facilitating role: Tochtermann 2008, p. 88.

687 Informed decision making usually implies that full information provides just results. For an example to the contrary: Stulberg 1997, p. 941.

information of their rights.⁶⁸⁸ Indeed, there are concerns that a fair agreement will not be achieved when there is an imbalance of power between the parties.⁶⁸⁹ For this reason some scholars have argued that agreements that are unbalanced should not be concluded under “*mediations auspices*” and that the mediator should prevent parties from binding themselves to agreements that “*are so one-sided and unfair that they shock the conscience.*”⁶⁹⁰

Mediation may also not be appropriate when the parties adhere to a subjective standard of justice that is fundamentally different from the social, legal or cultural norms in a given society.⁶⁹¹ The question of whether mediators should be called on to intervene in the outcome envisaged by the parties is difficult to answer. Self-determination theorists consider that the purpose of mediation should be based on a robust perception of party choice and autonomy and that any mediation that restricts the issues the parties are allowed to consider or that requires the parties to adjust their proposals or to adjust their interests should be excluded.⁶⁹² Mediators find themselves in a dilemma: if the mediators replace the standard of justice adopted by the parties with their standard of justice or intervene in favour of the party that appears to be weaker, they jeopardize their impartiality and the self-determination of the parties, both fundamental principles of mediation. If they fail to intervene, they may contribute to an outcome that is the result of a malfunctioning process.

4.4.2.2 Substantive fairness in the legal practice of mediation

Is substantive fairness a value that is reflected in the legal practice of mediation? The weight that is given to substantive fairness may be examined by analysing a range of legal communications in the light of the different aspects of substantive justice: does the mediator need to achieve a result that satisfies an external, objective

688 In favour of a rights-based dispute resolution system for B2C disputes: Eidenmüller and Engel 2014, p. 281.

689 *Wendenburg* examines different instruments to address structural imbalances in mediation, he rejects measures to screen disputes for their appropriateness: Wendenburg 2013, p. 247, an intervention of the mediator in favour of the weaker party as this would be in contradiction to the mediator’s duty of impartiality and the principle of party self-determination: Wendenburg 2013, p. 282, the termination of the mediation by the mediator: Wendenburg 2013, p. 285 and is critical as regards the a duty to obtain legal advice or mandatory legal representation in the mediation: Wendenburg 2013, pp. 292, 297 and an ex-post control of the mediated outcome: Wendenburg 2013, p. 308. *Wendenburg* considers the introduction of formal requirements in respect of the mediated outcome as not sufficiently effective: Wendenburg 2013, p. 321. He favours as a complementary measure the introduction of a cooling-off period during which the parties may exercise a right of revocation: Wendenburg 2013, p. 324 and develops a system that is based on the principle of informed consent including a legal (not mandatory) representation of the weaker party and a cooling-off period during which the weaker party may cancel the mediated outcome: Wendenburg 2013, p. 336.

690 Waldman and Ojelabi 2014, pp. 423.

691 For an example regarding a clitoridectomy practiced according to Somalian culture and possible solutions in mediation: Stulberg 2005, p. 226. On Sharia law in alternative dispute resolution: McGoldrick 2009, pp. 636–637.

692 Stulberg 1997, p. 944.

standard of justice? Do the parties need to be informed about an external, objective standard of justice? Is there a safeguard against settlements that fail to satisfy a minimum objective standard of substantive justice? According to the Mediation Directive, the purpose of mediation is a settlement. The Mediation Directive does not set any requirements regarding the quality of the settlement. It provides only that a Member State may refuse to declare a mediated settlement agreement enforceable, if the outcome is contrary to the law of the respective Member State or unenforceable.⁶⁹³ The quality of the settlement therefore remains a criterion to be evaluated ex-post, hence following the mediation. Also, the European Code of Conduct for Mediators does not qualify the outcome of the mediation, but it introduces a minimum standard of substantive fairness in respect of the mediated outcome, when it provides that a mediator has the right to terminate the mediation and must inform the parties, in cases in which the settlement reached appears in the mediator's view illegal or unenforceable (Section 3.2. of the European Code of Conduct for Mediators). Substantive fairness does not become a purpose to be achieved by the mediator, but a minimum criterion that the mediator is required to introduce as a basis for the parties' decision-making. This does not mean that substantively unfair agreements may not be concluded within the mediation. First, the mediator has only the right, but not the duty to terminate the mediation. Secondly, the agreement must be illegal in the view of the mediator who may not have more expertise than the parties to assess the illegality of the agreement.

The European Code of Conduct for Mediators imposes a duty on the mediator to *"take all appropriate measures to ensure that any agreement is reached by all parties through knowing and informed consent, and that all parties understand the terms of the agreement"* (Section 3.3. of the European Code of Conduct for Mediators). A similar provision can be found in the German Mediation Act, for instance, that requires the mediator to make an effort to have the parties conclude the agreement in awareness of the underlying circumstances and that they understand the contents of the agreement.⁶⁹⁴ While the mediator does not have a duty to ensure the substantive fairness of the mediated outcome, the mediator has a duty to contribute to the parties' informed decision-making. The precise contents of this obligation depend on the interpretation of what informed consent

693 This neutral stance can be contrasted to the Finnish Mediation Act. Section 7 of the Finnish Mediation Act requires that that proposals made by the mediator in court mediation must be appropriate in view of what the parties have brought forward in the mediation. However, this necessitates the mediator to adopt an evaluative approach.

694 Critically regarding the contents and purpose of this obligation: Hacke Andreas 2013, p. 223. Hacke notes that the respective provision appears to be based on the European Code of Conduct for Mediators and argues for a pragmatic interpretation of the provision. In his view, the mediator has only a duty to inform the parties, if a party's misunderstandings or misconceptions regarding facts are obvious. The mediator however, has no duty to advise the parties on legal issues. In any case, the mediator must act in accordance with his or her duty of impartiality.

means and what measures the mediator is expected to take in order to fulfil this duty, given that the mediator lacks any procedural instruments to obtain evidence or expertise, is bound by confidentiality obligations and that the enhancement of informed consent may be in conflict with the mediator's duty of impartiality. The European Code of Conduct leaves this question open.⁶⁹⁵

Unlike the European Code of Conduct for Mediators, the CEDR Code of Conduct requires the mediator only to ensure that the parties acknowledge “*that by signing they accept and understand the terms of the settlement*” (Section 5.3. of the CEDR Code of Conduct). In Section 7 of the CEDR Model Mediation Procedure, parties unrepresented in a mediation are advised to bring another person for support and to obtain legal advice before signing a legally binding agreement.⁶⁹⁶ Also, the MfN Mediation Rules have not introduced a professional duty of the mediator in respect of the substantive fairness of the mediation. On the contrary, the MfN Mediation Rules stress the parties' responsibility for the contents of the agreement who have the right to call expert advice.⁶⁹⁷ The mediator has to see that the outcome of the mediation is properly recorded in an agreement, by or with the help of a third party (Article 10 of the MfN Mediation Rules). According to the explanatory note to the MfN Mediation Rules, this should prevent the parties from complaining at a later stage that they did not understand the consequences or text of the agreements reached.⁶⁹⁸

Substantive fairness may not only show in the duties of the mediator in respect of achieving the mediated outcome, but is also connected to the question of whether the mediator can be held accountable for the mediated outcome. The EUIPO framework illustrates the duties as well as the accountability of a mediator who has expert knowledge on trademarks that are the subject matter of the disputes before the EUIPO and who might therefore be expected to be in a position to assess the legal situation and educate the parties with regard to substantive law. The EUIPO Mediation Agreement provides for the mediator to have the role to assist the parties in a “*voluntary and mutually satisfactory settlement*” (Clause 4 of the EUIPO Mediation Agreement) which reflects a subjective standard of fairness. Clause 9 then expressly excludes the mediator's liability to any party for the legality and enforceability of the agreement.⁶⁹⁹ The EUIPO Mediation Rules confirm the subjective standard of justice and add that the mediator has not a duty to give legal advice (Section 5.1. of the EUIPO Mediation Rules).

695 On informed consent, see above Chapter 4.4.1.3.

696 CEDR Model Mediation Procedure 2017.

697 MfN Mediation Rules 2017, Article 10.

698 MfN Explanatory Note 2017, Article 10.

699 Similar Decision on Mediation 2013, Article 6.

The role of substantive fairness in Civil and Commercial Mediation can also be clarified by examining fairness in dispute resolution systems that suffer from structural imbalance, as is the case for the dispute resolution bodies that have been established in the European Member State subsequent to the ADR Consumer Directive. For evaluative forms of ADR procedures which aim at resolving the dispute by proposing a solution, the ADR Consumer Directive requires the parties to be informed that the result achieved in the ADR procedure may be different from the result achieved in a court, and that the parties are informed about the legal effect of agreeing to or following such a proposed solution (Article 9 of the ADR Consumer Directive).⁷⁰⁰ There are no other safeguards that would expressly protect an objective standard of justice in consumer dispute resolution, nor are there any safeguards for ADR procedures, where no solution is proposed. This shows that an external objective standard of substantive fairness, does not play any significant role, even in disputes that suffer from a structural imbalance.

4.4.2.3 Substantive justice as rational justice

The legal practice of mediation does not introduce a distinct external objective standard of justice. It does not require the outcome to mirror the solution that may be achieved in litigation, nor does it expressly require the parties to be informed about their legal rights prior to giving their consent to the mediated settlement agreement. There appears to be no straightforward solution to the dilemma that arises in respect of structural imbalances and other imbalances that are due to a lack of information or expertise.⁷⁰¹ The European Code of Conduct for Mediators refers to a requirement of informed consent that remains vague. *Stulberg* has criticized the fact that the demand for informed settlement is often not understood as the requirement to ensure the parties' informed assessment of their "economic, psychological, metaphysical, ethical or political rights or interests", but simply as the requirement that the parties are aware of the *impact of the settlement on their legal rights*.⁷⁰² Such a narrow scope of substantive justice that is based on the law as an external objective standard of justice is difficult to reconcile with mediation as an interest based dispute resolution mechanism and not reflected in the legal communications.

700 Directive on Consumer ADR, Article 9 par. 2 (b). As mentioned in Chapter 2.5.5, this directive applies to consumer mediation conducted in certified national ADR entities and is not directly applicable to mediation that takes place outside these institutions. However, the Directive on Consumer ADR establishes certain binding quality requirements for certified ADR entities which reflect the European legislators' view regarding principles of mediation in consumer disputes. Critically regarding mediation in consumer disputes: Eidenmüller and Engel 2014. *Eidenmüller and Engel* argue that dispute resolution in consumer disputes should be rights-based and not interest-based: Eidenmüller and Engel 2014, p. 281.

701 The solutions suggested often involve the involvement of an external advisor or post mediation measures: Wendenburg 2013, pp. 336–349.

702 *Stulberg* 1997, p. 938.

In the discussion, one needs to keep in mind that substantive justice in mediation is different from the substantive justice created by general norms and also different from what the mediator considers to be just. In light of the nature of mediation as a process that rationalizes the decision-making of the parties, substantive justice should rather be seen as the outcome of a rational choice. If rationality of the decision-making is considered to be at the core of decision-making in mediation⁷⁰³ the mediator may not introduce an objective standard of justice or replace the standard of justice adopted by the parties, but must ensure that the parties take a rational decision. Rational decision-making differs from informed decision-making. Informed decision-making rests on the vision that the parties take their decision based on comprehensive legal and factual information. It therefore pre-supposes that information is available in the procedure and implies that the mediator has a duty to provide such information. In practice, decision-making in mediation includes an element of uncertainty in respect of the past and the future.

If one understands informed consent in the sense of rational consent, the mediator is required to ensure within the process that the parties' consent is based on a process of rational decision-making, hence that the parties are given the opportunity to reflect on their decision and the basis on which the decision was taken. It is a duty to use one's best efforts to contribute to an informed decision and does not actually constitute a duty to reach an informed result.⁷⁰⁴ Rational decision-making means that the parties take their decisions based on the information they receive within or for the purpose of the mediation, but that they are also aware that decision-making in mediation is based on a limited availability of information. Rational decision-making includes the idea that parties may take knowingly irrational decisions. Rational decision-making requires the parties to be made aware that mediation pursues a form of justice that is different from objective external standards of justice and that the adoption of a different standard of substantive justice may lead to a different result or to a result that would be more advantageous to the weaker party. However, it does not mean that the mediator is liable to inform the parties about the contents of the external standard of justice.

Substantive justice as *rational justice* is procedural in nature. Various instruments and practices contribute to rational decision-making by the parties in mediation. The circumstance that the process is structured already enhances the rationality of the parties' decision-making.⁷⁰⁵ When the process is structured, the

703 See Chapter 2.3.3.

704 The duty to achieve an informed decision would be an obligation *de résultat*. For the difference between an obligation *de résultat* and an obligation *de moyens*, see Chapter 4.4.3.

705 The structuring of the process has the effect that the process of decision-making becomes more conscious. On the two modes of decision-making which *Kahneman* describes as system I and system II: Kahneman 2011.

parties are required to explore their positions, interests and needs and alternatives for a solution as well as to develop their subjective standard of justice. The mediator enhances the rationality of the decision-making process, through which the mediator insists that the parties elaborate the principles on which the outcome will be based.⁷⁰⁶ These principles may be based on legal principles or rules, or other objective principles agreed upon by the parties.

If the rationality of the decision-making is adopted as the *morality* of mediation, it is the mediators' duty to use their best efforts to increase the self-determined, rational decision-making of the parties within the limits set by the duty of impartiality and their duty of confidentiality. The mediator is therefore prevented from taking sides or making an evaluation of the outcome based on the mediator's own standards of justice, nor can the mediator balance the disparity between the parties by giving legal advice or sharing confidential information. Instead, the mediator assists the parties in exploring different options and encourages them to determine the alternatives to the mediated outcome known as the Best Alternative to a Negotiated Agreement (BATNA) or the Worst Alternative to the Negotiated Agreement (WATNA), and challenges the solutions envisaged by the parties, a technique referred to as reality testing. Substantive justice in mediation means justice that is the result of a rational decision-making process.

Does this mean that no room is left for objective standards beyond the subjective standards and rationality of the parties – that there is no objective standard of justice in mediation? The analysis of the mediated settlement agreement has shown that there are limits to the self-determination of the parties if the outcome of the mediation is contrary to fundamental values of a legal system.⁷⁰⁷ The fundamental values of a given society constitute the core of the concept of substantive justice in mediation, a minimum standard that needs to be achieved in order for the mediated outcome to be valid and enforceable. Where such fundamental values and legal principles are at stake, the mediator's intervention does not collide with the parties' self-determination as the parties' self-determination does not comprise the freedom to conclude agreements in contradiction with these fundamental values. There is also only a small risk that the mediator's duty of impartiality would be jeopardized. Bias would require that a person would have the opportunity to take different attitudes or positions. When fundamental values of the legal system are at stake, the mediator has no such choice. One can therefore conclude that a mediator

706 *Menkel-Meadow* notes that rules and principles do play a role in negotiations: Menkel-Meadow 1994, p. 2675. In this context, also *legal* rules may play a role: see on the 'bargaining in the shadow of the law': Mnookin and Kornhauser 1979.

707 The core of substantive fairness can be seen in the grounds that entitle a court to refuse the confirmation of the enforceability of the mediated settlement agreement. As has been set out in Chapter 3.5.2., a court may refuse the confirmation of enforceability if the agreement is *against the law*. The concept of *against the law* is to some extent vague but embraces at least fundamental principles of the legal system and public policy.

may not contribute to a mediated outcome that is contrary to fundamental values of the legal system.

4.4.3 From service to due process in mediation

On one hand, procedural fairness is shown in the rights that the parties have in a process, but on the other, it is shown in the duties that are imposed on the mediator. I will develop the concept of procedural fairness from the contractual relationship between the mediator and the disputants and the duties that are imposed on the mediator. To start with it is useful to use a distinction made in French contract law. French doctrine makes a difference between an obligation *de résultat* and an obligation *de moyens*.⁷⁰⁸ A person who has entered an obligation *de résultat* is bound to achieve a specified result. A person who has entered an obligation *de moyens* is not bound to achieve a result, but to use his or her best efforts to achieve a certain aim. The mediator's duty in the mediation is not an obligation to achieve a settlement of the dispute. The mediator's duty in the mediation is to *use his or her best efforts* to achieve a settlement of the dispute.⁷⁰⁹ Apart from this obligation *de moyens* regarding the settlement of the dispute, the mediator may have an obligation *de résultat* in other respects. For instance, the mediator may have a duty to disclose information or to keep information undisclosed.

It is the principal duty of mediators to use their *best efforts* to conduct the mediation towards the settlement. This is the task which the mediator has been appointed for. The mediator is prevented from taking a decision in respect of the outcome of the mediation, but the mediator's duties do not simply consist of making practical arrangements for the negotiation of the parties either. The content of this principal duty, the question of what the mediator actually needs to perform in order to fulfil the mediator's obligation *de moyens* and the question of when the mediator has shown the required care and skill is a matter of interpretation. This interpretation is an operation of the legal system. It provides the legal system with the opportunity to regain sovereignty over the content of the agreement, to interpret the intention of the parties, to add to the content when it is lacking and to declare that some of the content is contrary to the law.⁷¹⁰

The duties the mediator has to perform are first to be determined on the basis of the intention of the parties, hence the disputants and the mediator. If the parties only agree that a person will be appointed to conduct the mediation, the

708 Zweigert and Kötz 1998, pp. 501.

709 The generally used example for the obligation *de moyens* is the example of a doctor. Doctors do not have a duty to heal the patient, but they have a duty to treat the patient. On the other hand, doctors have an obligation to provide information regarding the risks of the treatment, which is an obligation to *résultat*.

710 Luhmann 1995, p. 464.

intention of the parties is to be established and complemented by interpretation. According to the principle of self-determination, it would make sense to determine the parties' rights and obligations according to the common intention of the parties and therefore apply a subjective interpretation of the contract. However, in practice the parties will rarely define the duties of the mediator or the skills to be applied in the individual agreement. Moreover, the parties' understanding of the duties may be vague. This is particularly the case when parties are not experienced with institutional forms of dispute resolution. It is therefore not sufficient to apply a subjective method of interpretation, but it is necessary to ascertain how a reasonable person would understand the declaration of intent under similar circumstances. The intention of the parties is therefore to be established according to the objective generalized meaning, not according to the subjective intention of the communicator and different circumstances may be taken into account, such as the previous behaviour and practice of the parties, but also general usage.⁷¹¹

There is uncertainty regarding the rights and duties of the mediator. The mediator agreement is not a specific contract type that has been regulated in contract law. Comparative research has shown that different contract types have been used to fill the *lacunae*.⁷¹² Some rights and duties of the mediator may therefore be deduced from the contract type to which the mediator agreement has been assigned. Today there appears to be wide consensus that the mediator agreement has elements of a service contract and the rights and duties of the mediator may therefore be deduced from the rights and duties that generally arise under a service contract.⁷¹³ However, none of the existing contract types takes account of the specific procedural nature of the mediator agreement. In model mediation agreements, the mediator's obligations are specified with a varying degree of intensity. As a main rule, model mediation agreements make reference to a set of procedural rules or codes of conduct that have been developed by mediation institutes that often become a binding part of the agreement with the parties.⁷¹⁴

711 Kötzt and Flessner 1996, p. 168.

712 On the classification of the agreement with the mediator, see Esplugues 2014b, p. 609. Hopt and Steffek 2013, p. 55. Alexander 2009, p. 210. In Austria, the agreement is classified as a hybrid agreement consisting of service elements and work contract elements. In the Netherlands, the agreement has been classified as a mandate. In Germany, the agreement has been classified as a service agreement.

713 Hopt and Steffek 2013, p. 73.

714 The EUIPO mediation agreement specifies that the mediation is based on the Mediation Directive, the European Code of Conduct for Mediators and the EUIPO Rules on Mediation that become all part of the agreement: EUIPO Mediation Agreement, Clause 1. The CEDR Model Mediation Agreement contains a general reference to the procedural rules and code of conduct of the institute. Section 1 states that the mediator is bound to conduct, and the parties are bound to participate in, the mediation "*consistent with the CEDR Model Mediation Procedure and the CEDR Code of Conduct for Third Party Neutrals*". The MfN Sample Mediation Agreement sets out that the parties and the mediator should use their best efforts to settle the dispute and refers equally to the institutional rules of the institute: MfN Sample Mediation Agreement 2017, Section 2.1. In all cases, the procedural rules become part of the agreement.

The nature and purpose of the mediator agreement to set forth the rules that guide the mediator's role within the mediation is not satisfied if the mediator's duties depend on the applicable law, the classification of the agreement under a national contract typology and the arbitrary inclusion of procedural rules. The stabilization of the parties' expectations requires that the mediators' duties are construed in accordance with principles that are characteristic in Civil and Commercial Mediation and not in accordance with a typology used in national contract law for contracts that have a purpose that is unrelated to dispute resolution.

4.4.3.1 Impartiality, competence and effectiveness

Principles that are characteristic for Civil and Commercial Mediation may be derived from the definition of the mediator in the Mediation Directive. These principles reoccur and are specified in several variations in other legal communications. According to the Mediation Directive, a mediator is a "*third person who is asked to conduct a mediation in an effective, impartial and competent way...*" The German Mediation Act defines the mediator as an independent and neutral person who guides the parties through the mediation (Section 1. para. 2. of the German Mediation Act).⁷¹⁵ The French Code of Civil Procedure sets forth that the mediator accomplishes his task with impartiality, competence and diligence (Article 1530 French Code of Civil Procedure). Other national legislators have adopted *verbatim* the definition of the Mediation Directive as it is, for instance, the case in Austria in respect of cross-border mediation (Austrian EU Mediation Act, Section 2. par. 2.) or made a reference to the definition of the Mediation Directive as is the case for England and Wales (Part I, Section 8 of the Cross-Border Mediation (EU Directive) Regulations 2011). Only occasionally does the legislator fail to explicitly require impartiality or competence in the mediator. This is the case in Finland, where the mediator is defined as a *person trained in mediation*.⁷¹⁶ The codes and institutional mediation rules specify the mediator's competence, independence and impartiality in more detail.

Impartiality, competence and effectiveness are principles that may be used to determine whether a mediator has used his or her best efforts in the conduct of the mediation. In this triangle of principles, impartiality has a double function. It is a constituent element of the mediation and a principle for conducting the mediation procedure in a certain way. It not only determines the duties of the mediator but is also an essential element of Civil and Commercial Mediation. Impartiality as a constituting element of mediation determines the role that is

⁷¹⁵ In the German legislative text, the terms "*unabhängig und neutral*" is used, which has been translated as "*independent and impartial*" in the unofficial translation of the Federal Ministry of Justice and Consumer Protection.

⁷¹⁶ Finnish Mediation Act (394/2011), Chapter 3 Section 18.

attributed to the mediator in the mediation. It is not at the disposal of the parties. When the parties agree on a dispute resolution mechanism that involves the third person conducting the mediation in a partial way, there is no mediation, but some other process at hand.

The mediator's duty to conduct the mediation in an impartial manner requires the mediator to act in accordance with the role of the impartial, non-aligned third person. The mediator's failure to comply with this duty does not by itself deprive the mediation of its character. Mediation remains mediation as long as the parties do not agree on a change of the constituent elements of the mediation and therefore on the role of the mediator. However, a lack of impartiality may constitute a failure to fulfil the required duties. The standard of care to be applied is a matter of interpretation. An actual lack of impartiality, even the appearance of a lack of impartiality, may constitute a failure to comply with the required duty of care.

In the mediation literature, impartiality is a term that is often used interchangeably with neutrality or independence.⁷¹⁷ Also, in the preparatory work to the Mediation Directive, the terms are used inconsistently. The Mediation Directive uses the term *impartiality* while the European Code of Conduct for Mediators makes a distinction between impartiality and independence. In other soft law, the use is inconsistent and partly overlapping.⁷¹⁸ In fact, impartiality and independence can be seen as two sides of the same coin.⁷¹⁹ Both independence and impartiality refer to the neutrality of the mediator. Independence has an objective meaning and can be established on the basis of external circumstances. Independence means in the first place the absence of dependence on the parties and secondly the absence of conflicts of interest. A personal or business relationship to one or both parties or a financial or other interest in the outcome are circumstances that may cast doubt on the independence of the mediator (Section 2.1. of the European Code of Conduct of Mediators). The same is true for any involvement in the case as representative, legal advisor or decision taker (Section 4.2. of the EUIPO Rules on Mediation) or prior possession of confidential information about any of the parties or about the subject matter of the dispute (Section 4 CEDR Code of Conduct for their Party Neutrals). The existence of such circumstances creates the presumption that the mediator

717 Regarding the inconsistent use in mediation literature: Shapira 2016, p. 207. Ervasti and Nylund 2014, p. 135. Kovach 2005, p. 311. *Moore* distinguishes between neutrality and impartiality: Moore 2014, pp. 35, 36. Hopt and Steffek consider that neutrality is given meaning through the elements of independence and impartiality: Hopt and Steffek 2013, p. 75. *Tochtermann* notes that neutrality is used in addition or as a substitute for independence or impartiality: Tochtermann 2008, pp. 23, 27. He distinguishes between independence and impartiality in accordance with the terminology developed in arbitration. In France, a distinction is made between subjective (in the eyes of the parties) and objective impartiality: Deckert 2013, p. 498.

718 The inconsistency shows also in soft law. Compare for instance: the EUIPO Rules on Mediation (Independence and Neutrality), the MfN Code of Conduct (Independence and Impartiality), the CEDR Code of Conduct (Independence and Neutrality.)

719 In this sense, *Shapira* also considers that neutrality includes impartiality and obligations of the mediator in connection with conflicts of interest: Shapira 2016, p. 207.

lacks the capacity to conduct the mediation in an impartial way. Indeed, a lack of independence easily creates an environment in which it is impossible to conduct the mediation in an impartial way, as the parties may understand the conduct of the mediator in the context of the mediator's relationships. Partiality, however, is not an inevitable consequence of a lack of independence. A mediator may be capable of conducting the mediation in an impartial way despite the existence of relations with one or both parties or despite an interest in the outcome of the mediation.

Independence itself is not a duty to conduct the mediation in a specific way. It is not an obligation *de moyens* and therefore not an obligation to use one's best efforts, but the requirement of independence results in a legal duty of disclosure. This is reflected in the mediator's duty to inform the parties about possible relationships with one of the parties or a possible conflicting interest. This duty of information is an obligation *de résultat*. It is only complied with when the mediator has given the parties sufficient information regarding a possible lack of independence. Most codes require therefore that the mediator provides the parties with information regarding the mediator's independence at the beginning and during the entire mediation process.⁷²⁰

A lack of independence can either constitute an absolute procedural impediment or a relative procedural impediment. When it constitutes an absolute procedural impediment to the continuation of the mediation, the parties would not be able to waive the independence requirement. From the point of view of contract law, one would say that the matter is not subject to the parties' self-determination and therefore not dispositive. However, matters that are not dispositive constitute an exception that is usually introduced to protect a matter of public interest of the legal order. Where no such protected interest is involved, the parties may accept and agree to a lack of independence and therefore the existence of relations or a conflict of interest.⁷²¹ The existence of a conflict of interest does not yet mean that a mediator is incapable of conducting the mediation in an impartial way. In fact, also in arbitration, it is widely accepted that the existence of relationships with one of the parties or other conflicts of interests are within the parties' private autonomy, provided that the arbitrator has complied with his or her duty of information.⁷²²

720 For instance, Section 2.1. of the European Code of Conduct for Mediators, provides for a duty of disclosure, in case of "any circumstances that may, or may be seen to affect a mediator's independence or give rise to a conflict of interests. 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; the mediator, or a member of his firm, having acted in any capacity other than mediator for one or more of the parties."

721 On the consent requirement: German Mediation Act 2012, Section 3. CEDR Code of Conduct 2017, Section 4.4. EUIPO Rules on Mediation, Section 4.3.

722 Born 2014, p. 1991. Kurkela and Turunen 2010, p. 127.

The party's acceptance of a lack of independence, however, does not mean that the parties accept that the mediator conducts the mediation in a partial way. Impartiality is understood as the mediators' attitude in respect of either the parties or the outcome. It is often described as a lack of bias or as equal treatment of the parties.⁷²³ But it can also be understood as an equal interest in both parties.⁷²⁴ Impartiality is a central principle of mediation. There is no mediation if the parties accept that the mediator conducts the mediation in the interests of one of the parties and therefore becomes an ally instead of being neutral. But the mediator's impartiality may also be measured in terms of impact on the mediated outcome. For instance, *Kovach* considers that any impact or influence the mediator takes in order to correct an outcome the mediator considers unfair, presents a challenge to the mediator's impartiality.⁷²⁵

It has been noted that there is no absolute impartiality.⁷²⁶ Mediators are human beings and they may have more personal sympathy for one party than the other. They may also have a personal opinion of what they consider fair in respect of the outcome or they may prefer a solution that is in line with their own values. Personal preferences are a typical part of human behaviour and cannot be avoided. On the other hand, preferences depict the mediator's internal state of mind. A personal preference can therefore only be discerned when it is communicated. Only when communicated can it have an impact on the relationship with the parties or the outcome of the mediation. One may therefore say that the risk that a mediator loses his or her impartiality correlates with the mediator's involvement in the communication.

Mediation is dispute resolution *by means of communication*. The mediator is not outside the system of communication but participates in the communication between the parties. Communication is needed in order to achieve an outcome in the mediation. In court proceedings or arbitration, the decision-maker's internal attitude is disguised behind the letter of the law, but the impartial attitude of the mediator does not have similar safeguards. The mediator does not have recourse to a set of *legal* communications in order to hide personal preferences. The mediator's preferences may therefore only be compensated by mediation and communication techniques that maintain the perception of an impartial communication as well as the parties' perception that the mediator is conducting the mediation in an impartial way. The communication techniques used by the mediator are not only

723 Shapira 2016, pp. 209. Moore 2014, p. 36. Kovach 2005, p. 311.

724 Simmel 1964, p. 149.

725 Kovach 2005, p. 311. See also: Moore 2014, p. 36.

726 See for instance: Moore 2014, p. 36. *Shapira* distinguishes between internal and external impartiality and suggests focusing on the behaviour and appearance of the mediator: Shapira 2016, pp. 212. On the debate with regard to arbitrators, see Turunen 2005.

a means to rationalize the decision-making but may also have an impact on the communication between the parties and the outcome of the mediation. They also have an impact on the way the parties perceive the conduct of the mediator.

It has been claimed that impartiality is nothing more than the limit of intervention the mediators have set themselves and which is dependent on the mediators' understanding of their role and the respective mediation program.⁷²⁷ According to this view, impartiality is lip service to cover the actual impact of the mediator on the mediated outcome, especially when generating outcomes. Whether the mediator has acted impartially is then a question of the subjective perception of the parties and cannot be assessed by an objective test.⁷²⁸ This would mean that there is no objective requirement for the mediators' impartiality, but mediators are free to act at their discretion provided they maintain the appearance of impartiality. Indeed, impartiality is a question of appearance, a question of how the mediator communicates with the parties.

Impartiality, however, is too central a value of mediation to remain without an objective border. First, the mediator's duty to conduct the mediation in an impartial way is not an obligation de *résultat*. It is not a result that may either be achieved or not. The mediator's duty is a continuous duty to conduct the mediation with the parties without showing a personal preference. In the European Code of Conduct for Mediators, the mediators' duty of impartiality is expressed as a duty to use their best efforts to act with impartiality towards the parties and to serve the parties equally.⁷²⁹ Also, the EUIPO Rules on Mediation provide that the mediator must at all times act with impartiality towards the parties and be committed to serve all parties equally (Section 4.5. of the EUIPO Rules on Mediation). As impartiality is not a result that may be achieved or not achieved, the demand for impartiality is a command for optimization, a legal principle rather than a rule that must be followed.

Secondly, the impartiality of the mediator has a core that the mediator must respect in the mediation. This core of impartiality is marked by the essential element of mediation and the role that is attributed to the mediator. Mediators would be acting against the *morality* of mediation⁷³⁰ if they were to interfere with the essential elements of mediation. This would be the case if the mediator became the ally of one of the parties or if the mediator pursued personal preferences in respect of the outcome of the mediation. If the mediator makes proposals for the

727 Breidenbach 1995, p. 172.

728 Breidenbach 1995, p. 172. Moore considers that the ultimate test for impartiality is the perception of the parties: Moore 2014, p. 36.

729 Section 2.2. of the European Code of Conduct for Mediators requires mediators to act, and endeavour to be seen to act with impartiality towards the parties at all times, and be committed to serving all parties equally with respect to the process of mediation.

730 On the term see Chapter 4.3.

resolution of the dispute or gives an assessment of the proposals of the parties there is an objective (but rebuttable) presumption that the mediator has started to take sides or favours a particular outcome to the detriment of one of the parties.⁷³¹

Such interference would also collide with the core of the principle of self-determination. Do mediators also lose their impartiality in cases in which they attempt to balance an informational or power disparity between the parties or potentially influence the outcome by challenging the possible result in their role as an *agent of reality*?⁷³² This may be the case when the mediator informs a party about legal rights, advises a party to obtain legal advice or to consider the outcome that a party would achieve in a court. While such interference may compromise the impartiality of the mediator, it can also be seen as a guarantee of the self-determination of each of the parties or a requirement of substantive fairness.⁷³³ Such intervention of the mediator requires a balancing between the different principles of Civil and Commercial Mediation. The extent to which the mediator may intervene in order to ensure the parties' self-determination, or in order to attain substantive fairness depends on the value that is given to these principles in the legal order in comparison to the principle of procedural fairness, a principle that I will examine below.

Civil and Commercial Mediation has to be conducted in a competent way.⁷³⁴ Competence is not a legal concept, but depicts a bundle of skills and techniques that the mediator uses to facilitate the settlement. In setting a legal requirement that the mediation is to be conducted in a competent way, the law makes an express reference to criteria that are external to the legal system, an express reference to the *ars mediandi*.⁷³⁵ If mediation is considered to be a professional activity, competence means that a mediator has acquired the mediation skills and techniques of the profession and complies with professional standards.⁷³⁶ This is also expressed in the codes of conduct. For instance, according to the European Code of Conduct for Mediators "*mediators must be competent and knowledgeable in the process*

731 A mediator's proposal to correct an (unfair) solution envisaged by the parties always challenges the mediator's impartiality: Kovach 2005, pp. 311–312.

732 Breidenbach considers that the neutrality is a programmatic aim which is in conflict with other programmatic aims. Breidenbach 1995, p. 171.

733 See Chapter 4.4.2.3. See in this sense also Shapira who favours a substantive interpretation of impartiality that supports true self-determination. In his view the mediator has a duty to assist the parties in the exercise of self-determination, but this intervention must be limited to the least harmful intervention. Shapira 2016, pp. 219.

734 Competence is one element of the definition of the mediator set out in the Mediation Directive. It is further specified in the European Code of Conduct for Mediators, Section 1.

735 Regarding references to criteria external to the law such as habits, ethics or the *state of the art*: Luhmann 1995, p. 87. Such reference is part of the operations of the legal system and therefore the law must take account of the reference in accordance with its internal operations: Luhmann 1995, p. 88–89.

736 Boule and Nestic 2010, p. 2. The professionalization of mediation concerns in the first place mediators that handle formalized (legal) disputes: Kressel 2006, p. 738.

of mediation. Relevant factors include proper training, and continuous updating of their education and practice in mediation skills, having regard to any relevant standards or accreditation schemes." (Section 1.1. of the European Code of Conduct for Mediators). Mediation techniques are therefore not only an activity in which someone engages, but a skill that can be acquired, developed and assessed.

Mediation skills and techniques have been described in handbooks on mediation and taught in training courses.⁷³⁷ In social psychology, a distinction is made between three types of skills: skills that establish effective working relationships between the conflicting parties and the parties and the mediator; skills regarding developing and maintaining a cooperative conflict resolution process; and skills in developing a creative and productive decision-making process.⁷³⁸ The skills used in the mediation pursue these different purposes: some techniques, such as building rapport between the persons that participate in the mediation serve to build a favourable arena for the dispute resolution. Communication and mediation techniques such as the identification of the issues of conflict, active listening, reframing and open questions enhance the parties' involvement in the dispute resolution and promote the self-determination of the parties. Other techniques serve to increase the effectiveness and rationality of the parties' decision-making. This is the case for techniques such as the application of a stage model, but also the challenging of the options proposed by the parties. Caucuses may be used to maintain different communication systems within the mediation in order to overcome barriers to settlement. Mediation skills and techniques have been developed in the social practice of mediation. They include communication techniques, knowledge of conflict resolution and other skills and techniques that the mediator uses to address the various elements of the dispute, to generate options and to facilitate a settlement. These skills and the competence of the mediator is often measured in the number of training lessons or by means of a certification.

From the point of view of contract law, the requirement to conduct the mediation in a competent way constitutes a duty of care of the mediator: a mediator has to employ accepted methods of mediation and to show the required care.⁷³⁹ A mediator who does not conduct the mediation in accordance with recognized mediation skills fails to show the required duty of care to conduct mediation in accordance with the standards the parties may expect from the mediator. While the requirement of a competent mediator is an obligation de *résultat* that can be measured by

737 There is a vast literature on mediation practice. See for example: Boule and Nesic 2010. Ervasti and Nylund 2014, pp. 319–371. CEDR Mediator Handbook 2010.

738 Deutsch 2006, pp. 38–39.

739 Hopt and Steffek 2013, pp. 74–75.

objective criteria, such as through accreditation or a certain amount of training,⁷⁴⁰ the duty to conduct the mediation in a competent way is an obligation de *moyens*. Mediators have a duty to use their best efforts to conduct the mediation in a competent way and to use acknowledged skills and techniques. Understanding what acknowledged skills and techniques are and what the standard of care to be applied is, is not static. The *state of the art* changes with the professionalization of mediation, and therefore the required standard to be applied, changes over time and may be subjected to additional quality requirements. Although the reference to the *ars mediandi* is a reference to the social practice of mediation, the question of whether a mediator complied with the required duty of care is a legal question. Competence needs also to be seen in relation to the requirement of impartiality that is a legal concept. First, the mediator must not use mediation or communication techniques that make the mediator appear partial. On the other hand, the mediator must rely on communication techniques to maintain the appearance of impartiality. Communication techniques such as active listening and open questions are techniques that help mediators protect their appearance as an impartial, facilitative person. The more mediators use evaluative or directive communication techniques, the more likely they will risk appearing to act in favour of one party or in favour of a particular result.

Also, effectiveness is a reference to a criterion that is external to the legal system. According to conflict resolution theory, a conflict resolution process is effective, if the parties' competitive behaviour can be transformed into a cooperative behaviour.⁷⁴¹ In the discourse on alternative dispute resolution effectiveness is used differently. It often refers to the efficiency of mediation in comparison to litigation and therefore constitutes a political aim to decrease the workload of the courts rather than an aim to be achieved in the dispute resolution mechanism. If the efficiency of the system was the aim, the mediator's primary role would be to achieve high settlement rates in order to contribute to a cost reduction and efficient use of public and private expenditure.⁷⁴² But efficiency may also be understood as efficiency in respect of the time and costs used for the procedure, efficiency of the procedure used in order to reach a settlement, or efficiency of the outcome of mediation.⁷⁴³

740 Competence is often regarded as an element of the quality of mediation. Eighteen Member States have introduced a binding quality control mechanism, such as obligatory accreditation systems, while 19 Member State require the adherence to codes of conduct: Study for an evaluation and implementation of Directive 2008/52/EC 2016, p. VIII.

741 Compare *Deutsch* who considers that a constructive process of conflict resolution equates with an effective cooperative problem-solving process: *Deutsch* 2006, p. 32.

742 See *Bush* 1989, p. 260.

743 *Boulle* and *Nesic* describe efficiency as the extent to which the process is cost- and time-effective and maximises the value of the outcome and effectiveness as the extent to which the mediation achieves a settlement outcome: *Boulle* and *Nesic* 2010, pp. 10, 11.

The Mediation Directive does not define effectiveness nor efficiency. The preamble to the Mediation Directive refers to mediation in general as being a cost-effective and quick extra-judicial way to resolve disputes.⁷⁴⁴ Within the context of Civil and Commercial Mediation, efficiency is often referred to in terms of costs of mediation and time used in comparison to litigation. Mediation is considered to be efficient if the costs are low, access to the mediation is fast and the time spent on mediation is shorter than the time that would be spent on judicial processes.⁷⁴⁵ Also, the European Code of Conduct for Mediators perceives efficiency in terms of time, as it requires the mediator to take prompt settlement of the dispute into account in the conduct of the mediation (Section 3.1. para. 4). Such duty implies a certain degree of organization and structure of the mediator's intervention. Efficiency within the European context of mediation does not mean that the outcome of the mediation itself will be efficient.⁷⁴⁶ Such responsibility would require the mediator to have the capacity to assess the efficiency and to be in a position to intervene and direct the parties towards an efficient outcome. Efficiency – a concept that is defined in the law and economics studies as the optimal allocation of scarce resources - would then only be a substitute for substantive fairness, which - as examined above - is only to a limited extent for the mediator to be produced.

4.4.3.2 Procedural fairness

Objective fairness requirements – substantive and procedural – challenge the parties' self-determination as they deprive the parties of their right to agree and apply their own standards of fairness. As mediation rests on the parties' self-determination one may claim that no separate procedural fairness requirement is needed if the parties are in the position to take a decision by themselves, hence to determine the process as well as the outcome of the process. From this point of view, the parties' ability to determine the rules of the procedure are a sufficient guarantee for the fairness of the process. If one follows this line of argumentation, not legal rules or principles determine the standard to be complied with in the mediation, but the mediation is fair if the parties consider it to be fair.

The mediation literature often refers to procedural justice as a matter of the parties' subjective experience that the process has been fair.⁷⁴⁷ *Procedural justice* is a concept used in psychology and is to be distinguished from the concept of

744 Mediation Directive, Recital 6. The value behind efficiency is the public aim to reduce the workload of the courts. This focus is criticised by advocates of transformative mediation: Bush 1989, p. 262.

745 Study for an evaluation and implementation of Directive 2008/52/EC 2016, p. 79.

746 Eidenmüller and Engel define efficiency in the context of consumer dispute resolution as maximizing social welfare on a cost/benefit basis: Eidenmüller and Engel 2014, p. 283.

747 Hyman and Love 2002, p. 172.

fairness used in legal or philosophical contexts.⁷⁴⁸ Procedural justice refers to a field of research about how individuals experience a dispute resolution process. Procedural justice research therefore does not examine whether the procedure follows pre-determined rules or principles of fairness, or whether there are any such rules and principles at all. *Procedural fairness*, on the other hand, is a concept used in law, politics and ethics to describe objective pre-determined rules or principles that need to be complied with.

Procedural justice research has revealed that there are four factors that influence the parties' experience of fair treatment.⁷⁴⁹ First there is the parties' need to give their view of the story and express their opinions and arguments, which is referred to as *an opportunity for voice*. Second, people evaluate whether the decision-maker was impartial. Third, the parties assess the trustworthiness of the decision-maker and finally, the parties consider whether they have been treated with dignity and respect.⁷⁵⁰ While these findings have been derived from adjudicative decision-making processes, they have also been adopted in the mediation literature. Within mediation, the parties experience that they have been treated fairly if they can present their view and are listened to by a neutral third party whom they trust and who treats them with respect.⁷⁵¹

There are several rationales that seek to explain the importance of procedural justice in respect of the outcome.⁷⁵² The self-interest theory grounding on the works of *Thibaut and Walker* claims that the parties value the fairness of the process because they seek to control the procedure in order to achieve better outcomes.⁷⁵³ According to the group value theory, procedural justice is important as it shows a person's status within the group. Fair treatment by an authority shows that one is appreciated within the group.⁷⁵⁴ The fairness heuristic theory proposes that persons that have no reference or information to assess the fairness or unfairness of the outcome use the fairness of the procedure as a heuristic substitute.⁷⁵⁵

748 *Procedural justice* is a concept used in psychology. It refers to a line of research in social sciences about how individuals perceive the fairness of the procedure. In contrast to procedural fairness used in the context of law it captures the subjective assessments by individual of the fairness of a decision-making process. On the difference between the psychological perception of fairness and the normative conception of fairness, see also Shapira 2012, p. 301.

749 Hollander-Blumoff and Tyler 2011, p. 5. Tyler 1990, pp. 163–164.

750 In procedural justice research, a difference has been drawn between decision making factors consisting of neutrality and voice on the one hand and interpersonal factors consisting of trust and personal respect on the other hand: Hollander-Blumoff and Tyler 2011, p. 10.

751 Waldman 2011, p. 5.

752 Hollander-Blumoff and Tyler 2011, p. 6. Lind and Tyler 1988, pp. 221–242. On procedural justice: Thibaut and Walker 1975, p. 4.

753 Hollander-Blumoff and Tyler 2011, p. 6; Lind and Tyler 1988, p. 222.

754 Hollander-Blumoff and Tyler 2011, p. 6; Lind and Tyler 1988, p. 230.

755 Van den Bos, Kees, Lind, Vermunt and Am Wilke 1997, pp. 1035, 1042.

Psychological procedural justice research suggests that procedural justice increases the acceptance of the outcome and the legitimacy of the decision-maker, even where the outcome is unfavourable to the parties.⁷⁵⁶ As mentioned above, procedural justice research has traditionally concentrated on procedural justice in adjudicative processes. In empirical research on mediation, procedural justice has been associated with higher compliance with the mediated result and satisfaction with the outcome.⁷⁵⁷ The heuristic theory of procedural justice can be used to explain the need for a fairness in mediation. When the law as a standard of reference to determine the fairness of the outcome decreases, and the parties lack information regarding the outcome favourability, the importance of a fair dealing increases in the perception of the parties.

Procedural rules and principles may incorporate general perceptions of what is considered a just procedure. This is the case for judicial proceedings where the parties' right to be heard and the parties' right to an impartial judge are fundamental rights protected by Article 6 of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. In mediation, there are no statutory fundamental rights of the parties beyond the general proclamation that the parties should take the decisions by themselves. The Mediation Directive does not address the fairness of mediation. Fairness requirements, however, are not absent: there is an explicit requirement that the mediator must conduct the mediation in an impartial way. Besides that, the Mediation Directive provides that the quality of the mediation is an aim to be pursued. Article 4 of the Mediation Directive mentions two mechanisms for securing the quality of mediation. The first one is the development of and adherence to codes of conduct. The second is the training of the mediators.

4.4.3.3 Procedural fairness in the legal practice of mediation

The Mediation Directive does not require the mediation to be fair. Instead it requires the Member States to promote the quality of mediation. The Mediation Directive specifies quality in terms of adherence to (voluntary) codes of conduct and the training of mediators.⁷⁵⁸ The focus on the quality of mediation instead of on the fairness of mediation reflects the idea that mediation is a service provided to the parties rather than a common enterprise of conflict resolution. However, elements of fairness that have been recognized in research on procedural justice as elements that contribute to the experience of fairness are not absent in Civil

⁷⁵⁶ Tyler 1990, p. 172. Also, the legitimacy of adjudicative decisions rests on perceptions of procedural fairness that are expressed in the classical principles of procedural law, such as the principle of *audiatur et altera pars* and the principle of the impartiality of the decision-maker: Zippelius 1973, p. 298.

⁷⁵⁷ Pruitt, Peirce, McGillicuddy, Welton and Castrianno 1993, p. 324.

⁷⁵⁸ Mediation Directive, Article 4.

and Commercial Mediation. On the contrary, they are reflected in various codes of conduct and also in national legislation.

In the European Code of Conduct for Mediators, procedural fairness is one obligation of the mediator in addition to the impartiality and independence of the mediator and the mediator's duty to conduct the process. Under the heading of "*fairness of the process*", Section 3.2. para. 1 of the European Code of Conduct for Mediators requires that the mediator ensures that all parties have an equal opportunity to be involved in the process. Procedural fairness requirements are also provided for in Section 3.1.4. governing the conduct of the mediation. According to this section, the mediator must conduct the proceedings in an appropriate way, taking into account the circumstances of the case, including possible imbalances of power and any wishes the parties may express.

The CEDR Code of Conduct for Third Party Neutrals requires that the neutral will "*at all times act, and endeavour to be seen to act fairly, independently and with complete impartiality towards the Parties in the Process, without any bias in favour of, or discrimination against, any of the Parties.*" and "*will ensure that the Parties and their representatives all have adequate opportunities to be involved in the Process.*"⁷⁵⁹ The EUIPO Rules on Mediation provide in respect of the process that the mediator shall help the parties to have an overall view of the situation of the pending proceedings (Section 5.5. of the EUIPO Rules on Mediation). The requirement of an equal opportunity to be involved can also be found in the implementing legislation of the Member States. For instance, the German Mediation Act imposes on the mediator an obligation to ensure that the parties are involved in the mediation in an appropriate and fair way.⁷⁶⁰

The rules show diversity regarding the extent and the content of fairness in mediation. Nevertheless, several core elements can be identified. First, the mediator must be *impartial*. Secondly, the parties must be given the opportunity to *equal participation* in the mediation. These obligations are an expression of a general principle of fairness that is generally expected to be present in the mediation. The more institutional support these obligations have, the more they start to evolve into a standard that is not been set forth by the parties to the agreement but can be expected by the ordinary person in the street in respect of mediation. This means that the parties do not necessarily need to agree on the standard, but that the quality of the duties performed by the mediator are measured in terms of this general standard.

The right to equal participation or equal involvement in the process as well as the right to an impartial mediator are the fundamental rights of the parties in the

⁷⁵⁹ CEDR Code of Conduct 2017, Section 4.1. and 4.2.

⁷⁶⁰ German Mediation Act 2012, Section 2. para. 3.

mediation. They not only form a description of what the parties experience as fair but require certain behaviour from the mediator. When the fairness requires the mediator to ensure equal involvement or even an equality of arms of the parties, the role of the mediator changes. Impartiality of the mediator does then not only mean that the mediator must refrain from showing an opinion or from taking sides, but it would also mean that the mediator has to ensure the equal participation of the parties and, where necessary, take account of the parties' procedural imbalance.⁷⁶¹ This is what is often referred to as multipartial or omnipartial in the mediation literature.⁷⁶² According to this concept of impartiality, a mediator must not be impartial in the sense that he or she refrains from interfering with the parties' self-determination, but the mediator needs to be multipartial or omnipartial in the mediation, that is, to try to promote the parties' self-determination, to ensure that the parties are put in the position of being able to make self-determined rational decisions.

This focus on the equal participation of the parties and the postulate of an omnipartiality cannot change the fundamental nature of the mediator's impartiality. Omnipartiality cannot mean that the mediator acts contrary to the core content of impartiality and becomes the ally of one of the parties or shows a preference for a particular result. A mediator acting multipartially may therefore not take sides or favour a particular outcome. The mediator may also not provide one party with information in order to enable the party to take an informed decision. Multipartiality rather means that the mediator enhances the parties' self-determination by means of increasing the parties' insight into their own decision-making and by ensuring the rational decision-making of the parties. When the equal involvement in the decision-making process cannot be ensured, the mediator may not advocate the interests of one of the parties or make a proposal for the solution of the dispute. In such cases, the mediator only has the option to terminate the procedure or to request the parties to obtain outside advice.⁷⁶³

4.5 Confidentiality

Civil and Commercial Mediation in its basic definition does not need to be confidential in order to qualify as mediation. If confidentiality was an essential element of mediation, a lack of confidentiality would turn the process into something else. This, however, is not the case. The Mediation Directive does not

⁷⁶¹ European Code of Conduct for Mediators, Section 3.1. para. 4.

⁷⁶² Moore 2014, p. 36. *Omnipartial* means that the mediator is equally involved with both of the parties and attempts to satisfy all parties' interests.

⁷⁶³ Critically on the termination of the mediation by the mediator: Wendenburg 2013, p. 286.

require the mediation to be confidential in order to qualify as mediation. Even in jurisdictions in which mediation is defined as a confidential process, confidentiality is not considered to be an essential element of mediation, but something that is at the disposal of the parties.⁷⁶⁴ Also, in the social practice of mediation, confidentiality is not a universally accepted principle and mediation schemes have been operated successfully without the confidentiality of the process.⁷⁶⁵ Moreover, ancient forms of mediation took place in public within the community. Transparency is still required when mediation relates to public goods, as is the case in environmental mediation.

Confidentiality cannot be regarded as a value that justifies the bindingness of the mediated settlement agreement either, as is the case with self-determination, substantive fairness or procedural fairness. Nevertheless, confidentiality is an important element of mediation.⁷⁶⁶ Confidentiality is essential for starting the settlement communication and allowing the parties to engage in communication that goes behind positions and has the purpose of enhancing decision-making on the basis of the parties' interests and needs. The confidential nature of mediation will therefore be stressed by the mediator at the beginning of the mediation, but also during the mediation. It guides the communication of the parties within the mediation.

Confidentiality creates the safe environment the parties need in order to exchange information, reveal interests and make concessions which are needed when the parties explore alternatives for settling the dispute and for achieving a *pareto optimal* solution.⁷⁶⁷ It is a widely shared view that the parties' communication prior to and leading to the settlement of the dispute would be less successful if the parties had to fear that interests revealed during the mediation, weaknesses shown or concessions made, will be used against them outside the mediation, and in cases of a legal dispute, in later litigation. If the parties cannot rely on information revealed or settlement proposals made remaining confidential, they may refrain from disclosing information or making a proposal.⁷⁶⁸ Most authors agree therefore that confidentiality constitutes an essential factor for the success

764 See for Germany: Eidenmüller and Wagner 2013, p. 6. The French Code of Civil Procedure provides that mediation is subject to the principle of confidentiality, unless the parties agree otherwise: French Code of Civil Procedure, Article 1531.

765 Kovach 2006, p. 437. Menkel-Meadow, Love and Schneider 2006, p. 317. Alexander 2009, p. 247. It has been observed that in the context of litigation on mediation confidentiality is less important than assumed: see Coben and Thompson 2006, p. 48.

766 For international commercial mediation, see Berger 2015, p. 167. *Berger* considers that the significance of the principle of confidentiality exceeds its significance in arbitration. Confidentiality in mediation serves to "ensure the very integrity and functioning of the process itself." Also, *Esplugues* considers confidentiality as one of the major principles of mediation: *Esplugues* 2014b, p. 664. See also: *Ervasti and Nylund* 2014, p. 305.

767 Allen, Tony 2013, p. 169.

768 In this case "*mediation alchemy will fail, and zero sum-disputing will not transmute into settlement gold*": *Waldman* 2011, p. 227.

of mediation.⁷⁶⁹ Another question is the extent to which confidentiality persists outside the mediation and whether it is a legal principle in nature, a question which will be examined below in more detail.

Confidentiality not only has the purpose of enhancing the exchange of information and opinions between the parties, it also secures the parties' trust in the impartiality of the mediator. This trust may be jeopardized if the parties fear that the mediator could testify against them in subsequent proceedings or if a party fears that the mediator will share unfiltered information revealed in a private session with the other party.⁷⁷⁰ This could compromise the mediator's role as a neutral party, and therefore affect the integrity of the mediation process as such. The arguments for and against confidentiality reflect the tension between private interests and general considerations of justice.⁷⁷¹ Confidentiality enhances the success of mediation negotiations and establishes mediation as an independent dispute resolution mechanism. On the other hand, confidentiality may prove detrimental to the parties' rights. It may also be considered as a way to hide the mediation result from the public and prevent the public at large from achieving justice.

In addition to the confidentiality of the mediation in relation to its environment, confidentiality within the mediation, also referred to as insider/insider confidentiality is considered to be an important factor for the success of mediation.⁷⁷² Especially in the mediation of commercial disputes, it is common that the mediator meets in private with the parties. Such private sessions are used to overcome tensions between the parties' collaborative and competitive strategies that may jeopardize the success of the mediation.⁷⁷³ Mediation internal confidentiality is understood as being the mediator's duty not to convey information obtained in a private session from one party to the other party. The purpose of mediation internal confidentiality is to maintain an information barrier between the parties and to enable the parties

769 Wagner 2013, p. 247. Allen 2013, p. 1.

770 Deason 2001, p. 37. However, in practice the parties' willingness to disclose information to the mediator may be lower than generally presumed: Allen, Heather 2013.

771 Waldman 2011, pp. 229–234. Menkel-Meadow, Love and Schneider 2006, p. 317.

772 On the terminology see below. Two different approaches to mediation internal confidentiality have been identified: first, there is the open communication approach which means that the mediator may disclose to the other party all information that the parties have not identified as confidential. Second, there is the in-confidence approach. It means that a mediator may not disclose information he or she has gained in the private sessions, unless the mediator has been expressly authorized to do so by the parties: Alexander 2009, p. 249.

773 A *pareto* optimal solution requires that the parties disclose and share information to create options for settlement and maximize their joint gains. This has been referred to as the stage where the parties create value. The disclosure of information that is needed to obtain a *pareto* optimal solution may, however, be detrimental to a parties' bargaining position in a later stage of the mediation, where the parties intend to maximize their individual share in the solution they have created. At this stage, the party that has not disclosed information is at a competitive advantage. *Mnookin* describes this tension between value creating and value claiming as one essential barrier to the negotiated resolution of conflicts: *Mnookin* 1992, p. 239.

to explore various options for settlement in private with the mediator without losing control of the flow of information.⁷⁷⁴ Mediation internal confidentiality also has an external dimension. Internal confidentiality in mediation would be useless if the mediator was permitted to reveal this information in later court proceedings or to disclose it to the outside world.

4.5.1 Confidentiality in the legal practice of mediation

In contrast to litigation, which is a public procedure, mediation conducted outside the courts is often defined as a private process. Privacy within the context of mediation is to be understood as the factual restriction of access to the place of mediation. It means that no one other than the mediator, the parties to the dispute and their assistants, have access to the mediation venue. The factual privacy of mediation enhances the establishment of mediation as a distinct system. When the dispute resolution takes place in separate premises, the parties are more likely to detach from the role they have in their social life and are willing to subordinate to the *ratio* of the mediation. While the parties may control who has access to the mediation venue, their capacity to control the flow of information by physical means is limited to disclosing the information in the mediation or withholding the information in the mediation. Once the information has been disclosed in the mediation or documents have been produced, they can be used by the other party unless the other party is prevented from doing so by means of a legal obligation of confidentiality.

Confidentiality of mediation is a legal construct. It expands and prolongs the privacy that is created by means of a physical restriction of the access to the premises. Statutory rules and institutional rules standardize the circumstances under which information may be disclosed.⁷⁷⁵ The parties signing a confidentiality agreement expect the information to remain secret. Rules on confidentiality have therefore been described as a form of institutional trust; they are the basis for establishing the interpersonal trust required for the success of mediation.⁷⁷⁶ Confidentiality rules lead to a party's increased willingness to take a risk to disclose information which may be responded to by similar behaviour on the part of the other party.⁷⁷⁷ At a regulatory level, it has been considered that strong confidentiality regimes

⁷⁷⁴ In the US, there appears to be a tendency to abandon joint sessions: see Love and Waldman 2016, p. 141. This same trend cannot yet be observed in Europe, but in Europe a mixed system of joint and private sessions is common.

⁷⁷⁵ Deason 2005, p. 1416.

⁷⁷⁶ Deason 2005, p. 1417.

⁷⁷⁷ Deason 2005, p. 1417.

strengthen the trust in the process and therefore the development of mediation.⁷⁷⁸ A high level of legal confidentiality protection has been said to correlate with a higher number of mediations.⁷⁷⁹

Alexander distinguishes three dimensions of confidentiality based on the relations she has identified into *the insider/outsider confidentiality*, *insider/insider confidentiality* and *insider/court confidentiality*.⁷⁸⁰ Insider/outsider confidentiality refers to a general duty of confidentiality of persons involved into the mediation process towards persons that do not take part in the mediation. Insider/insider confidentiality regulates the exchange of information within the mediation and the extent to which the mediator may disclose information that has been disclosed to him by one party in a private session to the other party. Insider/court confidentiality concerns the confidentiality of the process in respect to subsequent court proceedings or arbitration. While this classification is useful to distinguish between the different dimensions of confidentiality that may arise in mediation, it does not classify the nature and effect of the rules that govern mediation. For instance, insider/insider confidentiality may be procedural in nature and therefore have an effect on the production of evidence in subsequent court proceedings.

Hopt distinguishes between confidentiality under procedural law and confidentiality under substantive law, according to the nature and effect of the obligation.⁷⁸¹ Confidentiality under procedural law determines whether statements made by the mediator or the parties in the mediation or evidence disclosed in the mediation may be introduced in subsequent court proceedings or arbitration. Confidentiality under procedural law may be divided into restrictions regarding the submissions that can be made in subsequent court proceedings, and restrictions regarding the evidence that may be presented. A confidentiality provision under procedural law may prevent the court from considering written and oral communications made in the framework of mediation in later court proceedings. Another question is whether it also restricts written or oral evidence presented in the mediation from being introduced in later court proceedings. Confidentiality under procedural law may arise under case law (as is the situation in English law) or be provided for in legislation (as it is in many continental European legal systems).⁷⁸² In civil proceedings, in general the parties are able to agree on the subject matter of their dispute and the court will not *ex-officio* require the parties to make submissions or present evidence that has arisen in the course

778 EC Green Paper on alternative dispute resolution COM (2002) 196, p. 28.

779 De Palo, D'Urso, Trevor, Branon, Canessa, Cawyer and Florence 2014, p. 129.

780 Alexander 2009, pp. 248-252.

781 Hopt and Steffek 2013, p. 50.

782 On the mediation privilege and its limits in the English law: Allen, Tony 2013, p. 169. The approaches in different jurisdictions differ: Alexander 2009, p. 253.

of the mediation. However, when a party has made submissions or requested certain evidence to be submitted, the courts will assess the admissibility of the submissions and the evidence in accordance with applicable procedural law.⁷⁸³ Whether agreements in which the parties agree not to make submissions or to use information or documents that have been disclosed in the mediation are honoured by the courts in subsequent court proceedings depends on the law of the *lex fori*.⁷⁸⁴

Confidentiality under substantive law determines whether the mediator or the parties may disclose information to another person. Confidentiality provisions under substantive law may be based on an agreement between the parties, institutional rules or statutes. Such provisions may restrict the mediator or the parties in sharing the information they have acquired during the mediation with the outside world or restrict the mediator from disclosing information received in the mediation from one party to the other party.⁷⁸⁵ Confidentiality restrictions under substantive law may also prohibit the use of information acquired during the mediation.

According to the *personal* scope, confidentiality may be divided into obligations that restrict the disclosure of information by the parties and confidentiality obligations that restrict the disclosure of information by the mediator. Statutory regulations that are specific to the mediation often focus on the mediator and leave it to the parties to determine the extent of substantive confidentiality obligations that they intend to enter. There is another question about what is to be kept confidential – hence the *subject matter* of mediation confidentiality. The confidential obligations may relate to information that has existed prior to the beginning of the mediation and has been presented in the mediation, and information that has been prepared in or for the purpose of the mediation. Information in a broad sense refers to information that has been revealed in the course of the mediation or for the purpose of the mediation as well as information that has arisen out of the mediation.⁷⁸⁶ Information in a broad sense includes the

783 On the law applicable to confidentiality: Hauser 2015, p. 94.

784 Bühring-Uhle, Kirchhoff and Scherer 2006, p. 235. *Koulu* notes that agreements whereby the parties restrict the production of evidence are in general considered valid in international procedural law, but the final assessment of the validity of such agreements is to be assessed under national law: Koulu 2009, p. 44. A contract that excludes or restricts the parties' rights to submit evidence may also be contrary to the fundamental right of presenting one's case and therefore be invalid: Koulu 2009, pp. 44, 96.

785 The European Code of Conduct for Mediators, for example, provides in respect of mediation internal confidentiality that "*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.*"

786 The Mediation Directive covers information arising out of, or in connection of the mediation. *Hopt* and *Steffek* adopt a narrower scope which covers information revealed in the course or for the purpose of mediation. The difference is not only semantic in nature as *Hopt* and *Steffek*'s definition does not appear to cover information on the procedure itself: *Hopt* and *Steffek* 2013, p. 50.

parties' statements and proposals in the mediation, written and oral evidence⁷⁸⁷ presented in the mediation, including information that has existed prior to the mediation, and written and oral evidence prepared during the mediation. In a narrow sense, information refers to communications within the context of the mediation, such as oral and written statements, concessions and proposals for settlement made in the mediation as well as information that has been generated in or for the mediation only, such as protocols.

The subject matter of confidentiality in a narrow sense covers only the mediation discussions proper, such as statements and concessions made by the parties, and does not extend to information that existed prior to the beginning of mediation or independent of the mediation, regardless of whether it was presented at the mediation or not. The above definitions leave one important question open – namely whether the subject matter of confidentiality also covers information relating to the mediation procedure itself and therefore the specific way the mediated settlement agreement has come into existence. Such evidence would include information regarding the procedure such as acts and omissions of the mediator, but also information regarding the question of whether mediation has actually taken place and whether the principles of mediation have been complied with. From this information, one may distinguish information that relates to the general conditions for the existence, validity and interpretation of the mediated settlement agreement. This information would concern information whether the parties had the intention to enter a binding obligation or whether their declaration of intent was flawed or based on erroneous assumptions or otherwise.

Confidentiality provisions can be found in a range of legal instruments, in legal regulations, case law as well as in soft law or agreements entered into between the parties. However, there is no uniform approach to the subject and scope of the confidentiality obligation.⁷⁸⁸ Article 7 of the Mediation Directive provides for the minimum harmonization of procedural confidentiality that applies to the mediator and those involved in the administration of the mediation. According to this minimum obligation, the mediator should not be compelled to give evidence in subsequent “*civil and commercial judicial proceedings or arbitration in respect of information arising out of or connected with a mediation process.*” As regards the subject matter, the scope of the confidentiality provision is broad and includes

787 Mediation is not about finding the truth and therefore evidence is not presented for the purpose of proof, but rather for the purpose of increasing trust or supporting one's position. Evidence is therefore to be understood in a broad sense. The narrow rules of procedural law do not apply.

788 Some authors have raised concerns regarding the lack of legal certainty in respect of a concept that is as fundamental as *confidentiality*. *Allen* argued that it was unclear, whether the law of England or Wales created by precedent was less or stricter than the Mediation Directive: *Allen*, Tony 2013, p. 219. Due to the differences in the scope of confidentiality, the extent of the protection varies depending on the applicable law: *Hauser* 2015.

not only statements and proposals made by the parties in the mediation, but also pre-existing information that has been disclosed in the mediation, as well as the mediation procedure itself and therefore also the way the mediated settlement agreement has come into existence. This broad scope in respect of the subject matter of confidentiality may be contrasted to the earlier provision contained in the proposal for the Mediation Directive that was limited to several issues: “*a) An invitation by a party to engage in mediation or the fact that a party was willing to participate in mediation; (b) Views expressed or suggestions made by a party in a mediation in respect of a possible settlement of the dispute; (c) Statements or admissions made by a party in the course of the mediation; (d) Proposals made by the mediator; (e) The fact that a party had indicated its willingness to accept a proposal for a settlement made by the mediator; (f) A document prepared solely for purposes of the mediation.*”⁷⁸⁹ This limited confidentiality provision contained in the earlier proposal for the Mediation Directive therefore did not include matters related to the essence of the procedure and the conduct of the mediation by the mediator or information that has existed prior or independent from the mediation nor did it include the mediated settlement agreement.

The personal scope of confidentiality under the Mediation Directive is narrow. The minimum confidentiality provision in the Mediation Directive does not preclude the *parties* making submissions in subsequent proceedings on the basis of the information acquired in the proceedings, nor does it constitute a procedural restriction on the use of evidence other than the mediator’s testimony.⁷⁹⁰ Furthermore, the confidentiality obligation is procedural in nature.⁷⁹¹ The statutory confidentiality provision does not constitute a general duty of confidentiality and does not prevent the parties or the mediator from disclosing the information outside the mediation proceedings or using the information for their own purpose. A general duty of confidentiality that covers the parties and the mediator may therefore only arise under an agreement entered between the parties. For the

789 The subject of confidentiality in a narrow sense has been set out in the Proposal for a Mediation Directive COM (2004) 718 which was modelled on the UNCITRAL Model Law on Conciliation 2002 but was later replaced by a general clause. Article 10 of the UNCITRAL Model Law has a broader personal scope and applies not only to the mediator, but also to the parties: UNCITRAL Model Law on Conciliation 2002.

790 Regarding the narrow personal scope of the Mediation Directive, see Hopt and Steffek 2013, p. 51. Alexander 2013, p. 181. According to *Wagner*, a broad interpretation of the wording of the Mediation Directive would extend the personal scope of confidentiality to all persons participating in the mediation, hence not only mediators, but also the parties and their lawyers would have a right to refuse to give evidence. The German legislator however, adopted, a narrow interpretation. Only mediators have a duty of confidentiality: *Wagner* 2013, p. 250. The German Mediation Act extends the restriction to written statements given by the mediator during the mediation. These written statements are therefore excluded as evidence: *Wagner*, p. 255. This wider interpretation is justified if one considers the protection of the integrity of the mediator as one of the primary goals of confidentiality.

791 The European Commission considered that there was not sufficient public interest to justify the regulation of confidentiality outside subsequent judicial proceedings: Commission Staff Working Paper SEC (2004) 1314, p. 6.

mediator and those participating in the administration of the mediation, one may assume that there is an implied duty of confidentiality that arises when the parties entrust the mediator with the mediation. For the parties, the situation is different. Their duty of confidentiality depends on the confidentiality agreement they have entered into, and on the procedural assessment of these confidentiality obligations under the procedural law of the *lex fori*. The situation can be compared to the legal situation in arbitration, in which confidentiality is often considered to be a general principle of arbitration, a view, however, that was rejected by some of the national courts.⁷⁹²

As the confidentiality of the Mediation Directive provides for a minimum protection level of confidentiality only, Member States may have implemented stricter laws of confidentiality. Indeed, there are considerable differences in the implementation, with considerable diversity in the nature and the personal and substantive scope of the confidentiality provision. The regulation is so multi-faceted that it has proved difficult to “*find patterns which yield useful insights.*”⁷⁹³ The actual scope of confidentiality beyond this minimum protection depends on the law that applies to the confidentiality and the nature of the confidentiality obligation. Confidentiality obligations under substantive law will be assessed in accordance with the mediation agreement or the mediation rules that have been adopted by the parties. Confidentiality under procedural law will be assessed by the court or arbitral tribunal, where the subsequent judicial or arbitration proceedings take place in accordance with the *lex fori*.⁷⁹⁴

The scope of the statutory confidentiality obligations is complemented by agreements entered into between the parties, mediation rules, as well as provisions of the codes of conduct that specify and increase the scope of statutory confidentiality. The European Code of Conduct for Mediators imposes on the mediator an obligation to keep confidential all information arising out of or in connection with the mediation, an obligation that includes also the obligation not to disclose information to an outside person. In respect of mediation internal

792 The Swedish Supreme Court rejected the assumption that there was a general principle of confidentiality in arbitration. The court considered that there was a common view that the arbitrators were bound to keep the arbitration procedure confidential, but that no such implied duty of confidentiality existed as between the parties: *Case T 1881-99, Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc, 160 Water Street*, NJA 2000, p. 538.

793 Hopt and Steffek 2013, p. 51. On the differences, see also: Esplugues 2015, p. 53. Esplugues 2014b, pp. 664–675. On the scope of confidentiality in cross-border mediation under the French, Austrian and German law, see Hauser 2015.

794 If the parties have not chosen a particular forum, they may choose between several courts to bring their action. This may lead to forum shopping and a rush into the courts to make use of a lower level of confidentiality or to search for a higher level of protection, hence forum shopping in relation to the production of evidence. As regards confidentiality provisions under substantive law, the parties are therefore well advised to protect confidentiality by means of agreements entered into between the parties and to make a choice regarding the forum for possible disputes to ensure that the parties’ agreement will be honoured by the courts or arbitral tribunal: see Hauser 2015, p. 94.

confidentiality, the mediator is prevented from disclosing information that has been disclosed to him in private by one party to the other party without permission (Section 4 of the European Code of Conduct for Mediators).

The EUIPO framework extends the personal scope of the confidentiality obligation. The rules set out in the Decision on Mediation are reproduced in the EUIPO Mediation Agreement, the EUIPO Rules on Mediation and in a confidentiality agreement that the parties are required to enter prior to the commencement of the mediation. According to the EUIPO Decision on Mediation, not only the mediator, but also the parties and their representatives are bound by the confidentiality obligation in respect of discussions and negotiations conducted within the framework of the mediation and in respect of information obtained during or in connection with the mediation (Article 5.1 and 5.2 of the Decision on Mediation). The provision seeks to produce a procedural effect as it expressly restricts the parties in disclosing such information in any judicial proceedings, arbitration or proceedings before the EUIPO (Article 5.2 of the Decision on Mediation). The Decision on Mediation seeks to restrict the parties' right to call the mediator as a witness or to require the mediator to produce records or notes relating to the mediation in subsequent litigation or arbitration (Article 5.5 of the Decision on Mediation). The Decision on Mediation adopts a broad concept of information and expressly states that information includes the *request for mediation*, the *entire process*, the *outcome of the mediation* and any opinions and suggestions made in the course of the mediation (Article 5.1 of the Decision on Mediation). However, Article 5.4 of the Decision on Mediation provides for an important exception to this broad concept of information. It sets out that confidentiality does not apply to documents, statements and communications submitted by the mediator or the parties in the mediation, if the party seeking to use this information in judicial proceedings or arbitration could have received the information independently from other sources. In respect of insider/insider confidentiality, the Decision on Mediation imposes on the mediator a duty of confidentiality in respect of information disclosed in confidence to the mediator by one of the parties (Article 5.3 of the Decision on Mediation). The EUIPO Mediation Rules further provide that "*all information is confidential and therefore without prejudice to any parties' legal position.*" This confidentiality is protected by the requirement that no transcript or recording of the mediation will be made and the mediator's obligation to "*return, destroy or delete all material obtained for the purpose of information* (Section 7 of the EUIPO Mediation Rules).

The CEDR framework extends the personal scope to all persons involved in the mediation, including the parties, the mediator as well as the CEDR mediation institute. Information includes all information arising out of or in connection with the mediation, including the terms of the settlement. The mediation agreement seeks to produce not only a substantive effect, but also a procedural effect in that

it expressly states that such information is without prejudice to any party's legal position (Section 4 of the CEDR Mediation Agreement). In respect of mediation internal confidentiality, the Mediation Agreement sets forth that neither the mediator nor CEDR will disclose information that has been privately disclosed to the mediator or CEDR by one party to any other party or third person without consent of the party disclosing the information. In respect of the process, the CEDR Mediation Rules state that "*what happens at the mediation is to be treated as confidential by the parties.*" (Section 8 of the CEDR Model Mediation Procedure). Also, the MfN Rules on Mediation contain a detailed regulation of confidentiality (Article 7 of the MfN Mediation Rules). The personal scope is broad and covers the mediators as well as the parties. Also, the concept of information that has been adopted is broad. It includes any information concerning the progress of the mediation and information supplied at the mediation, as well as documents revealed during or in connection with the mediation. It expressly includes the mediation agreement and minutes drawn up by the parties or the mediator. In respect of the settlement agreement it requires the parties to agree separately on the scope of the confidentiality obligation. It excludes information that had been or could have been at the disposal of the parties independently of the mediation. The MfN Rules on Mediation also include a mediation internal confidentiality obligation. In addition, the parties waive their right to call the mediator or other persons at MfN as a witness regarding information supplied or regarding the contents of the settlement agreement as well as their right to use anything that has transpired in the mediation as evidence against each other.

The rules incorporated in the different instruments show that there is a tendency to create a high protection of confidentiality. The rules seek to extend the scope of confidentiality, to regulate the flow of information within the mediation and to create procedural effects. As it is not certain that agreements that prevent the parties from making submissions or producing evidence will be honoured by the respective national courts in subsequent litigation, it is difficult to predict the actual scope of confidentiality in cross-border disputes. However, this lack of legal security does not necessarily have an impact on the parties' willingness to disclose information. First, mediators usually state in their opening statement that the mediation is confidential, regardless of the actual legal situation. The parties are therefore not aware that this promise of confidentiality may not differ from a general promise that the participants will not share the information with a friend, a promise that is often no more than a social obligation, without any legal consequences, if not kept. Secondly, unrepresented parties are especially unaware that differences in the scope of confidentiality do exist in cross-border disputes but rely on the assurance of the mediator in respect of the confidentiality and the mediation agreement. Parties represented by a lawyer, on the other hand, trust in the ability of their representatives to protect confidentiality by means of confidentiality agreements.

The parties therefore assume that their mediation discussion and information will be sufficiently protected, and the rules and principles contained in the different legal instruments will guide the communication process between the parties in the mediation.

4.5.2 Exceptions to confidentiality

Confidentiality is not maintained at any price, and there are certain reasons that justify exceptions to confidentiality.⁷⁹⁵ The Mediation Directive sets out three exceptions: The mediator may give evidence when the parties agree to the disclosure. This exception appears logical as it can be seen as an outflow of the parties' self-determination. If seen in the light of other values that confidentiality should protect, namely the parties' trust in integrity of the mediator, the exception is less evident. A mediator – according to the wording of the Mediation Directive - may not refuse to give evidence in order to protect his or her integrity, if the parties give their consent to him or her giving evidence in court.

The second exception is an exception in favour of overriding public policy considerations, required to ensure in particular the “*protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person*”. The public policy exception has also been included in the European Code of Conduct for Mediators (Section 4). This exception to the confidentiality obligation cannot be applied in a straightforward way. Public policy is a concept that expresses a value assessment and changes over time and according to the place where it is applied.⁷⁹⁶ An exception to confidentiality requires that the public interest in the testimony overrides the values that underlie the statutory confidentiality obligation. As earlier pointed out, the value behind confidentiality is not that information is under no circumstances disclosed to the outside world in an individual case. The question is rather how the legal system reacts and stabilizes the parties' expectations in respect of confidentiality in order to institutionalize the parties' trust in the confidentiality of mediation and the integrity of the mediator. Interference with confidentiality on the basis of public policy therefore requires that the integrity of the mediation process is balanced against the public interest that is at stake. However, the national legislators and the courts have wide discretion in the interpretation of

795 For mediation in the US, *Waldman* draws a distinction between exceptions that seek to prevent future harm and exceptions that seek to right an already existing wrong. *Preventing harm* refers to circumstances that are comparable to the public policy exception, although it varies in terms of scope. *Righting past wrongs* refers to exceptions that ensure the integrity of the process that may, for instance, be necessary to bring a claim for malpractice against the mediator or to challenge the validity of the agreement: Waldman 2011, p. 231.

796 On the interpretation of the concept of public policy with regard to different instruments: Hess and Pfeifer 2011.

the public policy exception. For instance, in the *Farm Assist* case it was held that *absolute confidentiality* was not available when disclosure is in the interests of justice.⁷⁹⁷ This interference with the confidentiality obligation will not only depend on the interpretation of what public policy is, but also on the question of how a given legal system values the integrity of mediation within its dispute resolution system.

The third exception is an exception in favour of the implementation and enforcement of the mediated settlement agreement. The mediator may therefore testify, “(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.”⁷⁹⁸ There is no doubt that the enforcement of the contents of the mediated settlement agreement by means of the power instruments of a state requires that the contents of the settlement is disclosed entirely or in part to the authorities that execute the agreement or are involved in the execution of the agreement. The terms of the mediated settlement agreement that provide for an obligation to pay a debt, fulfil another obligation or refrain from doing something must therefore be disclosed when the compulsory execution of these terms is sought. The same is true for other provisions that are typically included in a mediated settlement agreement, such as the parties’ agreement to end litigation before a court. The exception prevents the confidentiality obligation from being used in order to undermine the enforcement of the mediated settlement agreement.

Another question is whether other information may be disclosed in order to ensure the enforcement or implementation of the mediated settlement agreement. The contents of the agreement may be unclear. The written document may be incomplete or unconcise and may therefore require interpretation. It may be uncertain whether there is a valid agreement at all, or whether the agreement has been concluded under duress or fraud. One party may also dispute that there has been mediation or claim that mediation has been conducted contrary to the principles of mediation. These questions can only be assessed on the basis of evidence that arises out of or in connection with the mediation.

A narrow – literal interpretation - of the Mediation Directive would mandate only a disclosure of the written mediated settlement agreement or oral terms of what the mediator thinks has been agreed. The exception would not allow a disclosure of evidence regarding the intention of the parties or the way the agreement has come into existence. The national implementation and interpretation of the exception varies. Regarding the German Mediation Act, *Wagner* suggests that

797 *Farm Assist Ltd (FAL) v Secretary of State for the Environment Food and Rural Affairs (DEFRA)* [2009] EWHC 1102, para 44. On the interpretation of the scope of the exception and its distinction from the exception provided by English law under the concept of ‘interests of justice’, see: Allen, Tony 2013, p. 223. Brooker 2013, p. 212.

798 Mediation Directive, Article 7 para. 1 (b).

the exception must also permit disclosure if a dispute arises regarding the contents and *interpretation* of the mediated settlement agreement.⁷⁹⁹ He argues that a dispute regarding the contents and interpretation of the mediated settlement agreement is to be seen as a new dispute, one that is different from the dispute that was settled in the mediation. Therefore, there is no risk that the parties would benefit from the information disclosed in the mediation in order to improve their legal position in litigation on the original dispute. As the dispute regarding the contents and interpretation of the mediated settlement agreement is different from the original dispute, in his view there is also no risk that the mediator would influence the original dispute in favour of one party. As a consequence, there is in his view no reason to confine the exception to the disclosure of the contents of the mediated settlement agreement. *Allen*, on the other hand doubts that mediators give “*meaningful evidence about this.*” He notes that the exception fails to recognize the role and responsibility of the mediator in the mediation. Mediators are not responsible for the meaning, the fairness or enforceability of the mediated settlement agreement but this is a matter for the parties and their lawyers to establish. In his opinion, courts must be able to interpret orders and contracts without extrinsic oral evidence, in order to implement and enforce the agreement.⁸⁰⁰ Also, in France a restrictive interpretation has been suggested in order to respect the spirit of the mediation.⁸⁰¹

The difference in the interpretation of this exception mirrors the tension between a contractual approach, in which the mediated outcome is perceived merely as an ordinary agreement and an approach that perceives the mediated settlement agreement as the outcome of a dispute resolution process that has a dispute resolution function. If mediation is to constitute a process that in significant respects is functionally equivalent to judicial proceedings, one must contend with the idea that the mediated outcome is to stand by itself and that a further review or interpretation of the mediated outcome by an independent court with the assistance of the mediator undermines the position of mediation within the dispute resolution system. There is no point in having a *private* process if the parties are at risk of any mediated outcome that is to some extent ambiguous leading to court proceedings in which the mediator may disclose information the parties have entrusted to the mediator.

The higher the integrity of the process and the mediator is valued, the more difficult it is to override the rule of confidentiality in order to determine, interpret or correct the contents of the mediated settlement agreement in an ex-post court

799 Wagner 2013, p. 256.

800 Allen, Tony 2013, p. 225.

801 Wietek 2017, p. 341. For a narrow view based on an interpretation of the Mediation Directive, see: Frauenberger-Pfeiler and Risak 2012, p. 801.

procedure. Where the mediator has to provide evidence regarding the *correct* interpretation of the outcome, the mediator will take sides. A mediator interpreting the mediated outcome also assumes a role that is allocated to the parties and within the parties' self-determination. Adopting a narrow concept of dispute does not solve this dilemma, as a dispute on the interpretation of the contents of the mediated settlement agreement on a dispute cannot be entirely detached from the original dispute that has been subject to the mediation. One may argue that the process may not deserve protection, if the process has in fact been something different from mediation, in which fundamental principles of the mediation have not been complied with or where the mediator has engaged in misconduct. However, the Mediation Directive has not created an express exception in respect of information concerning the way the mediated outcome has come into existence, nor does the Mediation Directive provide an exception regarding information on the validity of the mediated settlement agreement or in respect of information on the process itself.⁸⁰² Relying on the Mediation Directive, one may therefore conclude that a party challenging the agreement on the basis of fraud, duress or an error may not rely on the testimony of the mediator. Only in exceptional cases will fraud, duress or error constitute a reason to interfere with the confidentiality restriction on the ground of overriding public policy.⁸⁰³

4.5.3 The effect of confidentiality

Earlier it was noted that the purpose of confidentiality in mediation is to create the trust that is needed in order to enhance the communication process and that this trust is *institutionalized* by means of statutory provisions, rules and mediation agreements entered into between the parties. These rules and agreements also have another consequence. They lead to different dimensions of communication and separate different communication systems from each other. When a matter is confidential, it does not become part of the communication that takes place outside the respective communication system in which the information was disclosed. Information that has been disclosed to the mediator in a private session is not part of the parties' common communication system, unless this information is introduced in the joint sessions. However, the parties are obliged to take their decisions on the basis of the information that is available to them, which may be incomplete. A decision that appears to be rational in light of the information exchanged within the joint session may therefore be irrational in light of other

⁸⁰² In contrast, compare the legal situation in the US, where several state legislators have provided for an exception for parties bringing an action against the mediator and the Uniform Mediation Act that excludes from protection information that is relevant to professional misconduct: Waldman 2011, p. 233.

⁸⁰³ See also Allen, Tony 2013, p. 223.

information that is under the confidentiality seal of the private session. A party aware of all the circumstances may not have agreed to the mediated settlement agreement had the information been disclosed in the joint session.

Mediation internal confidentiality increases the power of the mediator. The separation into different communication systems means that the mediator is the only person in the mediation who is aware of most circumstances that could form the basis for a rational decision. Even the mediator's perception of the basis for the decision may be incomplete, because the parties have no duty to disclose information to the mediator. In any case, the mediator may be contractually prevented from sharing the information disclosed by one party with the other party.⁸⁰⁴ Confidentiality under procedural law also creates different realities between the reality on the basis of which the parties take their decision in the mediation and the reality on the basis of which a court may review the existence or validity of the mediated settlement agreement. Confidentiality restrictions therefore increase the divergence between the substantive truth on the basis of which the court takes its decision and the substantive truth of the mediation.

The question of whether the mediated settlement agreement is valid or whether the mediation has been conducted in accordance with applicable law is typically a question that will be decided by a court or arbitral tribunal. As the mediator is the only person (other than the parties) who may provide information on what has happened during the mediation, a procedural confidentiality obligation ensures the finality of the mediated outcome. Confidentiality obligations imposed on the mediator are likely to reduce the parties' options for challenging the existence and validity of the mediated settlement agreement. Also, the question of whether a contract is against the law depends on the context of the agreement and remains disguised, unless the court has access to background information. One can therefore say that confidentiality in mediation protects the mediated outcome from a later review by the courts. A high level of confidentiality decreases the court's opportunity to review the validity and contents of the mediated settlement agreement.

In light of the effects of confidentiality, one can conclude that confidentiality is not only an element that is important for the success of mediation or the neutrality of the mediator. Confidentiality under procedural law protects the separation of mediation and litigation. Confidentiality may therefore be regarded as a mechanism that safeguards the value of mediation within the dispute resolution system. This position would be jeopardized if the courts had the capacity to undertake a comprehensive review of the mediation and the mediated settlement agreement.

804 Several Model Mediation Agreements contain such restrictions: see for instance the CEDR Model Mediation Agreement 2017, Section 5. The MfN Sample Mediation Agreement 2017, Section 4.1 referring to the MfN Mediation Rules 2017, Article 7. But it is also contained in the European Codes of Conduct for Mediators, Section 4.

A comprehensive review of the results achieved within mediation would lead to a situation in which mediation is considered to be a pre-stage to achieving justice, not as a method for achieving justice. It would not solve the conflict, but possibly prolong the conflict and lead to conflicts over the mediation. Mediation internal confidentiality provisions also mean that the parties accept that their decision-making rests upon limited availability of facts. They are aware that the other party has not disclosed all the information and that the mediator is prevented from sharing the information. This also means that the parties have no specific duty to disclose information. The truth on which the decision-making is based in the mediation is therefore the subjective truth each party has and not objective truth that can be reproduced within another system.

4.6 From self-determination to procedural fairness

At the beginning of Chapter 4, I questioned how the bindingness of the mediated settlement agreement achieved in Civil and Commercial Mediation is justified, and I made the claim that the deep justification does not reside in the consent of the parties, but in the procedure that is created by the parties in order to achieve the mediated settlement agreement. Based on the theory that procedures are systems that reduce the complexity of decision-making and legitimate the outcome of the procedure, I examined the elements that are essential to mediation. I came to the conclusion that mediation has three essential elements. First, there is a need for the parties to create a framework that stabilizes their normative expectations and this stabilization takes place in the form of the mediation agreement through which the parties agree on a distinct form of dispute resolution that is characterized by a distinct structure and distinct rules and principles that guide the communication process. The distinct procedural framework stabilizes the normative expectations of the parties with regard to the conduct of the specific process. The procedure, the way of acting, and the steps that will be followed become predictable.

Secondly, Civil and Commercial Mediation is characterized by the settlement of the dispute as the primary aim of mediation that is to be pursued by the mediator. The mediation may have other aims, such as the improvement of the interactions between the parties, but these other aims are not characteristic of the process. The settlement of a dispute as the primary aim of the mediation sets the framework for the mediation model that may be used to achieve this aim and determines the way the process is to be conducted. Thirdly, the parties assume distinct roles and start to act in accordance with these roles. For the parties, this means that they assume the role of active decision makers, while the mediator assumes the role of the impartial third party that facilitates the outcome of the mediation. The

impartial role of the mediator, that is the absence of any partisanship, is essential to mediation.

In order to identify and structure the principles that govern the mediation, I relied on values that are external to the legal system and may serve as a deep justification of the mediated settlement agreement and point of reflection. I used self-determination, substantive fairness and procedural fairness as external values and examined how they emerge in mediation and in legal communications. My analysis showed that self-determination – a value that is considered to be a central value of mediation – is restricted in Civil and Commercial Mediation. The parties are not always self-determined rational decision makers and there may be an imbalance in the equality of the parties that could be detrimental to the process. The parties' self-determination in respect of the process collides with the duties imposed on the mediator, such as impartiality and efficiency as well as with the requirement that the mediation is to follow a structure. The parties' self-determination in respect of the outcome is restricted due to a lack of information. Mediation does not have the purpose of providing full information as a basis for the parties' decision-making, nor is there a duty to disclose information imposed upon the parties or the mediator. On the contrary, mediation internal confidentiality restricts access to information.

Only to a limited extent can substantive fairness serve as a deep justification of the mediated settlement agreement. In mediation, substantive fairness does not mean that the parties need to adhere to an external standard of fairness nor can the achievement of substantive fairness be a duty that can be imposed upon the mediator, except to the extent that fundamental values of society are at stake. Substantive fairness in mediation means that the outcome of mediation is the outcome of a rational choice that does not contradict the fundamental values of society. As self-determination in mediation is restricted and substantive fairness is closely linked to the process of decision-making, only procedural fairness remains as a deep justification.

Procedural fairness in mediation means that the mediator conducts the mediation impartially in accordance with what is *state of the art* and ensures the equal involvement of the parties. Impartiality and equal participation of the parties are principles that are fundamental to the acceptance of the mediated outcome according to psychological research on procedural justice, and they also emerge as principles in legal communications. The mediator must act omnipartially which means that the mediator has to ensure the equal participation of the parties. Onmipartiality requires the mediator to enhance the parties' self-determination and rational decision-making and thereby balances the inequality of the parties. However, omnipartiality may not interfere with the core of the mediator's impartiality. A mediator may therefore not become a partisan or favour a particular outcome.

Confidentiality is considered to be a central element for the success of mediation but is not an essential element of the mediation nor does it serve as a deep justification for the bindingness of the mediated settlement agreement. It is a duty that is imposed on the mediator under the Mediation Directive, but may also be imposed on the parties under the mediation agreement. Insider/insider confidentiality serves to establish trust within the mediation and may be used to overcome strategic barriers to a negotiated settlement. Confidentiality has the effect of creating different levels of truth within and outside the mediation. Consequently, the mediator may be the only person in the process having the information to take rational decisions, while the parties' access to information is limited.

5 CONCLUSIONS

5.1 The normative dimension of mediation

It is common to perceive mediation as a social practice, a practice that takes place outside the law and is unrestricted by any legal rules. The purpose of my dissertation has been to examine the normative dimension of mediation as a practice that is *reproduced* within the legal system as legal practice. I have claimed that legal principles have started to emerge for the legal practice of mediation and sought to identify, interpret and systematize the legal rules and principles that form the basis of mediation within the legal system. I have used the concept of Civil and Commercial Mediation in order to depict the subject of my research.⁸⁰⁵ My main interest has been to identify, interpret, systematize and develop the rules and principles in light of the change from an adjudicative to a consensual dispute resolution system. My second interest has been more critical in nature. My interest has been whether the law takes account of shortcomings that have been referred to by critics as the central issues of Civil and Commercial Mediation, such as the issue of legal certainty, the question of whether a mediator always needs to be neutral and the imbalance between the parties.

I used a systemic approach to sketch Civil and Commercial Mediation and its existence within the legal system. This approach builds upon systems theory and the view that different social systems use different binary codes in order to operate: for the legal system, this means that there needs to be a legal communication in order for a communication to be regarded as part of the legal system. Contracts are legal communications that connect the legal system with other systems and provide a *structural coupling* between the legal system and other social systems. I have made use of this bridging function of the contract and analysed the outcome of the mediation and the mediation itself through the prism of the contract. Therefore, to a significant extent, my research is backed by contract theory, which, however, has its limits. Civil and Commercial Mediation can only be captured inadequately by contract theory, as it follows principles that are procedural in nature.

After the introduction, my work is divided into three main Chapters. In Chapter 2 I set out the theoretical framework for the subsequent chapters. I examined the reasons for the rise in the use of mediation in cross-border dispute resolution, which I see in the inadequacy of litigation to cope with conflicts, unless the elements that are not legal in nature have been eliminated, and the inadequacy

⁸⁰⁵ See on the term Chapter 1.1.2.

of the national dispute resolution system for solving cross-border disputes. Both factors are considered to be a barrier to market integration within the European Union. Mediation – a dispute resolution mechanism that is independent of the law – appears to provide a simple and effective solution to these inadequacies. Mediation, however, is only independent of the law if it remains a social practice. Alternative forms of dispute resolution only suppress the question of the law, but this suppression is not of a permanent nature.⁸⁰⁶

Mediation is based on a network of contracts and I used this as a method to examine mediation within the legal system.⁸⁰⁷ Through the mediation agreement that constitutes the basis and the framework for Civil and Commercial Mediation and the mediated settlement agreement that constitutes the outcome, mediation is reproduced within the legal system and starts to differentiate into a distinct dispute resolution mechanism. Within the legal system, mediation is embedded in a system of legal communications that enshrine rules and principles that have started to emerge in Civil and Commercial Mediation. The nature of mediation as a dispute resolution mechanism and the difference between the social practice of mediation and the legal practice of mediation were elaborated in Chapter 2.3. Civil and Commercial Mediation is functionally equivalent to judicial proceedings in many respects: it canalizes conflicts and results in a mediated settlement agreement that is binding and can be confirmed as enforceable upon request by the parties.⁸⁰⁸ The rationality of the decision-making mechanism differs from judicial proceedings, which does not mean that no legally binding decisions are taken.

Chapter 3 and 4 apply the theoretical framework. Chapter 3 deals with the outcome of mediation. The outcome of Civil and Commercial Mediation is not something the parties are free to choose whether to comply with. It is a binding agreement that seeks to change the legal relations between the parties and that is – if confirmed as enforceable – the equivalent to a judgment rendered by a court in many respects. In the legal system, the mediation paradigm that is characterized by flexibility and voluntary compliance cedes to the contract paradigm of liberal contract law that is characterized by the contractual principle of *pacta sunt servanda*. As the mediated outcome is considered within the legal system as though it is an ordinary agreement and not the outcome of a dispute resolution mechanism, the agreement is valid, even though the matter might not have been suitable for mediation, the dispute resolution mechanism has not been appropriate, or the agreement fails to resolve all elements of the conflict. Due to the contractual approach to mediation, the mediated settlement agreement is detached from the

806 Luhmann 1988 p. 30. See fn 26.

807 On the contract as an instrument of structural coupling and as a research method, see Chapter 2.2. On the terminology for the different contracts, see Chapter 1.3.

808 On the meaning of *functional equivalence*, see Chapter 2.3.2.1 above.

process of mediation. The circumstance that the mediation does not actually constitute Civil and Commercial Mediation, or that the mediator acts contrary to the requirement of impartiality or fails to conduct the process in accordance with the *state of the art* is unlikely to lead to the invalidity of the mediated settlement agreement.⁸⁰⁹ Substantive fairness, a principle of the contract law of the welfare state, will rarely be used as a ground of adjustment for the mediated settlement agreement. Due to emphasis on the parties' will and subjective understanding of fairness that is independent of the law, it is difficult – if not impossible – to establish and apply an external standard against which the result achieved by the parties may be assessed.⁸¹⁰ Consequently, there are no substantively unfair mediated settlement agreements, unless the mediated settlement agreement is clearly against public policy or mandatory laws or the contractual balance is so distorted that it cannot reasonably be considered that this could be compensated for by the subjective interests and values of the parties.

In Chapter 4, I examined the mediation process as a means to legitimate the bindingness of the mediated outcome and determined the essential elements that a mediation agreement must fulfil in order to establish a distinct procedural system. I concluded that the essence of Civil and Commercial Mediation consists of an agreement on the settlement as the aim of the mediation, the allocation of procedural roles to the participants in the mediation, and the submission to a structure. The agreement on the essential elements of the mediation stabilizes the parties' normative expectations in respect of the process and the parties start to act accordingly: the mediator will take the role of the impartial facilitator and the parties the role of active decision makers. In order to identify and structure the principles that govern mediation, I relied on values that are external to the legal system and may serve as a deep justification of the mediated settlement agreement and point of reflection and examined how these values show in the legal communications. I concluded that the deep justification of the mediated settlement agreement reached in Civil and Commercial Mediation is procedural fairness. The right to equal involvement in the procedure as well as the right to an impartial mediator are the fundamental rights of the parties in Civil and Commercial Mediation.⁸¹¹

809 On the separateness of the mediated settlement agreement and mediation, see Chapter 3.4.5.

810 On outcome fairness, see Chapter 3.4.4.

811 See Chapter 4.4.3.3.

5.2 Towards a general procedural doctrine for Civil and Commercial Mediation

It is not sufficient to view mediation as a social practice or a service that is provided to the parties. Civil and Commercial Mediation is a dispute resolution mechanism on the periphery of the legal system that fulfils a function that is equivalent to the performance of the courts, in that it canalizes conflicts and results in a binding settlement agreement that can be confirmed as enforceable on request by the parties. Civil and Commercial Mediation shares several elements with litigation: it ends in a decision and it constitutes a process that rationalizes the parties' decision-making and legitimates the outcome. The confidentiality of mediation is a legal construct and shields the position of mediation within European dispute resolution. Due to the confidentiality of mediation, the courts have only a limited opportunity to review the mediated settlement agreement. Such a review is also restricted due to the different rationality of the decision-making. Courts are bound to take decisions based on the law that constitutes an objective standard of fairness. As there is no such standard in mediation, the courts may only invalidate or adjust the outcome achieved in the mediation, if the outcome is contrary to mandatory law or public policy.

I claimed that the parties enter Civil and Commercial Mediation and conclude the mediated settlement agreement in the expectation that the process constitutes mediation and complies with the standards that one may objectively expect from Civil and Commercial Mediation and that the bindingness of the mediated settlement agreement is justified by the adherence to certain principles. I used values that are external to the legal system – self-determination, substantive fairness and procedural fairness – to analyse and structure the surface material in order to identify the procedural principles of mediation. On the basis of my findings, I seek to articulate some *procedural principles* of Civil and Commercial Mediation. The principles that I identified relate to the aim of mediation, the role of the participants, the procedure and the decision-making. In addition to these basic principles, I consider that procedural fairness has emerged as a principle of Civil and Commercial Mediation. The principle that determines the aim of Civil and Commercial Mediation is the principle of *efficient dispute settlement*. Civil and Commercial Mediation has a distinct aim, and this aim is to agree on the settlement of an articulated dispute, an aim that has been clearly stated by the European legislator and that also arises from the function of mediation within European dispute resolution. A dispute in Civil and Commercial Mediation means a dispute over civil or commercial matters that consists of legal positions and subjective

perceptions of frustrations of interests and needs.⁸¹² The scope of the dispute is defined by the parties and may change during the mediation. The aim of reaching a settlement does not exclude other aims being pursued in addition to the settlement of the dispute, such as the improvement of the interactions between the parties. On the contrary, the parties' emotions, interests and needs have to be addressed in the mediation. This follows from the broad concept of the dispute. However, as Civil and Commercial Mediation aims to achieve an efficient settlement of a distinct dispute, the improvement of the interactions between the parties cannot be the primary aim of Civil and Commercial Mediation. As the aim of mediation and the mediation model are interrelated, the aim to settle a distinct dispute determines the mediation model that serves to achieve the aim of efficient dispute resolution.

The principle of self-determination is a fundamental principle of Civil and Commercial Mediation. It determines the role of the parties and the mediator, but also the decision-making.⁸¹³ Self-determination means that the parties take the role of active decision-makers and are responsible for the decision-making while the mediator takes the role of a facilitator. Self-determination finds its visible expression in the *principle of voluntariness* which also marks the core of the parties' self-determination. The principle of voluntariness may relate to the participation, the process and the outcome. It means that the parties have the right to make choices and the right to give or refuse their consent. The core of the principle of self-determination is that the parties are free to terminate the mediation and they are free to choose the mediator and to give or refuse to give their consent on the procedural steps that will be taken within the mediation. They are also free to give or refuse their consent to the outcome of the mediation. Self-determination in respect of the outcome ends if the outcome is contrary to the law.

Self-determination in respect of the outcome is restricted by the specific concept of procedural truth. Civil and Commercial Mediation does not have as its purpose to establish the substantive truth or to enable the parties to take an informed decision subsequent to a comprehensive exchange of information. On the contrary, the parties have the right not to disclose information, especially when this would be detrimental in subsequent litigation. This right is secured by the contractual duty of confidentiality that is generally imposed on the mediator in respect of information that is disclosed in private meetings by one of the parties. The legal duty of confidentiality and the right not to disclose information create a distinct procedural truth in mediation. As consequences of this, the parties will be required to take decisions based on limited information, and the procedural truth that is

812 See Chapter 2.3.4, Chapter 3.3.2 and Chapter 4.3.2.

813 See Chapter 4.4.1.

available to the parties may be different from the procedural truth that is available to the mediator.⁸¹⁴

As information that is available to the parties may be restricted in the light of the specific concept of procedural truth in mediation, informed decision-making is to be understood as rational decision-making. Informed consent requires the parties to be aware that full information will not be disclosed and that they are responsible for their decisions and that the parties are encouraged to explore different options and to determine their alternatives to the mediated settlement. Informed consent in respect of the outcome therefore means that the parties' decision-making is based on the parties' rational choices made within or subsequent to a process that ensures that their decision-making is rational.⁸¹⁵ One may therefore say that that the *principle of rationalized decision-making* is one of the basic principles in Civil and Commercial Mediation.⁸¹⁶ Rational decision-making requires all aspects of the dispute to be addressed in the mediation, hence the parties' legal positions and subjective perceptions of frustrations of interests and needs.

In respect of the process, self-determination collides with duties that are imposed on the mediator: the duty to conduct the mediation impartially, effectively, and according to what is *state of the art*. The *principle of impartiality* is not only a principle of mediation, but also an essential element of Civil and Commercial Mediation. Where a mediator starts to take sides and becomes the ally of one party, the nature of the process changes. Such change has no immediate effect on the legal nature of the dispute resolution mechanism. As the mediation agreement stabilizes the normative expectations of the parties, the legal nature of the mediation only changes if it can be considered that the parties may have agreed to a change of the dispute resolution mechanism. However, evaluative forms of mediation jeopardize the mediator's impartiality and the mediator's evaluative behaviour may create a presumption of bias if the mediator makes a proposal in favour of a specific outcome.

Impartiality as the guiding principle of mediation, together with the requirement that the parties are equally involved in the process, are not only values that arise in procedural justice research, but they also depict a *principle of fairness* that constitutes the minimum requirement of due process in Civil and Commercial Mediation. In my analysis, I concluded that the parties' right to equal participation in the procedure and the right to an impartial mediator are an expression of the value of procedural fairness that is the deep justification for the bindingness of

814 This limited truth is a result of the parties' right not to disclose information and the mediation internal confidentiality. See Chapter 3.4.2 and Chapter 4.5.3.

815 On informed consent in mediation, see Chapter 4.4.1.3.

816 On the rationalization process in mediation, see Chapter 2.3.3. On substantive justice as rational justice, see Chapter 4.4.2.3.

the mediated settlement agreement.⁸¹⁷ I referred in this respect to the omnipartial mediator, hence a mediator who actively promotes the self-determination of the parties, without becoming the ally of one party. To secure the mediator's impartiality in the mediation, the mediator must adhere to communication techniques and mediation techniques that preserve the parties' perception of the mediator's impartiality, a principle that I call the *principle of unbiased communication*.⁸¹⁸

The above principles determine the role of the mediator and how the mediator is to conduct the procedure in order to ensure the parties' access to justice. These general principles apply also when there is an imbalance between the parties. Civil and Commercial Mediation does not take account of a structural imbalance between the parties or different power sources. To some extent, the mediator who is required to act omnipartially, hence to promote the self-determination of each party, may reconcile the imbalance between the parties. However, a mediator may not become a party or advisor of the weaker party. The mediator may not advance a particular outcome or otherwise act against the core content of impartiality.

5.3 Towards legal certainty in European Civil and Commercial Mediation

Legal certainty in Civil and Commercial Mediation requires that the parties' normative expectations in respect of the process are stabilized. This stabilization may be achieved by two means: by regulation or by a contract entered into between the parties. The European legislator has so far shied away from harmonizing the mediation process or introducing common principles regarding the quality of the procedure but has left the harmonization to the national legislators and soft law regulation. At the European level, this has led to the European Code of Conduct for Mediators, an instrument of self-regulation that has been initiated by the European Commission and at the national level to fragmented legislation and self-regulation. This soft approach enhances the flexibility of the process, which is considered to be one of the advantages of mediation, but it comes at the cost of legal certainty and consistency. It also results in the national fragmentation of a process that was designed to overcome national borders. Legal certainty and consistency, however would be necessary in order to establish the parties' trust in the second pillar of access to justice within European dispute resolution.

The second instrument for stabilizing the parties' normative expectations is not consistently used. Whether the parties have conducted Civil and Commercial

⁸¹⁷ See on procedural fairness Chapter 4.4.3.3.

⁸¹⁸ On communication and the appearance of impartiality, see Chapter 4.4.3.1.

Mediation is often assessed ex-post, hence once the mediation has been concluded. Some legislators require the mediation to be conducted on the basis of an agreement but fail to set forth the essential elements of such agreement.⁸¹⁹ In the absence of a clear typology of mediation agreements, the parties bear the risk that their conduct will not qualify as Civil and Commercial Mediation and that their mediation agreement will not be considered to be a mediation agreement. They assume the risk that the mediation is structured, facilitative and conducted towards the aim of achieving a settlement. In cross-border mediation, this risk increases, as the parties are not certain which law will apply to their conduct. This risk can only be balanced to a limited extent by the mediator, who educates the parties at the beginning of the mediation in the opening statement. Legal certainty would require that the main terms of the mediation agreement are standardized or that the parties adhere to mediation rules that set out the main principles of Civil and Commercial Mediation.

In order to establish mediation as the second pillar of access to justice and increase legal certainty, a common understanding about the rules and principles of Civil and Commercial Mediation is necessary. Individual contracts are not sufficient to establish a common understanding and create legal certainty. The Mediation Directive seeks to ensure the quality of Civil and Commercial Mediation by means of training or the adherence to codes of conduct.⁸²⁰ The European Code of Conduct for Mediators has been used by a range of organizations as a model for their own codes of conduct and has added to the harmonization of the quality of mediation within the European Union.⁸²¹ Other instruments that have been suggested to improve a common standard of quality are the exchange of best practices and the development of a European handbook for training organizations.⁸²² Both measures are useful in order to achieve the coherence that is needed in Civil and Commercial mediation, but they are not sufficient. This work has shown that legal principles have started to emerge in Civil and Commercial Mediation as have minimum guarantees of due process. Legal certainty would require these principles to be consolidated and restated as principles of Civil and Commercial Mediation.

819 For instance, the Finnish legislator requires the mediation to be conducted on the basis of an agreement, rules or similar arrangement: Finnish Mediation Act (394/2011), Chapter 3 Section 18.

820 Mediation Directive, Article 4.

821 The adherence to a code of conduct is considered by stakeholders to be a crucial element for ensuring quality: Study for an evaluation and implementation of Directive 2008/52/EC 2016, p. 76.

822 Study for an evaluation and implementation of Directive 2008/52/EC 2016, p. 80.

5.4 Next step in Civil and Commercial Mediation

The UNCITRAL Working Group II (Arbitration and Conciliation) has started to prepare an instrument on the direct enforcement of international commercial settlement agreements that is modelled on the New York Convention on the recognition and enforcement of foreign arbitration awards of 1958.⁸²³ The instrument seeks to introduce the direct enforcement of the mediated outcome in the country of enforcement. In order to secure the legal position of the defendant, a set of challenges to the recognition and enforcement of the mediated outcome is discussed including the defence that the mediated outcome does not constitute a valid agreement or that the mediator has failed to maintain fair treatment of the parties or has acted in breach of objective standards of mediation.⁸²⁴ Scholars have suggested a similar instrument for the European Union.⁸²⁵ The need to adhere to a universally applicable concept of due process will therefore not disappear, but rather will increase. While such defences constitute an impediment to the enforcement, their effect on the *validity* of the mediated settlement agreement is still unresolved. It is also open how such a defence can be made in light of the unspecific confidentiality provision in mediation that covers all information arising out or in connection with the mediation and such protects the process from any review.

823 On a corresponding proposal for the European Union, see Esplugues and Iglesias 2016, p. 22.

824 There is an ongoing debate on the content of this defence securing the due process of mediation. On the discussion, see UNCITRAL Working Group II, 16.2.2017, pp. 9–11.

825 Documents available at: http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html. Esplugues and Iglesias 2016, p. 75.

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