GlobalMediation.com

2014

Global Mediation Rio 2014
Coleção e.ISBN: 978-85-98144-41-2

MEDIAÇÃO E CONFLITOS INTERNACIONAIS

INTERNATIONAL CONFLICTS AND MEDIATION

Organização:
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e.ISBN – 978-85-98144-42-9

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Mediação e Conflitos Internacionais

International Conflicts and Mediation

Global Mediation
Rio 2014

Global Mediation Rio

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CATALOGAÇÃO NA FONTE: BIBLIOTECA DA PROCURADORIA GERAL DE JUSTIÇA DO ESTADO DO MARANHÃO

Mediação e Conflitos Internacionais/Cássius Guimarães Chai, Alberto Manuel Poletti Adorno, Christian Djeffal (orgs.). – São Luís: Procuradoria Geral de Justiça do Estado do Maranhão/Jornal da Justiça/Cultura, Direito e Sociedade (DGP/CNPq/UFMA).

Inclui Bibliografia

ISBN COLEÇÃO GLOBAL MEDIATION RIO 2014 - ISBN: 978-85-98144-31-3
ISBN: 978-85-98144-38-2

1.Mediação. 2. Sistema de Justiça Internacional. 3. Direito Comparado-União Europeia-America-Canada-China-Brasil.. I. Chai, Cássius Guimarães, II Adorno, Alberto Manuel Poletti

182p.

CDD 342.6643
341.311/350
CDU 342
35

Livro Publicado pelo Jornal da Justiça, pelo Ministério Público do Estado do Maranhão e pelo Grupo de Pesquisa Cultura, Direito e Sociedade (DGP/CNPq/UFMA).

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FORWORDS OF ORGANIZERS

It is not possible to ignore the importance of mediation in public international law. Article 33 of the UN Charter establishes that "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice".

In a globalized world where the relations between States and people from different countries are likely to increase, there are always possibilities of a growing number of conflicts. Before arriving to international courts, there is a requirement to mediate and try to solve a problem. We are not in a world where all cases should be treated in courts. It is very important to consider that some cases could be solved in regional systems rather than the international jurisdictions.

We are not going to discuss about all the cases solved by mediation but we have chosen some of them. We have preferred to discuss some of the peculiarities of mediation in different fields but related to some problems in specific areas: stolen pieces of arts, language, criminal justice, private international law and family and of course, the importance of mediation and their particularities in Europe and some countries.

There are many capacities that a mediator should be able to demonstrate: knowledge of the case, capacity of hearing, humanity and international practice, knowing of languages and different cultures is also essential.

Many people consider that working in international law is reserved to few people since some of these competences could be difficult to reach. We believe that there are opportunities for students and practitioners who really wish to pursue a career in this field. In trying to solve some of the disputes between international parties, we need to be creative since there are new elements that did not exist in the past. We could consider all the disputes in technology that were not known centuries ago. But we may also think that some of the problems have their roots in the past and it is important to examine the origins of the conflicts. Some of them are also related to different visions in government´s position and eager to disappear at the end of their periods in democratic societies. But others persist and the possibility of a new mediator and a new attempt to find a solution it is always possible.

We hope that these series of articles in International Law and mediation could encourage new practitioners in a world that will always be ready to receive more people interested in the field.

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NOTA DOS ORGANIZADORES

O presente volume, *Mediação e Conflitos Internacionais*, integra a **Coleção Acesso à Justiça** Global Mediation Rio 2014, fórum mundial realizado na cidade do Rio de Janeiro entre os dias 24 e 28 de Novembro de 2014, oportunidade em que se congregaram representantes de vinte e seis países com o objetivo de pensar o Sistema de Justiça a partir da premissa da solução alternativa dos conflitos e sua correlação com a jurisdição: Brasil; Portugal; Estados Unidos; França; Alemanha; Itália; Espanha; Hungria; Egito; Paraguai; Argentina; Uruguai; Chile; Turquia; Suécia; China; Japão; Canadá; Bulgária; Cabo Verde; Moçambique; Inglaterra; Colômbia; Angola; Irlanda e Austrália.

É importante registrar os impactos acadêmico e institucional que o Global Mediation Rio 2014 propiciou; e, enquanto programa permanente, passa a integrar o calendário mundial sobre a temática Mediação e Jurisdição em seus mais variados matizes sobre os conflitos sociais.

O enlace com os Poderes Judiciários Estaduais e da União, com o Conselho Nacional de Justiça, com as Cortes Superiores Nacionais e Cortes Estrangeiras, dentre estas com membros da Corte Europeia de Direitos Humanos, do Poder Judiciário da República do Paraguai, do Conselho de Direitos Humanos da República da França, com Instituições essenciais à Administração da Justiça, tais como o Ministério Público Brasileiro, a Advocacia Pública e a Defensoria Pública, a Ordem dos Advogados do Brasil seccional RJ, em conjunto com pesquisadores de vários centros de excelência na pesquisa e no ensino Jurídicos, nacionais e estrangeiros, dentre os quais a Universidade de São Paulo, a Universidade Federal de Ouro Preto, a Universidade Externado da Colômbia, o Instituto de Ciências Sociais Chinês, a Faculdade de Direito de Vitória, a Universidade Colômbia do Paraguai, a Universidade Federal Rural do Rio de Janeiro, a Universidade Estadual do Rio de Janeiro, a Universidade do Porto, do Grupo de Ensino Devry Brasil, da Universidade do Cairo, da Georgetown University, da American University, da Universidade Católica do Chile, da Universidad O'Higgens do Chile, da Universidad de Salamanca, da Universidad del Chile, da Central European University, da Universidad de Córdoba, da Universidade Nova de Lisboa, da Universidad de Guadalajara, da Universidad Rey Juan Carlos – Madrid, da Universidad de Buenos Aires, da FAPESP, do Instituto Ibero-americano de Saúde e Cidadania, do Grupo de Magistrados Europeus de Mediação, da Universidad de Los Andes – Colombia,

da ODR – Latinoamérica, da Universidade Federal do Rio de Janeiro, do Instituto de Mediação da Irlanda, a Universidade Estadual do Norte Fluminense, e de áreas afins, como a Psicologia, a Educação, as Ciências Políticas, o Serviço Social, bem demonstram as múltiplas possibilidades de inserção, de cooperação e de articulação nascidas no seio do Global Mediation Rio com os setores da sociedade civil e governamentais, a exemplo do Instituto dos Magistrados do Brasil, da Associação Nacional dos Membros do Ministério Público, a Secretaria Extraordinária da Reforma do Poder Judiciário. O Global Mediation Rio sob iniciativa do Jornal da Justiça e com o apoio do Ministério Público do Estado do Maranhão, do Poder Judiciário do Estado do Rio de Janeiro, do Ministério da Justiça, do Governo do Estado do Rio de Janeiro e da Prefeitura do Rio de Janeiro, pode, no consórcio de toda equipe, cumprir seus objetivos descortinados em sua visão e em sua missão.

O conteúdo de cada texto é de inteira e exclusiva responsabilidade de seus autores, bem como a revisão final individual.

Neste volume, os textos resultam dos trabalhos desenvolvidos no Grupo de Trabalho Mediação e Conflitos Internacionais sob coordenação dos insígnes professores Doutores Alberto Poletti Adorno, Cássius Guimarães Chai e Cristian Djeffal.

Há sempre desafios, não se pode esmorecer.

Boa leitura!

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STRUCTURE

e.ISBN - 978-85-98144-48-1

MEDIATION IN INTERNATIONAL LAW: MAPPING ITS SPECIFICS FOR COMPARISON

by Christian Djeffal[1]

1 INTRODUCTION

Research Question and Abstract

Mediation is a one form of dispute resolution that can be found on different levels such as national and international law, in different jurisdictions such as for example Brazil, Paraguay or Argentina and in different areas of the law such as criminal or commercial law. While the general definition of mediation might be the same across levels, jurisdictions and areas of the law, the context in which mediation differs to a great extent. The present article aims at highlighting the specifics of mediation in international law in order to make them accessible and comparable with mediation in other contexts. It looks at mediation from a legal perspective.[2] Achieving this aim goes clearly beyond the limits of the present article. The body of international law has grown significantly in substance but also regarding international institutions. The inquiry, therefore, has to be confined to the aim of a general framework helping to understand the specifics of mediation in international law. The first important step in this inquiry is to understand in what respects international law is particular.

Working Definition of Mediation

Before entering into the details of mediation in international law, it is essential to provide for a working definition of mediation and to delimit mediation from other means of dispute resolution. Mediation could be

[1] The author is law clerk at the Higher Regional Court Frankfurt and received his PhD from Humboldt-University of Berlin where he worked on Static and Evolutive Interpretation of International Treaties.

[2] For a good overview over other perspectives on mediation see Claude H Mayer and Dominic Busch, 'Einleitung: Mediation erforschen? Fragen - Forschungsmethoden - Ziele' in Claude H Mayer and Dominic Busch (eds), *Mediation erforschen: Fragen - Forschungsmethoden - Ziele* (VS Verlag für Sozialwissenschaften 2012) 19.

defined as means of resolving disputes through negotiations between the affected parties with the help and the active engagement of a third party. The first important feature is that there is a third party, meaning a party not directly participating in the dispute. The second *specificum* of mediation is that it is a non-obligatory way of resolving international disputes. As opposed to adjudication in courts, the mediator renders no binding decision. While the mediator actively engages in the process of negotiations, the parties can only solve their dispute through an agreement resulting from their negotiations.

2 GENERAL ENVIRONMENT OF INTERNATIONAL MEDIATION

From Classical to Modern International Law

To understand what the specifics of mediation in international law are, it is necessary to provide a general overview of the current state of international law as it is generally conceived. As the international legal order is constantly under development, it is necessary to picture the law against the background that will be called 'classical international law'.[3] While there are many concepts that aim to replace or reconceptualise international law, such as international public law, transnational law or global law, it is for the present endeavour only necessary to focus on a few observations.[4]

Of States and other actors

The central characteristic of the international legal system are its subjects. Traditionally, states have been the exclusive subjects in international law. The influential textbook of Henry Wheaton, to mention just one influential example among many opens its second chapter with the following words: 'The subjects of international law are separate political societies of men living independently of each other, and especially those

[3] Wolfgang Vitzthum, 'Begriff, Geschichte und Rechtsquellen des Völkerrechts' in Wolfgang Graf Vitzthum (ed), *Völkerrecht* (5th edn. de Gruyter 2010) 7 para 5; Wolfgang Friedmann, *The Changing Structure of International Law* (Stevens 1964) 5.

[4] For a brief overview over new ways of capturing international law see Christian Djeffal, 'Neue Akteure und das Völkerrecht: eine begriffsgeschichtliche Reflexion' in Thomas Bernhard, Ralph Nikol and Nina Schniederjahn (eds), *Transnationale Unternehmen und Nichtregierungsorganisationen im Völkerrecht* (Nomos 2013) 25.

e.ISBN - 978-85-98144-48-1

called Sovereign States.'[5] While he later introduced the distinction between sovereign states and those with limited sovereignty, this definition clearly shows that states have been at the centre of international law for him. To be a subject of international law means on the one hand the competence of actors to create international legal norms, on the other hand the possibility to be bound by international law. This means that the traditional view was that only states can have rights and duties under international law.

With the passing of time, some exceptions were added to this rule: firstly, there were special cases of sovereign states losing their territory like the Holy See for some time or their quality as state such as the Sovereign Military Order of Malta. Another significant development was the rise of international organisations, sometimes explicitly endowed with international legal personality.[6] The UN-Charter has made reference to human rights in its preamble, in Art. 1 (3), Art. 13 (1) (b) as well as in other provisions. This foreshadowed the recognition of the individual of subject of international law. Firstly, the rights of human beings were acknowledged in human rights treaties, while international criminal law later has shown that there are also duties for individuals in international law. International investment law protects foreign investments and shows that it is also possible to convey rights upon legal persons that are established by domestic law. There is also an increasing role of Non-governmental organisations in international law.[7]

All in all, it is fair to say that states are still the central actors in international law. States are the actors generally competent to create international legal norms. Yet, international law has gone far beyond regulating only the behaviour of states: there is a plurality of legal actors, including human being, legal persons established by national law, international organisations and non-governmental organisations that are all subject to international law. This is significant as one would also adapt the notion of an international dispute accordingly. Whereas such disputes would previously exist only between states, one could now also think of a dispute between an individual and an international organisation

[5] Henry Wheaton, A. C Boyd and W. B Lawrence, *Elements of international law* (vol 2, Stevens 1836) 51.

[6] Bardo Fassbender, 'Die Völkerrechtssubjektivität Internationaler Organisationen' (1986) 37 Österreichische Zeitschrift für öffentliches Recht 17.

[7] Anna-Karin Lindblom, *Non-governmental organisations in international law* (Cambridge University Press 2005).

or a company and a state. This also means that the potential relations in mediation proceedings have become more multifaceted.

On the other hand, states still play a decisive and special role in international law. They are the only actors that can create legal norms, furthermore most international norms are addressed to states.

Between Horizontal and Vertical

To picture the relations between subjects in a legal system in an ideal-typical way, we sometimes speak of horizontal and vertical systems.[8] In a horizontal legal system, the participants are all equal and generally free to enter into legal relations with each other. For example the classical codifications of private law aimed at creating a system enabling individuals to enter into contractual relations with each other on an equal basis irrespective of nobility or class. As opposed to this, in public law, there is generally a hierarchical and, therefore, vertical relation between the state and the individual. There is a monopoly on the exercise of force while the exercise of force of individuals is limited to very few exceptions.

As previously mentioned, in the classical international legal system, states were considered to be the only actors, from the quotation above, it can also be derived that states were considered to be sovereign and equal. They accepted no authority above them and dealt with other states on an equal footing. It is significant that international law was conceived as horizontal law between states.[9] As states were considered to be sovereign, there was no authority granting their rights in relation to other states. This resulted in the view held especially in the 19th century that war was an ordinary means of states to resolve disputes and enforce their sovereign rights. While there was no legal restriction, many initiatives developed aiming at curtailing the right to go to war.[10] Some treaties prescribed a procedural requirement to resort to mediation before it was legal to go to war. Arts. 12 and 15 of the Covenant of the League of Nations is possibly the best known example for

[8] Vitzthum (n 3) 23; Bin Cheng, 'Introduction to the Subjects of International Law' in Mohammed Bedjaoui (ed), *International Law: Achievements and Prospects* (Martinus Nijhoff 1991) 35.

[9] So, international legal principles were famously derived from private law analogies by Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: with special reference to international arbitration* (Lawbook Exchange 1927).

[10] For a general overview see Mary E O'Connell, 'War and Peace' in Bardo Fassbender and others (eds), *The Oxford handbook of the history of international law* (Oxford Univ. Press 2013).

such a clause. Under this provision, the parties had to submit a dispute to settlement or the council of the League of Nations and wait for three months before going to war. Yet, these provisions did not outlaw war as such.

It was the Charter of the United Nations that has again significantly altered this general view on international law. Firstly, the use of force is outlawed by Art. 2 (4) UN Charter. One general element of vertical authority is the competence of the Security Council to authorise forceful measures when there is a threat or breach of international peace and security. As the Security Council is composed of only 15 members, five of which have a permanent seat and the power to veto any resolution, the Council can effectively exercise it authority irrespective of the consent of the affected state.[11] This is even more significant as the Security Council has used this competence to issue abstract and general rules through resolutions in order to restore peace and security.[12] This is of course a major shift as it is now legally required to solve all international disputes peacefully.

All in all, it is fair to say that international law is still based on the equality of states, yet, vertical structures are developing. Especially regarding the United Nations there are such structures that in fact influence the peaceful settlement of disputes.

The International Judicial System

In most countries of the world, there is a system of courts with rather automatic jurisdictions over whatever disputes may arise. This has not always been the case but is rather a development resulting in the automatic jurisdiction of courts in all circumstances. Within certain countries, branches of courts have developed that specialise on certain legal areas. The German Constitution specifies for example 5 judicial branches in Article 95 Section one: the ordinary courts – having jurisdiction civil as well as criminal matters – administrative courts, financial courts – dealing mainly with tax cases –, social courts –dealing with social security – and labour courts. In the domestic setting, the availability of judicial review of any kind of action is either taken for granted or at least generally required. This is

[11] For more research on whether structures of public authority have evolved in international law see Armin von Bogdandy and others, *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2009).

[12] Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 AJIL 175.

best exemplified by the fact that the term 'alternative dispute resolution' ought to be understood as alternative to judicial dispute resolution.[13]

The international judicial system looks different. It has evolved substantially, too. Yet, it has not resulted in a judicial system in which one could presume that any dispute can potentially be solved by courts. In the classical era of international law in the Westphalian system there were no judicial institutions.[14] This changed, when the United Kingdom and the United States solved a dispute concerning an incident with the help of an arbitral tribunal based on the Jay Treaty of 1794.[15] From then on, arbitration was increasingly used and the 1899/1907 Conventions for the pacific settlement of disputes (Hague Conventions on Dispute Settlement)[16] established the Permanent Court of Arbitration which is not an arbitral tribunal *strictu sensu*, but an institution facilitating the establishment of an arbitral tribunal significantly. Looking at the means of dispute settlement, it can be seen that there was a constant trend towards a judicial solution: originally, states were conceived to be free to go to war or to try any dispute resolution mechanism of their choice. The Hague Conventions on Dispute Settlement were the result of a conference with a wide representation of states. While states could agree to further arbitration, the main means of dispute settlement that was touched upon in the treaties were mediation and good offices. The Act of the Pacific Settlement of Disputes of 1928 went one step further in envisaging a system mainly focussing on conciliation. In parallel to this development, the Covenant of the League of Nations also established the first court in international law with general jurisdiction, the Permanent Court of International Justice. Yet it had no automatic jurisdiction, states had to opt in and could still make reservations to their acceptance of the general jurisdiction. The same is true for its successor in the System of the United Nations, the International Court of Justice

[13] See only Simon Roberts, 'Mediation' in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press 2008).

[14] Jackson H Ralston, *International Arbitration: From Athens to Locarno* (Stanford University Press 1929) 174–189.

[15] For a detailed treatment see Thomas W Balch, *The Alabama Arbitration* (Allen, Lane & Scott 1900).

[16] The Hague Convention for the Pacific Settlement of International Disputes signed on 29 July 1899 and The Hague Convention for the Pacific Settlement of International Disputes signed on 18 October 1907. Both conventions are attainable on <www.pca-cpa.org> (accessed 10 November 2014) and reprinted in James Brown Scott (ed), *The Hague Conventions and Declarations of 1899 and 1907* (Oxford University Press 1915).

in the Hague. While it is possible for states to accept the jurisdiction of the court in a general manner, only 70 states have done so many of which have also included reservations limiting the jurisdiction of the court. Yet, after the end of the Second World War, other courts were established, most prominently in the regional human rights systems such as the American Convention on Human Rights and the European Convention on Human Rights. The latter Convention had an optional automatic jurisdiction which was made mandatory for all members of the Convention with the 11th additional protocol amending the Convention which entered into force on 1 November 1998. This came at a time when the number of international courts and tribunals has risen substantially: with the end of the cold war, there was an increasing amount of courts and tribunals in international law. Today, there are more than 125 judicial mechanisms, 25 of which could be considered as courts.[17] Some of them have jurisdiction over a specific treaty such as the European Court of Human Rights, other courts are specialised on specific areas of the law such as the International Tribunal for the Law of the Sea. This 'proliferation' of courts and tribunals has been recognised as significant development of international law having positive but also problematic effects.[18] Yet, it leads as a process also to a structural changes in the way in which international law operates.[19]

In sum, there is an increasing number of courts and tribunals in international law that are available for judicial settlement of disputes. Unlike in the domestic legal system, there is no clear hierarchy between those courts and the international legal system is also far from having an all-encompassing as well as automatic jurisdiction.

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[17] For an overview over existing mechanisms see <www.pict-pcti.org> (accessed on 10 November 2014).

[18] Roger P Alford, 'The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance' (2000) 94 ASIL PROC 160; Thomas Buergenthal, 'Proliferation of International Courts and Tribunals: Is it Good or Bad?' (2001) 14 LJIL 267; August Reinisch, 'The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections From the Perspective of Investment Arbitration' in Isabelle Buffard and Gerhard Hafner (eds), *International law between universalism and fragmentation: Festschrift in honour of Gerhard Hafner* (Martinus Nijhoff Publishers 2008).

[19] For a general discussion see Benedict Kingsbury, 'International Courts: uneven judicialisation in global order' in James Crawford and Martti Koskenniemi (eds), *International Law* (Cambridge University Press 2012).

Growth and Expansion of the International Legal System

Together with the growth of international institutions came the growth of substantive norms of international law. Thomas Friedman has captured this development with his often quoted phrase of the development from law of co-existence to the law of cooperation.[20] While international law previously laid out only the rules necessary for the coexistence of states such as rules on diplomatic intercourse, state immunity and the like, international law later had also the function to allow cooperation between states. Several authors have observed that international law has even moved beyond cooperation and have made suggestions how to update Friedmann's famous formula. What is important is that international law now regulates many subjects that were either in the domestic domain or have not even existed before in many jurisdictions. Especially in the field of human rights, international law became a motor for the development of rights in many jurisdictions. World trade law on the other hand is something that is genuinely international and cannot be achieved on the national level alone as it regulates international trade barriers. Furthermore, international health law, international environmental law and international investment law are expanding areas of international regulation.[21]

Within these areas of international law, there are sometimes specific rules that differ from the general rules in international law. This is evident when it comes to dispute settlement. While some treaties such as the WTO-treaties establish an exclusive system of dispute resolution, others like the United Nations Convention on the Law of the Sea establish non-obligatory ways of dispute resolution while other international legal norms have no specific rules for dispute settlement. This development is again important as one has to be careful to look at the general rules but also at rather specific rules applicable in certain areas.

[20] Wolfgang Friedmann, 'The Changing Dimensions of International Law' (1962) 62 ColLRev 1147; Friedmann, *The Changing Structure of International Law* (n 3).

[21] An important recent discussion concerned the question whether the new areas of international law became independent to such a degree that they ought to be considered as 'subsystems' or entities of their own. This was then called fragmentation of international law. See for example Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 EJIL 483.

e.ISBN - 978-85-98144-48-1

3 LEGAL FRAMEWORK

General International Law

Legal Norms

As previously mentioned, states agreed on the Hague Convention of 1899 and 1907. Those rules are still in force, but the system of dispute settlement they envisaged has changed subsequently. The relevance of the rules for meditation today is that they represent the agreement of states on some basic features of mediation which are still relevant today. This is particularly true for Art. 3 which stipulates that states can and 'should' offer their services as mediators even if they were not asked by the parties. As Art. 3 (2) & (3) specify, states have a right to initiate a mediation and an offer of mediation can never be regarded as an unfriendly act. This is a remarkable feature of international law which might be due to the limited number of actors. In any case, it is still the custom today that mediators may take an initiative themselves which does not have to be accepted but in turn will not be seen as an intervention or an unfriendly act.

As previously noted, the Charter of the United Nations is based upon the prohibition of force as provided for in Art. 2 (4), which is a prohibition upon all states. As a corollary, Art. 2 (3) UN Charter obliges all states to solve all disputes peacefully. It reads as follows: 'All Members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.' While Art. 2 (4) UN Charter functions as a prohibition outlawing a certain form of conduct, Art. 2 (3) UN Charter provides for the flip side of the coin, namely a positive obligation to actively resolve international disputes. It is even claimed that Art. 2 (3) UN Charter has attained the status of a *ius cogens* norm that is not derogable.[22]

The second part of the sentence of Art. 2 (3) UN Charter is most significant and deserves special mention: states are not only obliged to settle their disputes but to settle them in a sustainable manner in order not to endanger peace and security and justice. The inclusion of justice was advocated by smaller states at the Dumbarton Oaks conference as

[22] See Alfred Verdross and Bruno Simma, *Universelles Völkerrecht: Theorie und Praxis* (Duncker & Humblot 1984) paras 94ff. For further opinions see Meinhard Schröder, 'Verantwortlichkeit, Völkerstrafrecht, Streitbeilegung und Sanktion' in Wolfgang Graf Vitzthum (ed), *Völkerrecht* (5th edn. de Gruyter 2010) 614 n 244.

they feared that powerful states might use their power to arrive at unjust solutions.[23]

This general obligation, which has the status of a principle of the United Nations organisation, is developed in greater detail in Chapter VI on the Pacific Settlement of Disputes. The first provision in this chapter, Art. 33 UN Charter, which reads as follows:

'1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.'

This provision contains several important insights concerning mediation in international law. The first is that there is neither a hierarchical or logical structure nor an exhaustive number of means of settling disputes. The list contained in Art. 33 UN Charter follows a certain logics. It starts off with negotiations between the disputing parties and then enumerates several means of third party involvement with an ascending competence of the third party.

Definition of Mediation

General Features

Art. 33 UN Charter that has just been discussed serves well as a guide for the definition of mediation in international law as the other forms of dispute resolution can serve as guides on how to distinguish mediation from other forms of dispute resolution.[24] Other than negotiations, a mediation

[23] See Draft Amendment by Bolivia, UNCIO III, 580, 582 and the acceptance, UNCIO VI, 446, 458, 333. See Christian Tomuschat, 'Art. 2 (3)' in Bruno Simma and others (eds), *The Charter of the United Nations - Commentary* (3rd edn. Oxford Univ. Press 2012) 198 (n 72, 73). Tomuschat rightly points out that the requirement of justice cannot be understood as qualifying decisions of international courts and tribunals. From this as well as from the negotiating history follows, however, that the requirement of justice applies where parties reach a settlement through negotiation.

[24] Art. 6 of the Hague Convention on Dispute Settlement of 1907 stipulates that mediation has 'exclusively the character of advice, and never have binding force'.

also entails third parties that are not themselves parties to the dispute. Those actors have not the authority to adjudicate the dispute independently such as courts or arbitral tribunals. The closest form comparable to mediation is conciliation, which results in a suggestion of the mediator on how to resolve a certain issue whereas a mediator would not make such a final suggestion. All in all, mediation in international law has the following specific features: it happens in the context of negotiations of the disputants and it involves a third party which takes part in the negotiations without issuing a binding judgment or even making a final suggestion.

Internal Categorisation

Especially in international relations literature, there have been attempts to define different kinds of mediation.[25] Cases in which the mediator actively tries to influence the disputants[26] have been labelled as 'power mediation'. In these circumstances the mediator actively offers rewards or issues threats in order to facilitate agreement between parties.[27] On the other side of the spectrum is the so called 'consultation' or 'problem solving'. This is defined as involving…

'… the intervention of a skilled and knowledgeable third party (usually a team) who attempts to facilitate creative problem solving through communication and analysis using social-scientific understanding of conflict etiology and processes. An attempt is made to confront the opposing perceptions and attitudes and to reveal the underlying affective and relationship issues.'[28]

As opposed to 'power mediation', the process of consultation is conceived as more neutral and objective. Here, the mediator is rather acting as a counsellor, developing ideas and making suggestions without trying to influence the parties. The distinguishing feature is, therefore, the way in which the mediator influences the process. At the extremes are power in the form of legal threats and incentives, on the other end

[25] For a case study concerning the function of mediation see Cindy Daase, 'The Law of the Peacemaker: The Role of Mediators in Peace Negotiations and Lawmaking' (2012) 1 Cambridge Journal of International and Comparative Law 107.

[26] Loraleigh Keashly and Ronald J Fisher, 'A Contingency Perspective on Conflict Interventions: Theoretical and Practical Considerations' in Jacob Bercovitch (ed), *Resolving international conflicts: The theory and practice of mediation* (Lynne Rienner Publishers 1996) 241.

[27] ibid.

[28]

general ideas and suggestions such as helping the parties to draft a peace treaty or the like.

Another way to categorise mediation is to look at the actual effect the mediator seeks. Bercovitch distinguishes between three categories:[29] 'communication-facilitation strategies', through which the mediator enables the communication between the parties. In the international legal context, such a mediation that is limited to technical services is also called good offices.[30] Secondly, there are 'procedural strategies' in which 'a mediator may determine structural aspects of the meetings, control constituency influences, media publicity, the distribution of information, and the situation powers of the parties' resources and communication processes'.[31] Thirdly, 'directive strategies' in which the mediator 'affects the content and substance of the bargaining'.[32]

Actors: Cultures of Communication

Today, there is a variety of actors in the international arena.[33] This means that there are different actors responsible to be mediators but also different actors which are parties to disputes. Mediation is a process of negotiations between parties with the help of third parties. This means that communication is at the centre of the processes of mediation and negotiation. So when introducing the actors, something will also be said as to their communicative culture.

States

The main actors in international law are states. They are the only actors genuinely competent to create international law, the obligation to settle disputes peacefully is mainly addressed to states as they are generally conceived as capable of going to war. States are the international actors capable of using force. States are often parties to disputes in which mediation is necessary but states also often act as mediators. As mediators, they can

[29] Jacob Bercovitch, 'Mediation and Conflict Resolution' in Jacob Bercovitch, Victor Kremenyuk and William Zartman I (eds), *The Sage Handbook of conflict resolution* (SAGE 2007) 347.

[30]

[31] ibid.

[32] ibid.

[33] See the summary at …

e.ISBN - 978-85-98144-48-1

play different roles: Norway and Switzerland are often regarded as neutral mediators, while the United States often play a proactive role in processes of mediation. States can give incentives such for example of a financial nature but also threat with sanctions.

As regarding their communicative culture, it is often the representatives of states that lead processes of mediations as mediators due to their power but also their integrity and trust among the other parties. They are assisted by diplomats, who have as a profession the most experience and skill when it comes to the craft of mediation. The phrase to be diplomatic has attained a proverbial status when one wishes to express that somebody is skilled in negotiating or mediating disputes.

International Organisations

International organisations play a significant role when it comes to mediation. As regarding threats to the peace, it is mainly the United Nations as well as the respective regional organisation fulfilling that task. Specialised organisations can act as mediators in their domain.[34] The ways in which international organisations are involved in processes of mediation are manifold and can be best explained using the example of the United Nations.

Some of the main organs can engage in the role as mediator or at least provide the forum for mediation. This competence lies mostly with the Security Council. According to Art. 34, the Council is competent to investigate any dispute, according to Art. 35, Members of the United Nations may also bring disputes to the attention of the Council. Art. 36 gives the Council the competence to make a recommendation on how to solve the dispute. This could be regarded as a form of meta-mediation as the Security Council recommends to parties that cannot agree on how to solve their dispute a certain means of dispute settlement. Subjects to the general precedence taken by the Security Council according to Arts. 11 and 12, the General Assembly of the United Nations can act similarly according to Art. 35 (3) UN Charter. The Security Council and even more so the General Assembly are collective organs composed of different states which

[34] So for example, in the UN context mention is made of the World Food programme, the High Commissioner for Refugees, the UN Fund for Children see Cornelius J Peck, 'United Nations Mediation Experience: Practical Lessons for Conflict Resolution' in Jacob Bercovitch, Victor Kremenyuk and William Zartman I (eds), *The Sage Handbook of conflict resolution* (SAGE 2007) 414.

makes it hard for them to act effectively as mediators. This might have triggered the fact that the Secretary General has been the main organ of the United Nations that has been mostly engaged in mediating disputes.[35] The Secretary General either acts in person or appoints representatives or special envoys. In the department of Political Affairs a Mediation Support Unit has been established in 2006. This development was explicitly welcomed in a presidential statement in the Security Council in which it was also encouraged 'further use of this mechanism in the settlement of disputes'.[36]

The United Nations has also taken great efforts to strengthen the peaceful settlement of dispute through different means. The means of dispute settlement including mediation and the general obligation enshrined in Art. 2 (3) have been repeated in many important instruments such as the Friendly Relations Declaration, even though neither of the instruments has significantly added to the content already enshrined in the Charter.[37] Yet, there are also studies like further understanding of mediation such as the handbook on the peaceful settlement of disputes between states.[38]

A significant initiative is the informal 'Group of Friends of Mediation', which was founded on 24 September 2010 and consists of 40 Member States of the United Nations[39] as well as 7 regional organisations[40] and other international organisations.[41] This group was initiated by Finland and Turkey in order to promote and strengthen mediation on different levels. This group also managed to put the topic of mediation on the agenda of the General Assembly. In the 65th session the group proposed a resolution that was agreed on by the general assembly that recommended several measures to strengthen mediation.[42] A 'United Nations Guidance for Effective

[35] Daase (n 25) 122ff.

[36] Statement by the President of the Security Council, 23 September 2008, S/PRST/2008/36

[37] Tomuschat (n 23) 81 para 9.

[38] Office of Legal Affairs - Codification Division, *Handbook on the peaceful settlement of disputes between states* (United Nations 1992).

[39] Algeria, Bangladesh, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Colombia, Costa Rica, Denmark, Germany, Indonesia, Iraq, Ireland, Italy, Japan, Kenya, Liechtenstein, Lithuania, Malaysia, Mexico, Montenegro, Morocco, Nepal, Netherlands, Norway, Panama, Philippines, Qatar, Romania, Slovenia, South Africa, Spain, Sweden, Switzerland, Tanzania (United Republic of), Uganda, United States of America.

[40] African Union, League of Arab States, Association of Southeast Asian Nations, European Union, Organization of American States, Organisation of Islamic Cooperation, Organization for Security and Co-operation in Europe

[41] <www.peacemaker.un.org/friendsofmediation> (accessed 13 October 2014).

[42] General Assembly, Resolution, 28 July 2011, A/Res/65/283.

Mediation'[43] was annexed to a resolution in the next session in which it was also decided to consider mediation biannually.[44] It remains to be seen how this new wave of reflection of mediation impacts upon the practice but it is interesting to observe the increasing focus on mediation with the United Nations.

NGOs

Non-governmental organisations are of increasing importance on the international plane. When it comes to mediation, the most prominent of which is the International Committee of the Red Cross which is not an International Organisation but an association under Swiss law. The ICRC is bound by strict impartiality and objectivity and has taken this as a reason to abstain from any kind of political mediation.[45] One instance in which the ICRC is competent to offer its services as mediator is the appointment of protecting powers according to Art. 5 (3) of the first additional protocol.[46] Yet, there are many more situations in which the ICRC mediates. The ICRC often directly engages in mediations concerning the humanitarian situation in armed conflict, but it also has to reach an agreement on questions whether the ICRC should be involved and what its terms of reference ought to be.[47]

Individuals

It must also be mentioned that individuals can play a significant role in the process of mediation. They can of course be mandated by the parties, but also by the United Nations.[48] This requires, of course, that those individuals do not represent any legal entity apart from themselves.[49] One

[43] Annex to General Assembly, Resolution, 25 June 2012, A/66/811.
[44] General Assembly, Resolution, 25 June 2012, A/66/811.
[45] Victor H Umbricht, *Multilateral Mediation: Practical Experiences and Lessons* (Martinus Nijhoff 1989) 235–238.
[46] Michael Bothe, Karl J Partsch and Waldemar A Solf (eds), *New rules for victims in conflicts: commentary on the two 1977 protocols additional to the Geneva Conventions of 1949* (2nd edn, Brill 2013) 75.
[47] David P Forsythe, 'Humanitarian Mediation by the International Committee of the Red Cross' in Saadia Touval and William Zartman I (eds), *International Mediation in Theory and Practice* (Westview Press 1985) 237.
[48] For the latter see Report of the Secretary-General, 'An Agenda for Peace Preventive diplomacy, peacemaking and peace-keeping' A/47/277 - S/24111 17 June 1992 para 37
[49] Jacob Bercovitch, 'Introduction: Putting Mediation in Context' in Jacob Bercovitch (ed), *Studies in International Mediation: Essays in Honour of Jeffrey Z. Rubin* (Palgrave Macmillan 2002) 10.

well known class of mediators are elder stateswomen and statesmen who act as mediators even though they are no longer in office. The former president of the United States Jimmy Carter has acted as mediator several times and has even set up the Carter Center specialising also in mediation.[50]

3 THE SPECIFICS OF MEDIATION IN INTERNATIONAL LAW

After a general description of the normative framework regulating mediation in international law, it is now time to explain in what sense mediation in international law might be different from other fields of the law. This paper identifies three specifics of mediation in international law: these concern the aim of mediation, the ideal of a neutral mediator and the relationship between mediation and other forms of dispute settlement. Each of those topics is firstly discussed in a rather abstract fashion but then illuminated with an example of international mediation in practice.

The Aim of Mediation

Not endangering peace and security and justice

In domestic law, mediation is used as an alternative means of dispute resolution to reach settlements that satisfy the parties and sometimes go beyond what the law prescribes. The aim of processes like mediation is to find an apt solution that works for the parties and solves their dispute. In international law, in the Hague Conventions of 1899 and 1907 it was stipulated that 'the part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance'. While it is not surprising that a mediator should reconcile opposing claims, it is from our perspective today rather astonishing that mediators should appease the feelings between states. Such an obligation is understandable when most disputes arise between heads of states that are in power for a lifetime and that have close relationships, yet, modern definitions lay much less stress on making this psychological element explicit.

To discover the aim of mediation, we would today look at the principle of the peaceful settlement of disputes which is enshrined in Art. 2 (3) UN-

[50] See <www.cartercenter.org/peace/conflict-resolution> (accessed 10 October 2014).

Charter which is today universally applicable as norm stemming from a treaty as well as from customary law. This norm is a principle, generally obliging all states. It also spells out the aim of mediation in international law. This aim is fourfold: to settle disputes, to do so in a peaceful manner and to do so in a manner preserving peace and security as well as justice. This can also be conceived as the aim of mediation.

The fact that the aim is to actually settle the disputes is most obvious. As was previously mentioned, the obligation to settle the disputes peacefully is the flipside of the prohibition of the use of force in international law.[51] Under the current state of international law and the universal regime of the UN Charter, it is clear that disputes ought to be settled peacefully without forceful means. What is more rarely mentioned is the interesting qualification contained in Art. 2 (3) UN Charter stipulating that the peaceful resolution of the dispute must neither endanger peace and security nor justice.

Looking at peace and security, it seems counterintuitive that the peaceful resolution of a dispute might endanger peace and security. This seeming obscurity is lessened by the observation that international disputes very often have wider implications. Other states might have legitimate economic or security interests that are at stake when a dispute arises. Political, religious and ethnic considerations can also play a role. This is why the peaceful resolution of a dispute of two states can endanger peace and security in relation to other states which are not directly party to the dispute.

As mentioned above, the criterion of justice was suggested by smaller states that feared the bigger bargaining power of bigger states. It has rightly been mentioned that the criterion of justice hardly every plays a role in judicial or arbitral proceedings.[52] This is not true, however, for non-judicial means of dispute resolution. Part of the requirement of justice are the prohibition to abuse rights and the general obligation to act in good faith. While any state is certainly right in pursuing its own interests and to try to have a good bargain, there are limits despite the agreements of states. This is particularly the case if the representatives of one state abandon its interest due to the intervention of another more powerful state. Justice will also be

[51] Tomuschat (n 23) 78 para 2.

[52] Christian Wolff, *Law of Nations Treated According to a Scientific Method: translation of the edition of 1764 [Jus Gentium Methodo Scientifica Pertractatum]* (Joseph H. Drake tr vol 2, Clarendon Press 1934) 523 para 1036.

in issue when the parties to a dispute agree on a point which goes manifestly against the law. There is a certain tension when legal disputes are settled in a process of negotiation and bargaining. To circumvent legal positions completely might undermine the law. While states are generally free to choose the means of dispute resolution they prefer, there is a preference for judicial means when it comes to legal questions. This preference can be found in Art. 36 (3) UN Charter, which obliges the Security Council when making a recommendation how to solve the dispute to 'take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice.'

The Papal Peace Initiative of 1917

While Pope Benedict the XV. remained neutral in the first years of the First World War,[53] he tried to initiate peace talks between the belligerents from 1916 on. He appointed Eugenio Pacelli, who later became Pope Pius the XII., as Nuntius in Munich in Germany and entrusted him with the negotiations of a peace initiative.[54] The pope aimed at initiating negotiations between the belligrents that would end the war. The pope had no mandate by the parties, yet, the general strategy was to reach an agreement with Germany that would give the opposing parties an incentive to enter into negotiations. The negotiations with Germany circled around a 7 point plan which included the guaranteed freedom of the seas, mutual disarmament and a mandatory judicial mechanism for the resolution of disputes.[55] The negotiations with Germany were very complex as they had to involve a variety of actors, but Pope Benedict decided to speed up the process by a statement that was also aimed to prepare the other parties to the future suggestion.[56] The statement opened with the following lines:

[53] Hubert Wolf, 'Der Papst als Mediator?: Die Friedensinitiative Benedikts XV. von 1917 und Nuntius Pacelli' in Gerd Althoff (ed), *Frieden stiften: Vermittlung und Konfliktlösung vom Mittelalter bis heute* (Wissenschaftliche Buchgesellschaft 2011) 171.

[54] For the possible motivation for the peace initiative see Charles J Herber, 'Eugenio Pacelli's Mission to Germany and the Papal Peace Proposal of 1917' (1979) 65 The Catholic Historical Review 20, 20.

[55] See summaries by Wolf (n 48) 177; Herber (n 49) 29.

[56] 'Peace Proposal of Pope Benedict XV: August 1, 1917' in James Brown Scott (ed), *Official Statements of War Aims and Peace Proposals, December 1916 to November 1918* (Carnegie Institution of Washington 1921).

'TO THE RULERS OF THE BELLIGERENT PEOPLES: From the beginning of our Pontificate, in the midst of the horror of the awful war let loose on Europe, we have had of all things three in mind: To maintain perfect impartiality toward all the belligerents, as becomes him who is the common father and loves all his children with equal affection; continually to endeavor to do them all as much good as possible, without exception of person, without distinction of nationality or religion as is dictated to us by the universal law of charity as well as by the supreme spiritual charge with which we have been entrusted by Christ; finally, as also required by our mission of peace, to omit nothing, as far as it lay in our power that could contribute to expedite the end of these calamities by endeavoring to bring the people and their rulers to more moderate resolution, to the serene deliberation of peace, of a "just and lasting" peace.'[57]

The first two main points relate to the impartiality of the pope and the equal treatment of all parties. As to the second point, it is most interesting that the pope went on to qualify the peace he envisaged as 'just and lasting'. We see here a parallel to the formula in Art. 2 (3) UN Charter. Yet, it became apparent that the other belligerents questioned whether the peace plan was really just as it would lead back to the *status quo ante* before the war. This was clearly expressed by the President of the United States, Woodrow Wilson, who issued a statement through the Secretary of State Robert Lansing.[58] From this speech it clearly appeared that there was a different notion of what a just peace would mean. In the end, the German government did not accept the Papal proposal especially regarding the independence of Belgium and the other belligerents either rejected the peace proposal or did not even answer it.[59] The efforts by all parties show that they were generally ready to conclude peace, yet the question whether the terms of peace were just.

[57] ibid.

[58] Robert Lansing, 'Reply of President Wilson to the Peace appeal of the Pope: August 27, 1917' in James Brown Scott (ed), *Official Statements of War Aims and Peace Proposals, December 1916 to November 1918* (Carnegie Institution of Washington 1921).

[59] Wolf (n 48) 185.

Objective and Subjective Mediators

The Ideal Mediator

One important features of mediation in the domestic setting is that the mediator is conceived as a neutral person that is not in any way engaged in the dispute.[60] The mediator then makes suggestions that are conceived objective statements of an idle observer. In the words of the philosopher and classical author Christian Wolff one could also say that 'a mediator pleads the cause of either party'.[61] The present inquiry suggests that things might be different in international law. There is of course the possibility of having rather unaffected observers such as neutral states, international organisations or individuals of a high reputation. Yet, this is not the only way in which mediation works and it should be mentioned that it is also not the way in which mediation in international law ought to work. The neutrality of the mediator is not an aim of the process, it is just a means to reach the aims of mediation, i.e. a peaceful and sustainable settlement of the dispute. It is submitted that those aims can in many situations be better reached with a mediator acting out of his own interest and with a clear position. This becomes most evident in peace talks in which opposing powers are involved which are not directly parties to the dispute. But it had an active interest to broker the peace and to mediate between the parties and succeeded in that aim as the parties to the dispute were also willing to reach an agreement. Another advantage of voluntarily including mediators that are not neutral in the narrow sense of the term is to make agreements more sustainable. In many situations, actors which are not directly involved in the dispute pursue certain interests that might lead them to even actively support one party or the other. They are not directly parties to the dispute, yet, they are involved. If they then act as mediators, they are fully informed and also able to have an influence on the process. Especially in cases in which there is more than one party mediating, this can have the effect of negotiation among the mediators. Their involvement can produce solutions that are more durable and sustainable as the mediators also have a voice in the process. This is again in line with the general aim of not endangering international peace and security and justice. To include parties with an indirect interest as

[60] John W Cooley, *The Mediator's Handbook: Advanced Practice Guide for Civil Litigation* (2nd edn, South Bend 2006) 35–36.

[61] Lansing (n 55).

mediators gives them voice and might help to produce a solution that also fits into the international context. The obvious danger is of course that this complicates the matter further. In any case, it is obvious that the picture of a neutral and objective mediator is not the only viable idea in international law. Which mediator to choose will depend very much on the context.

The Congress of Berlin of 1878

When the Ottoman Empire fought independence movements in the Balkans in the 1870ies a situation arose that could have led to a European war.[62] Russia intervened and went to war against the Ottoman Empire with the result that almost all parts of the Ottoman Empire in Europe gained their independence. The Austrian-Hungarian Empire and England perceived this as threat to their interests on the Balkans and issued a threat of war to Russia.[63] Yet, all parties to the conflict had an interest to negotiate, after attempts to negotiate directly failed they asked the Chancellor of the German Empire Bismarck to host a congress in Berlin.[64] The congress was held from 13 June to 13 July during 20 plenary sessions which lasted from two to three hours.[65] Six states were represented at the congress, namely the Austrian-Hungarian empire, England, France, Germany, Italy and Russia. Each state sent 3 delegates except for the Italian delegation which consisted of two members so that the plenary was generally composed of 20 delegates.[66] When dealing with specific questions, delegates from Greece, Rumania and Persia were also admitted.

This congress is in many respects a typical act of congress diplomacy as it was common in the 19th century. What stands out is that the actors made interesting remarks about the function and the personal qualities of mediators. This started with Chancellor Bismarck's speech to the Reichstag in which he had to explain and answer to Parliament his summoning of the congress in Berlin. In this context he said:

[62] Serge Maiwald, *Der Berliner Kongress 1878 und das Völkerrecht* (Wissenschaftliche Buchgesellschaft 1948) 16–18.

[63] Imanuel Geiss, 'Einleitung' in Imanuel Geiss (ed), *Der Berliner Kongreß 1878: Protokolle und Materialien* (Harald Boldt Verlag 1978) XVI.

[64] Heinz Wolter, *Bismarck's Außenpolitik 1871-1881: Außenpolitische Grundlinien von der Reichsgründung bis zum Dreikaiserbündnis* (Akademie-Verlag 1983) 253–254.

[65] Geiss, 'Einleitung' (n 57) XVII.

[66] Geiss, 'Einleitung' (n 57) XVII.

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'I do not consider the mediation of peace in a way that we act as an arbiter for diverging views and say: this is how it should be, this is what the power of the German Empire guarantees, but I think more modest … more like an honest broker who really tries to make the deal happen.'[67]

The phrase of an honest broker is still often quoted and signifies that a mediator acts in the interest of the parties of a deal without exaggerating his own interest. Yet, the metaphor of a broker also shows that an arbitrator does not act without any interest. Another aspect deriving from this quote is that a mediator is not acting judgmental or assessing the situation in his own authority but rather looking for the greatest possible overlap between the interests of the parties. Bismarck also stated in another context that he would not 'assume the role as judge over Europe'.

The fact that the congress is rather well documented allows some insights into how a mediator can influence the proceedings. Before the congress was summoned, Bismarck contacted the parties in secrecy to get a clearer picture of their interests.[68] While it was common at that time to conduct diplomatic intercourse in French, the English Prime Minister Earl of Beaconsfield (Benjamin Disraeli) was not capable of speaking French while the Russian Foreign minister Gortschakow did not speak English.[69] It was for the other participants at the conference speaking both languages to compensate this lack of understanding. His strategy for the congress was to negotiate swiftly and speedily and to try not to discuss contentious, complex and controversial questions in the plenary but to defer them to commissions and ad-hoc sub-commissions.[70]

There was another instance in which it transpired how Bismarck saw his office as mediator. The foreign minister Gortschakow tried to include a clause into the draft treaty that would include a collective guarantee obliging all parties to the treaty to enforce it if necessary by force.[71] He provided for several arguments against such a collective guarantee as he found that it would not only prevent war but also give rise to further

[67] Translation by the author. Aus der Rede des Fürsten Bismarck über die orientalische Frage, 9 (1878) Volksblatt. Eine Wochenzeitschrift mit Bildern 66-68.

[68] Otto von Bismarck, *Bismarck - the Man & the Statesman: Being the Reflections and Reminiscences of Otto von Bismarck* (A. J. Butler tr, Harper & Brothers Publishers 1899) 238.

[69] ibid XIX.

[70] Geiss, 'Einleitung' (n 57) XX.

[71] Imanuel Geiss (ed), *Der Berliner Kongreß 1878: Protokolle und Materialien* (Harald Boldt Verlag 1978) 148.

disputes.[72] What is significant, however, is that he explicitly stepped outside of his role as mediator and assumed the role of a representative of Germany. The proceedings record 'The count of Bismarck does not wish to comment on this as the president of the whole congress, he can only speak as representative of Germany'.[73] A collective guarantee would have meant a direct obligation for all parties to enforce the treaty, this would have made Germany a direct party to the dispute. As a consequence, Bismarck had to step out of the role as a mediator and communicate as an affected party which he did. All in all, this reinforces the general idea we can take away from this section, namely that there is a fine line between mediation and direct involvement. Mediators will often act out of a broader interest in the dispute. In the face of such interests, it is very hard to hold on to the ideal of the absolutely neutral and objective mediator. It would be a better approach to recognise the existing interests of potential mediators and see whether they could fit into the process of negotiations.

Integrative Dispute Resolution

Beyond Alternative Dispute Resolution

Mediation is widely regarded as a means of alternative dispute resolution. This is particularly true for the domestic setting. In most domestic jurisdictions there was an almost complete process of what international relations theorists have framed judicialisation.[74] In this process, the exercise of power has almost completely become subject to judicial review the result of which was termed as rule of law. This basically means that judges as neutral and objective arbitrators – in the non-technical sense of the word – have the last say in every dispute and can decide due to preconceived general and abstract rules which lead their way. In this setting, in which parties went to court when their bilateral talks failed, alternative means of dispute resolution were 'reinvented'. The term alternative signifies an alternative to judicial proceedings. The proponents of alternative dispute resolution rely on the great advantages such a form of dispute resolution can have in

[72] ibid 149.

[73] 'Le Prince de Bismarck dit qu'il n'a pas mandat d'exprimer, á cet ègard, comme Président, le seafiment du Congrès: il ne peut donner son opinion comme représentant d'Allemagne.' ibid 130.

[74] Kingsbury (n 19).

specific circumstances.[75] On the contrary, it is also clear that such an alternative to the ordinary judicial proceedings can have the effect to undermine them and can ultimately result in a circumvention of the rule of law.[76]

As the general sketch about the development of international law has shown, the notion of mediation as alternative means of dispute resolution cannot be generalised. Looking at the historical relationship between mediation and judicial and quasi-judicial means of dispute resolution, the story is quite different indeed. Mediation has always been part of the picture. There has been mediation between antique nations very early in history, there has been mediation in the middle ages as well as afterwards. Mediation is a constant throughout history. In contrast, the judicial settlement of disputes is a rather recent phenomenon, even though it gains ground. If one were to isolate the development of international, it would be fair to say that judicial settlements and arbitrations are at present alternative means of dispute settlement while negotiations and mediation are the standard means.

There is also another sense in which the notion of alternative dispute settlement does not really work well in international law. The 're-invention' of mediation as alternative means relies, as previously stated explicitly on its nature that is different from judicial procedures. Especially Art. 33 UN Charter acknowledges that there are different means of dispute settlement, there is no general hierarchy.[77] Based on this interpretation, one could say that all means of dispute resolution are alternatives in relation to each other. Yet, the ultimate goal is to resolve the dispute, to do so peacefully and sustainable by maintaining justice and peace and security. In international law, the means of settling disputes work many ways and it is not about which means to choose but more about their interplay. This is why the means of dispute resolution are best described as integrative dispute resolution. There are judgments of international courts finding that there is a duty to negotiate the dispute in an equitable manner while the courts cannot go any further in determining the issue. This was the result the ICJ reached in the famous Danube Damn case.[78] There are treaty clauses

[75] Cooley (n 57) 12.

[76] Katharina von Schlieffen, 'Mediation im Rechtsstaat - Chancen einer neuen Konfliktordnung' in Fritjof Haft and Katharina von Schlieffen (eds), *Handbuch Mediation* (C. H. Beck 2009).

[77] Yet, there is a general preference for judicial means as expressed by Art. 36 (3) UN Charter, see further at 16.

[78] *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia),* [1997] ICJ Rep (International Court of Justice) 7.

providing for a structured way of using the means of dispute resolution. Take for example Art. 22 of the Convention on Elimination of All Forms of Racial Discrimination which requires negations prior to filing a case before the international court of justice.[79] Yet, the history of settling the dispute between the United States and Iran shows how mediation can lay the ground for the other means of dispute resolution. It were the good offices of Algerian diplomats that established contacts between the parties and abled a mediation. The process of mediation resulted in a treaty that established a claims tribunal dealing with expropriation cases and thereby settling many international disputes. International disputes can be very complex, they are then not easily discharged of through one process. The success of the means of dispute resolution should not be measured in absolute terms looking at the final resolution. All means are successful when they bring the parties closer to the aim as defined above. One means of dispute resolution might result into the next. The condition is that progress is reached without threating peace, security and justice.

The Algerian Mediation in the dispute between the United States and Iran

The review of the US Iran hostage crisis reveals many of the complexities an international dispute can have. On 4 November 1979 in the course of the Iranian revolution, the US embassy in Tehran was overrun by Iranians which were not hindered by Iranian security forces.[80] The personnel in the embassy was taken hostage and this created a manifest dispute between the two states that had many issues to settle in the course of the regime change. Such were frozen assets of Iran in the United States, the belongings of the Shah, and dispossessions of American citizens. The failure of the Iranian authorities to protect the American embassy was a flagrant violation of diplomatic law and made it very difficult for the Americans to communicate with the new regime, these difficulties were even worsened by the fact that it was unclear with whom to negotiate. On the side of Iran, the new regime openly held anti-western believes having a religious dimension which favoured a complete breakdown of any relationship with Western

[79] Adopted on 21 December 1965, entry into force 4 January 1969, 660 UNTS 195ff..

[80] For a general historical account of the occurrences see David Farber, *Taken Hostage: The Iran Hostage Crisis and America's First Encounter with Radical Islam* (Princeton University Press 2006) 137ff; David P Houghton, *US Foreign Policy and the Iran Hostage Crisis* (Cambridge University Press 2001) 76ff.

countries. The hostage taking forced the United States to act, yet it was impossible to act. Several measures such as engaging mediators,[81] a military rescue operation or filing an interim order before the International Court of Justice failed. In this situation, Algerian diplomats managed to establish relationships between the governments of the United States and Iran. They were partly acting as messengers between states until Iran introduced a claim for a deposit for 24 million US $ which was perceived as exaggerated by the representatives of the US and Algeria.[82] After the mediation broke down, the Americans resumed negotiations and the Algerians took now a different stance: This was described by an insider on the Algerian side as 'catalysts' or active element, trying to make rigid positions more flexible.[83] When transmitting messages they also tried to explain them to the other parties, before transmitting a message they also 'gave "warnings", really in the form of advice, telling the Iranians, for example, that such and such would not be acceptable to the Americans'.[84] In the preparation of an agreement that would finally settle the dispute, they advised the Americans as to how they could avoid language in the treaty that would upset the other party while leaving the content intact. When Iran refused to be involved directly in signing a treaty, the representatives of Algeria issued a declaration to which the parties to the dispute acceded. The resulting treaty, the Algiers Accords, also established a tribunal dealing with expropriation cases, which is still in operation today. The successful mediation process which could only be sketched here showed how mediation can work on the international plane. It was an alternative dispute resolution, especially after Iran completely ignored the proceedings but also the judgment of the international court of justice. Yet, it was also an integrative form of dispute resolution, bringing a conflict back into the realm of law by settling the hostage situation and establishing another form, namely the claims tribunal to deal with remaining issues. It also shows that mediation is a process, as is the settlement of disputes. A success cannot only lie in the final settlement but also in the fact that the process of settling the dispute peacefully is held alive.

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[81] For a list of potential mediators see Gary Sick, 'The Partial Negotiator: Algeria and the U.S. Hostages in Iran' in Saadia Touval and William Zartman I (eds), *International Mediation in Theory and Practice* (Westview Press 1985) 22.

[82] Raymond Cohen, 'Cultural Aspects of International Mediation' in Jacob Bercovitch (ed), *Resolving international conflicts: The theory and practice of mediation* (Lynne Rienner Publishers 1996) 118.

[83] Marvine Howe, 'Wary Algeria edged into pivotal role' *New York Times* (26 January 1981)

[84] ibid.

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4 APPENDIX: 1907 HAGUE CONVENTION ON THE PEACEFUL SETTLEMENT OF DISPUTES

Article 2

In case of serious disagreement or dispute, before an appeal to arms, the Contracting Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers.

Article 3

Independently of this recourse, the Contracting Powers deem it expedient and desirable that one or more Powers, strangers to the dispute, should, on their own initiative and as far as circumstances may allow, offer their good offices or mediation to the States at variance.

Powers strangers to the dispute have the right to offer good offices or mediation even during the course of hostilities.

The exercise of this right can never be regarded by either of the parties in dispute as an unfriendly act.

Article 4

The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance.

Article 5

The functions of the mediator are at an end when once it is declared, either by one of the parties to the dispute or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

Article 6

Good offices and mediation undertaken either at the request of the parties in dispute or on the initiative of Powers strangers to the dispute have exclusively the character of advice, and never have binding force.

Article 7

The acceptance of mediation cannot, unless there be an agreement to the contrary, have the effect of interrupting, delaying, or hindering mobilization or other measures of preparation for war.

If it takes place after the commencement of hostilities, the military operations in progress are not interrupted in the absence of an agreement to the contrary.

Article 8

The Contracting Powers are agreed in recommending the application, when circumstances allow, of special mediation in the following form:

In case of a serious difference endangering peace, the States at variance choose respectively a Power, to which they intrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations.

For the period of this mandate, the term of which, unless otherwise stipulated, cannot exceed thirty days, the States in dispute cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the mediating Powers, which must use their best efforts to settle it.

In case of a definite rupture of pacific relations, these Powers are charged with the joint task of taking advantage of any opportunity to restore peace.

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[85] Cooley (n 57) 13.

e.ISBN - 978-85-98144-48-1

MEDIOS AMISTOSOS/ALTERNATIVOS DE RESOLUCIÓN DE LITIGIOS[1]

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INTRODUCIÓN

1. - La solución amistosa de litigios no es nueva, ya que es anterior a la idea misma del proceso judicial. Históricamente, las disputas se resolvían mediante la conciliación[2]. Esta debería también ser el primer reflejo[3] frente a la aparición de una controversia y el juez ser el último recurso cuando falla la negociación puesto que "*la intervención de un juez para decidir litigios (...) se percibe cada vez menos como un modo ideal y ordinario de justicia*"[4].

2. - Los métodos de resolución amistosa de conflictos son especialmente atractivos en la actualidad, en pleno período de crisis

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[1] Traduction de Mme Maria José Azar Baud, Maitre de conférences à l'Université Paris XI Jean Monnet

[2] L . Cadiet, J. Normand et S. Amrani Mekki, *Théorie générale du procès*, 2ème PUF, coll. Thémis, 2013, n° 113 sq.; S. Amrani Mekki et Y. Strickler, Procédure civile, PUF coll. Thémis, 2014, spéc. n° 137 et s., pp. 237 et s. C. Gauvard *et alii, Le règlement des conflits au Moyen-Âge,* Publications de la Sorbonne, 2001, spéc. D. Barthélémy, La vengeance, le jugement et le compromis, pp. 11 *sq* V. déjà, E.-N. Pigeau, Paris, *La procédure civile des tribunaux de France démontrée par principes et mise en action par des formules,* 1807, Livre premier - *Des moyens de prévenir les procès,* pp. 1-46.

[3] G. Cornu et J. Foyer, Procédure civile, PUF col. Thémis, 2ème éd. 1996, spéc. n° 9 p. 54 : « Isocrate « si l'on m'avait fait quelque injure à moi même je ne me vengeais pas de l'offense par les voies de la justice, mais je remettais la décision de notre différend à ses propres amis » Cf, les préceptes évangéliques dans Matthieu 5-23, 38, et le manuel de discipline de Maître de Justice (Manuscrits de la mer morte). Dans cette vue, le mode normal de solution des litiges est la conciliation, la réconciliation, la paix de l'âme ».

[4] Y. Desdevises, *V° Conciliation et médiation, in Dictionnaire de la justice* L. Cadiet (dir.), PUF, 2004.

e.ISBN - 978-85-98144-48-1

económica. En efecto, éstos permiten evitar el recurso a los tribunales y economizar así el presupuesto del poder judicial. Participan entonces de la desjudicialización, incitada tanto a nivel nacional como europeo.

Además, los métodos de resolución amistosa de conflictos ofrecen una solución pragmática y consensual que permite salir de la rigidez de la Ley, a veces considerada inapropiada en este momento. Su carácter consensual permite también garantizar una mejor ejecución de la decisión y evitar los recursos judiciales. En algunos países, como Vietnam y Bielorrusia, los MARL constituyen igualmente una alternativa para evitar al juez, en países autoritarios, de quien puede sospecharse un riesgo de parcialidad y dependencia. Para preservar el comercio y dar seguridad a las partes contratantes, el recurso a la mediación es entonces frecuente.

Los MARL son incluso preferidos al arbitraje, considerado como demasiado restrictivo y regulado, por la flexibilidad que aquéllos ofrecen. Ello es consistente con lo que Bruno Oppetit denomina la "ley de sustitución"[5], es decir, un nuevo modelo de resolución de conflictos que compensa las deficiencias de la ley.

3. – Ahora bien, a pesar de todas sus ventajas, los MARL no pueden prosperar sin cierto control. Descartando la protección judicial, debe asegurarse que la renuncia al derecho a la justicia no haya sido concedida bajo presión y que el proceso de negociación haya cumplido con ciertos principios directores. Su desarrollo en Francia se produce, a veces, en múltiples direcciones, sin consistencia. Sólo recientemente, estos modos de resolución amistosa de conflictos nacen con el Decreto nº 2012-66 del 20 de enero de 2012, que les ha dedicado un libro nuevo, el quinto del Código de Procedimiento Civil[6].

4. - Para intentar presentarlos de la manera más provechosa, hay que distinguir dos tipos de resolución amistosa de litigios. En primer lugar, la resolución amistosa de conflictos extrajudicial, que se despliega *a priori* fuera del ámbito judicial y dentro del contexto de la libertad contractual (I).

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[5] B. Oppetit, *Les modes alternatifs de règlement des différends de la vie économique, Justices*, 1995-1, pp. 53 et s.

[6] *JO* 22 janv., p. 1280 ; S. Amrani Mekki, Echos, Gaz. Pal. 25 mai 2012 ; *D.* 2012, 292, obs. Astaix ; *Procédures* 2012, n° 77, obs. Douchy-Oudot. V. C. Laporte, *Le festival des MARC ! Procédures* 2012, Alertes 9.F. Rongeat-Oudin, *Le règlement amiable des différends est en bonne marche ! JCP* 2012, 175. – Sur quelques aspects particuliers, V. not. V. H. Croze et C. Laporte, *Mais où est donc passé l'article 1441-4 du Code de procédure civile ? Gaz. Pal.* 1er-3 avr. 2012, 16. – H. Croze, *Procédure participative et acte d'avocat : Procédures* 2012, Repère 4.

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En segundo lugar, la resolución amistosa de conflictos judicial, por ende enmarcada dentro del proceso judicial (II).

I - LA RESOLUCIÓN AMISTOSA EXTRAJUDICIAL

5. – Con el fin de no complicar esta presentación, no voy a entrar en las dificultades terminológicas de la distinción entre la conciliación y la mediación, y voy a repetir la definición amplia adoptada por el CPC, en el artículo 1530 que establece que se trata de "*cualquier proceso estructurado, mediante el cual dos o más partes intentan llegar a un acuerdo sin ningún procedimiento judicial para la resolución amistosa de su controversia, con la ayuda de un tercero elegido por ellos, quien ejercerá sus funciones con imparcialidad, competencia y diligencia*"[7].
Dos características pueden identificarse útilmente, y están relacionadas con el éxito de la resolución alternativa de los litigios. Por un lado, al ser extrajudiciales y dejadas en gran parte libradas al arbitrio contractual, se han desarrollado una multiplicidad de ofertas de resolución extrajudicial en la práctica y en los textos legales. Solo me limitaré a explicar algunas modalidades (A). Por otra parte, el legislador y los tribunales han hecho todo lo posible para mejorar su eficacia, imponiéndolas como condición previa y otorgando a los acuerdos el carácter de "equivalentes jurisdiccionales" (B).

A – Modalidades

6. - Los modos alternativos de resolución de conflictos se han desarrollado en la práctica contractual y no es de extrañar, pues, que, conforme a la imaginación de los profesionales, hayan adoptado diversas formas. El legislador, sin embargo, intervino pronto para fomentar su desarrollo, al mismo tiempo que para enmarcarlas. A continuación vamos a desarrollar la manera más característica, la clásica cláusula de

[7] La Directiva européa del 21 de mayo 2008 define la mediacion como : « *un processus structuré, quelle que soit la manière dont il est nommé ou visé, dans lequel deux ou plusieurs parties à un litige tentent par elles-mêmes, volontairement de parvenir à un accord sur la résolution de leur litige à l'aide d'un médiateur* » (art 7). Esta definicion larga corresponde tan a la mediacion que a la conciliacion. Mas, la directiva précisa que no importa la denominacion. Pero se excluye la conciliacion inter partes asi como lo que impone las clausulas de « arrangement amiable.

pre-mediación o mediación previa (1) y el más moderno, aunque crítico, convenio de procedimiento participativo (2).

1) LA CLAUSULA DE MEDIACIÓN PREVIA OBLIGATORIA

7. - La mediación convencional permite de resolver un litigio de manera amistosa, antes de ejercer una acción judicial. Encontró un tal éxito en Francia que atrajo la intervención del legislador para enmarcarla. A través de tales cláusulas de mediación, las partes de un contrato se comprometen, en caso de producirse un litigio, a intentar resolverlo de manera amistosa, antes de ejercer cualquier acción ante el juez. Dichas cláusulas, convertidas en verdaderas cláusulas de estilo, se combinan a menudo con las cláusulas de arbitraje. Si la mediación fracasa, las partes se comprometen a acudir a un árbitro. Podemos preguntarnos acerca de su validez (a) antes de considerar su régimen jurídico (b).

a) Validez

8. - La validez de las cláusulas de mediación no era obvia, debido a su naturaleza híbrida: aun siendo contractuales tienen un objeto procesal. Se trata de cláusulas que versan sobre el litigio, que no se refieren directamente al objeto del contrato, sino a los casos patológicos, por lo cual algunos autores dicen que es, como el arbitraje, un contrato separable. Se trata de una especie de contrato dentro del contrato. Su propósito es singular porque tales cláusulas versan sobre el derecho a demandar, derecho que en realidad aun no ha nacido. Ahora bien, es imposible renunciar anticipadamente al derecho a demandar, que es un derecho fundamental, un derecho humano[8].

[8] V. égal. pour sa valeur de principe général du droit communautaire, CJCE, 15 mai 1986, *Johnson*, 222/84, p. 1663 ; pour sa valeur constitutionnelle, v. Cons. Const. 9 avril 1996, *Statut de la Polynésie française*, *AJDA,* 1996, 371, n. Schrameck, *LPA,* 4 septembre 1996, p. 9, n. M. Verpeaux ; Pour sa nature de principe général du droit, CE 7 février 1947, *D'aillières,* Rec. 50 ; CE 17 février 1950, *Dame Lamotte*, Rec. 110 ; pour sa qualification de principe fondamental, AP, 30 juin 2005, *JCP* 1995, II, 22478, concl. Jéol, n. Perdriau, *D.* 1995, 515, conl. Jéol, n. Drago, rapport Ancel, *BICC*, 1août 1995. C'est parfois le caractère d'ordre public d'une action en justice qui est invoquée pour écarter le jeu d'une clause, ainsi de l'article 1792-5 C. civ. en matière de garantie décennale, v. Civ. 3, 9 octobre 2007, Droit imm. 2008, 158, obs. Ph. Malinvaud.

Sin duda, es posible enmendarlo[9], en la medida en que dicha enmienda no socave la efectividad del derecho a demandar. Las cláusulas de mediación no implican una renuncia a demandar, sino la enmienda al mismo, al obligar a las partes a pasar por un intento forzado de conciliación. Dicho de otro modo, se trata de una renuncia temporal al derecho de accionar. Una sentencia de la Sala conjunta de la Corte de Casación del 14 de febrero de 2003 reconoció su validez, lo que se ha confirmado en varias ocasiones desde entonces[10].

9. - Sin embargo, las cláusulas de mediación no deben, en sus términos, impedir el acceso efectivo a la justicia. En este sentido, una sentencia de la Corte de Justicia de la Unión Europea del 18 de marzo 2010 establece las condiciones bajo las cuales una conciliación previa es válida[11]. En particular, la cláusula no debe conducir a "*una decisión vinculante para las partes*", ya que sería contrario a la idea misma de la mediación, "*no debe causar un retraso considerable a la presentación de un recurso judicial (y) debe suspender la prescripción de las acciones sobre los derechos en cuestión*"[12] para preservar el derecho de accionar. Por ello, por ejemplo, y para preservar el derecho de juzgar, el intento de mediación debe tener un efecto sobre el curso de la prescripción. El artículo 2238 del Código civil francés dispone que la conciliación suspende el plazo de prescripción[13].

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[9] Ainsi les clauses de non recours sont-elles valables du fait qu'elles n'amènent pas à une renonciation à l'action mais à une limitation de celle-ci en réservant l'action à l'encontre par exemple du seul fabricant et non du crédit bailleur en cas de vice caché. Com. 30 octobre 1973, BC IV, n° 303. N. Cayrol, Les actes ayant pour objet d'action en justice, Economica, 2001, p. 224 : « le juge est prié de se taire ! »

[10] Cass., ch. mixte, 14 févr. 2003, D. 2003. 1386, note P. Ancel et M. Cottin ; Rev. arb. 2003. 403, 1re esp. et note C. Jarrosson ; CCC 2003, comm. n° 84, obs. L. Leveneur ; JCP 2003. I. 142, n° 13 s. , obs. G. Virassamy ; Defrénois 2003, art. 37810, n° 86, obs. R. Libchaber. V. aussi, dans le même sens, Com. 13 juin 2003, CCC 203, comm. n° 134, obs. L. Leveneur.

[11] CJUE, 18 mars 2010, aff. C-317/08, C-318/08, C-319/08 et C-320/08, JCP 2010, I, n° 5, obs. T Clay, procédures, 2010, com. 179, C. Nourissat.

[12] Article 8 de la directive du 21 mai 2008 : Afin « *que les parties qui choisissent la médiation pour tenter de résoudre ne litige ne soient pas empêchées par la suite d'entamer une procédure judiciaire ou une procédure d'arbitrage concernant ce litige du fait de l'expiration des délais de prescription pendant le processus de médiation* ».

[13] Mais sa rédaction toute entière tournée vers le souci de régler les problèmes de computation n'est pas limpide. En effet, le texte indique « *lorsque, après la survenance du litige* », ce qui semble exclure tout effet suspensif lorsque la conciliation ou la médiation a été convenue avant même sa survenance par une clause contractuelle En ce sens, B. Fauvarque- Cosson et J. François, *op. cit*., spéc. n° 21 : « *Littéralement, elle ne s'applique que si les parties sont d'accord pour recourir à la conciliation ; dans ce cadre, elle nécessite soit un accord écrit postérieur à la survenance du litige soit, à défaut d'écrit, que les parties manifestent leur accord en se présentant à une réunion de*

Con el fin de respetar el acceso efectivo a los tribunales, los tribunales han sostenido que la cláusula no excluye la presentación ante el juez con el fin de solicitar medidas provisionales, conservatorias o de prueba[14].

10. - La validez de la cláusula de mediación depende también, como con cualquier cláusula contractual, del consentimiento libre e informado que se otorga. Es la razón por la cual, en ciertos tipos de contratos, el desequilibrio entre las partes pone en duda la validez de dichas cláusulas; es lo que ocurre, en particular, en el derecho laboral y en el derecho de los consumidores o del consumo.

En el derecho laboral, la validez de la cláusula de mediación podría ser discutida, y la Sala laboral del Tribunal Supremo, en sentencia del 5 de diciembre de 2012, acaba de excluirla, al considerar que "*debido a la existencia de una conciliación previa y obligatoria en sede laboral, una cláusula en el contrato de trabajo que impone una conciliación frente a cualquier disputa que surja con relación a dicho contrato no impedirá a las partes de acudir directamente el juez del tribunal laboral competente para la controversia*"[15]. Sin embargo, dicha motivación no es convincente en la medida en una mediación no debe excluir otra. Aun más, tal argumentación refleja una voluntad política de reservar la mediación institucional a los tribunales laborales. En efecto, el preliminario obligatorio de concilicion es un simbolo, una especificidad del tribunal laboral. Ahora bien, este tribunal es criticable y disputado. Admitir une competencia entre los modos de conciliacion seria une manera de preguntar su existencia. Resulta que sin sanccion, la clausula se convierte en opcional.

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conciliation ou de médiation». V. aussi, D. Mazeaud et R. Wintgen, *op. cit*., spéc. n° 22 : « *Ce refus paraît justifié, tant la notion de négociations est incertaine. Il est en effet extrêmement délicat de déterminer si un échange entre les parties doit être qualifié de négociation et, dans l'affirmative, à quel moment précis cette négociation débute et prend fin. Il semble donc préférable de réserver la suspension à des modes de règlement de conflit plus formalisés, telles la médiation ou la conciliation, comme le fait la loi de 2008, à l'instar des PU (art. 10.7) ».*

[14] Civ. 3, 28 mars 2007, Bull. civ. III, n°43 ; RTD civ. 2007. 807, obs. Ph. Théry; RD imm. 2007.355, 1re esp. Ph. Malinvaud, JCP, 2007, I, 200, obs. T. Clay. Même solution qu'en matière d'arbitrage, Civ. 3e, 20 déc. 1982, Bull. civ. III, n° 360 ; Civ. 2e, 11 oct. 1995, Bull. civ. II, n° 235. Pourtant, le risque est grand pour ces dernières de nuire à la conciliation elle-même. En effet, la durée d'attente d'exécution de la mesure d'instruction peut être disproportionnée à la durée raisonnable de la conciliation. De plus, son résultat pourrait dicter l'issue de la conciliation et ne plus laisser place à une réelle négociation.

[15] Soc. 5 déc. 2012, *Gaz. Pal.* 9 mars 2013, Amrani mekki, *RDT* 2013, 124, E. Serverin, *D.* 2012, p. 2969, *Dr. soc.* 2013. 178, obs. D. Boulmier

11. - En cuanto al derecho del consumidor, un decreto del 18 de marzo 2009 estipula que son cláusulas presuntamente abusivas aquellas que tengan por objeto o efecto "*remover o interferir con el ejercicio de las acciones judiciales o recursos por parte del consumidor, en particular, al exigir al consumidor (...) pasar exclusivamente a través de la resolución alternativa de conflictos*"[16]. Desafortunadamente, el artículo está mal redactado ya que si tal cláusula impone exclusivamente una mediación, excluyendo el derecho de accionar, no se trata de una enmienda sino de una renuncia al derecho de acción, lo que la convierte simplemente en ilegal. En cambio, si se trata sólo una renuncia temporal, corresponde al profesional demostrar que dicha cláusula relativa al proceso de mediación no crea un desequilibrio significativo, conforme al método descrito en la cláusula.

b) Régimen legal

12. - A pesar de su éxito, la mediación convencional se rige por unos pocos artículos, la mayoría de los cuales están relacionados con la calidad de mediador y retoman parcialmente los artículos sobre la mediación judicial. Esto es lo que distingue, en Francia, a la mediación del conciliador, quien tiene un estatus especial regulado por el Decreto de 20 de marzo de 1978, que hace del conciliador un actor del servicio público de la justicia, a diferencia de los mediadores[17]. El mediador es en sí mismo una persona física o jurídica, quien debe contar en su actividad actual o pasada con la "*calificación necesaria con respecto a la naturaleza de la controversia o justificar una formación o la experiencia adecuada a la práctica de la mediación*" (1533 Al. 2 CPC).

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[16] A. Astaix, *Clauses abusives : publication des listes « noire » et « grise », D*. 2009 p. 797. – D. Legeais, *Clauses abusives. Décret portant application de l'article 132-1 du code de la consommation, RTD com,* 2009, 2009, pp. 424 et s. - G. Notté, *Liste des clauses abusives (D. n° 2009-302, 18 mars 2009), CCC*, Avril 2009, alerte 23. – G. Paisant, *Le décret portant listes noire et grise de clauses abusives, JCP*, 2009, 116. - N. Sauphanor Brouilaud, *Clauses abusives* : les nouvelles clauses « noires » et « grises » . - *À propos du décret du 18 mars 2009, JCP,* 2009, act. 168. – O. Tournafond, *Interdiction des clauses autorisant le professionnel à modifier les caractéristiques de l'immeuble à livrer, revue Dr immobilier*, 2009, pp. 300 et

[17] C'est une personne physique ou morale, bénévole, désignée par ordonnance du premier président de la Cour d'appel. Pour officier en qualité de conciliateur, il est exigé une expérience juridique d'au moins trois années et il n'est pas rare qu'il s'agisse d'anciens juges. Il est désigné d'abord pour une période qu'on pourrait qualifier de probatoire d'un an puis pour deux ans

Un Decreto del 20 de enero de 2012 hizo una alternativa de lo que antes eran dos requisitos acumulativos. Interesa entonces destacar que la experiencia de la mediación es necesaria, lo que permite distinguir mejor al mediador del experto. Además, no se trata necesariamente de un abogado porque "*no es directamente a la aproximación de las posiciones jurídicas que (la mediación) obra, sino de las personas*"[18]. Es un intermediario, un *go between*, destinado al acercamiento de las partes[119]. Acerca de la mediación judicial, el Código de Procedimiento Civil dispone que el mediador es nombrado "*para oír a las partes y sus puntos de vista con el fin de que aquéllas puedan encontrar una solución a su conflicto*[120]".

14. – El artículo 1531 del CPC dispone, además, que el proceso está sujeto al principio de confidencialidad, el cual no es absoluto. No sólo las partes pueden oponerse sino que se limita a las constataciones del mediador y a las declaraciones obtenidas durante la mediación. Por último, hay excepciones en caso de "*razones imperiosas de orden público o por razones relacionadas con la protección del interés superior del niño o la integridad física o psíquica de la persona*" y "*cuando la revelación de la existencia o de la divulgación del contenido del acuerdo resultante de la mediación sea necesaria para su implementación o ejecución*". Se trata, por lo tanto, de una regulación, que contiene un marco director de la mediación convencional, pero que sigue siendo incompleto y que se halla a disposición de las partes. Al lado de esta mediación convencional que siempre ha existido fue creado recientemente una Convención (o convenio) de proceso (o procedimiento) participativo.

[18] G. Cornu et J. Foyer, *op. cit*, spéc. n° 9 p 54.

[19] en ce sens X. LAGARDE, *L'efficacité des clauses de conciliation ou de médiation, Rev. arb.,* 2000, pp. 377-401, spéc. p. 381; R. MARTIN, *Quand le grain ne meurt… de conciliation en médiation, J.C.P. (G),* 1996, I, 3977, spéc. n° 7.

[20] Art. 131-1 CPC

2) CONVENIO DE PROCEDIMIENTO PARTICIPATIVO

15. - El convenio de procedimiento participativo[21] fue creado en Francia por una ley del 22 de diciembre de 2011[22]. A raíz de un informe ministerial[23], éste se inscribió en un contexto particular de la lucha por el mercado de derecho. Los abogados buscaban recuperar el monopolio perdido con la fuga de litigios a los procesos de mediación, los cuales, como vimos, no les están reservados.

El convenio de procedimiento participativo ha emergido junto con otras formas de resolución alternativa de conflictos, de los que hay que distinguirlo cuidadosamente; en efecto, como ya lo dijimos, en la actualidad hay una multitud de ofertas de resolución amistosa. La particularidad de los convenios de procedimiento participativo es de no imponer la intervención de un tercero mediador, sino la asistencia de un abogado a cada parte. Se trata, bajo la nueva sección del artículo 2062 C. civ., de "*un contrato por el cual las partes de una controversia que aún no ha dado lugar al acceso a la jurisdicción judicial o arbitral se ponen de acuerdo para trabajar juntos de buena fe para resolver de manera amistosa la controversia*".

El Convenio de procedimiento participativo se rige tanto por el Código Civil como por el Código de Procedimiento Civil, que determinan tanto las condiciones (a) como sus modalidades (b).

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[21] S. Amrani Mekki, La convention de procédure participative, D. 2011, 3007 ; E. Boccara, Gaz. Pal. 16-18 janv. 2011, p. 3 ; E. Bonnet, Procédures 2011, alerte 11 ; T. Clay, JCP, I, 666, spéc. n°8 ; M. Douchy-Oudot, Procédures 2011, n°99 ; Entretien avec H. Poivey-Leclercq, JCP 2011, act. 70 ; Autre mode de règlement alternatif des litiges : la procédure participative, AJ Famille 2010 p. 257 ; F. G›Sell, JCP G 2011, doctr. 468, § 5 ; Vers la justice participative ? Pour une négociation à l'ombre du droit, D. 2010, p. 2450 : O. de Mattos, CDE 2011, act. 7 ; S. Sauphanor, Gaz. Pal. 16-18 janv. 2011, p. 10 ; J.-Ph. Tricoit : Rev. arb. 2011, p. 213 ; et, pour un point de vue général, H. Croze, La bataille de l›amiable, Procédures repère 2 ; N. Fricero, Qui a peur de la justice participative ? Pour une justice, autrement in Mél. S. Guinchard, Dalloz 2010, p. 145. Adde, en matière familiale, couvrant la conciliation, la médiation et la procédure participative : E. Mulon, État des lieux des modes amiables de règlement des conflits en matière familiale, Gaz. Pal. 4-5 févr. 2011, p. 8.

[22] La loi n°2010-1609 du 22 déc. 2010 (*JO* 23 Déc. 2010) crée la convention de procédure participative qui figure aux articles 2062 et suivants du Code civil.

[23] Rapport S. Guinchard, *Ambition raisonnée pour une justice apaisée*, La documentation française, 2008, spéc. p.29, « *47. Création d'une nouvelle procédure de règlement amiable des litiges : la procédure participative de négociation assistée par avocat Cette procédure devrait permettre de faciliter le règlement amiable des litiges, sous l'impulsion des avocats ; en cas d'échec partiel ou total de la négociation, une passerelle vers la saisine simplifiée de la juridiction permet un traitement accéléré de l'affaire (observations et pièces des parties figurant dans l'acte de saisine)* ». V. aussi, pp. 168 et s.

A) Condiciones del Convenio de procedimiento participativo

16. - Ante todo, el Convenio de procedimiento participativo no es posible sino en presencia de abogados, porque "*nadie puede, sin ser abogado, asistir en un proceso participativo previsto en el Código Civil*"[24]. Calificado de victoria real por la barra de abogados (colegios de abogados), el monopolio otorgado se justifica por las garantías ofrecidas por la intervención del abogado en la redacción del acuerdo, su consejo jurídico y para garantizar que el acceso al juez no se halla vedado[25]. Su intervención también evita que la parte tenga que renovar sus esfuerzos para acceder al juez si la negociación fracasa, pues el mismo abogado puede representar la parte ante el juez. Además, la presencia del abogado aporta el posible beneficio de justicia gratuita o de litigar sin gastos. Por último, y lo más importante, el monopolio de los abogados se justifica por la concepción que se tiene de esta fase de negociación.

A diferencia de la ley de los Estados Unidos, que hace del derecho colaborativo un proceso en sí mismo desconectado del juicio, el Convenio de proceso participativo parece previsto como un paso previo, una especie de instancia previa. Se trata de un "*pacto de no agresión a plazo*"[26]. De ello se desprende que el abogado no tiene la obligación de desistirse, por el contrario, continuará en proceso judicial del caso si las negociaciones fracasan. La desventaja de este sistema es que la presencia de abogados puede cristalizar el debate. Los abogados tienden a negociar sobre la base de lo que podrían obtener del juez. Entonces se encuentra una oposición legal entre las partes, allí donde el proceso amistoso debe garantizar una solución pragmática. Esto es probablemente lo que marca la diferencia más evidente con el derecho de colaboración. De hecho, la fase de negociación será un anticipo de prueba.

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[24] Article 4 de la loi n° 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques tel que modifié par l'article 37 III de la loi du 22 décembre 2010.

[25] Cependant, d'autres professions auraient pu y prétendre, notamment celle de notaire. Tout au plus peut-on remarquer que le rapport Guinchard indique que « à la demande du représentant du Conseil supérieur du notariat, il est précisé que la procédure participative ne préjudicie pas aux règles de la publicité foncière, de façon à ce que le rôle du notaire soit préservé, dans le respect des exigences du décret no 55-22 du 4 janvier 1955 et du décret no 55- 1350 du 14 octobre 1955 »,

[26] H. Poivey-Leclercq, *La convention de procédure participative, JCP*, 2011, act. 70

17. – Por otra parte, el Convenio de procedimiento participativo no se permite en cualquier materia. El legislador optó, en el artículo 2064, párrafo 2 del C. civ.[27], simplemente excluir las controversias relativas a un contrato de trabajo en el ámbito de un Convenio de procedimiento participativo. También se excluye sobre los derechos respecto de los cuales las partes no tienen la libre disposición, lo que es obvio en materia contractual[28]. Sin embargo, es válido cuando es "*firmado por los cónyuges en vistas a buscar una solución consensual en materia de divorcio o de separación*" art. 2067 C. civ.).

Por lo tanto, entra dentro del ámbito de aplicación posible de la Convención de procedimiento participativo una cantidad limitada de disputas familiares. Para entender esto, debemos recordar que es precisamente en este tipo de litigio que se encuentra el origen de la construcción de la ley de colaboración en los Estados Unidos. Debido a que se trata de un litigio abundante, masivo, es preciso incluirlo en un objetivo de desjudicialización. Sin embargo, su inclusión es sólo parcial. En primer lugar, porque la admisión se limita al divorcio y a la separación y por ende solo puede referirse a una parte del conflicto si, por ejemplo, también está en juego la patria potestad. En segundo lugar, y lo más importante en este sentido, el acuerdo alcanzado no estará sujeto a homologación judicial, sino que debe seguir el procedimiento estándar. No se trata de un "divorcio bajo la órbita del abogado"[29]. Este límite está plenamente justificado por el deseo de conferir seguridad a los acuerdos alcanzados en materias delicadas[30]. Sin embargo, se disminuye significativamente el interés práctico porque se incurre en el riesgo de una pérdida de tiempo. "*El convenio de proceso participativo en las disputas de familia no es un procedimiento alternativo a los procesos judiciales formales, se trata de un proceso de negociación que puede preceder a este último, pero que no lo reemplaza de ninguna manera*"[31].

18. – Por último, la ley agrega las condiciones formales para la conclusión de un convenio de procedimiento participativo. El convenio de procedimiento participativo es un contrato especial, nominado, solemne y

[27] Article 2064 al. 2 C. civ. : « *Toutefois, aucune convention ne peut être conclue à l'effet de résoudre les différends qui s'élèvent à l'occasion de tout contrat de travail soumis aux dispositions du code du travail entre les employeurs, ou leurs représentants, et les salariés qu'ils emploient* ».

[28] E. Bonnet, La convention de procédure participative, Procédures n° 3, Mars 2011, alerte 1

[29] M. Douchy-Oudot : Procédures 2011, comm. 99

[30] M. Bruggeman, Premiers pas vers un droit collaboratif ?, Droit de la famille n° 2, Février 2011, alerte 15

[31] M. Douchy-Oudot : Procédures 2011, comm. 99

relativo a una controversia respecto de la cual no ha habido acceso al juez. Es una especie de "convención de método[32]", conforme al artículo 2063 C. civ., que afirma que "*debe establecerse por escrito, bajo pena de nulidad, y contener: 1° El término, 2 ° El objeto de la disputa; 3° Los documentos y la información necesaria para la resolución del conflicto y los términos o modalidades de intercambio*". Y no cabe "*temer entrar en los detalles, aunque parezcan obvios. La precisión y la claridad del acuerdo garantizará la eficacia de su ejecución y deberán ser tales que eviten el riesgo de deslizamiento (en el sentido de exceso) de una parte, que luego comportaría la aniquilación del procedimiento*"[33].

B) Modalidades del Convenio de procedimiento participativo

19. - Regido por el Código de Procedimiento Civil, el acuerdo tiene por efecto de suspender el curso del plazo de prescripción[34] y ello con el objeto de garantizar la efectividad del derecho a un juez. Sin embargo, muchas cuestiones quedan sin resolver con relación a su régimen. Al respecto, uno de los principales problemas es el de la aplicabilidad - o no - de ciertos principios. Tal es el caso del principio de la confidencialidad, el cual no es abordado por la legislación, a diferencia de lo que ocurre con la legislación referida a la mediación convencional[35].

Dicho aspecto referido a la confidencialidad puede depender de la concepción que se tenga de esta fase amistosa. En efecto, desde el momento en que el Convenio de procedimiento participativo es visto como una instancia previa, el mismo viene a parecerse a un escrito judicial y por lo tanto no es confidencial[36]. Sin embargo, la falta de confidencialidad impide cierta libertad para negociar y podría mermar su eficacia. En la actualidad, la doctrina estima que, para poder imponerse, la confidencialidad debe estar prevista convencionalmente por las partes. El mismo cuestionamiento cabe

[32] A. Sauret, *La convention de procédure participative* **: une nouvelle règle de traitement à l'amiable de certains différends survenant en droit social, Gaz Pal**, 5 mars 2011, n° 64, p. 33

[33] Hélène Poivey-Leclercq, La Convention de procédure participative « Un pacte de non agression à durée déterminée », JCP, 24 janvier 2011, 70

[34] Article 2238 al. 2 C. civ. issu de l'article 37 II de la loi du 22 décembre 2010.

[35] Th. Wickers, président du CNB, discours aux États généraux du droit de la famille, 27 janv. 2011

[36] S. Sauphanor, *La convention de procédure participative* : aspects pratiques. À propos de la loi du 22 décembre 2010 relative à l'exécution des décisions de justice, aux conditions d'exercice de certaines professions réglementées et aux experts judiciaires, Gaz. Pal. 18 janvier 2011, n° 18, p. 10. En ce sens égal. F. Rongeat Oudin, *op. cit.*

con relación al principio de contradicción, al que algunos textos aluden, aunque sin imponerlo con claridad[37].

20. - Si la negociación falla, el convenio de procedimiento participativo tiene la ventaja de permitir un acceso más rápido y eficiente al proceso judicial[38]. Es por ello que el convenio de procedimiento participativo se concibe como una "pre-instrucción" del caso, si las negociaciones fracasan[39]. En consecuencia se ha podido evocar un "descentramiento del juicio". En caso de no-acuerdo o de acuerdo parcial, la causa se ve eximida de la etapa de conciliación previa obligatoria. Aun más, en tales casos, la causa escapa, en principio, a la etapa de instrucción, llamada en derecho francés *mise en état*, con excepción de los casos en que nuevos elementos deban ser tratados.

Cuando el procedimiento no da lugar a ningún acuerdo, ni siquiera parcial, el juez decide de acuerdo a las normas de derecho común, de acuerdo con el procedimiento de llamado *sur requête conjointe*, que podría traducirse como una demanda conjunta de ambas partes, o a pedido de la parte más diligente, *sur requête unilatérale*. En todo caso, la petición debe hacerse dentro de los tres meses siguientes al término del proceso de concertación participativa.

B - Eficacia de la resolución amistosa extrajudicial de litigios

21. - El objetivo, tanto a nivel europeo como nacional, es fomentar una desjudicialización perenne de los litigios. El incentivo debe ser fuerte

[37] l'article 2068 C. civ. place la convention sous l'égide du Code de procédure civile et, « la vertu du rôle que joue le contradictoire dans le procès favorise sa diffusion hors la sphère du procès pour innerver, en vérité, l'ensemble du droit ». L'article 2063 C. civ. pourrait éclairer dans la mesure où il indique que la convention doit contenir en son sein « les pièces et informations nécessaires à la résolution du différend et les modalités de leur échange ». En outre, l'article 1545 al 2 CPC dispose que « la communication des écritures et pièces entre les parties se fait par l'intermédiaire de leurs avocats selon les modalités prévues par la convention ; ceux-ci les portent à la connaissance des intéressés par tous moyens appropriés. Un bordereau est établi lorsqu'une pièce est communiquée ». Ces dispositions suggèrent une certaine liberté des parties quant à l'étendue de ce qui est soumis au débat. Contrairement au procès civil, les parties ne sont pas obligées de se communiquer les documents spontanément (art 132 CPC). Une telle souplesse laisse poindre le risque de déloyauté contraire à la lettre de l'article 2062 C. Civ. En effet, l'absence d'une contradiction effective porte le risque d'un accord obtenu sur des éléments partiels et partant défectueux. L'absence de contradiction n'instaurerait pas un climat de confiance pourtant indispensable au processus. En outre, la détermination par anticipation des éléments nécessaires à la négociation pourrait la brider.

[38] Rapport Guinchard, *op. cit.*

[39] En ce sens, v. notre article, La convention de procédure participative, précit.

para intentar una conciliación. Para que sea totalmente atractivo, no sólo debemos asegurar que el proceso de mediación sea efectivo (1), sino también que su resultado proporcionará un "equivalente judicial" (2).

1 / EFICIENCIA DEL PROCESO

22. – El no respeto de la obligación de tentativas de mediación previa es sancionada por una especie de preclusión llamada en derecho francés *fin de non recevoir.* Tal sanción fue establecida por la jurisprudencia, por sentencia de la Sala mixta de la Corte de casación del 14 de febrero 2003[40], a propósito de la cláusula de mediación previa[41]. La misma solución está prevista expresamente por el artículo 2265 C. civ. que contempla el convenio de procedimiento participativo.

La utilización de una sanción procesal en caso de incumplimiento de una cláusula contractual procede del hecho de que esta última fue llamada *clause au rabais*, suerte de "cláusula barata", ya que la pena convencional es ampliamente ineficiente. En efecto, el incumplimiento de una cláusula debe generar una responsabilidad contractual. Sin embargo, la responsabilidad contractual requiere la prueba de la culpa, del daño y del nexo causal. En cuanto a la primera, la prueba de la culpa plantea pocas dificultades ya que el acceso al juez mismo constituye en sí el incumplimiento de la obligación de acudir a la mediación de manera previa. En cambio, la prueba del daño es la condición más difícil. Se trata, pues, de probar la pérdida de la oportunidad de conciliar, lo que resulta sumamente difícil de establecer y aún más difícil de cuantificar[42]. Además, recordemos que las costas judiciales no son indemnizables[43], y por ende el cálculo de los daños resultantes de la pérdida de una oportunidad de negociar no es fácil de

[40] Cass., ch. mixte, 14 févr. 2003, *D*. 2003. 1386, n. P. Ancel et M. Cottin ; *Rev. arb*. 2003. 403, 1re esp. et note C. Jarrosson ; *CCC* 2003, comm. n° 84, obs. L. Leveneur ; *JCP* 2003. I. 142, n° 13 s., obs. G. Virassamy ; *Defrénois* 2003, art. 37810, n° 86, obs. R. Libchaber. V. aussi, dans le même sens, Com. 13 juin 2003, *CCC* 2003 comm. n° 134, obs. L. Leveneur.

[41] Qu'elle a confirmé pour une clause de médiation préalable, ce qui est une bonne chose étant la difficulté voire l'impossibilité à les distinguer. Cass. 1re civ., 8 avril 2009, n° 08-10.866 : JurisData n° 2009-047864 ; Bull. civ. 2009, I, n° 78 ; JCP G 2009, n° 26, 43, note O. Cuperlier ; I, 369, n° 9, obs. S. Amrani Mekki, D. 2009, p. 1284, obs. X. Delpech ; Procédures 2009, comm. 203

[42] La Cour de cassation considère que les frais du procès ne sont pas un préjudice réparable, Civ. 2, 8 juillet 2004, *Bull. civ*. II, n° 365, *dt et procédures*, 2005, com. n° 29, D. 2004, IR, 2195.

[43] La Cour de cassation considère que les frais du procès ne sont pas un préjudice réparable, Civ. 2, 8 juillet 2004, *Bull. civ*. II, n° 365, *dt et procédures*, 2005, com. n° 29, D. 2004, IR, 2195.

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configurar. Se sigue de ello que debe incluirse una cláusula para asegurar la sanción penal, más enérgica.

23. - El Tribunal Supremo francés ha optado por la sanción más severa, dado su régimen flexible que aplica rigurosamente[44]. En efecto, la *fin de non recevoir,* puede invocarse en cualquier momento del procedimiento, sin necesidad de justificar un agravio. Sin embargo, la *fin de non recevoir* sanciona, en principio, la falta de derecho de accionar, lo que no se condice con la sanción de una cláusula contractual. En primer lugar, el derecho de acción existe, pero está temporalmente congelado. Para justificar tal sanción de falta de acción, podría alternativamente considerarse que es el interés en actuar que falla, "intérêt à agir", pero dicha solución parece artificial. Puede concluirse entonces, que se trata de aquellas *fins de non recevoir* "falsas" que utiliza el sistema jurídico para propósitos distintos a la finalidad procesal[45]. Al mismo tiempo, la posibilidad de invocarlas en todo tiempo del procedimiento[46], o la de regularización[47] de tales excepciones o defensas, no corresponde a la tentativa de conciliación, normalmente previa al proceso. Por último, la adopción de tal sanción es difícil de conciliar con la sanción en caso de incumplimiento de una cláusula de

[44] Il convient de noter que la Cour de cassation est exigeante quant au respect de la clause. Il n'est ainsi pas possible de se contenter d'une tentative de conciliation. Il faut respecter la procédure de conciliation imposée contractuellement. La Cour de cassation, dans un arrêt de la troisième chambre civile de la Cour de cassation du 30 octobre 2007, a ainsi refusé de considérer qu'une conciliation avait été tentée devant SOS médecin alors que la clause prévoyait une médiation devant deux membres du conseil départemental des Yvelines, chaque partie choisissant librement l'un de ces deux membres (Civ. 3, 30 octobre 2007, *JCP*, G, 2007, IV, 3173, *D*., 2008, p. 506, n. J. Penneau). La Cour de justice de l'Union européenne ne l'est pas moins qui exige que les parties tentent une conciliation alors même que l'organe de conciliation n'existe pas encore. Ainsi, alors que des utilisateurs de téléphonie mobile n'avaient pu saisir une commission régionale de conciliation non encore créée dans la région, la CJUE considère que la conciliation devait néanmoins être tentée (CJUE, 18 mars 2010, aff. C-317/08, C-318/08, C-319/08 et C-320/08, JCP 2010, I, n° 5, obs. T Clay, procédures, 2010, com. 179, C. Nourissat).

[45] J. Héron et T. Le Bars, *Droit judiciaire privé*, 4ème éd., Montchrestien, 2010, spéc. n° 140, p. 120.

[46] Cass. com., 22 févr. 2005, n° 02-11.519, JCP, 2005, I, 183, n° 3, obs. Th. Clay ; Dr. et patrimoine 2006, p. 94, obs. S. Amrani-Mekki ; RDC 2005, p. 1143, obs. X. Lagarde. Il en résulte, en l'espèce, qu'après 6 ans de procédure, une partie peut invoquer la clause et le juge demander aux parties « avant toute saisine du juge » de tenter une conciliation. Or, celle-ci sera forcément faussée par l'existence d'un jugement ayant donné gain de cause à une partie. C'est pourquoi il a pu être proposé de limiter l'invocabilité de la clause à la première instance, ce qui serait une entorse importante au régime des fins de non recevoir. V. cep. Soc. 7 décembre 2011, *Gaz. Pal.* 2 mars 2011, obs. S. Amrani mekki qui semble admettre une renonciation conventionnelle à la clause par mutuus dissensus, ce qui était préconisé par M. R. Perrot.

[47] Civ. 2, 16 décembre 2010, *D.* 2011, 172 ; *Rev. arb.* 2011.229, obs. J.-Ph. Tricoit.

arbitraje; en este último caso, se trata de una objeción procesal que debe ser planteada *in limine litis*[48]. En la práctica, las cláusulas de conciliación y de arbitraje aparecen a menudo combinadas. A falta de acuerdo, las partes se comprometen a someterse a arbitraje. Sin embargo, esto puede acarrear que se acuda a un tribunal arbitral sin pasar por la mediación previa y se solicite a éste que se vuelva a la mediación previa, lo que es un sinsentido económico[49].

Por fin se deba notar une jurisprudencia muy importante de 2014 en la que el Tribunal supremo se niega a aplicar la sanccion porque la clausula no precisa el procedimiento de conciliacion[50]. Este decision es interesante ya que refleja que las clausulas son numerosas y que a veces las partes quieren evitar el juez invocando formulas aproximativas. Pero, desafortunadamente, el Tribunal supremo no indica cuales son las precisiones necesarias y imperativas de procedimiento.

Se sigue de lo dicho que la pena que se establezca puede volver más segura la conciliación, pero para que ésta sea eficaz, también debe uno asegurarse que se lleve a cabo pacíficamente.

2 / EFICACIA DEL RESULTADO

24. - El incentivo para pasar por un modo alternativo de resolución de conflictos viene también de la fuerza que se otorga al acuerdo alcanzado. Que éste detenga el valor jurídico de una convención no garantiza seguridad ni serenidad alguna, en caso de nacer disputas. De hecho, una convención puede ser impugnada ante los tribunales de primera instancia y su fuerza vinculante es limitada ya que no constituye en sí mismo un título ejecutivo. Por ello, todas las posibilidades para aumentar su valor deben ser tenidas en cuenta. Desde ya, hay que señalar que si el acuerdo puede ser descripto como una transacción, porque hay concesiones recíprocas, ésta será más sólida, en la medida en que no puede impugnarse sino en casos limitados

[48] CIv. 2, 20 novembre 2001, Bull. civ., II, n° 168 ; . V. aussi, Civ. 1, 3 février 2010, n° 09-13.618 : JurisData n° 2010-051400, JCP, 2010, I, n° 8, obs. T. Clay : L'arrêt considère que l'intervention postérieure d'un tiers n'est pas de nature à permettre de souler la clause compromissoire dès lors que le tiers ne se prévaut d'aucun droit propre.

[49] H. Motulsky, Menace sur l'arbitrage : la prétendue incompétence des arbitres en cas de contestation sur l'existence ou la validité d'une clause compromissoire, *JCP* G 1954, I, 1194 ; Question préalable et question préjudicielle en matière de compétence arbitrale, *JCP* G 1957, I, 1383.

[50] Com. 29 avril 2014, n°12-27004, *Gaz. Pal.* 9 spet. 2014, p. 15, S. Amrani Mekki.

e.ISBN - 978-85-98144-48-1

y beneficiará de la autoridad de cosa transigida. Si además dicho acuerdo es firmado por un abogado, también tendrá un efecto probatorio especial y más interesante porque el abogado certifica "*haber informado plenamente a las partes que aconseja sobre las consecuencias jurídicas de la ley*" y el acto da fe mientras no se pruebe su falsedad[51]. Sin embargo, no goza de fuerza ejecutoria porque el abogado, a diferencia del notario, no otorga un título ejecutorio.

25. – El nuevo libro 5 CPC permite al juez homologar el acuerdo obtenido y conferirle fuerza ejecutoria[52]. Varias disposiciones se refieren a esta homologación y son comunes a los acuerdos que resultan de diferentes procesos amistosos de resolución de litigios.

Las partes podrán solicitar la homologación al tribunal normalmente competente para decidir el fondo de la cuestión. A modo de incentivación para solicitarla, la tarifa de 35 € que se exige para cualquier proceso judicial no es aplicable. Pero sobre todo, los textos legales impiden al juez modificar los términos del acuerdo. No debe apreciar los términos de éste con relación a lo que él hubiera podido o podría decidir. Sin embargo, tampoco se especifica el contenido de su control. Según la jurisprudencia, el juez solo debe proceder a un control de respeto del orden público y de las buenas costumbres del acuerdo.

El nuevo libro 5 CPC consagra algunas distinciones según el proceso que haya dado lugar al acuerdo y se refieren a la persona que puede acudir al juez para solicitar su homologación.

Por otra parte, si estos procesos extrajudiciales permiten evitar el recurso al juez, otros permiten un acuerdo amistoso durante el proceso y permiten evitar llegar a la sentencia judicial.

II - LA RESOLUCIÓN AMISTOSA JUDICIAL

26. – No siempre existe una alternativa al ejercicio de la acción judicial. En cambio puede haber una alternativa a la solución judicial. Por

[51] Article 66-3-1 à 66-3-3 de la loi du 31 décembre 1971 no 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et Juridiques tels qu'ajoutés par la loi no 2011-331 du 28 mars 2011 de modernisation des professions judiciaires ou juridiques et certaines professions réglementées.

[52] H. Croze et C. Laporte, *Mais où est donc passé l'article 1441-4 du Code de procédure civile ?,* Gaz. Pal., 3 avril 2012, n° 94, p 16.

ello, la solución convencional amistosa es posible y deseable a pesar de la introducción de una acción en justicia, e incluso a pesar de una sentencia, para evitar los recursos a que ésta puede dar lugar o para facilitar su ejecución.

La conciliación judicial es principalmente el hecho del juez, porque en virtud del artículo 21 CPC "*entra deber del juez el de conciliar a las partes*". El juez "*es más bien un padre que un juez, debe considerar como una victoria la de conciliar a sus hijos antes que la de pronunciarse*" [53]. No se trata con esto de negar la función de los tribunales civiles, como lo señaló J. Bentham[54], sino de exaltarla. Juzgar y conciliar son consideradas como "*misiones hermanas, casi como hermanas gemelas*[55]". Sin embargo, este principio director tiene la desventaja de crear un velo de sospecha sobre el juez en caso de fracaso de la conciliación, debido a su posible parcialidad. "*Juzgar por la aplicación del derecho e intentar de conciliar, lo que sugiere al menos una renuncia parcial del derecho (...), constituye para muchos una contradicción difícil de justificar; esta doble función puede además ser llevada adelante imparcialmente por el mismo juez, quien debe juzgar lo que y a aquellos que él no ha podido acercar?* [56]". Es por ello que en la práctica, ante el tribunal de comercio, el juez que es a veces designado como conciliador de un caso debía apartarse de la causa si la conciliación fracasaba. Como resultado de ello, se adoptó la costumbre de enviar las causas susceptibles de conciliación siempre al mismo juez, quien devino *de facto* un conciliador delegado[57]. Además, el juez carece de tiempo para intentar una conciliación.

Esta es la razón por la cual la conciliación judicial es a menudo una

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[53] V. TREILHARD, *Exposé des motifs au corps législatif du 4 avril 1806,* cité par H. SOLUS, *J.C.P.,* 1939, 1, 82.

[54] V. J. BENTHAM, *Montesquieu, Pensées,* n° 2162 : « Dans un mauvais système de procédure avec une marche lente, des frais énormes, une justice douteuse, il est évident qu'un accommodement mauvais en lui même, peut être relativement bon ; mieux vaut sauver une partie de son droit que l'exposer tout entier ou de ne le recouvrer qu'après avoir censuré une partie de sa vie dans les tribulations et les angoisses qui assaillent le malheureux plaideur à chaque pas de sa carrière ; mais pour obvier ce mal, le devoir du législateur est de corriger la procédure et non de chercher les expédients pour s'en passer. Ce qu'il doit à ses sujets, ce n'est pas une demi justice, c'est la justice dans sa plénitude » ; R. MERLE, *Contribution à l'étude de l'acte déclaratif*, *op. cit.*, n° 136 et n° 137, p. 190 : L'auteur parlait ainsi de complexe de supériorité correspondant à la confiance en la justice et faisant choisir le procès, auquel il oppose un complexe d'infériorité qui marquerait le doute par rapport au procès et lui ferait préférer la transaction.

[55] G. Cornu et J. Foyer, *op. cit*. spéc. n° 9 p. 55.

[56] Y. Desdevises, *V° Conciliation et médiation, op. cit.*

[57] M. Blin, *Table ronde sur la conciliation, in La procédure orale, premiers enseignements un an après le décret du 1er octobre 2010, Deuxièmes rencontres de procédure civile*, LGDJ, coll. IRJS 2012, spéc. pp. .

conciliación delegada, ya sea a un conciliador o una mediación judicial (A). Aun más, es posible que la conciliación sea integrada al procedimiento, en ciertas áreas donde ésta constituye una condición previa (B).

A – La conciliación judicial delegada

27. - Dos procesos de negociación amistosa existen en el curso del procedimiento: la conciliación y la mediación judicial. Ambas se distinguen por el estatus del tercero. Mientras que el conciliador es una persona benévola, nombrada por orden del primer presidente del Tribunal de Apelación por un período determinado e inscripta en una lista[58], el mediador es una persona remunerada, elegida por el juez, sin tener que figurar en lista alguna. Pero más fundamentalmente, la conciliación y la mediación pueden distinguirse por el hecho de que si el juez puede ser un conciliador, el no puede ser un mediador porque entonces "éste *tiene una misión terapéutica que no corresponde al juez, y que en consecuencia no puede delegar*[59]". En otras palabras, mientras que el conciliador busca extinguir el litigio, el mediador va más allá al tratar de apaciguar el conflicto subyacente[60].

a) Conciliación judicial

28. - Instalado en el marco del Tribunal "de instancia", el conciliador fue nombrado naturalmente con relación a las disputas que son de competencia de aquel fuero. Así intervino principalmente en materia de pequeños litigios de consumo o por temas de alquiler. La seducción por la conciliación ha llevado recientemente al legislador, por decreto del 1° de octubre de 2010, a extender el recurso a aquélla dentro de otras jurisdicciones, en particular, la del Tribunal de Comercio. Si la reforma ha sido burlada durante un tiempo por la inadaptación de los conciliadores de justicia a los litigios comerciales, pareciera al contrario que estos últimos le han encontrado interés. De hecho, antiguos magistrados de comercio requieren hoy convertirse en conciliadores de justicia, lo que puede aportar un real valor agregado. Sin embargo, debe cuidarse que éste no adopte

[58] Il en existe environ 1600 aujourd'hui.

[59] E. Serverin, Le médiateur civil et le service public de la justice, RTDciv. 2003, pp. 235 et s.

[60] En ce sens, v. B. Gorchs, La médiation dans le procès civil, sens et contresens, RTDciv. 2003 pp. 409 et s.

la postura de juzgar sino de de conciliar. Para evitar cualquier dificultad derivada de su imparcialidad, debe intervenir fuera de la jurisdicción donde intervino como juez[61].

29. - El juez designa al conciliador estableciendo su misión que no puede durar más de dos meses, pero que puede ser renovada. Esto puede hacerse en las diferentes etapas del procedimiento.

El conciliador judicial puede hacer constataciones personales y una investigación a condición de aceptación de las partes, pero debe mantener informado al juez de cualquier dificultad en el cumplimiento de su misión. Por otra parte, el juez puede dar por terminada la misión de conciliación en cualquier momento, a pedido de las partes, del conciliador o de oficio, si la conciliación le parece comprometida. Tales decisiones del juez constituyen medidas de administración judicial, lo que impide ejercer un recurso salvo el de exceso o abuso de poder.

b) Mediación Judicial

30. - La conciliación también puede ser delegada a un mediador judicial quien no está sujeto a la misma categoría que el conciliador. Por lo tanto, existe en la actualidad un verdadero "mercado de la mediación[62]" que se disputan diferentes profesionales del derecho (abogados, notarios, hujieres de justicia), entre otros. Todo juez tiene la posibilidad de designar un mediador judicial.

31. - Una particularidad de la mediación constituye la remuneración del mediador[63], lo que justifica que haya que provisionarse una suma a tal fin. Además, su misión tiene una duración máxima de tres meses, renovable una sola vez por el mismo período, a petición del mediador. Por último, si bien se indica que el mediador puede oír a terceros, no es claro que si aquél puede presentarse en el lugar de los hechos.

32. - El Código de Procedimiento Civil establece que las partes en una conciliación o en una mediación pueden someter el acuerdo a homologación judicial. Sin embargo, a tal fin, se utiliza una fórmula sumamente criticada según la cual "*la homologación es materia discrecional*

[61] En ce sens, S. Lataste, *Table ronde sur la conciliation, in La procédure orale, premiers enseignements un an après le décret du 1er octobre 2010, op. cit.*

[62] E. Boccara, Médiation : petit marché deviendra gros ? Gaz. Pal. 21-23 mars 2010, 8 ; H. Croze, La bataille de l'amiable, procédures, 2011, repère, 2.

[63] Similaires à la rémunération d'un technicien.

para el juez", la cual no es utilizada para los modos de resolución amistosa extrajudicial. Estos modos de resolución amistosa son interesantes ya que se acude a ellos cuando el caso puede ser resuelto de una manera distinta a la sentencia. En consecuencia, el juez decide caso por caso de su interés. Por el contrario, ciertos contenciosos son, por naturaleza, sujetos a conciliación judicial regulada de tal manera que ésta se integra en el proceso judicial como un requisito previo.

B – La conciliación judicial integrada

33. - En ciertos asuntos, la conciliación judicial ha sido integrada al proceso, sea como una etapa previa obligatoria al procedimiento, sea como un procedimiento autónomo. En efecto, "*El modo (amistoso) es tan útil en determinadas materias que la ley establece una conciliación previa obligatoria*[64]".

Los favores por la conciliación han justificado, durante el período revolucionario, que ésta sea un pasaje obligado ante todas las jurisdicciones. Sin embargo, frente a la pérdida de tiempo que ello ocasionara, tales instancias previas y obligatorias fueron suprimidas en 1949, pero se conservaron para aquellos contenciosos "sensibles", donde el afecto es importante y las relaciones entre las partes son fuertes y duraderas, a saber, el proceso de divorcio y en el contencioso laboral[65].

34. - La conciliación previa ante los Tribunales de Trabajo[66] es fuertemente criticada por ser una fuente de retrasos[67] y por no dar lugar a una tasa satisfactoria de acuerdos. Además, hay varias

[64] G. Cornu et J. Foyer, *Procédure civile,* PUF coll. Thémis, 2ème éd. 1996, spéc. n° 8 p. 48.

[65] Il existe d'autres tentatives de conciliation, notamment devant le tribunal paritaire des baux ruraux (art 887 CPC) et dans une certaine mesure devant les commissions de surendettement, v. E. Jeuland, Droit processuel général, Montchrestien, 2ème éd. 2012, spéc. n° 340 p. 325.

[66] G. Chabot, Remarques sur la vocation conciliatoire des juridictions prud'homales, D. 2002, 2140 ; Ph. Clément, A. Jeammaud, E. Serverin, F. Vennin, *Les règlements non juridictionnels des litiges prud'homaux,* Droit Social 1987, p 55 ; O. Dell'asino, *Pour un renouveau de la conciliation prud'homale : la conciliation de procédure,* Gaz. Pal., 1er Août 1987, p 523 ; T. Grumbach, *De l'audience initiale devant le Conseil de prud'hommes*, Le Droit Ouvrier, Mai 2006, p 235 ; J.-P. Poli, *Le Bureau de conciliation « un juge qui écoute et qui conseille »*, Le Droit Ouvrier, Mai 2006, p 246 ; A. Supiot, La conciliation prud'homale, Dr. Soc. 1985, pp. 225 et s. ; M. Zavarro, La conciliation dans le contentieux prud'homal, in Mélanges P. Julien, Edilaix, 203, pp. 415 et s.

[67] H. Flichy, *La justice sociale, in Pour une autre justice,* colloque au Sénat du 21 janvier 1998, Ass. Droit et Démocratie*, P.A.* 26 juin 1998, spéc. p. 40 : « *Je crois qu'il faut que les juges profitent du temps qu'ils ne perdront plus à tenir des audiences de conciliation inutiles pour se consacrer dorénavant à la mise en l'état des dossiers, comme cela se fait maintenant devant la cour d'appel de Paris* ».

razones por las cuales la conciliación se vuelve muy relativa: el gran número de excepciones al carácter obligatorio de la conciliación[68], que las demandas efectuadas con posterioridad a la conciliación previa obligatoria[69] no estarán sometidas a ésta, que su incumplimiento puede ser regularizado[90] incluso en la instancia de la apelación[91] y que su sanción es difícil de aplicar[92].

Ahora bien, la conciliación previa sigue siendo ampliamente defendida porque está íntimamente vinculada a la institución de las juntas de conciliación laboral, cuyo lema es "*servât y conciliât*". En primer lugar, porque garantiza la igualdad en la conciliación por la presencia de dos consejeros laborales, uno empleado y el otro empleador. En segundo lugar, porque la tasa tan baja de alrededor del 10% de acuerdos[93] es engañosa en la medida en que la conciliación no siempre conduce a un acta que la registre. De hecho, más del 40% de los casos no pasan de la fase de conciliación a la de sentencia, lo que constituye, según los más optimistas, la tasa real de conciliación[94]. Por último, y lo más importante, la conciliación no sería "tiempo perdido" en la medida en que ésta asegura una "pre-instancia" del caso[95]. De hecho, la junta de conciliación tiene amplios poderes para resolver el caso. Puede adoptar medidas cautelares, medidas provisionales, medidas de investigación y resolver todo incidente del procedimiento.

La conciliación previa en materia laboral está totalmente integrada al procedimiento. Es una fase de la instancia laboral, un momento privilegiado para dar una oportunidad a la conciliación donde el equilibrio entre

[68] Par exemple en matière de requalification du contrat du travail, ce qui permet en outre de faire échapper les autres demandes au préalable de conciliation, v not. Soc. 4 décembre 2002, JCP 2003, I, 156 n° 2, obs. Bousez, Procédures, 2003, n° 69.

[69] Même en appel, ce qui leur permet d'échapper au préalable de conciliation.

[90] Soc., 18 novembre 1998, *Bull. civ.*, V, n° 507, *J.C.P.*, 1999, IV, 1034

[91] Soc. 12 décembre 2000, RTDciv. 2001, p. 207

[92] Sur l'application délicate du régime de l'exception de nullité au non respect du préalable obligatoire de conciliation, M. Zavarro, La conciliation dans le contentieux prud'homal, *op. cit.,* spéc. p. 421 : « Si l'absence de conciliation préalable devait être sanctionnée, il aurait certainement été plus opportun de considérer qu'elle rend la demande irrecevable mais convenait-il vraiment d'aller jusque là ? Il ne m'apparaît en effet pas absolument certain que la conciliation préalable doive commander la régularité de la procédure subséquente ».

[93] Il était de 93% entre 1830 et 1842.

[94] E. Serverin, Le sort des demandes prud'homales en 2004, in Procès du travail, travail du procès, LGDJ, coll. IRJS, 2008, pp. 67 et s.

[95] Art. R 1454-14 C. trav.

las partes está restablecido[96]. Sin embargo, no es la última oportunidad, porque obviamente no impide una conciliación posterior espontánea, llevada adelante por el mismo tribunal laboral o por un mediador. En caso de conciliación total o parcial, el acta labrada menciona el contenido del acuerdo (artículo R 1454-10 C. del trabajo) cuyo valor es el de un título ejecutorio (C. del trabajo art. 1454-1411).

35. - Del mismo modo, en el proceso de divorcio existe una conciliación previa obligatoria, calificada de "momento fuerte[97]", incluso si es pasible de las mismas críticas que en materia laboral[98]. La conciliación se integra en el proceso judicial lo que implica un alargamiento del procedimiento cuyos plazos están lejos de ser "eficientes[99]". En la práctica, esta fase de conciliación evoluciona de una conciliación "pura y simple" a una fase preparatoria del divorcio en la medida en que "*no busca tanto reconciliar a los cónyuges como conducirlos a considerar conjuntamente el divorcio y sus consecuencias de manera constructiva y organizada*[100]". En efecto, el artículo 252 párrafo 2 del Código Civil establece que "*el juez trata de conciliar ambos cónyuges tanto sobre el principio del divorcio como de sus consecuencias*". No hay conciliación para evitar la sentencia de divorcio, sino para convenir sobre sus modalidades, cuyo procedimiento está regulado minuciosamente. "*En ambos casos (laboral y de divorcio) el primer encuentro entre las partes y el juez ofrece la posibilidad de un "allanamiento" de posiciones opuestas, y el objetivo no es, o muy poco en el divorcio, la desaparición de los conflictos mediante la conciliación de las partes, sino la búsqueda de una solución amistosa en cuanto a las consecuencias, provisorias o definitivas del divorcio*[101]".

Con el fin de promover la conciliación, se prohíbe exponer los hechos o las razones del divorcio. La demanda no debe considerarse como

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[96] Il a été proposé de spécialiser des conseillers prud'hommes à cette phase de conciliation, ce qi a été réalisé avec succès à Grenoble. V. B. Blohorn-Brenneur, *Bicentenaire de la création des conseils de prud'hommes : bilan et perspectives,* Dalloz 2006, pp. 1324 et s.

[97] S. Thouret, Les mécanismes procéduraux issus de la loi n° 2004-439 du 26 mai 2004 relative au divorce, Procédures 2004, études n° 8

[98] C. Bouty, Pour une suppression du préalable obligatoire de conciliation en matière de divorce, *D.* 2008, 2728.

[99] Deuxième rapport de la Commission européenne pour l'efficacité de la justice (CEPEJ), p. 166, http://www.coe.int/cepej. La France était classée en 2008 16e sur 17 pays comparés

[100] A. Bénabent, Droit civil, droit de la famille, Montchrestien, 2010, spéc. n° 502, p. 219 ; P. Couvrat et G. Giudicelli Delage, JCl, Proc. Civ., Fasc 160..

[101] M.-C. Rondeau-Rivier, *Les modes alternatifs de règlement des conflits en droit du travail, Justices,* 1997, n° 8, pp. 33 et s., spéc. p. 35

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el lanzamiento de hostilidades. Además, como en sede laboral, el juez tiene la facultad de adoptar medidas urgentes durante la conciliación y para gestionar la situación de los cónyuges durante la instancia, en caso de no llegarse a una conciliación. De nuevo, este intento previo de conciliación no excluye otras formas de conciliación posteriores. Por otra parte, el juez también puede ofrecer e incluso obligar a los esposos a acudir a un mediador familiar. Se trata de obligar a las partes a reunirse con el mediador al menos una vez para que éste les explique los beneficios de la mediación.

36. - Por lo tanto, según la legislación francesa, los métodos de resolución amistosa de los conflictos son muchos y variados, extra-judiciales o judiciales, con o sin la intervención de un tercero, con o sin abogados. La pauta es clara, sin embargo. Se trata de hacer del juez el último recurso, de desjudicializar un litigio de manera perenne porque, como dice un proverbio africano, a menudo no hay conflicto, sino dos personas que no se han escuchado.

e.ISBN - 978-85-98144-48-1

‘MEDIATION AND LANGUAGE RIGHTS: A HUMAN RIGHTS PERSPECTIVE’

Fernand de Varennes [1]

ט וַיִּקָּרְאוּ סֹפְרֵי הַמֶּלֶךְ בָּעֵת הַהִיא בַּחֹדֶשׁ הַשְּׁלִישִׁי הוּא חֹדֶשׁ סִיוָן, בִּשְׁלוֹשָׁה וְעֶשְׂרִים
בּוֹ, וַיִּכָּתֵב כְּכָל אֲשֶׁר צִוָּה מָרְדֳּכַי אֶל הַיְּהוּדִים וְאֶל הָאֲחַשְׁדַּרְפְּנִים וְהַפַּחוֹת וְשָׂרֵי הַמְּדִינוֹת אֲשֶׁר
מֵהֹדּוּ וְעַד כּוּשׁ שֶׁבַע וְעֶשְׂרִים וּמְאָה מְדִינָה, מְדִינָה וּמְדִינָה כִּכְתָבָהּ וְעַם וָעָם כִּלְשׁוֹנוֹ; וְאֶל
הַיְּהוּדִים כִּכְתָבָם, וְכִלְשׁוֹנָם.

9 Then were the king›s scribes called at that time, in the third month, which is the month Sivan, on the three and twentieth day thereof; and it was written according to all that Mordecai commanded concerning the Jews, even to the satraps, and the governors and princes of the provinces which are from India unto Ethiopia, a hundred twenty and seven provinces, unto every province according to the writing thereof, and unto every people after their language, and to the Jews according to their writing, and according to their language. »
Book of Esther 1:22, Old Testament

Senhoras e senhores, Mesdames, Mesdemoiselles, messieurs!

This extract from the Book of Esther in the Old Testament, known as the Megillah in Hebrew, written perhaps 2,500 years ago, is one of the first stories recognising the need for language to be taken into account when a government interacts with a diverse population made up of people from many different backgrounds.

Esther was able to convince the King of Persia to use the main languages spoken from « India to Ethiopia » in order to transmit his orders quickly and effectively rather than to only use one official language in his empire.

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e.ISBN - 978-85-98144-48-1

Esther is in a way perhaps the first linguistic and cultural mediator in human history. She was also Jewish and knew that to not communicate to her people in their language could have led to delays which in the circumstances could have had fatal results.

This story, Mesdames et messieurs, illustrates ***the potential role and importance of linguistic and cultural mediation***. This will also be the central theme of my presentation, though I will be making the connection between this concept of linguistic mediation and international human rights standards.

I think it is important to point out from the very beginning that this concept of linguistic mediation is not exactly the same as what it is usually understood in law where it is a form of alternative dispute resolution to resolve disputes between two or more parties through a third party, the mediator, in order to negotiate a settlement. It refers to :

A linguistic [and cultural] mediator is most frequently understood to be a third party to assist and protect the interests of an individual in his or her interaction with state authorities, rather than to seek to negotiate a settlement.

My background is in international law, I am a jurist, and while others at this conference are addressing more generally the relationship between human rights and mediation, I will be focussing more on the role of language, and human rights, in mediation.

To start with, let me quickly explain the basis for the legal, human rights obligation to take into account language in some situations of mediation:

Where disadvantages or potential prejudices are significant, translation or interpretation services in mediation contexts must be in place. [The proportionality principle in application of the prohibition of discrimination on the ground of language].

To put it at its simplest, the prohibition of discrimination in human rights law is the legal basis for putting into place in certain contexts linguistic mediation services. This can occur where even though a particular language may not be officially used by state authorities, they nevertheless still have at a minimum to take some steps to communicate effectively through interpretation offered by a mediator.

I should add, still from a legal, human rights perspective, that the fundamental basis for this recognition is the principal of respect for dignity and the personal characteristics of individuals. Language is in this sense and in my opinion one of the most important individual characteristics which

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must absolutely be taken into account in certain cases of discrimination which will be described in my presentation. This is especially true in the case of groups which are particularly vulnerable in relation to language preferences: immigrants and indigenous peoples, which as it happens are also two significant categories here in Brazil.

As the Canadian Supreme Court recognised in one famous case:

The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.

Re Manitoba Language Rights, [1985] 1 S.C.R. 721, p. 744

At its most basic, this principle is also an acknowledgment that the consequences for some individuals in the language choice of the state, as happens with interactions with judges, police officers, medical doctors and nurses or any other public employee may be so serious or are so disadvantageous that authorities must to some degree try to take some measures to address this.

It is important to distinguish between interpretation or translation which is in some cases required under human rights principles of fairness, especially in the case of criminal procedures, from a much wider concept of linguistic and cultural mediations which is more involved and extensive, and associated with the prohibition of discrimination.

In a number of countries, and this is more clearly established in Europe and countries such as Italy, linguistic and cultural mediation is not only about translating for someone who is not fluent in the language used by authorities – it is a role which takes into account cultural differences which might also have negative effects for some individuals who in addition face language difficulties.

For a refugee, immigrant or a member of an indigenous people, the interaction between him or her and a judge, or with a medical doctor, is often also one of subordination between the first and the second. But in addition to this, and this is the important element to keep in mind,

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an individual belonging to one of these vulnerable communities may be excluded or have difficulties in understanding what is being asked or what is happening for cultural reasons in addition to the linguistic difficulties.

For example, even though things have changed a great deal in recent years, it was traditionally considered unacceptable among some indigenous Aborigines in Australia to directly look at a stranger in the eyes when speaking. This was considered a lack of respect, or even a sign of agressivity.

However, in Western criminal law not looking into someone's eyes is often considered suspicious from which negative connotations may be derived, especially in the anglo=-saxon common law use of juries.

Another ***difference involving linguistic and cultural dimensions*** is the concept of self-defence in criminal law. This concept did not exist in traditional Aboriginal societies, so that if you just asked a question such as « Are you guilty of killing your neighbour? », even in his or her language, an Aborigine might answer yes, I am guilty, because a direct translation of guilty could simply mean « did you commit the act of killing your neighbour ». In certain Aboriginal societies, the concept of guilt outside of any cultural reference was simply translated as involving the commission of the physical act, and not whether he or she was guilty in a Western legal sense since of course it was possible for a person not to be guilty in cases of self-defence.

These two examples show how **linguistic and cultural mediation go beyond mere translation or interpretation** by adding another human rights dimension of the prohibition of discrimination where the consequences of not taking into account linguistic and cultural differences may be particularly serious. There is no human rights obligation for state authorities to use all languages in the services provided by the State. But there is a need to address the most serious cases of disadvantage and exclusion, such as in criminal and some health matters, where it is reasonable and justified to do so in light of the impact linguistic and cultural factors may have.

As a consequence,

Although the interpretation of this aspect of the right of non-discrimination in international law is still going through a process of clarification, there is increasing support for the view that the operation of non-discrimination must take into account the need to balance a state's **legitimate interests and goals** in prescribing certain preferences with the

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ensuing disadvantage, denial or burden this may effect on individuals. Everything comes down to whether or not in the end the measure or conduct is "reasonable", "arbitrary" or "fair".

Fernand de Varennes (1997), To speak or not to speak: The rights of persons belonging to linguistic minorities, Paper to the UN Working Group on Minorities, E/CN.4/Sub.2/AC.5/1997/WP.6

It is important to emphasise that the more serious ***potential impact of language and cultural differences*** are most often to be found in refugee, immigrant and indigenous groups. It is also here that you find the greatest need for a human rights approach based on the principles of reasonability and proportionality that you find under the prohibition of discrimination, and a balancing of what is reasonable and justified when one considers the legitimate interests and objectives of the state when taking into account the consequences on individuals of language preferences in a certain cultural context.

It might be useful to illustrate the difference between using translation or interpretation for the purposes of a fair trial where an accused does not understand the language used in court proceedings, with the approach and extent which could involve a linguistic and cultural mediator for reasons of non-discrimination.

In the United States and other common law countries, you can have a trial with jury for certain criminal offences, and there will be an interpreter so that an accused is aware of the evidence against him and be able to prepare his or her defence accordingly, as well as translation of essential documents in the proceedings, where he or she does not understand English.

In terms of the evidence which the jury members can take into consideration, only the official translation provided by the interpreter is considered to be part of the proceedings. This means that from a legal point of view in a criminal trial, the jury must only consider the official translation provided by the court interpreter.

But what happens if there is incorrect interpretation in court, and one of the jury members understands the language of the accused and realises that the official translation is wrong?

Well, it seems the legal position in the United States is to exclude from the jury anyone who is bilingual and might understand the language of the accused. The reasoning here is that a bilingual juror might be inclined not to automatically accept the official interpretation – and this cannot be allowed, even if the official interpretation is wrong.

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In criminal law, at least in the US, only the evidence presented in English through the official interpretation during the trial is considered to have legal validity, even if it is not perfect, and even if it is incorrect.

This is the conclusion of the US Supreme Court in the case of Hernández v. New York where the Supreme Court confirmed that it is perfectly acceptable to exclude potential jury members if they understand the language of an accused, as is explained here with a bit of embarrassment :

Hernández v. New York 500 U.S. 352 (1991)

[It is allowed to exclude bilingual individuals from a jury because they might not immediately accept an interpreter's official translation of evidence, though the US Supreme Court admitted this may seem unfair].

"It is a harsh paradox that one may become proficient enough in English to participate in trial… only to encounter disqualification because he knows a second language as well."

The linguistic aspect of the right to interpretation is therefore quite limited here, since the right to a fair trial recognises that while there is a prejudice or disadvantage in a trial conducted only in English, the role of an interpreter in this particular context is limited. The interpreter is not a mediator, nor is he or she there to take into account the interests of or protect the accused from a miscarriage of justice. The court interpreter in a criminal trial is merely acting as an arm of the court, and as such the members of a jury must blindly follow its official linguistic translation. In order to avoid any challenge however, courts in the United States appear to be ready to simply exclude anyone who understands the language of an accused.

The important difference between a court interpreter and a linguistic and cultural mediator which I want to mention here however is very clear: a court interpreter cannot intervene between a state and an accused, whereas a linguistic mediator as is acknowledged in a number of European countries must in fact play a role in trying to ensure that the rights of a person when interacting with state authorities are respected.

I do not wish before going any further to give you the impression that in the type of situation I have just described in the United States that a person would have no recourse. On the contrary, an accused can always contest the quality of poor interpretation in a criminal trial, and this is a situation which as a matter of fact occurs fairly frequently. Strictly speaking

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however, a court interpreter in a criminal trial has absolutely no role to play when it comes to defend, protect or even merely inform an accused when his or her rights might be threatened.

I will use the example of public health care to make clearer the connection of how linguistic and cultural mediation may be needed in terms of respect for basic human rights obligations.

Essentially, in a number of jurisdictions, it is recognised that in areas such as public health where the consequences of not taking into account an individual's linguistic and cultural background can be extremely serious, even deadly, the prohibition of discrimination on the ground of race, ethnicity or language may require appropriate and culturally appropriate translation or interpretation in health care contexts.

In the Council of Europe, for example, there is a special Recommendation of the Committee of Ministers – which represents the top political leadership of all countries members of the Council of Europe, on health services in a multicultural society. It is recognised in this recommendation that quality access to health care for ethnic minorities, which by the way includes particularly immigrants or indigenous peoples, is often difficult for what are called « structural reasons » and require putting into place translation and interpretation services.

Recommendation Rec(2006)18 of the Committee of Ministers to member states on health services in a multicultural society

Noting, in this context, that inequalities with regard to health care affecting ethnic groups are linked to problems of access, the lack of culture competence in health care providers, lack of essential provisions (such as interpreter services or translated health education material), all of which may be structural barriers to quality care;

In fact the Council of Europe makes the link between problems of access to health care and human rights :

Recommendation Rec(2006)18 of the Committee of Ministers to member states on health services in a multicultural society

Considering that respect for human rights and the dignity of the individual requires that this diversity is taken into account in the equitable delivery of health services;

In a way, linguistic and cultural mediation play an essential role which is also recognised under the prohibition of discrimination in human rights law: as far as is reasonably possible, access to health care must be assured as the Council of Europe once again recognised.

There is in particular here for the need to "develop strategies for eliminating practical barriers for multicultural populations to access health care, including linguistic and cultural hurdles":

Recommendation Rec(2006)18 of the Committee of Ministers to member states on health services in a multicultural society

2. ACCESS TO HEALTH CARE

2.1. **Equitable access to health care services** of appropriate quality should be promoted and monitored. In order to achieve the objective of equal access to health care, member states should develop strategies for eliminating practical barriers for multicultural populations to access health care, including linguistic and cultural hurdles.

Linguistic and cultural mediation thus plays a potential key role in an approach which is based on respect for human rights of minorities, indigenous peoples, immigrants and refugees.

The work of mediators in this sense is a task linked to the implementation of human rights, especially but not exclusively in the field of health care. This is also a task recognised by the Committee of Ministers of the Council of Europe as requiring, especially in the field of languages, clear, direct and urgent intervention:

Recommendation Rec(2006)18 of the Committee of Ministers to member states on health services in a multicultural society

3. Improving quality of communication – Language barriers

3.1**. Removing barriers to communication is** one of the most urgent, evident and straightforward areas in which interventions are needed; a general policy that facilitates the learning of the language of the host country for ethnic minority members and immigrants should also be developed.

3.2. **Professional interpreters** should be made available and used on a regular basis for ethnic minority patients who need them, whenever appropriate.

3.3. **Linguistic diversity** should be taken into account, including appropriate legal measures.

3.4. Health care professionals should be made aware that **linguistic barriers** have negative effects on the quality of health care. They should be trained to work together with interpreters in an effective way.

3.5**. Training programmes** are needed for interpreters working within the field of health care. Besides basic interpreting skills, these

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should include medical terminology, courses on the structure of the health care system, ethical interpreting practice, culture competence and culture brokerage. Interpreters working in mental health care settings ought to be specially trained to perform their tasks in the context of psychotherapeutic or psychiatric interventions. Public health authorities should be encouraged to monitor the quality of medical interpreter services for ethnic minorities.

Mediators may not be human rights lawyers or jurists, but their work can – and I would add must be in certain circumstances – work which is human rights oriented.

Some European governments have gone a long way to develop this role for linguistic and cultural mediators, and I think this is particularly the case of Italy where authorities in different parts of the country have a number of mediators in place to address the needs of the most relevant minority or immigrant communities in their midst – and where linguistic and cultural mediators is actually also a well-recognised profession with university programmes specifically developed for this purpose, and where there are various regulations and certification in place for their work. It seems that it is also very effective. You have here the definition of what is a linguistic cultural mediator in Italy:

A Cultural Linguistic Mediator is a professional representative with the task to facilitating communication and understanding, both on linguistic and cultural level, between service seekers of ethnic minorities and functionaries in agencies or public service offices, self-presenting in an equidistant and neutral way between the interested parts.

This explains a great deal about the potential importance of mediation for the protection of human rights with a language and cultural dimension from a legal point of view, specifically the right to equality without discrimination, but also perhaps the need to keep in mind and in practice the central position of language in the identity of individuals, and the role it plays in terms of access and communication in many areas where mediation is needed and essential.

Does not the sun shine equally for the whole world? Do we not all equally breathe the air? Do you not feel shame at authorizing only three languages and condemning other people to blindness and deafness? Tell me, do you think that God is helpless and cannot bestow equality, or that he is envious and will not give it?

Constantine the Philosopher (St. Cyril), 827-869

Obrigado.

e.ISBN - 978-85-98144-48-1

PRIVATE INTERNATIONAL LAW, FAMILY LAW AND MEDIATION

Alberto Manuel Poletti Adorno[1]

The existence of marriages, civil unions and union of family members from different nationalities in a globalized society lead us to reflect on some of the conflicts of such mechanisms in the International Private Law (IPL) that ought to be solved while using mediation.

Some of the issues are related to mediation in Public International Law where there are private international situations and conflicts within laws. We can see that most of these issues are particularly related to international cooperation.

We are going to briefly touch upon the norms in European Union (EU) and the South American Process Mercado Común del Sur (MERCOSUR) in order to analyze these experiences in the use of mediation.

The Treaty of International Law Procedure signed on March 1940 by Uruguay, Brazil, Colombia, Bolivia, Argentina, Peru y Paraguay do not have any norm about mediation[2]. We don´t find specific norms regarding mediation in CIDIP Treaties although we can find references to commercial arbitration and recognition of awards and foreign decisions.

1 MEDIATION IN THE EUROPEAN UNION

After the Counsel of Tampere en 1999 it was recommended to the States to promote ADR. Two norms, Reg. 44/2001 and Reg. 2201/2003 allow the possibility of mediation in family law. These norms with the Green Book about the modalities of ADR were the origin of Directive 2008/52/CE, of May 21, 2008, about aspects of mediation in civil and commercial affairs.

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[2] Treaty of International Law Procedure http://www.urjc.es/ceib/espacios/observatorio/coop_judicial /documentos/cj_civil/CJ-CIV-A-I-01.pdf

Art. 2 establishes that mediation can be used in trans border civil and commercial disputes, except those cases in which rights and obligations are not subject to renunciation or disposal to the parties according with national legislation. Even if at the beginning of the Directive it is mentioned that these situations are quite common in family and labor law, article 2 mentions specifically labor, tax and administrative law and the regime of State responsibility for acts or omissions in the exercise of its authority (*iure imperii act*).

It is clear that there are some situations in the field of civil and family law that are not subject to transactions, specifically in the countries that establish the intervention of Public Officials in cases related to marital state of persons. However, cases of divorce, marital alimony, child support and distribution of property are frequent disputes in a mediation could be a useful tool to solve disputes.

It is important to mention that art. 5.2 establishes that the Directive is not applicable if national legislation provides the obligation of mediation or settle incentives of sanctions for using mediation, as far as it is not limited the right of the parties to access to the judicial system. It is possible for the countries to enact mechanisms prior or during the process, in order to reduce the cases submitted to the courts.

It must be noted that there is a possibility to ask for the agreement issued with an executive force, respecting the legislation of each State party.

Finally, we must note that in spite of the scope of the Directive, which is international disputes, it is also possible to use it in national disputes (section 8).

2 FAMILY LAW AND MEDIATION IN MERCOSUR

The South American integration process is behind the European process. We can mention the Decision 58/2012 related to the Agreement between the State parties on international jurisdiction, applicable law and international cooperation in the field of marriage, personal relations, goods, divorce and non matrimonial union. In this norm, mediation is not mentioned as a mechanism for solution of controversies, this norm enacts the applicable legislations to conflicts of law in marriages, civil union and the obligation of international cooperation to solve conflicts. This takes us to Las Leñas Agreement

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on civil, commercial, labor y administrative fields[3] and Ouro Preto for provisional measures[4].

We have to mention that controversies that may arise in these cases between the countries may be solved by a mechanism established in the Protocol of Olives in MERCOSUR. Articles 4 and 6 refer to direct negotiations between the States and intervention of GMC before the arbitration process.

We consider it would be important to use mediation as mechanism for dispute resolution in DIPR and family conflicts. We know that mediation can be used in MERCOSUR State Parties but we don´t have a compulsory norm that leads, encourages the persons to use it in private conflicts.

The recognition of mediation in an integration process will allow the use by private and public officials. We know that mediation can be used in international law according to article 33 of the UN Charter, but we should also remember that citizen are not allow to go directly to the TPR MERCOSUR and they are forced to pass through their States.

We can observe that diplomatic agents have requested in some cases the intervention of the institutions of other countries in the restitution of children, which has been frequently done in the past.

The possibilities to use mediation on these cases are not frequent. The Hague Convention of 1980 and Interamerican Convention of 1989 are worried about the quick transfer of the child to his/her place of origin when it is required. Mediation can, however, be useful in some cases.

3 IS THERE A POSSIBLE MEDIATION IN FAMILY LAW USING INTERNATIONAL PRIVATE LAW?

State and private citizen may use mediation to solve their disputes. The force of mediation is so important that sometimes doesn't allow the parties to appeal the decision that registers the agreement.

In this case, the mother and the father providing a child support have requested to reach an agreement with an amount of money that the father should give his child. After the audience, the mother considers this amount was not sufficient and she asked the Court of appeal to cancel the

[3] Texts in Spanish: http://www.mre.gov.py/v1/Adjuntos/mercosur/Acuerdos/1992/espanol/protocolodecooperacionyasistenciajurisdiccional.pdf

[4] http://www.parlamento.gub.uy/htmlstat/pl/protocolos/prot16930.htm

e.ISBN - 978-85-98144-48-1

agreement since she did not have the opportunity to determine the amount of the incomes of the father and offer evidence. She also argues the right of the child for due process in this case. The Court of appeal considered the agreement is a way to end up disputes and that the agreement, when registered by a Court, has the force of a judicial decision and it is not subject to appeal.

An important tool to reject the claim was the presence of the Attorney of the mother, for the audience in which the request of child support was presented.

Mediation has important effects that it is not possible to ignore even in children jurisdiction where there are international principles like the superior interest of the child and integral protection of the child.

Many of the problems in family field should be solved by using mediation. We believe these mechanisms should be promoted in MERCOSUR. The creation of a code of ethic and possibility of training should be the next step, as well as signing new treaties allowing the use of mediation in family cases.

e.ISBN - 978-85-98144-48-1

PRIVATE INTERNATIONAL LAW, FAMILY LAW AND MEDIATION

Alberto Manuel Poletti Adorno[1]

La existencia de matrimonios, uniones de hecho y convivencias de personas de distintas nacionalidades en una sociedad globalizada nos lleva a reflexionar sobre algunos de los mecanismos existentes en el ámbito del Derecho Internacional Privado para resolver, con la ayuda de la mediación, los conflictos que pudieran llegar a surgir.

Surgen entonces varias preguntas vinculadas a la plaza que tiene y debería tener la mediación en el derecho internacional privado donde se analizan conflictos de normas y situaciones privadas internacionales. Notemos que la mayoría de las normas en la materia se refieren a la cooperación internacional principalmente.

Así, nos hemos detenido a analizar los principios comunes y las divergencias existentes entre la Unión Europea y el MERCOSUR, con el fin de analizar las experiencias de dichos instrumentos legislativos.

Notemos que el Tratado de Derecho Procesal internacional suscrito el 19 de marzo de 1940 por los delegados de Uruguay, Brasil, Colombia, Bolivia, Argentina, Perú y Paraguay no contiene ninguna norma sobre mediación[2]. Tampoco encontramos específicamente normas de mediación en las CIDIP aunque es dable mencionar que se hace referencia al arbitraje comercial y al reconocimiento de laudos y sentencias extranjeras.

1 LA PLAZA DE LA MEDIACIÓN EN LA UNIÓN EUROPEA

Luego del Consejo de Tampere en 1999 se recomendó a los Estados que promuevan el uso de métodos alternativos de solución de litigios. Dos

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[2] Tratado de derecho procesal internacional http://www.urjc.es/ceib/espacios/observatorio/coop_judicial/documentos/cj_civil/CJ-CIV-A-I-01.pdf

normas, el Reglamento 44/2001 y el Reglamento 2201/2003 permitieron dar impulso al ámbito de la mediación en derecho de familia. Estas experiencias sumadas a los aportes del libro verde sobre las modalidades alternativas de solución de conflictos en el ámbito civil y mercantil derivaron en la actual Directiva 2008/52/CE, de 21 de mayo de 2008, sobre ciertos aspectos de la mediación en asuntos civiles y comerciales.

El art. 2 menciona expresamente que la Directiva se aplica a los litigios transfronterizos civiles y comerciales con la salvedad de aquellos derechos y obligaciones que no estén a disposición de las partes en virtud de la legislación pertinente. Si bien el considerando menciona que estas situaciones son frecuentes en el ámbito del derecho de familia y el derecho laboral, el citado artículo 2 menciona que no se aplica a los asuntos fiscales, aduaneros o administrativos ni a la responsabilidad del Estado por actos u omisiones en el ejercicio de su autoridad soberana (*actos iure imperii*).

Está claro que existen situaciones en el ámbito del derecho civil y de familia que no pueden ser objeto de transacción, sobre todo en aquellos países que requieren la intervención del Ministerio Público en los procesos vinculados al estado civil de las personas. Sin embargo, existen cada vez más situaciones derivadas de prestación de alimentos, régimen de relacionamiento, pensiones entre esposos y distribución de los bienes de la sociedad conyugal por no citar algunos casos en los que los aspectos vinculados a la familia harían oportuna la mediación.

Es importante destacar que el art. 5.2 dispone que la Directiva no afecta a la legislación nacional que estipula la obligatoriedad de la mediación o que la someta a incentivos o sanciones, ya sea antes o después del inicio del proceso judicial, siempre que no se impida a las partes el ejercicio el derecho de acceso al sistema judicial. Con ello, queda a salvo la posibilidad de que los países establezcan mecanismos obligatorios en forma previa o concomitante a un proceso, medida que se justifica con el fin de descargar los tribunales.

Nótese igualmente que se prevé la posibilidad de solicitar que un acuerdo sea revestido de carácter ejecutivo, respetando no obstante el orden público de los Estados.

Es dable destacar finalmente que si bien el objetivo es la mediación de litigios transfronterizos, nada impide que estas normas puedan aplicarse también a litigios internos dentro de los países (considerando 8).

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2 LAS NORMAS SOBRE FAMILIA Y MEDIACIÓN EN EL MERCOSUR

El proceso de integración sudamericano se encuentra muy retrasado con relación al europeo. Podría citarse la Decisión 58/2012 vinculada al Acuerdo entre los Estados partes sobre jurisdicción internacionalmente competente, ley aplicable y cooperación jurídica internacional en materia de matrimonio, relaciones personales entre los cónyuges, régimen matrimonial de bienes, divorcio, separación conyugal y unión no matrimonial. En esta norma no se menciona a la mediación como un mecanismo viable para la solución de controversias, limitándose a establecer la ley aplicable a los distintos supuestos. No obstante se establece la obligación de cooperación jurídica internacional por medio de los acuerdos de Las Leñas para los ámbitos civil, comercial, laboral y administrativo[3] y de Ouro Preto para medidas cautelares[4].

Es cable mencionar que las controversias que surjan con relación a la Decisión se deben resolver por el sistema de controversias vigentes en el MERCOSUR. El Protocolo de Olivos se refiere en sus arts. 4 y 6 a las negociaciones directas entre los Estados y la intervención del GMC antes de recurrir al procedimiento arbitral.

Sería importante mencionar la mediación como un mecanismo de solución de controversias que puede resultar útil a los particulares para resolver sus conflictos. No obstante, la mediación es utilizada por las jurisdicciones nacionales de los Estados en sus procesos.

La elevación de la norma a nivel del proceso de integración permitiría no obstante su utilización por los diversos órganos para la solución de controversias. Aunque esta práctica puede ser utilizada conforme al derecho internacional al ser un medio pacífico de solución de conflicto con base en el art. 33 de la Carta de la ONU. Recordemos que los particulares no pueden recurrir directamente al TPR sino que deben hacerlo a través de los Estados.

Notemos por ejemplo que los agente diplomáticos han solicitado en algunos casos la intervención de los órganos de otro país para resolver casos de restitución internacional de menores, tal vez uno de los conflictos más frecuentes.

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[3] Textos en idioma castellano http://www.mre.gov.py/v1/Adjuntos/mercosur/Acuerdos/1992/espanol/protocolodecooperacionyasistenciajurisdiccional.pdf

[4] http://www.parlamento.gub.uy/htmlstat/pl/protocolos/prot16930.htm

Notemos que en este ámbito, las posibilidades de recurrir a la mediación son remotas. Los jueces, cumpliendo el rol activo que les es reconocido por la Convención sobre los aspectos civiles de la sustracción internacional de menores de 25 de octubre de 1980 y la Convención interamericana sobre restitución internacional de menores de 15 de julio de 1989 se preocupan por el rápido traslado del menor a su lugar de origen cuando corresponda.

3 ¿ES POSIBLE UNA MEDIACIÓN EN DERECHO DE FAMILIA EN EL ÁMBITO DEL DIPR?

Tanto el Estado como los particulares deberían utilizar este mecanismo. Es dable mencionar que el alcance otorgado a la mediación y la conciliación impide la impugnación del fallo, aun cuando se aleguen diversas situaciones. Es importante mencionar un caso de un tribunal de apelación de Paraguay en materia de prestación de alimentos. Así, en el período inicial del procedimiento y en presencia del juez de la niñez que concilió a las partes, se llegó a un acuerdo para fijar un monto de una cuota alimentaria. La madre, que luego consideró que el monto era pequeño, recurrió al Tribunal de Apelación diciendo que se le había privado del derecho a ofrecer pruebas destinadas a determinar los ingresos del actor, y el debido proceso que debe asegurarse a los derechos de los niños con carácter prevaleciente. El Tribunal consideró que el acuerdo al que llegaron las partes, que constituye conforme a la ley una forma de terminación del proceso, tenía la fuerza de una sentencia por aplicación de normas internas del código procesal civil y no podía ser atacado por la vía recursiva.

Un elemento importante para el rechazo fue la presencia del Abogado como patrocinante en la audiencia convocada para la substanciación del pedido de fijación de alimentos.

Notemos entonces con este ejemplo que la mediación tiene efectos importantes y que no puede dejarse sin efecto el acuerdo arribado incluso en el ámbito de la niñez en el que rige el interés superior y la protección integral del niño/a.

Muchos de los problemas en el ámbito familiar deberían resolverse principalmente por medio de la mediación entre las partes, fuera del ámbito judicial. Es este, creemos, un mecanismo que debería implementarse en el MERCOSUR. La creación de un código de ética y la posibilidad de

entrenamiento en casos internacionales deberían ser el próximo paso, independientemente del mejoramiento de la normativa jurídica con el reconocimiento de la mediación en casos vinculados a la familia.

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e.ISBN - 978-85-98144-48-1

JURISDICCIÓN PENAL Y MEDIACIÓN. PERSPECTIVAS Y REALIDAD EN LA REPÚBLICA DE CHILE

Sergio Peña Neira[1]

Resumen: La mediación, uno de los medios auto-compositivos de solución de controversias no debe ser contraria, en general, al "Principio de legalidad" y al "Estado de derecho", sea un conflicto de origen público o privado, porque se debe considerar las limitaciones de las Normas jurídicas o el Ordenamiento jurídico al actuar de las partes, de los mediadores. Lo más importante, en materia procesal penal no se encuentra instituida de manera jurídicamente expresa sino se deriva, en Chile, de la decisión de escoger un determinado procedimiento (abreviado o simplificado) o una "Salida Alternativa" (acuerdos reparatorios, suspensión provisional del procedimiento). Distinguimos entre mediaciones jurídicas y extrajurídicas. Las primeras pueden ser o no legales, establecidas. La Mediación es productos de las partes no de los terceros mediadores y no puede ser contraria al Ordenamiento jurídico internacional y nacional. Las normas jurídicas en materia procesal civil y penal significaron un gran avance contra el Leviatán representado por las monarquías totalitarias y el totalitarismo, al menos se regulaba por las normas jurídicas, y debemos ser cuidadosa a fin de no contar ni con pequeños Leviatanes ni con una justicia penal negociada donde se transe la vida o el honor.

Palabras claves: Mediación, Derecho procesal penal, Salida Alternativa

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e.ISBN - 978-85-98144-48-1

1 INTRODUCCIÓN

Es para mí un motivo de alegría estar en la tierras brasileñas y exponer un poco acerca de la mediación en mi país, Chile. Desde esta breve introducción al artículo deseo indicar que es, sin duda, una alegría volver a estas tierras y mirar al Atlántico recordando a jueces internacionales como Cancado Trindade o teóricos del derecho como Tercio Sampaio Ferraz Jr. o procesalistas de gran alcurnia como Marinoni o a penalistas como Luis Luizi a quién uno de mis maestros, Manuel de Rivacoba, tenía en alta estima e invitó a la Universidad de Valparaíso en 1994 y otros y a sus escritores entre los cuales Amado y Vasconcelos ocupan especial aprecio en mis lecturas de joven. Es de suyo necesario recordar la estancia que tuvimos mi maestro el Catedrático Dr. Manuel Terol y quien escribe estas líneas, en tierras brasileñas a propósito de materias jurídicas en 2012 donde expusimos algunas consideraciones relacionadas a la persecución penal desde una perspectiva constitucional o metodológica.

Algunas cuestiones metodológicas generales

En materia de Mediación, Chile tiene fórmulas alternativas de solución de controversias principalmente en el ámbito del Derecho procesal civil y procesal del Trabajo[2], es decir, en ámbitos jurídicos donde los intereses jurídicos protegidos pueden ser disponibles por las partes. Esto por encontrarse contenido en leyes chilenas que así lo indican[3].

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[2] Peña, Sergio, *Procedimientos e impugnaciones del Libro V del Código del Trabajo*, Editorial Metropolitana, 2ª Edición, Santiago de Chile, 2014, pp. 63 y ss., Vara, Mario, *Mediación laboral en la Dirección del Trabajo: Entre la búsqueda de identidad y la necesaria autocrítica*, Antofagasta, s.f., Poblete, Patricio, *La Mediación laboral y sus ventajas para el Chile de hoy*, Facultad de Derecho de la Universidad de Chile, Memoria de Prueba, Santiago de Chile, 2005.

[3] Leyes (algunas) que contienen expresa mención en esta materia son: República de Chile, *Ley 19.968, Crea los tribunales de Familia*, Diario Oficial de 30.08.2004 actualizada al 25.08.2014, Artículos 103 y siguientes donde en el artículo 103 se define la Mediación así "mediación aquel sistema de resolución de conflictos en el que un tercero imparcial, sin poder decisorio, llamado mediador, ayuda a las partes a buscar por sí mismas una solución al conflicto y sus efectos, mediante acuerdos." Además se aceptan los avenimientos que son contratos celebrados entre las partes con la ayuda de un tercero designado por las mismas para que por sus buenos oficios se alcancen tales acuerdos y s transformen en contratos "en que sea procedente de acuerdo a la ley", artículo 104. El Código del Trabajo, asimismo, indica en su artículo 374 bis el requisito de llegar a una mediación en materia de huelga y de no ser así, dentro de las 48 horas siguientes a la declaración de huelga se puede solicitar por cualquiera de las partes la Inspector del Trabajo sus buenos oficios o 378 donde una vez votada la huelga debe decidirse si se recurrirá a la

La Mediación puede definirse de diversas maneras[4], "uno de los procesos de búsqueda de equilibrio de poder en las formas no coercitivas, que conduce a ajustes y desemboca en un convenio"[5], supone la existencia de partes y de un tercero (adjetivado por algunos como "neutral" o "facilitador") una controversia, generalmente de hecho, es decir, una discrepancia que se origina de las relaciones intersubjetivas preexistentes en sentido restringido (por ejemplo contractuales) o en sentido lato (no causar daño a otro). Esta controversia podría configurarse como conflicto, así se dice desde una perspectiva sociológica y sicológica que es una "conducta competitiva entre personas o grupos"[6]. En este sentido se proponen diversas metodologías analíticas considerando, a los efectos de nuestro estudio, los "conflictos de intereses" entre las partes en un juicio penal con "necesidades incompatibles o percibidas como tales"[7]. En el caso del procedimiento penal las necesidades, salvo excepciones, son necesariamente incompatibles en razón de la naturaleza del conflicto en cuanto los "bienes jurídicos" son considerados en la mayoría de los casos imposibles de negociar, por ejemplo, la vida, la honra u otros del mismo carácter.

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mediación, artículo 486 donde se indica que en caso de vulneración de derechos fundamentales en el procedimiento de tutela la Dirección del Trabajo de Chile debe iniciar un procedimiento de Mediación a "fin de agotar las posibilidades de corrección de las infracciones constatadas". cfr. República de Chile, *DFL 1, Fija texto refundido, coordinado y sistematizado del Código del Trabajo*, Diario Oficial de 16.01.2003, Santiago de Chile, actualizado 30.10.2014 artículos 374 bis, 486. Asimismo en materia de consumidores es posible considerar esta posibilidad así República de Chile, *Ley 19496, Establece normas sobre protección de los derechos de los consumidores*, Diario Oficial 07.02.97 actualizada 09.06.2014, artículos 56 a 56 H, República de Chile, *Ley 19966, Establece un régimen de garantías de salud*, Diario Oficial 3.09.2004, actualizada a 24.04.2012, Santiago de Chile, 2014, artículo 43 y ss., define la Mediación como "un procedimiento no adversarial y tiene por objetivo propender a que, mediante la comunicación directa entre las partes y con intervención de un mediador, ellas lleguen a una solución extrajudicial de la controversia", artículo 43. Acerca de otras formas o proyectos acerca de Mediación en Chile un estudio muy superficial, Alfaro, Eduardo, et al., *La Mediación en Chile*, Sociedad Chilena de Políticas Públicas, Santiago de Chile, s.f.

[4] Moore, Christopher, *Negociación o Mediación*, Centro de investigaciones por la Paz "Gernika Gogoratuz", Bilbao, 1994, p. 16 la define como "intervención de una tercera parte imparcial y neutral, que no tiene el poder de tomar decisiones, en una disputa o negociación, para ayudar a las partes contendientes a alcanzar un acuerdo mutuamente aceptable sobre los temas en disputa".

[5] Palacios, Tomás, Mediación penal, Facultad de Derecho, Universidad de Chile, Santiago de Chile, 2005.

[6] Moore, Christopher, *Op. cit.*, p. 4.

[7] Moore, Christopher, *Op. cit.*, p. 5.

Sin perjuicio de las discusiones que puedan plantearse en cuanto a los fundamentos teórico- jurídicos de la Mediación distinguimos entre Mediaciones jurídicos y extrajurídicas, las primeras de carácter legal o extralegal. La Mediación jurídica es aquella que se considera dentro del Ordenamiento jurídico respetando al mismo en cuanto a su fuente, a los límites y las consecuencias jurídicas pudiendo contemplarse en la ley (en el caso chileno, la mediación familiar) o no contemplarse en la ley (en el caso chileno las denominadas "Salidas Alternativas" o la sustitución de procedimientos penales[8]) respetando y aplicando, sin embargo, todas las normas jurídicas legales. La Mediación extrajurídica es aquella que se plantea fuera del ordenamiento jurídico pudiendo ser lícita (sobre materias respecto de las cuales el Ordenamiento jurídico admite la posibilidad de disponibilidad renunciándose los derechos por las partes por mirar al interés individual del renunciante y la ausencia de prohibición de renuncia) e ilícita (por no mirar al interés individual sino ser de interés colectivo y encontrarse expresamente impedida la renuncia o la disposición). En este último caso los intereses derivados de la comisión de delitos son los que tienen principal cabida, en principio la Mediación además de extrajurídica es ilícita y por excepción y debido a una verdadera "utilización" del proceso o el "aspecto dinámico" del mismo a través de su interpretación y aplicación es que podemos encontrarnos con Mediaciones[9].

Es más, en el procedimiento penal sin embargo, no existe de derecho, es decir, en normas jurídicas, la Mediación. Sin embargo, es posible exponer algunos de los posibles alcances de acuerdo a delitos de "acción

[8] Como lo señala Zaffaroni esta respuesta, la reparación, no es nueva en el Derecho penal existiendo hasta el siglo XII, donde el profesor hace prevenciones acerca de las diferencias patrimoniales denunciando su inexistencia en Argentina y en Ordenamiento jurídicos de otros países además de acompañar una bibliografía al respecto y la imposibilidad de solucionar todos los conflictos, cfr. Zaffaroni, Raúl, Aliaga, Alejandro, Slokar, Alejandro, *Derecho penal: Parte General*, Ediar, Buenos Aires, 2ª Edición, 2002, pp. 47-48. En materia de consecuencia del delito nos debatimos entre la reparación y la punición.

[9] En cuanto a interpretación y aplicación deseamos llamar la atención a nuestro trabajo, Peña, Sergio, *La utilización de recursos genéticos naturales, defendiendo los derechos de sujetos internacionales en la Convención sobre Diversidad Biológica y propiedad industrial: interpretación y aplicación y derecho comparado*, Universidad Internacional de Andalucía, España, 2013.

penal privada" donde puede plantearse este "supuesto de hecho"[10] y algunas situaciones de manera extra jurídica por las fiscalías plantean "de hecho" la Mediación penal.

l.- La mediación penal resulta algo complejo por la indisponibilidad de la mayoría de los "bienes jurídicos protegidos"

Los "bienes jurídicos" cumplen funciones diversas según sea la actividad de que se trate. En el procedimiento penal el tribunal las utiliza para fijar el tipo de delito de que se trate así como, en la sentencia, el alcance de la pena aunque de manera diferente, siempre se resuelven conflictos en la prevención al proteger los bienes jurídicos[11]. Sin embargo, además establece los límites del actuar del juzgador, no puede sino considerar a dicho "bien jurídico" a fin de aplicar la ley porque de otra forma no puede saber el tipo de importancia del delito. Debe considerarse que "bien jurídico[12]" es una construcción doctrinal[13] desarrollada por los penalistas en esta materia[14]. Todo delito trae como consecuencia la violación de un "bien jurídico", sólo un "bien jurídico"[15].

Esta construcción doctrinal protege al Ser humano al impedir que éste se vea acusado y se considere el delito imputado en diferentes categorías de "bienes jurídicos". Estos mismos bienes son, a su vez, una fuente inagotable de auxilio para comprender la esencia de dichos delitos.

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[10] Pereznieto, Leonel, Ledesma, Abel, *Introducción al Estudio del Derecho*, Editorial Harla, México, 1992, p. 25, en estos casos la conducta humana imputativamente vinculada con la consecuencia jurídica no se encuentra incluida. Es por eso que resulta de suyo fundamental incluirla y sólo podemos deducir la existencia de Mediación por actos de los sujetos, sus consecuencias jurídicas, pero no podemos calificar los mismos desde el punto de vista jurídico como Mediación y con ello perdemos los efectos que tal calificación jurídica conlleva. También se puede seguir en Kelsen, Hans, *Teoría Pura del Derecho* (trad. Roberto Vernengo), Universidad Nacional Autónoma de México, México, 1982, pp. 26, 29, Larenz, Karl, *Metodología de la Ciencia del Derecho*, Ariel, Barcelona, 2001, pp. 243-244. Un problema a cerca de este asunto en de Castro-Coura, Alexandre y Andrade de Acevedo, Silvagner, *Indeterminacao do direito e discricionariedade judicial*, en de Castro Coura, Alexandre y Coelho de Azevedo Bussinger, Elda (Organizadores), Direito Politica e Constitucao, Editora CRV, Curitiba, Brasil, 2014, p. 101 a propósito de la ley en la isla de Sancho Panza.

[11] El artículo 439 del Código Procesal Penal chileno así lo indica. República de Chile, *Código Procesal Penal*, Editorial Jurídica de Chile, Santiago de Chile, 2008, artículo 439.

[12] Al menos en su versión liberal apunta a la preservación del "bien jurídico" de todos los habitantes cfr. Zaffaroni, Raúl, *Op. cit.*, p. 55.

[13] Zaffaroni, Raúl, Aliaga, Alejandro, Slokar, Alejandro, *Op. cit.*, p. 99.

[14] Bacigalupo, Enrique, *Manual de Derecho penal*, Temis, Bogotá, pp. 4-5. Se plantea que los "bienes jurídicos" por medio de la protección de valores "ético-sociales" elementales de la acción.

[15] Bacigalupo, Enrique, *Op. cit.*, p 9.

No son una construcción cualquiera. La característica principal es que son indisponibles.

2 LA POSIBILIDAD PROCESAL DE DESARROLLAR LA MEDIACIÓN

La Mediación se la considera uno de los Medios Alternativos de Solución de conflictos o formas no jurisdiccionales de solución de conflictos. En el Derecho procesal se les denomina formas autocompositivas de los conflictos[16] donde se logra obtener el término del conflicto a través de la carga de las partes siendo el mediador un medio y no una solución al conflicto lo que en el área extra-jurídica se denomina "facilitador", es decir, auxilia a la solución de la conflicto pero no dicta sentencia.

Veremos en el transcurso de esta exposición que resulta muy difícil considerar, actualmente, de Derecho, la existencia de un sistema de mediación dentro del proceso penal[17]. Sólo en el Proceso penal, previo respeto de las garantías constitucionales relativos al "debido proceso" del artículo 19 número tres: "nullum crimen, nulla poena sine lege", "nullum crimen, nulla poena sine tribunal", el denominado "proceso debido"[18]. Es decir, la mediación no podría violentar estos y otras normas jurídicas contenidas en tratados internacionales como el Pacto de San José de Costa Rica[19]. Asimismo, al iniciarse un proceso de mediación penal se requiere contar con nuevos paradigmas. Esos paradigmas deben reflejar perspectivas novedosas que en áreas determinadas auxilien al desarrollo de respuestas punitivas preventivas evitando que faltas y simples delitos lleven a la persona a la cárcel pero que, en el contexto de su círculo social lo obliguen a cumplir con una pena cumpliendo ella la función de disuadir

[16] "La composición de la litis puede obtenerse también por medios distintos del proceso civil; puesta como función de éste dicha composición, se entiende que, para denotar tales medios, puede servir el concepto de equivalentes", Carnelutti, Francesco, *Op. cit.*, pp. 109. Por su parte, el autor Chiovenda indica que existen transacciones "homologadas" similares a la mediación que se deben desarrollar dentro de la "amigable composición" en "modos excepcionales" de terminación del juicio, Chiovenda, José, *Principios de Derecho procesal*, Editorial Reus (S.A.), Madrid, 1925, p. 381.

[17] Alfaro, Sergio, *Entrevista*, Pontificia Universidad Católica de Valparaíso, Valparaíso, 2014.

[18] República de Chile, *Constitución Política de la República de Chile*, Santiago de Chile, 2014.

[19] República de Chile, *Pacto de San José de Costa Rica; Convención Interamericana de Derechos humanos*, Diario Oficial 5.01.1991, Santiago de Chile, 1991.

e.ISBN - 978-85-98144-48-1

por escarnio público con la comisión de las mismas u otras faltas así como simples delitos[20].

II.- El proceso penal chileno admite algunas situaciones jurídicas excepcionales en materia de mediación, algunas propiamente consideradas por el Código Procesal Penal en cuanto a posibilidades de término del proceso de manera judicial pero considerada como una forma de término y otras que se han desarrollado por las fiscalías

El Proceso penal chileno (a través de su Código Procesal Penal) ha establecido algunas posibilidades para que se planteen procedimientos, formales e informales, de mediación entre la Fiscalía o el querellante y el formalizado y/o querellado[21]. Este procedimiento merece considerar, someramente, la estructura de los procedimientos penales contemplados en el Código Procesal Penal[22].

II. 1.- Los Procedimientos penales chilenos

En materia procesal penal podemos encontrar los siguientes procedimientos:

a.- El Procedimiento Ordinario Penal

Este procedimiento consta de tres etapas, una de investigación iniciada o por querella o por denuncia o por orden del Ministerio Público que conlleva la posibilidad de la formalización del investigado y la posibilidad, frente a una serie de supuestos jurídico que no analizaremos aquí, de o acusar o declarar el sobreseimiento[23]. Es posible aquí una primera posibilidad de Mediación en las denominadas "acuerdos reparatorios" y la "suspensión provisional del procedimiento", todas denominadas "Salidas

[20] En este sentido miramos al Código penal chileno. En este se distinguen crímenes, simples delitos o faltas. República de Chile, *Código Penal*, Editorial Jurídica de Chile, 2008.

[21] República de Chile, *Código Procesal Penal*, Editorial Jurídica de Chile, Santiago de Chile, 2007, Artículos 61, 70 letra "d" donde se establece expresamente: "d) Escuchar a la víctima antes de solicitar o resolver la suspensión del procedimiento o su terminación por cualquier causa." Con esta parte se cumple uno de los argumentos expuestos. El que el Ministerio Público debe entregar no sólo información sino conocimiento del respectivo posible escenario en caso de suspensión o terminación del juicio. Eso implica incluir los elementos de alguna propuesta hecha en caso que exista la misma pero primariamente no es aquel el objetivo. Asimismo, artículo 69 inciso final indica que en caso que exista un abogado defensor entonces ocurre que debe entregarle la información y, a su vez, el conocimiento, al abogado de la víctima.

[22] Sobre este "paralelismo" o "aplicación práctica" se tratará en otra parte.

[23] Por todos, Carocca, Alex, *Manual Nuevo Procedimiento Penal*, 3ª Edición, Editorial Lexis Nexis, Santiago de Chile, 2005, pp. 115-151.

Alternativas". Los primeros son "Acuerdos entre imputado y víctima cuyo objetivo es reparar los daños provocados a las víctima"[24]. La segunda debe ejecutarse "con el acuerdo del imputado" y es el Juez de Garantía quien decide[25]. Además extinguen la acción penal. Los requisitos para esta forma de "Salida Alternativa" son de una parte que en caso de una sentencia el delito no tuviere una pena superior a tres años de privación de libertad, ausencia de condena del imputado anteriormente por crimen o simple delito, y la ausencia de una "suspensión condicional del procedimiento" en el momento de la comisión del delito[26]. Incluso se establece la presencia del abogado defensor a la audiencia ante el Juez de Garantía como requisito para la efectividad jurídica de la "Salida Alternativa" denominada "Suspensión provisional de Procedimiento". A su vez, el Juez de Garantía podría convertirse en mediador debido a que si el querellante o la víctima asisten a la audiencia donde se discute este tema el juez debe escucharlos[27].

Esto siempre que miremos la Mediación penal desde la perspectiva "del interés preponderante de la víctima en la obtención de la reparación de los daños causados por el delito"[28]. Desgraciadamente la discusión, al menos en Chile, es más compleja en lo que se refiere al Derecho procesal penal, no es una cuestión del tipo de Justicia sino del tipo de Verdad que se quiera obtener y del fundamento del Proceso y del Derecho procesal, si el Derecho de Acción es fundamento de la Justicia o de la Solución de Conflictos[29]. Este artículo no entrará en esta materia porque, como es lógico, nos llevaría más allá de lo que este artículo tiene por objeto, establecer en el Derecho chileno las formas en que en el Proceso penal se plantea la Mediación. La verdad que mucho de la denominada "Justicia Restaurativa"[30] se relaciona con la función de la

[24] República de Chile, *Glosario*, Defensoría penal pública, Santiago de Chile, 2014.
[25] República de Chile, Código Procesal penal, *Op. cit.*, artículo 237 inciso 1.
[26] República de Chile, Código Procesal penal, *Op. cit.*, artículo 237 inciso 1.
[27] República de Chile, Código Procesal penal, *Op. cit.*, artículo 237 inciso 3.
[28] Díaz, Alejandra, *La experiencia de la mediación penal en Chile*, Polit. Crim., Vol. 5, No. 9 (julio 2010), Art. 1, pp. 1-67.
[29] Al respecto, Ferrer, Jordi, *La valoración de la prueba: Verdad de los enunciados probatorios y justificación de la decisión* en Ferrer, Jordi, et. al., Estudios sobre la prueba, Universidad Nacional Autónoma de México, México, pp. 2-3. En Chile, Fuchs, Andrés, *Proceso, prueba y verdad,* Editorial Metropolitana, Santiago de Chile, 2011.
[30] Menkel-Meadow, Carrie, *Restorative Justice: What is it and Does it Work?*, Annu. Rev. Law Soc. Sci. 2007. 3:10.1-19.27. En este movimiento de carácter intelectual el primer objetivo es lograr obtener que actos "muy malos o crímenes (que pueden incluir muchas más clases de actividades que aquellos que han sido descritos legalmente como criminosos) ocurren, sus efectos sobre las víctimas, ofensores, los que se encuentren interesados (como los miembros de la

pena, si es de carácter preventivo o no, cuestión que es posible encontrar en la Biblia o en Kant y que no puede ser tratada aquí. Así lo ha descrito Bacigalupo, entre nosotros, discípulo de Jiménez al decir que: "[l]a tensión entre las ideas vinculadas con la justicia y las referidas a la utilidad social se han dado en distintos modelos de Estado"[31]. Es decir, debemos cuidarnos de nuevas tendencias, muy respetables, frente al requisito de una resolución práctica sin definir previamente, al menos, teorías sobre la Justicia o la solución conflictos en nuestras sociedades porque transformaríamos una discusión no resuelta en un problema sin solución y generando la idea de una solución a los problemas jurídicos y sociales. Una aplicación progresiva de la Mediación, inclusive en algunos ámbitos del procedimiento penal, puede ser oportuna, una aplicación sin observar sus efectos y corregir los efectos negativos, puede traer consecuencias sociales y jurídicas negativas a los fines de Justicia y solución de conflictos[32].

Siguiendo con la idea central la formalización así como los actos procesales ejecutados en dicho procedimiento deben ser controlados por el Ministerio Público y por el Tribunal de Garantía competente, según el territorio. La Etapa Intermedia se inicia con la acusación donde el acusado y el Tribunal de Garantía competentes efectúan una serie de actos procesales a través de sus abogados acerca de las formalidades, oportunidad y licitud de la acusación[33]. El Tribunal de Garantía, tras una audiencia denominada de Etapa Intermedia procede a dictar una resolución titulada por la ley "Auto de Apertura de Juicio Oral". Luego de ello se procede a conocer por un tribunal diferente, el Tribunal de Juicio Oral en lo Penal competente, dicha resolución y se inicia con la lectura de la misma el Juicio Oral para

familia, empleados, o ciudadanos) y la comunidad en general en que ello se encuentra inserto" (traducción mía). Estos "actos malos en las interacciones humanas generan necesidades y responsabilidades para los participantes directos en el acto, así como para la sociedad toda en que estos actos ocurren" (traducción mía).

[31] Bacigalupo, Enrique, *Derecho penal, Parte General*, 2ª Parte, Hammurabi, Buenos Aires, 1999, p. 31 basados en la justicia, la intimidación o amenaza, el riesgo de futuros delitos y la necesidad de evitarlos la prevención mediante prevención. Esta teoría sobre la Justicia Restaurativa sería una mezcla de ellas que se relaciona mucho a la idea de una devolución o negociación por el delito cometido que ponga fin a las consecuencias síquicas y físicas sin un fundamento jurídico y sin saber si tiene o no efectos positivos.

[32] En Brasil, no debemos olvidar, se ha aplicado la Ley 9.099 de 1995 y quizás algunos de sus resultados puedan ser de interés en la materia, cfr., de Araujo Argollo, Eliana, *Juizgados Especiaias Criminais (O real papel do conciliador)*, Universidade Gama Filho, Salvador de Bahía, 2010, pp. 43-49.

[33] Por todos, Carocca, Alex, *Op. cit.*, pp. 193-202, pp. 209-220.

concluir con una sentencia. Existe el Recurso de Nulidad frente a dicha sentencia[34].

b.- Procedimiento abreviado

Este procedimiento corresponde conocerlo al Tribunal de Garantía[35] y se desarrolla desde la formalización (en la investigación) hasta antes de comenzar el Juicio Oral[36] y en la acusación debe hacerse presente la solicitud de que se proceda conforme al "procedimiento abreviado"[37].

Este procedimiento sólo cabe en aquellos casos de hechos que el Ministerio Público, fiscal, solicite al Tribunal de Garantía la imposición de una pena privativa de libertad no superior a cinco años de presidio o reclusión menores en su grado máximo u otras penas de distinta naturaleza, cualquiera sea su entidad o monto, únicas, conjuntas o alternativas[38].

Los antecedentes invocados para la discusión de la decisión (discutida entre la acusadora y la defensa) de un "procedimiento abreviado" no podrán ser considerados en un Juicio Oral[39], donde se considera entrar en una mediación y/o negociación acerca de la acusación y de la pena, los antecedentes son, por tanto, privados y secretos, según la naturaleza del delito de que se trate.

El imputado debe manifestar conocer los hechos materia de la acusación y de los antecedentes en que se fundan aceptarlos expresamente, manifestar su conformidad con el procedimiento.

Razones para una mediación formal (procedimientos) o informal (solución de conflictos)

Las razones jurídicas de una mediación formal podemos dividirlas en dos, en el caso de los procedimientos es que ellos lo permiten, el procedimiento abreviado dice relación con las penas a los delitos, en el caso de otros procedimientos la necesidad de resolver los conflictos en razón de (incluyendo el procedimiento abreviado) la dificultad de la prueba, las posibles repercusiones públicas, y la celeridad (una cuestión económica).

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[34] Por todos, Carocca, Alex, *Op. cit.*, pp. 193-202, pp. 216-229.
[35] República de Chile, *Código Orgánico de Tribunales*, Editorial Jurídica de Chile, 2008, Artículo 14 letra "c".
[36] República de Chile, Código Procesal Penal, *Op. cit.*
[37] República de Chile, Código Procesal Penal, *Op. cit.*, Artículos 68 y 259 letra "h".
[38] República de Chile, Código Procesal Penal, *Op. cit.*, Artículo 406.
[39] República de Chile, Código Procesal Penal, *Op. cit.*, Artículo 335.

e.ISBN - 978-85-98144-48-1

3 LA DIFICULTAD DE LA PRUEBA

Es un dato de toda causa que uno de los problemas más complejos en cualquier procedimiento penal es el de la prueba. La razón se fundamente en contar con elementos que, en general, permitan probar, o sea, lograr, más allá de una "duda razonable"[40] y aplicando las reglas de la sana crítica, un criterio de certeza y un criterio de valoración respectivamente, que la prueba no sólo es veraz sino jurídicamente correcta y, además, efectiva[41].

Lo anterior nos lleva a que podamos indicar que existen hechos que efectivamente han sido probados.

Los filtros relacionados con la prueba sea en el periodo de investigación (la reglamentación a veces demasiado exhaustiva del legislador), en la etapa intermedia (la posibilidad del acusado de oponer excepciones que necesariamente corrigen el procedimiento y por consiguiente la carga de la prueba de manera indirecta o que vienen a controlar que los medios de prueba y los elementos de prueba son perfectamente lícitos o que los mismos son en una cantidad que permita lograr contar o con prueba suficiente y no sobreabundante) o en el Juicio Oral el procedimiento tanto del discurso de apertura como el de clausura con todo el periodo de prueba (donde se controla la misma de manera exhaustiva a través de la interrogación de peritos y testigos, contra-interrogación, y de documentos, elementos de prueba, etc.) hace que, en muchos casos, el Ministerio Público chileno busque una fórmula como el "procedimiento abreviado" o a archivar la causa en los primeros momentos de la investigación[42]. Esto significa el "uso" del procedimiento para solucionar conflicto o satisfacer intereses[43].

En todos estos casos el proceso de convencimiento al Ministerio Público se efectúa por la parte investigada o acusada o por entes externos que ven el procedimiento como una gran pérdida de tiempo. Nos referiremos a ello en un momento. No nos detendremos en la crítica a esta realidad de hecho, baste nombrar al jurista y penalista alemán Claus Roxin que ha

[40] Peña, Sergio, Estudio introductorio en Peña, Sergio, *Jurisprudencia sobre la Duda Razonable* con un *Breve Estudio Preliminar*, Editorial Metropolitana, Santiago, 2014.

[41] Peña, Sergio, *Op. cit.*, p. 15.

[42] En el caso de delitos contra menores se puede mencionar la dificultad de recordar eventos traumáticos, Guzmán, Karen, *Indeterminación temporal fáctica de la acusación, derecho a defensa y hallazgos científicos en la investigación de los procesos de memoria de los niños y niñas víctimas de delitos sexuales*, Revista jurídica del Ministerio Público No 56, Santiago de Chile, p. 133.

[43] No se ha escrito sobre los efectos extrajurídicos de los actos procesales, que se plantean en la realidad social. Sin embargo, es posible observarlos aquí como un "uso" del procedimiento.

indicado respecto de un procedimiento similar de su propio país por las fiscalías del mismo como una Justicia compositiva o de retribución[44], muy parecido al sistema norteamericano donde este asunto se ha reglado desde hace mucho tiempo. Las empresas aseguradoras, por ejemplo, observan con buenos ojos el que se pueda llegar a un acuerdo y así poner término a los juicios pagando el seguro pero, a su vez, castigando al delincuente.

4 LAS POSIBLES "REPERCUSIONES PÚBLICAS"

Un segundo problema es el de las "repercusiones públicas" del procedimiento, particularmente en delitos de "cuello blanco" o en delitos de connotación sexual. Es un dato del actual procedimiento chileno que es extremadamente público en contraposición al antiguo procedimiento inquisitivo vigente hasta 1998. Las causas permiten ser seguidas en televisión "de señal abierta" con lo cual puede llegarse al escarnio público, a la condena anticipada de carácter social e inclusive a la condena anticipada por los tribunales. Nos referiremos a dos casos, el primero denominado el caso "La Polar". Esta multitienda fue atrapada en un procedimiento que según muchos se consideró fraudulento, todavía sometido a juicio, consistente en otorgar créditos a los clientes para que efectuaran compras y, luego, unilateralmente proceder a aumentarles las deudas en razón de intereses y reajustes que se determinaban por la multitienda en virtud que el contrato de crédito permitía tal posibilidad. Una gran cantidad de clientes reclamó al Servicio Nacional de Consumidor el que de deudas ínfimas se les notifico por la multitienda el deber de pagar deudas millonarias. El Servicio Nacional del Consumidor intervino y sancionó a la multitienda pero envió los antecedentes al Ministerio Público y éste descubrió que la empresa ocupaba estas deudas millonarias como fundamento de su petición a los bancos de la plaza de crédito en virtud de la necesidad de efectivo porque estas deudas millonarias no habían sido pagadas. En base a la misma deuda y por medio del contrato de factoring los bancos prestaban dinero sin dejar constancia del mismo porque se les aseguraba el que dicho dinero sería devuelto una vez cobrada la deuda. La deuda era

[44] Roxin, Claus, *Posición jurídica y tareas futuras del Ministerio Público*, en Maier, Julio (Comp.), El ministerio público en el proceso penal, Ad Hoc, Buenos Aires, 1993, pp. 37-60 donde Roxin indica que los fiscales podrían buscar una justicia negociada o convertirse en juez y parte a fin de solucionar el conflicto pero no descubrir o intentar descubrir la verdad.

tan alta que no podría ser pagada y tuvo que ser "repactada". Los ejecutivos de "La Polar" han sido encauzados y esto se hizo público mostrándose las pruebas en televisión, suficientes para formalizarlos y acusarlos pero tal vez insuficientes para condenarlos, es el caso del ejecutivo señor Nicolás Ramírez quien aceptó un procedimiento abreviado y una condena[45]. Una situación similar han vivido algunas universidades en Chile. Los abogados de estos ejecutivos intentan lograr una mediación a fin de no someter a sus clientes a la persecución penal por medio de los procedimientos legales, que, breves, no evitan aparecer en televisión y ser reconocidos luego en la calle o en cualquier lugar e inclusive ser criticados de "viva voz" ellos, su cónyuge, ascendientes o descendientes[46]. Un segundo ámbito donde se ha generado la posibilidad de contar con una mediación es en el caso de delitos "sexuales" particularmente lo que se denomina "abusos deshonestos"[47] por una necesaria descripción "global" del delito que no es una "descripción fáctica de los episodios, eventos, contextos o hechos" por la persona de las víctimas[48]. En ellos los formalizados se ven expuestos al escarnio público, particularmente cuando se trata de menores. En ellos los abogados defensores prefieren contar con un procedimiento de carácter abreviado por medio del juicio correspondiente de carácter abreviado[49]. Ha ocurrido el caso de un ex senador chileno en el cual se planteó el procedimiento abreviado a fin de evitarle el bochorno de ser sometido a Juicio Oral aun cuando la fiscalía no poseía prueba concluyente en su contra pero hubiera significado para su salud y para su honra y la de su familia un efecto devastador.

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[45] En este caso puede confrontarse, El Mercurio, *Caso La Polar*, Martes 25 de noviembre de 2015, <http://www.emol.com/tag/1017/caso-la-polar.html> (25 de noviembre de 2015).

[46] Figueroa, Juan Pablo, Riquelme, Gregorio, Guzmán, Juan, *Cómo lucraron los dueños de la Universidad del Mar*, CIPER, 2012, <http://ciperchile.cl/2012/07/30/las-pruebas-de-como-lucraron-los-duenos-de-la-universidad-del-mar-i/> (25.10.2014). Grau, Nicolás, *La U. del Mar y la generación perdida*, CIPER, Chile, 2012, <http://ciperchile.cl/2012/12/28/la-u-del-mar-y-la-generacion-estafada/> (25.10.2014).

[47] Lleva a la imposibilidad de fijar determinadamente los hechos por los cuales acusa llevando al Ministerio Público a entrar en un proceso de negociación. Valenzuela, Karen, *Op. cit.,* p. 133.

[48] Valenzuela, Karen, *Op. cit.*, p. 134, citando República de Chile, *Fallo RUC No 0900583907-3, RIT No 112-2009*, Tribunal Oral de Puerto Montt, Poder Judicial de Chile, 2009, considerando decimoséptimo.

[49] El Mercurio, *Los hitos claves del agitado Caso Lavandero*, Santiago de Chile, 2005, <http://www.emol.com/noticias/nacional/2005/06/25/186641/los-hitos-claves-del-agitado-caso-lavandero.html> (25.11.2014).

5 LA CELERIDAD

Un tercer ámbito que permite explicar y da pábulo para un proceso mediador es el de la celeridad que requiere la vida comercial en la solución de los asuntos criminales. Un empresario no le importa el que se pierdan especies por robo y a las empresas aseguradoras no les interesan litigios de grandes periodos de tiempo para ellas por más que se haga necesario contar con un procedimiento que salvaguarde las garantías constitucionales chilenas y las de los tratados internacionales de los cuales Chile es parte, por ejemplo, la Convención Interamericana de Derechos Humanos. Un procedimiento clásico en esta materia es al que se somete a las personas jurídicas de Derecho privado con fines o sin fines de lucro, empresas o corporaciones o fundaciones. En estos casos el deseo es evitar el procedimiento por los costos involucrados en el mismo, no sólo la imagen pública sino los costos involucrados a la sanción máxima para la persona jurídica, el cierre de la misma. Los casos ejemplares en esta materia son los ya referidos, el caso de la empresa "La Polar", y el de una serie de universidades que han debido cambiar a sus administradores y han enfrentado una posibilidad de término de sus actividades.

6 EL MEDIADOR

En la Mediación penal, de carácter jurídica aunque no de carácter legal, podemos apuntar, según las circunstancias, al Juez de Garantía, al Ministerio público o a los abogados de las partes según se trate del "procedimiento abreviado" o de las "Salidas Alternativas". A fin de alcanzar un procedimiento abreviado y una solución, desde esta perspectiva, es el Juez de Garantía quien dirige la audiencia entregando información a las partes y aunando voluntades a fin de obtener una definición en cuanto al procedimiento a seguir. En los otros casos, si hay abogados, el Mediador debería ser el Ministerio Público, y así poner fin a la investigación, aunque definiendo la persecución o no del delito, y, si no hay abogado de la víctima, mediar entre el victimario y la victima de acuerdo a la "Salida Alternativa" de que se trate.

III.- Savoir faire, sacar las cuentas, cuanta rebaja de condena se puede obtener en la sentencia y con la buena conducta posterior

Sin embargo, aparece inmediatamente una cuestión compleja: ¿Cómo es que se desarrolla la Mediación penal?

Frente a la ausencia de normas jurídicas admitiendo la Mediación penal aparece la pregunta sobre los procedimientos informales para alcanzar o la sustitución del procedimiento o el término del procedimiento en los estadios iniciales de la investigación. Así podemos mencionar a lo menos una primera posibilidad, la de la solución del conflicto que necesariamente provoca la pregunta acerca de la Justicia en el mismo.

Es decir, la pregunta que se formula es si el fin de los procedimientos penales y de la obligación de persecución penal en razón de un delito es la Justicia y, por consiguiente, una verdad material o, por el contrario sólo una verdad de carácter formal dejando en la duda la calidad de autor, cómplice o encubridor del sujeto a quien se le ha imputado[50]. En este caso miramos a un fin superior, el poner término a los efectos jurídicos y materiales del delito. Suponemos que quien ha sido imputado del mismo habrá reconocido éste permitiendo su juzgamiento pero para reparar el daño a la sociedad y a las personas en su persona física o jurídica, honra, u otro "bien jurídico" puede desarrollarse una Mediación. El procedimiento de Mediación puede tener alguna de las "causas eficientes" anotadas más arribas u otras, se requiere generar confianza entre las partes a fin de desarrollar una "Salida Alternativa" o el "procedimiento abreviado". En este caso necesariamente el Juez de Garantía, el Ministerio público o el abogado habrán de actuar de "mediador" buscando o poner fin al procedimiento o sustituir el mismo según proceda explicando claramente las consecuencias en uno u otro caso. Deberá establecerse por el Mediador el interés de cada parte, de una la víctima (desde una disculpa hasta una reparación permanente o la permanencia en la cárcel) y del victimario (la liberación de responsabilidad penal hasta las disculpas)[51].

Aquí procederemos a hacer una serie de afirmaciones necesarias respecto de las cuales sólo habremos de considerar argumentos de

[50] En este sentido el mismo Ministerio Público de Chile se ha encargado de analizar la "Salida Alternativa" intitulada "Archivo Provisional". En su Plan Estratégico Nacional 2009-2015 uno de los objetivos es descongestionar mejorando continuamente la gestión administrativa y dentro de ello la aplicación del mismo de manera extendida principalmente en materia de "imputado desconocido" cfr. Castillo, Ignacio, Tapia, María, Ursa, María, *Estudio sobre la aplicación de los Archivos Provisionales*, Ministerio Público, Santiago de Chile, 2011, pp. 5-6. Además tienen una serie de ventajas las "Salidas Alternativas", así se apuntan, solución oportuna para la víctima, rehabilitación y reinserción al imputado, ahorro de recursos al Estado, cfr. Quiroz, María, *Modelo chileno 2,* Fletcher Law School, Tufts University, 2014, p. 9, <fletcher.archive.tusm-oit.org>

[51] Cuidando que no se convierta en una suerte de retorno a la "Ley del Talión", un problema siempre presente en este tipo de procedimiento.

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autoridad. Entendemos la verdad material como la búsqueda de justicia efectiva aplicando al sujeto que ha cometido el delito una sanción en base a un procedimiento descrito por la ley y por un acto previamente descrito precisa y determinadamente en la ley misma. Entendemos, de otra parte, la verdad formal como la conclusión del conflicto generado por el acto u omisión descrita por la ley que genera un daño (o un peligro) a un sujeto en cualquiera de sus bienes jurídicos. Lo anterior no es ocioso en cuanto el primero significaría extender el juicio ante un tribunal hasta efectivamente condenar a un sujeto en pruebas afianzadas y relaciones lógicas debidamente construidas a fin de sentenciar y condenar (o absolver) fundadamente. Sabemos, sin embargo, que la realidad sólo permite contar con soluciones parciales donde sólo cabe lograr que la víctima, sus parientes o el Estado cuente con una sentencia limitando en el tiempo al delincuente en su actuar futuro sin saber si cometió o no el delito.

Es producto del actuar del Juez de Garantía, del fiscal del Ministerio Público o del abogado de la parte que es posible lograr alcanzar un resultado que resuelva el conflicto sin contar con todas y cada una de las pruebas. Así:

a.- porque son física o intelectualmente imposibles de obtener dichas pruebas.

b.- El miedo al escarnio público o a la celeridad en el procedimiento lleva y conlleva la necesidad de contar con un procedimiento para dar solución al conflicto alcanzando una verdad formal, la condena, mas no material, a determinación más allá de toda duda razonable que el sujeto es quien cometió el delito. Se ha desarrollado el trabajo del Juez de Garantía, es necesario analizar ahora otros actores.

7 LOS ABOGADOS OPERAN COMO MEDIADORES

En efecto, los mediadores entre las personas que o han sufrido daños desde un punto de vista jurídico o sus familiares y la fiscalía serán los abogados de la parte.

La forma o manera en que debería desarrollarse es a través de conversaciones y comunicación telefónica entre la Fiscalía y el abogado de la parte. Podría plantearse entre el Fiscal como mediador, la víctima o sus familiares y el victimario y sus familiares. Finalmente podría plantearse entre el fiscal y otros actores que pudieran interesarse.

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8 EL FISCAL TIENE LA PRIMERA PALABRA

Sea que se decida por alguna de las fórmulas de las "Salidas Alternativas" o del Procedimiento Abreviado el Ministerio Público, considerando cualquiera de las razones expuestas, no como parte sino como actor, deberá efectuar la evaluación de continuar con el Juicio Ordinario o buscar una fórmula intermedia que sea beneficiosa para éste. No puede olvidar lo siguiente, él no es un juez, deberá considerar las normas jurídicas procesales penales, deberá considerar el control que podría ejercer el Tribunal de Garantía sobre sus actos y los controles administrativos a ser ejercidos sobre él.

Sea que él proponga (lo que apareja una crítica compleja relacionada con los límites de su actuación y la transferencia a una justicia negociada o inclusive amenazante) o que le propongan (en este caso hablamos de recibir una oferta del abogado de la parte querellante o del victimario) siempre habrá de cuidar el principio de legalidad. El Mediador no se encuentra claramente determinado aunque necesariamente debería ser o el abogado o el fiscal. La decisión final, según el tipo de caso sería la víctima o sus descendientes y el victimario.

9 CONCLUSIÓN

Resulta extremadamente relevante considerar que la relación entre la Mediación y el Derecho procesal penal es excepcional. Es más bien una forma de solucionar conflictos paralela y utilizando o usando al procedimiento y sus medios en obtener los beneficios de una solución rápida y eficaz, no necesariamente justa ni completamente satisfactiva pero realista frente al sinnúmero de juicios que enfrenta la judicatura. Se requiere que el principio de legalidad sea respetado porque su destrucción o banalización convierte al sistema judicial en inoperante. Es más, provoca serias dificultades para lograr que la justicia se alcance, sea de carácter formal o material. Las normas jurídicas tienen como fundamento, en muchos casos y esta no es la excepción, evitar el abuso o la idea de solución de conflictos a toda costa sin considerar los fundamentos de tal solución.

De otra parte sólo ciertos "bienes jurídicos" pueden ser dispuestos o mediados, aquellos que no constituyen un valor intrínseco en sí mismo y que tienen una penalidad baja. De otra forma al quedar todo a merced de la

mediación no habría necesidad de jueces y menos de "bienes jurídicos", una opción posible pero compleja para un Estado Social de Derecho.

Si nos encontramos dentro del procedimiento de investigación y luego de la formalización, al observarse la misma se podrá comprender que procederá o no la acusación. Es allí donde el fiscal podrá o no decidir si inicia un cambio de procedimiento y por consiguiente debe entrar en la discusión o con el abogado de la misma o con la víctima y el victimario según el caso. En la mediación informal necesariamente entrará en conversación con víctima y con victimario.

Las causas de la Mediación son múltiples apuntando sólo tres, a saber, insuficiencia probatoria, publicidad, economía (jurídica y financiera).

Los roles de los actores son diferentes, en el caso del Juez de Garantía puede llegarse a la conclusión de sugerir a través de resoluciones y sus efectos prácticos el posible futuro del procedimiento. El Fiscal o el Ministerio Público, dentro del marco legal pueden iniciar contactos y comunicación para decidir una posible modificación del procedimiento o derechamente un acuerdo. En ese caso debe procederse a un proceso de acuerdo con las partes sin abogados o con los abogados. En este punto podría presentarse la generación de un procedimiento debidamente considerado por el legislador chileno que actualmente no existe pero nos generaría, a lo menos, una discusión respecto a la imparcialidad del Mediador debido a que éste es a su vez el ente acusador.

Finalmente es bueno recordar que una suerte de "Justicia Retributiva" sólo se entiende en el caso de delitos contra la propiedad y no todos dichos delitos sino ciertos y determinados delitos. Eso si bien se plantea así no puede dar pábulo al ente investigador, policía o carabineros, a ejecutar actividad alguna relacionada con la solución de conflictos a través de la Mediación. La primera razón es el peligro de involucrarse en actividades que podrían ser contrarias a la ley, segunda, la posibilidad de desincentivar la persecución penal cuando la misma es la única manera de obtener sanción y compensación en el caso de delitos contra la propiedad o contra otros bienes jurídicos. Todas estas instituciones han buscado disminuir el poder omnímodo del Estado y de otra parte permitir a las personas la seguridad que sus derechos no serán vulnerados por actos de autoridad con lo cual nos enfrentaríamos a un problema práctico, cambiaríamos a un Leviatán por pequeños Leviatanes o padrinos que nos llevarían siempre a una solución que en determinados lugares se tomarían como ofertas "que no podrán rechazar".

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e.ISBN - 978-85-98144-48-1

PROCEDURAL FAIRNESS BEYOND THE COURTROOM: ALTERNATIVE DISPUTE RESOLUTION AND ARTICLE 6(1) OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

by
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Keywords: *Human Rights; European Convention on Human Rights Article 6(1); Alternative Dispute Resolution*

Summary
Article 6(1) Procedural Requirements: The European Convention on Human Rights contains procedural safeguards, which ensure that individuals in all Member States shall have access to a tribunal established by law for the determination of civil rights and obligations and that this tribunal will be impartial, independent, and will provide a public hearing.

Waiver: The European Court of Human Rights (ECtHR) has held that Article 6(1) does not prevent parties from waiving the right to a court (in favour of ADR) in individual cases through clear and unequivocal statements or actions. This waiver can include the right to a public hearing, the right to judicial review, and the right to challenge the impartiality of the decision-maker.

Alternative Dispute Resolution Processes in Compliance with Article 6(1): The European Convention does not require that all Alternative Dispute Resolution (ADR) processes contain identical procedures to that of a formal court. In cases where ADR is compulsory or where there is no possibility for judicial review, however, the ADR mechanism must comply with the basic procedural safeguards contained in Article 6(1), such as the opportunity for an oral hearing.

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e.ISBN - 978-85-98144-48-1

1 INTRODUCTION

At first glance, the private processes of alternative dispute resolution (ADR) seem far removed from the purview of a supra-national human rights court like the European Court of Human Rights (ECtHR). ADR is primarily a mechanism by which private parties resolve conflicts without recourse to the formal legal system. Conversely, the European Court of Human Rights, in Strasbourg, France, hears cases against its 47 Member States regarding violations of the European Convention on Human Rights. The ECtHR is not an appellate court for all of Europe, but rather it reviews individual cases against national governments for compatibility with the principles of the Convention. Furthermore, although the Court hears individual applications, which arise out of conflicts at the national level, it will only declare applications admissible if the applicant has already exhausted all available domestic remedies.[3]

Questions relating to ADR, then, only reach the Strasbourg Court through applications against Member States in which the applicant[4] claims that the judicial review or regulation of ADR processes at the national level violated the Convention. The ECtHR does not review the ADR decision as such, but instead considers whether the whole process available to the applicant at the national level is in accordance with Article 6 of the European Convention on Human Rights. Article 6(1) ensures that an individual is afforded fundamental procedural safeguards when his or her civil rights are at stake. Specifically, the Article states in relevant part that: "In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[5]"

Article 6 protections apply beyond ensuring fairness once a case is initiated; it also ensures access to courts in the first place. In one of its

[3] Article 35§1, European Convention on Human Rights.

[4] An applicant can be a natural person or a corporation.

[5] The full text of Article 6(1) reads: "In determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publically, but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." Article 6§1, European Convention on Human Rights.

earliest cases, the Court held that access to courts is an inherent principle within Article 6. Specifically, the Court held that, "[t]he principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 must be read in the light of these principles.[6]"

Alternative dispute resolution has become an increasingly popular method for cheaply and efficiently adjudicating claims that might otherwise go through the civil court system. There are many forms of ADR, but some of the most important types include: mediation, reconciliation, arbitration, ombudsman offices, and mediation-arbitration. The different mechanisms vary based on the type of decision-maker, the scope and binding nature of the decision, the role of parties and lawyers, and the extent to which parties must mutually agree upon the results.[7] The Strasbourg Court's focus to date has been primarily on arbitration, with some implications for mediation.

ADR methods vary considerably, but they can all be distinguished from a formal trial by their procedures. Because ADR is not bound by the strict dictates of civil procedure, decisions can be made faster and in closer conformity to the needs and wishes of the parties. However the absence of formal civil court procedures carries its own risks. ADR may lack processes that protect litigants from unfair surprise, incomplete information, biased judges, and unjust results.

The European Court of Human Rights is, therefore, confronted with a unique challenge when applicants contest ADR decisions on the grounds that Article 6 has been violated. On the one hand, ADR provides individuals with considerable freedom to resolve issues without the costly and lengthy intervention of a formal court. Given serious backlogs in some countries' civil courts, and the expertise of ADR specialists such as arbitrators, ADR in some form is certainly desirable. ADR and formal courts have different procedures in part because they serve distinct functions, "The administration of justice demands predictability and that equal cases should be treated equally (the principle of equality). This accounts for the limitation in what it is possible to achieve in a court of law. In mediation, on the other hand, no obstacles are met in order to accommodate a solution

[6] *Golder v. the United Kingdom*, 21 February 1975, § 35, Series A no. 18.

[7] See generally, *Alternative Dispute Resolution* [online]. 3rd ed. § 2:1. American Law Reports. Available from: Thomson Reuters Westlaw.

for the individual case.[8]" The Strasbourg Court respects that ADR draws its justification from values outside those of the traditional justice system. On the other hand, however, the Court has a responsibility to ensure that Member States respect Article 6 rights.

To date, the ECtHR has intervened infrequently in ADR cases. The Strasbourg Court's role is not to review the outcome of the ADR decision. Rather, the Court reviews the process by which an individual's civil rights and obligations were considered by the ADR decision-maker, as well as the mechanisms available at the national level to oversee this process. As the Commission[9] stated in an early arbitration case, "insofar as arbitration is based on agreements between the parties to the dispute, it is a natural consequence of their right to regulate their mutual relations as they see fit. From a more general perspective, arbitration procedures can also be said to pursue the legitimate aim of encouraging non-judicial settlements and of relieving the courts of an excessive burden of cases.[10]"

In some ways, ADR is antithetical to Article 6. It is often secret, there may not be a hearing or reasons given for the decision, the decision-makers may arguably have a personal or professional stake in the outcome. In the context of a national legal system, such factors would be deeply troubling. In the ADR context, however, they may be highly desirable. Individuals often prefer to waive their rights to a full-blown trial in favour of a cheaper, faster, and more discrete method. Specialists or members of a profession may also prefer to self-regulate, both to maintain the dignity of the profession and also because accurate determinations require expertise outside the purview of generalist judges. As one commentator argued, because ADR serves the individual interests of the parties, decisions do not need rational justifications or applicability as broader rules: "ADR does not make any claim to have the functions said to be possessed by the administration of justice – it is not a question of the alternative administration of justice but an alternative to the administration of justice.[11]" However, it is also true

[8] Bengt LINDELL. Alternative Dispute Resolution and the Administration of Justice – Basic Principles. *Scandinavian Studies in Law* [online]. No. 51, 2007 [cited 10 October 2014]. Available from: http://www.scandinavianlaw.se/pdf/51-14.pdf, p. 317.

[9] Prior to 1998, the European Court of Human Rights was divided into two parts: the Court and the Commission on Human Rights. The Commission provided a filtering function for applications before they reached the Court. The Commission issued many important decisions, whose principles are still relevant to the current Court's jurisprudence.

[10] *Axelsson v. Sweden*, no. 11960/86, Commission decision of 13 July 1990.

[11] LINDELL, cited above, p. 331.

that, "A self-regulatory approach works because private systems will have to meet basic standards of justice if they want their users to have faith in them. Indeed disputants will not opt for alternatives to the court if they are not confident that the system is fair.[12]"

Assuming, therefore, that the Strasbourg Court should honour the individual (or the state's) preference for a privatised process, at what point must the Court intervene? In principle, there is nothing in Article 6 which prohibits ADR (particularly arbitration, which the Court has dealt with the most frequently). As the Court has repeatedly affirmed: "For the purposes of Article 6 para. 1 (art. 6-1) a tribunal need not be a court of law integrated within the standard judicial machinery. It may . . . be set up to deal with a specific subject matter which can be appropriately administered outside the ordinary court system.[13]"

Nevertheless, the Court has not abdicated all responsibility for reviewing fundamental fairness, even in ADR processes. Rather than taking a strict view on ADR, the Court balances competing interests and often finds that although the ADR process hardly resembles the trial process originally envisioned in Article 6, that a fair balance has been struck. Although Article 6 rights are some of the most frequently applied and most important rights contained in the Convention, when it comes to ADR, the Court has left some space for creative alternatives. The Court does, however, provide guidelines that can help clarify the points at which Article 6 and ADR conflict. When it comes to determining whether an ADR decision is compatible with Article 6, the Court considers a series of questions:

Does the controversy involve a civil right or obligation as understood by the Court?

Did the applicant voluntarily waive his or her right to access a court in favour of ADR?

If the waiver was voluntary, were there safeguards in place to protect against serious breaches of public policy?

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[12] Susan SCHIAVETTA. The Relationship Between e-ADR and Article 6 of the European Convention of Human Rights pursuant to the Case Law of the European Court of Human Rights, *The Journal of Information, Law and Technology (JILT)* [online]. Vol. 1, 2004 (1). [cited 10 October 2014]. Available from: <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_1/schiavetta/>.

[13] *Rolf Gustafson v. Sweden*, 1 July 1997, § 45, Reports of Judgments and Decisions 1997 IV. See also, *Suda v. the Czech Republic*, no. 1643/06, § 48, 28 October 2010.

e.ISBN - 978-85-98144-48-1

If the ADR process was compulsory, what was the policy reason for it? Did the Member State strike a fair balance between the policy interest and the individual's rights?

Is there an opportunity for full judicial review?

If not, what is the scope of judicial review?

If there is less than full judicial review, does the ADR process provide adequate Article 6 protections? Is there a process for ensuring that the decision-makers are independent and impartial? Is there the option of a public hearing? Do the decision-makers provide reasons for their decisions?

This article will address each question in turn, highlighting key European Court of Human Rights case law and exposing areas for further development. First, we examine some ADR options available in the Council of Europe Member States and the ways in which national legal systems respond to ADR. Next, we will analyse the Strasbourg Court's jurisprudence on issues of waiver, judicial review, and ADR processes. Finally, we explore the intersection between ADR, Article 6, and the rest of the European Convention on Human Rights; highlighting key questions for future ADR cases.

2 ADR AND THE MEMBER STATES

Member states vary widely on ADR possibilities. Some have numerous private dispute resolution mechanisms, such as arbitration and mediation. Arbitration tribunals sometimes decide disputes between investors, shareholders, and parties to multi-million euro contracts. Mediation might occur as couples divorce; as a mechanism for dividing assets or child custody without the adversarial trappings of the justice system. Specialised tribunals decide questions about professional athletes, doctors, and lawyers, as well as the governance of religious communities.

Member states regulate ADR differently. Some countries have become global centres for arbitration or specialised dispute resolution. These countries provide a welcoming home for private tribunals, which operate both within and outside of state regulation. Other countries are more wary of allowing even consenting parties to remove their disputes from the formal legal system. In Sweden, one scholar posited that, "The private administration of justice, like privatisation on the whole, has been considered by the Social Democrats as presenting

a threat to the welfare state.[14]" Some countries also exempt certain subjects from the domain of ADR, for example, in France and Germany arbitration is not permitted in labour disputes (outside of the collective bargaining process), even in cases where the contract includes an arbitration clause.[15]

Member states also approach the relationship between ADR and courts differently. For example, countries have different measures for allowing judicial review or enforcement of ADR judgments. Statues that define the jurisdiction of courts over ADR judgments contain a range of options for courts.[16] In some cases, there might be the opportunity for nearly full judicial review, while in other cases national courts are limited to addressing only constitutional questions or issues of public order. In an early case regarding professional review boards, the Court noted that in Belgium, although "the [national] court will have before it the complete case-file . . . The [Belgian] court does not have jurisdiction to rectify factual errors on the part of the Appeals Councils or to examine whether the sanction is proportionate to the fault.[17]"

In general, there are purely private types of ADR, but there are also mechanisms for court-enforced mediation or "statutory" arbitration. Contractual ADR relies upon the consent and volition of the parties. By contrast, statutory ADR is state-mandated and often run through state institutions. For example, there may be a law requiring parties to attempt court-run mediation and only in the event that the parties are unable to reach a decision, can they bring the case into court. In the United Kingdom, the Ministry of Justice states that, "People applying to the Family Court

[14] LINDELL, cited above, p. 339

[15] See, PROSKAUER. *International Trends in Employment Dispute Resolution – Counsel's Perspectives*, remarks delivered at the *Worlds of Work: Employment Dispute Resolution Systems Across the Globe Conference* Hosted by St. John's University School of Law and Fitzwilliam College, Cambridge University, July 21 2011, available from: http://www.proskauer.com/files/Event/f4ce52c8-78cb-4634-993f-6a188b827e63/Presentation/EventAttachment/18218ba8-fba8-4d9d-85e7-717a66791533/Agenda.pdf, p. 3.

[16] A very clear example of how national legal systems regulate the scope of judicial review can be found in the Swiss Code, which states that in matters of international arbitration, parties shall have recourse to national courts in limited circumstances, particularly when the fundamental protections of due process have been violated or when the decision is contrary to public order. *Swiss Statute Governing Private International Law*. Article 190. Available from: http://www.admin.ch/opc/fr/classified-compilation/19870312/index.html.

[17] *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, § 33, Series A no. 43.

to resolve disputes over children or finances, *legally need to prove they've considered mediation first*.[18]"

Thus, the ECtHR confronts a diverse set of private and public mechanisms for dispute resolution. The Court must decide when and how to intervene to ensure that Article 6 rights are respected, while at the same time allowing for experimentation and growth of positive alternatives to litigation. As the Court explained in *Le Compte*, "Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies and, a fortiori, of judicial bodies which do not satisfy the said requirements [of Article 6] in every respect; the legal tradition of many member States of the Council of Europe may be invoked in support of such a system.[19]"

The Strasbourg Court has decided only a small number of ADR cases, most of which have dealt with arbitration. Of course, because the defending party in an ECHR case is always a Member State, the Strasbourg Court does not directly review the ADR process as such. Rather, it reviews the way in which the Member State ensures that ADR decisions (or the possibility for judicial review) conform to fundamental fairness.

There are several possible explanations as to why, if ADR is so prevalent in Europe, that there have not been more cases. One possibility is that the Court has not been particularly open to finding violations in ADR cases; preferring to leave a wide margin of appreciation for Member States to deal with private alternatives to court as each nation sees fit. Another explanation is that few applicants with complaints about ADR exhaust all domestic remedies. If an individual chooses ADR in order to reduce the time, cost, and publicity of a public trial, they are unlikely to maintain the case through the full national legal system. Perhaps a third explanation is that individuals are satisfied with ADR judgments. Individuals may contract for specific ADR procedures that are uniquely tailored to their interests. Then, even a losing party might be content with the process.

In all likelihood, each of the above factors explains a part of the whole picture of ADR in Europe. As processes become increasingly popular and institutionalised, perhaps the Court will take a larger role

[18] *Mediation and alternatives to court*. Ministry of Justice of the United Kingdom, 4 June 2014 [viewed 10 October 2014]. Available from: https://www.justice.gov.uk/courts/mediation (emphasis added).

[19] *Le Compte*, cited above, § 51.

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in ensuring that ADR conforms to Article 6. On the other hand, more formal ADR system may more closely resemble courts and, therefore, pose fewer Article 6 concerns.

3 CIVIL RIGHTS

ADR provides a private alternative to public court. In this sense "private" can entail both a confidential process and a process devoid of state intervention. If the state does not intervene, the obvious next question is how Article 6 can apply at all. Governments occasionally, but infrequently, create ADR tribunals. More often, however, states determine the scope of judicial review. Furthermore, parties in ADR processes activate the courts when they appeal the ADR decision or when they seek assistance from the state's powerful enforcement mechanisms. Even if the Member State is implicated, however, in order for Article 6 to apply, the issue must concern an individual's civil rights or obligations.

The Court has interpreted "civil rights and obligations" broadly, finding it to be an autonomous concept, particularly when pecuniary interests are at stake.[20] Although the Court takes into account national definitions of civil rights, the national distinction may not be dispositive. In particular, the Court has held that "Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right - and not its legal classification - under the domestic law of the State concerned.[21]" The Grand Chamber has clarified that, in principle, "merely showing that a dispute is "pecuniary" in nature is not in itself sufficient to attract the applicability of Article 6 § 1 under its 'civil' head.[22]"

In the ADR context, however, the Court has labelled interests as "civil rights" even in a case that challenged arbitration clauses in government contracts, which were regulated by specific legislation. There, the Court stated that, "the applicants' right under the arbitration award was 'pecuniary' in nature, as had been their claim for damages allowed by the arbitration court. Their right to recover the sums awarded by the

[20] See e.g., *Le Compte*, cited above, §§ 44-51.
[21] *König v. Germany*, 28 June 1978, §89, Series A no. 27.
[22] *Ferrazzini v. Italy* [GC], no. 44759/98, § 25, ECHR 2001VII.

arbitration court was therefore a 'civil right' within the meaning of Article 6.[23]" Indeed, one commentator has even claimed that, "More often than not the subject matter of a case involving a voluntary ADR scheme will concern the determination of civil rights and obligations… the ability to recover any sums awarded is a civil right, and where court proceedings are launched to set aside or enforce such an award, the outcome will be determinative of that right.[24]"

4 WAIVER

Individuals waive the right to a tribunal every day through settlements, plea bargaining, paying a fine rather than contesting it, and (of course) by choosing not to bring a case in the first place. We would not wish to live in a world in which every dispute was forced through the formal judicial system. Nevertheless, waiver must be interrogated. First, a person can only waiver his or her rights if the waiver is voluntary. Therefore, courts must have a mechanism for determining what constitutes voluntariness. Second, waiver assumes that the right to a tribunal is a private right, one that benefits the rights-holder, not the community as a whole. If a competent person prefers to use ADR, rather than a court, then there is no reason to prevent them from so doing. However, the public hearing and reason-giving associated with the formal legal system may be public goods, which benefit the community as well as the individual participants. If that is the case, then waiver may not always be permissible, even when voluntary.

The first element – was the waiver voluntary? – although complicated as a matter of human psychology, is an inquiry well-known in the legal world. The Court has held for many years that a person *may* waive their right to adjudication by a court, including the right to a public hearing.[25]

[23] *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, § 40, Series A no. 301B.

[24] SCHIAVETTA, cited above.

[25] As *Le Compte*, cited above, suggests, "neither the letter nor the spirit of Article 6 par. 1 (art. 6-1) would have prevented [the applicants] from waiving this right [to a public hearing] of their own free will, whether expressly or tacitly; conducting disciplinary proceedings of this kind in private does not contravene the Convention, provided that the person concerned consents. (§59)"

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Therefore, the question becomes whether the applicant has *in fact* waived his or her rights. The waiver principle was firmly established in *Deweer v. Belgium*. In *Deweer*, the applicant was a shop owner who has been fined by the Belgian authorities. He was given the opportunity to pay a smaller fine and have the matter closed or to challenge the grounds for the punishment and risk much more serious consequences if he lost (not to mention that his shop would remain closed for the duration of the legal challenge). The applicant opted to pay the fine, but argued that he could not be compelled to give up his right to a tribunal though such a method. The Commission and the Court responded by articulating the standard which has subsequently governed for decades:

In the Contracting States' domestic legal systems a waiver of this kind is frequently encountered both in civil matters, notably in the shape of arbitration clauses in contracts, and in criminal matters in the shape, inter alia, of fines paid by way of composition. The waiver, which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the Convention…[26]

Because waiver itself does not violate the Convention, applicants are more likely to claim that the waiver was not truly voluntary. The Court looks for an unequivocal waiver. The Court has addressed waiver piece-by-piece; considering waiver of a public hearing, waiver of further judicial review, and waiver of impartiality separately. The framework that the Court uses, however, was set out in *Suovaniemi*:

The Court considers that the Contracting States enjoy considerable discretion in regulating the question on which grounds an arbitral award should be quashed, since the quashing of an already rendered award will often mean that a long and costly arbitral procedure will become useless and that considerable work and expense must be invested in new proceedings . . . considering that throughout the arbitration the applicants were represented by counsel, the waiver was accompanied by *sufficient guarantees commensurate to its importance*. The Court furthermore notes that in the proceedings before the national courts the applicants had ample opportunity to advance their arguments, inter alia, concerning the circumstances in which the waiver took place during the arbitration proceedings. . . . the Court comes to the conclusion that in the circumstances of the present case concerning arbitral proceedings the applicants' waiver of their right to an

[26] *Deweer v. Belgium*, 27 February 1980, § 49, Series A no. 35.

e.ISBN - 978-85-98144-48-1

impartial judge should be regarded as effective for Convention purposes. (emphasis added)[27]

The Court will certainly hold applicants to the terms of contracts which they drafted. Regret after the fact is insufficient to overturn an ADR determination, as the Court held, "It is true that no appeal lay against the arbitration tribunal's decision, but it was the applicant company itself … which chose to insert such a clause in the concession contract. There is nothing to prevent an applicant from waiving certain rights, provided that such a waiver is, as in the instant case, lawful and unequivocal.[28]" Even when there is a contractual agreement, however, the Court may find that there is insufficient evidence that the applicant specifically waived his right to access a court of law, in lieu of arbitration. In *Suda v. the Czech Republic*, for example, the Court found that although the shareholder agreement contained an arbitration clause, the rights of minority shareholders were insufficiently protected particularly because they did not have the opportunity to contest the arbitration decision, which violated Article 6(1).[29]

One question that the Court has not yet clearly answered is whether a person who signs a contract with an ADR clause can be said to voluntarily waive the right to a court if the only way to practice his or her profession is to agree to ADR. In *Axelsson v. Sweden*, the Commission found that an arbitration agreement, which was required in order to run a taxi service in a particular city, did not violate Article 6(1) and was not compulsory.[30] Mandatory professional review boards, however, are subject to Article 6(1).[31] However, at least one case has been communicated, but has not yet been decided, which asks whether Article 6(1) applies directly where

[27] *Suovaneimi v. Finland* (dec.), no, 31737/96, 23 February 1999.

[28] *Transado-Transportes Fluviais do Sado, S.S. v. Portugal* (dec.), no. 35943/02, 16 December 2003.

[29] The case, which is only in French, states the following : « Pour éviter un déséquilibre tel qu'il aboutirait à dépouiller arbitrairement et injustement une personne au profit d'une autre, la Cour estime qu'il convient d'offrir aux actionnaires minoritaires des moyens de défense appropriés. Or, obliger le requérant en l'espèce à porter sa contestation de nature patrimoniale devant les arbitres ne remplissant pas les garanties fondamentales de l'article 6 § 1, garanties auxquelles l'intéressé n'avait pas renoncées, emporte selon la Cour violation de son droit à un tribunal. » *Suda v. the Czech Republic*, no. 1643/06, § 55, 28 October 2010.

[30] In *Axelsson*, cited above, the Commission stated that: "in the present case the Swedish courts found that the applicants were bound by the arbitration clause, which was part of the agreement which they had entered into with MTEA. In these circumstances, the Commission finds that the applicants must be regarded as having themselves renounced a court procedure."

[31] See, *Le Compte*, cited above.

participation in professional sports require adherence to arbitration in lieu of courts.[32]

In contrast to the "waiver" analysis, if the ADR procedure is compulsory, then the Court will apply a different test. In general, compulsory arbitration must comply with Article 6(1). In some cases, however, it seems that the Court will allow mandatory ADR, even when it lacks Article 6 protections, if there is an overwhelming policy reason to dispose of all claims in a particular area through a single process. For example, an early arbitration case involved the compensation scheme associated with the UK's nationalization of key industries during the 1970s. Shareholders in industries that were nationalised went before an arbitration tribunal to have their compensation award calculated. Individual shareholders, particularly minority shareholders, did not have the right to directly access the tribunal, as awards for each corporation were determined together. Although there were few procedural safeguards, and the Member State acknowledged that the method for calculating awards lead to some significant under-payments, the Court held that:

Notwithstanding this bar on individual access, the Court does not consider that in the particular circumstances the very essence of Sir William Lithgow's right to a court was impaired.

The 1977 Act established a collective system for the settlement of disputes concerning compensation, in that the parties to proceedings before the Arbitration Tribunal would be the Secretary of State for Industry on the one hand and the Stockholders' Representative on the other.[33]

5 PUBLIC POLICY

Even when an individual has waived his or her Article 6 rights, the Court may nevertheless find that Article 6 has been violated. This implies that there is more to Article 6 than simply protecting an individual litigant – for example because publicity and reason-giving have repercussions for the public as a whole or because the Court wants to be certain that states regulate ADR to some extent. Even if every individual would choose to have his or her dispute dealt with confidentially and swiftly, such a system could detract

[32] See, *Mutu v. Switzerland* (communicated), no. 40575/10, 12 February 2013.
[33] *Lithgow and Others v. the United Kingdom*, 8 July 1986, § 196, Series A no. 102.

from the clarity, equality, and certainty of the legal system as a whole. For example, although there was no violation in the case, the Court did state that:

The applicant company had voluntarily entered into an arbitration agreement and thereby renounced its right to have its civil rights determined in court proceedings for the conduct of which the State is responsible under the Convention.

This does not mean, however, that the respondent State's responsibility is completely excluded as the arbitration award had to be recognised by the German courts and be given executory effect by them. The courts thereby exercised a certain control and guarantee as to the fairness and correctness of the arbitration proceedings which they considered to have been carried out in conformity with fundamental rights and in particular with the right of the applicant company to be heard.

There is no doubt that a voluntary waiver of court proceedings in favour of arbitration is in principle acceptable from the point of view of Article 6 . . . Even so, such a waiver should not necessarily be considered to amount to a waiver of all the rights under Article 6. . . . an unequivocal waiver of Convention rights is valid only insofar as such waiver is "permissible". Waiver may be permissible with regard to certain rights but not with regard to certain others. A distinction may have to be made even between different rights guaranteed by Article 6.[34]

In other cases, the Court finds that states have overriding policy reasons to require ADR and to enforce the judgments. Such issues arise when large numbers of litigants (such as shareholders) have a similar stake in one legal question. The Court understands full well that sometime efficiency protects justice better than a full formal process would. Considering the number of "unreasonable delay" cases that the Court hears regarding backlogs in national legal systems, it would be absurd for the Court not to acknowledge the value of streamlined, time-saving processes. For example, with regard to decisions taken by an administrative body without full judicial review, the Court held that, "Regard being had to the respect which must be accorded to decisions taken by the administrative authorities on grounds of expediency and to the nature of the complaints made by the Zumtobel partnership, the review by the Administrative Court accordingly, in this instance, fulfilled the requirements of Article 6 para. 1.[35]

[34] *Suovaneimi,* cited above.
[35] *Zumtobel v. Austria*, 21 September 1993, § 32, Series A no. 268 A.

6 JUDICIAL REVIEW

When parties can appeal ADR judgments in national courts, then the underlying ADR process need not comply with Article 6. However, full judicial review (including de novo review of the facts) would defeat much of the purpose of having an alternative process. Is it the case that, "Not only must courts meet the basic standards of justice themselves, but they must guarantee the fairness and correctness by refusing to enforce awards where the procedure leading to the award had not met the basic procedural guarantees…[36]"? In other words, to what extent must national legal systems review and police ADR?

Although most Member States provide some limited forms of judicial review, they do not provide full review of ADR judgments. As such, the Court must define how narrow the possible scope of judicial review needs to be before the ADR process itself must comply with Article 6. Put differently, the Court reviews the whole available process – from the initial ADR decision to the final possible appeal – to determine whether the applicant has had the opportunity for a fair hearing of his or her civil rights. As one scholar described, the Court asks:

Firstly, does the fact that states confirm and enforce arbitral awards in setting-aside and enforcement proceedings, respectively, mean that they acknowledge and adopt the award and the process that led to it as their own? Secondly, and given that the previous question is answered in the affirmative, do states have an obligation to provide remedies so that Article 6 (1) rights can be given effect to or can states be held responsible only when existing setting-aside or enforcement proceedings fail to ensure that arbitral proceedings and awards meet the standards of Article 6 (1)?[37]

Like with other aspects of ADR, judicial review can be waived by parties, if it is done in a clear and unequivocal manner. The Court resists finding waiver by implication, although it will do so, particularly when the applicant did not object or appeal the ADR determination at the time of the initial determination. For example, the Court will dismiss applications as inadmissible if the applicant failed to challenge the ADR process at the

[36] SCHIAVETTA, cited above.

[37] Fredrik RINGQUIST. *Do Procedural Human Rights Requirements Apply to Arbitration – a Study of Article 6 (1) of the European Convention on Human Rights and its Bearing upon Arbitration*. Master's Thesis, University of Lund Faculty of Law, 2005. p.47.

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time of the initial case. In that way, the Court weeds out applicants whose real issue is with the outcome of their case, not with the process by which the decision was made.[38]

The Court's inquiry into the scope of judicial review was laid out clearly in the early Commission decision of *Bremelid v. Sweden*. There, the applicants challenged that fact that, "under Swedish legislation, an arbitration award cannot be challenged before the ordinary courts unless there is proof of an obvious procedural defect or bias on the part of an arbitrator.[39]" The Commission responded by describing the two-step inquiry for applying Article 6(1) to the judicial review of ADR decisions:

In the present case, the Commission is required to examine whether the arbitrators . . . constituted a tribunal within the meaning of Article 6(1), whether they offered sufficient guarantees of independence and impartiality, and whether their proceedings were fair and public, as required by that Article. If the answer to any of these questions should be negative, it should then examine whether recourse to a court provided for in Article 21 of the Swedish Arbitration Act, despite its limited character, permits it to be concluded that the applicants were duly afforded the guarantees referred to in Article 6(1).[40]

The Court must, therefore, decide whether the scope of judicial review is sufficient, such that the ADR process itself need not comply with Article 6. For example, it will inquire into whether the national courts can review the facts of the case, or just questions of law. Furthermore, the Court will generally require that at least one level of review includes an oral hearing.[41] However, de novo review is not obligatory. In 1996, the Commission articulated the position which has more or less been upheld since that time:

[A]ccount must be taken not only of the arbitration agreement between the parties and the nature of the private arbitration proceedings, but also of the legislative framework providing for such proceedings in order to determine whether the domestic courts retained some measure

[38] For example, in *Hedland v. Sweden*, no. 24118/94, Commission decision 9 April 1997, the Commission declared the case inadmissible because the applicant had not sought judicial review of the arbitration proceeding at the time that his case was first decided by the arbitration tribunal.

[39] *Bramelid v. Sweden*, no. 8588/79, Commission decision of 12 October 1982.

[40] *Id.*

[41] See, *Le Compte,* cited above.

of control of the arbitration proceedings and whether this control has been properly exercised in the concrete case...

The Commission observes that the grounds on which arbitral awards may be challenged before national courts differ among the Contracting States and considers that it cannot be required under the Convention that national courts must ensure that arbitral proceedings have been in conformity with Article 6 (Art. 6) of the Convention. In some respects - in particular as regards publicity - it is clear that arbitral proceedings are often not even intended to be in conformity with Article 6 (Art. 6), and the arbitration agreement entails a renunciation of the full application of that Article. The Commission therefore considers that an arbitral award does not necessarily have to be quashed because the parties have not enjoyed all the guarantees of Article 6 (Art. 6), but each Contracting State may in principle decide itself on which grounds an arbitral award should be quashed.[42]

Put differently, the Strasbourg Court does not require that all ADR processes conform to Article 6(1) or that all national legal system provide full review of ADR decisions.[43] Rather, it seems that Member States must have some form of review over ADR – for cases of grave procedural irregularity or to interrogate the voluntariness of a particular waiver – but that the Member States have wide discretion regarding the scope of review.

7 ADR PROCESSES

If the Court determines that the ADR process taken alone must conform to Article 6's procedural requirements (either because it is compulsory or because it is non-reviewable), then what processes must the ADR system provide? Of course, ADR is private and the ECtHR cannot

[42] *Nordström-Janzon and Nordström-Lehtinen v. the Netherlands*, no. 28101/95, Commission decision of 27 November 1996.

[43] In particular, the Court has long held that it will defer to national determinations regarding the admissibility of evidence, as the Grand Chamber has stated: "While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law … It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible." *Jalloh v. Germany* [GC], no. 54810/00, §94-95, ECHR 2006IX.

regulate it directly. Rather, the question for the Court is: under what circumstances may a Member State enforce or uphold a final ADR decision without reviewing the judgment in its own courts? Put differently, for the Member State "responsibility occurs as a result of a state's failure to provide remedies in state courts against such violations by arbitral tribunals, or, when such remedies exist, the state courts fail to sanction violations.[44]"

Article 6 contains a number of clear requirements: determinations of civil rights and obligations must be fair and public, they must be made by a tribunal established by law, the decision-makers must be independent and impartial, and the decision must be made without unreasonable delay. The most important of these requirements in the ADR context are the public hearing, the impartial and independent decision-maker, and the overarching general concept of fairness.[45]

However, the Court has found that dispute resolution processes that do not conform to the procedures of a full trial may nevertheless satisfy Article 6. In *Rolf Gustafson v. Sweden*, the Court found that "While it is true that the decisions reached by the Board were final and not subject to appeal either to a higher administrative authority or to a court of law, it is to be noted from the above considerations that the Board complied for the purposes at hand with the requirements which Article 6 para. 1 (art. 6-1) prescribes in respect of a tribunal.[46]" Those considerations, although the parties disputed the exact nature of the process, were as follows:

[The applicant] complained that oral proceedings were in fact a rare occurrence and that hearings were not open to the public. Furthermore, the Board only gave routine and cursory consideration to the claims before it and the minutes of the Board's sessions indicated that his own claim suffered from such treatment. Finally, the decisions of the Board were not properly reasoned and there was no opportunity to appeal against them.

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[44] RINGQUIST, cited above, p. 13.

[45] Although the Court has not had the opportunity to address this issue in the ADR context, an important element of fundamental fairness is the concept of "equality of arms", which the Court has addressed in other Article 6(1) contexts. The Court generally holds that "certain principles concerning the notion of a 'fair hearing' in cases concerning civil rights and obligations emerge from the Court's case-law… [I]t is clear that the requirement of 'equality of arms', in the sense of a 'fair balance' between the parties, applies in principle to such cases as well as to criminal cases … [As] regards litigation involving opposing private interests, 'equality of arms' implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent." *Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, §33, Series A no. 274.

[46] *Rolf Gustafson,* cited above, § 48.

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The Government stressed that the Board exercised its powers in an independent and impartial manner on the basis of legal rules and established procedures … The applicant was entitled … to present his claim orally before the Board but since he never requested this he should be considered to have waived his right. The procedure used was fair and in many respects very similar to that followed by a Court of Appeal or by an Administrative Court of Appeal when deciding cases on the basis of the case file alone. Case files were carefully prepared by the secretariat prior to their submission to the Board for formal consideration; nor was it possible to draw any conclusions from the minutes of the Board's sessions as to the precise amount of time devoted to a case file.[47]

In a case involving a professional review board for doctors, the Court articulated some other criteria for determining whether the scope of judicial review is adequate and what processes must be provided in the ADR procedure if judicial review in inadequate. There, three doctors were temporarily suspended from practice based on determinations by a professional board, after which they appealed to the Belgian court of Cassation, had jurisdiction to hear only a limited range of legal questions. Regarding the review board's policy of conducting private hearings, the Court found that the doctors were:

[E]ntitled to have the proceedings conducted in public. Admittedly, neither the letter nor the spirit of Article 6 par. 1 (art. 6-1) would have prevented them from waiving this right of their own free will, whether expressly or tacitly; conducting disciplinary proceedings of this kind in private does not contravene the Convention, provided that the person concerned consents. In the present case, however, the applicants clearly wanted and claimed a public hearing. To refuse them such a hearing was not permissible under Article 6 par. 1 (art. 6-1), since none of the circumstances set out in its second sentence existed.

The public character of the proceedings before the Belgian Court of Cassation cannot suffice to remedy this defect. In fact, the Court of Cassation "shall not take cognisance of the merits of cases" … this means that numerous issues arising in "contestations" (disputes) concerning "civil rights and obligations" fall outside its jurisdiction … On the issues of this nature arising in the present case, there was neither a public hearing nor a decision pronounced publicly as required by Article 6 par. 1 (art. 6-1).[48]

[273] *Id*. at §§ 43-44.
[274] *Le Compte*, cited above, §§ 59-60.

Although the Court has not fully articulated the exact form that ADR must take in order to comply with Article 6(1) in the absence of judicial review, it does provide some guidelines. Participants must have some possibility to request a public hearing, and the ADR tribunal must take into considerations some of the main safeguards articulated in Article 6 and in the Court's case law. This analysis, however, leaves open the possibility for many kinds of ADR, without entirely describing how national legal systems are to oversee these private processes or ensure that procedural requirements are met.

8 EMERGING ISSUES IN ADR (BEYOND ARTICLE 6)

ADR has human rights implications beyond Article 6(1). Article 1 of Protocol 1, which protects property rights, is the most clearly relevant source of rights outside of Article 6. This is particularly true when the state uses an arbitration tribunal to determine the level of compensation to reimburse property owners for eminent domain or similar government actions.[49] However, Articles 8, 9, and 14, which protect private and family life, religion, and equality, might also come into play. For example, an ADR body might decide a person's right to employment or to pursue a particular career, as in the case of professional review boards. In such cases, an applicant could argue that, even if there were adequate procedural safeguards, that the outcome disproportionately infringes upon a substantive right to pursue his chosen profession.

In certain countries, such as the United Kingdom, religious bodies sometimes mediate family law questions. In recent years, Muslim communities in the UK have sought judgments from ADR tribunals that apply Sharia law. Such alternatives to the national legal system provide flexibility and individualised determinations, particularly in deeply personal areas like divorce. [50] Similarly in Germany, federal courts gave significant deference to church rules when reviewing labour contracts for employees of religious institutions. Although the Strasbourg Court ruled on Article 8 (private life) grounds, it held that the national courts must give adequate reasons why "interests of the Church far outweighed those

[49] See, *Stran Greek Refineries,* cited above.

[50] Jessie BRECHIN. A study of the use of Sharia law in religious arbitration in the United Kingdom and the concerns that this raises for human rights. *Ecclesiastical Law Journal*, vol. 15, issue 3 (2013), p. 293-315.

of the applicant.[51]" However, this leaves open the question: to what extent are ecclesiastical tribunals also bound by Article 6(1)? Some worry that including religious law frustrates not only procedural rights protected by Article 6, but also both freedom or religion and non-discrimination rights as well.

Does the current waiver analysis function as well when the parties are members of a religious community? Should the Court take the same approach to determining whether the waiver is voluntary that it would use for arbitration clauses in contracts or shareholders agreements? Perhaps, in the case of religious ADR tribunals, the Court should show greater deference to individual choices, in order to respect freedom of religion. However, at what point does allowing a different court system for a minority group veer in the direction of discrimination?

9 CONCLUSION

Future ECtHR cases involving ADR and Article 6 are inevitable. Given the relative scarcity of Strasbourg case law on the issue, the Court's next steps are difficult to predict. It seems clear that Member States cannot abdicate regulatory responsibility over ADR mechanisms available within their jurisdictions. It is equally evident that ADR options will continue to grow.

Article 6(1) covers a wide range of possible disputes – both civil and criminal, but it was not drafted with ADR in mind. The Court confronts a complex set of semi-public, semi-private decisions and must decide at which points to intervene and ensure that certain procedural safeguards are in place. In order to determine its proper role, the Court must balance the traditional cornerstones of justice – publicity, impartiality, reason-giving – with the modern reality, in which there are many (possibly preferable) alternatives.

One risk is that a legal system will privatise one waiver at a time, such that whole areas of law are no longer under the purview of national courts.[52] Some worry that, "the dimension of truth in justice and the procedural

[51] *Schüth v. Germany*, no. 1620/03, § 74, ECHR 2010.

[52] See, for example, Owen M. FISS, Against Settlement, *Yale Law Journal*, vol. 93, (1984), p.1075: "I do not believe that settlement [including ADR] as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated instead as a highly problematic technique for streamlining dockets. Settlement is for me

principles associated with it are being sacrificed for the sake of promoting speedy and less costly dispute resolution.[53]" One possible response is the German theory of *Drittwirkung* (third party effect), which applies public law concepts like fundamental rights to private parties, such as parties to a contract.[54] In the European human rights context, Member States who are bound by the ECHR would be obligated to ensure that private ADR processes complied with human rights requirements, regardless on the level of state involvement. National courts, for example, would apply Article 6(1) jurisprudence to private disputes regarding pre-court dispute resolution. Although the Strasbourg Court has not applied the principle of *Drittwirkung* in its ADR case law, such a theory would considerably expand the scope of human rights review over alternative dispute practices.

These issues raise many unanswered questions that are ripe for further analysis, such as:

Are these substantive limits on the topics that can be addressed through ADR?

To what extent can a Member State's legal system become privatized through a series of voluntary waivers by litigants?

Should the Court provide particular analysis for contracts of adhesion, e-ADR, or other commercial arbitration mechanisms?

How does the European Convention on Human Rights intersect with European Union law, international arbitration treaties, and other supra-national law dealing with ADR?

Who has standing to challenge an ADR process – it is only the parties to the ADR decision, or are there 3rd parties whose rights would be better protected by a public and formal tribunal adjudication?

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the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised."

[53] RINGQUIST, cited above, p. 1.

[54] *Id*. at p. 45.

e.ISBN - 978-85-98144-48-1

CULTURAL PROPERTY, INTERNATIONAL LAW, LOOTED ANTIQUITIES & THE USE OF ALTERNATIVE DISPUTE RESOLUTION

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I INTRODUCTION

The role of alternative dispute resolution (ADR) – and of negotiations, mediation and arbitration – are now a mainstay of the legal system in many parts of the world. Thus, it seems appropriate that we reflect on its role in an area that is growing in its complexity – that is – in trying to resolve legal (and political) disputes regarding cultural heritage matters, including those involving looted artifacts and antiquities (these terms will be used interchangeably).

According to some, the history of cultural property is "in large part, a history of theft."[1] And if that is so, then there ample reasons to turn to ADR in order to help solve some of the most irretraceable disputes in antiquity.

[1] Holland Cotter, *Who Owns Art?*, N.Y. Times, (Mar. 29, 2006), http://www.nytimes.com/2006/03/29/arts/artsspecial/29treasures.html?pagewanted=print&_r=0.

e.ISBN - 978-85-98144-48-1

Recent events in Syria, Iraq and elsewhere in the Middle East demonstrate that conflict and lawlessness are serious threats to cultural property and can provide a steady supply of looted artifacts to the marketplace. While the looting of Mosul Museum in Iraq opened a new chapter on the gravity of looted artifacts and terrorist financing, the phenomenon itself is not new. Empirical evidence -- from the large number of claims from states, ethnic groups and individuals for artifacts stolen decades or hundreds of years ago -- highlights the complexity of cultural property litigation. As these cases come forward, the legal community is faced with issues of sovereign immunity, indigenous rights, ethics, statutes of limitations, laws of different states, and interpretation of international treaties. Such cases have elicited international attention, but unsurprisingly, due to their complexity, the international community has yet to produce an adequate single approach to solve these kinds of claims.

This chapter focuses on the present legal standard for deciding cases involving cultural property under international and U.S. law. Second, for the sake of a more complete discussion, it draws a distinction between cases where despite good faith efforts museums/collectors purchase artifacts with dubious provenance or in violation of ethical/moral principles (where ADR may be useful) and cases involving artifacts looted from recent conflict areas and/or in violation of domestic and international law (where criminal law may apply). Finally, drawing lessons from negotiated agreements between states and/or museums, this chapter highlights reasons why ADR may be effective in settling disputes among stakeholders.

II CULTURAL PROPERTY IN LAW

Cultural objects in property law have a special treatment because culture is an instrument that can be used for various purposes, as it cuts across diverse interests. While cultural property can be effectively described, one cannot fully capture its significance in rational terms.[2] One cannot logically explain why a poem, a painting, or a symbol moves a viewer/listener. The legal scholarship generally assumes that

[2] John Merryman, *The Public Interest in Protecting Cultural* Property, 77 Calif. L. Review, 341 (1989).

cultural property is special and deserves special protection[3] for two main reasons. First, it preserves historical connection with the past, thus allowing new generations to feel connected with a particular identity.[4] Historical knowledge, as evidenced through archaeology, helps groups to legitimize or delegitimize interests, particularly when seeking to establish sovereignty and build nationhood. "Archaeological knowledge, and the discourse that frames that knowledge, can and does have a direct impact on people's sense of cultural identity, and thus becomes a legitimate target and point of contention for a range of interests."[5] Artistic expression creates an awareness that a common community exists. "The national artistic patrimony is therefore closely linked to the process of education: the study of a nation's art is part of the process through which citizens learn who they are" – and indeed, for many – a "perception of a common culture and common past is one way of learning that we are part of a community, that we belong to one another in a special way." [6]

Second, cultural property has scholarly and aesthetic values. However, these attributes are only appreciated through careful preservation of original context. If the artifacts are removed without a proper methodology to preserve context, much of the knowledge on history and culture is irreparably harmed. As a general practice, archeologists study objects in association with their accompanying archeological features, that is, burials, houses, places of worship, and the like. "Each time an antiquity is discovered and removed from a site without first being studied by anthropologists, the historical record that can be constructed through scientific evaluation of the piece *in situ* is destroyed."[7]

The destruction of sites and looting of artifacts inevitably results in the irretrievable loss of such information.[8] In an attempt to preserve

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[3] Eric Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, University of Chicago, (Nov. 8, 2006) http://www.law.uchicago.edu/academics/publiclaw/index.html.

[4] *See* Patty Gerstenblith, *Identity and Cultural Property*: *The Protection of Cultural Property in the United States*, 75 B.U. L. Rev. 559 (1995).

[5] Laurajane Smith, Archaeological Theory and the Politics of Cultural Heritage 4 (2004).

[6] Paul M. Bator, *An Essay on the International Art Trade*, 34 Stan. L. Rev., no. 2, 1982 at 304.

[7] *Id*., at 301-02.

[8] *See, e.g.*, Jonathan S. Moore, *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 Yale L.J. 466, 466 (1988).

historical sites and cultural property many states have enacted ownership laws and export regulation laws. Source states with rich archaeological sites have enacted laws vesting ownership of undiscovered artifacts in the state (patrimony laws).[9] Such laws unilaterally establish legal state ownership over artifacts even if they are have not been excavated. In contrast, export laws regulate what can and cannot be exported abroad, but do necessarily vest ownership.[10] The difference between these two kinds of laws is that state patrimony laws "give rise to both criminal and civil liability to persons who knowingly transfer, possess and deal in such property."[11]

a. Legal Standards Governing Cultural Property

i. *International Conventions on Cultural Property*

International law concerning cultural property is governed by two main legal regimes. The first protects cultural property during armed conflict, and the second protects cultural property from illegal trade. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter "Hague 1954") states that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind," because "each people makes its contribution to the culture of the world."[12]

The convention aims to protect cultural property in times of war or internal conflict and extends its reach to peacetime sale of cultural property looted during an armed conflict.[13] One interesting note about Hague 1954 is that while the United States did not sign it until 2009, but its troops have consistently received training and have followed its provisions in their military operations.[14]

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[9] States like Egypt, Italy, Iraq, Mexico, and People's Republic of China all have legislations declaring the state to be the owner of artifacts that are underground and not yet excavated.

[10] Patty Gersenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 Conn. J. Int'l L. 197, 219 (2001).

[11] Jane A. Levine, *The Importance of Provenance Documentation in the Market for Ancient Art and Artifacts: The Future of the Market May Depend on Documenting the Past*, 19 DePaul J. Art, Tech. & Intell. Prop. L. 219, 222 (2009).

[12] *Id*., Preamble.

[13] *Id*., Article 4(3).

[14] Discussion by Hays Parks, "Protection of Cultural Property from the Effects of War," In Phelan, M., Edson, G., and Mayfield, K., (eds), The Law of Cultural Property and the Natural Heritage (1998)

The second agreement, the 1970 United Nations Educational, Scientific, and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter "UNESCO 1970"),[15] focuses on private conduct during peacetime.[16] UNESCO 1970 was groundbreaking in its objectives because it sought to control the market cultural property, prohibit the "illicit" trade in cultural objects.[17] The preamble to the Convention states: "Considering that cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting."[18]

UNESCO 1970 prohibits the "impoverishment of the cultural heritage" of a state of origin through "illicit import, export and transfer of ownership" of cultural property.[19] It also highlights the interests of states in the "national cultural heritage," thus prohibiting the trade of cultural property contrary to the law of the state of origin,[20] and calls upon signatory states to prevent the trafficking of such objects and facilitate their repatriation.[21]

In the wake of cultural property destruction and theft in Middle East and beyond in post 911-era[22], a number of states have signed the UNESCO 1970 Convention and enacted implementing laws. For example, the United Kingdom (UK) enacted implementing legislation for the UNESCO 1970 Convention, in response to the looting of museums in Iraq following the 2003 invasion.

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[15] UNESCO 1970, http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html

[16] Discussion in *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, 917 F.2d 278, 295-7 (7th Cir. 1992).

[17] UNESCO 1970 *supra* note 15.

[18] *Id*.

[19] *Id*. Article 2.

[20] *Id.* Article 3.

[21] *Id.* Article 7, 9, and 13.

[22] In April 2003, it was reported that the Iraq Museum had been ransacked and more 14,000-15,000 pieces had been stolen. The investigation determined that there had been three thefts at the museum by three different groups, including: 1) professionals who stole several dozen of the most prized treasures; 2) random looters who stole more than 3,000 excavation-site pieces; 3) and insiders who stole almost 11,000 cylinder seals and pieces of jewelry. Matthew Bogdanos, "The Causalities of War: the Truth bout the Museums of Iraq," 109 Am. J. Archeol. 482 (2005).

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Under the Dealing in Cultural Objects (Offences) Act 2003, it is illegal for individuals to deal in "tainted cultural objects."[23] Cultural property looted after 2003 are specifically identified as "tainted cultural objects."[24] In 2003, Switzerland enacted legislation requiring due diligence on the "art trade and auctioning business" to ensure that collectors are not purchasing stolen, illegally excavated and/or illicitly imported cultural property. Furthermore, Switzerland is negotiating bilateral agreements with Egypt, Guatemala, Russia, and Turkey to further strengthen such efforts. Other states that have become members to the UNESCO 1970 Convention in response to such looting are: the US,[25] Switzerland, the UK, France, Sweden, South Africa, Norway, and Japan.[26] Currently UNESCO 1970 has 127 member states.[27]

The 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage,[28] is a follow up to the two earlier conventions. This agreement established the "World Heritage Committee," to protect the Cultural and Natural Heritage of Outstanding Universal Value.[29] Each signatory state agreed to submit an inventory of cultural and natural heritage to the World Heritage Committee, and in turn, the Committee updates and publishes a "World Heritage List."[30]

More than two decades later, the international community established the International Institute for the Unification of Private Law (UNIDROIT)

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[23] Dealing in Cultural Objects (Offences) Act, 2003, c. 27, §§ 1-6 (U.K.).

[24] *Id*. at § 2(2)(a).

[25] The Senate voted unanimously to accept the UNESCO Convention in 1972, but implementing legislation was delayed for eleven years. Patrick J. O'Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic* 106-12 (Inst. of Art and Law 2000); see generally Barbara B. Rosecrance, *Harmonious Meeting: The McClain Decision and the Cultural Property Implementation Act*, 19 Cornell Intl. L. J. 311 (1986).

[26] *Id*. For a more detailed discussion of the British and Swiss implementing legislation, see Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Protection of Cultural Heritage at the Beginning of the 21st Century*, 37 Geo. J. Int'l. L. 245, 332-34 (2006).

[27] For a list of State Parties, see UNESCO 1970 http://portal.unesco.org/la/convention.asp?KO=13039&language=E&order=alpha.

[28] UNESCO, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, http://whc.unesco.org/en/conventiontext/ (last visited April 23, 2015). Article 6 highlights that cultural and natural heritage of outstanding universal value "constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate." Member states agree to help identify, protect, conserve, and preserve such heritage.

[29] UNESCO 1970 *supra* note 15, Article 8.

[30] *Id*. at Article 11(2).

Convention on or Illegally Exported Cultural Property (adopted in Rome in 1995), which builds upon the 1970 UNESCO Convention principles (hereinafter "UNIDROIT 1995"). Under this Convention cultural property that is unlawfully excavated, or lawfully excavated but unlawfully retained, is categorized as stolen,[31] and should be returned to the original owner.[32] A signatory state may ask courts in other member states to order the return of illegally exported cultural objects back to the state of origin.[33] Although not all UN members (the US is one of them) have ratified UNIDROIT 1995, its provisions can guide courts facing complicated cultural property cases.[34]

In addition to government action, museums have also entered into international agreements to protect cultural property. In 1986, the International Council of Museums (ICOM) adopted a Code of Ethics, which requires its members to employ due diligence and avoid acquiring artifacts with dubious provenance.[35] Under Article 6 of this Code, members should cooperate with source states/peoples to return cultural property that has been acquired in violation of international/ domestic laws.[36]

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[31] *Id.* Article 3(2).

[32] *Id.* Article 3(1). The Convention does not require that a theft be proven.

[33] *Id.* Article 5.

[34] Marilyn E. Phelan, *Cultural Property: Who owns it and What Laws Protect It?*, 74 Tex. B.J. 202 (2011).

[35] International Council of Museums, *Code of Ethics*, http://icom.museum/ethics.html#section2 (last visited Jan. 9, 2015).

[36] International Council of Museums, *ICOM Code of Ethics for Museums* (Oct 8, 2004), http://icom.museum/fileadmin/user_upload/pdf/Codes/code_ethics2013_eng.pdf. Some examples include: Article 6.2: Return of Cultural Property: "Museums should be prepared to initiate dialogues for the return of cultural property to a country or people of origin. This should be undertaken in an impartial manner, based on scientific, professional and humanitarian principles as well as applicable local, national and international legislation, in preference to action at a governmental or political level." Article 6.3: Restitution of Cultural Property: "When a country or people of origin seeks the restitution of an object or specimen that can be demonstrated to have been exported or otherwise transferred in violation of the principles of international and national conventions, and shown to be part of that country's or people's cultural or natural heritage, the museum concerned should, if legally free to do so, take prompt and responsible steps to co-operate in its return." Article 6.4: Cultural Objects from an Occupied Country: "Museums should abstain from purchasing or acquiring cultural objects from an occupied territory and respect fully all laws and conventions that regulate the import, export and transfer of cultural or natural materials."

In addition to its Code of Ethics, since 2000 ICOM has worked with UNESCO to publish thirteen Red Lists for cultural property at risk in different regions of the world.[37] Such lists aim to facilitate the efforts of police, customs officials and other law enforcement agencies working to protect cultural property worldwide. These Red Lists specify objects that are particularly vulnerable to trafficking, and have been proven successful. For example, in 2003, French authorities were able to identify and recover artifacts from Togo and Iraq.[38] In 2007, Swiss authorities stopped the online sale of a 4,000-year-old clay tablet, purportedly smuggled out of Iraq.[39] In 2011, U.S. customs intercepted a 12.75-inch Roman oinochoe that was being shipped to an arts dealer in New York.[40] The wine pitcher from the 5th to 8th century A.D. was returned to the Afghani government.

Other similar initiatives to combat illegal trafficking of cultural property include the Asia-Pacific Economic Cooperation (APEC)'s "Pathfinder Dialogue." On September 23, 2013, the APEC met in Bangkok to discuss the global fight against illicit trade and corruption. Through the "Pathfinder Dialogue" the APEC enumerated best practices and expressed support for new international agreements and investigations to combat illegal commerce.[41]

ii. *Cultural Property in US Law*

While the international community has taken steps to combat trafficking of cultural property, there is no international forum with specific jurisdiction over such issues. In the US, courts have provided judicial remedies for parties seeking restitution of their stolen cultural

[37] International Council of Museums, *Red List Database*, http://icom.museum/resources/red-lists-database/ (last visited April 23, 2015)

[38] Mark Vlasic, *Stolen History*, Foreign Policy (Dec. 13, 2013) http://foreignpolicy.com/2013/12/13/stolen-history/.

[39] *Illegal Sale Stopped on Swiss eBay,* Swissinfo.ch (Dec. 19, 2007), http://www.swissinfo.ch/eng/illegal-sale-stopped-on-swiss-ebay/6323074.

[40] The Embassy of Afghanistan, *ICE Returns Stolen Antiquities to Islamic Republic of Afghanistan* (Sept. 9, 2013), http://www.embassyofafghanistan.org/article/ice-returns-stolen-antiquities-to-islamic-republic-of-afghanistan.

[41] U.S. Department of State, *Remarks at the APEC Pathfinder Dialogue on Combating Corruption and Illicit Tra*de (Sept. 23, 2013), http://www.state.gov/p/eap/rls/rm/2013/09/214800.htm.

property,[42] using common law[43] and enacting legislation to adhere to the principles of international conventions. For example, in order to adhere to Articles 7 and 9 of the UNESCO 1970 Convention, the US congress enacted the Cultural Property Implementation Act (CPIA)[44] in 1982.[45]

The CPIA prohibits the importation of stolen cultural property (listed in the inventory of a museum, religious or secular public institution in another UNESCO 1970 member state) into the US.[46] This act empowers the President to impose import restrictions on looted cultural property of another member state. [47] The US President may enter into a bilateral agreement restricting imports of cultural property from a particular member states.[48] However, the CPIA has no criminal penalties, and provides only for civil forfeiture of the cultural materials at stake.[49]

US courts have used the common law principle, the English *nemo dat*[50] rule to provide relief for parties seeking restitution of their cultural property. Under this rule, a bona fide purchaser who purchases a stolen property cannot acquire good title from a thief, thus the title remains with the true owner.[51] This common law principle is now codified[52] and it is now

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[42] *See, e.g.*, *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, 917 F.2d 278, 280, 290-01, 294 (7th Cir. 1992), in which the court applied Indiana law to determine the right of possession of four 6th century Byzantine mosaics, as between the Church of Cyprus, the Republic of Cyprus, and the purchaser of the mosaics. The court held that the mosaics were stolen from the rightful owner (the Church of Cyprus), thus, the purchaser of the mosaics never obtained title to, or right to possession of, the mosaics. The court ordered the return of the mosaics to the Republic of Cyprus.

[43] *Nemo dat quod non habet*. (He who hath not cannot give.)

[44] 19 U.S.C. §2601 et seq. (2000).

[45] 19 U.S.C. §§ 2601-13 (2000).

[46] 19 U.S.C. § 2607 (2000). The definition of "cultural property" tracks that given in Article 1 of the UNESCO Convention and is very broad. 19 U.S.C. § 2601(6) (2000).

[47] 19 U.S.C. §§ 2602-03 (2000). For a more detailed discussion of the CPIA process, see Gerstenblith, *supra* note 26, at 332-34.

[48] 19 U.S.C. §2602 (2000).

[49] 19 U.S.C. § 2609 (2000).

[50] *See supra* note 43.

[51] In *Menzel v. List*, 298 N.Y.S.2d 979, 246 N.E.2d 742 (N.Y. 1969) stating that the "principle has been basic in the law that a thief conveys no title as against the true owner." [See also *Menzel v. List*, 267 N.Y.S.2d 804, 819 (1966).]

[52] U.C.C. Article 2.403, codified in Texas at Tex. Bus. & Comm. Code §2.403 states that a purchaser acquires all the title the purchaser's transferor had power to transfer. Hence if there was a thief in the chain of title, a transferor could not transfer good title.

statutory law in 49 states except Louisiana.[53] Given that under *nemo dat* a bona fide purchaser of stolen cultural property cannot obtain good title, he/she can be held liable indefinitely to claims of true owners. A New York court described this law "as a bulwark against the handiwork of evil, to guard to rightful owners the fruits of their labors."[54]

While 49 states abide by the *nemo dat* rule, a New Jersey court imposed a due diligence requirement upon the original owners, requiring them to act on their rights to the stolen artwork.[55] Other courts shift the due diligence requirement to the purchasers of the cultural property, recognizing that burdening the true owner can lead to undesirable results.[56] Courts seem to sympathize the rightful owners when balancing the rights of bona fide purchasers and the original owners.[57] As such, if a buyer does not conduct an adequate search for the artifact's provenance, he/she may not be an "innocent purchaser."[58]

Illegally Exported Cultural Property

The body of law regulating illegally exported artifacts differs from the stolen property law, in that it does not always prohibit purchasers from acquiring good title to such artifacts.[59] In fact, in many cases, courts have allowed a purchaser to keep possession of an illegally exported artifact

[53] In *Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 579 (5th Cir. 2010), pet. cert. filed (2010), the Fifth Circuit held that, pursuant to Louisiana Civil Code, §3491, ownership can be lost through adverse possession. In this case, one could acquire title of alleged Holocaust- looted art through acquisitive prescription.

[54] *Menzel v. List*, *supra* note 51, 267 N.Y.S. at 819.

[55] In *O'Keeffe v. Snyder*, 416 A.2d 862, 875 (N.J. 1980), the Supreme Court of New Jersey ruled that it should protect n good faith purchaser from an owner who "sleeps on his rights."

[56] In *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1152-53, 1163 (2d Cir. 1982), a federal appellate court did not impose a due diligence requirement upon the rightful owner. The court ruled that the two priceless Albrecht Duerer portraits stolen in 1945 from a castle located in Germany, should be returned to the rightful owner.

[57] Discussion in *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, 917 F.2d 278, 288, 293-94 (7th Cir. 1992). In *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 430 (N.Y. 1991), the New York court confirmed that New York courts do not impose a due diligence requirement on victims of art thefts.

[58] *Id.* at 294, the Seventh Circuit expressed doubt that Goldberg, the purchaser of the mosaics taken from the Church of Cyprus, was a bona fide purchaser. She did not conduct a due diligence provenance search of the origin of the mosaics.

[59] Discussion in *United States v. McClain*, 545 F.2d 988, 996 (5th Cir. 1977).

if it was not stolen.[60] However, most source states have patrimony laws, declaring state ownership over all artifacts discovered and undiscovered in their territory.[61] In cases where a foreign government asserts title to an artifact originating from its territory, the National Property Act (NSPA)[62] generally controls. In these circumstances, exporting artifacts from a source state with patrimony laws is a taking even if the state of origin may have never had physical possession of the artifacts.[63]

Case law helps to illuminate the current legal standard in illegally imported cultural property. In *United States v. McClain*,[64] the Fifth Circuit court reiterated that Mexico's patrimony laws vested state ownership onto undiscovered artifacts, and under NSPA any such artifacts exported from Mexico without permission constituted theft.[65] The court convicted individuals who conspired to sell pre-Columbian artifacts in Texas, stating that it was clear that Mexico owned those artifacts.[66]

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[60] In *Peru v. Johnson*, 720 F. Supp. 810, 814 (C.D. Cal. 1989), the court decided that restrictions on the export of certain artifacts were addressed to protection of such artifacts and that such restrictions did not imply ownership. In *United States v. Eighteenth Century Peruvian Oil on Canvas Painting of the Doble Trinidad*, 597 F. Supp.2d 618, 625 (E.D.Va. 2009), the court ruled that two paintings were properly seized and administratively forfeited under CPIA regardless of whether they originated from Bolivia or Peru. (The United States has a bilateral agreement pursuant to CPIA with both Bolivia and Peru.)

[61] For example, in 1939 Italy enacted the Law for the Protection of Works of Artistic and Historic Interests (Law n.1089/39), which made the trade in antiquities illegal. Through this law, the Italian government vested state ownership to all its archaeological artifacts in 1939. Consequently, all archaeological objects belong to the state unless they were in private ownership prior to 1902. More importantly, only the state (or people with a special permit) can conduct excavations. See *United States v. Antique Platter of Gold*, 184 F.3d 131, 133 (2d Cir. 1999), cert. den., 120 S. Ct. 978 (2000). Greece has a similar law, the 1932 Act with Respect to Antiquities, which vests state ownership to all its archeological artifacts. Accordingly, individuals cannot acquire ownership of antiquities in Greece. Turkey declared in force and effect a 1906 Decree in 1926, which vests state ownership on all antiquities found in or on lands of the Republic. In 1926, Turkey enacted a Turkish Civil Code, wherein Article 697 makes all antiquities found on Turkish land property of the Republic. In 1983, the Egyptian government declared ownership to all its archaeological artifacts pursuant to its Antiquities' Protection Law (Article 6). See United *States v. Schulz*, 333 F.3d 395, 398 (2nd Cir. 2003).

[62] 18 U.S.C. §§ 2314-15 (1948). The National Stolen Properties Act makes it a felony to knowingly sell or receive stolen goods in interstate or foreign commerce.

[63] See *McClain*, 545 F.2d at 996, and *Schulz*, 333 F.3d at 398.

[64] *Id.*

[65] The defendants' conviction on the substantive counts was reversed because the Fifth Circuit held that only Mexico's 1972 law was truly a vesting statute. Nonetheless, the defendants' conviction on the conspiracy count was affirmed. *McClain*, 593 F2d 658, 671-72 (5th Cir 1979).

[66] *Id*. Still in *Peru v. Johnson*, 720 F. Supp. 810, 814-5 *supra* note 60 (D.C. Cir. 1989), the court held that Peru had not sufficiently stated a claim of ownership to pre-Columbian artifacts it

In *United States v. Schulz*,[67] the Second Circuit used NSPA to convict Frederick Schultz's, a prominent New York art dealer, for illegally importing and selling looted Egyptian artifacts. The Second Circuit adopted the *McClain* holding and found Schultz guilty for conspiring to deal in antiquities removed from Egypt in violation of its 1983 national ownership law.[68] This was the first case where a US court convicted someone under the NSPA by applying a foreign statute to a criminal case.

In addition to the NSPA, the Archaeological Resources Protection Act (ARPA) has provisions that can be applied to cases involving export (both domestic and international) of stolen archaeological resources, including those taken in violation of a patrimony laws.[69] Given the precedent in *McClain* and *Schultz*, foreign patrimony ownership laws can be used in US criminal courts to convict individuals involved in illegal transport of artifacts. [70]

Other provisions used to combat illegal import of artifacts involve US Customs and Border Protection. All imported commercial goods, including archeological items, require proper declaration of value and state of origin.[71] This declaration is material in determining what laws govern the imported artifacts. Fraudulently misstating the state of origin and/or

claimed were excavated from historical monuments in Peru. The court ruled against Peru because evidence could not properly identify where the artifacts were found and from where (what state) they were exported. In addition, it determined that the extent of Peru's claim of ownership based on its domestic law was uncertain.

[67] In *United States v. Schultz*, 333 F.3d 393, 397-99 *supra* note 61 (2d. Cir. 2003), a well-known art dealer was convicted for knowingly transporting stolen Egyptian antiquities. The dealer was indicted for "conspiring to receive stolen Egyptian antiquities that had been transported in interstate and foreign commerce" in violation of the NSPA. The dealer argued that the objects were not stolen because they were not owned by anyone. The prosecution, successfully showed that the Egyptian government owned the antiquities pursuant to a patrimony law known as "Law 117," which provides that all antiquities found in Egypt after 1983 are property of the Egyptian government. The Second Circuit ruled that NSPA applies to property that is stolen in violation of a foreign patrimony law and that the Cultural Property Implementation Act is not the exclusive means of dealing with stolen artifacts and antiquities, as the dealer had contended.

[68] Egyptian Law 117, art 6, quoted in *Schultz*, 333 F3d at 399-400.

[69] Archaeological Resources Protection Act, 16 USC § 470ee(c) (2000). Criminal prosecution would also be available under state statutes prohibiting possession and dealing in stolen property.

[70] Those circuits include the Second Circuit (*Schultz*, 333 F3d 393), the Fifth and Eleventh Circuits (*McClain*, 593 F2d 658), and the Ninth Circuit (*United States v. Hollinshead*, 495 F2d 1154 (9th Cir 1974)).

[71] 18 USC §§ 542, 545 (2000).

value of an imported artifact may lead to its forfeiture and criminal charges against the importer.[72]

Using patrimony laws, a source state may bring action (a replevin claim and/or a criminal indictment), against the possessor of an illegally exported artifact. Both *McClain* and *Schultz* holdings recognized national vesting laws, which means that a foreign government can recover antiquities trafficked after the effective date of its national ownership law.

For example, the Italian government brought charges against Marion True, a former curator of antiquities at the J. Paul Getty Museum in Los Angeles, for conspiring to export looted antiquities from Italy.[73] The prosecutors pursued their cases against Ms. True for more than five years, despite the fact that the Getty Museum returned several artifacts to Italy.[74] At the end, an Italian court ruled that the statute of limitations on the crimes Ms. True was accused of had expired. Similarly, Greek prosecutors brought criminal action against Ms. True based on their patrimony laws. However, the charges were dropped after the Getty Museum agreed to return a disputed ancient gold wreath and the statute of limitations on the alleged crime had expired.[75]

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[72] See *United States v. An Antique Platter of Gold*, 184 F.3d 131,136-37 (2d. Cir. 1999) (holding that the country of origin of an ancient gold phiale was Sicily, where it was excavated, rather than Switzerland, as declared by the importer, through which it was transported en route to the US); US Immigration and Customs Enforcement Press Release, Department of Homeland Security Returns Rare Artifacts to the Pakistani Government (Jan 23, 2007), available at < http://www.ice.gov/pi/news/newsreleases/ articles/070123newark.htm> (visited Jan. 1, 2015) (announcing the restitution of several Buddha statues and other antiquities to Pakistan because their country of origin was incorrectly stated to be Dubai).

[73] Discussion at "Marion True," http:// www.topics.nytimes.com/topics/reference/timestopics/people/t/marion_ true/index.html (last visited Jan. 9, 2015).

[74] Elisabetta Povoledo, *Rome Trial of Ex-Getty Curator Ends*, N.Y. Times (Oct. 13, 2010), http:// www.nytimes.com/2010/10/14/arts/design/14true.html. Although Italy did not dismiss the charges against the curator, the trial ended in October 2010, when the court ruled the statue of limitations had expired on the curator's alleged crimes. *See also* Elizabetta Polvoledo, *Getty Pact Appears to Ease Rome Trial*, N.Y. Times (Sept. 27, 2007), http:// www.nytimes.com/2007/01/18/arts/design/18gett.html, and Carol Vogel, *Ciao to a Met Prize Returning to Italy*, N.Y. Times (Jan. 11, 2008), http:// www.nytimes.com/2008/01/11/arts/design/11voge.html.

[75] *See* Anthee Carassava, *Greek Court Dismissed Case Against Ex-Curator*, N.Y. Times (Nov. 28, 2007) http:// www.nytimes.com/2007/11/28/arts/design/28true.html.

2. *New Acquisition Standards in American Museums*

The looting of Iraqi Museum in 2003 prompted a wide response by both governments and museums.[76] In June 2004, the Association of American Museum Directors ("AAMD") published a Report on the Acquisition of Archaeological Materials and Ancient Art, advising its members to adopt rules for purchasing archeological items that have been out of their source state for ten years prior to acquisition.[77] The AAMD revised this wait period in 2008, when it advised its members that November 17, 1970 (the date of the 1970 UNESCO Convention)[78] is "the most pertinent threshold for the application of more rigorous standards to the acquisition of archaeological materials and ancient art as well as for the development of a unified set of expectations for museums, sellers and donors."[79] In July 2008, the American Association of Museums ("AAM") also issued new Standards Regarding Archaeological Material and Ancient Art, which advised members to require "documentation that the object was out of its probable country of modern discovery by November 17, 1970."[80]

The AAMD and the AAM instruct their members to conduct rigorous research into provenance of an artifact as a precondition to its acquisition. The AAMD asks its members to: "thoroughly research the ownership

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[76] Jane A. Levine, *The Importance of Provenance Documentation in the Market for Ancient Art and Artifacts: The Future of the Market May Depend on Documenting the Past*, 19 DePaul J. Art, Tech. & Intell. Prop. L. 219 (2009).

[77] Ass'n of Art Museum Dirs., *Report on Acquisition of Archaeological Materials and Ancient Art 5* (2004), available at http:// www.aamd.org/papers/documents/TaskForceReportwithCoverPage_Final.pdf. The AAMD's June 2004 policy recommendation was criticized for two reasons. First, the ten-year rolling policy provided inadequate legal protection, because states have statutes of limitation longer than ten years. Second, unscrupulous dealers may use this standard to their advantage, that is, hold questionable artifacts for ten years and then bring them to the market when there is a "documented" history of ten years.

[78] The J. Paul Getty Museum was the first American museum to adopt a Policy Statement in October 2006, requiring evidence that an archeological material has been out of its state of origin since 1970, the date of the 1970 UNESCO Convention. See Press Release, J. Paul Getty Museum, *J. Paul Getty Museum Announces Revised Acquisitions Policy* (Oct. 26, 2006), available at http:// www.getty.edu/news/press/center/revised_acquisition_policy_release_102606.html.

[79] Ass'n of Art Museum Dirs., *New Report on Acquisition of Archaeological Materials and Ancient Art 4* (2008), available at http:// www.aamd.org/newsroom/documents/2008ReportAndRelease.pdf. (last visited Jan. 9, 2015).

[80] Am. Ass'n of Museums, *Standards Regarding Archaeological Material and Ancient Art 1* (2008), available at http://www.aam-us.org/ museumresources/ethics/upload/Standards%20Regarding%C20Archaeological%C20Material%C20and%C20Ancient%Ärt.pdf. (last visited Jan. 9, 2015).

history of archaeological materials or works of ancient art . . . prior to their acquisition, including making a rigorous effort to obtain accurate written documentation with respect to their history, including import and export documents."[81] Similarly, the AAM states: "Museums should rigorously research the provenance of an object prior to acquisition, make a concerted effort to obtain accurate written documentation with respect to the history of the object, including export and import documents, and require sellers, donors, and their representatives to provide all available information and documentation."[82]

The AAMD and AAM require their members to seek complete provenance documentation from sellers and donors. The AAMD asks its members to not "acquire a work unless provenance research substantiates that the work was outside its country of probable modern discovery before 1970 or was legally exported from its probable country of modern discovery after 1970."[83] While the AAM members are instructed to "promptly publish" acquisitions of artifacts, including provenances and images thus making the information available to all interested parties.[84]

Both the AAMD Standards and the AAM Guidelines acknowledge that at times, despite due diligence, good faith and rigorous research, it will not be possible to document provenance an artifact back to 1970. To avoid any ethical issues that might arise in these kinds of acquisitions, the AAMD has an on-line registry, where members list objects acquired without proper documentation,[85] but based on an "informed judgment" were outside the state of modern discovery prior to 1970.[86]

III DISTINCTION BETWEEN CASES INVOLVING ARTIFACTS ACQUIRED BEFORE AND AFTER NOVEMBER 1970

Trafficked artifacts have very different histories/facts and the market for antiquities is a patient one. As such, some cases may fall under the

[81] Ass'n of Art Museum Dirs., *supra* note 79.
[82] Am. Ass'n of Museums, *supra* note 80.
[83] Ass'n of Art Museum Dirs., *supra* note 79 at 5.
[84] *Id.*
[85] Artifacts that cannot be traced back to November 1970.
[86] *See* Ass'n of Art Museum Dirs, *Object Registry*, http:// aamdobjectregistry.org/ (last visited Jan. 9, 2015).

criminal law umbrella, some may be civil litigation claims and others may be better solved through ADR. For example, cases involving items looted from recent conflict zones in Iraq and Syria will likely be treated differently from cases involving cultural objects removed in the 1800s, such as the Elgin Marbles.

The looting and destruction caused by Islamic State of Iraq and the Levant (ISIL) in Iraq, Syria and beyond has prompted UNESCO to call for a total ban on the trade of Syrian cultural goods. In addition, the agency's director general has been active in urging the International Criminal Court (ICC) to recognize "the destruction of cultural heritage [as] a crime against humanity."[87]

The publication of Red Lists, the Pathfinder Dialogue, proactive efforts by the Interpol and other international law enforcement agencies working to stop ISIL's destructive and allegedly lucrative practice of smuggling artifacts[88] from Syria and Iraq to sponsor terrorism show that the international community is committed to combating the destruction of cultural property. However, these kinds of cases may fall under the jurisdiction of the International Criminal Court, depending on the specific facts of the case and whether there is wider support to see the destruction of cultural property seen as a war crime (understanding the importance of prosecutor's discression and a focus on prosecutions for mass executions, etc.), or at the very least they should be tried in jurisdictions where the offence takes place.

The UN is taking some initial steps to help possibly bring ISIL perpetrators to court for their crimes against humanity, war crimes, and possible acts of genocide.[89] In March 2015, the UN human rights office in Geneva called on the Human Rights Council to urge the UN Security Council to address, "in the strongest terms, information that points to genocide, crimes against humanity and war crimes," and to refer the situation in Iraq to the International Criminal Court for investigation.[90]

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[87] UNESCO, *State Secretary Kerry and Director-General Bokova Call for End to Cultural Destruction in Iraq and Syria*, Sept. 22, 2014, available at http://www.unesco.org/new/en/media-services/single- (last visited Jan. 9, 2015).

[88] Madeline Grant, *Head of UNESCO Accuses ISIS of Trying to 'Delete' Civilizations*, Newsweek (Nov. 14, 2014), available at http://www.newsweek.com/head-unesco-compares-isis-methods-nazis-brands-destruction-archealogical-sites-284456.

[89] Nick Cumming-Bruce, *United Nations Investigators Accuse ISIS of Genocide Over Attacks on Yazidis*, N.Y. Times (March 19, 2015), available at http://www.nytimes.com/2015/03/20/world/middleeast/isis-genocide-yazidis-iraq-un-panel.html.

[90] *ISIL May Have Committed Genocide, War Crimes in Iraq, says UN Human Rights Report*, UN News Centre, (March19, 2015), http://www.un.org/apps/news/story.asp?NewsID=50369#.VTRf0WRViko.

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Some of these crimes committed by ISIL, such as the killing of US citizens, may be tried in US federal courts because they are likely violations of US criminal law. However, the US and other states such as Japan and UK that are also considering trying cases involving atrocities against their citizens, "should not limit themselves to potential prosecutions of [ISIL] members under domestic criminal laws."[91] Some are advocating that, "all" ISIL offenses fall under the jurisdiction of the International Criminal Court and should be referred to it.[92]

Acquisitions of artifacts derived from looting and destruction of sites in conflict zones, likely flagrant violations of patrimony laws, and illegal export of artifacts should likely remain under the umbrella of criminal law. However, in cases involving artifacts discovered and out of their source state prior to the establishment of UNESCO 1970 Convention, November 17, 1970, it may be help to consider the use of ADR.

In such cases, when the law offers few efficient options and the statute of limitations may have run, mediation and negotiations between parties may be an alternative to legal proceedings. As iterated in various resolutions, declarations, guidelines, and code of ethics, restitution of cultural property has many facets that involve ethical, humanitarian, and social aspects. ADR and cultural diplomacy may provide promising tools in the process of repatriation of artifacts with dubious provenance, because they allow opposing sides to negotiate though a less rigid process, thus allowing them to pursue individualized interests rather than standard solutions prescribed by law.

IV USE OF ADR IN REPATRIATING ARTIFACTS WITH DUBIOUS PROVENANCE

One important feature of all the above-mentioned Conventions and Codes is their encouragement for dialogue and ADR. Article 17(5) of the UNESCO 1970 Convention provides that "at the request of at least two States Parties to this Convention which are engaged in a dispute over its implementation, UNESCO may extend its good offices to reach

[91] John B. Bellinger III, *Make ISIS's Leaders Face Justice*, N.Y. Times (April 2, 2015), http://mobile.nytimes.com/2015/04/03/opinion/make-isis-leaders-face-justice.html?referrer=&_r=0.

[92] *Id.*

a settlement between them."[93] Article 8(2) of the UNIDROIT 1995 Convention provides that parties to a dispute under its Part II or Part III "may agree to submit the dispute to any Court or other competent authority or to arbitration."[94]

Interestingly, there are a number of cases dealing with repatriation of artifacts with dubious provenance to their state of origin that were solved through negotiations between the parties involved, rather than court decisions. Some noteworthy cases resolved through ADR and cultural diplomacy include the following: the repatriation of Axum stele from Italy to Ethiopia; the repatriation of the Great Zimbabwe Soapstone Bird from Germany to Zimbabwe; the repatriation of the ancestral human remains from the Royal College of Surgeons to South Australia; and the repatriation of the ceremonial mask of the Kwakwaka'wakw people of Vancouver Island from the British Museum to Canada; the reunification of the neo-Sumerian alabaster figure divided between the Louvre, in France and the Metropolitan Museum, in the US.[95]

In addition, Greece and Italy have entered into agreements with various museums, such as, Metropolitan Museum of Art, the Boston Museum of Fine Arts, and the Princeton University Art Museum to repatriate artifacts with questionable provenance in their collections.[96] These success stories indicate that ADR can promote cooperation, collaboration and foster good relations between parties.

a. Mutual benefits of ADR

There are a number of reasons why ADR may be a preferred method to formal legal proceedings. ADR may work in these kinds of cases because: (1) there are different jurisdictions involved, and the outcome of the case in a formal court might be uncertain; (2) it avoids the high costs of litigation; (3) judicial decisions are difficult to enforce when dealing with multiple parties from different parts of the world; (4) jurisdiction over the parties and over the objects at issue, and the choice of law in a formal court can be

[93] 14 November 1970. Entered into force 24 April 1972. Ratified by 116 states.
[94] 24 June 1995. Entered into force 1 July 1998. Ratified by 29 states.
[95] Vadi, Valentina, Schneider, Hildegard E.G.S., Art, Cultural Heritage and the Market: Ethical and Legal Issues 94 (2014).
[96] Discussion at "Olympian Contests with Italy," available at http://www.artsjournal.com/culturegrrl/2010/02/ olympian_contests_with_italy_m.html (last visited Jan. 9, 2015).

e.ISBN - 978-85-98144-48-1

problematic; (5) satisfying the burden of proof can be challenging in cases where the artifacts has been illegally exported and has changed ownership multiple times in the value chain; (6) laws are not retrospective and a number of cases may be barred due to statutes of limitations; (7) finally, parties involved may have other goals, such as, reunification of an object, thus they are interested in fostering good relations.[97]

To elaborate on these points, parties may prefer ADR because it allows adverse parties take control over their dispute thus preserving good rapport on the case at issue and future ones. Furthermore, parties involved in artifact repatriation disputes typically come from different legal traditions and mindsets, thus the outcome in a formal court might make them uneasy. The often-opaque provenance of most disputed artifacts makes it difficult for foreign governments to evaluate their likelihood of success at trial. As such, pursuing litigation may be useful in bringing museums/collectors/states to the table, but ADR allows flexibility and options that are not available in the court of law.

The second reason involves finances. Legal fees for bringing a case to court can be prohibitive.[98] If a party claiming its cultural property has limited resources, the costs of the formal legal process can deter them from seeking justice.

Third, legal decisions might not be easy to enforce because they might be unpopular in the loosing state and cause disorder. That is, when decisions are imposed from a foreign court, they might lack acceptance/legitimacy within a given state's citizens.

Fourth, ADR allows parties to avoid issues of jurisdiction and choice of law when they are diverse – and fifth, even if issues of jurisdiction and applicable law are resolved, satisfying the burden of proof can be difficult because artifacts are often smuggled and have changed ownership through the value chain. The burden of proof allocated to claimants, can be difficult to achieve given that even in highly reputable museums there are antiquities with little or no provenance documentation.[99]

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[97] Irini Stamatoudi, *Mediation and Cultural Diplomacy*, 61 Museum Int'l 116, 118 (2009).

[98] Julia A. McCord, *The Strategic Targeting of Diligence: A New Perspective on Stemming the Illicit Trade in Art*, 70 Ind. L.J. 985, 996 (1995).

[99] Jason Felch & Ralph Frammolino, Chasing Aphrodite: The Hunt for Looted Antiquities at the World's Richest Museum 55 (2011) (claiming that the Getty Museum had over 800 antiquities with dubious provenance).

Sixth, generally speaking, laws are not retrospective, that is, even if new legislation is created, the new rules do not apply to acts that took place before the enactment of that particular law. Moreover, claims may also be barred by statues of limitations. Because courts have do adhere to strict legal standards, ADR may allow parties to negotiate where claims might still be valid under ethical, historical, scientific, and humanitarian grounds.

Lastly, parties involved in cases dealing with repatriation might have a different agenda in mind. For example, states, museums, individual collectors that have a strong interest in art and archeology may wish to return pieces to be reunified with other artifacts and create a whole object. For example, the Louvre and the Metropolitan Museum negotiated an agreement to reunify a neo-Sumerian alabaster figure, which was divided between the two.[100] Others may wish to maintain a good reputation and foster good relations between parties for future endeavors. This approach may help museums that wish to exchange exhibitions or contribute to the infrastructure of the source state through the creation of museum annexes.

For such reasons the parties involved in repatriation of artifacts may choose ADR in resolving their dispute over claimed objects.[101] In the aforementioned circumstances, ADR and cultural diplomacy may become increasingly relevant and useful. Noting that in some cases the parties came to the negotiating table after an initial legal action, ADR may lead to swifter and more creative resolutions, thus fostering cooperation and preventing reputation damage to highly esteemed institutions.

b. Examples of Mutually Beneficial Repatriation Agreements

Oftentimes, litigation serves to bring parties to the bargaining table, but beyond that, it may not actually result in a swift return of the item at issue. Filing legal complaints against museum personal for every contested artifact may be too extreme to enforce. Also, experience has shown that criminal indictments against museum personnel, when work was done in

[100] See *Athens International Conference on the Return of Cultural Property to its Country of Origin*, UNESCO (March 17-18, 2008) http://www.unesco.org/culture/laws/pdf/Revuedepresse_Athenes.pdf

[101] Another case that indicates some deficiencies with the legal recourse is the *Sevso Treasure* Case. See H. Kurzweil, L. Gagion and L. De Walden, *The Trial of the Sevso Treasure*, in Kate Fitz Gibbon (ed.), Who Owns the Past? Cultural Policy, Cultural Property and the Law (2005). See also Karl Meyer, The Plundered Past: The Story of the Illegal International Traffic in Works of Art 41 (1973).

good faith, may harm the relationship between museums and the foreign government seeking the intervention.[102] Maintaining good rapport between parties can be useful because museums have conservation, curatorial, and research expertise that helps enhance knowledge and identify looted antiquities on the black market.[103] More than three decades ago, Paul Bator suggested that, "museums [should] consider arrangements with foreign museums and governments that involve reciprocal measures, rather than simply repatriation of objects to their countries of origin."[104] The following are examples where a US museum entered into such an agreement with Italy in 2006[105] and Cambodia in 2013.

i. *The Metropolitan Museum of Art and Italy Agreement*

In late 2005, the Italian Ministry of Culture claimed that the Met had twenty-two[106] antiquities looted from Italy.[107] Although the Met admitted that it was unsure of the disputed pieces' provenance, the museum stated that "Italy would have to provide "incontrovertible evidence"' that the antiquities in question were illegally excavated.[108]

The Italian prosecutors' evidence for the Met's allegedly looted pots came largely from the trial of Giacomo Medici, a Roman art dealer. Although Medici denied the charges he was convicted in December 2004 of smuggling objects, including those subject to the 2006 negotiations between Italy and the Met. Italian Prosecutors claimed that Medici bought the Euphronios krater, (excavated in Cerveteri, near Rome) from tomb robbers. He then apparently sold it to Robert Hecht, a U.S. dealer who sold the krater for $1 million in 1972 to the Met. Hecht was also on trial

[102] *See* Randy Kennedy, *Trial Over, Former Getty Curator Speaks Out*, N.Y. Times: ArtsBeat (Jan. 6, 2011), http://artsbeat.blogs.nytimes.com/2011/01/06/trial-over-former-getty-curator-speaks-out/.

[103] *United States v. One 18th Century Colombian Monstrance*, 797 F.2d 1370, 1373 (5th Cir. 1986) (a curator of the San Antonio Art Museum alerted U.S. Customs about a possible violation of the NSPA when a dealer attempted to sell dubious artifacts to the museum).

[104] Paul M. Bator, *An Essay on the International Trade in Art*, 34 Stan. L. Rev. 275, 364 (1982).

[105] Alan Riding, *Why "Antiquities Trials" Focus on America*, N.Y. Times (Nov. 25, 2005) http://www.nytimes.com/2005/11/25/arts/design/25muse.html.

[106] Vernon Silver & Stephen West, *The Metropolitan Museum Offers To Return 20 Disputed Works to Italy*, Bloomberg (Feb 2, 2006), http://www.bloomberg.com/apps/news?pid=10000088&sid=aqrKfX2wmyRw&refer=culture.

[107] See Riding, *supra* note 105.

[108] *Id*.

in Rome for smuggling dozens of antiquities, including the Euphronios krater and the 15-piece set of silver that prosecutors claim was looted from Morgantina, in Sicily.

The Italian Ministry of Culture and the Met entered into negotiations, and three months later, on February 2, 2006, they agreed that the museum would formally "transfer of title to six antiquities—including a group of 16 Hellenistic silver pieces—to Italy,"[109] in exchange for long-term loans of other artworks and participation in archeological discovery in Italy. In a joint statement, the Italian Ministry of Culture and the Met stated that the agreement "redresses past improprieties in the acquisitions process through a highly equitable arrangement."[110]

According to the negotiated agreement, the repatriation would occur in three phases. First, the museum would return four classical Apulian vases,[111] soon after the accord.[112] Second, in 2008 the Met would return the Euphronios krater, described as "one of the finest existing examples of Greek vessels from the sixth century B.C."[113] Lastly, in 2010 the Met would relinquish the fifteen-piece silverware set known as the Morgantina Collection, which it had acquired in two lots in the early 1980s for approximately $2.75 million.[114] This repatriation timeframe was advantageous for the Met because it enabled the museum to exhibit the 2,500-year-old Attic krater by the potter Euxitheos and the painter Euphronios for an additional nine months in its Greek and Roman galleries, which opened in April 2007.[115]

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[109] The Metropolitan Museum of Art, *Statement by the Metropolitan Museum of Art on Its Agreement with Italian Ministry of Culture* (Feb 21, 2006), available at http://www.metmuseum.org/about-the-museum/press-room/news/2006/statement-by-the-metropolitan-museum-of-art-on-its-agreement-with-italian-ministry-of-culture.

[110] Metropolitan Museum of Art, *Statement by the Metropolitan Museum of Art on its Agreement with Italian Ministry of Culture* (Feb. 21, 2006), http://www.metmuseum.org.

[111] *Id*.

[112] Randy Kennedy & Hugh Eakin, *Met Chief, Unbowed, Defends Museum's Role*, N.Y. Times (Feb. 28, 2006) http://query.nytimes.com/gst/fullpage.html?res=9C01EEDB1631F93BA15751C0A9609C8B63.

[113] Anthee Carassava, *Greek Officials Planning to Bring Charges Against Ex-Curator*, N.Y.Times (May 5, 2006), http://www.nytimes.com/2006/05/05/arts/design/05getty.html?pagewanted=print&_r=0.

[114] Maura Singleton, *Plunder: The Theft of the Morgantina Silver*, U. Va. Mag., Spring 2006, available at http://uvamagazine.org/articles/plunder (last visited on April 23, 2015).

[115] The Metropolitan Museum of Art, *Statement by the Metropolitan Museum of Art on Its Agreement with Italian Ministry of Culture* (Feb 21, 2006), http://www.metmuseum.org/about-the-museum/press-room/news/2006/statement-by-the-metropolitan-museum-of-art-on-its-agreement-with-italian-ministry-of-culture.

It is important to highlight that this agreement clearly stated that the Met acquired the artifacts in good faith, thus preserving and recognizing its good reputation and ethics. Italy also waived the right to pursue any form of legal action against the museum for these works in the future. The Ministry of Culture promised to loan "works of art of equivalent beauty and importance to the objects being returned" for up to four years, which is the legal maximum under Italian law.[116] Such an amicable agreement, where both parties emphasize long-term cooperation, benefits both parties involved and the public at large. The Director of the Met stated that, "[the museum] is particularly gratified that, through this agreement, its millions of annual visitors will continue to see comparably great works of ancient art on long-term loan from Italy to this institution."[117]

ii. *The Metropolitan Museum and Cambodia Agreement*

On May 3, 2013, the Met announced that it would repatriate two 10th-century Koh Ker stone statues of "Kneeling Attendants."[118] These pieces were donated to the Museum in separate stages, in the late 1980s and early 1990s, and had been on public display in its Southeast Asian Wing since 1994. The decision to return these artifacts to Cambodia came after negotiations between the museum and the Cambodian government, who claimed that the two statutes in question had been removed from a remote jungle temple around the time of Cambodia's civil war in the early 1970s.[119]

In its announcement of the agreement to repatriate the artifacts, the museum stated that it had "recently came into possession of new documentary research that was not available to the Museum when the objects were acquired." In fact, evidence showed that the sculptures had been looted from the Koh Ker temple, and eyewitnesses claimed that they had been undisturbed as late as 1970. The Met director, Thomas P. Campbell stated that: "The Museum is committed to applying rigorous provenance

[116] *Id*.

[117] *Id*.

[118] The Metropolitan Museum, *Metropolitan Museum of Art to Return two Khmer Sculptures to Cambodia* (May 3, 2014), available at http://www.metmuseum.org/about-the-museum/press-room/news/2013/cambodian-returns.

[119] Tom Mashberg & Ralph Blumenthal, *The Met will Return a Pair of Statutes to Cambodia*, N.Y. Times (May 3, 2014), http://www.nytimes.com/2013/05/04/arts/design/the-met-to-return-statues-to-cambodia.html?_r=0.

standards not only to new acquisitions, but to the study of works long in its collections in an ongoing effort to learn as much as possible about ownership history." He highlighted the fact that the museum seeks to "strengthen the good relationship it has long maintained with scholarly institutions and colleagues in Cambodia and to foster and celebrate continued cooperation and dialogue between us."[120]

The Cambodian officials have also hailed high praise for the museum's ethics, stating that the repatriation of the sculptures shows "the high ethical standards and professional practices of the Metropolitan Museum of Art."[121] Indeed, the parties have developed a collaborative relationship, as the Met has exhibited works by contemporary Cambodian artists and held a major exhibition of Khmer artifacts in 2014.[122]

c. *International Relations Considerations Relating to Repatriating Artifacts Through Cooperative Agreements*

International forums, code of ethics, cooperative bilateral/multilateral agreements, domestic courts recognizing other states' laws, help validate the sovereignty of all states. Due to changes in the legal norms and ethics on collecting antiquities over the past century, particularly in the last two decades or so, ADR and cultural diplomacy allow sovereign states to be more equal in their quest for repatriation of cultural property, regardless of their international prestige, wealth, and power. Voluntarily repatriating artifacts, through mutually cooperative agreements, creates a new "level playing field where some claims of longstanding stakeholders, including developing countries, are finally being respected."[123]

Today's collectors, dealers, and museums may not purchase/take cultural property at will, as it may have been the case in 18th and 19th centuries. With the rise of newly independent states in the 1960s, many post-colonial governments "began to assert their right to control the fate of the art that they claim as their own. In later years, multiculturalism and identity politics strengthened their case and fortified their resolve."[124]

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[120] *Id*.
[121] *Id*.
[122] *Id*.
[123] Patrick Hunt, *International Law and the Ethics of Antiquities Trafficking*, 9 Stan. J. of Int'l. Relat. 80 (2000), http://web.stanford.edu/group/sjir/pdf/Hunt_11.2.pdf (last visited April 14, 2015).
[124] Cotter, *supra* note 1.

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One example that better explains this point is the return of Aksum stele, which was removed by the fascist Italian army "as a war trophy"[125] in 1937, back to Ethiopia in 2005. For many years the Ethiopians demanded its return, as the giant Aksum stele symbolizes the great achievements and importance of the Ancient Aksumite kingdom. Yet, the elaborately carved granite stood near the Arch of Constandine in Rome, until Italy started pursuing its own cases against the Getty Museum in Los Angeles, the Metropolitan Museum in New York, the Fine Arts Museum of Boston, among others, claiming that they had improperly acquired Italian cultural artifacts.

Italy eventually returned the giant Aksum stele to Ethiopia, dating from around 300 A.D. 80 feet long, and weighting 160 tons. Likely because of the shift in ethical dealings/acquisition of cultural property, international law, and public opinion, the Aksum stele was repatriated after almost 70 years.[126]

It is hoped that such cooperative agreements and voluntary repatriations of artifacts will foster greater ethical conduct in the world of cultural property. New philosophical and legal ramifications are in place as "[m]any more institutions and donors acknowledge the harms that purchasing and possessing looted art poses."[127] Looted cultural property does not only deprive nations and ethnic groups of their history, but the illicit antiquities trade can also fund violence and terror. By agreeing to repatriate looted cultural property, individuals, institutions and states remedying "past wrongs and help set the moral standard for the entire field."[128]

V. CONCLUSION

Like much of international law, the law and policy which impacts looted antiquities and cultural heritage issues is evolving. One can argue that a possible emerging trend to repatriate cultural property to their source

[125] *Aksum*, UNESCO, http://whc.unesco.org/en/list/15 (last visited April 14, 2015).
[126] Hunt, *supra* note 123 at 80.
[127] Mark Vlasic, *Tomb Raiders and Returns: Recovering Cambodian Antiquities and Our Collective Culture*, Huffington Post (May 23, 2014) http://www.huffingtonpost.com/mark-v-vlasic/tomb-raiders-and-returns_b_5383752.html.
[128] *Id*.

state is no longer simply a question of theft or trafficking, but has evolved to include ethical, moral, and scientific considerations. It is possible that artifacts that are unique, carry deep meaning in their source state, and can only be understood and appreciated within a particular cultural context (ancestral burials, national symbols, ritual objects, and parts of outstanding works of art) are particularly amenable to the use of ADR between claimants.

Returning cultural property to their source states allows citizens to recontextualize these objects into their history and conscience.[129] In many ways, cultural heritage is "a living connection to the past,"[130] which allows generations within a state to learn who they are as a people and that they belong together in a special way.

Repatriating cultural property, when proper, will not deplete museums because cooperative agreements allow for creative solutions. UNESCO 1976 Recommendation Concerning the International Exchange of Cultural Property, reiterates that cooperative agreements are "enriching to all parties [and] also lead to a better use of the international community's cultural heritage which is the sum of all the national heritages."[131] For example, agreements may provide for future long-term loans of the repatriated objects back to the bestowing institution, which allows the source state to maintain a cultural presence in international museums, and enhance the advantages that stem from the international display of cultural property.[132] Such cooperative/negotiated agreements "provide the countries of origin with an opportunity to ensure that their cultural and artistic legacy will"[133] remain relevant beyond their borders.

The internationalization of ideas and concepts has highlighted the importance of the preservation of culture as a means to bring nations closer and work toward shared common interests. States and museums may differ in their ultimate goals to repatriate or maintain artifacts, yet all actors involved may benefit when culture is preserved. Their willingness to enter into negotiations

[129] John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 Am. J. Int'l L. 831, 832 (1986).

[130] Cotter, *supra* note 1.

[131] John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part Two)*, 28 Environs Envtl. L. & Pol'y J. 58 (2004); see also John Henry Merryman, Albert E. Elsen & Stephen K. Urice, Law, Ethics and the Visual Arts 417 (5th ed., Kluwer Law Int'l 2007) (1979). (The "international distribution of works of a nation's earlier cultures or of its more recent artists is in the nation's interest.").

[132] *Id*. at 417-18.

[133] Christa L. Kirby, *Stolen Cultural Property: Available Museum Responses to an International Dilem*ma, 104 Dick. L. Rev. 729, 744 (2000).

to repatriate cultural property shows a possible keenness to compromise and cooperate. It is for this reason that in appropriate cases, mediation, negotiation and cultural diplomacy are useful tools in fostering cooperation among states and museums and at the same time strengthening research and excavations, exhibition exchanges, and creation of museum annexes.[134]

International agreements and their adaptation into national law have arguably facilitated cases involving repatriation of cultural property. States have actually implemented these basic principles of good practice and conduct. Even though the legal route has become simpler after the recent agreements and case precedents, litigation may be a less desirable route. For example, on May 14, 2015, Greece announced that it would not litigate the return of the Parthenon Sculptures in the International Court of Justice, and it would pursue a "diplomatic and political" approach instead. This decision came after a lengthy high-profile campaign for their repatriation. Indeed, after the opening of the new Acropolis Museum in Athens in 2009, designed to display all surviving marbles in their original layout, the Greek government revamped its decades old campaign to repatriate the marbles. In his announcement ruling out legal action, the Greek Minister of Culture, Nikos Xydakis noted that "in international courts the outcome is uncertain."[135] He also highlighted that public opinion on the future of the Parthenon Sculptures is slowly changing in favor of Greece, thus, making cultural diplomacy a more suitable venue.[136]

Over the years states, museums and collectors have become more informed and more perceptive of unethical dealings in artifacts, while the public has become more sensitized. Furthermore, cultural property often embodies deep-seated emotions,[137] and "delicate moral and cultural issues,"[138] which are best approached through cooperation and reconciliation. The fact that there are significant cases where parties negotiated their settlement outside of court, indicates that there is a move towards a common understanding approach in repatriation of artifacts cases.

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[134] Wolfgang Eichwede, *Models of Restitution (Germany, Russia, Ukraine),* in Elizabeth Simpson (ed.) The Spoils of War (1997).

[135] *Elgin Marbles Legal Action Ruled Out by Greece*, BBC (May 14, 2015) http://www.bbc.com/news/uk-32735410.

[136] *Id*.

[137] John E. Bersin, *The Protection of Cultural Property and the Promotion of International Trade in Art*, 13 N.Y.L. Sch. J. Int'l & Comp. L. 125, 134 (1992).

[138] Robert K. Paterson, *The "Caring and Sharing" Alternative: Recent Progress in the International Law Association to Develop Draft Cultural Material Principles*, 12 Int'l J. of Cultural Prop. 62, 74 (2005), (quoting the ILA Committee Report's Draft Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material).

e.ISBN - 978-85-98144-48-1

Programação Global Mediation Rio 2014

24/11

Local:
- Plenário da Lâmina Central - Tribunal Pleno
- Avenida Erasmo Braga, 115, Centro (sujeito à mudança)

18h00
Formação de Mesa de Honra
- Ministro Ricardo Lewandowski – Presidente do Supremo Tribunal Federal
- Ministro Marco Aurélio Gastaldi Buzzi – Superior Tribunal de Justiça
- Dr. Eduardo Paes – Prefeito da Cidade do Rio de Janeiro
- Desembargadora Leila Mariano – Presidente do Tribunal de Justiça do Rio de Janeiro - TJRJ
- Embaixador Jorge Chediek - Representante Residente do PNUD – Programa das Nações Unidas para o Desenvolvimento
- Desembargador Sérgio Schwaitzer – Presidente do TRF2
- Desembargador Carlos Araujo Drummond – Presidente do TRT2
- Dr. Sérgio Zveiter - Deputado Federal, Relator do Projeto de Lei da Mediação
- Desembargador Roberto Guimarães – Presidente do Instituto dos Magistrados do Brasil - IMB
- Dr. Marcus Vinicius Furtado Coelho - Pres. do Conselho Federal da OAB
- Jornalista Luiz Mauricio – Secretário Geral do Global Mediation Rio

Execução do Hino Nacional
- Homenagem especial à Ministra Nancy Andrighi, pelo Desembargador Agostinho Teixeira e pela Desembargadora Leila Maria Carillo Cavalcante Ribeiro Mariano

19h30
Conferência Magna
- Ministra Nancy Andrighi – Corregedora Nacional de Justiça

25/11

Local:
- Auditório Antonio Carlos Amorim - EMERJ
- Avenida Erasmo Braga, 115, 4º andar, Centro (sujeito à mudança)

09h00 – 10h00
Painel I - Conferência Nacional
Conferencista:
- Dr. José Mariano Beltrame - Secretário de Estado de Segurança do Rio de Janeiro

Tema:
- Programa de Polícia Pacificadora e os desafios da mediação de conflitos

10h00 – 10h30
- Intervalo

10h30 – 11h30
Painel II - Conferência Nacional
Conferencistas:
- Profa. Pós doutora Bárbara Mourão – Pesquisadora do Centro de Estudos de Segurança e Cidadania (Cesec/UCAM) e Cel. Frederico Caldas – Coordenador de Polícia Pacificadora/PMERJ

Tema:
- A mediação como mecanismo de proximidade

Debatedor:
- Prof. Mestre André Luiz Rodrigues – Coordenador do ISER – Instituto de Estudos da Religião - Rio de Janeiro

11h30 – 12h30
Painel III - Conferência Nacional
Conferencistas:
- Prof. Dr. Pedro Strozenberg – Presidente do Conselho Estadual de Direitos Humanos do Rio de Janeiro
- Anna Maria Di Masi – Coordenadora do Núcleo de Mediação de Conflito – Ministério Público/RJ

Tema:
- Mediação de Conflitos: teoria e prática

Debatedor:
- Maj. Leonardo Mazzurana – Assessor da Subsecretaria de Educação, Valorização e Prevenção/SESEG-RJ

12h30 – 14h00
- Intervalo para almoço

14h00 – 17h00
- Visita Técnica ao Núcleo de Mediação de UPP (exclusivamente para delegações internacionais)

17h00
- Encerramento de Atividades

26/11

Local:
- Auditório Antonio Carlos Amorim - EMERJ
- Avenida Erasmo Braga, 115, 4º andar, Centro (sujeito à mudança)

08h30
Painel IV – Conferência Nacional
Conferencista:
- Desembargadora Leila Mariano – Presidente do TJRJ - Brasil

Tema:
- Soluções Alternativas de Conflitos e os Desafios da Jurisdição Brasileira

Debatedor 1:
- Dra. Ana Tereza Basílio - Juíza TRE

Debatedor 2:
- Desembargador Fábio Dutra - TJRJ

09h15
Painel V - Conferência Internacional
Conferencista:
- Dr. César Landa, ex-Ministro da Corte Constitucional da República do Perú, Vice-presidente da Associação Internacional de Direito Constitucional - Perú

Tema:
- Controle constitucional dos mecanismos alternativos de resolução de conflitos: a mediação

Debatedor 1:
- Prof. Doutorando Ricardo Alexandre Oliveira Ciriaco – Advogado e representante do Grupo de Ensino Devry Brasil

Debatedor 2:
- Desembargadora Jacqueline Montenegro - TJRJ

10h00
Painel VI - Conferência Nacional
Conferencista:
- Prof. Dr. Cássius Guimarães Chai - MPMA - Brasil

Tema:
- Negociação de Conflitos Coletivos e Penais – Desafios e Possibilidades no manejo de Termos de Ajustamento de Condutas

Debatedor 1:
- Prof. Dr. Alexandre de Castro Coura – MPES

Debatedor 2:
- Prof. Dra. Juliana Magalhães – Coordenadora do Programa de Pós-Graduação da Universidade Federal do Rio de Janeiro - UFRJ

10h45
Painel VII - Conferência Internacional
Conferencista:
- Dr. Fernand de Varennes, Observatoire International des Droits Linguistique - Canadá

Tema
- Mediação e Direito Idiomático: Uma perspectiva a partir dos Direitos Humanos

Debatedor 1:
- Dr. Michel Betenjane Romano - Promotor de Justiça do Ministério Público do Estado de São Paulo

Debatedor 2:
- Mahmoud S. Elsaman – Universidade do Cairo - Egito

11h30 – 13h15
- Intervalo para almoço

13h30 - 14h00
Painel VIII - **Conferência Internacional**
Conferencista:
- Dra. Liv Larsson - Presidente do Centro de Mediação da Suécia

Tema:
- Mediação e comunicação Não-Violenta

14h00 - 14h30
Painel IX - Conferência Internacional
Conferencista:
- Prof. Pos.Doc. Mark Vlasic – Georgetown University- EUA

Tema:
- Mediação e direitos humanos na perspectiva de heranças culturais

14h45 – 18h15
Grupo de Trabalho I:
- Mediação, Sistema de Justiça e Administração Pública – O Poder Judiciário, O Ministério Público e a Advocacia Pública.

Local:
- AUDITÓRIO ANTONIO CARLOS AMORIM - EMERJ
- Avenida Erasmo Braga, 115, 4º andar, Centro (sujeito à mudança)

Coordenadores:
- Prof. Dr. Alexandre de Castro Coura (MPES) e Dr. Daury Cesar Fabriz (Prof. do Programa de Doutorado da Faculdade de Direito de Vitória)

Conferencistas:
- **Dra.** Cynthia Jones – American University – Washington College of Law – EUA
- **Dr.** Mahmoud Elsaman – Universidade do Cairo – Egito
- **Dr.** Américo Freire Jr. - Juiz Federal, Doutor e mestre em Direitos e Garantias Fundamentais pela FDV. Professor da FDV
- **Dr.** Nelson Camata Moreira Professor do Programa de Doutorado e Mestrado em Direitos e Garantias Fundamentais da FDV. Advogado

Grupo de Trabalho II
- Mediação e Direitos Humanos

Local:
- AUDITÓRIO Desembargador Nelson Ribeiro Alves
- Avenida Erasmo Braga, 115, 4º andar, Centro (sujeito à mudança)

Coordenadores:
- Prof. Dra. Elda Bussinguer e Prof. Dr. Ricardo Goretti - Faculdade de Direito de Vitória (FDV)

Conferencistas:
- **Dra**. Rosa Maria Freire – Sócia fundadora do GMME – Grupo de Magistrados Europeus de Mediação – Espanha

- **Dr.** Emiliano Carretero Morales – Subdiretor Máster em Mediação, Negociação e Resolução de Conflitos – Universidad Carlos III – Madrid
- **Dra.** Juliana Loss - Mediadora. Professora de negociação e mediação. Membro da CEMCA - Comissão Especial de Mediação, Conciliação e Arbitragem e da Comissão para Relações com a França.
- **Dr.** José Luiz Bolzan

Grupo de Trabalho III

- Mediação e Relações de Consumo

Local:

- Auditório Desembargador Jose Navega Cretton
- Avenida Erasmo Braga, 115, 7º andar, lâmina 1 – Centro (sujeito à mudança)

Coordenador:

- Prof. Dr. Anibal Zárate Pérez, Doutor por Universidade Paris II de Parthéon-Assas, Universidad Externado Colombia

Conferencistas:

- **Prof.** Manuel Izquierdo Carrasco – Dr. em Direito pela Universidade de Córdoba – Espanha
- **Prof.** Lorenzo Villegas Carrasquilla - Catedrático da Universidade dos Andes – Colombia
- **Dr.** Cristiano Heineck Schmitt – Membro da Comissão Especial de Defesa do Consumidor da OAB Seccional do Rio Grande do Sul
- **Dr.** Guilherme Magalhães Martins – Titular da 3ª. Promotoria Cível da Capital do Rio de Janeiro
- **Dra.** Fabiana Rodrigues Barletta - Diretora Adjunta de Comunicação do Instituto BRASILCON – Instituto Brasileiro de Política e Direito do Consumidor.
- **Dr.** Lindojon G. Bezerra dos Santos – Presidente e Conselheiro do Conselho de Usuários de Telecomunicações da Região Nordeste do Grupo AMX - ANATEL

27/11

Local:

- Auditório Antonio Carlos Amorim - EMERJ
- Avenida Erasmo Braga, 115, 4º andar, Centro (sujeito à mudança)

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08h30
Painel X - Conferência Internacional
Conferencista:
- Profa. Dra. Soraya Amrani Mekki - Conselho de Direitos Humanos da República Francesa - França

Tema:
- Mediação e processo: desafios e possibilidades pela reforma civil e de direitos sociais na França

Debatedor 1:
- Prof. Doutorando Francisco Lima Soares, Cientista Político-Social da Universidade de Sorbonne - França

Debatedor 2:
- Prof. Doutor Alberto Manuel Adorno Poletti – Universidad Columbia Del Paraguay

09h15
Painel XI – Conferência Nacional
Conferencista:
- Dr. José Antônio Fichtner - advogado e Professor

Debatedor 1:
- Dra. Patricia Félix Tassara - Subprocuradora Geral do Município do Rio de Janeiro

Debatedor 2:
- Dr. Luiz Eduardo Cavalcanti Corrêa - Procurador do Município do Rio de Janeiro

Tema:
- Administração de processos de mediação

10h00
Painel XII – Conferência Internacional
Conferencista:
- Prof. Dr. Alberto Elisavetsky – Observatório de Conflito da Universidade Nacional da Argentina e Fundador da Resolução de Conflitos on Line da América Latina - Argentina

Tema:
- Estado de arte da resolução de conflitos e de novas tecnologias – os desafios da América Latina

Debatedor 1:

- Profa. Dra. Alicia Millan - Diretora do Centro de Negociação e Mediação e do Conselho Profissional de Ciências Econômicas da cidade de Buenos Aires.

Debatedor 2:

- Prof. Dr. Manuel Izquierdo Carrasco – Decano de Direito da Universidade de Córdoba – Espanha

10h45
Painel XIII: - Conferência Internacional
Conferencista:

- Juiz András Sájo - Corte Européia de Direitos Humanos União Europeia / Hungria

Tema:

- O processo de resolução alternativa de litígios e proteção dos direitos humanos no âmbito do Tribunal Europeu dos Direitos Humanos - requisitos de equidade.

Debatedor 1:

- Dra. Juliana Pereira da Silva – Secretária Nacional do Consumidor - SENACON

Debatedor 2:

- Dr. Flavio Crocce Caetano – Secretário Nacional de Reforma do Judiciário

11h30 – 13h15:

- Intervalo para almoço

13h30 - 14h00
Painel XIV - Conferência Internacional
Conferencista:

- Dr. Casimiro Manuel Marques Balsa – Prof. Catedrático no Depto. de Sociologia da Universidade Nova de Lisboa - Portugal

Tema:

- A mediação de conflito no ambiente escolar do continente europeu

14h00 - 14h30
Painel XV - Conferência Internacional
Conferencista:
- Prof. Dr. Sergio Ramiro Peña Neira – Universidad de Chile

Tema:
- Jurisdição penal e mediação. Perspectivas e realidade na República do Chile

14h45 – 18h15
Grupo de Trabalho IV:
- Mediação, Processo Penal e suas Metodologias

Local:
- AUDITÓRIO ANTONIO CARLOS AMORIM - EMERJ
- Av.Erasmo Braga, 115, 4º and. Centro (sujeito à mudança)

Coordenadores:
- Prof. Dr. Alberto Manuel Poletti Adorno – Universidad Columbia del Paraguay e Prof. Dr. Weliton Sousa Carvalho

Conferencistas:
- Dra. Claudia Criscioni Ferreira – Membro da comissão nacional de estudo da reforma do sistema de justiça criminal – Paraguai
- **Prof.** Máster Dr. Nicolás Rucci – Procurador Cybercrime. Ministério Segurança e Justiça da Provincia de Buenos Aires – Argentina
- **Prof.** Mario Camilo Torres – Justiça Criminal – Paraguai
- **Sra.** Claudia Velazquez - Treinadora de Negociação de Conflitos do Centro de Arbitragem e Mediação - Paraguai

Grupo de Trabalho V:
- Mediação Comunitária

Local:
- Auditório Des. Nelson Ribeiro Alves-Av.Erasmo Braga, 115, 4ºand. Centro (sujeito à mudança)

Coordenadores:
- Dr. Michel Betenjane Romano (MPSP) e Professor Doutor Adolfo Braga Neto – Presidente do IMAB – Instituto de Mediação e Arbitragem do Brasil

Conferencistas:
- Dra. Tatiana Rached – Secretaria de Justiça e Defesa da Cidadania de São Paulo.
- **Dr.** Guilherme de Almeida – Prof. pós doutorado no Freiburg Institute of Advanced Studies (FRIAS)

- **Dra.** Célia Nobrega Reis – Ministério da Justiça e dos Direitos Humanos de Angola
- **Dr.** Alejandro Nató – Provedor de Justiça de Buenos Aires - Argentina

Grupo de Trabalho VI:

- Mediação Familiar, Infância, Idoso e Gênero

Local:

- Auditório Desembargador Jose Navega Cretton
- Avenida Erasmo Braga, 115, 7º andar, lâmina 1 – Centro (sujeito à mudança)

Coordenadores:

- Prof. Pos.Doc. José Manuel Peixoto Caldas - Diretor do Observatório Iberoamericano de Saúde e Cidadania, Universidade do Porto, Pesquisador Visitante FIESP e Prof. Doutor Alexandre Gustavo de Melo Franco Bahia, UFOP.

Conferencistas:

- Dr. José Manuel Mendez Tappia – Mestre em Medicina Social da Universidade - México
- **Dra.** Leila Tardivo – Pres. da Comissão de Cultura e Extensão do Instituto de Psicologia da USP
- **Dr.** Dierle José Coelho Nunes – Mestre pela PUC-Minas e pela Universitá degli Studi di Roma "La Sapienza"
- **Dra.** Almudena Manso -Doutora em sociologia do departamento de comunicação II e ciências sociais na Universidade Rey Juan Carlos.

28/11

Local:
Auditório Antonio Carlos Amorim - EMERJ
Avenida Erasmo Braga, 115, 4º andar, Centro (sujeito à mudança)

8h30
Painel XVI - Conferência Internacional
Conferencista:

- Prof. Mo Jing Hong - China

Tema:

- Os desafios de resolução de conflitos entre as diferentes culturas - novas fronteiras de jurisdição internacional sob o conceito de direitos universais.

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Debatedor 1:
- Des. Federal Fausto Martin De Sanctis – TRF3

Debatedor 2:
- Luciano Badini–Promotor de Justiça de Minas Gerais–Brasil

09h15
Painel XVII - Conferência Internacional
Conferencista:
- Dr. Gerry Rooney - Presidente do Instituto Irlandês de Mediação (Irlanda)

Tema:
- A experiência Irlandesa na reforma legislativa na adoção da mediação e os desafios ao legislador e à jurisdição

Debatedor 1:
- Dr. Paulo Assed Estefan – Juiz Diretor do Fórum de Campos dos Goytacazes–RJ - Mestre em Direito Constitucional

Debatedor 2:
- Des. Federal Luiz Stefanini TRF3

10h00
Painel XVIII - Delegações Internacionais

10h45
PaineL XIX - Conferência Nacional
Conferencista:
- Min. Marco Aurélio Buzzi - STJ

Tema:
- Ressurgimento dos Meios Adequados de Resolução de Conflitos

Debatedor 1:
- Min. Ricardo Villas Bôas Cueva - STJ

Debatedor 2:
- Min. Paulo de Tarso Sanseverino - STJ

11h30 – 13h15:
- Intervalo para almoço

13h30 – 17h15
Grupo de Trabalho VII:
- Mediação e Conflitos Internacionais

Local:
- Auditório Antonio Carlos Amorim - EMERJ
- Avenida Erasmo Braga, 115, 4º andar, Centro (sujeito à mudança)

Coordenadores:
- Prof. Dr. Christian Djeffal – Universidade de Berlim/Alemanha e Prof. Dr. Raphael Vasconcelos

Conferencistas:
- Prof. Dr. Alberto Manuel Poletti Adorno – Universidad Columbia del Paraguay
- **Dr.** Cassius Guimarães Chai – MPMA

Grupo de Trabalho VIII:
- Mediação, Linguagem, Comportamento e Multiculturalismo

Local:
- Auditório Desembargador Nelson Ribeiro Alves
- Avenida Erasmo Braga, 115, 4º andar, Centro (sujeito à mudança)

Coordenadores:
- Prof. Mestre Décio Nascimento Guimarães – Universidade Estadual do Norte Fluminense e Profa. Dra. Bianka Pires André - Universidade Estadual do Norte Fluminense (UENF)

Conferencistas:
- **Dr**. Casimiro Manuel Marques Balsa – Prof. Catedrático no Depto. de Sociologia da Universidade Nova de Lisboa - Portugal
- **Dra**. Martha Vergara Fregoso – Coordenadora de Pesquisa do Centro Universitário de Ciências Sociais e Humanas da Universidade de Guadalajara

Grupo de Trabalho IX:
- Mediação e Direitos Sociais Indisponíveis: Trabalho, Saúde, Educação e Meio-Ambiente

Local:
- Auditório Desembargador Jose Navega Cretton

Avenida Erasmo Braga, 115, 7º andar, lâmina 1 – Centro (sujeito à mudança)

Coordenadores:
- Prof. Doutoranda Maria do Socorro Almeida de Sousa – TRT 16ª. Região/Maranhão, Prof. Dra. Herli de Sousa Carvalho - Universidade Federal do Maranhão – UFMA e Universidade Federal do Rio Grande

do Norte – UFRN e Prof. Esp. Mariana Lucena Sousa Santos

Conferencistas:

- Prof. Dr. Filinto Elisio de Aguiar Cardoso (Cabo Verde) – Vice-Presidente da Multilingual Schools Foundation (Portugal)
- **Profa.** Edith Maria Barbosa Ramos – Universidade Federal do Maranhão
- **Profa.** Nicia Regina Sampaio – Ministério Público do Espírito Santo

Clausura Plenária

- Plenário da Lâmina Central - Tribunal Pleno
- Avenida Erasmo Braga, 115 - Centro

e.ISBN - 978-85-98144-48-1

CARTA RIO GLOBAL MEDIATION DE ACESSO À JUSTIÇA E FORTALECIMENTO DA CIDADANIA

O *Global Mediation Rio*, por seus Conselhos Acadêmico e Científico, bem como pela Coordenação Científico-Internacional e pelas Coordenações dos seus Grupos de Trabalho reunidos na cidade do Rio de Janeiro, no mês de novembro de 2014, nos dias 24 a 28;

Considerando que o conflito social manifesta-se multifacetariamente e, portanto, inscreve-se na riqueza do mundo da vida e se conforma na gramática de práticas sócio-institucionais naturalizadas;

Considerando que a Mediação é coetaneamente método e procedimento e pode ambientalizar um contexto para fortalecer o *sentimento de pertencimento* e de identidade constitucionais nas experiências democráticas objetivando a pacificação social;

Considerando a abertura semântica intercultural e transdisciplinar plasmável na Mediação, impondo um permanente exercício crítico-construtivo da efetividade da realização de Justiça Social e densificação da cidadania;

Admitindo que os processos decisórios oficiais devem acolher a condição ínsita aos princípios do devido procedimento legal e do contraditório enquanto oportunidade de ser ouvido em paridade de reconhecimento e de consideração;

Admitindo a inalienabilidade de permanente proteção aos Direitos Humanos;

Admitindo que está reservado ao Poder Judiciário o papel institucional de protetor dos Direitos Humanos e que tal condição à um Estado Democrático não elimina a possibilidade de convivência com um sistema *multidoor* para conhecimento, apreensão e solução de conflitos; e,

Admitindo que é curial romper-se com a mentalidade conformada em pré-compreensões teóricas de que a legitimidade de decidir bastar-se-ia na literalidade da lei,

Adota os seguintes enunciados:

O acesso à justiça social deve ter na figura do Poder Judiciário o garantidor último e residual como possibilidade institucional factível de pacificação social;

Os Poderes Republicanos articuladamente devem convergir para uma política de Estado no estabelecimento de outros meios de solução de controvérsias, firmando parcerias e fomentando a atuação das Instituições essenciais à administração da Justiça;

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A Mediação como serviço público nas políticas de Estado deve reger-se pela informalidade, flexibilidade, gratuidade, confidencialidade e independência do mediador, preconizando um processo difuso para conhecer conflitos privados e públicos;

Os instrumentos institucionalizados de Mediação, públicos e ou privados, em especial os empresariais, devem dispor de meios tecnológicos que sejam capazes de democratizar o acesso eficiente, ágil e facilitado a todos os interessados;

A Mediação Penal, quando adequado, deve ser pensada e realizada como meio de prestigiar a composição e a reparação civil dos danos causados às vítimas com preponderância sobre as alternativas de encarceramento;

O princípio da oportunidade regrada para o manejo da Ação Penal deve ser considerado como vetor do agir ministerial público sempre e quando o bem lesionado for disponível e os resultados forem mais representativos para a pacificação social;

A Mediação deve ser possibilitada em toda e qualquer fase processual, na execução penal inclusive, como meio de concretizar a pacificação social e promover com mais efetividade processos de ressocialização;

A Mediação comunitária, enquanto mecanismo de emancipação, de autocomposição, de autodeterminação e de empoderamento social, deve ser prioritariamente conduzida por seus atores sociais, habilitados e conduzidos a desenvolverem competências para identificar, elaborar e ambientalizar espaços para a solução de seus conflitos;

Compreender o contexto do conflito e as características subjetivas, de vulnerabilidade física, psíquica e socioeconômica, são condições necessárias para condução do processo de autocomposição ou de auxílio ao processo de autocomposição visando alcançar a sua diluição e a superação de disputas;

A autodeterminação dos povos e a soberania são princípios que devem fortalecer a afirmação do preceito do não uso da força, e prestigiar a solução pacífica de controvérsias com o compromisso de não renúncia de proteção da pessoa humana e de sua dignidade, sua história e sua memória;

O processo de Mediação dos conflitos deve ser abordado como um meio integrativo no qual a identificação das diferenças, compreendida dentre elas a linguagem e seus maneirismos, convirja para um diálogo a ser estabelecido com clareza de conceitos, e igual respeito e consideração;

A Mediação de conflitos laborais, individuais ou coletivos, deve ultimar-se preservando o princípio da irrenunciabilidade dos direitos não

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patrimoniais e o direito de acesso à justiça, com as garantias que lhe são conferidas, respeitado o direito fundamental de escolha consciente;

A Mediação em matéria de meio ambiente deve transcender a resolução de conflitos consolidados, para alcançar a construção de um mundo sustentável para as gerações futuras;

Os processos de aprendizagem, em todos os seus níveis, áreas e setores, devem ser urdidos a partir da consciência de sua capacidade de formar uma mentalidade com competências capaz de empoderar o cidadão, e de lho conduzir ao fortalecimento de uma cultura de pacificação de conflitos;

A Mediação em matéria de saúde deve preservar ao máximo os direitos fundamentais devendo o Estado adotar controle dos recursos materiais e humanos, promovendo de modo facilitado e inclusivo a correta informação sobre seus serviços e procedimentos, atentando para as inovações tecnológicas e de insumos, observando a transparência e a eficiência administrativas.

e.ISBN - 978-85-98144-48-1

Rio de Janeiro, Novembro 24 a 28 de 2014.

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