Mediation in Cyprus: Theory Without Practice

Anna Plevri[1]

Abstract

The paper presents the mediation legislation of Cyprus and the actual practice of mediation in the island, if any. The recent developments and upcoming actions or initiatives on mediation in Cyprus on behalf of the Ministry of Justice, such as the draft law on mediation of family disputes, which is currently under parliamentary review and the proposed reform of the mediation law 159/2012, are also discussed in the paper. In this framework, the goal of the paper is to present the provisions of mediation legislation in Cyprus, the emergence of its problems and gaps, and some critical remarks on the direction to improve the legislation and to promote mediation in practice via compulsory mediation in some categories of civil and/or commercial disputes, as a possible regulatory change in order to succeed actual mediation practice in Cyprus.

Keywords: alternative dispute resolution (ADR), dispute, agreement to mediation, compulsory mediation, court, judge, Cyprus, family mediation, legal order, mediator, mediation process

Basic Principles, Key Features, Advantages and Disadvantages of Mediation as an Alternative Dispute Resolution Method

Two (or more) parties (individuals or businesses) who 'share a dispute' is a common occurance. Those parties may have tried to resolve their dispute or difference by themselves through discussions and they (may) have failed. As a second action, they may have each instructed lawyers to send formal letters, possibly without success. Should court proceedings be the only way out? It seems that the answer to this question is negative, because the opposing parties also have available forms of alternative dispute resolution (ADR). The spectrum of alternative (or amicable or appropriate) dispute resolution methods includes negotiation,[2] mediation,[3] conciliations and ombudsmen,

1 Anna Plevri is a Lecturer in the School of Law, University of Nicosia.

2 In the UK, another ADR technique similar to negotiation (least evaluative) is the Round Table Meetings (RTMs). The RTMs operate 'in the direct shadow of the civil courts'. Sometimes they are described as 'mediation without the mediator' as there is no process manager in this type of ADR. Process is worked out by the lead lawyers for each party, who also are the main protagonists in the discussion. This process is frequently deployed in the UK, particularly in clinical negligence and personal injury cases, albeit that where it does not lead to settlement it is sometimes followed by a formal mediation which may yet lead to settlement. See in detail, ADR and Civil Justice, *CJC ADR Working Group Final Report*, November 2018, Section 3: The types of ADR available, 3.6. Available at: https://www.judiciary.uk/announcements/new-report-on-alternative-dispute-resolution/.

3 See further, S. Walker, *Mediation Advocacy: Representing Clients in Mediation* (Haywards Heath: Bloomsbury Professional, 2017), 15-31. On the landscape of ADR provisions in England and Wales,

judicial or private early neutral evaluation[4] and arbitration.[5]

Mediation, in its essence, does not end with a judgment as an outcome of the process but seeks a voluntary solution that is acceptable to the parties involved in a dispute.[6] Moreover, mediation is a flexible, cost-effective and confidential procedure, which assists the parties with the help of a third, neutral person, the mediator, to find common ground and work towards settling and reaching an agreement without delay.[7] It is worth noting that mediation can be a very useful way to resolve disputes out of court, especially in cases where emotions run high, such as in divorce cases.

A form of ADR, mediation is a 'civilized' way to resolve a dispute because, unlike the adversarial method of litigation, mediation is best suited to those cases where the parties genuinely wish to avoid prolonging the dispute and to preserve their relationship. In this framework, mediation is not just an amicable alternative but also an appropriate and effective way to resolve certain categories of disputes, such as civil, family, commercial, or workplace, or disputes related to health care services, where there are specific positions, interests and needs of the disputant parties, but who would like to preserve their (family, working, commercial, business etc.) relationship and cooperation after the resolution of their dispute. This is not the case in civil litigation, where the litigants become involved in a court battle. In other words, one could further define mediation as a voluntary and confidential method of resolving disputes between two or more parties out of court, with the help of a moderator.

A mediator is a neutral person who assists the parties in negotiating and reaching a settlement they both accept[8] in disputes where both parties have the 'power of disposal' of their rights and claims. In contrast with an arbitrator, a mediator neither

see ADR and Civil Justice Council, *CJC ADR Working Group Interim Report* (October 2017), 15-16 and for Overseas 41-48, available at https://www.judiciary.gov.uk/wp-content/uploads/2017/10/interim-report-future-role-of-adr-in-civil-justice-20171017.pdf. and ADR and Civil Justice, *CJC ADR Working Group Final Report* (November 2018), Section 3: 3.8–3.10.

4 See ADR and Civil Justice, *CJC ADR Working Group Final Report,* Section 3: 3.8–3.10.

5 Arbitration is the most evaluative method of ADR. Arbitration differs in principle from mediation and other ADR methods, in that parties choose it in order to obtain a private adjudication of their dispute entirely outside the civil court process. The arbitral tribunal is the one who decides on the dispute by rendering its award.

6 R. Rewald, *Mediation in Europe: The Most Misunderstood Method of Alternative Dispute Resolution*, World Arbitration Report (New York City: Weil, Gotshal & Manges LLP, Spring 2014), 14, available at: https://www.weil.com/~/media/files/pdfs/WWAR_Newsletter_Spring2014.pdf.

7 On the core principles, key points and process of mediation, see K. Aubrey-Johnson, H. Curtis, *Making Mediation Work for You: A Practical Handbook* (London: Legal Action Group, 2012), 3-30. Comparison of laws, regulatory models and fundamental issues of mediation are discussed in K. Hopt and F. Steffek (eds), *Mediation. Principles and Regulation in Comparative Perspective*, 1st ed., (Oxford: Oxford University Press, 2013), 3-127.

8 See further, Walker, *Mediation Advocacy: Representing Clients in Mediation,* 15-16, 28-30, 32-36. On mediation in England and Wales, see Civil Justice Council, *ADR and Civil Justice*, *CJC ADR Working Group Interim Report* (October 2017), 16-20.

renders an award on the disputed matters nor applies law.

Furthermore, another view of mediation could be that of facilitated negotiation. Settling early, reducing (emotional) stress, acrimony, legal costs and saving time are results that the parties can actually achieve through the mediation process by using the powerful tool of constructive dialogue. According to the revised definition of mediation of the Centre for Effective Dispute Resolution (CEDR):

> 'Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution'.[9]

This definition seeks to emphasize the idea that while mediation is a process with a powerful format, it is nevertheless fundamentally flexible. Furthermore, it highlights that mediation is a safe environment where parties can talk freely, experiment with ideas and are ultimately in control of the process. It also stresses that mediators should be proactive in assisting parties to find a solution, although the parties have ownership of the outcomes.[10]

Moreover, it is well known that the main benefits and key characteristics of mediation[11] could be summarised as follows:

(a) Mediation is a voluntary process. This means that the opposing parties are the ones who decide and actually try to resolve their dispute through mediation. The outcome of mediation is commonly elaborated and agreed by the parties. Even in jurisdictions such as in England and Wales, where the civil litigation rules do not provide for compulsory mediation, it is recommended that parties consider mediation before going to trial. Mediation clauses are also increasingly used in commercial contracts instead of or as a supplement to an arbitration clause. Moreover, parties can mediate at any stage before or during proceedings, and refusal to mediate can give rise to cost sanctions in court proceedings.

(b) Mediation is confidential and is conducted 'without prejudice'.[12] This means that any information disclosed during mediation may not be used in subsequent arbitration or litigation proceedings without the express agreement of both parties. The element of confidentiality is crucial at all stages of the mediation process, such as preparation, opening, exploration, negotiation and closing. This specific aspect of mediation is very important for both individuals' and corporations' reputation,

9 See CEDR, 'CEDR revises definition of mediation' (2004, November 1), available at https://www.cedr.com/solve/mediation/.

10 See CEDR, 'CEDR revises definition of mediation'.

11 See Aubrey-Johnson and Curtis, '*Making Mediation Work for You',* 31-51, on the question 'Why choose mediation?' See Walker, *Mediation Advocacy*, 63-74, regarding the various mediation models.

12 See Walker, *Mediation Advocacy*, 33-34, 127-130, 229-237.

fame, personal information, data, etc. It is also remarkable that the advantage of confidentiality in mediation provides the parties with the opportunity to resolve their differences in a way that will not attract negative publicity. As a concluding remark, 'confidentiality goes to the essence of the mediation process'.[13]

(c) Any settlement reached is legally binding once put into writing and signed by the parties. Moreover, a written settlement as an outcome of mediation is binding and enforceable according to the provisions of the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008[14] on certain aspects of mediation in civil and commercial disputes (the Mediation Directive) and according to the provisions of the national mediation legislation of each state.

(d) Mediation is quick since it is informal and flexible. This is a clear advantage of mediation over litigation and arbitration processes. Usually most mediations are arranged within a few days or weeks. A formal mediation session commonly lasts for only one or two days or even for a few hours, since no lengthy submissions, cross-examination, discovery and legal arguments are involved. This is of significant importance since it is well known that 'justice delayed is justice denied!' Moreover, in monetary claims, a party is likely to agree to a lower amount of money if it will be payed quickly. In addition to that, mediation can run alongside litigation or arbitration. So if the parties reach a settlement via mediation, they terminate every other process, since the dispute is now resolved. Ordinarily, courts (in most jurisdictions) will actively encourage the parties to consider mediation throughout the lifetime of a court case.

(e) In comparison to traditional litigation or arbitration processes, mediation is a cost-effective route to resolving disputes. More specifically, there is a clear advantage of mediating, especially early in the timeline of a dispute,[15] because one can avoid potentially high legal costs from an early settlement. More specifically, the parties can save enormous sums of money by mediating at the right time and preserving a working relationship. In any case, the cheapest lawyer is a settlement.

(f) Mediation gives parties control over the process and its outcome. In addition, the parties have the power and opportunity to choose their mediator. Of course the parties may be compelled to go to mediation but they cannot be compelled to reach a settlement. This, would be of course contrary to the protection of the right of access to court and the right of a person to be heard by a court in a judicial scheme, as well as to each person's private autonomy. These rights are protected by the Constitution

13 Walker, *Mediation Advocacy*, 229.

14 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (hereinafter Parliament and Council Directive on Mediation), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF.

15 This is very important for jury systems where actions, rights and claims are decided by jury and/or the legal costs in litigation are high.

of each state and the European Convention on Human Rights (ECHR, article 6). To conclude, in mediation, the parties settle their dispute only if they want to settle.[16]

(g) The variety of settlement options in mediation is wide and they are not focused only on monetary settlements. This way parties can find solutions that suit their needs, restore, preserve and maintain future relationships more effectively than through arbitration or litigation, or even create more opportunities for further cooperation. This is not possible in court proceedings, where specific remedies apply and there are limitations on the content of court orders. In comparison to litigation, sustainable monetary or non-monetary solutions could arise through mediation, which is a benefit of strategic importance. The human aspect of the conflict has its own important role in the mediation procedure and the potential settlement.

Based on the above analysis, one could conclude that mediation operates in the shadow of civil courts. Mediation is not a panacea for all kinds of dispute. As any other process, mediation has disadvantages, which are often overlooked. For instance, parties should not use mediation to get to the truth of disputed matters but to find a mutually acceptable solution. Moreover, while in litigation, lawyers have legal arguments, tools and methods to produce evidence and testimony, this is not the case in mediation. Mediators have specific skills that may help restore balance, but there is a limit to what they can do. Finally, mediation may not be successful and the parties may not reach an agreement. In this case, the disputants will have to go through the time-consuming and expensive process of a trial after having spent time and money in mediation.

Regarding the mediator's role,[17] firstly, it should be noted that the mediator is a neutral, third person, who assists the opposing parties by using specific skills and techniques such as active listening, open questioning, positive reframing, empathy, acknowledgement of the emotions of the parties and summarizing, to reach an amicable solution and to resolve their dispute in a mutually acceptable manner. The actual role and duty of the mediator is to encourage the disputants to reveal to her/him what their true interests and needs are and to explore and discuss possible solutions. The mediator is neither a judge nor an arbitrator. As an unbiased intermediary, the mediator listens to potential apologies, explores possible points of settlement and realistic solutions, discusses with each party workable and viable agreements and prioritizes the main points of the dispute and the key issues for each party.

The mediator does not dictate the outcome of mediation but helps both (or more) parties to develop and evaluate new options for resolving the crucial issues at hand,

16 Walker, *Mediation Advocacy*, 33.

17 See in detail, Walker, *Mediation Advocacy*, 39-49, 51-58. Regarding the mediation profession, business or job, see S. Walker, *FAQs for Mediators*, (Haywards Heath, UK: Bloomsbury Professional, 2017) and S. Walker, *Setting up a Business as a Mediator*, (Haywards Heath: Bloomsbury Professional, 2016).

tailoring the solution to their specific needs, and broadening the possible outcomes. Moreover, the mediator listens to potential apologies and explores realistic solutions as possible points of settlement – zones of possible agreements (ZOPA) – discusses and prioritizes the key issues of the dispute for each party.

Every mediator should comply with the rules of conduct for mediators according to the national legislation of each state (if any) which in turn is guided by the European Code of Conduct for Mediators,[18] which sets out a number of principles to which individual mediators may voluntarily decide to commit themselves. Mediators may use the above Code for all civil and commercial matters.

The EU Mediation Directive 2008/52

In 2002, the Council of Europe addressed the problem of the long backlog of court actions and costly legal expenses with the adoption of the *Recommendation of the Committee of Ministers*.[19] The Recommendation encouraged EU member states to clarify the mediation process within their legal systems.

Furthermore, in 2004 the European Commission Directorate of Justice and Home Affairs adopted a *Code of Conduct for European Mediation Services* and a proposal for legislation to ensure uniform practices and standards.[20] This was followed in 2008 by the European Union Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters (Mediation Directive) which provided a framework for cross-border mediation. In 2011, the European Parliament adopted a resolution regarding the implementation of the 2008 directive.[21] This resolution said that individual states should regulate mediation in their own systems in order to meet the requirement for the regulation of cross-border mediation.

The Mediation Directive is designed to facilitate access to alternative dispute resolution mechanisms and to promote the amicable settlement of disputes, while encouraging the use of mediation. The Directive applies to cross-border civil disputes, including family law, and commercial matters. It applies when at least one of the parties is domiciled in an EU Member State. Conversely, it does not apply to disputes concerning revenue, customs, administrative matters, liability of the State or omissions in the exercise of State authority. Neither does it apply to disputes where one or more parties is domiciled or resident in Denmark. The Mediation Directive, together with Directive 2013/11/EU on alternative dispute resolution and Regulation (EU) No

18 European Code of Conduct for Mediators, available at http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.
19 18 September 2002 (REC 2002).
20 SEC 2004/0251 (COD).
21 2011/2026 (INI).

524/2013 on online dispute resolution, is one of the European legal acts on alternative dispute resolution mechanisms.

The above Directive has been in force since 13 June 2008 and it required EU Member States to implement necessary legislation, regulations, and administrative provisions on cross-border mediation by 20 May 2011, although Article 10 of the Directive set the transposition deadline for 21 November 2010 (Article 12, Directive 2008/52/EC). The Directive has not been amended yet.

Article 3 of the Mediation Directive describes mediation as a structured process whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach agreement on the settlement of their dispute with the assistance of a mediator. Mediation can either be initiated by the parties to the dispute, suggested or ordered by a court, or prescribed by the law of a member state. Mediation, as required by the text of the Directive, should generally be confidential. Moreover according to the Directive, agreements resulting from mediation should be generally enforceable. Member States have an obligation to promote and encourage the availability to the general public of information on how to contact mediators or organisations providing mediation services.

The Commission's report on the application of the Mediation Directive of 2016 (COM(2016) 542)[22] noted that the Directive had had a 'significant impact on the legislation of many Member States', while this impact varied 'according to the pre-existing level of national mediation systems'. Despite the fact that the report concluded that there was no particular need to revise the Directive, its application could be improved in some ways. For instance, member states needed to step up their efforts to promote and encourage the use of mediation through various mechanisms included in the Directive, such as providing financial incentives or ensuring enforceability of mediation agreements. In this regard, the Commission also promised to do more to promote the take-up of mediation and to co-finance mediation-related projects, and pages on the member states' mediation systems.

Moreover, in the 27 June 2017 Report of the Committee on Legal Affairs of the EU on the implementation of the Mediation Directive,[23] the main findings are the

22 European Commission, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, 26.08.2016, COM (2016) 542, Final (2016, August 26).

23 Committee on Legal Affairs, on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the 'Mediation Directive') (2016/2066(INI)), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2017-0238+0+DOC+XML+V0//EN#title1. See also, J. Tymowski, *The Mediation Directive, European Implementation Assessment, In-depth analysis* (Brussels: European Parliamentary Research Service, 2016), available at: http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA(2016)593789.

following: Almost all member states opted to extend the Directive's requirements to cover domestic disputes, too. A number of member states allow the use of mediation in civil and commercial matters, including family and employment matters, while not explicitly excluding mediation for revenue, customs or administrative matters or for the liability of the state for acts and omissions in the exercise of state authority. All Member States foresee the possibility for courts to invite the parties to use mediation, while 15 allow courts to invite parties to information sessions on mediation. Less than half of the member states have introduced an obligation in their national laws to inform people about mediation. Finally, the above report noted the need for a balanced relationship between mediation and judicial proceedings.

In addition, on 27 November 2018, the EU Parliament organized an inter-parliamentary committee meeting, in cooperation with the European Network of Ombudsmen. Members of the 28 national parliaments were also invited. In this committee meeting, the key findings of the briefing note titled: 'A Ten-Year-Long EU Mediation Paradox – When an EU Directive Needs To Be More … Directive'[24] were presented. More specifically, it was noted that ten years since its adoption, the EU Mediation Directive remains very far from reaching its stated goals of encouraging the use of mediation and especially of achieving a 'balanced relationship between mediation and judicial proceedings' (Article 1 of the Directive).

The paradox of mediation, which is universally praised and promoted, is that it is used in less than 1% of civil and commercial cases in the EU, which grow disturbingly bigger. Official data and multiple studies have clearly shown that the best way, if not the only one, to significantly increase the number of mediated disputes is to require that litigants make a serious and reasonable initial effort at mediation. During this initial stage, the parties should be allowed the freedom to decide whether or not to continue their efforts at mediation (so-called required mediation with easy opt-out). Behavioural science, in particular, has long demonstrated the limits of any policy approach based on opt-in models, such as those underlying all forms of voluntary mediation.

Italy is the only member state that has adopted and applied an opt-out mediation model, applicable to about 15% of all civil and commercial cases. In those cases, mediation is now playing a very significant role in the effective resolution of disputes. This is not the case for the remaining 85%, where mediation remains opt-in, and, as a result, mediations are extremely rare. In other member states, renewed regulatory

24 The entire briefing note is available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf. The link to the video recording of the meeting, simultaneously interpreted in the 23 official languages of the EU is the following: http://www.europarl.europa.eu/ep-live/en/committees/video?event=20181127-0930-COMMITTEE-PETI-JURI (mediation panel starts at 10.00.30, presentation by Giuseppe de Palo).

attempts at simply encouraging mediation are most likely to prove ineffective (again), while merely requiring mediation before trial without offering an easy opt-out option is equally likely to be later ruled unconstitutional (again). Presented in late 2016 with the proposal to adopt the opt-out mediation model, in 2017 the European Parliament decided to leave the Directive unchanged, thus continuing (according to the briefing note) '...to leave national legislators without directions as to how to achieve the Directive's ultimate goals, and EU citizens and businesses without the financial and other benefits that the increased use of mediation would generate'.

Legislative Framework on Mediation in Cyprus

Mediation has been introduced in Cyprus by the (applicable) Mediation on Civil Disputes Law 159(I) of 2012,[25] which was enacted on 16 November 2012 and governs the mediation process.[26] This law harmonised Cypriot legislation with the (above) Mediation Directive 2008/52/EC[27] of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. In this way, Cyprus adopted appropriate legislation regarding mediation. Yet, this was not enough in order to actually have mediation practice in Cyprus and to benefit from its advantages. In any case, the adoption of laws does not necessarily result in a broader understanding and actual practice of mediation.

Mediation in Cyprus is regulated as an alternative, voluntary, out of court, confidential and cost-effective dispute resolution method. According to the Cypriot mediation legislation, mediators need to meet certain prerequisites, such as mediation training, to be on the mediation registry of the Ministry of Justice and Public Order.

Moreover, the Financial Ombudsman of the Republic of Cyprus aids and cooperates with certified mediators in order to resolve financial disputes between

25 See, the website of the Cyprus Bar Association: http://www.cyprusbarassociation.org/index.php/en/for-lawyers/mediation where there the Law 159(I) of 2012 is available in Greek. The law is also available in Greek at www.cylaw.org.

26 See A. Emilianides and N. Charalampides., 'Cyprus', in *Civil and Commercial Mediation in Europe: Cross Border Mediation,* Vol. 2, eds. C. Esplugues et al. (Antwerp: Intersentia), 103-123 on the monistic legal framework of Law 159(I)/2012. See A. Emilianides and X. Xenofontos, 'Mediation in Cyprus', *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures*, eds C. Esplugues, J. L. Iglesias, and G. Palao (Antwerp: Intersentia, 2012), 92-94, regarding the long tradition of Cyprus of mediation mechanisms in labour law disputes.

27 The Mediation Directive 2008/52/EC is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF. On the transposition of the EU Mediation Directive in Cyprus, see Emilianides and Charalampides, 'Cyprus'; Emilianides and Xenofontos, Mediation in Cyprus; A. Georgiades, 'Cyprus', in *EU Mediation Law and Practice*, eds. G. De Palo and M. Trevor (Oxford: Oxford University Press, 2012), 47-58; A. Georgiades, T*he Variegated Landscape of Mediation*, eds. M. Schonewille and F. Schonewille (The Hague: Eleven International Publishing, 2014), 99-107.

consumers and banks pursuant to the provisions of Law 84(I)/2010.[28] In the framework of Law 84(I)/2010, as amended or replaced, debt restructuring mediations are taking place in Cyprus between consumers and banks.

Online Dispute Resolution (ODR)[29] is established in Cyprus for disputes between consumers and businesses via the European Consumer Centre in Cyprus, according to the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004, and Directive 2009/22/EC (Directive on consumer ADR)[30] and Regulation (EU) No 524/2013 of the European Parliament and the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR).[31]

In addition, a draft law on mediating family disputes is pending and has been under review at the Parliament since 2014.[32] This draft should be passed soon, after the Parliament's law committee modified it extensively over the last four years and mainly during the last two years, based on suggestions and comments from the Cyprus Bar Association and other associations like the Cyprus Association of Mediation (*Cymedas*)[33] and individual experts.

Finally, a recent report on the Functional Review of the Courts System in Cyprus, conducted and delivered by the Institute of Public Administration of Ireland, dated 27 March 2018[34] presented findings on Cyprus' legal order. The report found there to be serious deficiencies with the operations of the courts system that had been highlighted in previous reports e.g. Erotocritou Report (Report of the Supreme Court on operational needs of the courts, 2016). It also looked at comparative EU studies, e.g.

28 See N. Koulouris, *Cypriot Civil Procedure*, in Greek (Athens: Nomiki Bibliothiki, 2017), 335-340.

29 On ODR/E Justice, see indicatively, G. Diamantopoulos and V. Koumpli, 'Mediation: The Greek ADR Journey Through Time', 336, B. Hess and N. Pelzer, 'Mediation in Germany: Finding the Right Balance between Regulation and Self-Regulation', 308-309, and A. De Luca, 'Mediation in Italy: Feature and Trends', 363-364, in *New Developments in Civil and Commercial Mediation, Global Comparative Perspectives*, ed. C. Esplugues and L. Marquis (Switzerland: Springer, 2015).

30 Directive on consumer ADR, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013L0011.

31 Regulation on consumer ODR, available at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32013R0524.

32 The last amendment of the draft in which the author has access is dated 7 June 2017. On the bill concerning mediation in Family Law Matters, pursuant to Council of Europe Recommendation No. R (98) which was pending before the House of Representatives since 2004, see Emilianides and Xenofontos, 'Mediation in Cyprus', 90-92.

33 Cyprus Mediation Association, https://www.cymedas.com/english/index.php.

34 Technical Assistance Project 2017/2018, supported by the Structural Reform Support Service (SRSS) of the European Commission, available at http://www.supremecourt.gov.cy/Judicial/SC.nsf/All/F8C912FFF71E0020C225825D0038F145/$file/Functional%20Review%20of%20Courts%20System%20of%20Cyprus%20IPA%20Ireland_Final%20Report%20March%202018.pdf.

EU Justice Scoreboard, that show that while Cyprus scores relatively highly on judicial independence, it scores poorly on measures of efficiency. e.g. length of time for case to be processed through the courts, and measures of quality, such as information available to the public.

Furthermore, the report emphasized that the key challenges of the system are: i) chronic delays and a growing backlog of cases; ii) the average waiting time of 6.3 years for the Supreme Court to hear an appeal at the end of 2016, with 4300 cases pending that year; iii) the increase in over 90% of the number of civil and criminal appeals filed in the past 10 years; and, iv) the increasing backlog of civil cases in District Courts. In addition, the above report noted the delays in Cypriot justice would have negative effects on Cyprus's reputation and and rule of law, and that alternative dispute resolution methods are not used much. As a result, the report explicitly stated that 'allowing the system to continue without major reform is not an option'.

Notably, the report recommends to ''introduce ADR mechanisms in consumer disputes and injuries assessments, and consider making recourse to these a requirement prior to recourse to court'. Furthermore, it recommends that 'The Rules of Court should be amended to make provision for the court to refer cases to mediation'.

Mediation Law 159(I) of 2012

The Provisions of Mediation Law 159(I) of 2012

Law 159(I)/2012 has six parts and contains 34 articles. The provisions of this law are applicable to certain aspects of civil[35] and commercial disputes,[36] whether cross-border or not, as well as to cross-border labor disputes.[37] This law is not applicable to family disputes, as it is explicitly defined in Article 2 regarding its scope. The wording of Law 159(I) of 2012 is wide enough to capture the whole spectrum of commercial

35 Article 2 of Law 159(I)/2012 states: 'In this Law, unless the context otherwise provides – "civil dispute" means any dispute which may be an object of civil proceedings by the meaning assigned to this term by virtue of the Courts Law and includes labor disputes but does not include family disputes. "Commercial dispute" means dispute arising from a commercial transaction between undertakings or between undertakings and public authorities, as this term is interpreted by the Combating Late Payment in Commercial Transactions Law'.

36 See Emilianides and Charalampides, 'Cyprus'; Emilianides and Xenofontos, 'Mediation in Cyprus'; N. Koulouris, *Cypriot Civil Procedure*, 335-340.

37 Article 3 of Law 159(I)/2012 states '3. – (1) Subject to the provisions of subsection (2), this Law shall be applied to civil disputes, including cross-border disputes. (2) This Law shall not apply – (a) to any civil disputes, whether cross-border or not, concerning certain rights and obligations, for which the parties are not free to decide themselves under the relevant applicable law; (b) to labor disputes which are not included in the cross-border disputes, notwithstanding if no rights and obligations are raised thereof, for which the parties are not free to decide themselves under the relevant applicable law; (c) to any revenue, customs or administrative disputes, or matters relating to the liability of the state for acts or omissions in the exercise of state authority. ("acta jure imperii")'.

disputes as well as every kind of civil dispute.

Moreover, the mediation law does not apply to any dispute in which the parties have no freedom to determine pursuant to the applicable law, and to tax, customs, administrative disputes, or disputes concerning the state's actions or omissions. The amediation law constitutes an attempt to regulate the mediation process by containing provisions for, among others, the creation of a register of mediators and relevant minimum requirements, mediators' duties during the mediation process, procedural matters of the mediation process, the role of the court and the issue of the enforcement of any settlement agreement reached.

Article 2 of Law 159(I)/2012 states that "'mediation" means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. Provided that, it excludes any attempt that may be made by the Court or judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question'. Therefore, mediation is regulated in Cyprus as an alternative, voluntary, out of court, confidential and cost-effective dispute resolution method.

Issues regarding the mediators are regulated in the third part of the law (Articles 5-13), and provisions of the mediation process itself are placed in the fourth part of the law (Articles 14-27). It is important to note that in Cyprus the disputant parties can agree (voluntarily) to mediate their dispute. The court has also the ability but not the obligation to refer a certain dispute to mediation. In practice though, mediation referred by the court is rather rare.

Furthermore, according to the provisions of the above mediation law, the parties are the ones who choose the mediator.[38] The mediation process is prescribed under the law as informal and parties in consultation with the mediator can agree the way of conducting the process, its duration, the obligation of confidentiality of the procedure, the remuneration of the mediator, the terms of payment and any other matter deemed necessary. The parties have of course the choices to reach a certain settlement.

Moreover, the Cypriot mediation law provides for registration of mediators to the Registry of Mediators as well as their removal from the registry. Specifically, according to Article 7, practicing advocates, members of the Cyprus Chamber of Commerce and Industry and of the Technical Chamber of Cyprus have the right to be on the Registry of Mediators if they meet specific criteria. The Mediation Registry is held by the Minister of Justice and Public Order. Actually, according to certain provisions of Law 159(I) 2012, there are two Registers of Mediators: (a) the Register of Mediators where the mediation in question concerns a commercial dispute, and (b) the Register

38 In complex cases or if the parties wish so, the mediation could be conducted with two mediators.

of Mediators where the mediation in question concerns civil dispute, other than commercial.

The detailed procedure a person needs to follow in order to be on the Registries of Mediators is explained (in English too) on the Ministry of Justice's website[39]. Mediation training is needed, and every registered mediator is obliged to continue his/her training on mediation by attending courses of a certain duration and to submit the relevant certification to the Ministry of Justice and Public Order.

When it comes to the enforceability of the settlement as a result of mediation, the parties may apply to the court to declare a written agreement as enforceable (according to Article 32 of Law 159(I) of 2012). In addition, either of the (two) parties may terminate the mediation process at any time, as stated in Article 28 (d).

Does Mediation Actually Work in Cyprus or Is There Just 'Mediation Theory'?

The adoption of a mediation law in a certain state/jurisdiction is not enough for the broader understanding and real practice of mediation to be achieved, at least to the extent that attorneys at law would be comfortable suggesting mediation as a method of conflict resolution to their clients.

It has already been mentioned that mediation has been regulated in Cyprus for a number of years, but there is still no actual practice. Even though there are no available official statistics on mediation, the number of mediations which took place in Cyprus until today is dramatically low. Moreover, there are no data for mediations initiated by Cypriot courts (if any) since 2012, while the number of civil and commercial cases before Cypriot courts remains high. It is therefore urgent to find a solution that would ease the overburdened court system in Cyprus, and this is something that the Cypriot legislator should deal with.

One could argue that the legal culture of Cyprus has no tradition of mediation even though other types of ADR, such as arbitration, are often practiced, especially in commercial and construction disputes. The reality is that the actual practice of mediation in Cyprus is moving slowly despite the fact that this particular ADR method could contribute effectively to the resolution of many disputes in a jurisdiction where a period of approximately 3 to 5 years is usually needed to achieve a final and enforceable[40] judgment in civil and/or commercial disputes, because of the large caseload, which is overwhelming the courts.

39 See Ministry of Justice and Public Order, 'Promotion of Legislative Work', available at http://www.mjpo.gov.cy/mjpo/mjpo.nsf/page21_en/page21_en?OpenDocument.

40 See the 2018 EU Justice Scoreboard, published by the European Commission, which gives a comparative overview of the quality, independence and efficiency of justice systems in the European Union and aims at assisting Member States to improve the effectiveness of their justice systems. Available at https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf.

Another argument for holding back the practice of mediation in Cyprus is the fact that the majority of people, businesses and companies do not know much or even anything regarding this ADR method, meaning that the levels of awareness of mediation are very low. Awareness of ADR is an important and difficult challenge in other jurisdictions in Europe too. For instance, the Final Report on ADR and Civil Justice of the CJC ADR Working Group in the UK[41] states that the promotion of ADR must be seen as part of the wider challenge in public legal education.[42] Initiatives such as peer mediation in schools and universities, organization of a 'Mediation Awareness Week', embracement of ADR in law faculties, professional training, disciplinary codes for mediators, coordination between the different ADR areas, creation of a user-friendly online portal with visual information about ADR methods, and ADR references in broadcast and social media by the ADR community should be applauded.

In addition, the viewpoint of the Cyprus Bar Association should be taken into account, and attorneys-at-law should play an important role in encouraging mediation as an effective way of avoiding costly and time-consuming court cases in which only one party can be the winner.[43] This role could be seen as a duty of the attorneys-at-law. Filing an action in a court in Cyprus is not too expensive and the costs of civil litigation in general are not as high as they are in other jurisdictions, where ADR methods are more often used.

The truth is that mediation must be understood by both attorneys-at-law and disputant parties to be effective. It is indeed well known that for a successful (civil or commercial) mediation, one must have the consent of both parties and an adequate if not excellent understanding of mediation and its value on behalf of the involved advocates. Having said that, mediation is most likely to be successful if the lawyers involved in the case may confidently suggest mediation to their clients as an effective way to resolve a dispute. Furthermore, mediation has more chances to be successful if each side knows exactly what is being proposed when the attorneys of both parties are familiar with the mediation process in their respective practice.

Additionally, in the framework of the Cypriot reality, ADR methods are not an integral part of dispute resolution culture. On the contrary, the prevailing legal culture is the litigation culture. Judges and attorneys do not confidently promote mediation to the parties mainly because of their strong confidence in the court system and litigation,

41 ADR and Civil Justice, *CJC ADR Working Group Final Report*, November 2018, Section 2: Executive Summary, Section 6: Awareness of ADR.

42 See S. Shaelou and N. Agapiou, 'Alternative Resolution of Civil Disputes in Cyprus' [in Greek], *In Business News* (2018, July 27), available at: https://inbusinessnews.reporter.com.cy/opinions/article/191248/enallaktiki-epilysi-astikon-diaforon-stin-kypriaki-dimokratia.

43 See R. Levitt, 'Compulsory mediation edges closer after Civil Justice Council report' (23 October 2017), available at https://www.linkedin.com/pulse/compulsory-mediation-edges-closer-after-civil-justice-roger-levitt/?trk=v-feed.

even though they do admit that this system is not as effective as it should and even they are aware that a large caseload is overwhelming the courts and causing substantial delays. There is also widespread uncertainty as to how mediation works in practice and if it is a part of a lawyers' job.

The Cyprus Mediation Association (CYMEDAS) states on its website regarding the reality of mediation practice in Cyprus:

> 'Unfortunately the situation referring to the philosophy and practice of mediation hasn't changed much. There is strong opposition from legal circles who loathe mediation because it bypasses legal proceedings. This was briefly the case in the States in the 90s. Now all advanced countries have legislation covering mediation as alternative to litigation and mediation thieves. Restorative justice is the new development something that is aimed at by European Union... We should though, have in mind the legislation on mediation for family disputes is due to be adopted by the parliament for more than five years and nobody knows when the lawyer-parliamentarians will change their minds'.[44]

Another reason for the low use of mediation is that the courts in Cyprus are not doing enough to promote and encourage mediation, especially at the early stages of a dispute, even though the mediation law gives them this ability.

Finally, the awareness and popularity of mediation in Cyprus could increase if the mediation law is (effectively) reformed in a way that a power would be conferred on the court to compel parties to engage in the mediation procedure, at least in certain categories of civil and/or commercial cases.

The Provisions of the Draft Law on Mediation of Family Disputes in Cyprus Under the Title 'Law on Mediation of Family Disputes'

The draft law on mediation of family disputes has six parts which include 47 articles. The first part of the draft regards definitions, the scope of the draft and general provisions. More specifically, the content of Article 1 of the draft defines the terms 'mediator', 'family case', 'child', 'agreement to mediation' and 'agreement of settlement through mediation'. At this point it should be noted that the draft regards any case relevant to the institution of family and includes, inter alia, cases regarding child custody, sustenance (monetary support) of children or spouses, and property disputes between spouses. Regarding the legal matter of custody, one could argue that this is not a dispute which could or should be resolved via mediation, because there is no authority of disposal of each party (the parents) on this matter. Therefore, there is a solid argument that a dispute between parents on the custody of their child should be

44 Cyprus Mediation Association, available at https://www.cymedas.com/english/index.php.

decided by the court, with the assistance and/or testimony of an expert.

Article 2 combined with Article 4 defines family mediation. According to this definition, mediation means an alternative to the court method of resolving family disputes, through an out of court structured procedure, where two or more members of a family are trying to resolve their disputes with the help of a mediator. The scope of the mediation procedure is described in Article 4, which states that in the framework of family mediation, the parties resort to resolve their family dispute assisted by a mediator.

Moreover, in the second paragraph of Article 4, there are also stated goals of this upcoming family mediation law. Among others, the discussed law aims to encourage family members to consent on approaches to limit hostile behaviour and to improve communication within a family. In addition, it seeks to minimize the negative consequences that could arise out of a family conflict, to encourage the maintenance of family relationships, especially between parents and their children in the present as well as in the future, to safeguard the interests of children and to encourage responsible joint parental custody for the best interest and welfare of the child, according to the Convention for the Rights of Children, which Cyprus ratified in 1990.[45]

Article 5 of the draft contains the basic principles according to which mediation should always be conducted on a voluntary and not mandatory basis, without any kind of discrimination, by securing the interests of the child and of course with confidentiality, neutrality and impartiality on behalf of the mediator. Except for the voluntary character of mediation, the other principles are indeed fundamental to a family mediation procedure. More precisely, family mediation could and should be regulated as compulsory, at least until the point that mediation becomes culturally normal in the Cypriot legal order, and that specific categories of family disputes should be referred to mediation automatically by a (legally regulated) self-policing ADR system and/or by the court, before an action is filed in the Family Court.

Of course, no law can mandate any party to compromise and wave his/her rights. What the law could/should actually do is to compel family members to try (prior to litigation) to find a solution in good will, out of court, with the assistance of a qualified mediator, or at least to mandate the disputants to participate to an information session with a mediator, prior to the commencement of court proceedings and ideally without any judicial intervention or need for court's time.[46]

45 The Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by the General Assembly Resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx. See also, *United Nations Convention on the Rights of the Child and the Republic of Cyprus,* available at http://uncrcpc.org.cy/index/about-us/uncrc-adoption,-signatures-and-ratifications.html.

46 See ADR and Civil Justice, *CJC ADR Working Group Final Report, November 2018*, Section 8: Government/Court Encouragement of ADR, A way forward: Notice to Mediate, 8.39-8.42.

In some jurisdictions, such as in the UK, referral to mediation is already compulsory in specific family[47] disputes, in the form of pretrial information and assessment meetings, and in employment law cases,[48] and there is still debate about extending its use to civil and commercial areas of law.[49] In addition, Italy is now considering to expand mandatory mediation to family cases. The Italian Justice Commission is currently discussing the approval of the DDL 735, also known as the DDL Pillon. The new bill aims to reform child custody issues, maintenance and childcare, and it is introducing mandatory mediation for family law cases where minor children are involved, in an effort to avoid the 'negative legal environment' when dealing with such delicate cases. Inevitably, this has given rise to an interesting debate, but definitely signposts the increasing international tendency to opt for mandatory mediation.[50]

47 'Mediation information and assessment meetings (MIAMS) first introduced in the family dispute system of the UK in 2010. Since April 2014, it has been compulsory (subject to limited exceptions) for those issuing proceedings for financial relief or for a child arrangements order to attend a MIAM. While the party making the application has to attend the MIAM the Respondent is simply expected to attend. The two parties can attend a single meeting but separate meetings appear to be the norm (where the Respondent attends at all). At the MIAM the mediator will guide the parties as to the available alternatives to court, especially mediation, the advantages and disadvantages of each. Ultimately it is a decision for the parties as to whether to go down the road of mediation but it is a decision reached after discussion with the mediator and therefore on the basis of informed views.' See more in the *ADR and Civil Justice CJR Working Group Interim Report*, and ADR and Civil Justice, *CJC ADR Working Group Final Report,* November 2018, Section 7: Availability of ADR, 7.11-7.20, Section 8.

48 See J. Munby, *Family Mediation in England and Wales: A Guide for Judges, Magistrates and Legal Advisors*, available at http://www.familylaw.co.uk/system/redactor_assets/documents/385/Family_Mediation_in_England_and_Wales_A_guide_for_judges__magistrates_and_legal_advisors.pdf. On the use of mediation in divorce cases in the UK see J. Herring, *Family Law*, 5th ed. (Harlow: Pearson Education, 2011), 136-148.

49 Justice ministers are actually keen to find more ways to settle disputes out of court, and the expert working group of the Civil Justice Council concluded that current measures to promote mediation are not working and should be extended further to include an element of compulsion. The CJC has opened a consultation, requesting written submissions on the findings and recommendations of the latest report, *ADR and Civil Justice CJR Working Group Interim Report*. These submissions were collated and discussed, prior to the preparation and submission to the Government of the final report. See Levitt, Compulsory mediation edges closer after Civil Justice Council report. According to the Executive Summary of the Final Report on ADR and Civil Justice, of the CJC ADR Working Group in the UK, November 2018, Section 7: Availability of ADR, Quality Assurance and Regulation, 7.11, Section 2: Executive Summary, 2.6: 'We do not support the introduction of civil MIAMs. We do not support the introduction of blanket compulsion in the sense of an administrative requirement that proof of ADR activity has to be provided as a precondition of any particular step. We have been keen to identify an acceptable mechanism under which a mediation could be triggered without the intervention of the Court. We identify a number of policy decisions that arise if this option is to be pursued.'

50 La Altra Pagina, 'Presentato in Senato il disegno di legge che prevede la mediazione familiare obbligatoria', available at http://www.laltrapagina.it/mag/presentato-in-senato-il-disegno-di-legge-che-prevede-la-mediazione-familiare-obbligatoria/#.W6nW1Zvyl5Y.

Having said that, automatic referral to family mediation or by the Cypriot Family Court is a proposal that deserves full support due to the real benefits that family mediation can actually achieve for a family. A regulated compulsory effort to attend a family mediation session, could lead the parties to the resolution of their dispute.

The second part of the draft contains provisions for the beginning of a family mediation process, for the required qualifications of the family mediators and regarding the institution of providing legal aid to the parties under the framework of family mediation. When it comes to the question of when family mediation can begin, the answer according to the draft (Article 6) is at any time. This means that family mediation could begin even in the middle of a court proceeding, as long as both parties agree to that. It is noteworthy that, according to the draft, mediation can resolve only a part of a family dispute or the whole of it.

The second part of the draft also contains a detailed analysis of the family mediation registry. The Ministry of Justice and Public Order will be in charge of this registry. Moreover, Article 10 of the draft refers in detail to the duties of a family mediator.[51] Among others, the mediator should be independent, impartial, neutral and efficient, should act according to the principles of the mediation procedure and the rules of the Code of Conduct for Mediators,[52] and should respect the positions of the parties and the balance of their negotiation positions. The mediator should also ensure the private and confidential nature of mediation in order not to reveal any conversation conducted during mediation. Another very important duty of the mediator is to inform the parties that if certain severe matters are disclosed during the mediation, such as child abuse or any other form of violence, the mediator will reveal these matters to the authorities. Additionally, there is an explicit provision regarding the duty of the mediator to decide ad hoc if there is a conflict of interest, and there are certain occasions where it is considered that there is a conflict of interest. Another duty of the mediator is to inform the parties about their right to participate in the mediation process with their lawyers. According to the draft, the mediator cannot force a certain solution upon the parties, but she or he can suggest an idea or solution which may help the resolution of the dispute. This role and ability on behalf of the mediator needs to be handled in a careful way since it risks the mediator's neutrality and/or impartiality.

The third part of the draft regards rules on the procedure of family mediation. The parties have to agree on the appointment of a mediator and can deny her/his

51 See Family Matters Council, 'Code of Practice of Family Mediators in the UK, September 2016', available at https://www.familymediationcouncil.org.uk/wp-content/uploads/2016/09/FMC-Code-of-Practice-September-2016-2.pdf.

52 See the European Code of Conduct for Mediators, available at: http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.

appointment without reasoning. It is worth noting that the draft provides that a court can suggest mediation to the parties. Moreover, any court and not only the family court, can inform the parties regarding the institution of mediation and its procedure as an ADR method. This provision would be more efficient towards the goal of the broader encouragement of ADR if providing information about mediation was drafted as a duty of the court.

A very interesting provision of the draft is Article 18 (3) which states that if the judge believes that there is a conflict of interest between the parents and the child in a certain dispute, she/he can postpone the court's procedure on the condition that the child will be represented in the mediation by the Commissioner of Children's Rights. The efficient application of this provision will demand readiness and actions from the office of the Commissioner of Children's Rights.

The fourth part of the draft regulates the possible outcome of the mediation procedure, the termination of it and the agreement on the resolution of the dispute. The mediation procedure terminates if the parties settle, which means if they resolve their dispute or decide that they cannot agree, or if the mediator believes that the process has no point, or if any party desires to end the mediation, or if there is a matter of violence. One of the most important provisions of the draft regards the essential content of the written agreement through which the parties actually resolve their dispute. The enforcement of the mediation agreement is possible, according to the draft, if the party who seeks to enforce it proceeds to have it ratified by the competent court. If the mediation process does not end in an agreement, the mediator will draft a document of an unsuccessful mediation.

Finally, the fifth part of the draft contains provisions for disciplinary procedures against family mediators and the last part of the draft regulates final and transitional provisions of the family mediation law.

Critical Remarks on Mediation Law 159(I) of 2012 and Its Proposed Reform

It is true that the main challenge for mediation, especially in Europe, is to have the practice of it promoted so that, at some point, mediation will become one of the regular dispute resolution methods and not just an alternative dispute resolution method. According to an optimistic view, mediation will have a future, central role in dispute resolution, although Cyprus has a long way to go to reach that point.

Moreover, it is indeed difficult to answer the question, 'Why do people not choose mediation?' since mediation is faster and cheaper than litigation, plus it is an efficient way to resolve disputes. As stated above, the level of awareness of mediation as an ADR method is still very low. ADR in general is not adequately marketed, and steps must be taken to make sure that the parties consider all their options to resolve their dispute. Furthermore, the reality is that attorneys-at-law promote litigation more

than mediation and this creates a climate of uncertainty to the parties. In any case, a regulatory change in the field of dispute resolution, could be compulsory mediation in certain categories of civil disputes and especially in family disputes, as a step or condition before the commencement of the litigation proceedings. This could be a dynamic and effective way to make the parties understand that they can resolve their disputes by themselves, assisted by a mediator in a faster and cost effective way.

The existence of mediation legislation itself is of course not enough to promote and enhance the use of mediation in practice. This is the case for Cyprus, too. The local legal culture is resistant to embracing the full benefits of the mediation process. In addition, it is notable that section 15 (1) of the Mediation Law[53] provides that the court, before which an action is pending, may invite the parties to attend an information session on the use of mediation and the possibility of resolving the dispute via mediation. In that case, any of the parties may veto the above suggested possibility and the consent of all parties is required before the court exercise its power to stay proceedings for mediation.

The general picture of the relationship of the (civil) justice system and ADR in Cyprus is characterized by the combined absence of both a court's power or duty to compel parties to participate in any form of ADR practice, other than arbitration and a substantive or procedural obligation for litigants to consider ADR prior to commencing trial proceedings. The above absences are not contributing to the development of ADR in Cyprus and to the effective change of the local legal culture.

In Greece, where the legal system also has no developed mediation culture, an important reform of the mediation law in civil and commercial disputes took place in January 2018. Mediation Law 4512 of 17 January 2018 has substantially amended the

53 Article 15 of Law 159(I)/2012: '15. -(1) A Court, before which judicial proceedings are brought, in relation to a case that falls within the scope of this Law, at any stage of the proceedings and before the issue of a decision, may (a) invite the parties to appear before it, to inform them on the use of mediation and the possibility of settlement of their dispute by using this procedure; and (b) upon a common request of all the parties or one of them, with the explicit consent of the others, when appropriate and having regard to all the circumstances of the case, postpone the judicial proceedings so that mediation can take place. (2) In the event that any of the parties does not agree to use mediation, the Court shall proceed with the judicial proceeding. (3) In the decision of the Court to postpone the judicial proceeding, issued by virtue of subsection (1) explicit reference is made to the consent of the parties and to the duration of the mediation, which may not exceed three (3) months. (4) With the completion of the time-limit set out in the Court decision, the parties shall inform the Court of the procedure followed and the result of the mediation and may, in case no agreement on the settlement is reached, ask for extension of the duration of the mediation, for a period not exceeding three (3) months. (5) The Court may, in proprio motu, or, at the request of any of the parties, interrupt the mediation procedure before the end of the time-limit provided for by virtue of this section. (6) A Court decision issued by virtue of subsection (4) or by subsection (5) is not subject to an appeal.'

previous law (Law 3898/2010).[54] Articles 178 through 206 of Law 4512/2018 regulate the new mediation landscape. In the recent Greek mediation law, there are provisions (Article 182) that introduce compulsory mediation for seven categories of disputes of private law as a pretrial procedural condition before the court's hearing (condition of admissibility of the hearing).[55] Failure to engage in a mediation 'attempt' is sanctioned with inadmissibility of the hearing proceedings. First of all, the claimant's attorney is required to inform his client about the possibility or the obligation to resort to mediation. Regardless of the result, a respective document signed by the party and the attorney must be submitted to the court, otherwise the court will not enter into the merits of the hearing of the dispute and a reopening of the case will be ordered. The reform of mediation legislation in Greece aims to promote and establish mediation in the Greek legal system which will reduce delays in the court system, especially the provision that attorneys-at-law are legally compelled to inform their clients in writing about mediation and to promote mediation as an ADR mechanism prior to filing any sort of legal action, as well as the provision for compulsory pretrial mediation in specific categories of disputes. Moreover, to harmonize more with the European Mediation Directive, the Greek legislator tried adopt the Italian mediation model on compulsory mediation, which has shown successful results so far.[56] Law 4512/2018

54 Law 3898/2010, titled 'Mediation in civil and commercial matters', implemented in Greece the Directive on Mediation. Regarding the mediation landscape in Greece under law 3898/2010, see in detail N. Klamaris and C. Chronopoulou, 'Mediation in Greece: A Contemporary Procedural Approach to Resolving Disputes', in *Mediation. Principles and Regulation in Comparative Perspectiv*e, 1st edition, eds. Hopt and Steffek, (Oxford: Oxford University Press, 2013), 585-604; Sp. Antonelos and E. Plessa, *Mediation in civil and commercial cases, International experience and Greek adjustment*, in Greek (Athens: Sakkoulas Publications, 2014); E. Koltsaki, 'Impartiality and neutrality of the mediator. Theory and practice' [in Greek], in *Legal Issues and Aspects of Mediation*, ed. Ath. Kaisis (Thermi: International Hellenic University, 2014) 79-85; St. Angoura St., (2014), 'The legal nature of the consent to mediate', [in Greek] in *Legal Issues and Aspects of Mediation*, 23-29; Diamantopoulos and Koumpli, 'Mediation: The Greek ADR Journey Through Time', D. Theocharis, *Mediation as an alternative dispute resolution method. Analysis of law 3898/2010*, in Greek (Athens: Nomiki Bibliothiki, 2015); B. Blohorn-Brenneur, *Mediation for all*, trans. Sp. Antonelos (Athens: Sakkoulas Publications, 2016).

55 See in detail A. Georgiades, D. Theocharis, A. Plevri, K. Komnios, and P. Giannopoulos, *Compulsory Mediation and relevant issues* (Athens: Sakkoulas Publications, 2018); H. Meidanis, 'The Mediation Process under Greek Law No 4512/2018', [in Greek], *Journal of Arbitration & Mediation and other ADR Methods*, Vol. 1 (2018), 59-72, N. Klamaris, 'Mediation according to Law 4512/2018' [in Greek], *Review of Civil Procedure*, Vol. 3 (2018), 255-256; D. Mouzaki, 'Compulsory mediation and the right to judicial protection', Vol. 3 (2018), 257-280.

56 See G. De Palo and L. Keller, 'Mediation in Italy: Alternative Dispute Resolution for All', in *Mediation, Principles and Regulation in Comparative Perspective*, 667-695. Further analysis and statistics on the Italian model in G. Matteucci, 'Civil mediation how to kick start it: the Italian Experience. The relevance of training', (2017), available at http://www.academia.edu/35125411/ADR_Matteucci_2017.10.30_Civil_mediation_how_to_kick-start_it_the_Italian_experience._The_relevance_of_training, and http://www.altalex.eu/content/civil-mediation-how-kick-start-it-italian-experience.

contains overly detailed regulation of issues, which is uncommon to a legislative text, and renders the law problematic in its implementation, raising concerns as to its future success. The provisions of the mediation law for compulsory pretrial mediation was about come into force as of 17 October 2018, but a more recent law (No. 4566/2018) was enacted that delayed these provisions from taking effect until September 2019. This legislative development was actually a result of an opinion of the Administrative Plenary Session of the Supreme Court of Greece (No. 34/2018) regarding mandatory recourse to mediation in which it was stipulated that compulsory mediation as a pretrial condition is not compatible with specific provisions of the Greek Constitution and EU Law.[57] More specifically that law's provision for mandatory mediation is in violation of the right of access to justice, since mandatory mediation comes at a cost which is deemed excessive.

In the framework of the Cypriot legal system, the level of awareness of mediation as an ADR method is very low and there is misinformation regarding the potential benefits mediation may confer over the litigation process. In addition, attorneys-at-law in Cyprus could contribute to the promotion of mediation by familiarizing themselves with it and by playing an active role to encourage it.[58] This role could be seen as their duty. Relevant to this discussion, it is a fact that filing a court action in Cyprus is not very expensive and the costs of civil litigation are not as high as they are in other jurisdictions, for example in the UK, the USA or Australia, where mediation is a well-developed, tested and an effective method of resolving disputes.

Moreover, in summer 2018, the Cypriot Ministry of Justice and Public Order stated its intention to reform the core mediation law of Cyprus (Law 159(I) 2012) along with the basic proposed reforms, and it called on any individual or institutions to submit observations to these proposed reforms. The proposed reforms are based on a consultants' report, which was conducted prior to the announcement. In principle, there is need to reform the Cypriot mediation law, but the way in which the Ministry's proposals are drafted may cause more problems than those they intend to resolve. Additionally, the main goal of the Ministry of Justice should be the effective promotion of mediation in Cyprus via legislation and by other means. It seems that this goal is not

57 See further, *Review of Civil Procedure*, Vol. 3 (Athens: Sakkoulas Publications, 2018), 287-325 with comments by Assistant Professor Giannopoulos P., 325-330 [in Greek], *Journal Arbitration & Mediation and other ADR Methods*, Vol. 1 (Nomiki Bibliothiki S.A., 2018), 99-131 [in Greek] with comments by Judge of the Supreme Court Loverdos D., 131-132 and the Memo of the Plenary Session of the Presidents of the Bar Associations of Greece to the Administrative Plenary Session of the Supreme Court of Greece (28.06.2018), available at www.dsa.gr%2Fsites%2Fdefault%2Ffiles%2Fnews%2Fattached%2Fdiamesolavisi-ypomnimashedio_2_28.6.2018.

58 See Roger Levitt, *Compulsory mediation edges closer after Civil Justice Council report*, LinkedIn.com (2017, October 23), available at https://www.linkedin.com/pulse/compulsory-mediation-edges-closer-after-civil-justice-roger-levitt/?trk=v-feed.

served through the proposed reform of the mediation law.

More precisely, the proposed reform does not answer questions, such as how will the judges convince the parties to try mediation, in which stage of the court's procedure and with what motives? For instance, there is a provision in the proposed reform regarding the implementation of compulsory mediation even if the case is pending at the Supreme Court. This is problematic, especially in its relation to each person's constitutional right to be heard by a state judge.

Finally, there is no clear connection between the proposed introduction of compulsory mediation as a condition/stage before litigation proceedings and the reform of the Rules of the Cypriot Civil Procedure, which is absolutely necessary so that the court system and the institution of mediation to be designated accordingly and to be in balance. Furthermore, more specific rules should be introduced regarding compulsory mediation in order that this (pretrial) obligation on behalf of the parties does not lead to additional delays of the proceedings or too an increase in costs if the parties retain a right to bypass the mediation process.

Concluding Remarks

Mediation is a trend in conflict resolution in almost all jurisdictions. Although mediation has primarily been a philosophical concept known to most civilizations, its promotion nowadays is based on a policy choice concerning the governance of the state and the administration of justice. In Cyprus, despite the existence of mediation legislation on civil and commercial disputes in the last six years, the actual practice of mediation in general happens rarely, and there is no mediation culture. Cyprus' legal system is 'litigation-friendly'. The majority of the involved parties and/or professionals are not aware of mediation and its advantages, and there is a complete lack of information and knowledge regarding mediation even among attorneys. An understanding of mediation in comparison with traditional litigation would actually enable parties to choose the most appropriate mechanism for resolving their disputes. This could change only through targeted and dynamic actions. For example, the Ministry of Justice and Public Order could undertake information campaigns and could proposal to use mediation in disputes where big organizations and/or businesses or even municipalities are involved. The Cyprus Bar Association could also support and promote mediation. This could change through legislative initiatives, such as promoting specific motives for using mediation and/or putting in force pretrial, compulsory mediation.

The option of compulsory mediation as a pretrial condition, before the hearing of a civil or commercial claim, or by court mandate, is nevertheless a possibility for every European legislator in the framework of a justice system and its relationship with ADR. This policy maintains that mediation is an adjunct to, not a replacement for, litigation. In this context, it is crucial that among the recommendations of the report

on the Functional Review of the Courts System in Cyprus, conducted by the Institute of Public Administration of Ireland and delivered to the Cypriot Ministry of Justice and Public Order and the Supreme Court in March 2018, there is a clear proposal to introduce ADR mechanisms and to consider making recourse to these a requirement prior to recourse to court.

Finally, Courts in Cyprus should lead the way in supporting and promoting mediation by encouraging the parties to try mediation in cases where settlement is a likely outcome. In other words, Court should be the last resort not the first one.

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