

## PART XV

### CONSENSUAL DISPUTE RESOLUTION AND ARBITRATION

#### CHAPTER 3

#### CONSENSUAL DISPUTE RESOLUTION AND ITS INTERPLAY WITH CIVIL PROCEDURE

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## 1 INSTITUTIONALIZING CONSENSUAL METHODS OF CONFLICT RESOLUTION IN THE JUDICIAL SYSTEM

### 1.1 The Pound Conference and the Multidoor Concept

- 1 Historically, resolution through the agreement of the parties, or even arbitration, dates back to a time prior to that of the process. However, focusing on modern society, currents of legal thought related to Alternative Dispute Resolution (ADR) originated in the 1970s in the United States.<sup>2</sup>
- 2 In 1976, the congress 'National Conference on the Causes of Popular Dissatisfaction with Justice' was organized by various judicial institutions and the legal profession,<sup>3</sup> named in honour of Professor Roscoe Pound, who under this title made a famous speech at the opening of the American Bar Congress in 1906.<sup>4</sup> Pound's speech constituted an assessment of the inadequacies of the Justice system of the time, 130 years after independence from the United Kingdom.<sup>5</sup>
- 3 Judge Burger, president of the Supreme Court of the United States, led the conference for three days with a group of nearly 200 professionals consisting of federal and state court judges, prosecutors, lawyers, university professors and other experts, with the objective of reflecting on the situation of Justice in 1976 for the year 2000. Judge Burger referred to data such as the population of the country in 1906, compared to that of 1976, and in view of the probable increase in litigation, he asked whether the Justice system would be able to take on the challenges of the future. He proposed that a 'systematic anticipation' of solutions be carried out, just as was done in business environments.
- 4 Burger anticipated that there would probably be 'other mechanisms and procedures better suited to meeting the needs of individuals', and specifically referred to flexible mechanisms for small claims, as well as arbitration and more appropriate mechanisms for family disputes ('We should study whether we can manage these highly sensitive and intimate issues outside of the formal and potentially traumatic atmosphere of the

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<sup>2</sup> B G Garth and M Cappelletti, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buffalo Law Review, 181-292.

<sup>3</sup> The co-organizers were the Judicial Conference of the United States, the Conference of Chief Justices and the American Bar Association (ABA).

<sup>4</sup> Lecture by the Dean of the University of Nebraska (later Harvard's Dean), Roscoe Pound, at the annual meeting of the ABA, entitled 'The Causes of Popular Dissatisfaction with the Administration of Justice' (1906) ABA Reports, 29. Pound was 36 years old at the time, and his description of the various factors of dissatisfaction, which included the, in his opinion, excessively confrontational (sports-style) behaviour of the lawyers. This issue among others produced an enormous stir among the assembled lawyers, contrary in favour of his vision.

<sup>5</sup> *Proceedings of the national conference on popular dissatisfaction with the Administration of Justice* (Pound Conference) (National Center for State Courts, Saint Paul, Minnesota, 7-9 April 1976), 3 ff. The lecture also occurred in the same location as Pound's original lecture.

courts').<sup>6</sup> Furthermore, at this conference, several experts discussed the possibility of complementing the Justice system with other mechanisms, in addition to seeking measures to render Justice more efficient and affordable.

- 5 Specifically, Professor Sander, in his conference 'Varieties of Dispute Processing' described the Justice model that has become the paradigm of the twenty-first century in advanced countries, the multi-door courthouse. Professor Sander referred to the growing pressure on the Administration of Justice due to different factors. He pointed out that in previous times the police, the family, the school and the church occupied a space for resolving conflicts that had been left vacant due to the complexity of modern society and its problems, the growth of government at all levels and the expectations that had been created, among others.
- 6 Given this panorama, and the high probability of increase, the objective would be to seek mechanisms to reduce litigation, either through reducing regulations or through alternative mechanisms. He referred, first, to the fact that conflicts can be prevented through material regulations (such as by establishing a no-fault system for accidents or decriminalizing behaviours). Likewise, it is appropriate to clearly establish the consequences of a conduct in a normative manner, versus establishing a system of wide choice of decision, in order to reduce litigation.<sup>7</sup> Secondly, Sander points out that there is a rich variety of procedures that alone, or in combination, can offer more 'effective' conflict resolution. To do this, he pointed out that it is necessary to know the characteristics of conflict resolution mechanisms, such as court resolution, arbitration, mediation, negotiation and various mixtures of these and other instruments so that we can develop rational criteria to establish what types of conflicts are resolved by different procedures, and decide wisely which matters should remain in court to be resolved, and which should be processed in another way.
- 7 In Brazil, the concept of the *Sistema Multiportas de Resolução de Conflitos* (Multi-door Dispute Resolution System) encompasses a structured approach to conflict resolution, offering and referring parties access to various resolution mechanisms tailored to meet their specific needs. This model allows individuals or organizations involved in disputes to select from multiple pathways, such as negotiation, mediation, arbitration, or litigation, each designed to address different types of conflicts in a manner most suitable to their circumstances and objectives. In comparison to the definition of Sander, this mechanism has evolved to emphasize a balance between state-provided judicial mechanisms and private ones. One of the Brazilian regulations regarding the implementation of the *Sistema Multiportas de Resolução de Conflitos* was the Act 13.140

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<sup>6</sup> W E Burger, 'Agenda for 2000 AD-Need for Systematic Anticipation', *Inaugural Lecture of the Pound Conference* (Saint Paul, Minnesota, 7 April 1976), 26.

<sup>7</sup> Sander's proposal is coherent with the approach of Economic Analysis of Law, eg, S Pastor Prieto, 'Eficiencia y medios alternativos' (2007) 11 *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid*, 49-78.

for the implementation of alternative mechanisms and the traditional system of litigation.<sup>8</sup> This kind of structures, part of a 'Système de justice plurielle'<sup>9</sup> as pointed out by Cadet, in France, must offer legal safeguards equivalent to procedural ones.

- 8 Sander also pointed out that if an adequate conflict processing system is established, it is possible that the number of conflicts processed will increase since many of them probably did not manifest themselves in an inadequate system. The criteria that could help, according to Sander, were to establish which mechanism to choose based on:

#### 1.1.1 *The Nature of the Conflict*

- 9 Polycentric problems are not suitable for a third-party decision system (jurisdiction and arbitration) since they are not adaptable to an all-or-nothing solution. For example, if a testator leaves a collection of paintings to two museums, a mediated or negotiated solution will be much more appropriate to accommodate the interests of the two museums than an externally imposed solution. He also refers to matters that could be handled by another entity other than the court, for example, divorce by mutual agreement before an administrative authority.

#### 1.1.2 *Relationship Between the People in Dispute*

- 10 The situation is different if people are in a long-term relationship, or if their relationship is temporary. In the first case, it should be easier for them to find their own solution because there will be a greater interest in mending the social bonds.

#### 1.1.3 *Value of the Claim*

- 11 Sander believes that minor disputes should not occupy the court's time in many cases, and that conciliation could be favoured, and a filtering system established to determine which matters have to be heard by the court.

#### 1.1.4 *Cost*

- 12 He considers that it is difficult to assess the costs of judicial procedures, but even more difficult to assess the intangible costs of the inadequacy of the resolution procedure. He assumes that the greater the procedural formality, the greater the cost.

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<sup>8</sup> M A Garcia Lopes Lorencini, "'Sistema Multiportas': Opções para tratamento de conflitos de forma adequada", in C A de Salles, M A Garcia Lopes Lorencini and P E Alves da Silva (ed), *Negociação, Mediação, Conciliação e Arbitragem* (Forense, 2019) 57-85.

<sup>9</sup> L Cadet, 'Panorama des modes alternatifs de règlement des conflits en droit français' (2011) 28 *Ritsumeikan Law Review*, 147-167.

### 1.1.5 Speed

- 13 He refers to the lack of existing data, although Sander believed that it was correctly assumed that arbitration is faster than litigation, possibly due to causes such as the difference in complexity of the issues, the greater number of *judges* in arbitration and the possibility of greater cooperation of litigants in arbitration.
- 14 Professor Sander considered that in his time there were already substantive differences in the processing of conflicts: special family courts, administrative courts for taxes, or even in the criminal field the diversion of minor crimes to mediation and considered that the time was right to resort to a greater number of alternative procedures.
- 15 The main idea that Sander provided was that of a flexible and varied conflict resolution system, which would be organized through the filtering of cases by virtue of the adequacy of the resolution procedure to the conflict. Specifically, he pointed out that
 

we could have a vision of the future for the year 2000 in which we would not simply see a court, but a conflict resolution centre, in which the citizen would first be channelled through an agent who would sift through the matter and direct them to the procedure or sequence of procedures most appropriate to their case type. The directory at the entrance of the centre could indicate that the official who does the evaluation and filtering of matters is in room 1, mediation in room 2, Arbitration in 3, Fact Finding Procedure in 4, Evaluation Panel of malpractice matters in 5 and Superior Court in 6. With this model, one could be sure of one thing; there would be ample opportunities to participate. Finally, law schools should diversify their almost exclusive concern with the judicial process and begin to expose students to the broad set of conflict resolution procedures.
- 16 This description constituted the basic concept of a *multidoor courthouse*, which, starting from the Pound Conference of 1976, gained prominence in the organization of Justice in the United States, Canada and Anglo-Saxon countries, and which in the twenty-first century is assumed internationally as a model to be developed.
- 17 The exceptional value of Sander's lecture lies, on the one hand, in the introduction of the concept of adequacy of the procedure to the type of conflict, and on the other hand, in the ideal construction of a conflict processing system, the multi-door courthouse.
- 18 The concept of adequacy of the procedure to the conflict has been inherent to conflict resolution since the beginning of time. Sander's contribution goes beyond the contemporary understanding of the processing of disputes, offering a risky vision by stating that the judicial process will not always be the appropriate way. This is a highly debated issue among those with traditional legal mindsets.

- 19 Regarding the concept provided by Sander of a multi-door court, where each door would lead to a form of conflict resolution: For a multi-door system to work, it is necessary that a procedure for submitting matters to the court be designed, and that these are selected prior to being distributed by a court official to ensure being sent to the most appropriate *door* from the beginning. These doors may be mediation, expert evaluation, arbitration, conciliation, litigation. Today, the multi-door system is consolidated in many countries in America and Europe, where the most conservative systems have begun the introduction of mediation linked to the courts. Although a multi-door system is not formally organized, the existence of at least one structured mediation service linked to the courts can be understood as a two-door system.
- 20 Nearly 50 years after the Pound Conference, Sander's ideas remain progressive and even controversial in many legal cultures. In many other legal cultures, consensual dispute resolutions are well-established and integral to the justice system, which absolutely needs to integrate them to function in a balanced and efficient manner.<sup>10</sup>

### 1.1. Integration of Consensual Mechanisms as a Way to Increase Justice Quality

- 21 The legal-political evolution of many countries in recent years is aimed at consolidating the pillars of the justice service. Both citizens in general, as well as users and legal operators, demand a higher level of quality of justice, which is frequently questioned by the citizens. Appropriate conflict resolution methods can offer greater satisfaction to the citizens, who feel heard, take responsibility for their conflict, and will see agreements fulfilled more easily.
- 22 Starting from a different historical legal development of justice in democracy in different countries in the world, we observe that citizens of developed and developing countries have expectations in relation to justice, which are much broader and more demanding than those existing in the second half of the twentieth century. This was the era of construction in Europe of the basic pillars of modern democracies, which would include an independent Civil Justice system, while other developed countries such as the United

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<sup>10</sup> Among the varied developments in Latin America, the Brazilian model integrates ADR and the judicial procedure. It establishes 'the settlement principle' in Article 3.1 of the Code of Civil Procedure: 'The State will always encourage the parties to reach a consensual solution to the dispute'. M Fandiño, L Espinosa and M Sucunza, *Comparative analysis of civil justice reforms in Latin America* (CEJA, 2021), 99, <https://biblioteca.cejamerica.org/bitstream/handle/2015/5668/Comparative%20Analysis%20of%20Civil%20Justice%20Reforms%20in%20Latin%20America.pdf?sequence=1&isAllowed=y> accessed 4 February 2024.

States would already have consolidated democratic institutions and an advanced Justice system.<sup>11</sup>

- 23 On the other hand, in Latin America and the Caribbean, after the military dictatorships and armed conflicts present in most countries, a process of re-establishing the democratic system began. This included among its efforts, the strengthening of the judicial system, due process, and access to justice to consolidate the Rule of Law, ADR has been a way to implement access to justice. This process began in Colombia in 1991 and continued in Argentina in 1995, including among their objectives the decongestion of civil judicial offices. In this way, a vision of ADR (*métodos alternativos de solución de controversias*, MASC) as formulas aimed at decongesting inefficient civil and commercial justice systems was consolidated in Latin America. The changes in Colombia and Argentina were followed by Ecuador, Costa Rica and Bolivia, which issued their laws in 1999, Panama in 1999, Honduras in 2001 and El Salvador and Paraguay in 2002.<sup>12</sup> The 2008 Brasilia Rules on Access to Justice in conditions of vulnerability did consolidate ADR development.<sup>13</sup>
- 24 This trend of the use of ADR as a way to guarantee access to justice is confirmed in African countries such as Ghana and Nigeria, where mediation or other ADR may be easier to integrate into communities already familiarized with traditional justice forums such as village courts or councils of chiefs.<sup>14</sup> The interaction of modern ADR with informal traditional justice and the protection of women's rights and vulnerable groups remains an open question.<sup>15</sup>

#### 1.1.1. ADR as a Quality Factor in Evaluating and Improving Justice Systems

- 25 Entering the twenty-first century, citizens of developed countries demand from states and officials that Justice be not only fair and transparent but also efficient and affordable, among other quality demands.
- 26 Society expects swift justice, with reasonable costs and effective enforcement of rulings. States themselves are aware of this challenge, and in addition, several governmental and non-governmental institutions have taken up the issue. In general, it is observed that

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<sup>11</sup> M Villamarín López, 'Access to Justice as a Fundamental Right' in B Hess, M Woo, L Cadiet, S Menétrey, and E Vallines García (ed), *Comparative Procedural Law and Justice* (2024), Part III Chapter 2, para 27 <https://www.cplj.org/publications/3-2-access-to-justice-and-costs-of-litigation> accessed 26 October 2024.

<sup>12</sup> H Soletto-Muñoz and M Fandiño, *Manual de mediación civil* (CEJA 2017) 22.

<sup>13</sup> Within the framework of the XIV Ibero-American Judicial Summit.

<sup>14</sup> E Bosio and A Palacio Jaramillo, *Increasing Access to Justice in Fragile Settings* (World Bank 2023) 31 ff.

<sup>15</sup> UNDP, UNICEF and UN Women, *Informal Justice Systems: Charting a course for human rights-based engagement* (2013) <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2013/1/Informal-Justice-Systems-Charting-a-Course-for-Human-Rights-Based-Engagement.pdf> accessed 3 December 2024.



dissatisfaction with civil justice focuses mainly on the delay and ineffectiveness of resolutions,<sup>16</sup> factors that demonstrably harm national economies.<sup>17</sup>

- 27 The studies carried out are quantitative and qualitative. Institutions such as the Council of Europe European Commission for the Efficiency of Justice (CEPEJ) from Council of Europe or Organisation for Economic Co-operation and Development (OECD)<sup>18</sup> collect official data from the Justice institutions, such as actual duration times of processes, number of cases, judiciary budget, performance, etc. Other institutions such as the World Bank in Doing Business<sup>19</sup> or projects such as the World Justice Rule of Law Index Project have carried out comparative studies that are based on the perception of people, whether they are users of justice, legal professionals or parties or the general population.<sup>20</sup>
- 28 In Europe, CEPEJ, since 2002 focuses its work on the quality of justice, evaluating generic issues (budget, organization of courts, number of judges and prosecutors, general effectiveness) and, above all, as elements of special relevance, time management and the effective enforcement of resolutions, as they are the scourges of the effectiveness of justice. CEPEJ also analyses the development of mediation, a quality instrument for

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<sup>16</sup> Among them the CEPEJ reports, the World Bank Doing Business reports, the OECD Judicial performance report prepared by G Palumbo, G Giupponi, L Nunziata and J Mora-Sanguinetti, 'Judicial performance determinants: a cross-country perspective' (2013) OECD Economic Policy Papers <https://www.oecd-ilibrary.org/docserver/5k44x00md5g8-en.pdf?expires=1733222702&id=id&accname=guest&checksum=5F03C3F10C39A0952C98B5014C0FFA6D> accessed 14 January 2024.

<sup>17</sup> J Mora Sanguinetti, 'Recent evidence on the economic effects of the functioning of justice' (2016) Bank of Spain, Economic Bulletin, 33-41.

<sup>18</sup> Thus, the OECD study (n 16).

<sup>19</sup> The study methodology was based on responses to surveys and case studies, that led to a review after irregularities and discontinuing the index in 2020. The review focuses on the need for a change in the methodology and the quality of the data. L Alfaro, A Auerbach, M Cárdenas, T Ito, S Kalemli-Özcan and J Sandefur, *Doing Business: External Panel Review* (Final Report September, 2021).

<sup>20</sup> See Methodology of the World Justice Project's Rule of Law index report, World Justice Project, *Behind the Numbers* (Section 4, 2023) <https://worldjusticeproject.org/rule-of-law-index/download/s/Index-Methodology-2023.pdf> accessed 20 December 2023. As part of the evaluation of the civil justice system, the respondent is asked about the efficiency of alternative dispute mechanisms as one of 11 circumstances that would describe problems in civil and commercial courts: Inefficient alternative dispute mechanisms to resolve disputes outside the courts. World Justice Project, *Qualified respondents' questionnaire* (2023), Civil and Commercial Law, Question 23 g <https://worldjusticeproject.org/rule-of-law-index/about#howwemeasure> accessed 3 December 2024.

justice that the Council of Europe intends for States to develop in practically all areas of Justice.<sup>21</sup>

- 29 CEPEJ collects and analyses data on ADR use, especially court-connected mediation and conciliation. The 2022 Report refers to an increase in the use of consensual procedures and points out that reforms aimed at strengthening ADR are still relevant for some countries, while in others, the widespread use of ADRs is a long-standing reality. This raises the question of whether the promotion of ADR is a way to mitigate the downward trend in the number of courts in Europe.<sup>22</sup>
- 30 In the 2024 Justice Scoreboard, the CEPEJ underscores the promotion and incentives for the use of Alternative Dispute Resolution (ADR) methods across the European Union. The report concludes that there is a general trend toward encouraging the adoption of ADR. Nevertheless, these methods continue to account for a significantly lower proportion of conflict resolution cases compared to traditional litigation.<sup>23</sup>
- 31 Some of the main international organizations that are specialized in the study and evaluation of the functioning of judicial systems identify the need to incorporate appropriate conflict resolution mechanisms as a possibility to improve the quality of the functioning of judicial systems.
- 32 The institutions that promote the quality of Justice defend the measurement of different parameters of special relevance, reviewing structural issues such as independence,

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<sup>21</sup> CEPEJ official webpage accessible at [http://www.coe.int/T/dghl/cooperation/cepej/default\\_en.asp](http://www.coe.int/T/dghl/cooperation/cepej/default_en.asp) accessed 20 December 2023. Among the data collected by CEPEJ, several are related to consensual dispute resolution: Public budget allocated for legal aid for cases not brought to court such ADR (question 12.1); in para 7, dedicated to Court related mediation and other alternative dispute resolution methods, is included the number of accredited or registered mediators for court-related mediation (question 166), and specifically, differentiated from court-connected mediation, which methods exist in the country (question 168): 'Question 168: Do the following alternative dispute resolution (ADR) methods exist in your country Court Related Mediation should be differentiated from other Alternative Dispute Resolution procedures, in particular: *Mediation (other than court related mediation)*: Structured and confidential process in which an impartial third person, known as a mediator, assists the parties by facilitating the communication between them for the purpose of resolving issues in dispute. *Conciliation*: Confidential process by which an impartial third person, known as a conciliator, makes a non-binding proposal to the parties for the settlement of a dispute between them. *Arbitration*: Procedure by which the parties select an impartial third person, known as an arbitrator, to determine a dispute between them, and whose decision is binding. *'Other ADR'*: may refer to, for example, negotiated agreement, collaborative law, collaborative practice, hybrid processes, assistance of an ombudsman, early neutral evaluation, etc. Processes in different countries may vary in both design and terminology'. CEPEJ, *Explanatory note to the scheme for evaluating European judicial systems 2024 cycle* (2022 data) <https://rm.coe.int/explanatory-note-2024-cycle-cepej-2023-2-en/1680ad2b8a> accessed 20 June 2024.

<sup>22</sup> CEPEJ, *European judicial systems. CEPEJ Evaluation report* (2022 Evaluation cycle, 2020 data), 102 <https://rm.coe.int/cepej-report-2020-22-e-web/1680a86279> accessed 3 December 2024.

<sup>23</sup> European Commission, *The 2024 EU Justice Scoreboard* (June 2024) [https://commission.europa.eu/document/download/84aa3726-82d7-4401-98c1-fee04a7d2dd6\\_en?filename=2024%20EU%20Justice%20Scoreboard.pdf](https://commission.europa.eu/document/download/84aa3726-82d7-4401-98c1-fee04a7d2dd6_en?filename=2024%20EU%20Justice%20Scoreboard.pdf) accessed 3 December 2024.

quality of training, investment in justice, use of technology and material and personal means in proportion to the population, the wealth of the country and the amount of litigation. Performance-related parameters, directly linked to user satisfaction, are also considered: resolution time, cost, effectiveness of resolutions, etc.<sup>24</sup>

- 33 CEPEJ outlines five pillars of justice functioning: 1. Strategy and policies, 2. Work processes and operations, 3. Access to justice. Communication with users and the public, 4. Human resources and independence of judges and 5. Economic means. Each of these global titles includes various parameters, the need to evaluate the result being common to all. Except for the economic means, all pillars reference ADR: the existence of ADR policies, knowledge of ADR by judges, material and procedural regulation related to ADR and control of the effectiveness of ADR.<sup>25</sup>
- 34 International Consortium for Court Excellence<sup>26</sup>, which unites numerous judicial institutions worldwide, includes consensual mechanisms among its quality elements in the *International Framework for Court Excellence*. The quality system developed by the entity applicable to ADR, since in this area, according to the consortium, ‘there is a sufficient link through judicial management or supervision’. Court-connected alternative dispute resolutions are an element of quality (Area 4):

As part of case management, courts may also consider court-annexed alternative dispute resolution (ADR). ADR allows parties to work towards an amicable solution and avoid the need to go to trial. If the matter can be resolved through ADR, parties benefit from the time savings and avoid incurring additional cost of litigation. This enables courts to provide affordable and accessible methods to resolve disputes. In some courts, technology has been introduced to assist the courts by providing an online platform for parties to resolve disputes between themselves or with the involvement of a mediator.<sup>27</sup>

- 35 Furthermore, there is ongoing discussion regarding the potential integration of Artificial Intelligence in Alternative Dispute Resolution (ADR) processes. AI could serve as a

<sup>24</sup> Among these working principles of CEPEJ on the efficiency of judicial procedures are access to justice, reasonable duration of the process, elimination of undue delays, reduction of the cost of procedures, effective enforcement of decisions and in a timely manner. Resolution establishing the European Commission for the efficiency of justice, Res (2002)12 of 18 September 2002 (CEPEJ).

<sup>25</sup> CEPEJ, *Checklist for promoting the quality of justice and the courts* (adopted by CEPEJ at its 11th plenary meeting, Strasbourg 2-3 July 2008), 2.

<sup>26</sup> As the framework describes itself, ‘The International Framework for Court Excellence is a quality management system designed to help courts to improve their performance. It includes universal core values, seven areas of court excellence aligned with those values, as well as concepts, case studies, and tools by which courts worldwide can voluntarily assess and improve the quality of justice and court administration’ <https://www.courtexcellence.com/> accessed 3 December 2024. See K Gilbert, ‘Soutenir le pilotage de la qualité des juridictions en Europe: Le projet européen “Court Quality Framework Design”’ (2018) 8(1) *International Journal of Procedural Law*, 167-190

<sup>27</sup> International Consortium for Court Excellence (ICCE), *International framework for Court excellence* (3rd edn, May 2020).

technological tool capable of providing answers to basic legal inquiries, analysing legal documents to alleviate workloads, and even drafting settlements or generating proposals to facilitate agreements.<sup>28</sup>

## 2 LINKAGES WITH THE COURT SYSTEM

- 36 Consensual conflict resolution methods can have varying relationships with the procedural justice system, from a complementary relationship to one of unrelatedness to being a real formal alternative for the citizen.
- 37 Relationship with the Justice system has brought reflections about the name and nature of the consensual methods, alternative, adequate, informal, self-composition, or consensual, among others. In recent years, academics have shifted from referring to 'alternative' dispute resolutions to describing them as 'adequate' or 'effective' so that it is possible to identify the most appropriate way of solving conflicts.<sup>29</sup>
- 38 On the one hand, a broader conception of Justice, focusing on citizens' interests and satisfaction, and involving various professionals and services, and on the other hand, the need for efficient dispute resolution systems has led to diverse interactions between consensual methods and the court system.
- 39 Currently, most formal consensual methods have some degree of integration with the justice system, suggesting a complementary nature to the Court system and begin to exit its classification as an alternative to the Court, as was assumed in the last quarter of the last century with the rise of ADR with arbitration.<sup>30</sup>
- 40 Consensual dispute mechanisms, depending on their link to the civil procedure, can be classified as connected, annexed, related or unrelated to the court system. The Multidoor courthouse model represents a classic approach for more cohesive interaction at the initial stage of civil procedure. Specifically embedding mechanisms such as mediation across the civil justice system is an objective in countries such as the UK.<sup>31</sup>

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<sup>28</sup> B Laukermann, 'Alternative Dispute Resolution and Artificial Intelligence' in B Hess, M Woo, L Cadiet, S Menétrey, and E Vallines García (ed), *Comparative Procedural Law and Justice* (2024), Part IX Chapter 5, para 179-181 <https://www.cplj.org/publications/9-5-alternative-dispute-resolution-and-artificial-intelligence> accessed 23 September 2024.

<sup>29</sup> A Cabral, 'Consensual Dispute Resolution' in B Hess, M Woo, L Cadiet, S Menétrey, and E Vallines García (ed), *Comparative Procedural Law and Justice* (2024), Part XV Chapter 1, para 23, 24 <https://www.cplj.org/publications/15-1-consensual-dispute-resolution> accessed 3 November 2024.

<sup>30</sup> S Barona Vilar, "Justicia Integral" y "Access to Justice". Crisis y evolución del "paradigma" in S Barona Vilar (ed), *Mediación, arbitraje y jurisdicción en el actual paradigma de justicia* (Thomson Reuters-Civitas 2016) 31-55.

<sup>31</sup> See foreword of Lord Bellamy QC in Ministry of Justice (UK), *Consultation: Increasing the use of mediation in the civil justice system* (CP 721, 2022), 3 ff.

## 2.1 Consensual Dispute Resolution Connected to the Court

- 41 Consensual dispute resolutions, such as mediation or negotiation are mechanisms of conflict resolution that can be used in the private sphere or be linked to court litigation.
- 42 The establishment of appropriate conflict resolution programs linked to the courts is becoming more common, like what Professor Sander advanced in 1976, the multi-door courthouse.
- 43 Court dispute system designs often include mediation as a *door* to which many courts refer matters for which they consider it most appropriate to try to reach an agreement with the help of a third party, the mediator.
- 44 This mediation model has been called court-linked mediation, judicial mediation, or intra-judicial mediation. It can occur at any point during a legal process initiated by a lawsuit, including at the beginning, middle, or even during the decision execution phase.<sup>32</sup>
- 45 The parties may engage in mediation either through referral or on their own initiative. In either case, we could describe it as intra-judicial mediation as it occurs once the process and development has begun, and the result will have effects on said process. However, intra-judicial mediation typically refers to when the initiative for mediation comes from the jurisdictional body or when the services of the jurisdictional body are used.
- 46 It would be probably more adequate to refer to court related mediation or court-connected mediation, as in the USA system, although in other European countries it is generally called judicial mediation, such as in Belgium, where they distinguish it from the voluntary one<sup>33</sup>, or in France from the private one or ‘conciliation judiciaire’ or ‘audience de règlement amiable’<sup>34</sup>, or court related mediation as made by the CEPEJ, since the term judicial mediation can lead to the erroneous conclusion that it is the judge who carries out some mediation activity, as can be the case in some countries such as Germany.

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<sup>32</sup> H Soletto-Muñoz, *Mediación y resolución de conflictos, técnicas y ámbitos* (Tecnos 2017) 301-325.

<sup>33</sup> *Loi modifiant le Code judiciaire en ce qui concerne la médiation*, Act to amend the Judicial Code with regard to mediation, 21 February 2005 (Belgium), modified the judicial code in this regard concerning mediation.

<sup>34</sup> Presented by J Floch, *Rapport d'Information sur la médiation en Europe* (Assemblée nationale, 13 February 2007), 14. L Cadiet, ‘Panorama des modes alternatifs de règlement des conflits en droit français’ (2011) 28 *Ritsumeikan Law Review*, 147-167.

## 2.2 Consensual Dispute Resolution Related to the Court: A Necessary Step to Access the Courts

- 47 The trend of incorporating consensual dispute resolution mechanisms into the justice system at large, aimed at reducing judicialization, has led many countries to establish mandatory use of consensual mechanisms as a procedural requirement to access civil courts, along with other measures, such as economic disincentives, aimed at deterring litigation.<sup>35</sup>
- 48 Balancing this legal obligation (mandatory attempt of agreement through mediation or other mechanism) with the right of access to justice has been a topic of debate in continental European countries as well as in other parts of the world.<sup>36</sup>
- 49 The Court of Justice of the European Union confirmed the possibility of restricting the right of access to justice in a proportionate way:

it is settled case-law of the Court that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed.<sup>37</sup>

- 50 Similarly, the European Court of Human Rights (ECtHR) has consistently underscored through its jurisprudence that fundamental rights, including the right of access to justice, are not absolute. The Court has recognized that such rights may indeed be subject to restrictions, provided these restrictions are proportionate and justified by a legitimate public interest. This principle reflects the Court's careful balancing of individual rights with broader societal and administrative needs, aiming to ensure that restrictions do not undermine the essential core of the rights in question. In the case of *Ashingdane v United Kingdom*<sup>38</sup>, the ECtHR examined the permissible scope of limitations on access to courts,

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<sup>35</sup> See P Cortés, 'Embedding alternative dispute resolution in the civil justice system: A taxonomy for ADR referrals and a digital pathway to increase the uptake of ADR' (2023) 43(2) Legal Studies, 312-330.

<sup>36</sup> M A Noone and O O Akin Ojelabi, 'Ensuring Access to Justice in Mediation within the Civil Justice System' (2014) 40(2) Monash University Law Review, 528-563.

<sup>37</sup> *Menini and Rampanelli v Banco Poolare Societ  Cooperativa* (CJEU), Judgment 14 June 2017 [ECLI:EU:C:2017:457] para 54 <https://curia.europa.eu/juris/document/document.jsf?jsessionid=0ECB3973C67BA7A8C4A4849B748CB9B6?text=&docid=191706&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=529598> accessed 22 June 2024.

<sup>38</sup> *Ashingdane v The United Kingdom*, Case 8225/78 (ECtHR), Judgment 28 May 1985 [ECLI:CE:ECHR:1985:0528JUD000822578] para 57 [https://hudoc.echr.coe.int/spa#{%22fulltext%22:\[%22Ashingdane%20v.%20United%20Kingdom%22\],%22documentcollectionid%22:\[%22GRANDCHAMBER%22,%22CHAMBER%22\],%22itemid%22:\[%22001-57425%22\]}](https://hudoc.echr.coe.int/spa#{%22fulltext%22:[%22Ashingdane%20v.%20United%20Kingdom%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57425%22]}) accessed on 20 September 2024.

establishing an important precedent for the proportionality of such restrictions. In its ruling, the Court stated:

Certainly, the right of access to the courts is not absolute but may be subject to limitations [...]. Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.

- 51 In England and Wales, the Judiciary published a report which set out their view that not only was compulsory mediation lawful but that its introduction should be encouraged<sup>39</sup> as it is in many countries such as Italy, Ireland, Argentina, Australia, US or Canada.<sup>40</sup>
- 52 The adequate use of the Public Justice service system arises as a sufficient argument to restrict direct access to the courts. There's a growing trend to incorporate the concept that citizens should use public services responsibly, including the justice system, into legislation.<sup>41</sup> In Brazil, the code of civil procedure follows it under the settlement principle, there should be a preference for settlements whenever possible as a general principle of prevalence of non-judicial solutions to disputes that are not limited to available rights.<sup>42</sup>
- 53 The dispute systems design should ensure the efficacy of the rights of the citizens, the Court of Justice of the European Union in *Menini and Rampanelli v Banco Poolare Società Cooperativa*, specifically outlined proportionate measures that in the case set balanced restrictions to access to justice.<sup>43</sup>

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<sup>39</sup> Civil Justice Council (CJC) (UK), *Compulsory ADR* (Judicial ADR Liaison Committee, June 2021).

<sup>40</sup> Different levels of mandatoriness following Quek continuum: (i) Categorical or discretionary referral with no sanctions; (ii) Requirement to attend mediation orientation session or case conference; (iii) Soft sanctions; (iv) Opt-out scheme; (v) No exemptions) are studied in different jurisdictions in Scottish Government, *An International Evidence Review of Mediation in Civil Justice* (Crime and Justice, Social research, 2019). See also D Queck, 'Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11(2) *Cardozo Journal of Conflict Resolution*, 479-509.

<sup>41</sup> This approach was included in the Spanish Draft Law on Efficiency Measures of the Public Justice Service expected to be approved at the end of 2024.

<sup>42</sup> M Fandiño, L Espinosa and M Sucunza (n 10) 99.

<sup>43</sup> 'Accordingly, the requirement for a mediation procedure as a condition for the admissibility of proceedings before the courts may prove compatible with the principle of effective judicial protection, provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs — or gives rise to very low costs — for the parties, and only if electronic means are not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires'. *Menini and Rampanelli v Banco Popolare Società Cooperativa* (n 37), para 61.



### 2.3 Consensual Dispute Resolution not Connected to the Court

- 54 Consensual dispute resolution not connected to the Court — those initiated by parties using private services or services unaffiliated with the Court — may impact judicial proceedings in various ways. For example, in some countries, the agreement enjoys the effect of *res judicata* without the need of subsequent procedures.<sup>44</sup>

## 3 INTERPLAY BETWEEN CONSENSUAL DISPUTE RESOLUTION METHODS AND PROCEDURE

### 3.1 Referral

#### 3.1.1 *The Adequacy of the Consensual Procedure to the Conflict*

- 55 In the context of civil conflict, the first decision by the parties and their lawyers is to choose the most appropriate resolution method: in a strong case defensible based on rights, arbitration or jurisdiction may be appropriate. If the parties diverge on issues of a technical nature, resolution through an expert report will be highly indicated; if there are reasons of equity or emotional issues that have caused the disagreement, mediation is probably more appropriate.
- 56 Reflecting on the possibility of managing a conflict through mediation or another consensual method, unlike court litigation, where the prohibition of *non liquet* applies, not every consensual method appears adequate to all conflicts. The relevant principle in conflict resolution is to choose the most appropriate method to deal with the conflict type. The criteria used to diagnose which method is appropriate are the conflict's nature, the attitude of the parties, the existence of a risk of violence, the time available, etc. To this end, Dispute Systems Design (DSD) refers to the process in which disputants shape the structure of the dispute resolution mechanism, customizing existing frameworks to align with the specific needs and characteristics of the case.<sup>45</sup>
- 57 In general, there are matters in which it is more appropriate to resort to one method or another: family disputes or conflicts between people who have long-term relationships or will have one in the future, such as neighbours or friends. But even in these cases, in cases in which mediation, for example, is logically possible - cases involving families with young children - sometimes mediation cannot be carried out because there are circumstances such as the existence of a risk of violence, lack of confidence in the mediation, or the uncooperativeness of one of the lawyers, the perception of a very advantageous Best Alternative to a Negotiate Agreement (BATNA, a plan B in negotiation) of one of the parties (possibly unrealistic), among others.

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<sup>44</sup> M Fandiño, L Espinosa and M Sucunza (n 10) 100.

<sup>45</sup> A Cabral (n 29), para 33.



- 58 Sometimes, justice systems choose to refer automatically cases of a low monetary value, small claims, as appropriate for mediation or other mechanisms, taking into account on the one hand the likely simplicity of the case and on the other hand the disproportionate cost of the court procedures.
- 59 Automatic referral or referral based uniquely on the value of the claim, or the type of proceeding could result in a significant number of cases not proceeding with consensual dispute mechanism.<sup>46</sup> This approach could strain justice system resources in communicating with parties and providing informational appointments. An effective policy would integrate alternatives within the justice system, provide citizen information, increase accessibility, and improve resource efficiency, supporting a comprehensive referral system.

### 3.1.2 Voluntary vs Mandatory Referral

- 60 The referral of a case to mediation or other consensual method is in principle limited to an information session or first session, from which the parties will agree or not to initiate or to continue in a mediation procedure.
- 61 In civil legal systems, several opportunities are offered throughout the process for the parties to attempt an agreement, and even manage their matter through mediation, with the possibility of suspending the procedure, either at the request of the parties or on the judge's own motion.
- 62 In France, under the French Code of Civil Procedure (FCCP), there are two distinct types of mediation: contractual and judicial. Contractual, or voluntary, mediation, outlined in Articles 1530 to 1535 of the FCCP, is a fully voluntary process in which the parties engage in mediation to resolve their dispute without involving the court. In contrast, judicial mediation in relation to small claims is court-ordered, requiring the parties to attempt mediation as part of the judicial process.<sup>47</sup>
- 63 In Italy, the Legislative Decree no 28/2010 states a 'quasi-mandatory' the first meeting in non-judicial mediation for specific civil and mediation cases like insurance, banking or division of assets.<sup>48</sup> In Australia, there is a similar 'quasi-mandatory' mediation

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<sup>46</sup> The failure of the conciliation procedure in the Spanish civil procedure led to the elimination of the mandatory pre-trial conciliation in Spain. V Moreno Catena and V Cortes Domínguez, *Derecho Procesal Civil* (Tirant lo Blanch 2023).

<sup>47</sup> M Giacalone and S S Salehi, 'An empirical study on mediation in civil and commercial disputes in Europe: The mediation service providers perspective' (2022) 2 *Revista Italo-Española de Derecho Procesal*, 11-54.

<sup>48</sup> V Indovina, 'When Mandatory Mediation Meets the Adversarial Legal Culture of Lawyers: An Empirical Study in Italy' (2020) 26 *Harvard Negotiation Law Review*, 69-111.

system in which most of the Courts have discretionary powers to refer civil and commercial cases to mediation without the consent of the parties.<sup>49</sup>

- 64 In Germany, Article 15a of the Code of Civil Procedure (GCCP) permits *Länder* (Federal States) to implement mandatory mediation for specific types of cases, including small claims (up to EUR 750), neighbour disputes, and defamation cases involving the media. Similarly, Austria has comparable regulations regarding neighbour disputes since 2004.<sup>50</sup>
- 65 In contrast, in Spain<sup>51</sup>, Chile<sup>52</sup>, or Belgium<sup>53</sup>, civil and mediation cases are based on the voluntariness principle<sup>54</sup>, nevertheless, the trend in the more reluctant countries towards mandatory provisions seems to be evolving, with the gradual introduction of indirect forms of mitigated obligation or incentives and disincentives regarding the use of mediation or other ADR<sup>55</sup>.

### 3.1.2.1 The Possibility of Mandatory Mediation Attempts

- 66 The possibility of making the attempt at mediation or other mechanism mandatory is increasingly being raised by scholars and legal professionals even though there are important obstacles such as the resistance of more traditional legal sectors that promote access to ordinary justice understood as a streamlined system with a single gateway directed straight to a judge.
- 67 Some argue that the right to effective judicial protection in its aspect of access to courts is an obstacle to the mandatory nature of attempting mediation. However, this approach seems to be generally surpassed by the most modern doctrine and legislation, and on the contrary, a broader justice system should integrate these appropriate conflict resolution mechanisms.

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<sup>49</sup> M Hanks, 'Perspectives on mandatory mediation' (2012) 35(3) University of New South Wales Journal, 929-952.

<sup>50</sup> C H Van Rhee, 'Mandatory mediation before litigation in civil and commercial matters: A European perspective' (2021) 4 Access to Justice in Eastern Europe, 7-24.

<sup>51</sup> Art 6 of the Spanish Act 5/2012 on Mediation in Civil and Commercial Matters.

<sup>52</sup> Art 106 of the Chilean Act No 19968 on the creation of Family Courts.

<sup>53</sup> Chapter II Part VI of the Belgian Judicial Code.

<sup>54</sup> H Soleto Muñoz, 'Tutela judicial y alternativas al proceso: instrumentos adecuados para la protección de los derechos de las personas mayores' (2021) 25 AFDUAM: Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid, 419-437. In relation to Belgium, M Giacalone and S S Salehi (n 47) 11-54.

<sup>55</sup> The likely approval of the Efficiency Measures of the Public Service Justice Act is expected in Spain in December 2024, which, based on the concept of justice as a public service, and the obligation of the citizens to contribute to the sustainability of the system, will include as a procedural requirement for the filing of the lawsuit the prior attempt at settlement, along with numerous incentives for settlement and disincentives for litigation.

- 68 The importance of the right to an effective justice system, in which only appropriate cases enter, on the one hand, and the relevance of the protection of rights such as those of minors or workers, or in general of vulnerable persons, on the other, strongly support the initial or post-mediation diversion of matters.
- 69 Systems that seek to encourage the use of mediation by making it mandatory usually introduce the obligation to attempt mediation before the start of the court litigation procedure. Thus, they require attendance of an information session or the first mediation session, or even a minimum number of them. The consequences of non-compliance may range from a denial of access to jurisdiction (as generally occurs in labour dispute resolution systems with a prior mediation or conciliation phase), or a limitation on the procedural rights of the party who breaches the law, including a sanction as a fine or award of costs.
- 70 In the European Union framework, the May 2008 Directive states that voluntariness does not preclude some states from making mediation mandatory or subjecting it to incentives or sanctions, either before or after the initiation of judicial proceedings, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.
- 71 As we pointed out, in general, in European countries, the use of mediation in the family environment is encouraged, and in some countries, the Court can compulsorily refer the parties to a first mediation session, such as in Finland, Malta, Czech Republic, and some German<sup>56</sup> *Länder*, while in other countries such as the United Kingdom its use is favoured, opting for a strong recommendation to go to mediation included in the prejudicial protocols without being mandatory it is indicated that it must be tried and that the court may require proof that mediation has been attempted.<sup>57</sup> In Italy, based on the Directive, mediation has been established as mandatory in small claims civil matters, on a temporary basis, and for the purposes of expanding mediation as an appropriate mechanism to reduce litigation and the serious Italian problem of delay of

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<sup>56</sup> *Rapport d'Information de la Assemblée Nationale* (France) 28.

<sup>57</sup> In the United Kingdom, in the Practice Direction-Pre-action Conduct, for 8.1 it is indicated that 'Starting proceedings should usually be a step of last resort, and proceedings should not normally be started when a settlement is still actively being explored. Although ADR is not compulsory, the parties should consider whether some form of ADR procedure might enable them to settle the matter without starting proceedings. The court may require evidence that the parties considered some form of ADR'. On the strategy of the English courts to favour the use of mediation see N Andrews, 'Mediation in England' in H D Bernardina de Pinho and J L de Andrade, *Contemporary trends in mediation* (Dykinson 2015) 13-14.

Justice.<sup>58</sup> Among the countries with experiences of mandatory mediation attempts, the United States and Canada stand out.<sup>59</sup>

- 72 The obligation to attempt mediation in contested divorces that affect minors is perfectly defensible legally and even constitutionally in all systems, since the principle of the best interest of the child completely justifies this procedural requirement. Logically, mechanisms will have to be provided to allow the parent who attempts mediation and fails to have the other one to participate, to initiate judicial proceedings. Literature indicates the convenience of making mediation mandatory, especially for the purposes of knowledge of mediation by legal operators, mainly lawyers.<sup>60</sup>
- 73 Parenting plans are instruments that can also promote the practice of mediation.<sup>61</sup> Originating in the United States and Canada, the trend in many countries is to implement them, requiring a common parenting plan in the judicial procedure as a procedural requirement. If the parties do not reach an agreement, the parenting coordinator will carry out mediation-type activities and help draft the document.
- 74 Probably the most appropriate solution is to positively encourage access to a variety of forms of alternative dispute resolution, favouring access to mediation privately, supporting its use through instruments that are not repressive, but rather through publicity, and transmitting confidence in the institution of mediation, or even implementing the need to present joint parenting plans.
- 75 In Latin America, the movements in favour of mandatory nature have so far not focused on the powers of the judge to exhaustively refer a matter to intra-judicial mediation. In fact, a weakness of the civil systems in the region is the few *case management* powers granted to judges, who work in a way that is quite attached to the structure of the court procedure.
- 76 To date, in Latin America the referral from the court to mediation has not had as much development, perhaps due to the few countries that have implemented mediation

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<sup>58</sup> G Matteucci, 'Italy is doing it – should we be? Civil and commercial mediation in Italy' in H D Bernardina de Pinho and J L de Andrade (ed), *Contemporary trends in mediation* (Dykinson 2015) 205.

<sup>59</sup> In the United States, the variety in terms of alternative dispute resolution is very wide and depends largely on each state and even each county and court. The origin may be in California, a state in which mandatory mediation was imposed in 1980. See C Menkel-Meadow, 'Roots and inspirations: a brief history of the Foundations of Dispute Resolution' in M L Mofft and R C Bordone (ed), *The Handbook of dispute resolution* (Jossey-Bass 2005) 13-32.

<sup>60</sup> For a long time, studies have been conducted on mandatory mediation, such as R L Wissler 'The effects of mandatory mediation: empirical research on the experience of small claims and common pleas courts' (1977) 33 *Willamette Law Review*, 565-579, the result of which pointed out the advantage of mediation for lawyers, who recommended it to their subsequent clients after having had experiences of mandatory mediation.

<sup>61</sup> The parenting plan must specify the way in which both parents exercise parental responsibilities. The commitments they assume regarding the custody, care and education of their children must be stated.

centres connected to the courts.<sup>62</sup> In any case, it is common for the possibility for the judge to make this referral, for example in the General Code of Procedure of Ecuador that came into force in 2016.<sup>63</sup> The Civil Procedure Code of Honduras<sup>64</sup> also enables with a fairly broad provision the possibility of referring the case.

### 3.2 Procedural Impact of Consensual Dispute Resolution

- 77 Interaction between the Civil procedure and a consensual dispute resolution methods is typically regulated in many countries, especially with regard to mediation.

#### 3.2.1 Statute of Limitations and Suspension

- 78 To enhance the use of the consensual method of conflict resolution, mechanisms must be established to prevent the *abuse* of the procedure. Thus, in the event of the possibility that a mediation or other consensual procedure is initiated for dilatory purposes, legal systems must include mechanisms such as the suspension of the limitations. In the European Union case, the 2008 Directive included this requirement for mediation.<sup>65</sup>
- 79 In Italy, the Legislative Decree 28/2010 regulates the use of civil and commercial mediation. Its Art 8(2) contemplates that the limitation period applies from the date of the mediation request until the mediation process is concluded.<sup>66</sup>

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<sup>62</sup> H Soleto-Muñoz and M Fandiño (n 12).

<sup>63</sup> Art 294.6 General Code of Procedure of Ecuador: 'The judge, ex officio, or at the request of a party, may order that the controversy be transferred to a legally constituted mediation center, so that an agreement can be sought between the parties. In the event that the parties sign a mediation record in which a total agreement is recorded, the judge will incorporate it into the process to conclude it'.

<sup>64</sup> Art. 415. 2 Civil Procedure Code of Honduras: 'Likewise, in accordance with the Law, you may go to a mediation organization to avoid the process'.

<sup>65</sup> Directive on certain aspects of mediation in civil and commercial matters, 2008/52/EC of 21 May 2008 (EU). Article 8 'Effect of mediation on limitation and prescription periods':

1. Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.

2. Paragraph 1 shall be without prejudice to provisions on limitation or prescription periods in international agreements to which Member States are party.

Article 4 of the 2012 Spanish law transposing the Directive would develop it: 'Effects of mediation on prescription and expiration periods. The request to initiate mediation in accordance with article 16 will suspend the prescription or expiration of actions from the date on which the receipt of said request by the mediator is recorded, or the deposit with the mediation institution, if applicable. If within fifteen calendar days from receipt of the request to start mediation the minutes of the constitutive session provided for in article 19 are not signed, the calculation of the deadlines will be resumed. The suspension will last until the date of the signing of the mediation agreement or, failing that, the signing of the final minutes, or when the mediation is terminated for any of the reasons provided for in this Law'.

<sup>66</sup> R Caponi, G Armone, P Porreca and D Dalfino, 'La giustizia civile alla prova della mediazione (a proposito del d.leg 4 marzo 2010 n. 28)' (2010) 133 (4) Il Foro Italiano, 89-107.

- 80 In France, Article 2238 FCCP stipulates that the litigation process will be suspended when the parties agree to initiate mediation. This provision is further reinforced by the French Act of Modernization of Justice (2021), which encourages the use of mediation and mandates the suspension of limitation periods during the course of mediation.<sup>67</sup> In Turkey, Art 16 of the Mediation Code allows the suspension of the civil process due to the beginning of a mediation. This article states that if the parties initiate mediation before filing a lawsuit, the mediation process is considered to commence from the date the parties are invited to the first meeting and concludes when the mediation agreement is signed by both the mediator and the parties involved. On the other hand, if the parties seek mediation after filing a lawsuit, the process begins under one of the following conditions: (1) when the parties accept the court's invitation to mediate, (2) when the parties submit a written statement to the court confirming their agreement to enter mediation, or (3) when the parties' agreement to mediate is documented in the hearing record.<sup>68</sup>
- 81 In most of the European countries, the statute of limitations and the suspension of the civil/commercial proceedings are recognized by national legislation (eg, England and Wales<sup>69</sup>, Poland<sup>70</sup>, Bulgaria<sup>71</sup>, Greece<sup>72</sup> or Scotland<sup>73</sup> among others).

### 3.2.2 Lack of Jurisdiction

- 82 Systems can establish mechanisms to reinforce agreements to submit conflicts to mediation or other consensual methods, analogous to submission to arbitration, in which submission to mediation is established as a reason for submitting a declining of jurisdiction.
- 83 This creates a rather curious system of relationship between mediation or other consensual methods and the judicial process is thus designed, as it treats mediation similarly to arbitration. It proves challenging to introduce traditional procedural systems,

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<sup>67</sup> K Deckert, 'Mediation in France: Legal Framework and Practical Experiences' in K J Hopt and F Steffek (ed), *Mediation Principles and Regulation in Comparative Perspective* (Oxford 2013) 455-520.

<sup>68</sup> A G Usluel, 'Mandatory or Voluntary Mediation? Recent Turkish Mediation Legislation and a Comparative Analysis with the EU's Mediation Framework' (2020) 2 *Journal of Dispute Resolution*, 445-466.

<sup>69</sup> J M Scherpe and B Marten, 'Mediation in England and Wales: Regulation and Practice' in K J Hopt and F Steffek (ed), *Mediation Principles and Regulation in Comparative Perspective* (Oxford, 2013) 365-454.

<sup>70</sup> R Morek and L Rozdeiczer, 'Mediation in Poland: Time for a Quiet Revolution?' in K J Hopt and F Steffek (ed), *Mediation Principles and Regulation in Comparative Perspective* (Oxford, 2013) 775-808.

<sup>71</sup> E Georgiev and C Jessel-Holst, 'Mediation in Bulgaria: Legal Regime, EU Harmonisation and Practical Experience' in K J Hopt and F Steffek (ed), *Mediation Principles and Regulation in Comparative Perspective* (Oxford, 2013) 333-364.

<sup>72</sup> V Kourtis, 'Greece' in C Esplugues, J L Iglesias and G Palao (ed), *Civil and Commercial Mediation in Europe. National Mediation Rules and Procedures* (Cambridge, 2014) 193-216.

<sup>73</sup> E W Crawford and J M Carruthers, 'United Kingdom' in C Esplugues, J L Iglesias and G Palao (ed), *Civil and Commercial Mediation in Europe. National Mediation Rules and Procedures* (Cambridge, 2014), 515-538.

given the voluntary nature of consensual dispute resolution methods; if one party is unwilling to participate in the consensual method, the option to go to court exists. However, in some legislations (eg, England and Wales<sup>74</sup>, Spain<sup>75</sup>, or Romania<sup>76</sup> among others) a submission clause can produce a decline of jurisdiction. The interplay between the efficiency of consensual methods and access to justice is intricate.

### 3.2.3 Provisional Remedies

- 84 In civil and commercial mediation, provisional remedies serve as preventive legal measures that parties may seek from a court in cases where there is a high likelihood of irreparable harm if immediate action is not taken. These remedies play a crucial role when urgent protection is necessary to preserve the subject matter of the dispute or to prevent damage that cannot be later adequately addressed or compensated.
- 85 In Spain, Article 10(2) of Act 5/2012 on Civil and Commercial Mediation allows the parties to request provisional measures from the Court if there is a risk of losing rights or assets. Once one of the parties requests such a measure, the court that referred the case to mediation (or the one that, in the future, will enforce the mediation agreement) must assess the circumstances of the case. If such a risk is determined to exist, the court may order the precautionary measure for the duration of the mediation process.<sup>77</sup>
- 86 In Australian civil and commercial mediations, it is possible that parties ask for provisional measures when there is a risk of harm or loss before a final agreement is reached. These provisional measures may be asked by the parties to the Court. These remedies can be provided through an injunction to preserve the *status quo*, or freezing order to prevent the dissipation of assets during the mediation process (Section 23 of the Federal Court of Australia Act 1976 as well as state regulations like the Section 37-38 of the Magistrates' Court General Civil Procedure Rules of Victoria 2020).<sup>78</sup>

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<sup>74</sup> M Petsche, 'The enforceability of mediation clauses: A critical analysis of English case law' (2021) 5 Journal of Strategic Contracting and Negotiation, 43-59.

<sup>75</sup> According to Art 39 of the Spanish Civil Procedure Act 1/2000, the party affected by the breach of the clause may invoke the lack of jurisdiction of the courts due to the failure to initiate the mediation procedure.

<sup>76</sup> Art 2 of the Act 2/2006 regarding mediation and organisation of the profession of mediator. Further information, M Constantinescu and M S Corcis, 'Are mediation clauses binding and mandatory?' (2017) 7 Juridical Tribune, 53-63.

<sup>77</sup> V Pérez Daudí, 'La adopción de las medidas cautelares para asegurar la efectividad de la mediación' in H Soletto (dir), E Carretero Morales and C Ruiz López (coord), *Mediación y Resolución de Conflictos: Técnicas y Ámbitos* (Tecnos 2017) 372-386.

<sup>78</sup> S Colbran, P Spender, S Jackson and R Douglas, *Civil Procedure. Commentary and Materials* (LexisNexis 2012) 83-108.



### 3.2.4 Judicial Impact of Agreements

- 87 Agreements reached through a consensual dispute method concerning issues under the party autonomy, which do not need any kind of supervision or approval from the Justice system, can have an impact on the judicial procedure if connected to a case in the court. Every procedural regulation deals with the possibility of the parties reaching an agreement, and its outcome as a transaction or other, because of the principle of autonomy of the will and the adversarial principle, if the agreement is in accordance with the law and respects the interests of third parties are respected.
- 88 However, in matters where some kind of public interest, such as in family proceedings, where civil status or wellbeing of children are relevant not only for the parties but indeed for society, the judge or prosecutor, or both, or another authority, will supervise the agreement of the parties. This social interest in the matter limits the principle of autonomy, granting the judge or authority power to control the merits of what was agreed. The most common elements of public interest in civil processes are civil status and the interest of infants or people with disabilities or in general vulnerable persons.
- 89 This bargaining in the shadow of the law<sup>79</sup>, in the first quarter of the century still poses some questions. Judicial intervention should remain light when parties agree, and decisions against the agreement should be reserved for when its content or proposal (when a need of supervision exists) is harmful to the interests of children or vulnerable persons and the parties are not following the judge's instructions in their agreements. It is convenient for every legal system to define which issues are susceptible to control by the judge and which issues are not.
- 90 This topic has appeared in Latin America in the academic debate under the name of ratification or approval of agreements and has generated two quite antagonistic models of understanding the connection of the judge with the agreements. The first model understands that based on the principle of free will of the parties, the agreement automatically has the effect of *res judicata* and has the value of a sentence for the purposes of its enforcement.<sup>80</sup> The second model requires that the agreements be approved before a judicial authority.<sup>81</sup>

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<sup>79</sup> Referring to the shadow of the law as the ability to negotiate while understanding what regulation establish and what a court could rule, Robert Mnookin and Lewis Kornhauser, where in 1979 advocating the cause of negotiation and mediation in divorce disputes in the most cited article of family law: 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 (5) *The Yale Law*, 950-997.

<sup>80</sup> Bolivia, Brazil, Ecuador, El Salvador, Colombia, and Honduras follow this model. M Fandiño, L Espinosa and M Sucunza (n 10).

<sup>81</sup> Costa Rica and Nicaragua. Art 9 of Law 7,727 on alternative conflict resolution and promotion of social peace in Costa Rica: 'Judicial mediation agreements, once approved by the judge, and extrajudicial ones, will have the authority and effectiveness of material *res judicata* and will be enforceable immediately'.



- 91 In a comparative investigation of 19 countries carried out by the Justice Studies Center of the Americas (JSCA), serious deficiencies were found in the procedures of judicial approval of agreements. In some cases, rather than identifying aspects of public interest that should be protected, judges revoked agreements due to formal defects or even spelling errors (it is important to note that in many Latin American countries mediation is carried out by community leaders without university training).<sup>82</sup>
- 92 Approval control should be restricted to elements outside the scope of the agreement and that are affected by a public interest, such as issues that affect marital status, children, people with disabilities, vulnerable persons, or agreements that are carried out to the detriment of third parties with legitimate rights to the issue, as well as those that are contrary to public order.

### 3.2.5 Enforcement

- 93 Some states regulate a direct status for enforcing private agreements and others establish a special procedure for granting executive force of the agreement.
- 94 In the Spanish case, the rank of enforceable document or title is granted to the mediation agreement when elevated to a public deed that meets the legal requirements (Art 517.2 *Ley de Enjuiciamiento Civil* (Code of Civil Procedure), LEC), with no payment requirement necessary (Art 580 LEC).
- 95 In systems without specific regulation, the mediation agreement will have the effectiveness established for any private agreement or a specific force depending on whether it has been formalized.
- 96 In Latin America, the possibility of enforcing an agreement in some countries will depend on whether it has been approved by a judicial authority and in others it will have executive force by itself. One option to mitigate the number of agreements that must be judicially approved is allowing them to be brought to a Notary following the model of Spanish Law 5/2012.
- 97 In certain jurisdictions (such as Germany<sup>83</sup>, Czech Republic<sup>84</sup>, or The Netherlands<sup>85</sup> among others), an additional mechanism exists to enhance the legal enforceability of agreements. This mechanism involves obtaining a formal declaration of enforceability

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<sup>82</sup> H Soleto-Muñoz and M Fandiño (n 12).

<sup>83</sup> B Hess and N Pelzer, 'Mediation in Germany: Finding the Right Balance between Regulation and Self-Regulation' in C Esplugues and L Marquis (ed), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives* (Springer 2015) 291-312.

<sup>84</sup> M Pauknerová and M Pfeiffer, 'Act on Mediation – Significant Step on a Long Way to Make Mediation Work in the Czech Republic' in C Esplugues and L Marquis (ed), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives* (Springer 2015) 225-244.

<sup>85</sup> A Van Hoek and J Kocken, 'The Netherlands' in C Esplugues, J L Iglesias and G Palao (ed), *Civil and Commercial Mediation in Europe. National Mediation Rules and Procedures* (Cambridge, 2014) 491-513.

from either the courts or state-approved conciliation bodies. This process is particularly applicable when the agreement has been drafted by the legal representatives of the respective parties, thereby ensuring its compliance with the requisite legal standards and facilitating its recognition and enforcement within the judicial system.

- 98 Finally, there are a few countries (such as Poland, Luxembourg, Lithuania, France, Norway or Italy) that link the enforceability of the agreement to the acceptance of it by civil/commercial competent courts.<sup>86</sup>

### 3.2.5.1 Consensual Method Costs

- 99 The cost of mediation or other consensual methods linked to the courts is usually assumed by public entities and paid for by the parties in total or partially.
- 100 Regulations for non-mandatory mediation usually attribute the cost to the parties in equal parts, although the majority of court connected programs are usually free or partially free, with a certain number of sessions funded by the public system and from there on by the litigants.
- 101 Also, justice systems may include within the right to free justice the advice and guidance of a lawyer to participate in mediation.
- 102 The integration of mediation or other consensual methods into the right to free legal aid may represent a considerable financial burden for the state in cases where there is a high volume of mediation sessions or similar proceedings. However, from a broader law and economics perspective, this approach can yield a positive balance by decreasing the number of cases that reach the courts, thereby potentially reducing overall judicial expenses and alleviating the strain on court resources. Typically, mediation or other mechanisms part of the multidoor courthouse or connected to the Court would be free or their cost is treated as a court fee, but at minimum, the mediation procedure is usually free for people without financial resources.
- 103 Some countries develop systems that set rates for the parties depending on their income levels, even if they are very low. For example, in some United States programs, the mediation session for matters referred by the courts can vary between USD 30 and more than USD 100 depending on the income of the parties, taking into account the diversity of their economic capacity.

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<sup>86</sup> C Esplugues, 'General Report: New Developments in Civil and Commercial Mediation – Global Comparative Perspectives' in C Esplugues and L Marquis (ed), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives* (Springer 2015) 1-88.

## 3.2.5.2 Costs

- 104 Regarding procedural costs, some systems enable courts to order the party at fault to pay adverse costs at the end of the procedure (requiring a party to pay all or part of the other party's litigation costs) or to reach an agreement about the costs between the parties and the mediator. This approach involves the inclusion in European continental law systems of the concept of extra-procedural good faith in mediation that has been developed in England and Wales<sup>87</sup>, Ireland, Bulgaria, Italy or the Netherlands where it has become an incentive for the use of mediation.<sup>88</sup> This type of incentive supports the need for lawyers and other private procedural operators to learn how to work with mediation and consensual dispute resolution systems, to comprehend the institutions, the existing programs, and, above all, how to play their role as defenders and representatives in mediation in the most advantageous manner possible for their clients.
- 105 However, in Australia<sup>89</sup> or New Zealand<sup>90</sup>, the cost of mediation is pre-determined, requiring the parties to cover both the mediator's hourly fee and the mediation institution's fee. These fees are usually not governed by any regulation according to the free market rules. In contrast, in other countries (eg, Japan or Canada) the mediation fees are free to the parties involved in the process.<sup>91</sup>

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<sup>87</sup> In England and Wales, the pre-action guidance where a party is found to have unreasonably refused to use a dispute resolution process, the court is empowered to apply sanctions, including paying adverse costs.

<sup>88</sup> C Esplugues, 'Civil and Commercial Mediation and National Courts: Towards a New Concept of Justice for the XXI Century?' in M Schauer and B Verschraegen (ed), *General Reports of the XIXth Congress of the International Academy of Comparative Law* (Springer 2017) 213-259.

<sup>89</sup> V Waye, 'Mandatory mediation in Australia's civil justice system' (2016) 45 *Common Law World Review*, 214-235.

<sup>90</sup> G Morris, 'From Anecdote to Evidence: The New Zealand Commercial Mediation Market' (2017) 22 *NZ Business Law Quarterly*, 13. According to this research, the average cost of civil and commercial in New Zealand varies from NZD 2,500 to NZD 7,500 (EUR 1,350 to EUR 4,185).

<sup>91</sup> C Esplugues (n 86).

**ABBREVIATIONS AND ACRONYMS**

|          |  |
|----------|--|
| ADR      | Alternative Dispute Resolution   |
| Art      | Article/Articles   |
| BATNA    | Best Alternative to a Negotiate Agreement  |
| BGH      | <i>Bundesgerichtshof</i> (Federal Court of Justice) [Germany]  |
| CEJA     | <i>Centro de Estudios de Justicia de las Américas</i> (Justice Studies Center of the Americas)   |
| CEPEJ    | <i>Conseil de l'Europe Commission européenne pour l'efficacité de la justice</i> (Council of Europe European Commission for the efficiency of justice) |
| cf       | <i>confer</i> (compare)  |
| ch       | chapter  |
| CJC      | Civil Justice Council (UK)   |
| CJEU     | Court of Justice of the European Union   |
| ECHR     | European Court of Human Rights   |
| DSD      | Dispute Systems Design   |
| ECLI     | European Case Law Identifier   |
| ed       | editor/editors   |
| edn      | edition/editions   |
| eg       | <i>exempli gratia</i> (for example)  |
| etc      | et cetera  |
| EU       | European Union   |
| EUR      | Euro   |
| FCCP     | Code of Civil Procedure (France)   |
| ff       | following  |
| fn       | footnote (external, ie, in other chapters or in citations)   |
| ibid     | <i>ibidem</i> (in the same place)  |
| ie       | <i>id est</i> (that is)  |
| JPY      | Japanese Yen   |
| JSCA     | Justice Studies Center of the Americas   |
| LEC      | <i>Ley de Enjuiciamiento Civil</i> (Code of Civil Procedure) (Spain)   |
| n        | footnote (internal, ie, within the same chapter)   |
| no       | number/numbers   |
| NZD      | New Zealand Dollar   |
| OECD     | Organization for Economic Cooperation and Development  |
| para     | paragraph/paragraphs   |
| pt       | part   |
| Sec      | Section/Sections   |
| supp     | supplement/supplements   |
| trans/tr | translated, translation/translator   |
| UK       | United Kingdom   |

|          |                          |
|----------|--------------------------|
| UN       | United Nations           |
| US / USA | United States of America |
| USD      | United States Dollar     |
| v        | versus                   |
| vol      | volume/volumes           |

## LEGISLATION

### International/Supranational

European Mediation Directive on certain aspects of mediation in civil and commercial matters, Directive 2008/52/EC of 21 May 2008 (EU).

Resolution establishing the European Commission for the efficiency of justice, Res (2002)12 of 18 September 2002 (CEPEJ).

### National

*Code Civil français* (French Civil Code) (France).

*Code Judiciaire* 1967 (Judicial Code) (Belgium).

Code of Civil Procedure 1975 (France).

*Código de Processo Civil* 2015 (Code of Civil Procedure) (Brazil).

*Código Orgánico General de Procesos* (General Code of Procedure) (Ecuador).

*Código Procesal Civil* (Civil Procedure Code) (Honduras).

*Decreto Legislativo* n 28/2010 (Legislative Decree n 28/2010) (Italy).

Draft Law on Efficiency Measures of the Public Justice Service, November 2024 (Spain)  
[https://www.senado.es/legis15/publicaciones/pdf/senado/bocg/BOCG\\_D\\_15\\_183\\_1777.PDF](https://www.senado.es/legis15/publicaciones/pdf/senado/bocg/BOCG_D_15_183_1777.PDF)

Federal Court of Australia Act 1976 (Australia).

*Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu* (Act of Civil Conflicts Mediation) (Turkey).

*Lege nr 192 din 16 mai 2006 privind medierea şi organizarea profesiei de mediator* (Act 2/2006 regarding mediation and organisation of the profession of mediator, 16 May 2006) (Romania).

*Ley 1/2000 de Enjuiciamiento Civil* (Civil Procedure Act) (Spain).

*Ley 5/2012, de 6 de julio, de mediación en asuntos civiles y mercantiles* (Law 5/2012 on mediation in civil and commercial matters, 6 July 2012) (Spain).

*Ley No 7727 Resolución Alternativa de Conflictos y Promoción de la Paz Social* 1997 (Law 7727 on alternative conflict resolution and promotion of social peace) (Nicaragua).

*Ley N 19968 Ministerio de Justicia. Crea los Tribunales de Familia* (Law No 19968 Ministry of Justice. Creation of the Family Courts) (Chile).

Magistrates' Court General Civil Procedure Rules 2020 (Victoria, Australia).

*Zivilprozessordnung* (Code of Civil Procedure) (Germany).

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*Livio Menini and Maria Antonia Rampanelli v Banco Popolare Società Cooperativa*, Case C-75/16 (CJEU), Judgment 14 June 2017 [ECLI:EU:C:2017:457].



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