Insights & Analyses

The Function of Mediation in Transnational Family and Inheritance Law Litigation: The Role of the Department of Legal Sciences (DSG) - Unifi in European Field Research

Sara Landini* and Simona Viciani**

Abstract

This paper describes the participation of DSG, Unifi, in two European Union-funded research projects, GoInEU Plus and InMEDIATE, and presents the results, which highlight the need to resolve cross-border issues through solutions agreed by the parties with the intervention of professional dispute resolution facilitators. The projects have focused particularly on two areas where, for essentially cultural reasons, it is more difficult to find a framework of shared European principles: family law and succession law. The latest InMEDIATE project, therefore, has a more general dimension, covering all areas of dispute resolution, and is part of the ECVET system for training European professionals with the aim of designing the curriculum of an International Mediator.

I. Transnational Relationships: In Particular, the GoInEu Plus Project on Succession Statutes After the Entry into Force of EU Succession Regulations

In two projects coordinated by the Unifi Department of Legal Sciences (DSG), transnational litigation issues emerged.

GoInEu Plus[1] proposes to enlarge, with an innovative perspective, the scope of the first GoInEu project on succession law (which began on October 1, 2017, and ran for two years) to include problems regarding the recognition and enforcement of decisions in matters of matrimonial property regimes and registered partnerships property regimes. It therefore focuses on the legal management of different inheritance statutes for transnational families, with a new special focus on the increasing problems of integration of different cultures in Europe.

In this day and age, in times of ever-increasing migratory flows,[2] the problems

* Sara Landini is Full Professor of Business Law, University of Florence.

** Simona Viciani is Associate Professor of Private law, University of Florence.

For the purpose of the publication of this essay, para 1 is to be referred to Sara Landini, paras 2 through 4 to Simona Viciani.

[1] www.goineu.eu.

[2] According to the last available statistics, in 2015 migrants to EU Member States were 4.7 million, while at least two point eight million migrants have left an EU Member State; see

caused by transnational family relationships, and issues surrounding inheritance law, provide a wealth of examples to facilitate the understanding of how crucial it is to find new ways to foster the coexistence between different cultures and legal statuses, through the use of cultural mediation tools, for example. The aim is to overcome some of the social conflicts that may cause forms of religious and political radicalization that end up inciting terrorist behaviors.

This topic is therefore closely related to many of the problems that migrant families in Europe face today. It also applies to the issue of real integration that is currently a clear strategy for efficiently contributing to the European Agenda on Security in terms of providing effective judicial responses to terrorism.

Integration is one of the most important challenges in Europe. The European Commission recently adopted an Action Plan on the integration of third-country nationals (June 7, 2016). The Action Plan provides a comprehensive framework to support Member States' efforts in developing and strengthening their integration policies. It also describes concrete measures that the Commission will adopt.

The Plan includes actions across all policy areas that are crucial for integration:

- Pre-departure and pre-arrival measures, including actions to prepare migrants and local communities for the integration process;
- Education, such as actions to promote language training, Early Childhood Education and Care for migrant children, teacher training, and civic education;
- Employment and vocational training, including actions to promote early integration of migrants into the labor market and migrants' entrepreneurship;
- Access to basic services such as housing and healthcare;
- Active participation and social inclusion, including actions to support exchanges with the host society, migrants' participation to cultural life, and fighting discrimination.

In light of the current migratory challenges, and as announced in the Communication on April 6, 2016, the moment has now come to revisit and strengthen the common approach across policy areas and involve all relevant actors – including the EU, Member States, regional and local authorities, as well as social partners and civil society organizations. This is also supported by the European Parliament in its Resolution of 12 April 2016, which calls, among other matters, for full participation and early integration of all third country nationals, including refugees.

GoInEu Plus aims to reduce social conflicts by analyzing the impact of migration to EU Family & Successions Law, having particular regard to the application of European Regulations 1103 and 1104 enacted in 2016 coordinated with Regulation (EU) 2012/650.

It is well-known that the ways in which a person distributes their assets could have social implications, either after death or during their life. Additionally, the social values regarding family support, as well as government taxation policies and

https://tinyurl.com/s5c3ybc4 (last visited 10 February 2024).

succession laws, have real implications for the way that assets are transferred.[3]

Social values are strictly related to culture, which are mainly of a national dimension, and to national law.

Thus, in the case of international families, the identification of national law should account for the need for social cohesion.

Regulations 1103 and 1104, along with Regulation 650, try to find a solution to facilitate the principle of freedom of movement of European Citizens.[4]

European Parliament and Council Regulation (EU) 2016/1103 of 24 June 2016 aims to implement enhanced cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of matrimonial property regimes.

All the rules applicable to matrimonial property regimes should be covered in a single instrument to provide married couples with legal certainty regarding their property and to offer them a degree of predictability. In order to allow spouses in another Member State to enjoy their rights, which have been created or transferred to them as a result of the matrimonial property regime, this Regulation must be applied.

On this topic, it is important to consider the role of private autonomy in regulating the situations of power and duty related to *jus in rem* even in legal systems, such as Italy, ordered on the principle of typicality of jus *in rem*. The parties could therefore regulate, in agreement of the choice of the applicable law, within the spaces left to their private autonomy, the adaptation of an unknown right *in rem* to the closest equivalent right under the law of that other Member State.

It is also necessary to consider the changes within the concept of wealth, currently leaning towards financial instruments that represent real systems for allocating family wealth.

Regulation 1103 only deals with matrimonial property regimes and it should not apply to other preliminary questions such as the existence, validity or recognition of a marriage. These preliminary questions are covered by the national law of

[3] See K. Bulcroft, 'A Cross-National Study of the Laws of Succession and Inheritance: Implications for Family Dynamics' 2 *Journal of Law and Family Studies*, 1 (2000).

[4] See P. Franzina and I. Viarengo, The EU Regulations on the Property Regimes of International Couples (Elgar: Cheltenham, 2020), 1-13; C. Marrese, Successioni transfrontaliere tra diritto interno e diritto internazionale (Milano: Giuffrè, 2019), 9-11. With particular regard to Regulation 650 see A. Damascelli, Diritto internazionale privato delle successioni a causa di morte (dalla l. n.218/1995 al reg. UE n. 650/2012) (Milano: Giuffrè, 2013), 157; A. Davì and A. Zanobetti, Il nuovo diritto internazionale privato europeo delle successioni (Torino: Giappichelli, 2014), 308; C. Baldus, 'Erede e legatario secondo il regolamento europeo in materia di successioni' Vita notarile, 561-570 (2015); T. Ballarini, 'Il nuovo regolamento europeo sulle successioni' Rivista di diritto internazionale, 1116 (2013); R. Battiloro, 'Le successioni transfrontaliere ai sensi del reg. UE n. 650/2012 tra residenza abituale e certificato successorio europeo' Diritto di famiglia e delle persone, 658 (2015); A. Bonomi and P. Wautelet, Il regolamento europeo delle successioni commentario al reg. UE 650/2012 applicabile dal 17 agosto 2015 (Milano: Giuffrè, 2015); E. Calò, 'La pianificazione successoria dei cittadini spagnoli e dei residenti in Spagna alla luce della disciplina europea delle successioni' Rivista del notariato, 691 (2018).

Member States, including their rules of private international law.

Private autonomy plays a relevant role in the choice of the law governing the matrimonial property regime.[5]

According to Art 22, the spouses or future spouses may agree to designate, or change, the law applicable to their matrimonial property regime, if the law is one of the following:

(a) The law of the State where the spouses or future spouses, or one of them, is habitually resident at the time the agreement is concluded; or

(b) The law of a State of nationality of either spouse or future spouse at the time the agreement is concluded.

Regulation (EU) 2016/1104 similarly provides for implementing enhanced cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions relating to matters of the property consequences of registered partnerships.

According to Art 22 of Regulation 1104, partners or future partners may agree to designate, or change, the law applicable to the property consequences of their registered partnership, if that law attaches property consequences to the institution of the registered partnership and if the law is one of the following:

(a) the law of the State where the partners or future partners, or one of them, is habitually resident at the time the agreement is concluded;

(b) the law of a State of nationality of either partner or future partner at the time the agreement is concluded; or

(c) the law of the State under whose law the registered partnership was created.

Only where there is an absence of a choice-of-law agreement pursuant to Art 22, the law applicable to the matrimonial property regime shall be determined according to secondary criteria. For instance, the spouses' first common habitual residence after the conclusion of the marriage, and, in case of partnership, the law of the State under whose law the registered partnership was created.

Regarding both marriage and partnership, this Regulation specifies that the application of a provision of the law of any State may be refused only if such application is manifestly incompatible with the public policy (order public) of the forum.

Both of these regulations are connected to Regulation 650 as some succession rights arise from the property regime of the marriage or of the partnership.

These regulations make up a unified framework which, when read in conjunction with national law, can penetrate national systems. They address a specific EU goal and they need to be read in unison even if they seem to cover different areas. The Union has given itself the objective of maintaining and developing an area of freedom, security and justice to ensure the free movement of people. For the gradual establishment of such an area, the Union is to adopt measures relating to judicial

[5] O. Feraci, 'L'autonomia della volontà nel diritto internazionale privato dell'Unione Europea' *Rivista di diritto internazionale*, 424 (2013).

cooperation in civil matters that have cross-border implications, particularly when necessary for the proper functioning of the internal market.

Regulation 650 shall apply to the succession to the estates of deceased persons. It shall not apply to revenue, customs or administrative matters.

Some matters shall be excluded from the scope of this Regulation. Particularly questions relating to matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage. Regulation 1103 shall apply to matrimonial property regimes. 'Matrimonial property regime' is defined as a set of rules concerning the property relationships between the spouses and in their relations with third parties, as a result of marriage or its dissolution. By the way, it shall not apply to the succession to the estate of a deceased spouse.

Regulation 1104 shall apply to matters of the property consequences of registered partnerships.

'Registered partnership' is defined as the regime governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfills the legal formalities required by that law for its creation. It shall not apply, incidentally, to the succession to the estate of a deceased partner.

In reality, it is difficult to distinguish family property matters from inheritance matters. One way to think about it is to consider the difficulty that lies with agreements relating to the family balance sheet that may have effects mortis causa or agreements made about inheritance that affect the ownership of assets in family relationships. These regulations must be considered in line with the ultimate objective of allowing the free movement of European citizens by avoiding constraints that may derive from the problems of applicable law with respect to two fundamental aspects of being a person: family relationships and succession affairs.[6]

During the implementation of the project's training objectives, difficulties emerged regarding its application. The results from the GoInEu and GoInEu Plus projects, which aimed to contribute to developing and disseminating an innovative cross-professional EU law training program, focusing specifically on Migration and Cultural Mediation. The results highlighted some weaknesses such as a lack of knowledge of the EU Regulation among professionals, a requirement to communicate and disseminate their content to citizens, challenges in specific cases to determine the scope of application of different EU regulations in inheritance, patrimonial families' regime (650, 1103, 1104), the possible cross-application of Regulations (EU) 2012/650 and 2016/679 for digital goods (see web profiles on social network), and the use of EU certificates (EU Succession Certificate) to exercise rights in front of banks, insurers, and investments funds. With regard to the certificates, it is

[6] See P. Biavati, 'La realizzazione dello spazio giudiziario europeo di giustizia, libertà e sicurezza: stato attuale e tendenza evolutive alla luce del programma di Stoccolma' *Rivista Trimestrale di diritto e procedura civile*, 185 (2013); A. Bucher, 'La famille en droit international privé' 283 *RCADI*, 39 (2000).

important to remember the recent entry into force of Regulation (EU) 2016/1191 promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) 2012/1024 which sets out a system for the further simplification of administrative formalities for the circulation of certain public documents and their certified copies where those public documents and the certified copies thereof are issued by a Member State authority for presentation in another Member State.

The results that have been achieved so far have opened up new trends that we are committed to exploring whilst the research team is active.

As Samuel Baumgartner stated in his paper published in 2004 'Is Transnational Litigation Different?', courts, legislators and lawyers still approach transnational cases in the same fashion as purely domestic ones, adjusting the concepts of domestic law where they believe it necessary. This approach was significant for the transnational issues setting. The same problem emerges with mediation applied to transnational cases. What are the issues and what is the adequate approach to transnational litigation?

Mediation is the most effective way to solve cross-border disputes for many reasons: i) time and cost saving; ii) small constraints and formalities; iii) inclusive and cross-cultural approach; and iv) flexible procedure preserving personal relationships.

II. Conflict Mediation as a Tool for Managing the Private Autonomy of the Parties

The contemporary trend toward introducing and enhancing alternative modes of dispute resolution is linked to both regulatory efficiency and private-subject protection objectives. It is geared toward reducing litigation and overcoming the high costs and complications of litigation and reducing lengthy litigation. It is also geared toward improving access to justice by broadening and diversifying the possibilities for protection and, at the very least, toward greater adequacy and specificity of judicial response.

To achieve these results, however, it requires a change in the legal culture of traditional systems of social regulation, moving away from that culture of conflict based on the clear dichotomy, typical of the procedural sphere, between winners and losers. Rather, it requires moving closer to mechanisms that provide for the return to the parties involved, through the strengthening of the mechanism of self-regulation, not only of the power but also of the 'responsibility' to make decisions about the conflict they are involved in.

Mediation refers to the procedure that aims to reach an agreement to settle a dispute (conciliation); it constitutes a conflict management tool that is part, along with other procedures, of the so-called ADR (*alternative dispute resolution*) systems, whose main feature is that they present themselves as alternatives to state

jurisdiction[7] and are based on the ability to ensure both the impartiality and the completeness of the conciliatory system.

The European Union has taken a decisive role in recent years,[8] producing a series of normative documents aimed at encouraging and regulating the use of ADR methods in member countries.[9]

Until decreto legislativo 4 March 2010 no 28 came into force, Italy had not adopted a legislative policy that addressed the issue of incorporating ADR practices into the legal system in an organic way, but only a series of provisions in the civil, commercial, and criminal fields. The law provides for three types of mediation as long as the rights are available: compulsory, delegated, and optional.

The recent reform of the commercial and civil mediation process[10] expands the areas for which mediation is mandatory. The new Art 5 of decreto legislativo 28/2010 adds disputes concerning joint ventures, consortia, franchises, labor

[7] ADR, which originated in the United States in the 1970s, soon spread to Europe as well thanks to various European Union interventions, including the March 30, 1998 recommendation and subsequent ones of 4 April 2001 and 19 April 2001.

[8] European Parliament and Council Directive (CE) 2008/52 of 21 May 2008 on certain aspects of mediation in civil and commercial matters represented the point of arrival of a long and complex process, which started, as recalled in point 2 of the 'recital' by the Tampere European Council of October 1999, then developing over the years, in the framework of Community initiatives on access to justice - an area in which the subject of mediation, and more generally of ADR, must therefore be framed from the point of view of Community legislation -, initiatives that have been articulated in numerous interventions by the Commission and Parliament, starting in 1998.

[9] In France, alternative dispute resolution tools are called MARC (*Modes Alternatifs de Règlement des Conflits*) it is possible to state that the remedy embraces the most varied forms: arbitration, mediation and conciliation which are divided into judicial and extrajudicial. Representing, therefore, an alternative to the judicial solution, they can still develop before the judge who must in that case ensure the validity of the agreements in relation to the procedural rules but respond to a public policy aimed at offering ever more and fitting answers to the growing demand for justice requested by the affiliates. Also in Germany, the methods of conciliatory justice are widely used thanks also to the active role played by lawyers and notaries. The latter often find themselves playing the role of neutral consultants of the parties when drafting the transaction and, moreover, in some regions of Germany, they are authorized to conduct real mediations. The judge has various tools suitable for bringing the parties closer together: he can order the parties face-to-face or provide assessments of fact or law himself with the power to organize the proceedings and in some cases the judge is educated in mediation.

In Austria, where alternative dispute resolution systems offer the parties a more adequate solution than civil proceedings for those conflicts that have specific characteristics, a special federal law has even been enacted (law 'on mediation in civil matters' issued in 2003 and entered into force on 1 May 2004).

Outside of Europe, in England and Wales in addition to arbitration used widely for international disputes, between large companies, in employment law and consumer disputes, other ADR tools are also used such as mediation, impartial assessment, of the regulatory authorities (bodies established by law of the Parliament independent of the government), judicial conciliation, determination through technical consultants, impartial inquiry and the 'medarb'.

[10] Legge 26 novembre 2021 no 206 (Delega al Governo per l'efficienza del processo civile e per la revisione della disciplina degli strumenti di risoluzione alternativa delle controversie e misure urgenti di razionalizzazione dei procedimenti in materia di diritti delle persone e delle famiglie nonché in materia di esecuzione forzata) and decreto legislativo 10 ottobre 2022 no 149 (Attuazione della legge no 206 del 26 novembre 2021).

contracts, network contracts, supply contracts, partnerships and subcontracts.

The norm on compulsory mediation, as it has been regulated,[11] has provided a scope of application identified by subject matter.

When choosing which matters should be subject to an obligatory attempt at conciliation, the law follows two criteria: first, it examines whether the substantive relationships between the parties, if intended to last beyond the settlement of the specific dispute, are deemed suitable for mandatory mediation; second, it considers disputes relating to certain types of contracts that, although they do not assume lasting relationships between the parties and see a massive dissemination, are the basis of a significant part of the dispute.

It is critical in mediation, more than in any other practice, to lay the foundations for the development of a relationship between the parties.

This is an extremely complex confrontation, because of the technical and emotional aspects involved and the difficulty of getting the parties to negotiate. However, if a mediation is carried out properly by the mediator[12] and the lawyer,[13] it can, in our opinion, effectively and adequately resolve confrontation.

Therefore, for mediation to be successful, the mediators ability to negotiate carries great importance,[14] taking into account their ability to convey the will of the parties, but we also agree with those who believe[15] that, even when the mediator formulates the proposal, it is always the parties involved who actually perform the act of disposition, the expression of their will.

This last observation, while referring specifically to the role of mediation with respect to the reaffirmation of the principle of the negotiating autonomy of the parties in their disputes, nonetheless allows us to argue for the validity of this principle in all forms of crisis management, particularly with regard to the priorities that arise in relation to the purposes of alternative dispute resolution remedies.[16]

[11] Decreto legge 29 dicembre 2010, no 225, coordinated with the conversion law, legge 26 febbraio 2011 no 10, 'Proroga di termini previsti da disposizioni legislative e di interventi urgenti in materia tributaria e di sostegno alle imprese e alle famiglie'.

[12] Regarding specifically the function of the mediator, see the interesting reflections of M. Martello, *La formazione del mediatore. Comprendere le ragioni dei conflitti per trovare le soluzioni* (Torino: Giappichelli, 2013).

[13] On the lawyer's role in mediating, see P. Lucarelli, 'Mediazione, la "Chiave d'oro" per la risoluzione dei conflitti' *Guida al diritto*, 46 (2013).

[14] For a study on the figure of the mediator, A. Tonarelli, 'Sociogenesi di una professione al confine tra le professioni: il caso del mediatore civile e commerciale', in A. Tonarelli and S. Viciani eds, *Le professioni intellettuali tra diritto e innovazione* (Pisa: Pacini, 2015), 91.

[15] For reflections, including critical ones, on the role of the mediator, I. Pagni, 'La mediazione dinanzi alla Corte Costituzionale dopo l'ordinanza del Tar Lazio n. 3202/2011' *Corriere giuridico*, 995 (2011); Id, 'Gli spazi e i ruoli della mediazione dopo la sentenza della Corte Costituzionale 6 dicembre 2012, n. 272' *Corriere giuridico*, 262 (2013).

[16] We highlight the importance of this text on mediation as a conflict resolution technique, A. Robert et al, *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition* (San Francisco: Jossey-Bass, 1994). 'Forse il primo passo da fare è proprio quello di allontanarsi da una visione della mediazione che sia quella esclusiva di tecnica di risoluzione dei conflitti alternativa a quella giudiziale e di abbracciare definitivamente la spiegazione in termini di

Transformative mediation, in its real meaning, defines its autonomy not so much as supporting the jurisdictional act's mode of conflict regulation, but as an autonomous mode of conflict regulation itself. In other words, the purpose of transformative mediation is to return the power and responsibility for resolving the dispute to the protagonists of the conflict. This practice, in a way, abandons the classic problem-solving approach to mediation and instead works on the abilities and possibilities of the parties involved to find a solution to their dispute on their own. Thus, increasing the empowerment of each in mutual recognition, so as to transform their interaction from conflictual to constructive and collaborative.[17]

In this framework, it is clear how the focus is on the construction of the private sphere as a formal guarantee of interests and prerogatives referring not only to the individual person but also to the problems related to the representation of private spheres that come into constant interrelation with each other.[18]

The latter observation, while referring specifically to the role of mediation with respect to the reaffirmation of the principle of the parties negotiating autonomy in crisis management, nevertheless allows us to argue for the validity of this principle in all its forms, especially with respect to the priorities that arise in the field with respect to the purposes of alternative dispute resolution remedies.

The same is also true for assisted negotiation,[19] which is an important tool in the field of out-of-court dispute resolution and can complement, rather than replace, mandatory mediation.

III. The Role of Transnational Mediation in Cross-Border Civil Disputes. The InMEDIATE European Project

Mediation is undoubtedly a very useful tool for handling disputes between parties of different nationalities.

Differences in language, tradition, and culture are often a reason for

negoziazione assistita, che si valorizzi cioè la dimensione volontaria e privata del fenomeno', so, P. Lucarelli, 'La mediazione nelle controversie commerciali', in C. Besso ed, *La mediazione civile e commerciale* (Torino: Giappichelli, 2010), 229.

[17] Private autonomy consists of the power of individuals to freely regulate their own interests and make decisions within the limits and obligations established by law. On the basis of the relationship between the private individual and the legal system, private autonomy is defined from time to time either as a power granted to individuals or as an original freedom, a social phenomenon that pre-exists any kind of legal recognition. The Constitution does not expressly mention it but indirectly protects it in Arts 2 and 3 (as a necessary tool for the full development of the human person) and in Art 41 (as a private economic initiative).

[18] P. Perlingieri, Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti (Napoli: Edizioni Scientifiche Italiane, 2020).

[19] For an in-depth study of assisted negotiation, see S. Delle Monache, 'Profili civilistici della negoziazione assistita' *Giustizia civile*, 105-127 (2015). In this contribution, the Author focuses on the centrality in assisted negotiation of good faith in the obvious difficulty of combining it with the defensive strategies of lawyers, taking into account the peculiar role played by the latter in the procedure in question.

misunderstanding, but it can also be a starting point for building a new dialogue, a new mutual understanding.

The difficult management of conflict dynamics and cross-cultural issues in cross-border civil disputes has made transnational mediation today the main tool for alternative dispute resolution between parties of different nationalities. These disputes may arise due to the heterogeneity of domestic legal systems and respective procedural rules, whose application at trial would lengthen the time of dispute resolution.

For the purposes of Art 2 of Directive (EC) 2008/53,[20] a cross-border dispute is defined as a dispute in which at least one of the parties is domiciled or ordinarily a resident in a member state other than that of any other party on the date on which: (a) the parties agree to use mediation after the dispute arises; (b) recourse to mediation is ordered by a court; (c) the obligation to resort to mediation arises under national law; or (d) for the purposes of Art 5, an invitation is issued to the parties (by judge)

A cross-border dispute shall also mean a dispute in which a judicial or arbitration proceeding resulting from mediation between the parties is initiated in a member state other than that in which the parties were domiciled or resided habitually at the date referred to in paragraph (1) (a), (b) or (c).

In this framework, one of the key challenges is the diversity of training standards and mediation qualifications in the EU. This makes it difficult for mediators to manage conflict dynamics and cross-cultural issues in cross-border civil disputes.

As the second para of Art 1 of the Directive clarifies, the directive applies to cross-border disputes, a limitation set out in Art 67 of the Treaty,[21] with reference to Arts 65 and 61, which expressly refer to 'judicial cooperation measures in civil matters having cross-border implications'.

However, this limitation has not been an obstacle, in almost all member states, to the extension of national legislation to internal mediation on the basis of the principles of the directive (as the directive itself advocates, in point eight of the recitals preceding the text, stating that 'nothing should prevent member states from applying these provisions to internal mediation proceedings as well').

The issues of mediation, and ADRs more generally, are now topics that can be discussed anywhere in Europe with the certainty of being understood. In fact, it can be said that the basic issues that are discussed are always the same, even in different national contexts, ranging from the mandatory-optional alternative to the court-ordered case-mediation, or from the issue of defensive assistance to that of the training requirements of mediators.[22]

In short, mediation represents an activity that relies on a common tongue where the words used have the same meaning for everyone, avoiding the need

[20] Directive (EC) 2008/52 n 9 above.
[21] https://tinyurl.com/2y5zw83x (last visited 10 February 2024).
[22] M. Marinari, 'La mediazione nella prospettiva europea' *Questione giustizia*, 1 (2015).

for translation, at least in most cases, meaning that anyone can understand and be understood even when engaging with international interlocutors that operate in the mediation environment. This is a very important achievement, which should also be analyzed from a sociology of law perspective.

In practice, the procedure covers the following stages: dispute, litigation, communication, negotiation, and closure.

Communication is the most important stage in this circle. In fact, in ADR, and particularly in mediation, we are dealing with the concept of negotiability. This, therefore, does not require confrontation, and can create a 'common' law of mediation, at least in relation to some basic elements, although individual national realities have their own unique elements.[23]

Ideally, we would be able to look at the individual and have the ability to see them in their social context to understand how their decision-making process works, their priorities, and how their decisions will be evaluated in his or her home country. In this way, cultural differences become elements of communication and negotiation, and one can benefit from knowing a certain culture while keeping individual interests at the forefront all the time.[24]

Civil mediations in international disputes are not yet widespread, despite numerous past initiatives at the European level. One of the main challenges is the differences in training standards and qualifications in this field in the EU, making it difficult for mediators to manage conflict dynamics and cross-cultural issues in cross-border civil disputes.

In this context, InMEDIATE, a project funded by the European Commission under the ERASMUS+ program (October 2020-June 2023).[25] InMEDIATE focused on establishing pan-European standards for mediator skills.

The mission and goals of the project were: promoting cross-border mediation, improving cooperation and networking in the field, fostering high quality standards in the mediation training system, designing, implementing, and delivering and validating a learning outcomes-oriented training curriculum.

Some goals of the project include the assimilation of online education resources on a single platform and making those resources available for free public use. An additional goal is the dissemination of knowledge and learning materials, and the creation of tools to replicate the InMEDIATE certification system and InMEDIATE training curriculum for international civil mediators with an InMEDIATE e-Platform. It is expected that the outcome will consist of a toolkit that replicates the InMEDIATE training course and its related certification system that provides: i) guidance for national and international organizations willing to adopt the training course model and methodology; ii) quality standards and procedures adopted to

[23] n 23 above.

[24] G. De Bertiand A. Marsaglia, *Gestire negoziazione e mediazione. Guida per l'avvocato* (Milano: Altalex, 2022).

[25] https://www.inmediateproject.eu/.

assess the final qualifications in terms of enhanced knowledge, competencies and skills gained by the participants on completion of the course; iii) methodological framework and practical tools for continuous professional development of VET teachers, trainers and mentors in the mediation field. Unifi's Department of Legal Sciences participated in the project to assess and verify whether the qualifications necessary for the creation of the professional figure of the transnational mediator are acquired during the training. In addition, the project must obtain certification from the Italian Ministry of Justice in order to obtain formal acknowledgement of Italian participation. We can consider this to be a concrete achievement in line with the creation of a certification that other member states within the European credit system can recognize for vocational education and training (ECVET) system.[26]

To achieve this, the objectives of the Recommendation of the European Parliament and of the Council of 18 June 2009 on the establishment of a European credit system aimed at facilitating the assessment of learning outcomes of individuals and enabling the recognition of credits acquired in courses established in different Member States by individuals interested in having a qualification, in a European area of lifelong learning without borders, have been analyzed by the research team.

This study became necessary because the objectives of the Recommendation (to support and supplement the activities of Member States, to facilitate cooperation between them, to increase transparency, and to promote mobility and lifelong learning) cannot be adequately achieved by Member States, but rather, due to scale or effects, would be better achieved at the Community level. The Community may adopt measures in accordance with the principle of subsidiarity as set out in Art 5 of the Treaty.[27]

In accordance with point eight of the Recommendation, ECVET is applicable to all learning outcomes that, in principle, should be attainable through a variety of education and learning pathways at all levels of the European Qualifications Framework for Lifelong Learning (EQF) and subsequently transferred and recognized.

The Recommendation thus contributes to the broader goals of promoting lifelong learning and increasing the employability, openness to mobility, and social inclusion of workers and learners. In particular, it facilitates the development of flexible and individualized pathways, as well as the recognition of learning outcomes acquired through non-formal and informal learning.

In addition, Section ten explains that the document should facilitate the compatibility, comparability and complementarity of credit systems used in VET and the European Credit Transfer and Accumulation System (ECTS), used in higher education. Thus, it should contribute to greater permeability between levels of

[26] It is one of the common EU tools. It is intended to aid the transfer, recognition and accumulation of assessed learning outcomes of individuals aiming to achieve a qualification and to promote lifelong learning through flexible and individualized learning pathways.

[27] https://tinyurl.com/2y5zw83x.

education and training, in accordance with national legislation and practices.

Based on these thematic insights, with the understanding that more training, transparent information, and freely available educational content would help to increase mediation services at the local, regional, national, and cross-border levels, the DSG, Unifi, produced an Evaluation Report[28] based on objectives. The report focused on:

- Assessment of the learning results achieved by the trainees in terms of capacity and expertise;

- Assessment of the training program in terms of impact, efficiency and effectiveness;

- As a final assessment, based on the ECVET recognition methodology, it was suggested that an appropriate number of credits be assigned to each part of the training and learning outcomes, based on a table prepared for this purpose.[29]

[28] Evaluation Report, UNIFI Training Evaluation and Certification (M26-28) LP: Uni Florence.

[29] Please, refer to viewing the following table contained within the Report.

Module-Knowledge-Ability-Expertise-Credits

Module 1: Alternative Dispute Resolution: Legal Framework & Mediator's Responsibility

Knowledge: EU regulatory system – EU legal initiatives

Credits: 1

Module 2: Mediation Styles and Code of Conduct

Knowledge: Standards of mediation practice as stated in the European Code of Conduct for Mediators

Credits: 2

Module 3: Culture and Communication

Ability: Deepening awareness of our values, beliefs and perceptions

Credits: 2

Module 4: Conflict Analysis

Ability: Asking questions

Credits: 2

Module 5: Negotiation

Ability: Conduct a negotiation

Credits: 2

Module 6: Mediation Stages

Ability: Ability to demonstrate competence, to differentiate various mediation stages and to understand the importance of the preparatory phase in cross-border commercial disputes

Credits: 4

Module 7 Mediation techniques.

Expertise: Reflexivity in mediation, taking into account assumptions and cultural lenses. Preparation and varying expectations as well as ways of communicating and working with culturally diverse parties. Specific techniques useful throughout the mediation process, including clarification, identifying vicious circles and working with the value square model

Credits: 3

Module 8: Co-mediation

Expertise: Creative cooperation between co-mediators

Credits: 3

Module 9: Online Dispute Resolution

Expertise: Overview of online dispute resolution, specifically e-negotiation, online arbitration, and online mediation. The advantages and disadvantages of using video-conferencing platforms

Credits: 2

Total credits: 21

IV. The Resolution of Transnational Family and Inheritance Issues Through the Challenges of GoInEU Plus and InMEDIATE Projects

Transnational mediation aims to resolve family disputes involving at least two countries.

Sometimes, these types of litigation develop in a context characterized by the different cultural and religious practices of the people involved, or when the customary practices of one country contradict the laws of the country to which the member has moved. In these cases, international mediation can help people in conflict overcome these differences to reach an agreement.

Specifically, in the first part of this study, mediation in family relationships is a structured process during which an impartial mediator allows members of a family to talk constructively about their conflict. The goal is to facilitate communication and dialogue to find satisfactory solutions for all family members involved in the conflict.

As previously noted, the EU council has adopted regulations implementing two forms of enhanced cooperation on matrimonial property relations and property effects of registered partnerships, respectively Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law, recognition and enforcement of decisions regarding matrimonial property regimes and Regulation (EU) 2016/1104, for registered partnerships.[30] These instruments, which are effective as of 29 January 2019, dictate uniform rules on jurisdiction, applicable law and recognition, and enforcement of foreign decisions.

In order to make it easier for spouses or partners to manage their assets, the Regulations authorize them to choose the law applicable to their property regime, regardless of the nature or location of the assets, from among the laws that have a close connection with them by reason of their habitual residence or citizenship. It is possible to make this choice at any point during the relationship.[31]

The new instruments in this framework aim to eliminate obstacles to the free movement of persons in the European judicial area. It aids in particular with overcoming the difficulties experienced by couples, whether same-sex or heterosexual, in the management or distribution of their property, either between themselves or with third parties, and either during their relationship or at the time of liquidation of the property regime. It also ensures legal certainty and greater predictability of solutions.

But the difficulties arising from obtaining a shared form of integration among all member states means that these regulations operate within a whole set of both domestic and EU regulations with which they interact very closely.

This clearly causes a whole set of conflicts relating to the prevalence of one set of rules over another when applied to a particular situation concerning the delimitation of the scope of application of the rules of succession and property rules.

[30] https://tinyurl.com/2w98np5h.

[31] Respectively, recitals 44 and 45 of Regulations above in the text.

Significantly, the occurrence of family conflicts in matters of inheritance is far from uncommon and can cause rifts among family members that are difficult to heal.

Especially in cross-border successions, uncertain situations can be created for all parties involved, although with the introduction with a single regulation (Regulation (EU) 2012/650), which governs all *mortis causa* successions opened on the territory of a member state as of 17 August 2015, even if it is a non-EU citizen, a process of harmonization has begun through the application of the principles of uniqueness and universality of the applicable law of the complex situation preceding.

The Regulation ensures that a cross-border succession is handled consistently, under one law, and by one authority. In principle, the courts of the member state where a citizen was last habitually a resident of will have jurisdiction to decide the succession and the law of that state will apply.

However, citizens may choose the law of their country of citizenship to be the law applicable to their inheritance. The application of a single law by a single authority to a cross-border succession avoids parallel proceedings with possible conflicting court decisions. It also ensures that decisions made in one member state are recognized throughout the Union without the need for a special procedure.[32]

A European Certificate of Succession (ECS) has been introduced: this document, issued by the probate authority, can be used by heirs, legatees, executors and administrators of the estate to prove their status and exercise their rights or powers in other member states. Once issued, the ECS will be recognized in all member states without the need for any special procedure.[33]

Nevertheless, these principles cannot be general in scope.[34]

[32] According to which, Art 21, the law applicable to the entire succession is that of the state in which the *de cuius* had his or her residence at the time of death and if, by way of exception, it is found that the deceased had closer connections with a state other than that established under paragraph 1, the law of succession of that state will apply.

To the subsequent Art 22 according to which a person may choose as the law he governs his entire succession that of the state in which he has citizenship at the time of his choice or death.

[33] On 9 December 2014, the Commission adopted an Implementing Regulation establishing the forms to be used under the Succession Regulation, cf Commission Implementing Regulation (EU) 2014/1329 of 9 December 2014 establishing the Forms referred to in Regulation (EU) 2012/650 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, available at https://tinyurl.com/3mhpdtf7 (last visited 10 February 2024).

[34] On the topic, L. Fumagalli, 'Rinvio e unità della successione nel nuovo diritto internazionale privato' *Rivista di diritto internazionale privato e processuale*, 835 (1997); E. Calò *Le successioni nel diritto internazionale privato* (Padova: CEDAM, 2007), 33; D. Solomon, 'Die Renaissance des Renvoi im europäischen Internationalen Privatrecht', in *Liber amicorum Klaus Schurig* (München: De Gruyter, 2012), 237-253; H. Schack, 'Was bleibt vom Renvoi?' *IPRax*, 315-319 (2013); A. Bonomi, 'Il regolamento europeo sulle successioni' *Rivista di diritto internazionale privato e processuale*, 293–307 (2013); R. Ambrosino, 'La scissione delle successioni transnazionali: osservazioni sulla sorte delle liberalità del de cuius' (2022), available at https://tinyurl.com/yxmweent (last visited 10 February 2024).

The principles therefore create a crisis in the unity of the inheritance system, which has brought back into play the principle of fractioning this system, the latter of which has also been brought back to relevance in the Italian legal system by an important ruling of the Supreme Court.[35]

The recurrence of a dualistic system in the regulation of transnational succession implies the opening of at least two (or more, if the deceased's real estate is present in more than one state) successions. It also implies the formation of two distinct masses, each subject to different rules of vocation and publicity. For example, the various laws that are necessary to verify the validity and effectiveness of the succession title, to identify heirs, and to determine the size of shares and methods of acceptance and publicity.[36]

The scope of the *lex successionis*, in particular, identified for estate and movable successions, encompasses all three stages in which the succession procedure unfolds: devolution, inheritance transmission of assets, and division.

With regard to the rights of the beneficiaries, the partitioning of the inheritance could lead to some rather dubious solutions because the possible non-communication of the two inheritance masses would lead to an undermining of the internal order, for the reason that the exclusion of the assets that are part of the foreign succession would result in a questionable compression of the *de cuius* disposable share, significantly undermining the freedom of testamentary self-determination.

In all these cases, mediation proves to be a very effective tool for preventing and resolving conflicts within families about inheritance.

For a significant survey of the concept of public policy, see G. Perlingieri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2019), where it is noted that the distinction between domestic and international public policy is often overstated, since more appropriate seems to be that between fundamental principles and legislative provisions expressing the same that cannot be derogated from by any domestic or external legislation and mandatory norms that are not expressive of fundamental rights and therefore not only derogable by foreign legislation but also applicable to foreign nationals under conditions of reciprocity (Art 16 preleggi).

[35] Corte di Cassazione-Sezioni unite 5 February 2021 no 2867, annotated by M. Rizzuti, 'Successioni transnazionali e revocazioni testamentarie' *Corriere giuridico* 1325-1329 (2021); even by R. Barone, 'Le Sezioni Unite della Cassazione intervengono su una successione transfrontaliera italo-inglese: una decisione ricca di spunti interessanti' *Vita notarile*, 1-28 (2022); D. Damascelli, 'La Cassazione si esprime su qualificazione e rinvio in materia successoria: un'occasione persa per la messa a fuoco di due questioni generali del diritto internazionale privato' *Famiglia e diritto*, 11-24 (2021); F. Marongiu Bonaiuti, 'Il diritto internazionale privato delle successioni in casi collegati al Regno Unito: riflessioni sulla sentenza Pescatore' *Trust e attività fiduciarie*, 696-709 (2022). The Court in its reasoning dwells on the obligation of the judge to consider the two successions independent of each other, each subject to different rules of vocation and deletion, verification of the title of the estate, the respective shares of the co-heirs, the manner of acceptance and the rights of the legitimates.

[36] See, F. Morongiu Buonaiuti, 'The Low Applicable to Succession, Between Unit and Splitting of the Relevant Legal Regime, the Role of Renvoi' *The Italian Review of International and Comparative law*, 405-419 (2021); H. Lewald, 'Questions de droit international des successions' *Recueil des Courts*, 19-20 (1925); A.E. Von Overbeck, 'Divers aspects de l'unification du droit international privé spécialement en matière de successions' *Recueil des Courts*, 561 (1961); A. Grahl Madsen, 'Conflict between the Principles of Unitary Successions and the System of Scission' *ICLQ*, 598-643 (1979).

It is particularly effective in transnational mediation (where it is important to establish where proceedings are held and which language is used) because the proceedings can adapt to each party's need, while also maintaining their choice on whether they wish to continue or abandon the mediation to reach a settlement of interests that represents the real desires of each party.

In this way, the GoInEU and GoInEU Plus projects, by following the InMEDIATE training program to provide professionals with a comprehensive set of specialized knowledge, technical and cross-cultural skills, can resolve certain issues. The issues that can be resolved are as follows: ensure a uniform application of European law, which is in turn strengthened through action; EU citizens and migrants are better informed about the current state of implementation of European law, and are confident that their successions will be recognized in member states; discrimination against different family structures is addressed and solutions are proposed; and input is offered to study the impact of migration and emerging technologies on succession law.