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BEST INTEREST OF THE CHILD IN CUSTODY DISPUTES AND MEDIATION IN ESTONIA AND IRELAND: A COMPARATIVE ANALYSIS

Bachelor's thesis

Programme Law, specialization EU and International Law

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Tallinn 2021

I declare that I have compiled the paper independently and all works, important standpoints and data by other authors have been properly referenced and the same paper has not been previously presented for grading.

The document length is 10,361 words from the introduction to the end of the conclusion.

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ABSTRACT

The Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters was created to mainly cater for cross-borders disputes even though it states that it could be used as a basis for domestic disputes. The Directive was implemented by the European Union to harmonize the laws regarding cross-border mediation disputes across its member states. The liberty to implement were not concretely discussed in the directive because of the difference in procedural rules across member states.

There are two main approaches used by member states: Monistic approach where the local laws adopt the EU mediation directive to regulate both internal disputes and cross-border dispute mediations.The dualistic approach uses a different law to regulate internal mediation disputes an d cross-border disputes. Countries without a strong Alternative Dispute Resolution culture (ADR) scheme struggle with who will best prioritize the child's interest as social workers have no legal background to tackle issues. Legal professionals are not interested in curing the conflict because they know the law cannot solve the problems but how to manage to dispute for a peaceful co-existence.

This thesis will examine if the directive has contributed to this problem by not providing a clear legal procedure for its member states and giving them liberty to choose approaches on how they implement the laws complicates the harmonization in the member states and its limitations to an effective family mediation procedure. The different approach: monistic in Estonia and dualistic approach in Ireland in the implementation of the directive will be further examined with focus on family mediation. The comparison of these approaches with Estonia and Ireland as a case study will provide answers to the research problems above.

Keywords: Alternative Dispute Resolution (ADR), Family Mediation, Child Custody, best interest of the child.

INTRODUCTION

In the years past, modern societies embraced the idea of litigation[1] but now look forward to other forms of dispute resolution. ADR has been gaining favour with a large majority of lawyers and judges in the legal profession for the last quarter-century, as it has allowed businesses, government agencies, and private parties to settle cases without court intervention.

Mediation according to the Jackson book of ADR is a flexible process conducted confidentially in which a neutral person actively assist parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution[2]. The popularity of mediation is evident in the fast-rising rates at which people are referred for mediation as a first resolution.[3] A lot of attention has been paid to the substantive law changes that has contributed to the transformation.[4] This paradigm shift both in civil and criminal law brought about implications in the justice system in general. The effectiveness of this shift has been questioned by many scholars over the years and it can be compared to the debate that occurred in the 16th century about law and equity.[5]

In the family law dispute resolution system, just like any other aspect of law, we have the traditional way of settling disputes and the modernized way of resolving disputes without litigation. Due to the sensitivity around family issues, it is believed to be one of the hardest. Divorce rates has been on the high in the Europe since 1960[6] and due to this high rates, a lot of

[1] Esplugues, C. (2008). Mediation in the EU after the Transposition of the Directive 2008/52/EC on Mediation in Civil and Commercial Matters. Civil and Commercial Mediation in the EU after the transposition of the Directive, pg.52.
[2] Blake, S., Browne, J., & Sime, S. The Jackson ADR Handbook (2nd Ed.) The judicial College, the Civil Justice Council, The civil Mediation Council. New York: Oxford University Press.
[3] Stalford, H. (2010). Crossing boundaries: Reconciling law, culture and values in international family mediation. *Journal of Social Welfare & Family Law*, *32*(2), pg.4.
[4] Jane C. Murphy (2009). Revitalizing the Adversary System in Family Law, University of Baltimore School of Law, 78 U.Cin.L.Rev.891
[5] Remingtont, F. J. Discretionary Justice: A Preliminary Inquiry. KENNETH CULP DAVIS. Louisiana State University Press, Baton Rouge, 1969. Pp. xii, 233.
[6] Amato, P. R. (2014). The consequences of divorce for adults and children: An update. *Društvena istraživanja: časopis za opća društvena pitanja*, *23*(1), pg. 1.

pressure has been put on the family courts and cost the court its efficiency[7] in putting the interest of everyone involved at heart. Children[8] have been subjects of their parents' legal proceedings[9] and most times do not have a say in the proceedings at all. The past decade has brought about growing concern about the child's inclusion. This new drive was fuelled by the United Nations Convention on the Rights of the Child adopted in 1989 and has grown to become the world's most widely ratified human rights convention.[10] The convention acknowledged acceded to the right of child to have a voice in the decision-making process in matters that directly affect them.[11] In 2009, the United Nations (UN) Committee on the Rights of the Child further announced that the states need to implement legislation "to include the right of the child to be heard by decision-makers and in mediation processes".[12] The best interest concept is based on different factors that emphasizes not only the societal expectations for gender roles but also social change movement.[13] It relies on indeterminate factors [14] however, no consensus reached on what is best interest of the child. The concept of best interest is understanding that various factors apply to various situations and this factor do not apply to every family at every given time.[15]

The European Council on 8th May, 2008 created the Directive 2008/52/EC to govern certain aspects of mediation in civil and commercial matters. This directive set down the basic guidelines to follow in mediation for its Member States but the choice of implementation is left for each nation to choose.[16] This directive explains explicitly the standards of mediation i.e. the effectiveness of the process and the enforceability of agreements resulting from mediation.[17] Though this directive applies solely to cross-border disputes, MS could implement it on national

[7] Taylor, N. J. (2006). *Care of children: Families, dispute resolution and the Family Court* (Doctoral dissertation, University of Otago).
[8] A common tern used to define anyone under the age of 18. This legal term fails to distinguish between toddlers/infants and budding adolescents. For clarity and consistency, the author will use the term 'child' to refer to anyone under the age of 18.
[9] Ibid., 6
[10] United Nations Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2nd September, 1990).
[11] United Nations Convention on the Rights of the Child, Art 12.
[12] United Nations Committee on the Rights of the Child, Convention on the Rights of the Child General Comment No 12, 51st session, CRC/C/GC/12 (1 July 2009), 12. (General Comment No 12).
[13] Weisberg, D. K., & Appleton, S. F. (2015). *Modern Family Law: cases and materials*. Wolters Kluwer Law & Business, pg. 690-694.
[14] Fineman, M. L., & Opie, A. (1987). The uses of social science data in legal policymaking: Custody determinations at divorce. *Wis. L. Rev.*, 107, pg. 112. See also Caulley, A. (2018). Equal isn't always equitable: Reforming the use of joint custody presumptions in judicial child custody determinations. Boston University Public Interest Law Journal, 27(2), pg. 413.
[15] Bartosz v. Jones, 197 P.3d 310, 319 (Idaho 2008) (Judgement: overemphasis of one factor is an abuse of discretion).
[16] Treaty on the Functioning of the European Union, Article 288.
[17] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters *OJ L 136, 24.5.2008,* Article 1

level i.e. domestic disputes too. A state could decide to apply Directive 2008/52/EC to its domestic dispute or have an entirely different approach to its mediation process.

The approaches can be divided into two: the monistic approach and the dualistic approach.[18] The monistic approach is the approach where the member state simultaneously uses the Directive 2008/52/EC for both cross-border disputes and domestic disputes[19] while the dualistic approach is the approach whereby the MS uses Directive 2008/52/EC solely for cross-border disputes and has a different regulation for domestic disputes.[20]

Estonia is an example of a MS of the European Union that uses the monistic approach i.e. integrating Directive 2008/52/EC into its national laws in matters relating to mediation.

Ireland is an example of a MS of the European Union that uses the dualistic approach to regulate mediation matters. Directive 2008/52/EC is used solely to regulate the cross-border disputes and uses Mediation Bill 2017[21] to regulate the internal/domestics mediation disputes.

This bachelor thesis will examine the approach of both countries mediation approach and how it affects the child and their best interest. There is a well-known problem in the mediation schemes of countries without a strong ADR culture and it is that integrated, holistic approaches and strategies are not available. The social workers do not have adequate legal knowledge, the legal practitioners under estimate these concepts and strategies as they know the law does not solve problems because it is inevitable in our social community, the law only helps to resolve disputes.

This thesis will also examine the inclusion of the child in mediation process and if their opinions are welcomed in decision that affect them directly or indirectly. The issues to be examined will include visitation rights, access to child protection worker, child maintenance and upkeep, child place of residence *inter alia.* The aim of the thesis is to identify legal gaps and possible lack of child's protection rights in the mediation process in the above highlighted processes. Lastly, conclusion will be made on the best possible approach for the child and possible improvement in the existing approaches and who is the best person to represent the child.

[18] Carle, D. H. (2015). *A comparative analysis of mediation by examination and critique of the theory and practice thereof in Germany, Scotland and Switzerland* (Doctoral dissertation, University of Glasgow). Pg. 3.
[19] Esplugues (2008), supra nota 1. 35.
[20] Ibid.
[21] Mediation Bill 2017.

European Union laws, domestic laws. International conventions, soft laws will be used to support the research. Other sources other than legal sources will also be used to buttress the findings.

This thesis will contain four chapters to enable smooth navigation and understanding for all irrespective of discipline. The paper will explicitly define and examine the various dispute resolution methods, after which an overview of both approaches and its relation to the child's interest will be thoroughly examined. The pros and cons of these approaches, legal gaps and the rights of the child in mediation processes, most especially in child custody disputes.

Chapter one will discuss the history behind conflict and its management, dispute resolution and various methods of dispute resolution. The concept of mediation will be extensively discussed, the evolution of family mediation and the involvement of children in this process will be examined. This is essential for a foundational knowledge of the topic in discuss on which the other chapters will build on.

Chapter two and will assess the domestic laws of Estonia and Ireland in relation to mediation, family mediation especially. Estonia's and Ireland's approach to the EU's mediation directive, the progress thus far and the current adoption challenges that has caused shortcomings in its effectiveness will be examined. This chapter will also discuss current mediators training in Estonia and Ireland

The final chapter aims to compare both jurisdictions, suggest what could be imbibed from each jurisdiction to improve the process in the other and provide propositions to promote the mediation culture and shortcomings of the Directive in the current state of affairs in its member states. In conclusion, the author will give remarks on the development of the mediation directive.

The legal system believes of the notion that adversaries in a legal dispute will provide all the necessary information and clues to unravel a case, this approach lets the power of conviction rest in the hands of who has much more proof or in the hands of a decision maker to determine the truth and make the best decision.[22] Mediation is the best ADR process that takes into account the relationship of the family and how to sustain the relationship.[23] It also protects the psychological

[22] Firestone, G., & Weinstein, J. (2004). In the best interests of children: A proposal to transform the adversarial system. Family Court Review, 42(2), pg. 203.
[23] McGowan, D. (2018). Reframing the mediation debate in Irish all-issues divorce disputes: From mediation vs. litigation to mediation and litigation. *Journal of Social Welfare and Family Law*, *40*(2), pg.189.

development of the child and protects the child from trauma which might have occurred in the course of litigation.

According to the Het Mediation Bureau, research shows that agreements reached during a mediation process are more likely to be accepted and complied with by the parties involved as it means the parents involved have to come to an agreement themselves.[24] The mediation process has shown great benefits for the child and reduces the win-lose situation that tends to stiffen the atmosphere and a breeding ground for bitterness and strife amongst the parents thereby weakening the parent-child bond.[25] A mediator is a confidant for the child during the divorce and custody process as this is a time when parents have little capacity to parent.

Children have the right to be informed in the mediation process because parents though have the right to separation and divorce and even the upbringing of the child[26], it most times conflicts with what is the best interest of the child.[27] The most critical issue relevant to divorce that affects the child emotional stability is the right to custody[28] and most times there can be interference of the law if an agreement is not reached by the parents.[29] In this case, the best interest of the child is considered.

Litigations may be costly even if the disputing parties are allowed to come for proceeding *pro se* i.e. to represent themselves in civil cases[30], it is most times not achievable so economic reasons might hinder disputing parties from pursuing in-court dispute resolution, though The European Convention for the Protection of Human Rights and Fundamental Freedoms grants the right for a free and fair trial i.e. unhindered access to justice[31], there are financial constraints which were not explicitly defined in the article[32].

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[24] Het Mediation Bureau (2019) what is the purpose on cross border mediation? Accessible by: https://kinderontvoering.org/het-mediation-bureau/crossborder-mediation/wat-is-het-doel-van-crossborder-media Accessed on: 02nd March, 2021.

[25] Kelly, J. B. (2002). Psychological and legal interventions for parents and children in custody and access disputes: Current research and practice. *Va. J. Soc. Pol'y & L.*, *10*, 129, pg.131.

[26] Jolivet, K. R. (2012). The psychological impact of divorce on children: What is a family lawyer to do? *AM. J. FAM. L.*, *25*, pg. 175-178.

[27] Aziz, N. A., Rahmat, N. E., & Abdullah, R. (2020). 'Best Interest of a Child' Doctrine in Divorce Cases: Resorting to family mediation practice. *Environment-Behavior Proceedings Journal*, *5*(15), pg. 265.

[28] Ibid., 265

[29] Visitation Rights of Non-custodial Parents (2021). Accessible by: https://www.lawfirms.com/resources/child-custody/child-visitation/non-custodial-parent.htm Accessed on 09th April, 2021.

[30] Zimerman, N., & Tyler, T. R. (2010). Between access to counsel and access to justice: A psychological perspective. *Fordham Urb. LJ*, *37*, 473. Pg. 6.

[31] European Convention for Protection of Human Rights and Fundamental Freedoms (ECHR) Article 6

[32] Flynn, A., & Hodgson, J. (Eds.). (2017). *Access to justice and legal aid: Comparative perspectives on unmet legal need*. Bloomsbury Publishing. Pg.

This study rests on a theoretical framework of Rawls' theory of procedural justice which is the fairness of a procedure by which a decision is reached.[33] This theory believes in the process of dispute resolution, disputing parties are more satisfied with outcome of the proceedings because their voices are heard.[34] If the results of a proceeding is biased towards a party, satisfaction remains prevalent to that party due to the fairness of the procedure.[35] This research adopts a qualitative research methodology which involves the use of text to understand cultural and historical life.[36] The research also uses comparative studies because comparative legal research has often been able to illustrate the cultural elements of the law. The study of comparative law explains the differences between legal cultures of different jurisdiction and will aid understanding the different techniques and implementation used to achieve the common goal.[37] Comparison was drawn from literature on family law and child custody which is mostly but not limited to the legal aspect. For a better understanding, analysis will be based on the use of primary data obtained from statutes, scientific books, journals, scientific articles and online news sources to compare the member states in study. The author will communicate the similarities in the jurisdictions compared as well as its differences.

Research information gathered from primary and secondary sources will be employed to compare the countries in study and recommend areas of improvements.

[33] Rawls, J. (1999) *A Theory of Justice* (Revised Edition). Cambridge, Massachusetts: Harvard University Press. pg. 3-7
[34] Vermunt, R., Törnblom, K. (1996) Introduction: Distributive and procedural justice. Social Justice Research 9. Pg.305-309.
[35] Ibid., 305-310
[36] Leavy, P. (2014). *The Oxford Handbook of Qualitative Research.* (eds.) New York: Oxford University Press. Pg. 20-21.
[37] Bussani, M., Mattei, U. (2012). The Cambridge Companion to Comparative Law. (eds.) New York: Cambridge University Press. Pg. 20.

1. GENERAL OVERVIEW AND LEGAL FRAMEWORK OF MEDIATION

1.1. Conflict management and Dispute Resolution

A conflict exist when two or more people wish to or carry out acts that are mutually inconsistent.[38] All conflicts do not results in a legal dispute but unsolved dispute could potentially turn into a dispute.[39] A conflict does not necessarily mean a negative disagreement, it is has become one of human traits which could potentially lead to understanding the plight and concerns of the parties involved and for possible solution to the impending problem. It is a helpful vehicle that cast light into that which is wrong with the status quo.[40]

A conflict is coined from two Latin words *con* meaning 'together' and *fligere* 'meaning to strike'. From the literal meaning, conflict might connote a sharp disagreement, a negative collision of ideas, values and interests to the ordinary mind[41] Disputes occur due to unmanaged conflict. Conflicts are inevitable due to individual difference but disputes can be avoided. Conflicts can result in constructive change, preservation of relations and innovative ides if properly managed and could lead to strained and threatened relationship, destructive consequences if mismanaged.[42] In situations where disputes cannot be avoided, there need to be an effective legal system whose aim is to resolve the dispute as efficiently as possible to manage the problem and negotiate a settlement in order to preserve relationships.[43] The main methods of Alternative Dispute Resolution are arbitration, mediation and negotiation. Though there is no universal way to dispute resolution, it is necessary to examine the situation on a case basis to have the most effective result

[38] Nicholson, M., & Michael, N. (1992). *Rationality and the analysis of international conflict*. Cambridge University Press. Pg. 11.
[39] Yarn, D. H. (1999). *Dictionary of conflict resolution*, pg. 115.
[40] Nader, L. (2002). *The life of the law: anthropological projects*. Univ of California Press, pg. 49.
[41] Fiadjoe, A. (2013). *Alternative dispute resolution: a developing world perspective*. Routledge. Pg. 8
[42] Brown. J, H. (1999). *ADR Principles and Practice*. (2nd ed.) London: Sweet and Maxwell Limited. Pg.1
[43] Fenn, P. (2012). *Commercial Conflict Management and Dispute Resolution*. Routledge. Chapter 3, pg.

and the disputing parties should have the liberty to choose whichever dispute resolution method they prefer[44].

At times when conflicts occur, the disputing parties might decide to resolve the conflicting ideas on their own through discussions and negotiations. In the case where there is no success, the disputing parties seeks the help of a third party. The third party can address different aspects of the conflict with different approaches as he or she deem fit. Over the years, the repetitive approaches[45] to dispute resolution around the world other than in court resolution are classified as Alternative Dispute Resolution.

In this paper, the author will focus on mediation, though mediation, in a restricted way, cold be referred to as assisted negotiation.[46] Assisted negotiations generally favour incentives based that are based on associative tactics, in support of relationships that needs to be preserved.[47] Mediation is a facilitative method of dispute resolution that requires the assistance of a third party. It is approached as a flexible and easily tailored way in which parties can work out solutions to their disputes.[48] The third party has no legal right or power to make decisions for the disputing parties, he is only to guide them on the best path to resolving the dispute. While court proceedings are authoritative, formalized and claim-oriented, mediation offers a flexible, self-determined approach in which all aspects of the conflict, independent of their legal relevance, may be considered.[49]

The practice of mediation could be traced back to the early men in almost every culture of the world. It has a long and varied history.[50] It was used as a traditional means of dispute resolution and as a means to ensure several cultures, that societal cohesion was maintained in the face of individual and communal conflicts.[51] The Hindus in India used the *panchayat*[52]justice system, this was also used in the Caribbean Island of Trinidad and Tobago. Likewise in Africa, respected

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[44] Douglas J. A. (2012). *Election Law and Civil Discourse: The Promise of ADR*. 27 no. 2, Ohio State Journal on Dispute Resolution 27, pg. 291-320.
[45] Wall Jr, J. A., Callister, R. R. (1995). *Conflict and Its Management*. Journal of management, 21, (3), pg. 535-540.
[46] Solarte-Vasquez, M.C., (2014). The Institutionalization process of Alternative Dispute Resolution mechanisms in the European Union; The Estonian legal developments experience *L'Europe Unie*, pg. 95.
[47] Ibid., 96.
[48] Esher, J.A., et al. (2005). *Bankruptcy Mediation*. Alexandria, ABI, pg. 7.
[49] Steffek, F. (2012). Mediation in the European Union: An Introduction. *Cambridge University*, pg. 1.
[50] Fiadjoe (2013), *supra nota* 41. 4.
[51] Ibid., 4
[52] Panchayat is rural dispute resolution system in India. See: The London School of Economics and Political Science. Islam Mohammed (2020, Jun 8), Access to Justice for marginalized rural victims across South Asia: Issues and Challenges. [Blog post]. Accessible by: https://blogs.lse.ac.uk/southasia/2020/06/08/access-to-justice-for-the-marginalised-rural-people-across-south-asia-issues-and-challenges/ Accessed on 30 March, 2021.

elders and nobles were called upon for counsel in any dispute. Mediation was also practiced by the Jews in religious and political gatherings. These different factors (culture, values, beliefs, religion, and self-concepts) will affect the procedure used, the purpose of using an assisted dispute resolution process goes beyond the listed factors above.[53] Though mediation has been in existence for a long time, it only became an official process of dispute resolution in the mid-1990.

The European Commission in the year 2002, presented a Green Paper on ADR in civil and commercial disputes[54]. This enabled the members of the commission representing the member states discuss about possible ways of implementing mediation in the EU. This discussion and deliberations birthed Directive 2008/52/EC, this directive gave an overview on the establishment of freedom, security and justice which encompasses access to judicial as well as extrajudicial dispute resolution methods. This directive covers only civil and commercial cases[55] and like any other directive, it sets binding rules that must be adhered to by member states but gives the MS the choice of method of implementation[56].

1.2 General Overview of Mediation

Mediation is one of the most common and readily available ADR methods for dispute resolution and has since the 1970s evolved to become more official approved in several countries, more institutionalized and has become a major avenue for making decision not only in the legal system but it cuts across various fields for resolving conflicts and disputes.[57] It is a facilitative[58] method of dispute resolution through the involvement of a neutral third party. In the course of the mediation process, the third party i.e. the mediator (hereinafter called the mediator) will not takes sides with ant party but will only guide the parties to a mutual understanding and agreement. For a successful mediation process, the parties must have the autonomy to discontinue with the process

[53] Fiadjoe, (2013), supra nota 41. 4-5
[54] Green Paper on alternative dispute resolution in civil and commercial law, Commission of the European Communities, Brussels, 19.4.2002, EU: COM (2002) 196.
[55] 'In civil and commercial disputes arriving at a settlement of the presenting issues is the primary goal. 'Referenced in Brown (1999) *supra nota* 42. 10-11.
[56] Treaty of the Functioning of the European Union, Article 288.
[57] Roberts, M.M. (2014). *Mediation in family disputes: Principles of practice*. Ashgate Publishing, Ltd, pg.3.
[58] Nataliia, M. & Gren N. M. (2016). *The Principles of Mediation*. No. 24, Journal of Eastern European Law, 75-79.

at any time should they feel uncomfortable about going further, mediation must also toll the statute of limitations, otherwise people may be reluctant and opt for litigation.[59]

Some of the advantages of mediation include the lesser handling time than litigation, mediation is also less expensive than litigation mostly in countries with a well-developed mediation system e.g. Ireland, mutual resolution of conflict which results in a more friendly outcome *inter alia*. Mediation is also considerably confidential, when a case is handled by the court, automatically comes to the public eye except in cases where it threatens national security or it involves a minor. Mediation is based on principles of confidentiality and self-determination. Also, it avails a better access to justice in situations where there is an overwhelming number of cases to be tried in court, the court could delegate some of the cases to be heard through mediation. Furthermore, mediation avails the disputing parties the required support to understand each other's point of view though the long term success of mediation depends on the mediator remaining neutral while being proactive and promoting understanding between the parties.[60]There are also few disadvantages of mediation already pointed out by scholars of this field which include less availability of mediators which could affect the quality of the mediation process, it could also affect the cost of mediation due less supply of practitioners. A typical example will Estonia[61]. Another disadvantage is the unwilling nature of the disputants to cooperate with the mediator for the quick resolution of their dispute.

Mediation popularity in Europe still remains low compared to the US, Canada and Australia despite the European Commission's effort on the development of mediation. Adoption of laws by the EU countries do not necessarily lead to the countries fully understanding the concept of mediation or the attorneys recommending it as a means of dispute resolution. ADR literature on mediation has broadly classified into two things that could help parties find help to their disagreements: coaching association and creative administration of the disputes.[62] Mediation is known for its flexibility, the mediator should be ready to adapt proceedings to the requirement of each case. Mediation consists of a progression of meetings arranged by the facilitator, beginning with an information exchange stage (were the parties are instructed on guidelines and the process

[59] Rewald, R. (2014). *Mediation in Europe: the most misunderstood method of alternative dispute resolution*, World Arbitration Report, New York City: Weil, Gotshal & Manges LLP, spring 2014, pg. 1.
[60] Joamets K.& Solarte Vásquez M.C. (2019) *Current challenges of family mediation in Estonia, Journal of Contemporary European Studies,*
[61] Pesce F., Rone D., Laura Carpaneto, Cellerino Ch., Dominelli S., Montorsi E.G., Queirolo I., Solarte-Vásquez M.C., Toleikyte N., Tuisk T., Vebraite V. (2016). *Mediation to Foster European Wide Settlement of Disputes.* E-book, Chapter 5.
[62] Solarte-Vasquez (2014), *supra nota* 46. 9.

in effect), followed by dialog meetings and ending with a concluding session.[63] Outcome from the procedure should represent consent on legally enforceable agreements for mutual gain, partial agreements or their absence that in times is the most reasonable and mutually beneficial resolution available.[64]

1.3 Family Mediation and Determination of Childs Best Interest

Directive 2008/52/EC was adopted to encourage the use of ADR to resolve disputes to enhance interpersonal relationship other than the traditional methods. Mediation creates a constructive atmosphere and amicable outcomes in proceedings involving children.[65] The core fundamental of mediation initiation is the fact that parties are competent to reach decision themselves[66]. This statement does not diminish the involvement of the mediator but explains that the disputants are of legal capacity to reach a decision. As soon as the spouses have decided to separate and get a divorce, mediation is based on principle of the best interest of the child[67] according to Art. 3(1) Convention on the Rights of the Child (CRC). Traditionally, the rights of the child or children is interpreted by the parents and parents would usually go to mediation sessions without the children. Due to severity of the situation, parents prefer to turn to a third party for assistance as they cannot differentiate between the best interest of both parties (child and parents). Children are often not nor informed or do they hear about decisions that were made in the mediation process that are connected to the separation.[68]

The determination of the child's best interest is a cumulative factor of circumstances characterizing the child, circumstances and capabilities of child's potential custodian(s) in order to affirm the most important objective i.e. the environment and well-being supporting child's

[63] Ibid., 9.
[64] Ibid., 9.
[65] Joamets K. & Solarte Vásquez M.C. (2019), *supra nota* 60. 3.
[66] Roberts, M. (2008). *Mediation in Family disputes: Principles of practice*. (3rd ed.), Hampshire, UK: Ashgate Publishing. Pg. 12.
[67] The principle of the best interests of the child is one of the four overarching guiding principles on children's rights (right to non-discrimination, best interests, the right to life, survival and development, and the right to participation or right to express views and have them taken into account) Referenced in European Union Migration and Home Affairs Accessible by : https://ec.europa.eu/home-affairs/content/best-interests-child. Accessed on 18the March, 2021.
[68] Mantle, G., & Critchley, A. (2004). Social work and child-centred family court mediation. *British Journal of Social Work*, *34*(8), pg. 1161-1172.

development to the maximum.[69] He associated three concepts of child best interest; First, determining child's best interests can be seen, one hand, as a procedural matter according to which possible impacts (positive or negative) of decisions involving children have to be taken into account in the decision-making process. Second, the best interest of the child is a basic right that has to be applied all the time. Third, child's best interest is a fundamental, legal principle with the aim of limiting adults' uncontrolled power over children (practitioners work for children and with them, making decisions in children's name).[70] This concept could however translate differently depending on the profession involved. A social worker, lawyer or psychologist world definitely have different opinions and approach to a particular case and this could affect the outcome of the dispute resolution process. The concept of best interest of the child includes active involvement of the child in planning the activities and decisions concerning his/her well-being and involvement of various practitioners.

Though the process is about the child, the child is almost non-existent in the decision-making. There always is an imminent risk that the preoccupation of professionals in regards to best interest of the child could result in a conflict between the parents of the child and the professionals who believe they know better. One of the main discourse is if the divorcing partners can also make decisions that are in the best interest of the child as each partner will seek out for their own interest and to be at the better side at the end of everything.

There are divergent views on the inclusion of children in the divorce mediation process. Some scholars have argued that children should be involved in the process because their physical presence could be a reminder to the parent of their parental responsibilities. It is also necessary that the child is present as he could also give the mediator and the parents' relevant first-hand information pertaining the subject discussed. The perceived view of what the parents think about the child is usually different from the thought process of the child. It is safe to say that for a balanced and non-biased information and clear view of the situation, both the child and the parent need to be present when issues that directly or indirectly affect the child are discussed. An important research also lamed that the stress and poor communication involved in the whole process most especially in the immediate aftermath of separation caused a 'diminished capacity to parent' that could account for discrepancy of perception.[71] Children need not have the final say

[69] Zermatten, J. (2010). The best interests of the child principle: literal analysis and function. *The International Journal of Children's Rights*, *18*(4), 483-499.
[70] Ibid
[71] Wallerstein, J. S., & Kelly, J. B. (1980). Effects of divorce on the visiting father–child relationship. *The American Journal of Psychiatry*.

in the decisions especially minors but it is important that they are involved in the process. It is believed they would at least be happy after the sadness that comes with witnessing the family's disruption. High numbers of children experience breakdown after the process has led to more child inclusion in the divorce mediation process.

Some others have argued that a child need not be present in the process to have his or her voice heard as it was stressful for them and not expected of the children to give informed and correct opinion and views about their best interest in the present and in the future. It is also argued that most children make incompatible demands that are not achievable or unrealistic, the children's view could not be imposed on the parent because it undermines the parents' decision-making authority.

The Model Standards for Family and Divorce Mediation[72] claims that only in extraordinary circumstances are the child permitted to take part in the process without the consent of their parents and the child representative.[73] Extraordinary circumstances here means that parents are not forced to include the child if they oppose to it. If the parents to not agree to the same decision, either of them (usually the objecting parent) could terminate the process rather than include the child. The Model Standard does not impose any the child's inclusion but relies on the parents' agreement to include the child.

There have been an increase in the focus of rights to citizenship of children. The United Nations Convention on the Rights of the Child and European Convention of the Rights of the Child has supported this premise. This decisions have favoured the inclusion of children in decisions that affect them directly though in reality no one knows what is the best interest of a particular child as there are different varying factors in each case thus it is necessary that fixed and lucid procedures are put in place and duly regulated in respect to short -term and long-term areas of the child's life. Later on in this paper, the author will examine the International laws and domestic laws in selected country and the legal gaps that need improvement.

[72] Model Standards of Practice for Family and Divorce Mediation (August 2000) (Developed by the Symposium on Standards of Practice),accessible at: http://www.afccnet.org/pdfs/modelstandards.pdf accessed on: 22nd March, 2020), reprinted in The Symposium on Standards of Practice, Model Standards of Practice for Family and Divorce Mediation, 35 Fam. L. Q. 27, 35 (2001).
[73] Ibid.

2. MEDIATION UNDER THE DOMESTIC LAWS OF ESTONIA AND IRELAND

2.1 General Overview of Mediation under the Domestic Laws of Estonia

Estonia was one of the first EU member states to implement the EU rules on mediation in her national legislation. The Estonian parliament adopted the conciliation Act to implement the directive on 18th November 2009 but it was not entered into force until 1st January, 2010.[74]

Estonia does not have a special Directive with the 'mediation' word like in other countries neither does it have an official definition of mediation in any national legal act. Though conciliation is used, the concept is that of mediation as referred to in Directive 2008/52/EC. Mediation was already in use Estonia before the act as a pre-trial procedure but the introduction of the act created a defined legal framework though Estonia still a lot of improvement to be done in the area mediation as the use of mediation has not increased or popularized neither has it enjoyed benefits following the implementation.[75] Conciliation is different from mediation is a more formal dispute resolution method than mediation. The role of the conciliator is to promote communication skills as well as negotiation rather than directing the parties to reach mutual agreement which mediation promotes. A conciliator is a legal expert who is focused on reaching a legally enforceable agreement for both parties. Though the conciliator is there to ensure legality of the process, one party could still feel cheated in the negotiation process. The inadequate distinction of these concept has claimed to be one of the challenges for an effective implementation of the ADR methods. This reflects the insufficient understanding of the best strategies and techniques developed in the field by the theory and supported by empirical studies because the difference in the two terms are

[74] Conciliation Act Accessible by: https://www.riigiteataja.ee/en/eli/530102013028/consolide Accessed on: 23rd March, 2020.
[75] Joamets & Solarte (2019). *Supra nota* 60. 4.

paradigmatic[76]in the absence of an agreement about the meaning and use of a consistent terminology.[77] Some argument have been that the concepts have the same meaning and that the Directive did not establish any difference[78] but the arguments failed to recognize that the directive did not create an entirely new ADR method but acted as an institutionalization instrument in regard to mature theoretical concepts that exist in other legal traditions and systems. For the sake of clarity, mediation will be the term referred to expect in cases where the Conciliation Act is referred to.

Mediation in Estonia is generally voluntary, it can only be made compulsory as a pre-trial procedure if it is stated by the law[79] though there are a few exceptions. According to Article 357(1) and (2) of the Code of Civil Procedure (CCP), the court can suspend the proceeding of a divorce case if there is a possibility the marriage can be preserved or the situation salvaged. The court can then suggest ADR processes mostly especially mediation to the couple. Another exception where mediation can be made compulsory is if a parent alleges that the other parent has violated a court ruling controlling access to the child or compliance to the ruling is hindered. However, all of these would not hold if a mediation procedure had previously failed.[80]

2.2. Family Mediation in Estonia and Child's Best Interest in Custody Disputes

Family mediation in not defined by the law in Estonia but the tern 'compromise' as in the Conciliation Act does not indicate if it refers to agreements resulting from mediation processes or to any other ADR process.[81] In Estonia, family disputes are classifies as civil matters but in the case of family mediation, it is regulated by the Code of Civil Procedure. According to article 430 (1) of the CCP states that until the time a court decision concerning the action enters into force, the parties have the right to terminate the proceeding by a compromise.[82] The court approves a compromise by a ruling which also terminates the proceeding in the matter. The ruling on approval

[76] Paradigmatic denotes the relationship between different words and languages of a set of linguistic items that form mutually exclusive choices in a language structure. Joamets and Solarte (2019). *Supra nota* 61. 6. See also Cambridge
[77] Solarte-Vasquez (2014). *Supra nota*. 46.
[78] Nolan-Haley, J. (2007). Teaching Comparative Perspectives in Mediation: Some Preliminary Reflections. . *John's L. Rev.*, *81*, pg. 265.
[79] Conciliation Act, Article 11.
[80] Code of Civil Procedure, Article 563(1).
[81] Solarte-Vasquez (2014). *Supra nota* 46, 7.
[82] Code of Civil Procedure, Article 430(1).

of a compromise sets out the conditions of the compromise. Governmental institutes are aware of the process even though the law does not specifically cover its provision e.g. mediation is recommended by the Estonian Ministry of Social Affairs but it is not provided by the law local government officials are encouraged to use mediation without a proper framework to guide the procedure. [83] Neither the code of civil procedure not the Conciliation Act explicitly explains what body is responsible for regulating mediation affairs in Estonia.

The Estonian Child Protection Act, confirms the need to hear the child taking into account his/her age and development and account for his/her opinion based on the age and development as one of the circumstances. It is imperative to consider the age of the child but not necessarily consider it invalid if child is a toddler as little narrations of the child could hold vital information especially in cases where child has witnessed physical and verbal abuse. The objective of this concept is to ensure the child's safety, well-being and development. According to the CCP, the court shall hear a child of at least ten years of age but the court can also hear a younger child. Especially in cases where the hearing is necessary in resolving like the example cited above. The child can only be refused hearing if there is a reasonable cause.

Though there are no laws in Estonia to mandate mediation, disputing parties are encouraged by the court and legal representatives to mediate before considering litigation. The judges also have the right to order parties to mediate if they feel the issues could still be remedied but this seldom happens.

According to statistics Estonia, 3262 marriages ended officially in divorce in Estonia in 2016 with number of divorced marriages with under 18-year-old children was 1641. The number of child custody disputes has increased in the past years.[84] In many cases, parents are unable to reach an agreement even with the intervention of the child protection worker. The court system then decided to take into account the child's best interest.[85] In Estonia, the child representative (attorney) and child protection worker, whose opinion the court respects in its decision making still has some vital roles to fulfil.[86] According to a recent study with a sample of 999 children from

[83] Ibid., 7.
[84] Toros, K. (2011). *Assessment of child well-being: Child protection practice in Estonia*. Tallinna Ülikool. Pg. 97-118.
[85] Owen, J., & Rhoades, G. K. (2012). Reducing interparental conflict among parents in contentious child custody disputes: An initial investigation of the Working Together Program. *Journal of Marital and Family Therapy*, *38*(3), 542-555.
[86] Toros, K., Valma, K., & Tiko, A. (2014). Interpretation of the principle of "best interests of the child" in the context of inter-parental child custody disputes: case of Estonia. *Journal of Social Welfare and Human Rights*, *2*(1), 289-303. Pg.2.

grades 4-12, it is evident that the child need to participate more in matters that affect them. Children in grades 4-12, n = 999[87], they see themselves as independent persons. 96% of children agree that children have their own preferences and opinions that needs to be taken into account, most of these children feel that listening to the child is as important as listening to an adult (96% of children who answered agreed partially or totally with that), including taking into account children's opinions and preferences.[88]

Mardisalu's study of the approach to the child in Estonian judicial system in the practice of separation from the family in 2007 discusses the court system only defines 'best interest of the child but gives no criteria on how it is achieved. She further states that children younger than age seven are treated as objects because the legislation do not require asking their opinion. Though the legislation supports a child above ten be heard, this is not an automatic qualification as there are no clear specifications on this subject. Power still rests on the child protection worker on how he/she best understands the child's best interest.

Child custody evaluations have been the subject of scepticism, nowadays this kind of intervention plays a crucial role in resolving custody disputes[89]. The cases judges have the power to call upon non-judicial experts to seek their opinion, but the final decision rests in their arms.[90]

In Estonia, there is no licensed training certificate required by the law. According to the Conciliation Act mediators duties can be carried out by an attorney, notary or a 'natural person'. Under the current law in Estonia, anyone wishing to be a mediator could be one, the only distinguishing mark is the enforceability of the mediation agreement. Training is put together the Estonian Association of Mediators in cooperation with the Ministry of Social Affairs, the Ministry of Justice and professional mediators in a 160 h training session.[91]

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[87] Karu, M., Turk, P., Biin, H., & Suvi, H. (2012). Monitoring of child's rights and parenting. *Survey of Adult Population. Tallinn: Praxis*. Pg.7.
[88] Toros, Valma & Tiko (2014), *supra nota* 86.3.
[89] Bow, J. N., Gottlieb, M. C., & Gould-Saltman, H. D. (2011). ATTORNEYS'BELIEFS AND OPINIONS ABOUT CHILD CUSTODY EVALUATIONS. *Family Court Review*, *49*(2), 301-312.
[90] Ranieri, S., Molgora, S., Tamanza, G., & Emery, R. E. (2016). Promoting co-parenting after divorce: a relational perspective on child custody evaluations in Italy. *Journal of Divorce & Remarriage*, *57*(5), 361-373. Pg.4.
[91] Family Mediation in Estonia. Accessible by: http://lepitus.ee/family-mediation-in-estonia/. Accessed on : February 28,2020,

2.3 General Overview of Mediation under the Domestic Laws of Ireland

Mediation in Ireland has a different approach than Estonia. They adopted the dualistic approach to the implementation of the 2008 Mediation Directive i.e. they have a separate legislation that governs domestic mediation disputes. Ireland implemented the directive through the European Communities (Mediation Regulations 2011) was signed into law 5th May, 2011. The Regulation is not applicable to domestic disputes and does not go beyond the wordings of the regulation.[92]

ADR processes have evolved as the state has recognised the need to have alternatives to the traditional court system. Mediation has been funded in Ireland since the year 1984 and developed Europe's first publicly funded family mediation scheme in 1986.[93] Irrespective of the initiative the acceptance of the public has been low.

The Law Reform Commission of Ireland (LRC) developed a draft mediation and Conciliation Bill as a part of its long term ADR projects. In 2012, the Draft General Scheme of Mediation Bill hereinafter known as Draft Bill was approved.

When the Regulation was initially implemented in Ireland, many of the Irish legal or corporate community were not aware of the provision about the cross-border mediation in the Mediation Regulation and was an important step in the integration of mediation into the Irish civil justice system.[94] The aim of the Mediation Regulation with Draft Bill is to aid mediation become a mainstream dispute resolution pathway and act as a catalyst for making Ireland a model jurisdiction for the promotion and development of both domestic and cross-border mediation but this has not really been achieved.

Ireland is one of the few common law jurisdiction that has not established a court-annexed mediation scheme. A pilot family mediation programme was established in 2011 at a district court in Dublin as a result of the collaboration between the Irish Courts Service, The legal Aid Board and the Family Mediation Service. This made the both mediation and legal services available at

[92] De Palo, G., & Trevor, M. B. (Eds.). (2012). *EU mediation law and practice*. Oxford University Press, Oxford.
[93] Conneely, S., & O'Shea, R. (2019). Innovative Family Mediation Research Initiative Embedded in the Community In Ireland. *Family Court Review*, *57*(3), 342-348.
[94] De Palo, G., & Trevor, M. B. (Eds.). (2012) *supra nota* 92, 173

one's location to motivate more people interested in mediation services when seeking to resolve disputes.

2.4 Family Mediation in Ireland and Child's Best Interest in Custody Disputes

Family Mediation Service (FMS) in Ireland was established in 1986 and modelled on early mediation services in Bristol.[95] The FMS then began a three year-pilot project which was the first publicly funded mediation service in Europe which set the pattern for development of this service in Wales, Scotland, Ireland, Northern Ireland and England.

Family law litigants face a really tough in the legal system because family law disputes such separation divorce, domestic violence, child custody and access bring about painful experiences and difficult decisions.[96] Application to family law courts keep increasing and research shows that "The adversarial nature of proceedings does little to resolve conflict in families' lives but rather compounds and increases that conflict in many cases. Alternatives, such as mediation and collaborative law, should be better supported and encouraged, and be widely available countrywide".[97]

A look at the profiles of client at the FMS shows the evolving nature of family disputes in Ireland. In 1986, client profile indicated only married couples who had decided to separate but as at 2009, "there has been varying categories which include same sex couples who had decided to separate, married and unmarried couples who had decided to separate, parents who had never lived together but have a child or children together, second or third relationship separating - additional issues for step parents and children, mediation for non-Irish nationals, mediation for culturally diverse couples, mediation for couples living in different jurisdictions, mediation between foster and natural parents, mediation between grandparents and natural parents, mediation between in-laws,

[95] Irlande. Law Reform Commission. (2010). *Report: Alternative Dispute Resolution: Mediation and Conciliation*. Law Reform Commission. Pg. 119.

[96]Matthews, C. (2009) Call for Radical Reform of Family Law. 12(4).pg. 99.
[97] Ibid., 99.

and elder mediation"[98] ADR processes has remained underutilised in Ireland even with the record setting ideas of the FMS.

The Family Law Reporting Committee agreed with the view of the commission in its consultation paper of 2009 that mediation will avail participant opportunities to make a settlement in the process rather than wait till the end of the hearing as it is in traditional courts but did not agree with the mandatory mediation in family law cases.[99]

Ireland uses the facilitative approach to mediation where concern is on the process rather than the outcome. Direct work with children does not appear in the routine of family mediation. Research showed that "There was a marked reluctance to engage in direct work with children other than in suitable circumstances.[100] The incidence of such suitable circumstances as evidenced in the findings was low"[101] The reasons given to justify this include young age of children, level of conflict was too high, or the mediators did not feel sufficiently equipped or skilled to engage with children directly.[102]

The voice of the child is included in the mediation process in three different ways; directly a meeting with the mediator, through information brought to the mediator by the parents and via family meeting (this is where the parents sit the children to explain the process of separation, the effect and future arrangements). This service is provided by the FMS and integrated in the Legal Aid Board and through private organizations and public practitioners. The need of every family differ from case to case and it is important that the process it modified to help their situation. In a partnering relationship where children are involved, though the partnering relationship end, the parenting relationship continues. The mediator ought to work with the parents to find a suitable solution that caters for their own needs without neglecting the child's. During separation, parents are trying to detach from each other and at the same time need to remain attached to the child, parents might find it difficult to communicate with the children and setting limits when information and routine is needed.[103] Due to the sensitivity and pain the parents look to their children for affirmation while children need freedom to express negative towards their parents

[98] Law Reform Commission (2010) *supra nota* 95. 120
[99] Ibid., 121.
[100] Kearney, S. (2014). The Voice of the Child in Mediation. *Journal of Mediation & Applied Conflict Analysis*, *1*(2), pg. 154.
[101] Foley-Friel, M. (2011) Unseen but are they heard? An exploration of the mediator's perspective on the role of children in Irish Mediation. See also Sweeny, D. & Lloyd, M. (eds) (2011) *Mediation in focus: A Celebration of the Family Mediation Service in Ireland,* Oxford UK: Hart Publishing. Pg. 58-63.
[102] Kearney (2014), *Supra nota* 100. 153
[103] Ibid., 153.

whom they may blame for the sudden changes happening in their lives.[104] The parents need a mediation plan that will take into account the needs of every member affected.

Most mediators in Ireland prefer the indirect meeting with the child where the parents brings all necessary information relating to the child. The information include the names, age, what they know about the separation, how they are reacting to the separation, how well they know about the effects of the separation. The mediators believe this process encourages the parents to take into consideration the child's opinion, views and perspective. This approach has its own challenges because the mediator's interference and guide is limited to the information given to the parents and emphasis is on the parents as the decision makers. Whatever decision is reached or options considered are discussed in detail. Though the child is not directly asked, the mediator tries to keep the discussion child-focused by asking relevant question in order to draw out an explicit parental plan.[105]

The mediation principles of impartiality and confidentiality can have particular relevance. Should concerns arise involving any allegation or fear of abuse, the mediator explores with parents their responsibilities in dealing with these issues, and follows distinct policies and procedures in ensuring the protection of children.[106]

In this third approach, parents can agree of what and what not to share in the session beforehand and if the child enquires about additional details, the meeting will be adjourned and renegotiations made on how best to present the issue.

Irrespective of which approach, the commission recommend the guidelines stated in the requirements of Children First: National Guidelines for the Protection and Welfare of Children, published by the Office of the Minister for Children and Youth Affairs in the Department of Health and Children in 2010[107] that "A proper balance must be struck between protecting children and respecting the rights and needs of parents/carers and families; but where there is conflict, the child's welfare must come first".[108]

[104] Ibid., 153.
[105] Ibid., 153
[106] MII Code of Ethics and Practice, 2009
[107] Children First: national guidelines for the protection and welfare of children. (Department of Health and Children, 2010)
[108] Ibid.

2.5 Comparison of Both Jurisdictions and the effect of Directive 2008/52/EC

Having analysed these two legal system, it can be deduced that there are differences in their domestic laws regarding domestic dispute mediation and similarities in their practice of dispute mediation.

In Ireland, mediation is legally by the Irish Mediation Bill 2017 defined as a facilitative voluntary process in which parties to a dispute, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve the dispute.[109] In contrast, Estonia there is no primary legislation defining mediation at all. Irrespective of the legal definition, mediation in practice is agreed to the a process involving an independent and impartial third party guides the disputing parties on how to resolve their disputes amicably. The differences in the definition are just theoretical.

In Estonia, The conciliation act is general in regards to the training of mediators. There is no legally mandatory accreditation system but in practice, private organization in cooperation with Federal ministries put together a training for mediators. Similarly, The Irish Mediation Bill 2017 does not have statutory basis for the training or accreditation of mediators in its code of conduct.

The difference in both legal systems is the application of the directive. Estonia transferred Directive 2008/52/EC into the national law applicable for cross-border disputes as well as domestic disputes thus the 'monistic approach'. This approach avails greater harmonization of the rules and allows easy determination and a predictable legal framework valid for any mediation irrespective of where the disputants reside.[110] In contrast, Ireland implemented Directive 2008/52/EC only in regards to cross-border disputes thus the 'dualistic approach'.

[109] Mediation Bill 2017
[110] Carle, (2015), *supra nota* 18, 94.

3. PROPOSITION FOR A BETTER MEDIATION CULTURE IN THE EUROPEAN UNION.

In summary, this thesis showed the current differences in the rules on mediation in Estonia and Ireland.

The Directive would have created a harmonized approach for all member states had it not been distinguished between cross-border and domestic disputes. Though the monistic approach is a more straight forward approach and easier for an ordinary person to understand, the effect is not really felt. The mediation culture in both countries examined still need a lot of improvement but a more explicit directive or a regulation that would create a more harmonized mediation approach at the EU level and MS could create additional regulations to suit their jurisdiction because family law is about cultural features.

The author also proposes an advancement of what has been previously proposed many times before by professional on the need to a harmonized training at national level but has not been made functional. Currently, in many EU states, mediation trainings range from a 40 hours trainings to 120 hours training which an insufficient time to train a mediator. An extensive mediation training model need to be adopted by MS to ensure that mediators are properly groomed irrespective of their previous education e.g. in Estonia, mediation are mostly conducted by psychologist or social workers who do not have legal knowledge.

The author suggest this training model is recognized at the national level of every member state and run by a mediation organization. This training model will have different pathways to cater for professionals in the field as well as individuals who want to pursue a career in mediation.

The Introductory pathway: The Introductory pathway will cater for any graduate with an interest in the field of mediation. This will provide a concrete foundational understanding of the field and how mediation can help solve disputes cases especially family disputes. This stage of the training is most important as it will give trainees an idea of the system and each person can

choose which specialized pathway he will need to follow. An experienced mediator depending on the years of field experience need not participate in the introductory pathway.

At the end of this course which will run for a week, trainees will take an exam or a test. Upon passing this test, they can apply to be a member of the Mediation Organization.

Intermediate Pathway: This is another training pathway for those who have some sort of knowledge in the field beforehand. At this stage, the trainees can listen to previous mediation sessions upon acceptance by disputing parties with confidential information taken out of the recordings. Upon passing the Intermediate pathway course, the trainee can apply to the mediation organization to attain the rank of an associate.

Specialized Pathway: When the trainees have either completed the introductory or intermediate training pathway, they can decide to specialize in which area they please e.g. domestic\family mediation, work place mediation, and international mediation *inter alia*. Here, the trainee will be allowed to participate in mediation sessions if agreed by disputants and is bound by confidentiality agreement. This will enable the trainee have a real life practical experience of the process. Upon passing the specialized pathway training, the trainee becomes a fellow.

Expert Pathway: After a designated time of 3-5 years of practical experience in the field, an expert pathway training can be enrolled for where upon completion, the trainee can apply for to be an expert in the mediation board.

Mediation Training Model

- Introductory Pathway
- Intermediate Pathway
- Specialised Pathway
- Expert Pathway
- Refresher Training

	1	2	3	4	5
Requirements	Any professional who seeks to build a career in mediation	Knowledge of the field beforehand e.g ADR courses in Law School	Completion of either introductory or intermediate pathway training	3 - 5 years of practical experience	Completion of any pathway trainings
Scope of Training	Introduction to ADR Introduction to Mediation Problem of Mediation	Introduction to Mediation Current trends in Mediation Problem associated with the process	Introductory information about specialised area of interest, problem faced and solutions provided	More indepth training in specialised area of expertise	Refresher courses to keep practitioners updated on current trends in the field
Access to listen to previous sessions	Not Applicable	Not Applicable	Yes, upon agreement of disputing parties	Yes, upon agreement of disputing parties	Not Applicable
Access to mediation sessions	Not Applicable	Not Applicable	Yes, upon agreement of disputing parties	Yes, upon agreement of disputing parties	Not Applicable
Rank upon induction into mediation board	Member	Associate	Fellow	Expert	Not Applicable

The advantage of this model is its multidisciplinary approach, all interested professional can enrol as it creates an avenue where for example a psychologist would learn more about the legal aspect and the law regulating their field of expertise. A well-seasoned mediator who knows the law, understands the psychological effect divorce and other family-related can affect a child´s wellbeing and overall output will actively include the parent and child and every other relevant parties´ information to guide in making decisions that will take the child's interest into consideration without neglecting the parents 'needs.

A continued refreshers training is also needed for practicing professionals as it is important to stay abreast of the current trends because mediation keeps evolving.

Additionally, the government though need not interfere with the activities of the training, it is necessary to keep the process in check for quality assurance of the process, code and conduct of the practitioners inter alia to ensure a just and fair procedure.

CONCLUSION

The research aimed to examine the adoption approach by EU Member States to Directive 2008/52/EC in the determination of the Child's best interest in mediation and shortcomings that currently exist. Development of mediation in the EU especially in the determination of the child's best interest has been is not uniform and has not met up with the aim of the Directive 2008/52/EC of harmonizing mediation across its MS. The Directive aims is focused of cross-border disputes and MS have the liberty to either apply the same directive for domestic disputes or create a new legislation altogether for regulating domestic disputes hence, the monistic (same guidelines regulating cross-border and domestic mediation disputes) and dualistic approach (different guidelines regulating cross-border and domestic mediation disputes). This liberty in the implementation of the directive has not helped states with little or no mediation culture beforehand. The primary factor of this irregularity is the directive´s distinguished focus on cross-border disputes alone. Another causation factor is the educational awareness of the mediating practitioners and even the general public. A comparative method was used to establish the current status in Estonia (monistic) and Ireland (dualistic) and observe the different mediation procedures in these states. It was discovered that there is a low mediation culture in both states even in Ireland which is one the Europe pioneers of mediation practice. Though Estonia is one of the first few countries to adopt Directive 2008, there still isn't a proper regulation that defines mediation of the process of mediation. Mediation is still very much regarded as conciliation as the regulation that regulates mediation is known as the 'Conciliation Act'. A lot of people are still unaware of the process and those aware have little or no confidence in the system. The EU though has helped created a mediation presence by establishing a legal framework for the mediation process but the Directive would have created a more harmonized legislation (primary aim) if it had not specialized on cross, it can be determined that the Directive 2008/52/EC contributed to the low mediation culture in its member states. Another worrisome issue is the determination of who can determine the child' best interest. Most times, mediation sessions are anchored by child protection workers or psychologist who are inept in legal matters or lawyers who know the law but have insufficient knowledge of how to handle disputes in a non-court setting of the field. The disputing parents also

cannot be relied upon to act in the child's best interest as they might also be going through emotional stress. Thus it is necessary to have a well-trained and grounded professional to walk the parties to a favorable outcome for all parties. Most member states do not have a training model where individual from all walks of life interested in building a career in mediation. The limitation observed by the author was availability of many training centers with no monitoring from any control body to ascertain the quality of the services rendered and code of conduct of the practitioners. The author suggest a multidisciplinary mediation training model implemented at the national level of every member state where professional from every walk of life can enroll to get training and build a career in. This will assist immensely in advancing the current challenges mediation in facing, it will also create a durable and trust worthy system there encouraging people to opt for the service. The training will build a well-grounded professional who is well informed by the law and also have the great problem-solving and communication skill to ensure best interest of everyone especially the child is considered at every step of the way.

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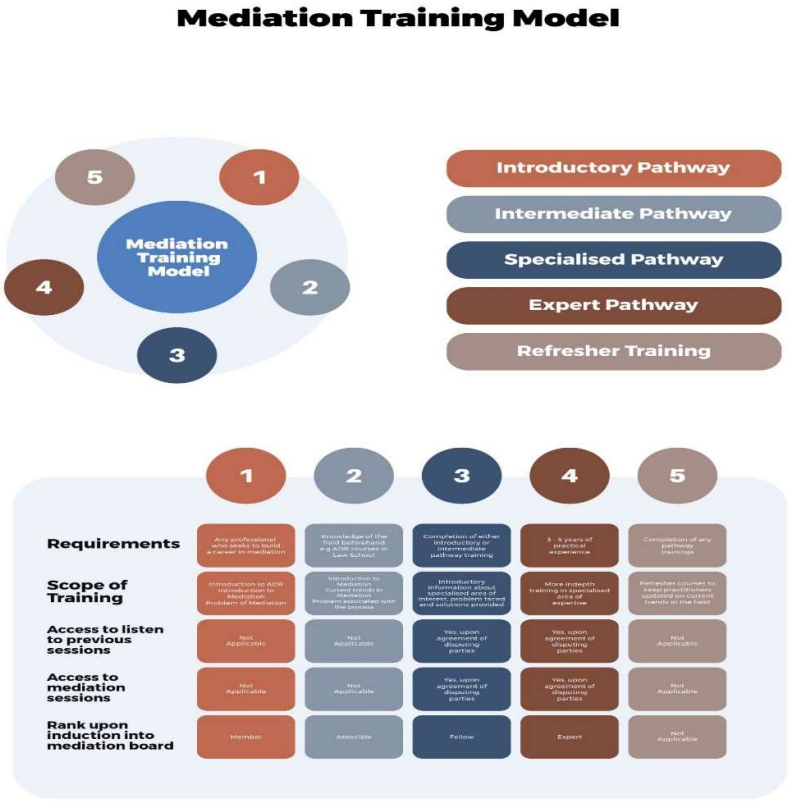
APPENDICES

Appendix 1 Proposed Mediation Training Model



Mediation Training Model

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