Olga Jović Prlainović[*]
Jelena Belović[**]

MEDIATION IN FAMILY DISPUTES

Abstract

The paper discusses the advantages and disadvantages of the application of family relations mediation to dispute resolution in the area of parental rights (including child sustenance), unmarried couples, family members, sharing property and other property issues ranging from family relationships, national legal frameworks, to the Family Law and the Law on mediation in dispute resolution of the Republic of Serbia, which represents the reference framework for the parties to a dispute to settle the dispute by mutual consent.

At the same time, the paper devotes attention to family relations mediation at the EU level through the so-called "The Vienna Action Plan" adopted with the aim of guaranteeing EU citizens equal access to justice and promoting cooperation between judicial authorities. In the legal systems of the EU Member States, the approach to mediation is not unique, that is, in certain legal systems, mediation is mandatory before the court proceedings begin, whereas in others, however, the presence of an information mediation meeting is mandatory but not mediation itself, while the third approach implies that mediation is voluntary and optional (a judge or lawyer presents to the parties the possibility of mediation, and the parties decide on that at their own discretion), and, finally, there is an approach implying that mediation is not usable.

The main reason is that both national and international legal frameworks allow the party's autonomy much more space in creation as well as in resolving private legal relationships.

The paper analyses mediation as a specific ADR method focusing on family dispute resolution.

Key words*: family mediation, divorce proceedings, ADR, EU framework, parties autonomy.*

I.THE IMPORTANCE AND ROLE OF MEDIATION IN FAMILY RELATIONSHIPS

In contemporary law, family and divorce mediation has grown in importance given that in a contentious situation of conflicting interests, constructive conflict resolution with the assistance of a third party (mediator) leads to an agreement and a mutually acceptable solution. Mediation as an alternative (extra judicial or administrative procedure) dispute resolution method was

[*] Olga Jović-Prlainović, Ph.D, Full Professor, University of Priština-Kosovska Mitrovica, olga.jovic@pr.ac.rs
[**] Jelena Belović, Ph.D, Associate Professor, University of Priština-Kosovska Mitrovica, jelena.belovic@pr.ac.rs

introduced into the family law of the Republic of Serbia though the 2005 Family Law[1], although mediation between spouses during a divorce, bearing a different name, content and jurisdiction at the time, was applied as part of the Serbian legislation when the Basic Law on Marriage of the SFRY (1946)[2] came into force during the legislative competence of the federal state. Subsequent constitutional reforms (1971-1974) led to the transfer of family relations regulation competence on to the republics and provinces, hence the Law on Marriage and Family Relations of the Republic of Serbia[3] regulated mediation (reconciliation) procedure within the framework of divorce proceedings as mandatory in the event of an uncontested divorce, which was conducted by the Social Welfare Center or a judge, depending on whether or not the spouses had minor children.[4]

Chronologically speaking, from the middle of the last century to the present, numerous regulations have been adopted extending the field of application of mediation to different areas of life.[5]Nevertheless, the basic valid normative framework for mediation in the Republic of Serbia is the Law on Mediation in Dispute Resolution.[6]Mediation encompasses a procedure in the course of which the parties voluntarily seek to resolve a dispute through negotiation, with the assistance of a mediator *helping the parties to reach an agreement* (Article 2 of the Law on Mediation in Dispute Resolution). The aforementioned definition of mediation characterizes its legal physiognomy: first, the mediator's attitude is impartial, i.e. neutral (mediator has no interest in the subject matter of the dispute since he/she does not expect to make profit directly from the parties for intermediary services); second, voluntariness - the parties to a dispute decide freely and without coercion to take part in this procedure as well as to choose a mediator (the party that

[1]Art. 229-246 of the Family Law (hereinafter referred to as: FLS), *Сл. гласник PC/Official Gazette of the Republic of Serbia*, No. 18/05,7/2011, 6/2015.

[2]The Basic Law on Marriage, *Službeni list FNRJ*, No. 29/1946, 36/1948, 11/1951, 44/1951, 18/1955, 4/1957, 28/1965.

[3]The Law on Marriage and Family Relations, *Сл. гласник CPC*, No. 22/80, 24/84, 11/88, *Сл. гласник PC/Official Herald of the Republic of Serbia*, No. 22/93, 25/93, 35/94, 46/95, 29/2001.

[4]Art. 352-358 of the Law on Marriage and Family Relations.

[5]Legislation on the application of mediation in national legislation includes the following: Civil Procedure Act (*Сл. гласник PC /Official Herald of the Republic of Serbia*, No. 72/2011, 49/2013, 74/2013, 55/2014, 87/2018); Law on Peaceful Settlement of Labor Disputes (*Сл. гласникPC/Official Herald of the Republic of Serbia*, No. 125/2004, 104/2009, 50/2018); the Law on Insurance (*Сл. гласник PC / Official Herald of the Republic of Serbia*, No. 139/2014); Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles (*Сл. гласник PC/Official Herald of the Republic of Serbia*, No. 85/2005); Law on the Prohibition of Discrimination (*Сл. гласник PC/Official Herald of the Republic of Serbia*, No. 22/2009); Law on Insolvency (*Сл. гласник PC/Official Herald of the Republic of Serbia*, No. 104/2009, 99/2011, 71/2012, 83/2014, 113/2017, 44/2018, 95/2018); Law on Prevention of Harassment at Work (*Сл. гласник PC/Official Herald of the Republic of Serbia*, No. 36/2010); Consumer Protection Law (*Сл. гласник PC/ Official Herald of the Republic of Serbia*, No. 62/2014, 6/2016); Law on Consensual Financial Restructuring (*Сл. гласник PC/ Official Herald of the Republic of Serbia*, No. 89/2015); Criminal Procedure Act (*Сл. гласник PC/Official Herald of the Republic of Serbia*, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019); Social Welfare Act (*Сл. гласник PC/ Official Herald of the Republic of Serbia*, No. 24/2011); Financial Services Consumer Protection Law (*Сл. гласник PC/Official Herald of the Republic of Serbia*, No. 36/2011, 139/2014); Law on Ombudsman (*Сл. гласник PC/ Official Herald of the Republic of Serbia*, No. 79/2005, 54/2007); Whistleblower Protection Act (*Сл. гласник PC/ Official Herald of the Republic of Serbia*, No. 128/2014); Law on Enforcement and Security Interest (*Сл. гласник PC/ Official Herald of the Republic of Serbia*, No. 106/2015, 106/2016, 113/2017); and a set of by-laws regulating in detail the application of the law on mediation.

[6]Law on Mediation in Dispute Resolution, *Сл. гласник PC/ Official Gazette of the Republic of Serbia*, No. 55/2014, which rendered the 2005 Law on Mediation invalid (*Сл. гласник PC/Official Gazette of the Republic of Serbia*, No. 18/2005).

refuses mediation or a particular mediator suffers no consequences); third, the mediator does not make valid decisions, but encourages the parties to a dispute to recognize their own interests and negotiate a mutually acceptable solution, respecting the individual needs and interests of the parties to a dispute, the so-called (win-win) outcome, that is, an integrative approach to conflict resolution as opposed to a distributive (win-lose) litigation approach to dispute resolution;[7] finally, mediation is a process in which the public is excluded.

In resolving disputes between family members, particularly between spouses, spouses as parents and children, mediation has multiple advantages. Bearing in mind the permanent nature of the parent-child relationship, focusing on the needs of children and protection of their best interests in the mediation process contributes to good parental relationships in the future, given that spouses arrive at more functional solutions through direct communication and constructive dialogue, making it easier for them to communicate in the future.[8] In other words, the possibility for a consensual arrangement of mutual rights and obligations of spouses after the termination of their marriage, without determining who is right, provides a good basis for the preservation of their personal and property interests, and, by analogy, a positive atmosphere for the growth and development of their children.

II. LEGISLATIVE FRAMEWORK FOR MEDIATION IN DIVORCE PROCEEDINGS

In the positive family law, mediation between spouses is envisaged in the event of one spouse filing a petition for dissolution of marriage,[9] as a form of out-of-court and non-conflict dispute resolution between spouses over the personal, personal and property consequences of the divorce.[10] In a word, the mediation procedure is conducted in a dissolution of marriage litigation or dissolution of marriage or annulment of marriage initiated by a lawsuit[11], for if divorce proceedings have been initiated by a proposal for a no-fault divorce, the spouses are obliged, in keeping with the letter of the law, to submit a written agreement on the exercise of parental rights and a written agreement on the division of joint property, along with the petition for a no-fault divorce.[12]However, even when divorce proceedings have been initiated by a lawsuit, mediation is

[7]See: the official website of the National Association of Mediators of Serbia, <https://nums.rs> accessed 06 June 2019.

The court proceedings are formal in nature and mandatory for the defendant, and the verdict on the outcome of the dispute is reached by the judge. On the contrary, mediation is a completely informal and voluntary procedure, where decisions are made jointly by both parties. The mediator's role is to control the process, ensuring that the parties arrive at a solution. Unlike litigation, which is time consuming and financially burdensome for both parties to a dispute, mediation is an inexpensive and expeditious procedure?

[8]Kirsikka Salminen, *Mediation and the Best Interests of the Child from the Child Law Perspective,* In: Nordic Mediation Research, Nylund A., Ervasti K., Adrian L. (Eds.), Springer Open, Switzerland 2018, (eBook) https://doi.org/10.1007/978-3-319-73019-6, 213-214.

[9]Art. 230 par.1 of the FLS.

[10]From the perspective of European family law theory, mediation is possible in all family disputes, irrespective of the nature of the relationship between the members of the family (marriage, kinship, extramarital affairs). For more information see: Mira Alinčić, , "Europsko viđenje postupka obiteljskog posredovanja", *Revija za socijalnu politiku*, (1999) Zagreb, 6/3-4, 227; Irena Majstorović, "Posredovanje prije razvoda braka: hrvatsko pravo i europska riješenja", *Zbornik Pravnog fakulteta u Zagrebu*, (2007), Zagreb, 57/2, 406.

[11]Марија Драшкић, *Коментар Породичног закона, Пракса Европског суда за људска права, Пракса Уставног суда, Пракса редовних судова (према стању законодавства од 1. децембра 2015. године)*, (ЈП Службени гласник, Београд, 2016), 555.

[12]Art. 40 of the FLS.

not conducted unless one of the spouses consents to mediation; if one of the spouses is incapable of sound judgment; if the whereabouts of one of the spouses is unknown; if one or both spouses live abroad (Article 230, Paragraph 2 of the FLS).

1. Conducting mediation

As a rule, mediation is conducted by a court, scheduling a mediation hearing after receiving a petition for dissolution of marriage or annulment of marriage. In addition to the summons to the mediation hearing, the litigating parties are served with the petition for dissolution of marriage or annulment of marriage (Article 231, paragraphs 1 and 2 of the FLS).[13] The third paragraph of this article of the law stipulates that the judge managing the mediation may not participate in the decision-making process at some later stage of the proceedings, unless the mediation is successful. Upon receipt of the lawsuit initiating the divorce litigation, the court schedules a mediation hearing that is held only before the individual judge.[14] In order to successfully manage the mediation, it is necessary that the judge has undergone training as a mediator[15] so as to explain to the spouses the procedure, purpose and outcome of mediation, that is, to inform the parties that their refusal to participate in the mediation process, and the potential failure of this procedure, will not have any impact on the court proceedings, nor their party position in the proceedings.

The judge managing the mediation is obliged to suggest that the spouses seek psycho-social counseling, and if they agree, the court will, at their proposal, or with their consent, entrust the mediation to the competent guardianship institution, spousal or family counseling institution or other institution specialized in family relations mediation, by serving the parties with a lawsuit for dissolution of marriage or annulment of marriage (Article 232, Paragraphs 2, 3, 4). Bearing in mind the flexible legal regulation of divorce mediation, it seems unlikely that strengthening the litigating parties' confidence in the possibility of settling the dispute peacefully will be conducive to achieving significant results in relation to the total number of successfully completed mediation procedures.[16] In this respect, the existing deficiencies are to be eliminated and the mediation process is to be harmonized with the models recommended within the EU, to which the second part of this paper will be devoted.

2. From reconciliation to settlement

The legal concept of the mediation procedure includes two stages: the procedure for attempting reconciliation and the procedure for attempting to resolve the dispute by mutual agreement -

[13]М Драшкић, *Коментар Породичног закона...op.cit.,* pp. 556. This legislative provision is contrary to the basic principle that a lawsuit is not served on the respondent for an answer that applies to all proceedings concerning family relations. Therefore, in the conflict of these two rules, priority should be given to the general principle. In other words, not serving a lawsuit on the respondent would prevent the mediation process from being compromised.

[14]Art. 232 Para. 1of the FLS.

[15]In the course of mediation development in Serbia so far, only a certain number of judges have undergone training programs for mediators organized by some of the international and national organizations active in this field. Mediation programs at courts have been created with the aim of continuous work with litigating parties, but in practice, there is obviously a lack of interest of citizens in mediation services. This is proven by the fact that judges are erroneously instructed to set the three-day deadline for the parties to declare if they accept the mediation procedure, and if the parties fail to respond the court decides they have not accepted the mediation procedure. See: Блажо Недић, Јелена Арсић, *Препоруке за развој и примену медијације у Србији,* (International Finance Corporation, Београд, 2011), 22.

[16]For instance, section 41of the Norwegian Law on Marriage (§41. Lov om indgaaelseogopløsningavegteskap) stipulates that mediation is mandatory when the spouses decide to separate or divorce.

settlement (Article 229 of the FLS). The attempt at reconciliation in a divorce litigation initiated by a lawsuit is conducted before a court or other competent institution, at the beginning of divorce litigation, when efforts are made to mend the parties' disturbed marital relations without a divorce or in a situation where this is likely to happen.[17]If the spouses are reconciled, the divorce lawsuit will be deemed to have been withdrawn, whereas, on the contrary, if no reconciliation has taken place, or one or both spouses, although duly summoned, fail to respond to the reconciliation summons, the reconciliation has failed and the court will proceed with a settlement procedure aimed at resolving the most important issues in a divorce dispute by mutual agreement of the parties.

The procedure for attempting settlement of a dispute by mutual agreement (settlement) is conducted before the institution attempting the reconciliation.[18] The court or institution entrusted with the mediation procedure will endeavor to make spouses agree on their exercise of parental rights and the division of joint property. Spouses and their attorneys (who cannot attend the reconciliation procedure) are summoned to the settlement procedure. The success of the settlement is estimated based on the goals achieved, and therefore if the spouses reach an agreement on the exercise of parental rights and an agreement on the division of joint property, the settlement will be considered to have succeeded. However, if the spouses reach an agreement on only one of these two issues, the settlement is partially successful. The spouses' agreement then becomes an integral part of the decree of divorce, provided that the court considers the agreement to be in the best interests of the child. The settlement fails if the spouses fail to reach an agreement on either of the two issues, or if one or both spouses, although duly summoned, fail to respond to the settlement summons. In this case, the court conducting the litigation has to, on its own motion, decide on the exercise of parental rights in the best interests of the child, when, in fact, in making a secondary decision, it examines the facts and circumstances surrounding the main petition, which is dissolution of marriage or annulment of marriage. After the litigation has been conducted, the court reaches a verdict on dissolution of marriage or annulment of marriage.

The existing law on family and marriage mediation is incomplete and inaccurate, which makes it necessary to modify the law governing family relations in terms of ensuring more adequate mediation within the framework of the Family Law of the Republic of Serbia.

III. EUROPEAN REGULATIONS AS INSPIRATION AND ROLE MODEL

The Republic of Serbia is genuinely committed to the European integration process, being aware of the fact that this process requires substantial and fundamental changes in the judicial system. In creating the reform steps within the scope of Chapter 23 defined in the Action Plan, the Negotiating Group was guided primarily by the *acquis communautaire*. The Action Plan was formulated based on the results of the Judicial Functional Review conducted by the World Bank in the Republic of Serbia in 2014.[19] With regard to the mediation, the recommendations made based on the results of this review are focused on the following:

- Operationalization of the Law on Mediation;

[17]Art. 233-239 of the FLS.
[18]Art. 240-246 of the FLS.
[19]*The Judicial Functional Review in the Republic of Serbia*, October 2014, available at: https://www.vk.sud.rs/sites/default/files/attachments/Funkcionalna%20analiza%20pravosudja%20u%20Srbiji_0.pdf, accessed 06 June 2019.

- Encouraging court users and professionals to opt for mediation;
- Monitoring mediation results;
- Providing professional staff with intensive training for mediation;
- Delivering information to potential court users.[20]

In December 2018, the Ministry of Justice formed a working group to amend the Dispute Settlement Act with the aim of finding adequate mechanisms to establish an effective and sustainable mediation dispute settlement system, in accordance with the European and international standards. The efforts made to this end have been manifest since January 1, 2019, when the Law on Amendments to the Law on Court Fees came into force, encouraging the parties to resolve disputes under an amicable settlement and delaying the payment of court fees, in order to leave the parties the opportunity to reconsider peaceful dispute resolution.

The European Union actively promotes methods of alternative dispute resolution ("ADR"), such as mediation. There is a trend in both national and EU legal frameworks to allow the party's autonomy much more space in creation as well as in resolving private legal relationships. The party autonomy acts as a very important connecting factor in creating unified collision norms on determination of applicable law concerning private cross-border relationship. The contractual and non-contractual relationship was traditionally reserved for this subjective connecting factor. Recently, the party's autonomy has been given much more space concerning family relationship: divorce and legal separation[21], recognition and enforcement of judgments in matrimonial matters and parental responsibility matters[22]and contribution towards child sustenance[23]. However, these represent the unification of purely collision norms that apply only in cases involving foreign elements, so called cross-border relationship. Currently, there are no Community provisions on applicable law in divorce, matrimonial matters and matters of parental responsibility because the Treaty does not provide any legal basis for the development of a substantive family law. This means that EU is neither competent to unify a substantive family law, nor currently empowered to legislate by regulation or directive in this field, since the family branch of civil law does not fall under the exclusive or even peripheral jurisdiction of the Community institutions in accordance with Article 3 and 5 of the Treaty.[24]The reasons for such a situation reside in different legal approaches to family relationships conditioned by culture, religion, history, etc.[25]

Nevertheless, mediation is becoming highly significant in family dispute resolution. Additionally, the practice of the European Court of Human Rights indicates that it is necessary to support

---

[20] Ibid, 409.

[21] See: Art. 5 of Council Regulation (EU) 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (2010) OJ L 343/10, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:343:0010:0016:en:PDF, accessed 20 June 2019.

[22] See: Art.12 of Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) 1347/2000, OJ L 338/2003, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003R2201, accessed 20 June 2019.

[23] See: Art. 15 of Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, (2008) OJ L 7/1, 10/1/2009.

[24]Ardeleanu Anca-Monica, "Principles of European Family Law regarding Divorce", *Acta Universitatis Danubis,* (2013), 53.

[25]In 2001 aiming to start with theoretical and practical unification of European Family Law the Commission on European Family Law was founded. Commission members stated that harmonization of family law is desirable concerning free movement of people, straitening of European identity and contributing in creation of an effective European judicial area. https://ceflonline.net/

broader application of mediation as an alternative to litigation in family disputes. It has been argued in a number of cases that the legal possibility of applying family mediation is an important element in protecting the right to respect for private and family life as set out in Article 8 of the European Convention.[26]

Mediation as a desirable family dispute resolution method has also been recognized by the Council of Europe, which has adopted a special Recommendation R (98) 1 on mediation in family matters.[27]The Reccomendation was adopted, *inter alia*, after recognizing the growing number of family disputes, particularly those resulting from separation or divorce, and the detrimental consequences of conflict for families and the high social and economic cost to states. It was also the result of consideration of the need to ensure the protection of the best interests and welfare of the child as enshrined in international instruments, especially taking into account problems concerning custody and access arising as a result of a separation or divorce. Specific characteristics of family disputes were emphasized, namely:

- The fact that family disputes involve persons who, by definition, will have interdependent and continued relationships;
- The fact that family disputes arise in a context of distressing emotions and heighten them;
- The fact that separation and divorce have a profound impact on all the members of the family, children in particular.[28]

The Council of Europe produced, among other things, another important recommendation on mediation, namely Recommendation REC (2002) 10 of the Committee of Ministers to Member States concerning mediation in civil matters.[29]The importance of mediation is highlighted in the Council of the European Union and the European Commission Action Plan adopted at the 1998 Vienna meeting ("The Vienna Action Plan") for the purpose of implementing the provisions of the Treaty of Amsterdam relating to the creation of an area of freedom, security and justice. One of the items of this Plan was to develop mediation, in matrimonial matters in particular, as part of measures that guarantee equal access to justice for EU citizens. The Vienna Plan also made a significant contribution to the formulation of unified rules on conflict in divorce matters. The importance of mediation as an alternative method of family dispute resolution is emphasized in the Green Paper on Alternative Dispute Resolution in Civil and Commercial Law of 2002.[30]

III.1. Mediation Directive

In the European Union a framework for cross-border mediation is provided by "Directive 2008/52/EC of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters" (in the following: Mediation Directive or just Directive). The Mediation Directive, which dates from 21 May 2008, has been in force since 13 June 2008 and requires the European Member States (except Denmark) to implement the necessary laws, regulations and administrative provisions by 20 May 2011 at the latest. A strong regulatory impetus has been emanated to EU countries from The Mediation Directive. Many Member States reacted by not only regulating cross-border mediations as required, but they also extended their

[26]*Cengiz Kiliç v. Turkey*, (2011), petition No. 16192/06.

[27] RECOMMENDATION (98) 1 of the Committee of Ministers to Member States on Family Mediation, http://www.coe.int/t/dghl/standardsetting/family/7th%20conference_en_files/Rec(98)1%20E.pdf

[28]Art. 5 of Recommendation.

[29] Preporuka_REC_2002_10_o_medijaciji_u_gradjanskim_stvarima%20(2).pdf

[30] Green Paper on alternative dispute resolution in civil and commercial law, COM (2002) 196 final, EUR- Lex portal europa.eu

law reforms to cover purely national mediations as well. Member States that have come forward with a comprehensive reform of mediation law since June 2008, when the Mediation Directive came into force, are, for example France, Germany, Greece, Italy and Spain.

According to Art. 3 of the Mediation Directive: *''mediation denotes a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator''*. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State. It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question.

The Directive applies only to cross-border disputes as defined in Article 2 of the Directive. These are the disputes in which at least one of the parties is domiciled or habitually resident in a Member State other than State of the other party, on the date on which (a) the parties agree to use mediation after the dispute has arisen; (b) mediation is ordered by a court; (c) an obligation to use mediation arises under national law; or (d) for the purposes of Article 5 an invitation by a court to use mediation or attend an information session is made to the parties.

However, recital 10 specifically states that the Directive is to be applied to procedures where two or more parties to cross-border disputes attempt a friendly resolution of their dispute on a voluntary basis, with the support of a mediator. It is explicitly emphasized that it applies to civil and commercial matters. Nevertheless, the Directive is not to apply to the rights and obligations the parties are not free to decide upon by themselves under the rules of the applicable law. Such rights and obligations are particularly common in family and labor law. The recital serves as an additional explanation for the application of the provisions of the Directive, whereas the express provision of Art. 1 excluded from the scope of the Directive the rights and obligations which, under the relevant applicable regulations, which are not at the parties' disposal, and they are as follows: tax, customs, and administrative matters or issues related to the responsibility of the state for acts and omissions in the exercise of public authority (*acta iure imperii*). Other recitals, however, refer solely to the parties' agreements resulting from mediation in family matters concerning the issue of their enforceability, instructing that these agreements should be enforced in accordance with national rules or Community law.[31]However, the Commission Report to the European Parliament and the Council attached special importance to mediation in the area of family law. Mediation can create a constructive atmosphere for discussion and ensure fair cooperation between parents. Furthermore, mutually agreed solutions are likely to be long-lasting and, in addition to the main habitual residence of the child, they may also resolve issue to do with visiting schedule plans or contribution towards child sustenance.[32]

While the Directive only applies to cross-border disputes, it does not restrict the Member States to enact laws that cover cross-border as well as purely national mediations. Generally, one set of

[31]Council Regulation (EC) 44/2001 from 22 December 2000 on jurisdiction, recognition, and enforcement of judgments in civil and commercial matters OJ L 12 and Council Regulation (EZ) 2201/2003 from 22 November 2003 on jurisdiction, recognition and enforcement of judgments in matrimonial matters and parental responsibility matters OJ L 338.

[32] REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters COM/2016/0542 final https://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:52016DC0542&from=EN

rules for national and international mediations is desirable, as this fosters the understanding and practice of mediation and avoids arbitrarily different regulation.
In the legal systems of the EU Member States the approach to family mediation is not unique. In certain legal systems, mediation is mandatory before the court proceedings begin; in others, however, the presence of an information mediation meeting is mandatory but not mediation itself, while the third approach implies that mediation is voluntary and optional (a judge or lawyer presents to the parties the possibility of mediation, and the parties decide on that at their own discretion), and, ultimately, there is an approach that mediation is not usable. Recently, more precisely in 2018, there has been a noticeable trend of introducing mandatory mediation in the following countries: Greece, Romania and Turkey. The concept of compulsory mediation has been used since the 1990s in Sweden, Norway and Denmark. It is worth noting that the European Union recommends that mediation is not mandatory, but that it has not ruled out the possibility of making it mandatory in national law. This possibility is recognized only on condition that, by standardizing mandatory mediation, national legislators do not interfere with the right of access to a court. From this it can be inferred that the obligation to mediate does not in itself constitute a violation of Article 6 of the Convention for the Protection of Human Rights.[33]This attitude is also supported by the European Court of Human Rights. [34]

IV.CONCLUSION

The basic intent of introducing Alternative Dispute Resolution methods in EU western countries is aimed at reducing of court litigation, increasing of judicial efficiency and finding more individualizated approach to dispute resolution. An individualizated approach means understanding the conflicting interests of the parties to the conflict. The particular importance of this approach is related to the family disputes. It is appropriate to put "the best interest of the child" in this legal framework, especially if the skills and professionalism of the mediators are on high level. Hence, the mediation can serve as a true *win-win* solution for opposing parties. In other types of disputes, judges/mediators may use pre-formulated standards and other guidelines developed by the practice, as a basis for better understanding of the parties' positions. The family relations are deficient in standards because personal interests do not allow their formation. Therefore, mediation may be the best medium for their proper interpretation and resolution. The main goal of mediation is to initiate communication between the disputed parties, to indentify the issues at stake and resolve them in a way that is most acceptable for all persons involved.

Bibliography:

1. Ardeleanu Anca-Monica, "Principles of European Family Law regarding Divorce", *Acta Universitatis Danubis,* (2013).
2. Блажо Недић, Јелена Арсић, *Препоруке за развој и примену медијације у Србији,* (International Finance Corporation, Београд, 2011).
3. Irena Majstorović, "Posredovanje prije razvoda braka: hrvatsko pravo i europska riješenja", *Zbornik Pravnog fakulteta u Zagrebu,* (2007), Zagreb, 57/2.
4. Council Regulation (EC) 44/2001 from 22 December 2000 on jurisdiction, recognition, and enforcement of judgments in civil and commercial matters OJ L 12

[33]Suzana Bubić,"Ustanova porodičnog posredovanja u evropskom, njemačkom domaćem pravu", *NPR,*(2012), 25.
[34] *Menini and another v. Banco Popolare Società Cooperativa* , C-75/16.

5. Council Regulation (EZ) 2201/2003 from 22 November 2003 on jurisdiction, recognition and enforcement of judgments in matrimonial matters and parental responsibility matters OJ L 338.
6. Green Paper on alternative dispute resolution in civil and commercial law, COM (2002) 196 final, EUR-Lex portal europa.eu
7. DIREKTIVA 2008/52/EZ EUROPSKOG PARLAMENTA I VEĆA od 21. maja 2008. godine o nekim aspektima mirenja u građanskim i trgovačkim stvarima, OJ L 136/3.
8. Kirsikka Salminen, *Mediation and the Best Interests of the Child from the Child Law Perspective,* In: Nordic Mediation Research, Nylund A., Ervasti K., Adrian L. (Eds.), Springer Open, Switzerland 2018, (eBook) https://doi.org/10.1007/978-3-319-73019-6
9. Mira Alinčić, , "Europsko viđenje postupka obiteljskog posredovanja", *Revija za socijalnu politiku*, (1999) Zagreb, 6/3-4.
10. Марија Драшкић, *Коментар Породичног закона, Пракса Европског суда за људска права, Пракса Уставног суда, Пракса редовних судова (према стању законодавства од 1. децембра 2015. године)*, (ЈП Службени гласник, Београд 2016)
11. Suzana Bubić,"Ustanova porodičnog posredovanja u evropskom, njemačkom domaćem pravu", *NPR*, (2012).
12. *The Judicial Functional Review in the Republic of Serbia*, October 2014, available at: https://www.vk.sud.rs/sites/default/files/attachments/Funkcionalna%20analiza%20pravosudja%20u%20Srbiji_0.pdf
13. RECOMMENDATION (98) 1 of the Committee of Ministers to Member States on Family Mediation, http://www.coe.int/t/dghl/standardsetting/family/7th%20conference_en_files/Rec(98)1%20E.pdf
14. REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters COM/2016/0542 final https://eur-lex.europa.eu/legalcontent/HR/TXT/PDF/?uri=CELEX:52016DC0542&from=EN