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The Mediation Process – a Better Access to Justice in EU?

– Enforcement of agreements resulting from a mediation process –

Bachelor's thesis in Commercial and Tax Law (Mediation)

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Abstract

Unlike litigation and arbitration, mediation is a more informal way to settle disputes. The process has been considered to be quick, cheap and interest-based and it is said to promote amicable settlements. Yet mediation is not commonly used as a dispute resolution method in Sweden today. However, mediation as a dispute resolution method is promoted by the EU institutions and the European Parliament and the Council has adopted a directive which will secure that the EU citizens, in some cases, will have the possibility to choose extrajudicial mediation as a dispute resolution method. Until now, it has not been possible for parties to immediately seek enforcement of the content of a Swedish extrajudicial mediation settlement agreement. However, the directive will also ensure that the EU Member States provide the EU citizens with such enforcement possibilities. According to the wording of the directive, the request of enforcement will require all parties' explicit consent. This means, that if such consent is not given, the content of the agreement cannot be made enforceable. The uncertainty whether such consent will be given in the end of the process or not may contribute to people waiving to initiate a mediation process because the actual outcome of the process could be difficult to predict. For the mediation process to be considered as an equivalent way to settle disputes to the e.g. litigation proceeding, it is necessary that the parties also experience the results of the processes as equivalent. The requirement of consent is not totally abandoned in the proposed Swedish Mediation Act by which the directive shall be implemented. Instead of choosing the wording of the directive, there are other perspectives on the matter of enforcement which the Swedish legislature perhaps could be inspired by when implementing the directive.

Abbreviations

ADR	Alternative dispute resolution
Ds	Swedish Ministry Publications Series
EU	European Union
IBA	International Bar Association
MLICC	UNCITRAL Model Law on International Commercial Conciliation
NCCUSL	National Conference of Commissioners on Uniform State Laws
SCC	Stockholm Chamber of Commerce
SFS	Swedish Code of Statues
SOU	Swedish Government Official Reports
TFEU	Treaty on the Functioning of the European Union
ULC	Uniform Law Commission
UMA	Uniform Mediation Act
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
U.S.	United States of America

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I Introduction

I.1 Background

Our everyday lives are always exposed to conflicts of different variety. They are often a result of different opinions or values. Everyone knows with certainty that conflicts are unavoidable regardless how hard we try. Frequently we can solve an actual dispute but occasionally we cannot. Conflicts may occur in both personal and in professional life e.g. between partners, friends, and business-partners or between fellow passengers. People tend, at least try to, resolve the conflict if the relationship is worth working on but sometimes the dissension between the disputing parties complicates further contact. In these situations a neutral person, a mediator, may help the disputing parties to understand each other's needs and this may simply facilitate the resolution of the problem.

In modern societies it is easier to build cross-border relationships due to globalization. When building new relationships it is not necessary to leave one's native country anymore because of e.g. the Internet. It is not uncommon for commercial companies to have contacts all over the world. Cross-border relationships can also result in disputes, a major reason for this could be different languages and different cultures which may contribute to misunderstandings and dissensions.

A dispute can either be resolved between the conflicting parties themselves on a voluntarily basis or be settled by e.g. a court or an arbitration tribunal, where a final decision, binding for the parties is the result. The problems with the latter proceedings are of course that they are not only time-consuming but they also assume a great deal of money and would probably jeopardize the relationship between the parties. When there are cross-border disputes many factors have to be taken into account, it might be necessary to decide which legal system is applicable on the situation, especially when two or more legal systems claim to be applicable.

Mediation is an alternative method to settle disputes. The method is frequently used in some countries such as the United States of America (the U.S.) and less used in other countries such as Sweden.¹ The main reason why mediation is frequently used in the U.S. but still relatively uncommon in Sweden is due to the differences in the civil law and common law systems.² Why mediation has increased more rapidly in common law countries has especially to do with three identifiable factors: The slower court system, the higher costs as a

¹ See Engström, D. *Medling som tvistlösningsmetod*, Jure Förlag AB, Stockholm 2009, p. 20.

² See Lindell, B. *Alternativ tvistlösning – särskilt medling och skiljeförfarande*, Iustus Förlag AB, Uppsala 2000, p. 10.

result of the litigation proceeding in a general court and the ambition to minimize the hostility between disputing parties.³ Some jurisdictions see the mediation process as a self-evident dispute resolution method.⁴ In short, the mediation process implies that the parties engage *a neutral third person* who will help reach an acceptable settlement to both parties.⁵ If the parties experience the settlement fair, the parties more likely will respect and act in compliance with it.⁶ Mediation is generally referred to as an *alternative dispute resolution (ADR)* because it is an alternative dispute resolution method to litigation and arbitration. What kinds of dispute resolution methods the term actually covers is however somewhat diffuse and there are different opinions about the actual content of the term.⁷

The mediation process not only raises questions during the actual process e.g. “who should be our mediator?”, “what kind of confidentiality shall apply during the process and after it?” or “how are we going to split the costs for the mediation process?”. Even after the actual process other interesting questions about e.g. enforceability of the content of the reached settlement agreement arise. What effects does an agreement resulting from a mediation process actually have legally? These questions are not easily answered but it is important for the parties to know what their mediation settlement agreement really implies, especially in a cross-border situation.

1.2 Aims and Delimitations

The aim of the thesis is to examine whether the wording and thereby the practical scope of the provisions of enforceability in Article 6(1) of Directive 2008/52/EC⁸ may limit the underlying objectives of the directive in preamble 5 and to what extent these provisions will affect a forthcoming Swedish harmonization. The subsidiary aim is to examine whether there are any other perspectives in the field of enforceability of agreements resulting from a mediation process and whether the Swedish legislature could be influenced by these other perspectives when implementing the aforementioned directive.

This thesis will exclude all other disputes than pure commercial disputes, where the parties are likely to have a greater influence on the choice of dispute resolution method. When

³ See Engström, D. *Medling som tvistlösningsmetod*, p. 195-196.

⁴ See Engström, D. *Medling som tvistlösningsmetod*, p. 23.

⁵ See Jenkins, J. and Stebbings, S. *International Construction Arbitration Law*, Kluwer Law International, the Netherlands 2006, p. 60.

⁶ See Engström, D. *Medling som tvistlösningsmetod*, p. 24.

⁷ See Moses, M. L. *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press, the United States of America 2008, p. 13.

⁸ 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*, (henceforth Directive 2008/52/EC). OJ L 136, 24.5.2008. p. 3. Celex No 32008L0052.

various mediation processes are examined, only the main features of the processes will be described, this will hopefully provide the reader with an initial understanding of the processes but not with any profound knowledge about them. Additionally, to profoundly examine the actual processes are not necessary for answering the aims of the thesis. Moreover, as the thesis is meant to highlight the issue of enforceability of the content of an agreements resulting from a mediation process it has been necessary to assume that the actual content of the mediation settlement agreement at least in theory is enforceable i.e. that the agreement is not contrary to the law in which country the parties seek to enforce their settlement etcetera. The possibilities to refuse confirmation of a mediation settlement agreement and thereby prevent enforcement of the content of that agreement, shall not be examined in a broader sense, it is only briefly mentioned. Furthermore, no other ADR than mediation will be examined. Moreover, not all of the proposed amendments in the Swedish Government bill 2010/11:128⁹ will be examined because some of them are considered irrelevant for the writing of this thesis. Finally, the other perspectives on enforceability mentioned in the thesis, i.e. other than the European and the Swedish ones, are not exhausted in any way. Since finding other perspectives on enforceability is the subsidiary aim of the thesis it was not considered necessary to find all other perspectives on enforceability.

1.3 Materials and Methods

Due to the international character of mediation as an ADR, a large variety of materials have been studied. The primary source is the EU law followed by the Swedish domestic law. The internal market implies that the European Union (henceforth EU) Member States “adopt [...] measures in the field of judicial cooperation in civil matters”.¹⁰ Concerned EU legal acts will therefore form the essence of the thesis, accompanied by the Swedish domestic law such as acts, government bills, legislative histories and literature. All other sources that have been used are subordinated in one way or another and have therefore not been given the same influence. Because of a lack of Swedish literature regarding mediation, sometimes it has also been necessary to study international literature. In general the major part of the international literature on mediation is American because of the common use of mediation in the U.S.¹¹ Important to bear in mind is that the American literature to a great extent neither explains nor comments on EU law or Swedish domestic law. Because modern media-

⁹ The Swedish Government bill 2010/11:128, *Medling och förlikning – ökade möjligheter att komma överens*, of the Swedish Government (the Swedish Ministry of Justice) Stockholm 14 April 2011.

¹⁰ See Preamble (1) of Directive 2008/52/EC.

¹¹ See Engström, D. *Medling som tvistlösningsmetod*, p. 20. See also Lindell, B. *Alternativ tvistlösning – särskilt medling och skiljeförfarande*, p. 69.

tion principles have originated¹² in the U.S. the American literature could be relevant, especially in the situations where Swedish literature is limited. Other legal acts, i.e. other than European and Swedish legal acts have also been studied to be able to answer the subordinated aim of the thesis.

The *UNCITRAL Model Law on International Commercial Conciliation* (henceforth MLICC)¹³ that was adopted by the *United Nations Commission on International Trade Law* (henceforth UNCITRAL)¹⁴ e.g. is a global instrument to harmonize the mediation process between the Member States of the *United Nations* (henceforth UN).¹⁵ Presently, not all of the UN Member States are members of the UNCITRAL. Currently, Sweden is not a member of the UNCITRAL.¹⁶ However, the UN Member States are strongly recommended to incorporate the model law into their own domestic laws.¹⁷ Important to bear in mind is that the MLICC in fact is a model law and not a convention. The UN Member States “may modify or leave out some of its provisions.”¹⁸

The American *Uniform Mediation Act* (henceforth UMA)¹⁹ drafted by the *National Conference of Commissioners on Uniform State Laws* (henceforth NCCUSL)²⁰ better known as the *Uniform Law Commission* (henceforth ULC) may serve as an example of a legislation influenced by the MLICC.²¹

The Finnish *Act on mediation in civil cases in general courts*²², may serve with a European perspective on enforcement of the content of agreements resulting from a mediation process. The international legal acts inter alia provide the thesis with other existing perspec-

¹² See Lindell, B. *Alternativ tvistlösning – särskilt medling och skiljeförfarande*, p. 9.

¹³ See the MLICC with Guide to Enactment and Use (2002) at http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf, last visited 17 May 2011.

¹⁴ About the UNCITRAL at http://www.uncitral.org/uncitral/en/about_us.html, last visited 17 May 2011.

¹⁵ See the UN Member States at <http://www.un.org/en/members/index.shtml>, last visited 17 May 2011.

¹⁶ See the members of the UNCITRAL at <http://www.uncitral.org/uncitral/en/about/origin.html>, last visited 17 May 2011.

¹⁷ See the MLICC – Part two, *Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (2002)*, B. The Model Law as a tool for harmonizing legislation, paragraph 13, p. 13. See also Engström, D. *Medling som tvistlösningsmetod*, p. 174.

¹⁸ See the MLICC – Part two, *Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (2002)*, B. The Model Law as a tool for harmonizing legislation, paragraph 14, p. 13.

¹⁹ See the UMA at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm>, last visited 17 May 2011.

²⁰ About the NCCUSL or the ULC at <http://www.nccusl.org/>, see under the tag “about the ULC”, last visited 17 May 2011.

²¹ See information about adopted legislations based on the Model Law (MLICC) at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html, last visited 17 May 2011.

²² See the Finnish State’s Database of laws, decrees, international treaties and precedents (henceforth Finlex) *The Finnish Act on mediation in civil cases in general courts* or *Lag om medling i tvistemål i allmänna domstolar* (henceforth the Finnish Mediation Act) 26.8.2005/663 at <http://www.finlex.fi/sv/laki/ajantasa/2005/20050663>, last visited 17 May 2011.

tives on mediation and enforcement. Hopefully, this will show the complexity in the matters of enforceability and that there is more than one solution to this problem, which also will justify the subordinated aim of the thesis.

At first, all the sources that initially were considered relevant for the writing of this thesis were cursorily studied, thereafter all irrelevant information in the sources was sorted out. Due to the different variety and value of the sources it was initially inevitable to use a *descriptive method*²³ to create a better understanding of the hierarchy of the sources and of the topic. A better understanding of the topic facilitates both valuation but also a later *comparison*²⁴ of the sources. It is not unusual to compare the EU law with the Swedish domestic law, it comes naturally as the EU law is a large part of the Swedish domestic law. However, it could be difficult to justify why it is appropriate to seek other perspectives on mediation and enforcement since the Swedish legislature is free to implement Directive 2008/52/EC in any appropriate way, as to the results of the aforementioned directive to be achieved and when the Swedish legislature in fact is not obliged to observe any other perspectives. However, since there is not that much legislation in the area of mediation in Sweden today and because of the Swedish legislature is not bound by any direct formalities when implementing a directive it should be defensible to seek other perspectives on mediation and enforcement. In order to reach a conclusion a comparison between all the mentioned perspectives on mediation and enforcement, mentioned in the thesis, have been made.

²³ See Sandgren, C. *Rättsvetenskap för uppsatsförfattare – Ämne, material, metod och argumentation*, 2nd edition, Norstedts Juridik AB, Stockholm 2007, p. 66.

²⁴ See Sandgren, C. *Rättsvetenskap för uppsatsförfattare – Ämne, material, metod och argumentation*, p. 39.

2 The Mediation Process

2.1 A World-Wide Matter

Mediation is a growing dispute resolution method within the EU. On 21 May 2008 the European Parliament and the Council adopted Directive 2008/52/EC as a result of a long-term cooperation that began with the European Councils' meeting in Tammerfors, Finland, in 1999.²⁵ The aim was inter alia to create a better access to justice in the EU and the European Council encouraged the EU member states to create "alternative, extrajudicial procedures".²⁶ However, mediation is an ADR that started to grow for real in the U.S. as early as 1976 after *the Pound Conference*, in Minnesota.²⁷ This was a meeting of American judges and jurists, formally known as *the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*. Indicated by the name the gatherings' purpose was to examine the public dissatisfaction about "the efficiency and fairness of court systems and their administration."²⁸ As a result of the Pound conference three *Neighbourhood Justice Centers*, aiming to examine to what extent mediation could be used to resolve disputes were established. Due to the successful outcome there are a large number of centers in the U.S. today.²⁹

It is not hard to understand that mediation is an increasing dispute resolution method as it is promoted practically all over the Internet and global instruments such as the MLICC indicate that there is a widespread interest for mediation. As stated above, mediation is already a common dispute resolution method especially in the U.S. and it remains to be seen whether mediation also may increase on a European level.

2.2 General Aspects of the Mediation Process

The concept of mediation has been defined in various ways. Below, a couple of definitions of the concept of mediation:

²⁵ See Engström, D. *Medling som tvistlösningsmetod*, p. 149-150.

²⁶ The European Council in Tammerfors 15-16 October 1999, see the Conclusions of the Chairmanship at http://www.euoparl.europa.eu/summits/tam_sv.htm (see under B. A genuine European area of justice, V. Better access to justice in Europe, paragraph 30) *last visited 17 May 2011*. See also Preamble (2) and Preamble (5) of Directive 2008/52/EC.

²⁷ See Lindell, B. *Alternativ tvistlösning – särskilt medling och skiljeförfarande*, p. 9.

²⁸ Program on Negotiations at Harvard Law School, "News and Events", "Reflections on Impact of Mediation 25 Years After the Pound Conference" <http://www.pon.harvard.edu/news/reflections-on-impact-of-mediation-25-years-after-the-pound-conference/>, *last visited 17 May 2011*. See also Lindell, B. *Alternativ tvistlösning – särskilt medling och skiljeförfarande*, p. 9.

²⁹ See Lindell, B. *Alternativ tvistlösning – särskilt medling och skiljeförfarande*, p. 9.

”(a) ‘Mediation’ means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.”³⁰

Further:

“(1) ‘Mediation’ means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.”³¹

Besides the different definitions, it is quite clear that the underlying purpose of the concept of mediation often is the same regardless definition.³²

According to Moses, mediation is often referred to as an “interest-based procedure” because the mediators strive to “understand and reconcile the interests of the parties”, the opposite is a “right-based procedure” e.g. like the one in a litigation proceeding.³³ In short terms, the earlier means that the mediator seeks to find solutions based on the parties’ interests and not based on any rule. The mediator can and may not impose a decision upon the parties.³⁴ However, the mediator should, besides being a neutral party who listens to and shares information between the parties, help the parties to resolve the contentious issues and perhaps submit formal proposals on how the dispute could be resolved.³⁵ The mediator is however not to be compared with a judge. The proposal may be adopted by the parties if they find the proposal consistent with their interests, the judge on the other hand, is judging between the parties regardless of their interests.³⁶ Furthermore, a mediator should be a *neutral* and *impartial* person. Neutral in its relationship to the parties and impartial so that it does not favour either party on the other’s expense.³⁷

Normally, if a contract between two parties contains a clause in which they have agreed to participate in a mediation process if any dispute arises, the mediation process will start as it is laid down in that clause. The clause can either be detailed or in a short form.³⁸ However, the parties may also initiate a mediation process without such clause as the process is voluntary³⁹. Moreover, mediation “can occur at any time in the dispute.”⁴⁰ The first thing to

³⁰ See the definition in Article 3(a) of Directive 2008/52/EC.

³¹ See the definition in Section 2(1) of the UMA.

³² See also the definition in Article 1(3) of the MLICC, the MLICC however, uses the term “conciliation” instead of “mediation”, the actual difference between these two terms will be examined later on.

³³ See Moses, M. L. *The Principles and Practice of International Commercial Arbitration*, p.14.

³⁴ See Lindell, B. *Alternativ tvistlösning – särskilt medling och skiljeförfarande*, p. 70-71.

³⁵ See Engström, D. *Medling som tvistlösningsmetod*, p. 27.

³⁶ See Engström, D. *Medling som tvistlösningsmetod*, p. 27.

³⁷ See Lindell, B. *Alternativ tvistlösning – särskilt medling och skiljeförfarande*, p. 71.

³⁸ See Jenkins, J. and Stebbings, S. *International Construction Arbitration Law*, p. 131.

³⁹ See Lindell, B. *Alternativ tvistlösning – särskilt medling och skiljeförfarande*, p. 70.

⁴⁰ See Moses, M. L. *The Principles and Practice of International Commercial Arbitration*, p.14.

do when the process has been initiated is to choose the person who will be the mediator. By not determining the rights or the obligations of the parties, the mediator will try to get the parties to realize that it is “in their interest to settle early and cheaply” even if that might mean that the parties have to compromise. The most suitable person to be a mediator is not a person who can determine what is right or wrong, the most suitable person is a person with large interpersonal skills and knowledge about the subject matter. The person appointed as a mediator then has to identify what each party wants to get out of the mediation process and thereafter try to bring them together. A skillful mediator only focuses on the relevant parts of the subject matter and focuses on “removing the obstacles to settlement”, which especially deep-rooted disputes contain of.⁴¹

The Mediation process is said to be more “effective than simple negotiations”, this is because the mediator, working together with the parties, effect compromises by encourage “them to recognise weakness in their case” or by “suggesting grounds of agreement”.⁴²

The term “conciliation” and the term “mediation” are often used interchangeably.⁴³ However, it is necessary that the reader is aware of that there are people that not perceive these two terms interchangeably.⁴⁴ According to Engström, the terms are synonymous to each other, but he also reminds his readers about the various content of the term in different languages.⁴⁵ According to Moses on the other hand, there is a slight difference between conciliation and mediation. A conciliator offers the parties proposals on how they can resolve the dispute, if the parties reject that proposal, the conciliator will offer another one. The mediator on the other hand tries to get the parties to find solutions to the dispute on their own. However, if the parties request that the mediator shall offer them proposals on how the dispute can be resolved the mediator may do so.⁴⁶

It must be evident that even the term mediation does not mean the same thing to all people. Today there are different ideas about what mediation really implies because not all of the practitioners mediate in the same way and thereby approach mediation differently. These distinct approaches have especially grown in the U.S. where mediation is commonly used. For instance, the “Facilitative Mediation” implies that the mediator does not offer any proposals on resolving the dispute at all, nor predict a likely court decision or give ad-

⁴¹ Free from Jenkins, J. and Stebbings S. *International Construction Arbitration Law*, p. 131.

⁴² See Lew, J. D. M., Mistelis, L. A. and Kröll, S. M. *Comparative International Commercial Arbitration*, Kluwer Law International, The Netherlands 2003, paragraph 1-46, p. 14.

⁴³ See Moses, M. L. *The Principles and Practice of International Commercial Arbitration*, p. 14.

⁴⁴ See Jenkins, J. and Stebbings, S. *International Construction Arbitration Law*, p. 131.

⁴⁵ See Engström, D. *Medling som tvistlösningsmetod*, p. 26.

⁴⁶ See Moses, M. L. *The Principles and Practice of International Commercial Arbitration*, p.14.

vices or opinions on how the dispute could be resolved. In fact, it is solely the parties that are in charge of the result of the process while the mediator merely is in charge of the actual process. Consequently, the mediator's role is to facilitate the process and to ensure that the parties' settlement agreement is based on understanding and information. The "Evaluative Mediation" on the other hand is another approach to mediation. Based on a legal concept of fairness, the evaluative mediator is keener to secure the parties' legal rights than to secure their interests and needs. In order to reach a resolution, an evaluative mediator points out weaknesses in the parties' cases, predicts a likely court decision or gives advices and opinions on how the dispute could be resolved.⁴⁷

2.3 Why Enforcement

At the time of writing the agreements resulting from a voluntarily, extrajudicial, mediation process is not binding for the parties, if so only on a contractual ground. Unlike a legally binding judgment and an arbitration award such agreement cannot be enforced immediately.⁴⁸ In Sweden it is the *Swedish Enforcement Authority* (*Kronofogdemyndigheten*⁴⁹) which is the competent authority to enforce e.g. legally binding judgments and arbitration awards etcetera.⁵⁰ However, the Swedish Enforcement Authority can only execute on certain grounds, these grounds are established in Chapter 3 of the Swedish Enforcement Code. Enforcement means that the parties or at least one of them can request that the Swedish Enforcement Authority enforce *it*⁵¹, which has been considered enforceable according to Chapter 3 of the Swedish Enforcement Code.⁵² Noteworthy is that it is a criminal act to try to enforce something without any help from a competent authority.⁵³ It may be important for the mediating parties to have their agreement enforceable, especially since there is always a certain risk that one party may breach the reached agreement. These breaching problems might occur mainly in the case of voluntary, extrajudicial, mediation settlement agreements as the

⁴⁷ Free from Zena Zumeta, *Styles of mediation: Facilitative, Evaluative, and Transformative Mediation*, September 2000, at <http://www.mediate.com/articles/zumeta.cfm>, last visited 17 May 2011.

⁴⁸ See Chapter 3 Article 1 of the Swedish Enforcement Code (*Utsökningsbalk*) (the Swedish Code of Statues or SFS 1981:774). See also the Swedish Government Official Reports (SOU 2007:26) *Alternativ tvistlösning – Betänkande av Utredningen om alternativa former för tvistlösning vid tingsrätt*, Stockholm 2007, p. 66 and Engström, D. *Medling som tvistlösningsmetod*, p. 26-27.

⁴⁹ See the homepage of the Swedish Enforcement Authority at <http://www.kronofogden.se/4.7856a2b411550b99fb7800086822.html>, last visited 17 May 2011.

⁵⁰ See Chapter 1 Article 3 of the Swedish Enforcement Code.

⁵¹ The Swedish terminology of anything enforceable is *exekutionstitel* (*title of execution*), see Chapter 3 Article 1 and 2 of the Swedish Enforcement Code. With the term *exekutionstitel* means a written document that according to Swedish law may constitute grounds of enforcement, see Heuman, L. *Specialprocess – Utsökning och konkurs*, Norstedts Juridik AB, Visby 2007, 6th edition, p. 116.

⁵² See Heuman, L. *Specialprocess – Utsökning och konkurs*, p. 108.

⁵³ See Chapter 8 Article 9 of the Swedish Penal Code (*Brottsbalk*) (SFS 1962:700).

compliance of such agreements are dependent on the parties' good will, especially as these agreements only are binding on a contractual ground.⁵⁴

⁵⁴ See Engström, D. *Medling som tvistlösningsmetod*, p. 26 and p. 201.

3 Enforcement of an Agreement Resulting from Mediation

3.1 According to the EU Law

As explained in section 2.1, the European Parliament and the Council adopted Directive 2008/52/EC *on certain aspects of mediation in civil and commercial matters* in an attempt to create a better access to justice in the EU, the access should encompass both judicial and extrajudicial dispute resolution methods. Furthermore, the directive “should contribute to the proper functioning of the internal market” and the mediation services should for that reason be made more available.⁵⁵ Mediation was seen as a cost-effective and as a quick method to resolve disputes of civil and commercial matters and the process was considered to be “tailored to the needs of the parties.”⁵⁶ It was also considered necessary that those who wanted to use mediation as a dispute resolution method could “rely on a predictable legal framework”.⁵⁷

The Directive is only applicable “in cross-border disputes, to civil and commercial matters”, with the exceptions of certain enumerated disputes.⁵⁸ A cross-border dispute is defined in Article 2 of the aforementioned Directive. A dispute is cross-border if one of the parties is “domiciled or habitually resident” in another Member State than the other party or parties at the time of the initiation of the mediation process.⁵⁹

In Article 6 of the aforementioned directive there are provisions regarding enforceability of agreements resulting from mediation. First of all, Directive 2008/52/EC implies that the EU Member States have to ensure the parties, or one of them, the possibility to request enforcement of the content of a written agreement resulting from mediation. However, if it is only one of the parties who wishes to make the agreement enforceable, the other party’s *explicit consent* is required. Normally, the content of an agreement shall be made enforceable without any questions. However, the Member State, in which the request of enforcement is made, may refuse enforcement either when the content of the agreement “is contrary to the law” of that member state or when “the law of that Member State does not provide for its enforceability.”⁶⁰ There are actually similar possibilities for an EU Member State to refuse recognition of judgments from another EU Member State and thereby prevent en-

⁵⁵ Free from Preamble (5) of Directive 2008/52/EC.

⁵⁶ See Preamble (6) of Directive 2008/52/EC.

⁵⁷ See Preamble (7) of Directive 2008/52/EC.

⁵⁸ See Article 1(2) of Directive 2008/52/EC.

⁵⁹ See Article 2(1) of Directive 2008/52/EC.

⁶⁰ Free from Article 6(1) of Directive 2008/52/EC.

enforcement of such judgments. The grounds are thus few and stated in Article 34 and Article 35 of the Council Regulation (EC) No 44/2001 (of 22 December 2000) *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*.⁶¹

It is either a court or other competent authority of the Member State, in which the request of the enforcement is made, that can make the content of the agreement enforceable. The enforceability is established by a judgment, a decision or in an authentic instrument in accordance with the law of that Member State.⁶² The Member States have to inform the Commission about the courts or other authorities that are competent to receive requests of enforcement.⁶³ Directive 2008/52/EC must be implemented in the member states' domestic laws before 21 May 2011.⁶⁴

3.2 According to Present Swedish Legislation

Presently there are a few various kinds of mediation processes in Sweden, these will briefly be described in a moment. This means that a mediation process can be initiated in various ways. If the mediation process is initiated before the dispute has been brought before a general court or an arbitration tribunal the process is called extrajudicial mediation. It is not uncommon that commercial operators provide their contracts with clauses that stipulate that arising disputes shall be settled through mediation.⁶⁵ As explained in section 2.3, agreements resulting from extrajudicial mediation, as opposed to mediation in a court or in an arbitral tribunal, which will be discussed later on, are not immediately enforceable and they are only binding on a contractual ground.⁶⁶ Inevitably, what type of mediation process the parties choose does not only affect the process itself, it also affects the parties' possibilities to get the agreement enforceable. Current Swedish legislation does not meet the requirements in Article 6 nor the other provisions of Directive 2008/52/EC.⁶⁷ Therefore, the Swedish domestic law has to be reviewed so that it meets the minimum standards of the aforementioned directive. At the time of writing the legislative process is in full progress. The Swedish Government bill 2010:11/128 will probably soon be adopted by the Swedish Parliament and if it is adopted it will not only contribute to a new Swedish act in the field

⁶¹ Council Regulation (EC) No 44/2001 (of 22 December 2000) *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*. (Henceforth Brussels I Regulation) OJ L 12, 16.1.2001. p. 1. Celex No 32001R0044.

⁶² See Article 6(2) of Directive 2008/52/EC.

⁶³ See Article 6(3) compared with Article 10 of Directive 2008/52/EC.

⁶⁴ See Article 12 of Directive 2008/52/EC.

⁶⁵ Free from Engström, D. *Medling som tvistlösningsmetod*, p. 35.

⁶⁶ See Engström, D. *Medling som tvistlösningsmetod*, p. 26-27.

⁶⁷ See the Swedish Government bill 2010/11:128, under the main content of the Government bill, p. 1. See also Engström, D. *Medling som tvistlösningsmetod*, p. 199.

of mediation but also to amendments to existing legislation, more on the content of the Government bill in section 3.3.

3.2.1 Special Mediation in the Swedish District Courts

First of all it must be recalled that when an action is brought before a general court and the judicial proceeding has begun, parties tend to already have clear positions and only argue their case. This is however not particular surprising as the parties must have established their claims, their causes of action and any objections they might have before the proceeding begins, this contributes to clarifying the positions of the parties.⁶⁸ It is not impossible to change the action, but the possibility is of course limited.⁶⁹ Furthermore, it is natural that one party would like to win the case, the plaintiff, and that the other one is keen not to lose it, the defendant. Additionally, the court enters as a third party and takes over the whole responsibility for the outcome of the case.⁷⁰ According to Lindell, some of the provisions in the Swedish Code of Judicial Procedure counteract interest-based strategies, i.e. solutions that meet both parties' interests. These provisions counteract e.g. the possibilities to find compromise resolutions and the possibilities to have the action extended.⁷¹ Another thing worth noticing is that a court session, according to the provision in Chapter 5 Article 1 of the Swedish Code of Judicial Procedure, is public.

When an action has been brought before a Swedish District court, the court shall endeavour to reconcile the parties or otherwise ensure that they reach a mutual understanding, if it is appropriate to the nature of the lawsuit and to other circumstances of the case.⁷² This provision is mandatory according to the legislative history.⁷³ If the case is of an optional character and with having regard to the nature of the lawsuit, it is more appropriate to use so called special mediation (*särskild medling*) on the dispute, the court may submit the parties to appear at a conciliation session before a mediator who is appointed by the court.⁷⁴ Special mediation should only be initiated if neither party is opposed to it. Furthermore, the court appointed mediator should not be someone that the parties do not accept.⁷⁵ According to the legislative history, special mediation should be reserved for cases

⁶⁸ See Chapter 42 Articles 2, 6 and 7 of the Swedish Code of Judicial Procedure (*Rättegångsbalk*) (SFS 1942:740). See also Lindell, B. *Alternativ tvistlösning – särskilt medling och skiljeförfarande*, p. 117-118.

⁶⁹ See Chapter 13 Article 3 of the Swedish Code of Judicial Procedure.

⁷⁰ See Lindell, B. *Alternativ tvistlösning – särskilt medling och skiljeförfarande*, p. 117-118.

⁷¹ See Lindell, B. *Alternativ tvistlösning – särskilt medling och skiljeförfarande*, p. 118.

⁷² See Chapter 42 Article 17 paragraph 1 of the Swedish Code of Judicial Procedure.

⁷³ See the Swedish Government bill 1986/87:89, *om ett reformerat tingsrättsförfarande*, of the Swedish Government, Stockholm 26 February 1987, p. 207.

⁷⁴ See Chapter 42 Article 17 paragraph 2 of the Swedish Code of Judicial Procedure.

⁷⁵ See the Swedish Government bill 1986/87:89, p. 207.

that are likely to require considerable resources in the ordinary litigation proceeding. Pure legal relationship may be considered unsuitable for special mediation. However, in cases which assumes a great deal of money and where it is time-consuming to investigate the detailed positions of the parties and where the evidence is likely to be extensive, the special mediation process should be considered.⁷⁶ Furthermore, the mediator should only focus on the essential aspects of the dispute, this means that it is not possible for the mediator to achieve an absolute fairness.⁷⁷ Worth mentioning is that special mediation currently only can take place in a Swedish District court. This is evident from the construction of the Swedish Code of Judicial Procedure. Chapter 42 of the Swedish Code of Judicial Procedure only deals with litigation proceedings in the Swedish District courts. However, the SOU Committee concluded, in SOU 2007:26, that there also were good reasons to initiate special mediation in a Swedish Court of Appeal.⁷⁸ In fact, it may soon be possible to initiate mediation in a Swedish Court of Appeal, more on that in section 3.3.3.

The parties can request that the court shall confirm the content of the settlement agreement resulting from mediation according to the provisions in Chapter 42 Article 17 of the Swedish Code of Judicial Procedure.⁷⁹ This means that if the parties reach a settlement agreement in a District court and they request the court to confirm the content of that settlement agreement, the content of such agreement can be enforced by the Swedish Enforcement Authority, if the judgment in which the court confirm the content has become legally binding.⁸⁰

3.2.2 Mediation in the Arbitration Proceeding

The arbitration proceeding is a rival method to the litigation proceeding, especially when both proceedings result in a decision which can be enforced immediately.⁸¹ Arbitration is usually said to have three advantages which makes it more attractive as a dispute resolution method than the litigation proceeding: First of all, the proceeding is quick, frequently faster than an ordinary litigation proceeding. Secondly, the parties have a larger influence on which persons that will settle the dispute. Finally, the arbitration proceeding is not public unlike the litigation proceeding.⁸² Another advantage with the arbitration proceeding is that

⁷⁶ Free from the Swedish Government bill 1986/87:89, p. 207-208.

⁷⁷ See the Swedish Government bill 1986/87:89, p. 208.

⁷⁸ See SOU 2007:26 p. 102-105.

⁷⁹ See Chapter 17 Articles 1 and 6 of the Swedish Code of Judicial Procedure.

⁸⁰ See Chapter 3 Article 1 paragraph 1 (2) and Chapter 3 Article 13 of the Swedish Enforcement Code.

⁸¹ See Kwart, J. and Olsson, B. *Tristlösning genom skiljeförfarande – en handledning till lagen om skiljeförfarande*, 2nd edition, Norstedts Juridik AB, Stockholm 2007, p. 29.

⁸² See Kwart, J. and Olsson, B. *Tristlösning genom skiljeförfarande – en handledning till lagen om skiljeförfarande*, p. 31.

a Swedish arbitration award can be recognized and enforced in more countries than a Swedish judgment.⁸³ The arbitration proceeding is usually initiated by an arbitration clause in a contract between the parties. The parties may also afterwards the arisen dispute agree that the dispute shall be handed over to arbitrators, the latter is however not particularly common.⁸⁴ Moreover, the dispute has to be of an optional character.⁸⁵ If the parties have not agreed on anything else, the party who wants to request arbitration shall inform the other party of this in writing.⁸⁶ The party shall also state the subject matter that the party wishes the arbitrators to determine.⁸⁷ Furthermore, the party shall provide the other party with information about his choice of arbitrator.⁸⁸ Normally, the arbitrators shall be three to the number, however, if the parties have agreed on anything else this will apply.⁸⁹ If the parties have not decided how the arbitrators are going to be appointed, the Swedish Arbitration Act then states that the other party will choose the second arbitrator. Finally, the two by the parties appointed arbitrators will thereafter choose a third arbitrator, which will be the chairman of the arbitration tribunal.⁹⁰ Normally, when the proceeding is finished, the arbitrators will settle the dispute through a final arbitration award.⁹¹

If the parties reach a settlement agreement during the arbitration proceeding, before the arbitral tribunal has settled the dispute, the parties can request that the arbitration tribunal shall confirm the content of that agreement in an arbitration award.⁹² An award is enforceable according to the provisions in the Swedish Enforcement Code.⁹³

3.2.3 Extrajudicial Mediation According to SCC Mediation Rules

A mediation process may also be initiated under the *Stockholm Chamber of Commerce* (henceforth SCC)⁹⁴ *Mediation Rules*⁹⁵.⁹⁶ The SCC is mostly known its *Arbitration Institute*, however, the SCC does not only deal with arbitration proceedings. For instance, the *SCC Mediation*

⁸³ See Kvarn, J. and Olsson, B. *Twistlösning genom skiljeförfarande – en handledning till lagen om skiljeförfarande*, p. 32.

⁸⁴ See Kvarn, J. and Olsson, B. *Twistlösning genom skiljeförfarande – en handledning till lagen om skiljeförfarande*, p. 11.

⁸⁵ See Article 1 paragraph 1 of the *Swedish Arbitration Act (Lag (1999:116) om skiljeförfarande)*.

⁸⁶ See Article 19 paragraph 2(1) of the Swedish Arbitration Act.

⁸⁷ See Article 19 paragraph 2(2) of the Swedish Arbitration Act.

⁸⁸ See Article 19 paragraph 2(3) of the Swedish Arbitration Act.

⁸⁹ See Article 12 Article 13 the Swedish Arbitration Act.

⁹⁰ See Article 13 and Article 20 of the Swedish Arbitration Act.

⁹¹ See Article 27 paragraph 1 and 4 of the Swedish Arbitration Act.

⁹² See Article 27 paragraph 1 and 2 of the Swedish Arbitration Act.

⁹³ See Chapter 3 Article 1 paragraph 1(4) and Chapter 3 Article 15 of the Swedish Enforcement Code.

⁹⁴ About the SCC at <http://www.sccinstitute.com/hem-3/om-oss-3.aspx>, last visited 17 May 2011.

⁹⁵ See the Mediation Rules of the Mediation Institute of the Stockholm Chamber of Commerce at http://www.sccinstitute.com/filearchive/1/12753/web_A4_Medling_eng.pdf, last visited 17 May 2011.

⁹⁶ Initiate Mediation, under “This is how it works” at <http://www.sccinstitute.com/?id=23731>, last visited 17 May 2011. See also the SCC Mediation Rules, Initiation of mediation, Article 4, Request for mediation. See also Engström, D. *Medling som twistlösningsmetod*, p. 100.

Institute was established in 1999 and its *Board* is specialized in the field of mediation.⁹⁷ The SCC mediation process is extrajudicial.⁹⁸

Normally, it is the SCC Mediation Institute that appoints the mediator.⁹⁹ However, if the parties “jointly propose” a person to be the mediator, the SCC Mediation Institute shall accept that person as the mediator.¹⁰⁰ The SCC mediation process has, since its creation, not generated in a large number of mediation processes, yet.¹⁰¹ However, according to SCC: “SCC has witnessed an increasing awareness of mediation as a constructive tool for solving commercial disputes.”¹⁰² A mediation process under the SCC Mediation Rules can either be initiated by a dispute resolution clause in which the parties have agreed that the SCC Mediation Institute shall resolve an arisen dispute or under a latter agreement by the parties.¹⁰³ However, in cases where only one party makes a request for mediation, the SCC Mediation Institute, before the mediation process can take place, has to ask the other party if it agrees to participate in the mediation process.¹⁰⁴

The parties can request, in connection with their settlement agreement and with the appointed mediator’s consent, that the mediator shall be appointed as an arbitrator and thereby confirm the mediation agreement through an arbitration award.¹⁰⁵ An arbitration award is, as explained in section 3.2.2, enforceable according to the provision in the Swedish Enforcement Code.¹⁰⁶

3.3 After a Swedish Harmonization to EU Law

As said before in section 3.1, Directive 2008/52/EC shall be incorporated in the EU Member States’ domestic laws before 21 May 2011.¹⁰⁷ A directive is binding upon each Member State, but only to the extent that its results can be achieved. However, it is up to each Member State to decide how the provisions of a directive should be implemented into

⁹⁷ About the SCC Mediation Institute at <http://www.sccinstitute.com/medling-4/om-medlingsinstitutet-2.aspx>, last visited 17 May 2011.

⁹⁸ See Engström, D. *Medling som tvistlösningsmetod*, p. 35.

⁹⁹ See Article 6(1), Appointment of Mediator, of the SCC Mediation Rules.

¹⁰⁰ See Article 6(2), Appointment of Mediator, of the SCC Mediation Rules.

¹⁰¹ See Engström, D. *Medling som tvistlösningsmetod*, p. 99. See also the SCC’s own statistics over the year of 2010 at <http://www.sccinstitute.com/?id=23700>, last visited 17 May 2011.

¹⁰² See the webpage mentioned in footnote 97.

¹⁰³ See the SCC Mediation Rules, Initiation of Mediation, Article 4(1), Request of Mediation. See also Engström, D. *Medling som tvistlösningsmetod*, p. 100.

¹⁰⁴ See the SCC Mediation Rules, Initiation of Mediation, Article 4(2), Request of Mediation.

¹⁰⁵ See the SCC Mediation Rules, Termination of the Mediation, Article 12, Confirmation of a Settlement Agreement in an Arbitral Award.

¹⁰⁶ See Chapter 3 Article 1 paragraph 1(4) and Chapter 3 Article 15 of the Swedish Enforcement Code.

¹⁰⁷ See Article 12 of Directive 2008/52/EC.

its domestic law.¹⁰⁸ In extension, this means that no Member State is bound to follow the terminology and systematic of the directive if the result can be achieved in any other way. Consequently, should a Member State already have provisions, in its domestic law, that meet the minimum standards of the directive, the Member State does not have to take any further actions.¹⁰⁹ However, present Swedish domestic law must in some areas, be adjusted so that the directive is properly implemented.¹¹⁰ In Government bill 2010/11:128, presented to the Swedish Parliament, the Swedish Government has presented proposals on how Directive 2008/52/EC should be implemented in the Swedish domestic law. In the aforementioned bill it has been proposed that a new act on mediation shall be enacted and that there must be some amendments to existing legislation.¹¹¹

3.3.1 A Swedish Mediation Act – The Intended Scope

The proposed Mediation Act, if it is adopted by the Swedish Parliament, will come into force as early as in the end of the summer, on 1 August 2011.¹¹²

The new act shall only be applicable on disputes in a civil and commercial matters and the lawsuit has to be optional.¹¹³ In the case of disputes of a mixed nature, mediation only can take place in the part that is of an optional character.¹¹⁴ Furthermore, according to Article 1 paragraph 2 of the proposed Mediation Act, the act shall not apply to such mediation which occurs in a court, other authority, an arbitration board or in a foreign court.

Article 2 of the proposed Mediation Act regulates which foreign agreements resulting from mediation that can be confirmed enforceable. What determines whether such foreign agreement can be confirmed enforceable according to Article 2 is the parties' habitual residence or domicile when the mediation was initiated.¹¹⁵ Article 2 paragraph 1(1) of the proposed Mediation Act regulates the situations where both parties were habitually resident or domiciled in Sweden when the mediation was initiated. Paragraph 1(2) of the aforementioned article on the other hand, regulates the situations where one of the parties was habi-

¹⁰⁸ See Chapter 2 – *Legal Acts of the Union, Adopting Procedures and other Provisions* – Section 1 – *The Legal Acts of the Union* – Article 288 paragraphs 1 and 3 of the Treaty on the Functioning of the European Union (henceforth TFEU) – OJ C 115, 9.5.2008. p. 47. Notice No 2008/C 115/01.

¹⁰⁹ This was e.g. found in the Swedish Ministry Publications Series (Ds) 2010:39, *Medling i vissa privaträttsliga frågor*, the Swedish Ministry of Justice, 23 November 2010, p. 43.

¹¹⁰ See the Swedish Government bill 2010/11:128, p. 1.

¹¹¹ See the Swedish Government bill 2010/11:128, p. 1.

¹¹² See the Swedish Government bill 2010/11:128, p. 7.

¹¹³ See the Swedish Government bill 2010/11:128, Article 1 paragraph 1 of the proposed Mediation Act, p. 5. See also the comments to the aforementioned article, p. 81.

¹¹⁴ See the comments to Article 1 paragraph 1 of the proposed Mediation Act in the Swedish Government bill 2010/11:128, p. 81.

¹¹⁵ See the comments to Article 2 paragraph 1 of the proposed Mediation Act in the Swedish Government bill 2010/11:128, p. 82.

tually resident or domiciled in Sweden but the other party was habitually resident or domiciled in another EU Member State, however not in Denmark, when the mediation was initiated. Article 2 paragraph 2 of the proposed Mediation Act states that the habitual residence or domicile shall be determined in accordance with the provisions in Article 59 and Article 60 of the Brussels I Regulation.

3.3.2 Enforcement According to the Proposed Swedish Mediation Act

Article 7 of the proposed Mediation Act regulates who can request enforcement of the content of a settlement agreement resulting from mediation according to the aforementioned act. The article partly implements the provisions in Article 6 of Directive 2008/52/EC.¹¹⁶ Article 7 of the aforementioned act states that the parties or one of them, with the other party's or parties' consent, can request a court to confirm the content of the settlement agreement enforceable. If it is only one of the parties that request enforcement, this party must attach a certificate of the other parties consent to its request.¹¹⁷

According to Article 8 paragraph 1 of the aforementioned act, a request of enforcement shall be made to that District court in whose Court district one of the parties is habitually resident. To determine the applicant's habitual residence in paragraph 1 of the aforementioned article, it is appropriate to take guidance from Chapter 10, about competent courts, of the Swedish Code of Judicial Procedure and its case law.¹¹⁸ Moreover, the applicant will have to explain why it considers the court competent to confirm the content of the settlement agreement.¹¹⁹ Värmland District court is competent court when no other court is competent.¹²⁰ The provision in Article 8 paragraph 2 of the aforementioned act will technically only be applicable when both parties are resident in another EU Member State than Sweden when the request of enforcement is made.¹²¹

The request has to be made in written form and contain certain specified information. Furthermore, the application shall be in Swedish, unless the court finds it unnecessary.¹²²

¹¹⁶ See the comments to Article 7 of the proposed Mediation Act in the Swedish Government bill 2010/11:128, p. 85.

¹¹⁷ See the Swedish Government bill 2010/11:128, Article 9 paragraph 2(3) of the proposed Mediation Act, p. 6.

¹¹⁸ See the comments to Article 8 paragraph 1 of the proposed Mediation Act in the Swedish Government bill 2010/11:128, p. 85-86.

¹¹⁹ See the Swedish Government bill 2010/11:128, Article 9 paragraph 1(3) of the proposed Mediation Act, p. 6.

¹²⁰ See the Swedish Government bill 2010/11:128, Article 8 paragraph 2 of the proposed Mediation Act, p. 6.

¹²¹ See the comments to Article 8 paragraph 2 of the proposed Mediation Act in the Swedish Government bill 2010/11:128, p. 86.

¹²² See more about the certain information required in Article 9 of the proposed Mediation Act in the Swedish Government bill 2010/11:128, p. 6. See also the comments to the aforementioned article, p. 86-87.

A prerequisite for enforcement is that the agreement contains an obligation that can cause enforceability in Sweden.¹²³ According to the comments to Article 10 of the proposed Mediation Act, it shall *inter alia* be investigated whether the conditions given in Article 3 are met.¹²⁴ Article 3 e.g. states that any agreement resulting from mediation according to the act has to be in written form. However, the court does not have to consider if the agreement is in accordance with Swedish substantive law, yet the court has to consider whether the dispute is of an optional character or not. Regarding the obligation it e.g. may be the question of an obligation to pay a certain amount in money or give away personal estate. However, the court does not have to form an opinion of whether the asset in practice is executable or not. Agreements of pure legal relationships between parties or agreements on the contrary to the fundamental principles for the Swedish legal system shall not be confirmed enforceable.¹²⁵ If the court confirms the content of the parties' settlement agreement and the confirmation becomes legally binding, the content of the agreement will be enforceable according to the new wording of Chapter 3 Article 1 paragraph 1(2) and Chapter 3 Article 13 of the Swedish Enforcement Code, more on the amendments in section 3.3.3.

When the court shall decide whether the content of the mediation settlement agreement shall be confirmed, it is obliged to inform the parties about any decision that affects the confirmation according to Article 11 of the proposed Mediation Act.

As explained in section 3.3.1, the new act will come into force 1 August 2011. Additionally, the proposed amendments will also come into force on that date.¹²⁶ However, meanwhile the present order still applies.

3.3.3 Amendments to Existing Legislation

This thesis does not intend to examine every amendment in details, but the most important amendments will briefly be illuminated.

As explained in section 3.2.1, currently special mediation only can be initiated in a Swedish District court. In SOU 2007:26, the SOU Committee concluded that special mediation also should be initiated in a Swedish Court of Appeal and in Government bill 2010/11:128 the Swedish Government has proposed that it will be the case. If the Swedish Parliament

¹²³ See the Swedish Government bill 2010/11:128, Article 10 of the proposed Mediation Act, p. 7.

¹²⁴ See the comments to Article 10 of the proposed Mediation Act in the Swedish Government bill 2010/11:128, p. 87.

¹²⁵ Free from the Swedish Government bill 2010/11:128, the comments to Article 10 of the proposed Mediation Act, p. 87.

¹²⁶ See the Swedish Government bill 2010/11:128, p. 10, 12, 14 and 16.

adopts the amendment, the rule will be inserted in the former repealed provision in Chapter 50 Article 11 of the Swedish Code of Judicial Procedure.¹²⁷

Another amendment is that Chapter 42 Article 17 of the Swedish Code of Judicial Procedure will be given a new wording.¹²⁸ The new wording in Chapter 42 Article 17 paragraph 1 will increase the courts liabilities to act for a settlement between the parties. The court will have to raise the question of mediation between the parties, unless it is not considered inappropriate to raise such question.¹²⁹ If it is not inappropriate to act for a settlement the court may decide that such settlement will be achieved by special mediation in accordance with paragraph 2 of the aforementioned Article. What is new is that the aforementioned paragraph explicitly henceforth will require the parties' consent to special mediation.¹³⁰ Furthermore, the court shall set a time limit for the special mediation process, the time limit should be conformal to the complexity and the size of the dispute. Are there good reasons to extend that time limit the court may do so, however this possibility should be exercised with restraint as cases always should be resolved within a reasonable time.¹³¹

Finally, Chapter 3 Article 1 paragraph 1(2) of the Swedish Enforcement Code is supplemented with another title of execution. Settlement agreements resulting from a mediation process according to the new Mediation Act may, in the future, also constitute a title of execution and the content of such agreement can thereby be made enforceable. This provided that a court has confirmed the content of the agreement in accordance with Article 7 of the proposed Mediation Act. The scope of Chapter 3 Article 13 of the Swedish Enforcement Code has also broadened. The aforementioned article will henceforth also include mediation settlement agreements confirmed by a court according to the proposed Mediation Act.¹³²

¹²⁷ See the Swedish Government bill 2010/11:128, p 10. See also the comments to the proposed amendment, p. 90-91.

¹²⁸ See the Swedish Government bill 2010/11:128, p. 9-10.

¹²⁹ See the comments to the proposed amendment in Chapter 42 Article 17 paragraph 1 in the Swedish Government bill 2010/11:128, p. 89.

¹³⁰ See the comments to the proposed amendment in Chapter 42 Article 17 paragraph 2 in the Swedish Government bill 2010/11:128, p. 90.

¹³¹ See the comments to the proposed amendment in Chapter 42 Article 17 paragraph 2 in the Swedish Government bill 2010/11:128, p. 90.

¹³² Free from the Government bill 2010/11:128, the comments to the proposed amendments in Chapter 3 Article 1 paragraph 1(2) and Chapter 3 Article 13 of the Swedish Enforcement Code, p. 91-92.

4 Other Perspective on Enforcement of Agreements Resulting from Mediation

4.1 Why Define Other Perspectives on Enforcement¹³³

As established in the previous chapters, there are a large variety of alternatives in which two parties can initiate a mediation process in Sweden today. Consequently, the parties' possibilities to get their agreement enforceable will vary from case to case. As it has been explained in the previous chapters (3.1 and 3.3.2) both Directive 2008/52/EC and the proposed Swedish Mediation Act presuppose that either both parties or one of them, with the other party's explicit consent or consent, can request enforcement of the mediation settlement agreement.¹³⁴ According to Engström, the wording of Article 6 of Directive 2008/52/EC can result in that a party, by not giving its explicit consent, prevent or sabotage the enforcement of the content of the agreement. Moreover, that the parties' compliance to the agreement resulting from the mediation process probably will be submitted to the parties' good will.¹³⁵ Engström suggests that the Swedish legislature, when implementing Directive 2008/52/EC should abolish the requirement of explicit consent in Article 6(1) of the aforementioned directive.¹³⁶ However, it does not look to be the case as the wording in Article 7 of the proposed Swedish Mediation Act in fact will require the other party's or parties' consent to the enforcement.

While on a European and a Swedish level there are ways to look upon enforcement of agreements resulting from various kinds of mediation processes, there are also other ways to look upon the aforementioned matter, more on this below.

4.2 Other Perspectives

First and foremost it must be clarified that the following approaches, somehow have been rejected by the Swedish legislature. For instance, the Swedish Government found that the UNCITRAL MLICC should not be incorporated into Swedish law. Surely the provisions of the MLICC were not considered to be on the contrary to those in Directive 2008/52/EC. However, the MLICC contains no provisions about how the mediation process will effect limitation periods. Furthermore, some of the provisions in the MLICC,

¹³³ The basic idea on the somewhat limited wording in Article 6(1) of Directive 2008/52/EC originates from Engström, D. *Medling som tvistlösningsmetod*, p. 157-158 and p. 201.

¹³⁴ See Article 6(1) of Directive 2008/52/EC and Article 7 of the proposed Swedish Mediation Act.

¹³⁵ See Engström, D. *Medling som tvistlösningsmetod*, p. 201. Additionally, this is something the European Parliament and the Council actually wanted to prevent, see Preamble (19) of Directive 2008/52/EC.

¹³⁶ See Engström D. *Medling som tvistlösningsmetod*, p. 201.

e.g. those about what could constitute warrantable evidences, were not considered compatible with Swedish legal customs.¹³⁷ As to the Finnish Mediation Act, it was established in SOU 2007:26 that the courts of Sweden should not offer extrajudicial mediation unlike the courts of Finland.¹³⁸ The consideration was built upon especially two arguments: First, an extrajudicial mediation process was not considered to be a task for the Swedish courts. Secondly, it was questioned whether the Swedish State would offer parties free mediation when the dispute was not brought before a court.¹³⁹

4.2.1 The UN – The MLICC of the UNCITRAL

First of all the reader of this thesis has to be aware of that the UNCITRAL MLICC uses the term “conciliation” instead of the term “mediation”.¹⁴⁰ As explained in section 2.2 the terms could be interchangeably but not necessarily.

According to Article 14 of the MLICC, any of the parties concluded agreement settling a dispute is binding and enforceable. In the footnote to the aforementioned article it is nevertheless laid down that “an enacting State may consider the possibility of such a procedure being mandatory.” Moreover, the aforementioned article also provides the enacting States with a possibility to “*insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement*”. The comments to inter alia Article 14 is described in the Guide of Enactment and Use of the UNCITRAL Model Law.¹⁴¹ In paragraph 87 of the Guide of Enactment and Use are the reasons for Article 14. In the aforementioned paragraph it is mentioned that many practitioners “would enjoy a regime of expedited enforcement” or would, in regards of the enforceability of a settlement agreement resulting from conciliation, enjoy that such settlement agreement would be treated equivalent to or at least in similarity to an arbitral award.¹⁴² Thus, it is laid down in the comments to Article 14 that its wording represents the “smallest common denominator” because of the differences in the various legal systems of the Member States and when a total harmonization of the legislations in the various legal systems was not possible to achieve, some issues was left to the enacting States to decide in their own legislations. The general opinion when creating the

¹³⁷ Free from the Government bill 2010/11:128, p. 39.

¹³⁸ See SOU 2007:26, p. 135.

¹³⁹ See SOU 2007:26, p 136.

¹⁴⁰ See the headed reasoning in section 2.2.

¹⁴¹ See Part Two – *Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (2002)* p. 9-58. The *Guide to Enactment and Use* of Article 14 of the MLICC is found on p. 55-58.

¹⁴² See Part Two – *Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (2002)*. Comments on article 14, Reasons for expedited enforcement, paragraph 87, p. 55.

MLICC however was, that the enforcement procedure should be quick and easy and that such procedure therefore should be promoted.¹⁴³

4.2.2 The U.S. – The UMA of the NCCUSL

Even in the U.S. questions of enforcement of mediation settlement agreements are common, despite the common use of mediation as an ADR. All the conflicts that have arisen after a mediation process have contributed to “a substantial body of case law in the United States.”¹⁴⁴ A single body of law governing mediation or enforcement of mediation settlement agreements does not exist in the U.S. yet, this because there are 50 different state jurisdictions and administrations of justice.¹⁴⁵ Special rules for mediation have been established by many of these jurisdictions and “many courts have developed their own mediation procedures.” Depending on which specific state laws or court procedures that is applicable, the possibility to enforce the content of the mediation settlement agreement varies.¹⁴⁶ According to Sussman, there are e.g. states that require signed written agreement and there are states that require that the parties, in the agreement, shall confirm that they understood the significance of the agreement. Furthermore, some states provide “cooling off” periods”, meaning that a party during a certain period may withdraw its consent to a settlement etcetera.¹⁴⁷

Generally, U.S. courts apply traditional contract law principles on mediation settlement agreements as the courts view such agreements as contracts. According to Sussman, the U.S. courts take “little regard to the special nature of the negotiations in the mediation context.”¹⁴⁸ In the U.S. case *Chantey Music Publishing, Inc. v. Malaco, Inc.*¹⁴⁹ about a copyright dispute, the Mississippi Supreme Court held that the state of Mississippi favors compromises reached by way of mediation. Moreover the court held that the Mississippi courts ordinari-

¹⁴³ Free from Part Two – *Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (2002)*. Comments on article 14, Issue of enforcement of a settlement agreement left to domestic law, paragraph 88, p. 55.

¹⁴⁴ See Sussman, E. Hoguet Newman & Regal LLP, New York, the International Bar Association (henceforth IBA) Legal Practice Division, Mediation Committee Newsletter April 2006. *A brief survey of US case law on enforcing mediation settlement agreements over objections to the existence or validity of such agreements and implications for mediation confidentiality and mediator testimony* (henceforth *A brief survey of US case law on enforcing mediation settlement agreements*), at http://www.sussmanadr.com/docs/IBA_mediation_enforcement_0406.pdf, p. 32. Last visited 17 May 2011.

¹⁴⁵ See Sussman, E. *A brief survey of US case law on enforcing mediation settlement agreements*, p. 32.

¹⁴⁶ See Sussman, E. *A brief survey of US case law on enforcing mediation settlement agreements*, p. 32.

¹⁴⁷ See Sussman, E. *A brief survey of US case law on enforcing mediation settlement agreements*, p. 32.

¹⁴⁸ See Sussman, E. *A brief survey of US case law on enforcing mediation settlement agreements*, p. 32.

¹⁴⁹ *Chantey Music Publishing, Inc. v. Malaco, Inc.* 915 So 2d 1052, 1055 (Miss 2005), (henceforth *Chantey v. Malaco*), the Supreme Court of Mississippi.

ly, will enforce an agreement settling a dispute between the parties, “absent any fraud, mistake, or overreaching.”¹⁵⁰

As explained in section 1.3, the UMA is influenced by the UNCITRAL MLICC.¹⁵¹ Yet the UMA has not been adopted in all of the 50 U.S. states.¹⁵² It was because of the multiplicity of differing provisions relating to U.S. mediation processes that the UMA was drafted. The purpose of the aforementioned act was to “assure confidentiality and foster uniformity.”¹⁵³ The aforementioned act inter alia contains “standards on confidentiality in mediation”, which will effect the facts, available to the court, when it explores whether a settlement agreement should be enforced.¹⁵⁴ The confidentiality standards of the UMA is thus only intended to be minimum standards, the idea was not to replace the rules applicable in some states with more rigorous requirements of confidentiality.¹⁵⁵ According to Section 4(a) of the UMA “a mediation communication is privileged [...] and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded”, this provisions safeguards the confidentiality of mediation, however, there is no rule without exceptions.¹⁵⁶ Section 6 of the UMA provides the exceptions to privilege. The exceptions found in Section 6 of the UMA are limited and specifies were “other policy interests have greater weight.”¹⁵⁷ According to Section 6(a) (1) there is “no privilege under Section 4” when there is an agreement signed by all the parties. This means, regardless the privilege in Section 4 of the UMA, anyone of the litigant parties can, in accordance with the exception in Section 6(a) (1) of the UMA, bring the written signed agreement to a court for enforcement.¹⁵⁸

4.2.3 Finland – The Finnish Mediation Act

According to Chapter 1 Article 1 of the Finnish Mediation Act, civil cases or other contentious matters of applications can be subject to a mediation process in a Finnish general court in accordance to the provisions in the aforementioned act. According to the Finnish

¹⁵⁰ See *Chantey v. Malaco*, Discussion, paragraph 11.

¹⁵¹ See the webpage mentioned in footnote 21.

¹⁵² See which states that have adopted the UMA at <http://www.nccusl.org/Acts.aspx?title=mediation>, see under the link to the Mediation Act, last visited 17 May 2011.

¹⁵³ See Sussman, E. *A brief survey of US case law on enforcing mediation settlement agreements*, p. 36.

¹⁵⁴ See Sussman, E. *A brief survey of US case law on enforcing mediation settlement agreements*, p. 32.

¹⁵⁵ See Sussman, E. *A brief survey of US case law on enforcing mediation settlement agreements*, p. 36.

¹⁵⁶ See Sussman, E. *A brief survey of US case law on enforcing mediation settlement agreements*, p. 36.

¹⁵⁷ See Sussman, E. *A brief survey of US case law on enforcing mediation settlement agreements*, p. 36.

¹⁵⁸ See Sussman, E. *A brief survey of US case law on enforcing mediation settlement agreements*, p. 36.

Government bill RP 114/2004 rd¹⁵⁹ the aforementioned act shall provide parties with the opportunity to initiate a mediation process to resolve their dispute in a Finnish general court, despite the fact that the dispute has not become subject for a litigation proceeding, if the dispute is due to a legal relationship that could be dealt with as a civil case and thereby be subject for litigation. However, the aforementioned act will only apply to disputes in a civil and commercial matter.¹⁶⁰ It is not entirely clear from the wording in Chapter 1 Article 1 of the aforementioned act in which kinds of civil cases a mediation process could be used. However, it appears in the Government bill that mediation can be initiated in all types of civil cases, even those which are mandatory to their nature.¹⁶¹ Through mediation processes amicable agreements can be reached.¹⁶² It was stated in the aforementioned Finnish Government bill that mediation in this way could be seen as an alternative to litigation as the decision is a result of an administration of justice.¹⁶³

Chapter 1 Article 3 of the aforementioned act regulates under which conditions a dispute can be subject to a mediation process. Firstly, the matter has to be suitable for mediation. Secondly, it must be appropriate with a mediation process with regard to the claims of the parties'. To form an opinion whether mediation is appropriate or not, it is suitable to make an assessment of to which extent the parties may agree on the matter. If the parties can agree on most of the matter, a mediation process most likely will promote the possibility to reach an agreement and a mediation process may therefore be appropriate.¹⁶⁴ According to the Government bill it may also be advantageous to use mediation in civil cases of a mandatory nature as it may be possible to harmonize the parties' position and draw guidelines for a solution.¹⁶⁵ If the matter shall be considered suitable for mediation, the parties' positions cannot already have been laid down, in such cases it might be difficult to achieve an agreement through a mediation process.¹⁶⁶ Even if the matter is found suitable for mediation, it might not be appropriate in general to use a mediation process on the dispute.¹⁶⁷ The Finnish Government bill RP 114/2004 rd gives some examples of these kinds of situations: Firstly, a mediation process should not be initiated if one party's rights under the law

¹⁵⁹ See the Finnish Government bill RP 114/2004 rd, *Regeringens proposition till Riksdagen med förslag till lagstiftning om medling i tvistemål och stadfästelse av förlikning i allmänna domstolar*, at Finlex <http://www.finlex.fi/sv/esitykset/he/2004/20040114.pdf>, last visited 17 May 2011.

¹⁶⁰ Free from the Finnish Government bill RP 114/2004 rd, p. 27.

¹⁶¹ See the Finnish Government bill RP 114/2004 rd, p. 27.

¹⁶² See Chapter 1 Article 2 of the Finnish Mediation Act.

¹⁶³ See the Finnish Government bill RP 114/2004 rd, p. 28.

¹⁶⁴ See the Finnish Government bill RP 114/2004 rd, p. 28.

¹⁶⁵ See the Finnish Government bill RP 114/2004 rd, p. 28.

¹⁶⁶ See the Finnish Government bill RP 114/2004 rd, p. 29.

¹⁶⁷ See the Finnish Government bill RP 114/2004 rd, p. 29.

is delayed or prevented, particularly as a result of the opponent's reprehensive conduct. Secondly, a mediation process should not be initiated when the parties are not to be considered equally, especially if one of the parties interest are not properly guarded. Thirdly, a mediation process should not be initiated when the matter is so unstructured that neither any claims, causes of action nor legal elements cannot be defined. Finally, a mediation process should not be initiated when the economic interest is considered to be insignificant in comparison to the treatment of the matter.¹⁶⁸

According to Chapter 2 Article 4 paragraph 1 of the Finnish Mediation Act, disputes that have not yet been subject for a litigation proceeding thus can be subject for a mediation process in a Finnish general court. It is either one or both of the parties that, in writing, requests that the dispute shall be resolved through a mediation process in a Finnish general court. Both parties must however agree to initiate a mediation process.¹⁶⁹ In the application for initiating a mediation process, the party or both of them have to specify what the dispute is all about and why they are of different opinions, they also have to explain why the dispute is considered suitable for mediation.¹⁷⁰ Such application shall not be of the same nature as an application for a summons, the application shall rather be brief and neutral. The application must however be so specific that the Finnish general court can make an opinion about whether dispute falls under the scope of the Finnish Mediation Act or not. Furthermore the court has to been able to determine whether the parties' different opinions are of a legal interest.¹⁷¹

In Finland, a mediation process can also be initiated when the dispute already is subject for litigation.¹⁷² According to Chapter 2 Article 4 paragraph 2 of the Finnish Mediation Act, an application to initiate mediation when the dispute already is subject for litigation may be formulated freely, as the application for a summons already contains information about the matter and the matters of dispute.¹⁷³ The parties can apply for mediation until the preparatory proceedings is finished.¹⁷⁴ The application is either made by one of the parties or both of them.¹⁷⁵ However, a mediation process cannot be initiated if not all of the parties agree on initiating a mediation process.¹⁷⁶ Moreover, decisions about initiating a mediation

¹⁶⁸ Free from the Finnish Government bill RP 114/2004 rd, p. 29.

¹⁶⁹ See Chapter 2 Article 4 paragraph 3 of the Finnish Mediation Act.

¹⁷⁰ See Chapter 2 Article 4 paragraph 1 of the Finnish Mediation Act.

¹⁷¹ Free from the Finnish Government bill RP 114/2004 rd, p. 30.

¹⁷² See Chapter 2 Article 4 paragraph 2 of the Finnish Mediation Act.

¹⁷³ See the Finnish Government bill RP 114/2004 rd, p. 31.

¹⁷⁴ See the Finnish Government bill RP 114/2004 rd, p. 31.

¹⁷⁵ See Chapter 2 Article 4 paragraph 2 of the Finnish Mediation Act.

¹⁷⁶ See Chapter 2 Article 4 paragraph 3 of the Finnish Mediation Act.

process can only be taken by the concerned Finnish general court. This means that a decision of the parties to initiate a mediation process cannot be legally binding for the court.¹⁷⁷

According to Chapter 2 Article 8 paragraph 1 of the Finnish Mediation Act, a mediation settlement agreement between the parties can be confirmed by a courts' ruling. In the aforementioned Finnish Government bill it is said that if the mediation process shall result in a permanent solution between the parties and meet the expectations on the legal security, a mediation settlement agreement must be made confirmable, binding for the parties and enforceable.¹⁷⁸ According to Chapter 2 Article 8 paragraph 2 of the Finnish Mediation Act, the provisions of mediation settlement agreements and the confirmation of them shall meet the legal provisions of mediation settlement agreements as a result of a litigation proceeding.¹⁷⁹ The latter legal provisions are found in Chapter 20 of the Finnish Code of Judicial Procedure^{180 181}. A mediation settlement agreement as a result of a litigation proceeding is enforceable in accordance with the provisions in Chapter 2 Article 12 of the Finnish Enforcement Code^{182 183}. It is clear from the aforementioned Article that the mediation settlement agreement is enforced as a legally binding judgment.

¹⁷⁷ See Chapter 2 Article 4 paragraph 4 of the Finnish Mediation Act. See also the Finnish Government bill RP 114/2004 rd, p. 31.

¹⁷⁸ See the Finnish Government bill RP 114/2004 rd, p. 37.

¹⁷⁹ See also the Finnish Government bill RP 114/2004 rd, p. 37.

¹⁸⁰ See the Finnish *Code of Judicial Procedure (Rättgångs Balk)* 1.1.1734/4, Chapter 20 26.8.2005/664 at Finlex <http://www.finlex.fi/sv/laki/ajantasa/1734/17340004000?search%5Btype%5D=pika&search%5Bpika%5D=R%C3%A4tteg%C3%A5ngs%20balk>, last visited 17 May 2011.

¹⁸¹ See also the Finnish Government bill RP 114/2004 rd, p. 37.

¹⁸² See the Finnish *Enforcement Code (Utsökningsbalk)* 15.6.2007/705 at Finlex <http://www.finlex.fi/sv/laki/ajantasa/2007/20070705?search%5Btype%5D=pika&search%5Bpika%5D=uts%C3%B6kningslag>, last visited 17 May 2011.

¹⁸³ See also the Finnish Government bill RP 114/2004 rd, p. 37.

5 Summary

5.1 The Author's Reflections on the Aim of the Thesis

The aim of this thesis was to examine whether the wording and the practical scope of the provisions of enforceability in Article 6(1) of Directive 2008/52/EC might limit the underlying objectives of the directive in preamble 5 and to what extent these provisions would affect a forthcoming Swedish harmonization.

First and foremost, it is necessary to remind the reader of the objectives of the aforementioned directive. The primary attempt was to create a better access to justice in the EU, the access should encompass both judicial and extrajudicial dispute resolution methods. Additionally, mediation services should be made more available and thereby contribute to a proper functioning of the internal market.

Through Directive 2008/52/EC the EU institutions *inter alia* wished to expand the use of mediation in extrajudicial situations, especially as the procedure is cost-effective, quick and tailored to the needs of the parties. I believe that this is something that especially commercial operators most likely will appreciate. In theory, the fact that these operators will be offered an alternative dispute resolution method to litigation and arbitration, in which they can save time, money and escape the eyes of the public, should be welcomed with open arms. Within the realm of civil and commercial matters it might be the best for the parties to reach a consensus, a fair deal to both parties should probably in the long run foster a future relationship between the parties.

When two parties cannot resolve their dispute because of the dissension between them has become too large, they have to rely on some form of dispute resolution method guaranteed by the law. Their choice of method will naturally be submitted to result the parties wish to achieve and the continuing relationship between the parties is probably dependent on the actual outcome of that dispute resolution method. If the parties wish to preserve the relationship, they will likely choose a dispute resolution method that as little as possible affects the already strained relationship. Mediation is most likely such a method, especially as the parties themselves have the ability to, relatively freely, govern the mediation process and since there is no direct element of coercion affecting the parties. I believe that unnecessary coercions never foster relationships. However, even if the parties have a desire to continue their relationship and for that matter choose to initiate a mediation process, there is always an uncertainty whether the other party actually will comply with the agreement

settling the dispute. Until now, agreements resulting from an extrajudicial mediation process cannot immediately be made enforceable in Sweden.

Consider this scenario, two parties choose to initiate a mediation process according to the provisions of the proposed Swedish Mediation Act, mediation takes place over a few months and a mediation settlement agreement is reached. However, when the parties fulfill their part of the agreement, one of them ignores to fulfill his part. The other party cannot apply for enforcement of the consent of their agreement and thereby force compliance since Article 7 of the proposed Swedish Mediation Act requires the other party's or parties' consent. The result of this is a deadlocked situation. The only option left, for the party who wishes to evocate fulfillment of the agreement, is to bring an action against the other party before a Swedish District court and hope that the court will rule to his advantage, however, there are no guarantees that the court actually will do so. In my opinion, the uncertainty whether an extrajudicial mediation settlement agreement can be made enforceable will probably not encourage parties to initiate a mediation process according to the provisions in the proposed Swedish Mediation Act. I believe, for a mediation process according to the proposed Swedish Mediation Act to be considered equivalent to the litigation proceeding or the arbitration proceeding, the result of the mediation process also must be considered equivalent to the results of the litigation proceeding and the arbitration proceeding. Uncertainty is something that usually does not attracts people, especially when a large amount of money is at stake. Additionally, the fact that the whole process until a final solution, which content is enforceable, might get longer than expected probably would not be attractive either. Mediation could be an effective and efficient dispute resolution method suitable for disputes in civil and commercial matters, but the uncertainty of the results of this method potentially overshadows its advantages.

On the other hand, an agreement between two parties is indeed binding but it does not necessarily mean that the agreement is in accordance with Swedish legal principles or Swedish law. It might jeopardize the legal system and the legal security if agreements contrary the Swedish legal principles are confirmed. However, Directive 2008/52/EC provided the EU Member States with a possibility to deny enforcement of any agreement that e.g. was contrary to the law of that Member State. There is a subtle distinction between these two interests, preserving the legal principles and the legal security and promoting the use of mediation as a dispute resolution method by giving the parties an opportunity to get the content of their extrajudicial mediation settlement agreement enforceable.

As I see it, if the parties do not experience that the mediation process will be a method that is as good as the litigation proceeding or the arbitration proceeding, the objectives of Directive 2008/52/EC cannot be achieved. Consider this, why would a party want to choose an untried and uncertain process in front of a proven and effective process with known results? In my opinion, explicit consent or mere consent therefore might cause undesired effects, how big the difference between explicit consent and a mere consent actually is going to be remains to be seen. I believe that it would be stretched too far to require all parties' consent to initiating a mediation process and thereafter require all parties' consent to the request of the enforcement.

I believe that it is necessary to eliminate the uncertain conditions around the enforcement of mediation settlement agreements in Article 7 of the proposed Swedish Mediation Act before the Swedish legislature passes the Swedish Government bill 2010/11:128. A dispute resolution method must be effective and efficient in order to be considered functioning. In my opinion, an agreement resulting from an extrajudicial mediation process settling a dispute must be considered final and irreversible. After all, in a mediation process the parties have a larger acting space than in e.g. the litigation proceedings or the arbitration proceedings and they are free to conclude an agreement and they are free to abstain.

5.2 The Author's Reflections on the Subsidiary Aim of the Thesis

The subsidiary aim of this thesis was to examine whether there were any other perspectives in the field of enforceability of agreements resulting from a mediation process and whether the Swedish legislature could be influenced by these other perspectives when implementing Directive 2008/52/EC. Since there are no formal requirements when implementing a directive, the Swedish Mediation Act could to be influenced by other perspectives on enforceability of mediation settlement agreements other than the European. The different perspectives mentioned in the previous chapter will be commented in the following sections.

5.2.1 Reflections on the UN Perspective

In my opinion the SOU Committee rejected an incorporation of the UNCITRAL MLICC too quickly due to some of the provisions in the MLICC. Indeed, the SOU Committee found that some of the provisions were not considered compatible with Swedish legal customs, however, the MLICC is merely a model law and the incorporating states are entitled to modify or leave out some of its provisions. Therefore, in my opinion nothing speaks against that the Swedish Mediation Act also could be influenced by the MLICC as the in-

compatible provisions in the MLICC easily could be excluded or rewritten so that they will be adapted to Swedish legal customs. Even though it was impossible for the creator of the MLICC to harmonize the laws of all UNCITRAL Member States, the basic idea which was manifested in Article 14 of the MLICC was that mediation settlement agreement would be binding and enforceable. I believe that the Swedish Mediation Act has to have the same approach to mediation settlement agreements. However, the advantages of the MLICC are also the disadvantages. The MLICC is merely a model law and the incorporating states are to a great extent free to adapt the provisions of the MLICC to their own domestic laws in any preferred way. This might actually decrease the intended harmonization. If the incorporation states influence their domestic laws without adapting the provisions in the MLICC any further, the MLICC has potential to become a well known legal framework. This would most likely create a certain degree of recognition and reliance among its practitioners which in extension probably also could foster cross-border mediation processes.

5.2.2 Reflections on the U.S. Perspective

As explained above, the UMA is not superior to the U.S. States' laws, however, the purpose of the UMA was to foster uniformity and assure confidentiality in the mediation process. Normally, anything mentioned during a mediation process is considered to be confidential. Actually to break this confidentiality, so that a court can confirm the content of the agreement enforceable, requires a written agreement signed by all parties. A party's desire to apply for enforcement of the content of a mediation settlement agreement is thereby subordinated to the confidentiality surrounding the mediation process. In my opinion, confidentiality might be one of the strongest justification grounds when denying enforcement of the content of a mediation settlement agreement. Confidentiality might justify the wording in Article 6(1) of Directive 2008/52/EC and the wording in Article 7 of the proposed Swedish Mediation Act. Maybe, the confidentiality part of the mediation process was the only reason why a party agreed to initiate a mediation process.

It was shown in section 4.2.2, that some jurisdictions have established special rules for mediation. Some jurisdictions require signed written agreement, which perhaps is the best given that oral agreements are difficult to prove. However, both Directive 2008/52/EC and the proposed Swedish Mediation Act already require that the content of an agreement has to be in written form to be enforceable. Other jurisdictions require a confirmation by the parties that they actually have understood the significance of the agreement. In my opinion, this is a very interesting requirement that also could be used in the Swedish Mediation

Act. As the parties would have to confirm that they have understood the significance of their agreement it might be difficult for them to argue differently on later phase, after such confirmation it might be difficult to claim the opposite just to prevent enforcement of a mediation settlement agreement. If one of the parties is unsure about the significance of the agreement, this party will not have to give such confirmation. However, this might contribute to deadlocked situations. By not confirming one's understanding, a party would be able to prevent or sabotage enforcement of the mediation settlement agreement. Finally, some jurisdictions provide a cooling off period in which the parties get a chance to withdraw an already given consent to a settlement. In my opinion, normally this would be a fair possibility for the parties. However, such possibility naturally will mean that the parties are free to withdraw any given consent during a certain period. I believe that this cooling off period could have a deterrent effect on those who wish to initiate a mediation process, if the counterpart suddenly could change his mind.

5.2.3 Reflections on the Finnish Perspective

In my opinion, the Finnish perspective on mediation and enforcement of mediation settlement agreements is exemplary. I believe that the Finnish legislature has shown that Finland is willing to give mediation as a dispute resolution method a decent chance to become an equivalent alternative to the litigation proceeding and the arbitration proceeding. The Finnish Act on mediation in civil cases in general courts does not require all parties' consent when there is only one of the parties requesting enforcement of the mediation settlement agreement. I believe that this gives a clear picture on the legal situation, if all parties in a mediation process are aware of that it is enough with one party requesting enforcement, this might prevent "non-serious" attempts to mediation where the dispute still might end up in court. The parties would therefore more likely feel comfortable with their choice of dispute resolution method. In my opinion, this would foster an increased use of the mediation process.

5.3 Conclusions

I believe that the wording and thereby the practical scope of Article 6(1) of Directive 2008/52/EC probably will limit the underlying objectives of the aforementioned directive in preamble 5. Furthermore, that the wording in Article 6(1) of Directive 2008/52/EC might prevent one party to request enforcement of a mediation settlement agreement, because it also will require the explicit consent of the rest of the parties. The uncertainty

whether the other party will give such consent might be deterrent to some people. If a person because of that uncertainty waives a mediation process, the objectives stated in preamble 5 of the aforementioned directive cannot be achieved. The Swedish Government did not totally abandon the wording of Article 6(1) of the aforementioned directive when creating Government bill 2010/11:128 and therefore Article 7 of the proposed Swedish Mediation Act also require the consent from the rest of the parties. Because of the uncertainty that arises when two parties do not know whether any reached agreement settling a dispute could be enforceable or not I believe that there will not be a significant increase of the use of mediation as a dispute resolution method, not even after a Swedish harmonization.

Since the EU Member States are not bound by a directive's terminology or systematic but only obliged to make sure that the results of a directive are achieved, I believe that the Swedish Government should have taken more notice of other existing perspectives on enforceability when creating the proposed Mediation Act. There are a lot of different interesting perspectives on enforcement of mediation settlement agreements and some of them could be useful in the Swedish Mediation Act.

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