

# MEDIATION IN THE CATALAN LEGAL SYSTEM: SPECIAL REFERENCE TO ITS GUIDING PRINCIPLES

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I.	INTRODUCTION.....	453
II.	REGULATORY FRAMEWORK.....	455
III.	SOME ESSENTIAL ASPECTS OF THE CURRENT LAW BASED UPON THE CATALAN LAW ON MEDIATION IN PRIVATE MATTERS, AND THE STATE LAW ON MEDIATION IN CIVIL AND COMMERCIAL MATTERS .....	460
	A. <i>The Concept of Mediation</i> .....	460
	B. <i>Goal of Mediation</i> .....	461
	C. <i>Guiding Principles of Mediation</i> .....	462
	1. Principle of Voluntariness.....	463
	2. Principles of Impartiality and Neutrality.....	464
	3. Principle of Confidentiality.....	466
	4. Personal Nature .....	467
	5. Principle of Good Faith.....	468
	6. Other Guiding Principles of Mediation.....	469
	7. The Agreements Resulting from Mediation, Judicial Efficacy, and Enforceability.....	469
	8. Mediation and the Regulatory Statutes of Limitations and Expiration .....	471
IV.	CONCLUSION .....	471

## I. INTRODUCTION

Until the publication of the Catalan Family Mediation Law (CFML),<sup>1</sup> France was the only European country with a specific law in effect regulating family mediation.<sup>2</sup> As such, the CFML presented substantial

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1. See generally Ley 1/2001, de 15 de marzo, de Mediación Familiar de Cataluña [Law 1/2001, of March 15, of Catalan Family Mediation Law] (B.O.E. 2001, 7380) (Spain).

2. See generally Loi 95-125 du 8 février 1995 relative à l'Organisation des Juridictions et à la Procédure Civile, Pénale et Administrative [Law 95-125 on the Organization of the Courts and the Civil,

innovation in the field of family law at a time in which the rest of the Spanish State did not have a generalized practice of mediation. Subsequent to the publication of the CFML, the practice of mediation has been subject to development through diverse, autonomous norms.<sup>3</sup>

This article will analyze the coexistence of existing regulation and the current Catalan Law on Mediation in Private Matters (CLMPM) with the general mediation law currently contained in the Spanish Law on Mediation in Civil and Commercial Matters (SLMCCM), which bridged the gap in the field at that time.<sup>4</sup> The purpose of the CLMPM is to establish the principles that guarantee the proper exercise of mediation administered by a department that is competent in civil law.<sup>5</sup> The SLMCCM, pursuant to its Statement of Purpose, incorporates Directive 2008/52/EC of the European Council into Spanish law.<sup>6</sup> In this context, the SLMCCM as expressed by its Statement of Purpose, incorporates directive 2008/52/EC<sup>7</sup> into Spanish law, and, at the same time, adapting this regulation to the requirements imposed by the modifications to the Civil Code and the Code of Civil Procedure.<sup>8</sup> These laws previously regulated separation and divorce matters. The SLMCCM also regulates a general regimen applicable to all mediation taking place in Spain, purporting to have legally binding and

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Criminal and Administrative Procedure], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Feb. 9, 1995, Part II, Ch. 1.

3. See generally Catalan Law on Family Mediation (B.O.E. 2001, 7380); See generally Ley 15/2009, de 22 de Julio, de Mediación en el Ámbito del Derecho Privado [Law 15/2009, of July 22, of Mediation in Private Matters] (B.O.E. 2009, 13567) (Spain) (The Catalan Law on Family Mediation, was subsequently developed by Law 15/2009); see Decret 135/2012, de 23 d'octubre, pel qual s'aprova el Reglament de la Llei 15/2009, del 22 de juliol, de Mediació en l'Àmbit Privat [Decree 135/2012, of Oct. 23, approving Law 15/2009, of Jul 22, on Mediation in Private Matters] (D.O.G.C. 2012, 6240) (Spain).

4. Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 13567) (Spain); see generally Ley 15/2009, de 22 de Julio, de Mediación en el Ámbito del Derecho Privado [Law 15/2009, of July 22, of Mediation in Private Matters] (B.O.E. 2009, 13567) (Spain) (There was no general law on mediation in Spain until this law came into effect.).

5. See Law on Mediation in Private Matters (B.O.E. 2009, 13567) at 70788 (Spain).

6. Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 13567) at 49224 (Spain).

7. Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 13567) at 49224 (Spain).

8. See generally *id.*; Ley 9/1998, de 15 de Julio, del Código de Familia, Disposición Final 3a [Catalan Family Code, Third Final Disposition] (D.O.G.C. 1998, 2687) (Spain) (Through the enactment of the Law of Mediation in Cataluña, the legislator fulfilled the compromise derived from the 3rd Final Disposition of the law 91/1998, of July 15, of the Catalan Family Code.).

circumscribed effect.<sup>9</sup> However, this law applies only to civil and commercial matters<sup>10</sup> achieved by following the provisions of the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on International Commercial Arbitration.<sup>11</sup>

## II. REGULATORY FRAMEWORK

The CFML is the immediate predecessor to the autonomous regulation currently in effect.<sup>12</sup> Until the publication of such a norm, as previously stated, only France had a law in effect on such matters.<sup>13</sup> As such, the Catalan Parliament complied with recommendation number twelve of the Committee of Ministers of the European Council.<sup>14</sup> This recommendation highlighted the necessity for developing mediation as an instrument to facilitate peaceful resolution of conflicts arising in the family law field.<sup>15</sup>

The CFML advanced substantial innovations in the field of family law at a time when Spain did not have a generalized mediation practice.<sup>16</sup> Thus, subsequent to the publication of the Catalan norm, the practice of mediation was the object of development through diverse, autonomous regulations.<sup>17</sup> Notwithstanding, the application of the CFML<sup>18</sup> along with the publication of diverse laws and recommendations both in Spain and Europe<sup>19</sup> made it

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9. *See generally* Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 13567) (Spain).

10. *Id.* art. 2.1.

11. *See generally* U.N. Int'l Comm. on Int'l Trade Law, Model Law on Int'l Commercial Arbitration, U.N. Sales No. S.05.V.4 (2004).

12. *See generally* Family Mediation Law of Cataluña (B.O.E. 2001, 7380).

13. *Id.*

14. Council Committee of Ministers Recommendation No. R (98)1 of 21 Jan. 1998, 1998 O.J. at 15. [*hereinafter* Recommendation 98(1)].

15. *See id.* at 14.

16. *See generally* Family Mediation Law of Cataluña (B.O.E. 2001, 7380).

17. *See generally* Catalan Law on Family Mediation (B.O.E. 2001, 7380); *see generally* Ley 15/2009, de 22 de Julio, de Mediación en el Ámbito del Derecho Privado [Law 15/2009, of July 22, of Mediation in Private Matters] (B.O.E. 2009, 13567) (Spain) (The Catalan Law on Family Mediation, was subsequently developed by Law 15/2009.); *see* Decret 135/2012, de 23 d'octubre, pel qual s'aprova el Reglament de la Llei 15/2009, del 22 de juliol, de Mediació en l'Àmbit Privat [Decree 135/2012, of Oct. 23, approving Law 15/2009, of Jul 22, on Mediation in Private Matters (D.O.G.C. 2012, 6240) (Spain).

18. *See generally* Family Mediation Law of Cataluña (B.O.E. 2001, 7380).

19. *See generally* Council Directive (EC) No. 2008/52 of 21 May 2008, 2008 O.J. (L 136/3); *see generally* Commission Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, COM (2002) 196 final (Apr. 19, 2002).

advisable to update the Catalan norm to widen the initially narrow scope of its application.<sup>20</sup>

In this context, the CLMPM<sup>21</sup> emerged as a necessity because previously existing law did not adapt to the aforementioned circumstances. Further, Directive 2008/52/EC of the European Council<sup>22</sup> highlighted novelties in the area of civil and commercial litigation that opened the door to the adaptation of the then existing norms in member states to new societal demands. Thus, the CLMPM<sup>23</sup> did not undertake to regulate mediation as a whole.<sup>24</sup> This law undertook to establish principles that guarantee the proper exercise of mediation administered by the competent administrative body. The CLMPM regulates certain instruments of support such as the principle of confidentiality and the specialization of mediators.<sup>25</sup>

In this way, the Statement of Purpose of the CLMPM maintains the following:

The will to avoid the judicialization of certain conflicts not only has the goal of mainstreaming the work of the justice tribunals, but also, fundamentally of making possible the obtainment of self-managed, effective, and responsible solutions to conflicts that would ensure the subsequent adherence to the agreements that would preserve the future relationship of the parties. This means that the central tenet of the mediation system is linked to the technical preparation of the mediator. As such, specialization of the mediators must be maximized, in conjunction with the basic principles of the system: confidentiality, impartiality, neutrality and the mechanisms of connection and cooperation with the tribunals to approve the agreements in matters that require jurisdictional control.<sup>26</sup>

Additionally, in order to overcome sectorial resistance, the law maintains that “[t]he function of advocacy in the mediation procedure is to

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20. *See generally* Family Mediation Law of Cataluña (B.O.E. 2001, 7380); *see generally* Catalan Law on Mediation in Private Matters (B.O.E. 2009, 13567).

21. *Ley 15/2009, de 22 de Julio, de Mediación en el Ámbito del Derecho Privado* [Law 15/2009, of July 22, of Mediation in Private Matters] (B.O.E. 2009, 13567) (Spain).

22. *See generally* Council Directive (EC) No. 2008/52 of 21 May 2008, 2008 O.J. (L 136/3).

23. *See generally* Family Mediation Law of Cataluña (B.O.E. 2001, 7380).

24. Waiting for the enactment of a national law that would develop the related subjects to the institution and that corresponded to the national legislature.

25. Catalan Law on Mediation in Private Matters (B.O.E. 2009, 13567) at ch. 2.

26. *Id.* at 70785–86.

guarantee the preservation of the rights of citizens,” and concludes with the following:

The dynamic relations between mediation and the judicial process are the essential nucleus of the directive about certain aspects of mediation in civil and commercial matters. In this sense, the voluntariness of the system for the parties is not an obstacle for this law to establish the rights of the parties and the accompanying obligation to attend an informative session to be set by the competent jurisdictional body [. . .]. This law voluntarily respects the contents of Law 1/2001 and has as its objectives: widening the reach of mediation to certain conflicts in the field of civil [law] characterized by the necessity of the parties to maintain a viable relationship in the future, dissipate any doubt about the effect of family conflicts subject to mediation, and lastly, to introduce certain systematic and technical improvements. It must be noted that what is established by the aforementioned directive, is the introduction of mediation in a general way to all fields of civil and commercial conflicts, what makes necessary the approval of a general mediation law. While such law is not approved, it is necessary to organize the existing regulation and widen its scope to new fields [. . .].<sup>27</sup>

As such, the entry into effect of the CLMPM would require the subsequent approval and entry into effect of a general mediation law. This necessity ultimately was met by the entry into effect of the SLMCCM,<sup>28</sup> which bridged the existing gap in the field.

The latter norm, as expressed by its Statement of Purpose, incorporates directive 2008/52/EC<sup>29</sup> into Spanish law, while at the same time adapting this regulation to the requirements imposed by the modifications to the Civil Code and the Code of Civil Procedure.<sup>30</sup> These laws previously regulated separation and divorce matters. The SLMCCM<sup>31</sup> also regulates a general regimen applicable to all mediation transpiring in Spain and purporting to have a legally binding and circumscribed effect; however, this

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27. *Id.* at 10787.

28. Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 9112) at 49224-25 (Spain).

29. *Id.* at 49224.

30. *See generally* Law Modifying the Civil Code and the Code of Civil Procedure in Separation and Divorce Matters (B.O.E. 2005, 11684)(Spain).

31. *See* Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 9112) at 49224–25 (Spain).

law applies only to civil and commercial matters<sup>32</sup> achieved by following the provisions of the UNCITRAL Model Law on International Commercial Arbitration.<sup>33</sup>

The SLMCCM<sup>34</sup> seeks primarily to establish the mechanisms of coordination among mediation and state jurisdiction, as well as ensuring the rights of citizens, placing mediation as a system of alternative dispute resolution that complements the judicial process. In this sense, the law establishes mediation as an alternative to the judicial process and to arbitration, purporting to establish a clear demarcation among these systems.<sup>35</sup> Thus, the institution of mediation is based upon the intervention of a neutral professional to facilitate the resolution of conflict by the parties in an equitable manner, permitting the preservation of the underlying relationships and retaining control of the conflict. This control is reflected in the Statement of Purpose of this law, which maintains the following:

Despite the development in Spain of recent years, in the ambit of the Autonomous Communities, until the approval of the Real Decree-law 5/2012 [the State] lacked a general organization of mediation applicable to diverse civil and commercial matters, that would ensure the connection between mediation and ordinary jurisdiction, thus making effective the primary pillar of mediation, which is the de-judicialization of certain matters, that could have a solution better adapted to the necessities and interests of the parties in conflict than the one that would result from the judicial process [ . . . ]. Mediation as a formula of self-management [of conflict], is an effective instrument for the resolution of controversies when the judicial conflict affects the subjective right of available character. As an institution directed toward judicial peace, it contributes to the conception of the justice tribunals in this section of the judicial system as a last resort, in the event that the conflict cannot be resolved by the mere will of the parties, and it could be a skillful adjunct in the reduction of the case load of the [justice tribunals], reducing their intervention to those cases where the parties in conflict have not

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32. See *id.* at 49225 (Excluding from the scope of application of the norm certain fields with the intention of reserving its regulation to the corresponding regional norms.).

33. See generally U.N. Int'l Comm. on Int'l Trade Law, Model Law on Int'l Commercial Arbitration, U.N. Sales No. S.05.V.4 (2004).

34. See Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 9112) at 49225 (Spain).

35. *Id.* at 49224.

been successful in putting an end, through an agreement, to the situation in controversy.<sup>36</sup>

As previously mentioned, the model of mediation instated by the SLMCCM<sup>37</sup> is based upon voluntariness and the freedom of decision of the parties. It also allows the active intervention of a mediator directed towards the resolution of the conflict of the parties involved. The SLMCCM institutes a flexible model, tending to favor the non-dilatory use of the institution, and, as such, refrains from burdening the judicial process.<sup>38</sup> The law additionally places great emphasis on respecting the autonomy of the parties, giving each party the ability to recognize the agreement as a court order should they decide to notarize the agreement, making it enforceable.<sup>39</sup> In such case, the agreement reached would be subject to direct execution before the justice tribunals without the need for a declarative process. This waiver of the declarative process includes the suspension of the statute of limitations and expiration.<sup>40</sup>

As a departure from the premise in the SLMCCM<sup>41</sup> and similar to the Catalan Law, the mediator is regarded as the essential piece of the legal model.<sup>42</sup> In this sense, the State Law is centered on the regulation of the mediator's civil responsibility in carrying out his duties.

In light of the foregoing, the essential characteristics of the current law should be examined:

. . . [T]he field of competency of the State in matters of commercial, procedural and civil legislation, that permit articulation of a framework for the exercise of mediation, without prejudice to dispositions dictated by the Autonomous Communities in the exercise of their competency is strictly circumscribed.<sup>43</sup>

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36. Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 9112) at 49225 (Spain).

37. *See id.* at 49225.

38. *See id.* at 49224–25.

39. *Id.* art. 23.3.

40. *Id.* art. 4.

41. *See generally* Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 9112) (Spain).

42. *Id.* at 49224.

43. *Id.* at 49226.

### III. SOME ESSENTIAL ASPECTS OF THE CURRENT LAW BASED UPON THE CATALAN LAW ON MEDIATION IN PRIVATE MATTERS, AND THE STATE LAW ON MEDIATION IN CIVIL AND COMMERCIAL MATTERS

Based upon the declarations of principles outlined in the preceding section, which are detached from their respective Statements of Purpose, the following sections will undertake the study of the essential characteristics of the current regulation. As a starting point, these characteristics will use the content from the WHITE BOOK OF MEDIATION IN CATALUÑA (WHITE BOOK) published by the Department of Justice of the Generality of Cataluña in 2010. Following the publication of the WHITE BOOK in 2010 novelties were presented by the subsequent publication of the State Law in 2012.<sup>44</sup>

#### A. *The Concept of Mediation*

The Catalan Law, borrowing from the directions presented in the European Council Directive, established in its Article 1:

To the effects of this law, it is understood by mediation the non-judicial process of voluntary and confidential character that undertakes to facilitate the communication between persons, so that they may manage on their own a solution to the conflicts that affect them, with the assistance of a mediator that acts in an impartial and neutral manner. Mediation, as a method of managing conflicts, purports to avoid the aperture of judicial processes of litigious character, put an end to the ones already initiated, or shorten their time.<sup>45</sup>

From this point of view, the essential elements the concept of mediation utilized by the Catalan Law are:

- 1) The proceeding;
- 2) The role of the parties in conflict; and
- 3) The role of the mediator.<sup>46</sup>

In turn, Article 1 of the Spanish Law<sup>47</sup> maintains that “[i]t is understood by mediation, that medium of solution of controversies,

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44. See generally GENERALITAT DE CATALUNYA, LIBRE BLANC DE LA MEDIACIÓ A CATALUNYA [WHITE BOOK ON MEDIATION IN CATALUÑA] (1st ed. 2011) [hereinafter WHITE BOOK]; see generally Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 9112); see generally Catalan Law on Mediation in Private Matters (B.O.E. 2009, 13567)(Spain).

45. Catalan Law on Mediation in Private Matters (B.O.E. 2009, 13567) at art. 1

46. See *id.*

47. See generally Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 9112)(Spain).

whatever its denomination, in which two or more parties attempt to reach on their own a voluntary agreement with the intervention of a mediator.”<sup>48</sup> Article 1 amended the previous mention of the term “negotiation” that was contained in the initial Pre-project of Law on Mediation in Civil and Commercial Matters,<sup>49</sup> and had been subject to criticism in the report of the General Council of the Judiciary that was effectuated on the topic.<sup>50</sup>

In this manner, the mention of the parties in conflict clearly impacts the implication of the parties in the effectuation of the proceedings, insofar as the construction of the response is attributed to the parties in the conflict presented.

The mediator is placed as the identifying note of the institution from the moment that he stands as the conductor of the mediation proceedings. The function of the Catalan Law,<sup>51</sup> therefore is limited only to the facilitation of the communication between the parties, and it might conclude with aiding the parties in reaching compromises and decisions on their own; however the Catalan Law does not allow the mediator to impose any solution or concrete measure.<sup>52</sup> Conversely, Article 13 of the State Law establishes that the mediator “will facilitate communication between the parties and will oversee that they have sufficient information and advice [. . .]. The mediator will carry out an active role tending to achieve the approach of the parties, with respect to the principles contained in this Law.”<sup>53</sup>

### B. Goal of Mediation

Departing from the provisions of Article 1.1 in the Catalan Law, it can be said that this law is consistent with the general objective of mediation, which is understood as an attempt to have the parties reach an agreement on

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48. *Id.* art. 1.1.

49. Ministerio de Justicia, *Anteproyecto de Ley de Mediación en Asuntos Civiles y Mercantiles*, [Ministry of Justice, *Pre-project of Law on Mediation in Civil and Commercial Matters*] at 6.

50. Consejo General del Poder Judicial *Informe al Anteproyecto de Ley de Mediación en Asuntos Civiles y Mercantiles* [General Council of the Judiciary, *Report on the Pre-project of Law on Mediation in Civil and Commercial Matters*] at 22 (The Consejo General del Poder Judicial [General Council of the Judiciary] (CGPJ) is a collegiate, autonomous, constitutional organ composed by judges and other jurists. The CGPJ exercises control over the Judicial Power with the purpose of guaranteeing judicial independence of the judges in the exercise of their judicial function in front of everybody.).

51. *See generally* Catalan Law on Mediation in Private Matters (B.O.E. 2009, 13567).

52. *Id.*

53. Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 9112) at art. 13.

their own.<sup>54</sup> It is presupposed that a conflict exists. The methodology of self-management facilitates communication between the parties such that the parties are the ones that manage the conflict in which they are implicated.<sup>55</sup> Article 1.2 pronounces in plain language that the secondary function of mediation is to avoid the collapse of the justice tribunals in any possible measure.<sup>56</sup>

Having established these goals of the institution of mediation, as laid out by the aforementioned laws, it must be noted, however, that in sectorial normative fields, other goals of a preventative character,<sup>57</sup> educational character, or reparative character may be identified.<sup>58</sup>

### C. Guiding Principles of Mediation

When deciding whether to abide by certain guiding principles, both the Catalan Law and the State Law adopted their content based on their respective legislative histories. As such, the Catalan Law<sup>59</sup> adopts what was established by the Third Additional Disposition of the Catalan Family Code, which ordered that the future project of law on family mediation should be based upon the following criteria:

- a) Absolute confidentiality of the content of the mediation sessions;
  - b) Liberty of the parties to separate or desist of the mediation at any time;
  - c) Judicial approval of the agreements reached in mediation;
- and

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54. Catalan Law on Mediation in Private Matters (B.O.E. 2009, 13567) at art. 1.1.

55. *Id.*

56. *Id.* art. 1.2.

57. See WHITE BOOK, *supra* note 44 at 836; see generally Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 9112); see generally Catalan Law on Mediation in Private Matters (B.O.E. 2009, 13567); see generally Generalitat de Catalunya, Department de Justícia, *Decàleg de Bones Pràctiques de la Mediació Ciutadana i Comunitària*, Nov. 2008, [Decalogue of Good Practices of Civic and Community Mediation] [hereinafter Decalogue] available at [http://www20.gencat.cat/docs/Justicia/Documents/ARXTUS/PC-Compartim-decalog\\_bonespractiques\\_2008\\_decaleg.pdf](http://www20.gencat.cat/docs/Justicia/Documents/ARXTUS/PC-Compartim-decalog_bonespractiques_2008_decaleg.pdf) (last visited Feb. 17, 2013) (the WHITE BOOK OF MEDIATION IN CATALUÑA points out that the preventive function is part of the same conception as the community or civic mediation, asserting that: “a non-normative text of reference, the Decalogue of Good Practices of Civic and Community Mediation, establishes that: ‘the mediation permits to know the estate of social unrest and becomes, in itself, a preventive tool.’ Points out this way that this function is identified in the art. 32 of the Catalan Law 12/2009, of July 10, of education, where cohabits with the educative function”).

58. Said function is typically given in the criminal field or in the restorative justice, where mediation seeks a restorative or conciliatory activity with the victim from the minor’s side.

59. See generally Catalan Law on Mediation in Private Matters (B.O.E. 2009, 13567).

- d) Maximum duration of the mediation process is limited to three months, extensions may be granted for the same amount of time when requested by the mediator.<sup>60</sup>

A further look at the legislative history of the Catalan Law establishes voluntariness,<sup>61</sup> confidentiality,<sup>62</sup> good faith,<sup>63</sup> the personal nature of the proceeding,<sup>64</sup> and the neutrality of the mediator as principles of mediation. The Catalan Law references the nuclei of the concept of mediation contained in Article 1.1, which qualifies the institution as one of a voluntary and a confidential character, with the role of the mediator as impartial and third party neutral.<sup>65</sup> In the same vein, the State Law establishes neutrality,<sup>66</sup> confidentiality,<sup>67</sup> voluntariness and free disposition,<sup>68</sup> equality among the parties and impartiality of the mediator<sup>69</sup> as the guiding principles of the institution of mediation.

The next section will analyze in detail the principles arising from the aforementioned laws.

### 1. Principle of Voluntariness

Voluntariness is set as the basic and necessary presupposition in every definition of mediation.<sup>70</sup> From this point of view, Article 5 of the Catalan Law defines this principle as the freedom of the party to subject herself to mediation, as well as the freedom to desist mediation, at any time without alleging just cause for doing so.<sup>71</sup> The Catalan Law was concerned with avoiding the misuse of the institution of mediation because of its practical failure as a self-managing system parallel to the judicial system. The Catalan Law expressly states with regard to desisting mediation that “. . . [the following] cannot have effect in a later litigation the fact that parties

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60. Law 1/1998, of July 15, on the Catalan Family Code (D.O.G.C. 1998, 2687) at 9155; see Catalan Law on Mediation in Private Matters art. 1.1 (B.O.E. 2009, 13567).

61. See Catalan Law on Mediation in Private Matters (B.O.E. 2009, 13567) art. 5.

62. *Id.* art. 7.

63. *Id.* art. 9.

64. *Id.* art. 8.

65. *Id.* art. 1.1.

66. Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 9112) at art. 8.

67. *Id.* art. 9.

68. *Id.* art. 6.

69. *Id.* art. 7.

70. See Catalan Law on Mediation in Private Matters (B.O.E. 2009, 13567) art. 5.

71. *Id.* art. 5.

desisted, offers of negotiation of the parties, agreements revoked within the allowed time and in the proper manner, nor any other circumstance known as a consequence to the proceeding.”<sup>72</sup>

The State Law establishes voluntariness as a guiding principle both at the beginning of proceedings and in relation to desisting.<sup>73</sup> In contrast to the Catalan Law, Article 6.2 of the State Law establishes the need for compliance to submit to mediation and for the necessity of opening the mediation proceeding before turning to the judicial process or any other extrajudicial solution such as arbitration.<sup>74</sup> Given this autonomy in conjunction with the right of the parties to desist at any time, the legislative provision becomes superfluous because a final resolution of the conflict may be unnecessarily delayed.

This means that voluntariness is compatible with the possibility of mandating that the parties attend an informative session about mediation, or with the establishment of measures that would induce the solicitation of the commencement of the same, as long as the sessions do not impede access to the judicial system.<sup>75</sup> The Preamble and Article 11.1 of the Catalan Law, and Article 17 of the State Law, address this issue.<sup>76</sup> However, the Catalan Law lacks a provision regarding consequences of unexcused absences to the informative session.<sup>77</sup> Article 17.1 of the State Law expressly provides that such absence is unjustified, and will be seen as desisting, even if the information of the party or parties that did not attend the session was not of a confidential character. Such absence will result in the re-opening of the judicial process that gave rise to the mediation proceeding.<sup>78</sup>

## 2. Principles of Impartiality and Neutrality

The principles of impartiality and neutrality are predicates to the conduct of the mediator during the process, and, as stated by Article 6 of the Catalan Law, focus on guaranteeing equality among the parties throughout the proceeding.<sup>79</sup> Meanwhile, the State Law differs from the Catalan Law because it combines references to the following principles:

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72. *See id.* art. 5.2.

73. *See* Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 5) (Spain).

74. *Id.* art. 6.2.

75. *Id.*

76. Catalan Law on Mediation in Private Matters (B.O.E. 2009, 13567) art. 11.1; Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 5) art. 17.1 (Spain).

77. Catalan Law on Mediation in Private Matters (B.O.E. 2009, 13567) art. 11.1 (Spain).

78. Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 5) art. 17.1 (Spain).

79. Catalan Law on Mediation in Private Matters (B.O.E. 2009, 13567) art. 6.

- 1) The principle of impartiality;
- 2) The principle of equality among the parties in Article 7; and refers independently to; and
- 3) The principle of neutrality in Article 8.<sup>80</sup>

In any event, the principle of impartiality constitutes a common denominator in all conflict resolution in which a third party intervenes. This means that a third party cannot, through her intervention, position herself in favor of the interest or in support of the points of view of any of the parties to the prejudice of the other party.<sup>81</sup> A logical corollary to the lack of compliance of such duty of the mediator is the possibility of the imposition of sanctions to the mediator,<sup>82</sup> with the discretion being within the law of the scenarios of resignation or recusal<sup>83</sup> or the establishment of civil penalties for damages.<sup>84</sup>

As accurately ascertained in the WHITE BOOK,<sup>85</sup> neutrality, in contrast to impartiality, is a principle exclusively predictable of mediation, such that this principle no longer makes reference to the relation of the mediator to the interests in conflict, but to the faculties of the mediator in relation to the result of the process of mediation.<sup>86</sup> As such, in the scheme of the Catalan Law, the role of the mediator is to merely assist the parties, without imposing on them any solution or concrete measure.<sup>87</sup> It is precisely this note of neutrality that sets mediation apart from other self-management methods such as trial or arbitration. The State Law, after defining the principle of neutrality in Article 8 and establishing in Article 13.1 that the mediator will facilitate communication between the parties and will oversee that the parties have sufficient information and assistance, appears to surpass the concept of the mediator as a mere facilitator in the Catalan Law.<sup>88</sup> Article 13.2 of the State Law maintains that “[t]he mediator will

80. Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 5) art. 7–8 (Spain).

81. *Id.* art. 7.

82. *See* Law on Mediation in Civil and Commercial Matters art. 11.3, 14 (B.O.E. 2012, 9112) art. 6.

83. *See* Catalan Law on Mediation in Private Matters (B.O.E. 2009, 15) art. 19.2 (without prejudice of considering that impartiality is not incompatible with the respect to the superior interests as could be the minors or handicapped interests, as it is contained in art. 19.2 of the Catalan Law.).

84. *Id.* art. 14.

85. *See generally* WHITE BOOK, *supra* note 41 at 1–26; *see, e.g.*, Catalan Law on Mediation in Private Matters art. 1.1(B.O.E. 2009, 13567).

86. WHITE BOOK, *supra* note 44, at 158.

87. Catalan Law on Mediation in Private Matters (B.O.E. 2009, 13567) art. 6.2.

88. *See id.* art. 6.2; *see* Law on Mediation in Civil and Commercial Matters (B.O.E. 2012) art. 8, 13.1.

develop an active role tending to accomplish the approach of the parties, with respect to the principles contained in this Law.”<sup>89</sup>

### 3. Principle of Confidentiality

The principle of confidentiality arises at the time of ensuring mutual trust between the parties and with the mediator.<sup>90</sup> Trust is necessary to the successful conclusion of a proceeding in which the parties themselves are called upon to reach an agreement.<sup>91</sup> This principle purports to avoid the documents used in mediation proceedings or information obtained in the same, from being used in eventual judicial or arbitration proceedings.<sup>92</sup> For this reason, the person intervening in the proceeding has a duty of professional secrecy.<sup>93</sup> From this perspective, the duty of confidentiality is negative, understood as a duty to refrain from disclosing the facts and documents related to the mediation proceeding.<sup>94</sup>

In the State Law, this duty of confidentiality is contemplated in Article 9.1, extending to the intervening parties the protection of professional secrecy of the mediator.<sup>95</sup> It may be understood that it affects whoever else intervenes in a technical capacity by virtue of the generic mention of “people” who participate in the proceeding stated in Article 9.2.<sup>96</sup> This principle prohibits mediators or other intervening persons from testifying or producing documents in reference to the mediation in a later judicial or arbitration proceeding unless the parties have expressly allowed for it, or it is done in compliance with a court order.<sup>97</sup>

The Catalan Law expressly includes other technical interveners in the duty of confidentiality and in the duty of professional secrecy in its Article 7.1, but it appears to forget the duty of professional secrecy in the second part of the Article. This is because the Catalan Law establishes that the

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89. Law on Mediation in Civil and Commercial Matters (B.O.E. 2012) art. 13.2.

90. See Catalan Law on Mediation in Private Matters (B.O.E. 2009, 13567) art. 7; see Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 9112) art. 9.

91. See *id.*

92. See *id.*

93. See Catalan Law on Mediation in Private Matters (B.O.E. 2009, 15) art. 30 (and it is precisely for this reason that the infraction of this principle by the mediator it is considered a serious or very serious offense as per art. 30 of the Catalan Law, being also punishable the revelation of secrets as offense under the art. 199 of the Penal Code. However, no specific sanction is stipulated in the law regarding the violation of the duty of confidentiality by one of the parties.)

94. *Id.* art. 9.

95. *Id.* art. 9.1.

96. See *id.* art. 9.2.

97. *Id.* art. 8.

parties in a mediation proceeding, without prejudice of what is established in the penal and procedure codes, cannot solicit in trial or acts of judicial instruction the declaration of the mediator as an expert or lay witness.<sup>98</sup>

In any case, the Catalan Law, in contrast to the State Law, opts for exempting the duty of confidentiality in its Article 7.4 when the information obtained in the proceeding is not personalized information and is merely used for background or investigation, further the duty is excepted when the information obtained comports with a threat to the life or the physical or psychological integrity of a person.<sup>99</sup> Based upon this, Article 7.5 reinforces this exception with respect to the mediator, adding to the threats to life or the integrity of a person, the knowledge of prosecutable criminal acts.<sup>100</sup> Assuming any of these circumstances, the mediator is relieved from his duty of confidentiality and must stop the mediation proceeding from going any further and she must inform the judicial authorities of these circumstances.<sup>101</sup>

#### 4. Personal Nature

In accordance with the essence of an institution characterized by the fact that the parties involved in the conflict are the ones called upon to find a possible solution and adopting a model that is presented in the rest of the autonomous laws about mediation in existence, the Catalan Law establishes, as a general rule, that the parties must be present (in person) at mediation sessions.<sup>102</sup> It must be noted that such definitive characteristics are consubstantial to those in the field of family mediation, but can be questioned in other fields in which mediation mechanisms extend.<sup>103</sup> The law itself, in its first section, highlights that the possibility of utilization of technical media that facilitates remote communication may be used in exceptional circumstances in which it is impossible for all parties to be present.<sup>104</sup> In Article 8, Section 2, where the law expresses the circumstances in civil mediation with a plurality of persons involved, the law permits the parties to designate spokespersons that recognize that they

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98. Catalan Law on Mediation in Private Matters (B.O.E. 2009, 15) art. 7.1.

99. *Id.* art. 7.4.

100. *Id.* art. 7.5.

101. *See id.* art. 7, 8.

102. *Id.* art. 8.

103. *See* Catalan Law on Mediation in Private Matters (B.O.E. 2009, 13567) art. 8.

104. *Id.* art. 8.1.

carry negotiating capacity, that represent interests of each one of the interested parties.<sup>105</sup>

The WHITE BOOK considered it necessary for flexibility with regard to this element of Catalan Law; thus the WHITE BOOK incorporates a minimum number of instrumental sessions between the mediator and each one of the parties in conflict.<sup>106</sup> These sessions should effectuate a better or more accurate management of the conflict.<sup>107</sup> The call to make the proceedings more flexible seems to have been taken on by the state legislature.<sup>108</sup> When the state legislature refrained from referencing the principle of personal nature as provided in Article 13.2, it provided the mediator with an active role.<sup>109</sup> In Article 10.1, the law empowers the parties to decide the way in which the mediation will be organized.<sup>110</sup> Finally, in Article 21, the mediator is empowered to communicate with the parties in a non-simultaneous manner<sup>111</sup> and to meet with them separately.<sup>112</sup> This expressly allows for mediation by way of electronic means, but limited to the circumstances described in Article 24.<sup>113</sup>

### 5. Principle of Good Faith

The Catalan Law provides the principle of good faith as a general principle of the legal mediation system.<sup>114</sup> The principle of good faith is linked to the conduct of the parties as well as the conduct of the mediator.<sup>115</sup> The law, however, omits mention in its text whether this principle is also linked to the acts of third party interveners in the proceedings.<sup>116</sup> The State Law makes reference to this principle, not formally in the guiding principles of the institution but with relation to the conduct of the parties in the mediation.<sup>117</sup> In this sense, Article 10 of the State Law predicates the duty of good faith with the duty of loyalty and mutual respect, but refers to

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105. *Id.* art. 8.2.

106. WHITE BOOK, *supra* note 44 at 845.

107. *Id.*

108. *See* Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 9112) art. 13.2.

109. *Id.*

110. *Id.* art. 10.1.

111. *Id.* art. 21.2.

112. *Id.* art. 21.3.

113. *See* Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 9112) art. 24.

114. Catalan Law on Mediation in Private Matters (B.O.E. 2009, 13567) art. 9.

115. *Id.*

116. *See id.*

117. Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 9112) art. 10.

the latter principles in connection only with the parties involved in the mediation. This could suggest that such a duty of good faith need not be formally stated with respect to the mediator.<sup>118</sup> The principles that guide the conduct of mediators regulated in Article 13 seem to necessarily include the duty of good faith. Similarly, conduct by a mediator that weakens the guiding principles formally stated in the law could give rise to liability for damages and prejudice in accordance with the stipulations of Article 14.<sup>119</sup>

## 6. Other Guiding Principles of Mediation

It must be noted that an analysis of comparative law presents other mediation systems that include many other principles such as the principles of freedom or autonomy of private will, veracity, equity in the proceeding, equality of arms, flexibility, and transparency.<sup>120</sup> The Catalan Law did not formally list all these principles as predicates of the institution of mediation.<sup>121</sup>

## 7. The Agreements Resulting from Mediation, Judicial Efficacy, and Enforceability

To conclude the present analysis of the fundamental guiding aspects of mediation in the current legislative scheme effective in Cataluña, the value of agreements reached by parties in mediation must be referenced.<sup>122</sup> It should be noted that on private agreements, the principle of private autonomy of will is important, as presented in Article 1.255 of the Civil Code (complemented by the principle of civil liberty stated in Article 111-6 of the Civil Code of Cataluña).<sup>123</sup> The value of agreements reached by the parties will similarly depend on the will of the parties.<sup>124</sup> The agreement could be with or without judicial value. It could even be a transactional agreement as long as the agreement complies with the conditions needed for the validity and efficacy of transactional pacts contained in Article 1809 of the Civil Code.<sup>125</sup>

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118. *See id.*

119. *Id.* art. 13.

120. WHITE BOOK, *supra* note 44 at 845.

121. *See generally* Catalan Law on Mediation in Private Matters (B.O.E. 2009, 13567).

122. Catalan Law on Mediation in Private Matters (B.O.E 2009, 13567) at art. 19.

123. *See* C.C. art. 1255 (Spain); *see* Catalan C.C. art. 111–16 (Spain).

124. *See* C.C. art. 1255 (Spain); *see* Catalan C.C. art. 111–16 (Spain).

125. *See* C.C. art. 1809.

The agreements reached will be valid, independent of the form in which they are adopted.<sup>126</sup> The exceptions are those agreements for which the law requires a determined form, in which case the form must comply with the law.<sup>127</sup>

Article 19 of the Catalan Law expressly provides that the agreements that affect matters or persons in need of special protection or matters of public concern, will merely have a propositional character, and will require judicial approval for efficacy and validity.<sup>128</sup> The Catalan Law also provides that legal counsel assisting the parties in the mediation is responsible for incorporating the agreements to correspond with the protocols; further legal counsel must communicate to the court whether an agreement has been reached by way of mediation.<sup>129</sup>

After mediation has been completed and an agreement has been reached, problems may arise if there is a lack of compliance with the agreement. In such a case, the mediator does not possess the power to compel the parties to comply with the agreement.<sup>130</sup> In addition, they may not be subject to a new mediation proceeding, as it is presupposed that such mediation would be ineffective in quieting the dispute by submitting it to a system of self-managed conflict resolution.<sup>131</sup> The lack of compliance with the terms in the agreement by one of the parties moves the originating conflict within the exclusive jurisdiction of the judicial tribunals.<sup>132</sup>

In circumstances where agreements have been reached and are subsequently broken (and are not within Article 517 of the Civil Procedure Code) there is no other remedy other than to initiate a judicial declarative proceeding, which will generate an enforceable judgment.<sup>133</sup>

To avoid this, the State Law dedicates Title V to the execution of agreements reached through mediation.<sup>134</sup> It provides that such agreements are enforceable, as long as the parties opt to notarize the writing.<sup>135</sup>

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126. See C.C. art. 1278.

127. Catalan Law on Mediation in Private Matters (B.O.E 2009, 13567) at art. 19.

128. *Id.*

129. *Id.*

130. See *id.*

131. See *id.*

132. C. E., B.O.E. n. 311, Dec. 29, 1978 (Spain) at art. 117.3; L.O.P.J., B.O.E. n. 157, Jul. 2, 1985 (Spain) art. 2.

133. See C. E., B.O.E. n. 311, Dec. 29, 1978 (Spain) at art. 117.3; L.O.P.J., B.O.E. n. 157, Jul. 2,

134. See Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 9112) at arts. 25–27.

135. *Id.*

## 8. Mediation and the Regulatory Statutes of Limitations and Expiration

The State Law is concerned that parties may avoid the use of mediation as a means of dispute resolution out of fear that the statute of limitations and expiration of judicial actions may run as a consequence. It should be noted that in an attempt to favor its use, the State Law has made it possible for parties to commence judicial actions upon completion of mediation that would finalize the proceeding.<sup>136</sup> In this sense, the Catalan Law omits any pronouncement that refers to the interruption of the statute of limitations notwithstanding the existence of an advanced local civil law that refers to it.<sup>137</sup> Meanwhile, the Spanish law allows for the suspension of the statute of limitations in its preamble. The Spanish Law prohibits the submission of the conflict to arbitration or judicial proceeding while mediation is still pending. This is established in its Article 10.<sup>138</sup>

That being said, the Spanish law breaks with the general rule stipulated in Article 1973 of the Spanish Civil Code which allows for the interruption of the statute of limitations.<sup>139</sup> Because of this, the Spanish law states: “[t]he suspension of the statute of limitations at the beginning of the proceedings contrary to the general rule of the interruption of the statute of limitations, with the purpose of suppressing possible disincentives and avoid that mediation could produce non desired judicial effects.”<sup>140</sup>

## IV. CONCLUSION

The foregoing sections analyzed the essential elements that comprise the institution of mediation. However, it is necessary to conclude that the commendable intentions manifested by the legislature may not be sufficient.<sup>141</sup> The regulation of mediation is currently lacking and devoid of enforceability, but there is a possible exception of conflict resolution in the marital and family field and minor matters local in nature.<sup>142</sup>

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136. *See id.* art. 10.

137. *See generally* Catalan Law on Mediation in Private Matters (B.O.E 2009, 13567); *see* Catalan C.C. art. 121–22.

138. *See* Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 9112) art. 10 (Proceeding headed to modify and rewrite articles. 19.1, 39, 63.1, 65.2, 66, and 206 of the Spanish Code of Civil Procedure by virtue of what is said in the Third Final Disposition.).

139. Spanish C.C. art.1973.

140. Law on Mediation in Civil and Commercial Matters (B.O.E. 2012, 9112) at 49225.

141. *See generally id.*

142. *See generally id.*