MEDIATION IN CROSS-BORDER FAMILY MAINTENANCE AND CHILD SUPPORT

MEDIAÇÃO EM PRESTAÇÃO INTERNACIONAL DE ALIMENTOS À CRIANÇA E À FAMÍLIA

Inez Lopes

Professora-adjunta de direito internacional privado e público da Faculdade de Direito da Universidade de Brasília (UnB). Coordenadora do Grupo de Estudos em Direito Internacional Privado, Comércio Internacional e Direitos Humanos - GDIP-Justiça Transnacional (CNPq). Coordenadora da Rede de Processo Civil Internacional (REDE-PCI).

Abstract

This paper aims to demonstrate that mediation is a more desirable, faster and effective way to facilitate cross-border maintenance and child support. Out-of-court mechanisms, such as mediation, are used in family disputes resolutions in some countries. Brazil has adopted a Mediation Law, which recognises party autonomy to reach an agreement on family issues resulting from extrajudicial mediation. However, an agreement on family matters related to unavailable but negotiable rights, involving children or vulnerable persons, must be ratified by a court, and the intervention of the public prosecutor's office is required. Diversity of legal sources makes private international law very peculiar, because it creates channels to facilitate recognition of foreign decisions or agreements abroad. The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance has been adopted to facilitate cross-border recovery of maintenance, and amicable solutions between creditor and debtor in order to obtain voluntary payment of maintenance have been encouraged. In this scenario, central authorities have a proactive role to promote and encourage the use of ADR methods such as mediation, conciliation or similar processes. States should recognise cross-border maintenance rights and facilitate international legal cooperation to enforce decisions and private agreements related to maintenance obligations, and should respect legal and cultural diversity.

Keywords: Cross-border maintenance. Mediation. Central authority. Transnational family.

Resumo

Este artigo tem como objetivo demonstrar que a mediação é a maneira mais desejável, mais rápida e eficaz de facilitar a prestação internacional de alimentos. Mecanismos extrajudiciais, como mediação, são usados em resoluções de disputas familiares em alguns países. O Brasil adotou a Lei de Mediação, que reconhece a autonomia das partes para concluir um acordo sobre questões familiares resultantes da mediação extrajudicial. No entanto, um acordo sobre questões familiares relacionadas a direitos indisponíveis, mas negociáveis, envolvendo crianças ou pessoas vulneráveis, deve ser ratificado por um tribunal, e é necessária a intervenção do Ministério Público. A diversidade de fontes jurídicas torna o direito internacional privado muito peculiar, porque cria canais para facilitar o reconhecimento de decisões ou acordos estrangeiros no exterior. A Convenção da Haia, de 23 de novembro de 2007, sobre a Cobrança Internacional de Alimentos para Crianças e Outros Membros da Família foi adotada para facilitar a prestação internacional de alimentos, e foram incentivadas soluções amigáveis entre credor e devedor para obter pagamento voluntário de alimentos. Nesse cenário, as autoridades centrais têm um papel proativo de promover e incentivar o uso de métodos ADR, como mediação, conciliação ou processos semelhantes. Os Estados devem reconhecer os direitos à alimentos transfronteiriços e facilitar a cooperação jurídica internacional para fazer cumprir decisões e acordos privados relacionados às obrigações alimentares, e devem respeitar a diversidade jurídica e cultural.

Palavras-chave: Prestação internacional de alimentos. Mediação. Autoridade central. Família transnacional.

A. INTRODUCTION

Globalization has impacts on family life. In its economic aspect, the phenomenon promotes the free circulation of goods, services and capital, facilitating international trade; on the social side, it increases the mobility and cross-border movement of people. Migration is a phenomenon that contributes to the very development of human society. According to Böhning, “anthropologically speaking, migration is an irrepressible human urge”.[1] Therefore, migration is characterized as a factor of economic and social development, since states open their borders to economically active migrants when “land, energy or capital are not utilised to their potential”,[2] generating wealth both for migrants’ countries of destination and their countries of origin, as in remittances of capital to migrants’ families. Migration, voluntary or forced, increases the emergence of transnational families, those linked to two or more countries simultaneously by various elements of connection, such as nationality, domicile or habitual residence.

1 W R Böhning, ‘Studies in International Labour Migration’ (London and Basingtoke, Macmillan Press, 1984), 12.

2 See Böhning (1) 34.

Thus, globalization promotes an "internationalization" of social life, which becomes more and more cosmopolitan and extraterritorial. Beck says that "all of us have a *glocal* life",[3] because "the relationship between physical space and community collapses", and "alternation and choice of spaces are godparents of globalization".[4] As a result, there is an increasing number of transnational marriages and cohabitation relationships between different countries and cultures. Therefore, international society faces a plurality of family structures that are no longer typically based on traditional wedlock relationships. In some cases, private life is not limited to the protection of national borders.

In cases of family crisis, problems become even more complex with the "transnationalization" of rights and obligations, which depend on states' political will to promote international cooperation for the recognition of extraterritorial effects of family rights acquired abroad. As pointed out by Araújo and Vargas, "family mobility is a reality and changes of residence are ever more common in cases of dissolution of marriages".[5] Situations involving child support and family maintenance arise from family crises, or breakdown of parents' relationships. The laws of most countries recognise parents' responsibility to support and care for their underage children. Nonetheless, the family maintenance obligations of other relatives, such as grandparents' responsibility in relation to their grandchildren and obligations between spouses, are not widely accepted, although the family concept has become broad and plural.

Since the mid-twentieth century, states have ratified international treaties to facilitate recognition and enforcement of foreign judgments related to recovery of child support and family maintenance. Several instruments have been adopted, the most recent ones being the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (The 2007 Hague Convention on Maintenance) and the Hague Protocol on the Law Applicable to Maintenance Obligations (The 2007 Hague Protocol on the Law Applicable), which establish rules on private international law and international legal cooperation to facilitate the recovery of cross-border maintenance. Families' relationships are very dynamic and diverse, which challenges the international community to find a path to harmonize the rules of both substantive and procedural private international law in family law matters.

3 U Beck, 'O que é Globalização? Equívocos do Globalismo (São Paulo, Paz e Terra,1999), 136.

4 See Beck (3) 137.

5 N ARAUJO; D T VARGAS, "The cross-border recognition and enforcement of private agreements in family disputes on debate at the Hague Conference on Private International Law", in Jose Antonio Moreno Rodrigues; Claudia Lima Marques. (Org.). *Los Servicios en el Derecho Internacional Privado. Jornadas de la ASADIP 2014*. (1ed.Porto Alegre / Asuncion: Gráfica e Editora RJR, 2014, v. 1, pp. 485-506) 490.

B. RIGHT TO CHILD SUPPORT AND FAMILY MAINTENANCE: GLOBAL AND REGIONAL PROTECTION

The right to maintenance is based upon the dignity of the human person, and it constitutes a fundamental right in international law. According to the United Nations Convention on the Rights of the Child of 20 November 1989 (UNCRC), the principle of the best interest of the child must be respected.[6] This principle is considered as a primary consideration that is to be undertaken by all states' institutions, even though the convention does not define clearly what "best interest" is. Concerning the obligation of child support, it calls on state parties to take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the state party and from abroad.[7] In this sense, the obligation to pay child support comes from parentage in the first place, and then from persons otherwise legally and financially responsible to support a child.

Prior to that, at the regional level, the Bustamante Code, adopted in 1928, is the first international treaty to codify private international law (PIL). With a view of harmonizing private international law, it establishes rules related to maintenance obligation with three approaches. Firstly, in relation to parentage, it considers that the rule that gives the right to maintenance is an international public policy. Secondly, the maintenance concept is subjected to personal creditor law in relation to one's relatives. Furthermore, the provisions referring to maintenance obligations between relatives are also international public policy, and prohibit the resignation and relinquishing of maintenance right.[8] Thirdly, in case of international adoption, it applies the same rules regarding maintenance provisions. Later, the Inter-American Convention on Support Obligations, adopted on 15 October 1989, establishes the law applicable[9] to support obligations and to jurisdiction and international procedural cooperation when the support creditor and debtor are habitually residing in different countries, regardless of immigration status.

On the global level, within the United Nations system, the Convention on the Recovery Abroad of Maintenance, adopted on 20 June 1956 in New York,[10] was a great step towards ensuring maintenance obligations rights and facilitating international procedural civil law to alleviate difficulties in recovering maintenance abroad. However, after 61 years only

6 As prescribed in Article 3.

7 See Article 27, paragraph 4, of the UNCRC.

8 In accordance with Article 68.

9 This convention applies the principle of the most favourable law to the creditor.

10 Brazil is a participant in the 1956 New York Convention, signed on 31 December 1956 and deposited

64 states had joined the convention, compared to 196 parties of the UNCRC. Despite its limitations, the 1956 New York Convention has been a successful convention for recovery of maintenance abroad.

Nevertheless, the conception of maintenance is quite varied among countries. Based on the idea of solidarity, people who are facing economic woes can apply for maintenance from relatives, spouses or partners, as long as those parties have the financial capacity required. Despite that, international instruments and national laws are focused on child support and, to some extent, the care of disabled persons, rather than on marital or affinity relations.

The main point of convergence between countries involves the obligations of parents or others financially responsible for paying support for the child,[11] whether they are residing in the country where the child lives or abroad.

Yet, it is important to highlight that the cultural dimension of law plays a key role in cross-border situations, and maintenance can be interpreted in different ways.[12] Legislative divergences among countries may arise as to the person responsible for paying the maintenance. For instance, Colombia made notification under the 1956 New York Convention to state that "maintenance shall include the obligation to pay the mother's pregnancy and childbirth expenses".[13] Another example refers to the obligation of the stepfather or stepmother to pay child support when the natural parent does not pay, as is provided by the law of the province of Manitoba, in Canada.

In the case of cross-border conflicts, could a decision be based on the recognition of kinship by socio-affective affinity? Based upon a human rights approach, some family relations should be recognised in order to promote justice. The modern family is plural and diverse, and party autonomy should be regarded when parental responsibility respects the best interest of the child.

C. FROM 1956 TO 2007 HAGUE CONVENTION ON MAINTENANCE: KEEP MOVING

the instruments of ratification on 14 November 1960, under the Law Decree no. 10, 13 November 1958.

11 As provided in article 27, paragraph 1, of the the UNCRC.

12 E Jayme, "Cultural dimesion of Maintenance Law from a Private International Law Perspective", in Beaumont, B Hess, LWalker and S Spancken (eds) *The Recovery of Maintenance in the EU and Worldwide* (Oxford, Hart Publishing, 2014), pp 3-14.

13 United nations Treaty Collection. Maintenace Obligations. 1 . Convention on the Recovery Abroad of Maintenance https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XX-1&chapter=20&Temp=mtdsg3&clang=_en accessed on 17 July 2017.

The 2007 Hague Convention on Maintenance and the 2007 Hague Protocol on the Law Applicable seek to establish a modern, efficient and accessible international system for the cross-border recovery of child support and other forms of family maintenance.[14] The convention seeks to facilitate the circulation of decisions or agreements related to the payment of child support or family maintenance. The international obligation laid down in Article 2 is based on ensuring the right to maintenance for the child, irrespective of the marital status of the parents. In addition, the convention replaces treaties previously concluded within the framework of the Hague Conference (of 1956, 1958 and 1973) and of the 1956 United Nations system, the Convention on the Recovery Abroad of Maintenance.

The 2007 Hague Convention on Maintenance recognises as equivalent either the decisions or agreements made by administrative and judicial authorities with regard to the provision of maintenance.[15] Even if a foreign decision includes contents related to family duties and rights, the decision is likely to be only partially recognised for its maintenance provisions.

Brazil signed and deposited the instruments of ratification on July 17, 2017 of the 2007 Hague Convention on Maintenance, after Congress approved it by passing Legislative Decree no. 146 of 9 December 2016. Brazil made reservations on Article 20, subparagraph 1(e), and Article 30 (8) related to agreement to the jurisdiction in writing by the parties and declarations on Article 2 (3) to extend the application to other family members.

D. MAINTENANCE OBLIGATION: CONVERGENCE AND DIVERGENCE

The definition of maintenance is quite varied among countries. Based on the idea of solidarity, people who are facing economic need can request maintenance from relatives, spouses or partners, provided that they have the financial capacity. However, each country establishes its own standards, systems and structures for recovery of maintenance.

The Hague Convention of 2007 also does not define maintenance in Article 3. In the Explanatory Report, Borrás and Degeling state that “the possibility of including a definition of ‘maintenance’ was considered but, in the end, rejected”.[16] The maintenance concept is open for each state to establish its own concept at its own discretion, therefore permitting

14 See HCCH, Maintenance Obligation Protocol Homepage, https://www.hcch.net/en/instruments/conventions/specialised-sections/child-support-and-family-maintenance/ accessed on 17 July 2017.

15 See Article 19.

16 A Borrás, J Degeling, “Explanatory report on the convention of 23 november 2007, on the international recovery of child support and other forms of family maintenance”, (Edited by the Permanent Bureau of the

the coexistence of different legal systems. Maintenance should not be restricted to periodic payment, as explained below:

> Indeed it was accepted that any monetary or property order may constitute a maintenance order where its purpose is to enable the creditor to provide for himself or herself and where the needs and resources of the creditor and debtor are taken into account in determining what order is appropriate.[17]

The main point of convergence concerning maintenance is defined in Article 27 of the UNCRC, which prescribes the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development, particularly with regard to nutrition, clothing and housing. Besides, parents or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the necessary conditions of living for the child's development.

Although the UNCRC aims at protecting children up to 18 years, the 2007 Hague Convention on Maintenance has taken a positive approach by expanding age limits for recognising maintenance obligations arising from a familial relationship to persons up to the age of 21. This does not mean that states have to change their rules for legal majority, but only to accept the obligation to recognise and enforce a foreign decision to recovery maintenance from children and adolescents up to 21 years.

Under the Brazilian legal system, the right to child support or family maintenance is based upon reciprocal obligations between parents and children, and the obligation may be extended to ascendants and descendants. In certain situations, maintenance obligations may reach collateral relatives, in accordance with the Brazilian Civil Code. However, there is a limitation of responsibility upon a second degree of the collateral line, which includes siblings.[18] Today, maintenance obligations are decided by a judge based upon four criteria, instead of two: necessity (of the requesting person), possibility (of payment by the person who is requested and is legally responsible for the obligation), proportionality,[19] and reasonability,[20] i.e., if it is proportional and reasonable for what is offered as maintenance.

Another positive approach of the 2007 Hague Convention on Maintenance is the provision for its applicability regardless of parents' marital status, putting aside any sort of discrimination that could arise on the judgment recognition and building a path to the best

---

Conference, 2009) 73.

17 Ibid at 73.

18 As it was made on the Declaration regarding Article 2(3): Brazil extends the application of the whole of the Convention, subject to reservations, to obligations to provide maintenance arising from collateral kinship, direct kinship, marriage or affinity, including, in particular, obligations in respect of vulnerable persons.

19 M B DIAS, "Manual de Direito das Famílias" (4a Edição, São Paulo, Editora Revista dos Tribunais, 2016).

20 C M S Pereira, "Instituições de direito civil" (vol. V – 22. ed. – Rio de Janeiro: Forense, 2014).

interest of the child.

1. AGE LIMIT

Despite a broad majority of states having been in favour of maintenance obligation until the age of 21, considering the difficulties of some countries to accept this treaty obligation, under paragraph 2 of Article 2, states may reserve the right to limit the application of the Convention to persons under the age of 18 years, with reciprocal effects. This means that the country which makes a reservation described as *ratione personae*[21] can claim the application of the Convention to persons only under the age of 18 years. For instance, Montenegro has reserved "the right to limit the application up to 18 years, with reciprocal effects".[22]

While on one hand, states may limit the age for recovery maintenance, on the other, states may declare the extension of application for maintenance obligation beyond 21 years. For instance, Albania has declared "the right to enforce maintenance obligations even for adult children up to age of twenty-five years". Moreover, Norway has declared that it "will enforce maintenance decisions in favour of children beyond 21 years, however not beyond 25 years".[23] Likewise, Turkey has declared that "the maintenance obligations shall be extended to the children who have not attained the age of 25 years, provided that the education of the children continues".[24] Ukraine has reserved "the right to apply the Convention to maintenance obligations arising from a parent-child relationship towards a person under the age of 18"; however, Ukraine has also declared that it "will extend the application from parents in favour

21 A Borrás, "The Necessity Flexibility in Application of the New Instruments on Maintenance" in BOELE-WOEKI, Katharina et al, *Convergence and Divergence in International Private Law,* (Liber Amicorum, pp.173-192, Kurt Sieht, Schulthess, Eleven, 2010) 186.

22 HCCH, Declaration/Reservation/Notification "Montenegro reserves the right to limit the application of Article 2, paragraph 2, sub-paragraph l *a)*, of the Convention to persons who have not attained the age of l8 years. Montenegro shall not be entitled to claim the application of the Convention to persons of the age excluded by this reservation." https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1329&disp=resdn accessed on 14 March 2017.

23 HCCH, Declaration/Reservation/Notification "The Republic of Albania declares, in accordance with Article 2 (3) of the Convention, the right to enforce maintenance obligations even for adult children up to age of twenty-five years, provided that they attend the high school or university, according to Article 197 of the Family Code" https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1121&disp=resdn accessed on 14 March 2017.

24 HCCH, Declaration/Reservation/ "The Republic of Turkey declares that In accordance with subparagraph "a" of the first paragraph, the maintenance obligations shall be extended to the children who have not attained the age of 25 years, provided that the education of the children continues" https://www.hcch.net/pt/instruments/conventions/status-table/notifications/?csid=1355&disp=resdn accessed on 14 March 2017.

of an adult daughter, son, who continue studies until they reach the age of 23".[25]

Under the Brazilian Civil Code, the duration of child support is 18 years, the age of majority.[26] However, this right is extended up through undergraduate education.[27] According to the Superior Court of Justice's judgement, the maintenance obligation does not cease automatically, and the payment is based upon kinship relations.[28]. Legal nature of maintenance payment is different regarding the age. When a person is a minor, the obligation to *support* is based upon parental responsibility; but when a person is of legal age, the obligation is based upon *assistance*, resulting from kinship and real need.

2. FAMILY SOLIDARITY AND MAINTENANCE

The 2007 Hague Convention on Maintenance does not define the term "family relationship"; in this sense each state has to determine the concept for itself. The convention also innovates by allowing the extension of its purpose to comply with the recovery of vulnerable adults' maintenance obligation.

Ukraine has accepted requests from grandparents to minor grandchildren, from step-parents to stepchildren, and in other situations.[29] Turkey has extended maintenance

25 HCCH, Declaration/Reservation/Notification "In accordance with Article 63 of the Convention, Ukraine declares that it will extend the application of Chapters V and VIII of the Convention to recovery of maintenance: From parents in favour of an adult daughter, son, who continue studies until they reach the age of 23" https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1068&disp=resdn accessed on 14 March 2017.

26 According to Article 5 of the Brazilian Civil Code.

27 Superior Court of Justice, *Processual Civil - Civil - Ação de Alimentos,* Recurso Especial no. 1218510-SP (2010/0184661-7) Terceira Turma Relatora Ministra Nancy Andrighi, Recorrente CEM, Date of Judgment 27 September 2011.

28 I Lopes, "Maintenance Obligations in the Brazilian Legal System", in Beaumont, B Hess, LWalker and S Spancken (eds) *The Recovery of Maintenance in the EU and Worldwide* (Oxford, Hart Publishing, 2014) 207.

29 See HCCH, Declaration/Reservation/Notification In accordance with Article 63 of the Convention, Ukraine declares that it will extend the application of Chapters V and VIII of the Convention to recovery of maintenance:
From parents in favour of an adult incapacitated daughter, son;
From parents in favour of an adult daughter, son, who continue studies until they reach the age of 23;
From an adult daughter, son in favour of incapacitated parents;
From a grandmother, grandfather in favour of grandchildren, who are under age;
From adult grandchildren, great-grandchildren in favour of an incapacitated grandmother, grandfather, great-grandmother, great-grandfather;
From adult siblings in favour of siblings, who are under age, and incapacitated adult siblings;
From stepmother, stepfather in favour of stepdaughter, stepson, who are under age;
From an adult stepdaughter, stepson in favour of an incapacitated stepmother, stepfather https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1068&disp=resdn accessed on 14 March 2017.

obligations for spouses, children with physical or mental disabilities without age limits, and parents in need. Other states have not extended the scope of the convention beyond the relations between parents and children and between spouses. In the meantime, the European Union has stated that it may extend the maintenance obligation under Article 2 (3) of the Convention for all requests for maintenance arising from family, kinship, marriage or affinity relationships.[30] It is important to stress that these declarations will only apply bilaterally.

In addition, Brazil extends the application of the whole of the Convention, subject to reservations, to obligations in order to provide maintenance arising from collateral kinship, direct kinship, marriage or affinity, including, in particular, obligations in respect of vulnerable persons. However, there is a limitation of responsibility upon a second degree of the collateral line, which includes siblings.

According to case law, grandparents are responsible, not only for paying child support successively, but also for complementing the payment when there is clear insufficiency by the father or mother. In addition, a new approach has been adopted to establish maintenance obligations arising at least from socio-affective relations on a case-by-case basis. For instance, Superior Court of Justice (STJ) has recognised that it is not possible to cancel maintenance obligations in a case where a person has spontaneously recognised paternity and registered a daughter, even though years later the absence of a biological link between the parties was proved but there was evidence of social relations since the child's birth and for more than ten years. [31]

E. CROSS-BORDER CHILD SUPPORT AND FAMILY MAINTENANCE UNDER THE BRAZILIAN CIVIL PROCEDURAL LAW

30 HCCH, Declaration/Reservation/Notification "The European Union makes the following unilateral declaration:
The European Union wishes to underline the great importance it attaches to the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.
The Union recognises that extending the application of the Convention to all maintenance obligations arising from a family relationship, parentage, marriage or affinity is likely to increase considerably its effectiveness, allowing all maintenance creditors to benefit from the system of administrative cooperation established by the Convention. It is in this spirit that the European Union intends to extend the application of Chapters II and III of the Convention to spousal support when the Convention enters into force with regard to the Union.
Furthermore, the European Union undertakes, within seven years, in the light of experience acquired and possible declarations of extension made by other Contracting States, to examine the possibility of extending the application of the Convention as a whole to all maintenance obligations arising from a family relationship, parentage, marriage or affinity" HCCH, Declaration/Reservation/Notification https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1377&disp=resdn accessed on 2 July 2017.

31 Superior Court of Justice "Turma reafirma que reconhecimento espontâneo e vínculo socioafetivo impedem negativa posterior de paternidade" http://www.stj.jus.br/sites/STJ/default/pt_BR/Comunica%C3%A7%C3%A3o/noticias/Not%C3%ADcias/Turma-reafirma-que-reconhecimento-espont%C3%A2neo-e-v%C3%ADnculo-socioafetivo-impedem-negativa-posterior-de-paternidade, Acessed on 22 June 2017.

The 2015 Civil Procedure Code presents some innovations in relation to the previous one from 1973, since Article 22 provides special rules on concurrent jurisdiction on cross-border maintenance. Therefore, both Brazilian and foreign courts are competent to hear a case claiming maintenance when the creditor is domiciled or has residence in Brazil; or when the defendant maintains ties such as possession or ownership of assets, receives income or obtains economic benefits in Brazil.

The *lis pendens* rule is "important in order to ensure legal certainty".[32] Pursuant to Article 24 of the Brazilian Civil Procedure Code (CPC), unless there is a provision in the international treaties that Brazil has adopted, Brazilian courts have jurisdiction over a case even though there is a case abroad involving the same cause of action and between the same parties simultaneously. Nevertheless, a pending case before the Brazilian jurisdiction does not prevent recognition of foreign judgment.

Therefore, there should be a dialogue between Article 24 of the CPC and Article 22 (c) of the 2007 Hague Convention in order to avoid conflicting situations "where there are two conflicting decisions arising in two different States".[33]

F. ALTERNATIVE DISPUTE RESOLUTION (ADR) MECHANISMS AND ACCESS TO JUSTICE

Alternative Dispute Resolution (ADR) Mechanisms have been defined as alternate means to the state court systems. ADR comprises bargaining methods such as negotiation (no third party involved), conciliation and mediation (both are assisted by third parties), and adjudication, which includes arbitration. The foundation of all ADR processes is the agreement of the parties giving their consent to submit a dispute to a neutral third party.[34] How can ADR mechanisms facilitate the cross-border recovery of child support or family maintenance?

Extrajudicial methods are based upon party autonomy, and a person has the capacity to decide about his or her private life and search for the best way to achieve solutions for conflicts. While the conciliator can guide the parties to the solution of the conflict, the mediator cannot not. The mediator can be proactive, but cannot guide, suggest, or decide on anything. The conciliator can show the advantages of getting an agreement. A judge

32 L Walker, Maintenance and Child Support in Private International Law, (Oxford and Portland: Hart, 2015) 60.

33 Walker *supra* 33, 161.

34 J Hörnle, "Cross-Border Internet Dispute Resolution" (Cambidge University Press,, 2009). 49

cannot be a mediator in a case in which he or she was designated to settle the litigation. However, a judge can be a conciliator for the parties to reach an agreement.

Both access to justice and the right to maintenance are human rights in most jurisdictions. ADR means ensuring better maintenance provisions and facilitating access to justice for people who are in different countries, based upon international legal cooperation. Mediation contributes to faster and fairer settlement, as the parties are directed to reach an agreement or a self-composition in family matters, including child support and maintenance.

1. MEDIATION AND CONCILIATION IN FAMILY ACTIONS

Party autonomy in family matters has been accepted in a number of countries, and "this principle is not restricted to the choice of law in contracts". It has a well-established tradition in relation to matrimonial property regimes, in relation to trusts, in relation to succession within certain limits, perhaps in relation to family law, and in relation to torts."[35] Concerns for the interest of individuals as opposed to those of states is the main preoccupation and justification of private international law.[36] Nevertheless, when family matters involve weak parties such as a child or other vulnerable persons, social concern "has led to a greater involvement of the State in private relations".[37] Araújo states that

> Behind the expansion of the autonomy of the will in the family is the increasingly consolidated understanding that the judicial system, despite fulfilling its role, is not the place to decide what is best for the family. The judicialization of family quarrels, with the psychological pressure and slowness peculiar to them, does not meet the principle of the best interest of the child. Therefore, it is necessary to encourage the family to go their own way to a solution to their disputes.[38]

Although party autonomy in the field of family law "is usually regarded by most legal systems with extreme care and caution",[39] a recent paradigm shift has been prominent in this area, even if involving children. It is important to highlight that agreements made by the

35 P. E Nygh, Reasonable Expectations of Parties in Choice of Law, Recueil, p. 294-295.

36 F Vischer,"General course on private international law (Volume 232)", in *Collected Courses of the Hague Academy of International Law* (The Hague Academy of International Law, 1992) 31

37 *Ibid at 31*

38 N Araújo, "Novos temas na agenda da Conferência da Haia de Direito Internacional Privado: Grupo de Especialistas discute o reconhecimento e execução de acordos privados em disputas familiares internacionais, New topic in the agenda of the Hague Conference on Private International Law: Groups of Specialists discuss recognition and enforcement of private agreements in cross-border family disputes" ASADIP, 2014, http://www.asadip.org/v2/wp-content/uploads/2015/03/HCCH-Acordos-Privados_13jun2014ADFASvf.pdf, acessed on 02/02/2015.

39 Araújo, Vargas, *supra* n 5, 490.

parties are closer to what “happens” inside the family relation, provided that there is “an adequate and optimal response to resolving cross-border family disputes involving children, while providing appropriate legal security” according to Rubaja.[40] Araújo and Vargas say that “unlike commercial matters, in which boundaries are strictly set forth in the agreement, it is not always possible to foresee if a private agreement involving a family dispute will have an impact outside the country where it was entered into force”.[41]

Therefore, mediation in family law in relation to cases of divorce without children is a good alternative for peaceful dispute resolution, provided that parties are in an isonomic position to decide. Otherwise, issues involving unequal conditions, domestic violence and other forms of abuse against any member of the family or violence against the disabled may not be solved by ADR methods, once it cannot be considered as amicable solution.

It is important to stress that both parents are responsible for the best interest of the child, with the duty to protect and ensure basic rights such as shelter, maintenance, clothes, education and health care. When parents live together, they have joint responsibility for the child, and after divorce, they remain responsible, “even if one parent has the main custody or residence over the child, and the other parent has a visitation right.[42] Additionally, an agreement between parents obtained through mediation could obligate and empower parents to actively and purposefully address the issues affecting the future of their family.[43]

Mediation in family matters may encounter some difficulties when parents live far away from each other and the parties need to meet for a certain period of time to achieve an agreement. The use of a mediation mechanism might have to involve direct contact between parties, face-to-face.

2. MEDIATION IN CROSS-BORDER MAINTENANCE

The 2007 Hague Convention on Maintenance assigns to central authorities the role of encouraging amicable solutions with a view to obtaining voluntary payment of maintenance, where suitable by use of mediation, conciliation or similar processes, according to Article 6 (d). Among the implementation measures, states should allow the use of mediation, conciliation or other alternative means of settling disputes in favour of voluntary enforcement, as set

40 N Rubaja, “El reconocimiento y ejecución de acuerdos transfronterizos como vía para asegurar los derechos de los niños en situaciones familiares internacionales”, in *Revista de Derecho de Familia,* (Abeledo Perrot, Septiembre 2016, Nº 76, Buenos Aires, Thomson Reuters, p.207 – 222), 222 (16).

41 Araújo; Vargas, *supra* n 5, 490.

42 B Pali, S Voet, “Family Mediation in International Family Conflicts” in *The European Context Institute of Criminology,* (Katholieke Universiteit Leuven, 2012) 10.

43 Ibid at 31.

forth in Article 34 (2) i.

In addition, Walker highlights that judges and central authorities "should be wary of placing too much emphasis on amicable solutions as forced mediations are unlikely to promote access to justice, and will most likely delay proceedings".[44] For this reason, mediation is based upon voluntary resolution and parties' will.

Mediation in cross-border maintenance is possible between debtor and creditor, provided that the creditor has achieved majority and that the countries involved have made declarations to extend the international legal cooperation for recovery of family maintenance, and that both parties are in equal bargaining positions.

Furthermore, the 2007 Hague Convention requires a more pro-active role of central authorities in promoting or encouraging the use of methods or procedures for achieving amicable solutions. The voluntary payment of maintenance should not impede the effective access to procedures within the meaning of Article 14.[45] In the Explanatory Report, Borrás and Degeling state that "it is generally accepted that, while voluntary arrangements can be the most effective solution in some cases, not all cases will be suited for a voluntary resolution or the use of mediation".[46]

Family cross-border mediation has been encouraged as an alternative process to amicable solutions whenever possible, instead of judicial dispute. In several cases, family disputes involve many issues regarding divorce, custody, child support and spousal maintenance, and solutions are set in a single package. Mediation may also be used to solve particular issues arising from family relations, like the reorganization of custody, re-setting right to visitation and re-defining the maintenance payment amount.

One of the main advantages of cross-border mediation in maintenance matters is that parties may reach an agreement faster than by litigating before national courts, and that it may reduce costs of proceedings and increase compliance with the agreement. Maintenance obligation can be set together with other family matters into agreement in a single package through mediation. Besides, arrangements through mediation can be achieved only for setting the maintenance payment, regardless of the parents' status or relation. Parties can choose a single mediator, or two mediators, one representing each party; either way, mediators have to carry out the mediation procedure to induce the parties to come to an agreement.

3. CO-MEDIATION ON MAINTENANCE

44 Walker, *supra* 33, 219.

45 Borrás, Degeling, *supra 16,* 95.

46 Ibid at 95.

When parties are residing in different places, co-mediation can be a good practice in order to solve cross-border litigation on family matters, including maintenance payment. It also facilitates "intercultural dialogue" when amicable solutions take into account parties' cultural diversity and respect their will.

Considering that meditation is based upon voluntarism and mutual trust among parties, co-mediation in family matters is unlikely to fail on compliance. A good practice in co-mediation is that both mediators have to exchange information about the family conflict and try make the parties reach an agreement in the best interest of a child, and as well as of the family. Usually conflicts in cross-border maintenance are about payment amount or about the absence of payment.

Some difficulties may arise in cross-border co-mediation. Face-to-face meetings might also appear as an obstacle to settle voluntary resolution. When national laws regarding mediation are diametrically opposed, some confusion can be present among parties who want to solve their conflict by mediation. Other problems may arise when procedure rules are not clear to the parties involved. For this reason, the mediation contract must provide all information required to perform mediation procedure to all parties. Transparency on procedure rules, unbiased mediators and confidentiality are the keys to co-mediation success.

The main advantage of "two co-mediators who try to work together for the same goal" is that this "may represent a 'model of constructive cooperation' to the parties".[47] Another advantage is that each mediator should take into account national law regarding parties' agreement through mediation, in order to facilitate the enforceability when it meets essential requirements. For instance, in spite of the fact that the right to maintenance and child support are considered inalienable rights but negotiable, according to the Brazilian law, it is possible for the use of mediation to have as a result an out-of-court agreement made by parents. Notwithstanding that, an extrajudicial agreement must be ratified before a national court, after the intervention/auditory of the public prosecutor's office; otherwise, it will not have judicial effect. Only between spouses may the maintenance obligation be waived in a divorce or separation agreement through mediation.

Central authorities play an important role in informing about mediation policies and in guiding appropriate procedures for the settlement of family and maintenance dispute. In case of breach of agreement, states have to recognise of cross-border maintenance agreements made by parties, even when technological alternatives are used to solve disputes, such as mediation online.

The use of technology in the modern information society may facilitate cross-border

47 Z D Şuştac, J Walker, C Ignat, A E Ciucă, S E Lungu, "Best Practice Guide On The Use Of Mediation in Cross-border cases" (Civil Justice 2010 Programme of the European Union, Cucharest, 2013) 20.

dispute resolution. Cross-border mediation "may be carried out online by using modern communication technologies in the mediation process, with the observance of rules and principles used in a common procedure".[48] The Brazilian Mediation Law allows the use of Internet or other means of communication that facilitate negotiation at a distance, provided that the parties have previously agreed to do so, as set forth in Article 46. In addition, the National Council of Justice (CNJ) has developed the Digital Mediation System with the view of creating a safe environment for parties to achieve "virtual agreement" when they are in different places. In international private relations, when one of the parties is domiciled abroad, the Mediation Law allows a person to settle a conflict through mediation methods that involve electronic means.

The language that is used in the drafting of the agreement may become an issue, especially when an agreement is written in two different languages chosen by the parties involved. Considering the foreign element, different interpretations may arise. Both are authentic documents. Hence, co-mediators should be cautious and careful about the content of the agreement clauses, which should faithfully reflect the arrangements made by the parties during the negotiation of the agreement through mediation. Both versions are titles to be enforced before national courts in case of breach by one party.

4. PARADIGM SHIFT FROM THE NEW CIVIL PROCEDURAL CODE

Since the passing of Law no. 13.105, of 16 March 2015, known as the Civil Procedural Code, there has been a new approach concerning ways of settling disputes. Tartuce states that the law "promotes a 'nonjudicial' approach for settling conflicts or disputes in Brazilian society" (*desjudicialização*).[49] In addition, it removes the idea of competitive litigation as a match. Pursuant to Article 3, a threat or injury is not excluded from the judicial assessment. However, the three paragraphs of this article encourage Brazilian society to search for other alternatives of settlement disputes such as arbitration, conciliation, mediation and other consensual methods of dispute resolution.

Before the Civil Procedural Code, the National Council of Justice (CNJ) set forth Resolution no. 125 of 2010, which provides for the Judicial Policy for the Adequate Treatment of Conflicts of Interest within the Judiciary Power. According to Article 4, the CNJ is responsible for organizing a program with the objective of promoting actions to encourage self-composition of litigation and social pacification through conciliation and mediation. The

48 Şuştac, Walker, Ignat, Ciucă, Lungu, *Supra* 48, 14.

49 F Tartuce, "Da Extrajudicialização do Direito de Família e das Sucessões. Parte I – Da Mediação", Migalhas, 28 de julho de 2016, . http://www.migalhas.com.br/FamiliaeSucessoes/104,MI244807,61044-Da+extrajudicializacao+do+Direito+de+Familia+e+das+sucessoes+Parte+I, acceced on 15 June 2017.

"Conciliation is Cool" Program[50] was launched in 2010 as a public management of conflict program that gives awards for the most successful practices, stimulates creativity and disseminates the norm of the use of alternative dispute resolution for conflicts.

Both methods, conciliation and mediation, are guided by principles such as informality, simplicity, economy, celerity, orality and procedural flexibility. Because conciliation and mediation are both extrajudicial methods that aim at socially pacific dispute resolution, they are sometimes used as synonyms, but they are not. Conciliation is a method used in simpler, or restricted, conflicts in which the third-party facilitator can adopt a more active, but neutral, conflict-free and impartial approach. It is a brief consensual process.[51] Mediation is a form of conflict resolution in which a neutral and impartial third person facilitates dialogue between the parties, so that the parties can build, with autonomy and solidarity, the best solution to their conflicts. It is used in multidimensional or complex disputes.[52]

5. MEDIATION IN BRAZIL: A NEW APPROACH TO SETTLING CONFLICTS

Before the Mediation Law, as mentioned before, the National Council of Justice (CNJ) developed some public policies in order to encourage judicial conciliation instead of judicial litigation. CNJ Recommendation no. 50/2014 was published in order to stimulate and support courts in the whole country to adopt a new approach to consensus-based conflict resolution techniques.

Law no. 13.140, of 26 June 2015, known as a "Civil Milestone of Mediation", defines mediation in Article 1 as a mean of settling disputes between individuals and promoting the self-determination of conflicts within the public administration, as well as a technical activity performed by an impartial third party, chosen or accepted by the parties, without decision-making power, based upon party autonomy in order to achieve consensual solutions to the dispute.

In 2016, the First Colloquy for Extrajudicial Prevention and Settlement of Litigation, sponsored by the Centre for Judicial Studies of the Federal Court Council (CEJ/CJF), approved 87 statements, 34 of which related to mediation. According to Statement 14, mediation is "a method of appropriate treatment of disputes that must be encouraged by

50 A pun in Portughese: "Conciliação é legal"

51 Conselho Nacional de Justiça (CNJ), "Manual de mediação Judicial", Comitê Gestor Nacional da Conciliação, Organização A G Azevedo, 2016, p. 21-23 See http://www.cnj.jus.br/programas-e-acoes/conciliacao-e-mediacao-portal-da-conciliacao, which is avalaible in English and Spanish.

52 CNJ, *supra* 52, 20-21.

Brazilian federate states, with the active participation of society, as a way to ensure access to justice and the just legal order".[53]

Mediation can be considered successful when parties reach an agreement.[54] Usually, the agreement is voluntarily fulfilled; however, cases may arise in which one of the parties breaches the agreement, wholly or partially, usually making it necessary to be brought before a court to be enforced. Notwithstanding, the Mediation Law recognises private agreements on family matters resulting from extrajudicial mediation. Pursuant to Article 3 of the Mediation Law, there is a possibility for settling a conflict regarding available or unavailable rights that are negotiable. Nevertheless, paragraph 2 sets forth that the consensus achieved by the parties involving unavailable but negotiable rights must be ratified in court, and the intervention or review of the public prosecutor's office is also required, especially in cases involving the interest of minors and other incapable persons**.** Considering that party autonomy is limited in enforcement, dependent on the manifestation of the public prosecutor's office, as well as the *exequatur* of the decision rendered by a judge,[55] Brazil made reservations to Article 20(1)(e) and to Article 30(8) of the 2007 Hague Convention on Maintenance.

Concerning mediation involving children, Statement 26 of the Centre for Judicial Studies of the Federal Court Council (CEJ/CJF), has a new approach:

> The participation of children, adolescents and young people, respecting their stage of development and degree of understanding, is admissible in the mediation process when the conflict (or part of it) is related to their interests or rights.[56]

As a result, it is possible for children and adolescents to get involved in mediation when necessary and in very particular conflicts, based upon Article 227 of the Brazilian Federal Constitution in relation to the protection of children and adolescents by family, state and society, which includes the right to freedom of opinion and expression.[57]

---

53 The Federal Court Council (CEJ/CJF), "I Jornada Prevenção e Solução Extrajudicial de Litígios", 2016 http://www.cjf.jus.br/cjf/noticias/2016-1/setembro/cjf-publica-integra-dos-87-enunciados-aprovados-na-i-jornada-prevencao-e-solucao-extrajudicial-de-litigios, accessed on 09 June 2016.

54 E D'Alessandro, "Results of mediation and cross-border enforcement of mediation agreements, 2013, *Era Forum*, (October 2013, volume 14, Issue 3, pp 409-420) 409.

55 HCCH, Declaration/Reservation/Notification "Reservation to Article 20(1)(e): Brazil does not recognise or enforce a decision in which an agreement to the jurisdiction has been reached in writing by the parties when the litigation involves obligations to provide maintenance for children or for individuals considered incapacitated adults and elderly persons, categories defined by the Brazilian legislation and which will be specified in accordance with Article 57. Reservation to Article 30(8): Brazil does not recognise or enforce a maintenance arrangement containing provisions regarding minors, incapacitated adults and elderly persons, categories defined by the Brazilian legislation and which will be specified in accordance with Article 57 of the Convention" https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1377&disp=resdn accessed on 27 December 2017.

56 The Federal Court Council (CEJ/CJF), *supra* 54.

57 Tartuce, *supra 50.*

In cross-border maintenance, considering that Brazil reserved the right to recognise or enforce private agreements on maintenance provisions regarding minor, elderly and incapable persons, and limits party autonomy in cases involving unavailable but negotiable rights without any judicial authority intervention, countries should be aware of differences among judicial legal systems, observing countries' profiles.

CONCLUSIONS

Mediation, conciliation and other alternative dispute resolution mechanisms represent a paradigm shift in the Brazilian judicial system. The increase of conciliation for conflict resolution has been a successful experience, especially regarding centres for conciliation (CEJUSCs). This paradigm shift points away from culture of "judicial war" to a culture of "social dialogue" between the parties involved. Mediation goes in the same successful direction, including in furnishing better solutions on family matters.

Cross-border mediation promotes an approximation among cultural diversity, building a bridge of social justice. It strengthens the culture of peace in the settlement of disputes, especially in the area of family matters, protecting vulnerable people such as women and children.

Cross-border mediation is another way of guaranteeing transnational families access to justice. It is very important to emphasise that the fundamental principles of maintenance rights are the dignity of a human being and family solidarity.

Transnational families need to solve their problems. Recognition of cross-border mediation or even co-mediation can be a path to achieve self-composition and fairness in family matters, including child support and maintenance, through international legal cooperation.

REFERENCES

ARAUJO, Nadia; VARGAS, Daniela T. **The cross-border recognition and enforcement of private agreements in family disputes on debate at the Hague Conference on Private International Law**. In Jose Antonio Moreno Rodrigues; Claudia Lima Marques. (Org.). *Los Servicios en el Derecho Internacional Privado. Jornadas de la ASADIP 2014*, 1ed.Porto Alegre / Asuncion: Gráfica e Editora RJR, 2014, v. 1, pp. 485-506.

ARAÚJO, Nadia. **Novos temas na agenda da Conferência da Haia de Direito Internacional Privado: Grupo de Especialistas discute o reconhecimento e execução de acordos privados em disputas familiares internacionais.** New topic in the agenda of the Hague Conference on Private International Law: Groups of Specialists discuss recognition and enforcement of private agreements in cross-border family disputes" ASADIP, 2014, http://www.asadip.org/v2/wp-content/uploads/2015/03/HCCH-Acordos-Privados_13jun2014ADFASvf.pdf, acessed on 02/02/2015.

BECK, Ulirch. **O que é Globalização? Equívocos do Globalismo.** São Paulo, Paz e Terra,1999.

BORRÁS, Alegría; Degeling, Jennifer. **Explanatory report on the convention of 23 november 2007, on the international recovery of child support and other forms of family maintenance.** Edited by the Permanent Bureau of the Conference, 2009.

BORRÁS, Alegría. **The Necessity Flexibility in Application of the New Instruments on Maintenance.** In BOELE-WOEKI, Katharina et al, *Convergence and Divergence in International Private Law,* Liber Amicorum, pp.173-192, Kurt Sieht, Schulthess, Eleven, 2010.

D'ALESSANDRO, E .**Results of mediation and cross-border enforcement of mediation agreements.** *Era Forum*, October 2013, volume 14, Issue 3, pp 409-420.

HÖRNLE, J. "Cross-Border Internet Dispute Resolution. Cambidge University Press, 2009

DIAS, Maria Berenice. **Manual de Direito das Famílias.** 4a Edição, São Paulo, Editora

Revista dos Tribunais, 2016.

JAYME, Erik. **Cultural dimesion of Maintenance Law from a Private International Law Perspective.** In Beaumont, B Hess, LWalker and S Spancken (eds) *The Recovery of Maintenance in the EU and Worldwide*, Oxford, Hart Publishing, 2014.

LOPES, Inez. Maintenance Obligations in the Brazilian Legal System. In Beaumont, B Hess, LWalker and S Spancken (eds) *The Recovery of Maintenance in the EU and Worldwide,* Oxford, Hart Publishing, 2014.

NYGH, Peter E. **Reasonable Expectations of Parties in Choice of Law in contract and in tort.** *Recueil des cours,* Volume 251.1995, pp. 269-400.

RUBAJA, Nieve. **El reconocimiento y ejecución de acuerdos transfronterizos como vía para asegurar los derechos de los niños en situaciones familiares internacionales.** In *Revista de Derecho de Familia,* Abeledo Perrot, Septiembre 2016, Nº 76, Buenos Aires, Thomson Reuters, p.207 – 222.

PALI, B.; VOET, S. **Family Mediation in International Family Conflicts**. In *The European Context Institute of Criminology,* (Katholieke Universiteit Leuven, 2012

PEREIRA, Caio Mario S. **Instituições de direito civil**. Vol. V – 22. ed. – Rio de Janeiro: Forense, 2014.

ŞUŞTAC, Z. D.; WALKER, J.; IGNAT, C.; CIUCĂ, A. E.; LUNGU, S. E**. Best Practice Guide On The Use Of Mediation in Cross-border cases.** Civil Justice 2010 Programme of the European Union, Cucharest, 2013.

TARTUCE, F. **Da Extrajudicialização do Direito de Família e das Sucessões**. Parte I – Da Mediação", Migalhas, 28 de julho de 2016, Available at. http://www.migalhas.com.br/FamiliaeSucessoes/104,MI244807,61044-Da+extrajudicializacao+do+Direito+de+Familia+e+das+sucessoes+Parte+I, acceced on 15 June 2017.

VISCHER, F. **General course on private international law**.Volume 232. In *Collected*

Courses of the Hague Academy of International Law (The Hague Academy of International Law, 1992.

WALKER, Lara. Maintenance and Child Support in Private International Law, Oxford and Portland: Hart, 2015.