

# The Law Applicable to International Mediation Contracts

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### ***Abstract\****

*Mediation entails the provision of the services of a professional, the mediator, who holds a legal relationship with the disputants: the mediation contract. Where there are transnational elements in the mediation process, the contract is of an international character. In such situation, the Laws of the diverse States involved could claim to be applicable to the same contract. The determination of the (only) Law applicable is of utmost interest in spite of the high degree of standardization of the obligations of both parties in the mediation contract. First, for such *lex contractus* establishes the limits of the freedom of the contracting parties. And second, for there are important matters that the parties do not usually tackle within the wording of mediation contracts and that model rules and standards do not either regulate. The present paper aims at illustrating about the functioning of the present and the future instruments of Private International Law that solve the conflict-of-laws issue: Rome Convention and Rome I Regulation.*

*Título:* Derecho aplicable a los contratos internacionales de mediación

*Keywords:* International mediation contracts, conflict-of-laws, Rome I Regulation

*Palabras clave:* Contratos de mediación internacional, Derecho aplicable, Reglamento Roma I

### ***Summary***

#### **1. Introduction: Main Features of International Mediation Contracts**

##### **1.1. Mediation contracts**

##### **1.2. Internationality of mediation contracts**

#### **2. The Law Applicable to International Mediation Contracts**

##### **2.1. Commercial mediation**

##### **2.2. Family mediation- “ordinary issue”**

###### **a. Consumer contract**

###### **b. Non- consumer contract**

##### **2.3. Family mediation – “special issue”: mediation in international parental child abduction**

###### **a. Consumer contract**

###### **b. Non-consumer contract**

#### **3. Bibliography**

## 1. Introduction: Main Features of International Mediation Contracts

Mediation is, by definition, a structured process whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of the mediator, who is the third person asked to conduct the mediation in an effective, impartial and competent way<sup>1</sup>. Thus, the mediator simply helps the disputants to arrive at a resolution of the conflict by agreement without adjudication. But this task is far from being a simple one. On the contrary, for a mediation process to arrive to a good end, it is compulsory that the *facilitator* is acquainted with certain procedures, techniques and skills that he/she has to use<sup>2</sup>. In short: mediators need to be professionals.

Mediation is therefore also a job: mediators do provide services on a commercial basis. As a result, there is a legal relationship between the mediator and the disputant parties. Both oblige themselves to the performance of certain acts: in order to give and receive the services of mediation, the disputants and the mediator conclude a contract<sup>3</sup>.

### 1.1. Mediation contracts

A mediation contract is, first of all, a contract for the provision of services. The mediator's performance is the one which characterizes the contract<sup>4</sup>, and it is a services' provision. As has been pointed out before, the mediator undertakes to use her/his best efforts to channel the communication between the disputants, so that they may conclude their own arrangement on the conflict. On their part, the disputants are obliged to pay for the services rendered, even if the fees may be assumed by third parties, namely the State<sup>5</sup> or charities<sup>6</sup>, notwithstanding the fact that

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<sup>1</sup> See these definitions (of "mediation" and "mediator") in Article 3 of Directive 2008/52/EC of the European Parliament and of the Council of 21.5.2008 on certain aspects of mediation in civil and commercial matters, *Official Journal of the European Union (OJEU)* L 136, 24.5.2008.

<sup>2</sup> FIADJOE (2004, p. 58).

<sup>3</sup> The mediation contract is usually known as mediation agreement; but I will use the term "contract" to differentiate it from the agreement that the disputants may reach at the end of the mediation process.

<sup>4</sup> The determination of the performance which is characteristic of the contract could be fundamental for the determination of the law applicable to the mediation contract in absence of choice. Such performance is said to be the performance that reveals the legal and economic function of the contract, i.e., the one that "gives a name" to the contract -habitually the non-pecuniary one, as the payment of a prize is common to the majority of the contracts: CARRILLO (1994, pp. 121-129) and VIRGÓS (1996, pp. 5291-5297). If Rome I Regulation applies (see *infra*, n 18), it will not be necessary to resort to this notion for this particular contract.

<sup>5</sup> Although mediation services are normally provided free, the number of private mediators is increasing in most countries. See WALKER (2000, pp. 30-31).

mediation expenses may also be considered a part of legal aid<sup>7</sup>. The mediation contract is, as a result, an onerous contract and it has a synallagmatic character.

In addition, it is important to draw attention to the fact that this contract has always a plurality of parties, at least in one of the contractual positions, i.e., the disputants' position. In fact, it is likely that both parties are composed of two or more persons, for it is also possible that the process is conducted by a body of mediators (see *infra*).

Finally, it is also worthy to reveal that the existence of legal regulations specially enacted for this contract varies to a great extent. It is nominated and regulated in some legal systems<sup>8</sup>, whilst it lacks any specific rules –it is innominated– in others. But, whatever may be the case, the main sources for the determination of the most fundamental parties' obligations, and of the mediator's duties in particular, are to be found both in the standards of conduct to which these professionals are often voluntarily bound, and in the deontological rules of a compulsory nature given by the institutions or associations to which mediators belong. Just to mention a couple of examples of the voluntary rules, there is a "European Code of Conduct for Mediators"<sup>9</sup> to which the European Union has given express support<sup>10</sup>, and a set of "Model Standards of Conduct for Mediators", adopted in 2005 under the auspice of the American Arbitration Association<sup>11</sup>. As far as the obligatory norms concerns, the illustrations can be found both in the International Chamber of Commerce (ICC) ADR Rules of 2001<sup>12</sup>

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<sup>6</sup> For instance, mediation in cases of international parental child abduction that was offered under the frame of the reunite Mediation Pilot Scheme, is supported by the Nuffield Foundation. See REUNITE (2006, p. 10).

<sup>7</sup> Indeed, Council Directive 2002/8/CE of 27<sup>th</sup> January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, *Official Journal of the European Communities (OJEC)* L 26, 1.31.2003 establishes that "legal aid is to be granted on the same terms both for conventional legal proceedings and for out-of-court procedures such as mediation, where recourse to them is required by the law, or ordered by the court" [for further information see CUARTERO (2007, pp. 51-52)].

<sup>8</sup> For instance, the Law of Balearic Islands n 16/2006, of 22<sup>th</sup> November 2006, of Family Mediation (*Ley 18/2006, de 22 de noviembre de Mediación Familiar*; BOE n 303, 12.20.2006) contains a whole title completely devoted to the regulation of the mediation contract (See Title I: articles 3 to 24). For further information concerning this regulation, see DE LA TORRE (2007).

<sup>9</sup> See [http://ec.europa.eu/civiljustice/adr/adr\\_ec\\_code\\_conduct\\_en.pdf](http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf) (accessed 22.12.2010).

<sup>10</sup> § 17 of the Preamble of the Mediation Directive asserts that "Mediators should be made aware of the existence of the European Code of Conduct for Mediators which should also be made available to the general public on the Internet". The Code is available on the web site of the European Union (see previous note).

<sup>11</sup> See [http://www.abanet.org/dispute/documents/model\\_standards\\_conduct\\_april2007.pdf](http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf) (accessed 22.12.2010).

<sup>12</sup> See [http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/adr\\_rules.pdf](http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/adr_rules.pdf) (accessed 22.12.2010).

and in the set of rules elaborated by the Netherlands Mediation Institute<sup>13</sup> to which other associations, as Gemme (*Grupo Europeo de Magistrados por la Mediación*), remit in their model contracts<sup>14</sup>. The widespread employment of auto-regulatory standards and rules, together with the extensive use of model contracts or model agreements<sup>15</sup>, contribute to a vast standardization of the basic regulation of mediation contracts. The obligations that are most intrinsically related to the mediation process are instituted in every set of rules with a high degree of similarity. Voluntariness, confidentiality, privacy and neutrality on the part of the mediator; right to any party's withdrawal from the process; obligation to pay the agreed mediation's fees on the part of the disputants, and so on, are some of the ever-present elements. For this reason, should the (state) Law applicable to the contract have a specific regulation for mediation contracts, the duties it would establish will not essentially differ to those set up in the above mentioned sets of rules.

However, regardless of the high degree of standardization, the determination of the law applicable to the mediation contract in international situations is of utmost interest, for two main reasons. The first one is that *lex contractus* establishes the limits of the freedom of the contracting parties. The validity of all the terms of the contract would always be examined in the light of this law. The second reason is that there are important matters that the parties do not tackle habitually within the wording of mediation contracts and that model rules and standards do not either regulate. For instance, the type of obligation of the plural debtors (i.e., of the disputants in every mediation, and sometimes, of the mediators, where there are more than one). Let us imagine that the mediator, who has accomplished her/his part of the business, is not fully satisfied with the amount that the disputants have paid. The mediator needs to know whether she/he has to demand each of the parties only that debtor's part, or she/he may rather require it from any one of them until full performance has been received. In short, the mediator would need to know whether the disputants' obligation is separate or solidary (*joint and several*) (respectively)<sup>16</sup>. The answer is to be found in the law applicable to the contract.

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<sup>13</sup> Netherlands Mediation Institute (NMI) Rules of 2008: <http://www.nmi-mediation.nl> (accessed 22.12.2010).

<sup>14</sup> In Gemme's "Mediation Agreement Draft", available at <http://www.gemme.eu/en/article/mediation-agreement> (accessed 22.12.2010).

<sup>15</sup> The NMI also has a Model Mediation Agreement, dated 2004, available in its web site: <http://www.nmi-mediation.nl> (accessed 22.12.2010).

<sup>16</sup> For a definition of these terms, see Article 10:101 of the Principles of European Contract Law (PECL).

## 1.2. Internationality of mediation contracts

The need to determine the law applicable to a contract appears where there is a choice to make between the laws of different countries or territories, i.e., where such a contract has an international character or where the contract is connected with more than one Law of a regional character<sup>17</sup>. In this paper, I will commit myself to the analysis of the international situations<sup>18</sup>. These situations are ruled, at the present time, by a European Law instrument: Rome I Regulation<sup>19</sup>.

A mediation contract is to be considered international when it involves one or more elements alien to the internal social system of a given country. For example, one or all of the parties to the contract are foreigners or national persons habitually resident abroad; the contract is signed abroad; or the obligations of the parties need to be performed in a foreign country<sup>20</sup>. In all these cases, mediation will have cross-border implications that pose particular problems<sup>21</sup>. However, what is important to consider here is that internationality cannot be “forced” by way of creating an inter-State conflict-of-laws issue through the introduction of a choice-of-law clause in the contract. In other words: parties in a mediation contract cannot choose a foreign Law where all the elements relevant to the situation<sup>22</sup> at the time of the choice are connected with a country other than the country whose Law has been chosen, for Article 3.3 RIR establishes that, in that case, “the choice of the parties shall not prejudice

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<sup>17</sup> In Spain there is still no State Law regulating mediation, but Andalucía, Asturias, Baleares, Canarias, Castilla y León, Castilla-La Mancha, Cataluña, Galicia, Madrid and Valencia, i.e., more than the half of the *Comunidades Autónomas*, have passed their own Law.

<sup>18</sup> The solution for the conflict of laws issue of an interregional character could be different to the international one, as both RC and RRI (Article 19 RC and Article 22 RIR; see next note) establish the possibility not to apply their own rules to the former.

<sup>19</sup> Regulation (EC) n 593/2008 of the European Parliament and of the Council of 17.6.2008 on the law applicable to contractual obligations (Rome I), *OJEU* L177, 7.4.2008 (quoted as Rome I Regulation or RIR). It is worthy to mention that the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19.6.1980, *OJEC* L 226, 9/10/1980 (quoted as Rome Convention or RC) is applicable where the contract has been concluded after its date of entry into vigour, i.e., after 17.12.2009 (see Articles 24 and 28 RRI). Both instruments are of a universal scope: the law specified by any of them shall be applied whether or not it is the law of a contracting or a Member State (see Articles 2 RC and 2 RIR).

<sup>20</sup> See GIULIANO and LAGARDE (1980).

<sup>21</sup> For an overview of the specific problems of family international mediation in Spanish Private International Law, see PALAO MORENO (2003).

<sup>22</sup> The reference is made to the “situation” and not to the “contract” itself. For an explanation of the reasons and consequences, see FORNER (2009, p. 61).

the application of provisions of the law of that other country which cannot be derogated from by agreement”<sup>23</sup>.

In order to cope with the maximum range of situations concerning international mediation contracts, I will work, in the following epigraph, with three different study-cases of an international dimension. In all the cases, the Law applicable, as I explained before, would let the mediator know, among other aspects, whether she/he may require the totality from any one of the disputant, or, on the contrary, whether she/he has to require from each of the parties only that debtor’s part (see *supra*).

## 2. The Law Applicable to International Mediation Contracts

### 2.1. Commercial mediation

The first of the situations announced involves two undertakings that decide to refer an international commercial dispute to mediation. Let us suppose that one of the undertakings is domiciled in the United Kingdom and the other one in Germany. As they look for an impartial, neutral and competent mediator, and they expect him/her to have a good knowledge of both English and German, they decide to turn to the Nederlands Mediation Instituut (NMI)<sup>24</sup> and sign the corresponding contract with this institution.

The “model agreement” (model contract) currently used by the NMI<sup>25</sup> holds a choice-of-law clause (Article 11), according to which “This agreement shall be exclusively governed by Dutch Law”. Thus, in a real case that the one proposed, the Law applicable would be Dutch Law, not only because there is no possible use of the “exception clause” against the will of the parties, but also because an express choice of law by the parties would be valid under Article 3 RIR (*ex* Article 3 RC), and is not limited here. Where disputants are legal or natural persons performing tasks in the exercise of their respective trade or profession, mediation contracts cannot be considered consumer contracts (it happens otherwise in next study-case, *infra*). Therefore, the only possible limit to the will of the parties would apply if the Rome I Regulation applies, the Law chosen is the Law of a third country,

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<sup>23</sup> Thus, the designation of a given State law as the applicable to the contract where it is not international will not be considered as a true choice-of-law clause, but just as a mere integration of such law in the contract (“substantive” freedom of choice). Therefore, it is subject to the limitations established in the law applicable to the contract, i.e., the law of the (only) country connected with such contract.

<sup>24</sup> A basic assumption in international mediation is that parties will choose, when possible, a mediator from a third country; and, to this extent, the knowledge of the languages of the parties would be decisive for the election: JAGTENBERG (2001, pp. 91-92).

<sup>25</sup> See *supra*, n 14.

there are Community Law rules that cannot be derogated from by agreement and all the relevant elements to the situation at the time of the choice are located in one or more Member State<sup>26</sup>.

As the law of The Netherlands would apply, the mediator would have to recover from each of the disputants the part of the debt corresponding to that party: the British undertaking and the German undertaking are separate debtors according to the general presumption established by Dutch Law<sup>27</sup>.

Should the mediation contract lack a choice-of-law clause, the law applicable to the contract would also be Dutch Law. Indeed, that was the solution under the Rome Convention<sup>28</sup> and it is still the result of application of the Rome I Regulation, even if it has introduced a great novelty, by setting up a rigid conflict-of-laws rule<sup>29</sup>. According to Article 4.1 RIR "a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence"<sup>30</sup>.

In this "easy case" it is still worthy to pay attention to two particulars.

The first one concerns the utilization of the "exception clause", which would allow applying another Law, where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, under any of the applicable instruments (see Article 4.3 RIR, *ex* Article 4.5 RC). In the given case, such use is little plausible, for nothing in the circumstances described leads us to conclude that other Law different to Dutch Law is more closely connected with the mediation contract.

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<sup>26</sup> For Article 3.4 of RIR (RC lacks a rule like this one) establishes that such choice of a "law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement". In favour of this provision, see BONOMI (2008, pp. 171-173); more critic, GARCIMARTÍN (2008, p. 8).

<sup>27</sup> See Article 6.1 of Book VI of the Civil Code of the Netherlands. The presumption would fall if the parties agree on the contrary, i.e., on the introduction of a solidarity clause in the contract.

<sup>28</sup> Article 4.1 RC establishes that the applicable law in the absence of choice is the "law of the country with which it (the contract) is most closely connected"; and Article 4.2 RC adds that "(...) it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration (...)". Subsequently, as the performance which is characteristic of the contract is the provision of the mediation's services (see *supra*), the applicable Law is the Law of the central administration of the NMI. In this case such Law would coincide with the Law applicable.

<sup>29</sup> GARCIMARTÍN (2008, pp. 9-10); BONOMI (2008, pp. 173-176) and UBERTAZZI (2008, pp. 67-78). FORNER (2009, p. 77) refers to an "attenuated rigidity" (*rigidez amortiguada*), due to the possibility of employing the "exception clause" set by Article 4.3 RIR.

<sup>30</sup> RIR has introduced another relevant change: the determination of the habitual residence of legal persons for the purposes of the Regulation is regulated in Article 19. See FONT (2009).



The second issue concerns the possibility of incorporating by reference a non-State body of law. Such possibility is expressly mentioned in the Rome I Regulation (Recital 13) in order to make it clear that this instrument, following the Rome Convention and contrary to the Proposal for the Regulation<sup>31</sup>, does not permit the election of such body as *lex contractus*<sup>32</sup>. The (allowed) incorporation of any of the currently existing “bodies” that have a specific regulation of plurality of parties, i.e., the European Code of Contracts, the Lando Principles and the Common Frame of Reference, would have led to a substantive solution opposite to the solution given by Dutch Law. The debt will not be considered separate, given that, according to any of the abovementioned instruments, plural debts are presumed to be solidary<sup>33</sup>.

## 2.2. Family mediation- “ordinary issue”

In the second situation, a British national and a German national that live together in Germany decide to separate and go to family mediation in order to reach agreements concerning their children. The couple has the same reasons as the undertakings to turn to the NMI: they want someone *truly* neutral and they want the mediator to speak both languages fluently. But in this case the determination of the *lex contractus*, even if the Rome I Regulation would still be applicable<sup>34</sup>, is a little more difficult.

### a. Consumer contract

To start with, the family mediation contract might be a consumer contract. Be it the case, the Law applicable, in the absence of a choice, would be the law of the habitual residence of the consumers (Article 6.1 RIR, *ex* 5.1 RC). German Law would apply, given that the couple has its habitual residence in Germany. According to German Law, the mediator would be able to recover the whole

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<sup>31</sup> See Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I), COM (2005) 650 final. Greeting the introduction of such possibility, see, among others, LANDO and NIELSEN (2007, pp. 30-34).

<sup>32</sup> For an explanation of the withdrawal of the novelty in the final wording of RRI, see GARCIMARTIN (2008, p. 6). See also HEISS (2009, pp. 9-12).

<sup>33</sup> See Article 88.1 European Code of Contracts; Article 10:102 PECL; Article III.4:103(2) CFR.

<sup>34</sup> Article 1.2 excludes the application of the Regulation to “rights and duties arising out of a family relationship, parentage, marriage or affinity (...). The same solution is established in Article 1.2 RC. As a result, neither of them regulates the Law applicable to the agreements eventually reached by the disputants in a family mediation. For further information about the enforceability of such agreements in the EU, see PALAO MORENO (2005). But the nature of the dispute (commercial or familiar) does not condition the application of RC or RIR to the mediation contract itself, since it does not change its character of contract for the provision of services.

of the sum debited from any of the disputants, since the presumption set in that Law favors solidarity in plural debts<sup>35</sup>.

For the contract to be considered a consumer contract, it must have been concluded by a person for a purpose which can be regarded as being outside her/his trade or profession, the consumer<sup>36</sup>, with another person, the professional, acting in the exercise of her/his trade or profession. This is the case in the contract signed by the members of the family and the NMI. But it would also be necessary, if the date of signature was previous to 17<sup>th</sup> December 2009 (and therefore the Rome Convention is applicable), (1) that the NMI addresses the family advertising or a specific invitation to the conclusion of the contract, which must take place in Germany<sup>37</sup>; and (2) that the services of mediation are not supplied exclusively in The Netherlands<sup>38</sup>. If Rome I Regulation applies, a higher number of contracts falls under the protection of the rule on consumer contracts: although it will also be necessary that at least a part of the services are provided in Germany<sup>39</sup>, the disputants would be considered “consumers” even if they do not conclude the contract in the country of their habitual residence<sup>40</sup>. In our case, should the couple have traveled to Rotterdam to conclude the contract in the premises of the *Instituut*, the consideration of the contract as a consumer’s contract would not be altered. What the Rome I Regulation demands is that the professional “pursues his commercial or professional activities in the country where the consumer has his habitual residence, or by any means directs such activities to that country or to several countries, including that country, and the contract falls within the scope of such activities” (See Article 6.1 RIR)<sup>41</sup>.

If the said requirements are met, the election of any Law different than the Law of the habitual residence of the consumer (German Law, in the case) shall not have the result of depriving the consumer of the protection afforded by the mandatory rules of the Law of her/his habitual

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<sup>35</sup> See § 427 BGB.

<sup>36</sup> RRI demands that this person is a natural person (see Article 6.1 RIR); however, under RC it could be a legal person, given that it does not contract in the frame of the trade or profession (see Article 5.1 RC). See RAGNO (2009).

<sup>37</sup> The other possibilities given in Article 5.2 RC are not very likely to happen in the case.

<sup>38</sup> Article 5.4 establishes that Article 5 “shall not apply to (...) b) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence”.

<sup>39</sup> Article 6.4 a) of RIR holds the same exception to the application of the Article itself than Article 5.4 of RC. For an explanation of the reasons, see GIULIANO and LAGARDE (1980).

<sup>40</sup> It has been said that by abandoning this requirement, RIR closes a gap and avoids a hole in the consumer’s legal armour: see MANKOWSKI (2008, pp. 138-139).

<sup>41</sup> For further information, see among others: MANKOWSKI (2008) and RAGNO (2009).

residence. Thus, all the mandatory rules of German Law that aim at the protection of consumers would be applied, notwithstanding the fact that the choice-of-law clause in the NMI “model agreement” sets forth the application of Dutch Law<sup>42</sup>. Paradoxically, in this case, the disputants would be more protected if Dutch Law were applicable, for solidarity (Dutch solution) entails a greater protection to the creditor (the mediator) against the debtors (each of the members of the couple)<sup>43</sup>, but the regulation of plural debts cannot be considered mandatory, in my opinion, unless the rules expressly declare so<sup>44</sup>.

### **b. Non- consumer contract**

If any of the requirements for the contract to be considered a consumer contract under the Rome I Regulation is not met (*ad ex.*, the mediator has never travelled to Germany to conduct the mediation), it will be necessary to turn to the general rule. Therefore, in the absence of a choice by the parties of the applicable Law<sup>45</sup>, the Law of the Netherlands will be the *lex contractus*, as it is the Law of the country where the service provider has its habitual residence (Article 4.1 b RIR, ex Articles 4.1 and 4.2 RC).

### **2.3. Family mediation – “special issue”: mediation in international parental child abduction**

The third case concerns the employment of mediation in a situation of international abduction<sup>46</sup>. Let us suppose that an international couple, resident in New York, decide to separate. Both agree that the

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<sup>42</sup> See *supra*.

<sup>43</sup> See MIGNOT (2007).

<sup>44</sup> The provisions that regulate the type of a plural obligation that are applicable when an explicit mention lacks in the contract are to be considered mandatory rules for the protection of consumers when this end is explicitly declared in the Law. For instance, Article 1122 of the Draft Proposal of Law for the Amendment of the Spanish Civil Code presented by the *Comisión General de Codificación* (see in the Special *Boletín de Información del Ministerio de Justicia* of January 2009) establishes that plural debtors are supposed to be solidary debtors, except if they became obliged by the means of a contract concluded with a professional and the former acted as consumers. This provision would be a contracts-mandatory rule, applicable where the consumer has his/her habitual residence in Spain, notwithstanding the choice of law made in the contract in favour of the Law of another country. See, in relation with Rome Convention, WOJEBODA (2000, pp. 200-201).

<sup>45</sup> Remember that Article 11 of the NIM model agreement does contain a choice-of-law provision in favor of Dutch Law (*cit. supra*). This election of a given state Law is not restricted for this contract in RC, and according to RIR it has a single limitation: the above mentioned limitation laid down in Article 3.4 (see *supra*, n 19).

<sup>46</sup> For further information concerning this subject, see, among others: MONEGER (2004); GANANCIA (2004); VIGERS (2006); PAUL and WALKER (2008) and OREJUDO (2009).

mother, a German national, will be the primary carer of the children they have in common. When the fortnight that the mother and children have spent in Germany has gone by, the mother decides not to come back to NY. The father, who has not given his permission for them to stay, makes an application for the return of the children under the Hague Convention 1980<sup>47</sup>. If both the father and the mother agree, a special mediation Program existing between Germany and the USA comes into action. The Program consists of a specific co-mediation: one of the mediators is a woman and the other one a man; one of them has a psycho-social or educational background, and the other has a legal education; one of them is a German, and the other one is a US national, and, where possible, the German will be living in the USA and the North-American in Germany<sup>48</sup>. The most neutral space is therefore created: any special connection to just one of the countries involved is expressly avoided. As a result, the determination of the applicable law will be much more intricate.

#### a. Consumer contract

The first complicatedness relates to the determination of disputants' habitual residence, which, if the contract is a consumer contract, is the key to ascertain the *lex contractus* (see *supra*). The Rome I Regulation does not offer a definition for habitual residence of non-professionals<sup>49</sup>, and the resort to the criteria used in other community instruments appears to be clearly inconvenient<sup>50</sup>. In this case, the main purpose of the application of Article 6 RIR (*ex* Article 5 RC) is, undoubtedly, the protection of consumers –the applicable law would be the law of their habitual residence– so it would be adequate to consider the real or actual habitual residence of each of the disputants at the time of the conclusion of the mediation contract. Therefore, even if the above-mentioned requirements for a contract to be a consumer contract are met in this situation, the consumers lack a single habitual residence.

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<sup>47</sup>Hague Convention of 25.10.1980 on the Civil Aspects of International Child Abduction: [http://hcch.e-vision.nl/index\\_en.php?act=conventions.pdf&cid=24](http://hcch.e-vision.nl/index_en.php?act=conventions.pdf&cid=24) (accessed 22.12.2010).

<sup>48</sup> At least, both may have a great knowledge of both parent's cultural background. See PAUL and WALKER (2008) and VIGERS (2006).

<sup>49</sup> Nor does RC. See Article 19 RIR for legal persons and professional natural persons.

<sup>50</sup> The fundamental reason is that Private International Law instruments enacted by the EC institutions have different objectives and goals. For instance, according to Brussels II *bis* Regulation [Council Regulation (EC) n 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) n 1347/2000, OJEC L338, 23.12.2003] the family would still be US resident, for habitual residence not only expresses a geographical and material proximity, linked to the procedural aspects, but also aims at protecting minor children, through the requirement of an effective integration of them in the country of their habitual residence. The protection of minors is not a goal of the consumers' protection rules applicable (or not) in our study-case.

A reasonable general solution to the problem where there is a plurality of parties on the consumers' side, and they reside habitually in different countries, would be allowing them to make a choice between the Laws of the countries where they have their habitual residences<sup>51</sup>. In the particular case, this possibility would only happen if the mediation is conducted in Germany and in NY simultaneously<sup>52</sup>, for the contract would only be a consumer contract if the mediation is not accomplished exclusively out of the country of the consumer's habitual residence [Article 6.4 b) RIR, *ex* Article 5.4.b) RC]. Should the father travel to Germany to attend the mediation sessions<sup>53</sup>, the contract would only be considered a consumer contract if it is the German habitual residence of the mother that is (exclusively) taken into consideration. As has been said before, if the mediation contract is deemed to be a consumer contract, the contractually imperative rules of the Law of the habitual residence of the consumer would be applicable even if another Law has been chosen as *lex contractus*.

#### **b. Non-consumer contract**

If the contract cannot be regarded as a consumer contract (for instance, because habitual residence is declared to be in the US and mediation is exclusively conducted in Germany), another complicatedness arises where co-mediation is carried out by two or more mediators, if such mediators do not live in the same country. Remember that the general rule sets for that the Law applicable is the Law of the country where the provider of the services (i.e., the mediator) has his/her habitual residence [see Article 4.1 b) RIR, *ex* Articles 4.1 and 4.2 RC]. In such a case, it would be necessary to turn to the default rule, according to which the *lex contractus* is the Law of the country with which the contract is most closely connected (Article 4.4 RIR, *ex* 4.5 RC). The complexity here comes from the already revealed fact that a great effort has been made to keep mediation –and the contract– equidistant with regard to the countries with which the situation has relevant connections (the USA and Germany). The complication could lessen if the whole mediation is in fact carried out in a single State (for instance, Germany), but where a direct mediation is conducted using video or teleconferencing facilities or communication over Internet, or where an indirect mediation with both mediators and parents in their respective states takes place, it would be

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<sup>51</sup> This is the solution that GARCIMARTÍN proposed to the problem in the Meeting on “*La Ley aplicable a las obligaciones contractuales y extracontractuales: continuidad e innovación*”, that took place in Palma de Mallorca, on 7.5.2009.

<sup>52</sup> NY law would be applicable (and the presumption will favour separateness of the obligations), even if it is the law of a non-Member State: RIR has not retained the wording of the Proposal, according to which the consumer had to be a resident of a Member State. See QUIÑONES (2006); AÑOVIROS (2006) and RAGNO (2009).

<sup>53</sup> This is frequent practice within the Programs or Schemes that have been settled to cope with international abduction situations: the left-behind parent travels to the country where the retention or the removal has taken place, where a block co-mediation (over a weekend or a 2-day period) is conducted. See REUNITE (2006, p. 11) and VIGERS (2006, pp. 9-10).

extremely difficult to decide which is the “most closely connected” Law<sup>54</sup>. The advisability of a choice-of-law clause needs, for these situations, no further explanation.

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<sup>54</sup> Both possibilities, described by VIGERS (2006, pp. 14-15), are in fact used within the German/US mediation.

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