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RESPONSE OF THE CCBE TO THE EUROPEAN COMMISSION'S GREEN PAPER ON ALTERNATIVE DISPUTE RESOLUTION IN CIVIL AND COMMERCIAL LAW OF APRIL 19, 2002

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In the Green Paper, the European Union tends to look at Alternative Dispute Resolution (ADR) mainly as an access to justice project. For the CCBE, ADR should, however, be seen as a private autonomy and service delivery project. Mediation and other ADR proceedings should rather enable the parties to make use of their contractual freedom in which the courts or private arbitral tribunals would otherwise render a final decision. This freedom of the parties should be preserved to the largest possible degree. Any establishment of minimum quality criteria may entail an over-regulation, as it can respectively be seen in Austrian and Hungarian draft laws.

Likewise, the European Union should not be too concerned as far as the assurance of legal minimum criteria is concerned. If ADR is deemed to expand the contractual freedom of the parties rather than to establish a new formal process that is subject to procedural minimum guarantees, these safeguards should be left to the parties.

In addition, the CCBE wants to draw the Commission's attention to the fact that it follows expressly from the Code of Conduct for Lawyers in the European Union, adopted by the 18 national delegations representing the Bars and Law Societies of the European Union at the CCBE Plenary Session held in Lyon on 28 November 1998 (Article 3.7.1) that a lawyer at all times shall strive to achieve the most cost effective resolution of the client's dispute and shall advise the client at appropriate stages as to the desirability of attempting a settlement and/or a reference to ADR.

Looking at the field of alternative dispute resolution, lawyers assume many different tasks and roles. Three different approaches are to be mentioned: First, the lawyer may serve as an advisor in the decision making process, selecting the appropriate instrumental or procedural method of conflict resolution. In this role, the lawyer should be able to determine whether a case is suitable to be presented at court or to be mediated. Second, the lawyers' role representing parties in mediation involves deciding on the forum and finding out what kind of mediation and what mediator is required. It may also involve dealing with the documentation, or - after the substantive mediation – drafting and formalising a settlement agreement. Third, the role of the lawyer may cover his role as facilitator of the process, as information gatherer, as reality tester, evaluator or supervisor.

The CCBE also wishes to emphasise that it is fully in agreement with the Commission when stating (point 9 in the Green Paper) that ADR constitutes a complement to judicial procedures and consequently not - and in spite of what the terminology ADR, traditionally standing for "Alternative Dispute Resolution", might indicate - a substitute to proceedings before a court of law. The CCBE finds that it is essential to maintain that the purpose of ADR is to offer parties in dispute supplementary ways of having a given dispute resolved and/or managed, if appropriate, and if the parties so wish.

As stated by the Commission in the Green Paper (point 11), ADR is at present characterized by being flexible, meaning in particular that the parties, in principle, are free (1) to have recourse to ADR, (2) to decide which organization or person will be in charge of the proceedings, (3) to determine the procedure that will be followed, (4) to decide whether to take part in the proceedings in person or to be represented and (5) to decide on the outcome of the proceedings. When considering possible new measures to be taken in order to develop and expand the use of ADR, the CCBE finds that it is essential to keep the above in mind and ensure that such measures do not interfere with the basic "spirit" of ADR, being a voluntary, party driven way of resolving/managing a given dispute.

The CCBE notes, however, that the Green Paper, on this particular point, is not completely consistent. In point 3 the Commission thus talks about *"ADRs which are conducted by the court or entrusted by the court to a third party ("ADRs in the context of judicial proceedings")*. Further, in point 27, when summarizing existing legislative measures already taken within the Member States, the Commission refers to "*With regard to ADR conducted by a court, the Member States' code of civil procedure allow for the possibility of seizing a judge concerned with conciliation, make conciliation the compulsory phase of the procedure or explicitly encourage judges to intervene actively in the search for an agreement between the parties. These specific missions entrusted to judges, which are not necessarily among their usual functions, must therefore be accompanied by suitable training programmes. "*

The CCBE finds that it is indeed relevant to consider also the interaction between court proceedings and possible in-court and out-of-court conciliation/mediation efforts, but also notices that in-court conciliation does not fall within the above definition of ADR. In order to avoid confusion, the CCBE believes that it is preferable to "reserve" the term ADR exclusively for dispute resolution procedures conducted by a third party, which takes place out-of-court, excluding arbitration. This, in particular, because conciliation provided to parties in dispute by a judge in a court of law, in general, is based on a legal approach to the dispute, whereas this would often not be the case in relation to conciliation/mediation taking place out-of-court - at least not in business-to-business disputes. On the other hand, the CCBE supports that the use of ADR is encouraged within each Member State by requiring that parties in dispute prove that they have considered the possibility of resolving/managing their dispute out-of-court, before going to court. This, in order to relieve national courts of law of unnecessary disputes (as mentioned above) and thereby make it possible for the courts to concentrate their efforts on resolving conflicts, which require the thorough legal review that only they (and as case may be arbitral tribunals) can provide.

Before commenting on the individual questions, the CCBE wishes to indicate that not all of its member delegations agreed with all aspects of this response. A small minority believes that only lawyers should be involved in ADR, that the European Community has no competence in this area and that ADR was not suitable for Member States where there is no backlog in the Courts.

Question 1

Are there problems such as to warrant Community action on ADR? If so, what are they? What is your opinion on the general approach to ADR that should be followed by the institutions of the European Union, and what might be the scope of such initiatives?

In order to realize the full potential of ADR, there are problems which justify European Union Initiatives. Advantages of Dispute Resolution outside court proceedings do not always appear to be achieved. The CCBE, therefore, supports the introduction or harmonization of a few framework provisions. At the same time, if any legal provisions are to be adopted, the CCBE urges the European Union to clearly define the scope of application. If mediation was at the centre of the EU initiatives, it should be defined more clearly – even if this definition is as broad as possible.

The CCBE recommends

1. a harmonisation of provisions regarding the suspension of the statute of limitation during settlement negotiations and mediation proceedings (see response to question 9), the enforceability of clauses in mediation agreements regarding the suspension of court proceedings (see response to question 5 and 6)
2. spelling out strong rules of protection of confidentiality of the settlement discussions (see response to question 15)
3. the enforceability of settlement agreements (see response to question 18).

The CCBE would welcome a recommendation of the European Union which would require parties in Civil Litigation to examine whether their case is suitable for Alternative Dispute Resolution. It should be left to the discretion of the member states what mechanisms might be used to implement such assessment.

Question 2

Should the initiatives to be taken be confined to defining the principles applicable to one single field (such as commercial law or family law) – field by field – and in this way discriminate between these different fields, or should they as far as possible extend to all the fields governed by civil and commercial law?

To the extent that the CCBE sees the need for introduction or amendment of rules, they may apply to all areas of civil and commercial law.

Special rules may apply to consumer disputes, employment disputes and family law disputes, but may also develop in other fields according to different professional standards.

Question 3

Should the initiatives to be undertaken deal separately with the methods of online dispute resolution (ODR) (an emerging sector which stands out because of its high rate of innovation and the rapid pace of development of new technologies) and the traditional methods, or on the contrary should they cover these methods without making any differentiation?

Generally speaking, the CCBE does not consider online dispute resolution as significant as it is deemed to be in the Green Paper. In terms of the process, the CCBE does not see a difference between online-proceedings and other dispute resolution proceedings as far as the legal framework is concerned. The use of the online-platform does not have any impact on the structure of the ADR proceedings.

Question 4

How might recourse to ADR practices be developed in the field of family law?

In certain member states, there are, for example, special provisions for the development of a consensus between parents regarding child custody. The harmonisation of such rules at the European level may not be necessary, but useful. However, the CCBE would like to leave the response to this question to family law and family mediation specialists.

Question 5

Should the legislation of the Member States be harmonised so that in each Member State ADR clauses have the same legal value?

ADR clauses are hereby understood as clauses that are inserted into contracts and that provide for a mediation attempt as a preliminary step prior to the initiation of legal proceedings in case of a dispute relating to the contract at stake.

The CCBE does not believe that there is a need to harmonise such clauses. As any contractual arrangement, their content will and should reflect the free will of the parties. There is no need for legislation in this respect.

Question 6

If so, should the validity of such clauses be generally accepted or should such validity be limited where these clauses appear in membership contracts in general or in contracts with consumers in particular?

Multi-step dispute resolution clauses, providing for mediation as a first step, should always be enforceable. To the extent that the mediation part of the clause is concerned, it should also be valid if the clauses are part of standard terms and conditions.

The only safeguard which should be made is that no party may be forced to give up non disposable rights. The enforceability of such clauses would result in an inappropriate treatment of the affected party. Likewise, a preliminary suspension of a suit may not turn into a prohibition to sue. Accordingly, mediation clauses should only be prevented from enforceability if they would make the parties loose rights or claims because the statute of limitations has expired.

Question 7

What in any case should be the scope of such clauses?

Since no binding outcome is imposed on the parties in ADR-proceedings, there are no risks in initiating ADR proceedings unless and as far as the parties' rights are jeopardized already by the initiation of the proceedings.

Question 8

Should we go as far as to consider that their violation would imply that the court has no jurisdiction to hear the dispute, for the time being at least?

The court should be authorized to dismiss or postpone a suit for the time being if the parties stipulated that a claim may only be filed with the court after the mediation session has taken place. At the same time, there is no need for an automatic interruption of a case once a claim has been filed. The actual experience of those

practising in the field shows that mediation proceedings may be completed successfully even if a suit has been filed already.

Question 9

Should the legislation of the Member States be harmonised so that in each Member State recourse to an ADR mechanism entails suspension of the limitation periods for the seizing of courts?

To the extent that any limitation periods may run, harmonized provisions within the member states may be useful. The German statutory provision that provides for the suspension of the period of limitation during negotiation and other dispute resolution proceedings (Sec. 203 of the Civil Code) may serve as an example.

The provision reads as follows: "If there are negotiations between the debtor and the creditor with respect to a claim or the circumstances pertaining to a claim, the period of limitation is suspended until or unless one of the parties refuses to continue this negotiations. The statute of limitation does not expire earlier than 3 months after the end of the period of suspension."

Since this provision has been introduced to German law, there is no impending pressure anymore for the parties to terminate their negotiations prior to the expiration of the statutory period of limitation. However, the parties have to carefully establish whether negotiations have taken place. The CCBE would welcome the harmonization of a comparable approach within all member states.

Question 10

What has been the experience of applying the Commission recommendations of 1998 and 2001?

The CCBE is not aware of any impact of recommendations regarding Alternative Dispute Resolution in consumer disputes. To the best of its knowledge, the CCBE does not know whether the consumers' confidence in Alternative Dispute Resolution has been strengthened.

Question 11

Could the principles set out in the two recommendations apply indiscriminately to fields other than consumer protection law and in particular be extended to civil and commercial law?

If the recommendations regarding consumer disputes would be applied to all disputes in civil and commercial law, the parties' private autonomy would be restricted rather than expanded. Accordingly, the CCBE does not recommend the application of the consumer dispute principles to other areas of law.

Recommendation 98/257/CE, in essence, deals with ADR systems in which the third party « *proposes or imposes a solution; it does not concern procedures that merely involve an attempt to bring the parties together to convince them to find a solution by common consent*"(Eighth Consideration). Since the latter is, however, the primary purpose of mediation and other means of dispute resolution, the principles contained in the recommendations are not necessarily transferable into any ADR system. Without a doubt, they seem quite adequate for ADR mechanisms, as envisaged in the Recommendations regarding consumer dispute settlement mechanisms that must lead to a binding or enforceable resolution of the dispute. Not all of them can, however, be reconciled with the non-binding ADR systems, in particular with mediation.

Addressing these principles one by one, the CCBE would support the following as they apply to mediation in particular:

- Principle of independence: **Applicable**; good rules of professional conduct should go even further than the rules indicated there; one submits, however, as a rule of ethics, that the principle of independence can be waived by the parties, if fully informed about the reasons of non-

independence, and when the parties are fully able to make an independent judgment about a waiver thereof.

- Principle of transparency: **Applicable but for** the publication (see comment to question 16 hereafter).

- Adversarial principle: **Not applicable**. Although good mediation principles require that the mediator hears the parties in joint sessions, this is not an essential element of mediation. Indeed, separate "caucus" sessions are an essential feature of many a mediation.

- Principle of effectiveness: **Mixed reply.**

    - Use of counsel: not indispensable but highly recommended in civil and commercial mediation. The presence of independent counsel enables the mediator to better remain independent and neutral inasmuch as he is not required to provide an opinion to the parties, hence remaining neutral and not risking to loose the image of neutrality; the presence of independent counsel is a guarantee that each party's right has been adequately considered prior to a settlement being reached;
    - Procedure free of charge: not doable in mediation carried out by professional and trained mediators;
    - Short time: yes, but the necessities of each case may demand otherwise: the parties must always, under the guidance of the mediator, remain in control of the process, including of its most appropriate timing.
    - Active role of the competent body: yes, but always in co-operation with the parties and with their approval.

- Principle of legality: **Not applicable**: this is not, by nature, an essential principle of mediation. Without a doubt, recourse to mediation may not deprive a litigant from the rights he may avail himself of under all applicable legal rules. Mediation, however, is not equivalent to a judicial recourse. It is nothing but one of the alternatives to court adjudication if and when the parties agree that it should be attempted prior to legal action or as an attempt during a judiciary process. A solution brought about through mediation does not necessarily need to be in accordance with the legal rights and duties that the parties have or had when embarking in the mediation process.
  On the other hand, the contract (whether a settlement or any other type of arrangement) needs to be legally enforceable if and when needed. In that respect attention ought to be given to the fact that an arrangement reached pursuant to mediation with the assistance of independent counsel for the parties and a qualified mediator may deserve a simplified enforcement procedure, thus avoiding the risk for the parties to find themselves with a settlement agreement that is left unperformed and having to go through a whole court procedure in order to get the settlement contract recognized and enforced.
  Common rules simplifying enforcement of settlements reached through mediation would be a welcome addition to any European code of civil procedure or a Convention applying within the EU (see also reply to question 18).

- Principle of liberty: **Applicable**, though under a proviso: In civil (except family matters) and commercial cases, one sees no reason why a recourse to mediation could not be agreed upon in advance, for instance in a commercial contract containing a clause under which the parties commit to attempt to try to solve disputes through mediation prior to having recourse to the courts or to arbitration. Such clauses should be encouraged and their enforcement enhanced in all EU countries through appropriate legislation (see reply to question 9).

- Principle of representation: **Applicable**.

Question 12

Of the principles enshrined in the recommendations, which in your view could be incorporated in the legislation of all the Member States?

It should be left to the organisations and individuals in the field to consider which recommendations they would like to adopt for their ADR proceedings. However, they should not be incorporated into the member states' legal systems without any distinction, see the replies to question 11.

Question 13

In your opinion, should the legislation of the Member States in regulated areas such as family law be harmonised so that common principles may be laid down with regard to procedural guarantees?

The CCBE does not recognize any necessity to harmonize European family law for due process reasons.

Question 14

What initiative do you think the institutions of the European Union should take, in close cooperation with interested circles, as regards the ethical rules which would be binding on third parties?

Ideally, the rules of good ethical conduct should be the same throughout the EU. In practice, the CCBE believes, however, that spelling out professional rules of conduct be best left to professional organizations or institutions to decide upon and to adapt to possibly changing needs, or to the needs of the profession, as experience will dictate. The CCBE itself has adopted a code of ethical rules which may serve an example and provide some guidance with respect to lawyers. Therefore, the CCBE does not recognize any need to harmonize the ethical rules.

At most, the institutions of the European Union should encourage or mandate the Member States to provide, through legislation, setting up a national professional body the purpose of which would be to elaborate such rules and to oversee their implementation and sanctioning. This would enhance uniformity of concepts, procedure and sanctions. Such institutions do already exist in certain countries, albeit on a voluntary (not statutory) basis.

Question 15

Should the legislation of the Member States be harmonized so that the confidentiality of ADRs is guaranteed in each Member State?

As the Green Paper points out, confidentiality may be one of the keys to the success of ADR.

1. Particularly in mediation, the CCBE believes that confidentiality is one of the tools that the third party can use in order to understand what drives the parties to the dispute, e.g. their motivations, hidden agendas, true interests or margins for settlement. Particularly in so-called *caucuses* (separate meetings), the third party can learn a lot more about a party than that party is willing to divulge in the presence of the other party(ies). Hence, confidentiality must be embedded in the process of mediation. The use of caucuses as a tool available to the mediator may vary from type to type of mediation[1]. The CCBE agrees that the use of caucuses or bilateral discussions should be ruled out when the third party is called upon to rule or provide a formal opinion (i.e. one that is meant to be used and become officially available at a later stage of the dispute resolution process) unless the parties explicitly stipulate otherwise.

[1] e.g.: it is a relatively widespread concept - though not necessarily unanimously accepted – that the family mediator should never hear the parties separately.

2. With respect to any potential subsequent litigation, the parties should undertake that they will keep the mediation confidential, meaning that they will not refer to any proposal or any concession made by the other party or any stand made by the mediator during the mediation in order to reach a settlement outside the mediation. Should the mediation result in consultation with outside persons, they, too, shall be made subject to due confidentiality obligations through separate undertakings as may be necessary.

3. The CCBE regards as desirable that the extent of the rule of confidentiality does not differ from one country to the other. Parties should be able to rely, once they embark in mediation, on rules they know and are familiar with. Similarly, if a third party is called upon to act in a country other than that in which he is acting usually (a situation that will happen frequently as parties of different countries will often agree on a third party whose citizenship differs from their own), it would be helpful if he could rely on uniform rules of confidentiality, for his own protection and for that of the parties.

4. In section 80, the Green Paper points out that the parties can carve out, by consent, some exceptions to the rule of confidentiality. The CCBE believes that there should be common rules on confidentiality, crafted along the following lines:

    - The parties are always free to agree on rules of confidentiality;
    - Unless the parties made any stipulation, the basic rule is as follows: content of mediation is confidential with respect to third parties and subsequent legal proceedings
    - Confidentiality is both a duty and a right, for the mediator as well as for the parties;
    - Confidentiality applies to all communications occurring within mediation, with a number of exceptions as outlined hereafter;
    - The statutory exceptions to confidentiality should be the following (i.e. the following are not confidential unless the parties agree otherwise):
        - the agreement to mediate (parties may want to or must sometimes be able to show they have attempted to solve the dispute through mediation);
        - the fact that an agreement has been reached pursuant to the mediation as well as the key elements of the settlement agreement;
        - anything else the parties wish to exclude from the scope of confidentiality, either in the mediation agreement itself, during the mediation process or after it has ended;
        - any regulatory model should exclude pre-existing documents.

    At the same time, the CCBE recognizes that it may be difficult to suggest a rule which does strike an appropriate balance between the principle and the exceptions. The CCBE considers Art. 10 and 13 of the UNCITRAL Model Law as a useful example of such approach.

    In addition, an EU Rule could suggest the Member States an option to create a statutory system by which a breach of confidentiality by a party in a court ordered mediation could give rise, at the court's discretion, to some other types of sanctions: e.g. fines, awarding of costs to the party that is the victim of the breach, etc.

5. As far as the protection of confidentiality by the third party is concerned, a lawyer as mediator is bound by a lawyer's obligation to maintain professional secrecy or privilege. Irrespective of its professional status, the third party should be protected against possible interrogation in relation to anything he or she has learned in the course of the mediation process. Therefore, the parties have to undertake that they will neither appoint the mediator as a witness in any matter relating to the dispute. Only the parties can relieve a third party from the duty of confidentiality; not a court or investigating magistrate.

6. If mediation takes place in a court-annexed context, it is important to provide the third party with a statutory means to reply "no comment" to the court or judge who has appointed him and who would wish to be informed about the content of the mediation or about the attitudes of the parties during the process. The third party should not be allowed to report to the court other than by informing the court, if and when

needed, about the agreement reached during the process or by reporting that the process has not yielded a solution that has been accepted by the litigants. In this respect, the CCBE agrees with the approach that has been chosen in Section 7 of the U.S. Uniform Mediation Act

Question 16

If so, how and to what extent should such confidentiality be guaranteed? To what extent should guarantees of confidentiality apply also to publication of the results of ADRs?

See comments above with respect to question 15. With respect to the publication of results, the CCBE suggests the following approach:

- Publication does not seem of the essence. Only in consumer cases it can be regarded as having some significance. In civil and commercial matters, publication should always require the written consent of the parties at stake;
- No publication (other than general statistics) seems to be possible in family matters;
- The mediation institutions should be able to keep track of mediation activities and of mediation results. This may present some importance, among other things in order to monitor licensed mediators' track records and intervention in case of inappropriate "boasting" by mediators. This may require some divulgation, always on a no-name basis. This does not go as far as justifying publication of results;

The CCBE does not see any need for regulatory intervention at EU level in this respect.

Question 17

In your opinion, should there be a Community rule to the effect that there is a period of reflection following ADR procedures before the agreement is signed or a period for withdrawal after the signing of the agreement? Should this question be instead handled within the framework of the ethical rules to which the third parties are subject?

From the CCBE's perspective, there is a confusion in the Green Paper between a Court/third party imposed solution and a mediated solution where the mediator assists the parties to reach their own solution. This can be seen particularly in paragraph 83 and in relation to Question 17 and the suggestion that there should be a period of reflection before the agreement is signed or a period for withdrawal after it is signed.

Such a suggestion is inimical to most commercial mediations where one of the driving imperatives is a desire for closure and finality and to end legal expenses. The suggestion would be open to real abuse as it is likely that one party, particularly that with greater financial strength will use the uncertainty caused by the delay to better their position. If the parties to a mediation wish for a period for reflection or to check with others that the proposed compromise is suitable they can always agree to such a procedure whereas imposing such a delay loses the benefit of a consensual conclusion.

Accordingly, there should be no cooling off period either prior to the signing of an agreement or after a settlement agreement has been reached. The goal of a properly conducted mediation should be an informed decision of the parties anyway. Therefore, there is no need to provide for any such time delays which will impose additional burdens on the process.

If – contrary to the recommendation of the CCBE –, the European Commission would nonetheless consider such rules, they should be limited to consumer disputes.

Question 18

Is there a need to make ADR agreements more effective in the Member States? What is the best solution the question recognition and enforcement of ADR agreements in other Member States of the European Union? Should specific rules be adopted to render ADR agreements enforceable? If so, subject to what guarantees?

Similarly the suggestion in the second part of Paragraph 83 that the validity of the agreement be verified prior to becoming an enforceable decision by means of the intervention of a judge, notary or a specialised body would be to add a requirement which is not part of our legal procedure and would be contrary to domestic contract law. Such a suggestion also would add much unnecessary expense, legal formality and time to alternative dispute resolution. For these reasons the CCBE agrees there is no need to adopt specific rules to render ADR agreements effective and enforceable and that the suggestions in the Green Paper leading to part of Question 18 run contrary to the benefits to the public which mediation can bring.

In turn, the CCBE sees a need to improve the opportunities of enforceability if parties have been assisted by lawyers when reaching a settlement. The opportunity to enforce such settlement agreement easily would certainly increase the attractiveness of this process to the parties.

Article 1.1.(2) of the Green Paper defines alternative methods of dispute resolution as „out -of - court dispute resolution processes conducted by a neutral third party, excluding arbitration proper". This possibility arises since the Green Paper is concerned only with ADR in civil and commercial matters. One may, however, wonder whether the same Rules should apply to employment and consumer law.

Based on this definition, Settlement agreements may in principle be adopted and become effective and (finally) enforceable for the following reasons:

1) Settlement agreements are subject to the Rome Convention of 19 June 1980 on the law applicable to contractual obligations:

Regardless whether an Settlement agreement reflects one party's complete admission of the other party's claim or whether it represents the compromise which the parties involved are willing to accept, Settlement agreements are settlement agreements, i.e. contracts. If a Settlement agreement is not performed by either party the other party may file an action for breach of contract.

The unified rules governing conflicts of laws (Rome Convention of 19 June 1980 on the law applicable to contractual obligations, the "Rome Convention") give sufficient legal basis in consideration of the applicable law at Community level. In context with the provisions of the applicable law they provide the appropriate means to secure the validity and effectiveness of contracts/settlements in the scope of civil and commercial matters, provided that the third party conducting the ADR process is sufficiently trained and knowledgeable.

According to Article 1 (2) and (3) of the Rome Convention, the Rome Convention does not apply to a number of matters. Since these excepted matters are in general either not subject of Settlement agreements or not appropriate for settlements per se there is no gap in regulation that would be required to be filled.

The uniform interpretation of the Rome Convention seems to be guaranteed by Article 18 of the Rome Convention and the Explanatory Notes.

Under this perspective, unification of the rules on validity and effectiveness of Settlement agreements seems unnecessary. Such unification would constitute an interference with the internal regime of civil law in the Member States.

2) Brussels Regulation provides for enforceable Settlement agreements

An action for breach of contract is not the exclusive remedy available to parties that have entered into a Settlement agreement if such agreement is not performed by either side. The existing rules of the Brussels Regulation already permit the parties to avoid court proceedings provided the Settlement agreement at issue complies with the requirements set forth for enforceability in the Brussels Regulation. The Brussels Regulation applies to all civil and commercial matters.

According to the Brussels Regulation the simplified exequatur system has been set in place for authentic instruments (former Article 50, now Article 57). The simplified exequatur system also applies for Settlements in Court (former Article 51, now Article 58). The Court has clearly stated the conditions which have to be fulfilled by authentic instruments in order to be regarded as authentic (Case C-260/97 Unibank AS v Flemming G. Christensen [1999] ECR I-3715 (judgment given on 17 June 1999)). Moreover, settlement agreements which have been drawn up by public authorities (such as notaries and judges) comply with the requirements as set forth in the Brussels Regulation. Accordingly, under the governing regime, the parties already have the opportunity to create enforceable Settlement agreements under certain preconditions.

The Green Paper indicates that the recourse to a judge to confer binding force on Settlement agreements might be paradox. This argument may not be considered as decisive for the following reasons:

a)
Efforts and costs related with court proceedings may not be compared with efforts and costs related with having binding force conferred on a Settlement agreement. Consequently, even if the recourse to a judge remains necessary to confer binding force on a Settlement agreement, ADR will still result in some saving of money and/or time.

b)
There are no compelling reasons to assume that widening the range of authorities that may confer binding force on an Settlement agreement will result in any saving of money and/or time.

c)
The minimum standards of certainty of justice mandate to deny enforceability to Settlement agreements that have not been approved by publicly appointed officials such as notaries and judges. Those officials are by virtue of their office endowed with independence and consequently guarantee impartiality. No other authority can be compared to them as far as independence and impartiality are concerned. Unless an authority is completely independent and impartial it can not give evidence that the Settlement agreement entered into by the parties indeed reflects the actual compromise which the parties have reached after evaluating their respective legal and factual position. The vague, unsubstantiated chance of money and/or time savings should under no circumstances be the reason for undermining the security of justice. Only the independent judges and notaries have nothing to gain or lose by approving settlement agreements.

A different assessment should, however, apply if a mediated settlement agreement is achieved with the assistance of lawyers. If both parties are being represented by lawyers, a mediated settlement should also be used as an enforceable title.

This type of settlement agreement could be treated like authentic instruments and court settlements. Currently, mediated settlement agreements are not enforceable per se. In order to balance this disadvantage, the CCBE would welcome an amendment of the Regulation if the parties are properly represented by counsel. This amendment should clarify that mediated settlement agreements which are achieved with the assistance of lawyers may be enforced within all member states.

When mediated settlement agreements are reached with the assistance of lawyers and the parties or one of them apply to the court because they wish that such agreement be given executory power, the court's review should be limited to checking that:

- the mediation has been carried on in accordance with whatever the laws of the country define as mediation;

- the (settlement) agreement reached has been reviewed by the parties' lawyers who assisted the parties during the mediation process, is signed by them and by the mediator;
- the agreement reached does not violate rules of public order or "bonae mores";

The CCBE feels that the assistance of independent lawyers during the process under the guidance of a mediator freely chosen or accepted by the parties themselves, should be regarded as a sufficient guarantee that the agreement has been reached after due consideration of the parties' respective rights and duties. Hence, there is no need for the courts to review it further since this would, in effect, give the party who has changed its mind a chance to renege on its approval of a solution reached freely in circumstances that guarantee due process consideration.
Such "easy enforcement" and access to court recognition would enhance recourse to mediation as a means for settling disputes and should therefore be encouraged. The institute of the "Lawyers' Settlement" (Anwaltsvergleich) may serve as an example.

Question 19

What initiatives in your view should the Community institutions take to support the training of third parties?

Generally speaking, negotiation and conflict resolution classes should be made part of the education as early as possible. Therefore, they should be integrated into school and university curricula in the Member States.

Practitioners in various professions may also benefit from training programs. The CCBE expects professional bodies all over Europe to ensure that the lawyers acting as mediators have sufficient skills and competences to serve as mediators. The experience of national Bar Association training academies, such as the German Bar Academy or the Danish Bar and Law Society, shows that lawyers may benefit from such training. Empirical research also shows that self-directed learning is more effective than control. Accordingly, the CCBE encourages the European Union to endorse programs based on recent research and self-directed learning concepts. These programs should also take the increasing significance of international and cross-cultural relationships into account.

At the same time, training should not be made a precondition to the practice of mediation. The arbitration community whose members have the power to render final and binding arbitration awards which may be enforced globally has never requested its arbitrators to complete a certain training program. There is no reason why a non-binding negotiation support, such as a mediation, should require a mandatory training program. Moreover, experience shows that there is a very high demand for mediation training programs. Accordingly, with respect to practitioners, training and education programs should be left to the national professional bodies in cooperation with CCBE.

A different reasoning may apply if parties are referred to mediation: Education or training criteria should be used if mediation needs to be conducted training is being run and requested by public institutions such as courts.

Question 20

Should support be given to initiatives to establish minimum training criteria with a view to the accreditation of third parties?

Certainly not, see above regarding question 19. After more than 20 years of rich experience and a long discussion, the drafters of the Uniform Mediation Act in the United States decided, such minimum criteria should not be adopted.

Question 21

Should special rules be adopted with regard to the liability of third parties? If so, which rules? What role should ethical codes play in this field?

The CCBE does not see any need to provide for additional rules of liability or to harmonize such rules. Liability of third parties exists as a matter of principle, in all countries. Common rules of law in each country shall provide sanctions in case liability is at stake.