Mediation

Contributing editor
Renate Dendorfer-Ditges

2017

GETTING THE DEAL THROUGH

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Mediation 2017

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Fifth edition

Getting the Deal Through is delighted to publish the fifth edition of *Mediation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Tanzania.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Renate Dendorfer-Ditges of Ditges Partnerschaft mbB, for her continued assistance with this volume.

GETTING THE DEAL THROUGH

London
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Introduction

Jonathan Lux
St Philips Stone Chambers

History
Mediation is the most popular of a range of dispute resolution methods covered by the acronym 'ADR': alternative dispute resolution.

The terminology here can be somewhat confused. Some say that ADR stands for 'alternative dispute resolution' (ie, an alternative to traditional litigation and arbitration); others say it stands for 'appropriate dispute resolution' (in which case the term becomes almost meaningless as it could embrace all known forms of dispute resolution); and some lawyers say it stands for 'alarming drop in revenue!' (because its effectiveness is such as to resolve in a matter of weeks disputes that might otherwise take years to resolve through the judicial system).

The definition I prefer places litigation and arbitration on one side of the fence and ADR on the other. In other words, the distinguishing feature is that the ADR neutral's role is not to 'decide' the dispute but to facilitate a settlement.

Mediation, while it may have been engaged in privately, was more or less unknown in the common law world until about 35 years ago. The civil law codes, on the other hand, contain provisions dealing with conciliation; in practice, however, these provisions were only rarely brought into play.

Modern ADR had its birthplace in the United States and some say that it is hardly surprising given that in the US the twin evils of cost and delay in the litigation process are at their most acute.

While there is a range of ADR processes, mediation has become by far the most popular.

The process
As mentioned, the mediator's role is not to make any decision but, rather, to facilitate a settlement. There is considerable flexibility in the process but a typical mediation will involve the following stages:

- the mediator is appointed by agreement between the parties or nominated by a third party (eg, the President of the Law Society);
- the mediator asks the parties to sign a mediation agreement, which will contain, inter alia, clauses enshrining the confidential and impartial nature of the process;
- the mediator invites the parties to send to him or her a 'mediation position paper' and, if they wish, a 'mediator's eyes only' paper and, if possible, to agree on a set of documents relevant to the purpose of the mediation. The mediation position paper is not supposed to be a replica of court or arbitration pleadings but, rather, to set out relevant background circumstances and what each party hopes to achieve from the process;
- pre-mediation meeting or teleconference: it is good practice for the mediator to contact each party in advance of the hearing to discuss background facts and, importantly, who is to be present on each side at the hearing. It is of critical importance that there is a senior decision-maker present on each side at the mediation hearing if a settlement is to be achieved on the day; and
- the mediation hearing: again, there are no hard and fast rules and the mediator will endeavour to adapt the process to the circumstances of the particular case.

In some countries (eg, Germany) the norm is for the mediator to conduct the mediation with both parties present throughout the day.

In England, on the other hand, it is the general practice for the mediator to hold private caucus sessions with each party. Indeed, in some mediations the distrust, and sometimes loathing, between the parties can be so great that they refuse to participate in joint sessions throughout the whole process.

Generally, however, the norm in England is for the day to start with a plenary session where the mediator explains his or her role and both parties then have an opportunity to present their issues relating to the dispute.

It is thereafter that the mediation process tends to come into its own, with the parties retiring to separate rooms and the mediator shuttling backwards and forwards between the parties until a settlement is achieved, which is said to happen in approximately 85 per cent of cases.

At that point, the mediator will tend to bring the parties back together to draw up and sign the settlement agreement – a very necessary step to ensure the likelihood of the terms of the agreement being carried out after the mediation process has finished.

A popular process?
The process is private and confidential so it is not easy to provide reliable data. It has been suggested, however, that commercial mediations in the UK are running at approximately 10,000 per annum, although I suspect that the true figure is far higher. With strong support from the government this number is set to rise. Indeed, in these recessionary times the government will be attracted to mediation if for no other reason than that it can serve to shave a considerable amount off the justice budget.

There is strong support also at the European level and an EU Directive on Cross-Border Mediation. In some countries mediation has been made compulsory – Italy and Argentina being two examples.

Other facts that are likely to lead to increased mediation include the following:

- parties are increasingly including multi-tiered dispute resolution clauses in their contracts, for example:
  - step 1: good faith negotiation between the parties;
  - step 2: mediation; and
  - step 3: arbitration or litigation.

There is English High Court authority for the proposition that a mediation clause is enforceable.

Even if a particular litigation lawyer is not a fan of mediation, it may amount to professional negligence to fail to advise a client that he or she has the option to mediate and on whether mediation would be suitable for the particular case.

The courts themselves are increasingly concerned by the high costs of litigation and lawyers are under a duty to ensure that costs are proportionate. During the case management conference the judge is likely to raise the subject of mediation, even if the parties do not, and the judge has the power to direct that the court proceedings be stayed so that mediation can take place. In such circumstances if one party unreasonably refuses to participate in mediation (or fails to engage with a proposal from his or her counterparty to do so), then the court has the power to impose costs sanctions. I have suggested that arbitrators have the self-same powers as the judges in this respect (www.st-philipsstone.com/who-we-are/latest-news/item/574-london-leading-a-mediator-s-view-on-mediation-in-arbitration-jonathan-lux).

Perhaps the most important reason for the increasing popularity of mediation is that it works. Unlike the fractured relationship that is the

sequel to a fully contested court or arbitration proceeding, mediation enables the parties to preserve their relationship and it is not uncommon for future business to be a term of the settlement agreement that is concluded at the end of the mediation.

What are the disadvantages?

Mediation will not give parties security for their claim, the publicity that they may want, the binding precedent that comes from a court judgment, or enforcement. On analysis, however, these disadvantages will evaporate.

If a claimant is concerned that the defendant may not be financially secure then there is nothing to stop the claimant from mediating and concurrently starting court or arbitration proceedings and then applying for a freezing injunction or ship arrest to ensure that there are assets to meet whatever entitlement the claimant has.

If it is publicity that a party wants (or more likely a published apology) then this can be made a term of the mediation settlement.

Very few parties are keen to fund the extensive costs involved in seeking a binding court precedent. In most cases it is the gathering and analysis of the facts that consumes the bulk of the costs. It has been said that 20 per cent of the overall costs is spent in presenting 80 per cent of the facts and then 80 per cent of the costs is spent dredging for the remaining 20 per cent of the facts, which only rarely make any substantive difference to the outcome of the case. This is hardly a successful economic model.

That said, if there is an issue of law on which a court decision is wanted (for example, on the construction of a clause in a contract) then the parties should seriously consider mediating everything but the contract issue and referring only the latter to the court.

It is also said that there can be difficulties in enforcing the mediation settlement agreement, which is simply another contract that can be broken. However, this ignores the fact that in many cases court or arbitration proceedings will have been started before the mediation takes place and, by agreement of the parties, it is perfectly possible to convert the mediation settlement agreement into a consent judgment or consent award with all the possibilities of enforcement that attach to a judgment or award.

Another suggested disadvantage is that mediation can be used (or abused) by a party as a 'fishing expedition' (ie, the party has no serious interest in settlement and simply wants to prise as much information from his or her opponent as possible to increase the chances of winning the subsequent court or arbitration proceedings). Again, this does not really stack up. If a party's evidence (documentary or witnesses, or both) is weak then this will come out before or at the trial. What then is the real disadvantage of this becoming apparent earlier, when only a fraction of the likely ultimate costs have been incurred?

The future of ADR

There is an increasing number of mediation issues coming to court (eg, confidentiality). It will be most important for the court to resist the temptation to pry into the mediation itself.

Another issue is that it may be difficult to mediate early, before each party knows what the other will say and has seen the evidence to back the case (or defence) put forward. I have devised a solution to this which I have called 'Early Resolution', described in greater detail at www.st-philipsstone.com/2016-09-22-07-43-05/adr-earlyresolution.

ADR is relatively young – certainly by comparison with the second oldest profession, the law. There is still considerable ignorance even among lawyers as to what it is and how it works. It is crucial that in these early years we take the time and trouble to grow a cadre of professional mediators who can be entrusted to take good care of the process. If this occurs then parties can only be impressed by the singular cost-efficiency, speed and 'relationship' advantages that mediation offers. This may lead to mediation becoming the dispute resolution process of first recourse and this publication is no doubt a helpful step in that direction.

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Law and institutions

1 Treaties

Is your country a signatory to any treaties that refer to mediation? Is your domestic mediation law based on a treaty?

In 2002 the Council of Europe published the Green Book, in which conflict settlement regulations were discussed. Taking a proactive approach, the Belgian government drafted the domestic law based on the Green Book. Belgium notified the European Commission on time that its Law on Mediation complied with the EU Directive 2008/52/EC (EU Directive) and, consequently, the Law did not need any further amendments.

However, a few remarks should be made: Belgian law allows one of the parties to submit the settlement agreement for homologation before the competent court. The terms of the Directive are quite different. The content of the agreement may be made enforceable on the request of the parties, or for one of them with the explicit consent of the others. Additionally, settlement agreements may only be submitted for homologation before the competent court if the mediation was carried out by a mediator accredited by the Federal Commission. Most foreign mediators, even if they comply with the criteria of the Federal Commission, are not actually accredited. However, owing to the fact that Belgian judges have a positive attitude towards European law, there have been no problems in this context to date.

2 Domestic mediation law

What are the primary domestic sources of law relating to domestic and foreign mediation? Are there any differences for the mediation of international cases?

The present Law on Mediation of 21 February 2005 applies to domestic as well as cross-border mediation. Additionally, the Federal Mediation Commission (FMC) issued a Code of Conduct for accredited mediators by its decision of 18 October 2007. The English translation of the Code of Conduct can be consulted in the Association for International Arbitration (AIA) book, *European Mediation Training for Practitioners of Justice: A Guide to European Mediation* (2012) and on the website for the Belgian Centre for Arbitration and Mediation (CEPANI).

3 Mandatory provisions

Are there provisions of domestic mediation law that must be considered in mediation proceedings?

Under the Law on Mediation, only disputes that can be the subject matter of a settlement agreement may be submitted to mediation. In the event of voluntary mediation the parties and the mediator must arrange and sign a mediation protocol, setting up the rules for the conduct of the mediation as well as its duration. It is not only the mediator who has the duty of confidentiality but also the parties, as well as third parties and experts. Only in cases where mediation is conducted by the accredited mediator may the settlement agreement be submitted for homologation to the competent court. In court-instigated mediation no appeal is possible against any court decision ordering the mediation, extending its duration or putting an end to the mediation.

4 Obligation to mediate

Is mediation in your country obligatory? Can mediation be ordered by courts in your country?

Mediation is not obligatory in Belgium. Although the Law on Mediation distinguishes the court-instigated type of mediation, a court can order it only at the joint request of the parties or on its own initiative but with the consent of the parties. The court may order mediation at any stage in the proceedings, even in summary proceedings, but not in proceedings before the Supreme Court or before the Case Allocation Court, as long as the case has not been closed for the purposes of rendering a judgment. There are no sanctions or any incentives related only to mediation under Belgian law.

5 Court-annexed mediation

Does the law of your country provide for court-annexed mediation? If so, is court-annexed mediation mandatory?

The previous Law on Mediation of 19 February 2001 and the judicial code provided for court-annexed mediation in family cases referred to as procedure-related, which, if successful, would conclude in an 'agreement order'. The current Law on Mediation highlights that the mediation process is a voluntary procedure. It provides that a court may, at the request of the parties or on its own initiative, but with the agreement of all the parties, order mediation in pending proceedings. However, the parties must consent to this.

Article 1735, section 3 of the Belgian Judicial Code (BJC) states that during the mediation, the dispute continues to be laid before the court, which, at any time, may take such measures as it deems necessary. At the request of the mediator or any of one of the parties, the court may put an end to the mediation even before expiry of the time limit that has been set.

Article 1736 of the BJC highlights that if the mediation leads to a settlement agreement, even if the agreement is only partial, any party may ask the court to homologate the said agreement, in accordance with article 1043. The court may refuse the homologation of the settlement agreement only if it is contrary to public policy or, in the case of mediation in family matters, if the agreement is against the interests of underage children.

If the mediation has not led to a full settlement agreement, the court proceedings are resumed at the date set, but the court has the right, if it deems it appropriate and with the consent of all the parties, to extend the term of office of the mediator for such a time limit as it determines.

Article 1737 of the BJC emphasises that it is not possible to appeal against any court decision ordering the mediation, extending its duration or putting an end to the mediation.

No further changes have taken place following the implementation of EU Directive 2008/52/EC except for the Statute of 2011 stipulating that in the case of divorce, the judge is obliged to mention the option of mediation to the parties. In light of this, the judge is allowed to stay the proceedings so the parties consider mediation. In addition, according to article 1725, in cases where one party sues another and there is a mediation clause in the contract, the judge can stay the proceedings but he or she can only do this if the interested party raises this exception.

The conclusion is that article 1729 clearly highlights that court-annexed mediation is not mandatory.

6 Mediation-arbitration and other forms of mediation-related ADR

Is mediation combined with arbitral proceedings? May a mediator act later in the same dispute as an arbitrator, conciliator or judge? Are arbitrators aware of mediation, and if yes, are they willing to transfer arbitration cases to mediation? Which other proceedings are available and used in your country that are related to mediation?

There is still much room for the development of mediation in Belgium and it will take some time for mediation to become combined with arbitral proceedings. No cases are known of where a mediator would have acted in the same dispute as an arbitrator.

Article 6 of the 2013 Standard Dispute Rules (SDR) of the Institute of Arbitration (the Institute) provides that the arbitral tribunal is expressly given powers to propose mediation. This provision aims to open a door for arb-med proceedings. Article 9 of the SDR now also explicitly mentions that the settlement agreement is included in the award.

7 Online dispute resolution (ODR)

Have there been any developments regarding online dispute resolution in your country? Is your country participating in any international ODR project? Is online mediation available in your country?

Unfortunately, no provisions were included regarding the following issues: hybrid dispute resolution proceedings such as med-arb or arb-med or class actions in arbitration and consumer arbitration.

Recently, the AIA supported a discussion entitled 'The Future of Mediation in Belgium' (FMB). The initiative seeks to promote awareness of mediation in Belgium and ways to cultivate and develop it. The information about the FMB's subsequent sessions can be found on the AIA website (www.arbitration-adr.org).

Semi-online mediation is available via the online platform Belmed. It is designed specifically for consumer disputes (non-commercial disputes are excluded) and conflicts between consumers residing in one of the 28 EU member states, and an enterprise that is registered in the Belgian register for companies, or vice versa (disputes between consumers and disputes between enterprises are excluded). It is open for the entire EU, but a link with Belgium should always be maintained. It will soon be modified owing to the new Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013. An EU-wide online platform was set up in February 2016 for disputes that arise from online transactions.

8 Confidentiality and disclosure

Is mediation a confidential proceeding in your country? In which cases can disclosure of confidential information by the mediator or the parties be permitted or compelled? Are there any sanctions for breach of confidentiality?

The Belgian legislator has recognised that confidentiality is a key condition to successful mediation proceedings. Article 1728 of the BJC deals with details pertaining to confidentiality.

The said article states that all documents and communications made during and for the purpose of mediation are confidential. They cannot be referred to in judicial, administrative or arbitral proceedings or in any other dispute resolution procedure and are not admissible as evidence, not even as an extrajudicial testimony.

If one of the parties violates the duty of confidentiality, the judge or the arbitrator decides whether any damages may be granted. If confidential documents have been disclosed they are ex officio excluded from the proceedings. There is no specific sanction under article 1728 of the BJC, but a civil action under article 1382 of the Belgian Civil Code (BCC) can be initiated.

The mediator may not be called upon by the parties as a witness in civil or administrative proceedings relating to facts with which he or she has become acquainted in the course of the mediation process. If the mediator violates the duty of confidentiality then article 1728, section 1 of the BJC in conjunction with article 458 of the Belgian Criminal Code is applicable to the mediator.

The new CEPANI rules on mediation came into effect on 1 January 2013. Article 10 stipulates that all communications between the parties and the mediator are confidential. Pre-existing documents or documents obtained by a party outside of the context of the mediation and that are communicated in the context and for the purposes of the mediation between the parties, to the mediator or by the mediator to the parties or to one of the parties are not covered by this confidentiality rule. However, if the documents were specifically communicated as confidential during the mediation process, documents cannot subsequently be used by the parties for purposes outside the mediation. The rules, therefore, reiterate and emphasise the importance of confidentiality in the mediation process.

9 Limitation period

Does a mediation proceeding suspend the limitation period for a court claim?

In Belgium, suspension of the limitation period is only possible if mediation is conducted by an accredited mediator. Further, under article 2262-bis of the BCC the limitation period of a claim based on a contract is 10 years.

In accordance with the general principles of part VII of the BJC, the judge or arbitrator may stay the examination of the case if requested by any party, unless, in respect of the dispute in question, the mediation clause is invalid or has ceased to exist.

For voluntary mediation, the invitation to mediate suspends the limitation period relating to the claim of that right for one month. If the parties reached the stage of making the mediation protocol, the signature of this protocol suspends the limitation period for the duration of the mediation. Except for express agreement by the parties, the suspension of the limitation period ends one month after notification by one of the parties, or by the mediator to the other party or parties, of its intention to terminate the mediation.

In the event of court-instigated mediation, the time limits in relation to the proceedings are suspended when the parties jointly request to order mediation, as from the date on which they formulate their request.

10 Settlement

What is the legal character of the final (settlement) agreement? What are the legal requirements for the enforceability or the content of the agreement? Is it possible to revise, withdraw or challenge the final settlement agreement?

In both types of mediation regulated by law, voluntary and court-instigated, the judge can only refuse the homologation of the settlement agreement if it is contrary to the public policy or if the agreement reached after mediation in family matters is in violation of the interests of underage children. The homologation decision has the consequences of a judgment, in the sense of article 1043 of the BJC.

In both voluntary and court-instigated mediation, any party can ask the court to homologate the settlement agreement in accordance with article 1043. It seems that these provisions are not in line with article 6.1 of the EU Directive since the EU Directive states that member states shall ensure that it is possible for the parties or one of them with the explicit consent of the others to request homologation.

Nevertheless, the Belgian homologation process is in compliance with article 6.2 of the EU Directive, which states that the content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the member state where the request is made, unless the content of the agreement is contrary to the law of the member states where the request is made or the law of that member state does not provide for its enforceability.

Homologation of a settlement agreement has to be requested from the competent judge. In civil and commercial matters depending on the case this can be the justice of the peace, the court of first instance, the commercial court or the court of appeal.

Further, according to the EU Directive the content of the agreement resulting from mediation that has been made enforceable in

one member state should be recognised and declared enforceable in the other member states in accordance with applicable Community or national law, including the Brussels I Regulation. Thus, mediation settlement agreements resulting from voluntary and court-instigated mediation homologated in Belgium should be equally enforceable in other member states.

11 Mediation institutions

What are the most prominent mediation institutions in your country?

There are not many institutions that focus purely on mediation operating in Belgium. Quite often, mediation is offered among other dispute resolution means by centres providing alternative dispute resolution services. The CEPANI is a prominent institution in the mediation field in Belgium. It was founded on the initiative and under the auspices of the Federation of Belgium Companies and the Belgian national committee of the International Chamber of Commerce. The CEPANI looks to appoint competent, diligent and independent arbitrators and mediators and to oversee the progress of the proceedings by resolving any legal and material difficulties that might emerge so as to meet the expectations of the parties as much as possible.

Also, bMediation can be considered as the prominent institution specialised in mediation in Belgium. bMediation is an independent non-profit organisation located in Brussels with the mission of optimising the prevention, management and resolution of disputes. bMediation offers services of accredited mediators and sets a date for the meeting with the other party and the mediator in a neutral environment. Before this meeting, the parties receive assistance from their legal and mediation advisers. bMediation also offers negotiation and mediation training. The bMediation website address is www.bmediation.eu.

Another institute with a focus on family mediation and mediation in social matters is Bemiddeling vzw.

Mediation procedure

12 Background

Describe the development of mediation in your country.

Unfortunately, mediation is not yet well-known in Belgium, which precludes making use of the advantages of this process. Media is not very helpful either in promoting the use of mediation. In 2007, a survey on the use of mediation was held (De Bauw, S and Gayse, B (2008) 'The judge and mediation: a need for new attitudes and skills?' in Van Ransbeeck, R (ed), *Bemiddeling, die Keure*, p. 188). The small number of responses (only 37 throughout the whole of Belgium) does not allow for any quantitative analysis to be made; however, it still gives a general idea of the current situation with regard to mediation in Belgium. Only 19 out of 37 judges who responded to the survey stated that they had ordered mediation at court proceedings further to article 1734 of the BJC, whereas only 13 of the same 37 respondents had dealt with homologation of the settlement agreement.

In June 2012, the mediation centre bMediation, in collaboration with the FMC, conducted a survey of the Belgian mediation market. The FMC forwarded a questionnaire to the mediators accredited by the FMC. However, accreditation with the FMC was not a condition for participation in the survey and the survey was also open to the general public. Consequently, it is not always clear whether the answers have been given by the accredited or non-accredited mediators.

The most significant results of the survey (of which there were 416 answers) are as follows:

- 55 per cent of the answers were from independent mediators not linked to any organisations; 30 per cent of the answers were from mediator–members of bMediation; 21 per cent of the answers were from mediators linked to 42 different small organisations having at least 10 members and 3 per cent were members of foreign organisations;
- 39.6 per cent of those who answered were accredited in the past, but at the time of the survey their accreditation had been withdrawn;
- by mid-2012 the number of accreditations with the FMC amounted to 1,207. In Belgium mediators can be recognised in family, civil and commercial or social matters. The same person can be accredited in more than one field; consequently, it is quite possible that the figure of 1,207 does not reflect the true number of accredited mediators;
- 54.6 per cent of the mediators work in Flanders; 34.4 per cent in Brussels; 27.9 per cent in Wallonia and 20 per cent of the mediators in other regions;
- 20 per cent of the mediators started providing mediation services before the Law of 2005;
- 45.5 per cent of the mediators have fewer than three years of experience;
- 37 per cent of the mediators are also lawyers;
- 40 per cent of the mediators have never conducted a single mediation case and do not have any practical experience;
- most mediation cases relate to family matters. However, it might surprise practitioners that 32 per cent of mediation cases belong to the domain of civil and commercial matters and 17 per cent to labour matters;
- court-instigated mediation is limited to 13 per cent and mediation centres are involved in only 15 per cent of mediation cases. More than 50 per cent of the cases come to mediators through word of mouth;
- 60 per cent of international mediation is done by only 12 mediators;
- mediation in family matters usually lasts for five sessions of 90 minutes to two hours each; commercial mediation lasts for two to three sessions of four hours each;
- in commercial matters the cost of mediation is between €500 and €1,500; and
- promotion of the mediators' services is done primarily through internet, business cards and letterheads. Twenty-five per cent of the mediators do not produce any promotional material.

On 4 April 2014, Belgium adopted an Act, introducing Book XVI on the Extrajudicial Settlement of Consumer Disputes in the Code of Economic Law. This law transposed provisions of the EU Directive 2013/11 on alternative dispute resolution for consumer disputes (C-ADR). Whereas part of the law had already entered into force on 13 May 2014, a part of it entered into force on 1 January 2015.

In order to establish a coordinating body for consumer dispute resolution (CDR), a service for consumer mediation has been created. This was a new step as there had been no general policy on consumer dispute resolution in Belgium before this.

The functions of the Service for Consumer Mediation are as follows:

- to inform consumers and enterprises of their rights and obligations;
- to act as a communication body that receives and transfers requests for extrajudicial resolution; and
- to mediate disputes if no other entity does so.

The Act not only introduces the service for consumer mediation, it also provides for requirements to be met by qualified mediation entities in order to provide extrajudicial CDR.

From the beginning of 2015, the government has placed significantly more importance on mediation. In addition, the court fees have been increased significantly. In a note from the Belgian Minister of Justice (March 2015), it was said that mediation will become more and more important in Belgium. The following was written:

> 80. *There have been measures taken in order to give to alternative dispute resolution methods, such as mediation, an equivalent place in the judicial law. This is useful in order to discharge judicial courts and to customise the solutions for the dispute, but also because a solution found through the process of mediation, in which the parties are reconciled, is more supported than an imposed settlement of the dispute. As all other forms of measures, these measures also aim to achieve a high qualitative way of resolving the dispute and also to speed up the dispute process and to avoid a maximum court intervention.*

In a short period of time there will be a review by a number of concrete legislative interventions – for example, the construction of the 'initial maximum duration' of the judicial mediation from three to six months – this will lead to more propagation of mediation in which the choice of mediation will be stimulated in each step of the litigation procedure. The goal of mediation is to stimulate the parties instead of given them a financial sanction.

81. There are a lot of different initiatives on mediation today in the various courts and tribunals. These practices have the aim to streamline and further develop good practices in all courts and tribunals.
The role of the Federal Mediation Commission is enlarged as to promote, follow up and further develop mediation at national level. In fact, they are planning each year to organise, in collaboration with other partners, a mediation week in October to promote such method of conflict resolution.
The system and practice of settlements are evaluated with a view to better provide information to the parties and to implement the good practices in all courts and tribunals. An amicable solutions system is important because it permits avoiding lengthy and expensive legal proceedings.

In addition, a draft of a new mediation law has been proposed by a group of mediators assisted by the AIA to the Ministry of Justice. The most important proposals are as follows:

- the draft introduces an essential distinction between the terms 'accredited mediator' and 'accredited mediation' on the one hand and 'mediator' and 'mediation' on the other hand. Only mediators accredited by the FMC may carry the title of accredited mediator and can mediate in the context of judicial mediation. The terms mediator and mediation have, in the English language, a much broader meaning than that to which this draft refers to mediator and mediation. The accredited mediator in this draft is a mediator accredited by the FMC, acting in accordance with the ethical rules of conduct drawn up by the FMC;
- the accredited mediation should also be rejuvenated with a limited number of items. The essential points of the formerly existing scheme can be kept. The Belgian law was and is still a model for numerous other laws;
- mediation should also be possible in disputes between the government and citizens. The government is never required to participate in mediation or to reach an agreement, but the current law enhances a fluid access to mediation. The domain of mediation should be of a similar size as the domain of arbitration: the terminology needs to be adjusted;
- associations of mediators should also be admitted to be recognised as accredited mediators, as is the case in many other countries, so that, for example, a judge can appoint an association as a mediator;
- further, the distinction should be made between mediation provided under a judicial procedure and under conventional mediation;
- the rules on conventional mediation should be refined. It is at the discretion of the parties to express how they want to organise the mediation procedure. They can choose more flexible forms. In the case of mediation from a distance it may be essential to be more flexible;
- mediation – as well as other forms of ADR methods – should be promoted. This will, among other things, be expressed in the settlement of costs that is required after a legal procedure following the failure or absence of an attempt to mediate. The judge may condemn the winning party that unreasonably refuses to proceed with an attempt to amicable settlement, and order them to pay the costs of the dispute. The adaptation of the rules of legal aid is also relevant here; and
- finally, the draft provides a bridge between the existing methods of dispute resolution, and more specifically the consumer mediation service, and judicial proceedings or arbitration.

Another initiative that ought to be mentioned is that different centres working on mediation in Belgium have been shortlisted by the AIA. A short survey of 50 centres has been communicated to the Ministry of Justice.

Last, but not least, has been the drafting of a Mediation Policy Plan (2015) on amending mediation legislation in Belgium. This plan is aimed at making mediation more attractive to resolve conflicts. The provisions of the amendment proposal broaden the capacities of the FMC, including recognition of accredited mediators, their education, discipline and the Deontological Code. On the basis of this proposal, a new institution, the Observatory on Conciliation and Mediation, is to be created, which shall coordinate all the associations of accredited mediators and keep track of the statistics of mediation cases. The draft also contains different proposals as to how to reduce the mediation costs and make mediation more available to the parties concerned. The Mediation Policy Plan is aimed at strengthening the status of mediation, as a means of dispute resolution, through making it faster, cheaper and party-oriented. It has also come to attention that legal pro bono points should be given to lawyers using mediation in their practice instead of merely starting proceedings in court.

In light of the above, 2017 looks very promising for mediation in Belgium.

13 Areas of disputes for mediation

In which areas of disputes is mediation preliminarily applied? Are there any disputes that cannot be mediated?

Under the Law on Mediation any dispute that can be the subject matter of a settlement agreement may be submitted to mediation. Therefore, the dispute has to be between two or more parties who have the discretion to settle. In order to settle, one has to be capable of disposing of the subject matter of the settlement. Thus, those who are incapable owing to their age or mental deficiency have to resort to a third person in order to enter into a settlement.

For public legal entities there is a lex specialis provided in article 1724 of the BJC, since these entities can only be parties to mediation in cases expressly determined by law or a royal decree decided by the Council of Ministers. Unfortunately, there is no law or royal decree that would stipulate cases when public entities can be parties to a mediation procedure.

The Law on Mediation specifically determines the scope of the disputes susceptible for mediation as follows:

- mutual rights and obligations of spouses (articles 212 to 226 of the BCC);
- obligations arising out of marriage (or origin) (articles 180 to 202 of the BCC);
- consequences of divorce (articles 295 to 307-bis of the BCC);
- parental authority (articles 371 to 387-ter of the BCC); and
- legal cohabitation (articles 1475 to 1479 of the BCC).

Finally, disputes arising from factual cohabitation can also be subject to mediation.

14 Procedural requirements

Are there procedural requirements for mediation proceedings in your country? Must the parties prepare for the mediation?

The procedural requirements depend on the type of mediation. If it is a voluntary mediation then before commencing the procedure parties and the mediator must sign the mediation protocol. In this protocol parties cover matters related to such issues as confidentiality, the mediator's fee rate and terms of payment and a brief summary of the dispute. It is good practice for the mediator to make parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions. In the event of court-instigated mediation the law requires that the court's decision ordering mediation expressly mentions the agreement of the parties, the name, the description and the address of the mediator and the initial duration of the mediator's term of office, which may not exceed three months and the date to which the case is postponed, which is the first useful day after the expiry of the time limit.

15 Structure and process of mediation

Describe the most common steps for the mediator's preparation of a mediation proceeding. Describe the most common structure of mediation proceedings. What is the typical time frame for a mediation proceeding? Are there any special considerations for international mediation proceedings?

The Law on Mediation does not describe the steps that a mediator has to take in mediation proceedings. However, the decision of the FMC of 18 October 2007 regarding the Code of Conduct for accredited mediators specifies what the mediator is expected to do at each stage of mediation. To ensure the complete awareness of the parties regarding the procedure before engaging in mediation, the Code of Conduct prescribes the mediator, before accepting his or her appointment, to explain the mediation procedure to the parties and provide them with all the necessary information. The mediator is also required to check whether he or she can accept the assignment and whether such an assignment is based on the free choice of the parties. The mediator informs the parties about the fees, any other costs related to mediation and that they can involve legal assistance, a counsellor or expert at any time. The parties and the mediator sign the mediation protocol. In the course of mediation the mediator must control that mediation takes place in a balanced and peaceful atmosphere and that interests of the parties are taken into consideration. The mediator must ensure that each party knows and understands the consequences of the proposed solutions and invites the parties to rely on external experts. At the stage of drafting the settlement agreement, the mediator controls that it is a true reproduction of the will of the parties and every agreed point of negotiation is included. The mediator informs the parties about the consequences of the signing of the settlement agreement.

16 Mediation style

What is the primary mediation style in your country for commercial mediation: facilitative mediation, evaluative mediation or transformative mediation? Are private sessions (caucuses) or joined sessions, or both commonly used in mediation?

The primary mediation style used in Belgium is facilitative. In Belgium, it is allowed for a mediator to hold private sessions with the parties before or within the mediation sessions without the danger of losing his or her impartiality, if doing so helps a mediator to obtain any important information. Any mediation participant can request a caucus with the mediator at any point in the process. However, it is the mediator who decides whether or not a caucus is appropriate at that moment, taking into account the emotional state of the parties. The information obtained through the caucus is strictly confidential and cannot be revealed by the mediator, unless the party explicitly consents to this. Both private and joint sessions are commonly used in mediation in Belgium.

17 Co-mediation

What form does team mediation typically take in your country? Is co-mediation regularly used in your country? In which kind of cases?

Unfortunately co-mediation is rarely used in Belgium.

18 Party representatives and third parties

What is the practice in your country with respect to the inclusion of party representatives in mediation proceedings? What is the practice with respect to experts and witnesses?

In practice the counsel participate in mediation mainly in business disputes. Lawyers will rarely be involved in mediation if the dispute concerns family matters.

The Law on Mediation allows the mediator, with the consent of the parties, to examine third parties or call upon an expert specialising in the subject matter. However, experts and witnesses will seldom take part in mediation in practice.

19 Specific mediation procedures/conflict or dispute management systems

Have companies set up their own dispute management systems in your country? Are there any special routes for consumers to use mediation for small claims? Are there any institutions that offer mediation for their customers, users, etc? Is there any reported or published information regarding dispute management systems of companies for conflicts in employment matters?

On 6 April 2011 the Belgian Federal Public Service Economy (FPS Economy) launched a new electronic platform for consumer dispute resolution called Belmed (Belgium + mediation). As mentioned in question 11, the available options of extrajudicial dispute resolution include arbitration, mediation, conciliation, ombudsman and services offered by the European Consumer Centre. The platform is aimed at handling disputes between consumers located in one member state of the EU and a trader registered with the Belgian Crossroads Bank for Enterprises. With this instrument, the FPS Economy wants to help reinforce consumers' trust in the goods and services market and encourage SMEs to invest more money in cross-border electronic commerce. This policy supports the European Commission's desire to boost the single market.

Provision of mediation services through Belmed can be rendered by Real Estate Conciliation, Arbitration and Mediation Board; an accredited mediator; Belgian Conflict Management Centre; and the federal mediation service 'Patient rights'. It is presumed that Belmed will undergo some changes following developments in the field of consumer ADR and consumer ODR. These changes should, therefore, be in line with the C-ADR Directive and C-ODR Regulation.

Mediation clauses and mediation agreement

20 Mediation clauses

Are mediation clauses commonly considered in the course of contract drafting? Are there special requirements for mediation clauses? Are there any relevant court decisions referring to such escalation clauses?

Multi-tiered clauses are valid under Belgian law and do occasionally occur in practice. If a clause containing an unequivocal obligation for the parties to take recourse to mediation prior to starting arbitration proceedings is raised before an arbitral tribunal, it should suspend the examination of the case (article 1725(2) of the Belgian Code of Civil Procedure). In order to be valid such a request must be raised at the outset of the proceedings, prior to any defence on the merits.

21 Conclusion and content

Is there any obligation to conclude an agreement between the mediator and the parties or between the parties before or at the beginning of the proceeding? Are there any legal requirements regarding the content of the agreement between the mediator and the parties? What are the common provisions for such mediation agreement? Must the agreement be in writing?

In voluntary mediation the parties and the mediator are required to confirm in the written mediation protocol their agreement regarding the rules for the conduct and duration of the mediation. The law specifically mentions the issues that have to be included in the protocol, as follows:

- the name and domicile of the parties and their counsel;
- the name, description and address of the mediator, and, as the case may be, the indication that the mediator is accredited by the Commission;
- the restatement of the voluntary character of mediation;
- a brief summary of the dispute;
- the restatement of the principle of the confidentiality of all communications exchanged during the mediation;
- the method by which the fees of the mediator are fixed, the fee rate as well as the terms of payment;
- the date; and
- the signature of the parties and of the mediator.

In court-instigated mediation, the decision of the court ordering mediation must mention the agreement of the parties, the name, the description and the address of the mediator and the initial duration of the mediator's term of office, which may not exceed three months and the date to which the case is postponed, which is the first useful day after the expiry of the time limit.

22 Costs for mediation

Are there any legal provisions on mediators' fees? What is the average mediator's fee in mediations involving companies? Is there any legal aid or other financial support for mediation proceedings if parties cannot afford to pay the mediator?

The way a mediator is paid (the method by which the fees of the mediator are fixed, the fee rate and the terms of payment) has to be set in the agreement between the parties and the mediator. Article 1731, section 1 provides that unless agreed otherwise by the parties, the mediation costs and fees are payable in equal shares by the parties. Generally, mediators are paid on an hourly rate (€150 to €350), which makes mediation much cheaper than arbitration where the amount in claim has to be taken into consideration. However, at CEPANI, the fees and cost of the mediator are determined by the Secretariat in accordance with the amount in dispute and within the limits mentioned on CEPANI's website. The administrative fee of CEPANI is fixed at 10 per cent of the fees and cost of the mediator.

Only where the dispute is treated by an accredited mediator will the federal government provide legal assistance, which implies partial or complete exemption of payment to individuals with low income. However, the federal government does not intervene financially with the work of non-accredited mediators.

Professional matters for mediators

23 Regulation

Is there any specific regulation of mediators in your jurisdiction? Give details. Are there any regulations on immigration or tax issues or regarding the right to work for foreign mediators?

Under the Law on Mediation, it is the FMC that accredits mediators. There are three categories of matters for which the FMC provides accreditation: family, civil and commercial and social matters. A separate application is required for each of these three categories. The Law on Mediation sets the minimum conditions that individuals must satisfy in order to obtain the title of accredited mediator. The requirements are further elaborated in the Commission's Guidelines for the introduction of the file to become accredited as a mediator of 21 February 2005. The Law on Mediation does not require the candidate mediator to be a lawyer. The FMC issued a Code of Conduct for accredited mediators by its decision of 18 October 2007. Non-compliance with the Code of Conduct can result in penalties and a possible withdrawal of accreditation. Foreign mediators can still practise mediation in Belgium, however, the settlement agreement reached at the end of the mediation process cannot be homologated by the judge, which might be regarded as violation of the free circulation in Europe (further to articles 49 and 56 TFEU and the Services Directive), because the mediator accredited in Belgium has a privilege as compared with mediators from other member states even if they meet similar requirements.

24 Training

Are there any requirements regarding training for mediators?

An institutional framework for accreditation of mediators, the FMC, created by the Belgian parliament, consists of a general commission and three special commissions. It is the general commission that accredits providers of mediation training and the trainings they provide. A decision of 1 February 2007 established accreditation requirements and procedures for training centres and for training of accredited mediators.

The FMC has regulated mediators' training, but training itself is provided by the private sector. The programme comprises a common core of 60 hours, divided into at least 25 hours of theoretical training and at least 25 hours of practical training. The common core covers the general principles of mediation (ethics and philosophy), study of the various ADR methods, applicable law, the sociological and psychological aspects and the process of mediation. The practical exercises cover the subjects in the programme and, through role-play, develop negotiation and communication skills. In addition to this common core, there are programmes specific to each type of mediation (at least 30 hours, freely divided between theoretical and practical training time). There are specific programmes in family, civil and commercial and social mediation.

The individuals seeking accreditation as mediators must prove either adequate training or experience relevant for the practice of mediation.

The AIA is an approved institution with a unique programme 'European Mediation Training for Practitioners of Justice' focused on cross-border civil and commercial mediation (www.emtpj.eu).

25 Continued education

Must mediators undertake continued professional education? Is there a credit point system for the continued education of mediators?

Further to the decision of 18 December 2008, each mediator, regardless of the matter for which he or she was accredited by the FMC, has to give proof of a continuing professional training of at least 18 hours spread over two consecutive years. The training may consist of theoretical training (conference or cycle of conferences, symposium, seminar, etc) or practical training. The programmes that are approved by the FMC, in accordance with its decision of 1 February 2007, are accepted as continuing professional education to the extent of the actual number of class hours without further examination of the content, provided it meets the requirement of at least 18 hours spread over two consecutive years. Each mediator may make combinations of other modules of training programmes offered in Belgium and abroad. These modules should have a direct benefit for mediation practice.

26 Accreditation of mediators

Outline the system for certification of mediators.

Mediators' accreditations are regulated by part VII of the BJC and article 3 of the Code of Conduct for accredited mediators.

The General Commission accredits mediators when the five conditions set out in article 1726, section 1 of the BJC are satisfied. These are as follows:

- on the basis of the present or past activity, the candidate mediator possesses the qualification required by the nature of the dispute;
- the candidate mediator demonstrates an adequate training or experience for the practice of mediation, depending on the case;
- the candidate mediator presents the guarantees of independence and impartiality necessary to practise mediation;
- the candidate mediator has not been convicted of a condemnation registered in a criminal record that is incompatible with the practice of an accredited mediator; and
- the candidate mediator has not incurred a disciplinary or administrative sanction that is incompatible with the practice of an accredited mediator, nor has his or her accreditation been withdrawn.

In addition, the FMC has drafted guidelines based on the Law on Mediation, in which it is stated that a candidate mediator who wishes to obtain accreditation as a mediator has to file a request with the FMC accompanied by the following documents:

- a formal request addressed to the President of the Commission mentioning the type of mediation in which he or she wants to act. For each type of mediation a separate request must be submitted. Each request must be accompanied by a complete file containing the documents mentioned below (copies are sufficient except for personal statements of the candidate);
- a curriculum vitae, mentioning the exercised profession on the date of request;
- an extract of a criminal record dated a maximum of two months before the date of submission of the request;

Update and trends

Although several commercial courts, for example, the Court of Appeal Antwerp and the commercial courts in Oudenaarde and Liège, have taken steps to promote mediation over the past few years, these have had little success. There is a common understanding among different mediation stakeholders in Belgium that mediation can be used more if it becomes mandatory in some way. That is why the new mediation bill drafted by stakeholders in 2015 requires a claimant to report in a writ of summons whether parties have already attempted to reach a mediation settlement agreement before commencing court proceedings or explain why the claimant considers that any amicable settlement or mediation is not an option.

Other key changes to the current Law on Mediation suggested in the bill are as follows:

- to allow mediation between the government and citizens;
- to change the structure of the FMC;
- to abolish division of mediators into civil and commercial, social, and family mediators;
- to create a Mediation Observatory, called IAG, that will bring together all mediation stakeholders, promote mediation and have authority to conclude the necessary sectoral agreements;
- to bring the scope of the use of mediation in line with that of arbitration by adjusting the terminology of the new mediation bill;
- to allow associations of mediators to be recognised as accredited mediators, so that, for example, a judge could also appoint an association of mediators as a mediator;
- to allow a court to impose an adverse costs order on a winning party who unreasonably refused to engage in mediation; and
- to link the existing methods of dispute resolution, and more specifically the consumer mediation service, and judicial proceedings or arbitration.

Although the adoption of the new Law on Mediation is key to promoting the use of mediation, other measures need to be explored.

Measures suggested by stakeholders

The mediation stakeholders have proposed five sets of measures to the government.

The first set of measures relates to education or spreading the mediation spirit. The stakeholders suggest that not only professional bodies like bar associations need to adopt rules promoting the use of mediation, but also schools and universities need to take efforts in spreading the mediation spirit by introducing courses on mediation into their curriculum. Public authorities should set an example by using mediation to resolve their disputes.

The second set of measures is directed at establishing the necessary regulatory structure to support the use of mediation in Belgium. The most important measure here is the adoption of the appropriate and advanced legislation on mediation (ie, the new Law on Mediation). Other measures here include the creation of the Mediation Observatory that will bring together existing mediation bodies and focus on promoting mediation.

The third set of measures is directed at introducing financial incentives to use mediation. For example, one of the measures suggested here is to grant pro deo points to those lawyers who act as mediators or assist parties in mediation.

The fourth set of measures relates to promoting the use of mediation and ADR in general by, for example, introducing a Belgian-wide 'Settlement Week' programme involving various stakeholders. Another measure here is to designate national mediation champions or ambassadors.

The last set of measures is directed at conducting empirical studies that would collect statistical data on the use of mediation and investigate budgetary savings resulting from mediation.

Proposals of the Chamber of Representatives

In addition, two proposals in the field of mediation are still worth mentioning.

The first proposal of the Chamber of Representatives of 13 December 2010 suggests that local authorities need to support neighbourhood mediation projects. These projects should be organised in order to give towns and cities a workable legislative instrument to intervene quickly and efficiently in case of a nuisance. Neighbourhood mediation is intended to improve the relationships between neighbours and resolve their individual conflicts. Neighbourhood mediation can be conducted between a neighbourhood supervisor or a concierge and the owners of the building.

Neighbourhood mediation can be helpful when there are complaints about, for example, noise, behaviour of children and vandalism.

While neighbourhood mediation is primarily domestic in nature, it can easily have cross-border application within the meaning of article 2(1) of the Directive as Belgium shares borders with four countries.

The second proposal is the Chamber of Representative's Proposal of Law of 6 May 2010 modifying the BJC regarding alternative methods of dispute resolution. This proposal aims to improve the Belgian judicial system by involving judges as mediators in the mediation process. This idea arose out of a study tour to Canada that was undertaken by a delegation of the commission to analyse the Canadian judicial system.

Under the proposal, that was voted by the Chamber of Representatives but made no further progress in the Senate, at every stage of labour, commercial or civil proceedings, except for the proceedings before the Supreme Court and the Case Allocation Court, a judge, if he or she considers it appropriate, can refer a case to another judge of the same jurisdiction who will facilitate a settlement between the parties, acting as a judge conciliator, or refer the parties to mediation. The judge conciliator must have an adequate training and has a duty to keep confidential all the information that he or she has become aware of while facilitating a settlement. If settlement is not reached, the judge conciliator will not be authorised to rule on the merits of the case.

Little hope was put in this proposal from the very beginning. It is well known that courts are understaffed and it might be counterproductive to load judges with more work. Increasing the workload of judges appears to be particularly inadequate as there are many accredited mediators eager to conduct mediation in civil and commercial matters.

- a sworn statement stating that no disciplinary or administrative sanctions were incurred before, or stating the disciplinary or administrative sanction incurred (for the candidate mediators who are part of or were part of a professional body or institute organised by the law, with an own disciplinary system, a certificate from the competent disciplinary authority stating that no disciplinary or administrative sanction was incurred, or with reference to the disciplinary or administrative sanction previously incurred);
- a document certifying that he or she has successfully completed an approved training course organised by a training organisation approved by the FMC, which focuses on the type of mediation for which the application is made;
- a copy of a bachelor's degree or proof that equivalent training has been successfully attained, or, for candidate mediators who exercise a profession that can only be exercised upon obtaining a high school degree or an advanced degree, at least a certificate stating what the exercised profession is, and a document showing at least two years of professional experience, or, in the event of absence of the documents attesting graduation, documentary evidence of at least five years of professional experience;
- a certificate stating that the activity of the mediator is covered by a professional liability insurance or a certificate issued by an authorised insurer, showing that the professional liability will be covered from the date on which the approval of the mediator has been granted; and
- a statement in which he or she engages to respect the Code of Conduct established by the FMC, and to attend the training programme that is approved by the FMC.

The General Commission provides a list of the accredited mediators to the courts and tribunals. At the same time it is possible to find the list of accredited mediators on the website of the FMC itself. Mediators accredited by the FMC can provide services in at least 15 different languages. Mediators who are not accredited by the FMC can still practise 'free mediation' in Belgium. However, the settlement agreement concluded at the end of mediation cannot be submitted to the court for homologation.

27 Mediator liability and sanctions

What are the duties of mediators in a mediation procedure? What liability do mediators face when offering their services and conducting mediation proceedings? Is professional indemnity insurance for mediators available or obligatory? Are there any further sanctions or other disciplinary measures for mediators in cases of misconduct, poor performance, etc? Are there any regulations referring to the dismissal of mediators?

One of the conditions of becoming an accredited mediator is to present the guarantees of independence and impartiality necessary to practise mediation. The Code of Conduct for accredited mediators stipulates in section 3 that the mediator has to be independent and impartial. If the situation of lack of independence or impartiality arises, the mediator is obliged to inform the parties about it. Failure to comply with this duty may lead to sanctions.

An accredited mediator is obliged to cover his or her mediation activity with professional liability insurance. This follows from the guidelines for the introduction of a file to obtain accreditation as a mediator, which the FMC drafted. In order to obtain a licence a mediator has to submit a request with the FMC accompanied by a file that includes, inter alia, a certificate stating that the activity of the mediator is covered by a professional liability insurance or a certificate issued by an authorised insurer, showing that the professional liability will be covered from the date on which the approval to the mediator is granted.

However, accreditation can be temporarily or permanently withdrawn if the mediator no longer meets the requirements of article 1726 of the BJC. There are specific sanctions for violation of the Code of Conduct for accredited mediators and a procedure for the imposition of such sanctions, which is regulated by a decision of 25 September 2008.

As follows from the decision, the failure of a mediator to meet obligations under the law or decisions of the FMC can trigger his or her appearance before the civil or criminal courts.

Additionally, any similar failure can lead to a procedure initiated by the General Commission of the FMC in accordance with article 1727, section 6(4) and (7) of the BJC.

The sanctions that the FMC could impose are as follows:

- a warning;
- a reprimand;
- a temporary withdrawal of the accreditation for a period of one month to one year; or
- a permanent withdrawal of the accreditation.

28 Appointment

Is there any regulation regarding the appointment of mediators? Is it common in your country to seek assistance by institutions or official bodies for the appointment of mediators? Are mediators obliged to inform about conflicts of interest in the course of appointment?

The Law on Mediation provides that the parties appoint the mediator either by mutual consent or call upon a third party to make the appointment. There is no any official regulation regarding the appointment of mediators. Private institutions establish their own appointment procedures. For example, under article 7 of CEPANI Mediation Rules, the Appointments Committee or the chairperson shall appoint the mediator. The parties may nominate the mediator by mutual consent, subject to the approval of the Appointments Committee or the chairperson.

The Code of Conduct specifically provides that a person cannot act as a mediator if he or she cannot fulfil his or her duty impartially and independently due to private material or moral interest, as follows:

- if he or she has a personal or professional relationship with one of the parties;
- if he or she can benefit, directly or indirectly, from the outcome of the case; or
- if one of his or her colleagues or partners has acted for one of the parties in a capacity other than a mediator.

If circumstances arise or if there are doubts as to the mediator's impartiality and independence, he or she shall disclose the circumstances that may give rise to justifiable doubts to his or her impartiality and independence, to the parties prior to as well as during the course of mediation or the mediator shall resign or he or she shall obtain a written agreement from the parties that the mediation can continue.

Cases

29 Notable cases

Briefly give details of any significant recent mediation cases or disputes or judgments involving mediation that have been published in your country.

Although information regarding a number of mediation cases has become public in Belgium, none of the known cases presents any particular interest.

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Law and institutions

1 Treaties

Is your country a signatory to any treaties that refer to mediation? Is your domestic mediation law based on a treaty?

In 1993 the Bermuda legislature enacted the Bermuda International Conciliation Arbitration Act. The Act incorporated into Bermudian law the UNCITRAL Model Law on International Commercial Conciliation. The interpretation section of the legislation defines conciliation to include mediation. The conciliation rules embodied in the legislation are defined as the UNCITRAL Conciliation Rules adopted by the United Nations Commission on International Trade Law on 23 July 1980.

It is important to note that the 1993 legislation was enacted to provide for the conduct of International Commercial Conciliations and Arbitrations and the Recognition and Enforcement of Foreign Arbitral awards in Bermuda. An international arbitration is defined in the Model Law as an arbitration where the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states.

2 Domestic mediation law

What are the primary domestic sources of law relating to domestic and foreign mediation? Are there any differences for the mediation of international cases?

International mediation is regulated by the Bermuda International Conciliation Arbitration Act 1993. Domestic mediations are governed by specific pieces of legislation in which mediation is either encouraged or mandated as a process for resolution of disputes within the particular field of activity regulated by the legislation.

Domestic appointment of a mediator or conciliator without the consent of the parties

In the field of labour relations, sections 5M and N of the Labour Relations Act 1975 give the Minister of Labour and Home Affairs authority to appoint a mediator to resolve a labour dispute. In the field of employment disputes, section 37 of the Employment Act 2000 authorises the employment inspector to investigate employment disputes and to endeavour to conciliate the parties and to effect settlement by all means at his or her disposal.

Domestic appointment of a mediator or conciliator with the consent of the parties

Section 10 of the Ombudsman Act 2004 gives authority to the ombudsman to deal with a complaint by voluntary mediation. Section 46 of the Public Access to Information Act 2010 authorises the information commissioner to resolve applications for review by voluntary mediation. Section 14 J of the Human Rights Act 1981 enacted by amendment in 2013 gives authority to the Human Rights Commission to offer the parties to a human rights complaint mediation or conciliation for the resolution of their dispute.

3 Mandatory provisions

Are there provisions of domestic mediation law that must be considered in mediation proceedings?

There are no mandatory provisions applicable to mediation in Bermuda.

4 Obligation to mediate

Is mediation in your country obligatory? Can mediation be ordered by courts in your country?

Apart from the statutory examples referred to in question 2, mediation is not obligatory in Bermuda. Furthermore, the courts cannot order parties to participate in mediation to resolve their dispute. Bermuda is a British overseas territory. Bermuda has its own parliament, which enacts legislation to govern the country and it has a separate court system. The highest court in the land is the Court of Appeal. The final appellate court is her Majesty's Privy Council in London. Bermudian laws are also based upon English common law and, as such, English legal authorities, particularly from the Supreme Court and the Privy Council, are both authoritative and binding in Bermuda. The English Court of Appeal decision in *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 is a highly persuasive authority in Bermuda, however, the case must be viewed with caution because Bermuda has not enacted the English Civil Procedure Rules concerning mediation. In *Halsey v Milton Keynes General NHS Trust* the court decided that compulsory alternative dispute resolution would be an unacceptable constraint on the right of access to the court and therefore a violation of article 6 of the European Convention on Human Rights, which provides the right to a fair trial. The equivalent provision in Bermuda is section 6 of the Bermuda Constitution Order 1968.

5 Court-annexed mediation

Does the law of your country provide for court-annexed mediation? If so, is court-annexed mediation mandatory?

There is no provision in Bermuda for court-annexed mediation. The courts of Bermuda do have authority to manage civil litigation disputes with the aim of furthering the overriding objective to deal with cases justly enshrined in the Rules of the Supreme Court of Bermuda. Active case management includes encouraging parties to use mediation in appropriate cases. The Barristers Code of Professional Conduct 1981 imposes a duty on members of the Bar to encourage clients to settle disputes if such an approach is advantageous to the client. Members of the Bermuda Bar are increasingly suggesting mediation to their clients as a form of alternative dispute resolution.

6 Mediation-arbitration and other forms of mediation-related ADR

Is mediation combined with arbitral proceedings? May a mediator act later in the same dispute as an arbitrator, conciliator or judge? Are arbitrators aware of mediation, and if yes, are they willing to transfer arbitration cases to mediation? Which other proceedings are available and used in your country that are related to mediation?

The Bermuda chapter of the Institute of Chartered Arbitrators provides access to both arbitration and mediation practitioners. By agreement, parties can attempt to resolve their disputes first by mediation, and if that approach fails, by arbitration. It is now common for local commercial contracts to contain clauses permitting both these forms of alternative dispute resolution before the dispute can be resolved in the courts. In domestic disputes, there is no prohibition on a mediator later acting in the same dispute as an arbitrator, however, parties may be concerned about information confidentially disclosed to the mediator, which would later inform the decision he or she would arrive at as an arbitrator.

In international arbitrations, section 14 of the Bermuda International Conciliation and Arbitration Act 1993 specifically prohibits a person who has served as conciliator being appointed as an arbitrator in the same dispute unless all parties agree in writing to such participation or the rules agreed for conciliation or arbitration so provide.

7 Online dispute resolution (ODR)

Have there been any developments regarding online dispute resolution in your country? Is your country participating in any international ODR project? Is online mediation available in your country?

There is no provision for online dispute resolution in Bermuda.

8 Confidentiality and disclosure

Is mediation a confidential proceeding in your country? In which cases can disclosure of confidential information by the mediator or the parties be permitted or compelled? Are there any sanctions for breach of confidentiality?

In Bermuda, mediation agreements and settlement agreements invariably contain confidentiality or non-disclosure clauses, or both. Bermudian law recognises the protection afforded to the mediator and parties to the mediation by the confidentiality and non-disclosure clauses inserted in mediation agreements. These clauses protect oral and written statements made on a 'without prejudice' basis during negotiations towards settlement of a dispute. Such without prejudice negotiations are inadmissible in subsequent court proceedings relating to the same subject matter. Mediation practitioners in Bermuda recognise that confidentiality clauses preserve the confidentiality of the mediation process. In *Instance and Others v Denny Brothers Printing Ltd* [2000], Times Law Reports, the court held without prejudice communications made in mediation that did not settle a dispute extended to later litigation connected to the same subject matter. In *Cumbria Waste Management Ltd and Lakewood Waste Management Ltd v Baines Wilson* [2008] EWHC 786 the High Court in England considered the extent and force of the confidentiality provision in the mediation agreement. The court decided on the grounds of the without prejudice privilege and, based on contracted confidentiality between the parties, it would be wrong to order disclosure of the mediation documents. In particular, the court wanted mediators to be free to conduct mediations without fear that their notes might be disclosed to others. This decision supported the contention that mediators may themselves have privilege in their own papers that the parties to the mediation cannot waive. A similar view was previously expressed in *Rudd v Trossacs Investments* [2006], a decision of the Ontario Superior Court of Justice in which the court upheld the confidentiality of mediations by refusing to compel a mediator to testify about communications between parties at a mediation.

A contrary view to the *Cumbria* case was expressed a year later in another decision of the English High Court, in *Farm Assist Limited (in liquidation) v the Secretary of State for the Environment, Food and Rural Affairs* (No. 2) [2009] EWHC 1102 [TCC]. The central issue in the case was whether the settlement agreement arising from the mediation could be set aside for economic duress. The court held that in the interests of justice the mediator should give evidence and refused the application to set aside the witness summons directed to the mediator because the mediator's evidence was necessary for the court to determine what was said and done in the mediation. An important point to note in this case was that the parties to the mediation had waived any without prejudice privilege in the mediation. The court further held that the parties were entitled to waive their privilege and as a consequence the privilege belonged only to the parties and not the mediator.

In *Brown v Rice & Patel* [2007] EWHC 625 the court was cognisant of the desirability of a distinct privilege attaching to the entire mediation process. However, the court declined to determine the question of whether a distinct mediation privilege existed in that particular case.

Disclosure of confidential information by the mediator or the parties is permitted or compelled in the following circumstances:

- unambiguous impropriety: in the above-mentioned case of *Farm Assist Limited (in liquidation) v the Secretary of State for the Environment, Food and Rural Affairs*, the court was influenced to consider what was said and done in the mediation in the face of an allegation of economic duress;
- threats: in the case of *Hall and Another v Pertemps Group Limited & Another* [2005], Times Law Reports, Mr Justice Lewison held that if threats made in the course of a mediation so frightened one party to the litigation that he or she wanted to bring proceedings to a halt irrespective of the merits of his or her claim the court would inquire into the nature of the threats;
- to prove the existence of a concluded agreement: in B*rown v Rice & Patel* the court was asked to hear evidence as to whether there was a concluded agreement arising out of a mediation. The court held that communications during the process, which were to be construed as without prejudice, could be admitted in evidence in order to determine whether a binding settlement had been concluded;
- evidence of legal rights: notes of mediation proceedings were used as evidence in the case of *Munt v Beasley* [2006] EWCA IV Civ 370. The court relied upon the evidence to establish that a landlord had, contrary to the express terms of a lease, included the use of a loft as part of the tenancy; and
- waiver: parties can agree to waive privilege over the without prejudice negotiations that took place in the mediation in order to allow a court to evaluate the details and conduct of the mediation (*Chantrey Vellacott v Convergence Group Plc* [2007] EWHC 1774).

The sanctions and remedies available for breach of the confidentiality clause in the mediation are governed by the normal principles of the law of contract.

9 Limitation period

Does a mediation proceeding suspend the limitation period for a court claim?

Unless the parties to the mediation enter into a tolling or standstill agreement, mediation proceedings do not suspend the limitation period.

10 Settlement

What is the legal character of the final (settlement) agreement? What are the legal requirements for the enforceability or the content of the agreement? Is it possible to revise, withdraw or challenge the final settlement agreement?

The parties to a mediation can enshrine their agreement in a binding written contract. The agreement of the parties does not have to be reduced in writing. Most mediation agreements provide that agreements of the parties should be contained in a written document in order to be enforceable. A mediation agreement is enforceable in the Bermudian courts (*THAKRAR v Ciro Citterio Menswear Plc (in administration)* [2002] EWHC 1975), Johal Freakley. A final settlement agreement can only be revised, withdrawn or challenged if the settlement agreement was challenged in court on the grounds of

fraud, illegality, misrepresentation, mistake, undue influence or economic duress.

In international mediations, article 13 of the UNCITRAL Conciliation Rules provides that by signing the settlement agreement the parties put to an end their dispute and are bound by the agreement.

11 Mediation institutions

What are the most prominent mediation institutions in your country?

The Bermuda chapter of the Institute of Chartered Arbitrators, the Human Rights Commission and the organisation Citizens Uprooting Racism in Bermuda (CURB) are not in themselves mediation institutions; however, they do offer mediation courses. The Institute of Chartered Arbitrators offers commercial mediation training and seeks to promote the resolution of commercial disputes by mediation. The Human Rights Commission offers mediation training geared specifically to human rights issues and CURB offers social justice mediation courses specifically directed to dealing with disputes concerning allegations of racism.

Mediation procedure

12 Background

Describe the development of mediation in your country.

Mediation is becoming well developed in Bermuda. This has arisen mainly through institutions such as the Labour Relations Office where the Minister of Labour and Home Affairs can resolve labour disputes by mediation and institutions such as the Institute of Chartered Arbitrators and CURB offering mediation courses on a regular basis, all of which have heightened public awareness that mediation is an effective form of dispute resolution.

13 Areas of disputes for mediation

In which areas of disputes is mediation preliminarily applied? Are there any disputes that cannot be mediated?

Mediation is primarily used in labour relation disputes, employment disputes, commercial disputes, human rights disputes and international arbitration disputes.

14 Procedural requirements

Are there procedural requirements for mediation proceedings in your country? Must the parties prepare for the mediation?

Parties, together with the mediator, invariably enter a written mediation agreement. However, there are no specific procedural requirements for the conduct of mediations in Bermuda. The mediation agreement will set out the procedure for the conduct of the mediation. However, the parties are free to informally agree the procedure for the conduct of the mediation.

15 Structure and process of mediation

Describe the most common steps for the mediator's preparation of a mediation proceeding. Describe the most common structure of mediation proceedings. What is the typical time frame for a mediation proceeding? Are there any special considerations for international mediation proceedings?

Because the range of mediations now being conducted in Bermuda is so wide and varied with more formalised mediation procedures adopted in commercial mediations and less formal mediation procedures being adopted in social justice mediations, it would not be accurate to set out a single procedure that is adopted in all mediations conducted in Bermuda.

Mediations invariably follow the basic structure whereby an agreement to mediate is signed by all the parties in dispute. At the commencement of the mediation all parties meet with their advisers if they are represented in private break-out rooms. Once the mediation commences the mediator will explain the mediation process and the rules governing the conduct of the mediation, after which each party is permitted to make an opening statement setting out their issues of concern and their reasons for attending the mediation. At this point, the mediator will determine whether to continue the mediation with all parties present or place the parties in separate rooms with a view to talking to each party separately, identifying their concerns in more detail so that the negotiation phase of the mediation can be conducted. Once an agreement has been reached the parties are encouraged to draft a written settlement agreement. Commercial mediations, mediations involving labour relations disputes and employment disputes tend to be more formal and paper intensive. These mediations may be preceded by preliminary hearings or directions hearings, or both. Social justice mediations are often less formal and the parties and the mediator are specifically encouraged to make the mediations less paper-intensive.

16 Mediation style

What is the primary mediation style in your country for commercial mediation: facilitative mediation, evaluative mediation or transformative mediation? Are private sessions (caucuses) or joined sessions, or both commonly used in mediation?

The primary mediation style in Bermuda for commercial mediation is facilitative. The mediation culture in Bermuda is for mediators to remain neutral in all aspects of the mediation. Mediators rarely take on the role of evaluative mediators, pointing out the weaknesses of a party's case and predicting a judge's opinion if the matter proceeds to trial.

17 Co-mediation

What form does team mediation typically take in your country? Is co-mediation regularly used in your country? In which kind of cases?

Co-mediation is not common in Bermuda. However, the mediation culture in Bermuda is not fixed in such a way that in appropriate cases co-mediation would be viewed as unacceptable by potential mediators or the parties to the mediation.

18 Party representatives and third parties

What is the practice in your country with respect to the inclusion of party representatives in mediation proceedings? What is the practice with respect to experts and witnesses?

The mediation culture in Bermuda welcomes the use of party representatives in mediations. In commercial mediations, labour relations mediations and employment mediations party representatives are invariably members of the legal profession. However, in specialised commercial fields such as construction disputes, party representatives are often quantity surveyors and in non-commercial mediations lawyers are rarely appointed as party representatives.

19 Specific mediation procedures/conflict or dispute management systems

Have companies set up their own dispute management systems in your country? Are there any special routes for consumers to use mediation for small claims? Are there any institutions that offer mediation for their customers, users, etc? Is there any reported or published information regarding dispute management systems of companies for conflicts in employment matters?

There are undocumented reports of local companies and international companies located in Bermuda setting up their own dispute management systems. By their very nature, little is known about these systems since they are private to the organisations that have created them. The Bermudian justice system has not adopted compulsory alternative dispute resolution as a tool for resolution of civil disputes. Therefore, there is no state-structured process of mediation of small claims.

Mediation clauses and mediation agreement

20 Mediation clauses

Are mediation clauses commonly considered in the course of contract drafting? Are there special requirements for mediation clauses? Are there any relevant court decisions referring to such escalation clauses?

Mediation clauses are commonly considered in the course of contract drafting, however, there are no special requirements for mediation clauses in contracts entered into between private parties. Escalation clauses may be agreed between the parties; however, there are no Bermudian court decisions on escalation clauses.

21 Conclusion and content

Is there any obligation to conclude an agreement between the mediator and the parties or between the parties before or at the beginning of the proceeding? Are there any legal requirements regarding the content of the agreement between the mediator and the parties? What are the common provisions for such mediation agreement? Must the agreement be in writing?

In the absence of legislation governing mediation in Bermuda there are no rules governing the content of a mediation settlement agreement. All the mediation courses offered by local institutions contain specific training to ensure that if the parties to a mediation do reach agreement that agreement is contained in a written document. There is no specific requirement under Bermudian law regarding what terms should be included in the settlement agreement or whether the agreement should be in writing.

22 Costs for mediation

Are there any legal provisions on mediators' fees? What is the average mediator's fee in mediations involving companies? Is there any legal aid or other financial support for mediation proceedings if parties cannot afford to pay the mediator?

There are no legal provisions in Bermuda regarding mediators' fees. If lawyers are appointed as mediators they tend to charge their commercial hourly rate as the fee for the conduct of the mediation. In the event that the mediator is of another professional discipline such as a quantity surveyor or an architect, they also tend to charge their professional hourly rate as their fee for conducting the mediation. There are no official fee scales for mediators so, in the event that a mediator is not professionally qualified, there is no standard scale of fee that will be charged. The legal aid scheme in force at present in Bermuda does not permit the grant of legal aid for parties to a mediation. There is no charge for the services of a mediator in state mediations under the Labour Relations Act 1975, the Employment Act 2000 and for mediations conducted by the Ombudsman. In commercial disputes the parties invariably agree that the mediator's fee will be split equally between the parties.

Professional matters for mediators

23 Regulation

Is there any specific regulation of mediators in your jurisdiction? Give details. Are there any regulations on immigration or tax issues or regarding the right to work for foreign mediators?

Mediation is not regulated by any professional body or government legislation. The title of mediator is not protected by law as a professional designation. At present, there is no limitation regarding professional background and experience to become a mediator and there are no regulations referring to the duties and rights of mediators.

24 Training

Are there any requirements regarding training for mediators?

The Bermuda chapter of the Institute of Chartered Arbitrators, the Human Rights Commission and CURB all provide courses to train mediators to the requisite standard each organisation believes must be achieved in order to be placed upon their respective lists of accredited mediators. In the absence of achieving the requisite standard in any of the courses on offer an individual will not be placed upon the list of approved mediators recommended to conduct mediations. Invariably, mediation courses offered in Bermuda require participants to undergo practical experience before they are accredited as mediators.

25 Continued education

Must mediators undertake continued professional education? Is there a credit point system for the continued education of mediators?

There is no requirement that mediators undertake continued professional education.

26 Accreditation of mediators

Outline the system for certification of mediators.

There is no official system for the accreditation, certification or registration of mediators. As stated in question 11, organisations such as the Bermuda Institute of Chartered Arbitrators, the Human Rights Commission and CURB offer mediation courses, which, upon completion, will result in the mediator being placed on that organisation's list of accredited mediators, available and recommended to conduct mediations in respect of disputes with reference to the particular organisation.

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27 Mediator liability and sanctions

What are the duties of mediators in a mediation procedure? What liability do mediators face when offering their services and conducting mediation proceedings? Is professional indemnity insurance for mediators available or obligatory? Are there any further sanctions or other disciplinary measures for mediators in cases of misconduct, poor performance, etc? Are there any regulations referring to the dismissal of mediators?

The duties of a mediator are set out in his or her contract of appointment or in the mediation agreement. Mediation agreements invariably contain a clause excluding the mediator from personal liability. Professional indemnity insurance is not obligatory for mediators, however, mediators who are professionally qualified as lawyers, architects or quantity surveyors will often ensure that their professional indemnity insurance covers any work they conduct as mediators.

28 Appointment

Is there any regulation regarding the appointment of mediators? Is it common in your country to seek assistance by institutions or official bodies for the appointment of mediators? Are mediators obliged to inform about conflicts of interest in the course of appointment?

There is no regulation by government of private institutions regarding appointments of mediators. Parties seeking the assistance of mediators are invariably directed to the institutions regulating the subject matter of their dispute, which, in turn, directs the parties to their list of accredited mediators. Mediators are not obliged to inform parties about any conflicts of interest in the course of appointment. However, the professional environment in Bermuda is such that potential mediators would invariably notify the parties to mediation of a potential conflict of interest.

Cases

29 Notable cases

Briefly give details of any significant recent mediation cases or disputes or judgments involving mediation that have been published in your country.

There have been no significant mediation cases or publicly available disputes published recently.

Brazil

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Law and institutions

1 Treaties

Is your country a signatory to any treaties that refer to mediation? Is your domestic mediation law based on a treaty?

Brazilian rules are modern and based on international standards, especially the UNCITRAL Model Law on International Commercial Conciliation.

But, as mediation has only recently been regulated in Brazil through specific Acts (Act No. 13,140 (the Mediation Act) and Act No. 13,105 (the new Civil Procedure Code)), Brazil is still not a signatory to any treaties regarding mediation.

2 Domestic mediation law

What are the primary domestic sources of law relating to domestic and foreign mediation? Are there any differences for the mediation of international cases?

Despite the historical relevance of mediation for settling disputes in Brazil and the dedication of legal doctrine to the subject, as well as the existence of several respected Brazilian institutions of mediation, this alternative dispute resolution method was only recently regulated in Brazil through specific Acts: the Mediation Act, published on 26 June 2015, which came into force on 23 December 2015 and the new Civil Procedure Code, published on 16 March 2015, which came into force on 17 March 2016. Before that, the most relevant rule regarding mediation was an administrative regulation from the National Council of Justice (Resolution No. 125/2010). According to article 3 of the Mediation Act, the main requirement to submit a dispute to mediation is simply that it is related to disposable rights or, if the rights in matter are non-disposable, they must be susceptible to settlement, without any distinctions between domestic or international cases.

3 Mandatory provisions

Are there provisions of domestic mediation law that must be considered in mediation proceedings?

In general, Brazilian law states that an impartial third party with no decisive power, chosen or accepted by the parties, must carry out the mediation proceeding, in order to assist or encourage them to reach consensual solutions for a dispute, as per the sole paragraph of article 1 of the Mediation Act. For some specific situations, the law states certain mandatory rules. Some of them are especially noteworthy. First, when parties solve a controversy involving something that is non-disposable but susceptible to settlement rights, article 3, paragraph 2 of the Mediation Act, demands that they must submit it to a judicial confirmation, preceded by a State Attorney's opinion. Further, on judicial mediations, parties must be assisted by a lawyer, as stated in article 26 of the Mediation Act and article 334, paragraph 9 of the new Civil Procedure Code, which is different from extrajudicial mediations, when attorneys are not required, considering that article 10 of the Mediation Act declares that parties may or may not be assisted by lawyers. It is important to highlight that in judicial proceedings the plaintiff and defendant must declare their own interests in mediation in their first manifestation in the records. Only after the mediation phase has passed can the defendant present his or her formal defence. If a judicial or arbitration proceeding is in course during mediation, parties shall request the suspension of the lawsuit for a reasonable period for them to reach the consensual solution for the dispute. For extrajudicial mediation, parties must agree on a mediation clause that states the date and place for the first mediation meeting to happen, the criteria for choosing the mediator and the penalties applicable if parties do not attend the first meeting. For the start of a mediation proceeding, one party must send a formal invitation to the other party, stating the scope of the mediation and the date and venue of the first meeting. If the party does not answer this invitation within 30 days, it is considered as rejected. Instead of agreeing on a specific mediation clause that will set the rules for the start of the proceeding, parties may simply choose to appoint a regulation published by a serious mediation institution to govern the proceeding. If the clause does not fully state the guidelines or regulation applicable, the Mediation Act states some general rules for those situations. For example, article 22, paragraph 2, item IV, sets a penalty for the party that receives an invitation to mediation, but does not attend the first meeting. In this case, the non-attending party must pay 50 per cent of the costs and judicial attorney fees in an eventual future judicial or arbitration proceeding involving the dispute that was intended to be solved in mediation, even if the party wins the case. The sole paragraph of article 20 of the Mediation Act also states that the final term of mediation is an extrajudicial execution instrument. If the term is confirmed by a judge it becomes a judicial execution instrument. Finally, it is important to assert that during mediation the statute of limitation is suspended.

4 Obligation to mediate

Is mediation in your country obligatory? Can mediation be ordered by courts in your country?

Article 334 of the new Civil Procedure Code provides that the first providence of the judge in the proceeding is to schedule a mediation or conciliation hearing, to which the parties must attend. Only if both parties declare their lack of interest in settling will the judge dismiss the need of a mediation or conciliation hearing. The unjustified absence of any of the parties to the hearing typifies an attempted act against the dignity of justice and the party that fails to attend must pay a penalty corresponding to a maximum percentage of 2 per cent of the value in question. However, the Mediation Act expressly states that no one will be obliged to remain in a mediation proceeding.

5 Court-annexed mediation

Does the law of your country provide for court-annexed mediation? If so, is court-annexed mediation mandatory?

As mentioned above, the new Civil Procedure Code states that the judge must schedule a mandatory conciliation or mediation hearing as an initial act in the lawsuit if any of the parties reveals an interest in settling. In the case of unjustified absence, the party will have to pay a fine that will not exceed 2 per cent of the value in question, as a penalty for an attempted act against the dignity of justice. It should be mentioned that in judicial mediation a lawyer must assist parties. If the party proves not to have financial resources to bear the expenses

of an attorney, then a public defender will be appointed, according to article 26 of the Mediation Act.

6 Mediation-arbitration and other forms of mediation-related ADR

Is mediation combined with arbitral proceedings? May a mediator act later in the same dispute as an arbitrator, conciliator or judge? Are arbitrators aware of mediation, and if yes, are they willing to transfer arbitration cases to mediation? Which other proceedings are available and used in your country that are related to mediation?

In Brazil, there is no mandatory combination between mediation and arbitration. Nonetheless, parties may agree on an escalation clause that provides that any controversy will be subjected to mediation then, if parties do not reach an agreement, they will go to arbitration, for example. In this case, the mediator cannot act later as an arbitrator or a witness related to the same conflict in which he or she has worked as a mediator, as per article 6 of the Mediation Act and article 166, paragraph 2 of the new Civil Procedure Code. For one year after the last mediation hearing, the mediator cannot assist, represent or defend any of the parties. The law does not provide any rules regarding the possibility of the mediator to act later as a judge or conciliator. During any arbitral or judicial lawsuit, parties may agree to submit the controversy to mediation. Arbitrators and judges are also allowed to suggest mediation sessions to parties during the proceeding. The new Civil Procedure Code states the duty of the judge to encourage a settlement between parties at any time, preferably through mediators or conciliators. Mediation and conciliation are the most common proceedings used in Brazil for parties to reach an agreement, as well as negotiation. Article 166, paragraph 3 of the new Civil Procedure Code expressly admits that mediators and conciliators use negotiation techniques with the aim of providing a favourable scenario to settlement.

7 Online dispute resolution (ODR)

Have there been any developments regarding online dispute resolution in your country? Is your country participating in any international ODR project? Is online mediation available in your country?

Article 46 of the Mediation Act allows mediation through the internet or any other communication means that allows settlement by distance, as long as parties agree to it. Accordingly, article 334, paragraph 7 of the new Civil Procedure Code allows online mediation hearings, as stated by law. However, no specific law regulating its proceeding has been published to date.

8 Confidentiality and disclosure

Is mediation a confidential proceeding in your country? In which cases can disclosure of confidential information by the mediator or the parties be permitted or compelled? Are there any sanctions for breach of confidentiality?

The Mediation Act states in article 30 that any information related to the mediation proceeding is confidential to third parties. In addition, the mediator cannot reveal information declared by one party during a private session, unless authorised. The law forbids revelation of information shared in a mediation proceeding in any arbitral or judicial lawsuit, except if parties agree, if the law demands the disclosure or if it is necessary for the execution of the settlement that parties were able to reach through mediation. One particular exception to confidentiality is regarding information related to crimes, which must be processed through a public criminal action. The confidentiality duty is binding for the mediator, parties, their representatives, lawyers and any person that directly or indirectly participated in the proceeding. From the beginning of the proceeding, the mediator shall warn parties about the confidentiality duty. Article 6 of the Mediation Act does not allow a mediator to act as a witness regarding facts related to the same conflict that he or she has worked on as a mediator. The law does not provide specific penalties for breach of confidentiality, although parties may state it in the mediation clause. Additionally, it may characterise civil liability for the defaulter party if it causes damages for the counterparty.

9 Limitation period

Does a mediation proceeding suspend the limitation period for a court claim?

Article 17 of the Mediation Act determines that during mediation the limitation period for a court claim is suspended.

10 Settlement

What is the legal character of the final (settlement) agreement? What are the legal requirements for the enforceability or the content of the agreement? Is it possible to revise, withdraw or challenge the final settlement agreement?

The law does not demand any legal form for the final agreement when parties reach settlement. Nevertheless, according to the general provisions of the Mediation Act and doctrine about the subject, the written form is required. In addition, it is convenient to assert that the Mediation Act determines that, by the end of a mediation proceeding, there must be a written final term. This term, according to the sole paragraph of article 20, is an extrajudicial execution instrument. If parties submit the final term to judicial confirmation, it becomes a judicial execution instrument. Therefore, there are no discussions about the binding character of the settlement reached by the parties during mediation. Considering its characteristic as an execution instrument, its revision, withdrawal or challenge, must be held through a formal lawsuit.

11 Mediation institutions

What are the most prominent mediation institutions in your country?

There are many mediation institutions in Brazil. In the public sphere, the Court of Rio de Janeiro State is responsible for a pioneer project involving mediation through its Permanent Nucleus of Consensual Methods of Dispute Resolution. Regarding extrajudicial institutions, there are several well-respected mediation centres and chambers. It is worth mentioning the Centre of Mediation of the Chamber of Commerce France-Brazil, the Brazilian Centre of Mediation and Arbitration, the Conciliation and Arbitration Chamber of Fundação Getúlio Vargas, the Centre of Mediation and Arbitration of the American Chamber of Commerce for Brazil and the Chamber of Mediation and Arbitration of the Eurochambers.

Mediation procedure

12 Background

Describe the development of mediation in your country.

Mediation is currently gaining an increasing relevance in Brazil, considering the recently published Mediation Act and the new Civil Procedure Code. The media, universities, doctrine and courts are in intensive discussion about mediation. In the past 20 years, interest in alternative dispute resolution methods has been growing. In the 1990s, Brazil began to discuss its first bill regarding mediation. In 2010 the first effective regulation about the subject was published – this was Resolution No. 125 of the National Council of Justice.

13 Areas of disputes for mediation

In which areas of disputes is mediation preliminarily applied? Are there any disputes that cannot be mediated?

As per article 3 of the Mediation Act, the main requirement to submit a dispute to mediation is simply that it is related to disposable rights or, if the rights in matter are non-disposable, they must be susceptible to settlement. The area in which mediation is already most commonly used in Brazil is in family disputes, consumer disputes and commercial disputes. It is worth mentioning a particular branch of dispute that accepts mediation: controversies involving public issues. Both the Mediation Act and the new Civil Procedure Code have stated specific provisions regarding this field, expressively allowing mediation to settle disputes involving organisations or entities of public administration, including collective mediation of disputes related to public services. The Mediation Act also permits the use of mediation in labour disputes. Yet,

its particular proceeding still needs to be established in a specific law. Another important aspect regards intellectual property matters. Since 2013, the National Institute of Intellectual Property has established a specific Mediation Regulation and Mediation Centre

14 Procedural requirements

Are there procedural requirements for mediation proceedings in your country? Must the parties prepare for the mediation?

First, it is important to highlight that article 166, paragraph 4 of the new Civil Procedure Code clearly states that mediation will be governed according to the free will of parties, including the procedural rules. Nonetheless, the law states general provisions about procedural requirements, such as the start of the mediation proceeding. For extrajudicial mediations, article 21 of the Mediation Act determines that the party interested in beginning mediation must send a formal invitation to the other party. That invitation must state the scope of the mediation and the date and venue of the first meeting. If the counterparty does not answer this invitation within 30 days, it is considered as rejected. For judicial mediation, parties must declare their interest in mediation in their first manifestation in the records. Following this, according to article 334 of the new Civil Procedure Code the judge will schedule a conciliation/mediation hearing. Only if parties are not able to reach settlement will the defended present his or her formal defence.

15 Structure and process of mediation

Describe the most common steps for the mediator's preparation of a mediation proceeding. Describe the most common structure of mediation proceedings. What is the typical time frame for a mediation proceeding? Are there any special considerations for international mediation proceedings?

It should be stated in this context that article 166, paragraph 4 of the new Civil Procedure Code asserts that the free will of parties will rule the mediation and its process. Even so, the new Civil Procedure Code, as well as the Mediation Act, provides some important rules about this matter. Regarding the time frame for a mediation proceeding to be concluded, the new Civil Procedure Code states that in judicial mediation there may be more than one session, as long as it does not exceed two months from the first meeting. The party will be given notice about the date of the session through its lawyer. No hearing will be held only if both parties have expressively declared their lack of interest in the amicable solution of the dispute, or if settlement is not applicable. In the case of multiparty disputes, all parties must declare an inexistence of interest in settlement. Parties may be represented by an attorney with specific powers to negotiate and settle. If parties are able to reach a consensual solution, the agreement will be written and confirmed by the judge in a final award. The mediation will end with a final written term, stating that agreement was reached by the parties or that no further attempts to settle are justifiable.

16 Mediation style

What is the primary mediation style in your country for commercial mediation: facilitative mediation, evaluative mediation or transformative mediation? Are private sessions (caucuses) or joined sessions, or both commonly used in mediation?

The primary mediation style in Brazil is facilitative mediation. That is because mediation would be an important alternative to encourage people to resolve disputes out of court, namely, to reduce the number of actions filed in the courts. Following this same goal, the new Civil Procedure Code has stated that even when a case is brought to the judiciary, it must pass through a mediation or conciliation phase, even before the defendant presents his or her answer. Nonetheless, some features of transformative mediation can be observed in article 165, paragraph 3 of the new Civil Procedure Code. It asserts that mediators – and not conciliators – will act in preference to cases involving parties with a previous bond and will help them to understand the matters and interests in dispute, seeking the re-establishment of communication in order to allow the parties themselves to identify consensual solutions that will bring mutual benefits for them. During the proceeding, both private and joint sessions are allowed, although joint sessions are more common.

17 Co-mediation

What form does team mediation typically take in your country? Is co-mediation regularly used in your country? In which kind of cases?

Article 168, paragraph 3 of the new Civil Procedure Code concedes the possibility of the indication of more than one mediator. The Mediation Act, in its article 15, also provides the possibility of co-mediation. The parties or the mediator, by the parties' consent, may request the participation of other mediators due to the nature or complexity of the matter being argued.

18 Party representatives and third parties

What is the practice in your country with respect to the inclusion of party representatives in mediation proceedings? What is the practice with respect to experts and witnesses?

In judicial mediation, parties must be assisted by a lawyer, as required by article 26 of the Mediation Act and article 334, paragraph 9 of the new Civil Procedure Code. Extrajudicial mediations, however, do not demand the participation of attorneys, according to article 10 of the Mediation Act. The law does not provide any rules about the participation of experts and witness. Although there is no legal barrier, it is not usual to have experts and witnesses in mediations in Brazil.

19 Specific mediation procedures/conflict or dispute management systems

Have companies set up their own dispute management systems in your country? Are there any special routes for consumers to use mediation for small claims? Are there any institutions that offer mediation for their customers, users, etc? Is there any reported or published information regarding dispute management systems of companies for conflicts in employment matters?

It is relevant to mention that some Brazilian companies have experienced a few noteworthy mediation cases, such as the one involving TAM Airlines, which created a specific mediation chamber to solve controversies related to the accident involving flight TAM 447. Two years after the chamber was installed, the programme was extremely successful, as 92 per cent of the beneficiaries of the victims were settled. This case has revealed itself as a pioneer and an outstanding example of successful mediation in Brazil. It is worth mentioning that some companies that have intensive consumer businesses such as telecom companies, banks and airlines have set up internal mediation departments to prevent conflicts with consumers being brought to justice. The measure is part of the 'National Strategy No Judicialisation', which was launched in 2014 by the Brazilian Ministry of Justice. The telecom companies and banks account for the majority of processes in Brazilian courts. Banks account for 38 per cent of all actions pending in the courts; while telecommunications companies account for 6 per cent. The creation of internal mediation departments is encouraged by the Ministry of Justice.

Mediation clauses and mediation agreement

20 Mediation clauses

Are mediation clauses commonly considered in the course of contract drafting? Are there special requirements for mediation clauses? Are there any relevant court decisions referring to such escalation clauses?

Mediation clauses are not unusual in private contracts. However, with the recently published Mediation Act in 2015 and the new Civil Procedure Code, it is expected that mediation is going to gain increasing importance and effectiveness in Brazil. Article 22 of the Mediation Act states that a mediation clause must contain at least the provision of a date and a place for the first mediation meeting to happen, the criteria to choose the mediator and the penalties applicable when parties do not attend the first meeting. Paragraph 1 of this same article allows

that, instead of describing this information, parties may simply choose to use a regulation published by a serious mediation institution to rule the proceeding. Although there is no specific provision in the law, parties can agree on an escalation clause. Taking into consideration that mediation is now becoming stronger in Brazil, there are still no relevant precedents about the subject in Brazilian courts.

21 Conclusion and content

Is there any obligation to conclude an agreement between the mediator and the parties or between the parties before or at the beginning of the proceeding? Are there any legal requirements regarding the content of the agreement between the mediator and the parties? What are the common provisions for such mediation agreement? Must the agreement be in writing?

There is no obligation that parties reach an agreement through mediation. However, in any case, a final term will be written by the mediator indicating if parties have or have not reached an agreement and a summary, or if no further attempts to settle are justifiable. Parties must read and agree with the content of the final term.

22 Costs for mediation

Are there any legal provisions on mediators' fees? What is the average mediator's fee in mediations involving companies? Is there any legal aid or other financial support for mediation proceedings if parties cannot afford to pay the mediator?

In a private mediation proceeding, the parties will establish who is going to be responsible for paying the expenses or if the parties are going to split the costs, which is the most common provision. For judicial mediation, article 13 of the Mediation Act asserts that courts will stipulate the mediator costs and parties are responsible for the payment. Article 169 of the new Civil Procedure Code states that courts will estimate the mediator costs based on the parameters of the National Council of Justice. If a party proves not to have financial resources to bear the expense of mediation, he or she will be conceded exempt of the costs, according to article 4, paragraph 2 of the Mediation Act. In relation to this, paragraph 2 of article 169 of the new Civil Procedure Code provides that the courts will determine the percentage of non-remunerated hearings that private chambers of mediation and conciliation will have to bear in order to have its credentials regularised. Besides that, article 169, paragraph 1 of the new Civil Procedure Code provides that mediation can be carried out as a voluntary job.

Professional matters for mediators

23 Regulation

Is there any specific regulation of mediators in your jurisdiction? Give details. Are there any regulations on immigration or tax issues or regarding the right to work for foreign mediators?

The regulation regarding mediators has been uniformed with the published Mediation Act and the new Civil Procedure Code. Previously, only administrative regulations stated the few rules and requirements related to mediators and there was no federal act regarding the subject. Now, the new Civil Procedure Code demands that mediators and private chambers of mediation must have a formal register before a federal database or courts. In order to request the formal register, mediators must cater to the requirement of minimum capacity, consistent in taking a course carried out by an accredited entity, according to article 167, paragraph 1 of the new Civil Procedure Code. Besides that, article 11 of the Mediation Act demands that the mediator has had a university degree for at least two years. The register may be preceded or not by a public service examination. The database will indicate the relevant data regarding the mediator's performance, the number of cases in which he or she has participated, if settlements were reached or not, the type of subject in controversy, and this will be published at least once a year for public knowledge. Administrative rules may also state requirements that are more specific. For example, the Court of Rio de Janeiro State demands that mediators cannot have criminal convictions, according to article 2 of Normative Rule No. 145/2016.

Update and trends

Both the public and private sectors are committed to disseminate and promote mediation as an alternative and efficient dispute resolution. Since 2010, when the Brazilian National Council of Justice issued Resolution No. 125, the mediation market in Brazil became considerably more active. This new public policy was welcomed by both segments – public, notably the Ministry of Justice and the Judiciary, and private, for example, the Rio de Janeiro Federation of Industries and the Federation of Industries of the state of São Paulo, who have worked together to encourage growth, greater acceptance and wider application of mediation. The benefits of dispute resolution through mediation, in addition to it being faster and cheaper than court proceedings and arbitration, are that it is efficient, stimulates communication, restores links and addresses emotions and feelings. The use of mediation also tends to reduce the number of lawsuits. Therefore, the trend in Brazil is the increasing use of mediation as a consensual method of resolving conflicts.

The Mediation Act and the new Civil Procedure Code provide several principles that must be observed in mediation in general, such as the impartiality and independence of mediators, the isonomy of parties, orality, informality, free will of parties, pursuit of settlement, confidentiality, good faith and an informed decision.

24 Training

Are there any requirements regarding training for mediators?

The National Council of Justice has a specific regulation for the technical capacity of mediators that includes training courses with role-playing exercises and supervised internships. Local courts may stipulate particular rules for the courses and requirements to be accomplished by mediators in order for one to be eligible for the formal register of mediators. Article 167, paragraph 2 of the new Civil Procedure Code states that the register may be preceded or not with a public service examination. If the court chooses to have its own list of mediators, paragraph 6 of article 167 of the new Civil Procedure Code demands that the mediators take a public service examination. In any case, Resolution No. 125/2010 of the National Council of Justice requires that mediators and any other specialists involved in consensual methods of settling disputes must be subjected to a permanent recurring training programme and public evaluation.

25 Continued education

Must mediators undertake continued professional education? Is there a credit point system for the continued education of mediators?

Resolution No. 125/2010 of the National Council of Justice requires that mediators and any other specialists involved in consensual methods of settling disputes must be subjected to a permanent recurring training programme and public evaluation.

26 Accreditation of mediators

Outline the system for certification of mediators.

As mentioned previously, the new Civil Procedure Code states that there should be a rigorous accreditation system, consisting of a formal registration before a federal database or courts of every mediator and private chamber of mediation. The database will indicate all data pertinent to the mediator's performance, such as the number of cases in which he or she has participated, if the parties were able to reach a settlement and what kind of subject was in discussion. This data will be published at least once a year for public knowledge. To be eligible for the formal register, the interested party must take a course carried out by an accredited entity and may have to take a public service examination and have a university degree for at least two years. Article 173 of the new Civil Procedure Code states that mediators will be excluded from the official records if they act with malice or fault during the conduction of mediation, violate confidentiality or act in a mediation procedure despite having any kind of disqualification. In addition, in judicial mediations, the judge responsible for the case or the judge responsible for the mediation centre may remove a mediator from his

or her activities for 180 days, through a reasoned decision, after verifying the inadequate performance of the mediator.

27 Mediator liability and sanctions

What are the duties of mediators in a mediation procedure? What liability do mediators face when offering their services and conducting mediation proceedings? Is professional indemnity insurance for mediators available or obligatory? Are there any further sanctions or other disciplinary measures for mediators in cases of misconduct, poor performance, etc? Are there any regulations referring to the dismissal of mediators?

The law does not rule about mediator liability and sanctions. The Resolution No. 125/2010 and article 173 of the new Civil Procedure Code provides hypotheses when mediators will be excluded from the official records. Those are: if they act with malice or fault during the conduction of mediation, violate confidentiality or act in a mediation procedure despite having any kind of disqualification. Also, in judicial mediations, the judge responsible for the case or the judge responsible for the mediation centre may remove a mediator from his or her activities for 180 days, through a reasoned decision, after verifying the inadequate performance of the mediator.

28 Appointment

Is there any regulation regarding the appointment of mediators? Is it common in your country to seek assistance by institutions or official bodies for the appointment of mediators? Are mediators obliged to inform about conflicts of interest in the course of appointment?

The Mediation Act asserts that parties will choose or accept the mediator. For extrajudicial mediations, the mediator may be any person with legal capacity in whom the parties trust. The mediation clause shall indicate the criteria for the appointment of the mediator. It is not required that extrajudicial mediators are members of any kind of council, entity or association. On the other hand, judicial mediators must have legal capacity, a university degree for at least two years and have attended the formation course carried out by an accredited entity. Judicial mediators must be members of the mediation centres of the court. Parties must accept the judicial mediator. The rules of disqualification or impediment pertinent for judges are also applicable for mediators. The sole paragraph of article 5 of the Mediation Act states that the mediator has the duty to reveal to parties, before accepting the charge, of any fact or circumstance that may give rise to any justified doubt of his or her impartiality. Following this, any of parties may refuse the mediator that is appointed. It should be stated that the new Civil Procedure Code indicates the causes of disqualification or impediment of the judge – which are applicable for mediators, as stated before. In general, they refer to situations where the judge has a personal relationship with the parties or their lawyers, directly or indirectly, has intervened in the case in any way (as a representative, expert, member of the State Attorney Office, witness, attorney, judge, etc) or has any personal interest in the dispute.

Cases

29 Notable cases

Briefly give details of any significant recent mediation cases or disputes or judgments involving mediation that have been published in your country.

Since mediation was recently regulated in Brazil (see question 1), there are currently not many cases of mediation in progress. Usually they start through a judicial order in lawsuits in which judges realise that a solution by the alternative method of mediation is likely to be reached, as recommended by Resolution No. 125/2010 of the National Council of Justice. Further, due to the confidentiality that is frequently applicable to mediation, details of the cases are not available to the public.

The most noteworthy Brazilian case regarding mediation is the case involving TAM Airlines mentioned in question 19. The mediation in the TAM case was successfully reproduced by Air France for the Brazilian victims of a flight accident in 2010.

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Law and institutions

1 Treaties

Is your country a signatory to any treaties that refer to mediation? Is your domestic mediation law based on a treaty?

Generally speaking, mediation in Canada has developed over time in the context of civil proceedings and proceedings under specialised legislation, such as labour relations legislation and human rights legislation.

Canada is a signatory to several international treaties that refer to mediation and is a member of the United Nations Commission on International Trade Law and the International Chamber of Commerce.

Two provincial governments have enacted legislation based on the UNCITRAL Model Law on International Commercial Conciliation. Ontario did so through the Commercial Mediation Act 2010, SO 2010, Chapter 16, Schedule 3. It should be noted that Ontario's Commercial Mediation Act 2010 does not apply to mediations that are subject to Ontario's court rules. Nova Scotia based its Commercial Mediation Act 2005, Chapter 36 on the UNCITRAL Model Law. In addition to providing some structure and legal context for the conduct of a mediation, the legislation enacted by Ontario and Nova Scotia both provide mechanisms whereby settlement resulting from a mediation process can be enforced pursuant to a court order.

2 Domestic mediation law

What are the primary domestic sources of law relating to domestic and foreign mediation? Are there any differences for the mediation of international cases?

There is no overarching law relating to mediation in Canada. Mediation processes have developed in an ad hoc manner throughout Canada. Requirements to engage in mediation have most often been implemented as a means to reduce the court backlogs. Indeed, most civil disputes in Canada settle prior to trial. On that basis, it is generally believed that requiring, or encouraging, parties to engage in mediation as part of the litigation process will reduce the number of cases that require a trial or other court intervention to resolve.

Specific requirements relating to mediation are defined by the jurisdiction in which the dispute is proceeding (whether that be federal, provincial or territorial) or by way of specific legislation that addresses a particular type of dispute such as, for example, human rights complaints, labour relations disputes or disputes arising in highly regulated industries.

Mediation is generally viewed in a positive light in Canada as it is recognised as an opportunity for parties to settle disputes early in the dispute resolution process without substantive court intervention and on mutually acceptable terms. This has a number of obvious advantages such as the following:

- obtaining a resolution that is better than what a judge (or other official) may ultimately decide;
- reducing the costs associated with dispute resolution; and
- avoiding prolonged litigation or other dispute resolution processes that may continue to distract the parties from their core business or leave matters unresolved for an undue amount of time.

Mediation is considered an integral part of civil litigation proceedings. For example, Ontario has adopted mandatory mediation in certain metropolitan centres. Even in regions that are not subject to mandatory mediation requirements, mediation has become prevalent in the context of civil litigation.

Also, for example, British Columbia has adopted the Notice to Mediate (General) Regulation BC Regulation 4/2001 under its Law and Equity Act [RSBC 1996], Chapter 253. Pursuant to this regulation, any party to a court action may initiate mediation by serving a 'Notice to Mediate' on every other party to the action. Indeed, British Columbia has adopted other regulations to address mediation in particular types of civil disputes such as the Notice to Mediate Regulation BC Regulation 127/98, which deals with court claims in the context of motor vehicle accidents, and the Notice to Mediate (Residential Construction) Regulation BC Regulation 152/99, which deals with court actions in the context of residential construction. Alberta has adopted a process whereby disputes in certain metropolitan areas may be referred to mediation by the court or at the request of a party to the proceeding.

In the context of civil litigation in the Federal Court of Canada, the Federal Courts Rules SOR/98-106 provide that parties may request that a judge conduct a mediation so as to encourage and facilitate discussion in an attempt to reach a mutually acceptable resolution of the dispute.

In addition, specialised legislation addressing labour disputes or human rights complaints often include means by which the dispute can be put to mediation on a consensual basis.

3 Mandatory provisions

Are there provisions of domestic mediation law that must be considered in mediation proceedings?

As noted above, mediation may be a required step in a dispute resolution process (whether that be in the context of traditional civil litigation before the courts or in the context of specialised administrative tribunals or boards). In addition, parties may agree to engage in mediation, which agreement may be made before the dispute arises (such as in the case of dispute resolution provisions in a contract) or after the dispute arises on a consensual basis.

Even in circumstances where there is a requirement to engage in mediation, the mediation process is largely determined by the parties on their own or in consultation with the chosen mediator. Since the success of mediation is dependent upon the parties coming to a mutual agreement to resolve their dispute, the parties are usually left to agree upon a mediation process. The mediation process is generally an informal process that only requires the parties to agree on a mediator and the time and place for the mediation. In circumstances where the parties are unable to agree upon a mediator in the context of a mediation that is undertaken as a required step in a dispute resolution process (such as, for example, pursuant to Ontario's Rules of Civil Procedure), a mediator may be appointed by the local authority from a roster of mediators.

Legislation or court rules governing mandatory mediation may require the parties to exchange mediation briefs prior to the mediation session. Even in circumstances where the mediation is not mandatory, it is generally recommended that the parties exchange mediation briefs that will set out the parties' respective positions and

key documents. This will facilitate the mediation process as the mediator and the parties will have the necessary background on which to pursue settlement discussions.

One key element to mediation is that it occurs on a 'without prejudice' basis. This means that statements made at the mediation in furtherance of settlement cannot be used later in the litigation process. This is based on common law requirements related to the privilege associated with communications in furtherance of settlement. The fact that communications may be privileged, and hence not subject to disclosure during the course of the litigation, does not necessarily mean that the communications are confidential. As such, it is generally recommended that the parties inform themselves of the jurisdiction's applicable rules regarding the status of communications made during the course of a mediation. Normally, the parties and the mediator enter into a mediation agreement that sets out the expectations regarding the without prejudice nature of communications made during the course of the mediation and will also include a confidentiality provision that requires the parties to keep such communications confidential.

4 Obligation to mediate

Is mediation in your country obligatory? Can mediation be ordered by courts in your country?

Mediation may be a mandatory requirement of a dispute resolution process. Much depends on the jurisdiction in which the proceeding is commenced and whether the dispute is subject to specific legislative or regulatory requirements.

In the context of civil litigation, requirements to mediate vary from province to province. In Ontario, mediation is mandatory in certain judicial districts in Ontario (being Essex County, Ottawa and Toronto), but is engaged in on a consensual basis throughout the province. Also, in Alberta the court may refer matters to mediation and, if so referred, the mediation is mandatory and the parties to the dispute must attend the mediation. In British Columbia, a party to a dispute may require a mediation by serving a Notice to Mediate, which results in the other parties to the litigation being required to participate in the mediation. In Saskatchewan, non-family civil cases are subject to mandatory mediation.

In addition, parties to particular types of disputes may be required to participate in a mediation. In British Columbia, for example, claims arising from motor vehicle accidents must be subject to mediation prior to going to trial.

Also in the context of civil litigation, most jurisdictions require the parties to participate in a pretrial conference prior to a trial date being set. While not a mediation in the traditional sense, pretrials conferences are presided over by a judge who will not be hearing the dispute and, hence, provide an opportunity for the parties to engage in settlement discussions, which are often facilitated or encouraged by the presiding judge.

5 Court-annexed mediation

Does the law of your country provide for court-annexed mediation? If so, is court-annexed mediation mandatory?

Mediation may be a mandatory requirement of a dispute resolution process. Much depends on the jurisdiction in which the proceeding is commenced and whether the dispute is subject to specific regulatory requirements.

See above for examples.

6 Mediation-arbitration and other forms of mediation-related ADR

Is mediation combined with arbitral proceedings? May a mediator act later in the same dispute as an arbitrator, conciliator or judge? Are arbitrators aware of mediation, and if yes, are they willing to transfer arbitration cases to mediation? Which other proceedings are available and used in your country that are related to mediation?

Mediation may be combined with arbitration and other forms of alternative dispute resolution mechanisms.

Most provincial arbitration legislation permit the parties to formulate a mediation-arbitration process in a manner that allows the arbitrator to engage in mediation, conciliation or other similar techniques to resolve the dispute. Where the mediation fails to resolve the dispute, the arbitrator may resume the arbitration and is not disqualified as a result of having engaged in mediation. It is important to note that such a process must be agreed to by the parties.

For example, in Ontario, an arbitrator is generally prohibited from acting as a mediator in the same dispute by virtue of section 35 of Ontario's Arbitration Act 1991, SO 1991, Chapter 17. However, section 3 of Ontario's Arbitration Act allows parties to contract out of many of the provisions of the Arbitration Act, including section 35. The Court of Appeal for Ontario has confirmed that parties can opt out of the section 35 prohibition (*Marchese v Marchese* [2007] ONCA 34). Therefore, it is good practice for parties to include a provision that expressly waives section 35 in their mediation-arbitration agreement.

Mediation-arbitration is specifically permitted by regulation in Ontario in the context of family arbitrations (Family Arbitration, O. Regulation 134/07) and in labour disputes (Labour Relations Act 1995, SO 1995, Chapter 1, Schedule A). It is also specifically permitted in commercial contexts by the Commercial Mediation Act 2010, SO 2010, Chapter 16, Schedule 3, with the agreement of all parties.

7 Online dispute resolution (ODR)

Have there been any developments regarding online dispute resolution in your country? Is your country participating in any international ODR project? Is online mediation available in your country?

Online dispute resolution services are available in Canada. Recently, the government of British Columbia created the Civil Resolution Tribunal, which is an online tribunal that is designed to hear strata (ie, condominium) and small claims disputes. The Civil Resolution Tribunal includes a mediation process (see Civil Resolution Tribunal Act (SBC 2012), Chapter 25).

8 Confidentiality and disclosure

Is mediation a confidential proceeding in your country? In which cases can disclosure of confidential information by the mediator or the parties be permitted or compelled? Are there any sanctions for breach of confidentiality?

A key element to mediation is that it occurs on a 'without prejudice' basis. This means that statements made at the mediation in furtherance of settlement cannot be used later in the litigation process. This is based on common law requirements related to the privileged associated with communications in furtherance of settlement. It is important to note, however, that where a settlement has been reached and there is a dispute about the terms of the settlement, communications made in furtherance of the settlement may be admissible.

The fact that communications may be privileged, and, hence, not subject to disclosure during the course of the litigation, does not necessarily mean that the communications are confidential outside the court process.

It is, therefore, recommended that the parties inform themselves of the rules regarding the status of communications made during the course of a mediation that apply in the jurisdiction where the dispute is being mediated. Normally, parties will enter into a mediation agreement that expressly sets out the parties' expectations regarding what use, if any, can be made of information obtained during the mediation process. Mediation agreements normally provide that communications in the context of the mediation are 'without prejudice' and, therefore, cannot be used in the context of litigating the dispute that is the subject of the mediation. Also, a mediation agreement will normally require that the parties keep information communicated to them in the context of the mediation confidential (ie, that the communications generally cannot be disclosed) and that the mediator is not compellable as a witness. Settlement agreements that result from the mediation process normally include provisions relating to confidentiality.

If the confidentiality requirement is set out in a contract, a party may use contractual remedies to obtain relief, which may include injunctive relief or damages, or both.

The parties to the mediation and the mediator may be permitted or otherwise compelled to disclose information in very limited circumstances. For example, communications that amount to unlawful

threats are not protected against disclosure. Also, a party is permitted to disclose communications where disclosure is required to protect the health or safety of a person. These exceptions are generally recognised in common law and are also reflected in the commercial mediation legislation adopted in the provinces of Ontario and Nova Scotia.

Specifically with respect to mediators, the Ontario Divisional Court in *Rudd v Trossacs Investments Inc* 79 OR (3d) 687 held that a mediator could not be compelled to give evidence as to whether one of the participants in a multiparty mediation was a party to a settlement that was allegedly agreed to at the mediation. The Divisional Court concluded that the mediator could not be compelled to give evidence regarding communications made during the course of the mediation on the basis that:

- the mediation agreement included a confidentiality provision;
- maintaining the confidentiality of communications during the course of mediation was essential to the functioning of the mediation process;
- there is a public interest to ensure that the relationship that gave rise to the communication (ie, the mediation process) be fostered; and
- the public interest in preserving confidentiality outweighed the public interest in disclosing the information.

9 Limitation period

Does a mediation proceeding suspend the limitation period for a court claim?

Each jurisdiction in Canada has adopted legislation setting out limitation periods for commencing court proceedings. Generally, limitation periods commence on the date when the plaintiff first learned of the basis for the claim and expire upon the passage of a stipulated time period. For example, in Ontario, claims must generally be commenced within two years of when the plaintiff first learned of the basis for the claim.

Generally, engaging in mediation does not suspend the limitation period for a court claim.

If mediation is undertaken prior to the commencement of court proceedings, it is recommended that parties refer to the limitation legislation in force in the jurisdiction that will govern the dispute.

Legislation setting out limitation periods for the commencement of court proceedings often includes provisions that allow the parties to enter into tolling agreements that extend the limitation periods set out in the applicable legislation. For example, Alberta's Limitation Act RSA 2000, Chapter L-12 provides that parties may enter into an agreement that extends the limitation period. However, the agreement must be in writing and signed by the person adversely affected by the extension of the limitation period. Also, for example, Ontario's Limitation Act 2002, SO 2002, Chapter 24, Schedule B provides that a limitation period may be varied, extended or excluded by agreement.

10 Settlement

What is the legal character of the final (settlement) agreement? What are the legal requirements for the enforceability or the content of the agreement? Is it possible to revise, withdraw or challenge the final settlement agreement?

Settlements achieved at mediation are treated as binding throughout Canada. Depending on the jurisdiction and the particular circumstances in which the settlement was reached, the settlement may be enforceable on the basis of the laws of contract or on the basis of applicable court rules or regulations.

To avoid disputes associated with settlement agreements, parties are encouraged to reduce the settlement agreement to writing at the conclusion of the mediation session. However, it is not necessary for an agreement to be reduced to writing in order to be enforced by the court (see, for example, *Hagel v Giles et al*, 82 OR (3d) 470 (ONCA)).

In very limited circumstances it may be possible to withdraw or challenge the final settlement agreement on the basis of recognised contract law principles, such as duress or fraud.

11 Mediation institutions

What are the most prominent mediation institutions in your country?

Mediation in Canada has generally developed on an ad hoc basis. As a result, a number of institutions exist across the country.

Mediate BC and ADR Canada are two significant non-profit organisations that promote and facilitate mediation. Mediate BC maintains rosters of civil and family mediators and provides education and training for mediators. ADR Canada has affiliated offices and member mediators across the country with access to services such as training and professional designations. ADR Canada also maintains national commercial mediation and arbitration rules that can be adopted by parties, including a model dispute resolution clause for inclusion in commercial contracts. Both institutions maintain a complaint mechanism through which the public can complain about their mediator breaching the standards of conduct maintained by each organisation.

Mediation procedure

12 Background

Describe the development of mediation in your country.

Mediation is generally viewed in a positive light in Canada. From the perspective of disputing parties, mediation offers an inexpensive means of exploring the potential to resolve a dispute in a 'without prejudice' environment. Equally, mediation is looked upon favourably by the court as it is a means of resolving disputes with minimal or no court intervention.

In some cases, mediation may be implemented in an effort to provide a system of dispute resolution with the flexibility to incorporate the cultural traditions of Aboriginal communities. For example, Nunavut, a Canadian territory created as a result of a land claims agreement between the Inuit and the government of Canada, has a mediation and family counselling programme that combines Inuit approaches to problem-solving with conventional mediation. This programme is administered through Nunavut's Community Justice Program.

Canada's federal system makes it difficult to collect national statistics on mediation. However, certain provincial statistics are available in varying formats. For example, the following:

- in Ottawa and Windsor (Essex County), both Ontario cities with mandatory mediation, 46 per cent of cases were fully settled in 2011–2012 (Ministry of the Attorney General, Court Services Division, Annual Report 2011–2012 (Ontario: Queen's Printer for Ontario), page 30 (www.attorneygeneral.jus.gov.on.ca));
- a survey of civil and family roster mediators conducted in British Columbia in 2015 reported a total of 887 civil mediations, 433 family mediations and 156 workplace mediations in 2014. This survey reported a resolution rate of 77 per cent of civil mediations, 76 per cent of family mediations and 72 per cent of workplace mediations in 2014 (Mediate BC's 2015 Survey of Roster Mediators, Summary of Key Results, pages 1 and 4 (www.mediatebc.com)); and
- a recent national survey of lawyers reported that mediation in family law disputes resulted in full settlement in 38 per cent of cases in the Northwest Territories and Yukon, 56.2 per cent of cases in British Columbia, 50.2 per cent of cases in the Prairies (Alberta, Manitoba and Saskatchewan), 57.5 per cent of cases in Ontario, 47.5 per cent of cases in Quebec and 41.1 per cent of cases in the Maritimes (New Brunswick, Newfoundland and Labrador, and Nova Scotia) (Access to Justice in Canada, 'The Astonishing Success Rate of Mediation in Resolving Family Law Disputes', 27 October 2014.

13 Areas of disputes for mediation

In which areas of disputes is mediation preliminarily applied? Are there any disputes that cannot be mediated?

Mediation is most predominantly applied in the context of civil litigation. However, mediation is generally available to resolve a wide variety of disputes, including labour disputes, human rights complaints and family law disputes.

14 Procedural requirements

Are there procedural requirements for mediation proceedings in your country? Must the parties prepare for the mediation?

Specific procedural requirements for mediation can vary depending on the jurisdiction in which the mediation occurs and the context of the mediation, such as, for example, whether the mediation is a court-mandated mediation.

Mediations generally involve similar procedures throughout Canada. Normally, parties agree upon a mediator and, in consultation with the chosen mediator, agree upon the time and place of the mediation. Once the parties have agreed on these basic aspects of the mediation, the parties and the mediator will then execute a mediation agreement. As noted above, the mediation agreement will set out the fees associated with the mediation and, most importantly, confirm that information exchanged during the course of the mediation is 'without prejudice' and confidential.

Normally, the parties exchange mediation briefs prior to the mediation. In their respective mediation briefs, the parties will set out their respective positions with respect to the dispute and will append key documents that they will rely upon at the mediation to substantiate their respective positions. The mediation brief is an important document as it provides the mediator with sufficient background regarding the dispute so as to facilitate settlement discussions. In the context of court-mandated mediations, the exchange of mediation briefs is usually mandatory.

The mediation session is normally attended by representatives of the respective parties who have the necessary background to engage in settlement discussions and the authority to settle the dispute. This is often a requirement of court-mandated mediation. This may mean that parties in addition to the actual litigants attend the mediation, such as, for example, a representative from an insurance company that is responding to the claim.

15 Structure and process of mediation

Describe the most common steps for the mediator's preparation of a mediation proceeding. Describe the most common structure of mediation proceedings. What is the typical time frame for a mediation proceeding? Are there any special considerations for international mediation proceedings?

Mediators are normally chosen on the basis of their experience with particular types of disputes. For example, mediators that are active in mediating personal injury claims are often lawyers that formerly practised in the area. Equally, mediators engaged to conduct mediations in the context of complex commercial disputes are usually lawyers who have practised extensively in the area or are former judges that are known to have presided over complex commercial matters.

Mediators normally prepare for the mediation by reviewing the mediation brief submitted by the parties and, to some extent, by carrying out independent legal research regarding any particular legal issues that may arise during the course of the mediation. Meetings with the parties prior to the mediation are rare. In most instances, communications between the mediator and the respective parties are limited to choosing a time and location for the mediation and confirming the dates by which mediation briefs will be exchanged. In complex commercial disputes, the mediator may engage in joint discussions with counsel so as to discuss and agree upon the mediation procedure.

After introductions, the mediation session normally begins with mediator setting out the purpose of the mediation and his or her role in the mediation process. The mediator will remind the parties that information exchanged during the course of the mediation is 'without prejudice' and confidential. The mediator will also explain any particular process that he or she may use during the mediation, such as caucusing.

The parties will then be provided an opportunity to explain their respective positions with respect to the dispute in a joint session. Once this process is completed, mediators will normally meet with the parties separately in order to better understand their respective positions and to determine whether any party is willing to make an offer to settle the dispute (ie, the mediator will caucus separately with the parties). In the context of civil claims for monetary damages, the mediator will then act as an intermediary between the parties bringing offers to settle back and forth between the parties.

In the event that the parties reach a settlement, the mediator will normally ask counsel to draft minutes of settlement reducing the settlement agreement to writing. The mediator may then have a final joint session to conclude the mediation.

In the event that the parties do not reach a settlement, the mediator may hold a final joint session. Much depends on the dynamics that the mediator experienced during the course of the mediation and the mediator's personal approach.

Apart from the timelines set in specific court rules (which may be extended with the consent of the parties), there is no particular time frame within which mediation occurs as the timelines for mediation are normally set by the parties or their respective legal counsel. It is important to note that, absent a court order, mediation may be a required step before trial in some jurisdictions. However, the fact that the parties have not engaged in mediation would not normally prevent a party from seeking interim or injunctive relief pending trial.

16 Mediation style

What is the primary mediation style in your country for commercial mediation: facilitative mediation, evaluative mediation or transformative mediation? Are private sessions (caucuses) or joined sessions, or both commonly used in mediation?

Mediators most often act as facilitators during the mediation session. The overall goal of the mediation is to keep the parties engaged in the process so that a resolution is possible.

After an initial introductory session where the mediator introduces him or herself and sets out the guidelines for the mediation, the mediator will invite the parties to set out their respective positions regarding the dispute. The mediator will then separately meet with the parties in 'caucus' sessions. In such sessions, the mediator will often explore the parties' positions, interests, values and needs in more detail. Mediators generally do not provide comments regarding the perceived weaknesses of a party's case as legal counsel is there to provide legal advice. Also, mediators generally want to avoid any perception that they are taking sides in the dispute. However, mediators will often caution parties on the consequences of failing to achieve settlement, such as, prolonged litigation, the costs of a trial and the fact that success at trial is not assured.

After engaging in separate caucus sessions with each of the parties, the mediator will then facilitate communications between the parties by bringing offers to settle or other communications back and forth between the parties. A mediator normally undertakes to keep communications between him or herself and a party during the caucus session confidential from the other party unless advised to provide specific information to the opposing party.

17 Co-mediation

What form does team mediation typically take in your country? Is co-mediation regularly used in your country? In which kind of cases?

Mediation is normally undertaken by a single mediator. However, if the parties agree, more than one mediator may be used.

18 Party representatives and third parties

What is the practice in your country with respect to the inclusion of party representatives in mediation proceedings? What is the practice with respect to experts and witnesses?

In disputes among sophisticated parties, legal counsel is invariably included in the mediation process.

Other advisers such as accountants or experts may be included in the mediation process, depending on the nature of the dispute and the utility of having such advisers in attendance.

19 Specific mediation procedures/conflict or dispute management systems

Have companies set up their own dispute management systems in your country? Are there any special routes for consumers to use mediation for small claims? Are there any institutions that offer mediation for their customers, users, etc? Is there any reported or published information regarding dispute management systems of companies for conflicts in employment matters?

Ontario has a mechanism for consumer complaints that can include mediation in some cases. Specifically, if a consumer complaint is filed with the Ministry of Government and Consumer Services, and if that complaint or other similar disputes involve more than C$500 or the Ministry sees the complaint as part of a pattern, the Ministry may mediate the complaint directly with the business on the complainant's behalf. If this mediation is not successful, the Ministry can pursue charges under Ontario's Consumer Protection Act.

Certain provinces have developed programmes whereby small claims disputes are subject to mediation. On 15 May 2015, Quebec began a pilot project whereby all applications concerning consumer contracts filed in small claims court in Gatineau and Terrrebonne are subject to mandatory mediation. Mediation is available for small claims consumer disputes throughout the rest of Quebec on a voluntary basis. In all regions this mediation is provided free of charge to the parties. British Columbia has also instituted a pilot project involving mandatory mediation of small claims. Under this project, the Robson Square Small Claims Court in Vancouver refers all complaints for more than C$5,000, and all personal injury complaints, to mandatory mediation.

At the federal level, all federally regulated financial institutions (FRFIs) are required by the Financial Consumer Agency of Canada (FCAC) to have internal procedures for consumer complaints. The FCAC does not specifically require mediation to form part of an FRFI's internal dispute settlement procedure. If consumers are not satisfied with the result achieved through an FRFI's internal procedure, they have a right to escalate their complaint to an external complaints body (ECB). At the time of writing, approved ECBs are the Ombudsman for Banking Services and Investments or the ADR Chambers Banking Ombuds Office, depending on the FRFI involved. These ECBs investigate complaints and may engage in facilitating a settlement between the parties, a process that can resemble mediation.

Mediation clauses and mediation agreement

20 Mediation clauses

Are mediation clauses commonly considered in the course of contract drafting? Are there special requirements for mediation clauses? Are there any relevant court decisions referring to such escalation clauses?

Mediation clauses are commonly included in contracts that contemplate an ongoing relationship, as mediation is generally viewed as a means to efficiently resolve disputes.

Special requirements for mediation clauses may be required, depending on the jurisdiction. For example, as noted above, parties in Ontario who wish to agree to a mediation-arbitration process in a commercial or non-family civil context must be careful to clearly express that intention so as to waive the prohibition on arbitrators acting as mediators in Ontario's Arbitration Act. The ability of parties to waive this prohibition was confirmed by the Court of Appeal for Ontario in *Marchese v Marchese* [2007] ONCA 34. Ontario's Commercial Mediation Act 2010, SO 2010, Chapter 16, Schedule 3 also prohibits a mediator from acting as an arbitrator unless the parties have agreed otherwise.

Certain industry associations have included mediation clauses in standard contracts. For example, the standard contracting documents developed by the Canadian Construction Documents Committee include clauses that provide for mediation. As noted above, the ADR Institute of Canada also provides model dispute resolution clauses.

21 Conclusion and content

Is there any obligation to conclude an agreement between the mediator and the parties or between the parties before or at the beginning of the proceeding? Are there any legal requirements regarding the content of the agreement between the mediator and the parties? What are the common provisions for such mediation agreement? Must the agreement be in writing?

There is no obligation to conclude an agreement between the mediators and the parties or between the parties before or at the beginning of the mediation. However, it is highly recommended.

Mediation agreements commonly include provisions confirming the following:

- the mediator's fees and who is responsible to pay the fees;
- that the mediator is a neutral party that is not in a conflict of interest;
- that the communications made during the course of the mediation are 'without prejudice' and confidential;
- that the mediator is not acting as legal counsel to any of the parties and will not provide legal advice; and
- that the mediator will not be called as a witness in any proceeding regarding the dispute.

Mediators will often include a provision seeking to limit their liability.

22 Costs for mediation

Are there any legal provisions on mediators' fees? What is the average mediator's fee in mediations involving companies? Is there any legal aid or other financial support for mediation proceedings if parties cannot afford to pay the mediator?

Costs for the mediation are agreed to prior to the mediation session. Mediation fees can vary depending on the length of the mediation, the number of parties involved, the complexity of the issues and the experience and expertise of the mediator. Generally, mediation agreements provide that each party is to pay for half of the cost of the mediation. However, as a condition of settlement the costs associated with the mediation may be varied as part of the settlement agreement. This often occurs in the context of personal injury or employment law cases where the plaintiff is usually an individual and the defendant has a greater capacity to pay the mediator's fees.

Mediators often charge on a half-day or full-day basis, which rates include limited preparation time. In complex commercial disputes, an experienced mediator can charge upwards of C$3,000 to C$5,000 a day for mediation.

In Ontario, if a mediator is chosen from the mandatory mediation programme's roster of mediators, fees are capped for a half-hour of preparation time per party and three hours of mediation. This fee schedule is based on the number of parties involved, with the maximum fees for two parties being C$600 plus goods and services tax (GST) and the maximum for five or more parties being C$825 plus GST.

In Saskatchewan, mediation can be provided by the Justice Dispute Resolution Office where dispute resolution is not available in a local area or where one or both parties do not meet a certain level of income. Fees for these services are based on an individual's ability to pay and vary from C$10 to C$50 per hour per party.

Legal aid organisations across the country may also provide mediation services or financial assistance for such.

Professional matters for mediators

23 Regulation

Is there any specific regulation of mediators in your jurisdiction? Give details. Are there any regulations on immigration or tax issues or regarding the right to work for foreign mediators?

There are no specific regulations relating to the qualification of mediators. In the case of court-mandated mediation, courts generally keep a

Update and trends

Mediation continues to grow in Canada and the approach to mediation is becoming increasingly sophisticated. For example, Ontario recently changed its rules with respect to mandatory mediation. Under the former rules, parties in specified metropolitan areas were required to submit a dispute to mediation soon after the commencement of proceedings. However, Ontario relaxed the rules relating to the timing of mediation so as to allow for other steps in the litigation process to occur (such as documentary disclosure and examinations for discovery) prior to mediation. This change was prompted by the recognition that mediation may have been occurring too early in the process, such that settlement was unlikely. As such, the revised rules allow for the parties to further investigate the merits of their respective position through the litigation process prior to mediation.

A recent decision out of the Ontario Superior Court of Justice, *McClintock v Karam* [2015] ONSC 1024, is of particular interest in the ongoing debate regarding the feasibility and appropriateness of the hybrid mediation-arbitration process. In this case, the Court removed a mediator-arbitrator in a family dispute after finding a reasonable apprehension of bias. The Court reasoned that while the 'informed person' in the reasonable apprehension of bias test would understand the nature of the mediation-arbitration process, it is important that the mediator-arbitrator 'remain open to persuasion and refrain from expressing strong views that might disclose a predisposition to decide one way or the other' (paragraph 75).

The Court held that the mediator-arbitrator fell below this standard, having made statements before the arbitration hearing regarding his or her intention to conclude this matter in favour of one party 'by one of two ways: an arbitration hearing and I change the residential plan, or you change' (paragraphs 76 and 77). The Court was further convinced of bias by a subsequent procedural inflexibility of the mediator-arbitrator, which appeared to show a rush to judgement. While litigants must meet a high standard in Canada to establish bias, the practice of mediation-arbitration could be particularly prone to such allegations in light of its somewhat awkward fusion of such differing processes. Mediator-arbitrators should pay particularly close attention to ensuring not only that they 'remain open to persuasion', but that they appear to do so as well.

roster of qualified mediators and have particular requirements of the mediators that are accepted onto their roster. (See question 24 regarding training requirements and question 22 regarding mediator fees.)

24 Training

Are there any requirements regarding training for mediators?

Most mediators that mediate commercial disputes or disputes that involve civil litigation are lawyers or former judges. Canada's provinces have differing criteria for selecting roster mediators.

For example, in Ontario, mediators are selected by local mediation committees appointed in Ottawa, Toronto and Windsor. These committees are expected to consider a candidate's experience, training and education; a candidate's familiarity with the civil justice system; and a candidate's references.

In British Columbia, a roster mediator must have fulfilled specific training and education requirements, meet experience prerequisites (eg, completion of a minimum number of civil mediations), have good character and have adequate liability insurance. However, a roster committee can decide that extensive experience and credibility can serve as a substitute for training requirements.

25 Continued education

Must mediators undertake continued professional education? Is there a credit point system for the continued education of mediators?

Mediators who are lawyers may be required to participate in mandatory professional training as a condition of being licensed to practise law.

26 Accreditation of mediators

Outline the system for certification of mediators.

There is no uniform system for the certification of mediators regarding mediations of commercial disputes. However, a number of institutions provide mediation courses.

Some jurisdictions maintain rosters of mediators. For example, Ontario maintains a list of mediators who are qualified to carry out mediations in the context of Ontario's mandatory mediation programme and a list of accredited mediators to assist in the mediation of family disputes. ADR Canada provides professional designations to mediators such as Chartered Mediator and Qualified Mediator. These are voluntary designations that mediators may apply for to enhance their professional profile.

27 Mediator liability and sanctions

What are the duties of mediators in a mediation procedure? What liability do mediators face when offering their services and conducting mediation proceedings? Is professional indemnity insurance for mediators available or obligatory? Are there any further sanctions or other disciplinary measures for mediators in cases of misconduct, poor performance, etc? Are there any regulations referring to the dismissal of mediators?

There are no known cases of a mediator being found liable as a result of the exercise of his or her functions as a mediator. The province of Saskatchewan explicitly grants immunity to mediators who are exercising their legislative duties in good faith, such as, mediators participating in mandatory mediations in that province (the Queen's Bench Act 1998, SS 1998, Chapter Q-1.01, section 44).

This does not mean that mediators are immune from liability in the rest of Canada. It is conceivable that a mediator may be sued for breach of contract for breaching his or her obligations as set out in the mediation agreement, such as, for example, disclosing information that the mediator was obliged to keep confidential. Also, it is conceivable that a mediator may be sued in tort on the basis of misrepresentation, such as, for example, stating that the mediator is not in a conflict of interest when a conflict exists.

Due to the challenges associated with establishing a 'duty of care' and an associated 'standard of care', it is difficult to conceive of a mediator being sued for negligence. There have been no reported cases on this issue in Canada.

In order to minimise liability, it is common practice for mediators in Canada to include a provision in their respective mediation agreements that limits or excludes liability.

28 Appointment

Is there any regulation regarding the appointment of mediators? Is it common in your country to seek assistance by institutions or official bodies for the appointment of mediators? Are mediators obliged to inform about conflicts of interest in the course of appointment?

Mediators are normally appointed by way of agreement between the parties to a dispute. In circumstances where there is an obligation to mediate pursuant to court rules (eg, mandatory mediation in Ontario) or pursuant to a contract, a mediator may be appointed by the court.

Mediators are obliged to inform the parties about conflicts of interest in the course of an appointment.

Cases

29 Notable cases

Briefly give details of any significant recent mediation cases or disputes or judgments involving mediation that have been published in your country.

In *Hagel v Giles et al* 82 OR (3d) 470, the Court of Appeal for Ontario issued an instructive decision on the application of a confidentiality clause where a party seeks to enforce a settlement agreement in court. In this case, a settlement agreement was reached at the conclusion of a mediation but was not reduced to writing. The plaintiff disputed the enforceability of this agreement. The Court held that where the enforceability of a settlement agreement is in issue, a court is entitled to consider what occurred in the negotiations in relation to that agreement.

However, in *Rudd v Trossacs Investments Inc* 79 OR (3d) 687, the Ontario Divisional Court was faced with the question of whether a mediator could be compelled to testify in court to determine whether a party was party to a settlement agreement. The Court held that, based on the privileged nature of the communications with the mediator, the mediator could not be compelled to testify. This was based not only on the confidentiality agreement signed by the parties, but also on the Court's view that the public interest in protecting the confidentiality of the mediation process outweighed the interest in compelling the evidence of the mediator.

A recent decision out of British Columbia provides insight into the high threshold for attaining an exemption from mandatory mediation in that province. Under the applicable legislation in British Columbia, a party can be exempt from mediation if it is 'materially impracticable or unfair to require the party to attend'. In *Matsqui First Nation v Canada (Attorney General)* [2015] BCSC 1409, the Crown sought to avoid mandatory mediation with the Matsqui First Nation under this exemption after receiving a notice to mediate.

In the underlying matter brought against the Department of Fisheries and Oceans (DFO), the Matsqui sought, inter alia, declaratory relief regarding the existence of an aboriginal right. The Crown argued that such issues could not be resolved in mediation and that the DFO does not have authority to resolve such claims. While the Court recognised that such relief is not readily available through mediation, it nevertheless denied the Crown's application. The Court held that 'the beauty of mediation lies in its confidentiality and flexibility' (paragraph 18) and 'one cannot help but ask what do the parties have to lose by confidentially exchanging and explaining perspectives and interests' (paragraph 19).

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Law and institutions

1 Treaties

Is your country a signatory to any treaties that refer to mediation? Is your domestic mediation law based on a treaty?

The United Kingdom and hence the jurisdiction of England and Wales (which is a separate legal jurisdiction within the UK) is not signatory to any treaties that refer to mediation.

EU Directive 2008/52/EC (the Mediation Directive) does apply to the UK. This Directive aims to facilitate access to mediation and promote amicable settlements between parties by the use of mediation in cross-border disputes. The UK has partly implemented the Mediation Directive by enacting the Civil Procedure Amendment Rules 2011, which came into force on 6 April 2011, and the Cross-Border Mediation (EU Directive) Regulations 2011, which came into effect on 20 May 2011. These rules are, however, only relevant to cross-border disputes. The 2011 Amendment Rules amended the Civil Procedure Rules (CPR), which govern the conduct of cases in England and Wales, and the implementation of the Mediation Directive can be found at CPR 78.23 to 78.28.

England and Wales is satisfied that its existing arrangements meet the requirements of article 4 of the Mediation Directive compelling EU member states to put in place quality control mechanisms for the provision of mediation services. The UK has notified the European Commission that it already complies with article 5 of the Mediation Directive (encouraging mediation when proceedings are in progress) through the CPR. The CPR 1.4(2)(e) requires the court to engage in active management of cases, which includes appropriate encouragement of alternative dispute resolution procedures, especially mediation.

2 Domestic mediation law

What are the primary domestic sources of law relating to domestic and foreign mediation? Are there any differences for the mediation of international cases?

The CPR are the primary domestic source of law. In domestic mediations, parties should have regard to the pre-action protocols that outline steps that parties should take prior to issuing a claim in the courts. The pre-action protocols emphasise cooperation between the parties in order to identify the main issues between them. A failure to cooperate may lead to costs penalties being imposed by the courts regardless of whether a party's claim is successful or not. In particular, paragraph 8 of the Practice Direction on Pre-Action Conduct (PDPAC) indicates that while alternative dispute resolution (ADR) is not compulsory, the courts may require evidence that the parties have considered some form of ADR. In this context, mediation is by far the most popular form of ADR in England and Wales.

The CPR are also the primary domestic source relating to cross-border mediation as they incorporate the Mediation Directive at CPR 78.23 to 78.28 and the accompanying Practice Direction. These provisions govern the relevant procedures for the following:

- ensuring that mediation settlements are enforceable;
- disclosure and inspection of mediation documents; and
- obtaining mediation evidence by witness summons or cross-examination with permission of the court.

Article 2 of the Directive defines 'cross-border' as where at least one of the parties is domiciled or habitually resident in a member state other than that of any other party on the date on which the following occurs:

- the parties agree to use mediation after the dispute has arisen;
- mediation is ordered by a court;
- an obligation to use mediation arises under national law; and
- a court invites the parties to mediate under article 5 of the Regulation.

Otherwise any international dispute that does not fall under the Directive, and falls under the jurisdiction of the courts of England and Wales, would be governed by the usual provisions of the CPR and parties would be obliged to follow the CPR and PDPAC. The parties are under an obligation to consider ADR, particularly at the pre-action stage, and failure to do so could result in an adverse costs order (CPR 44.2). In this regard the CPR do not differentiate between domestic and international disputes; the obligation to consider ADR applies in both cases.

3 Mandatory provisions

Are there provisions of domestic mediation law that must be considered in mediation proceedings?

There are no mandatory provisions applicable to mediation in the UK. The Centre for Effective Dispute Resolution (CEDR), a leading private sector provider and trainer, describes mediation as a 'flexible process' and it is this flexibility and control that parties retain during negotiations that provides a key incentive for parties to mediate rather than being limited to court procedure.

4 Obligation to mediate

Is mediation in your country obligatory? Can mediation be ordered by courts in your country?

Parties are able to mediate at any point either before or during court proceedings until the date of judgment. Mediation can either be conducted alongside litigation or arbitration proceedings or these proceedings can be 'stayed' while the parties mediate.

The UK has opted for mediation to be a voluntary process. The general view was stated by Dyson LJ in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 (*Halsey*), 'compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the Court and therefore a violation of article 6 (of the European Convention on Human Rights; right to a fair trial)'. Occasionally a court may direct the parties to take part in some form of ADR. However, such an order will not specify which ADR procedure is to be used and nor will it compel the parties to attend ADR; there will be provision in the order for a case management conference to be reconvened if the parties have failed to initiate ADR.

If a party refuses to mediate and such refusal is considered unreasonable, the refusing party runs the risk of court sanctions, namely an adverse costs order (CPR 44.2). In normal circumstances in the courts of England and Wales an award of legal costs will 'follow the event' (ie, the loser pays the winner's costs). However, in the case of *Dunnett v Railtrack Ltd*, the 'loser's' costs were ruled to be payable by the successful party due to a refusal to enter into mediation earlier on in the proceedings.

In *Halsey*, it was found that the burden was on the unsuccessful party (who would normally bear the costs) to prove that the successful party's refusal to enter into mediation was unreasonable. There is a trend in recent case law for a refusal to mediate to be considered unreasonable apart from in exceptional circumstances, with significant costs consequences for the refusing party. For an analysis of the cases and what is considered an unreasonable refusal to mediate, please see question 29.

In *Wright v Wright* [2013] EWCA Civ 234 Court of Appeal 27 March 2013, Lord Justice Ward suggested that it is time to undertake a review of the rule in *Halsey*, which decided that for the court to force unwilling parties into mediation 'would be to impose an unacceptable obstruction on their right of access to the court'. This was an aside and not a formal finding on the specific issue the Court of Appeal was deciding. Ward LJ suggested that '[p]erhaps some bold judge will accede to an invitation to rule on these questions so that the court can have another look at *Halsey* in the light of the past 10 years of developments in this field'.

5 Court-annexed mediation

Does the law of your country provide for court-annexed mediation? If so, is court-annexed mediation mandatory?

The Ministry of Justice is keen to promote ADR, and there are a number of court-annexed mediation schemes in England and Wales that have been running for a number of years.

The recent trend has been for these schemes to be expanded to encourage greater and more systematic use of mediation. The Mediation Service Pilot Scheme took effect on 1 April 2013 and following an extension ran until 31 March 2014, following which, the CPR (specifically Part 26) have been amended to reflect the experience gained in running this scheme.

Further schemes include the following:

- for small claims not exceeding £10,000 issued on or after 1 April 2013, where all the parties indicate on their directions questionnaire that they agree to mediation, the dispute will automatically be referred to the Small Claims Mediation Service, operated by HMCTS. This service is usually carried out over the telephone, and the parties do not speak to each other directly;
- the Court of Appeal Mediation Service (CAMS) has been running since 2003 for all non-family appeals. The judge, considering whether to give permission to appeal, will also consider whether the case should be referred to mediation through CAMS;
- the Court of Appeal is also running a pilot scheme whereby certain types of appeal are automatically referred to CAMS, unless the judge granting permission to appeal considers it inappropriate. This scheme applies to the following types of case:
  - all contractual claims up to the value of £250,000;
  - personal injury claims up to the value of £250,000;
  - inheritance claims where the estate value is below £500,000; and
  - boundary disputes of any value; and
- a mediation scheme called the Court Settlement Process (CSP) has been operating in the Technology and Construction Court for some years, where judges sit as mediators.

At present, the success of mediation depends very much on the parties' willingness to take part in the process; as Ward LJ commented, 'You may be able to drag the horse (a mule offers a better metaphor) to water, but you cannot force the wretched animal to drink if it stubbornly resists.'

Mediation under all of the above schemes remains voluntary but parties may be required to justify to the court their decision not to attempt mediation at subsequent court hearings, particularly at the stage when the court is determining the question of costs. However, this approach may change: see the above comments on *Wright v Wright*.

The procedures used in court-annexed mediations are similar to those used in other areas.

The only significant differences from contractual mediation are as follows:

- in court-annexed schemes, the initiative to refer the case to mediation and the choice of timing of the referral does not necessarily rest with the parties. The referral may either be made automatically (as in CAMS) or by the court (as in CSP); and
- in some schemes such as CAMS, the mediator is appointed by the scheme administrator (in this case CEDR), rather than by agreement between the parties, which is more usual in contractual mediations.

There are no specific requirements for court-annexed mediations.

6 Mediation-arbitration and other forms of mediation-related ADR

Is mediation combined with arbitral proceedings? May a mediator act later in the same dispute as an arbitrator, conciliator or judge? Are arbitrators aware of mediation, and if yes, are they willing to transfer arbitration cases to mediation? Which other proceedings are available and used in your country that are related to mediation?

Many arbitration bodies in England and Wales also offer mediation services. Bodies such as the Chartered Institute of Arbitrators issue practice guidelines, which indicate that an arbitrator can make use of ADR techniques by, for example, appointing an independent neutral to act as a mediator and to adjust the procedural timetable to allow such a mediation to take place.

It is common practice, particularly within certain specific sectors such as the construction industry, for commercial contracts in England and Wales to have dispute resolution clauses that specify which method of ADR the parties are required to engage in before resorting to court or arbitration proceedings. Industry and commercial bodies such as the City Disputes Panel in London often issue precedent dispute resolution clauses and relevant guidance. There is an increasing trend for dispute escalation clauses that contemplate the parties attempting to mediate any dispute in the first instance, but provide for some other form of resolution (eg, arbitration, expert determination or litigation) should the mediation fail.

It is very unusual for the same individual to act as both mediator and arbitrator in the same dispute. If mediation fails to arrive at a settlement, there is no rule of law to prevent the mediator's involvement in later proceedings. However, issues surrounding the confidential nature of the mediation process may make this incompatible with any later involvement. It is also likely that a losing party may challenge any arbitration award made following an unsuccessful mediation on the grounds of serious irregularity under section 68 of the Arbitration Act 1996, were the same individual to have acted as both mediator and arbitrator.

7 Online dispute resolution (ODR)

Have there been any developments regarding online dispute resolution in your country? Is your country participating in any international ODR project? Is online mediation available in your country?

EU member states were required to bring into force legislation and administrative provisions to comply with the ADR Directive by 9 July 2015. The ADR Directive applies to UK businesses where there is a contractual dispute between a consumer and a business and is implemented into domestic law by the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 and the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 (together, the 'Regulations'). The Regulations provide for the designation of 'competent authorities' and standards to be met by certified ADR entities that provide ADR services for consumer disputes. They also place obligations on traders to provide certain information to consumers about accessing ADR.

The ODR Regulation, which is binding on EU member states directly, took effect on 9 January 2016 in respect of the majority of its provisions. The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 and the Alternative Dispute Resolution for Consumer Disputes (Amendment) (No. 2) Regulations 2015 transposed the remaining provisions into domestic law. The Alternative Dispute Resolution for Consumer Disputes (Amendment) (No. 2) Regulations 2015 require that a competent authority and an ADR entity (including a body applying to become an ADR entity) provide a link to the online dispute resolution platform on their website.

To date there have been no legislative developments in England and Wales regarding online dispute resolution. However, there are a number of private sector initiatives offering ODR, mainly aimed at consumer problems and complaints. The government is encouraging the public sector to take part in such initiatives. An advisory group set up to report on ODR recommended in its report to the Civil Justice Council of 16 February 2015, that a state-run ODR system be established to facilitate access to justice, and to improve the small claims mediation service as detailed in question 5. It is hoped that this will be piloted as soon as possible.

The Chartered Trading Standards Institute website hosts the UK European Consumer Centre (UKECC), which participates in ODR Exchange. However, the UKECC only provides advice, not direct dispute resolution services.

8 Confidentiality and disclosure

Is mediation a confidential proceeding in your country? In which cases can disclosure of confidential information by the mediator or the parties be permitted or compelled? Are there any sanctions for breach of confidentiality?

Yes, mediation is usually confidential, and a non-disclosure clause will be inserted into most agreements to mediate and mediation settlement agreements. The sanctions and remedies available for a breach of the confidentiality clause follow the normal principles of English contract law. Therefore the remedies available will be entirely case-specific and will require an assessment of causation and remoteness of any loss suffered.

The non-disclosure provisions in the mediation agreement will normally prevent documentation and information disclosed during the process being used later in the proceedings. However, there are some exceptions. One such exception was referred to in the case of *Farm Assist Limited (in liquidation) v the Secretary of State for the Environment, Food and Rural Affairs (No. 2)* [2009] EWHC 1102 (TCC). The judgment reiterated that although it would be normal for a court to uphold a mediation agreement keeping the proceedings confidential, in exceptional circumstances a mediator can be ordered by the court to give evidence about what took place during mediation, if it is in the interests of justice. Even when the parties agree that matters can be referred to outside the mediation, the mediator can still enforce the confidentiality provision without reference to the parties.

There is also the question of 'privilege', a doctrine of English law that determines whether a party has the right to withhold a document from a third party or the court. Documents evidencing any genuine attempt to settle the dispute will be protected by the 'without prejudice' rule. Legal professional privilege also protects confidential communications between a client and his or her lawyer. These 'privileges' will apply during the mediation process by operation of the law (regardless of any contractual provisions). Privileged documents may be referred to the court in the event of a dispute over whether a settlement has in fact been reached.

With regard to cross-border mediations, the UK has implemented article 7 of the Mediation Directive. This requires that unless the parties agree otherwise, the mediator cannot be compelled to give evidence in connection with the mediation, except in very limited circumstances. The relevant provisions are contained in CPR Part 78.

9 Limitation period

Does a mediation proceeding suspend the limitation period for a court claim?

The domestic position is that a mediation does not suspend the limitation period. For a suspension of the limitation period the parties to the mediation would need to enter a separate 'standstill agreement'. Such an agreement would extend the period of time in which a claim can be made. Alternatively a party would need to issue a protective claim, and then seek a stay of the proceedings for the mediation to take place.

For cross-border disputes that are within the scope of the Mediation Directive and that commence on or after 20 May 2011, however, the limitation period is extended accordingly. The circumstances in which the limitation period can be extended are set out in section 33A(2) of the Limitation Act 1980.

10 Settlement

What is the legal character of the final (settlement) agreement? What are the legal requirements for the enforceability or the content of the agreement? Is it possible to revise, withdraw or challenge the final settlement agreement?

Settlement agreements reached in mediation are enforceable like any other contract. While there is no requirement for such settlement agreements to be in writing (except for employment tribunal cases), mediation agreements generally provide that a settlement is not enforceable until it has been agreed in writing and signed by the parties. Parties retain control of the decision of whether or not to settle and on what terms.

The settlement agreement will be enforceable as a contract through the English court system so long as the usual requirements for a binding contract have been complied with. A settlement may exceptionally be incapable of enforcement if its terms are too uncertain. For a settlement agreement to be unenforceable, a challenge to the validity of the agreement would need to be made by reason of mistake, fraud or illegality or alternatively the contract would need to be set aside by reason of misrepresentation, undue influence or economic duress.

The Court of Appeal in *Frost v Wake Smith and Tofields Solicitors* [2013] EWCA Civ 772 confirmed that a legal adviser representing clients during a mediation was not negligent for failing to ensure the legal enforceability of handwritten terms signed by the parties at the conclusion of a mediation, even though the final terms agreed were not capable of being legally enforceable. The Court of Appeal did comment that the solicitor's duty is to ensure that their client understands the nature of the mediation process and that the terms agreed may not be enforceable without a formal, binding legal agreement.

11 Mediation institutions

What are the most prominent mediation institutions in your country?

There are no public mediation institutions in the UK. The most prominent institutions in the UK are CEDR and the Civil Mediation Council (CMC). These private institutions are accreditation and advisory bodies respectively, which monitor rather than regulate providers and individuals. The accreditation procedures are described in question 20. The Advisory, Conciliation and Arbitration Service mediates some disputes in the field of labour law, generally those involving unions.

The involvement of these bodies ensures that standards are kept high, and offers some quasi-regulation of the free market approach. This free market approach has come about due to the vacuum afforded by the absence of government regulation of mediation providers and mediators.

Many of the most prominent mediators now work independently or through niche practices such as In Place of Strife, the City Disputes Panel and the Panel of Independent Mediators.

Mediation procedure

12 Background

Describe the development of mediation in your country.

The mediation industry was in its infancy until the reforms into English civil procedure were adopted in 1999. These reforms had the aim of making the litigation process quicker, simpler and less adversarial. The CPR require parties to consider ADR at the outset before proceedings are issued and throughout a case. In particular, when a case is being allocated to an appropriate court, parties are required to state any reasons why they do not wish to settle their claim using ADR. In addition,

CPR 44.2 provided the court with a wide discretion in relation to costs, including a consideration of the efforts that a party has made to resolve the dispute before or during proceedings.

A further development was the obligation imposed on solicitors by rule 2.02 of the Solicitors Code of Conduct 2007 explicitly requiring them to discuss ADR with their clients.

Mediation and ADR were also key topics in Lord Justice Jackson's 2009 review into civil litigation costs and upon which he made key recommendations, including the creation of a single authoritative handbook, *The Jackson ADR Handbook*, first published in 2013.

CEDR's latest mediation audit in May 2016 indicated that there are approximately 10,000 cases being mediated in the UK each year. The 319 mediators participating in CEDR's survey reported that 67 per cent of the cases they dealt with settled on the day, with a further 19 per cent settling shortly afterwards, making a combined success rate of 86 per cent.

13 Areas of disputes for mediation

In which areas of disputes is mediation preliminarily applied? Are there any disputes that cannot be mediated?

The bulk of cases using mediation tend to be in the commercial and contractual sphere including banking, construction and insurance as well as professional negligence. Mediation is also very active in the family courts and in public law. It is not common in labour law disputes other than those involving unions representing a body of workers.

It is considered that the vast majority of civil disputes are suitable for mediation and the court went further in *Halsey* to state that '[i]n our view most cases are not by their very nature unsuitable for ADR.' However, there are limited areas where it will not be appropriate such as criminal prosecutions, certain intellectual property matters, where an injunction is required or where it is necessary for the court to determine a matter of construction or law.

Mediation can also be used in relation to part of a dispute (eg, dispute as to costs of the matter).

14 Procedural requirements

Are there procedural requirements for mediation proceedings in your country? Must the parties prepare for the mediation?

There are no specific procedural requirements for mediation. Parties and the mediator usually enter a written mediation agreement. This will usually specify what information the mediator requires in advance of the mediation and the date by which such information is to be provided. It is common for a mediation bundle to be prepared containing key documents. It is also usual for a case summary highlighting the relevant documents to be exchanged with the other parties and provided to the mediator.

The documents drafted often follow the pattern of documents drafted in accordance with the CPR. This is because they are often prepared by lawyers. It is also common for mediators to have a legal background and so they often prefer legal-style documents.

15 Structure and process of mediation

Describe the most common steps for the mediator's preparation of a mediation proceeding. Describe the most common structure of mediation proceedings. What is the typical time frame for a mediation proceeding? Are there any special considerations for international mediation proceedings?

A case summary and mediation bundle will need to be prepared for the mediator. The documents required for the bundle will depend on which stage the case has reached. For example, if the matter is pre-action only key contractual documents may be required. Alternatively, if proceedings have been issued, relevant court documents such as statements of case and witness statements will be necessary.

Pre-mediation meetings are possible but not common and would only usually be used in multiparty or complex cases. It is more usual for the mediator to make telephone contact with the parties in advance of the mediation. The typical time frame for a commercial mediation is one day (ie, eight hours with overtime if necessary).

A typical commercial mediation involves the following stages:

- parties have a brief meeting with their advisers in their individual private rooms;
- there is a joint opening session. The mediator will explain the ground rules and highlight the importance of confidentiality. There is no set time for the opening joint session. Mediators usually encourage the opening session to continue for as long as possible but it may be curtailed if there is any sign of friction;
- each party makes a brief opening statement identifying the issues that concern them and their reasons for attending a mediation;
- parties undertake private talks with their advisers. The mediator will spend some time with each party identifying any further information required, exploring concerns and listening to frustrations;
- the mediation moves into the negotiation phase. The parties will begin to make offers and counter-offers to each other through the mediator, who will be nudging the parties towards settlement until the principle terms of any settlement are agreed;
- if an agreement in principle is reached, then the parties (most likely their legal advisers) begin to draft a formal settlement agreement (this may take some hours); and
- there is a final joint session where the parties execute the written formal settlement agreement.

There are no special considerations for international mediation proceedings except that the parties will need to make arrangements for interpreters and the translation of documents if required.

16 Mediation style

What is the primary mediation style in your country for commercial mediation: facilitative mediation, evaluative mediation or transformative mediation? Are private sessions (caucuses) or joined sessions, or both commonly used in mediation?

The general approach of mediators in the UK is facilitative, focusing on the parties' interests rather than providing any substantive advice or opinion. There are, however, a wide range of approaches to mediation and if the mediator is or has been an advocate, they are more likely to take a more interventionist approach by advising parties privately on their opinion as to the merits of the case and chances of success. Selection of an appropriate mediator for a case can therefore be a critical factor in the success or otherwise of the mediation.

All mediators will encourage each party to focus on the future and to ensure their expectations are realistic. A common technique employed is to ask each party what is their 'worst alternative to a negotiated agreement'. The mediator will highlight the weaknesses in the party's case, the litigation risk of proceeding to trial and the potential adverse cost consequences if they fail to settle at the mediation stage. The mediator also tries to encourage parties to think creatively about options for settlement. Even if the mediator has a legal background the settlement options considered will never be restricted to those that could be obtained in court.

17 Co-mediation

What form does team mediation typically take in your country? Is co-mediation regularly used in your country? In which kind of cases?

Mediation in the UK is typically presided over by one mediator, with co-mediation being rare. However, the co-mediation format can sometimes be very useful in multiparty cases, for example, in disputes arising out of construction and infrastructure contracts where there are often many interested parties. On a practical level, this often means that general meetings can be presided over by both mediators and then private meetings can be shared between the mediators.

18 Party representatives and third parties

What is the practice in your country with respect to the inclusion of party representatives in mediation proceedings? What is the practice with respect to experts and witnesses?

The UK has a flexible approach to party representatives. It is usual for parties to attend with legal representatives and other relevant

professional advisers such as architects, accountants, surveyors, etc. It is common practice to notify the mediator and the other parties of the identity of the people attending the mediation so that any objections can be raised in advance. The flexibility of the mediation process also means that it is possible for a party whom the other side finds objectionable to attend the mediation but to be excluded from joint sessions.

19 Specific mediation procedures/conflict or dispute management systems

Have companies set up their own dispute management systems in your country? Are there any special routes for consumers to use mediation for small claims? Are there any institutions that offer mediation for their customers, users, etc? Is there any reported or published information regarding dispute management systems of companies for conflicts in employment matters?

County courts provide a free mediation service for money claims worth £5,000 or less. The mediator will be a court employee with the mediation taking place by telephone in order to reduce costs. There are also online mediation services available that may be appropriate for small claims of between £5,000 and £15,000.

Mediation is now being incorporated into many companies' grievance procedures, especially within the context of employment law. However, some industry insiders have expressed the view that these are merely token gestures, pointing to the fact that independent panel mediators are not appointed and so the mediators may be naturally biased towards the company.

Many industries such as financial services, communications, legal services and the energy sector have set up their own ombudsman services to handle consumer complaints. While these ombudsmen do often liaise between the parties to facilitate settlement, they provide a view on the dispute and so are not akin to mediation in the traditional sense.

Mediation clauses and mediation agreement

20 Mediation clauses

Are mediation clauses commonly considered in the course of contract drafting? Are there special requirements for mediation clauses? Are there any relevant court decisions referring to such escalation clauses?

It is good practice when drafting a contract to consider including a mediation or other alternative dispute resolution clause as part of a dispute escalation process. While there are no specific requirements for these clauses, the common theme of the relevant English case law has been that simple agreements to negotiate are unenforceable. Instead, for a mediation clause to be enforceable, the particular procedure that the parties will follow before moving to court proceedings or arbitration, needs to be sufficiently certain and defined for the courts to identify the steps that the parties have agreed to follow: *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm). The courts are becoming more sympathetic to the concept of binding dispute escalation clauses. It has recently been held that a clause that simply required the parties to seek to resolve the dispute by 'friendly discussions', prior to referring the dispute to arbitration, was sufficiently certain to be enforceable: *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm).

In other cases, the courts have found dispute escalation clauses to be unenforceable because they were too equivocal in terms of process and parties' obligations, which meant that the court was unable to direct the parties to comply with the relevant clause: *Wah (Aka Alan Tang) and another v Grant Thornton International Ltd and others* [2012] EWHC 3198 (Ch). Therefore, any clause providing for mediation or alternative dispute resolution should be clear as to the process and obligations required of the parties to maximise the chance of the clause being enforced.

21 Conclusion and content

Is there any obligation to conclude an agreement between the mediator and the parties or between the parties before or at the beginning of the proceeding? Are there any legal requirements regarding the content of the agreement between the mediator and the parties? What are the common provisions for such mediation agreement? Must the agreement be in writing?

As there is no legislation governing mediation in the UK, the legal framework is commonly set out in a contractual agreement between the mediator and the parties at the outset of the mediation ('the mediation agreement'). There is, however, no legal requirement to enter into such an agreement, nor are there any rules governing the content of such an agreement.

Common provisions in mediation agreements include the following:

- the appointment of the mediator and a definition of his or her role and responsibilities;
- that the parties will attempt to settle the dispute in good faith;
- that a representative of the party with the relevant authority to settle the dispute will attend the mediation;
- confidentiality and privilege in the process and the documents produced for its purposes;
- that the parties will not call the mediator to give evidence in later proceedings;
- that any settlement must be in writing and signed by the parties in order to be enforceable;
- that the parties can withdraw at any time; and
- payment of the costs of the mediation.

22 Costs for mediation

Are there any legal provisions on mediators' fees? What is the average mediator's fee in mediations involving companies? Is there any legal aid or other financial support for mediation proceedings if parties cannot afford to pay the mediator?

There are no legal provisions governing mediators' fees, which are set by the market. A mediator's fee will depend on the individual's qualifications and specialism, for example, a lawyer practising in the city of London could expect to charge between £300 and £600 per hour plus VAT. There are no official fee scales, but the CEDR 2016 audit indicates that £1,545 is the average fee charged for one day's mediation for a less experienced mediator, rising to an average fee of £4,500 for an experienced professional. In addition to the costs of the mediator, the parties may also need to fund the cost of a suitable venue. However, for a claim valued between £5,000 and £15,000, it is possible to obtain a fixed-fee three-hour mediation for £300 plus VAT per party.

It is usual for the parties to agree to share the costs of the mediator but to bear the costs of their own legal representation. However, there are some circumstances where a party may agree to pay the entire cost of the mediation to encourage the other party to mediate. Some negligence claims may be funded by insurers or probate claims may be paid by the estate.

The mediation agreement may indicate how the parties' costs of the mediation are to be treated should the mediation fail to achieve settlement. Some agreements specify that the costs are not recoverable as part of the underlying litigation, while other agreements may treat the costs as costs of the action to be taken into account in any later settlement agreement or upon any court assessing the costs. If the mediation agreement is silent on the treatment of costs, then these can be included in any subsequent negotiation or court order.

Legal aid is not available for commercial disputes, although it may be available for consumer goods and services, clinical negligence, family disputes and certain inheritance disputes.

Professional matters for mediators

23 Regulation

Is there any specific regulation of mediators in your jurisdiction? Give details. Are there any regulations on immigration or tax issues or regarding the right to work for foreign mediators?

Mediation is not regulated by any government legislation, although there are many who see regulation as inevitable and something that will grow out of necessity.

At present, rather than regulation, there is what can be viewed as a free market of bodies who provide accreditation. By far the most popular form of accreditation is that available from the CMC, which has over 200 individual members and 50 member organisations across the UK. The annual accreditation applies to organisations, which have a panel of mediators who will have been trained in accordance with the standards of those institutions. The accreditation scheme was originally set up to meet the requirements of the National Mediation Helpline, which was in turn established as part of the Ministry of Justice's commitment to proportionate dispute resolution. The CMC accreditation standards are set out in question 26.

If a mediator is an EU citizen, then there are no restrictions on his or her right to work in the UK. If a mediator is from a non-EU country, and is to be paid in the UK, then he or she can apply for a visa to stay for up to one month under the Permitted Paid Engagement Rules. The foreign mediator needs to be a qualified lawyer who has been invited by a client. If a foreign mediator is not being paid in the UK, they will need to enter as a business visitor.

24 Training

Are there any requirements regarding training for mediators?

There are no public or official exams for mediators in the UK and there is no single standard of basic professional training for commercial mediators. Although, as referred to in question 23, training for mediators is required by providers in order for mediators to be appointed on the panel of the accredited bodies.

For example, CEDR training courses cover ethics, mediation theory, mediation practice and negotiation. CEDR-accredited mediators undertake 40 hours of face-to-face training and not less than 50 per cent of this time is to be spent undertaking role plays in class sizes no larger than 40 delegates. This is followed by an assessment. If the mediator is not professionally qualified in a discipline that includes law, they must demonstrate a grasp of basic contract law.

25 Continued education

Must mediators undertake continued professional education? Is there a credit point system for the continued education of mediators?

Under CMC guidelines, practising mediators from accredited organisations must undertake six hours of continuing professional development sessions by which they gain continuing professional development points. There is also a requirement that each mediator must undertake at least two mediations a year.

26 Accreditation of mediators

Outline the system for certification of mediators.

In the UK, accreditation is provided by various free market bodies such as the CMC. To meet the CMC accreditation standard, a provider must ensure the following:

- they follow the CMC code of conduct (which follows the EU Model Code of Conduct for Mediators (2004)) and offer a published complaints handling and feedback procedure and maintain records;
- provision of adequate insurance for the activities that its panel mediators undertake (indemnity insurance of £1 million for the provider and a further £1 million for the mediator or higher if the work involved features larger sums of money);
- they demonstrate that they have administrative arrangements that are suitable and proportionate to the nature of the work that they are undertaking and that they have the ability to allocate appropriate mediators to cases, in accordance with their training and experience;
- that adequate meditator training is in place, and that there is sufficient supervision and mentoring for their mediators (see questions 24 and 25); and
- that they have a panel of six or more trained commercial or civil mediators, and be able to provide a list of the same.

A UK government scheme called 'Find a Civil Mediation Provider' was launched in 2011. This allows individuals to find CMC accredited providers and obtain certain mediation services on a fixed-fee basis.

It is also thought that there will be a move towards accreditation of the individual rather than the provider.

In the 'free market model' existing in the UK, mediation providers (and also individuals) who are not tied to an accredited provider are free to practise. It is unlikely, however, that they will receive much work, as statistics confirm.

27 Mediator liability and sanctions

What are the duties of mediators in a mediation procedure? What liability do mediators face when offering their services and conducting mediation proceedings? Is professional indemnity insurance for mediators available or obligatory? Are there any further sanctions or other disciplinary measures for mediators in cases of misconduct, poor performance, etc? Are there any regulations referring to the dismissal of mediators?

Mediators do not have any specific duties other than those imposed by the mediation agreement. In particular there are no fiduciary duties for mediators.

Mediators are obliged to take out indemnity insurance by the providers they are attached to (see question 26), although there is no obligation to do so under any legislation. Those considering mediation would be ill-advised to instruct someone who had not arranged this cover as it would leave them in an exposed position.

Mediation agreements often attempt to exclude the mediator from personal liability, although there are certain liabilities that they cannot exclude, such as fraud. Mediators are instructed to operate under the codes of their providers, however, the fragmented nature of the industry means that the codes can differ in their terms. The vast majority of them will feature a complaints procedure. Poor performance may lead to reputational damage and low levels of instruction. The CMC grievance procedure does envisage a mediator being removed from their post if appropriate.

Update and trends

The appeal of mediation to businesses is clear – with CEDR claiming that the cost savings to businesses through conducting mediation in 2016 alone will be £2.8 billion.

The general trend for more parties to explore settlement through mediation continues to grow and we expect this to remain the case. Indeed, figures collated by CEDR in its biennial audit published in May 2016 found that the number of commercial mediations in the past 12 months had increased by 5 per cent on 2014's figures.

The increasing number of court-annexed mediation schemes, together with recent decisions indicating that it will only be in very limited circumstances that refusing to mediate will be reasonable, clearly show the courts' endorsement of this method of ADR and we accordingly expect the default position to be that the parties should mediate.

Parties and their advisers will need to be very clear on their reasoning to refuse mediation given the potential cost risks.

28 Appointment

Is there any regulation regarding the appointment of mediators? Is it common in your country to seek assistance by institutions or official bodies for the appointment of mediators? Are mediators obliged to inform about conflicts of interest in the course of appointment?

There is no regulation regarding the appointment of mediators, although each provider will have its own code for the correct allocation of mediators. A mediator is generally appointed by agreement between party representatives. If this fails, parties will often ask a provider to nominate a mediator, subject to party objections. Some courts operate mediation schemes through which mediators are appointed.

The theme of an absence of regulation with regard to mediation continues in contemplation of conflicts of interest. There is no legislation obliging mediators to disclose any conflicts that they may have. However, many mediators will come from professional backgrounds where conflict checks are carried out as a matter of course. If a mediator is a practising lawyer, then they remain subject to the relevant codes of conduct. As long as both parties are kept informed of all issues such a matter can be waived by any party that might otherwise feel prejudiced.

Cases

29 Notable cases

Briefly give details of any significant recent mediation cases or disputes or judgments involving mediation that have been published in your country.

There are many cases, including *Halsey* and *Burchell v Bullard* [2005] EWCA Civ 358, which confirm that lawyers must discuss the alternatives to litigation with their clients. While the *Halsey* case confirms that the English courts have no jurisdiction to force parties to mediate, ADR orders have, however, been made including in *Shirayama Shokusan v Danovo Ltd* [2003] EWHC 3306 (Ch).

The main principle that a party who refuses to consider ADR is at serious risk of a costs sanction in litigation was clearly stated in *Dunnett v Railtrack Ltd* [2002] 1 WLR 2434. What constitutes an unreasonable refusal to mediate was considered in *Halsey*.

These factors include the following:

- the merits of the case;
- was the nature of the case suitable for mediation;
- were other attempts at settlement made;
- would the costs of the mediation have been disproportionately high;
- would mediation have delayed the trial; and
- would mediation have had a reasonable prospect of success?

Silence in the face of an offer to mediate (*PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288) or a refusal to mediate on the basis of the defendant's confidence in his or her position and belief that the parties were too far apart (*Garritt-Critchley and others v Ronnan and another* [2014] EWHC 1774 (Ch)) have been held by the court to be unreasonable and costs sanctions were imposed in the litigation between the parties. This approach was confirmed in the recent case of *Laporte & anor v the Commissioner of Police of the Metropolis* [2015] EWHC 371 (QB). In this case, the defendant refused the claimant's offer to mediate on the basis that the claimant would only accept a financial offer, which the defendant was unlikely to make. The trial judge undertook a detailed review of the *Halsey* factors and concluded that this refusal was unreasonable and largely the result of the defendant being repeatedly on the procedural back foot leading to ADR being deprioritised. This approach and the unreasonable refusal to mediate led to the defendant being awarded only two-thirds of its costs, despite succeeding on all counts.

As set out above, without prejudice privilege (the rule that generally prevents statements made in a genuine attempt to settle a dispute from being put before the court as evidence of admission by the party who made them), applies to negotiations conducted through mediation. In *R (on the application of Wildbur) v the Ministry of Defence* [2016] EWHC 821 Admin, Cranston J clarified that the rule also applies to a party's failure to reply to an offer to settle – not only specific offers to settle themselves. In that case, it was ordered that wording in the claimant's reply to judicial review proceedings to the effect that the defendant had refused to mediate and only attended an informal meeting, be replaced with the more neutral statement 'alternative dispute resolution has been attempted, but has been unsuccessful'. However, as set out above, a refusal to mediate will be admissible at the stage where the court is considering the matter of costs.

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Law and institutions

1 Treaties

Is your country a signatory to any treaties that refer to mediation? Is your domestic mediation law based on a treaty?

Germany is a member state of the European Union. Therefore, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters had to be transferred into German law. Directive 2008/52/EC provides minimum standards that had to be considered by the legislator of the German Mediation Code dated 21 July 2012.

Also, the European Code of Conduct for Mediators (http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf) is relevant to Germany as a voluntary set of principles in mediation.

In addition, the Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for Consumer Disputes and the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes have to be transferred into German law.

2 Domestic mediation law

What are the primary domestic sources of law relating to domestic and foreign mediation? Are there any differences for the mediation of international cases?

The Mediation Code came into force on 26 July 2012. It is now the primary source for mediation in Germany in domestic as well as international cases.

The Mediation Code provides regulations for the following areas:

- section 1: definition of mediation and of the mediator;
- section 2: procedure of mediation, rights and duties of the mediator;
- section 3: neutrality and impartiality of the mediator;
- section 4: confidentiality obligations for the mediator;
- sections 5 and 6: basic and continued education for mediators, and requirements for the certified mediator;
- section 7: research and financial support of mediation; and
- section 8: evaluation of the development of mediation in Germany.

Further, the German Code of Civil Procedure (ZPO) and other statutes have been amended in several provisions, for example, section 253, paragraph 3 ZPO: in the event of commencement of an action, the claimant should declare in the statement of claim whether mediation has been tried beforehand, and if not, the relevant reasons for the refusal of conducting mediation in the given case.

In addition, the court can recommend mediation during the court proceeding; for the time of mediation, the court can stay the proceeding (section 278a ZPO).

3 Mandatory provisions

Are there provisions of domestic mediation law that must be considered in mediation proceedings?

The following provisions of the Mediation Code must be considered as mandatory:

- section 2.1: the parties choose the mediator;
- section 2.2: the mediator has to be sure that the parties understand the principles and the structure of the mediation proceeding and that the parties participate in the mediation voluntarily;
- section 2.3: the mediator must be neutral and has to aid the communication of the parties. He or she has to be sure that the parties are involved in the mediation proceeding in an adequate and fair manner. He or she needs the approval of all parties for private sessions (caucuses);
- section 2.4: third parties can only be involved in the mediation proceeding if all parties agree to it;
- section 2.5: the parties can terminate the mediation at any time. The mediator can terminate the mediation proceeding if he or she is of the opinion that the parties will not reach a settlement or if the parties can no longer communicate in an appropriate way;
- section 2.6: the mediator has to work towards a settlement whose content is understood by the parties. The mediator has to inform the parties who are not represented by advisers that they have the possibility of seeking the advice of external counsel before closing;
- section 3.1: the mediator has to reveal all circumstances that could affect his or her neutrality and impartiality;
- section 3.2: if a person already advised a party, he or she cannot act as a mediator in the same matter;
- section 3.5: the mediator is obliged to inform the parties on their demand about his or her background, education and expertise in the area of mediation;
- section 4: the mediator is obliged to keep confidential all information received in the course of the mediation proceeding; and
- section 5: the mediator is responsible for ensuring his or her own adequate basic and advanced training.

4 Obligation to mediate

Is mediation in your country obligatory? Can mediation be ordered by courts in your country?

Mediation remains voluntary even after the enactment of the Mediation Code. The German courts or other official institutions cannot order mediation before or during a court proceeding; they can only recommend mediation and, if the parties agree to mediation during a court proceeding, stay the court proceeding for the duration of mediation proceeding (section 278a, paragraph 2 ZPO).

5 Court-annexed mediation

Does the law of your country provide for court-annexed mediation? If so, is court-annexed mediation mandatory?

The German courts cannot order mediation before or during a court proceeding; they can only recommend mediation, as already mentioned. Only in family cases (divorce, child custody, etc) can the family court order the parties to participate in an information meeting referring to mediation (section 135 of the Act on the Procedure in Family Matters and in Matters of Non-contentious Jurisdiction).

According to section 278, paragraph 5 ZPO, the parties of a court proceeding can be transferred to a conciliation judge. The conciliation judge is a judge different from the appointed judge for the case who has no decision power but tries with the parties to resolve the dispute by

means of alternative dispute resolution (ADR). The conciliation judge has discretion regarding the methods of ADR to be applied in a certain case. In practice, predominantly mediation is applied in such cases. If the settlement efforts of the conciliation judge fail, the case continues in court for decision.

6 Mediation-arbitration and other forms of mediation-related ADR

Is mediation combined with arbitral proceedings? May a mediator act later in the same dispute as an arbitrator, conciliator or judge? Are arbitrators aware of mediation, and if yes, are they willing to transfer arbitration cases to mediation? Which other proceedings are available and used in your country that are related to mediation?

Mediation and arbitration are considered as completely different proceedings. The two proceedings are rarely combined, especially because German arbitrators are used to arranging settlement hearings within the arbitration proceedings (see, for example, section 32.1 of the German Institution of Arbitration (DIS) Arbitration Rules: at every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute). According to section 1053, paragraph 1 ZPO, an arbitral award with agreed terms is a possible option for parties to arbitration proceedings.

If mediation and arbitration are combined, it is either in the way of med-arb – mediation first, arbitration later (if mediation fails to resolve the dispute) – or in the way of a mediation window (a period of time during an arbitration that is set aside so mediation can take place and during which there is no other procedural activity). It is generally understood, however, that a mediator must be different from an arbitrator in the same proceeding. According to section 3.1 of the Mediation Code and section 1036, paragraph 1 ZPO, the concentration of both roles in one person could cause problems in respect of neutrality and impartiality. It is also considered as dangerous for the validity and enforceability of the later arbitral award.

In addition, conciliation is widely used in Germany, especially in certain areas of legal disputes (eg, in collective bargaining between unions and employers, in disputes under public law or in certain labour law disputes). According to the German understanding, in conciliation the neutral's decision is non-binding for both parties.

Further, adjudication becomes increasingly known in Germany as a method of choice for dispute resolution in the construction industry. The Deutsche Baugerichtstag eV, a German organisation referring to construction disputes, defined in 2010 recommendations for procedures to resolve disputes in the construction industry out of court. In 2013, a legal opinion of Hans-Jürgen Papier, the former President of the German Federal Constitutional Court, confirmed that adjudication is compliant with the German Constitution. In the following year rules for dispute resolution in the construction industry were enacted (AO-Bau/Alpha). In December 2013, the German Association for Dispute Resolution in the Construction Industry was founded.

7 Online dispute resolution (ODR)

Have there been any developments regarding online dispute resolution in your country? Is your country participating in any international ODR project? Is online mediation available in your country?

Several conciliation committees for consumer disputes exist in Germany, for example, the conciliation committee for public passenger traffic, the conciliation committee for energy and the ombudsman for bank and insurance companies who is responsible for disputes between banks and consumers. In addition, the German Ministry for Food, Agriculture and Consumers supports the establishment of a European Consumer Centre.

There is no significant use of online mediation for the time being. Nevertheless, it should be noted that Regulation (EU) No. 524/2013 of 21 May 2013 on Online Dispute Resolution for Consumer Disputes applies from 9 January 2016. Further, the Code for Settlement of Consumer Disputes entered into effect on 1 April 2016, which transfers the Directive 2013/11/EU of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes into German law.

8 Confidentiality and disclosure

Is mediation a confidential proceeding in your country? In which cases can disclosure of confidential information by the mediator or the parties be permitted or compelled? Are there any sanctions for breach of confidentiality?

According to section 4 of the Mediation Code, the mediation proceeding is confidential by law for the mediator. The Mediation Code does not cover the confidentiality obligation of the parties as well as of experts or other external persons who are included in the mediation proceeding. Such confidentiality must be agreed by separate contracts or explicit confidentiality declarations.

The exceptions of the mediator's confidentiality obligations are also governed by section 4 of the Mediation Code. The disclosure of the content of the mediation proceeding is allowed if the following applies:

- it is necessary for the implementation or enforcement of the settlement agreement;
- it is necessary for overriding considerations of public policy, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or
- the disclosure refers to facts that are obvious or that are not sufficiently important to necessitate their remaining confidential.

The disclosure of confidential information by the parties or other persons involved in the mediation proceeding depends on the provisions of the confidentiality agreement or on professional regulations, for example, existing for lawyers or tax advisers.

According to section 4, paragraph 1 of the Mediation Code in connection with section 383, paragraph 1, No. 6 ZPO, all mediators are exempted from the obligation to give evidence in court proceedings or in arbitration. This is applicable for civil cases, however, not for criminal cases. The parties can release the mediator from the duty of confidentiality for civil cases according to section 385, paragraph 2 ZPO, which would lead to the possibility of the mediator giving evidence in court or arbitration proceedings.

9 Limitation period

Does a mediation proceeding suspend the limitation period for a court claim?

According to section 203 of the German Civil Code, the limitation period is suspended for the duration of the mediation proceeding. As soon as the mediation proceeding is terminated, a grace period of three months starts. After the three-month grace period the limitation period continues.

10 Settlement

What is the legal character of the final (settlement) agreement? What are the legal requirements for the enforceability or the content of the agreement? Is it possible to revise, withdraw or challenge the final settlement agreement?

The settlement agreement at the end of a mediation proceeding essentially has the character of a contract that is binding between the parties. If the contract shall not be binding, it must be stated explicitly. All statutory regulations of German contract law apply for the mediation settlement agreement. This means that revision, withdrawal or challenge of the final settlement agreement follows the general rules of German contract law.

Such a settlement agreement is not enforceable in the same way as a judgment or an arbitral award. In fact, the enforceability of the settlement agreement requires further efforts and can be achieved in a number of ways, as follows:

- approval by a notary public: section 794, paragraph 1, No. 5 ZPO;
- a court-approved settlement agreement if the mediation was conducted in parallel to a court proceeding: section 794, paragraph 1, No. 1 ZPO;
- transfer of the settlement agreement into an arbitral award with agreed terms: section 794, paragraph 1, No. 4a ZPO; or

- transfer of the settlement agreement into an agreement by the lawyers of the parties and recorded by the responsible district court: section 796a, paragraph 1 ZPO.

11 Mediation institutions

What are the most prominent mediation institutions in your country?

In recent years several mediation organisations and institutions have been founded as private entities. The most prominent institutions are:

Working Group for Mediation of the German Bar Association
Littenstrasse 11
D-10179 Berlin
Tel: +49 30 72 61 52 128
http://mediation.anwaltverein.de

A subcommittee for mediation of the German Lawyer's Association that supports mediation in the legal profession.

The Federal Association of Mediation eV
Wittestrasse 30 k
D-13509 Berlin
Tel: +49 30 43 57 25 30
www.bmev.de

The largest German mediation association in terms of the number of members, including mediators from all fields of mediation.

The Federal Association for Mediation in Economic and Employment Issues
Prinzregentenstrasse 1
D-86150 Augsburg
Tel: +49 821 58 86 43 66
www.bmwa-deutschland.de

A German mediation association specialising in commercial mediation and mediation in the workplace.

The Federal Working Group for Family Mediation eV
Spichernstrasse 11
D-10777 Berlin
Tel: +49 30 23 62 82 66
www.bafm-mediation.de

The only German mediation association specialising in mediation in family matters.

Centre for Mediation
Verlag Dr Otto Schmidt KG
Gustav-Heinemann-Ufer 58
D-50968 Cologne
Tel: +49 221 93 73 88 21
www.centrale-fuer-mediation.de

A service centre for mediators and parties, providing information on mediation and other methods of conflict resolution and also supporting parties in their search for a mediator.

European Institute for Conflict Management (EUCON)
Brienner Strasse 9
D-80333 Munich
Tel: +49 89 57 95 18 34
www.eucon-institut.com

The leading mediation association for commercial mediation.

The German Institution of Arbitration (DIS)
Beethovenstrasse 5-13
D-50674 Cologne
Tel: +49 221 28 55 20
www.disarb.org

The DIS offers not only support for arbitral proceedings but also for other procedures of ADR, especially for mediation.

Mediation procedure

12 Background

Describe the development of mediation in your country.

The settlement of disputes has a long history in Germany. The German Code of Civil Procedure and former procedural laws focus on the task of judges to achieve a settlement between the parties in court.

Historical documents show that Alvise Contarini, an Italian diplomat, was appointed as mediator to negotiate the Peace of Westphalia as finalised in Münster and Osnabrück on 15 May 1648 and 24 October 1648 respectively to end the Thirty Years' War (1618–1648).

However, mediation in its modern form started in Germany at the end of the 1970s. One first initiative regarding mediation was made in the field of legal sociology, at a conference held in 1977, and later published in the Yearbook of Legal Sociology and Legal Theory. In 1979, the President of the Federal Constitutional Court pointed out the limited resources of the legal system (Bender, *German Judges' Newsletter* (1979) p. 357). The President of the Federal Court of Justice also concluded that there was a need for more efficiency in the judicial system, which mediation in particular could provide (Pfeiffer, *International Journal of Legal Policy* (1981) p. 121).

Until the late 1990s the general interest in non-adversarial ADR methods was relatively modest in Germany. Mediation was quite rare and its use mostly confined to the fields of divorce and environmental disputes.

Effective from 1 January 2000, the federal legislator introduced their new section 15a EGZPO (Introductory Law to the German Rules of Civil Procedure), which authorised the German federal states to establish conciliation for possible cases with a monetary value of up to €750 and certain types of minor disputes (eg, disputes between neighbours). In addition, the federal legislator amended a provision in the Code of Civil Procedure by providing for court referrals to ADR with the consent of the parties (section 278, paragraph 6 ZPO).

Further, the Ministry of Justice in Lower Saxony initiated a pilot programme to promote voluntary mediation based on this provision in several courts. In the context of this programme, judges referred cases mainly to judge-mediators who were not assigned to the particular case. The project started in January 2003 and was extremely successful. The success rate of this kind of court-annexed mediation was 79 per cent.

The German Bar Association in the meantime established a committee on ADR, as well as a section for mediation with several hundred members. In September 2008, the Annual National Conference of Lawyers, which is an important lobby for all legislative initiatives, dealt with mediation as a special topic.

Today, there is a significant body of German literature on mediation and the subject can frequently be found on the agenda of conferences and congresses in all business areas and branches. Meanwhile, thousands of lawyers and other professionals have been trained in mediation and offer their services as mediators. The Mediation Code, effective from 26 July 2012, is another milestone in the development of mediation in Germany.

Recently, the Federal Ministry of Justice enacted the Statutory Instrument on the Initial and Further Training for Certified Mediators of 21 August 2016. It introduces a two-tier system of certified and non-certified mediators.

13 Areas of disputes for mediation

In which areas of disputes is mediation preliminarily applied? Are there any disputes that cannot be mediated?

In Germany, mediation can be applied in all cases where a settlement is legally possible. Although mediation is traditionally applied in family disputes, it is increasingly used for commercial disputes and disputes related to environmental matters as well as in the public sector. Mediation is also applied in the area of intellectual property (eg, trademark or copyright licence cases) but cannot be applied for the granting of patents. Further, mediation is increasingly chosen for resolving workplace disputes (eg, disputes between employer and employees or between employer and works council).

Mediation cannot be applied in criminal cases, apart from cases of misdemeanour. For such cases, 'victim-offender mediation' can be ordered by the prosecutor or the court, given the consent of the victim.

14 Procedural requirements

Are there procedural requirements for mediation proceedings in your country? Must the parties prepare for the mediation?

According to section 1, paragraph 1 of the Mediation Code, the mediation proceeding must be structured. No further legal requirements are included in the Mediation Code or in the Civil Procedure Code. Nevertheless, mediation proceedings follow a logical structure as follows:

- opening statement;
- fact-finding and topics relevant for solutions;
- moving from the parties' positions to a discussion of their interests;
- collecting ideas for solutions and evaluating these ideas; and
- drawing up a final settlement agreement.

Whether parties must prepare for mediation depends on the needs of the mediator and on the case in dispute (complex or straightforward). There is no explicit legal requirement for the parties to prepare for the mediation proceeding.

15 Structure and process of mediation

Describe the most common steps for the mediator's preparation of a mediation proceeding. Describe the most common structure of mediation proceedings. What is the typical time frame for a mediation proceeding? Are there any special considerations for international mediation proceedings?

In commercial cases prior meetings are often arranged to discuss organisational issues of place, timing and schedule as well as the content of the mediator's agreement or confidentiality issues. In workplace disputes, prior meetings with the employees involved in the conflict are arranged in order to clarify the details of the situation as well as the willingness of the employees to mediate. In family cases prior meetings are also permitted and used.

Depending on the mediator's approach and the complexity of the case, prior statements of the parties and a summary of the parties' positions are usual and permitted, especially in commercial cases. Prior statements are less common in family cases.

The most common structure of a mediation proceeding as practised in Germany is as follows:

- opening statement of the mediator; clarification of the assignment and expectations of the parties; explanation of the main characteristics of mediation and of the mediator's role; establishment of ground rules in order to frame the boundaries of the mediation proceeding. According to section 2, paragraph 2 of the Mediation Code the assurance by the mediator is necessary that the parties participate voluntarily in the mediation proceeding and that the parties understand the characteristics and process of mediation;
- fact-finding and identification of the issues for which the parties need a solution;
- from positions to interests; clarifying common and contrary interests and objectives of the parties;
- identification of options (brainstorming); search for objective criteria; discussion, analysis and evaluation of the proposed solutions; and
- discussion and recording of the final settlement agreement; according to section 2, paragraph 6 of the Mediation Code, the mediator has to inform the parties that they can seek external advice (eg, a lawyer's opinion) before the closing of the settlement agreement.

The typical time frame for a mediation proceeding in commercial matters is one to two days in disputes between companies. In commercial cases referring to workplace disputes the number of mediation sessions is regularly higher and includes several meetings with the parties in private sessions. The same applies in family or environmental cases.

In respect of international mediation proceedings, intercultural and language matters are considered regularly. Such mediation proceedings are mainly conducted in English, often with intercultural co-mediators.

16 Mediation style

What is the primary mediation style in your country for commercial mediation: facilitative mediation, evaluative mediation or transformative mediation? Are private sessions (caucuses) or joined sessions, or both commonly used in mediation?

Traditionally, a mix between facilitative and evaluative mediation is used, especially in commercial mediation proceedings.

In general, German mediators prefer joint sessions focusing on the interests and needs of the parties. However, private sessions (caucuses) are increasingly used in all areas of mediation.

The mediator is responsible for the structure and the procedure of the mediation. He or she works with the parties on three levels: process, facts and relationship. In commercial cases, German mediators are often willing – preferably in private sessions – to advise the parties, to undertake risk assessment or a 'best alternative to a negotiated agreement' analysis.

17 Co-mediation

What form does team mediation typically take in your country? Is co-mediation regularly used in your country? In which kind of cases?

Co-mediation and team mediation are used in certain cases. Co-mediation is used predominantly in family disputes, whereas in commercial cases it is more common for single mediators to be assigned. Team mediation has been reported for large environmental cases.

18 Party representatives and third parties

What is the practice in your country with respect to the inclusion of party representatives in mediation proceedings? What is the practice with respect to experts and witnesses?

In commercial cases party representatives, especially lawyers or tax advisers, are regularly included in mediation proceedings. Depending on the case in question, experts or witnesses can be called if all parties agree to it (section 2, paragraph 4 of the Mediation Code). According to this provision, lawyers are considered as third parties, therefore, the inclusion of lawyers also needs the prior approval of all parties.

19 Specific mediation procedures/conflict or dispute management systems

Have companies set up their own dispute management systems in your country? Are there any special routes for consumers to use mediation for small claims? Are there any institutions that offer mediation for their customers, users, etc? Is there any reported or published information regarding dispute management systems of companies for conflicts in employment matters?

In the past few years, the public interest in conflict management and mediation has increased significantly. In May 2008 the 'Round Table Mediation and Conflict Management of German Major Enterprises' was established. SAP AG, E.ON Kernkraft GmbH, Audi AG, Bombardier Transportation GmbH, Deutsche Bahn AG, EnBW AG, Fraunhofer Gesellschaft and Siemens AG were founding partners. The Round Table is guided by the Institute for Conflict Management of the Viadrina European University regarding scientific research and evaluation. So far, regular quarterly meetings and conferences have been organised by the Round Table. Major topics were the optimisation of conflict analysis, choice of procedure and documentation of cases. Further concepts and the implementation of mediators as well as measurements for conflict management systems have also been discussed.

In addition, several studies exist that refer to ADR methods and conflict management systems (see PricewaterhouseCoopers (PwC) studies 'Commercial Dispute Resolution' 2005 and 2007, PwC study 'Conflict Management – From the Elements to the System' 2011, PwC

study 'Conflict Management as an Instrument of Value-Oriented Management' 2013; see www.pwc.com and KPMG study 'Cost of Conflicts – The Costs of Friction Loss in Industrial Enterprises' 2009; see www.kpmg.de).

Insurance companies dealing with legal expenses not only recommend mediation for all suitable cases, but also offer mediators and mediation services (eg, shuttle mediation on the phone).

Mediation clauses and mediation agreement

20 Mediation clauses

Are mediation clauses commonly considered in the course of contract drafting? Are there special requirements for mediation clauses? Are there any relevant court decisions referring to such escalation clauses?

Mediation clauses are increasingly included in commercial contracts, mainly in the form of multi-tiered clauses. If a mediation clause is included in a contract, the attempt to find a settlement in mediation has been considered as mandatory in few court cases, for example, the Federal Constitutional Court decided in 1977 as well as in 1983 and 1998 that the attempt to settle a case is inadmissible if conciliation is agreed in the Articles of Association of a company or in a contract. In a decision of 2008, the Federal Constitutional Court considered a conciliation clause as a precondition to litigation. On the other hand, the Federal Labour Court rendered a decision in 1999 regarding an agreement to call an ecclesiastic conciliation committee, which – according to the view of the judges – does not exclude the recourse to litigation. Finally, the District Court of Heilbronn referred in 2010 to a mediation clause and concluded that such clause cannot be interpreted as a preliminary waiver of action in state courts because mediation can be terminated by the parties at any time. However, the decision of the District Court Heilbronn was discussed in the legal literature and considered as fundamentally wrong.

21 Conclusion and content

Is there any obligation to conclude an agreement between the mediator and the parties or between the parties before or at the beginning of the proceeding? Are there any legal requirements regarding the content of the agreement between the mediator and the parties? What are the common provisions for such mediation agreement? Must the agreement be in writing?

According to the Mediation Code, no formal requirements exist in respect of the agreements between mediator and the parties or between the parties themselves. The mediator and the parties are, therefore, completely free to agree on the content but also regarding the form of the mediation agreement. Such agreements are commonly in writing and include provisions referring to the rights and duties of the mediator as well as referring to the rights and duties of the parties (trilateral contract).

Common provisions for such trilateral contracts between the mediator and the parties are, inter alia, as follows:

- preamble with a short description of the dispute;
- assignment of the mediator and the mediator's duty to conduct the mediation in person;
- description of the main characteristics of the mediation proceeding: decision-making power remains with the parties, mediator does not act as a decision-maker, amicable solution as the goal of the mediation proceeding, etc;
- assurance of the mediator's neutrality and impartiality, also according to section 1, paragraph 2; section 2, paragraph 3; and section 3 of the Mediation Code;
- confidentiality agreement, especially linked to parties and referring to section 4 of the Mediation Code;
- assurance of the voluntary nature of the parties' participation; also according to section 2, paragraph 2 of the Mediation Code;
- right of the mediator and the parties to terminate the mediation proceeding with immediate effect, also considering section 2, paragraph 5 of the Mediation Code;
- right of the mediator to call for caucus and correspondent approval by the parties according to section 2, paragraph 3 of the Mediation Code;
- provisions referring to time, place and structure of the mediation proceeding;
- if court or arbitration proceedings are already commenced: agreement on the stay of such proceedings for the duration of the mediation;
- agreement on the prolongation of legal or contractual deadlines or limitation periods, if legally allowed;
- fee of the mediator and costs of the mediation proceeding; and
- joint and several liability of the parties for costs and expenses related to the mediation proceeding.

22 Costs for mediation

Are there any legal provisions on mediators' fees? What is the average mediator's fee in mediations involving companies? Is there any legal aid or other financial support for mediation proceedings if parties cannot afford to pay the mediator?

The mediator's fees are not regulated by law and are, therefore, free for negotiation. Only in cases of administered mediation do some mediation organisations determine a fee scale. In commercial cases the mediator's fees range from €150 to €450 per hour plus VAT, depending on the expertise of the mediator and on the volume of the case in dispute. In family cases, the hourly fees are lower. In workplace disputes, daily rates are also common. Often, a flat fee is agreed for the preparation and the follow-up work.

The parties usually split the mediator's fees and agree on joint and several liability.

The administration fees of mediation organisations are as follows:

German Institution of Arbitration (DIS)

- Procedural fee amounts to €250;
- the fee for nomination of a mediator by the DIS amounts to €250; and
- fees of a mediator amount to €300 per hour, unless agreed otherwise.

All fees are subject to VAT.

EUCON

Value of the dispute	Registration fee	Procedural fee	Fees of the mediator per hour
Up to €100,000	€250	€500	€200
From € 100,000 to €1 million	€250	€2,000	€300
From €1 million to €10 million	€250	€6,000	€300
€10 million and above	€250	€8,000	€300

There is no legal aid or other financial support by the state for mediation proceedings if parties cannot afford to pay the mediator. However, German courts are willing to include the costs for mediation proceedings into the general assessment of costs if the mediation has been conducted as court-annexed mediation.

Professional matters for mediators

23 Regulation

Is there any specific regulation of mediators in your jurisdiction? Give details. Are there any regulations on immigration or tax issues or regarding the right to work for foreign mediators?

At present, no specific regulation for the professional title 'mediator' exists. However, as mentioned above, the Federal Ministry of Justice enacted the Statutory Instrument on the Initial and Further Training for Certified Mediators of 21 August 2016 (the Statutory Instrument),

which stipulates requirements for qualification as a 'certified mediator'. Still, even in regard to the certified mediator, there is no regulatory body that issues a certification. It is the sole duty of the mediator to ensure that he or she fulfils the requirements to carry this title. Competitors could sue for unfair competition if the requirements are not met.

There are no regulations or limitations regarding the basic profession of a mediator, nor are there regulations regarding having a certain university degree level. In respect of immigration or tax issues or regarding the work of foreign mediators, no special regulations exist. Rather, the general regulations of immigration or tax law apply.

Referring to the rights and duties of a mediator, the Mediation Code provides some regulations that have been described above (see especially questions 2, 3, 8 and 15).

24 Training

Are there any requirements regarding training for mediators?

According to section 5, paragraph 1 of the Mediation Code, mediators have to ensure their own adequate training and continued education. Mediators also have to ensure that they are sufficiently skilled in theory and in practice to guide the parties in a competent manner through the mediation proceeding.

An adequate training should especially convey the following elements:

- the basics of mediation as well as of the procedure and the frame conditions;
- negotiation and communication techniques;
- conflict competence;
- legal aspects of mediation and the role of law in mediation; and
- practical exercises, role play and supervision.

In regard to the 'certified mediator', section 2, paragraph 1 of the Statutory Instrument stipulates that a person must only carry the title of certified mediator after completing training for certified mediators. This includes a minimum of 120 hours' initial training. Further, the certified mediator must conduct a mediation or co-mediation during the training or up to one year after the training, followed by individual supervision. Within two years of finishing the initial training, the certified mediator must partake in four more individual supervisions following a mediation.

25 Continued education

Must mediators undertake continued professional education? Is there a credit point system for the continued education of mediators?

See question 24. No credit point system for the continued education of mediators exists at present. The 'certified mediator' must partake in professional education courses, which must cover 40 hours of training during a four-year period. Suitable courses must match a minimum quality standard.

26 Accreditation of mediators

Outline the system for certification of mediators.

Following on from questions 23 and 24, it can also be said that it is completely open at the moment as to which organisation (private or official) will be responsible in the future for the certification of mediators. A kind of accreditation system that refers to training organisations is intended.

In the future, a two-tier system of certified mediators and non-certified mediators will exist (see sections 5 and 6 of the Mediation Code). It can be assumed that the certified mediators will be better positioned in the market and will be considered as the better qualified and more experienced mediators. This will be supported by the requirement that certified mediators will be forced to provide evidence regarding practical experience and mediation cases.

27 Mediator liability and sanctions

What are the duties of mediators in a mediation procedure? What liability do mediators face when offering their services and conducting mediation proceedings? Is professional indemnity insurance for mediators available or obligatory? Are there any further sanctions or other disciplinary measures for mediators in cases of misconduct, poor performance, etc? Are there any regulations referring to the dismissal of mediators?

Regarding the duties of a mediator, the Mediation Code provides some regulations that have been described in questions 2, 3, 8 and 15.

In the event of the violation of such duties the mediator could be liable for damages according to the rules of the Civil Code or, very rarely, accused of criminal behaviour according to the Criminal Code. There are no special civil or criminal provisions, sanctions or disciplinary measures for mediators in cases of misconduct, poor performance, etc.

Most German insurance companies offer professional indemnity insurance for mediators, although it is not obligatory.

According to section 2, paragraph 5 of the Mediation Code, the parties can end the mediation proceeding in cases of misconduct or poor performance of the mediator. In such cases, the parties could also refuse the payment of the mediator according to the general rules of the Civil Code and the relevant rules of contract law.

28 Appointment

Is there any regulation regarding the appointment of mediators? Is it common in your country to seek assistance by institutions or official bodies for the appointment of mediators? Are mediators obliged to inform about conflicts of interest in the course of appointment?

Section 2, paragraph 1 of the Mediation Code literally says: 'The parties choose the mediator.' This is also the general way to appoint a mediator

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in Germany. Courts can only propose mediation and are very hesitant to propose mediators because no official lists of mediators exist.

If the parties agree to an administered mediation, the corresponding mediation organisation (eg, DIS or EUCON) can appoint mediators according to their rules and regulations (see, for example, section 4 of the DIS Mediation Rules (the English version can be found at: www.dis-arb.de/en/16/rules/dis-mediation-rules-id31) and section 3 of the EUCON Rules of Procedure (the English version can be found at www.eucon-institut.de/wp-content/downloads/pdf/EUCON_Mediation_1_Verfahrensordnung_English.pdf.

The mediator has to undertake a conflict check and must inform the parties about a possible conflict as follows:

- section 3.1 of the Mediation Code: the mediator has to reveal all circumstances that could influence his or her neutrality and impartiality;
- section 3.2 of the Mediation Code: if a person has already advised a party, he or she cannot act as a mediator in the same matter. Such case cannot be subject to approval by the parties; and
- section 3.3 of the Mediation Code: the mediator has to inform the parties if one of his or her colleagues has advised a party in the same matter. In such case and after such information, the parties can agree on the service of the mediator according to section 3.4 of the Mediation Code.

Cases

29 Notable cases

Briefly give details of any significant recent mediation cases or disputes or judgments involving mediation that have been published in your country.

Because mediation is considered as strictly confidential, there are only a few publications describing mediation cases.

Some well-known mediation cases that have been published are as follows:

- *Mediation Airport Frankfurt am Main* related to the extension of another landing runway in 1998 (www.forum-flughafen-region.de/fileadmin/files/Archiv/Archiv_Mediation-Dokumentation/Dokumentation_Mediation_Frankfurt_Leitfaden_2000.pdf);
- *Mediation Stuttgart 21* related to the reconstruction of the railway station in Stuttgart in 2010 (www.sueddeutsche.de/politik/stuttgart-mediation-ist-kein-zauberwerk-1.1010315);
- Mediation in the trade dispute *Deutsche Bahn (German Railways) v Trade Union GDL* in 2007 (www.manager-magazin.de/unternehmen/artikel/0,2828,499541,00.html);
- the German Federal Constitutional Court decided on 14 February 2007 (1 BvR 1351/01) regarding the question of whether it is in accordance with the German Constitution to require conciliation/mediation as a first step before an action in court is admissible and stated literally: 'to resolve a disputable state of a problem by an amicable solution takes [...] principle preference over a judicial decision'; and
- the German Federal Court of Justice decided on 14 January 2016 (I ZR 98/15) that a legal expenses insurance provider may contractually stipulate that the insured party must attempt mediation before covering any further legal expenses.

Hong Kong

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Law and institutions

1 Treaties

Is your country a signatory to any treaties that refer to mediation? Is your domestic mediation law based on a treaty?

The treaties signed by the People's Republic of China (PRC) also apply to Hong Kong as a Special Administrative Region of the PRC. Hong Kong is also able to conclude and implement agreements with foreign states and regions and international organisations in areas of trade, finance, economic and monetary affairs, shipping, communications, tourism, culture and sports (see www.doj.gov.hk/eng/laws/treaties.html for a complete list of applicable treaties and bilateral agreements). The UNCITRAL Model Arbitration Law is adopted by Hong Kong and is an important basis for its Arbitration Ordinance (Cap 609), but the UNCITRAL Model Law on International Commercial Conciliation has not been adopted.

The Mediation Ordinance (Cap 620) is not based on any treaty.

2 Domestic mediation law

What are the primary domestic sources of law relating to domestic and foreign mediation? Are there any differences for the mediation of international cases?

Hong Kong is known as an international dispute resolution centre and has enacted the Mediation Ordinance (Cap 620) (www.doj.gov.hk/eng/public/pdf/2013/cape.pdf) applicable to mediation of both domestic and international cases. It came into effect on 1 January 2013. Although there is no civil procedure legislation related to mediation in force, the judiciary of Hong Kong has issued nine practice directions (see http://mediation.judiciary.gov.hk/en/practice_directions.html for a complete list) for the conduct of various court proceedings related to mediation. The most significant ones related to business activities are Practice Direction (PD) 31 (PD 31 mediation generally), PD 3.3 (winding-up of corporations) and PD 6.1 (construction and arbitration list).

There are no differences for the mediation of international cases.

3 Mandatory provisions

Are there provisions of domestic mediation law that must be considered in mediation proceedings?

There are no mandatory provisions for mediation in Hong Kong. Mediation is conducted on the voluntary willingness of the parties. PD 31 (http://legalref.judiciary.gov.hk/lrs/common/pd/pdcontent.jsp?pdn=PD31.htm&lang=EN) has provisions for litigants to initiate mediation proceedings. Any legally represented party to a litigation can give notice to the other parties of their intention to resolve the case by mediation. In Hong Kong, the court has the discretion to awards costs to the successful party. Under PD 31, the court also has the discretion to make 'adverse costs order against a party on the ground of unreasonable failure to engage in mediation'. While PD 31 does not impose parties to mandatory mediation, the practical effect is that parties (under legal advice of their solicitors and encouragement by the court) are more likely to attempt mediation in order to avoid the possibility of an adverse costs order under PD 31.

4 Obligation to mediate

Is mediation in your country obligatory? Can mediation be ordered by courts in your country?

There are no obligations for parties to mediate. The court will encourage parties to mediate their differences. See question 3.

5 Court-annexed mediation

Does the law of your country provide for court-annexed mediation? If so, is court-annexed mediation mandatory?

There are no laws that provide for court-annexed mediations.

6 Mediation-arbitration and other forms of mediation-related ADR

Is mediation combined with arbitral proceedings? May a mediator act later in the same dispute as an arbitrator, conciliator or judge? Are arbitrators aware of mediation, and if yes, are they willing to transfer arbitration cases to mediation? Which other proceedings are available and used in your country that are related to mediation?

Sections 32 and 33 of the Arbitration Ordinance (Cap 609) (www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075/$FILE/CAP_609_e_b5.pdf) provide for a mediation after arbitral proceedings have commenced. The arbitrator can, with the consent of the parties, act as the mediator in the mediation. In the event the mediation does not arrive at a settlement, the mediator may act as the arbitrator of the same dispute (under certain circumstances).

On the contrary, the Mediation Ordinance (Cap 620) defines a mediator as 'one or more impartial individuals, without adjudicating a dispute or any aspect of it' and specifically excludes mediation proceedings referred to in sections 32(3) and 33 of the Arbitration Ordinance (Cap 609).

The Mediation Code (adopted by institutions in Hong Kong, see www.hkmaal.org.hk/en/HongKongMediationCode.php) and the annexed 'agreement to mediate' stipulates that the mediator should have no interest in the outcome of the mediation and to disclose any potential conflicts of interest to the parties. The agreement to mediate further clarifies that the mediator will not give any advice to, or make any decisions for any party and will not impose a result on any of the parties. The Mediation Code is presently under review.

Many arbitrators in Hong Kong are 'accredited mediators' and those who are not are generally aware of mediation and its benefits. There is no information available to ascertain if arbitrators are willing to transfer arbitration cases to mediation.

Adjudication is promoted by many professional construction associations as an ADR proceeding. There is no legislation related to adjudication. The Hong Kong International Arbitration Centre (HKIAC) maintains a panel of about 30 adjudicators and has published its Adjudication Rules and a Code of Ethical Conduct.

A consultation document was released in 2015 for comments on a 'Proposed Security of Payment Legislation for the Construction Industry – Public Consultation' (SOPL) (www.devb.gov.hk/filemanager/en/content_880/SOPL_Summary_and_Guide.pdf). The proposed SOPL

provides for a statutory right for parties to seek adjudication for disputes related to payment of construction works.

In the public sector, SOPL will apply to all contracts and subcontracts for works, including maintenance and renovation.

In the private sector, SOPL will only apply to individuals, businesses and incorporated owners on the procurement of new buildings costing over HK$5 million or related consultancy services costing over HK$500,000. It should be noted that private sector repair, maintenance and renovation will not be covered.

Claims under contracts can be made as statutory 'payment claims'. If these are ignored or disputed they can be taken to adjudication for a binding decision.

Conciliation is defined in certain legislation related to labour and labour relations as well as various types of discrimination in society. The Labour Relations Ordinance (Cap 55) provides for a form of 'mediation', which in essence is more akin to conciliation. The Ombudsman Ordinance (Cap 397) also provides for 'mediation' for minor matters. All of the processes described in this paragraph as well as 'mediation' defined in sections 32 and 33 of the Arbitration Ordinance are specifically excluded by the Mediation Ordinance.

A pilot scheme for the Private Financial Adjudication (PFA) has recently been set up to deal with matrimonial and family proceedings. It is a voluntary determinant process conducted by a recognised adjudicator under a PFA agreement signed by the parties. The parties must agree to go through the process in good faith and comply with the procedural directions of the adjudicator. The determination by the adjudicator is binding on the parties but not binding on the court. It is not an arbitral award but considered by the court to make an order as it deems fit having regard to the approach in *S v S* [2014] EWHC 7 (Fam).

7 Online dispute resolution (ODR)

Have there been any developments regarding online dispute resolution in your country? Is your country participating in any international ODR project? Is online mediation available in your country?

The HKIAC (www.hkiac.org) has ODR mechanisms using 'documents only' arbitration for resolving disputes for domain names, registry transfers, internet keywords and wireless keywords.

Hong Kong is listed as a participating country for ODR exchange on its website, no published information is available.

No published information is available for online mediation in Hong Kong.

8 Confidentiality and disclosure

Is mediation a confidential proceeding in your country? In which cases can disclosure of confidential information by the mediator or the parties be permitted or compelled? Are there any sanctions for breach of confidentiality?

One of the objects of the Mediation Ordinance (Cap 620) is: 'to protect the confidential nature of mediation communications' (section 3(b)). The Ordinance clearly states that all 'mediation communications' (other than the agreement to mediate or the settlement agreement – section 5) cannot be disclosed except where allowed (section 8(1)). This includes parties' consent, when imposed by law, to prevent danger of injury to a child or for seeking legal advice (section 8(2)).

With the leave of the court or tribunal (by application under section 10), section 8(3) further allows disclosure 'for the purpose of enforcing or challenging a mediated settlement agreement', where there is a complaint against a mediator or other justifiable purpose.

These are the usual exceptions in most common law jurisdictions.

One notable exception is disclosure for 'research, evaluation or educational purposes without revealing, or being likely to reveal, directly or indirectly, the identity of a person to whom the mediation communication relates' (section 8(3)(f)). The Hong Kong government seems anxious to be able to compile statistics on mediation.

No sanctions are imposed by the Ordinance if a mediator breaches confidentiality. On the other hand, mediation institutions such as the Hong Kong Mediator Accreditation Association Limited (HKMAAL), HKIAC, the Law Society and the HK Mediation Centre (HKMCentre) have published ethical and disciplinary rules for mediators on their panels. No reported cases have been published.

9 Limitation period

Does a mediation proceeding suspend the limitation period for a court claim?

No.

10 Settlement

What is the legal character of the final (settlement) agreement? What are the legal requirements for the enforceability or the content of the agreement? Is it possible to revise, withdraw or challenge the final settlement agreement?

The mediation settlement agreement is drafted as a legally binding contract. Its enforceability is that of any legally binding contract in Hong Kong. The parties can also consent to the court making an order based on the terms of settlement.

In the case of a settlement by the parties to an arbitral proceeding, the parties can also consent to the Arbitral Tribunal making a consensual award based on the terms of settlement (section 66(1) of the Arbitration Ordinance that is a verbatim quote from article 30 of the UNCITRAL Model Law). In the event the parties prepare and enter into a written 'settlement agreement', section 66(2) of the Ordinance deems that agreement to be an arbitral award for the purposes of enforcement.

It is difficult to revise, withdraw or challenge the final settlement agreement unless there is compelling evidence. In the first *Champion Concord* case (*Champion Concord Ltd and Craigside Investments Ltd v Lau Koon Foo and the District Lands Officer, Sai Kung* (unreported), FACV Nos. 16 and 17 of 2010, 27 May 2011)) the Appeal Committee refused an application for an appeal to the Court of Final Appeal (CFA) on the basis that it was an attempt to 'start the litigation all over again' and that the 'fundamental importance of confidentiality in mediation is universally acknowledged and it can only be in highly exceptional circumstances that evidence which invades such confidentiality will be permitted to be adduced'.

In the second *Champion Concord* case (*Champion Concord Ltd and another v Lau Koon Foo and another* (FACV Nos. 16 and 17 of 2010)), the CFA held that 'the language of the agreement was clear and left no room for doubt as to the parties' understanding.'

11 Mediation institutions

What are the most prominent mediation institutions in your country?

The HKMAAL was established in 2012 by the Law Society of Hong Kong, the HKIAC, the Bar Association and the HKMCentre (as founding members) under the strong encouragement and support of various departments of the government of Hong Kong (Recommendation 25 of the Working Party on Mediation set up by the Department of Justice (DOJ) to establish a single mediator accreditation body in Hong Kong – see questions 12 and 26).

The HKMAAL has seven corporate members: CEDR Asia-Pacific; Hong Kong Institute of Arbitrators; the Hong Kong Institute of Architects; Hong Kong Institute of Construction Managers; the Hong Kong Institute of Surveyors; the Hong Kong Institution of Engineers; and Professional Mediation Consultancy Centre Limited.

All founding and corporate members of the HKMAAL have undertaken to abide by the accreditation criteria of the HKMAAL.

The HKMAAL is the premier mediator accreditation organisation in Hong Kong. Its mission is to set standards for the accreditation of mediators and training courses and to 'promote a culture of best practice and professionalism in mediation in Hong Kong'.

The Hong Kong Mediation Council was formed in the 1980s as a branch of the HKIAC. The HKMCentre was formed in the late 1990s. Since the advent of PD 31 in 2010 (see question 3), many more mediation-related institutions have popped up.

Mediation procedure

12 Background

Describe the development of mediation in your country.

When the new Hong Kong Airport Core Projects (ACP) was commenced (in the 1980s) to build the new Hong Kong International Airport at Chep Lap Kok, Lantau Island, the contracts related to ACP incorporated a 'mediate then arbitrate' clause. Several dozen cases were mediated with about 70–80 per cent success. The General Conditions of Contract of the Government of Hong Kong have included a similar clause since the 1990s for all building and infrastructural works.

Between 2000 and 2003, the Family Court of Hong Kong started the first family mediation scheme with a Practice Direction of the Court (PD 15.10). There were some 1,000 cases during the three years with almost 70 per cent of the cases resulting in full settlement and almost 10 per cent with partial settlement. Its resounding success led to more pilot schemes using Practice Directions (http://mediation.judiciary.gov.hk/en/practice_directions.html).

Following in the footsteps of the Civil Justice Reform (CJR) in England by Lord Woolf in 1996, the CJR working party was established in Hong Kong in 2000. Its final report was published in 2004. The Civil Justice (Miscellaneous Amendments) Bill was passed into law in 2008 and came into force on 2 April 2009.

The Chief Justice's Working Party was set up in 2006 to consider how consensual mediation of civil disputes in the court of first instance, the District Court and Lands Tribunal may be facilitated.

A working group on mediation was set up by the DOJ in 2008 to review the current development of mediation and provision of mediation services in Hong Kong. Its report was published in February 2010 and had 48 recommendations that outlined the preliminary development of mediation in Hong Kong. A mediation task force was set up by the DOJ in 2010 to implement the 48 recommendations.

The Mediation Ordinance Cap 620 (January 2012) and the formation of HKMAAL in 2012 were the result of the 48 recommendations.

PD 31 was implemented as part of the CJR in Hong Kong (effective 2 April 2010).

The judiciary publishes extensive statistics on mediation (http://mediation.judiciary.gov.hk/en/figures_and_statistics.html) and their success rates.

In summary, there is a growing trend in the number of mediations conducted in Hong Kong for District Courts (DC) and Court of First Instance (CFI) cases. The percentage of mediations that resulted in full or partial settlement average around 43 per cent. There seems to be a slight reverse trend for Family Court (FC) and Lands Tribunal Building Management (LTBM) cases. Their settlement rates were 68 per cent and 42 per cent respectively.

The number of mediation cases conducted by the above courts and their success rates for full or partial settlement are as follows:

- DC: 1,754 cases; 44 per cent (between 2011 and 2015);
- CFI: 2,900 cases; 43 per cent (between 2011 and 2015);
- FC: 1,391 cases; 68 per cent (between 2003 and 2015); and
- LTBM: 812 cases; 42 per cent (between 2008 and 2015).

13 Areas of disputes for mediation

In which areas of disputes is mediation preliminarily applied? Are there any disputes that cannot be mediated?

Family, personal injuries and building management cases comprise the bulk of mediation cases in Hong Kong. There are also many mediations involving construction, commercial, trading and banking disputes.

There are no restrictions on the types of civil disputes that can be mediated in Hong Kong. Restorative justice in criminal law is not prevalent in Hong Kong but is growing in prominence.

Peer mediation programmes have been implemented for selected secondary schools since around 2000.

14 Procedural requirements

Are there procedural requirements for mediation proceedings in your country? Must the parties prepare for the mediation?

The Mediation Ordinance defines mediation as a process where an impartial mediator assists the parties to identify the issues in dispute, explore and generate options, communicate with one another or reach an agreement regarding the resolution of the whole, or part, of the dispute (section 4(1)). The Ordinance does not set out any specified procedural requirements.

The Mediation Code (presently under review) does not impose a specific mediation procedure. The annexed Agreement to Mediate does restrict the mediator from giving advice, impose a result to or make decisions for any party (section 4). If a mediator is appointed pursuant to these terms, then the mediator is bound to conduct the mediation only by using a facilitative mediation model. It should be noted that although the Mediation Ordinance does not seem to have such a restriction; Schedule 1 lists certain 'conciliation' or 'mediation' processes (including 'mediation' under the Arbitration Ordinance) in other Ordinances not applicable under the Mediation Ordinance. These processes can be described as 'not' or 'not quite' facilitative. The question arises: does this imply that the Mediation Ordinance is indirectly ruling out other forms of mediation?

There is no legislation regarding the duties of a party in a mediation. In section 7 of the annexed agreement to mediate (in the Mediation Code), the parties 'agree to cooperate in good faith with the mediator and each other during the mediation'. In practice, the parties will usually prepare an information package for the mediation.

15 Structure and process of mediation

Describe the most common steps for the mediator's preparation of a mediation proceeding. Describe the most common structure of mediation proceedings. What is the typical time frame for a mediation proceeding? Are there any special considerations for international mediation proceedings?

The facilitative style of mediation is promoted in Hong Kong. The Mediation Code (presently under review) and the assessment criteria of HKMAAL use the facilitative mediation model.

For commercial mediations, the mediator will usually meet privately with the parties after his or her appointment has been finalised and retainer received. Bundles of documents would already have been prepared for the mediator to review. The parties may agree on the document list prepared for the mediator and each party would also prepare a confidential brief for the mediator. Alternatively, each of the parties might prepare their own bundle and mark certain documents as 'confidential'.

At the private meeting, the mediator would explain his or her role and what the parties might expect at the mediation. The parties will be reminded to prepare the relevant authorisations for those attending the mediation and undertakings of confidentiality. This meeting might touch on some of the merits of the case and is primarily used by the mediator to explain the process, assess the personalities of the negotiating team and understand a bit more of their positions.

The common mediation process model used in Hong Kong is as follows:

- introduction stage (opening statement of mediator and the parties);
- exploration stage (initial discussion, common ground/issues, identification of issues, prioritised agenda, discussion of each agenda item (seek objective criteria, options));
- negotiation stage (initial negotiations, private sessions (underlying issues, reality checking), final negotiations); and
- settlement stage (analyse if solutions are workable, record in writing).

A simple mediation could be completed within half to one day; PD 31 requires parties to agree to 'a specified minimum level of participation [to] qualify as a sufficient attempt at the mediation'. Often, that level is specified as two hours.

A more complex mediation where parties are keen to settle might take two or more days. Mediations can also be adjourned to allow parties to provide more information.

There are many bilingual mediators (English and Cantonese) in Hong Kong. A handful are trilingual (Putonghua/Mandarin). There are also mediators fluent in other languages. As a modern cosmopolitan city, translators for most languages are available in Hong Kong.

16 Mediation style

What is the primary mediation style in your country for commercial mediation: facilitative mediation, evaluative mediation or transformative mediation? Are private sessions (caucuses) or joined sessions, or both commonly used in mediation?

The 'facilitative' style of mediation is most commonly used in Hong Kong. The mediation ordinance alludes to this style and defines the mediator's role as one 'without adjudicating a dispute or any aspect of it'. The Mediation Code itself is silent, though the annexed 'Agreement to Mediate' clearly defines the mediation process synonymous with that of a 'facilitative mediation'.

It would seem that parties and the mediator would have to 'opt out' of the Mediation Ordinance (if that is possible) to conduct an 'evaluative mediation' and to redraft the role of the mediator in the 'Agreement to Mediate' as that of an 'evaluative mediator'. Another alternative might be to just rename that procedure without attaching the word 'mediation' to the 'process'. As the Mediation Ordinance only came into effect in 2013, there are as yet no cases on this topic.

The DOJ and the Intellectual Property Department of the government of Hong Kong have, since late 2015, been promoting Hong Kong as an intellectual property trading hub as well as promoting 'evaluative mediation' as one of the methods for resolving IP disputes as an alternative to 'facilitative mediation'. It is presently unclear as to which model of evaluative mediation is being considered – whether facilitation is first attempted before the 'evaluative mode' or if it is more akin to an 'early neutral evaluation' (ENE). It seems that government is leaning more towards an ENE approach and labelling it as an 'evaluative mediation'.

Transformative mediation is not prevalent in Hong Kong.

Both joined (or joint) sessions and private session (caucuses) are commonly used in Hong Kong.

17 Co-mediation

What form does team mediation typically take in your country? Is co-mediation regularly used in your country? In which kind of cases?

The Mediation Ordinance recognises co-mediation (section 4(1)). There is no information available to ascertain if it is regularly used in Hong Kong. With the consent of all parties, an intern of the appointed mediator may also be present. In this case, the intern is present more as an observer than as a co-mediator. To be accredited as a family mediator, part of the assessment process requires the candidate to mediate two live cases under supervision. The 'family supervisor' is present as an 'assessor' and to assist only when the candidate is experiencing difficulties. This is also not strictly a co-mediation even though two 'mediators' are present during the mediation.

This author has conducted numerous complex international cases where a team of up to three mediators were present to assist with observing the parties' reactions during the mediation by note-taking and conducting private sessions with parties. Co-mediation is useful when certain technical knowledge or expertise is required in topics that no one mediator can be expected to possess.

18 Party representatives and third parties

What is the practice in your country with respect to the inclusion of party representatives in mediation proceedings? What is the practice with respect to experts and witnesses?

There are no restrictions regarding party representatives and third parties (including experts) attending as long as the parties consent and the attendees sign an undertaking regarding the confidentiality of the mediation. Lawyers are usually present for complex mediations and absent for simple cases to save legal costs.

Witnesses (except for experts) are seldom present in a mediation.

19 Specific mediation procedures/conflict or dispute management systems

Have companies set up their own dispute management systems in your country? Are there any special routes for consumers to use mediation for small claims? Are there any institutions that offer mediation for their customers, users, etc? Is there any reported or published information regarding dispute management systems of companies for conflicts in employment matters?

There are nine Practice Directions of the court dealing with various areas of disputes (see question 2).

Certain industries have mediation schemes for disputes with their consumers or the public.

The HK Mediation Council initiated the New Insurance Mediation Pilot Scheme in 2006 with start-up funding from the Hong Kong Federation of Insurers.

The HKIAC was appointed by the Hong Kong Monetary Authority (HKMA) in 2008 to be the service provider for the Lehman Brothers-related Investment Products Disputes Mediation and Arbitration Scheme. This scheme was terminated around 2011.

The Financial Dispute Resolution Centre (FDRC) was set up in November 2011 as a dispute resolution centre to resolve disputes involving consumers and financial institutions licensed by the HKMA or the Securities and Futures Commission (www.fdrc.org.hk/en/html/aboutus/aboutus_welcome.php). The resolution mechanism involves a unique system of mediation then arbitration (only if the complainant wishes to continue with arbitration). The claim must be less than HK$500,000 (although there are recent discussions to amend the present maximum claim amount) and a 12-month limitation period. The fees for this service payable by the claimant are based on the amount in dispute: either HK$1,000 or HK$2,000. There were probably less than 100 FDRC mediation cases during the first three and a half years of operations.

The customer complaint settlement scheme (CCSS) for the telecommunications industry was set up in November 2012 for a two-year trial period. It was funded by the Office of the Telecommunications Authority and operated by the Communications Association of Hong Kong. In its first year, there were 106 cases referred to the CCSS, of which 31 cases were referred to mediation. The remaining 75 cases were settled before the referral. Of 31 cases referred to mediation, nine cases were settled before the mediation and the other 22 cases were settled after the mediation. The mediation fee paid by the consumer and the service provider were HK$100 and HK$200 respectively (www.ofca.gov.hk/filemanager/ofca/en/content_793/CCSS_AnnualReport.pdf).

Mediation clauses and mediation agreement

20 Mediation clauses

Are mediation clauses commonly considered in the course of contract drafting? Are there special requirements for mediation clauses? Are there any relevant court decisions referring to such escalation clauses?

ADR clauses are commonplace in Hong Kong for arbitrations. Mediation clauses (mediate first then arbitrate) are starting to gain recognition but are not often used. Even if a mediation clause is present, and as we do not have a mandatory system of mediation in Hong Kong, such a clause merely reminds parties that mediation is an option. Even if the courts were to enforce such a clause, an unwilling party can simply attend the mediation meeting and not participate.

More complex multi-tiered escalation clauses are rare. There are no relevant court decisions referring to such escalation clauses.

Update and trends

The introduction of the pilot scheme for the PFA to deal with matrimonial and family proceedings is a recent development in Hong Kong. It is a voluntary determinant process conducted by a recognised adjudicator under a PFA agreement signed by the parties. This pilot scheme seems to be working well and may evolve into an accepted procedure in future matrimonial proceedings. See question 6.

There has been a recent move by the DOJ to use 'evaluative mediation' (using a model more akin to ENE) for intellectual property disputes as 'an alternative to facilitative mediation'. See question 16.

21 Conclusion and content

Is there any obligation to conclude an agreement between the mediator and the parties or between the parties before or at the beginning of the proceeding? Are there any legal requirements regarding the content of the agreement between the mediator and the parties? What are the common provisions for such mediation agreement? Must the agreement be in writing?

The Mediation Ordinance defines an 'agreement to mediate' as being in writing. It is presumed this is done before the commencement of the mediation. It would be impractical for a mediator to commence a mediation before this agreement is finalised and signed.

The Mediation Code (presently under review) provides a sample 'agreement to mediate'. The object of this agreement is to appoint the mediator and bind the parties to mediate on such mutually agreed terms.

The sample is comprehensive and provides for the following:

- appointment of the mediator;
- the role of the mediator;
- conflict of interest;
- the mediator's fees;
- role and responsibilities;
- cooperation by the parties;
- authority to settle and representation at the mediation session;
- communication between the mediator and the parties;
- confidentiality of the mediation;
- termination of the mediation;
- settlement of the dispute;
- exclusion of liability and indemnity;
- compliance with the Mediation Code;
- cost of the mediation;
- legal status and effect of the mediation; and
- full disclosure.

22 Costs for mediation

Are there any legal provisions on mediators' fees? What is the average mediator's fee in mediations involving companies? Is there any legal aid or other financial support for mediation proceedings if parties cannot afford to pay the mediator?

There is no legislation on a mediator's fees. The Hong Kong Mediation Code does impose on the mediator to describe in writing the fees for the mediation and not to charge contingent fees or base the fees upon the outcome of the mediation. Similar provisions are found in the HKIAC and HK Law Society's Mediation Rules.

Mediator fees for mediation involving companies vary according to the experience and seniority of the mediator, ranging from US$80 to US$250, US$500 and even upwards of US$1,000 per hour. Some mediators charge on a per-case basis for simple cases. Some might charge a daily rate. There are mediation schemes (for defined types of cases) that have fixed fees for the case or by the hour. These schemes are usually designed for consumer-related matters.

The mediator fees and the venue rental charges are usually split between the parties.

The Legal Aid Department of Hong Kong (LAD) is a keen supporter of mediation. Parties who pass the means test with cases that pass the merits test are referred to a solicitor who handles the litigation. The LAD oversees the legal proceedings and encourages the parties to mediate rather than settling for trial.

Professional matters for mediators

23 Regulation

Is there any specific regulation of mediators in your jurisdiction? Give details. Are there any regulations on immigration or tax issues or regarding the right to work for foreign mediators?

There are no regulations in Hong Kong regarding qualification of mediators. In theory, any person whom the parties trust can be appointed by them as their mediator (subject to the confidentiality requirements of the Mediation Ordinance).

The agreement to mediate (which also appoints the mediator) is likely to include the mediation rules agreed to by the parties. The mediator would be obliged to adhere to those rules.

Institutions that maintain panels of mediators have their own disciplinary requirements and proceedings.

A foreign national will have to apply for a temporary work visa from the Hong Kong Immigration Department when acting as a mediator in Hong Kong. Income taxes might be payable on income earned in Hong Kong subject to the 60-day rule exemption. The flat-rate tax for 2016 (without any deductions) was a maximum of 15 per cent of the income earned in Hong Kong. There are also numerous double taxation treaties that Hong Kong has concluded with different countries (www.ird.gov.hk/eng/tax/dta_inc.htm).

It would be advisable to seek tax advice.

24 Training

Are there any requirements regarding training for mediators?

The HKMAAL is the premier mediator accreditation organisation in Hong Kong (see question 11).

Each mediation training course conducted by third-party course providers have to be approved by the HKMAAL. The HKMAAL imposes strict experience requirements for lead trainers, assistant trainers and coaches. The course must be at least 40 hours (excluding breaks) and include negotiation skills and mediation dynamics, relationship and communication skills, a facilitative process model, intake and ethics.

25 Continued education

Must mediators undertake continued professional education? Is there a credit point system for the continued education of mediators?

Most of the institutions that accredit mediators or maintain a panel of mediators will have continued professional development (CPD) requirements. Generally, there are five CPD points (usually one point per hour of study) per year. The HKMAAL and the Law Society require a mediator on their panels to accumulate 15 CPD points over three years. The HKIAC requires 20 points over four years.

26 Accreditation of mediators

Outline the system for certification of mediators.

See questions 11 and 12. Accreditation for an HKMAAL-accredited mediator (general) includes the following:

- completion of HKMAAL-approved mediation training course (at least 40 hours);
- mediation of at least two HKMAAL simulated general (non-family) mediation cases (the applicant must be assessed to have achieved an acceptable level of competency in two cases); and
- submission of an application (the applicant must have three years' full-time working experience, and may require an interview or further conditions).

Accreditation for HKMAAL-accredited mediator (family) includes the following:

- completion of HKMAAL-approved basic family mediation training course (at least 40 hours);
- completion of HKMAAL-approved advanced family mediation training course (at least 24 hours);

- supervision by a 'family supervisor' in at least two live family mediation cases (must demonstrate the ability to manage emotional intensity and mediate complex financial and child-related matters; achieving an acceptable level of competency in two cases); and
- submission of an application (the applicant must have a relevant university degree and work experience, and may require an interview or further conditions).

Conversion programmes are also available for general mediators to be accredited as a family mediator and vice versa (see www.hkmaal.org.hk/en/HowToBecomeAMediator_F.php for more details).

The HKMAAL has more than 2,200 accredited mediators (general and family) on its registries. Its founding members, corporate members and other organisations also maintain their own registries of mediators.

27 Mediator liability and sanctions

What are the duties of mediators in a mediation procedure? What liability do mediators face when offering their services and conducting mediation proceedings? Is professional indemnity insurance for mediators available or obligatory? Are there any further sanctions or other disciplinary measures for mediators in cases of misconduct, poor performance, etc? Are there any regulations referring to the dismissal of mediators?

The Mediation Ordinance does not mention liability of mediators. Section 104 of the Arbitration Ordinance provides that a mediator is only liable in law for dishonesty for an act done or omitted to be done.

The Mediation Code (presently under review) is also silent on the liability of a mediator and puts the onus on the mediator to consider if professional indemnity insurance is appropriate (section 6). The annexed Agreement to Mediate clearly excludes liability except for fraudulent acts or omissions (section 18).

The Mediation Rules of the HKIAC (section 15) and that of the Law Society (section 14) exclude liability except for acts or omissions 'as the consequences of fraud or dishonesty' (section 15).

It is up to the individual mediator to obtain professional indemnity insurance and many mediators do not necessarily have coverage due to the high cost and low risk. The Law Society's professional indemnity insurance covers solicitors acting as a mediator if that activity forms part of the legal practice of their firm.

Mediation institutions that maintain a panel of mediators will usually have their own mediation rules, code of ethics and disciplinary procedures.

28 Appointment

Is there any regulation regarding the appointment of mediators? Is it common in your country to seek assistance by institutions or official bodies for the appointment of mediators? Are mediators obliged to inform about conflicts of interest in the course of appointment?

Section 32 of the Arbitration Ordinance (Cap 609) allows the HKIAC to appoint a mediator only in the case where there is an arbitration agreement that provides for the appointment of a mediator. No other institution has a similar statutory power of appointment of a mediator. If the parties' agreement to mediate does not have a suitable mediator appointment clause (such as deferring to the head of a professional body or the HKIAC), then parties either choose their own mediator or consent to a specific institution to appoint the mediator.

There is no data on the total number of mediator appointments by institutions.

The HKMAAL does not appoint mediators. The Joint Mediator Helpline Office (set up in 2010 by eight professional institutions to promote mediation) indirectly appoints mediators via an appointment by its founders: the HKIAC; the HK Bar Association; the Law Society of Hong Kong; the Chartered Institute of Arbitrators (East Asia Branch); the Hong Kong Institute of Arbitrators; the Hong Kong Institute of Architects; the Hong Kong Institute of Surveyors; and the HKMCentre.

The Mediation Ordinance defines a mediator as 'impartial'. The Mediation Code (section 2) also uses the same word and requires the mediator to disclose 'any affiliations/interests which the mediator may have or had with any party' and prior consent is required.

The Mediation Rules of the HKIAC and the Law Society are similar. Section 6 of both rules provides for the disqualification of a mediator where there are any financial or personal interest and requires written disclosure ('any prior dealings with either of the parties or any circumstances likely to create a presumption of bias or prevent a prompt resolution of the dispute') to and consent from the parties.

Cases

29 Notable cases

Briefly give details of any significant recent mediation cases or disputes or judgments involving mediation that have been published in your country.

There are few reported cases in Hong Kong related to mediation. The following cases have been categorised.

Suitability of mediation / reasonableness / costs order issues

- *Chan Gordon v Lee Wai Hing and Li Po Kwong* [2011] 2 HKLRD 1029; date of judgment: 20 April 2011;
- *Golden Eagle International (Group) Ltd v GR Investment Holdings Ltd* [2010] 3 HKLRD 273 HCA 2032/2007;
- *Catherine v Tary Ltd* (unreported) [2009], HCPI 805/2007, HKEC 1669;

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- *the Incorporated Owners of Shatin New Town (the Applicant) v Yeung Kui (the Respondent)* CACV 45/2009 on appeal from LDBM No. 339 of 2007;
- *Wu Wei v Liu Yi Ping* HCA 1452/2004; and
- *Chu Chung Ming v Lam Wai Dan* HCCW 377/2011.

Confidentiality of mediation (note that the cases predate the Mediation Ordinance)

- *S (the Petitioner) v T (the Respondent)* CACV 209/2009 on appeal from FCMC No. 11,230 of 2008; and
- *Champion Concord Ltd and Craigside Investments Ltd v Lau Koon Foo and the District Lands Officer, Sai Kung* (unreported), FACV Nos. 16 and 17 of 2010, 27 May 2011.

Settlement agreement

- *Champion Concord Ltd and Craigside Investments Ltd v Lau Koon Foo and the District Lands Officer, Sai Kung* (unreported), FACV Nos. 16 and 17 of 2010, 27 May 2011) (see previous);
- the Court of Final Appeal: *Champion Concord Ltd and another v Lau Koon Foo and another*, FACV Nos. 16 and 17 of 2010;
- *L v C* [2007] 3 HKLRD 819; and
- *SPH v CA* [2014] 17 HKCFAR 364 para 30.

Case management and mediation

- *Faith Bright Development Ltd v Ng Kwok Kuen and others* [2010] 5 HKLRD 425; HCA 9058/1999.

Selection of mediator

- *Upplan Co Ltd v Li Ho Ming and others* [2010] HCA 1915/2009, before Registrar Lung.

India

Sriram Panchu and Avni Rastogi

Indian Centre for Mediation and Dispute Resolution

Law and institutions

1 Treaties

Is your country a signatory to any treaties that refer to mediation? Is your domestic mediation law based on a treaty?

In India the terms 'mediation' and 'conciliation' are used synonymously; this is clarified in the judgment of the Supreme Court in its decision in *Afcons Infrastructure Ltd v M/s Cherian Varkey Construction* [2010] (7) SCALE 293.

(In this commentary, the terms 'mediation' and 'mediator' are used; they should be taken to also mean 'conciliation' and 'conciliator'.)

There are two principal enactments that deal with mediation. The Rules framed by the Supreme Court and the high courts under section 89 of the Code of Civil Procedure (CPC) deal with court-annexed mediation. Part III of the Arbitration and Conciliation Act 1996 (ACA) deals with private mediation.

Part III of the ACA is based on the UNCITRAL Conciliation Rules 1980.

Several substantive provisions of the relevant rules under section 89 of the CPC mirror those in the ACA.

2 Domestic mediation law

What are the primary domestic sources of law relating to domestic and foreign mediation? Are there any differences for the mediation of international cases?

The primary domestic sources of law relating to mediation in India are as follows:

- the Arbitration and Conciliation Act 1996 (specifically Part III);
- section 89 of the CPC 1908;
- the Industrial Disputes Act 1947, which provides for mediation of industrial disputes by officers appointed by the government;
- the Hindu Marriage Act 1955, the Special Marriages Act 1954 and the Family Courts Act 1984, which require the court in the first instance to attempt mediation between parties;
- the Legal Services Authorities Act 1987, which provides for setting up Lok Adalats (see question 6); and
- section 442 of the Companies Act 2013, which provides for referral of company disputes to mediation by the National Company Law Tribunal and Appellate Tribunal read with the Companies Mediation and Conciliation Rules 2016 (notified on 9 September 2016).

The enforcement of settlements in international commercial conciliation is treated differently under the ACA. International commercial conciliation settlements can be enforced in any of the following ways:

- incorporation in an arbitral award on agreed terms that can be enforced in international jurisdictions by virtue of legislation enforcing international conventions such as the New York and Geneva Conventions;
- treating the settlement as a contract and enforcing it as such in India under the Contract Act, Specific Relief Act and the CPC; or
- incorporation in a decree of the court. Such decree can be enforced in India under the CPC, which provides for the enforcement of Indian and foreign decrees.

3 Mandatory provisions

Are there provisions of domestic mediation law that must be considered in mediation proceedings?

Part III of the ACA is applicable to private mediations. It contains provisions for the appointment and role of mediators, conduct of proceedings, communication and disclosure of information, status and effect and enforcement of settlement agreements, confidentiality, not resorting to arbitral or judicial proceedings during mediation (except when necessary to protect rights), costs, non-admissibility of evidence in other proceedings, etc.

The Civil Procedure (Mediation) Rules framed under section 89 of the CPC by different high courts deal with court-annexed mediation and provide for appointment and empanelment of mediators, disqualifications, procedure for mediation, confidentiality, role of mediators, fixing of fees, ethics, etc.

Other provisions of the CPC provide that in disputes where the government is a party, and in matrimonial matters, the court should make every effort to assist the parties to arrive at a settlement.

Under the Industrial Disputes Act 1947, mediators have a wide latitude to persuade the parties to come to a settlement and may also inform the government of the reasons why a settlement could not be reached. Such mediation is mandatory where a public utility service is involved.

The CPC and the Indian Contract Act 1872 also provide that:

- where a compromise is entered into between the parties, the court shall pass a decree in accordance with it, except when the agreement is void or voidable under the Indian Contract Act 1872. Agreements cannot violate public policy, be immoral or defeat the provisions of law, or be fraudulent, or involve injury to the property of another;
- agreements on behalf of numerous parties can be entered into only with the leave of court; and
- minors cannot enter into agreement: they will have to be represented by natural guardians or guardians appointed by the court.

4 Obligation to mediate

Is mediation in your country obligatory? Can mediation be ordered by courts in your country?

Section 89 of the CPC, as clarified by the Supreme Court in *Afcons v Varkey*, requires the court to consider, for each case before it, whether it is fit for reference to ADR. If it finds that the case does not fall in the 'excluded category' (see question 13), the court should attempt reference to one of the five categories of ADR processes – arbitration, private mediation (conciliation), court-annexed mediation, Lok Adalat and judicial settlement. The parties' consent is required for a reference to arbitration or private mediation. There is no requirement of consent of parties for the other three ADR processes; the court will hear the parties and determine which is most appropriate. The court will keep track of the ADR process by fixing a hearing date for the ADR report. In the event that the ADR process fails, the court will proceed with the hearing of the suit.

5 Court-annexed mediation

Does the law of your country provide for court-annexed mediation? If so, is court-annexed mediation mandatory?

Section 89 of the CPC and the Rules framed by the Supreme Court and the several high courts thereunder provide for reference by courts to mediation. This is usually to the court-annexed mediation centres that have been established by the Supreme Court, high courts and several district courts. The court provides facilities for mediation and support staff. The mediators are lawyers whose training is organised by the court. The service is free or of minimal cost to the litigants. Mediators are appointed as per the roster. The mediation is conducted within the court complex and the CPC Rules framed by the relevant high court are followed. The order for mediation has to be made by a judge under section 89. These features constitute the significant differences between court-annexed mediation and private mediation. While the court does not insist that the parties settle the dispute in mediation, it will adversely view an unfounded refusal to engage in the process.

6 Mediation-arbitration and other forms of mediation-related ADR

Is mediation combined with arbitral proceedings? May a mediator act later in the same dispute as an arbitrator, conciliator or judge? Are arbitrators aware of mediation, and if yes, are they willing to transfer arbitration cases to mediation? Which other proceedings are available and used in your country that are related to mediation?

The ACA, in section 80(a), provides that, unless otherwise agreed by the parties, the mediator shall not act as an arbitrator in respect of a dispute that is the subject of the mediation proceedings. So with the agreement of the parties in a private mediation, the mediator may arbitrate the dispute if the mediation does not succeed.

Section 30 provides that it is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute, and that with the agreement of the parties the arbitral tribunal may use private mediation or other procedures at any time during the arbitration proceedings to encourage settlement. A settlement so achieved can be recorded in the form of an arbitral award on agreed terms, and is enforceable in court. Under this section, the arbitrator may encourage parties to go to mediation at the hands of a different neutral, or the arbitrator may him or herself act as the mediator. This provides the possibility of med-arb or arb-med. This must be done with consent of the parties.

Often it is senior advocates and retired judges who are appointed as arbitrators in India. They are aware of mediation, but arbitration cases are not frequently transferred to mediation. The likelihood of that happening is higher if the arbitrator is also a trained mediator.

Other consensual dispute resolution methods that are available in India are the Lok Adalat system and judicial settlement. A Lok Adalat is an institution set up under section 19 of the Legal Services Authorities Act 1987 with the jurisdiction to determine and to arrive at a compromise or settlement between the parties to disputes of typically low complexity. The *Afcons* case (see question 29) defines 'judicial settlement' as 'a compromise entered by the parties with the assistance of the court adjudicating the matter, or another judge to whom the court has referred the dispute'. However, there are no rules or procedure laid down for judicial settlements.

We use an innovation of arb-med that avoids the problem of disclosure and confidentiality. The neutral first acts as an arbitrator, hears parties and prepares the award. The award is brought to the next session but is kept confidential. The neutral then engages with the parties as a mediator. Parties are free to make disclosures and offer settlement options since these will not affect the award. By this time the parties are aware of the larger picture and the weak aspects of their case, and the mediator is also aware of the same. We have found that this method has a high rate of success.

7 Online dispute resolution (ODR)

Have there been any developments regarding online dispute resolution in your country? Is your country participating in any international ODR project? Is online mediation available in your country?

There is no online dispute resolution in India today. However, India has had some engagement in ODR in the last decade. eBay India, until 2008, had the concept of online community courts to resolve disputes online. In 2011 an international conference on ODR was hosted in Chennai where the scope and benefits of ODR in dispute resolution and providing access to justice were discussed.

There is no legislation on ODR in India. Representatives from India are participating in the UNCITRAL working group on cross-border ODR.

Online mediation is not available in the country, but there is likely to be a demand for it.

8 Confidentiality and disclosure

Is mediation a confidential proceeding in your country? In which cases can disclosure of confidential information by the mediator or the parties be permitted or compelled? Are there any sanctions for breach of confidentiality?

Yes, mediation proceedings are confidential in India. Section 75 of the ACA provides that notwithstanding anything contained in any other law in force in India, the conciliator and the parties shall keep all matters relating to the mediation proceedings confidential, and that confidentiality extends to the settlement agreement except where its disclosure is necessary for implementation and enforcement.

Best practices dictate that parties to the dispute and the mediator sign a confidentiality agreement prior to the commencement of mediation proceedings.

Section 80(b) of the ACA specifically provides that the conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings.

Section 81 of the ACA makes the following inadmissible as evidence in arbitral or judicial proceeding:

- views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;
- admissions made by the other party in the course of the conciliation proceedings;
- proposals made by the conciliator; and
- the fact that the other party had indicated to accept a proposal for settlement made by the conciliator.

In court-referred mediations, confidentiality is protected by the rules drawn up by courts under the CPC to regulate cases referred by judges to mediation (Rule 20 of the Model Civil Procedure (Mediation) Rules 2003). In their reports to the court, the mediators must only state whether the case has been settled or not; no further details are to be given.

Confidential information given by one side in the mediation process cannot be revealed to the other party.

In case of a breach of confidentiality, the injured party can sue for breach of contract, or negligence or wilful misconduct. It can seek damages or a permanent injunction against disclosure. It may also be entitled to seek interlocutory injunctions to prevent disclosure. The court will take a serious view of a breach of confidentiality.

9 Limitation period

Does a mediation proceeding suspend the limitation period for a court claim?

No. In India, the mediation proceeding does not suspend the limitation period for a court claim. Section 77 of the ACA prohibits parties to a conciliation from initiating any arbitral or judicial proceedings during the conciliation proceedings in respect of a dispute that is the subject matter of the conciliation proceedings, except that a party may do so where such proceedings are necessary to preserve its rights. So in the event that the limitation period is close to expiring, the claimant is permitted to initiate arbitral or judicial proceedings.

10 Settlement

What is the legal character of the final (settlement) agreement? What are the legal requirements for the enforceability or the content of the agreement? Is it possible to revise, withdraw or challenge the final settlement agreement?

Section 73 of the ACA provides for the drawing up and signing of a written settlement agreement. When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively. The mediator is required to authenticate the settlement agreement and furnish a copy of the same to each of the parties. Section 74 provides that a settlement agreement has the same effect as an arbitral award on agreed terms. Therefore, it is enforceable as a decree of court, and may also be challenged on the same grounds as an arbitral award.

In the case of a settlement arrived at in a court-annexed mediation or judicial settlement, the same should be reduced to writing and presented to the court, which will pass an order or decree on the terms thereof.

It is extremely difficult to challenge a settlement agreement or award or decree based on such agreement. The vitiating factors are in the nature of fraud, coercion, incapacity of a party, or being contrary to public policy.

Where both parties agree, the settlement agreement can be modified or withdrawn. This cannot be done unilaterally.

11 Mediation institutions

What are the most prominent mediation institutions in your country?

The court mediation centres are the most prominent mediation institutions in India. The Supreme Court, almost all 24 high courts, and several district courts in the country have mediation centres. These courts exercise original and appellate jurisdiction across the entire range of litigation. The country's first court-annexed mediation centre was set up in the Madras High Court in 2005, and soon this model was emulated in other high courts. The courts have given the lead in institutionalising mediation, providing training, certification, referrals, etc.

Non-official institutes include the following:

- the Indian Centre for Alternative Dispute Resolution (ICADR), New Delhi;
- the London Court for International Arbitration (LCIA) (Indian Branch), New Delhi (the ICADR and LCIA focus on arbitration but also promote mediation);
- the Indian Institute of Arbitration and Mediation, Bangalore (carries out training in mediation and produces publications);
- the Arbitration, Mediation, Legal Education and Development Centre, Ahmedabad (comprised of lawyers interested in mediation);
- ADR Centre, Kerala (an initiative of the Centre for Public Policy Research);
- the Indian Centre for Mediation and Dispute Resolution, Chennai (a mediation institute for promoting and conducting mediation); and
- the India International Mediation Centre being set up by the Ministry of Corporate Affairs (government of India) and the Indian Institute of Corporate Affairs as a mediation and mediation training institute.

Mediation procedure

12 Background

Describe the development of mediation in your country.

India has a tradition of consensual resolution. It had the institution of the Panchayat – the five elders – who heard disputes, tried to bring about settlement, and if that failed, issued orders to be obeyed (one of the oldest forms of med-arb). Disputants participated and were heard and the aim of the body was to reach a workable solution. However, this faded in the face of British rule and the spread of the common law system.

In the past decade, interest in mediation has revived. It is now being introduced in a structural and institutionalised way, under the umbrella of the legal system. In 1996 Parliament legislated amendments to the CPC to bring mediation into the court system, and also passed the ACA. The courts have embraced this process strongly, and it is now part of culture and practice to recommend and popularise it, and to send cases to mediation especially to the in-house mediation centres of the courts. The press and other media have carried favourable accounts.

13 Areas of disputes for mediation

In which areas of disputes is mediation preliminarily applied? Are there any disputes that cannot be mediated?

Mediation is used in virtually the entire range of commercial, contractual, business, corporate, employment, and intellectual property disputes. It is also useful in transnational disputes that are bedevilled by issues of choice of jurisdiction and law, and enforcement.

Below is an indicative list provided by the Supreme Court in *Afcons v Varkey*:

- all cases relating to trade, commerce, contracts, corporations, property, construction, banking/financial, shipping and real estate;
- matrimonial disputes, custody cases, maintenance, partition or division of family property;
- disputes between neighbours, employers and employees;
- cases relating to tortious liability; and
- consumer disputes.

In the same decision the Supreme Court also carved out the 'excluded category' of cases that cannot be referred to mediation – representative suits involving public interest, cases involving grant of authority by court after enquiry (grant of probate), cases involving serious allegations of fraud, cases requiring protection of courts (claims against minors, etc), suits for declaration of title against the government and cases involving prosecution for criminal offences that cannot be compounded. Rule 30 of the Companies Mediation Rules provides for a similar list of exclusions.

As regards patents, a challenge to a grant or refusal of patent can be done only in legal forums; however, where a commercial resolution is possible, mediation can be applied.

14 Procedural requirements

Are there procedural requirements for mediation proceedings in your country? Must the parties prepare for the mediation?

In court-referred mediations, the judge records the consent of parties to mediate before marking the case to mediation either in the court mediation centre or to a mediator specifically appointed by the judge. The appointed mediator is free to decide on the procedure to be followed in the mediation or to follow the procedure laid down in the Civil Procedure (Mediation) Rules. Some mediators request parties to file a brief statement of facts and issues prior to the first session. At the first session the process of mediation is explained fully, facts and issues are ascertained and if not done so already the mediators may request statements or summaries to be filed.

In private mediation, it is quite common for the mediator to require parties to submit a statement of facts and a summary of legal proceedings ahead of the mediation. Parties are requested to come to mediation prepared with the facts and with authority to settle the dispute.

15 Structure and process of mediation

Describe the most common steps for the mediator's preparation of a mediation proceeding. Describe the most common structure of mediation proceedings. What is the typical time frame for a mediation proceeding? Are there any special considerations for international mediation proceedings?

Prior to the mediation, the following takes place:

(i) the mediator will ensure that he or she has no conflict of interest in the matter, and will withdraw if any exists;
(ii) the terms of engagement of the mediator (fees and expenses, etc) are made known and agreed to by the parties;
(iii) the confidentiality agreement is signed between the parties and the mediator;

(iv) the mediator circulates a note especially for guidance of parties giving information on the mediation process and responding to any questions; and
(v) if the mediator so desires, the parties may be asked to send him or her a statement of the case, and the issues involved. Steps (ii) and (iii) do not apply in court-referred mediations.

At the mediation proceedings, the mediator will, at the first joint session:
- ensure that all required are attending and have the requisite authority to do so, and make the necessary introductions;
- explain the concept of mediation and answer queries on the same;
- request parties to each make their opening statement;
- request the lawyers to make the supplementary statements on the law relevant to the matter;
- see if any further facts are needed, and determine how to ascertain them; and
- identify the issues that need to be resolved to arrive at a settlement.

Thereafter at the separate sessions the mediator will:
(i) explore the long-term interests of the parties;
(ii) expose them to the weakness in their case, and the lack of good alternatives to settlement (in the evaluative mode);
(iii) encourage and engage with the parties in identifying options for settlement;
(iv) focus on possible settlement options and refine them; and
(v) draft, or help draft, the written settlement agreement. Steps (iii)–(v) may also take place in joint sessions.

In the court mediation scheme the time limit is 60 days from the start of the mediation, extendable if progress is being made. Typically, cases will settle within 60 or 90 days.

In private mediation, the time taken depends on the complexity of the matter, and the needs of parties. Some cases settle in a couple of weeks, others in 30 to 60 days, and some take considerably longer.

In international mediations, language may be an issue though English is predominantly used. Cultural differences may also pose a problem. If co-mediation is permissible, it may help to have a mediator from each nationality.

16 Mediation style

What is the primary mediation style in your country for commercial mediation: facilitative mediation, evaluative mediation or transformative mediation? Are private sessions (caucuses) or joined sessions, or both commonly used in mediation?

The primary mediation style is evaluative. Disputants seem to prefer having an authority figure as the mediator, and are more comfortable being led in the mediation rather than the mediator being more hands-off. This is a cultural trait quite common in Asia. The parties expect the mediator to give them his or her view of the weakness of their case, and to actively participate in finding solutions; indeed, they would be disappointed if they felt that the mediator was not fully engaged with them in resolving the dispute. Some mediators prefer to be facilitative. Transformative mediation is rare.

However, it needs also to be said that most mediators will start off being facilitative, having movement come from the parties, and get evaluative later in the process when the interventionist skills become necessary to break an impasse and throw up solutions.

The first session will be a joint one; thereafter the practice is to quickly break into private sessions. Further joint sessions will be held as the occasion demands, to clarify facts or highlight progress, or identify blocks, and of course, when agreement has been reached.

17 Co-mediation

What form does team mediation typically take in your country? Is co-mediation regularly used in your country? In which kind of cases?

In the court mediation scheme, co-mediation is the norm.

In private meditation, it is usual to have one mediator. However, when circumstances warrant, such as parties being from different nationalities, or an expert from the field being required, or the matter is of much complexity, co-mediation can be adopted.

18 Party representatives and third parties

What is the practice in your country with respect to the inclusion of party representatives in mediation proceedings? What is the practice with respect to experts and witnesses?

Lawyers are usually allowed to accompany parties in mediation sessions.

Tax advisers may also accompany parties to the mediation session, though this is not usual. It is more the case that their advice is sought outside the mediation session.

Experts can be brought in, but there is no formal recording of evidence. They come in to throw more light on particular aspects and aid discussion.

It is open to parties to bring in witnesses, although this is usually not seen in mediations. Here too, there is no recording of evidence.

19 Specific mediation procedures/conflict or dispute management systems

Have companies set up their own dispute management systems in your country? Are there any special routes for consumers to use mediation for small claims? Are there any institutions that offer mediation for their customers, users, etc? Is there any reported or published information regarding dispute management systems of companies for conflicts in employment matters?

Private mediation is yet to develop on a substantial scale in India. However, companies are showing interest in using mediation for disputes within their organisations, and externally with suppliers and consumers. Banks, consumer durable manufacturers and service providers are potential areas for starting in-house dispute management systems. Informal use of mediation, applying its principles, has started. The banking and insurance sectors have ombudsman schemes appointed by the industry regulators for dispute resolution.

No, there is no information published regarding dispute management systems of companies for conflicts in employment matters.

Mediation clauses and mediation agreement

20 Mediation clauses

Are mediation clauses commonly considered in the course of contract drafting? Are there special requirements for mediation clauses? Are there any relevant court decisions referring to such escalation clauses?

It is common practice for dispute resolution clauses in contracts to provide that at first instance an attempt shall be made to resolve any dispute that may arise through amicable means. This is usually not explained further and often does not refer particularly to mediation. Parties understand it to mean talks by senior officers of the entities involved. If these attempts fail, such clauses usually provide that the dispute may be referred to arbitration or a suit may be filed in the specified court.

Now with greater awareness about mediation it is finding a place in contracts as the first-step resolution method.

21 Conclusion and content

Is there any obligation to conclude an agreement between the mediator and the parties or between the parties before or at the beginning of the proceeding? Are there any legal requirements regarding the content of the agreement between the mediator and the parties? What are the common provisions for such mediation agreement? Must the agreement be in writing?

In the court mediation process, there is no obligation to have an agreement between the parties and the mediator, since the Rules under the CPC govern the mediation.

In other mediations, while there is no legal mandate, it is customary to have such an agreement. This will provide that the parties agree to mediate in good faith, and that they will observe confidentiality with regard to the mediation. It may also provide for the fees to be paid to the mediator.

The agreement must be in writing.

22 Costs for mediation

Are there any legal provisions on mediators' fees? What is the average mediator's fee in mediations involving companies? Is there any legal aid or other financial support for mediation proceedings if parties cannot afford to pay the mediator?

The Company Mediation Rules provide for a fee of 1,000 rupees to be paid to the tribunal with the application for referring a matter to mediation. There are no legal provisions on mediators' fees. The fee is usually on a time spent basis varying from 25,000 to 300,000 rupees per day.

The parties usually share the mediator's fees equally.

There is no legal aid or financial support for mediation proceedings if parties cannot pay the mediator's fees. In the court-run mediation scheme, the mediation service is usually free.

Professional matters for mediators

23 Regulation

Is there any specific regulation of mediators in your jurisdiction? Give details. Are there any regulations on immigration or tax issues or regarding the right to work for foreign mediators?

Mediators operating under the court mediation scheme are regulated by rules framed under the CPC. This covers qualification, certification, norms of procedure, ethics and removal from the panel. The Companies Mediation Rules provide for similar regulation for the panel of mediators appointed under them.

There is no regulation of mediators outside of the court mediation scheme. As of now, the title 'mediator' is not protected by law.

There is no requirement that only lawyers can be mediators, although it is notable that most mediators are lawyers.

As regards foreign mediators, prior permission from the Reserve Bank of India is required for a foreign national to practise a profession in India if such person desires to remit such earnings outside India. Income earned in India is taxable, subject to double taxation avoidance treaties.

So far no issue has been raised about foreign mediators conducting mediations in India.

24 Training

Are there any requirements regarding training for mediators?

The basic training provided by the court-annexed mediation centres is 40 hours in duration. Thereafter the mediators gain experience as co-mediators and then as mediators. An advanced training is then conducted usually of 20-hour duration. After the advanced course, the certificate of accreditation is awarded. In 2016 the Ministry of Corporate Affairs commenced a 40-hour mediation course through the Indian Institute of Corporate Affairs.

The subjects covered include development of mediation, theories of conflict and resolution, mediation process, techniques and skills, ethics, law, etc.

There is no public or official exam, although empanelment will be denied if it is felt that a basic level of competence has not been reached, or there are issues of lack of integrity.

In the private (non-court) field, there are a few institutions that offer training in mediation. The course duration and content is similar to that mentioned above. Certification is given, but there is no official recognition for such certificates.

Update and trends

In India, the court mediation system is quite well established. Almost all of the country's high courts (24 in total) have mediation centres and the process is also percolating downwards to the district courts.

The field of private mediation is yet to take off and it will be some time before its potential is realised and achieved. Presumably following from the Law Commission of India's evaluation of legislation pertaining to mediation, the law ministry was reported to be considering introducing a comprehensive legislation on mediation in February 2016. That has not taken place; however, the amendments proposed to the Consumer Protection Act include a chapter on mediation of consumer disputes.

With the passage of the Companies Act 2013 and the Company Mediation Rules 2016, new avenues for business mediation are opening in India. The Central Ministry of Corporate Affairs is also making efforts to promote mediation through mediation training and by setting up the India International Mediation Centre.

25 Continued education

Must mediators undertake continued professional education? Is there a credit point system for the continued education of mediators?

There is no requirement that mediators must undertake continued professional education.

In the court mediation system, the mediation centres do arrange for refresher courses, and mediators are encouraged to attend these.

There is no system for continuing legal education credits in India.

26 Accreditation of mediators

Outline the system for certification of mediators.

In the court mediation system, accreditation of mediators takes place after completion of the basic training course, 20 hours of mediation (including co-mediation) and completion of the advanced course (see question 24).

Non-certified mediators are not barred from practice, although some accreditation is necessary for empanelment with court and tribunal mediation panels. With growing awareness there will be a preference for certified accredited mediators.

There is no two-tier system for ordinary and specially certified mediators.

27 Mediator liability and sanctions

What are the duties of mediators in a mediation procedure? What liability do mediators face when offering their services and conducting mediation proceedings? Is professional indemnity insurance for mediators available or obligatory? Are there any further sanctions or other disciplinary measures for mediators in cases of misconduct, poor performance, etc? Are there any regulations referring to the dismissal of mediators?

The ACA and the CPC spell out the duties of mediators. These pertain to disclosure, improper conduct, confidentiality, not imposing settlements etc.

The Acts do not spell out any liability that mediators face in offering their services and conducting mediations. In fact Rule 22 of the Model Civil Procedure (Mediation) Rules and Rule 23 of the Companies (Mediation) Rules provide that a mediator shall not be held liable for anything bona fide done or omitted to be done by him or her during the mediation proceedings for civil or criminal action. In the court mediation system, mediators can be removed from the panel for misconduct or poor performance.

Professional indemnity insurance is neither available nor obligatory.

28 Appointment

Is there any regulation regarding the appointment of mediators? Is it common in your country to seek assistance by institutions or official bodies for the appointment of mediators? Are mediators obliged to inform about conflicts of interest in the course of appointment?

In the court system, the Civil Procedure (Mediation) Rules regulate the accreditation, empanelment of mediators and the appointments in the individual cases. Such appointments are usually based on the roster; in exceptional cases mediators may be specified by name by the referring judge.

In the field of private mediation, it has not yet become the practice to seek assistance of institutions for appointment of mediators.

Mediators are obliged to inform the parties about conflicts of interest. This must be done before the proceedings commence, or, if such conflict arises thereafter, as soon as the mediator is aware of the same. Both the ACA and the Mediation Rules require such disclosure.

Cases

29 Notable cases

Briefly give details of any significant recent mediation cases or disputes or judgments involving mediation that have been published in your country.

Significant recent mediation cases or disputes or judgments involving mediation that have been published, are the following:

- *Salem Bar Association v Union of India* [2003] 1 SCC 49: the Supreme Court upheld the constitutional validity of the amended section 89 of the CPC. It appointed a committee to suggest rules for ADR processes to be adopted by the high courts;
- *Afcons Infrastructure Ltd v M/s Cherian Varkey Construction* [2010] (7) SCALE 293 (see questions 1, 4, 6 and 13): this wide-ranging judgment of the Supreme Court clarified several aspects of section 89 including reference and enforcement;
- *Haresh Dayaram Thakur v State of Maharashtra and others* AIR [2000] SC 2281: the Supreme Court observed in this case that the strict rules of procedure contained in the CPC and the Indian Evidence Act 1872 do not bind the mediator;
- *Gajanan v Raghurai Thamba* MANU/MH/0131/2007: the Bombay High Court held that in light of sections 80 and 81 of the ACA, a conciliator could not be called as witness, adding that allowing such a practice would wholly undermine the effectiveness of the mechanism;
- *Alcove Industries v Oriental Structural Engineers* [2008] (1) ArbLR 393 Delhi: conciliation prior to arbitration may compromise confidentiality;
- *Moti Ram (D) TR LRS v Ashok Kumar* [2011] 1 SCC 466: the mediator's report should not disclose details of the offers made by the parties;
- *B S Krishnamurthy v B S Nagaraj*, decided on 14 January 2011: the Supreme Court stressed the need for lawyers to advise their clients to try mediation for resolving their disputes especially where relationships are involved;
- *Birdha Ram v Manohar Lal* [2014] (1) RLW 854: the Rajasthan High Court refunded the entire court fees following the compromise arrived at by parties through mediation;
- *Rudraaradya v Nanjundappa ILR* [2011] Kar 221: defence cannot be struck off for failure to appear before the mediator; and
- *State of MP v Madan Lal Supreme Court of India* [2015]: the Supreme Court held that there could be no mediation or compromise between the accused and the victim in cases of rape.

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Law and institutions

1 Treaties

Is your country a signatory to any treaties that refer to mediation? Is your domestic mediation law based on a treaty?

Italy implemented Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters with Legislative Decree No. 28/2010, which was implemented by Ministerial Decree Nos. 180/2010 and 145/2011.

Besides the above-mentioned pieces of legislation, many alternative dispute resolution (ADR) providers (public or private) voluntarily refer – for international mediation (outside the EU) – to the United Nations Commission on International Trade Law Model Law on International Commercial Conciliation.

On 3 September 2015 Legislative Decree No. 130/2015 came into force, implementing Directive 2013/11/ EU on alternative dispute resolution for consumer disputes.

2 Domestic mediation law

What are the primary domestic sources of law relating to domestic and foreign mediation? Are there any differences for the mediation of international cases?

ADR methods have generally been known in Italy for a long time, but mediation in particular has only started to receive attention in its development as a serious means of dispute resolution over the past 15 years or so.

As mentioned above, the Italian government has recently implemented Directive 2013/11/EU on ADR for consumer disputes, transposing the Directive and adapting it to the various ADR procedures already present in consumer affairs.

The entry into force of Decree No. 130/2015 also modifies Decree No. 28/2010 and the manner in which the mediation centres that are currently registered with the Italian Ministry of Justice should carry out mediations between professionals/companies and consumers.

Legislative Decree No. 130/2015 has made changes and additions to Decree No. 206/2005, better known as 'Consumer Code', with the inclusion of 'Title II-bis – extrajudicial disputes resolution' (article 141 to 141-decies), which regulates the procedural methods for ADR procedures.

In practice, ADR helps consumers to resolve disputes with commercial traders when problems arise with a purchased product or service; for instance, if the seller refuses to repair a product or to make a refund to which the consumer is entitled.

It should be noted that under article 141, paragraph 10, the consumer will not be deprived of the right of appeal to the competent court, whatever the outcome of the court settlement before the ADR entity. Before Legislative Decree No. 28 of 4 March 2010 (updated by Decree-Law No. 69 of 21 June 2013, converted by Law No. 98 of 9 August 2013), the most significant innovation over the past few years for the development of mediation in Italy was contained in Legislative Decree No. 5/2003 (now repealed by the above-mentioned Decree No. 28/2010, which has taken its place and has broadened the scope of the attempts of mediation to all civil and commercial disputes). Decree No. 5/2003 provided for both mediation and arbitration in disputes within a company (and certain other circumstances as, for instance, banking and financial disputes).

Law No. 129 of 2004 entitled 'Rules for the regulation of the franchising', in article 7, entitled 'Mediation', states that for disputes relating to the franchising agreement the parties may agree that prior to court proceedings or arbitration, an attempt at mediation should be made at the mediation office of the chamber of commerce in whose territory the franchisee has their main office. At the mediation proceedings the provisions of Legislative Decree No. 28/2010 shall apply mutatis mutandis.

Legislative Decree No. 206 of 2005 (the Consumer Code) reorders the legislation on consumers and is the fundamental reference text for the protection of the rights of consumers and users.

The Consumer Code provides that the associations of consumers and users and other entities have the option, before judicial proceedings, to attempt mediation before the mediation office of the local chamber of commerce or other mediation providers competent under article 141 of the Consumer Code. The Consumer Code provides that the duration of the procedure is limited to 60 days (the period within which it must always be settled).

The mediation record, signed by the parties and the representative of the mediation provider, is lodged at the court of the place where the mediation was held for the approval of the judge, who makes it enforceable.

The Consumer Code provides for both offline and online mediation to settle disputes between consumers and professionals.

In 2006, Law No. 55, entitled 'Amendments to the Civil Code on family pacts', introduced article 768-octies of the Italian Civil Code, which states that disputes arising from provisions related to transfers of family businesses to descendants must be sent to one of the mediation bodies accredited by the Italian Ministry of Justice.

In 2007, by a regulation issued by the Authority for Telecommunications Supervision with Resolution No. 173/07/CONS, new procedures entered into force for settling disputes between users and operators of telecommunication services.

This Resolution states that the attempt of mediation is a 'condition of admissibility' of judicial action against suppliers of services, but widens the different procedures available to users.

On the website of the Authority for Telecommunications Supervision (www.agcom.it) it is possible to download the forms by which the user can carry out the following:

- requests for provisional measures to the continuity of telecommunication service (form GU5);
- requests for mediation (form UG); and
- requests for application for settlement of the dispute to the Authority (form GU14).

One change is the recognition of absolute equality – as to the condition of admissibility – between mediation proceedings managed by the mediation chambers established at the public offices for telecommunication (Corecom), those managed by the chambers of commerce and those managed by bodies that have arisen from joint agreements between consumer associations and telecommunications operators, and finally from all mediation providers recognised by the Consumer Code.

Legislative Decree No. 179 of 2007 on the institution of an Arbitration and Mediation Chamber within the Italian National

Commission on Companies and the Stock Exchange (Consob) provides for the establishment of a chamber of mediation and arbitration for resolving disputes between investors and brokers, because of violation by the brokers of requirements concerning information, fairness and transparency in contractual relationships with investors, and a system of compensation for damage suffered by investors and a special guarantee fund.

The legislation provides that the Chamber of Conciliation and Arbitration of Consob can make use of the mediation services of the mediation bodies entered in the Register of the Ministry of Justice.

3 Mandatory provisions

Are there provisions of domestic mediation law that must be considered in mediation proceedings?

Authorisation to mediate
For the purposes of the Legislative Decree No. 28/2010, mediation should be handled only by mediation bodies accredited by the Ministry of Justice.

Mandatory attempt of mediation
In certain disputes Italian law requires a previous mandatory mediation attempt.

Need for mandatory presence of the lawyers of the parties
At the first meeting and subsequent meetings, until the end of the procedure, each party must participate with the assistance of a lawyer.

Preliminary meeting
For every type of mediation it is ordered by law that a mandatory preliminary meeting in which the mediator, together with the parties and their lawyers, explains to the parties the function and how to conduct the mediation. The mediator, in the same first meeting, then invites the parties and their lawyers the chance to speak, to begin the process of mediation and, if positive, proceed with the conduct of the mediation.

Duration
The mediation proceeding can last for up to three months, after which the mediation attempt can be considered to be satisfied; even if the parties – on a voluntary basis – continue to try to negotiate a possible solution.

Confidentiality
The mediation process protects confidentiality and professional secrecy.

Enforceability
The mediation agreement may become enforceable (see below).

Penalties
Those not participating (without reason) in a mediation are required to pay some court costs in subsequent litigation.

Exemptions and benefits
The minutes of mediations with a value under €50,000 shall be exempt from payment of registration fees.

All records and documents relating to the mediation process shall be exempt from stamp duty and any expenses and taxes.

Those unable to meet costs of mediation can benefit from legal aid, and can freely participate in mediation. The parties to mediation can benefit from a tax credit up to a maximum of €500 in the event of a successful mediation. In the case of failure of the mediation, the tax credit is reduced by half.

4 Obligation to mediate

Is mediation in your country obligatory? Can mediation be ordered by courts in your country?

In Italian law a prior mediation attempt is only required in certain disputes. From the 1990s the legislature began to require mediation or conciliation and inserted provisions in this respect while passing laws that dealt with reforms in various sectors, as follows:

- Law No. 320 of 1963 provides for the obligatory attempt to mediate the dispute before the agricultural sections of the court;
- Law No. 481 of 1995 prescribes a mandatory attempt of mediation in disputes related to public utility services;
- Law No. 192 of 1998 prescribes an attempt of mediation for disputes between contractors and subcontractors. The mediation attempt must take place at the chamber of commerce where the subcontractor has its headquarters; and
- Law No. 183 of 2010 provides for a mandatory attempt to mediate in certain disputes related to employment contracts.

In civil and commercial matters, the mediation attempt is considered by Legislative Decree No. 28/2010 as 'voluntary' for all disputes, but it is a condition for admissibility of a judicial action, and therefore 'mandatory', for disputes relating to the following:

- co-ownership of land;
- property rights;
- division of assets;
- hereditary succession;
- family agreements;
- leasing;
- loans;
- commercial leases;
- medical and paramedical liability;
- defamation;
- insurance; and
- banking and financial agreements.

The parties, in those cases, must first attempt to resolve their disputes through mediation (with the mandatory assistance of lawyers) before submitting them to the Italian judicial system. If a party initiates proceedings before the court without first resorting to mediation, the judge shall suspend the case and order the parties to mediate. Such mediation has to be conducted by one of the ADR providers accredited by the Italian Ministry of Justice. The legislative decree provides that the unjustified failure of a party to appear at the mediation procedure can be considered by the judge in the subsequent judicial proceeding and trigger negative inferences, on the basis of article 116(2) of the Code of Civil Procedure. Additionally, new legislation (Law No. 148 of 14 September 2011) provides that, in the above-mentioned case, a party who fails to appear will be obliged to pay an amount (equal to the amount that a party must pay to the state when he or she participates in a judicial proceeding) to the state as a form of sanction. If a mediation clause is contained in advance in a contract or in a company's constitution and if a party has commenced a judicial proceeding without trying to mediate, the judge or the arbitrator – upon request of the interested party – must postpone the proceeding and fix a time, within a maximum of 15 days, by which the parties should request mediation by an accredited provider.

Generally, judges are not permitted by law to refer cases to mediation. They can only advise the parties, during the trial, to try to mediate their case. Only in some cases, as provided in Legislative Decree No. 274 of 2000 (relating to the criminal competence of the Italian judges) can the judge promote mediation, or refer the parties to a public or private mediation centre.

The new law provides that the court, even in court of appeal, after considering the nature of the case, the state of education of the case and the behaviour of parties, may order the parties to try to mediate. In these cases, the mediation is 'a condition of admissibility' of the proceedings, including during the appeal proceedings, but judges may not specify the mediator or the mediation provider (pursuant to Legislative Decree No. 28 of 4 March 2010).

5 Court-annexed mediation

Does the law of your country provide for court-annexed mediation? If so, is court-annexed mediation mandatory?

Generally speaking, Italian legislation does not provide for a real integration of mediation into court proceeding.

That said, a judge may try to mediate among the parties at every stage and degree of the civil and commercial proceeding headed by him or her.

In some cases (minor proceedings, divorce, etc) the judge can try to mediate before going on, but a true system of court-annexed mediation has not yet been provided for by law.

However, a certain degree of integration between mediation and trial was provided by Legislative Decree No. 28/2010, which states that some activities undertaken (or not undertaken) in mediation have an impact (positive or negative) on the possible subsequent judicial proceedings.

6 Mediation-arbitration and other forms of mediation-related ADR

Is mediation combined with arbitral proceedings? May a mediator act later in the same dispute as an arbitrator, conciliator or judge? Are arbitrators aware of mediation, and if yes, are they willing to transfer arbitration cases to mediation? Which other proceedings are available and used in your country that are related to mediation?

Generally speaking, hybrid ADR methods are not often used in Italy.

However, it is important to consider that some chambers of commerce and private ADR providers offer combined ADR instruments such as med-arb and med-then-arb (alongside mediation and arbitration).

The use of arb-med is restricted to some particular complex cases and some high-profile ADR providers (such as Concilia, some chambers of commerce, etc).

Only if the ADR body in which a mediator is accredited permits it may the mediator also act as arbitrator for the same parties and on the same controversy. In general, the appointment of different professionals is more common: one for the attempt of mediation and the other as arbitrator (or as a member of the arbitral tribunal).

In a civil trial, if a judge attempts to mediate between the parties and mediation fails, however, the same judge may continue the trial.

Even if there is the possibility, it is not very common that an arbitrator have the desire to transfer arbitration cases to mediation, losing the possibility to continue the arbitration procedure.

Some ADR providers (such as Concilia) use other ADR techniques as adjudication, expert determination and peace dialogue tables. These kind of ADRs are used for specific cases and, generally, upon request.

7 Online dispute resolution (ODR)

Have there been any developments regarding online dispute resolution in your country? Is your country participating in any international ODR project? Is online mediation available in your country?

The practice of using the internet and computers to try to solve disputes in mediation or arbitration has been known for many years in the Italian ADR system.

That said, it is important to know that the use of ODRs is not widespread or used frequently in Italy. In fact, only the major ADR providers have electronic ADR programmes that enable disputes to be solved in a virtual environment. One of the new laws on mediation (specifically Ministerial Decree No. 180/2010, recently updated) regarding the possibility of the use of electronic means in mediation indicates that the mediation rules of every ADR provider accredited by the Ministry of Justice cannot provide that access to mediation takes place exclusively through electronic means.

In any case, to manage online mediations, the mediation provider must have an electronic programme that has been prepared with all the protocols and the security measures established by the competent department of the Ministry of Justice. Therefore, the use of platforms such as Skype or those of a similar type is prohibited.

At present, there are no measures implementing European ODR legislation, although it will soon be necessary to discuss it.

8 Confidentiality and disclosure

Is mediation a confidential proceeding in your country? In which cases can disclosure of confidential information by the mediator or the parties be permitted or compelled? Are there any sanctions for breach of confidentiality?

All mediators must keep any information arising out of (or in connection with) the mediation confidential, including the fact that the mediation exists and has been conducted between the parties.

In addition, Legislative Decree No. 28/2010 provides that mediators may not be called as witnesses and the parties may not rely on any communications made or any information collected during mediation in the subsequent judicial proceedings.

In particular, article 9, entitled 'Duty of confidentiality', states that anyone who works in a mediation provider accredited by the Ministry of Justice is bound by an obligation of confidentiality with respect to statements made and the information acquired during the mediation process. In addition, the same article states that the mediator shall be held to confidentiality in relation to all other parties, with regard to the statements made and to the information acquired during the caucuses (separate sessions), except with the consent of the registrant, or the consent of the party from whom the information originated.

Article 10, entitled 'Usability and professional-secrecy', sets forth that the statements made or the information acquired in the course of a mediation process cannot be used in a trial having the same object, even in part, that has begun, been summarised, or continued after the failure of mediation, except with the consent of the registrant or the party from whom the information originated. Further, the evidence of witnesses is not allowed on the content of those statements and information.

The article further states that the mediator may not be required to testify about the content of the statements made and the information gathered during the mediation process before the court or other authorities.

In addition, in accordance with article 22 of Legislative Decree No. 28/2010, the mediator must report suspected money laundering or terrorist financing to the competent authority. The disclosure of confidential information by the mediator or the parties is permitted or compelled in the cases provided by article 7 of EU Directive 2008/52/EC.

9 Limitation period

Does a mediation proceeding suspend the limitation period for a court claim?

When the request for mediation is communicated to all the parties convened in the mediation, it interrupts the time line for a court action and, provided that it is the first such request, will prevent a right of action from expiring; but if the mediation fails, the proceedings must be brought within the same period of the limitation that starts from the filing of the report of failure to mediate.

10 Settlement

What is the legal character of the final (settlement) agreement? What are the legal requirements for the enforceability or the content of the agreement? Is it possible to revise, withdraw or challenge the final settlement agreement?

Legislative Decree No. 28/2010 has introduced a form of multi-step procedure: while mediation is the process in which a professional mediator helps the counterparties to resolve their dispute, conciliation is the positive result of the mediation process, the settlement.

The new law establishes that if an amicable settlement among the parties is reached, the mediator compiles the mediation minutes to which the text of the mediation agreement is attached.

With the novelties introduced in the text of the above-mentioned Legislative Decree No. 28/2010 by Decree-Law No. 69 (converted by Law No. 98 of 9 August 2013), where all the parties that have acceded to the mediation are assisted by a lawyer, the agreement that has been signed by the parties and by the same lawyers, is automatically

enforceable for: compulsory expropriation; execution for delivery and release; performance of the obligations of do's and don'ts; and recognition of judicial mortgage.

Lawyers witness and certify the compliance of the mediation agreement to mandatory rules and public policy.

In all other cases the agreement attached to the minutes is approved, on request of a party, by a decree of the president of the court, subject to verification and approval of compliance with mandatory rules and public order. In cross-border disputes, the mediation minutes are approved by the chief judge of the district in which they are to be performed.

11 Mediation institutions

What are the most prominent mediation institutions in your country?

In Italy public and private mediation providers are accredited by the Ministry of Justice for conducting civil and commercial mediation upon the provisions of Legislative Decree No. 28/2010 (there are more than 900 bodies at the time of writing, and the number will increase every month).

As for the public, the 104 Italian chambers of commerce are the more prominent public ADR bodies: each of them has a mediation and arbitration chamber.

Among them, the more well known are as follows:

- the chamber of mediation of the Milan Chamber of Commerce;
- the chamber of mediation of the Rome Chamber of Commerce; and
- Curia Mercatorum, an association of private law, not for profit, owned by several chambers of commerce, trade associations and professional associations, and led by the chamber of commerce of Treviso.

As for the private ADR providers, the most prominent are as follows:

- Concilia (www.conflictresolution.it), which, since 1999, has provided training and consultancy services in civil and commercial negotiation, mediation, conciliation and arbitration, as the leading Italian ADR provider. Concilia is headquartered in Rome, with accredited secondary offices in Italy and abroad. Concilia is accredited by the Italian Ministry of Justice for conducting civil and commercial mediations and for organising training for professional mediators. Among other things, Concilia houses the headquarters of the Italy Professional Chapter of Mediators Beyond Borders International and has been nominated as the first and unique Italian qualifying assessment programme by the Independent Standard Commission of the International Mediation Institute;
- Conciliatore Bancario e Finanziario (banking and financial mediation provider). This was born from an initiative led by the first 10 Italian banking groups to give customers a fast and efficient alternative to court proceedings (www.conciliatorebancario.it);
- the Chamber of Mediation of Consob, which was created to try to resolve, through mediation, banking and financial disputes (www.camera-consob.it); and
- ADR Notariato, created by the National Council of Notaries with multiple offices in Italy (www.adrnotariato.org).

Mediation procedure

12 Background

Describe the development of mediation in your country.

Even though mediation in its multiple forms (family, civil, commercial, corporate, environmental, social, etc) has been well known in Italy for many years, only recently have a general professionalism and common ethical standards been established for almost all forms of mediation.

In certain cases, however, there are still barriers to the use of mediation, and lawyers specifically are divided between those in favour of mediation and others who are absolutely opposed to it. The role played by the Italian chambers of commerce and by a few private ADR providers in the advancement of mediation procedures is undeniable.

The Ministry of Justice regularly publishes statistics regarding civil and commercial mediations in Italy. The new data for the first quarter of 2016 is derived from 445 responding mediation bodies.

In the study period, there were 76,083 new cases of mediation registered, which is in line with the data from 2015 (82,489 in the first quarter; 84,210 in the second; 62,581 in the third and 75,656 in the fourth). Among the controversies mostly treated in mediation in the first quarter of 2016 were those related to bank contracts (approximately 22 per cent), real rights (14 per cent), leasing (12 per cent) and condominium (11 per cent).

The adhering party appeared in 46 per cent of cases and, when the parties agreed to sit at the mediation table after the first meeting (the preliminary meeting), a settlement agreement was reached in 43 per cent of cases (all data is in line with previous surveys).

In general, an agreement was reached in 37.6 per cent of voluntary mediation cases, 21.4 per cent of mandatory mediation cases and 13.9 per cent of court-assigned cases.

Among the disputes to which there was a higher percentage of an appearance of the adhering party were those concerning relations between relatives (hereditary succession: 60.1 per cent; inheritance division: 57.1 per cent and family agreements: 56.3 per cent).

The adhering party appeared in between 50 and 55 per cent of disputes relating to property rights, lease, condominium and rental companies, while the percentage dropped to approximately 45 per cent in the event of bank contracts; to between 35 and 40 per cent in terms of damages from defamation by the press, financial contracts and damages from medical liability; and to only 13.4 per cent in terms of insurance contracts.

With regards to lawyers attending mediation: in voluntary mediation, 62 per cent of applicants were assisted by their legal, while this was 83 per cent for the adhering parties.

As for the length of the mediation, compared to 902 days (2015 data relating to a dispute in court), the average ADR procedure, with an appearance by the adherent and agreement, lasted 80 days, which is down compared to 103 days in 2015, but in line with 2013 (82 days) and 2014 (83 days).

13 Areas of disputes for mediation

In which areas of disputes is mediation preliminarily applied? Are there any disputes that cannot be mediated?

Currently, mediation is used for a wide range of disputes from civil to commercial, corporate, financial, banking, insurance, family, environmental, labour, consumer, criminal and social.

Criminal mediation, however, is used only in the case of offences prosecuted upon complaint and in juvenile proceedings.

In addition, on the basis of what is required by the European Directive on mediation, mediation attempts do not extend to revenue, customs or administrative matters or the liability of the state for acts and omissions in the exercise of official authority. On the contrary, only those matters that involve the liability of public authorities for non-authoritative acts fall into the category of disputes governed by Legislative Decree No. 28/2010.

14 Procedural requirements

Are there procedural requirements for mediation proceedings in your country? Must the parties prepare for the mediation?

No, the mediation procedure is very informal and the parties do not necessarily have to prepare summaries or keep records or documents.

The mediation procedure, however, is commenced with the filing – by the claimant – of a written request for mediation. The request must be transmitted by the ADR provider to the defendants by any means that can ensure the receipt of the documents: postal services, fax or certified email.

15 Structure and process of mediation

Describe the most common steps for the mediator's preparation of a mediation proceeding. Describe the most common structure of mediation proceedings. What is the typical time frame for a mediation proceeding? Are there any special considerations for international mediation proceedings?

The entire proceeding in this case can be described as follows:

- the parties (or one of them) submit a written mediation request to an independent qualified professional ADR provider accredited by the Ministry of Justice;

- the chosen ADR provider designates an independent mediator (chosen from among the mediators accredited by the ADR provider) and arranges the initial meeting between the parties;
- the date, location and name of the chosen mediator are communicated to other parties by the ADR provider and by the party who initiated mediation, if he or she wants to ensure that other parties have received the communication; and the fees payable to the accredited mediation bodies and to the mediator, to be borne by the parties, are provisionally established;
- the new law provides for the obligation of assistance of lawyers for all the parties involved in a mandatory mediation attempt. In these cases, the presence of the lawyers of the parties is mandatory for all the phases of the mediation procedure until the end;
- as previously mentioned, the new addition to Legislative Decree No. 28/2010 introduced the necessity of a 'preliminary meeting' before starting the mediation. For every type of mediation the law orders a mandatory preliminary meeting in which the mediator, together with the parties and their lawyers, explains to the parties the function and how to conduct the mediation. The mediator, in the same first meeting, then invites the parties and their lawyers to discuss the prospects of beginning the mediation process and, if positive, to proceed with the conduct of the mediation; and
- after this point, if the parties reached a positive accord to start the mediation proceeding, two different scenarios are possible, depending on the choices of the parties to the mediation, as follows:
  - if the parties are able to reach a written agreement, the mediator drafts the minutes of the meeting that must be signed by all the parties, by the mediator and by the lawyers of the parties; and
  - if no agreement is reached at the parties' request the mediator must issue a non-binding proposal about resolution of the dispute, which the parties may choose to accept or refuse.

If either party refuses the proposal, the mediation is considered to have failed and any party may commence a lawsuit. But if the judicial decision is identical to the previous mediator's proposal, such decision may affect the allocation of judicial expenses because the court will refuse to award all the costs and the expenses to the winning party if that party has previously rejected the mediator's proposal. In such circumstances, the court will order the winning party to pay the losing party's costs and court fees.

16 Mediation style

What is the primary mediation style in your country for commercial mediation: facilitative mediation, evaluative mediation or transformative mediation? Are private sessions (caucuses) or joined sessions, or both commonly used in mediation?

At any stage of the mediation procedure the parties may mutually ask the mediator to formulate a written proposal and he or she is obliged to issue a non-binding proposal for the resolution of the dispute, which the parties may choose to accept or refuse.

If no agreement is reached by the parties, before writing the mediation minutes, the mediator may voluntarily issue a non-binding proposal to try to help the parties reach an agreement on the basis of his or her proposal.

The primary mediation style for commercial mediation is 'facilitative' and, if the mediator thinks it is opportune, or if the parties require it, the style may change to 'evaluative'. Whatever the style, Italian mediations are managed with the use of joint and private sessions.

17 Co-mediation

What form does team mediation typically take in your country? Is co-mediation regularly used in your country? In which kind of cases?

Generally speaking, use of a sole mediator is the most common.

Co-mediations are more often used in family cases and for complex business mediations, or for multiparty mediation. Even for environmental mediation, co-mediations are used to resolve both legal-economic and social-relational aspects. Often, in these cases, lawyers (or accountants) act alongside sociologists or psychologists as mediators.

Further, the new law on mediation (Legislative Decree No. 28/2010) establishes that in disputes that require specific technical skills, the ADR provider may appoint one or more auxiliary mediators.

18 Party representatives and third parties

What is the practice in your country with respect to the inclusion of party representatives in mediation proceedings? What is the practice with respect to experts and witnesses?

Apart from the obligation by law (Legislative Decree No. 28/2010) of the presence of the party's lawyer in mandatory attempts of mediation, Italian legislation does not require the presence of consultants in mediation proceedings, but it is always recommended by the ADR providers that parties are accompanied by professional advisers, especially when the dispute is complex and difficult.

Legislative Decree No. 28/2010 sets out special rules applicable only to lawyers. When a lawyer has been appointed, he or she must inform the client about the possibility to use the mediation process and about the tax benefits that may come from a mediation procedure governed by Legislative Decree No. 28/2010. The lawyer will also inform the client of the cases in which the mediation is a condition of admissibility of the claim. The information must be provided clearly and in writing. In the case of breach of information obligations, the contract between the lawyer and the client is voidable. The document containing the information about the mediation procedure is signed by the customer and must be attached to the application for any court proceeding. The court, which verifies whether that document is attached to the application, informs the party of the right to request mediation, or sets the first hearing after the expiry of the deadline for the obligatory attempt at mediation (within three months of filing the mediation before an accredited provider).

Some mediation providers stipulate in their mediation rules that individuals must personally participate in the mediation process with the mandatory presence of a personal lawyer (in cases of mandatory attempts of mediation), being able to be assisted by other professionals of their choice. Only for serious and exceptional reasons may they participate in the proceedings using one or more representatives with the power to settle the dispute; while legal persons must participate in the process of mediation by a representative with the appropriate authority to resolve the dispute. For non-binding attempts of mediation, some mediation rules require the assistance of an attorney for each party for mediations whose value exceeds a certain amount (usually €50,000), unless the parties expressly waive this in writing.

With respect to experts and witnesses, the new law indicates that in complex cases, in addition to possible co-mediation, the mediator may make use of experts enrolled in the register of consultants in the courts. Parties may make use of their own experts and witnesses.

Lawyers and other assistants of the parties, as well as co-mediators, experts and witnesses, shall apply the rules of confidentiality provided for in the law.

19 Specific mediation procedures/conflict or dispute management systems

Have companies set up their own dispute management systems in your country? Are there any special routes for consumers to use mediation for small claims? Are there any institutions that offer mediation for their customers, users, etc? Is there any reported or published information regarding dispute management systems of companies for conflicts in employment matters?

Some ADR providers are specialised in creating dispute management systems for companies. However, mediation in civil and commercial matters must always follow the directions of Legislative Decree No. 28/2010. Systems are especially used to automate the processes that are the basis of any kind of mediation, such as requests for mediation, submission of documents, responses to individual requests by the ADR provider, etc. The Consumer Code provides that associations of consumers and users may, prior to judicial proceedings, attempt mediation before the local chamber of commerce or other competent

mediation providers. In such cases the duration of the mediation procedure is limited to 60 days, after which it is considered settled.

As a member state of the EU, Italy applies EC Regulation No. 861 of 2007 of the European Parliament and of the Council, which established a European small claims procedure in cross-border cases. The Regulation is applicable to civil and commercial matters, whatever the nature of the court or tribunal, where the value of a claim does not exceed €2,000 at the time when the claim form is received by the court or tribunal with jurisdiction, excluding all interests, expenses and disbursements. It does not extend, in particular, to revenue, customs or administrative matters or to the liability of the state for acts and omissions in the exercise of state authority.

The legislation also provides that, where possible, the court shall attempt to reach a settlement between the parties.

Mediation clauses and mediation agreement

20 Mediation clauses

Are mediation clauses commonly considered in the course of contract drafting? Are there special requirements for mediation clauses? Are there any relevant court decisions referring to such escalation clauses?

More and more in Italy, especially in the business world, during the drafting of contracts, particular attention is drawn to the inclusion of ADR clauses that may foresee only mediation or only arbitration, or they can be multi-step, providing the classic triad of negotiation, then mediation, then arbitration.

A classic example of a multi-step contract clause is the following mediation-then-arbitration clause:

- *Every dispute arising under or connected to this contract will first be object of an attempt of mediation procedure in accordance with the Mediation Rules of Concilia LLC, a company registered at the Italian Ministry of Justice, at No. 8 of the Register of the institutions delegated to handle civil and commercial mediation attempts. The seat of the mediation will be [...] [city]. Mediation rules, forms and table of fees currently in force at the beginning of the mediation procedure are available on the website www.conflictresolution.it. If the dispute is not resolved within (90) days from the deposit of the request of the mediation procedure, the dispute shall be settled by arbitration – under the Rules of Arbitration of Concilia LLC in force at the moment of activation of the arbitration, available on the website www.conflictresolution.it.*
- *The Arbitral Tribunal will consist of a sole arbitrator [or: three arbitrators] appointed pursuant to those Rules.*
- *The arbitration will be formal (or informal).*
- *The Arbitral Tribunal will decide in accordance with the rules of law of [...] [or: ex aequo et bono].*
- *The seat of the arbitration will be [...]*
- *The language of the arbitration will be [...]*
- *The decision of the arbitrator (arbitrators) will be final and binding on the parties.*

21 Conclusion and content

Is there any obligation to conclude an agreement between the mediator and the parties or between the parties before or at the beginning of the proceeding? Are there any legal requirements regarding the content of the agreement between the mediator and the parties? What are the common provisions for such mediation agreement? Must the agreement be in writing?

The parties are free to conclude a mediation agreement at their discretion. Nevertheless, the parties may themselves undertake a mediation attempt in advance through the provision of a specific contractual mediation clause in their mediation agreement.

As mentioned, during mediation the parties may only oblige the mediator to issue a non-binding written proposal.

22 Costs for mediation

Are there any legal provisions on mediators' fees? What is the average mediator's fee in mediations involving companies? Is there any legal aid or other financial support for mediation proceedings if parties cannot afford to pay the mediator?

For mediation mandated by law, there is an identical tariff for both public and private providers. With regard to voluntary mediations, each provider may set its own rates, which must be approved by the Ministry of Justice.

Parties are jointly and severally obliged to pay the fees and the fees increase in proportion to the value of the dispute. The mediator is paid by the provider, with a percentage of the fee that the parties pay to the same provider.

Public rates range from a minimum of €65 to a maximum of €9,200.

Professional matters for mediators

23 Regulation

Is there any specific regulation of mediators in your jurisdiction? Give details. Are there any regulations on immigration or tax issues or regarding the right to work for foreign mediators?

Mediators must possess at least a bachelor's degree or, alternatively, must be enrolled in a professional association or board.

Moreover, an accredited mediator must meet the following criteria:

- he or she must not have a criminal record;
- he or she must not be permanently or temporarily disqualified from public office;
- he or she must not be the subject of preventive or security measures or safety; and
- he or she must not have been the subject of disciplinary sanctions other than disciplinary warnings.

In addition, no mediator may declare him or herself willing to act as mediator for more than five accredited mediation providers.

Mediators may not assume rights and obligations, directly or indirectly, in the mediations they oversee. In addition, the mediators may not receive monetary compensation directly from the parties. The payment must be made directly to the mediation provider.

Before every mediation, the appointed mediator must: sign a declaration of impartiality; notify the mediation provider and to the parties all the reasons for possible damages to the impartiality; and respond to any organisational request of the mediation body.

The very latest legislation on mediation published, and in force since 24 September 2014 (Decree No. 139 of 4 August 2014), states that the mediator cannot be a party of a mediation or represent, or in any way assist, the parties in mediation procedures before the mediation providers in which he or she is accredited, or in which he or she is a partner, or hold a charge for any reason. The ban extends to professional members, associates or those exercising the profession in the same premises.

Moreover, a mediator who is currently in, or has been in, over the past two years, a professional relationship with one of the parties, or when one of the parties is assisted, or has been assisted in the past two years, by his or her partners, or associated with him or her, or who has practised in the same premises cannot be named.

Finally, the person who has played the role of mediator cannot entertain a professional relationship with one of the parties until at least two years after the definition of the procedure. The ban extends to professional members, associates or those engaged in the same premises.

24 Training

Are there any requirements regarding training for mediators?

The law states that civil and commercial mediators should have specific training (at least 50 hours) acquired from accredited ADR training centres.

The basic content of the training is laid down in the legislation as follows:

- national, EU and international legislation on mediation and conciliation;
- methodology of facilitative and award procedures of negotiation and mediation;
- conflict management and communicative interaction techniques, also with reference to mediation referred by the court; and
- effectiveness and operation of the mediation clauses, form, content and effects of the request for mediation and of the conciliation agreement, duties and responsibilities of the mediator.

The training is divided into theoretical and practical parts, with a maximum of 30 participants per course, including simulated sessions with student participation and a final examination for a minimum of four hours.

25 Continued education

Must mediators undertake continued professional education? Is there a credit point system for the continued education of mediators?

The law prescribes that civil and commercial professional mediators must take refresher courses (at least 18 hours every two years) and establish their participation, during each two-year period, and for the purposes of professional education, in at least 20 mediations managed by mediation organisations accredited to the Ministry of Justice.

26 Accreditation of mediators

Outline the system for certification of mediators.

Formal registration with the Ministry of Justice is required for those (ADR providers and mediators) wanting to conduct mediations in compliance with the new law. This means that, at present, only those ADR bodies listed on the Ministry register (www.giustizia.it) can act as an accredited ADR provider (with their accredited mediators) in civil and commercial mediations and other disputes covered by the current legislation.

The same is required for mediators: to work, a professional mediator who has passed an accredited training course (organised and managed by an accredited ADR training centre) needs to be accredited into the mediators' panel of an accredited ADR provider, otherwise he or she cannot operate.

Parties who entrust their civil and commercial dispute to an unregistered ADR provider and before an unregistered mediator risk not being able to enforce any resulting agreement. It seems that the legislature believes this interventionist regulatory approach is best for Italy, and that this is the most appropriate way to implement EU Directive 2008/52/EC in the Italian judicial system.

Apart from the special ministerial authorisation of ADR providers and mediators dealing with civil and commercial mediations under Legislative Decree No. 28/2010, there is a two-tier system in Italy, whereby ordinary mediators (not accredited by the Ministry of Justice) may deal with mediations in family, environmental, social, criminal and consumer disputes. Obviously, except for some provisions, a mediation managed by ordinary mediators may not have all the positive outcomes of a mediation under an accredited ADR provider and managed by an accredited mediator.

27 Mediator liability and sanctions

What are the duties of mediators in a mediation procedure? What liability do mediators face when offering their services and conducting mediation proceedings? Is professional indemnity insurance for mediators available or obligatory? Are there any further sanctions or other disciplinary measures for mediators in cases of misconduct, poor performance, etc? Are there any regulations referring to the dismissal of mediators?

The mediator must keep information acquired in joint and separate meetings confidential. In addition, the mediator must remain impartial, neutral and independent from all the parties of the mediation. The mediator must also inform the parties and the ADR provider that appointed him or her of every circumstance that may affect his or her impartiality and independence during the mediation. The mediator must monitor that the parties do not perpetrate crimes or fraud during the mediation procedure.

The mediator may be liable for wilful misconduct or gross negligence, for improper behaviour adopted during the mediation procedure he or she runs. The mediator may only be liable for the management of the mediation and for the preparation of the written minutes of mediation. The subsequent written agreement of the parties, which will be attached to the minutes of mediation, does not place any liability on the mediator.

Accredited ADR providers must possess an insurance policy for an amount not less than €500,000, for liability arising – for any reason – from the management of the mediations.

To date, Italian law does not oblige accredited mediators to have professional liability insurance if they are covered by the insurance of their ADR body, but if a liability arises and the ADR provider uses its insurance, the mediator can be obliged to reimburse the ADR body if he or she is found to be at fault.

The mediator may be dismissed at any time by the ADR mediation body; the mediator is not an employee of the ADR body, but acts as external adviser. The ADR body, therefore, may decide to remove the mediator from its list, especially in the event of misconduct or poor performance. Each ADR body has its own rules for evaluating the performance of its mediators. For example, some ADR bodies have accredited mediators who have a system of monitoring their performance certified by other external entities.

At the end of every mediation process, each party receives a form for the evaluation of the service and of the mediator: such an assessment of the parties may affect the subsequent assessment of a mediator by the ADR provider.

The law provides for cases in which the mediator may be expelled from the ADR providers that accredited him or her. An example is

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when the mediator has not taken a refresher course every two years, or no longer fulfils all the criteria to practise as a mediator.

28 Appointment

Is there any regulation regarding the appointment of mediators? Is it common in your country to seek assistance by institutions or official bodies for the appointment of mediators? Are mediators obliged to inform about conflicts of interest in the course of appointment?

The rules of the ADR bodies must provide – by law – the possibility that the parties voluntarily and mutually indicate the same mediator, for the purpose of his or her possible nomination by the ADR body.

Moreover, the law provides that if the mediator is not jointly chosen by the parties, the ADR bodies shall appoint the right mediator among those accredited, taking into account professional competences, also derived from the type of university degree held, besides other factors of competence and professionalism.

As mentioned above, at the time of his or her appointment the mediator must sign a declaration of impartiality. The mediator must not have any previous relationship with the parties, nor have relations of kinship, affinity, marriage with any of them. In addition, the mediator must not have been the adviser or the lawyer of one of the parties before the mediation.

Cases

29 Notable cases

Briefly give details of any significant recent mediation cases or disputes or judgments involving mediation that have been published in your country.

Recent judgments are as follows:

- Court of Florence judgment of 2 July 2015: the minutes of mediation cannot be approved in the absence of indication of the legal title;
- Court of Ascoli Piceno judgment of 15 June 2015: conviction, for the person who fails to appear in mediation, to pay the costs of the subsequent judgment;
- Court of Vasto judgment of 23 June 2015: the court requires the mediator to make a conciliation proposal even in the absence of a joint request of the parties;
- Court of Rome judgment of 10 July 2014: the failure of the defendant to attend a mediation procedure constitutes, in the subsequent judgment, an additional element for the assessment of the facts and the evidence in favour of the plaintiff;
- Court of Rimini judgment of 2014: the opposition to an injunction is not prosecutable if the mediation mandated by the court was not performed;
- Court of Florence judgment of 19 March 2014: in mediation mandated by the court the parties must appear in person, and mediation must commence regardless of whether the parties decide not to start;
- Court of Siena judgment of 25 June 2012: the failure to participate in mediation by the party who brought the request for mediation is considered an evasion of the law, because such conduct is committed intentionally in violation of a mandatory provision, which protects due process;
- Court of Varese, sez I civ, order of 6 July 2012: once the parties have been invited by the court to establish the mediation process, and mediation is successful, the parties need not state in the trial the success of the mediation, but can cause the court action to cease simply by not participating in the subsequent hearing; and
- Court of Ostia judgment of 5 July 2012: the non-appearance of the party duly summoned to attend a mediation is generally an integral element in favour of the requesting party for the investigation and the proof of the liability of the party that did not appear in mediation.

Nigeria

Godwin Omoaka
Templars

Law and institutions

1 Treaties

Is your country a signatory to any treaties that refer to mediation? Is your domestic mediation law based on a treaty?

Mediation in Nigeria is a largely informal process and there are no express domestic laws on mediation that apply to the whole country. Although Nigeria is a signatory of the UNCITRAL Model Law on International Commercial Arbitration, it is not a signatory of, and has not adopted, the UNCITRAL Model Law on International Commercial Conciliation (2002) or any other mediation treaties.

2 Domestic mediation law

What are the primary domestic sources of law relating to domestic and foreign mediation? Are there any differences for the mediation of international cases?

In Nigeria, mediation is a very flexible and generally voluntary dispute resolution mechanism and there are very few laws that provide for mediation. Nigeria's most significant law on alternative dispute resolution, which applies to the whole country, is the Arbitration and Conciliation Act Cap A18, LFN 2004. This law provides for arbitration and conciliation and distinguishes between domestic and international disputes settled by those mechanisms. It makes no provision for mediation.

However, Nigeria operates a federal system of government with legislative power vested in both the national (federal) and the constituent state levels. Laws in respect of ADR mechanisms, including mediation, can be enacted at the federal or state levels. Accordingly, while there are no federal laws governing mediation across the entire country, some of the states that are major commercial centres such as the Federal Capital Territory, Rivers State (Port Harcourt) and most significantly, Lagos state, have laws on mediation.

In Lagos state, the domestic sources of law that relate to mediation include the Lagos State Multi-Door Court Law 2007 and the accompanying Lagos State Multi-Door Court Practice Directions on Mediation, the Citizens Mediation Centre Law 2007 and the Lagos Court of Arbitration's (LCA) Mediation Guidelines 2011. In Kano state, there are the Mediation and Arbitration Rules 2008. The mediation laws, unlike the primary law on arbitration and conciliation, do not make any distinctions for disputes of an international nature.

3 Mandatory provisions

Are there provisions of domestic mediation law that must be considered in mediation proceedings?

The laws governing mediation proceedings are usually the laws or regulations of the particular institution in which mediation is to occur. Although, as explained, there are no specific laws that govern mediation generally, some of the rules that are required to be observed in most of the different laws relating to mediation institutions are as follows:

- the confidentiality rule: information and documentation produced or exchanged during the proceedings are kept confidential by all the participants including representatives, witnesses and any experts; and
- conflict of interest rule: mediators are required to be neutral to all parties and interests in the mediation proceedings. They must disclose any personal, financial or other interests they might have to the disputing parties prior to the start of mediation.

4 Obligation to mediate

Is mediation in your country obligatory? Can mediation be ordered by courts in your country?

Generally, the use of mediation is not obligatory in Nigeria, unless the parties have stated so in their contract. The rules of the high courts in some states require that attempts at other means of dispute resolution or amicable settlement be made before the parties institute litigious action. For example, Order 3, Rule 2(1)(e) of the High Court of Lagos State (Civil Procedure) Rules 2012 requires that a Pre-action Protocol Form 01 must be submitted as part of the documents to institute an action in that court. This form is essentially a statement to the effect that the litigant has already attempted other forms of out-of-court settlement that have been unsuccessful, including a description of the modes attempted. However, it is not compulsory that mediation be used. In certain circumstances, court-annexed mediation is mandatory.

5 Court-annexed mediation

Does the law of your country provide for court-annexed mediation? If so, is court-annexed mediation mandatory?

In a growing number of states in Nigeria such as Lagos, Ogun, Kano and, in the Federal Capital Territory, Abuja, court-annexed mediation is provided for under the auspices of the 'multi-door court house' (MDC). These MDCs provide various forms of ADR mechanisms including mediation.

Parties may voluntarily bring their disputes to the MDCs for mediation. Judges in the relevant high courts to which cases have been assigned for litigation may also refer the cases to mediation at the MDC if they believe that they have a good chance of being settled through those mechanisms (referral cases). This determination is usually made either at the beginning of the case or during a stage before trial known as the case management conference/pretrial conference stage.

Court-annexed mediation is not mandatory for all forms of dispute. It is mandatory in referral cases as the suit in court will not continue until the parties attempt the mediation mechanism. It would also be mandatory where mediation at the MDC is a term of the parties' agreement.

Finally, under the Lagos MDC (LMDC) Practice Directions, in certain circumstances where one of the parties has brought the dispute for mediation at the LMDC, a notice of referral will be issued to the other parties who are supposed to submit the dispute to the LMDC by making a written notice of submission to such within seven days. Where a party does not do so, the LMDC may send the matter to a judge of the High Court who has been specially mandated to supervise and enforce settlements through ADR (ADR Judge). The ADR Judge will order the other disputing parties to appear before him or her, consider the case and may order them to submit to mediation. In such a case, mediation would also be compulsory. Refusal to appear before the ADR Judge or submit matter to the LMDC would amount to punishable contempt of court.

6 Mediation-arbitration and other forms of mediation-related ADR

Is mediation combined with arbitral proceedings? May a mediator act later in the same dispute as an arbitrator, conciliator or judge? Are arbitrators aware of mediation, and if yes, are they willing to transfer arbitration cases to mediation? Which other proceedings are available and used in your country that are related to mediation?

In some institutions, mediation proceedings may be combined with arbitration proceedings. In the LMDC, where mediation fails, the parties can move to arbitration within the LMDC if it is stipulated in their agreement or they desire to do so. Generally, mediators do not subsequently act as arbitrators or judges in the same matters so a new person is appointed as arbitrator.

Arbitrators are aware of mediation and recognise it. However, unlike litigation where the judges may refer cases for mediation, arbitrators are not obliged to and rarely, if ever, transfer disputes brought before them for arbitration to mediation.

Other forms of ADR mechanisms that are similar to mediation such as adjudication, early neutral evaluation and conciliation are available in Nigeria. Legislative provisions on conciliation applicable to the entire nation are available by virtue of the Arbitration and Conciliation Act Cap A18, Laws of the Federation of Nigeria 2004 (ACA). As a result of the inclusion of provisions on conciliation in the ACA, the use of this ADR mechanism in Nigeria is rapidly growing.

7 Online dispute resolution (ODR)

Have there been any developments regarding online dispute resolution in your country? Is your country participating in any international ODR project? Is online mediation available in your country?

ODR is currently not available in Nigeria and the country is not a signatory to or participant in any ODR treaties or associations. However, the rapid development of technology in Nigeria is likely to result in the development of ODR in the next few years. As a matter of fact, there is a growing awareness of the concept of ODR and prominent lawyers in Nigeria, such as the former Attorney General of the Federation, have called for the development of ODR in Nigeria.

8 Confidentiality and disclosure

Is mediation a confidential proceeding in your country? In which cases can disclosure of confidential information by the mediator or the parties be permitted or compelled? Are there any sanctions for breach of confidentiality?

Under the legislation and regulations that govern mediation proceedings in Nigerian mediation institutions, mediation is confidential. There is a duty of confidentiality on the mediator, the parties and all representatives, witnesses or other participants of the proceedings. This duty is a permanent one. The proceedings and any documents or information used in or arising from them are confidential.

Mediators and other workers in the mediation institutions are not permitted to be called as witnesses by either of the parties in respect of the mediation proceedings or information provided in the course of the mediation. Additionally (subject to some exceptions), documents that are produced or provided in mediation proceedings cannot be divulged, admitted or forced to be discoverable (ie, produced by the other party to the dispute).

There are some exceptions to the duty of confidentiality. Primarily, disclosures may be made with the consent of all the parties to the dispute. Documents provided for or arising from mediation may be disclosed if they would ordinarily have been available for discovery in arbitration or litigation proceedings. Information may also be disclosed to the extent that it is necessary to enforce any settlement agreement reached in the High Court. Under the Citizens Mediation Centre Law, information from mediation proceedings at the Citizens Mediation Centre can also be disclosed where it is necessary to enable any person to perform their legal duties. Any criminal offences disclosed during the proceedings are also not subject to the confidentiality protection.

9 Limitation period

Does a mediation proceeding suspend the limitation period for a court claim?

Mediation is generally not mandatory. As such mediation undertaken before the institution of an action in court does not suspend the limitation period for a court action in Nigeria. Where an action has been instituted in the High Court and the matter is then referred to the LMDC (ie, a referral case), under the LMDC Practice Directions, the limitation period is suspended.

10 Settlement

What is the legal character of the final (settlement) agreement? What are the legal requirements for the enforceability or the content of the agreement? Is it possible to revise, withdraw or challenge the final settlement agreement?

In cases where a final settlement is reached, the settlement agreement, when properly executed, is binding and enforceable. Under the LMDC Law and the Citizens Mediation Law, it is enforceable as an order of the court once it is endorsed by a judge. However, under the LCA Mediation guidelines, it is simply enforceable as a binding contract.

Settlement agreements made in the mediation institutions are required to be put into writing and signed by both of the parties (or their appointed representatives) and the mediator. The LMDC Practice Directions give detailed analysis of the process of preparing and enforcing the settlement agreement, which is as follows: the mediator is to put into writing the 'terms of settlement' the parties have agreed to; the parties then make any further comments or inputs to what has been written down by the mediator; and, once they are satisfied, the parties can sign the settlement agreement. The settlement agreement would then be taken to the judge who referred the matter (in a referral case) or to an ADR Judge for endorsement.

If aspects of the agreement are unclear, the parties may agree to revise those aspects. Failing such agreement, the mediation agreement is binding as it is. Once drawn up, it is rare for parties to withdraw or challenge the agreement. This is particularly true of agreements made under the auspices of the LMDC or Citizens Mediation Centre, which, upon endorsement by the judge, automatically attain the status of a court order and become enforceable forthwith.

11 Mediation institutions

What are the most prominent mediation institutions in your country?

The most prominent mediation institutions in Nigeria are the LMDC, the Abuja Multi-Door Courthouse, the Lagos Court of Arbitration and the Citizens Mediation Centre. There is also the Institute of Chartered Mediators and Conciliators and mediation under the auspices of the Chartered Institute of Arbitration.

The LMDC is a court-annexed ADR institution set up by the Negotiation and Conflict Management Group and the High Court of Lagos State and established by the Lagos Multi-Door Court Law 2007. This institution engages in mediation as well as other forms of ADR such as arbitration and conciliation. The LMDC is a non-profit statutory corporation and has its centres annexed to the high courts of Lagos state in different parts of the state. The LMDC's main purpose is to ensure quicker access to justice by reducing the caseload of the courts and dealing with matters that can likely be resolved without litigation. The LMDC has become very popular and has influenced the development of other MDCs in different parts of Nigeria, including the Abuja Multi-Door Courthouse, the Ogun Multi-Door Courthouse and the Kano Multi-Door Courthouse.

The LCA is an independent international centre for the resolution of disputes, particularly commercial disputes. The LCA, as its name suggests, has its main focus on the resolution of conflicts using arbitration. However, it also has a mediation centre for resolution of disputes through mediation.

The Citizens Mediation Centre is an independent statutory corporation in Lagos state established by the Citizens Mediation Centre Law 2007. It was set up to increase access to justice for the less privileged and to encourage the use of ADR mechanisms. The Citizens

Mediation Centre mostly deals with landlord and tenant disputes, employer and employee disputes, family disputes and debt-related matters. However, it may also deal with commercial investment disputes if the Governing Council of the Centre deems it fit to do so.

The Institute of Chartered Mediators and Conciliators is a body of professional mediators, which, among others, aims at regulating the practice of mediation and conciliation in Nigeria, trains and certifies new mediators through an accreditation and certification course and generally promotes the use of ADR for the resolution of disputes.

Mediation procedure

12 Background

Describe the development of mediation in your country.

The formal concept of mediation as an ADR mechanism and alternative to litigation is still a relatively new, growing concept in Nigeria. However, dispute resolution mechanisms very similar to mediation have existed within the traditional societies of Nigeria for many years. In many traditional societies in Nigeria, mediation was regularly used as an informal tool for resolving petty disputes. On a more formal level, many societies had a committee of elders, family heads, chiefs and emirs who presided over and sought to bring solutions and resolution of disputes between parties. Often, these mediators (especially when they were not kings) were chosen for their respectability in society, their knowledge of the laws and customs of the land and their wisdom, etc.

Although mediation as a formal concept is still not very popular within Nigeria, with the growth in prominence of ADR mechanisms in general, there is an increase in the awareness and use of mediation as an alternative to litigation (or more commonly, as an initial step before the use of other, more binding, ADR mechanisms such as arbitration).

13 Areas of disputes for mediation

In which areas of disputes is mediation preliminarily applied? Are there any disputes that cannot be mediated?

Mediation can be applied in all types of disputes. It is often used in commercial disputes, family disputes, landlord and tenant/property disputes, etc. There are no laws that restrict disputes that can be subject to mediation since it is a generally voluntary and informal process. In fact, criminal prosecutions, despite not being capable of being resolved by mediation in the 'strict' sense of the term, in some states in Nigeria, can be resolved by a system of 'plea bargaining', which shares many similarities with mediation.

14 Procedural requirements

Are there procedural requirements for mediation proceedings in your country? Must the parties prepare for the mediation?

There are no general legal requirements for mediation proceedings in Nigeria. The regulations that guide the various institutions provide specific requirements to be followed in preparation for mediation at their institutions.

The LMDC Practice Directions, for example, require that parties who are voluntarily submitting their dispute for mediation at the LMDC must make a formal written request for mediation. The parties must then file at least five copies of the request for mediation with the LMDC – three copies for the LMDC and one for each party to the dispute.

Upon filing of the written requests, the LMDC will appoint a mediator from its panel of neutrals (a list of potential mediators held by the LMDC) subject to the wishes of the parties. Alternatively, the parties may choose a mediator for themselves.

The mediator and the parties will then sign a mediation agreement detailing the procedure for the mediation.

Under the LCA mediation guidelines, in addition to the requirements detailed under the LMDC Practice Directions, the mediator must complete a disclosure form prior to the start of mediation. Additionally, the parties (and representatives) must have a pre-mediation session with the mediator to schedule the mediation, determine how documentation is to be shared and arrange the time and date of mediation meetings. It is also during this session that they sign a mediation agreement.

15 Structure and process of mediation

Describe the most common steps for the mediator's preparation of a mediation proceeding. Describe the most common structure of mediation proceedings. What is the typical time frame for a mediation proceeding? Are there any special considerations for international mediation proceedings?

Generally, mediation proceedings in Nigeria involve the following procedures:

Pre-mediation sessions
Prior to the start of the mediation sessions, the mediator usually engages in pre-mediation sessions with the parties and their representatives. These sessions are to enable the mediator to determine and understand the basic issues in the dispute. They also give the mediator an opportunity to determine the structure of the mediation process that would be most suitable for the parties. Additionally, at this meeting, the mediator, the parties and their representatives enter into a mediation agreement, which specifies the terms that will govern the mediation proceedings.

The opening session
This is the first main joint session between the mediator and the parties to the dispute. At this stage, the mediator will explain the mediation process, his or her role as a mediator, etc. Resolution of relationships may also be attempted in this session before the proper mediation on the issues in dispute begins. The issues in dispute will also be identified and characterised and the parties' priorities will be determined.

Private caucusing
Private caucusing is a recognised step in mediation proceedings in Nigeria. It provides an opportunity for parties to provide important information that they ordinarily would not have provided to the mediator in the presence of the other parties. Private caucusing usually occurs after the first joint session at the opening phase. However, it can occur several times and at any time in the course of the proceedings.

Joint sessions
At these sessions, the parties attempt to come to a resolution or settlement on the issues in dispute with the guidance and encouragement of the mediator.

Closure
Where the parties reach a settlement on some or all of the issues in dispute, they will agree on terms and this will be incorporated in a settlement agreement or a memorandum of understanding executed by the parties (or their authorised representatives).

The time frame for mediation is not a regulated process. As such, the time frame can vary significantly depending on the complexity and technicality of the subject matter of the dispute.

16 Mediation style

What is the primary mediation style in your country for commercial mediation: facilitative mediation, evaluative mediation or transformative mediation? Are private sessions (caucuses) or joined sessions, or both commonly used in mediation?

There is no prescribed form or method of mediation that must be adopted by parties in commercial (or any other form of) mediation. However, a mixture of the evaluative and facilitative approaches is often adopted in commercial mediation proceedings in Nigeria, particularly for mediation proceedings conducted in the mediation institutions in Nigeria. A mediator is to assist the disputing parties to reach an outcome. In doing so, mediators can point out weaknesses in each of the parties' cases (in private caucuses). Mediators also consider the interests of the parties and make suggestions for possible outcomes that meet the interests and goals of the parties. In reaching a mediated settlement in commercial disputes, the proceedings often involve private caucusing in the earlier stages of mediation proceedings and subsequent joint sessions until the parties reach an agreement.

Update and trends

As the recognition of the importance of ADR mechanisms continues to grow, there is likely to be an advancement in the development of mediation as a dispute resolution mechanism in Nigeria. Additionally, the rapid growth of online marketing in Nigeria is likely to be accompanied by ODR mechanisms in the near future.

17 Co-mediation

What form does team mediation typically take in your country? Is co-mediation regularly used in your country? In which kind of cases?

Mediation proceedings in Nigeria usually involve only one mediator unless the parties agree otherwise. However, for mediations conducted in the LMDC, co-mediation is also permitted in situations where the single mediator is of the opinion that he or she does not have the requisite expertise to handle the matters raised in the mediation proceedings alone and requires assistance.

18 Party representatives and third parties

What is the practice in your country with respect to the inclusion of party representatives in mediation proceedings? What is the practice with respect to experts and witnesses?

In mediation proceedings in Nigeria, particularly within the mediation institutions, party representatives, especially lawyers, are an accepted and even expected part of mediation proceedings. This is particularly so for referral cases in the MDCs, where the parties would already have legal representatives in the litigious suit. The only requirement to be observed with respect to representatives is that where any party does not intend to participate in the proceedings themselves, their representatives must provide a letter of authority or power of attorney to the institution, signed by such party permitting the representatives to execute binding settlement agreements on their behalf. Party representatives, particularly legal representatives, are enjoined under the law to encourage ADR and amicable settlement (including mediation) among their clients.

Independent experts and witnesses are also a recognised and accepted part of mediation proceedings when they are needed. It is important to note that the rules of confidentiality applicable to mediators and the parties to a dispute are also binding on any representatives, experts or witnesses in the proceedings.

19 Specific mediation procedures/conflict or dispute management systems

Have companies set up their own dispute management systems in your country? Are there any special routes for consumers to use mediation for small claims? Are there any institutions that offer mediation for their customers, users, etc? Is there any reported or published information regarding dispute management systems of companies for conflicts in employment matters?

In Nigeria, there is a dearth of information on the availability of internal or specialised mediation mechanisms for employees or customers. The Citizens Mediation Centre deals with employee disputes and other small claims. The LCA also has a small claims centre to resolve claims involving sums below 5 million naira.

Mediation clauses and mediation agreement

20 Mediation clauses

Are mediation clauses commonly considered in the course of contract drafting? Are there special requirements for mediation clauses? Are there any relevant court decisions referring to such escalation clauses?

Clauses requiring the adoption of mediation as the specific form of ADR mechanism applicable are not typically included in contracts. Arbitration (or expert determination for technical issues) is more commonly chosen. However, there is an increase in the inclusion of mediation clauses in agreements through a multi-tiered approach involving an attempt at amicable settlement (through mediation or sometimes, negotiation), followed by arbitration.

21 Conclusion and content

Is there any obligation to conclude an agreement between the mediator and the parties or between the parties before or at the beginning of the proceeding? Are there any legal requirements regarding the content of the agreement between the mediator and the parties? What are the common provisions for such mediation agreement? Must the agreement be in writing?

The mediator, the parties and their representatives in a dispute submitted before any of the mediation institutions in Nigeria are required to execute written mediation agreements before the start of the mediation proceedings. At the LCA, this is usually done at a pre-mediation session using a prescribed form.

The mediation agreement usually contains the following information:

- details of the parties and their representatives for the mediation proceedings;
- details of the dates, times and venues of the mediation proceedings;
- an undertaking by the mediator to conduct the mediation diligently in accordance with the rules of the institution or any rules chosen by the parties, which have been approved by the management of the institution;
- an undertaking by the parties to indemnify the mediator of any liability that arises from or is connected to the mediation unless it is caused by his or her fraud or dishonesty;
- confidentiality requirements; and
- terms of payment of the costs of mediation.

22 Costs for mediation

Are there any legal provisions on mediators' fees? What is the average mediator's fee in mediations involving companies? Is there any legal aid or other financial support for mediation proceedings if parties cannot afford to pay the mediator?

The laws and guidelines regulating specific mediation institutions do not stipulate mediators' fees. Rather, they give authority to the institutions to determine mediators' fees and any registration or administration fees payable by the parties. Where parties voluntarily appoint mediators and conduct their mediation proceedings outside of the ambit of the mediation institutions, the mediators' fees are negotiated between the parties and the mediator at their discretion.

The fees payable to mediators would depend on the complexity of the case and technicality of the subject matter as well as the number of mediators with the level of experience to handle a dispute in relation to that subject matter. This can vary quite significantly and can range between US$200 and US$50,000, or more.

Fees and other costs payable for mediation proceedings in mediation institutions in Nigeria are usually split equally between the parties to the mediation. However, this is subject to any contrary agreements by the parties.

In most of the mediation institutions, there are no specific or regular legal aid or financial support programmes to assist parties in paying for the costs of their mediation. However, the Citizens Mediation Centre in Lagos state is aimed at providing free and affordable mediation services to indigent people for disputes that occur within the state. Thus, such individuals would not be required to pay any of the costs of the mediation proceedings.

Professional matters for mediators

23 Regulation

Is there any specific regulation of mediators in your jurisdiction? Give details. Are there any regulations on immigration or tax issues or regarding the right to work for foreign mediators?

There is no specific regulation governing mediators in Nigeria. There is no requirement that they be lawyers or of any specific profession. The laws governing some of the mediation institutions, such as the LMDC, simply require that a person carrying out the role of mediation within their institution (whether chosen from their panel of neutrals or appointed independently by the parties), be trained and certified by a reputable local or international mediation institution or body.

There are also no specific regulations regarding the right to work for foreign mediators. Foreign mediators would simply be required to have the relevant visas and work permits (where necessary) to enter and work in Nigeria.

24 Training

Are there any requirements regarding training for mediators?

There are no compulsory training requirements for mediation such as the length of time or content of the training. This is determined by the institution or organisation with whom the training or accreditation is undertaken. For instance, training for accreditation with the Institute of Chartered Mediators and Conciliators and the Chartered Institute of Arbitration is for a period of 40 hours (ie, Monday–Friday (8am–5pm daily). There are visible differences in the course content of the various institutions. Notwithstanding, topics such as introduction to the ADR spectrum, conflict analysis, communication skills and ethical conduct for mediators are part of the curriculum.

The mediation institutions such as the LMDC and the LCA require that mediators have considerable practical experience in their field. As such, a mediator seeking to be chosen must prove this.

25 Continued education

Must mediators undertake continued professional education? Is there a credit point system for the continued education of mediators?

There are no specific legal requirements that mediators must undertake continued professional education. Mediators undertake refresher courses on an individual basis and this attracts points for CLE purposes.

26 Accreditation of mediators

Outline the system for certification of mediators.

There are no official registers of mediators or any mandatory, formal accreditation qualifications required in order to act as a mediator in Nigeria. However, some organisations, most popularly, the Institute of Chartered Mediators and Conciliators, accredit mediators in Nigeria. It is important to note that, although there is no general legal requirement for accreditation of mediators, by virtue of their specific regulations, most mediation institutions in Nigeria only choose chartered or accredited mediators to be part of their panel of neutrals. Accreditation also increases the chances of being appointed as a mediator generally as it gives credibility to the mediator.

27 Mediator liability and sanctions

What are the duties of mediators in a mediation procedure? What liability do mediators face when offering their services and conducting mediation proceedings? Is professional indemnity insurance for mediators available or obligatory? Are there any further sanctions or other disciplinary measures for mediators in cases of misconduct, poor performance, etc? Are there any regulations referring to the dismissal of mediators?

The different guidelines and regulations of the mediation institutions spell out the role of mediators in mediation proceedings. In fact, the LMDC has a code of conduct for mediators that categorises their duties into some broad sections. The duties encapsulated under these sections are also placed on mediators in the laws of other mediation institutions. This code of conduct was adopted from an initiative by the American Arbitration Association, the American Bar Association and the Society of Professionals in Disputes Resolution. The duties are as follows:

- self-determination: mediators are not to make decisions for the parties in dispute or forcefully influence their decisions, rather they are to simply facilitate communication and maintain an enabling environment for the parties to come to a decision;
- impartiality: mediators are expected to be neutral in relation to all the parties to the dispute;
- conflict of interest: mediators are not allowed to mediate in a dispute in which they may have a personal or financial interest. They are required to disclose any interests that may be potentially conflicting before they meet the parties. Under the LCA guidelines, every potential mediator is required to complete a disclosure form with details of any conflicting interests that they might have;
- competence: mediators are expected to only accept disputes on a subject matter that they are competent in;
- confidentiality: like all other participants in the mediation proceedings, mediators are under a duty to keep the mediation proceedings confidential;

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- advertising and solicitation: mediators are required to be truthful about their areas of competence and their levels of competence in those areas;
- obligations to the mediation process: mediators are under a duty to ensure that they have sufficient time to properly perform their role as mediator, including for adequate preparation prior to mediation proceedings. A mediator should also prevent any delays or disruptions to mediation proceedings by parties or other participants; and
- law: mediators who are not legal practitioners are under a duty to refrain from providing any professional legal advice. Instead, they may point parties to the appropriate channels for advice.

Mediators who are on the panel of neutrals list in any mediation institution would be liable to removal in the event that they breach the rules, engage in misconduct or are unable to perform their duties. Additionally, mediators may face civil or criminal liability for any fraudulent or dishonest actions.

28 Appointment

Is there any regulation regarding the appointment of mediators? Is it common in your country to seek assistance by institutions or official bodies for the appointment of mediators? Are mediators obliged to inform about conflicts of interest in the course of appointment?

There is no general regulation that provides for the appointment of mediators. However, the various mediation institutions have laws and guidelines that govern the appointment of their panel of neutrals – the list of individuals available to act as mediators over any disputes submitted to the institution. The panel of neutrals is expected to consist of people with sufficient experience in their field and training and certification in the art of mediation.

Mediators are usually appointed from the panel of neutrals list for specific proceedings. They are usually appointed by the parties, or alternatively, by a person responsible for such appointment (in the LCA, the President and in the LMDC, the Executive Secretary).

Although parties typically choose individuals from the panel of neutrals provided by the mediation institution to which they have submitted their dispute, they need not do so. Where parties have agreed in their contract, or subsequently, to appoint a particular mediator or use another procedure for appointment, they may do so.

Cases

29 Notable cases

Briefly give details of any significant recent mediation cases or disputes or judgments involving mediation that have been published in your country.

There have not been many mediation cases published in Nigeria. However, in the case of *Folarin and another v Idowu and others* [2013] LPELR-22123 (CA), the Court of Appeal, the second highest court in Nigeria, recognised the importance of agreements to engage in mediation and other forms of out-of-court settlement in a contract as well as any settlement agreements made pursuant to such mediation proceedings. It held that any settlement agreements made pursuant to contractually imposed mediation must be enforced by the courts and will be binding on the parties who have endorsed or agreed to it.

Romania

Sanda Elena Lungu and Constantin Adi Gavrila
Craiova Mediation Centre

Law and institutions

1 Treaties

Is your country a signatory to any treaties that refer to mediation? Is your domestic mediation law based on a treaty?

Romania has not signed any treaties in the field of mediation. In the presentation of the arguments to enact the Mediation Law, the Romanian Ministry of Justice indicated EU legislation as the single source of the proposal, namely Recommendation (2002)10 of the Committee of Ministers to member states on mediation in civil matters, Recommendation (98)1 of the Committee of Ministers to member states on family mediation and Recommendation (99)19 of the Committee of Ministers to member states concerning mediation in penal matters.

The Romanian Mediation Law is also based on the European Code of Conduct of the Mediators and the draft of Directive 2008/52/EC of the European Parliament and of the Council regarding certain issues of mediation in civil and commercial matters.

Since 24 May 2008, when Directive 2008/52/EC was published in the Official Journal of the European Union, Romanian legislation has changed slightly to transpose the Directive's provisions as much as possible. Some facets of Law No. 192/2006 were also improved to transpose the provisions of Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market.

2 Domestic mediation law

What are the primary domestic sources of law relating to domestic and foreign mediation? Are there any differences for the mediation of international cases?

On 22 May 2006, Law No. 192/2006 on the mediation and organisation of the mediator profession was published in the Romanian Official Journal. It is this law that brings, for the first time, clarification on the place of mediation within dispute or conflict resolution, the role and obligations of the mediator in dispute resolution, how to access mediation services and who can act as a mediator.

To transfer the provisions of Directive 2008/52/EC of the European Parliament and of the Council regarding certain issues of mediation in civil and commercial cases into Romanian law, the Romanian Parliament adopted Law No. 202/2010 on measures to accelerate settlement of lawsuits, which modified the Civil Procedural Code and the Penal Procedural code. Mediation is now included for the first time in the two Procedural Codes as an alternative method of settling disputes.

After 147 years, a new Civil Code came into force in Romania on 1 October 2011 and a new Civil Procedural Code on 15 February 2013. Both have included specific disposals on mediation and other alternative dispute resolution methods.

Neither the Codes nor Law No. 192/2006 concerning mediation and organisation of a mediator's profession include reference to cross-border mediation. All the legal provisions in this matter are applicable both for domestic and foreign mediation.

3 Mandatory provisions

Are there provisions of domestic mediation law that must be considered in mediation proceedings?

The Mediation Law stipulates, among others, that the mediator has the following obligations:

- to deliver any explanations to the parties related to the mediation process, so that the parties clearly understand the purpose, limits and effects of mediation;
- to ensure that mediation is achieved in full respect of the freedom, dignity and private lives of the parties;
- to conduct the mediation process impartially and ensure a constant balance among the parties; and
- to refuse to take over a case, if he or she is aware of any circumstance that might prevent him or her from being impartial and neutral, as well as if he or she finds that the rights concerned cannot be subject to mediation, in accordance with article 2.

The mediator is also bound to keep confidentiality over the information obtained throughout his or her the mediation process, to observe the deontological norms and to respond to the requests from the judicial authorities, in accordance with the provisions of article 32 of the Romanian Mediation Law and to constantly improve his or her knowledge and mediation skills by attending in-service or continuous training courses, under the conditions and requirements as defined by the Mediation Council.

4 Obligation to mediate

Is mediation in your country obligatory? Can mediation be ordered by courts in your country?

The parties, legal or natural entities, can voluntarily resort to mediation, including after a trial has been initiated in front of competent courts of instance, by mutually agreeing to settle by mediation a conflict or a dispute. In any convention regarding the rights that the parties can dispose on, they may include a mediation clause, whose validity shall be independent from the validity of the contract in which it is included.

Romanian law does not have any provisions for mandatory mediation as a pretrial or during the trial condition.

According to article 227, paragraphs 2 and 3 of the new Romanian Civil Procedure Code, the judge can invite the parties to participate in an information session on the advantages of using this procedure. The session is free of charge. When he or she considers it necessary, taking into account the case circumstances, the judge will recommend the parties to resort to mediation, with a view to settling the litigation amiably at any phase of the trial. It must be noted that mediation is not compulsory for the parties.

In July 2013, according to new developments of the legislation in the mediation field (Law No. 115/2012), the claimant was required to prove that, before going to court, he or she has attended an information session with a mediator regarding mediation advantages. The requirement applied to a number of fields of law such as family, commercial, civil and, to a limited extent, criminal cases. The evidence of attending such a session was to be made in the form of a certificate released by the mediator who provided the information session. A new piece of

legislation (Governmental Emergency Ordinance No. 90/2012), taking effect from August 2013, created the sanction of case inadmissibility if the claimant failed to participate in the information sessions regarding mediation benefits. According to the Decision No. 266 of 7 May 2014, the Romanian Constitutional Court found that both the claimant's obligation to attend the information session regarding mediation benefits and the sanction of case inadmissibility are not constitutional. From the Court's decision:

> *[...]mandatory participation in learning about the advantages of mediation is a limited access to justice because it is a filter for the exercise of this constitutional right, and through the application of legal proceedings' inadmissibility, this right is not just restricted, but even prohibited.*
>
> 23 *Since there may be situations where natural or legal persons want to resolve their conflict exclusively in the court, the Court notes that the legal regulation criticised did not allow them to assess for themselves whether or not they need this information. Free access to justice is the faculty of the individual to apply to a court to defend their rights or legitimate interests capitalisation. Any limitation of this right, however small it is, must be duly justified, analysing to what extent the disadvantages due to it do not somehow outweigh the possible benefits. Both the Constitutional Court and the European Court of Human Rights state that 'mere legal consecration, even at the highest, constitutionally level, is not likely to ensure its real effectiveness, as long as, in practice, the exercise of this right faces obstacles. Access to justice must be ensured, therefore, effectively and efficiently.'*
>
> 24 *Accordingly, the Court considers that the preliminary mandatory procedure of information on the advantages of mediation appears to be a disincentive to obtaining citizen's rights in the courts of law. Furthermore, a procedure consisting in information on the existence of a law appears, undoubtedly, as a violation of the right of access to justice, which puts undue burden on litigants, especially since the procedure is limited to a duty to inform, and no actual attempt to resolve the conflict through mediation, so the parties briefing before the mediator has a formal character.*
>
> 25 *In the context of that retained above, the Court finds that the obligation imposed on the parties, natural or legal persons, to participate in the briefing on the advantages of mediation, otherwise inadmissible, the application for summons is an unconstitutional measure, contrary to article 21 of the Constitution.*

5 Court-annexed mediation

Does the law of your country provide for court-annexed mediation? If so, is court-annexed mediation mandatory?

In Romania, mediation is organised only as an out-of-court procedure because it is only available in private practice. Therefore, public authorities, including the courts, cannot offer mediation services.

6 Mediation-arbitration and other forms of mediation-related ADR

Is mediation combined with arbitral proceedings? May a mediator act later in the same dispute as an arbitrator, conciliator or judge? Are arbitrators aware of mediation, and if yes, are they willing to transfer arbitration cases to mediation? Which other proceedings are available and used in your country that are related to mediation?

In Romania, the mediation is never combined with arbitral proceedings. Hybrid ADR methods, if any, are very rare and are based on contract clauses that were most likely introduced on the advice of counsel from countries with experience in this field.

The mediator cannot act later in the same dispute as an arbitrator, conciliator or judge, because the mediator is bound to keep confidentiality over the information obtained throughout the mediation process. If a mediator infringes this rule, he or she can be accountable or can be sued in a civil or penal lawsuit.

Mediation services, among others, take place in the chambers of commerce, as the regular arbitration courts. An arbitrator can be also a mediator, but cannot act as a mediator in the same case. Because arbitration is not often used in Romania, there is no practice of transferring arbitration cases to mediation.

Other than mediation and arbitration, ADR methods are not commonly used in Romania.

7 Online dispute resolution (ODR)

Have there been any developments regarding online dispute resolution in your country? Is your country participating in any international ODR project? Is online mediation available in your country?

To date, Romanian legislation has no special disposals regarding ODR. Online mediation is available, but it depends on the mediator and the parties' access to the internet.

However, as the field of mediation is developing freely on a supply and demand basis, it is expected that, in some cases, parties will choose online communication over face-to-face meetings, for efficiency reasons.

8 Confidentiality and disclosure

Is mediation a confidential proceeding in your country? In which cases can disclosure of confidential information by the mediator or the parties be permitted or compelled? Are there any sanctions for breach of confidentiality?

Professional secrecy is recognised equally as being both a right and a primary and fundamental duty of the mediator.

The mediator cannot act as a witness in a hearing concerning the facts or documents he or she is aware of from the mediation procedure. All the information provided and obtained during the mediation procedure by the parties in conflict or dispute shall have a confidential character to third parties and cannot be used as evidence for judicial and arbitral procedures, except for the case when the parties agree otherwise or the law states the contrary.

The mediator cannot be heard as a witness related to his or her deeds or to the instruments he or she took note of within the mediation procedure. In criminal cases, mediator can be heard as a witness only if he or she has the prior, express and written agreement of the parties and, if applicable, of the other interested parties. A witness' capacity is primary as compared with that of a mediator, with regard to the facts and circumstances that he or she knew before becoming a mediator in that particular case. In all cases, after being heard as a witness, a mediator can no longer perform mediation process in that particular case.

One of the exceptions from the mediator's obligation to keep confidentiality is provided for in the Mediation Law, in particular in the section about family cases where it is provided that, if during mediation, the mediator notes any facts that jeopardise the normal growth or development of a child or severely affect his or her best interests, he or she shall be bound to notify the relevant authority. The obligation to keep confidential any information taken down during the mediation and the documents drafted during mediation even after the mediator retires is also stipulated in Law No. 192/2006 (article 32), as well as in a mediator's code of ethics and professional deontology. From a disciplinary point of view, the mediator can be held liable if he or she breaks these rules.

When the mediation procedure is closed for a case that is also pending in a court of law, the mediator is bound in any case to deliver to the judge the original and electronic form of the mediation agreement and the signed statement of mediation closure if the parties reached an agreement or only the signed statement of mediation closure if the mediation closed before settlement or without any settlement.

The entire support provided during the mediation by the parties, by the lawyers, by other persons that may attend the mediation under parties' mutually agreed conditions, including translators or external specialists, shall have confidential character to third parties and shall not be used as evidence for judicial and arbitral procedures, except for the case when the parties agree otherwise or the law states the contrary. The mediator shall draw the attention of the persons participating in mediation, on their obligation to keep total confidentiality and, for such a purpose, he or she may require them to sign a confidentiality agreement.

9 Limitation period

Does a mediation proceeding suspend the limitation period for a court claim?

As a rule, prescription does not begin to flow, and, if it began to flow, it would be suspended. According to article 2532, point 6 of the Romanian Civil Code, the prescription period is suspended if the negotiations between the parties are held no earlier than six months before the expiry of the prescription period.

According to point 7 of the same article, if the negotiations are held according to a contractual clause or within a preliminary legal procedure, the prescription is suspended for a maximum of three months.

If parties only attend an information session on the mediation procedure and its advantages without starting a mediation procedure this does not suspend the limitation period for a court claim.

10 Settlement

What is the legal character of the final (settlement) agreement? What are the legal requirements for the enforceability or the content of the agreement? Is it possible to revise, withdraw or challenge the final settlement agreement?

The agreement has the power of a written document under private signature. Therefore, it has the legal value of a contract between the parties.

The parties' agreement can be submitted for notarisation by a public notary (and at the same time awarded mandatory title to the mediation agreement), or, if applicable, to approval by the court of law, and it will award mandatory title to the mediation agreement.

Moreover, notarisation of the mediation agreement by a notary public or going to a court of law is required in certain situations (transfer of the private property rights regarding immoveable goods or whenever the law requires, under the nullity penalty, the fulfilment of substance and form requirements).

The parties can revise the final settlement agreement in front of the mediator by concluding another agreement from their own motion or on the request of the court.

From 2012 when Mediation Law was changed, the judge or the public notary can modify the agreement, if the parties agree, to fulfil the condition of substance or form requested by law.

Being a written document under private signature, parties can challenge the agreement in any circumstance.

If parties choose to make the agreement enforceable through a notary or in court, they may only ask for the agreement to be rendered null if, at the time the parties reached agreement they infringed some mandatory disposals of law, or they did not have the full capacity to close an agreement or their consent was invalid.

11 Mediation institutions

What are the most prominent mediation institutions in your country?

The Mediation Council, which is an autonomous body and legal entity of public interest and whose head office is in Bucharest, was established by the Romanian Mediation Law for the purpose of organising the mediation activity. The Mediation Council is a private organisation.

The Mediation Council is made up of nine full members and three surrogate members, elected by direct and secret vote by the mediators who have the right to vote, under the conditions provided by the Organisational and Operational Rules and Regulations of the Mediation Council.

The Mediation Council is a regulatory and quality assurance body and its major goals refer to authorising mediators, trainers and training institutions to make proposals to add or, as the case may be, to correlate legislation on mediation, to issue and supervise training standards and to prepare and update mediators at national level (www.cmediere.ro). The Council is not a professional association and each mediator is bound to be member of a professional association.

The Romanian Mediation Council is the official voice of the mediation profession in Romania and administers the Romanian accreditation scheme according to the Romanian Mediation Law.

Mediation procedure

12 Background

Describe the development of mediation in your country.

Culturally, Romania had the village elder's point of reference to dialogue and community peace, but being a centralised society for the second half of the twentieth century, many Romanians lost their confidence and self-determination, exactly the mentality conducive to consensus processes, including mediation.

According to the data provided by the members of the Mediation Council, before the Mediation Law, in 2006 there were no more than 3,000 mediations in Romania, with a 70 per cent success rate.

Since 2006, mediation has risen in popularity. This is owing to the law-based designation of the activity as a profession, independent from the government and exclusively subordinated to the mediator's will.

Fundamentally, with the exception of the opt-in model that was unsuccessful for over a year until it was found unconstitutional in 2014 by the Romanian Constitutional Court, the development of mediation activity was rather natural in Romania, as it was designed as a private service based on supply matching demand and no other obligations, sanctions or incentives.

As of September 2016, there are 6,339 mediators (www.cmediere.ro/mediatori/), 23 training providers and 131 mediation trainers in Romania, all authorised by the Mediation Council.

13 Areas of disputes for mediation

In which areas of disputes is mediation preliminarily applied? Are there any disputes that cannot be mediated?

According to Law No. 192/2006 concerning mediation and organisation of a mediator's profession, any conflicts or disputes occurring in civil, commercial, family, penal matters, in the consumer protection sector, in labour cases, as well as in any other matters, can be settled by means of mediation under the conditions stated in the Mediation Law.

Strictly personal rights, such as the rights related to the status of the person, as well as any other rights that the parties cannot, according to the law, dispose of in any convention or in any other way allowed by law, cannot be subject to mediation.

14 Procedural requirements

Are there procedural requirements for mediation proceedings in your country? Must the parties prepare for the mediation?

According to the Mediation Law, each mediator has the right to use his or her own model to organise the mediation procedure, by observing the dispositions and principles stated in the law (self-determination, neutrality, impartiality, confidentiality and informed consent).

Therefore, pending mediators' styles and level of process influence, the parties may be encouraged to prepare case summaries or meet with the mediator in advance for preparation purposes. Parties may also meet with their advisers to prepare for the mediation meetings.

Also, there is a certain level of legal procedural requirement for invitations sent to the parties, documents for signing (eg, mediation agreement) and special provisions for court-related cases or juridical areas (eg, family or penal).

15 Structure and process of mediation

Describe the most common steps for the mediator's preparation of a mediation proceeding. Describe the most common structure of mediation proceedings. What is the typical time frame for a mediation proceeding? Are there any special considerations for international mediation proceedings?

The parties can request joint or separate mediation services from a mediator. Where only one party submits the request for mediation, the mediator shall send a written invitation to the other party to accept mediation, indicating a maximum 15-day period to respond. The invitation is sent using any delivery means likely to confirm receipt of the text. The applicant shall provide the mediator with all the necessary information to contact the other party.

If one of the parties is unable to meet the mediator when invited, the mediator, at the request of the other party, can decide on a new date and notify the other party of the change. In the case the mediation is accepted, the parties in conflict or dispute will sign an agreement with the mediator.

If one of the parties gives explicit written refusal for mediation, does not respond to the invitation or fails to meet with the mediator twice in a row at the stated deadlines for signing the mediation contract, then mediation can be considered as not accepted.

In Romania, holding mediation sessions before signing a mediation agreement or contract is forbidden.

According to the mediation training standard applicable to all mediation training providers and courses, the minimum stages of the mediation process are as follows:

- consent or agreement to mediate and preparation of the mediation session;
- introduction of the mediation process and definition of its rules;
- identification of problems;
- exploration of interests and problems;
- generating options;
- conclusion of the agreement; and
- closing the mediation session.

Setting out mediation ground rules is common practice between Romanian mediators. If the parties reach an agreement, according to the law they can decide whether they want it written up, except for certain types of cases where it is required (eg, property cases).

In cases when the subject of the mediation presents difficulties or controversial legal or juridical aspects or aspects related to any other specialised fields, the mediator may, based on the consent of the involved parties, ask for the opinion or standpoint of an external specialist in the respective field.

There are no special considerations for international mediation proceedings.

16 Mediation style

What is the primary mediation style in your country for commercial mediation: facilitative mediation, evaluative mediation or transformative mediation? Are private sessions (caucuses) or joined sessions, or both commonly used in mediation?

The primary mediation style in Romania is facilitative, although it is not stated in the Romanian Mediation Law. However, upon request for services the mediators can use transformative, narrative or evaluative techniques.

The most important thing is that the mediation keeps to fundamental principles and must be based on the trust parties invest in the mediator as the person capable of facilitating negotiations and supporting them for conflict settlement purposes, by mutually reaching a convenient, efficient and sustainable solution.

Techniques such as private joint sessions are common and used to shape the mediation process. In practice, depending on factors such as the level of emotion involved in a case, the mediation can, proportionally, be held more often in joint sessions.

17 Co-mediation

What form does team mediation typically take in your country? Is co-mediation regularly used in your country? In which kind of cases?

According to article 5(1) of the Romanian Mediation Law, mediation can be performed by one or more mediators. It is the only provision in the law regarding the possibility of co-mediation in Romania.

Co-mediation is regularly used in Romania for family cases (one male and one female mediator) and complex cases pending in courts (one lawyer and one specialist mediator) or for mentoring purposes where less experienced mediators work with more experienced colleagues for a period of time for continuous professional development purposes.

18 Party representatives and third parties

What is the practice in your country with respect to the inclusion of party representatives in mediation proceedings? What is the practice with respect to experts and witnesses?

The parties have the right to be assisted by a lawyer or other persons, under mutually agreed conditions (article 52(1) of the Romanian Mediation Law).

The entire support provided during the mediation to the parties under conflict or dispute, by other persons who participate in the mediation procedure shall have a confidential character to third parties and shall not be used as evidence for judicial and arbitral procedures, except in the case where the parties agree otherwise or the law states the contrary. Therefore, the party representatives can be asked by the mediator to sign a confidentiality agreement.

Where the subject of the mediation presents difficult or controversial legal or juridical aspects or aspects related to any other specialised fields, the mediator may, based on the consent of the involved parties, ask for the opinion or standpoint of an external specialist in the respective field. When asking for the standpoint of an external specialist, the mediator shall present only the controversial issues, without revealing the identity of the parties (article 55 of the Romanian Mediation Law).

There are no legal provisions or information from mediation practice regarding the participation of other persons in mediation as witnesses, but they are more likely to play the role of catalyst should they assume a constructive role.

19 Specific mediation procedures/conflict or dispute management systems

Have companies set up their own dispute management systems in your country? Are there any special routes for consumers to use mediation for small claims? Are there any institutions that offer mediation for their customers, users, etc? Is there any reported or published information regarding dispute management systems of companies for conflicts in employment matters?

Although it is a common practice in many countries, Romanian companies (including foreign corporations in Romania) do not have or regularly use dispute management systems. However, some private or public institutions have developed such systems under strategic projects in order to better manage conflicts of the type that affect those institutions.

There are no special routes for consumers to use mediation for small claims.

There is also no reported or published information regarding dispute management systems of companies in employment matters.

Mediation clauses and mediation agreement

20 Mediation clauses

Are mediation clauses commonly considered in the course of contract drafting? Are there special requirements for mediation clauses? Are there any relevant court decisions referring to such escalation clauses?

Until now, it has not been the norm to insert a mediation clause in a contract and there are no special requirements for such clauses. If a mediation clause is included in a contract and the parties ignore it, the judge cannot refuse to hear the case for that reason. Thus, there are no court decisions referring to escalation clauses.

However, mediation providers have started to put forward their own mediation clauses (www.mediere.ro/en/clauza-de-mediere.html):

> *Except as otherwise provided in this contract, any civil action concerning any dispute, controversy or claim arising from or in connection with this contract, including the interpretation or conclusion shall not be initiated before being referred to mediation to the Craiova Mediation Centre Association (CMC) in accordance with the mediation rules of CMC.*

21 Conclusion and content

Is there any obligation to conclude an agreement between the mediator and the parties or between the parties before or at the beginning of the proceeding? Are there any legal requirements regarding the content of the agreement between the mediator and the parties? What are the common provisions for such mediation agreement? Must the agreement be in writing?

The agreement to mediate is called the 'mediation contract' under Romanian Mediation Law. Holding mediation sessions before signing a mediation contract is forbidden. The mediation contract must be concluded between the mediator, on the one hand, and the parties under conflict or dispute, on the other.

According to article 45 of the Romanian Mediation Law, the mediation contract should include, under the sanction of nullity, the following clauses:

- the identity of the parties under the conflict or dispute or of their representatives, as the case may be;
- a description of the type or subject of the conflict or dispute;
- a statement of the parties showing that the parties have been informed by the mediator about mediation, its effects and applicable rules;
- the obligation of the mediator to retain confidentiality and the decision of the parties to retain confidentiality, depending on the case;
- the commitment of the parties under conflict or dispute to observe the rules applicable to mediation;
- the obligation of the parties under conflict or dispute to pay the due fee to the mediator and the expenses made by the same during mediation for the interest of the parties, as well as the down payment and payment modalities of such amounts, including a situation when the mediation procedure is waived or fails, as well as the share to be borne by each party, considering – depending on the case – the social situation of the parties. Unless otherwise agreed, such amounts shall be borne by the parties in equal amount;
- the agreement of the parties regarding the language mediation is to be performed in;
- the number of copies in which the agreement is to be prepared, in the case such agreement shall be in written form, and depending on the number of the signing parties of the mediation contract; and
- the obligation of the parties to sign the minutes prepared by the mediator, regardless of the outcome of the mediation.

The mediation contract must be concluded in written form, under the sanction of absolute nullity.

22 Costs for mediation

Are there any legal provisions on mediators' fees? What is the average mediator's fee in mediations involving companies? Is there any legal aid or other financial support for mediation proceedings if parties cannot afford to pay the mediator?

The mediator has the right to receive a fee, decided by negotiation with the parties, as well as reimbursement of the expenses from the mediation process. The fee should be a reasonable amount and should consider the nature and the subject of the dispute. Unless otherwise agreed, the mediation fees are borne by the parties in equal shares.

The mediation contract represents an executor title as concerns the obligations of the parties to pay the due fee to the mediator by the due dates.

Since mediation is a private service, there are no official fee scales that must be used by the mediator and the parties; each service provider is free to decide on the fee by using fee scales or by individual determination for each case.

According to Romanian Legal Aid Act No. 51/2008, if a party refuses to try mediation or other form of ADR, if applicable, an application for legal aid may be denied; also, according to the same act, the parties that cannot afford to pay a mediator can receive financial support for mediation.

Professional matters for mediators

23 Regulation

Is there any specific regulation of mediators in your jurisdiction? Give details. Are there any regulations on immigration or tax issues or regarding the right to work for foreign mediators?

The mediator profession in Romania can be practised only by individuals who have acquired the capacity of authorised mediator, under the national accreditation scheme and in compliance with the provisions in the Romanian Mediation Law.

A mediator can be any individual who meets the following requirements:

- is fully qualified to practise;
- has a university education;
- has at least three years' work experience;
- is medically able to perform this activity;
- has a good reputation and has not been convicted of an intended offence likely to affect the reputation of the mediator profession;
- has graduated in mediator training courses or a relevant master's degree level post-university programme, accredited in accordance with the law and approved by the Mediation Council; and
- has been authorised as a mediator, under the conditions stated in the Mediation Law.

Romanian Mediation Law, under article 8, regulates all the conditions for foreign mediators interested in working permanently or occasionally in Romania according to which citizens of EU member states, of the EEC or of the Swiss Confederation who are holders of a document certifying their capacity and qualification as a mediator (obtained in any of the above states), shall – under the right to residence context – have access to this profession in Romania, after such qualification documents shall be acknowledged by the Mediation Council, in accordance with the Law No. 200/2004 on the acknowledgement of professional diplomas and qualifications for the professions regulated in Romania, as later on modified and added. Mediator qualification documents obtained in any other state other than Romania, of the EU, the EEC or Swiss Confederation by the citizens listed above shall be acknowledged in accordance with the provisions under article 8, paragraph 5, applicable accordingly. In case the abilities and knowledge do not meet the qualification requirements as stated in the Romanian laws, the Mediation Council shall consider the professional experience of the applicant and can ask the applicant to demonstrate that he or she meets all such professional requirements. According to article 8, paragraph 5, the citizen of a third country, who graduates in mediator training courses abroad or who acquired mediator capacity abroad and wishes to permanently perform mediation activity in Romania, shall get access to this profession provided that he or she presents the education titles, accompanied by the validation certificate issued by the Ministry of Education and Research and he or she presents the contents of the completed training curriculum, including the training duration, and, as the case might be, the documents demonstrating his or her acquired capacity as a mediator.

The Mediation Council shall evaluate the contents of the presented training curriculum, including the training duration, comparing the knowledge and abilities certified by such documents in accordance with the Romanian legislation and shall decide, if the case, the access to this profession. The validation or compensation requirements of the applicant qualification in case his or her certified knowledge and abilities do not correspond to the qualification requirements as stated in the Romanian legislation, shall be defined based on the regulations stated under article 17, paragraph 2. Moreover, the foreign citizen mediator may perform mediation activity in Romania occasionally, under the form of service providing activity, based on the document certifying that he or she legally performs this profession in the country he or she is originated in or comes from, thus being exempted from the authorisation and listing on requirements, as stated in the laws; nevertheless, in such a case, the concerned person shall have the obligation to notify the Mediation Council in writing about carrying out this activity in Romania.

Update and trends

The market for mediation services in Romania has looked destined to fail since 2014 due to faulty application of faulty legislation. The only disputes that are now seen are internal, involving a limited number of topics that interest the profession.

There are almost no requests for mediation services and the 2014 Constitutional Court's Decision No. 266, which found the legislation for mandatory information sessions, including the sanction of case inadmissability, as unconstitutional, projected the idea that 'mediation is not constitutional' to the general public. Although Romania has had an 80-hours standard for basic mediation training since 2007, the whole experience of the Constitutional Court's decision has reopened the discussion about the quality of mediators and of mediation services.

Currently, the biggest challenge is to draw lessons from the experiment of the aforementioned legislation, as it is very easy for one to confuse the substantial elements (ie, the value that mediation and dispute resolution in general can bring about) with personal interests and values and the goal of making mediation mandatory in every case. Below is a tentative list of suggested improvements.

The goal of any act of Parliament should be to aim for better understanding, respect and acceptance. If this goal is reached, the general public would therefore seek mediation out of internal motivation, rather than through obligation and the number of cases should improve consequently as a result of this.

The mandatory components of the legal frameworks of mediation come with high risks that should be carefully assessed beforehand. Although numbers may rise, the practice is artificially sustained and if nothing else motivates the parties to ask for mediation services, they will completely forget about the possibility of mediation if the mandatory components are revoked. To make things worse, mandatory or not, a poor quality service will downgrade the trust and acceptance of mediation services.

Any policy may work well in some places and not in others. Romania is culturally different from many other places. Therefore, institutions should take into consideration the cultural component as being fundamental in assessing the effects of any possible rule.

The ongoing discussion about what needs to be done to advance mediation activities towards a higher level of understanding, acceptance, respect and use should include a strategic approach, with respect to collaboration, culture, stakeholders' interests and principles of mediation. Numbers are always useful, but should not be relied upon solely, especially when sound, solid statistics in mediation are still a thing of the future. Additionally, mediation should be promoted with the needs of people in mind, not as an argument for decreasing courts' backlogs or relieving the burden from the ever-decreasing government budget.

Finally, decisive steps must be taken in order to ensure a good quality mediation service.

24 Training

Are there any requirements regarding training for mediators?

Basic mediation training is performed by training providers, accredited by the Romanian Mediation Council under the conditions stipulated by the Romanian Mediation Training Standard.

The mediator training programmes proposed by the training providers must last at least 80 effective training hours and must cover the contents recommended in the standard: conflict theory and analysis, ADR, mediation, communication, negotiation and mediation legal framework.

The professional training of mediators must be concluded with a graduation examination, organised in accordance with the decisions adopted by the Mediation Council.

The mediator training programme must consist of a minimum 70 per cent share of practical exercises and in a maximum 30 per cent share of theoretical or academic elements.

In addition to the requirements for the curriculum, the Romanian Mediation Training Standard includes accreditation criteria for trainers and training providers.

25 Continued education

Must mediators undertake continued professional education? Is there a credit point system for the continued education of mediators?

Romanian mediators must undertake continued professional education (CPE) under various forms such as publications and participation at conferences or seminars. Although any organisation can organise CPE events, the CPE system is nationally managed by the Romanian Mediation Council, as each mediator must acquire 20 hours of CPE every year.

26 Accreditation of mediators

Outline the system for certification of mediators.

In Romania there is an official panel of mediators that can be found online at www.cmediere.ro/mediatori/. All Romanian mediators must be listed on the official national panel.

The Romanian Mediation Council under the conditions of article 7 of the Romanian Mediation Law (see question 20) authorises mediation.

However, in addition to the national accreditation scheme that is based in the law, there are no other certification systems for experienced mediators with the exception of the Transylvanian Institute for Mediation in Cluj-Napoca.

27 Mediator liability and sanctions

What are the duties of mediators in a mediation procedure? What liability do mediators face when offering their services and conducting mediation proceedings? Is professional indemnity insurance for mediators available or obligatory? Are there any further sanctions or other disciplinary measures for mediators in cases of misconduct, poor performance, etc? Are there any regulations referring to the dismissal of mediators?

Mediators authorised by the Mediation Council have the obligation to give a full explanation to the parties of the mediation process, so that they clearly understand the purpose, limits and the effects of mediation, especially those pertaining to the subject of the conflict or dispute. All the mediators should ensure that mediation is achieved in full respect of the freedom, dignity and private lives of the parties.

If a mediator is aware of any circumstance that might prevent him or her from being impartial and neutral, or if he or she finds that the rights concerned cannot be subject to mediation, he or she has the obligation to refuse the case (article 31 of Romanian Mediation Law No. 192/2006).

The mediator is bound to return to the parties all their documents entrusted throughout the mediation process. The mediator is also not allowed to represent or assist any of the parties in a judicial or arbitral procedure if such procedure concerns the conflict or dispute under his or her mediation.

As stated in Romanian legislation, mediation relies on cooperation among parties and on the use, by a mediator, of certain specific methods and techniques, based on communication and negotiation. The methods and techniques used by the mediator should exclusively serve the legitimate interests and aims of the parties in conflict or dispute. Also, the mediator cannot impose on the parties a solution related to the conflict or dispute subject to mediation.

The mediator is bound to keep the information obtained throughout his or her mediation process confidential, as well as the prepared documents or the documents submitted by the parties during the mediation, even after he or she ceases to act as a mediator (article 32 of the Romanian Mediation Law). Without a guarantee of confidentiality, trust cannot exist. Therefore, secrecy is recognised equally as being both a right and a primary and fundamental duty of the mediator (article 2.5 of the Code of Ethics and Professional Deontology of Mediators).

From a disciplinary point of view, the mediators can be held liable for the following transgressions:

- failure to observe the confidentiality, impartiality and neutrality obligations;
- refusal to respond to the requests coming from the judicial authorities, for the cases stipulated in the laws;
- refusal to return the documents entrusted to the mediator by the parties in conflict or dispute;
- representation or assistance of one of the parties in a judicial or arbitral procedure, if such procedure concerns the conflict or dispute under his or her mediation; and
- other acts that negatively affect the profession's integrity.

Any interested person can report to the Mediation Council, in writing under signature, an occurrence of any of the above-mentioned transgressions. Investigation of such transgression shall be performed in a maximum of 60 days from the date of the submitted report by a disciplinary commission formed by a member of the Mediation Council and two representatives of the mediators, randomly elected from the panel of mediators. The investigation file containing the proposed sanction or the proposal not to apply any disciplinary sanctions shall be submitted to the Mediation Council, which shall issue a decision (article 40 of the Romanian Mediation Law).

Disciplinary sanctions shall be applied depending on the seriousness of the transgression and shall consist, according to article 39 of the Mediation Law, in a written notice, a fine in an amount from 50 to 500 lei, suspension from his or her capacity as a mediator for a period of one to six months or the ceasing of his or her capacity as a mediator.

The civil liability of the mediator can be undertaken, in accordance with the civil laws, for bringing prejudice, by infringements of his or her professional obligations (article 42). Penal liability is not excluded if the mediator commits a crime.

Professional indemnity insurances for mediators are available in Romania, but are not obligatory.

At any stage of the mediation process, any of the parties involved are entitled to reject the mediation contract by giving written notice to the other party and to the mediator. The mediator shall consider the unilateral denunciation, and shall, within 48 hours of receiving the written notice, draw up mediation procedure closing minutes.

28 Appointment

Is there any regulation regarding the appointment of mediators? Is it common in your country to seek assistance by institutions or official bodies for the appointment of mediators? Are mediators obliged to inform about conflicts of interest in the course of appointment?

The parties are free to choose a mediator from the official panel of accredited mediators delivered by the Mediation Council, without any stipulation. This panel is available in the courts and also on the Mediation Council's website, which is also responsible for publishing the panel in the Romanian Official Journal twice a year.

The courts and the judge are not allowed to assist parties in the appointment of a mediator and it is not common to seek assistance from institutions or other official bodies.

If a mediator is aware of any circumstance that might prevent him or her from being impartial and neutral, he or she has an obligation to refuse this case. The mediator must immediately inform the parties of any conflict of interest occurred before or after his or her appointment, such as prior advice to one party in the same or other matters, member of a law firm advising a party in the same matter or a personal relationship.

Cases

29 Notable cases

Briefly give details of any significant recent mediation cases or disputes or judgments involving mediation that have been published in your country.

In 2011 and 2012 the cases concluded by means of mediation were published, including around 300 cases in the following matters: civil, commercial, family, penal, administrative or labour (see www.editurauniversitara.ro).

According to a decision of the Romanian Superior Council of Magistracy, the court decisions that are based on mediation agreements cannot be made public, therefore court decisions have not been publicly available since this decision was made. However, details of mediation cases can be made public pending parties' agreement.

A significant mediation case, which was made public by the parties and received significant media coverage, is the mediation of a penal case, where a female politician alleged that she was threatened and blackmailed by a former Romanian President in one of his public statements. Both parties agreed to mediate and the case did not conclude in a settlement. No other details about this case have been published, as parties agreed to keep these confidential.

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Law and institutions

1 Treaties

Is your country a signatory to any treaties that refer to mediation? Is your domestic mediation law based on a treaty?

Sweden is not a party to any treaty on mediation – neither the UNCITRAL Model Law on International Commercial Conciliation (the Model Law) nor Directive 2008/52/EC (the Directive) are considered as 'treaties' under Swedish law.

The Model Law has not been incorporated in Sweden, but the Directive was implemented in Sweden in 2011 by the Mediation Act (SFS 2011:860).

2 Domestic mediation law

What are the primary domestic sources of law relating to domestic and foreign mediation? Are there any differences for the mediation of international cases?

The Mediation Act is the primary source of law for commercial mediation outside of court proceedings. Mediation within court proceedings is governed by Chapter 42, section 17 and Chapter 50, section 11 of the Code of Judicial Procedure. Although legislation in relation to mediation also exists within criminal law, real estate law in respect of lease agreements, labour law and copyright law, the answers below do not relate to those fields of law.

By establishing three legal certainties for mediation outside of court proceedings the Mediation Act renders the support for the mediation practice that the Directive aims at. They are: mediators and their assistants are bound by a duty of confidentiality; limitation periods are put on hold; and the parties can have the settlement agreement declared immediately enforceable upon application to the court.

The Mediation Act does not provide rules for the proceedings, other than that the proceedings shall be structured and voluntary at all stages. The rest is left to the parties to decide upon on a contractual basis.

In relation to international mediation outside of court proceedings (ie, mediation with at least one party not being Swedish and mediation taking place outside of Sweden) the Mediation Act applies with the sole exception that it is not possible to get a court declaration of enforceability if the mediation agreement was entered into outside the EU, or in Denmark, which has negotiated an exception from all international private law issues within the EU.

3 Mandatory provisions

Are there provisions of domestic mediation law that must be considered in mediation proceedings?

In Sweden it is generally understood that mediation is based on voluntary undertakings by the parties at all times. There is only one provision that seems to be mandatory in the sense that the parties cannot agree to disregard it: the rule that limitation periods are put on hold if the parties agree to initiate mediation (see also question 9).

Given that the parties have agreed to mediation, however, the mediator has a mandatory duty of confidentiality. The duty of confidentiality means that the mediator is forbidden to disclose what he or she has learned in connection with the mediation procedure. It is possible for the parties to release the mediator from this duty should they agree to do so. This is a consequence of the duty of confidentiality being in the parties' interest.

4 Obligation to mediate

Is mediation in your country obligatory? Can mediation be ordered by courts in your country?

There is a broad understanding that mediation in order to be effective need be based on the parties' voluntary commitment at all stages.

Swedish courts have a possibility of using mediation as a tool in connection with their obligation to promote an amicable solution to a dispute (see question 5). There are no formal sanctions.

5 Court-annexed mediation

Does the law of your country provide for court-annexed mediation? If so, is court-annexed mediation mandatory?

Yes, Swedish courts have a possibility of using mediation as a tool in connection with their obligation to promote an amicable solution to a dispute, but only in matters where the parties are at liberty to reach a settlement. If the parties agree to a court-arranged mediation the court can order the parties to appear before a mediator appointed by the court (Code of Judicial Procedure Chapter 42, section 17(2) and Chapter 50, section 11). These provisions are partly the result of legislation implementing the Directive. The provisions put more pressure on the courts to endeavour to have disputes settled.

6 Mediation-arbitration and other forms of mediation-related ADR

Is mediation combined with arbitral proceedings? May a mediator act later in the same dispute as an arbitrator, conciliator or judge? Are arbitrators aware of mediation, and if yes, are they willing to transfer arbitration cases to mediation? Which other proceedings are available and used in your country that are related to mediation?

Mediation and arbitration are seen and handled as separate proceedings, but there is an increasing interest in two-tier dispute settlement clauses. Some such clauses seem to be aiming at prohibiting a party to request arbitration before mediation has been tried. In practice mediation will be very short if one party is reluctant to participate in the mediation. The mediator would then simply note that there is no basis for a successful mediation and the mediation would be terminated. Two-tier clauses making mediation a compulsory hurdle rather than an agreed possibility are, therefore, generally to be avoided – the Swedish approach to mediation is that to be effective mediation needs to be voluntary at all stages.

Generally the mediator would be barred from acting later on as an arbitrator or a judge in the same dispute. However, under the Stockholm Chamber of Commerce (SCC) Rules (see question 11), there is a possibility for the parties to agree once they have reached a settlement that the mediator shall, as arbitrator, issue an award confirming the settlement. If the parties wish to make a new mediation attempt later on in the dispute or to be aided by a conciliator in connection with

ordinary settlement negotiations, the parties are free to agree on the same person as before.

Arbitrators have typically not been active in trying to transfer arbitration cases to mediation. A change is likely as there is a growing understanding of mediation as a distinct dispute resolution process, not just an attempt at negotiating.

Adjudication, conciliation and other like proceedings exist on an ad hoc basis and are not commonly used.

7 Online dispute resolution (ODR)

Have there been any developments regarding online dispute resolution in your country? Is your country participating in any international ODR project? Is online mediation available in your country?

Online mediation is available on an ad hoc basis, but not yet on a platform supported by the authorities, except and to the extent provided for consumer disputes under the auspices of the EU ODR Project of which Sweden was a pilot participant. In June 2014, a government-appointed commission issued a report (SOU 2014:47) proposing the enhancement of dispute resolution in consumer disputes, in view of newer EU legislation, through, for example, changes in the routines of the National Board for Consumer Disputes in order to meet a general requirement of a 90-day handling period.

8 Confidentiality and disclosure

Is mediation a confidential proceeding in your country? In which cases can disclosure of confidential information by the mediator or the parties be permitted or compelled? Are there any sanctions for breach of confidentiality?

Yes, confidentiality is the general rule. It is, however, important to distinguish between the duty of confidentiality imposed on the mediator and the confidentiality imposed on the parties and their counsel.

The mediator is obligated to keep information gained in connection with mediation confidential under section 5 of the Mediation Act. If, for some reason, a mediation proceeding is not subject to the rules of the Mediation Act any duty of confidentially must be established on a contractual basis, but the content of such a duty would normally be the same as under the Mediation Act.

Parties and their counsel are not bound by any duty of confidentiality under law and such a duty must, thus, be established on a contractual basis. That said, if no express term that deals with confidentiality is agreed it might be successfully argued that such a duty exists naturale negotii since it is so widely understood that mediation shall be confidential. This issue is, however, yet to be clarified in case law.

A breach of confidentiality is sanctioned by general tort law and contract law and a person that breaches confidentiality can, thus, be subject to damages.

A mediator cannot formally refuse to give testimony but has the right to refuse to answer questions that would mean the mediator would breach the duty of confidentiality (Code of Judicial Procedure Chapter 36, section 5(2)). The mediator is permitted to give confidential information to defend him or herself from a claim for damages or criminal prosecution.

In court-arranged mediation the mediator will report to the court the outcome of the mediation. In mediation outside of court the opposite applies.

9 Limitation period

Does a mediation proceeding suspend the limitation period for a court claim?

Yes, limitation periods will be suspended during the mediation proceeding. A right to action or a claim that would otherwise be lost due to failure to start proceedings is preserved during the course of mediation. Under section 6 of the Mediation Act the limitation period to a right of action or to a claim is extended to one month after the mediation was terminated.

10 Settlement

What is the legal character of the final (settlement) agreement? What are the legal requirements for the enforceability or the content of the agreement? Is it possible to revise, withdraw or challenge the final settlement agreement?

Under sections 7 to 12 of the Mediation Act the parties, by jointly applying to the court, can make their settlement agreement resulting from mediation immediately enforceable. Failing such joint application the settlement agreement has the same contractual status as any other contract under Swedish general contract law, which means that a party that wishes to enforce a claim is primarily obligated to bring a court action or to request arbitration to obtain a judgment or an award that can be enforced. The possibilities to cancel or renegotiate a settlement agreement are handled under the rules of general Swedish contract law, which would normally mean that both parties must agree in order to renegotiate a settlement.

11 Mediation institutions

What are the most prominent mediation institutions in your country?

The most prominent mediation institution in Sweden is the Arbitration Institute at the SCC.

The SCC Rules can be found at www.sccinstitute.com and are a useful complement as the Mediation Act does not provide rules for the mediation procedure as such.

Mediation procedure

12 Background

Describe the development of mediation in your country.

Mediation has only recently come to the fore in commercial disputes. Commercial parties in Sweden used to consider a failure to reach a settlement agreement through negotiation a failure in every respect. Failing to settle, the parties used to consider as their only remaining alternative having the dispute decided by others, more often by arbitrators than by court judges. Nowadays, commercial parties in conflict are not prone to look upon litigation or arbitration as a sign of failure and consequently the number of court litigations and arbitrations has grown. The effect of this is that courts have become choked and that the cost of dispute resolution has increased. The arbitration alternative in particular has become increasingly time-consuming and costly. Thus, the members of the business community are pushing for mediation. The legal profession is beginning to meet this demand.

There are no statistics available to the public.

13 Areas of disputes for mediation

In which areas of disputes is mediation preliminarily applied? Are there any disputes that cannot be mediated?

See question 2, paragraph 1. The answers in this chapter deal with commercial disputes.

14 Procedural requirements

Are there procedural requirements for mediation proceedings in your country? Must the parties prepare for the mediation?

No, this depends on the mediation rules chosen by the parties and is, thus, an issue that is subject to the parties' mediation agreement.

15 Structure and process of mediation

Describe the most common steps for the mediator's preparation of a mediation proceeding. Describe the most common structure of mediation proceedings. What is the typical time frame for a mediation proceeding? Are there any special considerations for international mediation proceedings?

The answer to this question should be read in conjunction with the answer to question 16. The first step is for the parties and the mediator

to agree on the basics for the mediator, his or her remuneration, security down payment, time limits, the scope of the dispute, procedural rules, etc. This normally results in a written agreement with the parties in conflict and the mediator as contracting parties.

The time frame for the mediation in a commercial dispute typically varies from one or two days to four weeks, often with a tight first time limit and with an explicit intent to agree on an extension if the mediation makes progress but seems to need more time.

Mediations in Sweden, like arbitrations, are often international in the sense that at least one of the parties is not Swedish. Mediations are, therefore, often held in a foreign language, in most cases in English.

16 Mediation style

What is the primary mediation style in your country for commercial mediation: facilitative mediation, evaluative mediation or transformative mediation? Are private sessions (caucuses) or joined sessions, or both commonly used in mediation?

Mediation, such as existed in the past, was typically of the evaluative type, especially if court-administered. Now trained mediators from outside the court system almost exclusively use a facilitative method (the mediator structures the process to assist the parties in reaching a mutually agreeable resolution; predominantly joint session; no recommendations by the mediator and no advice or opinion as to the outcome; and focus on the interests of the parties), which is taught at the Centre for Effective Dispute Resolution (CEDR) and the Chartered Institute.

A mixture of joint sessions and caucuses (private sessions) is the standard procedure. This means that ideally three rooms should be available, one for joint sessions and one for each of the parties.

17 Co-mediation

What form does team mediation typically take in your country? Is co-mediation regularly used in your country? In which kind of cases?

Mediation in Sweden was typically performed with one mediator only. However, co-mediation has become increasingly common and this method is, in fact, always preferable, at least from the mediator's perspective.

18 Party representatives and third parties

What is the practice in your country with respect to the inclusion of party representatives in mediation proceedings? What is the practice with respect to experts and witnesses?

Normally the ultimately responsible person on either side is assisted by no more than one person, typically an experienced business lawyer. Additional people may be useful to have available over the phone or in an adjacent room.

Witness hearings are foreign to mediation.

19 Specific mediation procedures/conflict or dispute management systems

Have companies set up their own dispute management systems in your country? Are there any special routes for consumers to use mediation for small claims? Are there any institutions that offer mediation for their customers, users, etc? Is there any reported or published information regarding dispute management systems of companies for conflicts in employment matters?

Built-in dispute resolution procedures are now common in major contracting, joint venture, outsourcing and other agreements where the parties are bound together during a long period of time. Typically they are 'internal' in the sense that no outside person plays a dominant role. As far as we know there is no reported or published information regarding dispute management systems of companies for conflicts in employment matters.

Mediation clauses and mediation agreement

20 Mediation clauses

Are mediation clauses commonly considered in the course of contract drafting? Are there special requirements for mediation clauses? Are there any relevant court decisions referring to such escalation clauses?

The use of mediation clauses in contracts is becoming more frequent but is still not the standard. There are no legal or otherwise formal requirements for mediation clauses.

Mediation is normally agreed as the first dispute resolution procedure in a two-tier or escalation clause. The failure by one or both parties to such clauses to go to mediation before taking the next step is generally not considered a bar to opening a court proceeding or arbitration – mediation is seen as necessarily being voluntary at all stages, and the unwillingness by a party to participate can at most constitute a breach of contract.

21 Conclusion and content

Is there any obligation to conclude an agreement between the mediator and the parties or between the parties before or at the beginning of the proceeding? Are there any legal requirements regarding the content of the agreement between the mediator and the parties? What are the common provisions for such mediation agreement? Must the agreement be in writing?

There is no legal obligation or requirement for the mediator and parties to have an agreement, written or otherwise, but it is almost unavoidable and in any case highly recommendable to have one (see question 15).

22 Costs for mediation

Are there any legal provisions on mediators' fees? What is the average mediator's fee in mediations involving companies? Is there any legal aid or other financial support for mediation proceedings if parties cannot afford to pay the mediator?

As a general rule, the parties split the fee but are jointly and severally responsible in relation to the mediator.

In court-arranged mediation the parties have to agree to pay the mediator directly, since the mediation is not financed by the court. If the mediation is not successful and the court proceeding continues and a judgment is rendered it is, however, permissible for the court to order the losing party to pay the winning party's mediation cost as a part of the legal fees that the winning party has a right to claim.

Professional matters for mediators

23 Regulation

Is there any specific regulation of mediators in your jurisdiction? Give details. Are there any regulations on immigration or tax issues or regarding the right to work for foreign mediators?

No specific regulation that deals with criteria for mediators exists. The term 'mediator' is ordinarily not used as a professional title, but as a description of the role or function created by the step to initiate mediation. In commercial mediation it is usual that the mediator is a Swedish attorney-at-law (*advokat*: a professional title protected by law).

Mediators are often lawyers but there is no legal requirement. Except for the duty of confidentiality in section 5 of the Mediation Act there is no special regulation regarding the duties and rights of mediators. Their duties and rights are dealt with on a contractual basis and with application of general contract law.

General immigration law and tax law applies to foreign citizens performing an assignment as mediator in Sweden. Such issues are ordinarily dependent of the circumstances of the work performed (eg, the length of the mediator's stay in Sweden).

24 Training

Are there any requirements regarding training for mediators?

No, there are no requirements of any kind. It is generally considered an advantage to appoint a person who is accredited by an international institution.

25 Continued education

Must mediators undertake continued professional education? Is there a credit point system for the continued education of mediators?

There is no requirement in respect of continued education, no mediation organisation in Sweden that requires continued education and, thus, no credit point system.

26 Accreditation of mediators

Outline the system for certification of mediators.

There is no system for certification of mediators in Sweden such as an official register of mediators. Professionals (mostly attorneys) that are interested in mediation often seek certification at the CEDR in London. CEDR certification has, thus, become increasingly important for Swedish mediators as well.

In connection with court-arranged mediation each court has its own unofficial lists. The mediators used in court-arranged mediation are often retired judges.

27 Mediator liability and sanctions

What are the duties of mediators in a mediation procedure? What liability do mediators face when offering their services and conducting mediation proceedings? Is professional indemnity insurance for mediators available or obligatory? Are there any further sanctions or other disciplinary measures for mediators in cases of misconduct, poor performance, etc? Are there any regulations referring to the dismissal of mediators?

Section 5 of the Mediation Act imposes a duty of confidentiality on the mediator.

Other duties of mediators derive from the contractual basis between the mediator and the parties. The mediator assignment agreement is, however, also supplemented with the recognised practice that the mediator shall be impartial and independent. For a Swedish attorney-at-law the rule of independence also follows from the ethical guidelines of the Swedish Bar Association. For both attorneys-at-law and other professionals the IBA Guidelines on Conflict of Interest in International Arbitration would serve as a general standard.

The liability of the mediator is subject to the general rule of liability for negligence in Swedish contract law, thus, no explicit provision exists. Failure to apply the agreed mediation rules and unreasonable delays on behalf of the mediator would normally be considered negligent; however all must be evaluated in light of the parties' behaviour.

Having said this, the contractual relationship between the mediator and the parties may allow for more flexibility in terms of, inter alia, letting the parties' expectations on the mediator have an effect on the liability assessment. The contractual context also entails a burden to give notice of complaint within a reasonable time from the point that the party was aware of the negligent act or should have been aware of it. Failure to give notice of complaint will bar the party from invoking the negligent act as a basis for a claim against the mediator.

There is no requirement for professional indemnity insurance for mediators, if the mediator is not an attorney-at-law.

There is no regulation regarding the dismissal of mediators, but it is clear that the parties are free to dismiss a mediator at any point in time if they agree to do so. Where only one party wishes to dismiss the mediator the mediator should realise that the basis for his or her assignment has changed to such an extent that he or she should step aside voluntarily, by terminating the mediation or otherwise, depending on the wishes of both parties.

28 Appointment

Is there any regulation regarding the appointment of mediators? Is it common in your country to seek assistance by institutions or official bodies for the appointment of mediators? Are mediators obliged to inform about conflicts of interest in the course of appointment?

There is no regulation regarding the appointment of mediators. If the parties wish the SCC to appoint the mediator the parties would typically enter into a mediation agreement under the SCC mediation rules.

With regard to conflicts of interest see question 27.

Cases

29 Notable cases

Briefly give details of any significant recent mediation cases or disputes or judgments involving mediation that have been published in your country.

Mediation cases are not published in Sweden. It would, in our opinion, normally be contradictory to the mediation result if the details of a particular mediation were to be published. To only publish an overview of mediation proceedings would probably be perceived as pointless.

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Tanzania

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Law and institutions

1 Treaties

Is your country a signatory to any treaties that refer to mediation? Is your domestic mediation law based on a treaty?

Tanzania is currently not a signatory to any treaties relating to mediation. Tanzania's domestic mediation legal framework is not based on a treaty such as the UNCITRAL Model Law on International Commercial Conciliation (2002). Due to the fact that Tanzania is not a member of the European Union, the Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters is not applicable.

Notably important is that Tanzania has been a party to treaties that provide for mediation or conciliation such as the Convention on the Settlement of Investment Dispute between States and Nationals of Other States of 1965 since 17 June 1992 and to the Multilateral Investment Guarantee Agency of 1985 since 19 June 1992.

2 Domestic mediation law

What are the primary domestic sources of law relating to domestic and foreign mediation? Are there any differences for the mediation of international cases?

There is no specific domestic law relating to domestic mediation. The primary domestic sources of law relating to mediation are embedded in the Employment and Labour Relations Act 2014 (ELRA), the Labour Institutions Act and its Rules and the Civil Procedure Code (CPC) [CAP 33 RE 2002].

There are no specific laws governing foreign mediation or provisions in relation to mediation of international cases.

3 Mandatory provisions

Are there provisions of domestic mediation law that must be considered in mediation proceedings?

For court-connected mediations the High Court (Commercial Division) Procedure Rules (GN No. 250 of 2012) provide for provisions that must be observed such as attendance to mediation by the party or his or her advocate or both, the authority to settle, duration and confidentiality.

All labour disputes have to be referred to the Commission for Mediation and Arbitration (CMA) for mediation. Under the ELRA and the Labour Institutions (Mediation and Arbitration) Rules of 2007 the mediator is required to resolve the dispute through mediation within 30 days unless the parties agree to a longer period.

There are currently no specific provisions that must be considered for a voluntary privately conducted mediation.

4 Obligation to mediate

Is mediation in your country obligatory? Can mediation be ordered by courts in your country?

The choice to engage in mediation remains entirely with the parties. Mediation of labour disputes is obligatory; in the case of *Hector Sequeiraa v Serengeti Breweries Ltd*, High Court of Tanzania, Labour Division, Labour Complaint No. 20 of 2009, the Labour Court dismissed as 'incompetent' a labour complaint that was filed directly in the Court without first pursuing mandatory CMA mediation. Indeed, the significance of mediation cannot be ignored. There is an increasing trend by employers to settle labour disputes during CMA mediation especially where the employer's case is apparently weaker.

In civil suits, parties have to undergo a mandatory court-annexed mediation process during the pretrial stages before the suit can proceed to its actual litigation, on such stage the suit is assigned a mediator who is usually a magistrate or judge to help the parties mediate their dispute. The parties may opt to mediate out of court.

Judges are taking the view that parties should at least have attempted to settle their differences before resorting to court proceedings and courts are increasingly inviting parties to mediate before trial or appeal. In court-annexed mediation, parties who refuse unreasonably may suffer costs sanctions as provided under the Commercial Court Rules. The mediator may also dismiss the suit (if the party is a plaintiff) or make any other order that is deemed just against the party, who fails to attend without good cause, a scheduled mediation within the time appointed for the commencement of the session.

5 Court-annexed mediation

Does the law of your country provide for court-annexed mediation? If so, is court-annexed mediation mandatory?

Yes. The law in Tanzania does provide for court-annexed mediation under the CPC. This means the procedure is integrated into the court system and it is mandatory in civil disputes. The CPC brought in amendments that have made it a mandatory requirement for civil cases to be first referred to mediation before full trial is conducted. The amendments introduced new Orders VIIIA, VIIIB and VIIIC to the First Schedule of the CPC. There is mandatory requirement under the provisions of Rule 1 of Order VIIIC of the CPC, that all filed civil cases must go through the mediation stage between the completion of pleadings or interlocutory applications and the trial. The mediation is conducted by another judge or magistrate appointed by the court. If the parties fail to settle at mediation, the case is returned to the allocated judge or magistrate for trial.

6 Mediation-arbitration and other forms of mediation-related ADR

Is mediation combined with arbitral proceedings? May a mediator act later in the same dispute as an arbitrator, conciliator or judge? Are arbitrators aware of mediation, and if yes, are they willing to transfer arbitration cases to mediation? Which other proceedings are available and used in your country that are related to mediation?

Under the Labour Institutions (Mediation and Arbitration) Rules of 2007, the CMA may set down a combined mediation arbitration proceeding on the same date, which may be conducted by the same person. Most arbitrators are aware of mediation, however, are reluctant to refer matters to mediation due to parties not having confidence in the end result of the process. There are other forms of mediation-related ADR methods such as adjudication, which is primarily used in construction disputes and conciliation, used in family related disputes (the Marriage Conciliation Board established under the Law of Marriage Act No. 5 of 1971).

7 Online dispute resolution (ODR)

Have there been any developments regarding online dispute resolution in your country? Is your country participating in any international ODR project? Is online mediation available in your country?

There are no legislative developments or measures on online dispute resolution in the country mirroring the European ODR legislation or directives. Tanzania does not participate in any international ODR project such as the ODR Exchange or the Electronic Consumer Dispute Resolution.

Notable efforts have been made by Resolution Experts Tanzania, a private based ADR provider, who have spearheaded the way for ODR through the creation of iResolve (www.iresolve.co.tz), a web-based portal for consumer-related and commercial dispute resolution. Prior to the launch of iResolve in 2015, there was no online mediation facility available in the country. iResolve offers an online mediation service whereby parties are connected to a third-party neutral on the system by a dispute resolution specialist. The mediation is conducted through the use of electronic methods such as teleconferencing, email exchange, video-conferencing and multiparty conference facilities.

8 Confidentiality and disclosure

Is mediation a confidential proceeding in your country? In which cases can disclosure of confidential information by the mediator or the parties be permitted or compelled? Are there any sanctions for breach of confidentiality?

In general, mediation is a confidential procedure and mediators are required to maintain confidentiality. The requirement is usually explicitly addressed during the contractual stage between the parties and the mediator. For court-annexed mediation confidentiality is expressly provided for under the High Court (Commercial Division) Procedure Rules of 2012, which, under Rule 39, provides that mediation is confidential and no record of statement or information made by the parties during the mediation can be disclosed as evidence in subsequent court proceedings or any other subsequent settlement initiatives, except in relation to proceedings brought by either party to vitiate the settlement agreement on the grounds of fraud. Moreover, Rule 17 of the CMA Rules also provide that no person may refer to anything said at mediation proceedings during any subsequent proceedings, unless the parties agree in writing. Such confidentiality is extended to third parties, experts or witnesses to the proceedings.

The Tanzanian Evidence Act outlines a number of circumstances where confidentiality may be breached and it applies only to lawyers and advocates but could be extended to mediators as well.

9 Limitation period

Does a mediation proceeding suspend the limitation period for a court claim?

Mediation proceedings do not suspend the statutory limitation period for a court claim. The parties can opt to ask the court to stay the proceedings, which will have the effect of preserving the time limits within the proceedings.

10 Settlement

What is the legal character of the final (settlement) agreement? What are the legal requirements for the enforceability or the content of the agreement? Is it possible to revise, withdraw or challenge the final settlement agreement?

The final settlement agreement is a legally binding agreement and is enforceable under the normal rules of contract law. Although there is no requirement in common law that the settlement agreement be written, this is advisable to aid enforcement.

It is usual, if court proceedings have been commenced prior to the mediation, to include as a term of the settlement an obligation to withdraw or discontinue the action. The dismissal of the court proceedings may be achieved by consent order or consent judgment, which may record the terms of the settlement. If such terms are recorded, they become enforceable as a judgment of the court.

The existing reality is that the settlement agreement is unenforceable unless it has been reached through court-connected mediation or out-of-court mediation ordered by the court and a judgment is made on the basis of the settlement agreement. The parties may also explicitly agree for the settlement agreement to be ratified by the competent court, which gives the agreement the force and effect of a final judgment in court for it to be enforceable. It is possible to revise, or withdraw, the final settlement agreement only before it becomes binding.

In court-annexed mediation proceedings, where the mediation results in an amicable settlement of all issues in controversy, the mediator will complete a form known as a consent settlement order form. This form will identify the parties, contain the name of the court, number of the case and the full terms of the agreement. The same will then be recorded and have the same force as a judgment of the court and parties may make application for its execution of the decree.

11 Mediation institutions

What are the most prominent mediation institutions in your country?

The CMA is the most prominent institution for mediation. It is a public institution subordinate to the Labour Division of the High Court. It mainly deals with mediation and arbitration of labour disputes. For construction disputes the National Construction Council (NCC) is a government institution established through Act of Parliament No. 20 of 1979 (National Construction Council Act CAP 162 RE 2008) and tasked to facilitate the efficient resolution of disputes in the construction industry. The NCC hence provides mediation services specifically for construction disputes.

For voluntary mediation, there is only one private ADR provider in Tanzania, namely, Resolution Experts, established in 2014.

There are no foreign institutions offering mediation or ADR services in Tanzania. We are aware that there have been consultations between the China-Africa Joint Arbitration Centre (CAJAC) and the Tanganyika Law Society to join forces in establishing a branch of the CAJAC in Dar es Salaam, Tanzania.

Mediation procedure

12 Background

Describe the development of mediation in your country.

Mediation does have traditional roots in Tanzanian culture. It is common practice for many tribal groups to apply traditional methods of resolving disputes through the use of respected traditional wise men or persons within a community or a tribal chief who would reside over a conflict and assist the parties to resolve the matter. Nonetheless, Tanzania still lags behind in having a friendly environment for mediation. As a result, voluntary mediation is not widely used in major commercial disputes and its usage is growing at a slow rate.

There are no statistics or any data available on mediation proceedings, however, it is correct to say that the success rate of mediation in court-annexed and at the CMA has proved it to be a great alternative and it is currently gaining interest.

13 Areas of disputes for mediation

In which areas of disputes is mediation preliminarily applied? Are there any disputes that cannot be mediated?

Mediation in Tanzania is preliminarily applied in civil, commercial, construction, family and labour disputes. Intellectual property disputes, although very rare in Tanzania, are handled through a dispute resolution procedure unit established at the Registrar of Companies. The criminal justice system does not cater for mediation, however, there is also no specific law restricting the use of the method in criminal prosecution.

14 Procedural requirements

Are there procedural requirements for mediation proceedings in your country? Must the parties prepare for the mediation?

Mediation procedures are fixed under the CPC, the Labour Institutions Act, the Employment and Labour Relations Act and the Labour Institutions (Mediation and Arbitration) Rules of 2007. However, for

Update and trends

Recently, the judiciary, in conformity with article 107A(2)(d) of the Constitution of the United Republic of Tanzania has established under the High Court of Tanzania, an Alternative Dispute Resolution (Mediation Court) Division. The Division consists of mediators and arbitrators who are assigned cases by the administrator. Notably, the Division is not separate from the court system. The aim of the Division is to provide for speedier resolution of disputes and ease the strain on the courts in terms of backlog of cases.

There has been an increase of interest in ADR in the business community and as such the Tanganyika Law Society, in collaboration with other stakeholders, is looking to establish an ADR Centre that will be an institution providing for mediation and arbitration. This initiative will call on stakeholders to engage in establishing a regulatory environment for mediation professionals.

mediation of labour disputes under the CMA, the aggrieved party is required to file a prescribed form, which includes a summary of the dispute so as to initiate the mediation proceedings. Other procedural requirements include summons to the respondent and notice as to the hearing date to both parties.

In general, for voluntary mediation there is no procedural requirements and the parties are free to agree on a mediation procedure.

15 Structure and process of mediation

Describe the most common steps for the mediator's preparation of a mediation proceeding. Describe the most common structure of mediation proceedings. What is the typical time frame for a mediation proceeding? Are there any special considerations for international mediation proceedings?

While mediation as a process is structured, it remains sufficiently flexible to allow the mediator to assess the developing situation and to have meetings with participants in a manner considered most conducive to constructive dialogue. While there is no mandated structure for a mediation, common practice is for a mediation to incorporate caucus sessions between each party and the mediator, as well as joint sessions with both parties.

It is also important to note that under the commercial court rules the time frame for mediation should not exceed the period of 14 days subject to an extension of time that the court deems just to grant. Pursuant to the ELRA, mediators at the CMA are required to issue a certificate within 30 days or any longer period as may be agreed by the parties.

There are no special considerations for international mediation proceedings, hence international standards may apply without restrictions.

16 Mediation style

What is the primary mediation style in your country for commercial mediation: facilitative mediation, evaluative mediation or transformative mediation? Are private sessions (caucuses) or joined sessions, or both commonly used in mediation?

In court-annexed mediation, the presiding judge conducts the mediation sessions and the involved parties present their opinions on the disputed contents and propose matters to be conciliated. The judge is required to identify matters on which the parties have reached agreement and those on which they have not reached agreement.

The mediation styles for commercial mediation are primarily facilitative and evaluative. The mediator may opt for private (caucus) sessions with prior consent of the parties and joint sessions with the parties. As a principle, the mediator has no role in making any decision and the parties therefore retain absolute control over the outcome.

17 Co-mediation

What form does team mediation typically take in your country? Is co-mediation regularly used in your country? In which kind of cases?

Both solo and co-mediation can be adopted because there are no restrictions provided for under Tanzanian laws. The parties and the mediator may have to agree in the agreement to mediate. The use of a sole mediator is most common in Tanzania. Co-mediation is not practised or established in Tanzania.

18 Party representatives and third parties

What is the practice in your country with respect to the inclusion of party representatives in mediation proceedings? What is the practice with respect to experts and witnesses?

In court-annexed mediation, specifically under the High Court (Commercial Division) Procedure Rules of 2012, parties are normally represented by lawyers and the mediator may obtain expert advice subject to parties' consent on a technical aspect of the dispute, which advice shall be given in an independent and impartial manner and it shall have advisory effect. Private mediations, however, do not demand the participation of lawyers. Under Rule 34(2) of the same, third parties or their lawyers may also attend mediation sessions unless the court orders otherwise.

There are no specific rules in respect to experts and witnesses to a private mediation proceeding and hence parties may engage experts and witnesses.

19 Specific mediation procedures/conflict or dispute management systems

Have companies set up their own dispute management systems in your country? Are there any special routes for consumers to use mediation for small claims? Are there any institutions that offer mediation for their customers, users, etc? Is there any reported or published information regarding dispute management systems of companies for conflicts in employment matters?

Tanzanian labour laws have transgressed in the field of mediation, they provide for parties in a collective bargaining agreement the mandate to establish machinery for the expeditious resolution of grievances, which may include mediators. In this regard, companies are also required to have employee grievance and dispute procedures or policies that comply with the labour laws. There are no publicly published reports or information regarding dispute management systems of companies for conflict in employment matters.

There are no institutions that offer mediation for their customers or users. The Bank of Tanzania (BoT) recently issued guidelines for consumer complaints in 2015 requiring banking and financial institutions to set up complaints handling systems within their institutions. The BoT also opened up a dedicated complaint resolution desk specifically for financial and banking disputes. The Tanzania Insurance Regulatory Authority also has in place, pursuant to the insurance legislation, the Tanzania Insurance Ombudsman providing for mediation services for insurance industry disputes.

Mediation clauses and mediation agreement

20 Mediation clauses

Are mediation clauses commonly considered in the course of contract drafting? Are there special requirements for mediation clauses? Are there any relevant court decisions referring to such escalation clauses?

It is not unusual to find mediation clauses in contractual arrangements because there has been a substantial increase in awareness of the benefits of using ADR mechanisms in business contracts stipulating mediation as being the method to resolve any dispute between parties. Parties may also agree on two-tier or escalation dispute resolution clauses including mediation. Mediation clauses entered into by parties constitute legally binding contracts and a party who breaches this duty could be held liable.

21 Conclusion and content

Is there any obligation to conclude an agreement between the mediator and the parties or between the parties before or at the beginning of the proceeding? Are there any legal requirements regarding the content of the agreement between the mediator and the parties? What are the common provisions for such mediation agreement? Must the agreement be in writing?

There is no obligation to conclude an agreement between the mediator and the parties but prudent practice would require such an agreement to be in place to govern the relationship. It is also prudent for the parties to agree to mediate and commit to the process at the beginning of the proceedings; however, this is also not obligatory.

There is no legal requirement regarding the content of the agreement between the mediator and the parties in Tanzania. Although the laws of contract allow room for both written and oral agreements, for evidential purposes, the parties usually opt for a written agreement.

22 Costs for mediation

Are there any legal provisions on mediators' fees? What is the average mediator's fee in mediations involving companies? Is there any legal aid or other financial support for mediation proceedings if parties cannot afford to pay the mediator?

Generally, the parties have to bear the cost of mediation even if it is recommended by the court. The parties would normally agree on this cost in the contract between the parties and the mediator.

Professional matters for mediators

23 Regulation

Is there any specific regulation of mediators in your jurisdiction? Give details. Are there any regulations on immigration or tax issues or regarding the right to work for foreign mediators?

Currently, there is no official regulating body for mediation, nor are there any statutory qualifications needed to act as a mediator, thus anyone can become a mediator. In practice, most mediators have some form of accreditation following assessed professional training by a domestic or international dispute resolution institution before taking up a case. Although mediators may also possess other professional backgrounds or expertise, private and voluntary mediations in Tanzania are in general conducted by retired judges or senior lawyers.

Foreign mediators are required under Tanzanian immigration laws to have a business visa to enable them to conduct mediations in the country.

24 Training

Are there any requirements regarding training for mediators?

There are no requirements regarding training for mediators in Tanzania. For the time being, the Tanzania Institute of Arbitrators, in collaboration with the NCC, provide training that consists of a small mediation component. Mediation and ADR is also taught generally under the Bachelor of Laws degree curriculum as a compulsory unit and also as part of the ADR module at the Law School of Tanzania. Private mediation provider Resolution Experts has also established its own training wing, the ADR Academy, which offers training courses and forms of unofficial accreditation for mediators.

25 Continued education

Must mediators undertake continued professional education? Is there a credit point system for the continued education of mediators?

There is no requirement regarding continued professional education of mediators. Notably, the Tanganyika Law Society does extend CLE credits for mediation workshops and seminars conducted to members of the Society.

26 Accreditation of mediators

Outline the system for certification of mediators.

There is no national mediator register in Tanzania. When appointing a mediator, membership of a respected mediation organisation is often taken into account, as well as the mediator's experience in the field of the relevant dispute.

27 Mediator liability and sanctions

What are the duties of mediators in a mediation procedure? What liability do mediators face when offering their services and conducting mediation proceedings? Is professional indemnity insurance for mediators available or obligatory? Are there any further sanctions or other disciplinary measures for mediators in cases of misconduct, poor performance, etc? Are there any regulations referring to the dismissal of mediators?

The mediators' duties arise from the contractual relationship with the parties. The extent of mediators' liability is covered in the contract between the mediator and the parties. Pursuant to the principle of good faith and loyalty in contractual relations and so as to ensure the integrity of the mediation process, mediators are under a general obligation to disclose any conflict of interest before signing the mediation agreement. There is no requirement for professional liability insurance but this may be obtained at the parties' request. Due to the lack of a regulatory framework governing professional mediators in Tanzania, there are currently no sanctions or disciplinary measures that can be made against mediators, nor regulations referring to the dismissal of

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mediators. Lawyers who also act as mediators can be reported under the Advocates (Disciplinary and other proceedings) Rules.

28 Appointment

Is there any regulation regarding the appointment of mediators? Is it common in your country to seek assistance by institutions or official bodies for the appointment of mediators? Are mediators obliged to inform about conflicts of interest in the course of appointment?

There is no specific regulation regarding the appointment of mediators. The practice is that parties are at liberty to appoint the mediator. The parties may refer the dispute to one of the named institutions for the appointment of mediators. The CMA has powers to appoint and assign mediators to mediate disputes in accordance with provisions of any labour laws.

Cases

29 Notable cases

Briefly give details of any significant recent mediation cases or disputes or judgments involving mediation that have been published in your country.

There are several notable judgments such as in the case of *Fahari Bottlers Ltd and another v Registrar of Companies and another*, where the Court of Appeal held that the requirement for a suit to be referred to mediation first before full trial begins is mandatory under the CPC.

United States

Rodney L Lewis, Mary Kathryn Curry and Keithan Hedrick
Polsinelli PC

Law and institutions

1 Treaties

Is your country a signatory to any treaties that refer to mediation? Is your domestic mediation law based on a treaty?

The United States is a signatory to several international treaties that refer to mediation. Perhaps the most recognised is the United Nations Commission on International Trade Law (UNCITRAL). United States mediation law, however, is not based on any treaty. The mediation laws in the United States have evolved over time at the state and local level, and attempts at uniformity developed in the late 1980s.

The United States is a member of several international organisations that offer its members alternative dispute resolution (ADR). One such organisation is the World Intellectual Property Organization (WIPO) (www.wipo.int/portal/index.html.en). WIPO is the United Nations' agency dedicated to the use of intellectual property (patents, copyright, trademarks, designs, etc) as a means of stimulating innovation and creativity. WIPO has a Mediation and Arbitration Center (the Center) helping international companies mediate intellectual property issues. Based in Geneva, Switzerland, and developed by leading experts in cross-border dispute settlement, the procedures offered by the Center are widely recognised as particularly appropriate for technology, entertainment and other disputes involving intellectual property.

2 Domestic mediation law

What are the primary domestic sources of law relating to domestic and foreign mediation? Are there any differences for the mediation of international cases?

There are numerous statutory provisions at the state and administrative level, such as labour relations boards, public utilities and social services. States and administrative bodies have adopted their own rules regarding mediation. In addition, local courts often have their own individual rules pertaining to mandatory and voluntary mediation. There have been several attempts to develop uniform domestic mediation laws in the United Sates. Two notable statutes are described below.

In 1998, the United States Congress adopted the Alternative Dispute Resolution Act (www.adr.gov/pdf/adra.pdf), requiring all federal trial courts to implement ADR and granting judges authority to send a case to mandatory ADR procedures, including mediation.

Several states have attempted to coordinate their legislation by adopting the Uniform Mediation Act (UMA) (www.uniformlaws.org/Act.aspx?title=Mediation%20Act), or adopting the state's own mediation statute with similar provisions. The American Bar Association Section on Dispute Resolution and the National Commissioners on Uniform State Laws began drafting the UMA in 2001. The first state to adopt the UMA was Nebraska in 2003, followed a few months later by Illinois. At the time of writing, 12 states have adopted the UMA, and bills to enact it have been introduced in two others, New York and Massachusetts. Other states such as California, and Delaware have not adopted the UMA but instead have adopted similar legislation. The UMA primarily deals with confidentiality. In fact, many of the domestic statutes covering mediation deal with confidentiality of the mediation process and protection of mediation communications from being used in pretrial discovery and evidence presented at trial.

3 Mandatory provisions

Are there provisions of domestic mediation law that must be considered in mediation proceedings?

Mediation is generally voluntary and many aspects of mediation may be determined by the parties and other aspects vary by jurisdiction, where mediation might be required, and mediator. The main focus of mediation law in the United States is on confidentiality. Virtually all mediation laws and rules require some level of confidentiality. It is important for parties to understand the expectations of confidentiality in their particular jurisdiction and with their mediator.

4 Obligation to mediate

Is mediation in your country obligatory? Can mediation be ordered by courts in your country?

Mediation in the United States is generally not obligatory, but some jurisdictions do, in certain instances, require that certain categories of matters be submitted to mediation. For instance, the California Code of Procedure (CCP) (http://law.justia.com/codes/california/2009/ccp/1141.10-1141.31.html) section 1141.11(a) requires that 'all non-exempt unlimited civil cases' are to be submitted to arbitration if the amount in controversy will not exceed US$50,000 for each plaintiff. In other words, with some exceptions, matters involving less than US$50,000 per plaintiff are sent to compulsory or court-mandated arbitration. CCP section 1775.3(a) allows for parties to use mediation in place of arbitration for cases that are governed by section 1141.11(a).

Delaware has mandatory mediation for all bankruptcy adversary proceedings, for all appeals from the Bankruptcy Court to the District Court, as well as from the Federal District Court to the Federal Third Circuit Court of Appeals, and for all mortgage foreclosures in state court (see Delaware General Order: Procedures in Adversary Proceedings; www.deb.uscourts.gov/sites/default/files/general-ordes/mfw040704_orderadversary.pdf). In Illinois, at the state court level, no category of case is automatically required to be mediated, but the court may order parties to mediation where the court deems appropriate (see Illinois Circuit Court Rule 20.01; www.cookcountycourt.org/Manage/RulesoftheCourt/ReadRule/tabid/73/ArticleId/108/20-01-Court-annexed-Mediation.aspx).

Parties to a contract may include mediation clauses in the agreement to avoid litigation. In a typical mediation clause, parties agree that mediation must be used prior to litigation or binding arbitration of disputes arising from the contract. These clauses also allow the parties to design ground rules for dispute resolution before disputes occur. Courts will generally enforce mediation clauses and dismiss litigation when a party fails to comply with mediation clauses in a valid and binding contract.

5 Court-annexed mediation

Does the law of your country provide for court-annexed mediation? If so, is court-annexed mediation mandatory?

Yes. Most federal and state courts in the United States now use mediation programmes to help the parties settle their disputes. Indeed, mediation is the primary ADR process in federal, state and local courts. A court mediation programme may be based in the court, or involve

referrals by the court to outside ADR programmes run by bar associations, non-profit groups, other local courts or private ADR providers.

In some courts ADR is mandatory. Mandatory mediation programmes in the courts often depend on the amount in controversy in the dispute, with lower amounts in controversy, whether consumer of commercial in nature, often subject to mandatory mediation.

The United States Court of International Trade (CIT) also has a court-annexed mediation programme. Judges of the CIT are available throughout the pretrial phase of the litigation to conduct judge-hosted sessions of mediation. A judge may serve as the judge-mediator in any case referred for mediation, provided it is not a case in which he or she is the presiding judge. Mediation in the CIT is commenced by an Order of Referral to court-annexed mediation in response to a consent motion from all the parties, a motion from one or more of the parties or sua sponte by the assigned judge. During this time, the mediation schedule will include submission of position papers, and then the mediation session. The judge-mediator will promptly file a Report of Mediation at the conclusion of the mediation process, indicating whether the case has settled in whole or in part. A copy of the report is then provided to the referring judge assigned to the case.

6 Mediation-arbitration and other forms of mediation-related ADR

Is mediation combined with arbitral proceedings? May a mediator act later in the same dispute as an arbitrator, conciliator or judge? Are arbitrators aware of mediation, and if yes, are they willing to transfer arbitration cases to mediation? Which other proceedings are available and used in your country that are related to mediation?

Although combined mediation-arbitration is seen in contract provisions to precede or to take the place of litigation, or mediation to precede arbitration, combined mediation-arbitration is not found in United States laws. Unless all parties agree, the mediator may not act as an arbitrator or as a representative of, or counsel to, a party in any arbitral or judicial proceedings relating to the dispute that was the subject of the mediation.

Arbitrators might be aware of prior mediation efforts, but not necessarily. It depends on the contract or process, some of which require mediation before arbitration. But once a dispute is submitted to arbitration the arbitrator does not unilaterally refer the dispute to mediation.

Other ADR proceedings may be even less formal than mediation, and usually involve an appointed neutral to attempt to bring the parties to a place of conciliation where they can then consider more formal proceedings to resolve their dispute. Early neutral evaluation is another informal process, usually to focus on one or more discrete facts to help the parties resolve their misunderstandings that prevent them from resolving the dispute. Conciliation is aimed at fostering communication and trust through building relationships where they do not exist or are strained.

7 Online dispute resolution (ODR)

Have there been any developments regarding online dispute resolution in your country? Is your country participating in any international ODR project? Is online mediation available in your country?

Yes. Online dispute resolution sprang from the interplay between more traditional ADR and newer information and communication technology as a method for resolving disputes that were arising online and for which traditional means of ADR were inefficient or unavailable. Online dispute resolution can be consensual, as in automated negotiation using tech-based, bland-bidding services, for example, or assisted negotiation in which a technology platform or process, using questionnaires and other materials to the parties, assists in helping the parties reach a settlement through parameters helping them to define and limit the scope of their dispute. Online dispute resolution can also be adjudicative. That is in a more traditional sense of providing a neutral third party, such as an arbitrator. The major challenge facing the parties in online arbitration is definition of the scope of the rules governing the arbitration, and judicial enforcement if necessary to recognise an otherwise rather self-regulating process. As with e-commerce developments generally, online arbitration is gaining in popularity and acceptance in light of the ability of a party to question witnesses of the other parties at low costs with an online audio and video process using newer technologies, such as Google Hangouts.

Other examples of adjudicative ODR include the Uniform Domain Names, Dispute Resolution Policy.

Measures in the United States that mirror European Union ODR processes include, for example, the Electronic Commerce and Consumer Protection Group (e-Commerce Group) formed by leading technology companies including AT&T, Dell, IBM, Microsoft and others for the resolution of merchant-to-consumer disputes. A host of other industry initiatives by groups including the International Chamber of Commerce, the Better Business Bureau, BBBOnline and other trade and professional organisations have been established to further ODR. The United States also participates in international ODR projects. International initiatives include the United States's active role in the process by UNCITRAL to establish a wider-ranging ODR for global use.

Online mediation is available to resolve consumer and other disputes, but it has not gained broad acceptance in commercial disputes.

8 Confidentiality and disclosure

Is mediation a confidential proceeding in your country? In which cases can disclosure of confidential information by the mediator or the parties be permitted or compelled? Are there any sanctions for breach of confidentiality?

For a successful mediation, confidentiality is critical. Confidentiality allows parties to freely engage in candid, informal discussions of their interests in order to reach the best possible settlement of their claims. In the United States, material prepared specifically for the purpose of mediation is generally confidential. Confidentiality of the mediation process covers the information a party gives to the mediator in private. Generally, all information, records, reports or other documents received by a mediator while serving in that capacity will be confidential. The mediator will not be compelled to divulge such records or to testify or give evidence in regard to the mediation in any adversary proceeding or judicial forum. Usually the parties, mediator and other participants are obliged to keep confidential all information obtained during the mediation process and will not rely upon it or introduce it as evidence in any arbitral, judicial or other proceeding. The parties may agree in writing that materials used during mediation are not confidential.

Reports or findings by the mediator are also confidential. Neither a mediator nor anyone else may submit to a court or other adjudicative body any report or finding of any kind by the mediator concerning a mediation conducted by the mediator. Parties may agree in writing to allow disclosure of mediator reports. Mediators are in some instances authorised to report whether the parties settled during mediation and the settling parties to an ongoing litigation must inform the court of the settlement and have the case dismissed.

Rule 408 of the Federal Rules of Evidence (www.uscourts.gov/file/18068/download) provides additional protection for materials used exclusively for settlement purposes. Rule 408 prohibits the use of discussions regarding compromise or offers of settlement in any arbitral or judicial proceeding.

The UMA deals primarily with protecting the confidentiality of mediation. Drafting the confidentiality sections of the UMA was especially difficult because in 2001 there were over 250 state statutes relating to mediation confidentiality. For states that have adopted the UMA, including Illinois, all oral and written communications with the mediator at any time, other than executed settlement agreements, shall be deemed confidential and privileged in accordance with the provisions of the UMA. All such communications shall be exempt from discovery and inadmissible as evidence in any action or proceeding. However, evidence that is otherwise admissible or subject to discovery and not prepared solely for use in mediation is not inadmissible or protected from discovery.

The Federal Administrative Procedure Act (FAPA) is the law under which some federal government regulatory agencies such as the Food and Drug Administration and Environmental Protection Agency create the rules and regulations necessary to implement and enforce major legislative acts such as the Food Drug and Cosmetic Act, the Clean Air Act and the Occupational Safety and Health Act. FAPA differs from

other ADR confidentiality practices in its treatment of statements made and materials distributed to the opposing side during joint sessions. The Act states that there is no confidentiality protection if 'the dispute resolution communication was provided to or was available to all parties in the dispute resolution proceeding' 5 USC 574(b)(7). Communications in a joint session with all parties present fit squarely within this provision.

Although the general rule is that confidentiality of mediation communications is absolute as it applies to evidence prepared for the sole purpose of mediation, there are exceptions to the general rule of confidentiality, for instance, in situations where the Rules of Professional Conduct require reporting of a mediation communication, where it becomes necessary to defend against a lawsuit or claim for malpractice or other misconduct, or where there is threat of a prospective crime or of serious imminent harm to any person.

9 Limitation period

Does a mediation proceeding suspend the limitation period for a court claim?

In most states, mediation does not suspend or toll the limitation period for filing a court claim. Parties to a mediation may agree to enter into a tolling agreement or agreement to suspend the running of the statute of limitations pending mediation. Even if the parties agree to such a tolling arrangement it is important to research how courts treat such agreements in their particular jurisdiction. The court may not accept or follow parties' agreements to alter the limitation period and even well-intentioned plaintiffs may be time-barred from bringing their claim.

Some states, however, have enacted legislation tolling the statute of limitations for mediations conducted through an approved process or centre (for instance, Iowa, Minnesota, Montana, Nebraska and Washington). Some states have enacted tolling statutes for particular areas of dispute. Even in the presence of tolling statutes there may be disputes about how the law defines when mediation begins and ends. It is important to identify the applicable statute of limitations and to research whether a particular state tolls the limitation period while parties participate in pre-litigation mediation, and how the law defines the mediation period.

Section 928 of the California Civil Code (www.leginfo.ca.gov/.html/civ_table_of_contents.html) tolls the statute of limitations for disputes involving construction defects. The California International Arbitration and Conciliation of International Commercial Disputes Act (http://codes.lp.findlaw.com/cacode/CCP/3/3/9.3) provides for a stay of judicial and arbitral proceedings during the mediation proceedings of voluntary international mediations. In Illinois, when a court orders parties to mediation it is within the court's discretion to stay trial proceedings pending mediation. But a stay of trial is not the same as a stay of the statute of limitation period in which a lawsuit must be filed (Illinois Cook County Circuit Court Rule 20.06; www.cookcountycourt.org/FORATTORNEYSLITIGANTS/RulesoftheCourt/RulesoftheCourtList/tabid/1160/cid/28/smid/3566/tmid/453/Default.aspx).

10 Settlement

What is the legal character of the final (settlement) agreement? What are the legal requirements for the enforceability or the content of the agreement? Is it possible to revise, withdraw or challenge the final settlement agreement?

Unlike an arbitrator, the mediator has no authority to make binding rulings or to impose a settlement on the parties. Any settlement reached in the mediation will not be legally binding until it has been drafted in writing and signed by, or on behalf of, the parties. Parties must mediate in good faith but there is no obligation for the parties to settle.

Typically, parties draft a term sheet with the details of the settlement. Parties should make sure to get all the terms of the settlement agreement clear at the mediation. Once a settlement agreement is executed general contract principles apply. The settlement agreement, like any contract, is valid if there is mutual assent and adequate consideration.

General defences or challenges to the validity of contracts are available to challenge settlement agreements, such as mutual mistake, fraud, undue influence, duress, etc. Once a final settlement agreement is executed it is difficult to challenge.

In Illinois, for example, in the event of a dispute over a settlement agreement, the court will allow enforcement hearings only on fully executed written settlement agreements arising out of the mediation. Parties to the mediation may waive confidentiality to the extent necessary to testify at such hearings. The mediator may only testify to the existence or lack of existence of a fully executed written settlement agreement and shall not agree to or be compelled to testify as to any mediation communication or give interpretation of any mediation communication (see Illinois Circuit Court Rule 20.07(c); www.cookcountycourt.org/FORATTORNEYSLITIGANTS/RulesoftheCourt/RulesoftheCourtList/tabid/1160/cid/28/smid/3566/tmid/453/Default.aspx).

11 Mediation institutions

What are the most prominent mediation institutions in your country?

A number of organisations provide mediation services in each jurisdiction. The best practice, however, is to inquire through local counsel on the recommended mediators in a particular jurisdiction. Word of mouth is the primary method of advertising for mediators. Once a mediator develops a reputation for being effective, word spreads, similar to the way people refer physicians or attorneys.

One unfamiliar with mediators in a jurisdiction may obtain information about reputable mediation organisations through state bar associations. For instance, in Illinois, the Chicago Bar Association or Illinois Bar Association could be a resource for recommending mediators in Illinois. National bar associations are also excellent mediation resources. The American Bar Association's Section of Dispute Resolution, for instance, is the world's largest dispute resolution organisation with over 19,000 members. Also, a number of commercial dispute resolution organisations have become near-institutions.

It is important to note that some of the most well-known arbitration institutions also offer mediation services. The American Arbitration Association, the International Institute for Conflict Prevention and Resolution and the Society of Professionals in Dispute Resolution, for instance, also provide mediation services.

Mediation procedure

12 Background

Describe the development of mediation in your country.

In the United States, forms of mediation may be traced back to the country's earliest history dating back to the dispute resolution methods used in Native American society. The concept of court-sponsored mediation was brought by the early settlers from England.

In the early 20th century, mediation expanded in response to disruptive labour disputes. Mediation was used as an attempt to avoid strikes and the disruption that ensued when talks between labour and management broke down. The earliest attempts at legislation relating to mediation occurred in the late 1970s and early 1980s.

Today, mediation is common in civil and administrative agency matters. Mediation is widely relied upon to ease the burden on the courts and as a means to more cost-effectively resolve disputes between the parties than litigation. The public policy benefits of reducing the backlog of cases on the courts' dockets are substantial. Similarly, mediation reduces the cost of resolving a dispute because mediation is less expensive than the high cost of litigation.

Data on mediation is limited in some respects, specifically success rates, etc, because most mediations are confidential and results are generally not reported. There is some information at the state level about the large number of cases that use some form of alternative dispute resolution. According to the New York State Unified Court System website, out of 38,375 cases filed in New York courts in 2008, 21,464 of those cases used some form of ADR. In 2009, the most recent year reported, out of 38,780 cases filed, 22,339 of those cases used some form of ADR.

13 Areas of disputes for mediation

In which areas of disputes is mediation preliminarily applied? Are there any disputes that cannot be mediated?

In the United States, there is a wide array of areas of disputes that may be mediated.

Mediation is particularly prevalent in civil cases. For instance, commercial disputes including complex commercial litigation, landlord and tenant disputes, builders/contractors/homeowners disputes, labour and employment (including wrongful termination, discrimination, etc), and family law disputes are all frequently mediated.

Less frequent, but a growing trend in the United States, is mediation in criminal proceedings. Criminal mediation programmes typically handle misdemeanours, vandalism, minor assaults, theft and burglary. Victim-offender mediation is also becoming more popular. In 2006, the ABA's Criminal Justice Section established the ADR and Restorative Justice Committee, and in 2008 the ABA Board of Governors awarded a grant to start the Mediation in Criminal Matters Project, an ABA-wide effort to study and promote mediation in criminal law.

Parties may not mediate the granting of a patent.

14 Procedural requirements

Are there procedural requirements for mediation proceedings in your country? Must the parties prepare for the mediation?

The procedural requirements for mediation vary by jurisdiction and by mediator. Generally, the parties submit written mediation statements to the mediator explaining their understanding of the facts and briefly setting out the parties' respective positions.

A growing trend is that many mediators now require that the parties participate in a pre-mediation conference with the mediator in advance of the mediation, to address such considerations as what issues are expected, whether written statements are allowed, and who will attend.

Whether a party must be present during the mediation varies by jurisdiction and by mediator. Some mediators require parties to be present during the mediation, most mediators require a party representative with settlement authority to be present at the mediation and other mediators allow a party to be represented by counsel at the mediation and for the party to be available by telephone.

15 Structure and process of mediation

Describe the most common steps for the mediator's preparation of a mediation proceeding. Describe the most common structure of mediation proceedings. What is the typical time frame for a mediation proceeding? Are there any special considerations for international mediation proceedings?

Typically, the mediator conducts the mediation in such a manner as he or she considers appropriate. Mediation generally begins with a joint session to set an agenda, define the issues and ascertain the positions the parties. The mediator sets the ground rules, or reiterates the ground rules if the parties participated in a pre-mediation session with the mediator.

Whether to make opening statements is generally something the parties and the mediator may agree to have or not, and varies by mediator depending on his or her style. There are valid arguments for and against having the parties make opening statements. An opening statement may give the other side a clear understanding of a party's position, but opening statements can also add to the adversarial nature of the dispute, rather than fostering conciliation. Parties may become emboldened in their positions and hold firm in the negotiations rather than moving away from their respective positions to settle the dispute.

For example, the people present at the mediation are the plaintiff and her counsel, the defendant company and its counsel and the defendant company's insurer and its counsel. In the mediation opening statement the defendant company makes a good argument for little or no damages for plaintiff. The defendant's insurance company agrees with that argument and will not pay more than the minimum amount the defendant said in its opening statement. While there may be a good argument for little or no liability, if the jury believes the plaintiff's evidence, then the defendant company could be liable for a verdict significantly in excess of the limits of the insurance policy. During the mediation, if there is an offer from the plaintiff to settle the case below the policy limits and the defendant company insists that the insurance company settles for that amount, but the insurance company refuses, then the insurance company could be at risk – at trial – to pay the entire verdict, even if it is significantly above the policy limits. The defendant company would not want to acknowledge – in front of the plaintiff – the risk of a large verdict against it. But the defendant would want the mediator to understand the issue and for the mediator to explain that issue to the insurance company.

Over the past two decades mediations have evolved from just taking place in joint sessions to having a short joint session followed by a separate caucus between the mediator and each individual party or their counsel. This allows each side to explain and enlarge upon their position and mediation goals in confidence. It also gives the mediator an opportunity to ask questions that may serve to create doubt in a party's mind about the strength or validity of a particular position. It also allows the party to educate the mediator on potential weaknesses in the opposing positions and to provide the mediator with information the party did not want to provide in the joint session. The mediator's job is to seek concessions from each side in order to resolve the matter.

Mediations, particularly in the commercial realm, take place early in the course of litigation or sometimes before a lawsuit is even filed.

A typical two-party mediation generally is conducted in the course of one day. However, mediations with multiple parties and complex issues often require two days or more.

For international mediations, where the parties are from different countries, the contract between the parties controls whether there are any special considerations, including for presentation, attendance, whether the mediation rules of another country should apply, and the like. Otherwise, the only differences will be logistical, including locale, the use of interpreters if necessary, and similar considerations.

16 Mediation style

What is the primary mediation style in your country for commercial mediation: facilitative mediation, evaluative mediation or transformative mediation? Are private sessions (caucuses) or joined sessions, or both commonly used in mediation?

The primary mediation style in the United States is a combination of facilitative and evaluative.

Facilitative mediation is when a mediator controls the communication of relevant information between the parties, however this process is not usually done in joint sessions. Rather the information is exchanged in caucus situations, providing parties a space to vent and invent settlement options. The mediator transmits offers and demands. The mediator does not assess the legal merits of the case. The parties play a major role in the mediation, assisted by the mediator's questions to help to uncover underlying interests. The outcome is in the hands of the parties and counsel. After the parties do their best in the facilitative method, if the parties agree to it the mediation may shift to an evaluative mediation, in which the mediator assesses the strengths and weaknesses of each side's case and provides his or her opinion about the likely resolution of the case at trial. This is one reason parties may seek out or otherwise agree on a respected expert in the subject area of the dispute. The mediator may also suggest settlement terms.

There are pros and cons to the evaluative approach. On the one hand, if the mediator agrees with a party's position, and articulates his or her opinion to both sides, that party will be negotiating from a position of relative strength. The converse is true. Should the mediator agree with the other side's position then a party will be negotiating from a position of relative weakness. A benefit, regardless of the mediator's opinion, is that a party learns about the strengths and weaknesses of the other side's case should it move forward with litigation.

17 Co-mediation

What form does team mediation typically take in your country? Is co-mediation regularly used in your country? In which kind of cases?

Most mediation is before a single mediator. Co-mediation is not popular in the United States but is available in some types of dispute.

Co-mediation offers clients the benefits of a second mediator's perspective. Co-mediation primarily takes place in areas of dispute such as family and elder disputes.

18 Party representatives and third parties

What is the practice in your country with respect to the inclusion of party representatives in mediation proceedings? What is the practice with respect to experts and witnesses?

A party's attorney almost always attends the mediation. Whether the presence of a party or a representative with settlement authority is required, either physically or by telephone, varies by jurisdiction and by mediator. But the most common practice in commercial disputes is that someone with settlement authority is available.

The presence of 'experts' at the mediation (such as accountants, tax advisers, etc) is common, depending on the area of dispute and the facts. Experts may share their opinion and educate both sides of the dispute as to the strengths and weaknesses of their respective positions. The presence of a tax professional may be particularly helpful in structuring settlements that would be advantageous to one side and yet not detrimental to the other. Strategic structuring of settlements may effectively net a party more compensation without the compensating party having to actually pay more money. Having a tax professional assist with structuring settlements is very common in personal injury cases. The presence of experts should be discussed and agreed upon by the parties in advance of the mediation.

19 Specific mediation procedures/conflict or dispute management systems

Have companies set up their own dispute management systems in your country? Are there any special routes for consumers to use mediation for small claims? Are there any institutions that offer mediation for their customers, users, etc? Is there any reported or published information regarding dispute management systems of companies for conflicts in employment matters?

Because managers spend significant time reaching agreements with others when conflicts occur companies are developing internal conflict management systems. Typical goals for conflict management systems are prevention, quick resolution and low cost. Companies develop corporate policy on conflict management aligned with corporate values and document the conflict management programme for consistent application.

The following organisations are available to help consumers utilise ADR for small claims:

- the state attorney general or local consumer protection agency;
- small claims courts and court systems;
- non-profit dispute resolution organisations;
- bar associations and law school clinics; and
- the Better Business Bureau.

Some industries use mediation institutions with specific experience in their field. The mediation of securities brokerage disputes, for instance, is a newly emerging approach that has gained considerable interest in recent years, and often requires mediators with particular knowledge and experience. Mediation of securities brokerage disputes is available through the Office of Dispute Resolution of the Financial Industry Regulatory Authority (www.finra.org/web/groups/arbitrationmediation/@arbmed/@fdr/documents/arbmed/p124105.pdf), as well as through a number of private mediation services. Online mediation is available in a limited capacity in the United States but has not proven to be particularly useful.

There is little reported or published information of the mediated resolution of employment disputes. This is because most mediations are confidential. Individual mediators might keep their own working statistics if they mediate many of these disputes, but will not divulge such information, generally.

Mediation clauses and mediation agreement

20 Mediation clauses

Are mediation clauses commonly considered in the course of contract drafting? Are there special requirements for mediation clauses? Are there any relevant court decisions referring to such escalation clauses?

Yes, mediation clauses are commonly considered when parties draft contracts, especially for commercial transactions. Whether to negotiate a mediation requirement may depend on the parties' relative bargaining strengths, the locus of the transaction's performance, the strength or weakness of the law governing the transaction and other considerations. In certain types of contracts, employment arrangements and other dealings, the parties sometimes provide for multi-step procedures to resolve disputes. For example, a dispute resolution clause might require that the parties first negotiate in good faith, then engage a neutral's evaluation, where certain technical issues are disputed, for advice toward resolving assumptions that might be blocking further discussions and then mediate or mediate-arbitrate any remaining dispute. With the 'med-arb' clause, which is not widely used, if the parties cannot resolve their dispute voluntarily through mediation, they may provide that the mediator then act as arbitrator and issue a decision binding on the parties. Such tiered dispute resolution clauses are not as common in the United States as in Europe.

There is little United States case law regarding the enforceability of such escalation clauses that are similar to the United Kingdom high courts' 2014 decision in *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited* [2014] EWHC 2104 (Comm), upholding a contract clause requiring the parties to engage in 'friendly' negotiations before arbitration could commence. However, commercial parties, especially in international transactions, would do well to expect similar treatment in a US court and, thus, provide that the negotiation and mediation procedure is sufficiently detailed, any agreements for 'friendly' discussions are spelled out, conditions precedent for mediation before litigation are articulated and that a clear time period for the notice-through-mediation process is specified.

21 Conclusion and content

Is there any obligation to conclude an agreement between the mediator and the parties or between the parties before or at the beginning of the proceeding? Are there any legal requirements regarding the content of the agreement between the mediator and the parties? What are the common provisions for such mediation agreement? Must the agreement be in writing?

In the United States, the content of the agreement between the mediator and the parties is not governed by any particular law other than the laws regarding contracts, and parties are not required by law to execute a contract with the mediator. The mediator may insist, however, that the parties execute an agreement with the mediator before proceeding. Typically, contracts between the mediators and parties cover the following types of description:

- the scope of mediation;
- confidentiality of the proceedings;
- acknowledgement of mediator neutrality and impartiality; and
- responsibility for the mediator's fees.

Frequently, parties are required to pay some or all of the mediator's fees in advance of the mediation. It is not unusual for the mediator to include a waiver or limitation of liability clause in the contract.

22 Costs for mediation

Are there any legal provisions on mediators' fees? What is the average mediator's fee in mediations involving companies? Is there any legal aid or other financial support for mediation proceedings if parties cannot afford to pay the mediator?

Fees for mediators vary greatly. For court-annexed mediations, courts may set the rates for a mediator on its roster of neutrals but parties are

Update and trends

The trend in commercial, administrative and consumer disputes is towards more mediation and less litigation. This is due to a focus on reduction of risk and cost-technology advances that make information more readily accessible. This is true in courts, government administration, commercial and employment settings.

free to engage a mediator of their choosing and pay the corresponding rates. There are no official fee scales that must be used and mediators typically charge an hourly rate with a minimum number of hours or a flat per-day fee. In addition, mediators typically charge a fee for preparation time.

In a commercial dispute, the parties to mediation typically split the mediation fees. 'Party' is often defined as each participant in the mediation who is represented by counsel. For example, if there is one plaintiff to a mediation, and two defendants, all individually represented by counsel, there would be three 'parties' to the mediation and all three would split the mediation fees. If, on the other hand, there is one plaintiff and two defendants, however both defendants are represented by the same counsel, there might be two 'parties' under the foregoing definition and the mediator's fee would be split evenly between the two 'parties'. This arrangement may be subject to negotiation. The responsibility for paying fees, as with many other aspects of the mediation process, is negotiable between the parties.

Private commercial organisations that provide mediation services (eg, the American Arbitration Association, ADR Systems, JAMS, etc) set their rates to include the costs of their administrative overhead. Those charges are often separate from and in addition to the fees of the mediator. In some cases, those administrative charges include the use of conference and caucus facilities.

Some courts require mediators on their roster of approved mediators to provide certain amounts of mediation services without compensation for parties without the resources to pay the mediator's fee. In Delaware, mediators are asked to complete five pro bono mediations to complete their training and to assist the court.

A growing number of public and private non-profit programmes offer pro bono mediation services. The variations in the cost of mediation affect access and set up a quasi caste-system of mediation participants. Where a non-profit mediation programme may charge nothing for its services, and a private, for-profit mediator may charge an hourly rate or a full-day rate of up to US$10,000 per day, lower-income clients are only able to mediate through non-profit programmes to mediate their disputes.

Professional matters for mediators

23 Regulation

Is there any specific regulation of mediators in your jurisdiction? Give details. Are there any regulations on immigration or tax issues or regarding the right to work for foreign mediators?

There is no governing or regulatory body for mediation nor is there a uniform regulatory scheme in the United States governing the practice of mediation. Mediators are not state-licensed and there is no one formal certification process, although mediators may be trained and certified by any number of educational or court-annexed bodies, and there is no legal restriction on using the title 'mediator' as there is protecting the title of doctor and lawyer. There are, however, standards of conduct for mediators promulgated by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution (see www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_010409&revision=latestreleased). These standards include avoiding the appearance of conflicts of interest. As discussed below, some courts have certified mediators who have met certain court specific requirements.

In addition, there are generally no limitations regarding professional background. For example, a mediator need not be a lawyer, except in the District of Columbia to mediate civil court cases other than family disputes, although many mediators are former judges. Moving from the bench to mediation seems like a logical progression because a mediator must exercise good judgment and be impartial. However, not all former judges make good mediators. While on the bench, some judges wield their power to try to push parties toward settlement in a way that does not translate well to the skill set required to be an effective mediator. A party considering mediators should use the same judgment about the suitability of a mediator beyond the fact that the potential mediator is a retired judge.

Most states, including Delaware, Illinois and New York, have no state requirements or guidelines for mediators to practise (see www.mediationworks.com/medcert3/staterequirements.htm). California generally has no state requirements for mediators except for child custody mediation through the courts, and individual courts may establish additional requirements. Most state courts maintain a 'roster of neutrals' or list of mediators for court referrals. The courts establish requirements for mediators to make and maintain their status on such rosters.

24 Training

Are there any requirements regarding training for mediators?

There is no training requirement to become certified as a mediator because there is no formal certification process. But there are mediation training organisations such that a mediator may be 'certified' by that programme as having completed a certain number of hours of training. A number of state courts have implemented qualifications standards, including training requirements, for mediators receiving referrals from courts or providing services in court-connected dispute resolution programmes. These standards vary widely from state to state.

In California, for example, rule 12.36 of the Local Rules for the Los Angeles Superior Court (www.lacourt.org/courtrules/ui/index.aspx?tab=2) establishes the requirements for a mediator for the Los Angeles Superior Court system. Pursuant to rule 12.36, mediators must complete 30 hours of mediator training and must have completed at least eight mediations, each lasting at least two hours, within the past three years.

25 Continued education

Must mediators undertake continued professional education? Is there a credit point system for the continued education of mediators?

Again, there is no formal amount of continuing education required to be certified as a mediator because there is no formal mediation certification process other than as mentioned above. Courts and mediation institutions impose their own CLE requirements for a mediator to remain on the court's or mediation institution's roster. Again, this varies by jurisdiction and organisation.

26 Accreditation of mediators

Outline the system for certification of mediators.

In the United States there is no register of certified mediators nor is there state-imposed mediator accreditation in the United States. In any state, a mediator can practise in private settings without being licensed, certified or listed.

Again, court systems usually maintain a roster of approved mediators to recommend in court-annexed mediation and courts impose their own requirements for a mediator to be included on a roster of approved mediators. Mediation institutions similarly impose their own requirements for mediators.

27 Mediator liability and sanctions

What are the duties of mediators in a mediation procedure? What liability do mediators face when offering their services and conducting mediation proceedings? Is professional indemnity insurance for mediators available or obligatory? Are there any further sanctions or other disciplinary measures for mediators in cases of misconduct, poor performance, etc? Are there any regulations referring to the dismissal of mediators?

Independent claims or causes of action against mediators for malfeasance is rare. Mediators do not need to maintain a malpractice

insurance policy. Many mediation institutions include a waiver of liability clause for the organisation and its mediators in their contract with the parties.

The parties are under no obligation to settle and the mediator bears no duty to facilitate a settlement. The conduct of the mediator is not under the same scrutiny as the conduct of an arbitrator because the mediator may not make any binding decisions, unlike an arbitrator. There is a well-defined body of rules pertaining to arbitrator misconduct but a mediator really only facilitates conversation, without the same exposure as arbitrators.

The federal government has developed a Mediator Code of Professional Conduct (http://admin.fmcs.gov/assets/files/OGC/MediatorCodeofConduct.doc) for mediators employed by the Federal Mediation and Conciliation Service (FMCS). The FMCS is a federal agency that provides mediation services primarily in the area of collective bargaining.

While independent causes of action against mediators for malfeasance are rare, acts and omissions by lawyers participating in the mediation process are more common.

As there is no certification process for mediators there is no policy for the removal of poor mediators. Courts and mediation bodies may have their own policy for dealing with mediators who do not comply with the court's or institution's rules.

28 Appointment

Is there any regulation regarding the appointment of mediators? Is it common in your country to seek assistance by institutions or official bodies for the appointment of mediators? Are mediators obliged to inform about conflicts of interest in the course of appointment?

As explained above, courts have their own requirements for a mediator to achieve and maintain a place on the court's roster of mediators. The appointment of mediators varies by state and by area of dispute. Court-appointed mediators are prevalent in family law disputes. In child custody cases, for example, when parents cannot agree on arrangements for their children, California law requires that the parents attend a court-appointed mediation session. The court-appointed mediator will typically issue a custody recommendation to the judge.

Mediators are obliged to disclose all actual and potential conflicts of interest reasonably known to the mediator that could be seen as raising a question about impartiality. Only if all parties agree to mediate after being informed of conflicts may the mediator proceed with the mediation. A mediator must avoid the appearance of being conflicted or partial even after the mediation.

Cases

29 Notable cases

Briefly give details of any significant recent mediation cases or disputes or judgments involving mediation that have been published in your country.

There is little case law involving mediation because mediation results are generally confidential and not published. The case law that is out there generally deals with the conduct of attorneys for the parties during mediation and in some instances wrongful disclosure of confidential information.

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