



“EUROPEAN NETWORK OF MEDIATORS
FOR CROSS BORDER DISPUTE RESOLUTION”

The action is implemented by the Professional Association of the Mediators in Bulgaria,
Integrierte Mediation e.V. – Germany and the European Association of Judges for Mediation (GEMME)

EU Handbook on Mediation: Mediation Law and Practice in Other EU Countries

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BELGIUM¹

1. Legal Frame of Mediation

There is no specific Mediation Act in Belgium. The basic general statute of mediation has been introduced through the general Code of Civil Procedure on Feb.21, 2005 /articles 1724 to 1737 of the Code of Civil Procedure/. These provisions have not been amended after the adoption of Directive 2008/52/EC, as they are considered to be in line with the requirements of the Directive and to provide sufficient regulation of mediation.

The only significant change in mediation legislation after Directive 2008/52/EC was adopted refers to divorce proceedings. A statute of April 5, 2011, concerning divorce proceedings obliges the judge to inform the parties on the possibility of mediation and allows the judge on his own initiative to stay the proceedings so that the parties to consider mediation (new article 1254, §4/1, 1255, §6 and 1280 of the Code of civil procedure). For the rest, the existing procedure governed in articles 1724 - 1737 of the Code of Civil Procedure remains into force.

The Belgian mediation legislation does not distinguish internal and transnational mediation proceedings; hence the same provisions apply to both – domestic and crossborder mediations.

2. Court Referral to Mediation

Referral by a judge to mediation can be done at any stage of proceedings (with the exception of the proceedings before the Court of Cassation or a special court that handles jurisdiction issues). The mediation agreement concluded after a referral can be ratified by the judge upon a request of each of the parties. Such a request can only be rejected on narrow grounds.

As mentioned above, in divorce proceedings the judge is obliged to inform the parties on the possibility of mediation and has the right, on his own initiative, to stay the proceedings in order to allow the parties to consider mediation.

If a contract includes a clause for mediation in cases of possible conflict, and one of the parties directly sues the other party, the judge can stay the proceedings only if the interested party raises this exception (art.1725)(The judge can not stay the proceedings on his own initiative in these cases.)

¹ The information in this chapter is based on a summary on the implementation of the Mediation Directive up to November 2011, prepared by Mr. Ivan Verougstraete for the ADR Center - Italy





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3. Confidentiality of Mediation Proceedings

The confidentiality requirements concern not only the mediator but also the parties and the experts appointed during the mediation.

4. Enforceability of Mediation Agreements

The agreement made under supervision of an accredited mediator can be ratified by the court on request even of one of the parties and has the force of a judgement (court decision) when it is ratified. The judge can only reject the demand of ratification on grounds of public policy or in family matters when the agreement is contrary to the interests of the children

5. The Impact of Mediation on Statutes of Limitation

Entering into a conventional mediation entails legal effects: it has the effects of a formal notice (important for the interest due) and suspends the statute of limitations for one month (1730). Signing the mediation protocol suspends the prescription as long as the mediation proceedings last.

6. Requirements for Parties and Lawyers to Consider Mediation as a Dispute Resolution Option

Belgian law adheres to the concept that mediation is a fundamentally voluntary process. However, it is not excluded that a party –even a winning one- would have to pay part of the costs of the court proceedings if he or she has unreasonably refused to at least try a mediation (this might be considered as an abuse of rights).

7. Accreditation Requirements for Mediators

An accreditation system is provided, with the accreditation given to mediators and to training centers by a Federal commission on arbitration. There is no provision concerning the recognition of mediators trained abroad or recognized elsewhere in the EU.

It is worth to mention that it is generally admitted that professional judges cannot be mediators.

8. Duties of Legal Representatives and other Professional Mediation Participants





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The parties may use legal assistance in mediation proceedings, as well as to appoint an expert /with the consent of the mediator/. The obligation to keep all the information obtained in the course of mediation proceedings as confidential applies to all participants /including legal representatives and experts/.

9. Statistics

There are no reliable statistics available.



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BULGARIA

1. Legal Frame

The first efforts for establishing legal regulation of mediation in Bulgaria achieved success in December in 2004 when the Mediation Act (hereinafter referred to as the MA) was adopted. (Promulgated in State Gazette No. 110/17.12.2004, last amended, SG No. 27/1 April 2011).

Significant role for the increase of the practical implementation of mediation had also the new Civil Procedure Code (Promulgated, State Gazette No. 59/20.07.2007, effective 1.03.2008, last amended, SG No.5/14 January 2011). Several provisions thereof set out the necessary procedural measures for applying mediation in pending court cases and established an initial legal basis for connection between mediation and civil proceedings.

In addition to these two legal instruments, Ordinance No. 2 of 15.03.2007, (last amended, SG No. 29/ 8 April 2011). on the implementation of art.8 of the Mediation Act (regarding the registration rules for mediators and training organizations and the rules of procedural and ethical conduct for mediators), contributed to the quality of mediation and mediators by setting minimum standards for mediation training, and requirements for certification of mediators and training institutions.

As a result from the implementation of these three legislative instruments in the past six years the awareness of the Bulgarian legal community about mediation was increased, meaning that the term became more popular and the procedure was no more treated as "terra incognita". Few progressive lawyers and judges started consistently applying mediation procedures to their cases.

As a result, mediation is currently accepted by the legal community in Bulgaria as a recognizable and legitimate tool for alternative dispute resolution. Therefore, the immediate goal in the field of mediation now is to encourage more and more lawyers to think of mediation as a first choice for resolving a dispute, before going to court.

The European Community Directive 2008/52/EC ("Mediation Directive") serves as very important incentive in this respect as it encourages legal community to use mediation by creating significant guarantees for the rights and interests of parties using mediation. The Mediation Directive was implemented in Bulgaria within the deadline set therein, by a law amending and supplementing the Mediation Act adopted by the National Assembly, promulgated in State Gazette on 1 April 2011.

The amendments in the Bulgarian Mediation Act implementing the Mediation Directive are mainly focused on ensuring higher protection for parties in mediation in four main directions: in terms of confidentiality, statutes of limitation, mediators' impartiality and



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neutrality, and enforcement of settlement agreements achieved in mediation.

This chapter will outline in details the specific amendments in the Mediation Act and will focus on the legal and practical ways of putting these provisions into practice, as well as the challenges and achievements in the process of implementation of mediation legislation in Bulgaria.

2. Court Referral to Mediation

Court referral to mediation has been subject to legal regulation in Bulgaria before the implementation of the Mediation Directive – since 2004. The practical application of court referral was fostered by the procedural measures for referral provided for by the Civil Procedure Code in 2008 and by series of educational measures increasing judges' awareness about mediation.

The current regulation of court referral to mediation and its practical implementation by judges is completely in line with the concept adopted by the Mediation Directive stating that a court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle their dispute.

The option of inviting parties to attend an information session on the use of mediation (provided for by the Mediation Directive) has been seriously discussed in the process of implementing the Mediation Directive. As a result, some courts (starting or interested in starting their court-annexed mediation programs) have considered implementing such a measure in their own rules by explicitly encouraging parties to attend such an information session.

The option of mandatory mediation was also discussed in the process of preparation of the amendments of the Mediation Act implementing the Mediation Directive, and many mediation stakeholders and international advisors were consulted on this issue. The prevailing opinion was that mediation procedure in Bulgaria should remain voluntary in order to be used by parties and lawyers actually willing and being well prepared to benefit from its advantages.

Thus, the provisions for court referral in both Mediation Act and the Civil Procedure Code remained unchanged by the last legislative amendments implementing the Mediation Directive, as they were considered as wide and flexible as necessary to comply with the Mediation Directive and to practically foster court referral.

According to the current legislation in Bulgaria the court has the general authority upon its own discretion to "propose to parties to use mediation for resolving their dispute" (Art. 11 of the Mediation Act). The procedural moment, methods and consequences from referral to mediation are regulated in the Civil Procedure Code.

In civil and commercial proceedings, the court has the general authority "to refer the disputing parties to mediation when scheduling the first hearing of the case in public



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session" (Art.140, par. 3 of the Civil Procedure Code, Art.374, par. 2 of the Civil Procedure Code). In addition to that parties may be referred to mediation or decide to use it later on at any time during the proceedings. If the parties agree to use mediation the case may be postponed or stayed depending on the parties' will. (Art.229, par.1, item 1 of the Civil Procedure Code). In practice, parties are usually able to have mediation sessions in the period between two court hearings.

In divorce proceedings during the first hearing for examination of the case "the court shall be bound to direct the parties to mediation or another procedure for voluntary resolution of the dispute. If the parties agree to use mediation, the divorce case will be stayed. Each of the parties may request a resumption of the proceeding within six months. Unless such a request is made, the case shall be dismissed. Where settlement agreement is reached, depending on the content of the said agreement the case shall be dismissed or a proceeding for divorce by mutual consent shall be proceeded with." (Art.321, par. 2, 3, and 5 of the Civil Procedure Code).

An important incentive for the parties to reach a settlement agreement in a pending case (subsequently implemented by the court in a court settlement agreement) is that "half of the stamp duty deposited shall be refunded to the plaintiff". (Art.78, par.9 of the Civil Procedure Code).

3. Protections Provided to Ensure Confidentiality of Mediation Proceedings

As confidentiality in mediation provides important protection for the legal interests of mediating parties, it was guaranteed by the Bulgarian legislation even before the implementation of the Mediation Directive. The new provisions in the Mediation Act influenced by the Directive increased the protection of confidentiality and clarified the exceptions therefrom.

Currently, mediation confidentiality applies to all discussions in connection with the dispute. The participants in a mediation procedure are bound to respect the confidentiality of all circumstances, facts and documents as have come to the knowledge thereof in the course of the procedure. (art.7 of the MA).

The mediator shall be bound to keep as confidential all the information related to his/her activity as a mediator even after the end of the mediation procedure (art.33 of the Ordinance on the implementation of the Mediation Act).

Special protection for mediation confidentiality is ensured by specific measures in the civil procedure. Thus, according to Art. 166 of the Civil Procedure Code, mediators have been given the right to refuse to testify about a dispute they have mediated.

The new paragraphs of Art.7 of the Mediation Act implementing the Directive increase this protection, setting out that a mediator cannot be interrogated as a witness in respect of circumstances confided to him/her by any of the participants, which are relevant to



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the resolution of the dispute subject of mediation, except with the explicit consent of the participant who confided the circumstances (Art.7, par.2 of the Mediation Act).

The exceptions to mediation confidentiality, provided for in the new paragraph 3 of Art. 7 of the Mediation Act, strictly follow the Mediation Directive. Such exceptions shall only be admissible in the following cases: (i) where this is necessary for overriding considerations of criminal process or related to the protection of public order, (ii) when required to ensure the protection of the interests of children or to prevent harm to the physical or psychological integrity of a person, or (iii) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

Still, some gaps exist in respect of protection of mediation confidentiality. Parties and their lawyers are not prevented in any way from misuse of information received during mediation in subsequent court proceedings. There are no sanctioning mechanisms or sanctions provided for such a misuse of information, neither for parties and lawyers, nor for mediators. Indeed, parties and mediator undertake an obligation to keep confidentiality by signing an agreement to mediate containing a confidentiality clause, and lawyers – by signing a declaration of confidentiality, but these may only result in their contractual liability for damages. Only the general legal remedies are available in case of damages resulting from breach of mediation confidentiality, meaning that direct damages resulting from such a breach have to be proven by the parties pursuing compensation.

4. Enforceability of Mediation Agreements

The major change with the highest anticipated effect in the Bulgarian mediation legislation was made in furtherance of Art.6 of the Mediation Directive regulating enforceability of mediated agreements.

The new Art.18 of the Mediation Act implementing the Mediation Directive provides for that “agreement under a legal dispute within the meaning of art.1 of this law reached in a mediation procedure shall have the force of a court settlement agreement and shall be subject to approval by the regional courts in the country. The court shall approve the agreement after it has been confirmed by the parties, unless it conflicts with the law and good moral. The court shall hear the opinion of the prosecutor, if a prosecutor participates as a party to the case.”

This provision is expected to significantly foster the wider use of mediation.

First of all, in the Bulgarian Mediation Act the mediated agreement is given higher legal force than the one prescribed by the Mediation Directive. The Mediation Directive requires that Member States provide a procedure by which parties can request that the content of a written settlement agreement resulting from the mediation be made enforceable. Under the Bulgarian Mediation Act the mediated agreement approved by the court will not only be enforceable, but will also have the full legal force of a court settlement agreement



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(having *res iudicata*, also known as “claim preclusion”), meaning that it will be final, cannot be subject to appeal, and the same dispute between these parties can not be referred to the court in the future.

As a result, parties reaching settlement agreement in mediation can present it for approval before the competent regional court and thus get the highest possible protection for their rights and interests stipulated in the mediated agreement.

This new provision also sets a lot of questions which should be settled in order to ensure its fostering effect:

Which legal procedure under the Civil Procedure Code shall be applied by the court for the approval of the mediated agreement? (No changes have been made to the Civil Procedure Code clarifying the procedural implementation of this provision which raises lots of questions). What exactly will be the scope of the powers of the court? Should parties appear in person to confirm the agreement? How shall be prevented the misuse of this provision for approval of agreements which have not been achieved in mediation, but have been falsely presented as such? What state fees should be collected for such an approval? (There is no specific provision in the Fee Schedule on State Fees Collected by Courts. Therefore, a proposal for its amendments has been recently filed with the Ministry of Justice in order to avoid contradictory court practice in imposing fees and to ensure that parties willing to benefit from their right to have their settlement agreement approved by the court will not bear extraordinary expenses, similar to the state fees for filing a claim, which are 4% of the material interest.)

This new provision for enforcement of mediated agreements is applicable to agreements reached in out-of-court mediation, where no court proceedings for the resolution of the respective dispute have been initiated.

Mediated agreements reached in mediation in pending court cases may either be submitted to the court panel hearing the case for approval as a court settlement agreement, or the case may be dismissed based on parties’ request, or withdrawal or waiver of claim by the plaintiff.

In case when the parties present their mediated agreement to the court for approval, the court shall check whether the agreement complies with law and good morals, and shall implement the settlement agreement in court minutes signed by the court and by the parties. The court settlement agreement shall have the relevance of an effective judgment and shall not be appealable before a superior court. Where the settlement agreement refers to only part of the dispute, the court shall proceed with examination of the case in respect of the unsettled part. (Art.234 of the Civil Procedure Code).

In addition to the legal opportunities for judicial approval of settlement agreements reached in mediation, parties under mediated agreement may also choose to notarize their agreement. The settlement agreement (such as any contract) bearing notarized signatures may serve as a ground for the issue of an enforcement order in respect of the



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obligations contained therein to pay sums of money or other fungible things, as well as obligations to deliver particular things. The enforcement order is issued by the competent regional court. If such an enforcement order is not objected to by the debtor, the enforcement order shall enter into force and the court shall issue a writ of execution which shall serve for the initiation of the enforcement procedure. If the enforcement order is objected to by the debtor (within two weeks as of its service), the creditor requesting the enforcement order may bring an action to establish the receivable thereof within one month. In other words, a settlement agreement bearing notarized signatures may be directly enforced or may lead to a suit for establishing the receivable being subject of the settlement agreement, depending on whether the debtor objects to the enforcement order (and the receivable in the settlement agreement) or not. (Art.414 to 417 of the Civil Procedure Code).

5. The Impact of Mediation on Statutes of Limitation

The impact of mediation on Statutes of Limitation was regulated for the first time in Bulgarian law as a result of the implementation of the Mediation Directive.

New explicit provisions in the Mediation Act state that limitation periods shall not run during the mediation procedure. (Art. 11a of the Mediation Act).

To clarify the initial date of mediation, and thus the day when limitation periods shall be suspended, the law specifies exactly which moment shall be considered the beginning of mediation. According to Art. 11, par.2 of the Mediation Act, the beginning of mediation shall be the day, when parties have reached a consent for commencement of mediation procedure, and in the absence of an explicit consent - the day of the first meeting between all participants and the mediator.

This legal regulation of limitation periods reflecting the concept of the Mediation Directive provides high protection of legal rights and interests of parties in mediation by explicitly suspending the limitation periods during mediation.

However, there are at least two important practical issues related to limitation periods that need additional regulation.

First of all, there are no rules provided for determining the final date of mediation, or when exactly the suspended limitation periods shall continue running again. In order to ensure security for parties in mediation, it is provided for by the law, that mediation shall be terminated upon expiry of 6 months from the beginning of the procedure. (art. 15, par.1, item 6 of the Mediation Act). This very specific timeframe sets out clear limit with regard to limitation periods – if parties do not terminate mediation earlier, or the date of termination could not be easily defined (e.g. due to out-of-mediation discussions on possible next sessions or attempts for its continuation), with the expiry of the 6 month period from the beginning of mediation procedure, it will be terminated and limitation periods shall continue



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running. This timeframe also helps avoiding misuse of mediation for unreasonable delay of the resolution of a dispute.

Second, the legal provision regulating limitation periods should be placed in the Obligations and Contracts Act as it contains all provisions regulating limitation periods and is *lex generalis* in respect of all civil relation involving obligations and contracts. Its non-systematic placement in the Mediation Act might create some misinterpretations.

Regardless of the above small imperfections of the current regulation of limitation periods with regard to mediation, it still provides sufficient security for parties participating in mediation by ensuring that they will not be prevented from initiating judicial proceedings or arbitration because of their participation in mediation.

6. Requirements for Parties and Lawyers to Consider Mediation as a Dispute Resolution Option

The existing legal regulation of mediation, even after implementation of the Mediation Directive, does not provide any requirements for parties and lawyers to consider mediation as a dispute resolution option.

Requirements for Parties to Participate in Mediation

As the Bulgarian law sticks to the concept of voluntary mediation, there are no requirements for parties to participate in mediation. The mediation Act explicitly states that parties shall participate in the procedure of their own free will and may withdraw at any time.

7. Accreditation Requirements for Mediators

Accreditation requirements for mediators have been considered one of the most important guarantees for quality of mediation since the adoption of the Mediation Act in 2004. Therefore, very specific requirements for acquiring the capacity of a mediator have been provided in the Mediation Act and the Ordinance on its implementation, which ensure in practice the high quality of mediation trainings and the professional qualification of mediators.

The accreditation of a mediator is made by the Minister of Justice by entry into the Uniform Register of Mediators provided that the requirements of the Mediation Act and of the Ordinance on its implementation are met.

In order to be accredited as a mediator, one must be a legally capable person who has successfully passed a mediation training, has not been convicted for general crime, has not been deprived of the right to exercise a profession or an activity, has a permit for long-term (new provision) or permanent residence in the Republic of Bulgaria, in the event the person is a foreign national. Such a permit is not required from nationals of member-states of the



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European Union, the other states from the European Economic Area and Switzerland. (Article 8, par. 1 and 2 of the MA).

As a direct reflection of the Mediation Directive the opportunities for foreign nationals to become mediators in Bulgaria were extended by allowing foreign nationals having long-term residence in Bulgaria to acquire the capacity of mediators if they meet the other legal requirements (previously, only persons having permanent residence were allowed to become mediators).

It is important to mention that specific groups of officials are not allowed to serve as mediators. The general prohibition in Art. 4 of the Mediation Act provides that persons performing functions of administration of justice in the judiciary system may not carry out mediation activities. Thus, judges and prosecutors may not serve as mediators. Other government officials, such as officials in the ministries, may not perform mediations, based on the general prohibition that are not allowed to perform any paid activity in addition to their official service, except for lecturing. However, these government officials could perform pro-bono mediations.

As the key prerequisite for acquiring the capacity of a mediator, mediation training is very precisely regulated in the Mediation Act and in the Ordinance on its implementation. The mediation training required for accreditation must be provided by an accredited training institution approved by the Minister of Justice on the grounds of special requirements, such as training curriculum, qualified mediation trainers, etc. (Article 8, par. 1 and 2 of the MA, Chapter 2 of the Ordinance on the implementation of the MA). The list of the accredited institutions providing mediation training is available on the Web page of the Bulgarian Ministry of Justice, Registers Section, Uniform Register of Mediators: <http://www.justice.government.bg/new/Pages/Registers/Default.aspx?evntid=eq0G%2bPC%2bawg%3d>

The minimum contents and duration of the mediation training are specified in the Ordinance on the implementation of the Mediation Act. Minimum 60 hours of training are required for accreditation. The practical part of the training must be at least 30 hours of training.

Mediators who have successfully completed their mediation training after passing a test, a practical exam representing mock mediation, and an interview, receive a certificate issued by the training institution where they undergo their training. Based on this certificate for completion of mediation training and on a certificate of criminal conviction, mediators apply before the Minister of Justice, who issues an order for their registration in the Uniform Register of Mediators.

In furtherance of Article 4, par. 2 of the Mediation Directive, which emphasize on the importance of the initial and further training of mediators for ensuring that mediation is conducted in an effective, impartial and competent way, a specific new provision for further training of mediators was included in the Ordinance on the implementation of the



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Mediation Act. It encourages mediators (without obliging them) to regularly improve their skills and knowledge by passing further theoretical and practical training in specialized mediation (such as commercial, family, labour mediation, etc.). The minimum duration of such specialized trainings is 30 hours. Their minimum contents are explicitly specified and an exam is required for the successful completion of such a specialized training. (Art.11a of the Ordinance).

Currently, the existing regulation of accreditation of mediators is strict and reasonable and provides sufficient guarantees for the quality of mediators' qualification. There are specific mechanisms for control over the observance of the requirements for accreditation of mediators, exercised by the Minister of Justice. The actual responsibility for the quality of mediators' qualification though lies with the training institutions which educate, test and certify mediators.

Mediator Duties

The Bulgarian Mediation Act provides general framework of the main responsibilities of mediators, and the Ordinance on its implementation sets out special rules of procedural and ethical conduct for mediators – these rules of conduct being bounding for mediators. The mediators' duties correspond to the framework of the Mediation Directive setting out that mediation should be performed in a effective, impartial and competent way.

The Bulgarian Mediation Act promotes the model of facilitative mediation, where mediator supports parties in reaching their own agreement, without interfering with their final decision. Thus, mediator is entitled to guide parties through their negotiations as a neutral expert and to help them work out a reasonable and mutually acceptable agreement by keeping the conversation into track and ensuring fair procedure. Mediator is mainly responsible for supporting the communication process and diplomatically guiding the negotiations towards joint interests and mutually beneficial options. The Mediation Act explicitly states that mediator should not impose a resolution of the dispute and that all questions in mediation shall be resolved by mutual agreement between the parties (Art.6, par.1, second part, and par.2 of the Mediation Act).

The main responsibilities of mediators will be reviewed in the light of the mediation principles (according to the Bulgarian Mediation Act these are voluntary participation, equality, neutrality, impartiality and confidentiality), and with regard to the stages of mediation procedure.

Impartiality. A mediator shall not display partiality. (Art.6, par.1 of the Mediation Act).

In order to ensure the observance of the principles of impartiality and neutrality, a mediator shall only accept to conduct the procedure if able to guarantee his or her own independence, impartiality and neutrality (Art.9 of the Mediation Act).

Mediators are also obliged to disclose all circumstances that may give rise to reasonable doubt in the parties as to the impartiality and neutrality of the mediator, including



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when the mediator is a related party. For the above purpose, each mediator is required to sign declarations of impartiality for each procedure for which he/she has been assigned, where he/she shall state all circumstances that may give rise to reasonable doubt in the parties as to the impartiality and neutrality of the mediator, and shall present such declaration to the disputing parties. The requirement for signing such a declaration was set out as a result of the implementation of the Mediation Directive. (Art.13, par. 2 and 3 of the Mediation Act).

To guarantee the conduction of mediation in a neutral and impartial way, a mediator shall withdraw from the procedure upon occurrence of any circumstances that would cast doubt on the independence, impartiality and neutrality thereof. (Art.10, par.3 of the Mediation Act).

Confidentiality. As regards the so called external confidentiality (towards third parties) mediator shall be bound to keep confidential all circumstances, facts and documents as have come to the knowledge thereof in the course of the procedure. (Art.7, par. 1 of the Mediation Act). With respect to internal confidentiality (towards participants in mediation) mediator shall not communicate to the other participants in the mediation procedure any circumstances which relate to only one of the disputing parties without the explicit consent of such a party (Art.10, par.4 of the Mediation Act). The Mediator shall keep as confidential any information received in his capacity of a mediator even after termination of his/her functions as a mediator. (Art. 33 of the Ordinance).

Good faith and compliance with law. A mediator shall act in good faith in compliance with the law, good morals, and the procedural and ethical rules of mediator conduct - determined in the Ordinance. (Art.9 of the Mediation Act).

Prohibition for legal advice. The most important prohibition in the Mediation Act is that mediator may not give legal advice. (Art.10, par.1 of the Mediation Act)

Promotion of mediator's activity. Mediators' activity shall be promoted in a manner and by means giving a true picture of mediation. (Art. 35 of the Ordinance).

Mediator's duties before mediation. Prior to conduction of the mediation procedure, the mediator shall inform the parties of the essence of mediation and of the consequences thereof and shall require their written or oral consent to participation. (art. 13 of the Mediation Act).

Mediator's duties during mediation. Mediator shall take into consideration the opinion of each of the disputing parties. (Art.10, par.2 of the Mediation Act). Mediator shall create favourable environment for fluent communication in order to help parties improve their relations and reach an agreement.(Art.25 of the Ordinance) Mediators shall respect the opinion of each party and require respect from parties. (Art.28 of the Ordinance).

As a hint on what is expected from a mediator to do during the mediation procedure, the Mediation Act sets out very general guideline for some of the key activities that have to be guided by the mediator. In the course of the procedure, the essence of the dispute



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shall be clarified, the mutually acceptable options of solutions shall be specified, and the possible framework of an agreement shall be outlined. Upon performance of the said steps, the mediator may schedule separate meetings with each of the parties, with due respect for the equal rights thereof to participation in the procedure.

Mediator's duties with regard to the settlement agreement and termination of mediation. Mediators shall only assist parties in reaching a mutually acceptable agreement and shall create conditions for the parties to achieve such an agreement and understand the covenants thereof (Art.27 of the Ordinance).

Mediator shall neither be liable if the parties fail to reach a settlement, nor shall he/she be liable for non-performance of the agreement. (Art.10, par.5 and 6 of the Mediation Act).

Mediator's duties with regard to termination of mediation. Mediator is entitled to terminate mediation if according to his/her own judgement and ethics, there are reasons to believe that mediation conflicts with law or ethics. (Art.29 of the Ordinance).

It is also worth mentioning that the Mediation Act explicitly provides for that mediation procedure may be implemented by one or more mediators selected by the parties. In practice, co-mediation, conducted by two mediators as a team is seen as a beneficial model often implemented in Bulgaria.

Duties of Legal Representatives and other Professional Mediation Participants

The Mediation Act provides very wide opportunity for legal counsellors to participate in mediation procedure. They could act as representatives of a party, attending the procedure instead of their client or accompanied by their client (but having major role in negotiation). Any representative (either lawyer, or any other representative), attending mediation, must be authorized in writing. Except for acting as a representative, taking decisions for his/her client, a lawyer may also have the role of consultant providing legal advice – before, during or after mediation. In the role of a consultant, lawyer may personally attend the mediation session, or assist his/her client between mediation sessions or by phone. The legal framework is general, so that it gives sufficient flexibility.

Other specialists may likewise participate in a mediation procedure. This means that parties may bring to the mediation sessions their own consultants (e.g. financial, technical, accounting expert, psychologists, etc.) or consult with such experts. Both parties may also decide to use a neutral expert to provide them with an expert examination needed for the resolution of their case.

Court-annexed Mediation Schemes

To foster the court-connected mediation, a Court Settlement Program (with a Settlement Center) was initiated in the first quarter of 2010 by the biggest Bulgarian court – the Sofia Regional Court. Within this program parties in cases pending before the Sofia



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Regional Court have the opportunity to receive information and consultation on the opportunity to use mediation and other voluntary dispute resolution methods and to receive professional assistance for resolving their case at the Court Settlement Centre which operates pro bono. At the Court Settlement Centre parties are assisted in the settlement of their case by volunteer mediators and judges trained in mediation techniques. Parties having reached a settlement agreement may present it before the court and request its implementation in a court settlement agreement having the legal effect of a court decision, thus enjoying the refund of 50% of the state fee already paid for the court action.

The promising results from the first year of the Court Settlement Centre attracted additional institutional, financial and professional support² for its activity. From the beginning of year 2011 the Court Settlement Centre extended its mediation service to the second biggest court in Bulgaria - the Sofia City Court and attracted additional professional mediators to support its increased activity.

The encouraging results of the court-connected mediation program in the first year and a half of its existence – mentioned below, are consequence from the combined focused efforts of judges, mediators and court administration in three main directions: (i) institutional strengthening of the Court Settlement Center (by establishing effective rules and procedures for its administration, increasing professional capacity of the coordinators, and development of strategy for its sustainability); (ii) improving capacity of judges and mediators through series of mediation trainings (in referral, basic and specialized mediation techniques (e.g. commercial and family)); (iii) promoting mediation in the legal and business community and among the general public.

The biggest challenges with regard to court referral schemes are to motivate judges to refer cases, to educate lawyers on the benefits of mediation and to teach them useful approaches for negotiating in mediation, as well as to ensure high quality of mediation. The steps taken so far show that educating on mediation as many judges and lawyers as possible and their focused training in mediation techniques and procedure is one of the most efficient tools for encouraging wider use of mediation, including court-connected mediation programs.

8. Statistics

² The important social role and the promising results of the Court Settlement Centre attracted support from the America for Bulgaria Foundation within the project “Mediation and the Judiciary – a Successful Blend for Improved Access to Justice and Court Services” implemented by the Professional Association of Mediators in Bulgaria from the beginning of year 2011. The project fosters the development of the center by providing international consultancy, service and training, educating judges about mediation and extending the support of judges and lawyers for the development of Court Settlement Centre.



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Currently, reliable and comprehensive statistics are available for the cases mediated at the Court Settlement Centre at the Sofia Regional Court, and no national statistics is officially collected. The statistics from the Court Settlement Centre, show that mediation sessions are held in the Court Settlement Centre every working day and more than one third of the cases referred settle successfully.

The increase of cases referred and settled in the first half of the second year of the Centre's activity compared to the same period of the first year is more than 50%.

The statistics show that the average time needed for settlement of a case in mediation was 2 sessions, with approximate duration of 2 hours each. These results prove that parties save significant amount of time through mediation, and the court saves many hours of procedural time. Not to mention that 50% of the state fee is reimbursed to the plaintiff in case of settlement agreement.

Price

There is no national fee schedule regulating mediators' fees.

The Ordinance sets out some general rules on mediator's fees. Mediators shall start mediation procedure after parties agree on their mediator's fee. (Art. 34, par.1 of the Ordinance). Mediator's fee can neither depend on a condition nor be conditioned upon the outcome of dispute (Art.34, par.2 of the Ordinance).

Most mediators or mediation providers apply an hourly rate based fee for mediation. The mediation sessions held at the Court Settlement Centre are still free of charge for parties.

Conclusion

As discussed above, the Mediation Directive had important impact on the Bulgarian legislation governing mediation. The regulation of enforcement of settlement agreements reached in mediation is a key milestone for encouraging wider use of mediation. The provision that any mediated agreement which complies with the law and morals may be submitted for approval by the court and thus acquire the full legal force of a judgement, including enforceability, is a huge step towards giving parties the highest guarantees for the enforcement of their agreement. The other changes influenced by the Mediation Directive, and namely the explicit regulation of the suspension of limitation periods during mediation, the specific guarantees for confidentiality in mediation and the exceptions therefrom, and the additional measures for impartiality of mediators, provided the long expected and most needed guarantees for the legal rights and interests of parties participating in mediation.

So far, the biggest challenge in promoting mediation is to gain the proactive support of legal professionals. This purpose can be achieved by educating a critical mass of legal professional – both judges and attorneys about the practical advantages of mediation and the methods of its use in lawyers' practice. Lawyers' influence in respect of use of





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mediation is so important because it has been proven that when in conflict, parties first and most count on their lawyer's advice. Thus, having lawyers who are aware of mediation and well prepared to represent or consult their clients in mediation, is the key prerequisite for making mediation the first choice of parties in case of conflict. In addition to that, the practice shows that judges have a crucial role in legitimizing mediation as citizens and businesses referring their disputes to court trust judges and tend to respond positively judge's recommendation to use mediation. Raising the awareness of general public is also an important direction for promoting mediation.

A focused and sustainable state policy in the field of mediation (which is very much needed) would additionally foster the use of mediation, especially by combining the efforts of the variety of mediation stakeholders and contributing to the establishment of uniform practices in implementing mediation on national level. For example, so far only the two biggest courts in Bulgaria (in Sofia) have an operational court-annexed mediation program, which needs to be extended on national level in order to spread mediation throughout Bulgaria. Many courts in the country have shown serious interest in initiating their own mediation programs. Therefore, national guidelines and support (technical, promotional, financial, consultative, etc.) for courts for the implementation of their mediation programs would significantly increase the use of mediation and the results therefrom.

In addition to that, the combined efforts of educational institutions, such as universities, the National Institute of Justice (training all new magistrates), will help increase the awareness and preparation of lawyers and judges in the field of mediation. So far, the major driving force for the development of mediation in Bulgaria have been non-government organizations and their donors. The educational activity of training institutions, the strategic support of the Ministry of Justice, the proactive referral activities of the courts and the promotional assistance of bar associations and business associations would significantly contribute to the wider use of mediation as a preferred dispute resolution tool for parties having a dispute.

In conclusion, it might be summarized that the existing legal framework of mediation in Bulgaria having implemented the Mediation Directive, provides sufficient incentives and guarantees for the parties using mediation. Therefore, the next steps for fostering the development of mediation should be focused on combining the efforts of the mediation stakeholders as mentioned above, as well as raising the awareness of general public about mediation, and educating about it the professionals in conflict resolution - judges and lawyers.



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CZECH REPUBLIC³

1. Legal Frame of Mediation

Currently there is no Mediation Law in Czech Republic. The only legal regulation of “mediation” is for the purposes of the criminal procedure (victim – offender mediation). The mediation in the criminal victim – offender cases is governed by the law on the Probation and Mediation Service no. 257/2000 of the Collection of Laws.

There are also some provisions of the Code of Civil Procedure where mediation is mentioned, but they do not describe or regulate the mediation procedure itself.

The draft of the Mediation Act, implementing the requirements of the directive 2008/52/ES, is still in process of legislature. The first reading in the Parliament was on 21/9/2011.

The draft regulates the mediation process in a minimal extent (the initiation, termination, the refusal by the mediator, basic principles of the mediation process and the basic provisions of the mediation contract, the confidentiality of the mediator, the organisation of mediation).

Other aspects regarding mediation will be implemented in different acts as the Commercial Code, the Code of Civil Procedure, the Civil Code, the Act on Advocacy and Notary rules.

2. Court Referral to Mediation

According to the existing provisions of the Code of Civil Procedure, the court may order the parties to participate in the out-of-court settlement negotiation or mediation or a family therapy if the matter pertains underage children. If the parties agree to participate in the out-of-court settlement, the court will adjourn the proceedings as long as it is not

³ This chapter is based on the information available at the moment of its preparation /November – December 2011/. The following sources of information have been used: 2010 Mediation Country Report - Czech Republic, by Robert Cholenský - http://www.adrcenter.com/jamsinternational/civil-justice/Mediation_Country_Report_Czech_Republic.pdf/ and a summary on the implementation of the Mediation Directive up to November 2011, by Bei Heynink



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contrary to the purpose of the said proceedings. The court may determine the conditions of prolonging the adjournment, e.g. the court may order the parties to provide information on the development and outcome of the settlement negotiations or mediation. The parties do not have to provide information that was communicated during mediation or settlement negotiation and that is not reflected in the outcome (agreement).

According to the current draft of the Mediation Act, the court may order a first meeting with a mediator of 3 hours and for this purpose temporarily suspend the proceedings at most for 3 months.

Only the mediators-attorneys may be appointed for this compulsory meeting. The parties to the dispute shall choose the mediator-attorney from the Register, if not agreed, the court shall appoint him.

At this first meeting the mediator informs the parties about the possibilities of mediation. The costs of the compulsory meeting are considered costs of proceedings and are paid by the parties. The amount of costs is limited as well as the extent of the meeting (3 hours). The mediation itself is completely voluntary and the parties to a dispute may enter into a contract with the mediator and settle the price for its services.

3. Confidentiality of Mediation Proceedings

Currently there are no provisions regarding the confidentiality of the mediation. We do not have information whether such provisions are included in the draft of the Mediation Act.

4. Enforceability of Mediation Agreements

According to the current legislation, a mediation settlement agreement may be directly enforced if it is written by the notary or executor and includes the consent of the obliged party that the obligation stated in the settlement may be directly enforced if the said party does not honor the that obligation.

The draft Mediation Act provides for the enforceability of the settlement agreement under the following conditions:

- 1) The contents of a written mediation agreement can be made **enforceable** by drafting the agreement in the form of a notarial/executionary deed with an express consent to enforceability or by approval of judicial settlement.
- 2) In non-contentious proceedings the agreement can be approved by the final decision of the court.



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5. The Impact of Mediation on Statutes of Limitation

Today the parties to a dispute may agree on a conciliation proceeding guided by any person they choose. This conciliation proceeding has no effect on limitation and prescription period (unlike the mediation under the draft Mediation Act).

6. Requirements for Parties and Lawyers to Consider Mediation as a Dispute Resolution Option

According to the current draft of the Mediation Act, the court may order a first meeting with a mediator of 3 hours and for this purpose temporarily suspend the proceedings at most for 3 months.

7. Accreditation Requirements for Mediators

Currently there are no requirements.

The draft Mediation Act provides for such requirements. Under the Act a mediator is a **natural person**. The Act governs **only** the activity of **accredited mediators** (recorded in the Register of Mediators) in all non-penal matters. This does not incapacitate other persons from providing services similar to mediation; the state only guarantees the quality and competence of accredited mediators.

The Act de facto divides the accredited mediators in **2 categories**:

Mediators-attorneys, supervised by the Czech Bar Association (CBA):

- The CBA provides the training of mediators and mediators exams;
- The CBA executes the disciplinary procedure and imposes disciplinary punishments;
- The provisions for mediator-attorneys will be governed by the Act on Advocacy.

Accredited mediators, supervised by the Ministry of Justice:

- The Ministry keeps the Register of mediators and organises the mediators' exams. This exam requires next to the knowledge of the mediation methodology, different branches of law, psychology and sociology. The training of mediators is not regulated by the Act;
- There is no internal disciplinary procedure (as in the case of the mediators-attorneys) but the Act specifies several administrative delicts that can be committed by the accredited mediators.





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A mediator interested in **family mediation** can pass a special exam and such qualification shall be recorded in the Register of mediators.

A national of another Member State (or other natural person under the Recognition of qualifications of nationals of other Member States of the EU Act) may exercise mediation temporarily or occasionally as a **Visiting Mediator**. A visiting mediator must follow the Czech Mediation Act. The Ministry shall record the Visiting mediator into the Register (document proving that the visiting mediator exercises the mediation under the laws of other Member State is needed). The visiting mediator is entitled to exercise mediation by presentation of required documents to the Ministry.

The mediator (attorney or not) **cannot provide legal service** to the parties to the dispute. The pronouncement of his legal opinion is not considered as the provision of legal service

8. Statistics

There are no reliable statistics available.



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GREECE⁴

1. Legal Frame of Mediation

Law 3898/2010 on mediation transposes the Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters to Greek law. The Law applies to all mediations /cross-border and internal/. However, still several by-laws need to be enacted, dealing with a number of pending issues, such as: the establishment of training institutions, the establishment of the Mediation Certification Commission and its statutes, the rules and regulations dealing with certification criteria and controlling mechanisms to the training institutions, the accreditation conditions and requirements both for domestic and foreign mediators, and the amount of mediator’s fees per hour.

Hand in hand with the mediation act goes a new law on the rationalization and the improvement of the civil jurisdiction, which brings a number of amendments to the Code of Civil Procedure⁵. The basic idea was that 3 models should coexist within the Civil Justice scope: mediation, conciliation, and out of court dispute resolution by lawyers and their clients (collaborative mediation).

2. Court Referral to Mediation

A court before which an action is brought may, at any stage of the trial, invite the parties to use mediation in order to settle their dispute.

A court referral may be also initiated from a foreign court, as provided for by article 3 § 1 c of the act.

3. Protections Provided to Ensure Confidentiality of Mediation Proceedings

⁴ This chapter is based on the information available at the moment of its preparation /November – December 2011/. The following sources of information have been used: 2010 Mediation Country Report – Greece by Ioanna Anastassopoulou and Catherine Cotsaki - http://www.adrcenter.com/jamsinternational/civil-justice/Mediation_Country_Report_Greece.pdf and summaries on the implementation of the Mediation Directive up to November 2011, by Apostolos Anthimos and Ioanna Anastassopoulou

⁵ Law Nr. 3994/2011, published in the Official Gazette of the Hellenic Republic, Volume A, Nr. 165 / 25.7.2011, p. 2479 et seq.



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Art. 10 of the Greek Mediation Act provides for the confidentiality of the mediation procedure. It also stipulates that mediators, parties, their attorneys/representatives and any other person involved in the mediation process are not to be summoned as witnesses, nor may they be compelled to produce evidence in any subsequent judicial or arbitration proceedings. On this point, the new law appears to differ from the EU Directive, which confines the limits on service as witnesses and production of evidence to civil and commercial proceedings⁶. The mediation law, however, provides for an exception to this prohibition for public policy reasons. Such reasons are addressed in Article 7, para. 1 of the EU Directive and repeated in Article 10, para. 2 of the law.

4. Enforceability of Mediation Agreements

5. Requirements for Parties and Lawyers to Consider Mediation as a Dispute Resolution Option

There are not requirements for parties and lawyers to consider mediation as a dispute resolution option.

6. Requirements for Parties to Participate in Mediation

Following the choice made under Art. 214 A Para 4 CCP (previous version)⁷, and extensive efforts made by major Bar Associations, the act opted for the compulsory presence of the parties' lawyers. Pursuant to Article 8 Para 1, the parties or their legal representative for legal entities is to participate in the presence of an attorney at law.

7. Accreditation Requirements for Mediators

Under the Greek law the mediator must be a lawyer accredited as mediator by a competent Accreditation Body.

Pursuant to article 7 of the Mediation Act, the Accreditation Body will be the Department for lawyers and bailiffs, attached to the General Direction for the administration of Justice at the Ministry of Justice. By virtue of a decision from the MoJ, a number of important issues will be regulated, under Art. 7 para 2, such as:

- Quality control mechanisms for the assessment of mediators;
- Accreditation requirements for foreign mediators;

⁶ See Directive Article 7, para. 1.

⁷ Para. 4 is abolished by Article 19 law 3994/2011.





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- A “Code of Deontology,” which accredited mediators must respect, and
- Any other issues related to accreditation.

With respect to mediation training institutions, the law opted for the following solution: Pursuant to Article 5 para 1, a training centre has to be founded by at least one Greek Bar Association and one Greek Professional Chamber. Any other mediation training issues (e.g. the required number of training hours needed), however, will be regulated by presidential decree, following a proposal by the Ministry of Justice and the Ministry of Education, Lifelong Training & Religious Matters (Article 5, para. 2). Such a decree has not been issued yet.

Additionally, the new mediation law provides for the establishment of a commission entrusted with the preparation of necessary rules and regulations related to the certification criteria. The Ministry of Justice will determine the commission members (Article 6).

8. Price

The Law on Mediation provides that the minimum hourly rate of the mediator’s fee is to be defined and (later on) amended by decision of the MoJ (Art. 12 para 3). A mediator cannot collect an hourly fee for more than 24 hours of work. The 24-hour fee cap includes time spent for preliminary mediation preparation (Article 12, para. 1). Unless the parties agree otherwise, each party is obliged to pay half of the mediator’s fees, and each party pays his or her own attorney’s fees (Article 12, para. 2).

9. Statistics

There are no reliable statistics available.



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GERMANY⁸

1. Legal Frame of Mediation

Currently there is no Mediation Law in Germany.

Some procedural legal norms of the Code of Civil Procedure (ZPO) and the Code of Family Procedure oblige the courts to look for amicable settlements /see section 2 below/.

The draft of the Mediation Act, implementing the requirements of the directive 2008/52/ES, is still in process of legislature. The hearing in the Federal Parliament (*Bundestag*) took place the 15th of December 2011. The final hearing in the Upper House of the German Parliament (*Bundesrat*) is expected for February 2012. Therefore, the German Mediation Act will not be in force before March or April 2012.

The **content** of the German Mediation Act is limited to the basic duties and tasks of a mediator, some limitations in the mediator's function and to a general duty for education and advanced training. The scope of the draft German Mediation Act refers not only to cross-border mediations, but covers also national mediation proceedings in all areas of law.

The draft Mediation Act provides for the "pure" mediation primarily. This is the mediation procedure outside the court. A judge is allowed to suspend the court procedure in order to allow a court external mediation (*aussergerichtliche Mediation*). There have been discussions about the court internal mediation. Court internal mediation is a separated procedure where a judge who is not the sitting judge acts as mediator. (*gerichtsinterne Mediation*). The Federal Parliament (*Bundestag*) didn't provide this kind of procedure any more. Instead of that judges can act as some kind of "judges of the peace" (Güterichter) where a judge who is not involved in decision-making tries to settle the case. This procedure is slightly different to court internal mediation. This is in respect to the role and the reputation of judges but with an option, to use mediation skills as well.

⁸ This chapter is based on the information available at the moment of its preparation /November – December 2011/. The following sources of information have been used: 2010 Mediation Country Report – Germany by Christoph Strecker-http://www.adrcenter.com/jamsinternational/civil-justice/Mediation_Country_Report_Germany.pdf and a summary on the implementation of the Mediation Directive up to November 2011, prepared by Prof. Dr. Renate Dendorfer LL.M. MBA HEUSSEN RECHTSANWALTSGESELLSCHAFT MBH, MUNICH



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2. Court Referral to Mediation

Art. 278 paragraph 2 of the code of civil procedure (ZPO) obliges the civil courts to begin the hearing with a conciliatory hearing in which the judge has to discuss the issues of fact and of law with the parties and to put questions, if appropriate. According to Art. 278 paragraph 1 of the Code of Civil Procedure (ZPO) the judge shall in every situation of the lawsuit strive for an amicable settlement.

Art. 15 a of the Introductory Law to the Code of Civil Procedure entitles the regional legislator to prescribe that lawsuits on small claims / valued at or up to EUR 750.00/, lawsuits against neighbours and libel suits are admissible only after a prior extrajudicial attempt of conciliation. In addition, a provision in the German Code of Civil Procedure (ZPO) has been amended by providing for court referrals to ADR with the consent of the parties (Sec. 278 para. 6 ZPO).

Pursuant to art. 135 of the Code of Family Procedure the court can oblige the parties to participate at an information session about mediation. In appropriate cases the court shall propose an extrajudicial settlement. Pursuant to art. 156, in cases concerning children the court shall indicate in appropriate cases to mediation or other forms of extrajudicial dispute resolution.

According to an amendment of Sec. 253 (3) Civil Procedure Code, the statement of claims (*Klageschrift*) has to inform the judge on the parties' efforts to resolve the dispute in mediation before bringing the action in court and whether there are any reasons excluding mediation.

The amendment of Sec. 278 (5) ZPO include the possibility to transfer the parties to another judge who is acting as conciliator (*Güterichter*) for a conciliation hearing. Such conciliation hearing must not be confused with the court-annexed mediation. The relegation to a “conciliator-judge” remains in the pure discretion of the court and cannot be declined by the parties. The “conciliator-judge” has the power to schedule a binding hearing date which is not possible in court-annexed mediation. In addition, the “conciliator-judge” has the right to read the records of the case without the prior approval of the parties.

Furthermore, the amendment of Sec. 278a ZPO provides for the proposal of court-annexed mediation. The court proceeding shall be suspended for the time of the mediation proceeding. In the case of court-annexed mediation, the parties have the right to choose the mediator. If the mediator is a judge, he must consider all statutory requirements, e.g. confidentiality, duties of disclosure, training and education.



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Parties can, furthermore, bind themselves by all sorts of contracts not to go to court before having tried an amicable settlement of their dispute. Such a contract has to be respected by the courts and if there are no exceptions or reasons for nullity the contract, the court has to reject the lawsuit as inadmissible. The Federal Constitutional Court decided that it is no violation of due process if courts consider mediation clauses as binding contract provisions which must be followed-up before the court proceeding can be started.

3. Confidentiality of Mediation Proceedings

At the moment there is no legal rule that grants confidentiality of mediation proceedings as such. If the mediation is done by a lawyer, he may be subject to his professional confidentiality. This, however, would not be a protection for the mediation, but for the professional secret of lawyers

According to the draft Mediation Act, the mediator and all persons included in the mediation proceeding have the duty of confidentiality regarding all information gathered during the mediation proceeding. The provision is not clear with respect to "*all persons*" being obliged for confidentiality. According to the statement of the *Bundesregierung*, only staff of the mediator shall be part of this confidentiality obligation, but not persons as included by the parties, like experts or family members. In addition, it does not include the parties' duty of confidentiality, as well as an equivalent rule for documents produced during a mediation proceeding.

Based on this provision, all mediators – and persons included by the mediator – shall have the privilege to refuse to give evidence according to Sec. 383 para. 1 no. 6 Civil Procedure Code (ZPO) in civil actions. There is no according privilege for criminal procedures which is criticized by several organisations. The duty of confidentiality should not apply if (1) the disclosure of the mediation result is necessary for the enforcement of the settlement agreement; (2) the disclosure is necessary in order to avoid danger for a child or significant adverse effect of the physical or mental integrity of a person (*ordre public*), or – as an additional but less concrete exception – if (3) the facts are already in public domain or are not relevant enough for confidentiality.

For further confidentiality, e.g. of the parties themselves, experts and other persons included in the mediation proceeding, additional confidentiality agreements will be necessary. Such confidentiality agreements can be used for civil cases, but are not binding for criminal matters.



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4. Enforceability of Mediation Agreements

According to the amendment of Sec. 796d ZPO, the settlement agreement can be declared as enforceable on demand of each party, either by the district court as agreed between the parties or as located at the place of the mediation proceeding. The same procedure can be conducted vis-à-vis a notary public.

5. The Impact of Mediation on Statutes of Limitation

According to the already existing Sec. 203 Civil Code (BGB55) the suspension of limitation periods is also relevant for mediation proceedings. The statutory limitation periods are suspended as soon as parties start and continue negotiations for a certain claim or its circumstances. It is undisputed that mediation must be considered as such negotiation. The suspension ends if one party refuses mediation clearly and precisely or if the mediation proceeding ends – either successfully with a final agreement or as a failure.

Insofar, the German legislator was not forced to consider any further regulation considering Art. 8 EU Mediation Directive. However, other legal deadlines (*Ausschlussfristen*), e. g. the deadline for bringing an action in unfair dismissal cases according to the German Employment Protection Act are not covered by Sec. 203 BGB. Therefore, further regulation seems to be necessary in order to avoid uncertainty and unnecessary legal actions.

6. Requirements for Parties and Lawyers to Consider Mediation as a Dispute Resolution Option

Art. 15 a of the Introductory Law to the Code of Civil Procedure entitles all German states on their own discretion to prescribe that lawsuits on small claims / valued at or up to EUR 750.00/, lawsuits against neighbours and libel suits are admissible only after a prior extrajudicial attempt of conciliation. Several German states /such as Nordrhein-Westfalen, Bayern, Baden-Württemberg, Hessen and Brandenburg/ have introduced legislative schemes providing for mandatory ADR.

7. Requirements for Parties to Participate in Mediation

According to the draft Mediation Act, the mediation is voluntary procedure and the parties are free to end the mediation at any time.



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8. Accreditation Requirements for Mediators

Currently, there is neither a formal accreditation of mediators, nor a protection of this title. A sort of standardization is granted only by the institutions that provide professional training for mediators. Some professional organizations as BAFM, BM and others have elaborated binding criteria for their members who offer professional training of mediators. Above this, various universities and schools offer such training. The standard formation includes a minimum of 200 hours, a documentation of four mediations, a series of supervisions and a final colloquium. After having finished this training, the graduated persons can use the name of the institution where they graduated and call themselves “mediator (BAFM)”, “mediator University of X”.

The alternatives to regulate the mediator’s training, education and experience have been discussed during the legislative procedure concerning the draft Mediation Act and the discussion is still ongoing. According to the existing draft of the German Mediation Act, it is the own responsibility of the mediator to ensure by sufficient training and continuing education that he is skilled in theory and practice to guide the parties through the mediation proceeding. However, the *Bundesrat* and political parties, as well as the mediation associations, further involved commercial associations and the Federal Bar Association demand education and certification standards for mediators. The Federal Bar Association presented a proposal for statutory ordinance (*Rechtsverordnung*) referring to the education of certified mediators with a 90 hours training including the basics of mediation, the practice of mediation, negotiation and communication techniques, conflict management, legal framework for mediation, ethics and role of the mediator as well as supervision.⁹

9. Statistics

There are no national statistics available.

⁹ **Further information regarding the hearing of the Rechtsausschuss:** The German Mediation Act will allegedly include further regulation regarding the content of mediation trainings, the length (120 h at minimum) and the certification of mediators.



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ITALY¹⁰

1. Legal Frame of Mediation

Law No. 69 of 19 June 2009, Article 60 officially recognized mediation in civil and commercial disputes and delegated power to the Italian government to issue a Legislative Decree on mediation to implement the provisions of Directive 2008/52/EC.

Legislative Decree No. 28 of 4 March 2010 was enacted as a result of the delegation from Law 69/2009, Art. 60 and, while implementing Directive 2008/52/EC, incentivised mediation by creating financial incentives and enacting procedures for not only voluntary and judicial referral mediation, but also for mandatory mediation in many civil and commercial cases. Decree 28/2010 “forces” parties to mediate while ensuring the quality of mediation.

Ministry of Justice Decrees No. 180 of 18 October 2010 and No. 145 of 6 July 2011 provide specific guidelines needed to effectuate the provisions of Decree 28/2010 and issue quality standards for mediation organisations, mediators, mediator training, and mediation costs.

2. Referral to Mediation

Lawyers have the duty to inform clients about the option of mediation and specify all tax benefits of the procedure. Should the lawyer fail to inform the client about mediation, the attorney-client contract may be voided by the client. The information must be provided in writing and signed by the client. If the document is not joined to the writ of summons, the judge will inform the party about mediation.

The judge may suggest to the parties at any point during the proceedings to solve their dispute via mediation.

The mediation procedure must not last more than 4 months. If the parties do not reach an agreement, the mediator, upon request of the parties, has to provide them with a proposal, which they are free to adopt in order to settle the dispute. This proposal has to be

¹⁰ This chapter is based on the information available at the moment of its preparation /November – December 2011/. The following sources of information have been used: 2010 Mediation Country Report – Italy by ADR Center - http://www.adrcenter.com/jamsinternational/civil-justice/Mediation_Country_Report_Italy.pdf and a summary on the implementation of the Mediation Directive up to November 2011, by ADR Center



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sent to the parties in writing and, if they do not respond, their silence is considered to be a refusal of the proposal (Art. 11), with negative consequences for the allocation of process fees (Art.13). The party who prevails in a trial but has not accepted the mediator's proposal, may be ordered by the judge to pay the fees to the counterpart.

In addition, Italian law provides for mandatory mediation when the subject matter of the dispute falls amongst one of the following areas: tenancy, land rights, partition of property, hereditary succession, leases, loans, rental companies, damages resulting from vehicle and boat accidents, medical malpractice, defamation by the press or other means of advertising, contracts, insurance, or banking and finance. Parties to such a dispute must attempt mediation before trial; otherwise the case will be dismissed by the court.

3. Confidentiality of Mediation Proceedings

Mediation confidentiality is standardized, either during the process (Art. 9) or out of the mediation procedure (Art.10). All employees of the mediation body have the duty to keep all information received during the mediation process confidential. The same principles apply to information exchanged during private sessions (caucus), where the mediator cannot offer the information to the other party without prior consent.

In addition, according to article 200 of the Code of Criminal Procedure, mediators cannot be required to testify about information obtained in the course of their work. Information and declarations exchanged during the mediation procedure cannot be used as evidence during Court proceedings for the same dispute.

4. Enforceability of Mediation Agreements

Enforcement of mediation agreements is also monitored under the law. According to article 12 of the Decree this principle applies to all agreements in civil and commercial matters resolved through the mediation process handled by mediation bodies registered with the National Register. After the president of the court where the mediation organisation has its main office validates the agreement, it then becomes enforceable empowering the parties to seek execution.

Under Art. 17 all mediation acts, documents and agreements are exempt from stamp taxes and other charges. Under Art. 20, parties are entitled to a tax credit towards the mediation fee of up to €500.00 for a successful mediation and up to €250.00 if the mediation



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fails.

5. The Impact of Mediation on Statutes of Limitation

6. Requirements for Parties and Lawyers to Consider Mediation as a Dispute Resolution Option

Lawyers have the duty to inform clients about the option of mediation and specify all tax benefits of the procedure. Should the lawyer fail to inform the client about mediation, the attorney-client contract may be voided by the client.

In disputes, where the law provides for mandatory mediation, parties must attempt mediation before trial; otherwise the case will be dismissed by the court.

7. Requirements for Parties to Participate in Mediation

8. Accreditation Requirements for Mediators

The mediation providers must be registered in the National Register of Mediation Organizations at the Ministry of Justice. The National Register contains separate lists for public bodies and for private entities. Mediation organizations must apply to the Ministry of Justice and their application is considered by the Director-General of the Civil Justice Office.

Professionalism and efficiency are the two main requirements for mediation organizations wishing to appear on the National Register (Article 4 of *Decree 180/10*). The applicant must prove in particular: its financial capacity and organizational capability; the availability of insurance covering the professional liability of mediators for a minimum of € 500 000; the legal structure of the entity, its autonomy and the compatibility of its activity with its purpose; the administrative and accounting transparency of the entity and its legal and business relationships with its mediators; the professional qualifications of mediators; the guarantee of independence, impartiality and confidentiality that must be assured during the mediation process; the conformity of the mediation procedure rules to the law.

Among the requirements that must be fulfilled by conciliation bodies in order to be included in the register, the legislation places a strong emphasis on the personal qualifications of the mediators. Each organization must have at least five available individuals /no one can declare himself available to perform the functions as a mediator for



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more than five organizations/. These individuals must meet certain requirements, such as sufficient education and training, clean criminal record; not to be prohibited (perpetually or temporarily) to hold public office; not to have been subjected to restrictive measures, prevention or safety; to be reported to have no disciplinary other than warnings.

Public or private entities applying for entry to the National Register of Mediators must have their own rules for the mediation process. These rules must be inspired by the basic principles of informality, promptness and confidentiality.

Once registered, neither the mediation organization, nor the mediators can refuse to provide mediation services in the absence of a valid justification to do so.

An organization seeking to carry out mediation trainings must be included in the list of the Training organizations at the Ministry of Justice.

Art.18 provides for the minimum content and duration of the mediation trainings, as follows:

The basic training must be with the total duration of at least 50 hours, divided into theoretical and practical courses, including mock mediations, and a final test evaluation, with a maximum thirty participants per course.

The refresher training courses should last at least 18 hours and must be attended every two years.

9. National Statistics

- Mediations conducted from 21 May – 30 June 2011: 7,333/month, 28% increase from the previous month;
 - Type of filings: 69% mandatory: 29% voluntary, 1% judicial referral, 1% by contract;
 - Most frequently mediated subject matters: property rights (16%), lease agreements (11%), medical malpractice (8%);
- Percentage of mediations which have attendance of all parties: 27%;
- Percentage success of mediated cases: 58%;
- Percentage of mediations where parties have attorney representation: 80%;
- Number of mediations expected by 2012: 30,000 per month.



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NETHERLANDS¹¹

1. Legal Frame of Mediation

In Dutch law there are no specific statutory provisions pertaining to mediation, and only a few court decisions on the subject have been published so far.

The National Mediation Institute (NMI) has adopted its mediation rules (NMI Mediation Rules, adopted in 1995, amended in 2000). These rules provide for the basic principles of mediation and, in the absence of legislative framework, set standards for mediators, disputants, and judges. Three basic principles have been written into the NMI Mediation Rules:

1. mediation is based on the continuing voluntary consent of all parties;
2. the mediator must be independent and impartial; and
3. confidentiality and secrecy are to be observed during and after the mediation by all parties concerned.

A project of a legislative act on mediation implementing the requirements of the EU Mediation Directive is currently in the process of preparation.

2. Court Referral to Mediation

During the period 1999 – 2002 pilot mediation schemes have been introduced in two district courts. In 2005 a nation-wide court referral system for mediation was created. Despite the fact that these schemes operate on the principle of self regulation with minimum influence by the state, temporary financial contribution to mediations has been provided, as well as legal aid for the parties.

In the Court Encouraged Mediation project, mediation is provided as an extra service during a court procedure. At the hearing, the judge handling the case may refer the parties to a mediator. If such mediation appears unsuccessful, the court procedure will be resumed. The judge is not informed of the negotiations during the mediation in the event that the

¹¹ This chapter is based on the information available at the moment of its preparation /December 2011/. The following sources of information have been used: 2010 Country Report- Netherlands by ADR Center - http://www.adrcenter.com/jamsinternational/civil-justice/Mediation_Country_Report_Netherlands.pdf and a summary on the mediation practice in Netherlands until November 2011.





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court case is resumed. The Court Encouraged Mediation procedure is free of charge for the parties. The mediator, however, receives a fixed fee, which is directly paid by the Ministry of Justice.

Project *Mediation in de Gefinancierde Rechtsbijstand* (Mediation within the Legal Aid Scheme) started in May 2001. The main goal of this project is to resolve disputes by mediation, before a court procedure is initiated. A major requirement in Mediation within the Legal Aid Scheme is that at least one of the parties is entitled to legal aid. This is determined on the basis of the income of the parties. If both parties are entitled to legal aid, they both pay a fee based on their income akin to the fee for a court procedure. If a procedure is initiated following mediation, this fee does not have to be paid again. If one of the parties is not entitled to legal aid, half of the costs of the mediator will be borne by that party.

3. Confidentiality of Mediation Proceedings

As there is neither statutory provision for the confidentiality of the mediation, nor for the privilege of a mediator not to be compelled to testify on matters learnt during mediation, the obligation of confidentiality should be stipulated in a contract between the mediator and the parties, or as a confidentiality clause of the mediation agreement.

According to a judgment by the first instance court in Utrecht, 2 February 2005, LJN: AS5144: A **confidentiality** clause must be considered to be an agreement of documentary evidence in the sense of art. 153 Rv, which means that a judge in principal may not hear witnesses with regard to any information considered to be confidential in accordance with the confidentiality clause. However, art. 21 Rv contains the obligation for the parties to be truthful and exhaustive about all facts that might be relevant to a judgment. Only in exceptional circumstances will a judge order a conciliating party to disclose confidential information. This may only be the case when the need for truth prevails over the prejudice that might be suffered by a personal disclosure. Furthermore, it is imaginable in some cases that a mediator has a statutory duty to testify. This might be the case when a third party who is not bound to the confidentiality clause (art. 191 Rv) summons the mediator as a witness, or when the mediator is summoned to testify in a criminal case (art. 213 Sv) Unlike some professions, a mediator does not have the right of non-disclosure or legal privilege in such case.



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4. Enforceability of Mediation Agreements

There are no special rules with regard to the mediation agreements.

According to article 87 Rv, parties may request the judge to order their appearance in a court session in order to come to a **settlement**. If a settlement is reached and upon the request of a party, an official report containing the parties' commitments under the settlement may be drafted. Such a report is to be considered an enforceable award (art. 87 subsection 3).

It is also possible to record a settlement agreement by means of an arbitral award (art. 1069 Rv).

Agreements can also be entered as deeds, a notarial deed in which the settlement agreement is incorporated is enforceable. [Handboek Mediation 2003, p. 169]

5. The Impact of Mediation on Statutes of Limitation

There are no relevant provisions of law; hence mediation proceedings have no effect on the limitation and prescription periods.

6. Accreditation Requirements for Mediators

There are no statutory requirements.

The *Nederlands Mediation Instituut* (NMI) maintains a register of accredited NMI mediators and liaises with other institutions and government departments. To be registered as a NMI-mediator one must have attended (with success) one of the NMI-accredited mediation training courses. In addition, there is an annual contribution of approximately 200 EURO due. NMI has its own mediation and disciplinary rules, code of conduct, and complaint procedure, which the NMI-mediator has to comply with. Considering its activities, NMI can be regarded as an umbrella organization.

7. Statistics

The following statistical data has been reported, based on the information from the Legal Aid Board and the Council for the Judiciary:

Referral by the judge – 4183 cases for 2009, 4500 – for 2010;

Referral by the legal service counter- 2198 cases for 2009, 2500 – for 2010;



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Legal aid in mediation cases- 6798 for 2009, 6500 – for 2010.

SLOVENIA¹²

1. Legal Frame of Mediation

The Mediation in Civil and Commercial Matters Act¹³ (adopted on 23 May, 2008, into force since 21 June, 2008) - contains basic principles and rules on mediation procedure; transposes the Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters to Slovenian law. The Mediation Act applies to all mediations /cross-border and internal/ in disputes arising out of civil, commercial, labour, family and other property relationships with regard to claims which may be freely disposed of and settled by the parties (Art. 2, para. 1)/. Its provisions also apply to mediation in other disputes, as long as this complies with the nature of the legal relationship out of which the dispute has arisen and if this is not excluded by law.

Other Acts containing provisions on mediation procedure:

- **The Act on Alternative Dispute Resolution in Judicial Matters** /adopted in November 2009/- contains specific provisions on mediation offered by courts to parties in judicial proceedings. It imposes the obligation to all first instance courts and courts of appeal to offer mediation or other ADR to parties in civil, commercial, family and labour disputes. On the basis of this Act, the 59 courts of first instance (44 local courts, 11 district courts and 4 labour courts) offer mediation to parties since 15 June 2010. The 5 courts of second instance shall introduce such programmes before 15 June 2012. One of the courts of appeal has already introduced the programme of mediation.
- **The Patients Rights Act**- introduces mediation as a means of resolving disputes between a patient and a provider of medical services. In case of such disputes, mediation is offered to parties by the Commission for the Protection of Patients Rights.

¹² The following sources of information have been used for the preparation of this chapter: The Slovenian Legislation Implementing the EU Mediation Directive- note, prepared for the EP Committee on Legal Affairs; the Mediation in Civil and Commercial Matters Act - <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=40803> and a summary on the implementation of the Directive, prepared by Bojana Jovin Hrastnik

¹³ No regulatory framework for mediation existed in Slovenia before 2008. However, mediation did exist in practice already from the year 2001 on, mainly as courtannexed mediation.



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- **The Proposal for the Family Act** – contains several specific rules on mediation procedure in the area of family matters.

2. Court Referral to Mediation

According to the Civil Procedure Act, the court must, at any time, look for the possibility of a court settlement. Parties can conclude a court settlement in any stage during the proceedings (Article 306 of the CPA). A settlement hearing is a compulsory part of the proceedings (Article 305a). The main purpose of the settlement hearing is peaceful settlement of a dispute. In such hearing, a judge may inform parties on the use of mediation. The court may interrupt civil proceedings for up to 3 months, if parties agree to try alternative dispute resolution (Article 305).

The Act on ADR in Judicial Matters introduces a special provision on information session. This Act contains some incentives and some sanctions, for example: courts may demand from parties that they take part in a special information session on mediation; mediation is free of charge for parties in family and certain labour disputes; in other disputes (except in commercial disputes) the first 3 hours of mediation are free of charge for parties etc.

In case parties do not propose referring the case to alternative dispute resolution, the special information session may be held at any time during the judicial proceedings. The information session may be held by a judge or by his assistant (Article 18 of the Act on ADR in Judicial Matters). After the information session has been held, the court may decide that parties shall try solving their dispute in mediation. Parties have the right to oppose to such decision and in that case mediation proceedings do not commence. However, parties who unreasonably decline the use of mediation might bear costs of the judicial proceedings, irrespective of the outcome of the proceedings (Article 19 of the Act on ADR in Judicial Matters).

3. Confidentiality of Mediation Proceedings

Article 10 of the Mediation Act regulates *confidentiality within mediation proceedings*. It stipulates that information, received from one party, may be disclosed (by a mediator) to any other party to mediation, unless information has been given to the mediator subject to a specific condition that it be kept confidential.



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Article 11 of the Mediation Act regulates *confidentiality outside mediation proceedings (=towards third persons)*. It stipulates that all information originating from mediation or relating to it is confidential, unless otherwise agreed by the parties, or unless its disclosure is required by law or for the purposes of implementation or enforcement of a dispute settlement agreement.

Article 12 of the Mediation Act regulates the specific question of *admissibility of evidence in other proceedings*. The parties, mediators or third persons who participated in mediation shall not in arbitral, judicial or other similar proceedings rely on, introduce as evidence or give testimony regarding any information obtained during the mediation, including information that an invitation has been made by a party to engage in mediation proceedings or the fact that a party was willing to participate in mediation proceedings. Such information may only be disclosed or used in proceedings before an arbitral tribunal, court or other competent government authority for the purpose of evidence under conditions and to the extent required by law, in particular on grounds of public policy (e.g. protection of the interests of children or prevention of interference with a person's physical or mental integrity) or insofar as necessary for the implementation or enforcement of an agreement on the settlement of a dispute; otherwise such information shall be treated as an inadmissible fact or evidence.

4. Enforceability of Mediation Agreements

According to Article 14, para. 2 of the Mediation Act, parties may agree that the agreement shall take the form of a directly enforceable notarial deed, a court settlement or an arbitral award based on the settlement.

A court settlement in pending court cases: The Civil Procedure Act stipulates that the court must, at any time, look for the possibility of court settlement. Parties can conclude a court settlement in any stage during the proceedings (Article 306 of the CPA). Parties, who conclude an agreement in mediation during the judicial proceedings, can have the agreement written down in a form of a court settlement immediately after the termination of mediation proceedings.

A court settlement in cases of out-of-court mediation: In case an action has not been brought, it is also possible for parties to conclude a court settlement. The Civil Procedure Act stipulates that a person, who intends to bring an action, may try concluding a court settlement in local court (Article 309 of the CPA). Jurisdiction of the court is to be determined with regard to the place of residence of the other party in conflict. The court which receives a proposal for settlement shall invite the other party and present the offered terms of



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settlement to that party. The parties may also request together that an agreement be made enforceable by a court in a form of a court settlement.

A directly enforceable notarial deed is another possibility for the parties who conclude an agreement in mediation. The Notary Act stipulates that a notarial deed is enforceable in case a person, who has an obligation, determined in the deed, consents to direct enforceability in the same or in another notarial deed (provided that the claim is due; Article 4 of the Notary Act).

Arbitral award based on the settlement: The Arbitration Act (ZArbit) stipulates that the arbitral tribunal terminates proceedings in case parties conclude a settlement. Parties may demand that the settlement be written in a form of an arbitral award. The arbitral award rendered on the basis of the settlement has the same effects as any other arbitral award - the effects of a final judgement (Article 38, ZArbit) and may be enforced once it is declared enforceable by court (Article 41, ZArbit). The possibility of having the agreement written in a form of an arbitral award is suitable for those parties, who try mediation during the arbitration proceedings. For other parties it would be too complicated (too costly and time consuming) to start arbitration proceedings with the sole intention to have the agreement resulting from mediation be made enforceable.

5. The Impact of Mediation on Statutes of Limitation

Limitation period for a claim subject to mediation shall cease to run during mediation proceedings (Art.17 of the Mediation Act). If mediation is terminated without an agreement, the limitation period shall continue to run from the moment the mediation proceedings are terminated. The time that expired prior to the initiation of mediation proceedings shall be included in the limitation period laid down by law.

If a deadline for bringing an action is set by a special regulation in respect of a claim subject to mediation, this deadline shall not expire earlier than 15 days after the termination of mediation.

The Mediation Act determines the precise moment when mediation proceedings commence (Article 6) and when they terminate (Article 13).

6. Requirements for Parties and Lawyers to Consider Mediation as a Dispute Resolution Option





INTEGRIERTE MEDIATION



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According to Art. 16 of the Mediation Act, where the parties have agreed upon mediation and have expressly undertaken not to initiate, until the expiry of a certain period of time or until a specified event has occurred, arbitral or judicial proceedings with respect to an existing or future dispute, the arbitral tribunal or the court must, upon an objection by the defendant, dismiss such an action, unless the plaintiff demonstrates that otherwise harmful and irreparable consequences would occur. The defendant must submit this objection in the defence plea at the latest.

The court shall dismiss an action even if before bringing the action obligatory mediation proceedings are prescribed by law.

According to the Act on ADR in Judicial Matters, the judge may order an informational session and after such a session has been held, the court may decide that parties shall try solving their dispute in mediation. Parties have the right to oppose to such decision and in that case mediation proceedings do not commence. However, parties who unreasonably decline the use of mediation might bear costs of the judicial proceedings, irrespective of the outcome of the proceedings (Article 19 of the Act on ADR in Judicial Matters).

7. Requirements for Parties to Participate in Mediation

There are no requirements for the parties to participate in mediation. The principal of voluntary cooperation of the parties is declared as one of the fundamental principles of the Mediation Act (Art. 4, para 2). However, the party who unreasonably refuses to try mediation might have to bear some negative consequences (see p.6 above).

8. Accreditation Requirements for Mediators

The Mediation Act does not contain any provision on ensuring the quality of mediation.

However, the Act on ADR in Judicial Matters, adopted in November 2009 and Rules, issued on the basis of this Act, contain certain provisions which aim at ensuring the quality of mediation. The Act stipulates that mediators can only work in court-annexed or court-connected mediation programmes if they fulfil certain conditions. For example, they have to pass the initial and further training which meets the standards laid down by the Act (Article 8 of the Act on ADR in Judicial Matters). The Centre for Judicial Training provides training for mediators who work in court-annexed or in court-connected programmes. The Head of the ADR office in court monitors the execution of the programme and may take certain





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measures in case of problems with the quality of mediation services.

The Patients Rights Act and Rules, issued on the basis of this Act, also contain provisions aiming at ensuring the quality of mediation. For example, the Act lays down the conditions under which one may become mediator in the area of healthcare. It also determines control mechanisms concerning the provision of mediation services in this area.

9. Statistics

A total number of about 2 500 court – annexed mediations conducted for a year has been declared recently at a Mediation Experts Meeting held in November 2011 in Milan.



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SPAIN¹⁴

1. Legal Frame of Mediation

In the past ten years several autonomous communities (“regions”) have enacted their family mediation acts, which are not harmonized.

The European Mediation Directive has not been transposed in Spain yet.

A Bill on Mediation in Civil and Commercial Matters has been drawn up, but has not been enacted until now. The Bill establishes:

- a general scheme applicable not only to cross-border disputes, but to those domestic mediations that take place in accordance with the requisites of the Bill;
- mediation procedure as a pre-requisite to commencing court proceedings in claims up to 6.000,00 €;
- mediation agreements to be enforceable;
- suspension of limitation period by mediation;
- settlement agreement to end further litigation on the same issues;
- judges empowered to invite parties to go to mediation.

2. Court Referral to Mediation

Spain has a successful labor mediation scheme, which was implemented in 1996.

Pilot-tests of court-annexed programmes on civil and commercial mediation have been set in place recently, but there are no statistics available yet.

3. Confidentiality of Mediation Proceedings

Currently there are no established guidelines relating to **confidentiality** in connection with mediation.

¹⁴ This chapter is based on the information available at the moment of its preparation /December 2011/. The following sources have been used: 2010 Country Report- Spain by ADR Center http://www.adrcenter.com/jamsinternational/civil-justice/Mediation_Country_Report_Spain.pdf and a summary on the implementation of the Directive up to November 2011 by Mercedes Tarrazon.





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4. Enforceability of Mediation Agreements

Neither the **enforceability** of the settlement agreements nor the mediation clauses in commercial contracts have been addressed yet in the Spanish law. The current Bill on Mediation in Civil and Commercial Matters contains provisions regarding the enforceability of the mediation agreement.

5. The Impact of Mediation on Statutes of Limitation

Currently there are no provisions prescribing for any effect of mediation on statute of limitation. The Bill provides for the suspension of limitation period by mediation.

6. Accreditation Requirements for Mediators

No accreditation is required at the moment. Training courses are being offered through private organizations, such as ARyME. Training is also available in some universities, but it focuses on family mediation.



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UNITED KINGDOM¹⁵

1. Legal Frame of Mediation

There is no primary legislation for mediation in England, Scotland or Northern Ireland (nor is it believed for the Republic of Ireland). The development of mediation is due to spontaneous growth, some court auxiliary schemes, some Government statements and encouragement and incentives promoted by court judgments, principally in relation to the award of costs.

The Ministry of Justice has made clear its strong endorsement of mediation for purposes of allocation of scarce resources. This has been emphasised in various reports on the civil justice system, and first became a significant feature of Government policy with the “ADR Statement” by the Prime Minister in 2003, now the “Dispute Resolution Commitment” which requires all public contracting entities to be “pro-active” in using “effective, proportionate and appropriate forms of Dispute Resolution”.

The provisions of article 6 (enforceability of agreements resulting from mediation) and article 7 (confidentiality of mediation) of the Mediation Directive 2008/52 are implemented by inserting a new section (Section III – Mediation Directive) into Part 78 of the Civil Procedure Rules /CPR/, together with consequential amendments in Parts 5, 7, 8, 31 and 32. These amendments are in force since 06 April 2011 and only apply to mediations in cross-border disputes within the EU. /Ministry of Justice (ex-Lord Chancellor’s Department) confirms that the Directive in general will only apply to cross-border disputes within the EU/.

The provisions of articles 7 (confidentiality) and 8 of the Directive (effect of mediation on limitation and prescription periods) are implemented by Statutory Instruments 2011 No. 1133 /Mediation/ The Cross-Border Mediation (EU Directive) Regulations 2011 /in force since 20 May 2011/. The provisions of these Regulations apply only to cross-border mediations which have started on or after 20 May 2011.

¹⁵ This chapter is based on the information available at the moment of its preparation /December 2011/, as follows: 2010 Mediation Country Report - England and Wales by Alexander J Oddy, Anita Phillips and Mike McClure - http://www.adrcenter.com/jamsinternational/civil-justice/Mediation_Country_Report_England_and_Wales.pdf; the Civil Procedure Rules- <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/pdf/parts/part78.pdf>; Statutory Instruments 2011 No. 1133 /Mediation/ The Cross-Border Mediation (EU Directive) Regulations 2011 and summary on the implementation of the Directive up to November 2011, prepared by Andrew Colvin



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2. Court Referral to Mediation

There is a general disposition by judges to encourage mediation in civil and commercial cases. In divorce cases the standard procedure is to invite, but not to force, parties to attend an ADR information session in the early stages of matrimonial proceedings. The principal incentive in civil and commercial cases (but not divorce) is the possible denial of the award of costs to a victorious but uncooperative party. There is a court assisted scheme for mediation for small claims of up to £5000.

The Civil Procedure Rules ("CPR")

The CPR /in force since April 1999, last amended in October 2011/ encourage the use of ADR by litigants with the assistance of the Courts and empower the Court to sanction litigants who do not engage in ADR appropriately by reducing a successful party's usual entitlement to recover their legal costs.

- *The Pre-Action Protocols*

The CPR introduced a set of codes, called Pre-action Protocols, with a view to regulating the conduct of prospective litigants prior to commencing proceedings to try to ensure that litigation was truly a matter of last resort. The Protocols focus on practical measures requiring parties to articulate their cases clearly and to exchange relevant documents, at the same time all of them require parties to consider ADR processes prior to the commencement of proceedings. Whilst pre-action ADR is not mandatory, the Protocols make clear that if they are not followed then the Court *must* have regard to that conduct when determining costs at the conclusion of a matter.

- *The Overriding Objective*

The CPR introduced a guiding principle for the conduct of civil litigation - the overriding objective -that the Court must deal with cases "justly" (CPR 1.1). To further the overriding objective, the Court has a duty to manage cases actively. Active case management includes "*encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure*" (CPR 1.3).

- *Active Case Management*

Once litigation is underway and the parties have exchanged statements of case (pleadings), they are required to complete an Allocation Questionnaire, which assists the Court in managing the dispute appropriately. The Allocation Questionnaire includes as its first section a series of questions on settlement. It alerts parties to the



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fact that the Court will want to know what steps have been taken towards settlement and requires legal representatives to confirm *personally* that they have explained to their client the need to try to settle; the options available; and the possibility of costs sanctions if the client refuses to try to settle.

At the allocation stage, any of the parties may seek a stay of proceedings to attempt settlement through ADR or the Court may order a stay of one month or more for that purpose of its own volition.

- *Costs sanctions for an unreasonable refusal to consider ADR*

The costs of civil litigation in England and Wales are normally awarded according to the "loser pays" rule (CPR 44.3(2)). A successful party (whether claimant or defendant) will usually recover in the region of 60-70% of the costs of the action from the unsuccessful opponent. However, the award of costs according to the "loser pays" rule is subject to the Court's discretion and, in assessing costs, the Court must take in to account the conduct of the parties which includes conduct before proceedings, and the efforts made, if any, during proceedings to resolve the dispute (CPR 44.3(4) and (5)).

The leading decision is the Court of Appeal decision in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, in which the Court issued guidance on the relevant factors to consider in determining whether a party has acted unreasonably in refusing ADR. The burden of proof will be on the unsuccessful party (and thus the payer of costs) to show that the successful party's refusal of ADR was unreasonable. Factors relevant to that assessment include (but are not limited to): (1) the nature of the dispute; (2) the merits of the case; (3) whether other settlement methods have been attempted; (4) whether the costs of ADR would be disproportionately high; (5) whether ADR will delay a trial; (6) whether ADR has a reasonable prospect of success; and (7) whether the Court has encouraged the parties to attempt ADR.

Other notable cases include, *Nigel Witham Ltd v Robert Smith and others* [No.2] [2008] EWHC 12 (TCC), where it was held that a successful party might receive an adverse costs order if it agreed to mediate but delayed unreasonably in doing so. In *7th Earl of Malmesbury v Strutt & Partner* [2008] EWHC 424 (QB) the Court held that if a party appears at mediation and conducts itself in such a way as to make successful mediation all but impossible, that behaviour is similar to simply refusing to mediate altogether and accordingly that party can be penalised in costs.

Solicitors' Code of Conduct

The current Solicitors Code of Conduct, which came in to force on July 1, 2007, sets out the



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professional conduct obligations on English solicitors (although it is not strictly binding). Rule 2.02(1)(b), dealing with standards of client care, requires that a solicitor must "*give the client a clear explanation of the issues involved and the options available to the client*". The guidance to that rule provides that where the matter relates to a dispute between the client and a third party the solicitor "*should discuss whether mediation or some other alternative dispute resolution (ADR) procedure may be more appropriate than litigation, arbitration or other formal processes*".

Court-annexed schemes

The majority of civil disputes are not subject to any formal court-annexed schemes, although mediation or another ADR process will frequently take place under the encouragement of the Court in the exercise of its case management powers.

There are also several court-annexed schemes, as follows:

- *The National Mediation Helpline (NMH)* is operated on behalf of the government's Ministry of Justice in conjunction with the Civil Mediation Council (an unincorporated association established in 2003 by mediation providers, independent mediators, leading academics, legal bodies and government departments). Civil courts can refer litigants to the NMH to assist them in resolving their dispute through mediation. The parties are not compelled to use the NMH or to take part in mediation and the degree of encouragement by the court will depend on the individual judge. Mediations are organised through an approved ADR provider.
- *Small Claims Mediation Service* - This is a free and confidential service for litigants involved in small claims (i.e. £5,000 or less). The scheme is voluntary and parties are required to enter the mediation in good faith with the aim of achieving settlement. A trained mediator arranges the mediation, which usually lasts around an hour and is carried out by telephone. Where necessary face-to-face mediations are arranged.
- *Mayor's and City of London County Court* - This mediation scheme operates instead of the NMH scheme in the Mayor's and City of London County Court, which is the oldest local court in England. The scheme is operated by district judges on a selective, voluntary basis with the scheme being administered and mediations conducted away from the court office and buildings.
- *Technology, Engineering and Construction proceedings* - A pilot scheme called "Court Settlement Process" commenced in the Technology and Construction Court (TCC) in June 2006. This scheme enables a London TCC judge to provide a form of mediation if the parties so desire and agree.
- *Family proceedings* - Further to a pilot in 2009, a practice direction came into force in April 2010 that empowers civil courts hearing family law disputes to attempt to



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resolve appropriate cases through mediation. At the first hearing the court will conduct a conciliation process, sometimes involving a mediator. Where agreement is not reached, the court should adjourn proceedings for the parties to attempt mediation.

- *Labour proceedings* - Employers are encouraged to pursue early resolution of workplace disputes, thereby avoiding recourse to employment tribunals. The CMC workplace mediation provider registration scheme is the main access channel for users of workplace-related mediation services. Reputable mediation service providers in this sector can be found through the CMC website (www.civilmediation.org). The Advisory, Conciliation and Arbitration Service (Acas) is an independent organisation which aims to improve employment relations. It offers a free conciliation service for employment disputes that are to be heard before employment tribunals.
- *Appeal proceedings* - With the exception of family disputes (which are administered by the Court of Appeal), the Court of Appeal Mediation Scheme is administered by CEDR. A judge considering an application for permission to appeal is expressly required to consider whether the matter is suitable for mediation. The parties are not obliged to take part in the mediation, and they and the mediator can terminate the mediation by informing the Civil Appeals Office or CEDR at any time and without giving reasons.

3. Confidentiality of Mediation Proceedings

Under the provisions of Part 2¹⁶ of the Regulations /Statutory Instruments 2011 No. 1133/, a mediator or a mediation administrator has the right to withhold mediation evidence in civil and commercial judicial proceedings and arbitration. A court may order that a mediator or a mediation administrator must give or disclose mediation evidence where (a) all parties to the mediation agree to the giving or disclosure of the mediation evidence; (b) the giving or disclosure of the mediation evidence is necessary for overriding considerations of public policy, in accordance with article 7(1)(a) of the Mediation Directive; or (c) the mediation evidence relates to the mediation settlement, and the giving or disclosure of the mediation settlement is necessary to implement or enforce the mediation settlement agreement.

According to the new rule 78.27 of CPR, the mediator or mediation administrator might be summoned as witness on request of one of the parties only if the requesting party provide the court with evidence that: (a) all parties to the mediation agree to the obtaining

¹⁶ Part 2 extends to England and Wales only.



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of the mediation evidence; (b) obtaining the mediation evidence is necessary for overriding considerations of public policy, in accordance with article 7(1)(a) of the Mediation Directive; or (c) the disclosure or inspection of the mediation settlement is necessary to implement or enforce the mediation settlement agreement. When considering a request for a witness summons the court may invite any person, whether or not a party, to make representations. The same rules apply where a person seeks disclosure or inspection of mediation evidence that is in the control of a mediator or mediation administrator /rule 78.26/.

As for domestic mediations, the law does not explicitly provide for the confidentiality of the mediation, or for a privilege of a mediator not to be compelled to testify on matters learnt during mediation. However, whenever parties enter into a mediation agreement, this will usually include appropriate confidentiality provisions and the Court has held that there is an implied obligation of confidentiality as between the parties and the mediator in any event which each of them may enforce.

In the case of *Farm Assist (in liquidation) v The Secretary of State for the Environment, Food & Rural Affairs (No 2)* [2009] EWHC 1002, which reviewed the extent of the confidentiality in the mediation process, the court held that notwithstanding any express terms as to the confidentiality of the process, the Court retained a discretion to set aside such provisions when the interests of justice required it (on the facts of the case by compelling a mediator to answer a witness summons and attend court to give evidence on what had transpired in the mediation). Such cases are, however, rare and the Courts will appreciate that the confidentiality of the mediation process is an integral part of its success.

In EU cases judge should apply overriding considerations of public policy as in Directive.

Mediation proceedings including documents generated and oral statements made at the mediation are "without prejudice" /It is not open to either party (or the mediator) to refer to or rely on such material in any litigation or arbitration proceedings which are on foot or are subsequently commenced/. The without prejudice privilege belongs to the parties (and not the mediator) and can therefore be waived by agreement between the parties (see *Farm Assist*). Instances of waiver are, however, rare.

4. Enforceability of Mediation Agreements

The revisions to English Civil Procedure Rules /effective from 6 April 2011/ provide for the opportunity of making a mediation settlement, reached in a cross-border mediation under the Directive, enforceable by issuance of mediation settlement enforcement orders (MSEO) by the courts. According to the new rule 78.24 an application for a mediation settlement to be made enforceable could be filed by each of the parties with the



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explicit consent of the other parties. The mediation settlement agreement must be annexed to the application, along with any evidence of the explicit consent of the other parties. The party is deemed to have given explicit consent to the application for the mediation settlement agreement order when he or she (a) has agreed in the mediation settlement agreement that a mediation settlement enforcement order should be made in respect of that mediation settlement; (b) is a party to the application for MSEO; or (c) has written to the court consenting to the application for the mediation settlement enforcement order. Where the requirements are fulfilled and the court has evidence that each of the parties to the mediation settlement agreement has given explicit consent to the application for the order, the court will make an order making the mediation settlement enforceable. The application will be dealt with without a hearing, unless the court otherwise directs.

5. The Impact of Mediation on Statutes of Limitation

An amendment has been introduced¹⁷ for cross-border mediations suspending for the period of the mediation, plus eight weeks¹⁸ for reactivation, any final limitation date. For UK disputes, parties must either agree extension or one party must file protective claim.

6. Requirements for Parties and Lawyers to Consider Mediation as a Dispute Resolution Option

Under the Solicitors' Code of Conduct, the solicitors are obliged to "give the client a clear explanation of the issues involved and the options available to the client", including to discuss with the client whether mediation or some other alternative dispute resolution (ADR) procedure may be more appropriate than litigation, arbitration or other formal processes.

The Pre-Action Protocols require parties to consider ADR processes prior to the commencement of proceedings. Pre-action ADR is not mandatory, but the Protocols make clear that if they are not followed then the Court *must* have regard to that conduct when determining costs at the conclusion of a matter.

¹⁷ Parts 3 and 4 of the Statutory Instruments 2011 No. 1133 /Mediation/ The Cross-Border Mediation (EU Directive) Regulations 2011 - in force since 20 May 2011.

¹⁸ For some claims/complaints under the Sex Discrimination Act, Employment Rights Act, the Equality Act, Employment Tribunals Extension of Jurisdiction (England and Wales) Order, Employment Tribunals Extension of Jurisdiction (Scotland) Order and Working Time Regulations the respective time limits are extended for no more than four weeks (two weeks in some cases) after the end of the mediation. For more details see the Regulations.





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7. Requirements for Parties to Participate in Mediation

There are no requirements for the parties to participate in the mediation proceedings. However, a party –even a winning one- would have to incur part of the costs of the court proceedings if he or she has unreasonably refused to at least try mediation.

8. Accreditation Requirements for Mediators

No training or accreditation is formally required to practise as a mediator. However, in practice, the vast majority of mediators will be trained and accredited through a recognised ADR provider. It should be noted that a significant number of mediators, once trained and accredited, have no affiliation to any ADR provider and practise as sole practitioners.

Official accrediting bodies include the Law Society, the Bar Council and the CMC, but such accreditation relates to the standards, quality, and characteristics of the ADR provider and sets basic standards of training, Continuing Professional Development (CPD) and administration. Accreditation of providers does not apply to individual mediators operating under the auspices of such providers. The CMC endorsed and adopted the EU Model Code of Conduct for Mediators (the Code) in 2004 and expects the Code to be embraced by accredited mediation providers.

The Government does not consider it necessary to introduce any measures for training or codes of conduct since private organisations and court annexed schemes both insist on this for candidates for inclusion in their lists. The lone mediator is thus not controlled.

9. Statistics

There appears to be no national source of mediation statistics; each organisation has its own.



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CONCLUSIONS

While the EU Mediation Directive is intended to provide some uniformity regarding the most crucial issues, such as the quality of mediation service, confidentiality of the mediation, enforceability of the settlement agreement resulting from mediation and the effect of the mediation proceedings on the prescription and limitation periods, there are still EU countries where these issues are not addressed by the local legislation. Furthermore, the legislation of the countries that have already implemented the provisions of the Directive also provides for different legislative solutions on these issues in many cases. The main differences might be summarized, as follows:

1. With regard to the confidentiality of the mediation proceedings: While upon the Bulgarian, Belgian, Greek and Slovenian law the obligation for confidentiality apply to all the participants in the mediation proceedings, there are countries where this obligation concerns only the mediator and his staff, but not the parties and the other participants involved in the mediation proceedings by the parties /as in Germany, according to the current draft of the Mediation Act /. The law of another group of countries, such as Spain, Netherlands, UK /for domestic mediations/, Czech Republic and Germany /for now/ does not contain any provisions concerning the confidentiality, thus leaving the protection of confidentiality to be regulated in contractual way – through a confidentiality contract or clause, stipulated between the parties and the mediator. Bearing in mind these differences, it would be strongly advisable in order to ensure the confidentiality of the proceedings, a confidentiality clause to be included in the contract signed by the mediator and the parties prior to commencement of any of cross-border mediation.

2. With regard to the enforceability of the mediation agreement: Two main approaches have been followed regarding the legal means for making the mediation agreement enforceable: the conclusion of the mediation agreement in the form of a notarial deed with an express consent to enforceability /e.g. Czech Republic, Slovenia, Netherlands, Bulgaria/ or by approval of the agreement by the court as a judicial settlement /e.g. Belgium, Germany,



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Italy, Slovenia, UK, Netherlands, Bulgaria/. In some countries both means are available /e.g. Bulgaria, Slovenia, Netherlands/.

3. With regard to the impact of mediation on statutes of limitation: In Germany, Belgium, Bulgaria¹⁹ and Slovenia the limitation period for a claim subject to mediation shall cease to run during mediation proceedings. Additionally, in Slovenia, a deadline for bringing an action set by a special regulation in respect of a claim subject to mediation shall not expire earlier than 15 days after the termination of mediation. In UK the commencement of a cross-border mediation suspends for the period of the mediation, plus eight weeks for reactivation, any final limitation date. For UK disputes, parties must either agree extension or one party must file protective claim. In other countries /e.g. Spain, Netherlands, Czech Republic/ the current legislation does not provide for suspension of the limitation periods.

4. With regard to the accreditation requirements for mediators: Currently only few of the countries included in this report have adopted statutory requirements for the accreditation of mediators, mediation and training organisations, as well as for the training required /Italy, Bulgaria and Belgium/. While the Greek Mediation Law contains such requirements, the respective by-laws on the implementation of these requirements have not been enacted yet.

5. With regard to the mediation as a prerequisite for initiation of court proceedings:

Italian legislation provides for mandatory mediation when the subject matter of the dispute falls amongst one of the following areas: tenancy, land rights, partition of property, hereditary succession, leases, loans, rental companies, damages resulting from vehicle and boat accidents, medical malpractice, defamation by the press or other means of advertising, contracts, insurance, or banking and finance. Parties to such a dispute must attempt mediation before trial; otherwise the case will be dismissed by the court.

In Germany: Art. 15 a of the Introductory Law to the Code of Civil Procedure entitles all German states on their own discretion to prescribe that lawsuits on small claims / valued at or up to EUR 750.00/, lawsuits against neighbours and libel suits are admissible only after a prior extrajudicial attempt of conciliation. Several German states /such as Nordrhein-Westfalen, Bayern, Baden-Wurttemberg, Hessen and Brandenburg/ have introduced legislative schemes providing for mandatory ADR

¹⁹ It must be noted that in Bulgaria the mediation proceedings terminates with the expiry of six months from its commencement, hence the suspension of the limitation period is limited to no more than 6 months from the beginning of the mediation proceedings.





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According to Art.16, Para 2 of Slovenian Mediation Act, the court shall dismiss an action even if before bringing the action obligatory mediation proceedings are prescribed by law.

In many countries, if the parties to a contract have agreed that the disputes that may arise from the contract shall be resolved by mediation, the courts would respect such a clause and when an action concerning a respective dispute is brought without prior attempt to mediate, the court will stay /Belgium – on request of one of the parties/ or dismiss /e.g. Slovenia, Germany/ the case.

Furthermore, in many countries, as in UK, Italy, Slovenia and Belgium, a party who unreasonably refuses to at least try mediation might bear costs /or part of them/ of the judicial proceedings, irrespective of the outcome of the proceedings.

It might be concluded from the examples above that there are still considerable differences in the legal regulation of mediation and the consequences thereof within the EU member states, which must be taken into consideration in the cases of cross-border mediation.

