

Commercial mediation – a comparative review  
2013

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Note: In this Review, wherever possible, hypertext links have been provided to English language versions of the relevant texts. Where English translations are not available, the links are to texts in the national language.

Law as at December 2012 unless otherwise stated.

# Introduction

This is a review of the availability and process of mediation in 21 jurisdictions across the Americas, Asia-Pacific and Europe.

Welcome to the second edition of *Commercial Mediation – a comparative review*, in which we look at the place of mediation across the globe. We are delighted to include, in this edition, new chapters on mediation in Australia, Indonesia and Vietnam, contributed by our associates in Australia, Allens.

Since the first edition of this review was published last January, a number of jurisdictions have taken steps to confirm the importance of mediation in their dispute resolution process. New legislation has been enacted in France, Germany, Luxembourg, Spain and Hong Kong, bringing into effect the EU Mediation Directive where relevant and dealing with specific aspects of domestic mediation procedure, such as confidentiality, and draft proposals are under consideration in Portugal. We have updated the review to include these new initiatives and report on how the practice of mediation is developing and growing in importance world-wide.

Mediation, in which a neutral third party assists parties to work towards a negotiated settlement, is an increasingly popular and accepted method of resolving disagreements across the international business world. It is principally used by parties locked in a dispute which must otherwise be fought out in litigation. Building on the effectiveness of the process, commercial contracts now often include an obligation on parties to attempt to solve any disputes by mediation before launching court or arbitration proceedings. Indeed, mediation is increasingly adopted during long term contracts, particularly in international infrastructure and construction contracts, where nominated mediators are brought in at short notice to help the parties move round problems which would otherwise delay or destabilise the project. As this indicates, mediation can be particularly useful where the parties wish to continue a business relationship which could be damaged by aggressive court or arbitral proceedings.

In most jurisdictions, the choice to engage in mediation remains entirely that of the parties – on the whole, courts do not have the power to force parties to enter into settlement negotiations. Some argue that the success of mediation relies on the willingness of parties to compromise their positions, so it would run contrary to the spirit of the process for unwilling disputants to be forced to enter into such discussions. Others disagree, and some studies indicate the settlement rate of enforced mediation is comparable to that of purely voluntary mediation. Judges are taking the view that parties should at least have attempted to settle their differences before resorting to court proceedings and courts are increasingly inviting parties to mediate before trial or appeal. Parties who refuse unreasonably may suffer costs sanctions.

In general, the terms of any settlement reached through mediation will be recorded in a written contractual agreement, enforceable as any other contract would be. That position has been enhanced recently for member states of the European Union under a new Directive. This enables a mediation settlement that complies with certain conditions to be treated in the same way as a court order for enforcement purposes. This new initiative may result in mediation becoming even more attractive, particularly for EU disputes.

Mediation is recognised throughout the commercial world, but there remain differences in how the process is operated in different jurisdictions and, in particular, in how far the legislature or court system will go to compel parties to mediate. This comparative review considers how mediation works across 21 jurisdictions. It asks, for each jurisdiction, the following questions:

- > What is the position of mediation in this jurisdiction?
- > How is a mediation conducted?
- > Is there any obligation on litigants to mediate?
- > Does the court have powers to support a mediation?
- > Does failure to mediate attract adverse cost consequences?
- > Are mediations confidential?
- > How are settlement agreements enforced?
- > Is there a system of accreditation and/or regulatory body for mediators?

This comparative review is intended to highlight issues rather than to provide comprehensive advice. If you have any particular questions about mediation, please contact the Linklaters lawyers with whom you work, or me. Linklaters has a strong interest in mediation and we consider using mediation and its techniques to assist our clients. I hope you find this review helpful – we are keen to spread the word that mediation is a cost effective and commercial approach to resolving disputes.

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# What is mediation?

Mediation is a formal negotiation assisted by a neutral third party who guides the negotiation process, acts as the parties' go-between and helps them arrive at a settlement if possible. It is one of the most widely recognised forms of alternative dispute resolution ("ADR").

Unless and until a formal settlement agreement has been entered into, a mediation is non-binding. The consensual nature of process means that either party can walk away from the process at any time.

## Advantages

The advantages of mediation compared to more formal forms of dispute resolution include that:

- > the process is flexible and can take account of commercial issues (such as a desire to maintain a business relationship) as well as the legal strengths of the parties' positions;
- > a good mediator will be able to introduce novel ways of resolving disputes that the parties may not have considered;
- > the fact that parties have gone to the trouble of arranging the mediation means they are more likely to enter into negotiations with a view to settling, rather than "going through the motions";
- > discussions with the mediator are private and confidential. Any offers or concessions made in the mediation are "without prejudice" and cannot be revealed by the other side in later proceedings in court;
- > mediation may save the costs of a formal litigation process.

## When is mediation unsuitable?

Mediation may be less suitable where:

- > a fundamental principle is involved which requires judicial determination to set a precedent or interpret legislation, e.g. a civil rights matter or judicial review;
- > emergency protective relief, such as an injunction, is sought by one of the parties;
- > one party has clearly demonstrated its refusal to negotiate.

## How does it work?

The mediation process usually comprises the following steps:

- > the conduct of the mediation is agreed between the parties and mediator;
- > in advance of the mediation the parties exchange statements setting out their case and the matters on which they rely to support their arguments;
- > the mediation often opens with a joint session at which all parties meet with the mediator and present their opening statements;
- > in most jurisdictions, the parties then retire to separate rooms and the mediator meets each separately. During this phase, the mediator often shuttles between the parties, probing each side's position and giving advice/views on the strengths of the party's case. The parties communicate with the mediator on a confidential basis, perhaps authorising the mediator to give particular information to the other side but also revealing information that only the mediator is allowed to know;
- > the mediation will continue with private and group sessions until either a settlement is reached, the parties agree to suspend the mediation, they and/or the mediator realise that one will not be achieved, or the time runs out. Mediations are most commonly fixed for a day, but may be longer or shorter.

If the parties are able to reach a settlement of their dispute, this will be reflected in an agreement which is, generally, signed by them on the day. It is usually a requirement of the mediation agreement that someone with authority to bind each party is present at the mediation. If the mediation does not succeed in resolving the dispute the parties may walk away. However, this does not preclude them from meeting again with or without the mediator now that the issues have been narrowed and/or they have a better understanding of their opponent's case. Alternatively, if it is clear that no agreement will be reached, the parties are free to resume more formal dispute resolution methods, such as court or arbitration proceedings.

# The EU Mediation Directive

## The objectives and applicability of the Directive

The European institutions regard the promotion of mediation within the EU as highly desirable. However, without formal legislation, it has proved difficult to establish predictable and equal opportunities for mediation across member states.

The EU therefore adopted (in May 2008) the [European Mediation Directive 2008/52/EC](#) (the “Directive”) governing various mediation issues within Member States. All Member States (apart from Denmark, which has opted out of the Directive) were obliged to bring the provisions of the Directive into force by 21 May 2011.

The objective of the Directive is “to facilitate access to dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings” (Article 1). It applies where two or more parties to a cross-border dispute of a civil or commercial nature voluntarily attempt to reach an amicable settlement with the assistance of a mediator. It does not extend to revenue, customs or administrative matters, nor to disputes involving the liability of the state, nor to those areas of family law where the parties do not have a choice of applicable law. However, given the broad definition of “cross-border disputes”, the Directive’s provisions on confidentiality, limitation and prescription periods also apply in situations which are purely internal at the time of mediation but become international at the judicial proceedings stage, e.g. if one party moves abroad after mediation fails.

The Directive does not impose an obligation on parties to mediate although it does identify a number of potential advantages of mediation. Neither does the Directive contain detailed guidelines for the conduct of a mediation; rather it provides high level principles. It envisages that Member States will create their own mediation guidelines in accordance with their own procedures.

## What is a “cross-border” dispute?

Under the Directive, a dispute is “cross-border” when at least one of the parties is domiciled or habitually resident in a Member State different to the other party on one of the following dates:

- > when the parties agree to use mediation, a dispute having arisen;
- > when a court invites or orders the parties to attempt mediation; or
- > when the parties are obliged to use mediation under national law (Article 2.1).

The date on which the Directive first applies could be of importance when the obligation of confidentiality is being considered (see below). However, no guidance is given as to when an agreement to mediate is made and since the Directive will only apply where the parties are domiciled in different member states, different national laws may apply to the issue of when an agreement is entered into.

## Key provisions

The key provisions of the Directive include:

### > **providing that agreements reached through mediation may be made enforceable**

The enforcement of agreements reached by way of mediation is perhaps the most important and novel aspect of the Directive. Under Article 6, Member States have a duty to “*ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be enforceable*”. Compliance with agreements resulting from mediation should not “*depend on the good will of the parties*”.

As can be seen from the individual jurisdiction sections in this Review, settlement agreements, however reached, are usually considered to be contracts and enforceable under usual contract principles. Failure to comply with the terms agreed will be a breach of contract upon which the injured party may bring legal proceedings in accordance with local law. The Directive obliges Member States to set up a mechanism by which agreements resulting from mediation can be rendered enforceable if both parties so request. The choice of mechanism is left to the Member States. The Directive bolsters the status of a settlement agreement reached in a relevant cross-border mediation by providing that such agreements should be made enforceable unless either:

- the content of the agreement is contrary to the law of the Member State in which enforceability of the settlement agreement is requested; or
- the law of that Member State does not provide for the enforcement of agreements with that specific content.

Any agreement which has been made enforceable in one member state should be recognised and declared enforceable in other Member States in accordance with Community or national law, for example, by way of recognition under Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

> **acknowledging that judges to have the right to invite parties to attempt mediation**

Article 5 of the Directive gives a judge the right to invite the parties to have recourse to mediation if, at any stage of the procedure, the judge considers it appropriate. A judge can also suggest that the parties attend an information meeting on mediation. The intention is to encourage parties to consider using mediation, without making it compulsory. However, individual Member States are not prevented from introducing legislation to make mediation compulsory or subject to incentives or sanctions, provided that such legislation does not prevent access to the judicial system.

The Directive does not specify sanctions for failure to mediate but neither does it preclude individual Member States from introducing legislation for this purpose or prevent courts from imposing such sanctions.

> **providing that, to preserve confidentiality, submissions and disclosure in mediation may not be used in any subsequent legal proceedings and mediators may not be compelled to give evidence in any subsequent legal proceedings**

Under Article 7 of the Directive, the general position is that, unless the parties agree otherwise, neither mediators nor those administering the process can be obliged to give evidence in relation to matters or information arising from, or connected with, the mediation. There are two exceptions to this:

- where overriding public policy considerations make it necessary; in particular, when it is necessary to ensure the protection of children or to prevent physical or psychological harm;
- where disclosure of the content of an agreement resulting from mediation is necessary to implement or enforce that agreement.

Article 7.2 expressly provides that nothing in the Directive prevents Member States from enacting stricter confidentiality measures than these to govern mediations.

> **ensuring that parties' claims will not be statute-barred as a result of time spent on mediation**

The Directive proposes that any limitation period should be suspended while the parties are engaging in mediation, in order to guarantee that they will not be prevented from going to court should the limitation expire while the, ultimately unsuccessful, mediation is taking place. This is unsurprisingly one of the most controversial Articles of the Directive.

> **advocating the development and use of voluntary codes of conduct and quality control mechanisms**

The Directive obliges Member States to encourage the training of mediators and the development of, and adherence to, voluntary codes of conduct and other effective quality control mechanisms concerning the provision of mediation services. The voluntary nature of Article 4, however, means that there will be no process for monitoring or enforcing this and the emphasis will be on self-regulation.

## Current European proposals for other alternative dispute resolution methods

While mediation is perhaps the best established and most formalised method of ADR, the European Commission is also keen to strengthen other methods of out-of-court settlement. In November 2011 the Commission published two proposals aimed at promoting ADR within the European market. The first is a proposal for a new Directive on ADR for consumer disputes (“[Directive on consumer ADR](#)”) while the second would introduce a new regulation providing for online dispute resolution for consumer disputes (“[Regulation on consumer ODR](#)”). The two proposals form part of the same initiative.

### Proposed directive on consumer ADR

The Commission considers that ADR is not yet sufficiently developed across the EU to provide consumers with the low-cost, fast and simple out-of-court resolution of disputes that it potentially could. In its view, well-functioning ADR mechanisms are necessary to strengthen consumer confidence in the internal European market and Member States should ensure that consumers are aware of the ADR opportunities available to them. The proposed Directive seeks to bolster out-of-court resolution of contractual disputes arising from the sale of goods or supply of services by a trader to a consumer within the EU, by obliging Member States to ensure that there is appropriate access to good quality ADR facilities in such circumstances. ADR bodies will be required to demonstrate the qualities of expertise and impartiality, transparency, effectiveness and fairness, and provide certain information to would-be parties including information relating to financing, independence, competency, cost and legal effect of the ADR process. Member States will have to ensure that relevant, accessible information is available within their territories and that assistance is available to consumers, particularly in cross-border circumstances. ADR bodies will be monitored by a relevant authority within each Member State, and the European Commission will maintain a list of all those notified to it by individual states.

### Proposed regulation on consumer ODR

The proposed Regulation aims to establish an on-line dispute resolution platform (the “ODR platform”) providing a single point of entry for consumers and traders who seek to resolve a consumer dispute arising out of a cross-border e-commerce transaction. Under the proposal, the Commission will establish an ODR platform, which will take the form of an interactive web-site accessible by all consumers and traders operating in the EU, providing an electronic complaint form which can be completed on-line. The ODR platform will then suggest appropriate ADR bodies who may be able to assist the parties to reach a settlement of their dispute. The whole procedure may be conducted on-line, including correspondence between the parties and the ADR body. Member States will be obliged to designate one ODR contact point for their jurisdiction and provide details to the European Commission, which will then establish a cross-border network of ADR facilitators.

In December 2012 the European Parliament Committee on the Internal Market and Consumer Protection endorsed both proposals. A session to discuss them in the European Parliament is scheduled for March 2013, when the proposals are likely to be formally adopted. Member States will then have 18 months in which to implement the Directive. The Regulation will come into force without the need for further implementation.

### The EU Code of Conduct for mediators

In July 2004 the European Commission launched a [Code of Conduct for Mediators](#) which was approved and adopted by a large number of mediation experts. The Code of Conduct, which is voluntary, sets out a number of principles which individual mediators and organisations can adopt. It is intended to be applicable to all kinds of mediation in civil and commercial matters and aims to promote confidence in mediation by setting out appropriate standards for mediators relating to competence, independence, impartiality and confidentiality.

## Jurisdiction by jurisdiction analysis

Australia  
Belgium  
Brazil  
France  
Germany  
Hong Kong  
Indonesia  
Italy  
Japan  
Luxembourg  
The Netherlands  
People's Republic of China  
Poland  
Portugal  
Russia  
Singapore  
Spain  
Sweden  
UK  
US  
Vietnam



## What is the position of mediation in this jurisdiction?

In recent years Australia has seen a significant cultural shift in favour of alternative dispute resolution (ADR), including mediation. This has been supported by legislative reforms. In all Australian jurisdictions (both state and Federal), courts now have the power to refer parties to mediation.<sup>1</sup> Some jurisdictions even require parties to attempt to resolve their disputes through ADR, including mediation, prior to instituting court proceedings. These requirements are outlined in more detail below. Statistics show that there is a strong settlement rate for matters referred to mediation; for example, a recent study considering court-referred mediations in the New South Wales Supreme Court over a period of three years revealed a settlement rate of 46%.<sup>2</sup> Even if a matter does not settle at mediation, it is common for a settlement to be reached post-mediation before the matter proceeds to trial. The mediation often assists in narrowing the issues in dispute between the parties, and can act as a catalyst for subsequent settlement.

## How is a mediation conducted?

Mediation is a structured process guided by an independent party who assists the parties to identify the issues in dispute and attempt to reach a resolution. It is generally a confidential and without prejudice process. The mediator is usually selected by agreement between the parties but may be appointed by the court or an independent body where the parties cannot agree on an appointment. While there is no mandated structure for a mediation, common practice is for a mediation to incorporate private sessions between each party and the mediator, as well as sessions with both parties.

Private mediation is generally conducted by former judicial officers, senior lawyers or other professionals with particular expertise in the subject matter of the relevant dispute. It is common practice for parties to exchange position papers prior to the mediation. These aim to outline the key issues in dispute and afford each party the opportunity to state its position on those issues. The mediator is not usually asked to provide an opinion or make any sort of determination on the merits of the claim.

## Is there any obligation on litigants to mediate?

Parties may have contractually agreed that an ADR process, which may include mediation, will take place before litigation can commence. Further, as outlined above, there is specific legislation in some jurisdictions requiring specified dispute resolution steps to be taken before any court proceedings may be commenced. For example, in the Federal jurisdiction, applicants are required to file a “genuine steps” statement, together with any application initiating court proceedings, outlining the steps taken to resolve the dispute or the reason why no such steps were taken.<sup>3</sup> Respondents are required to file a corresponding statement. Undertaking a mediation is likely to constitute a “genuine step”. Further, some jurisdictions require pre-trial mediation in specific contexts such as family disputes or farm debts.

## Does the court have powers to support a mediation?

As stated above, in all Australian jurisdictions courts have the power to refer the parties to mediation, with or without the consent of the parties. There is an increasing trend for this power to be exercised by courts. For example, in a recent New South Wales Supreme Court case, one judicial officer noted that<sup>4</sup> “this is an area in which the received wisdom has changed radically” and “since the power [to order mediation] was conferred on the Court, there have been a number of instances in which mediations have succeeded, which have been ordered over the opposition, or consented to by the parties only where it is plain that the Court will order the mediation in the absence of consent”.

## Does failure to mediate attract adverse cost consequences?

A delay or failure to agree to mediate can result in an adverse costs order. As outlined above, at the federal level, there is legislation in place requiring parties to file a “genuine steps” statement prior to commencing proceedings. Whether a party filed a genuine steps statement when required and whether genuine steps were actually taken may be relevant in awarding costs.<sup>5</sup> Additionally as outlined below, courts may consider information and communications disclosed in mediations for the purpose of determining liability for costs.

At a state level, failure or a lack of willingness to mediate can be taken into account in making costs orders. In NSW, the court is specifically empowered to take any failure to comply with the requirement to resolve the dispute by agreement (which can include using mediation) into account in determining costs in the proceedings generally.<sup>6</sup>

<sup>1</sup> See, for example, *Civil Law (Wrongs) Act 2002*, section 195(1) (ACT); *Civil Procedure Act 1970* (NSW), section 26(1); *Supreme Court Rules* (NT), section 103J; *Supreme Court Act 1935* (SA), section 65(1); *Supreme Court Rules* (Vic), Chapter 1, Rule 50.07 and *Rules of the Supreme Court 1971* (WA), Order 29.2(q) – (ra).

<sup>2</sup> See “The Objectives, Scope and Focus of Mediation Legislation in Australia”, paper delivered by Justice P A Bergin, 11 May 2012, page 14.

<sup>3</sup> *Civil Dispute Resolution Act 2011*, section 6. This legislation commenced on 1 August 2011.

<sup>4</sup> *Remuneration Planning Corp v Fitton* [2001] NSWSC 1208, per Hamilton J.

<sup>5</sup> *Civil Dispute Resolution Act 2011*, sections 11 and 12.

<sup>6</sup> *Civil Procedure Act 1970* (NSW), section 18N(1)(a).

## Are mediations confidential?

Mediations in Australia are generally conducted on a “without prejudice” basis. Consequently, information and communications disclosed during the course of a mediation are privileged and not admissible in court proceedings.<sup>7</sup> The privilege can be waived where both the parties consent. There are also some limited exceptions to the “without prejudice” privilege. Information or communications disclosed during the course of a mediation may be adduced as evidence inter alia:

- > in order to show that a settlement agreement was actually reached or to establish the terms of that agreement;
- > to contradict or qualify evidence likely to mislead the court;<sup>8</sup> or
- > to determine liability for costs.<sup>9</sup>

In addition to the “without prejudice” privilege, parties can agree at the outset to keep mediations confidential. This agreement can be expressed either in the original contract between the parties or in the mediation agreement. Model mediation agreements prepared by the Institute of Arbitrators and Mediators Australia and LEADR (two of the leading Australian ADR institutions) both incorporate strict confidentiality obligations on both parties and the mediator. Legislation in all of Australia’s states and territories also provide for confidentiality over mediation sessions. However, mediators are permitted to disclose information in certain circumstances – for example, when the parties give consent, if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to a person or damage to a property and if required by law.<sup>10</sup>

## How are settlement agreements enforced?

A mediated settlement agreement is a legally binding agreement and is enforceable under the normal rules of contract law. Although there is no requirement at common law that the settlement agreement be written, this is advisable to aid enforcement. Conventionally a deed of agreement will be used. Some jurisdictions require the formalisation of certain types of mediated settlement agreements. For example, in Victoria, mediated settlement agreements in civil matters must be formalised.<sup>11</sup> Courts may also embody settlement agreements in consent orders.<sup>12</sup> This option can provide an effective enforcement tool, since a failure to comply with such an order may result in contempt of court.

## Is there a system of accreditation and/or regulatory body for mediators?

Mediators may voluntarily apply for accreditation through the non-compulsory National Mediator Accreditation System (NMAS) which is the principal source of mediator standards in Australia. The NMAS imposes approval and continuing accreditation requirements, including that the mediator pass a “good character” test, have a relationship with a recognised mediator accredited body and provide evidence of his or her competence. Courts usually elect to use NMAS mediators. State-based law societies and bar associations also maintain lists of accredited or qualified mediators.

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<sup>7</sup> See, for example, *Evidence Act 1995* (Cth), section 131(1).

<sup>8</sup> *Ibid*, section 131(2)(g).

<sup>9</sup> *Ibid*, section 131(2)(h).

<sup>10</sup> See *Mediation Act 1997* (ACT), section 10; *Civil Procedure Act 1970* (NSW), section 31; *Supreme Court Rules* (NT), Rule 48.13(8); *Supreme Court Act 1935* (SA), sections 65(3) and (6); *Supreme Court Rules 2000* (Tas), Rule 520; *Supreme Court Act 1986* (Vic), section 24A and *Supreme Court Act 1935* (WA), sections 71 and 72.

<sup>11</sup> *Legal Profession Act 2004* (Vic), s 4.3.12(1)

<sup>12</sup> See *Civil Procedure Act 1970* (NSW), section 29; *Supreme Court Act 1935* (SA), section 65(7); *Alternative Dispute Resolution Act 2001* (Tas), section 8(1) and *Legal Profession Act 1986* (Vic), section 4.3.12(2).

## What is the position of mediation in this jurisdiction?

In accordance with the principle of contractual freedom of the parties, as stipulated in Article 1134 of the Belgian Civil Code, parties to a contract can agree to resort to mediation as a form of dispute resolution, either prior to or after the emergence of a dispute.

In 2005, the Belgian legislator explicitly reconfirmed that mediation is a valid form of dispute resolution under Belgian law and introduced a new section into the Belgian Judicial Code which sets out the basic rules and principles of a mediation (Articles 1724 to 1737 Judicial Code).

According to Article 1724 Judicial Code, any dispute can be the subject of a mediation, unless the dispute relates to a matter which falls within the scope of the public order exception and is therefore excluded from the private contractual sphere.

## How is a mediation conducted?

Belgian law recognises three types of mediation, two of which are regulated by law and one being solely governed by the parties' agreement:

### (i) "Voluntary mediation" (Articles 1730 to 1733 Judicial Code)

Each party can before, during or after a legal or arbitral proceeding, propose to the other parties that they undertake a so-called "voluntary mediation". Despite the impression created by its name, this type of mediation is regulated by law.

Under a voluntary mediation, the parties must first agree on the appointment of a mediator or must entrust a third party with the appointment of a mediator.

The parties must then decide, in consultation with the appointed mediator, upon the procedural rules and timetable of the mediation. Their agreement on these aspects is recorded in a written "mediation protocol", which has to be signed by the parties and the mediator. The mediation protocol must contain the following elements:

- (i) the name and domicile of the parties and their respective counsel;
- (ii) the name, capacity and address of the mediator and, if applicable, noting that the mediator is recognised by the Federal Mediation Commission;
- (iii) an explicit reminder of the principle that the mediation is conducted on a voluntary basis;
- (iv) a summary overview of the dispute;
- (v) an explicit reminder of the principle of confidentiality of statements made during the mediation;
- (vi) information relating to the fees of the mediator and payment thereof;
- (vii) the date; and
- (viii) the signatures of the parties and the mediator.

From the moment a mediation protocol is signed, the limitation period for the claims relating to the dispute is suspended for the duration of the mediation.

Any settlement subsequently reached by the parties on the merits of the dispute is recorded in a written agreement, which is dated and signed by the parties and the mediator. The agreement contains a detailed description of the commitments of each of the parties and, again, if applicable, notes that the mediator is recognised by the Federal Mediation Commission.

If the parties have reached a settlement and if the mediator is recognised by the Federal Mediation Commission, each of the parties can request the competent court to ratify the settlement agreement. The court can only refuse such ratification if the agreement is contrary to the public interest or, in the sphere of family law mediations, if the agreement affects the interests of minors. Upon ratification, the settlement agreement has the force and effect of a final judgment.

### (ii) "Judicial mediation" (Articles 1734 to 1737 Judicial Code)

At the start of or during any legal proceedings (with the exception of proceedings before the Supreme Court and before the district courts), a competent court can, at the joint request of all parties or *ex officio* but with the consent of all parties, order a mediation. This is known as "judicial mediation" and is also regulated by law.

The court can order a judicial mediation as long as the legal debates before the court have not been closed. A judicial mediation can relate to the entire dispute or a part thereof. Where the judicial mediation has been ordered upon the joint request of all parties, the terms granted to the parties for the submission of trial briefs and the organisation of the hearing are suspended from the date of the joint request for mediation.

The parties must jointly agree upon the appointment of a mediator, who must be recognised by the Federal Mediation Commission, although there are certain exceptions. The court then ratifies the

parties' choice of mediator in a so-called "mediation order" which contains, as well as the express agreement of the parties to mediate, the name, capacity and address of the mediator. The mediation order further stipulates the initial term of the mediator's assignment – which may not exceed three months – and includes a date upon which the parties must report to the court on the outcome of the mediation.

The appointed mediator must be informed of his assignment within eight days of the date of the mediation order. Within a further eight days, the appointed mediator must inform the parties and the court of the place, date and time upon which he will commence his assignment.

At all times during the mediation, the court remains competent to intervene with any measures it deems necessary to assist the mediation. At the request of the mediator or of one of the parties, the court can also terminate the mediation prior to the end of the specified mediation term.

If the parties do not reach an agreement during the initial mediation term, they can ask the court either to grant an additional mediation term or to continue the legal proceedings.

In the event that the parties reach a settlement agreement, either of them can ask the court to ratify the agreement. Again, the court can only refuse such ratification if the agreement is contrary to the public interest or, in the sphere of family law mediations, if the agreement affects the interests of minors. Upon ratification of the settlement agreement, the agreement has the force and effect of a final judgment.

(iii) "Entirely voluntary mediation" outside the framework of the Judicial Code

The parties can also agree to submit their dispute to mediation outside the framework of the Judicial Code. In that case, all aspects of the mediation will be decided upon by the parties themselves, without intervention from the mediator or the court, in accordance with the principle of contractual freedom (Article 1134 Civil Code). However, any settlement agreement reached under this type of mediation will not be eligible for ratification by the competent court.

### Is there any obligation on litigants to mediate?

Mediation is essentially voluntary in nature, i.e. parties need to consent to mediate. Nevertheless, there exist a number of specific situations where an attempt for reconciliation is compulsory prior to the start of legal proceedings, such as for labour law disputes (Article 734 Judicial Code), rental housing disputes (Article 1344septies Judicial Code) and some environmental disputes (Article Act of 12 January 1993). Furthermore, if the parties have included a mediation clause into their contract, they cannot initiate legal or arbitral proceedings unless they have first conducted a mediation. Accordingly, the court or arbitral tribunal must, at the request of any party, suspend proceedings until the mediation is terminated. In accordance with Article 1725 Judicial Code, such a request must be made to the court before any other procedural exception or means of defence is raised.

The parties are not under an obligation to reach a settlement during the mediation, but they are obliged to conduct the mediation in good faith.

### Does the court have powers to support a mediation?

The most efficient tool in support of mediated settlement agreements is the potential to have an agreement which has been reached in the framework of a "voluntary mediation" or "judicial mediation", ratified by the competent court. Upon ratification, the agreement has the force and effect of a final judgment. Pursuant to the principle of *res judicata*, the parties may not bring their settlement agreement before the court for further adjudication.

As discussed above, the courts also have certain powers in the framework of a "judicial mediation". They can invite the parties to mediate, advise in relation to the appointment of a mediator, as well as supervise and guide the mediation process. However, in most instances, the court will only be able to make supporting orders if all parties agree.

### Does failure to mediate attract adverse cost consequences?

If there is no obligation upon the parties to mediate (e.g. pursuant to a mediation clause in their contract), it is highly unlikely that a failure to initiate mediation by one party will result in the court or arbitral tribunal ordering that party to pay compensation to the other parties. The court or arbitral tribunal might, however, do so if the refusal to co-operate with a mediation procedure amounts to a clear abuse of a right or a breach of previously agreed provisions.

## Are mediations confidential?

Yes. Pursuant to Article 1728 Judicial Code, all documents drawn up and all statements made during and for the purpose of a mediation conducted within the framework of the Judicial Code are confidential. They cannot be used in judicial, administrative or arbitral proceedings or in any other dispute resolution procedure and they are inadmissible as evidence. Documents used in breach of the confidentiality obligation will be ex officio excluded from the proceedings.

The confidentiality obligation can only be lifted if all parties agree, e.g. in the event that the parties want to have their settlement agreement ratified by the court.

If a party breaches the confidentiality obligation, the court or arbitral tribunal will determine whether any compensation should be granted to the other party or parties.

The mediator is equally bound by the confidentiality obligation and by a duty of professional secrecy, the breach of which is criminally sanctioned. The mediator cannot be summonsed by the parties to act as a witness in subsequent judicial, administrative or arbitral proceedings.

If, during the mediation and with the consent of the parties, the mediator has called third parties as witnesses or experts, those parties are also bound by the confidentiality obligation. Moreover, the third party expert will also be bound by the duty of professional secrecy and cannot be summonsed by the parties to act as a witness in subsequent judicial, administrative or arbitral proceedings.

## How are settlement agreements enforced?

As outlined above, a settlement agreement reached in the framework of a “voluntary mediation” or a “judicial mediation” can be ratified by the competent court, which gives the agreement the force and effect of a final judgment. Pursuant to the principle of *res judicata*, the parties may not bring their settlement agreement before the court for further adjudication.

Settlement agreements reached in the framework of an “entirely voluntary mediation”, as well as non-ratified settlement agreements reached in the framework of a “voluntary” or “judicial mediation” are enforced as contracts. Any disputes arising out of or in connection with the agreement can be brought before the competent court or arbitral tribunal.

## Is there a system of accreditation and/or regulatory body for mediators?

Article 1727 Judicial Code provides for the creation of a Federal Mediation Commission, which consists of one “general commission” and three “specialised commissions”.

The general commission of the Federal Mediation Commission has the following tasks:

- (i) accrediting the entities and bodies responsible for the training of mediators and accrediting their training and learning programmes;
- (ii) determining the criteria for accredited mediators and accrediting mediators who fulfil those criteria;
- (iii) determining the rules and procedures for accreditation of mediators and for revoking accreditations;
- (iv) drawing up a list of accredited mediators and distributing the list among the courts; and
- (v) drafting a code of conduct for mediators.

Article 1726 Judicial Code contains a list of minimum requirements which each mediator must fulfil in order to be eligible for accreditation by the general commission, including:

- (i) providing proof of sufficient competence in the legal field in which the mediator requests to be accredited;
- (ii) providing proof of adequate training or experience;
- (iii) providing proof of the required guarantees regarding independence and impartiality;
- (iv) not having been convicted of any criminal offences incompatible with the position of accredited mediator; and
- (v) not having incurred any disciplinary or administrative sanction incompatible with the position of accredited mediator nor having had its accreditation revoked.

Once accredited, mediators need to attend continuous training learning programmes recognised by the general commission.

The three specialised commissions have a duty to provide advice to the general commission in the fields of family law, civil and commercial law and social law, respectively.

## What is the position of mediation in this jurisdiction?

Mediation is one of the recognised forms of alternative dispute resolution in practice in Brazil which, together with negotiation, conciliation and arbitration, represent an efficient substitute to the country's court system. Notwithstanding its importance in practice, a legal framework for mediation is not yet effectively provided for by Brazilian law. Instead, mediation is regulated, where applicable, by the Brazilian Arbitration Act ([Law No. 9,307 of 1996](#)).

However, two bills currently under consideration by the National Congress may change this scenario in the near future. The first one, [Bill No. 4,827 of 1998](#), seeks not only to institutionalise and regulate mediation, but also to include it as a mandatory measure for all litigants who choose to submit their disputes directly to court. The second is Bill No. 166 of 2010, Brazil's new draft Code of Civil Procedure, which provides a set of rules and principles to be adhered to by mediators and litigants alike.

## How is mediation conducted?

Since the procedural aspects of mediation are not yet established by law, the way in which it is conducted varies according to the rules agreed by the parties. The mediation can either be institutional or *ad hoc*. Parties usually choose *ad hoc* mediations whereby their senior executives use their best efforts to reach an amicable settlement within a limited period of time (usually 30 days). The conduct of institutional mediations, however, varies greatly from institution to institution. In general terms, following the appointment of a mediator by the parties, the dispute is scrutinised and broken down into clear and direct issues, whereupon a list of possible solutions is drafted by the parties with assistance from the mediator. Using this list, the mediator assists the parties to reach a compromise and conclude a corresponding settlement agreement.

## Is there any obligation on litigants to mediate?

Litigants are not currently obliged to mediate commercial disputes. Although parties may be bound by a pre-existing contractual agreement, it does not necessarily impede direct submission of a conflict to court. However, there may be costs penalties (see below). Where there is no prior agreement, litigants must expressly choose to take part in mediation proceedings and any of the parties may opt to withdraw from the proceedings at any time.

## Does the court have powers to support a mediation?

The court does not have the power to compel litigants to mediate a commercial dispute, since a judicial order cannot take precedence over the parties' decision to voluntarily enter into mediation proceedings. Nonetheless, the court is able to enforce an agreement to mediate on request by one of the parties. Under the Code of Civil Procedure, judges should encourage the parties to settle throughout the progress of the proceedings.

As mentioned above, this may change if Bill 4,827 of 1998 is passed and comes into force, as mediation would then become a mandatory step in civil procedure.

Several state courts have undertaken programmes seeking to raise awareness of the forms of alternative dispute resolution available to litigants, particularly conciliation and mediation. Some programmes included the establishment of mediation centres and institutions on courthouse premises, providing efficient and free services to all interested parties. As a result of this initiative, mediation has become a viable alternative to less affluent parties, who otherwise would not be able to bear the costs related to mediation.

## Does failure to mediate attract adverse cost consequences?

There is no costs sanction if the parties cannot reach settlement after making a genuine effort to reach a compromise in mediation proceedings. However, where there is a mandatory mediation clause and one of the parties refuses to mediate without reasonable grounds, the party willing to mediate may commence proceedings for specific performance against the defaulting party and claim all costs and expenses related to those proceedings, should the court grant the request to force the defaulting party to mediate.

## Are mediations confidential?

There is no legal provision ruling that mediations shall be confidential. However, in practice, the duty to keep mediation proceedings confidential applies not only to the mediator, who is obliged not to disclose any information revealed in the course of the proceedings, but also to the litigants and to intervening third parties. Usually, agreements to mediate incorporate express provisions regarding confidentiality and penalty clauses in case of non-compliance. Confidentiality may also be provided in the rules of the mediation institutions (e.g. in the code of ethics of the National Council of Mediation and Arbitration Institutions ("[CONIMA](#)").

### How are settlement agreements enforced?

A settlement agreement resulting from successful mediation proceedings has the legal nature of a contract and is enforced as such.

### Is there a system of accreditation and/or regulatory body for mediators?

Currently, no official regulating body for mediation exists, nor are there any statutory qualifications needed to act as a mediator in Brazil. Some mediation organisations, however, have begun offering training courses and forms of unofficial accreditation for mediators, as well as drafting general rules of professional conduct.

For instance, CONIMA offers a membership programme for mediators and mediation institutions, promotes events on arbitration and mediation and has published a code of ethics with which its members are obliged to comply.



## What is the position of mediation in this jurisdiction?

The EU Mediation Directive was implemented in France by *Ordonnance No 2011-1540 of 16 November 2011*, passed pursuant to Law No 2011-525 of 17 May 2011 (the “*Ordonnance*”). The implementing legislation has gone beyond the scope of the EU Directive in the sense that it has created a general regime for mediation in France, subject to specific rules applicable to mediation of certain types of dispute<sup>1</sup>, which applies in relation to the mediation of both cross-border and domestic civil and commercial disputes<sup>2</sup>. The definition of mediation contained in the *Ordonnance*, is very close to that of the Directive. Accordingly, mediation is defined as any structured process, regardless of its name, whereby two or more parties attempt to reach an agreement to settle their dispute amicably, with the assistance of a third party, the mediator, chosen by them or appointed, with their agreement, by a judge seized of the dispute (Article 1 of the *Ordonnance*, enacted as Article 21 of the *Law of 8 February 1995* (the “1995 Law”)).

The *Ordonnance* has been supplemented by the decree n°2012-66 dated 20 January 2012 which sets out additional features of the new regime (the “Decree”).

Two types of mediation may be relevant for commercial disputes: court-ordered mediation (*médiation judiciaire*) and mediation on the basis of a contract, either in the form of a dispute resolution clause providing for mediation or a subsequent agreement (“contractual mediation”).

A section of the French Code of Civil Procedure (“CPC”) is dedicated to court-ordered mediation in civil and commercial matters (*Articles 131-1 to 131-15 of the CPC*). In accordance with Article 131-1 of the CPC, a judge may refer parties to mediation, but only with their consent. Pursuant to the Decree, a new section relating to the amicable resolution of disputes, and to contractual mediation in particular, has been introduced in the French Code of Civil Procedure (Article 1528 to 1568).

## How is a mediation conducted?

Mediation is conducted by a neutral third party. The mediator can be a legal entity or an individual. If it is a legal entity, it must submit the name of the individual who will be its representative in the mediation to either (i) the judge in a court-ordered mediation, or (ii) the parties in a contractual mediation.

The *Ordonnance* provides that the mediator must fulfil his or her role in a manner that is impartial, competent and diligent (Article 1 of the *Ordonnance*, enacted as Article 21-2 of the 1995 Law). The requirement of diligence is intended to mean that the mediator has a best endeavours obligation (“*obligation de moyens*”) to bring the mediation to a successful conclusion<sup>3</sup>. The procedure to be followed depends to a large extent on the parties’ agreement.

In the case of court-ordered mediation, if the parties agree to submit all or part of their dispute to mediation, the court will appoint the mediator or designate an association to nominate a mediator, in which case the judge must confirm the appointment. The judge also fixes a time period for the mediation when making the mediation order. Article 131-3 of the CPC provides for a maximum time period for the mediation of three months, which may be renewed once for the same period of time, at the request of the mediator. No specific mediation procedure is provided for in the CPC rules on court-appointed mediation. The CPC specifies that the mediator does not have investigatory powers but may, with the parties’ consent, hear third parties who appear voluntarily (Art. 131-8 CPC).

With regard to contractual mediation, the procedure to be followed will be determined by the mediator with the consent of the parties. Although the rules of civil procedure do not apply, the requirement of neutrality on the part of the mediator is essential to the mediation process and this principle can affect the procedure adopted. If the parties have referred to a set of mediation rules, such as those of the Paris Centre for Mediation and Arbitration (“*CMA*”), those rules may impose certain requirements, which may be incorporated into the parties’ agreement to mediate by reference (unless they provide otherwise).

In mediations, the principle of adversarial debates, applicable in court proceedings and arbitration, does not have to be respected (i.e. a party may have an ex parte meeting or “caucus” with the mediator).

<sup>1</sup> For example, specific regimes exist for, inter alia; mediation of family law matters and for court-ordered mediation in civil and commercial disputes. There also exist specific regimes for certain types of mediator, such as *conciliateurs de justice*.

<sup>2</sup> The *Ordonnance* specifically provides that it only applies to mediation of cross-border disputes, to the exclusion of domestic disputes, in the areas of labour and administrative law. The *Ordonnance* also provides that it does not apply to mediation in criminal law matters.

<sup>3</sup> Report to the President of the Republic regarding *Ordonnance* n° 2011-1540 of 16 November 2011 implementing Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, French *Journal Officiel* N° 0266 of 17 November 2011, page 19283.



### Is there any obligation on litigants to mediate?

There is no obligation to mediate in commercial matters<sup>4</sup>. Nevertheless, there appears to be increasing awareness amongst judges, lawyers and companies in France of the benefits of mediation.

Moreover, if the parties have agreed to a contractual provision providing for a compulsory attempt to mediate prior to referral of a dispute to a competent court, the parties must comply with it. Failure to comply with a contractual clause referring disputes to mediation will result in the inadmissibility of the claim before a court.

### Does the court have powers to support a mediation?

A distinction must be drawn between court-ordered and contractual mediation.

In the case of court-ordered mediation, the judge remains seized of the matter after referring the parties to mediation, with their consent (Art. 131-2 CPC). At the time of ordering a mediation, the judge will fix a provision for the costs, as well as a deadline for the parties to advance the funds. If the provision for costs is not paid, the mediation will be cancelled and the court proceedings will resume (Art. 131-6 CPC). The judge must be kept informed by the mediator as to any difficulties encountered (Art. 131-9 CPC). A party or the mediator may ask the judge to terminate the mediation at any time (Art. 131-10 CPC). The judge is also empowered to terminate the mediation of his or her own motion, if the mediation appears to be compromised. If the judge terminates the mediation, the court proceedings will resume. At the end of the mediation process, the judge fixes the amount of the mediator's fees and allocates the costs of the mediation between the parties (Art. 131-13 CPC).

With regard to contractual mediation, the role of the courts is often limited to enforcement of a settlement agreement reached in the context of the mediation. However, given that a dispute resolution clause providing for mediation is contractual in nature, a party could apply to a court to enforce the clause.

### Does failure to mediate attract adverse cost consequences?

Awards of costs in court proceedings are discretionary in France. Decisions on costs generally follow the event, but awards of costs tend to be much lower in France than in countries such as England. A party's conduct with regard to acceptance or not of a settlement offer is not referred to in the CPC as a factor to be taken into consideration by a court in making an award of costs. Similarly, French civil procedure rules do not, at present, provide that a failure to mediate is to be taken into consideration by a court in making an award of costs or that such a failure will necessarily have adverse consequences with regard to costs.

### Are mediations confidential?

Confidentiality is considered to be one of the most important features of mediation in France. Accordingly, the *Ordonnance* has included a general principle of confidentiality, which is subject to the same exceptions provided for in the EU Mediation Directive. The *Ordonnance* preserves the confidentiality of any observations made by the mediator and statements made during the course of the mediation and provides that they may not be disclosed to third parties, nor invoked or produced in the context of court or arbitration proceedings, without the agreement of the parties (Article 1 of the *Ordonnance*, enacted as article 21-3 of the 1995 Law). There are express exceptions which mirror those of the Mediation Directive. In addition, the *Ordonnance* provides that, where the mediator has been appointed by a judge, the mediator shall inform the judge or court as to whether or not the parties have reached an agreement.

Article 131-14 CPC states that "*The mediator's findings and the statements the mediator receives may not be produced or referred to subsequently in the proceedings without the parties' agreement, nor under any circumstances in connection with other proceedings*". This principle pre-dated the *Ordonnance* but is not inconsistent with it. Applying this provision, the courts have protected confidentiality through interlocutory orders<sup>5</sup>.

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<sup>4</sup> However, before the court of first instance for small civil matters (*Tribunal d'instance*), there is an obligation for the judge and the parties to try conciliation first before adversarial court proceedings.

<sup>5</sup> TGI Paris, 18 January 1999, *SNECMA v. P. Séguin et autres*, Gaz. Pal. 29 April – 3 May 2001 p. 45

## How are settlement agreements enforced?

An agreement embodying an amicable settlement of the parties is a contract, which is enforceable as such. However, a settlement agreement concluded during mediation may also be enforced through a court recognition process (referred to as “*homologation*”). In line with the Directive, the *Ordonnance* provides that, once a settlement agreement resulting from mediation has been recognised by the court, it may be enforced through execution measures as if it were a judgment (thereby given “*force exécutoire*”) (Article 1 of the *Ordonnance*, enacted as Article 21-5 of the 1995 Law).

With regard to court-ordered mediation, “*homologation*” is specifically provided for in article 131-12 CPC, which states that settlement agreements reached during the mediation process may, at the request of the parties, be recognised by the court that ordered the mediation through a non-adversarial procedure (“*procédure gracieuse*”).

With regard to contractual mediation, article 1534 of the Civil Code (created by the Decree) provides that the parties to the mediation (or one party with the consent of the others) may apply for a judge to be appointed to deal with the recognition of their mediation settlement.

The judge having jurisdiction to recognise the agreement is the judge who would have jurisdiction to hear the related dispute, should it proceed to trial. The judge will make his or her decision on paper and without a hearing unless he or she thinks one is specifically needed. He or she cannot modify the terms of the agreement.

Before rendering a decision that will make the agreement enforceable, the court will verify that its contents are not inconsistent with French principles of public policy<sup>6</sup>.

If the request for recognition is granted, anyone having an interest in the mediation can challenge this decision before the judge who granted recognition.

If the request is not granted, an appeal is allowed through a non adversarial procedure.

If the agreement resulting from a mediation has been recognised by a court or an authority in another member state, the agreement will be enforceable in France pursuant to the procedure of recognition of decisions set out in the EC Council Regulation no 44/2001 dated 22 December 2000.

## Is there a system of accreditation and/or regulatory body for mediators?

At present there is no statutory accreditation system or regulatory body for mediators in commercial cases, although this has been the subject of discussions given that such a system exists in France for mediators involved in family law cases. There are several institutions that provide mediation training and set qualification requirements for mediators (CMAP is an example of such an institution), but there is no general regulatory body.

Nevertheless, article 131-5 CPC does set out some minimum requirements for court-appointed mediators:

- (i) the mediator must not have been the subject of a criminal sentence, incapacity or forfeiture;
- (ii) the mediator must not have engaged in acts that are contrary to principles of honour, probity or good morals, giving rise to disciplinary or administrative sanctions or dismissal, removal, revocation, or withdrawal of an accreditation or authorisation;
- (iii) the mediator must have, by virtue of his or her actual or past occupation, qualifications with respect to the subject matter of the dispute;
- (iv) the mediator must have appropriate training or experience for the practice of mediation; and
- (v) the mediator must demonstrate the capacity to be independent.

As regards contractual mediation, the Decree sets out quite similar requirements (applicable to the mediator if he or she is an individual or, where the mediator is a legal entity, its representative):

- (i) The mediator must not have been the subject of a criminal sentence, incapacity or forfeiture;
- (ii) The mediator must have, by virtue of his or her actual or past occupation, qualifications with respect to the subject matter of the dispute or have appropriate training or experience for the practice of mediation.

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<sup>6</sup> Report to the President of the Republic, *supra*, page 19283.

## What is the position of mediation in this jurisdiction?

By the Act on the promotion of mediation and other methods of alternative dispute resolution (*Gesetzes zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung* (the “Promotion Act”)) the EU Mediation Directive was implemented into German law on 26 July 2012. The Promotion Act consists of two parts: (i) a mediation law (*Mediationsgesetz*, (the “Mediation Law”)) and (ii) amendments to several procedural codes, including the German Civil Procedural Code (*Zivilprozessordnung* (“ZPO”)).

The Mediation Law comprises nine articles: Article 1 defines the terms “mediation” and “mediator”; Article 2 contains general procedural provisions and outlines the mediator’s duties; Article 3 regulates the mediator’s disclosure obligations and restrictions; Article 4 deals with confidentiality; Article 5 covers training and certification of mediators; and Articles 6 to 9 deal with other aspects, such as the power of the Minister of Justice to enact further regulations regarding the training of mediators, evaluation of the Mediation Law itself and further interim regulations.

The Mediation Law and the provisions within the several procedural codes fully implement the Directive. The new provisions do not distinguish between domestic and cross-border mediations. Hence, the following features apply to both domestic and cross-border mediations.

## How is a mediation conducted?

Mediation may be initiated by the parties or at the court’s suggestion. Article 2 subsection 1 of the Mediation Law provides that the mediator is chosen by the parties, and is appointed either by the parties themselves or by a mediation institution at the parties’ request, such as the German Institution for Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit e.V.* (“DIS”)), or a Chamber of Commerce (*Handelskammer*). Direct appointment by the parties is most common.

Generally, parties do not need to be legally represented during a mediation. However, lawyers usually also attend mediations on commercial disputes to assist their clients with the presentation of their case.

The mediation process itself is intended to be flexible. Article 2 of the Mediation Law (*Procedure; Duties of the Mediator*) contains no specific guidelines for the mediation process. Nevertheless most mediations go through a five step procedure:

- (i) a mediation agreement is concluded in which the procedural outline for the mediation is set out, as well as issues such as confidentiality, timing, payment etc;
- (ii) the parties present a brief history of the dispute from their point of view and the issues which, in their opinion, need to be resolved;
- (iii) the mediator starts to explore each party’s “real interests”. In contrast to mediations in other countries, the mediator does not usually shuttle between the parties. In fact it is common for all participants (mediator and parties) to be present for all the negotiations. However, private sessions are permitted if desired;
- (iv) it is to be hoped that these negotiations will lead to a mutual agreement and therefore, possible solutions of the issues in dispute are explored and negotiated;
- (v) finally, the mediation is concluded by a written settlement which documents the parties’ decision to settle the dispute and the agreed terms of the settlement.

One-to-one meetings between the mediator and one party only are only allowed with the express consent of both parties.

There are no audited figures, but it is understood that the settlement rate after mediation is approximately 80%. The length and costs of a mediation will vary depending on the complexity of the process and the mediator appointed. The costs are typically shared between the parties.

## Is there any obligation on litigants to mediate?

Subject to any pre-existing contractual arrangement between parties to mediate a dispute, there is no obligation on litigants to mediate commercial disputes.

However, according to the new § 253 subsection 1, no. 1 ZPO, the statement of claim will have to include a paragraph stating whether the parties have made any attempt to settle their dispute through mediation or any other kind of ADR and whether they have any objections to such proceedings. Therefore, lawyers will in future be required to advise clients on the option of ADR, including mediation but, since mediation is a voluntarily process, there will be no obligation to mediate. However, the Promotion Act empowers the federal state government to introduce cost incentives to encourage mediation, such as reducing or even cancelling the court fee where a dispute is settled by mediation.

## Does the court have powers to support a mediation?

While courts cannot generally compel parties to mediate a commercial dispute they may, where litigation is pending, encourage the parties to attempt a mediation. If the parties agree to mediation, the civil proceedings will be suspended for the duration of the mediation.

In addition to mediating, the judge hearing a case may assist the parties to attempt to reach an amicable settlement at a conciliation hearing (*Güteverhandlung*), before commencing the trial's main oral hearing.

Further, the Promotion Act introduced an enhanced conciliation judge procedure (*erweitertes Güterichtermodell*). The conciliation judge is a judge who has not been appointed to hear the pending litigation. He is allowed to apply all methods to resolve the dispute, including mediation, (pursuant to the new § 278 subsection 5 ZPO). The main difference to a mediator is, however, that the conciliation judge is allowed to make a legal analysis of the case and to propose a solution to the parties. If a settlement agreement is reached before a conciliation judge it can be recorded in writing by the court ("*Prozessvergleich*"), resulting in a deed of execution that can be enforced without resorting to further court proceedings.

## Does failure to mediate attract adverse cost consequences?

The rejection of an invitation to commence any ADR proceeding is not followed by any costs sanctions, unless the parties had previously agreed otherwise.

## Are mediations confidential?

Corresponding to article 7 of the EU Mediation Directive, section 4 of the Mediation Law states that mediators and persons who are involved in the mediation proceedings (other than the parties) are required to keep confidential all the information received in connection with it. The duty of confidentiality corresponds with a procedural right to refuse to testify in civil litigation and arbitration in relation to information which is subject to the confidentiality obligation. Submissions made during the course of settlement negotiations will not usually be admissible as evidence in later court proceedings. However, exceptions are made if (i) the breach of confidentiality is necessary for the enforcement of the final mediation agreement, (ii) the breach of confidentiality is required for reasons of public policy (*ordre public*) or (iii) the facts which will be released are obvious and do not require confidentiality given their importance.

Section 4 of the Mediation Law does not apply to the parties and their legal representatives. However, mediation agreements will usually incorporate confidentiality clauses which will prevent the parties disclosing information obtained during the mediation in civil proceedings. Such a clause has to be drafted carefully. If the mediation agreement refers to the rules of a mediation institution, such as DIS, a confidentiality clause is usually automatically incorporated.

## How are settlement agreements enforced?

A settlement agreement entered into in the course of mediation will constitute a settlement under section 779 German Civil Code (*Bürgerliches Gesetzbuch*) and can therefore be enforced as a contract.

Furthermore, the agreement can either be recorded in a notarial deed (*notarielle Urkunde*) which is a deed of execution or, if the settlement is concluded by lawyers for and on behalf of the parties (*Anwaltsvergleich*), it may be declared immediately enforceable under a special procedure, provided that the paying party consents.

## Is there a system of accreditation and/or regulatory body for mediators?

Article 5 of the Mediation Law introduces quality standards that a mediator shall be required to fulfil. Mediators are personally obliged to undertake regular education and training. As yet, no regulating body exists to supervise compliance with this requirement. However, in practice most mediators have some form of accreditation following assessed training by appropriate associations. Furthermore, there are a number of mediation organisations in Germany.

Article 5 of the Mediation Law also introduces the so-called "certified mediator". Certified mediators will be mediators who are qualified in accordance with the regulations set out in Article 6 of the Mediation Law. This provision also empowers the Minister of Justice to enact further regulations regarding the training of mediators, for example, that future mediation training should comprise least 120 hours.

## What is the position of mediation in this jurisdiction?

Mediation is a recognised form of ADR in Hong Kong. In October 2012 it was announced that the Mediation Ordinance (the “Ordinance”) will come into effect on 1 January 2013. The principle effect of the Ordinance is to conform and clarify the positions in relation to the confidentiality of mediation proceedings, with such confidentiality obligations applying to mediation communications taking place both before and after the Ordinance comes into effect.

## How is a mediation conducted?

In Hong Kong, a commercial mediation is typically conducted in accordance with the parties’ agreement, which can be set out in a contractual dispute resolution clause or, more commonly, a standalone agreement signed by the parties after the dispute arises. The mediation may be administered by a professional body (e.g. the Hong Kong International Arbitration Centre (“HKIAC”)), in which case a set of pre-determined mediation rules would apply, or the procedures may be set out in the mediation agreement. Mediation is a confidential process. The mediator is independent from the parties. He may be chosen and agreed upon by the parties, or he may be appointed by an administering body. If parties are unable to agree on the mediator or other procedural matters for a mediation which relates to an on-going court action, they may apply to the court for directions. The parties need not be legally represented although they often are in a commercial dispute. Before the mediation, the parties may prepare document bundles and briefs to the mediator, depending on the complexity of the case. Some mediators also prefer to meet with the parties before the mediation, either jointly or separately.

In a typical case, the mediation will open with a plenary session, at which the parties will have an opportunity to present their cases. After the plenary session, the parties will move to separate rooms with the mediator shuttling between them for private sessions, with a view to achieving a compromise between the parties. Communications between the mediator and the parties in private sessions are confidential except if the party gives express consent for disclosure, or instructs the mediator to deliver a message or offer. Mediations are usually scheduled to last one day, although the parties and the mediator may agree to shorten or lengthen the time. Even if the parties are unable to reach an agreement at the mediation, they may continue to negotiate on a “without prejudice” basis until a compromise is reached. The cost of mediation (including the mediator’s costs and hire of a venue, if required) is usually shared equally between the parties.

## Is there any obligation on litigants to mediate?

Subject to any pre-existing contractual agreement between parties to mediate a dispute, there is no obligation on litigants to mediate commercial disputes. However, it is clear from the [Hong Kong High Court Practice Direction 31](#) that parties to proceedings commenced in the Hong Kong courts are expected to explore mediation as a means of resolving their dispute. The Timetabling Questionnaire that parties must complete before a case proceeds to trial stage requires legal representatives to confirm that they have explained to their clients the availability of mediation and the respective costs implications of mediation and litigation. Practice Direction 31 empowers a court to impose costs sanctions if it considers that parties have unreasonably refused to attempt to mediate a dispute.

The Financial Dispute Resolution Centre (“FDRC”) was officially opened on 19 June 2012. If a customer has a complaint against a Hong Kong financial institution which they wish to resolve outside the courts, the FDRC can impose mediation (and, if that fails, arbitration) on the financial institution. Details of the FDRC, including the criteria for vetting claims, and the establishment of a panel of mediators/arbitrators, are set out in the FDRC’s Terms of Reference and Mediation and Arbitration Rules.

## Does the court have powers to support a mediation?

Yes; the implementation of the Civil Justice Reforms in April 2009 has given the court a general power to make orders of its own motion consistent with the court’s duty to manage cases according to the underlying objectives of the Rules of the High Court, in particular, facilitating the efficient and cost-effective resolution of disputes. In the context of supporting mediation, the court may use this general power to impose an order to mediate on the parties. We are aware of one instance, in [Leung Ping Yeung & Ors v Jetour Holiday Limited & Ors \(unrep.\)](#) [2010] HKCU 316, where the court ordered parties to file mediation certificates stating whether they were willing to attempt mediation and, if not, why not. The court also ordered the lay clients to attend a Mediation Information Office briefing within 21 days.

## Does failure to mediate attract adverse cost consequences?

Yes; unreasonable failure to mediate a dispute may result in a court imposing adverse costs orders on one or more of the parties to litigation. Guidance on what does or does not constitute “unreasonable failure” is elaborated upon in Practice Direction 31. The court has a wide discretion in this regard. Some of the factors which may be relevant include (i) the nature of the dispute; (ii) the merits of the case; (iii) the extent to which other settlement methods have been attempted; (iv) whether the costs of mediation would be disproportionately high; (v) whether any delay in setting up the mediation would

have been prejudicial; and (vi) whether the mediation had a reasonable prospect of success. There have been several cases where the court has imposed a sanction in this regard, either by ordering a successful party to pay part of the costs of an unsuccessful party or by reducing the costs payable to a successful party, as a penalty for an unreasonable refusal to mediate.

A plaintiff or defendant to court proceedings may also invoke potential cost consequences for what it considers to be the unreasonable rejection of a settlement offer at mediation. Either party may make the same offer of settlement in the court action through a sanctioned offer/payment under [Order 22 of the Rules of the High Court](#). If the offeree fails at trial to obtain a better result than the offer, the court has a wide discretion to award costs on an indemnity basis against the offeree from the date of rejection of the sanctioned offer/payment along with penalty interest on such costs and penalty interest or denial of interest (as applicable) on the amount awarded in judgment.

### Are mediations confidential?

Agreements to mediate will usually include express provisions regarding confidentiality. As noted above, even in the absence of a confidentiality provision, the Ordinance (which will apply retrospectively) imposes a statutory obligation of confidentiality on mediation communications (as defined in the Ordinance).

Further, Practice Direction 31 provides that communications during the mediation process are without prejudice communications and are therefore confidential. Consequently, statements made during the mediation will not usually be admissible in later court proceedings relating to the same subject matter.

### How are settlement agreements enforced?

A settlement entered into at a mediation governs the contractual relationship between the parties and is therefore enforced as a contract. It is usual, if court proceedings have been commenced prior to the mediation, to include as a term of the settlement an obligation to withdraw or discontinue the action. The termination of the court proceedings may be achieved by consent order or consent judgment which may record the terms of the settlement. If such terms are recorded, they become enforceable as a judgment of the court.

### Is there a system of accreditation and/or regulatory body for mediators?

At present there is no regulating body for mediation in Hong Kong, nor are there any statutory qualifications to act as a mediator. In practice, most mediators have some form of accreditation following assessed training by a domestic or international dispute resolution institution. When appointing a mediator, membership of a respected mediation organisation is often taken into account, as well as the mediator's experience in the field of the relevant dispute. Key stakeholders have agreed to establish the Hong Kong Mediation Accreditation Association Limited, which will serve as the sole accreditation body for mediators. However, details on accreditation and dates for implementation are yet to be settled.

For the time being, there are a number of mediation organisations in Hong Kong, each of which maintains its own list of accredited mediators. The HKIAC is the largest training and accreditation organisation in Hong Kong for this purpose. The Hong Kong Bar Association also publishes a list of barristers that are able to act as mediators in the Bar List and the FDRC maintains its own list of mediators.



## What is the position of mediation in this jurisdiction?

The Indonesian state values and encourages the amicable settlement of disputes through mediation and other alternative dispute resolution (“ADR”) processes.<sup>1</sup> Indeed Indonesian civil procedural laws promote the settlement of disputes by means other than litigation.<sup>2</sup> Indonesia’s Arbitration Law (Law No. 30 of 1999) also encourages the inclusion of ADR provisions in Indonesian commercial agreements. These provisions require that genuine attempts be made to resolve any dispute by direct or third-party mediation.

## How is a mediation conducted?

The following procedural information relates only to court-annexed mediation.

Once a mediator is appointed, parties must exchange case summaries with each other within five days of the mediator’s appointment.<sup>3</sup> The mediation process can last up to forty days<sup>4</sup> and may be extended by a further fourteen days if both of the parties as well as the mediator agree that the extension should occur.<sup>5</sup> If the parties succeed in reaching a settlement through the mediation process, the mediator and any assisting lawyers will help the parties to draft an agreement.<sup>6</sup> If an agreement cannot be reached through mediation, the mediator will report to the presiding judge presiding who will then commence litigation.<sup>7</sup>

## Is there any obligation on litigants to mediate?

Supreme Court Regulation No. 02 of 2003 made it compulsory for all parties to a civil dispute in a court of first instance to spend a minimum of thirty days attempting to mediate their dispute. In 2008, Supreme Court Regulation No. 01 of 2008 (“the Regulation”) was introduced to replace the 2003 regulation. It retained the obligation on first instance litigants to mediate and made court-annexed mediation possible during case proceedings as well as at the pre-trial stage.<sup>8</sup> Under this Regulation a judge is empowered to obligate the parties to undergo mediation from the first day of the hearing.<sup>9</sup> Under Article 2(3), any failure to follow the mediation procedures in the Regulation will result in any judgment made being declared null and void. Interestingly Article 7(4) of the Regulation also imposes an obligation on the parties’ solicitors to encourage their clients to directly or actively participate in the mediation process.

Court-annexed mediation is also possible at an appellate, cassation or review level although there is no obligation to mediate in these circumstances.<sup>10</sup>

## Does the court have powers to support a mediation?

In addition to a court’s power to require parties to undergo mediation as a preliminary step described above, first instance courts have several other powers to support court-annexed mediation of civil disputes under the Regulation. The Regulation:

- > empowers the president of the chamber to appoint a judge of the relevant court with mediation certification to act as a mediator if the parties cannot agree on an appointment;<sup>11</sup>
- > obligates a judge to adjourn the hearing in order to give parties a chance to undergo mediation;<sup>12</sup>
- > gives a judge authority to encourage parties to make an effort to reach an amicable settlement of their dispute at any stage of the case examination before judgment is pronounced;<sup>13</sup> and
- > requires that a judge mention that an attempt at amicable settlement has been made in his or her legal reasoning.<sup>14</sup>

## Does failure to mediate attract adverse cost consequences?

A failure to mediate does not attract adverse cost consequences. However, as outlined above, any failure to follow the mediation procedures imposed by the Regulation will result in any judgment made being declared null and void. Parties looking to litigate in Indonesia should take notice of this provision.

<sup>1</sup> Karen Mills, ‘Indonesia’ in Michael Pryles (ed.), *Dispute Resolution in Asia* (2006) 165 – 199 (‘Mills’), page 175.

<sup>2</sup> Reviewed Inland Regulation, Article 130; Outer-Region Regulation, Article 150.

<sup>3</sup> Supreme Court Regulation No. 01 of 2008, Article 13(1). A translation of Supreme Court Regulation No. 01 of 2008 is available [here](#).

<sup>4</sup> *Ibid*, Article 13(3).

<sup>5</sup> *Ibid*, Article 13(4).

<sup>6</sup> *Ibid*, Article 17(1) & (2).

<sup>7</sup> *Ibid*, Article 18(1) & (2).

<sup>8</sup> *Ibid*, Article 18(3).

<sup>9</sup> *Ibid*, Article 7(1).

<sup>10</sup> *Ibid*, Article 21(1).

<sup>11</sup> *Ibid*, Article 11(5).

<sup>12</sup> *Ibid*, Article 7(5).

<sup>13</sup> *Ibid*, Article 18(3).

<sup>14</sup> *Ibid*, Article 2(4).

### Are mediations confidential?

Generally speaking, mediations are confidential. Article 6 of the Regulation states that “the mediation process is in principle closed in nature unless otherwise desired by the parties”. Any statements and acknowledgements made by the parties during the course of the mediation cannot be used as evidence in court proceedings following a failed mediation attempt<sup>15</sup> and any notes taken by the mediator must be destroyed.<sup>16</sup>

Voluntary mediation engaged in under the auspices of the Indonesian Mediation Centre (*Pusat Mediasi Nasional*) will be regulated by the centre’s rules which provide that all parties shall maintain the mediation’s confidentiality.<sup>17</sup>

### How are settlement agreements enforced?

If parties to a mediation reach an agreement, that agreement is to be put into writing with the assistance of the mediator and then signed by both parties as well as the mediator.<sup>18</sup> Where parties are legally represented their solicitors are obliged to declare their approval of the agreement in writing.<sup>19</sup> This written agreement will then be binding upon both parties<sup>20</sup> and is enforceable in the same way as a tribunal award. Parties also have the option of submitting the agreement to the judge who will in turn affirm it as a consent judgment.<sup>21</sup>

### Is there a system of accreditation and/or regulatory body for mediators?

The Regulation requires that a mediator of court-annexed mediation be accredited. A mediator will receive such accreditation after participating in a training program organised by an entity accredited by the Indonesian Supreme Court (such as the Indonesian Institute for Conflict Transformation).<sup>22</sup> Mediators can come from judicial or external professional backgrounds provided that they have successfully completed a compulsory certification training program – the curricula of which have been adopted from Western mediation systems.<sup>23</sup> Where no certified mediator is available a non-accredited judge may mediate.<sup>24</sup>

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<sup>15</sup> Ibid, Article 19(1).

<sup>16</sup> Ibid, Article 19(2).

<sup>17</sup> The Indonesian Mediation Centre, *Mediation Procedure*, paragraph 7.1. A translation of the Mediation Procedure is available [here](#).

<sup>18</sup> Ibid, Article 17(1).

<sup>19</sup> Ibid, Article 17(2).

<sup>20</sup> Karen Mills, ‘Indonesia’ in Michael J. Moser (ed.), *Arbitration in Asia* [6.2.1].

<sup>21</sup> Supreme Court Regulation No. 01 of 2008, Article 17(6).

<sup>22</sup> Ibid, Article 5(1).

<sup>23</sup> Fatahillah Abdul Syukur and Dale Bagshaw, ‘Judicial mediation in Indonesia: Challenges and opportunities’ (2012) 23 *Australian Dispute Resolution Journal* 274, page 276.

<sup>24</sup> Supreme Court Regulation No. 01 of 2008, Article 5(2).



## What is the position of mediation in this jurisdiction?

On 20 March 2011 an Italian legislative decree ([Legislative Decree 4 March 2010 No. 28](#)) (the “Decree”) came into force which (i) imposes, in relation to certain legal rights of a civil or commercial nature, a duty on the parties to pursue mediation before filing a claim with any national court and (ii) introduces a non mandatory procedure applicable to any civil and commercial litigation regarding matters other than those “mandatory” under the Decree.

On 24 October 2012, the Italian Constitutional Court declared that the provisions of the Decree imposing a duty to mediate before being permitted to file a claim at court were incompatible with the Italian Constitution. Accordingly, it was no longer compulsory to mediate before commencing court proceedings. The provisions of the Decree regarding the non-mandatory procedures applicable to mediation of civil and commercial matters remained in force.

However, the [decree No. 69 of 21 June 2013](#) (“*Disposizioni urgenti per il rilancio dell’economia*”) (the “2013 Decree”), brought into effect by Law no. 98 of 9 August 2013, reintroduced mandatory mediation for certain legal rights of a civil or commercial nature. Therefore, it is again mandatory to pursue mediation before commencing a trial in relation to certain disputes (listed below). The 2013 Decree provisions will enter into force on 21 September 2013. Those relating to compulsory mediation will be effective for four years starting from this date. However, after two years of the provisions being in force the Minister of Justice must review the situation, in order to measure the success of the obligation to mediate.

## How is a mediation conducted?

A mediation established under the Decree may be brought before any of the mediation organisations listed in Article 16 of the Decree in the city in which the court that is competent to hear the claim should the mediation fail, is located. The procedure will follow the rules applied by the organisation chosen by the parties.

The mediator(s) shall be appointed by the organisation chosen by the parties.

Once a request for mediation has been filed, the mediation proceedings must be completed within a three-month period.

The appointed mediator has to use his best efforts to assist the parties to reach an agreement. If an agreement is not reached or should the parties request the mediator to do so, the mediator himself can draw up a settlement proposal. The parties then have seven days to decide whether or not to accept the mediator’s proposal.

There are costs consequences in the event that this proposal is rejected and the case goes to trial (please see below). The costs of mediation will vary depending on the amount under dispute and on whether the parties have chosen a private or a public mediation body. Mediation is free of charge for any party who is exempt from court fees under Italian law.

## Is there any obligation on litigants to mediate?

The duty to mediate is mandatory for any disputes in relation to insurance, banking and financial agreements as well as other matters such as rights in rem (“*diritti reali*”), division of assets, inheritances, family arrangements (“*patti di famiglia*”), condominium, leases in general, gratuitous loans, leases of going concerns, medical liability (including the liability of hospitals and private health institutions) or defamation/libel. In such cases mediation has to be attempted before court proceedings are commenced. Should the claimant fail to pursue mediation proceedings, the claim is barred from continuing further and the failure may be raised by the defendant, or by the judge himself at the first hearing. However, should mediation fail, the claim may proceed to court litigation.

In some situations there are alternative mediation procedures available which pre-dated the Decree<sup>1</sup>. In these cases, the claimants will have the option of using either the procedure as set out in the Decree or the alternatives.

Rules and regulations contained in the Decree may also apply to any civil and commercial litigation regarding matters other than those listed above, which the parties choose to delegate to a mediator.

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<sup>1</sup> The two alternative mediation procedures already in force in Italy, which can be used instead of the mediation procedure under the Decree, are:

>the procedure (set out in [Legislative Decree no. 179 of 8 October 2007](#)) relating to disputes arising between investors and financial institutions concerning the breach by the latter of duties of information, transparency and fairness, and which is implemented by the arbitration and mediation chamber (the “*Camera di Conciliazione e Arbitrato*”); and  
>the procedure (implemented pursuant to [art. 128 bis of Legislative Decree no. 385 of 1 September 1993](#)) which applies to disputes that fall within the jurisdiction of the “*Arbitro Bancario Finanziario*”. In particular, this procedure concerns any disputes arising between banks on the one hand and their clients on the other, in relation to banking and financial products and services.

### Does the court have powers to support a mediation?

The courts can invite the parties to attempt to find an amicable settlement but, except for the specific matters listed above, the judge cannot compel the parties to mediate.

### Does failure to mediate attract cost consequences?

At the time of their appointment, lawyers must inform their clients in writing about: (i) the possibility of using mediation as an alternative form of dispute resolution; (ii) the potential cost advantages of proposing mediation; and (iii) the circumstances in which it is necessary to undertake mediation before claims may be commenced at court (“*condizione di procedibilità*”).

If the parties fail to achieve a settlement, then this may (subject to certain conditions) result in adverse costs consequences in any subsequent proceedings before the court.

The general rule in Italian court proceedings is that the losing party pays the winner’s costs. However, if the judge’s decision is effectively the same as the mediator’s proposal and the winning party had failed to accept that proposal, that party may not recover its costs and may have to pay the losing party’s costs and also pay other fees equal to the “*contributo unificato*”. Even if the judge’s decision does not match the mediator’s proposal exactly, the judge still has discretion to take this approach.

### Are mediations confidential?

Yes. Mediation is confidential and professionals involved with the proceedings are not permitted to disclose any information disclosed during the process. Unless given permission, mediators cannot disclose to either party any information disclosed in separate sessions. If the mediation fails, all information received during the process will be deemed without prejudice and cannot be used in subsequent contentious proceedings. Furthermore, information disclosed during the mediation cannot be used as evidence and the mediator cannot be called as a witness before any judicial authority.

### How are settlement agreements enforced?

In the event that the mediation is successful and the parties reach a settlement, an agreement will be drawn up and signed by lawyers representing all the parties which, once validated by the competent court, will assume the status of a writ of execution. This means it can be enforced directly, by way of specific performance and the registration of a legal charge over property.

### Is there a system of accreditation and/or regulatory body for mediators?

Yes. The Decree allows public and/or private bodies to establish mediation organisations, which must be registered with the Italian Ministry of Justice.

In addition, Italian bar associations can set up mediation organisations in each court of justice, and chambers of commerce and professional councils can establish mediation organisations under the provisions of the Decree for certain specific matters. These mediation organisations also need to be registered with the Italian Ministry of Justice before commencing operation.

Pursuant to the 2013 Decree, lawyers duly registered with the Italian bar are mediators by law.

*Law stated as at September 2013.*

## What is the position of mediation in this jurisdiction?

Japan operates three types of mediation (“*choutei*”):

- > mediation conducted and supported by the court (“Court Mediation”). Court Mediation is categorised into two types: (a) Civil Affairs Mediation for all civil affairs (including commercial matters) other than family affairs; and (b) Family Mediation for family affairs only. Both are commonly used: 78,210 civil cases and 136,292 family cases were dealt with by mediation in 2011;
- > mediation conducted and supported by government organisations other than the court (“Administrative Mediation”). Administrative Mediation is also common and is conducted by many governmental committees dealing with issues in specific areas such as consumer or employment disputes; and
- > mediation established and conducted by the private sector (including any foreign mediation bodies) (“Non-governmental Mediation”). This form of mediation is undertaken by many private organisations (e.g. the Bar Association Arbitration Centre, and financial alternative dispute resolution under the Financial Instruments and Exchange Act). The **Act on Promotion of the Use of ADR** (Act No. 151 of 2004) (the “ADR Act”, see further below), which came into force on 1 April 2007, promotes and regulates this type of mediation.

## How is a mediation conducted?

In a Court Mediation, the mediation committee established for each case directs the procedure. A judge heads the mediation committee, with two other committee members being appointed from the local community by the court. The parties are not involved in the process of appointing committee members. However, after 1 January 2013, if the committee members are related to the parties themselves (e.g. personal relations) the parties can ask the court to exclude those members.

The parties themselves must attend the mediation process, whether they have representatives or not. By law, a representative can attend the mediation instead of a party only in exceptional cases, such as a party's sickness. In practice, however, it is common for lawyers to attend the commercial mediation together with the party they represent.

The mediation costs will be paid at the beginning of the mediation by the party who proposed it. Costs are determined according to the amount claimed by the party commencing the mediation.

Typically, the mediation committee will set the date and time of the process (usually once or twice a month) and inform both parties of it by mail. On the actual date, the parties are separated into two different waiting rooms. The mediation committee will then have each party come into the committee room in turn, assisting both to reach a mutually acceptable position.

The procedures for Administrative Mediation and Non-governmental Mediation vary according to the internal rules of the relevant mediation body. Most procedures are generally the same as those in Court Mediation.

## Is there any obligation on litigants to mediate?

Yes.

Firstly, Japanese law specifies some categories of disputes (such as disputes regarding land/house rent, marriage, divorce, affiliation or adoption) for which the parties are required to attempt Court Mediation first. If a party commences court proceedings regarding such disputes without first having attempted mediation, the court will send the dispute back to Court Mediation. If Court Mediation fails, the parties can then commence legal proceedings.

Secondly, the court, if it considers it appropriate, may of its own motion (and without obtaining consent from either party) transfer litigation of a civil dispute to mediation. In these circumstances, once the proceedings to identify issues and evidence have completed, consent from both parties will need to be obtained.

Thirdly, any pre-existing contractual arrangement between the parties to mediate a dispute will bind the parties.

## Does the court have powers to support a mediation?

Yes. See above.

### Does failure to mediate attract adverse cost consequences?

Technically yes, but unlikely.

In Japan the unsuccessful party to litigation generally bears litigation costs (such as the cost of the court proceedings themselves, although not attorneys' fees). However, the court can impose on the successful party at its sole discretion any costs resulting from the successful party's unnecessary actions or failure to advance the proceedings without delay. Theoretically, therefore, if the successful party's failure to mediate (e.g. refusal to engage in mediation) was deemed unnecessary or to have delayed the process, the court can impose on that successful party any costs resulting from the failure. Practically, however, it is still uncommon and unlikely for the court to deem a party's failure to mediate to be "unnecessary" or to have "delayed the process".

### Are mediations confidential?

Yes. In Court Mediation, all proceedings and discussions are confidential and people may only attend with the permission of the mediation committee. Administrative Mediation and Non-governmental Mediation proceedings are also confidential, as set out in their own internal rules. A Non-governmental Mediation body can only be accredited under the ADR Act when it guarantees that its proceedings are confidential.

There is a strong argument that the information disclosed at mediation should not be used in subsequent litigation, because otherwise a frank discussion between the parties in an attempt to reach settlement cannot be achieved at mediation. As a result, it is common practice for the mediation committee to decline to divulge information disclosed at a Court Mediation to the court handling the subsequent litigation.

### How are settlement agreements enforced?

All settlements achieved in Court Mediations are entered onto the court record. The record of settlement is equivalent to a court order and the settlement is thus enforceable.

A settlement achieved at Administrative Mediation or Non-governmental Mediation is considered to be a mere agreement between the parties. If a party breaches the settlement, the other party needs to obtain a court order before it can enforce the agreement.

### Is there a system of accreditation and/or regulatory body for mediators?

Yes.

Court Mediation is completely regulated and supported by the court.

Administrative Mediation is established and controlled under applicable regulations.

For Non-governmental Mediation, the ADR Act sets out an accreditation system whereby a private ADR body which satisfies certain requirements is accredited and recognised by the Japanese government. Any Non-governmental Mediation bodies (other than those managed by lawyers) must be accredited under the ADR Act in order for them to organise and manage mediation. The government will give a Non-governmental Mediation body accreditation after an examination of whether that body is capable of appropriately managing mediation processes in line with the requirements under the ADR Act.

## What is the position of mediation in this jurisdiction?

The law of 24 February 2012 implementing the EU Mediation Directive 2008/52/EC of 21 May 2008 (the “Directive”) entered into force on 9 March 2012 (the “Law”). The Law goes beyond the implementation of the Directive and establishes a domestic commercial mediation framework covering national and EU cross-border civil and commercial mediation (addressing notably key aspects of civil procedure for the enforcement of out-of-court agreements throughout the EU).

Mediation is a structured process whereby two or more parties, on a voluntary basis, attempt to settle their dispute with the assistance of a mediator. The mediator has no power to make a binding decision on the parties but assists their negotiations. He has no investigatory powers but may, with the parties’ consent, hear third parties who appear voluntarily.

In civil and commercial matters, any dispute can be mediated except: (i) rights and obligations which are not under the parties’ control; (ii) provisions of public order; and (iii) matters relating to the State’s responsibility for acts and omissions in the exercise of state authority.

## How is a mediation conducted?

Two different kinds of mediation are introduced by the Law: contractual mediation and judicial mediation. In both cases, the procedure to be followed depends to a great extent on the parties’ mediation agreement. Parties may decide to end the mediation process at any time.

Contractual mediation can be suggested by any party at any time, unless court deliberations have started. The parties will either have agreed to mediate in advance by including an agreement to mediate in predetermined situations in their contract, or mediation can be entered into when a dispute has arisen. Once the parties have signed a mediation agreement, the limitation period for commencing court proceedings is suspended.

Judicial mediation refers to mediation that is suggested by the judge while a case is pending. The judge has no power to order mediation but may invite the parties to engage in mediation either upon his own initiative or upon request of any of the parties. In both cases, the parties’ consent to mediation is required before it is commenced. The duration of the mediation is determined in the decision which orders it and may not exceed a three month period, although that may be increased by one month at the request of both parties. When the parties jointly request that a mediation be ordered, the time limits in relation to the proceedings are suspended as from the date on which they submit their request. Mediation may cover part or the entirety of a dispute. The judge remains seized of the case during the course of the mediation and may, at any time, take whatever measure he considers necessary. He may also end the mediation before the specified time limit expires, upon request of the mediator or one of the parties.

## Is there any obligation on litigants to mediate?

There is no legal obligation on parties to engage into mediation. Mediation remains a voluntary process, chosen by the parties in order to settle their dispute. Mediation is primarily contractual in nature. The parties either include a mediation clause in their contract or decide to engage in mediation once a dispute has arisen. Depending on the circumstances, parties may therefore have a contractual obligation to engage in mediation prior to any other form of dispute resolution.

Parties are encouraged by the Law to include mediation clauses in their contracts. Where the parties have previously agreed to mediate, the judge hearing the case may stay the proceedings upon request of either party, unless the mediation clause is not, or is no longer, valid. Provisional and protective measures may be ordered despite the existence of a mediation clause. Applications for such protective and provisional measures do not impact on the effect of mediation clauses. In order for a mediation clause to be effective and taken into account in court, its existence must be notified to the court before any defence on the merits is pleaded, failing which the parties are precluded from invoking the clause (unless they both agree otherwise).

The court may itself suggest judicial mediation. However, in this case, mediation will only be undertaken if both parties agree.

## Does the court have powers to support a mediation?

The legal framework provided both by the Law and the Directive may encourage parties to engage in mediation rather than to initiate judicial proceedings. Courts may themselves suggest judicial mediation as long as their deliberations have not started. Mediation, however, remains a voluntary process as the court does not have the power to order mediation.

## Does a failure to mediate attract adverse cost consequences?

Failure to mediate does not result in adverse cost consequences. No legal basis currently exists which enables a court to take failure to mediate into consideration when making an award of cost.

### Are mediations confidential ?

Mediation is carried out in a manner which respects confidentiality: documents, disclosures and communications made during the process of mediation or for its purposes are confidential. The court must refuse to admit any mediation-related information that is or would be disclosed without both parties' consent. Mediators may not be compelled to testify in judicial proceedings as to information obtained during the mediation process. A party in breach of the confidentiality obligation may be ordered to pay damages.

### How are settlement agreements enforced ?

A mediation agreement will usually impose a contractual obligation on parties to abide by what may be decided in the settlement agreement resulting from mediation. As a result, settlement agreements will be enforced as any other contract.

However, settlement agreements concluded in Luxembourg, both domestic and cross-border, may be recognised and made enforceable by the President of the District Court (*Tribunal d'arrondissement*) upon request of all or one of the parties (provided that, in cases of cross-border disputes, all other parties agree to such a request). The Law sets out an exhaustive list of grounds for the recognition of a settlement agreement to be refused by the President of the District Court.

Recognition and enforcement of settlement agreements reached and made enforceable in other EU states (other than Denmark) abide by the same procedure as that provided for in Luxembourg for the implementation of Council Regulation n° 44/2001 on the recognition and enforcement of judgments in civil and commercial matters.

Under certain conditions, the President of the District Court may also make settlement agreements reached in another Member State of the European Union enforceable despite their not having yet been made enforceable in their country of origin.

### Is there a system of accreditation and/or regulatory body for mediators?

No regulatory body for mediators currently exists. However certain organisations for commercial mediation do exist, such as the ALMA (*Association luxembourgeoise de la médiation et des médiateurs agréés*) and CMBL (*Centre de médiation du barreau de Luxembourg*). The *Commission de surveillance du secteur financier* ("CSSF", which is the financial supervisory authority) and the *Association des Compagnies d'Assurances* ("ACA", which is the association for mediation in insurance disputes) are the other Luxembourg ADR bodies accredited by the European Commission. Their appointment of mediators depends on several selection criteria such as professional competence, experience in the field of business, and skills to carry out mediation. The Luxembourg ADR bodies will only accept mediators with a degree of training or experience in the field, thereby creating a certain form of accreditation.

According to the Law, the mediator can either be certified or not. The law defines a "certified mediator" as a natural person certified for that purpose by the Ministry of Justice. Only certified mediators, or mediators from another Member State of the European Union who fulfil similar requirements, can act in judicial mediation. In any case, the mediator is required to be impartial, independent and diligent.

## What is the position of mediation in this jurisdiction?

Mediation is used with increased frequency in the Netherlands. According to statistics provided by the **Netherlands Mediation Institute** (“NMI”) in 2011, the NMI conducts approximately 50,000 mediations per year.

Additionally, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the “Directive”) is currently in the process of being implemented into the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) and the Dutch Civil Code (*Burgerlijk Wetboek*). However, the Dutch Senate (*de Eerste Kamer*) had not, at the time of writing, given its approval to the proposed implementation of the Directive.

Additionally, the District Court of Amsterdam has recently introduced a pilot for mediation in bankruptcy proceedings. The pilot aims to investigate whether the costs in bankruptcy proceedings can be reduced via mediation. If costs can be reduced, more of the bankrupt company’s assets can be distributed to its creditors. Furthermore, mediation could speed up the bankruptcy process.

## How is a mediation conducted?

A mediator may be appointed by the parties or by a mediation institution (such as the NMI or the **Netherlands Arbitration Institute** (“NAI”)) prior to or pending legal proceedings before an arbitral tribunal or court. When court proceedings are pending, a Dutch court can refer the dispute to mediation in accordance with the “mediation alongside litigation” procedure (see below).

In general, the mediation process can be divided in four phases:

- (i) the preparation phase, during which the parties will agree on the allocation of the costs of the mediation process and determine the conduct of the mediation process;
- (ii) the plenary phase, during which parties will have the opportunity to share their views and opinions on the matter and the mediator can determine the wishes and interests of the parties;
- (iii) the negotiation phase, when possible solutions can be discussed and the actual negotiations take place; and
- (iv) the settlement phase, when the results are set out in the settlement agreement.

## Is there any obligation on litigants to mediate?

In general, there is no obligation on parties to a dispute to mediate in the Netherlands. The mediation is therefore considered voluntary. In this regard, “voluntary” means that the parties can agree that a mediator will guide them in the mediation process but they may, in principle, end the mediation at any time if either of them considers that the mediation will not contribute to resolving the dispute.

Mediation clauses entered into by the parties constitute legally binding contracts. However, they are not easily enforced before a Dutch court. In fact, the legal implications of a mediation clause are very limited. It has been established by decisions of the Dutch Supreme Court that parties who have agreed to resolve a dispute by way of mediation will always be free subsequently to decline to mediate. Consequently, a mediation clause does not impact on the competence of the courts to hear the dispute.

## Does the court have powers to support a mediation?

If a Dutch court finds that “mediation alongside litigation” (*“mediation naast rechtspraak”*) has the potential to resolve the dispute, this option will be mentioned during court proceedings. Before taking the decision to refer the case to mediation, the judge will thoroughly examine the file and weigh up the arguments for and against mediation. If the judge decides to refer, he will adjourn the court proceedings for a certain period in order to facilitate the mediation process. However, even in the context of “mediation alongside litigation”, the mediation process remains voluntary.

## Does failure to mediate attract adverse cost consequences?

A failure to mediate will, in principle, not attract adverse cost consequences. In the Netherlands the costs of litigation are allocated in accordance with a fixed tariff system (*het liquidatie-systeem*). According to the fixed tariff system, points are awarded for every procedural action the successful party had to take (e.g. issuing writ of summons, filing of written statements, oral hearings, etc.). These points are accumulated and multiplied with a fixed fee, the amount of which depends on the amount that was at stake in the proceedings. It should be noted that the procedural costs awarded will usually not cover the actual procedural costs of a party. Mediation is not incorporated in the fixed tariff system, therefore parties usually bear their own costs of that. It is also possible to make other arrangements regarding these costs during the preparation phase.

### Are mediations confidential?

Mediation is an informal process and, although recognised in the Dutch legal system, does not yet have a basis in the Dutch Code of Civil Procedure. Confidentiality of the mediation is not guaranteed as a matter of law. Therefore, parties should enter into a separate confidentiality agreement. The mediation rules of the NAI and the model mediation agreement of the NMI both contain confidentiality clauses. In addition, the NMI provides for a separate model agreement regarding the confidentiality of the mediation process which should be signed by both parties and which will be sent to them by the mediator.

It should be noted, however, that the Dutch Supreme Court (*de Hoge Raad*) has ruled that the court may, in general, call a mediator to a witness hearing. In principle the mediator does not have a right of privilege in witness hearings if his statements in those hearings could be of assistance in the court proceedings.

In addition, it is presumed that a limited right of privilege for mediators will be incorporated into article 165 of the Dutch Code of Civil Procedure after implementation of Directive 2008/52/EC of the European Parliament (see above).

### How are settlement agreements enforced?

Although parties will always be free to decline to mediate, any settlement agreement resulting from a mediation process is considered to be a legally binding agreement which is enforceable in court.

### Is there a system of accreditation and/or regulatory body for mediators?

The NMI, which has been an advocate of mediation in the Netherlands since 1993, maintains a list of certified mediators who are competent to act as mediators. Currently there are around 800 NMI-certified mediators in the Netherlands. Every mediator who is a registered NMI-mediator is bound by the code of conduct laid down by the NMI.



### What is the position of mediation in this jurisdiction?

Mediation is a recognised form of ADR in the PRC. It is generally administered by a court or arbitral tribunal. Professional commercial mediation institutions are not commonly used as mediation settlements cannot be enforced in the PRC without recourse to the PRC courts.

### How is a mediation conducted?

During the course of court proceedings, PRC courts are permitted to carry out mediation unless any of the parties refuse. Typically, the judge or the tribunal will encourage parties to attempt mediation first if they consider that the dispute could potentially be resolved by way of a mediation settlement. Parties may also, by agreement, request that the matter be referred to mediation during court proceedings. The judge(s) will take the role of mediator(s), and may invite individuals and institutions who have specific expertise relevant to the matter in dispute to assist in the mediation process. If the matter is settled in the course of mediation, the judge(s) will issue a settlement statement, which can be enforced by a court on request of either party if the other party fails to comply with the settlement terms. If any party refuses to refer the matter to mediation, or no settlement is reached, the court will continue with the normal trial proceedings. However, if a judge participates in a pre-trial mediation process as a mediator, he is generally not allowed to continue as judge in the trial proceedings relating to the same matter unless agreed to by the parties.

Referrals to mediation during an arbitration process are dealt with in a similar way. However, unlike court mediation, an arbitrator who acts as a mediator generally will not be precluded from arbitrating the same matter at a later stage.

As an alternative, parties can submit disputes to a professional commercial mediation institution, such as the [China Chamber of International Commerce Mediation Centre](#) ("CCICMC"), before commencing legal or arbitral proceedings. Generally, a mediator is appointed by the parties, or the mediation institution, from a panel of mediators maintained by the institution. The mediator may take any steps that he considers will be effective to facilitate the parties to reach a settlement, including, but not limited to: conducting the mediation in plenary session; having separate meetings with each of the parties; and seeking expert opinions.

Mediation conducted by a court does not give rise to any additional costs beyond the original costs of the court for the legal proceedings. If a dispute is settled by court mediation, the court will reduce its costs to 50% of the court fees. The costs of a mediation conducted by a mediation institution will vary depending on the value of the matter in dispute and/or the time spent on the mediation.

### Is there any obligation on litigants to mediate?

There is no statutory obligation on litigants to mediate a commercial dispute. In addition, even if there is a contractual agreement to mediate a dispute, any party may bring court proceedings or initiate arbitration proceedings without going to mediation. Technically, it could be argued that a party who fails to comply with an agreement to mediate a dispute is in breach of the agreement. However, in practice it is difficult for the other party to prove any losses that he may have suffered as a result of the technical breach. Accordingly, the PRC court is unlikely to impose any cost sanctions for a technical breach alone.

Lawyers are not required to advise clients of the option to mediate and its applicability to the dispute in question. A court will not impose any cost sanction on any party who rejects a court's suggestion for mediation and seeks adjudication.

### Does the court have powers to support a mediation?

Whilst courts cannot generally compel parties to mediate a commercial dispute, they increasingly encourage parties to attempt mediation. Under the [Civil Procedure Law](#), mediation is conducted solely on a voluntary basis.

Recently, the [Supreme Court of the PRC](#) has emphasised the need for ADR and the courts' role in supporting ADR (particularly mediation) as an effective method of resolving a dispute.

### Does failure to mediate attract adverse cost consequences?

Failure to consider ADR will not result in a court imposing adverse costs orders on parties to litigation.

### Are mediations confidential?

Yes.

The parties to court proceedings may request a confidential mediation and the court will allow such a request. Mediation conducted in arbitral proceedings or by a mediation institution is normally confidential in any event. The parties may also include an express confidentiality provision in an agreement to mediate to reinforce the confidential nature of the mediation.

Mediations are conducted on a “without prejudice” basis, meaning that submissions made in an attempt to reach settlement will not usually be admissible in later court proceedings relating to the same subject matter, subject to some limited exceptions (such as agreement of all the parties or a legal obligation to disclose the information).

### How are settlement agreements enforced?

A settlement reached by the parties and confirmed by a court or arbitral tribunal as a result of mediation conducted in a court or arbitral proceedings can be enforced as if it were a normal court judgment or arbitration award.

A settlement agreement entered into following mediation conducted by a mediation institution creates a contractual relationship between the parties and must therefore be enforced as a contract. However, the parties may, by mutual agreement, request a PRC court to recognise the settlement agreement within 30 days after the settlement becomes effective, so that the agreement can be enforced as a court judgment should one party fail to perform its obligations under the agreement.

### Is there a system of accreditation and/or regulatory body for mediators?

With regard to mediation conducted in the course of court or arbitral proceedings, the mediator must be a judge or arbitrator. However, at present there is no regulating body for mediation in the PRC and neither are there any statutory qualifications required to act as a mediator, for mediation conducted by professional mediation institutions. In practice, most mediators have some form of accreditation following assessed training by mediation institutions. When appointing a mediator, the mediator’s past conduct and performance is often taken into account, as well as his/her experience in the field of the relevant dispute.

## What is the position of mediation in this jurisdiction?

Mediation is a recognised form of ADR in Poland and is regulated by amendments introduced into the [Polish Civil Procedure Code](#) in 2005. Provisions regarding mediation are contained in articles 183.1 – 183.15 of the Code, while articles 184 – 186 regulate court settlements.

## How is a mediation conducted?

Mediation is always voluntary. A mediator may be appointed by the parties or by a mediation institution where they have agreed this in their mediation agreement, or by the court referring a case to mediation, provided that the parties agree with both the referral to mediation and the appointment of the mediator. There is no requirement for the parties to be legally represented. However, in commercial disputes lawyers usually attend the mediation session to assist their client in the presentation of their case. There are no set procedural rules for mediation. Mediation may begin with a plenary session where both parties present their case, followed by multiple sessions with the mediator working with each party separately, followed by a closing plenary session ending possibly with an agreed settlement. However, in practice mediation is also conducted by mediators in one long plenary session, perhaps adjourned from time to time for separate consultations with the mediator/lawyer assisting the party. The choice of the method is largely dependent on the experience of the mediator.

## Is there any obligation on litigants to mediate?

No. Mediation is completely voluntary, subject of course to any previous agreement between parties. The court may also refer the case to mediation. However, the parties are not obliged to enter into mediation.

## Does the court have powers to support a mediation?

Yes. The court may refer a case to mediation, either upon one party's request for mediation or at its own discretion, up until the close of the first court session in the case. The parties are not obliged to agree to mediate but have seven days from the court decision in that respect to oppose mediation. After that time they will be deemed to have agreed to mediation.

After the close of the first session in the case the court may only refer the case to mediation if the parties jointly request it. The court may refer a case to mediation only once in the course of proceedings.

In its order referring the dispute to mediation, the court specifies a maximum time limit of one month for conducting the mediation. This time limit may only be extended upon the joint request of the parties. Once the time limit has elapsed, the court will schedule a court hearing.

The inclination of individual courts to refer disputes to mediation without a prior request from a party to the dispute varies widely.

## Does failure to mediate attract adverse cost consequences?

Should a party refuse to participate in a mediation to which it has previously agreed, the court may issue a costs order against that party for the costs caused by its conduct, usually amounting to the cost of the mediation, regardless of the outcome of the case.

## Are mediations confidential?

Yes. The duty of confidentiality stems from the parties' agreement as well as being regulated by law. The whole mediation process is confidential and the mediator is bound to keep confidential all that he has learned during the mediation. Parties may not attempt to call or rely on in court, declarations or proposals made by other parties during the mediation; such evidence will be ineffective and will not be considered by the court.

## How are settlement agreements enforced?

Settlement agreements are valid enforcement orders and may be subject to enforcement in the same way as the court's judgments or settlements entered into in the course of litigation. To obtain such a status, a settlement agreement reached in the course of a mediation will first need to be approved by the court. The court may refuse to affirm a settlement agreement in part or in whole if it considers that it contradicts or circumvents the law, is contrary to fairness principles or is self-contradictory or ambiguous.

## Is there a system of accreditation and/or regulatory body for mediators?

There is no state-approved system of accreditation for mediators. However, local mediation institutions conduct numerous training events and have their own accreditation criteria. They also hold lists of accredited mediators, which are sent to Regional Courts. Courts referring cases to mediation may appoint mediators included on those lists.

## What is the position of mediation in this jurisdiction?

Mediation is a recognised ADR mechanism for civil and commercial disputes and can be accessed through a public mediation service available in special courts ("*Julgados de Paz*"), organised in accordance with [Law no. 78/2001, of 13 June 2001](#).

There are also public mediation centres run by the Portuguese Ministry of Justice for family, employment and criminal matters, and private mediation centres, most of which are dedicated to consumer rights mediation.

[Order \(Portaria\) no. 282/2010 of 25 May 2011](#) sets out the procedure for the selection of mediators to act in the *Julgados de Paz* and in family and employment mediation centres.

As established by [Order \(Portaria\) no. 203/2011, of 20 May](#), the time limit for bringing court proceedings will be suspended when mediation proceedings are carried out under the public mediation procedure and through any mediation centres recognised by a Member State.

On 30 November 2012, the Portuguese Government submitted a proposal for a new law on mediation to Parliament. This proposal would bring all relevant rules on mediation together in one piece of legislation and provide a set of main principles to be applicable to mediation in Portugal. The proposal also includes new legal rules relating to civil and commercial mediation, public mediation and the role of the mediator. At the time of writing, the proposal was still being considered by Parliament.

## How is a mediation conducted?

Mediation proceedings regarding civil and commercial disputes can be initiated by the parties themselves before proceedings are filed at court. They may also be commenced once judicial proceedings have begun, either on the judge's invitation or the agreement of the parties.

In both cases the parties must agree on the appointment of a mediator registered with the *Julgado de Paz* where the mediation proceedings will take place. If no agreement is reached, a mediator will be officially appointed by the *Julgado de Paz*. Parties only need to be legally represented if they are a company.

The proceedings will commence with a pre-mediation session where the designated mediator will set out the advantages of mediation and detail the nature and terms of the mediation proceedings. The parties must then confirm their agreement to submit the resolution of their dispute to mediation by way of a consent agreement that includes the rules by which the mediation process will be governed. Once the consent agreement has been formalised, the mediation session will take place with the mediator attempting to assist the parties to reach a mutually acceptable settlement of their dispute. The settlement reached by the parties will then be sent by the mediator to a judge of the *Julgado de Paz* for confirmation, which will result in it being treated in the same manner as a judicial decision.

On average, mediation proceedings last about two months. Each party pays a sum of between €50 to €75 towards the cost. The mediator is paid directly by the Portuguese State.

## Is there any obligation on litigants to mediate?

No. Even if the parties have a pre-existing contractual arrangement to mediate a dispute, they are not obliged to follow that ADR process as, unlike in arbitration proceedings, any of the parties is free to cease mediation at any point and initiate legal action before the judicial courts. Nevertheless, mediation is encouraged both by an increasing public awareness campaign organised by the Portuguese Government and private mediation associations, and by the Portuguese judicial courts whenever they have been called to settle a dispute.

Furthermore, under the [Portuguese Bar Association Code of Conduct](#), lawyers have an obligation to encourage their clients to reach an amicable resolution of their disputes, before accepting instructions to take a case before the judicial courts.

## Does the court have powers to support a mediation?

No. However, the [Portuguese Civil Procedure Code](#) provides that the court may, on its own motion, suspend judicial proceedings and submit the dispute to mediation, provided that all parties agree. The parties may also decide to submit the dispute to mediation at any point during the proceedings, suspending them for a period of up to six months.

## Does failure to mediate attract adverse cost consequences?

No.

### Are mediations confidential?

Yes. Under the Portuguese Civil Procedural Code, apart from the mediation agreement reached by the parties in the mediation proceedings, all aspects of the mediation proceedings must be kept confidential and cannot be taken into account during judicial proceedings except in exceptional circumstances (namely, for the protection of the physical or psychological well-being of any person).

### How are settlement agreements enforced?

In order to be enforceable before the judicial courts, settlement agreements must be confirmed by a judge from a judicial court through a specific judicial procedure, or by a judge of the *Julgados de Paz* where the mediation proceedings were carried out through the public mediation service available in those particular courts. Settlement agreements that have been confirmed by a judge are enforceable in the same manner as judicial decisions of the first instance judicial courts.

### Is there a system of accreditation and/or regulatory body for mediators?

At present there is no regulatory body for mediation. However, there are certain requirements an individual must fulfil to be eligible to be appointed as a mediator in the centres for mediation run by the Portuguese Ministry of Justice or the public mediation service available in the *Julgados de Paz*.

The requirements specify that such an individual must:

- (i) be over 25 years of age;
- (ii) be fully entitled to exercise his or her civil and political rights;
- (iii) possess a college degree;
- (iv) have completed a mediation course recognised by the Portuguese Ministry of Justice;
- (v) have no criminal record; and
- (vi) possess a good knowledge of the Portuguese language.

Mediators are also legally obliged to carry out their activities with independence, impartiality, credibility, competence, confidentiality and diligence, always maintaining high ethical standards.

A private organisation, the Association of Portuguese Mediators, is responsible for supervising the conduct of its associates and for ensuring their compliance with the code of ethics approved by it.

## What is the position of mediation in this jurisdiction?

The basis of mediation procedure in Russia was established by [Federal Law dated 27 July 2010 No. 193-FZ “on the alternative procedure of dispute resolution with the participation of a mediator \(mediation procedure\)”](#) (the “Mediation Law”), which came into force on 1 January 2011.

## How is a mediation conducted?

A mediation procedure is initiated and governed by an agreement to mediate concluded by the parties to a dispute. The standard mediation procedures of a particular mediation organisation may also apply where the agreement to mediate explicitly refers to those procedures. The parties may also specify in the agreement to mediate that a mediator may determine the procedure to be applied to the mediation himself/herself.

Mediation is conducted by one or several mediators. They can perform their activities on either a professional or a non-professional basis. Where the dispute has already been referred to the court or an arbitral tribunal, only professional mediators may mediate the dispute.

A mediator may be appointed by the parties. The parties may also request a particular mediation organisation to recommend a mediator or that such an organisation appoints a mediator. The costs of the mediation are shared between the parties unless otherwise provided by the agreement to mediate.

A successful mediation will result in the signing of a settlement agreement between all the parties.

## Is there any obligation on litigants to mediate?

Russian law contains no obligation to mediate a dispute. Under the Mediation Law, the existence of a mediation clause or an agreement to mediate will not prevent the parties submitting the dispute to the court or arbitral tribunal for consideration.

However, where the parties have provided in the mediation clause that, for the purposes of the mediation they will not apply to the court or arbitral tribunal for resolution of the dispute until a certain period of time since the dispute arose has elapsed, the court or arbitral tribunal will uphold that agreement until the relevant time period has expired, “unless one of the parties needs, in its own opinion, to protect its rights”. It appears from the literal meaning of this provision that it may be possible for a party to avoid the mediation clause altogether and refer the dispute directly to the court or arbitral tribunal. However, in the absence of any statutory guidance or court practice on the provision, its exact meaning is unclear.

## Does the court have powers to support a mediation?

Under Russian law, mediation is considered to be the right of parties to a dispute. Therefore, the courts are not empowered to compel parties to mediate a dispute.

At the same time, under the Russian Arbitration Procedure Code, the courts are entitled to encourage parties to settle disputes. Therefore, during the preliminary trial hearing a court is obliged to explain to the parties their right to mediate a dispute. Also, the court may at its own discretion adjourn a court hearing where the parties have themselves agreed to mediate their dispute.

## Does failure to mediate attract adverse cost consequences?

Russian law contains no explicit provision on the costs consequences where there has been a failure to mediate. However, the parties may agree otherwise in their agreement to mediate.

## Are mediations confidential?

Yes. Confidentiality is one of the main principles of the mediation procedure established by the Mediation Law. All information related to the mediation procedure is confidential and a mediator cannot be compelled to provide such information unless a federal law or an agreement between the parties to a dispute expressly provides otherwise. Accordingly, a mediator cannot be questioned in court in civil and commercial matters on issues learnt by him/her during the mediation procedure.

## How are settlement agreements enforced?

Where a dispute has been submitted for consideration to a court or arbitral tribunal but an intervening successful mediation has resulted in a settlement agreement before the court or tribunal gives its decision, the parties may request the court or arbitral tribunal to affirm the settlement agreement. A court-approved settlement agreement has the force of a court ruling. A settlement agreement approved by an arbitral tribunal is enforced as an arbitral award.

When parties resolve a dispute by mediation without applying to a court or arbitral tribunal, the resulting settlement agreement has the status of a contract and is enforced accordingly.

### Is there a system of accreditation and/or regulatory body for mediators?

There are no special accreditation requirements for non-professional mediators. However, to become a professional mediator one must complete certain, supplementary, training courses as required by the Mediation Law. They are held and diplomas are granted by organisations formally accredited to teach them.

Professional mediators and mediation organisations may join self-regulating mediation organisations but it is not mandatory under Russian law. These self-regulating mediation organisations are set up primarily to supervise members of such organisations.

## What is the position of mediation in this jurisdiction?

Mediation is a recognised form of ADR in Singapore. It is not only employed in matters of private disputes but forms an integral part of the dispute resolution mechanism in Singapore.

## How is a mediation conducted?

Mediation in Singapore has been largely institutionalised. In addition to court-based mediation, disputants may also undertake private mediation in a structured manner.

Court-based mediation is mediation conducted in the court by a judge or court official once parties have commenced litigation proceedings. The bulk of court-based mediation is handled under the Court Dispute Resolution mediation programme (“CDR”) at the Primary Dispute Resolution Centre (“PDRC”). Under the CDR programme, either the party or their lawyer can apply for mediation after all the pleadings have been filed and all parties involved agree. Upon receiving the written application for mediation, PDRC will schedule a mediation session which is presided over by an experienced District Judge who plays the part of a settlement judge.

Private mediation is spearheaded by the **Singapore Mediation Centre** (“SMC”), a non-profit-making organisation guaranteed by the Singapore Academy of Law. Typically, one or both parties contact SMC with a request for mediation. The case may also be referred to SMC by the courts. When the consent of all parties involved has been obtained, SMC arranges for the Mediation Agreement to be signed, appoints a mediator and tends to all other administrative details such as date, time and place for mediation. A party may reject the proposed mediator if it has valid reasons to do so (e.g. conflict of interests). The parties’ lawyers play a significant role in assisting the mediator and advising the parties throughout the mediation process.

## Is there any obligation on litigants to mediate?

Litigants are only obliged to mediate when mediation clauses have been incorporated in their contract. Where there is a breach of a mediation clause, normal contractual principles apply and parties are potentially entitled to various remedies, including damages or a stay of proceedings.

Nonetheless, courts today increasingly encourage mediation. For instance, particular efforts were made to promote mediation in cases with claims between S\$100,000 and S\$250,000 in the Subordinate Courts. Special pre-trial conferences were also implemented to inform the parties concerned of all dispute resolution programmes available. In fact, almost all cases at the Subordinate Courts undergo mediation.

## Does the court have powers to support a mediation?

Generally, courts cannot compel parties to mediate a commercial dispute.

However, the Subordinate Courts adopt a holistic approach in the provision of dispute resolution services to the wider community. Specially designed mediation programmes are available within the courts for a wide range of disputes, one of which is CDR where civil disputes are referred for mediation by the PDRC, as explained above.

Other mediation programmes offered in the courts include that offered by the Small Claims Tribunal which was established in 1985 with the passing of the Small Claims Tribunals Act. It handles disputes relating to contracts and claims not exceeding S\$10,000 in value. Once a claim is lodged in the Small Claims Tribunal, the parties concerned are obliged to attend a mediation session before a registrar. Where an amicable resolution cannot be reached, the matter will be fixed for hearing before a referee.

## Does failure to mediate attract adverse cost consequences?

The **Singapore Rules of Court** have been recently amended to the effect that adverse cost consequences may be ordered after paying regard to a party’s conduct in relation to mediation or ADR. Order 59 Rule 5(c) of the Rules of Court provides that when the Court is exercising its discretion as to costs, it shall take into account “the parties’ conduct in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution”. While there is no established case law examining the effect of this amendment, it suggests that Singapore is adopting a progressively active stance in encouraging ADR, particularly mediation.

## Are mediations confidential?

Yes, mediations are confidential. Apart from the mediator and the parties, no third party is privy to the mediation proceedings. Discussions which may prejudice a party will not be revealed in court in the event that mediation is unsuccessful. Further, matters raised in private interviews between the mediator and a party during the mediation process cannot be disclosed to any other party by the mediator. Where mediation sessions are conducted at SMC, mediators and the parties are bound by an agreement which prohibits the disclosure of information relating to the mediation.



Several statutory provisions have been enacted to safeguard the confidentiality of mediation through privilege and secrecy provisions. These provisions include sections 19 and 20 of the Community Mediation Centres Act and section 23 of the Evidence Act.

### How are settlement agreements enforced?

Usually, parties in private mediations would set out the terms of the settlement agreement in writing. Once both parties have signed the document, it is legally binding and its enforceability is governed by normal contractual principles. The settlement agreement may also provide for its terms to be recorded as a consent judgment or court order where there are pending court proceedings (e.g. CDR mediation sessions). On rare occasions, parties may agree to have the terms of the settlement subsequently recorded as a consent arbitral award.

### Is there a system of accreditation and/or regulatory body for mediators?

This depends on the type of mediation employed.

In private mediations, there is no law or system regulating the accreditation or standards of mediators. Thus, SMC has designed its own scheme of mediator training and accreditation. SMC invites nominations from various professional and trade organisations. These nominees attend a mediation workshop at SMC and depending on their assessment after the workshop, they may be appointed to the Panel of Principal Mediators. SMC's accreditation is subject to renewal every year. Under the SMC Mediation Procedure, a mediator has to comply with the SMC's Code of Conduct, which guides the mediator with regard to issues such as neutrality, impartiality and confidentiality.

On the other hand, mediations at CDR are conducted by judges as it is presumed that they will command greater respect and confidence from the parties in dispute. Settlement judges are directed by the Model Standards of Practice for Court Mediators of the Subordinate Courts. They are also required to subscribe to the Code of Ethics for Court Mediators of the Subordinate Courts of Singapore. The Code of Ethics covers issues concerning informed consent, conflict of interests, neutrality, impartiality and confidentiality.

## What is the position of mediation in this jurisdiction?

Although mediation is a recognised form of ADR, there is not a strong mediation culture in Spain. However, the legislator's increasing interest in the practice of mediation led to the recent passing into law of the Spanish Mediation Act 2012 (*Ley 5/2012, de 6 de julio (RCL 2012, 947)*), on mediation in civil and commercial matters (the "Mediation Act"). The Mediation Act transposes into Spanish law Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008, on certain aspects of mediation in civil and commercial matters.

## How is mediation conducted?

A neutral mediator is directly appointed by the parties. The mediator will assist the parties while working towards a negotiated settlement of their dispute but the parties will remain in control of the process and the outcome of the mediation at all times. Parties are often assisted by their lawyers during the mediation sessions and the costs are usually shared between the parties, especially if an agreement is not reached.

## Is there any obligation on litigants to mediate?

No, there is no legal obligation on litigants to attempt mediation in commercial disputes unless they have previously agreed to do so.

## Does the court have powers to support mediation?

The Spanish Civil Procedure Rules do not provide any particular judicial powers to support mediation. Judges may invite litigants appearing before them to mediate, but they may not act as mediator themselves in that mediation. However, courts are increasingly making orders compelling parties to mediate, particularly in family disputes, despite the lack of any legal obligation for the parties to do so.

## Does failure to mediate attract adverse cost consequences?

No, there are no cost-related consequences for parties who fail to mediate. However, where such a failure is in breach of a prior agreement between the parties to mediate, refusal to do so could constitute breach of contract, although any damages payable would be at the discretion of the judge.

## Are mediations confidential?

Yes, mediations are intended to be confidential. Article 9 of the Mediation Act states that the process and materials used in the proceedings must remain confidential.

Agreements to mediate also usually include express confidentiality clauses establishing monetary penalties for a breach of the duty of confidentiality.

## How are settlement agreements enforced?

As a general rule, settlement agreements reached after mediation will be enforced like any other contractual agreement. However, the parties can decide to make their agreement judicially enforceable by executing it before a notary public (provided that the parties comply with certain requirements). If the mediation process takes place while judicial proceedings are pending, any eventual settlement agreement reached between the parties could be validated by the court, in which case the settlement agreement would also become judicially enforceable.

## Is there a system of accreditation and/or regulatory body for mediators?

Title three of the Mediation Act, "*Mediators' Statute*", lays down the requirements for acting as a mediator. Mediators must hold an official university degree or have advanced vocational education and specific training to practise mediation, which can be gained by completing one or more specific courses run by duly certified institutions.

Impartiality is a requirement for mediators. Furthermore, the Mediation Act includes a provision requiring mediators to have civil liability insurance.

## What is the position of mediation in this jurisdiction?

Mediation is a recognised form of dispute resolution and has received increased attention during recent years in both academic and commercial circles. Well-known mediation institutes include the Mediation Institute of the Stockholm Chamber of Commerce (the “SCCMI”) and the West Sweden Chamber of Commerce and Industry (“WSCCI”).

On 1 August 2011, Sweden implemented EU Directive 2008/52/EC by introducing the Law (2011:860) on mediation in certain civil law disputes (Sw. *lag (2011:860) om medling i vissa privaträttsliga tvister*) (the “Mediation Law”). The Mediation Law applies to mediation proceedings in Sweden which are not conducted within the framework of already initiated court proceedings, arbitration proceedings or proceedings before a public authority. The Mediation Law addresses issues which have previously been of concern to parties considering mediation, such as confidentiality, enforcement and limitation, and it might therefore serve to increase interest in resolving disputes through mediation.

## How is a mediation conducted?

Although the mediation procedure can differ from case to case, it can generally be said to consist of the following five, simplified, phases: (i) a preparatory phase in which practical factors such as the costs and timeframe are decided upon and the mediator explains the process to the parties; (ii) a plenary session during which the parties present their cases; (iii) private sessions between the mediator and each party; (iv) a negotiation phase; and (v) a final phase where a settlement agreement is concluded, assuming that the parties have reached a solution. It is not unusual for mediating parties to have their legal counsel attend the proceedings.

Although the actual mediation process is usually conducted in the manner described above, the regulatory framework governing the mediation will differ depending on the context in which it is initiated.

Parties can choose to initiate mediation and appoint a mediator before legal proceedings are commenced. This type of mediation is governed by the Mediation Law. It is not unusual to find model clauses in commercial agreements prescribing that mediation shall be conducted under the rules of a mediation institute. Both the SCCMI and the WSCCI have a set of rules which the parties can choose to adopt to govern their mediation.

As mentioned above, the Mediation Law is not applicable when disputing parties choose to mediate after litigation has already been commenced. In these circumstances, as set out in the Code of Judicial Procedure (Sw. *Rättegångsbalken*), the court can, subject to both parties’ consent, appoint a mediator. It is important, in this context, to distinguish between formal mediation and separate attempts made in court to settle the dispute where the judge assists the parties to reach a settlement.

The cost of mediation, which is typically shared between the parties, will vary depending on, for example, the complexity of the dispute and the disputed amount. Mediating a dispute with a disputed amount of €5m with the SCCMI will cost approximately €20,000.

## Is there any obligation on litigants to mediate?

Subject to any contractual arrangements between parties to mediate a dispute, there is no obligation on disputing parties to mediate.

## Does the court have powers to support a mediation?

Under new legislation, courts increasingly have a duty to encourage parties to settle their disputes. Since 1 August 2011, courts have been obliged to encourage the parties to reach a settlement if it is not inappropriate, taking into account the nature of the dispute and other circumstances. Subject to the parties’ consent, the court can go a stage further and order that mediation shall take place. In these circumstances, a mediator will be appointed by the court. The mediator, who is paid for by the parties, will normally be a person who is not associated with the court and shall never be the judge hearing the case. The National Courts Administration (Sw. *domstolsverket*) keeps a record of mediators appointed by courts to act in such mediations.

## Does failure to mediate attract adverse cost consequences?

Swedish law does not impose any requirements on parties to a dispute to mediate. The court, therefore, has no power to impose any kind of sanction – including cost sanctions – on parties who refuse to do so. However, if the failure to mediate is in breach of a prior agreement to do so, it will be treated in the same way as any other breach of contract.

## Are mediations confidential?

In mediations conducted under the Mediation Law, the mediator and the mediator’s assistant are bound by a statutory duty of confidentiality and cannot reveal any information they have gained during the

mediation proceedings. Hence, the mediator and the mediator's assistant cannot, unless prescribed in law or if the party with the benefit of the confidentiality undertaking agrees, give evidence in court regarding what has taken place during the mediation. However, this undertaking does not extend to the parties. For this reason, the parties must enter into a separate confidentiality agreement or adopt mediation rules which include confidentiality provisions, to ensure that confidentiality is maintained.

In mediations conducted under the rules of the SCCMI, the mediator, the mediation institute, the parties and any other persons participating in the mediation are bound by a duty of confidentiality with regard to information disclosed during the mediation, unless the parties agree otherwise.

### How are settlement agreements enforced?

The rules of the SCCMI prescribe that the parties can, subject to the consent of the mediator, agree to appoint the mediator as an arbitrator and ask him to confirm the settlement agreement in the form of an arbitral award. This will enable the settlement to be enforced as such.

Parties to a mediation regulated under the Mediation Law can also apply to the court in a district in which any of the parties is domiciled, for the court to declare that the settlement agreement shall be enforceable as a court order.

If none of the measures above is adopted, a settlement agreement will be enforceable as a contract.

In this context, it should be noted that failure of the parties to reach a settlement does not prevent them from subsequently litigating or arbitrating the case. The Mediation Law sets out that if a limitation period is running when mediation is commenced, that period may not expire until one month after the mediation is concluded (subject to this not being contrary to Sweden's international commitments).

### Is there a system of accreditation and/or regulatory body for mediators?

There is no regulatory body for mediators. However, the National Courts Administration has been appointed to provide information on mediation. This information, which is meant to assist the parties in their choice of a mediator and to improve the quality of the mediation offered in Sweden, shall include codes of conduct for mediators (in particular, the European Code of Conduct).

The SCCMI and the WSCCI offer mediation courses. Participants who successfully undertake such courses are given the title of Certified Mediators (SCCMI) and Accredited Mediators (WSCCI).

## What is the position of mediation in this jurisdiction?

Mediation is well-recognised in the UK as an accepted form of ADR. Parties contemplating court litigation are under an obligation to consider whether their dispute could be settled by ADR and the courts have various powers to encourage parties to mediate (see below). When considering the implementation of the EU Directive, the Ministry of Justice considered that law and practice in England and Wales already complied in large part with the Directive's provision, but that additional legislation was needed to bring particular aspects into force. These were implemented by the [Cross-Border Mediation \(EU Directive\) Regulations 2011](#), which came into effect on 20 May 2011, and amendments to [Part 78 of the Civil Procedure Rules](#). The provisions only apply to cross-border mediations as the Ministry of Justice has decided that the provisions of the Directive should not be extended to UK domestic mediations.

## How is a mediation conducted?

A mediator may be appointed by the parties or by a mediation institution, such as the Centre for Effective Dispute Resolution ("CEDR") or the [ADR Group](#). Direct party appointment is increasingly used. Parties do not need to be legally represented, although lawyers usually attend on commercial disputes to advise and assist with the presentation of their client's case. While the mediation process is intended to be flexible, a format has developed which is often adopted in practice. Following an initial plenary session, the parties separate and the mediator will shuttle between them, assisting them, if possible, to reach a mutually acceptable position. Mediations are usually scheduled to last one day. There are no audited figures but it is understood that the settlement rate is 50 – 75%.

## Is there any obligation on litigants to mediate?

Subject to any pre-existing contractual arrangement between parties to mediate a dispute, there is no obligation on litigants to mediate commercial disputes. However, under the [Solicitors Code of Conduct](#) lawyers are required to advise clients of the option to mediate and its applicability to the dispute in question. Further, courts increasingly encourage mediation: the Allocation Questionnaire that parties must complete before a case goes to court requires legal representatives to confirm that they have explained to their clients the various ADR options. A court may order a stay of proceedings on its own initiative if it considers it would be valuable to permit the parties time to mediate, and can impose costs sanctions where it considers that a party has unreasonably refused to attempt to mediate. However, the Court of Appeal held in 2004 that forcing parties to mediate may breach their right to a fair trial under Article 6 of the European Convention on Human Rights.

## Does the court have powers to support a mediation?

Where the parties have previously agreed in a contract that they will mediate a dispute before commencing litigation, the court may stay court proceedings brought in contravention of that agreement. In the absence of such an agreement, and although the courts cannot compel parties to mediate a commercial dispute, they increasingly consider "orders to mediate" requiring the parties to attempt mediation. A party that ignores such an order will almost certainly face cost sanctions. The basis for such orders is the overriding objective in the Civil Procedure Rules ("CPR") to deal with matters justly and proportionately.

Specific court guides and an increasing body of case law emphasise the need for ADR (particularly mediation) to be considered as a method of resolving a dispute. All pre-action protocols (which are procedural rules setting out the obligations on parties before proceedings are formally commenced) include standard wording requiring the parties to consider whether ADR is appropriate.

CPR 1.4 also explicitly states that the courts should engage in active case management which will include "encouraging parties to use an alternative dispute procedure if the court considers that appropriate...", whilst CPR 26.4 allows parties, when completing the Allocation Questionnaire, to request a stay of proceedings to attempt to settle their dispute.

## Does failure to mediate attract adverse costs consequences?

Failure sufficiently to consider ADR may result in a court imposing adverse costs orders on one or more of the parties to litigation.

The burden will usually be on the unsuccessful party at trial to justify why a costs sanction should be imposed on the successful party for failure to consider ADR. (In the UK, the successful party to litigation is usually entitled to claim reimbursement of a proportion of its costs from the unsuccessful party.) The courts have been willing to impose costs sanctions where refusal to engage in ADR was deemed unreasonable, taking into account factors such as the apparent strength of a party's case.

### Are mediations confidential?

Generally, yes. Agreements to mediate will usually include express provisions regarding confidentiality. The model agreements used by the two leading mediation organisations, ADR Group and CEDR, incorporate confidentiality clauses. It is not only the mediation itself that is confidential; the sessions between the mediator and each party before, during and after the mediation will also usually be confidential.

Even in the absence of a confidentiality agreement, discussions during a mediation will generally be held to be confidential, given their character. Further, they are conducted on a “without prejudice” basis, meaning that submissions made in an attempt to reach settlement will not usually be admissible in later court proceedings relating to the same subject matter, subject to some limited exceptions (such as agreement of all the parties or a legal obligation to disclose the information). Any express confidentiality provisions in essence reinforce the without prejudice nature of the mediation. However, where the parties agree, the “without prejudice” nature of the mediation can be waived and the court has power to enquire into the mediation, even to the extent of calling the mediator as witness: this is very rare.

### How are settlement agreements enforced?

A settlement entered into at a mediation governs the contractual relationship between the parties and is therefore enforced as a contract.

Following the implementation into UK law of the Directive, an agreement reached in a cross-border mediation (as defined by the Directive) may be enforced by way of an application to court under the CPR.

### Is there a system of accreditation and/or regulatory body for mediators?

At present there is no regulating body for mediation and neither are there any statutory qualifications necessary to act as a mediator. However, in practice most mediators have some form of accreditation following assessed training by regulated bodies. When appointing a mediator, membership of a respected mediation organisation is often taken into account, as well as the mediator's experience in the field of the relevant dispute.

The two leading mediation organisations in the UK are CEDR and the ADR Group (see above). Increasingly their role is in the training of mediators and general education of the use of ADR, rather than as appointing bodies.

## What is the position of mediation in this jurisdiction?

There is a strong public policy in the US favoring methods of alternative dispute resolution, including mediation. The mediation process is essentially a facilitated negotiation between the parties to a dispute in order to reach a mutually acceptable settlement. Mediation can be a useful tool in complex commercial litigation to enable parties to manage risk, avoid litigation delay or reduce costs and can be commenced at any stage of a litigation, even prior to a litigation being filed. Mediation is in many cases a voluntary form of dispute resolution, although parties may have contractual obligations to mediate due to contractual mediation clauses and in some cases a court may require litigants to submit their dispute to mediation.

## How is a mediation conducted?

Parties select a mediator by agreement, with the assistance of an organization such as **JAMS** (formerly known as Judicial Arbitration and Mediation Services, Inc.) or the American Arbitration Association (“**AAA**”), or, in some cases, from a roster of court-approved mediators where the mediation relates to a dispute being litigated in a court that requires or encourages parties to submit disputes to mediation. Parties may be, and typically are, represented by counsel. Parties also typically need to have someone present who is authorised to make decisions regarding resolution of the dispute.

Mediation is more informal than arbitration or litigation and does not use rules of evidence or procedure, other than those procedures agreed by the parties. A mediation may include a joint conference with the parties and their counsel to set the agenda and define the issues, and then separate caucus sessions between the mediator and each party to discuss any specific issues or concerns affecting a settlement. A mediation may include the submission of written legal briefs or documentary evidence regarding the relevant issues. The mediator does not rule on questions of fact or law, does not render a decision or award and does not have authority to impose a settlement. The end result for a successful mediation would be a settlement agreed on by the parties.

## Is there any obligation on litigants to mediate?

Mediation is typically voluntary and both parties therefore need to consent to submit their dispute to mediation. However, parties may have contractual obligations to mediate due to mediation clauses in a relevant contract and in some cases a court in which the parties are litigating may require the parties to submit to mediation.

## Does the court have powers to support a mediation?

Courts may resolve disputes about the enforceability of a mediation clause in a contract. In addition, judges may encourage parties to a litigation to pursue out-of-court settlement through the mediation process. In some cases, the court may even order parties to try to mediate their dispute (e.g., New York courts have procedural mechanisms in place for handling such mediations), although the court cannot force the parties to agree to a settlement. Court-ordered mediations are usually conducted before a judge or magistrate judge, or one of a number of court-approved neutral mediators.

## Does failure to mediate attract adverse cost consequences?

In general, any party can withdraw from mediation at any time without adverse costs consequences (other than any costs or fees associated with the mediation itself). As a general matter, parties to a dispute in the US bear their own legal costs (with the exception of disputes involving certain federal statutes that contain fee-shifting provisions or agreements to pay costs under a settlement agreement or other contract). However, where the parties have been ordered by a court to submit to mediation, the court may impose sanctions, including awarding costs, if one party fails to participate in the mediation in good faith.

## Are mediations confidential?

Yes. Parties to mediation typically agree to confidentiality, and the model procedures set out by organisations such as the AAA provide that the mediator and parties shall treat as confidential any information disclosed during the process (subject to applicable law). As a general matter, settlement discussions, including statements made during a mediation, are inadmissible as evidence in a court proceeding. This is due to the well-established and strong public policy in favour of settlement of disputes. Of course, facts and documents otherwise admissible in evidence in a court proceeding will not be rendered inadmissible simply by their use in mediation.

### How are settlement agreements following a mediation enforced?

Any settlement agreement reached through the mediation process must be reduced to writing and executed by the parties. Neither the mediator nor any organisation such as JAMS or AAA has the authority to enforce a settlement. Settlement agreements may be enforced in the same way as any other contractual agreement – either through arbitration (if the agreement contains an arbitration clause) or in court.

### Is there a system of accreditation and/or regulatory body for mediators?

Although each state may have rules or guidelines related to mediators, there is no general system of accreditation or regulatory body for mediators in the US. Mediation organizations such as JAMS or AAA may set minimum qualifications for their mediators, including requisite professional experience and licences, amount of training in mediation skills or continuing education requirements and certain courts maintain rosters of court-approved mediators. Most mediators are lawyers or former judges, although mediators may also possess other professional backgrounds or expertise.



## What is the position of mediation in this jurisdiction?

In Vietnam, the terms “mediation” and “conciliation” mean the same thing and are often used interchangeably in the legislative documents, relevant commentary and the business community. For this reason, this chapter refers to “conciliation”, where this is the language used in the relevant documentation.

Legislative provisions relating to ADR are found in a variety of documents, including the following:

- > in 2003, Vietnam promulgated the *Ordinance on Commercial Arbitration*, in response to “the growing concern of foreign entities engaged in business in Vietnam to be able to enter into arbitration arrangements of their choice”,<sup>1</sup> which was replaced by the *Law on Commercial Arbitration* (the “Law”) with effect from 1 January 2011;<sup>2</sup>
- > the *Commercial Law 2005*, which applies to commercial dispute resolution, provides for one form of dispute resolution to be “conciliation between the parties in which a body, organization or individual selected by the parties acts as mediator”;<sup>3</sup>
- > there is specific legislation in place in relation to local mediation (sometimes referred to as “grassroots” mediation)<sup>4</sup> and mediation of labour disputes,<sup>5</sup> and there is a large number of local mediators in Vietnam with responsibility for enforcing emotional and value-based conflicts, familial, matrimonial and minor civil disputes, minor administrative disputes and minor property disagreements;<sup>6</sup> and
- > there is provision in the *Civil Procedure Code 2004* (as amended in 2011 (“CPC”)) for court-annexed conciliation between parties to civil litigation.<sup>7</sup>

Further, in 2007, mediation/conciliation was added to the functional scope of the Vietnam International Arbitration Centre (“VIAC”), which issued its own conciliation rules which took effect in September 2007 (“VIAC Rules”).<sup>8</sup>

## How is a mediation conducted?

In local mediation, mediators first talk with the disputing parties separately in order to try and reach an agreement. If this fails, the parties are brought together, usually in the local ward or hamlet offices,<sup>9</sup> and mediators explain the parties’ bargaining positions, drawing on relevant government policies where applicable.<sup>10</sup> If mediation fails, parties are referred to judicial or administrative procedures to resolve disputes.<sup>11</sup>

In court-annexed mediation/conciliation, the presiding judge conducts the conciliation session and the involved parties present their opinions on the disputed contents and propose matters to be conciliated. The judge is required to identify matters on which the parties have reached agreement, and have not reached agreement.<sup>12</sup> This has been described as an “evaluative” mediation model.<sup>13</sup>

Commercial mediation undertaken voluntarily by the parties is generally a structured process involving an independent party acting as mediator, who assists the parties to attempt to achieve a resolution to the dispute. For example, under the VIAC Rules, the conciliator may conduct the proceedings in any manner appropriate to the nature and substance of the dispute,<sup>14</sup> make proposals at any stage for the settlement of the dispute,<sup>15</sup> and may meet in person with each party separately or both parties together.<sup>16</sup> Mediation may also be conducted by arbitrators during the arbitration process, at the parties’ request, under the Law.<sup>17</sup>

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<sup>1</sup> Michael Polkinghorne and Le Cong Dinh, ‘Vietnam’ in Michael Pryles (ed.), *Dispute Resolution in Asia* (2006), 449-472, page 451.

<sup>2</sup> See *Law 54 on Commercial Arbitration* (17 June 2010), implemented by *Regulations Implementing the Law on Commercial Arbitration* on 28 July 2011 (‘Law on Commercial Arbitration’).

<sup>3</sup> *Commercial Law 2005*, Article 317(2).

<sup>4</sup> *Ordinance on Organisation and Operation of Conciliation*, passed by the Standing Committee of the National Assembly in 1998.

<sup>5</sup> Decree 133/2007/ND-CP dated 8 August 2007.

<sup>6</sup> See John Gillespie and Albert H Y Chen, *Legal Reforms in China and Vietnam: A comparison of Asian communist regimes* (2010), page 196.

<sup>7</sup> *Civil Procedure Code 2004*, as amended by the *Amended Civil Procedure Code 2011* (‘CPC’), Articles 179 to 195.

<sup>8</sup> See *VIAC Conciliation Rules* available at <http://www.viac.org.vn/en-US/Home/mediation-117/228/Conciliation-Rules.asp>.

<sup>9</sup> John Gillespie and Albert H Y Chen, *Legal Reforms in China and Vietnam: A comparison of Asian communist regimes* (2010), page 196.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> CPC, Article 185a.

<sup>13</sup> Jean-Claude Goldsmith, Arnold Ingenlousz and Gerald H Poinon, *ADR In Business: Practice and Issues across Countries and Cultures Volume II* (2011), page 553.

<sup>14</sup> VIAC Conciliation Rules, Article 7.3.

<sup>15</sup> VIAC Conciliation Rules, Article 7.4.

<sup>16</sup> VIAC Conciliation Rules, Article 9.1.

<sup>17</sup> *Law on Commercial Arbitration*, Article 9.

### Is there any obligation on litigants to mediate?

Court-annexed mediation is a compulsory stage in the period of preparation for trial at first instance, except for the cases in which the conciliation is not allowed or is unable to be carried out.<sup>18</sup> For example, mediation is a mandatory part of the divorce proceedings<sup>19</sup> or labour disputes, for which there are specific labour conciliation bodies.<sup>20</sup>

Further, local mediation is obligatory in real estate disputes,<sup>21</sup> and if they cannot resolve it by such conciliation, the People's committee of the commune where the real estate is located will co-ordinate with the Vietnam Fatherland Front, its member organizations and other social organizations in order to conciliate such dispute.<sup>22</sup>

### Does the court have powers to support a mediation?

Under Article 41(4) of the CPC, judges have a duty/power in civil litigation to “carry out conciliation to enable the concerned parties to reach an agreement on settlement” and to “issue a decision acknowledging the agreement of the concerned parties”. As outlined below, a settlement reached in a court-annexed conciliation is enforceable by the court.

### Does failure to mediate attract adverse cost consequences?

A failure to mediate does not attract adverse costs consequences in Vietnam. However, if the parties reach an agreement on settlement of the case prior to the commencement of a court first instance hearing, they will only be liable to pay 50% of the relevant court fee.<sup>23</sup>

### Are mediations confidential?

There are no confidentiality provisions for court-annexed or local mediation in Vietnam. For mediation conducted under the auspices of VIAC, the conciliator, the VIAC and parties are required to keep confidential all matters relating to the conciliation proceedings, including settlement agreements<sup>24</sup>. In addition, parties must agree not to use “in any form as a ground or evidence in arbitral or judicial proceedings” information or documents disclosed in the course of the conciliation proceedings.<sup>25</sup> Further, agreements to mediate frequently contain confidentiality provisions.

### How are settlement agreements enforced?

In local mediation, the mediation process ends when the parties have reached an agreement and voluntarily enforce its terms<sup>26</sup>. However, this type of agreement is not legally enforceable.

In court-annexed conciliation, where the parties reach an agreement on all the matters in the dispute and no party withdraws its consent to the agreement within seven days from the date of preparation of the record of the settlement, the judge presiding over the conciliation shall issue a decision acknowledging the settlement of the parties. This decision has legal effect and may not be subject to appeal or protest in accordance with usual appeal provisions.<sup>27</sup>

Where a mediation conducted by an arbitral tribunal under the Law results in a settlement, the Arbitration Tribunal will prepare minutes of the successful mediation to be signed by all parties and the arbitrator, and the Arbitration Tribunal shall issue a decision recognising the agreement of the parties. This decision shall be final and have the same validity as an arbitral award.<sup>28</sup>

Commentators have noted that there is a need to put in place in Vietnam laws that support mediated settlements reached outside arbitral or court proceedings.<sup>29</sup>

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<sup>18</sup> CPC, Article 180.

<sup>19</sup> Law on Marriage and Family, Article 88.

<sup>20</sup> See, eg, CPC, Article 31.

<sup>21</sup> Decree 181/2004/ND-CP dated 29 October 2004, Article 159.

<sup>22</sup> Law on Land, Article 135.

<sup>23</sup> CPC, Article 131.3

<sup>24</sup> VIAC Conciliation Rules, Article 14.

<sup>25</sup> VIAC Conciliation Rules, Article 20.

<sup>26</sup> Decree 160/199/ND-CP dated 18 October 1999, Article 16.1.

<sup>27</sup> CPC, Articles 186, 187 and 188.

<sup>28</sup> *Law on Commercial Arbitration*, Article 57.

<sup>29</sup> See, eg, Jean-Claude Goldsmith, Arnold Ingenlousz and Gerald H Pointon, *ADR In Business: Practice and Issues across Countries and Cultures Volume II* (2011), page 553.

### Is there a system of accreditation and/or regulatory body for mediators?

There is no formal system of accreditation or regulatory body for mediators. In relation to local mediation, the current legislative scheme provides that there shall be autonomous mediation teams “at the grassroots level”, staffed by local volunteers who are “over 18 years old and of good character”.<sup>30</sup> In court-annexed mediation/conciliation, as outlined above, the mediation may be conducted by a judge.

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<sup>30</sup> See John Gillespie and Albert H Y Chen, *Legal Reforms in China and Vietnam: A comparison of Asian communist regimes* (2010), page 196.

## Thank you

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