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# Alternative Dispute Resolution

A brief international guide

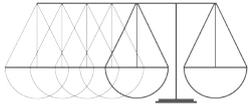
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# Alternative Dispute Resolution

## A brief international guide

The Position is stated as at 22 February 2016.

### Contents

European Union	4	Greece	24
Austria	6	Hungary	26
Bulgaria	8	Italy	30
Czech Republic	12	Luxembourg	34
Denmark	14	Poland	36
England & Wales	18	Portugal	40
France	20	Sweden	44
Germany	22	Switzerland	46
		Ukraine	48

# REBECCA ATTREE

## EUROPEAN UNION

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Mediation in Europe has become increasingly regarded as a reliable method of resolving disputes. This is in part due to the adoption of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters ('the Directive').

### Cross Border Recognition and Enforcement

One of the main aims of the Directive is that mediated settlement agreements are recognised and enforced in one Member State if made in another Member State as if they were court judgments. This is an important step in enhancing the efficacy of cross border mediation within the EU. It provides that mediation settlements are enforceable by a 'mediation settlement enforcement order'.

Article 6 of the Directive requires the 'explicit consent' of all parties for enforceability to be recognised by a court. Some countries require for example notarial execution of a settlement agreement. Otherwise the practical way to deal with this in cross border settlement agreements is for an enforceability clause to be drafted in the mediation settlement agreement. A model clause for inclusion in a mediation settlement agreement under English law can be viewed at <http://www.rebeccaattreemediator.com/publication/the-impact-of-the-eu-mediation-directive/>.

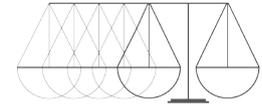
So far there are no international conventions that deal with recognition and enforcement of mediations between parties outside the EU, or with one or more party outside the EU. In these cases the mediation settlement agreement will be enforceable in contract.

The use of Med Arb can create a settlement in the form of an arbitral award enforceable under the New York Convention on the Recognition and Enforceability of Arbitral Awards. Med Arb is a process whereby it is agreed from the outset either a) if a mediation does not settle the dispute is immediately determined by arbitration or b) that the settlement reached at mediation will be handed down as an arbitral award.

Generally the question of legal and other costs are resolved at a mediation if the liability and quantum issues are settled. The costs element of the mediation settlement agreement would then be recognised and enforced in the same way as the substantive settlement. If the costs issues remain unresolved, that part of the dispute would be referred back to the court where the proceedings were being heard and costs would be assessed in accordance with the rules of the jurisdiction seised.

### Limitation Periods

A further step in favour of mediation is Article 8 of the Directive, which provides that member states shall ensure that the limitation or prescription period for any litigation or arbitration shall be extended during the period of the mediation process.



## Quality of Mediation

The Directive required Member States to provide systems for quality control of mediation services, judicial powers to invite parties to mediate, confidentiality of mediations and encourage Codes of Conduct and training of mediators.

## Confidentiality

Article 7 of the Directive provides that confidentiality of the mediation process will be preserved, unless (i) there are overriding policy considerations; or (ii) where disclosure of a mediation settlement agreement is necessary to enforce that agreement; or (iii) the parties agree.

## Conclusion

The implementation of the Directive in the EU has been a welcome advent for mediation. It puts mediation at the forefront of ADR, and gives a clear message that it is an effective and highly satisfactory method of resolving many types of disputes.



## AUSTRIA

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**Is mediation mandatory for any type of claim in your country before commencing arbitration or litigation? Can the court or tribunal compel the parties to participate in an ADR process?**

Mediation is optional in general. However there are some fields of law, such as family law, where the court can demand an attempt for mediation. Further special quasi mediation institutions have to be used/passed before going to court in an attempt to reach out-court-settlements in some cases such as private insolvencies, between tenants/landlords in big cities, between neighbours, in some states concerning public procurement, between doctors/patients (optional), and in some B2C businesses e.g. telecoms.

**If it is not mandatory, are there any consequences of not agreeing to mediate? (e.g. costs consequences)**

No.

**Is it common to include obligations to negotiate and mediate before commencing arbitration or litigation in commercial contracts? If so, are those clauses respected and enforceable?**

It becomes more common; those clauses are not enforceable practically if one party is not willing to participate in pre-trial-negotiations.

**Will parties frequently seek to negotiate a dispute directly without a lawyer or an independent neutral such as a mediator?**

Infrequently.

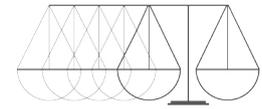
**How are mediators selected for an appointment? Are they usually legally qualified?**

There is an official list of mediators published in the internet by the Ministry of Justice. Every member listed has to prove the standards of qualification required by law and hold insurance. Only those registered in this list may be called a "registered mediator". The expression "mediator" itself is not protected. A mediator need not be a jurist.

There are several organisations/panels of mediators; e.g. one organized by lawyers, of whom all Bars in Austria are a member.

**Is the mediator purely facilitative or are they evaluative (i.e. give a recommendation on the terms upon which the dispute should be resolved)?**

They can be either.



## How is a mediation settlement agreement enforceable?

If the parties wish the settlement agreement reached at mediation to be court enforceable, local district courts are expressly obliged in the Civil Procedure Code to protocol such settlements as court-settlements without procedure/prior filing a law suit, but half the fee for filing a law suit would have to be paid to the court. Such an agreement can be made enforceable by a notarial deed too.

## What types of ADR process are commonly used? Is a particular process popular? If so, for which types of dispute?

If used at all, mediation and arbitration, and in specific cases, expert determination. Adjudication such as is used in England to avoid litigation in construction cases does not exist.

## Should I mediate in your country? What are the pros and cons?

There are qualified bodies and many mediators with professional skills and various backgrounds to be chosen according to the type of conflict.

Mediation is still not very common as an ADR method in general, because many cases are settled by an enforceable agreement during litigation initiated by or made with the help of the judge or by ongoing negotiations between the lawyers.

## Should I arbitrate under the laws of your country? What are the pros and cons?

There are well known and respected institutional arbitration tribunal courts in Vienna, such as the arbitration court of the ICC Austria or the Vienna International Arbitration Centre. The city is considered a neutral field for solving disputes between parties from the Eastern and Western hemisphere or Balkan states too.



## BULGARIA

Natalia Alexandrova

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**Is mediation mandatory for any type of claim in your country before commencing arbitration or litigation? Can the court or tribunal compel the parties to participate in an ADR process?**

Mediation is not mandatory in Bulgaria. However the court is obliged to invite the parties to reach an agreement and to clarify to it the consequences of such an agreement.

In order to comply with the European legislation changes are foreseen in the Bulgarian Civil Procedure Act as well as in the field of Family law that will make ADR obligatory.

Recent changes has been made in the Customer Protection Act whereby ADR is introduced in compliance with Regulation (EU) No 524/2013 on Online Dispute Resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR)

**If it is not mandatory, are there any consequences of not agreeing to mediate? (e.g. costs consequences)**

For the moment there are no consequences for the parties for not agreeing to mediate.

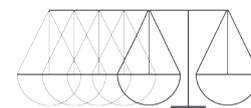
**Is it common to include obligations to negotiate and mediate before commencing arbitration or litigation in commercial contracts? If so, are those clauses respected and enforceable?**

It is common for Bulgarian commercial contracts to contain a clause for a dispute resolution via negotiations. Those clauses are respected by the contracting parties but they are not enforceable.

ADR is gaining popularity in Bulgaria at the moment. There are more than 1400 registered mediators as well as platforms for on-line mediation.

**Will parties frequently seek to negotiate a dispute directly without a lawyer or an independent neutral such as a mediator?**

It is common for the parties to negotiate directly and in case they use a third person it is often a lawyer. A greater part of the registered mediators are actually lawyers.



## How are mediators selected for an appointment? Are they usually legally qualified?

In order to be selected for an appointment a mediator needs to be registered in the Unified register of mediators. A mediator must meet the following requirements:

- has not been convicted for criminal offences at public law;
- has successfully undergone a course for mediators
- has not been deprived of the right to exercise a profession or conduct an activity;
- has a permit for long-term or permanent residence in the Republic of Bulgaria, in the event the person is a foreign national;
- has been entered in the Uniform Register of Mediators with the Minister of Justice.

Although a significant part of the mediators in Bulgaria are legally qualified according to the Mediation act they are not allowed to give legal advice.

## Is the mediator purely facilitative or are they evaluative (i.e. give a recommendation on the terms upon which the dispute should be resolved)?

The mediators in Bulgaria are purely facilitative.

## How is a mediation settlement agreement enforceable?

The mediation settlement agreement is as enforceable as any other agreement after an arbitration or state court proceedings.

A mediation settlement agreement is also enforceable as a contract.

## What types of ADR process are commonly used? Is a particular process popular? If so, for which types of dispute?

Mediation is less popular for the moment. Arbitration is more popular; in Bulgaria there are approximately 100 000 active commercial entities and 40 arbitral courts.



## BULGARIA continued

### Should I mediate in your country? What are the pros and cons?

As in other countries the main advantage of mediation is that it gives the opportunity to the parties to settle the dispute by themselves, which best suits their needs.

#### Pros:

- The procedure begins with the mutual consent of the parties and continues until the parties so wish.
- Most cases are settled within a couple of hours. Other cases might require several days or weeks, depending on the complexity of the issues and the will of the parties. Given the fact that a court case may be prolonged for years this is a very important advantage.
- Mediation is cheaper in comparison with court and arbitral procedures.
- All circumstances, data and documents that have become known to the participants in the course of the procedure are confidential. The confidentiality is guaranteed by the obligations of all the participants to keep confidentiality.

#### Cons:

- Due to the fact that the mediation settlement agreement is not directly enforceable in the case of nonfulfilment the parties need to go before a state court or arbitration.

- Although mediation is gaining popularity the slightly outdated notion of a dispute resolution in front of a court still dominates in Bulgaria.

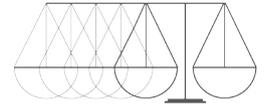
### Should I arbitrate under the laws of your country? What are the pros and cons?

#### Pros:

- In Bulgaria the arbitration is a one instance procedure which makes it much faster compared to a court one.
- The arbitrators are in the most cases experts on the scope of the case.
- The procedure may be modified according to the scope of the case.
- Confidentiality of the proceedings.
- The enforcement of an arbitral agreement issued by a Bulgarian arbitration court is secured to a much greater extent by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958 compared with the execution of a decision of a Bulgarian state court.

#### Cons:

- The decisions of an arbitral court cannot be appealed.
- Without the assistance of a state court an arbitral one cannot execute all judicial functions such as claim securities and safeguarding.
- Arbitration is more expensive compared to the State court procedure.



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[Return to contents](#)





## CZECH REPUBLIC

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**Is mediation mandatory for any type of claim in your country before commencing arbitration or litigation? Can the court or tribunal compel the parties to participate in an ADR process?**

Mediation is not a mandatory step before filing an action to the respective court. Nevertheless the court can compel the parties to participate in an ADR process – namely mediation. Such process is held in front of a registered mediator and can be terminated any time within the mediation process. The main principle of the mediation is it is voluntary.

**If it is not mandatory, are there any consequences of not agreeing to mediate? (e.g. costs consequences)**

A party who refuses to attend a first mediation meeting may be penalised in the form of a reduction or complete withdrawal of entitlement to reimbursement of costs of the proceedings. There are no legal consequences of not agreeing to mediate after the mediation has commenced.

**Is it common to include obligations to negotiate and mediate before commencing arbitration or litigation in commercial contracts? If so, are those clauses respected and enforceable?**

The mediation is still a developing branch of law in Czech Republic therefore it is not very common to include obligations to negotiate and mediate in commercial contracts.

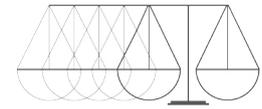
Our office does not include such clauses in the commercial contracts therefore we are not able to evaluate a possible respectability and/or enforceability of such stipulations.

**Will parties frequently seek to negotiate a dispute directly without a lawyer or an independent neutral such as a mediator?**

Depends on the “type” of client. Several business companies often negotiate various commercial aspects without the presence of lawyers. Often the lawyers step up when the negotiations have faltered.

**How are mediators selected for an appointment? Are they usually legally qualified?**

The registered mediator - attorney has to pass mediation exams that are held under the courtesy of Czech Bar Association. The register of all mediators is maintained by Ministry of Justice. The range of test circuits includes a wide range of legal issues therefore legal qualification is recommended.



## Is the mediator purely facilitative or are they evaluative (i.e. give a recommendation on the terms upon which the dispute should be resolved)?

The mediator also evaluates the discussed topic based on information submitted by both parties.

## How is a mediation settlement agreement enforceable?

The mediation agreement as such is not enforceable but the litigants may submit the mediation agreement to be approved and authorized by the respective court to become enforceable.

## Should I mediate in your country? What are the pros and cons?

As described above the mediation proceedings are still in an early stage of development and still many litigants are not even aware of such possibility in the course of court proceedings. Nevertheless the courts are recently starting to use the possibility of mediation set out by the legislation.

## Should I arbitrate under the laws of your country? What are the pros and cons?

Arbitration is used more often than mediation in Czech Republic. The main arbitration court is the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic. The arbitration proceedings are substantially more formal than the mediation proceedings. The arbitration is used for commercial disputes due to its speed.



## DENMARK

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**Is mediation mandatory for any type of claim in your country before commencing arbitration or litigation? Can the court or tribunal compel the parties to participate in an ADR process?**

Mediation is not mandatory for any type of claim before commencing arbitration or litigation. Although parties are obligated to explore possible settlement negotiations before a suit is brought before the courts. This includes exploring whether the case may be settled amicably, and if it is the case, the parties shall enter into negotiations. However, it is only an obligation to explore whether settlement is possible, and naturally not an obligation for the parties to settle the case.

The courts cannot compel the parties to participate in an ADR process. Danish courts encourage the disputing parties to enter into ADR by informing and referring the parties to public ADR-institutions.

**If it is not mandatory, are there any consequences of not agreeing to mediate? (e.g. costs consequences)**

Since mediation before commencing arbitration is not mandatory, no sanctions are imposed on the party refusing to participate in an ADR process.

Although sanctions may be imposed, if the parties refrain from exploring options for settlements and the claim is found to be unreasonable. In such case, it may have an effect on the decision by the court when awarding attorney fees and costs.

**Is it common to include obligations to negotiate and mediate before commencing arbitration or litigation in commercial contracts? If so, are those clauses respected and enforceable?**

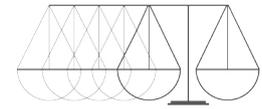
It is becoming more common that parties need to have tried to solve the dispute by mediation before commencing in litigation or arbitration. Multi-tiered dispute resolution clauses in commercial contracts are also seen more often. Courts and tribunals will typically respect these clauses. However, jurisprudence from Danish courts on such clauses is extremely rare. The courts yet have to determine the requirements of enforceability on such clauses.

**Will parties frequently seek to negotiate a dispute directly without a lawyer or an independent neutral such as a mediator?**

No. The parties will negotiate any dispute with assistance from lawyers or mediators.

**How are mediators selected for an appointment? Are they usually legally qualified?**

Formally, there are no specific requirements for the appointment of a mediator. Mediators are selected based upon their experience, education and personally qualifications and personality.



Mediators need a fundamental education and training in mediation. Since there are no specific requirements, mediators do not need to have a legal background. Although mediators must have practical experience and substantive expertise in the substantive area of the dispute.

### **Is the mediator purely facilitative or are they evaluative (i.e. give a recommendation on the terms upon which the dispute should be resolved)?**

The mediator can be facilitative as well as evaluative. However, they will mostly be facilitative and assist the parties in reaching a mutually agreeable resolution. The mediator is in charge of the process, while the parties are in charge of the outcome.

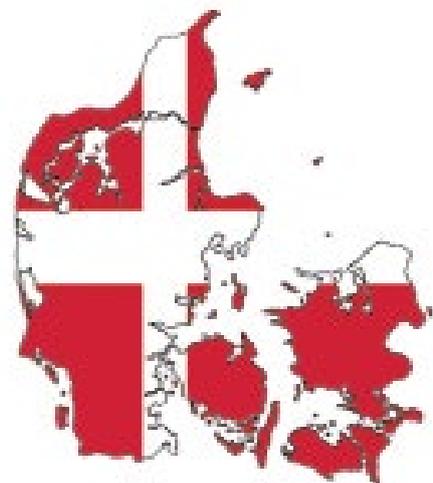
There is an assumption that an evaluative mediator must have substantive expertise or legal expertise in the substantive area of the dispute. Based on this assumption, most evaluative mediators would be attorneys.

Whether the arbitrator should be facilitative or evaluative will in any case depend on the character of the dispute and the parties' expectations and interest.

### **How is a mediation settlement agreement enforceable?**

A mediation settlement can be enforceable if the parties agree upon it. Based upon mutual agreement, the parties can include an enforceable clause in the settlement agreement. However, it is not typical to include an enforceability clause.

A mediation settlement can be converted into a judicial settlement. The parties can apply to a competent court for approval of their settlement and thereby have it become a judicial settlement. In such case, this judicial settlement has the effect of a final judgment and may be enforced against the will of the other party.





## DENMARK continued

What types of ADR process are commonly used? Is a particular process popular? If so, for which types of dispute?

Arbitration is commonly used as a dispute resolution in commercial contract, and in particular in construction contracts. The use of multi-tiered dispute resolution clauses is also becoming increasingly common in commercial agreements.

Mediation is also becoming more extensively used as dispute resolution.

Should I mediate in your country? What are the pros and cons?

**The pros:**

- Denmark is internationally minded and can provide experienced mediators (and arbitrators) with technical expertise and knowledge of the law and culture of different countries. This provides for a neutral forum and setting where parties from all over the world can feel safe to mediate their disputes in an efficient and fair process.

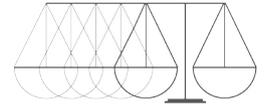
**The cons:**

- Mediation is not yet commonly applied as a choice for dispute resolution. However, mediation is becoming more applicable in commercial disputes.

Should I arbitrate under the laws of your country? What are the pros and cons?

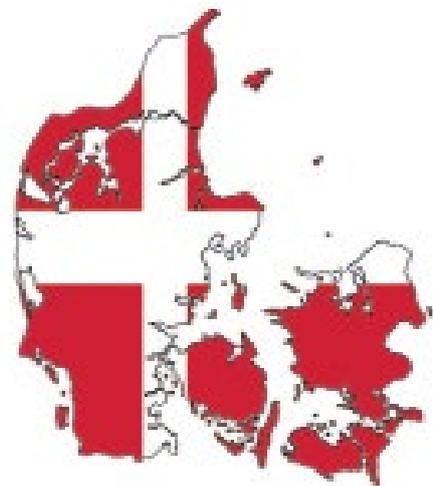
**The pros:**

- The Danish legal system is a hybrid between civil law and common law. This makes Danish law an excellent choice when determining which country's law to arbitrate under, especially in cases where one party is from a common law jurisdiction and the other party is from a civil law jurisdiction. Furthermore, Denmark has a favourable arbitration policy that has defined the courts' positive approach to arbitration agreements and disputes. Danish courts assist with the arbitral process when necessary and consistently enforce arbitral awards.



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[Return to contents](#)



# REBECCA ATTREE

## ENGLAND & WALES

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**Is mediation mandatory for any type of claim in your country before commencing arbitration or litigation? Can the court or tribunal compel the parties to participate in an ADR process?**

Mediation is voluntary for all types of claim. However before commencing divorce proceedings it is necessary to have considered mediation. The courts frequently stay proceedings to enable the parties to attempt to settle by mediation ,but the parties are never compelled to do so.

**If it is not mandatory, are there any consequences of not agreeing to mediate? (e.g. costs consequences)**

Frequently the courts impose costs sanctions on parties who unreasonably refuse to litigate. For example, a party who wins at court but unreasonably refused to mediate may recover only two thirds of their costs from the other party. A party who loses at court who unreasonably refused to mediate may have to pay the winner's costs on an indemnity basis, which may be disproportionate to the matter at stake. It has further been held that failure to respond to an invitation to mediate within two weeks can constitute an unreasonable refusal.

**Is it common to include obligations to negotiate and mediate before commencing arbitration or litigation in commercial contracts? If so, are those clauses respected and enforceable?**

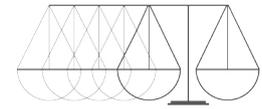
It is increasingly common practice to include such clauses in commercial contracts. An agreement to negotiate is not enforceable. An agreement to mediate is enforceable only if it refers to the Mediation Rules of a mediation provider that will set up a mediation in default of agreement by the parties. Examples of enforceable multi-tier clauses are available at <http://www.rebeccaattreemediator.com/sample-mediation-clauses-adr-group/>

**Will parties frequently seek to negotiate a dispute directly without a lawyer or an independent neutral such as a mediator?**

The parties will usually seek to negotiate a dispute using a solicitor, and increasingly, a mediator.

**How are mediators selected for an appointment? Are they usually legally qualified?**

Mediators may be selected by reputation, or reference to lists of major providers. The Civil Mediation Council also keeps a list of mediators registered with them. Many mediators are legally qualified, but they do not have to be.



## Is the mediator purely facilitative or are they evaluative (i.e. give a recommendation on the terms upon which the dispute should be resolved)?

Mediators may be facilitative or evaluative. There is an increased demand for mediators who will provide some degree of evaluation of where a settlement may lie.

## How is a mediation settlement agreement enforceable?

A mediation agreement is enforceable in contract. If the matter is subject to litigation, the settlement agreement will become a schedule to a Tomlin Order that will be sealed by the court, thereby becoming enforceable as a court order.

## What types of ADR process are commonly used?

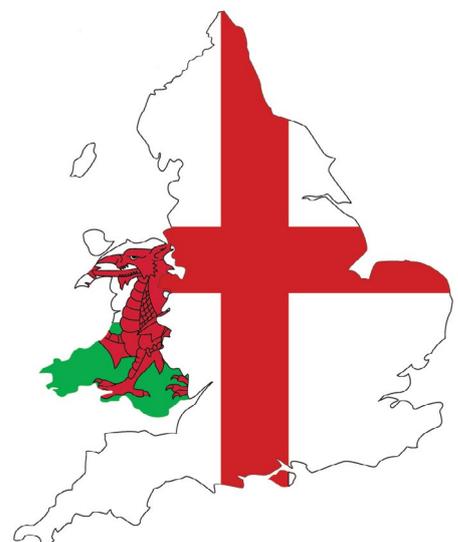
The most popular forms of ADR are mediation and arbitration. Mediation is used for a wide range of disputes, especially in view of the costs sanctions mentioned above. Arbitration is popular for international commercial claims since the award can rarely be appealed, giving a final solution quicker than litigation.

## Should I mediate in your country? What are the pros and cons?

Mediation is well established in England and Wales. There are many experienced mediators and the statistics of settlement on the day or soon after are approximately 75%. Mediation is more cost effective and quicker than going to court or arbitrating.

## Should I arbitrate under the laws of your country? What are the pros and cons?

Arbitration is well established by legislation, practice and Arbitral bodies in England and Wales. The quality of arbitrators available, ease of language and reputation of England and Wales as a centre of excellence for International trade make it a good choice of venue for arbitration.





## FRANCE

**Pierre Chaufour**

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**Is mediation mandatory for any type of claim in your country before commencing arbitration or litigation?**

Mediation is not mandatory for any type of claim before commencing arbitration or litigation. The court or tribunal can compel the parties to participate in an ADR process.

**If it is not mandatory, are there any consequences of not agreeing to mediate? (e.g. costs consequences)**

There are no consequences for not agreeing to mediate.

**Is it common to include obligations to negotiate and mediate before commencing arbitration or litigation in commercial contracts?**

It is not common to include obligations to negotiate and mediate before commencing arbitration or litigation in commercial contracts but it is common to include an obligation of arbitration.

**Will parties frequently seek to negotiate a dispute directly without a lawyer or an independent neutral such as a mediator?**

It is not usual to negotiate a dispute directly without a lawyer or an independent neutral such as a mediator.

**How are mediators selected for an appointment? Are they usually legally qualified?**

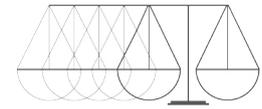
The mediator is selected by one of the parties and must be accepted by the opposition. Mediators are legally qualified. There are lists of mediators.

**Is the mediator purely facilitative or are they evaluative (i.e. give a recommendation on the terms upon which the dispute should be resolved)?**

The mediator is purely facilitative.

**How is a mediation settlement agreement enforceable?**

When the mediation finishes by an agreement, it is the agreement itself which is enforceable. It is not necessary to obtain a judgment.



## What types of ADR process are commonly used? Is a particular process popular?

The ADR processes commonly used in France are:

- a. mediation
- b. arbitration

## Should I mediate in your country? What are the pros and cons?

Lawyers from other E.U. member states can mediate in France. We have many skilled mediators in France. There are no disadvantages.

## Should I arbitrate under the laws of your country?

Lawyers from other E.U. member states may conduct arbitrations in France. There is no applicable law; it depends on the terms of reference of the arbitration. France is a famous place for arbitration. Thus there are really no pros or cons to arbitration in France.



## GERMANY

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**Is mediation mandatory for any type of claim in your country before commencing arbitration or litigation?**

The 16 states have legislative competence for this. Some states have used this competence to make pre-trial mediation mandatory for neighbourhood disputes, some for libel and slander by natural persons and some for small claims. Some states have repealed it for small claims because mandatory mediation failed to relieve the pressure on the courts. The court or tribunal cannot compel the parties to participate in an ADR process. But judges often use ADR techniques when proposing a settlement.

**If it is not mandatory, are there any consequences of not agreeing to mediate? (e.g. costs consequences)**

No.

**Is it common to include obligations to negotiate and mediate before commencing arbitration or litigation in commercial contracts?**

No, but this is seen occasionally. We have not heard of or seen any attempt to enforce them.

**Will parties frequently seek to negotiate a dispute directly without a lawyer or an independent neutral such as a mediator?**

Yes.

**How are mediators selected for an appointment?**

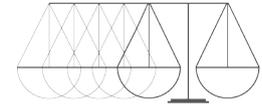
For the cases of mandatory mediation there is a list of mediators available at the town hall and the district court. This list can also be used to find a mediator for non-mandatory cases.

**Are they usually legally qualified?**

Some are.

**Is the mediator purely facilitative or are they evaluative (i.e. give a recommendation on the terms upon which the dispute should be resolved)?**

They will start being facilitative and might later ask the parties whether they wish an evaluative approach.



## How is a mediation settlement agreement enforceable?

If it is documented by a mediator from the list mentioned earlier it is an enforceable instrument falling under art. 58 of the Recast Brussels I Regulation. In other cases parties to the settlement might agree to make an enforceable notarial deed.

## What types of ADR process are commonly used? Is a particular process popular?

- a. ADR is available for almost everything except status issues (because status cannot be waived)
- b. early neutral evaluation if this makes negotiations easier
- c. expert determination used particularly when a question of fact is in dispute (e.g. Is this a defect? Who has caused the defect?)
- d. We have not yet heard of med arb in Germany
- e. Arbitration is relatively rarely used because it is often more expensive and slower than litigation.

## Should I mediate in your country? What are the pros and cons?

Pros: if you wish a neutral nation; mediator has usually lower costs to cover than in London, Paris or Switzerland. Cons: Language problems

## Should I arbitrate under the laws of your country?

The rules in the Code of Civil Procedure about arbitration were revised as per 1st January 1998 based on the UNCITRAL model law, so they are “state-of-the-art” and they avoid obstacles.

## What are the pros and cons?

The same as for and against mediation.





## GREECE

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**Is mediation mandatory for any type of claim in your country?**

No, it is not mandatory. According to the Greek legislation, mediation exists only for civil and commercial matters.

**If it is not mandatory, are there any consequences of not agreeing to mediate?**

No.

**Is it common to include obligations to negotiate and mediate before commencing arbitration or litigation in commercial contracts?**

Yes, it is common.

**If so, are those clauses respected and enforceable?**

It is mandatory, if such clauses exist as above, to enter in a Mediation Agreement.

If one party breaks the clause of the contract by proceeding straight to litigation, the other party shall be entitled to raise an objection based on abuse of right.

**Will parties frequently seek to negotiate a dispute without a lawyer or an independent neutral such as a mediator?**

Mostly they seek a lawyer who should also be a mediator.

**How are mediators selected for an appointment? Are they usually legally qualified?**

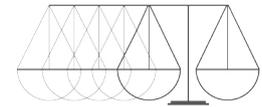
There are public records kept at the Ministry of Justice. Out of these public records mediators can be selected.

**Is the mediator purely facilitative or are they evaluative (i.e give a recommendation on the terms upon which the dispute should be resolved)?**

His/ her role is purely facilitative.

**How is a mediation settlement agreement enforceable?**

The Law provides that the Mediation Minute, drafted and signed by the Mediator and the parties, constitutes an enforceable document after having been filed at the registry of the Single Member Court of First Instance of the place where the mediation took place.



**Are early neutral valuation, expert determination, adjudication or med arb frequently used in your country? If so, for which types of dispute?**

No.

**Should I mediate in your country? What are the pros and cons?**

Definitely.

In Greece there is a safe legislation environment regulating mediation.

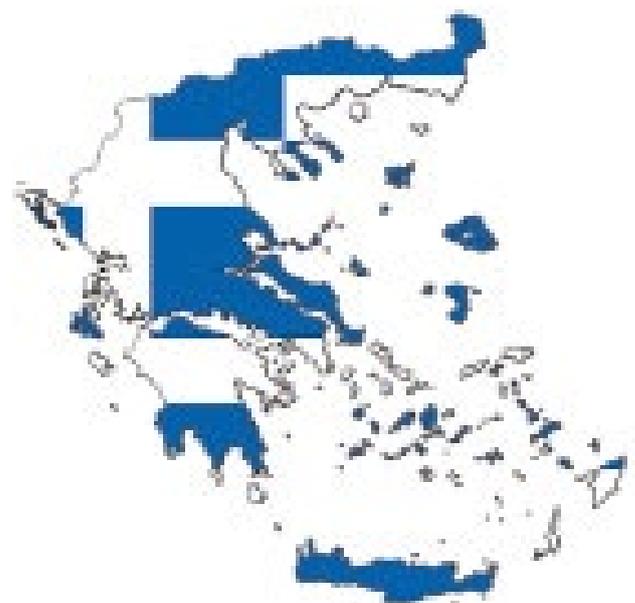
Accredited mediators following a strict code of ethics, low costs and most of all the fact that the Minutes of Mediation are totally enforceable under the Greek laws, render mediation an advisable choice.

**Should I arbitrate under the laws of your country? What are the pros and cons?**

It is a popular belief in Greece that arbitration is not a valid option because of the high costs.

However, this is not necessarily accurate.

We believe that arbitration is a good option and therefore we urge our clients to accept arbitration clauses in contracts.





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# HUNGARY

**Dr. Sándor Németh**

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**Is mediation mandatory for any type of claim in your country before commencing arbitration or litigation? Can the court or tribunal compel the parties to participate in an ADR process?**

Generally mediation or other types of ADR methods are not mandatory in any type of legal dispute.

The two exemptions in civil and commercial cases are (a) lawsuits between businesses and (b) certain special family law matters.

- a. If there is a legal dispute between two businesses, then the Code of Civil Procedure requires the parties to attempt negotiations before they would be allowed to go to court. This negotiation however does not have to be mediation; a simple exchange of letters for example would satisfy the court.
- b. In certain family law matters (usually where parental rights are disputed) it is obligatory for the parties to attempt mediation. They must participate in the first mediation session, however it is not mandatory to continue the mediation any further, or to reach an agreement.

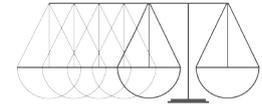
**If it is not mandatory, are there any consequences of not agreeing to mediate? (e.g. costs consequences)**

In the above cases (a) if a business does not verify to the court that it has attempted negotiations before filing the claim, its claim will be rejected on formal grounds; (b) in the above family law lawsuits, if one party fails to participate in the mediation session, the court may impose a fine on him/her.

**Is it common to include obligations to negotiate and mediate before commencing arbitration or litigation in commercial contracts? If so, are those clauses respected and enforceable?**

As mentioned above, according to the Code of Civil Procedure, it is mandatory to try to resolve disputes out of court between businesses before one would submit its claim to the court.

Partly because of that, it is a common contractual clause that the contracting parties undertake to settle their disputes by way of negotiations. In many cases though, the parties look at these clauses as a formality, and do not make a real effort to settle the actual disputes out of court.



## Will parties frequently seek to negotiate a dispute directly without a lawyer or an independent neutral such as a mediator?

If both parties have a real intention to negotiate a settlement of a dispute, then usually they start the negotiations between each other without the involvement of lawyers or mediators.

In our experience, in many cases the parties in a dispute only involve lawyers or mediators if the first rounds of their negotiations were not successful.

## How are mediators selected for an appointment? Are they usually legally qualified?

Mediators are selected by the parties with a common consent. To become a mediator, one has to pass an accredited mediation training, hold a degree and have 5 years of professional experience in his/ her field of expertise. They are also obliged to attend further training every 5 years. The registry of mediators is maintained by the Hungarian Ministry of Justice. Although legal skills are not required, the majority of Hungarian mediators are lawyers in practice.

## Is the mediator purely facilitative or are they evaluative (i.e. give a recommendation on the terms upon which the dispute should be resolved)?

The qualified mediator impartially facilitates the session but does not recommend a solution.

## How is a mediation settlement agreement enforceable?

The mediation settlement is consensual and compliance by the parties is voluntarily; therefore it does not have legal consequences. In case of non-compliance the dispute can be moved to court or arbitration.

However the parties have the opportunity to incorporate their agreement into a legally binding document, which in that case of course becomes enforceable in contract.





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## HUNGARY continued

### What types of ADR process are commonly used? Is a particular process popular? If so, for which types of dispute?

ADR methods are relatively newcomers to the Hungarian legal system, and not used as frequently as litigation. Mediation is a developing new field sometimes with experts involved. Arbitration is mainly used on an international level when multi-national companies are involved.

Other ADR methods are currently not used frequently in Hungary.

### Should I mediate in your country? What are the pros and cons?

#### Pros

- Mediation can be a quick, cost effective, out of court settlement of the dispute.
- The services of highly qualified mediators are available on the Hungarian market.

#### Cons:

- Mediation is a relatively new method in Hungary, so many people are not familiar with it and there is a chance that they would not agree to it, because of that.
- There are few legal regulations for mediation proceedings, so if the parties are not cooperative and cannot agree on procedural matters, the mediation procedure might fail.

### Should I arbitrate under the laws of your country? What are the pros and cons?

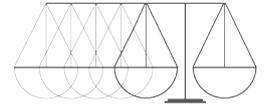
In general we recommend arbitration in Hungary.

#### Pros:

- The procedure takes substantially less time than the courts. This is especially important, because Hungarian court proceedings might take years to complete.
- In special legal matters, arbitrators might have more expertise than regular judges.
- There are established arbitration institutions in Hungary, who are also prepared to handle high-profile, international cases.
- Arbitral awards are binding in Hungary and are enforceable both domestically and abroad, as Hungary is a party to the New York Convention.

#### Cons:

- Arbitration is much more expensive than court
- Legal remedies against an arbitral award are very limited. No appeal is available and the court can only set aside an arbitral award for a very limited number of reasons.



# LIBRALEX

[Return to contents](#)





**STUDIO LEGALE  
VALOBRA CHERCHI**

## ITALY

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### **Is mediation mandatory for any type of claim in your country before commencing arbitration or litigation? Can the court or tribunal compel the parties to participate in an ADR process?**

According to Legislative Decree no. 28/2010, mediation is mandatory in two cases:

- a. pre-trial mediation: the attempt to mediate before Mediation Providers authorised by the Ministry of Justice is a condition precedent to bringing a suit in a Civil Court in many matters (e.g. rights in rem, inheritances, insurance, trusts and estates, landlord/tenant disputes, loans, leasing of companies, banking and financial contracts).

Instead of the mandatory mediation procedure under the Decree, two alternative mediation processes (already in force) can be used in Italy: the procedure implemented by the arbitration and mediation chamber ("Camera di Conciliazione e Arbitrato") relating to disputes between investors and financial institutions concerning the breach by the latter of duties of information, transparency and fairness and the procedure before a banking and financial arbitration chamber ("Arbitro Bancario Finanziario") concerning any disputes between banks and their clients;

- b. mediation referred by the Judge: the Judge, after evaluating the nature of the dispute and the status of the case, can refer them to mediation at any phase of the proceedings, also in appeal proceedings.

The attempt of mediation is a condition for the continuance of the proceedings

### **If it is not mandatory, are there any consequences of not agreeing to mediate?**

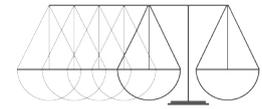
If the mediation is not mandatory, there are no consequences of not agreeing to mediate.

### **Is it common to include obligations to negotiate and mediate before commencing arbitration or litigation in commercial contracts? If so, are those clauses respected and enforceable?**

Mediation clauses in commercial agreements are recently becoming more frequent, especially in Business to Consumer contracts.

According to Legislative Decree no. 28/2010, if a mediation clause is included in a contract or company by-laws and mediation is not attempted before starting judicial proceedings, upon request of a party the Judge may assign a term to mediate and postpone the proceedings to the end of the mediation.

The attempt of mediation is a condition for the continuance of the proceedings.



## Will parties frequently seek to negotiate a dispute directly without a lawyer or an independent neutral such as a mediator?

After the entrance in force of Legislative Decree no. 28/2010, direct negotiations between the parties without lawyers and a Mediator are not frequent due to: a) the large number of matters covered by the mandatory mediation, in which the assistance of a lawyer is mandatory; b) the tax advantages provided if the settlement agreement is reached through mediation procedures; c) the direct enforceability of the mediation agreements signed by all the lawyers of the parties.

## How are mediators selected for an appointment? Are they usually legally qualified?

Mediators are designated by the Mediation Provider chosen by the parties (in voluntary mediations) or by the party who wants to start a legal action before a Court (in mandatory mediations).

Legal requirements to act as a mediator are the following: a) to be graduated or enrolled in a professional register; b) to attend and pass a training course at a Mediation Provider authorized by the Ministry of Justice; c) to have specific requisites of integrity; d) to be enrolled in the register of a Mediation Provider authorized by the Ministry of Justice. In practice, Mediators are generally lawyers registered at the Bar Associations.

Lawyers are recognised by law as professional mediators but they should follow a short initial training before acting as mediators and further training every two years.



## ITALY continued

**Is the mediator purely facilitative or are they evaluative (i.e. give a recommendation on the terms upon which the dispute should be resolved)?**

The mediator should be purely facilitative.

However, according to Legislative Decree no. 28/2010, a mediator could make a non-binding proposal about the resolution of the dispute (it is a duty if both parties mutually request it to him/ her ) and the refusal of mediator's proposal could affect the decision of the Judge on legal expenses, if the final judgment in the following proceedings is equivalent to the mediator's proposal.

**How is a mediation settlement agreement enforceable?**

A settlement agreement (copied or attached to mediation minutes) signed by the parties, the mediator and the lawyers representing all the parties is immediately enforceable. In the other cases, any party may request enforceability of the mediation agreement before the competent Court, which has to verify that the agreement is compliant with mandatory rules and public order provisions.

**What types of ADR process are commonly used? Is a particular process popular? If so, for which types of dispute?**

The main ADR processes used in Italy are Arbitration and Mediation (the latter after the entry in force of Legislative Decree no. 28/2010).

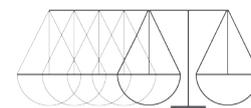
Arbitration clauses are usually included in business to business agreements between large-sized companies.

Mediation processes are obviously more common in matters where the conciliation is mandatory.

Since 2014 another type of ADR process has been introduced in Italy, called negotiation assisted by lawyers ("Negoziazione assistita"), which consists of an agreement by which the parties agree to cooperate in good faith and loyalty to solve the dispute amicably with the assistance only of lawyers, without an independent neutral: the agreement eventually reached between the parties is direct enforceable.

Assisted negotiation by lawyers is a condition precedent to bringing a suit in a Civil Court in disputes relating to compensation for damages caused by cars and boats and in all claims for payments up to Euro 50,000.00.

The introduction of assisted negotiation by lawyers is too recent to allow a verification of its effect in terms of reducing judicial disputes.



## Should I mediate in your country? What are the pros and cons?

In Italy the mediation is certainly advisable, especially compared to court proceedings, both for the duration of the procedure (not more than 3 months by law, compared to an average duration of a civil proceedings of about 2/3 years), the small expenses for mediation procedures (much lower than the litigation), and finally for the tax benefits when an agreement is reached.

Mediation in Italy does not present particular disadvantages.

## Should I arbitrate under the laws of your country? What are the pros and cons?

In Italy arbitration is governed by specific rules of Italian Civil Procedure Code and it is subject to the existence of an express arbitration clause included in the agreements which shows that the parties want to solve the dispute before the arbitrator instead of the Court.

Arbitration is definitely more convenient than legal proceedings in terms of duration and confidentiality of information and documents relating to the dispute. On the other hand, arbitration procedures are generally expensive and for this reason are commonly used in business to business contracts between large-sized or multinational companies.





# LUXEMBOURG

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**Is mediation mandatory for any type of claim in your country before commencing arbitration or litigation? Can the court or tribunal compel the parties to participate in an ADR process?**

Mediation is not mandatory before commencing arbitration or litigation unless the parties included it in a contract. A court or a tribunal cannot compel parties to participate to an ADR process.

**If it is not mandatory, are there any consequences of not agreeing to mediate? (e.g. costs consequences)**

There are no consequences for parties not agreeing to mediate.

**Is it common to include obligations to negotiate and mediate before commencing arbitration or litigation in commercial contracts? If so, are those clauses respected and enforceable?**

In a limited number of areas it is common to include such obligations (finance, construction). If so these clauses are respected and enforceable. However the judge has a limited right to control the content of these clauses.

**Will parties frequently seek to negotiate a dispute directly without a lawyer or an independent neutral such as a mediator?**

Historically no, but in the last 5 years it has begun to change.

**How are mediators selected for an appointment? Are they usually legally qualified?**

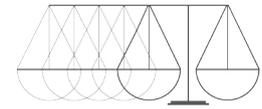
Mediation can be judicial or conventional:

Judicial: parties can choose their mediator from a list of mediators authorized by Ministry of Justice. The article 1251-1-3 of the "Nouveau code de procédure civile" describes what qualifications are required to become a mediator authorized by Ministry of Justice.

Conventional: parties can choose any person as a mediator whether or not he/ she is authorized by the Ministry of Justice. The qualification required is described under article 1251-2 (2) of the "Nouveau code de procédure civile". Usually the mediators are authorized members of associations of mediators.

**Is the mediator purely facilitative or are they evaluative (i.e. give a recommendation on the terms upon which the dispute should be resolved)?**

A mediator is purely facilitative.



## How is a mediation settlement agreement enforceable?

The mediation procedure is confidential. If parties reach an agreement, one party or all parties can petition the President of the Tribunal d'Arrondissement to approve the agreement which becomes enforceable.

## What types of ADR process are commonly used? Is a particular process popular? If so, for which types of dispute?

Historically ADR processes are not commonly used.

## Should I mediate in your country? What are the pros and cons?

### The pros:

- Mediators are highly qualified
- Mediation procedure is quicker than judicial procedure
- It is cheaper
- The process is confidential
- If parties find an agreement it is their solution

## Should I arbitrate under the laws of your country? What are the pros and cons?

### The pros:

- Arbitrators are highly qualified
- Arbitration procedure is quicker than judicial procedure
- The process is confidential

### The cons:

- It can be expensive





**MASIOTA**  
ADWOKACI I RADCOWIE PRAWNI

## POLAND

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### **Is mediation mandatory for any type of claim in your country before commencing arbitration or litigation? Can the court or tribunal compel the parties to participate in an ADR process?**

Mediation is not mandatory for any type of claim in Poland before commencing arbitration or litigation. In the course of civil proceedings the court may refer parties to mediation until the end of the first scheduled hearing. After the end of such hearing, the court may refer the parties to mediation only subject to a joint motion of the parties. No mediation should be conducted if a party does not express its consent to mediation within one week as of the day on which a decision to refer the case to mediation is announced or served on a party. The court may refer parties to mediation only once in the course of proceedings.

### **If it is not mandatory, are there any consequences of not agreeing to mediate? (e.g. costs consequences)**

There are no negative consequences for the party of not agreeing to mediate.

### **Is it common to include obligations to negotiate and mediate before commencing arbitration or litigation in commercial contracts? If so, are those clauses respected and enforceable?**

It is rather rare for parties to include obligations to negotiate and mediate before commencing arbitration or litigation in

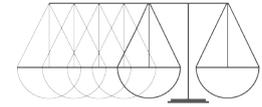
commercial contacts. This happens more often in the case of international agreements.

### **Will parties frequently seek to negotiate a dispute directly without a lawyer or an independent neutral such as a mediator?**

In the first place, the parties usually attempt to resolve a problem by themselves, without the assistance of a lawyer or an independent neutral such as mediator. Only after their efforts prove ineffective, they seek for professional legal advice. The other thing is that the parties hardly ever reach a satisfactory settlement without legal assistance.

### **How are mediators selected for an appointment? Are they usually legally qualified?**

The qualifications of the candidate for a mediator are different depending on the type of procedure. In the civil procedure a natural person with full capacity to perform acts in law and entitled to full public rights may become a mediator. It is inadmissible for a judge to perform the function of a mediator. However, this does not apply to retired judges. Non-governmental organisations, within the scope of their statutory activities, as well as higher education institutions, are entitled to keep a list of permanent mediators and establish mediation centres.



## Is the mediator purely facilitative or are they evaluative (i.e. give a recommendation on the terms upon which the dispute should be resolved)?

A mediator should remain impartial in conducting mediation. For this reason, the mediator is not entitled to give any recommendation on the terms upon which the dispute should be resolved. It is the parties who should find a satisfactory solution to a problem.

## How is a mediation settlement agreement enforceable?

A mediator draws a report, specifying place and time of mediation, as well as names and addresses of the respective parties, name and surname of the mediator and the outcome of mediation. If parties reach a settlement it should be quoted in or enclosed with the report. By signing the settlement, the parties consent to apply to the court for its validation. If a settlement is subject to enforcement, the court validates it by issuing an enforcement clause. The court refuses to validate a settlement reached before a mediator in whole or in part, if the settlement is contrary to the law or to the rules of the social conduct, or intends to circumvent the law, or where it is incomprehensible or contradictory. A settlement reached before a mediator, once validated by the court, has the binding effect of a settlement reached before the court. A settlement reached before a mediator that was validated by issuing an enforcement clause is an enforceable title.

## What types of ADR process are commonly used? Is a particular process popular? If so, for which types of dispute?

ADR methods, such as mediation and arbitration, are underestimated in Poland. The parties rarely decide to mediate or arbitrate, and if they do, it is mostly in commercial disputes. On the one hand, it is caused by the relatively high cost of mediation and arbitration. On the other hand, more actions for the promotion of ADR methods are needed as knowledge in Poland in this area is still limited.





## POLAND continued

### Should I mediate in your country? What are the pros and cons?

**Pros:**

- Mediation proceedings are private, unless the parties otherwise agree. This means that, if the settlement is not reached, the information revealed by the parties in the course of mediation is not available to the court. In some cases mediation may end quicker than litigation, saving both time and expense. The court will return half of the court fee if the litigation ends with a settlement. Each party has the opportunity to describe the dispute from its perspective without the restrictions of civil rules. There is the option to select a mediator who is skilled in the subject matter of the dispute and experienced in the negotiating strategy of the parties in dispute.

**Cons:**

- In Poland ADR methods are still not very popular, therefore the mediators often do not have enough professional experience to carry out negotiations between the parties.

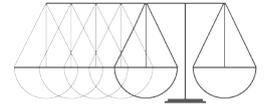
### Should I arbitrate under the laws of your country? What are the pros and cons?

**Pros:**

- The parties may determine in an agreement the number of arbitrators, as well as a method to appoint arbitrators. They may also propose the venue and the language of the proceedings. Because the parties arbitrate voluntarily, they are often more likely to work together rather than escalate their conflict, as is often the case in litigation. The rules of evidence and procedure are simplified.

**Cons:**

- Arbitration fees may be substantial, particularly in complex cases. Arbitration is still not very popular, therefore the arbitrators often do not have enough professional experience to carry out negotiations between the parties. The decision of an arbitration court is final and binding and there are very limited possibilities to question it before the common court.



# LIBRALEX

[Return to contents](#)



# PORTUGAL

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**Is mediation mandatory for any type of claim in your country before commencing arbitration or litigation? Can the court or tribunal compel the parties to participate in an ADR process?**

In 2006 and 2007 the Ministry of Justice, through GRAL (a cabinet created for alternative dispute resolution) created centres for mediation and conciliation to resolve family, labour and criminal disputes. The validity of the settlements obtained in these special mediation centres is recognised by court and enforceable, but parties still prefer go to court.

In 2013 a new law on Civil and Commercial Mediation (Law 29/2013) entered into force, however courts or tribunals still cannot compel the parties to mediate or participate in an ADR process before commencing arbitration or litigation and any consent the party gives to participate in a mediation process may be revoked at any time.

**If it is not mandatory, are there any consequences of not agreeing to mediate? (e.g. costs consequences)**

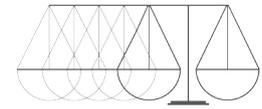
There are no consequences of not agreeing to mediate.

**Is it common to include obligations to negotiate and mediate before commencing arbitration or litigation in commercial contracts? If so, are those clauses respected and enforceable?**

In international contracts, especially with jurisdictions outside the EU, arbitration is advisable unless the parties agree to a suitable applicable court and law for both. Mediation usually is inserted in the contracts as a previous step to litigation. The clauses are limited to the goodwill of the parties, as it is very easy for the parties to justify litigation/arbitration because negotiations have stalled.

**Will parties frequently seek to negotiate a dispute directly without a lawyer or an independent neutral such as a mediator?**

No, usually in the beginning of a dispute lawyers tend to contact each other to try to open the doors for a possible mediation, between lawyers, that would actually be the indicated modus operandi according to the Law Society Deontology, unfortunately it is not always respected. Mediation in family disputes (divorce and exercise of parental responsibilities) has been the most successful, although according to official data only nearly 150 requests were presented in the first semester of 2014.



## How are mediators selected for an appointment? Are they usually legally qualified?

In most cases lawyers act as mediators; for example in the justice of the peace mediators usually are, if not lawyers, at least law school graduates with mediation training.

## Is the mediator purely facilitative or are they evaluative (i.e. give a recommendation on the terms upon which the dispute should be resolved)?

Mediators tend to be evaluative, in order to find a common ground and sometimes even common sense. The mediator must indicate the legal solution for the matter and a practical solution that tends to bring the parties together.

## How is a mediation settlement agreement enforceable?

In the justice of the peace it will be drafted as an agreement accredited by the judge of peace so it will have the value of a first instance sentence. As for other extra judicial mediation, i.e. done by lawyers, the agreement should be authenticated as a private document and signatures certified (lawyers can do this), thus in case of non-fulfilment it will be enforceable as an execution title.

## What types of ADR process are commonly used? Is a particular process popular? If so, for which types of dispute?

Mediation and arbitration are the most popular types of ADR, especially for smaller civil and commercial disputes. Arbitration before the ICC or other internationally recognised authorities is commonly used for disputes arising from international contracts concerning overseas investments or contracts with parties that are based in a country where the state judicial system does not guarantee a fair and swift dispute resolution.



## PORTUGAL continued

Besides mediation and arbitration the most successful form of ADR is the justice of peace. Portugal has around 25 centres of justice of peace, under the supervision of the Ministry of Justice, that have jurisdiction on civil matters up to 15,000,00 Euros. The justice of the peace is useful in simple disputes, the decisions are enforceable and the final costs resulting from the process are fixed, only 70 Euros, and paid by the defeated party.

### Should I mediate in your country? What are the pros and cons?

#### The pros:

- Mediation is recommended in Portugal, quality mediators and lawyers with lower legal fees than most of Europe.

#### The cons:

- Mediation agreements must have the involvement of a lawyer in order to become an enforceable title.

### Should I arbitrate under the laws of your country? What are the pros and cons?

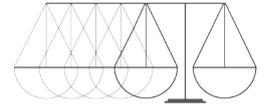
#### The pros:

- National and International Arbitration is recommended in Portugal. There are quality arbitrators for lower cost than average, very good territorial location and infrastructures, as well as

good weather. Portugal has also the potential to become, inside Europe, a specialist for arbitration between companies situated in Portuguese-speaking language countries such as Angola, Mozambique, Brazil, Timor, Macau.

#### The cons:

- Lengthier process due to the fact that parties may abuse guarantees for the parties (service of papers for example if not received at the head office, legal representatives must be served afterwards) and extended time limits.



# LIBRALEX

[Return to contents](#)



## SWEDEN

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### **Is mediation mandatory for any type of claim in your country?**

Yes, in some special legal relations and situations, for example in some situations in usufruct relations, tenancy and leasehold.

Certain kinds of claims, for example in labour disputes, have structured "pre-action protocols" which should be followed and which may include an obligation to negotiate before legal proceedings may be opened.

### **If it is not mandatory, are there any consequences of not agreeing to mediate? (e.g. costs consequences)**

No.

### **Is it common to include obligations to negotiate and mediate before commencing arbitration or litigation in commercial contracts? If so, are those clauses respected and enforceable?**

Such obligations are not common but exist in some contracts.

An obligation to negotiate or mediate is normally respected but is in practice not enforceable; however refusal to negotiate or mediate may be an obstacle to open legal proceedings.

### **Will parties frequently seek to negotiate a dispute without a lawyer or an independent neutral such as a mediator?**

Not frequently.

### **How are mediators selected for an appointment?**

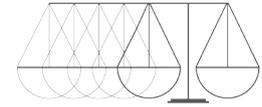
Before legal proceedings have commenced, often by recommendations from the parties' legal representatives. After legal proceedings have been opened, by the court; normally a senior judge is appointed. A mediation clause included in the contract may refer to mediation rules which stipulate the appointment of mediator.

### **Is the mediator purely facilitative or are they evaluative (i.e give a recommendation on the terms upon which the dispute should be resolved)?**

Normally a mediator is evaluative, but it may vary from mediator to mediator.

### **How is a mediation settlement agreement enforceable?**

If legal proceedings have commenced the court or arbitration tribunal can confirm the settlement agreement in an award. If legal proceedings not have been opened the court can according to rules in the Mediation Act confirm a settlement agreement and make it enforceable.



## Is arbitration a more common method of settling disputes than litigation in your country?

In commercial disputes when the amount of dispute justify the costs for the arbitrators, arbitration is a common process.

### If so, why? If not, why not?

Arbitration is regarded to be quicker, the proceedings are quicker and the main rule is that the award can not be appealed. The proceedings are private. The parties can appoint arbitrators in whom they trust.

## Do you use med arb in your country? (ie The parties agree to mediate and agree in advance if the dispute is not resolved they will arbitrate ).

Yes. The Arbitration Institute of the Stockholm Chamber of Commerce, SCC, [www.sccinstitute.com](http://www.sccinstitute.com), has med arb in one of the recommended model clauses for dispute resolution.

## Should I mediate in your country? What are the pros and cons?

### The pros

- A modern and effective legal system, and compared with several countries a quick, consistent and predictable procedure.

### The cons

- Perhaps the Swedish language. However Sweden is a very international country and almost all Swedes speak and understand English.

## Should I arbitrate under the laws of your country? What are the pros and cons?

See the answer to the previous question. Sweden has a long tradition as a place for international arbitration conducted in English and as a place for international investment disputes with parties without any connection with Sweden.



# KÖSTENBAUM & ASSOCIES

## Avocats au barreau de Genève

### SWITZERLAND

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**Is mediation mandatory for any type of claim in your country before commencing arbitration or litigation? Can the court or tribunal compel the parties to participate in an ADR process?**

No, mediation is voluntary for all type of claims, unless the parties have expressly agreed to submit the dispute to mediation.

**If it is not mandatory, are there any consequences of not agreeing to mediate? (e.g. costs consequences)**

No, there are absolutely no consequences as no party will be found failing to comply with its obligations.

**Is it common to include obligations to negotiate and mediate before commencing arbitration or litigation in commercial contracts? If so, are those clauses respected and enforceable?**

Yes, it is common to include such an obligation to negotiate or mediate. If the parties fail to undertake mediation or negotiation, while obligated, they run the risk of seeing their claims being dismissed by the court.

**Will parties frequently seek to negotiate a dispute directly without a lawyer or an independent neutral such as a mediator?**

No, they usually rely on a professional but it is not impossible.

**How are mediators selected for an appointment? Are they usually legally qualified?**

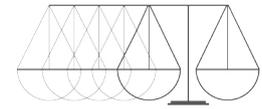
Mediators are usually selected upon reputation but general lists of Mediators are also available.

**Is the mediator purely facilitative or are they evaluative (i.e. give a recommendation on the terms upon which the dispute should be resolved)?**

Usually, Mediators are only facilitators but they are sometimes also entitled, with the agreement of the parties, to make a recommendation.

**How is a mediation settlement agreement enforceable?**

A mediation settlement is enforceable if included in an Arbitration award or in a Court judgement.



## What types of ADR process are commonly used? Is a particular process popular? If so, for which types of dispute?

Arbitration is certainly and by far the most commonly used ADR process used in Switzerland.

## Should I mediate in your country?

It is difficult to assess whether Mediation is more or less advisable in Switzerland than abroad.

## What are the pros and cons?

Mediators have often very good credentials. Yet, there is a more long standing tradition of mediation in Anglo-Saxon countries. Much depends on the mediator.

## Should I arbitrate under the laws of your country? What are the pros and cons?

As arbitration in Switzerland is closely related to its history of neutrality, and as numerous languages are spoken, there is a longstanding tradition of arbitration.

Swiss rules of arbitration very often govern international arbitration and you can certainly select with confidence experienced arbitrators, with good knowledge of international

law, in Geneva. The same is true for the lawyers participating in the arbitration. Swiss arbitration awards are recognised and enforced internationally.

Yet, if the value at stake is low, it might be cheaper for a claimant to file its claim before a regular Court, particularly if the arbitration clause provides for three arbitrators and not only for one single arbitrator.





## UKRAINE

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**Is mediation mandatory for any type of claim in your country before commencing arbitration or litigation? Can the court or tribunal compel the parties to participate in an ADR process?**

No type of alternative dispute resolution, including mediation, is mandatory in Ukraine. The court may suggest the parties to settle the dispute amicably by way of mediation or arbitration however it has no powers to compel the parties.

**If it is not mandatory, are there any consequences of not agreeing to mediate? (e.g. costs consequences)**

Ukrainian law does not regulate issues relating to mediation at all, so that there are no legal consequences for not agreeing to mediate.

**Is it common to include obligations to negotiate and mediate before commencing arbitration or litigation in commercial contracts? If so, are those clauses respected and enforceable?**

Many boilerplate contracts include multi-tier dispute resolution clauses suggesting a negotiation phase before referring the matter to litigation or arbitration. Mediation is agreed on extremely rare occasions. In one of the cases the Supreme Court enforced the obligation to negotiate a dispute and refused to recognize the arbitration award on the grounds that the claiming party made no effort to settle the dispute by way of negotiations.

**Will parties frequently seek to negotiate a dispute directly without a lawyer or an independent neutral such as a mediator?**

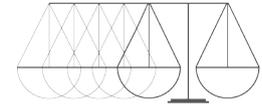
The Ukrainian legal environment has not yet got used to mediation as a type of alternative dispute resolution, so more frequently the parties enter into negotiations and, should the latter fail, proceed to arbitration/litigation.

**How are mediators selected for an appointment? Are they usually legally qualified?**

On rare occasions when mediation is chosen as an alternative method of resolving the dispute the parties tend to select mediators who have passed respective professional training. Many of the Ukrainian professional mediators are legally qualified however there are a number of mediators who are not.

**Is the mediator purely facilitative or are they evaluative (i.e. give a recommendation on the terms upon which the dispute should be resolved)?**

The mediators usually take a proactive position and apart from facilitating the discussion between the parties often suggest compromise solutions that would require mutual concessions for the sake of settlement of the dispute.



## How is a mediation settlement agreement enforceable?

A settlement agreement between the parties is binding as any other type of agreement. Should either of the parties fail to abide by the terms of such agreement it can be enforced via litigation/arbitration proceedings subject to the appropriate mechanism contained in the settlement agreement. Alternatively, the parties may immediately after the conclusion of the settlement agreement apply to the court so that it is approved as a judgment on agreed terms.

## What types of ADR process are commonly used? Is a particular process popular? If so, for which types of dispute?

Arbitration is the most popular alternative method of dispute resolution in Ukraine. The parties take recourse to arbitration in various areas. Other types of ADR are rarely used.

## Should I mediate in your country? What are the pros and cons?

### Pros:

- low costs of mediation; swift resolution of disputes.

### Cons:

- Cons: the opposing party may use mediation as dilatory tactics; in business community mediation is poorly distinguished from negotiations and thus treated as ineffective.

## Should I arbitrate under the laws of your country? What are the pros and cons?

### Pros:

- Ukrainian law "On International Commercial Arbitration" is largely based on the relevant UNCITRAL Model Law, therefore it sets an arbitration-friendly legal framework. The arbitration proceedings at the Ukrainian International Commercial Arbitration Court usually take from three to six months to complete and the arbitration costs are substantially lower than in other jurisdictions. The state courts have recently changed their approach in favour of recognition and enforcement of interim measures issued by an arbitration tribunal.

### Cons:

- Ukrainian procedural law does not set legal mechanisms for obtaining interim relief in support of arbitration or other court assistance (e.g., appointment of arbitrator by the court).



**Editor**

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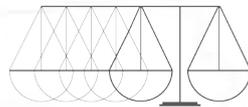
Laytons Solicitors LLP

The Position is stated as at 22 February 2016.

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