

# **Comparative Study of the legal and institutional frameworks and best practices on commercial mediation with recommendations for the Republic of Serbia**

**Countries and Regions analysed: Austria, Greece, Italy, Singapore, the Netherlands, Turkey, Western Balkans (Croatia, Slovenia, Montenegro, Macedonia and Bosnia and Herzegovina)**

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The development of this study was coordinated by Veronica Bradautanu, Principal Counsel. The study was prepared by a team of experts that included Leonardo D'Urso, Miglė Žukauskaitė, Ivana Ninčić Österle, Anne-Karin Grill, Elena Koltsaki, Lim Tat, Manon Shonewille and Asiyan Suleymanoglu.

Research assistance was provided by Lucija Baumann, Associate, Yulia Shapovalova, Counsel, Patricia Zghibarta, CCT, Liubov Skoryk, Acting Associate, Ljubomir Petruljeskov, Program Lead and Lorenzo Piacentini, Program Associate.

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One Exchange Square  
London EC2A 2JN  
United Kingdom

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## LIST OF ABBREVIATIONS

<b>ADR</b>	Alternative Dispute Resolution
<b>B2B</b>	Business to Business
<b>CoE</b>	Council of Europe
<b>CEPEJ</b>	Council of Europe European Commission for the efficiency of justice
<b>EBRD</b>	European Bank for Reconstruction and Development
<b>EBRD project</b>	EBRD project “Commercial Mediation in Serbia”, funded by the UK Investment Climate and Governance Fund
<b>EU</b>	European Union
<b>HJC</b>	High Court Council
<b>IMI</b>	International Mediation Institute
<b>IPA 2015 “EU For Justice”</b>	IPA 2015 “EU For Justice”: Strengthening the Capacities of the Ministry of Justice in line with the Requirements of the EU Accession Negotiation Process
<b>JA</b>	The Judicial Academy
<b>MDTF-JSS</b>	Multi Donor Trust Fund for Justice Sector Support in Serbia project
<b>Mediation Directive</b>	The Directive 2008/52/EC on certain aspects of mediation in Civil and Commercial matters of the European Parliament and the Council of the European Union
<b>MfN</b>	Mediators Federation Netherlands

<b>MoJ</b>	Ministry of Justice of the Republic of Serbia
<b>MoJ-HJC-SCC Guidelines</b>	Joint Guidelines for Enhancing the Use of Mediation issued by the Supreme Court of Cassation
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNCITRAL Model Law</b>	UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation
<b>Singapore Convention on Mediation</b>	United Nations Convention on International Settlement Agreements Resulting from Mediation
<b>SIMI</b>	Singapore International Mediation Institute
<b>SCC</b>	Supreme Court of Cassation
<b>White Paper</b>	White Paper for Mediation Legal Reform for consultation of the Ministry of Justice Working Group for Mediation (30 November 2019)
<b>Working Group</b>	the Working Group for drafting of amendments to the Law on Mediation in Dispute Resolution established by the Minister of Justice

## 1. EXECUTIVE SUMMARY

Mediation is a flexible dispute resolution process in which a mediator acts as a neutral facilitator who assists the parties in trying to reach a settlement of their dispute via a consensus. Accordingly, mediation enables parties to settle their own dispute to their mutual satisfaction, and to preserve their business relationship. Overwhelming evidence shows that mediation is a valuable method for resolving disputes and is worth promoting, which is why it is a public policy priority for many countries, as well as regional and international organizations.

In Serbia, the first mediation law was adopted fifteen years ago; six years ago it was replaced by a new law. Nevertheless, mediation remains a negligible dispute resolution pathway in Serbia, including for resolution of commercial disputes. In 2019, only 40 commercial mediations were reported in the country, conducted by a total of 16 mediators (both court-connected and out-of-court cases). By contrast, in 2019, commercial courts received 124,820 cases. Increased recourse to mediation would divert a significant number of cases from the commercial courts and hence improve their efficiency. Additionally, it would offer a more business-friendly, resource-efficient and flexible recourse to dispute resolution.

Further, as the COVID-19 outbreak has caused limited functioning of the judiciary throughout the world, including Serbia, the advantages and flexibility of mediation came to the fore.

With a view to identifying the most effective public policies and legislations to promote commercial mediation in Serbia, this Study analyses the existing legal framework and practice in six jurisdictions: Austria, Greece, Italy, the Netherlands, Turkey and Singapore, and additionally provides a regional overview for the Western Balkan countries (Croatia, Slovenia, Montenegro, North Macedonia and Bosnia and Herzegovina). The Study is developed by EBRD in cooperation with the IDLO and a number of key experts from various jurisdictions.

Based on such an analysis and review of successful practice, the Study proposes a number of recommendations for progressing commercial mediation in Serbia in order to increase its effective usage. A key conclusion of the Study is that while promotion, judicial support, strong institutions, infrastructure and expertise are all necessary ingredients, the most important factor to enhance the use of commercial mediation is to create a solid Commercial Mediation Regulation Framework. It is clear that in the context of civil law jurisdictions it is not enough to offer and promote a high-quality mediation service to increase the demand for mediation. Effective legislation needs to be put in place to significantly increase the number of mediations over a period of 3-5 years, as evidenced by the examples of Italy, Turkey and, most recently - Greece.

In the light of the lessons learnt from the reviewed jurisdictions, the recommendations for Serbian policy makers are categorized in three main groups, all of equal importance. The first two groups of recommendations include actions to progress the demand and supply side of mediation and pave the way for the third group of actions which entails a bold legislative reform. Each group is further split into sub-groups of recommendations, listed in no particular order of importance. Just as the Report requires a holistic reading, the authors likewise strongly urge that the three main groups of recommendations be applied holistically, to achieve an effective and sustainable public policy reform.

## **I. Increasing the demand for commercial mediation**

In the period leading to the new legislative reform of mediation in Serbia, actively taking on the following recommendations could increase the demand of commercial mediation and prepare the judicial, regulatory and business actors, while providing for smooth implementation of the legislative reform once the new legislation is enacted.

### ***A. Recommendations on establishing more effective judicial referral protocols in commercial courts***

1. Coordination and expansion of court-annexed mediation programmes within the specialised commercial court system (both first instance and appellate) (establishing pilot mediation schemes in selected courts);
2. Revision of MoJ-HJC-SCC Guidelines and their promotion, to ensure widespread implementation;
3. Establishing of cooperation agreements between courts, on the one hand, and faculties of law and commercial mediation centres, on the other;
4. Requiring in the Court Rules of Procedure and Mediation Guidelines that court presidents reach a balanced relation between mediation and judicial proceedings at every court level, which would also be set out nationally, within the MoJ-HJC-SCC Guidelines or a strategic document. A repercussion could be provided for failure to set and reach the BRTN;

5. Skills training for commercial judges and court administrators by the JA on case referral, pursuant to the CEPEJ Mediation Awareness Programme for Judges;
6. Advanced mediation training of a limited number of judges on ADR skills;
7. Introducing precise provisions on referral to mediation as part of judges' assessment in the Court Rules of Procedure and HJC documents (including when a case is considered as referred; target numbers and incentives);
8. Supporting the Commercial Appellate Court in dedicating a section on mediation at the Annual Conference of Commercial Courts organised annually in September as well as promotion and publication of the proceedings;
9. Supporting the Bar Academy in offering lawyers' commercial mediation advocacy training, especially on territories of courts where commercial court-annexed mediation programmes are established;
10. Identifying the mediators who are available to offer their services to the court (ex. court lists should provide more mediator credentials and information than the Registry provides; information on where they mediate – in the court or in their own offices; what their fee is, if any, etc.);
11. Allowing parties to have the right to choose a mediator from the panel at a private mediation provider/or choose the independent out-of-court registered mediator whereas if they choose judicial mediation (by a judge), they cannot have this right (Singapore model).

***B. Recommendations on conducting specific mediation awareness campaigns focused on selected business sectors***

1. Targeting specific business sectors in partnership with the related national or local business associations (like construction, agriculture, manufacturing, banking, related to intellectual property, corporate, employment, information technology, insurance, etc.) by the MoJ and relevant stakeholders and partners;
2. Targeting promotion connected to the judicial referral programs in selected commercial courts (i.e. limited to "pilot" territories).
3. Support the Bar Associations in organising mediation related panel discussions at the Lawyers' Conference and seminars of the Bar Academy, as well as in mediation advocacy training for commercial lawyers;
4. Active promotion of signing of "mediation pledges" by major companies;
5. Conduct a study among lawyers (in their capacity of referrers to mediation and advisers to companies) and companies (users of the services) that have experience with business mediation, and also among judges to provide knowledge and gain insight into opportunities and barriers to commercial mediation.

***C. Recommendations on promoting greater use of mediation and multi-step dispute resolution clauses in commercial contracts***

1. Advocating and educating on the benefits of using mediation and multi-step dispute resolution contract clauses which include mediation;
2. Collaboration with the established arbitral institutions, such as the Arbitral Court of the Chamber of Commerce and Industry and the Belgrade Arbitration Centre should be



encouraged, as well as joint outreach campaigns designed and held by the MoJ, representatives of the commercial courts, and arbitral and mediation centres.

3. Targeting in-house legal departments and commercial law firms by offering workshops on Negotiation and Mediation Advocacy Advanced Techniques in order to familiarise them with the benefits of mediation and prepare them to participate in the procedure;
4. Public administrations, agencies and companies should consider signing a mediation pledge and should be nudged by the MoJ to consider systematically the option of integrating mediation clauses in their contracts.

## **II. Increasing the quality of supply of commercial mediation services**

The quality of mediation services is of utmost importance to the success of mediation in commercial disputes. While, in theory, the market should be able to self-regulate and ensure that only qualified individuals are providing mediation services, it is not working in that manner in practice. This is especially true when the volume of disputes brought to mediation rises due to a legislative reform, which is the case with the proposed gradual introduction of mandatory mediation or the first information session with a mediator. The quality of mediation essentially lies on two pillars – selecting qualified individuals and institutions and supervising and supporting their activities further in practice.

### ***A. Recommendations on supporting the Ministry of Justice in developing its capacity and expanding the role of the Mediation Registry and the standard setting body***

1. Establishing and developing an MoJ Mediation Department and building its capacities;
2. Establishing of a Mediation Commission or Mediation Council by law, in order to provide expert support to the MoJ for the development of mediation and for outsourcing the management and monitoring of the accreditation process of mediators, mediation centres and training organisations;
3. Establishing and promoting partnerships with international mediation standard-setting organisations in order to ensure international recognition of Serbian mediators;
4. Higher standards must be prescribed and monitored for training bodies;
5. The training bodies should be bound to submit annual reports and should be periodically audited by the MoJ, as well as possibly sanctioned and struck off the Register.

### ***B. Recommendations on setting up an online platform and a national website on mediation with different functions***

1. Design, implement and run a comprehensive online platform that manages online the entire accreditation process of mediators, providers and training entities;
2. Publish a website, linked in real time with the online platform for accreditation, with the roster of accredited mediators, providers and training entities;
3. Publish a website with relevant information on mediation (news, laws and decrees, and quarterly statistics on mediation);
4. Consider adding a further function to the online platform as a national case management platform for mediations where users can choose a mediator or provider and file a mediation request (similar to the current Serbian court IT system).

### ***C. Recommendations on developing and promoting advanced training, assessment and credentialing for commercial mediators***

1. Accredited mediators should be divided in specialized rosters in order to increase the confidence of sophisticated users, especially if any of these categories will be encompassed by the requirements of attending the first information session, or when the court refers the case, in which case the specialization should be provided by law as a precondition for conducting mediation.
2. Specialized advanced training for commercial disputes (and, possibly, their various particular categories) should be carefully designed, its delivery should be supported and monitored, in order to comply with international standards.
3. Substantial capacity building of commercial mediation trainers and institutions must be effected, including establishing co-mediation programs, more simulations within the training, etc.
4. The practical part of specialised commercial mediation training should include:
  - a. Individual self-awareness and practical experience seminars to practice techniques of mediation through the use of role play, simulation and reflection;
  - b. Peer group work;
  - c. Case work and participation in practice supervision in the area of mediation;
  - d. Competency assessment for commercial specialisation may be outsourced to independent institutions.

### **III. Improvement of the commercial mediation regulatory framework**

The first two groups of recommendations described above have the main goal of paving the way for the third group of recommendations focused on an effective legislative reform. The findings of the present analysis on Austria, Greece, Italy, Netherlands, Singapore, Turkey and Western Balkans confirm the validity of the recommendations of the White Paper adopted by the Working Group. Austria, Greece, Netherlands, Singapore and Western Balkans have not been able to reach a substantial number of civil and commercial mediations compared with the number of judicial proceedings in court. Like Serbia, all these countries have experienced only few hundreds of mediations annually, compared with hundreds of thousands of litigations in courts. Only Italy and Turkey have put in place quite similar legislative reforms that Greece has decided to adopt in 2020; such reforms have effectively broken the status quo and generated a substantial number of mediations. The gradual introduction of the requirement to attend the first mediation meeting with easy opt-out as a precondition for recourse to court in selected dispute types has demonstrated that wide-spread use of mediation can not only be achieved relatively quickly, but can also bring high settlement rates.

### ***A. Recommendations on gradually introducing the obligation of attending the first mediation meeting with easy opt-out, as a pre-condition for recourse to court in certain commercial dispute types***

1. Introduce in some carefully selected commercial and B2B dispute types the requirement for the parties to attend a mediation meeting with easy opt-out (to be held within 30 days and with a small filing fee) as pre-requisite for filing the case in court, together with the following provisions;

2. Promote the presence of lawyers or corporate counsels trained in “mediation advocacy” to assist their clients within the mediation process;
3. Promote the opening of a mediation centre in every Bar Association;
4. Introduce specific lawyers’ fees and incentives that encourage the consensual settlement in mediation over litigation with the presence of lawyers;
5. The MoJ must closely follow the implementation of the law, including through feedback from lawyers, mediators, judges and end-users and regularly publish an assessment with recommendations;
6. The MoJ should be committed to drafting of amendments of the regulatory framework if the assessment shows it is necessary, as well as to making other beneficial adjustments to the mediation system.

#### ***B. Recommendations on judicial order of mediation***

1. Introduce mandatory court referral in certain cases;
2. Introduce court referral based on assessment of the judge, considering all the circumstances, especially the interests of the parties and of the third parties related to them, the duration of their relations and the level of their mutual reliance;
3. Require parties who refuse to participate in mediation to provide a reason for this refusal;
4. Such granting of judges the power to order litigants to try mediation, with the ability of the parties to opt out should be at little or no cost during the first meeting;
5. Require judges to state why they did not refer a case to mediation (change in Law on Civil Procedure, Court Rules of Procedure and bylaws of the High Judicial Council);
6. Make sanctions possible for parties' refusal to attend mediation proceedings, such as holding these parties liable for litigation costs even if they prevail in the subsequent trial of the case;
7. Redefining referral to mediation as part of judges’ assessment (amendments in Court Rules of Procedure and bylaws of the High Judicial Council);
8. Introducing a mediation promotion training program as part of mandatory initial and continuous training for judges.

#### ***C. Recommendations on the mandatory nature of the mediation clause and enforcement of the mediation settlement agreement***

1. Amend the relevant Serbian law by introduction of a provision adhering to the mediation clause stating that a claim in a court or an application to an arbitration institution shall be inadmissible unless mediation was attempted, or the period of time, specified in the mediation clause, has come to an end.
2. At least two alternatives should be provided by the law to allow for direct enforceability of a settlement agreement:
  - a) the parties and/or mediator may apply to the court in order to obtain an enforceability decision (if, for example, one party is not represented by a lawyer);
  - b) if the parties and lawyers sign (and seal) the agreement, and the mediator issues a confirmation that it originates from mediation, the agreement may become an

enforceable document, with no need for subsequent approval by the court (in which case the lawyers of the parties guarantee for the legal qualities of the agreement).

3. The MoJ should thoroughly analyse the grounds for refusing of enforcement provided in the Singapore Convention and other best practices in order to ensure an informed ratification process and smooth implementation, harmonised with international trends.

## 2. INTRODUCTION

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### 2.1. Document objectives

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This Study has been developed by the EBRD and IDLO and a number of key experts in mediation, as part of the technical cooperation project in Serbia to promote commercial mediation.

The main objective of the Study is to analyse the existing experiences and results in commercial mediation in selected relevant jurisdictions in order to draw recommendations for the development of commercial mediation in Serbia. The analysis of recourse to commercial mediation in **Austria, Greece, Italy, Netherlands, Turkey, Singapore and Western Balkan** countries leads to conclusions, which may be very useful for the development of commercial mediation in Serbia, with proper adaptations to the local context.

### 2.2. Project background

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The EBRD 2016-2018 Commercial Mediation project (Phase I) supported by the UK Good Governance Fund assisted the government and judiciary in raising awareness about commercial mediation. Phase I, implemented in cooperation with the European Centre for Dispute Resolution (ECDR), provided trainings on commercial mediation to judges and mediators; delivered conferences and media events to promote commercial mediation (with over 400 participants); and a communication strategy; provided advisory support to the mediation centre within the Serbian Chamber of Commerce and Industry and developed dedicated curriculum and trainings for the law schools about mediation. In view of EBRD's previous efforts to promote commercial mediation in Serbia and the opportunity to assist commercial courts, the Ministry of Justice of the Republic of Serbia (hereinafter - **MoJ**) and other relevant stakeholders to address commercial mediation in the ADR Strategy, legal reform and to build the infrastructure for resolving commercial disputes through mediation, EBRD engaged IDLO for the purposes of implementing Phase II aiming at preparing a comparative analysis of the mediation frameworks in other relevant jurisdictions, and at supporting the ADR Working Group with input focusing on commercial mediation for drafting the proposal for ADR legal reform, relevant White Paper and ADR Strategy for Serbia.

Building on the activities successfully delivered under Phase I of the Project, the overarching objective for Phase II is to assist the Government and the judiciary in Serbia with:

- supporting the ADR Working Group in developing an ADR Strategy for Serbia focusing on commercial mediation.

In order to develop the above-mentioned analysis, EBRD and IDLO engaged a team of experts from various jurisdictions to provide best practices and recommendations for the Serbian MoJ on the use of Mediation for Commercial Disputes. The Analysis is envisioned to deliver a twofold outcome:

- on one hand, it proposes to assist the Appellate Commercial Court and the Ministry of Justice in developing appropriate recommendations and solutions to support the reform of ADR in Serbia;
- on the other hand, it aims at conducting to an increase in the use of mediation as a method of Alternative Dispute Resolution in commercial disputes in Serbia, consequently reducing the burden and backlog of Commercial Courts and especially the beneficiary Appellate Commercial Court of Serbia, reducing the cost and time to solve disputes for the parties.  
By making the legal system more efficient, faster and more accessible, the project will improve the overall business climate in the country.

To achieve these outcomes, the Study will be presented to representatives of the judicial system, of the government, and of the private sector to provide a forum for consultation between the stakeholders and inform them of relevant developments in commercial mediation.

Given the status quo of the relatively modest recourse to mediation in Serbia, the main objective of this study is to provide several recommendations for the MoJ and its working group(s) in developing the mediation system policy and law on how to effectively adopt public policies and improve the legal framework specifically in the field of commercial mediation, based on concrete and proven experiences of selected national jurisdictions. In order to achieve this goal, the research consists of the following:

- 1) identifying international standards and recommendations which could be relevant for Serbia's commercial mediation reform policy
- 2) a thorough analysis of national institutional and legal frameworks for commercial mediation in selected jurisdictions, which are comparable and which have demonstrated proven results and/or promising developments in the field (Austria, Greece, Italy, Singapore, The Netherlands, Turkey and the Western Balkans countries: Croatia, Slovenia, Montenegro, Macedonia and Bosnia and Herzegovina);
- 3) defining good practices (both legal and institutional) in the field of commercial mediation, based on the analysis of the selected jurisdictions;
- 4) identifying preconditions, if any, needed for the good practices indicated to be effective, including but not limited to the legal or cultural environment in question;
- 5) identifying practices that were applied and were not effective, if any, indicating possible reasons for their failure;
- 6) evaluating the suitability of the good practices indicated with regard to Serbian legal, institutional and cultural environment.

The future mediation public policy initiative would benefit from a structured, inclusive process in which the stakeholders in Serbia would discuss and explore how, in the remits of the Constitution and the existing legal framework, a win-win legislative solution could be found, which would enable mediation to flourish sustainably.

### 3. METHODOLOGY

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#### 3.1. Scope of assessment: use of commercial mediation to resolve commercial disputes

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This study is concerned with commercial mediation implying the settlement of commercial disputes through mediation. However, in many jurisdictions there is no specific definition in the law as to what constitutes a “commercial dispute”, separate to a civil dispute, and consequently the distinction between commercial and civil mediation. For example, the EU Mediation Directive 52/2008 refers to “certain aspects of mediation in civil and commercial matters” without a clear distinction between the two categories that have quite different characteristics and actors.

As there is no single definition of what shall be included in the term ‘commercial’, for the purpose of this study it was chosen to rely on the definition of ‘commercial dispute’ provided in the instruments of United Nations Commission on International Trade Law (hereinafter - UNCITRAL), namely UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation<sup>1</sup> (hereinafter - UNCITRAL Model Law) and United Nations Convention on International Settlement Agreements Resulting from Mediation<sup>2</sup> (hereinafter – the Singapore Convention on Mediation).

There are two main reasons for such a choice. First, UNCITRAL has been formulating internationally recognized rules for decades with the primary and exceptional focus on commercial transactions. Second, UNCITRAL Model Law (including the 2002 version) has influenced the laws on mediation in more than 30 countries<sup>3</sup>, indicating that it is an internationally accepted standard.

As provided in the explanation of the Article 1 of the UNCITRAL Model Law 2018: *The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, **whether contractual or not**. Relationships of a commercial nature include, but are not limited to, the following transactions:*

- any trade transaction for the supply or exchange of goods or services;
- distribution agreement;
- commercial representation or agency;
- factoring;
- leasing;
- construction of works;
- consulting;
- engineering;
- licensing;
- investment;
- financing;
- banking;
- insurance;
- exploitation agreement or concession;
- joint venture and other forms of industrial or business cooperation;
- and carriage of goods or passengers by air, sea, rail or road.

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<sup>1</sup> UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002) [accessed 2019-08-16], available at: [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex\\_ii.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf).

<sup>2</sup> United Nations Convention on International Settlement Agreements Resulting from Mediation, Singapore, 2019 [accessed 2019-08-16], available at: [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation\\_convention\\_v1900316\\_eng.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf).

<sup>3</sup> The full list of countries which adopted legislation based on or influenced by the UNCITRAL Model law (2002) is available at: [https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_conciliation/status](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status).

A concrete example of some commercial disputes most suitable for mediation are construction contracts (from the refurbishing of office space to constructing of large infrastructures) and long-term supply contracts for services or goods. As one executive pointed out in the cited survey: *“Once you are in an established relationship with one supplier, it takes too long to find another one. We can’t replace them just like that. We have no interest in engaging in litigation with them, but rather in finding an amicable outcome that allows us to preserve the relationship.”*

The above commercial dispute types have in common - most of the time - two main characteristics:

- a) the presence of a written contract; and
- b) a business-to-business relationship.

Even though certain disputes may be commercial in nature, the legal regime applied to their resolution might be significantly different, especially taking into account the interests of the so-called weaker party and familial relationships. For these reasons, and taking into account Article 16 (2) of the UNCITRAL Model Law (2018) and Article 1 (2) of the Singapore Mediation Convention, the following dispute types **shall be excluded** from the scope of the study: *“... arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes; relating to family, inheritance or employment law.”*

Taking into account all of the above considerations and assumptions and, above all, the definition of UNCITRAL Model Law on International Commercial Mediation and International Settlement

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The present study is focused on the recourse to commercial mediation to solve disputes arising from business-to-business relationships, in selected, relevant jurisdictions, in order to draw recommendations for the development of commercial mediation in Serbia.

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Agreements Resulting from Mediation, 2018:

### **3.2. Method of assessment: supply and demand**

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The study is based on inductive research which aims at drawing recommendations for Serbia based on the experiences in the field in selected national jurisdictions. The primary data for the research is collected through the answers of national experts of the countries analysed: Austria, Greece, Italy, Singapore, The Netherlands, Turkey and the Western Balkans countries: Croatia, Slovenia, Montenegro, Macedonia and Bosnia and Herzegovina. The relevant indexes on judicial efficiency and mediation of the countries taken into consideration show both commonalities and differences with Serbia:



	Incoming Cases (every 100 inhabitants)	Pending Cases (every 100 inhabitants)	Disposition Time in days	Estimated nr. of mediations (every 100 inhabitant)
Montenegro	4,8	3,4	267	0,27
<b>Serbia</b>	<b>4,2</b>	<b>3,4</b>	<b>315</b>	<b>0,008</b>
Bosnia and Herzegovina	4,0	7,2	574	0,001
Croatia	3,3	3,8	364	NA
Italy	2,6	4,1	514	0,24
Slovenia	2,5	2,0	280	NA
<i>Average CoE Member States</i>	2,5	1,6	233	NA
Turkey	2,4	2,2	399	0,5
North Macedonia	1,6	0,9	223	0,002
Greece	1,4	2,3	610	0,004
Austria	1,0	0,4	133	0,005
Netherlands	0,9	0,3	121	0,005

*Tab. 1: Data from CEPEJ 2018 Report on the Efficiency and quality of justice. First instance civil and commercial litigious cases in 2016, with the addition of estimated number of mediations per 100 inhabitants*

Serbia is characterized by a very high number of incoming and pending civil and commercial litigious cases in the first instance courts, compared with the average of the 47 Member States of the Council of Europe. Except Turkey, Italy and Montenegro, all countries taken into consideration have irrelevant number of mediations compared with the number of cases in court, in relation to the number of inhabitants.

Previous quantitative and qualitative studies on mediation, scientific publications, international legal acts and soft law instruments form the basis of the secondary data used in the research. Particular emphasis has been placed on searching for quantitative data regarding the balanced relationship between commercial mediation and commercial court proceedings, as well as success rate of mediation cases.

Once collected, the data and information gathered have been divided and analysed according to the two main sides of the commercial mediation market in each jurisdiction: the demand and the supply side.

- The analysis of the **demand side of commercial mediation focuses on measuring the number of commercial mediations** (compared with the number of commercial litigations) divided by the types of recourses: (a) by prescription of the law, (b) by contract clause, (c) by judge referral and (d) fully voluntary. The different quantitative results in each jurisdiction and by each type of recourse derive from effective or less effective public policies on legal framework, judicial and court referral programs, public awareness, long-term educational programs, use of mediation contract clauses, with the aim of creating

the conditions and incentives needed to overcome barriers to the recourse to mediation in a business context.

- The **supply side** places great attention on the existence of a high-quality level of **mediation services** for businesses users. The supply side directs efforts at the traditional approach of building excellent mediation capacity through adapting best practices to local contexts, developing effective capacity to provide services, and providing training for the case managers and mediators.

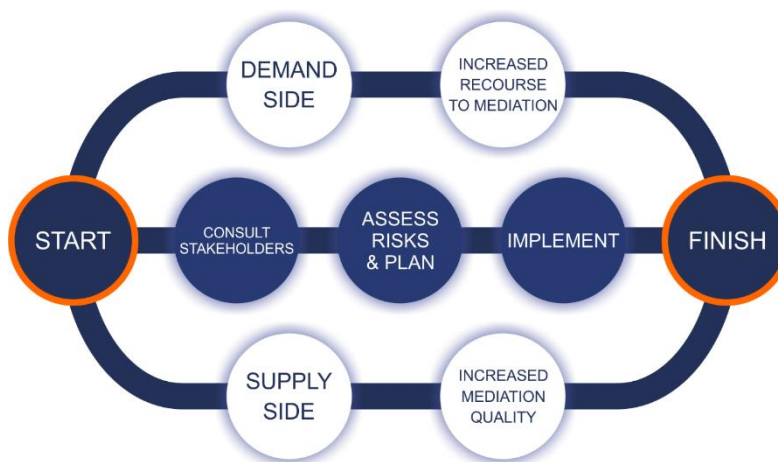


Figure 1: Two-track Methodology for increasing the demand and the quality of mediation

Such methodology is chosen for several reasons. First, recommendations based on good proven practices of other countries are more likely to be effective, as there is already a demonstrated example of their application. Second, introducing changes based on good practices allows avoiding the mistakes of implementation already made in other jurisdictions. Third, national experts are able to take into account wider national legal and cultural framework, hence, they are better capable of identifying the reasons why certain instruments are effective, or, to the contrary, not effective in their respective jurisdictions. Fourth, the reasoning found in the secondary data shall help reality test the recommendations provided in the broader perspective, not limited to the national jurisdictions selected.

## 4. OVERVIEW OF COMMERCIAL MEDIATION

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### 4.1. Advantages and barriers to using commercial mediation

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Mediation is a flexible dispute resolution process and a voluntary settlement technique, in which a mediator acts as a neutral facilitator to assist the parties in trying to arrive at a negotiated settlement of their dispute. Mediation, therefore, promotes the goal of enabling the parties to settle their own dispute to their mutual satisfaction, and to upkeep and improve their business relationship. In mediation, the parties remain in control of the outcome by negotiating an agreement based on their business interests. Both parties have control over the decision to settle the dispute, the terms of any settlement agreement, and its legal effects – whether contractually binding or automatically enforceable. Therefore, parties can often best resolve business disputes with the assistance of a neutral third party, the mediator.

Mediation is conducted privately and confidentially, and although highly flexible and adaptable, it is a structured dispute resolution process. Instead of imposing a decision on the parties or making decisions for them, the mediator's role is to facilitate discussions by identifying and clarifying the issues in dispute between the parties and assisting them to resolve the dispute by exploring alternatives and searching for creative solutions.

Overwhelming evidence shows that mediation is a valuable method for resolving disputes, worth promoting, which is why it is a public policy priority of most countries, as well as regional and international organisations. The study prepared by Ecorys and ADR Center for the European Commission<sup>4</sup> notes that *“international firms may be less inclined to invest in or trade with countries which have an unstable legal framework and a suboptimal dispute resolution capacity. And by the same token, domestic investors will feel uncomfortable and take this into account in their trade/investment pattern”*.

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<sup>4</sup> Ecorys and ADR CENTER, Study on the use of Alternative Dispute Resolution for Business to Business disputes in the European Union: Final Report, 2012 [accessed 2019-08-21], available at: <https://www.adrcenterfordevelopment.com/wp-content/uploads/2018/06/ADR-Final-Report-151012-1.pdf>, p. 12

The same study report mentions a survey among SMEs and large corporations of the main advantages and barriers to the use of mediation in solving a commercial dispute:

Advantages	Barriers
<ol style="list-style-type: none"> <li>1. Direct time savings;</li> <li>2. Direct cost savings;</li> <li>3. Indirect cost and time savings (e.g. capital unblocking);</li> <li>4. Preserving business relations;</li> <li>5. More control over the dispute resolution outcome;</li> <li>6. Avoidance of stress related to court litigation;</li> <li>7. Implementation of the decision taken.</li> </ol>	<ol style="list-style-type: none"> <li>1. Lack of awareness of mediation as a suitable means for solving disputes;</li> <li>2. Current template contracts do not contain a mediation clause;</li> <li>3. Conservative attitude of lawyers;</li> <li>4. Lack of mediation training;</li> <li>5. Corporate culture;</li> <li>6. Specific sector-wide agreements;</li> <li>7. Previous experience with mediation;</li> <li>8. Limited trustworthiness of the system;</li> <li>9. Confirmation from court required;</li> <li>10. Lack of cooperation from opposing partners.</li> </ol>

As noted, given the modest recourse to mediation, in most jurisdictions and corporate contexts the advantages have not been able to overcome the numerous barriers.

Nevertheless, as the COVID19 outbreak has caused disturbances in the functioning of judiciaries throughout the world, drastically affecting the functioning of judiciaries in Europe,<sup>5</sup> including Serbia<sup>6</sup> it can be witnessed throughout the world that the advantages of the flexibility that mediation provides are becoming more evident and used.

<sup>5</sup> Please see: CEPEJ: COVID19 Management of the judiciary - compilation of comments by country, <https://www.coe.int/en/web/cepej/compilation-comments>;

<sup>6</sup> Ministry of Justice Recommendations Regarding the Work of Courts and Public Prosecutor Offices during the State of Emergency declared March 15, 2020, <https://mpravde.gov.rs/sekcija/29166/konkretna-uputstva-za-rad-pojedinacnih-pravosudnih-organa-kao-i-javnih-beleznika-i-javnih-izvrsitelja-a-na-osnovu-preporuka-ministarstva-pravde-za-rad-za-vreme-vanrednog-stanja.php> ;

## 4.2. The “Mediation paradox”

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Several surveys<sup>7</sup> conducted mostly with representatives of Law Departments of large companies in the USA (2003) and in France (2009 and 2013) have demonstrated that the so-called “dispute-wise” companies favour the use of Alternative Dispute Resolution (hereinafter – ADR) methods and see litigation as a very last resort when facing a conflict.

In these surveys, typical comments by legal counsels are:

- *“Our feeling is that mediation is a good thing not only for the company but also for the suppliers, who can use this process both to mitigate risks and to build better relations with the manufacturer”*
- *“the business units see the positive effects of mediation. We focus on what we want and on the benefits of a negotiated agreement. We usually incorporate mediation into our contracts”*
- *“Some say that a mandatory mediation clause can undermine the effects of mediation, since the parties are thus compelled to participate. But without that clause, they wouldn’t use mediation at all. A forced approach is the best we can do for now.”<sup>8</sup>*

Other reports based on surveys conducted in the USA<sup>9</sup>, Europe<sup>10</sup> or even worldwide<sup>11</sup> also show that companies’ representatives indicate willingness to resort to ADR when facing a business-to-business (hereinafter – B2B) dispute. Such a choice is primarily justified based on time and cost efficiency, privacy and confidentiality, possibility to save their relations with both clients and suppliers, control

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<sup>7</sup> For more information see: FIDAL and American Arbitration Association, [accessed: 2019-08-14]. Available at: [https://www.adr.org/sites/default/files/document\\_repository/Dispute-Wise%20Management%20France%20-Best%20Practices%20Report.pdf](https://www.adr.org/sites/default/files/document_repository/Dispute-Wise%20Management%20France%20-Best%20Practices%20Report.pdf); American Arbitration Association, *Dispute-Wise Business Management: Improving Economic and Non-Economic Outcomes in Managing Business Conflicts*, 2006 [accessed: 2019-08-15]. Available at: [https://fundacionsignum.org/wp-content/uploads/2016/07/aaa\\_mediacion-arbitraje-resolucion-conflictos-dispute-wise\\_study\\_research\\_report\\_2011.pdf](https://fundacionsignum.org/wp-content/uploads/2016/07/aaa_mediacion-arbitraje-resolucion-conflictos-dispute-wise_study_research_report_2011.pdf); FIDAL and American Arbitration Association, *Dispute-Wise Business Management: Vers un Management Optimisé des Litiges*, 2009 [accessed: 2019-08-14]. Available at: <https://1010i73xhwo61n45xd3neg10-wpengine.netdna-ssl.com/wp-content/uploads/2015/01/Vers-un-management-optimis%C3%A9-des-litiges-2009.pdf>.

<sup>8</sup> Reported at page 17 of the cited survey *Dispute Wise Management: Best Corporate Practices in Dispute Management from France*, 2013

<sup>9</sup> Two related studies of Fortune 1000 corporations were conducted in the USA in 1997 and 2011 co-sponsored by Cornell University’s Scheinman Institute on Conflict Resolution, the Straus Institute for Dispute Resolution at Pepperdine University School of Law, and the International Institute for Conflict Prevention & Resolution. For more information see: STIPANOWICH, T. and LAMARE, J. R., Living with ‘ADR’: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations, *Harvard Negotiation Law Review*, 2013 [accessed: 2019-08-18] vol. 19 (1). Pepperdine University Legal Studies Research Paper No. 2013/16. Available at: <https://ssrn.com/abstract=2221471>.

<sup>10</sup> See, for example, FLASH EUROBAROMETER 347 - TNS POLITICAL & SOCIAL, *Business-to-business Alternative Dispute Resolution in the EU: Report*, 2012 [accessed 2019-08-21], available at: [https://ec.europa.eu/comfrontoffice/publicopinion/flash/fl\\_347\\_en.pdf](https://ec.europa.eu/comfrontoffice/publicopinion/flash/fl_347_en.pdf).

<sup>11</sup> INTERNATIONAL MEDIATION INSTITUTE, 2016 INTERNATIONAL MEDIATION & ADR SURVEY: Census of Conflict Management Stakeholders and Trends, 2016 [accessed 2019-08-22], available at: [odreurope.com/assets/site/content/IMI\\_survey\\_2016.pdf](http://odreurope.com/assets/site/content/IMI_survey_2016.pdf).

over results and the prospect of entering into new contracts, which would, subsequently, create additional value to the company<sup>12</sup>. Other studies<sup>13</sup> have also indicated a shift from judicial settlement of civil, or, in some cases more specifically, commercial, disputes to ADR. The previously mentioned studies conducted in the USA and in France have also established that arbitration and mediation are the most popular methods of ADR among companies of all sizes, from SME's to holdings, active in different sectors<sup>14</sup>. The majority of companies perceived arbitration as costlier and less capable of maintaining or ameliorating existing relationships. They also distinguished mediation as the speediest method of ADR<sup>15</sup>. While some studies indicate that arbitration remains more popular option than mediation<sup>16</sup>, at least in cross-border cases<sup>17</sup>, others firmly indicate that the willingness to resort to mediation is rising, while the willingness to resort to arbitration is falling<sup>18</sup>.

However, by reading into other reports and general statistics on mediation, it is evident that companies like mediation but rarely use it.<sup>19</sup> Companies indicate that they are willing to use mediation more often

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<sup>12</sup> FIDAL and American Arbitration Association, *Dispute-Wise Business Management: Vers un Management Optimisé des Litiges <...>*, p. 8.; 10. STIPANOWICH, T. and LAMARE, J. R., *Living with 'ADR': Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, Harvard Negotiation Law Review, 2013 [accessed: 2019-08-18] vol. 19 (1). Pepperdine University Legal Studies Research Paper No. 2013/16. Available at: <https://www.mdcourts.gov/sites/default/files/import/macro/pdfs/reports/cornellstudy2013.pdf>, p. 24.

<sup>13</sup> ERIN, R. *ADR, the Judiciary and Justice: Coming to Terms with the Alternatives*. *Harvard Law Review*, 2000, Vol. 113:1752 [accessed: 2019-08-14]. Available at : <http://scholarship.law.wm.edu/facpubs/250>, p. 1851; EVAS, T. *Expedited settlement of commercial disputes in the European Union: European Added Value Assessment accompanying the European Parliament's legislative initiative report*, *European Parliamentary Research Service*, 2018 [accessed: 2019-07-29]. Available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/627120/EPRS\\_STU\(2018\)627120\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/627120/EPRS_STU(2018)627120_EN.pdf), p. 10.

<sup>14</sup> FIDAL and American Arbitration Association, *Dispute-Wise Business Management: Vers un Management Optimisé des Litiges <...>*, p. 16.

<sup>15</sup> FIDAL and American Arbitration Association, *Dispute-Wise Business Management: Vers un Management Optimisé des Litiges <...>*, p. 9 – 10.

<sup>16</sup> FIDAL and American Arbitration Association, *Dispute Wise Management: Best Corporate Cractices in Dispute Management from France <...>*, p. 15.

<sup>17</sup> Ecorys and ADR CENTER, *Study on the use of Alternative Dispute Resolution for Business to Business disputes in the European Union: Final Report*, 2012 [accessed 2019-08-21], available at: <https://www.adrcenterfordevelopment.com/wp-content/uploads/2018/06/ADR-Final-Report-151012-1.pdf>, p. 7.

<sup>18</sup> See, for example, STIPANOWICH, T. and LAMARE, J. R., *Living with 'ADR': Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, Harvard Negotiation Law Review, 2013 [accessed: 2019-08-18] vol. 19 (1). Pepperdine University Legal Studies Research Paper No. 2013/16. Available at: <https://www.mdcourts.gov/sites/default/files/import/macro/pdfs/reports/cornellstudy2013.pdf>, p. 3, 44.

<sup>19</sup> Manon Schonewille (the country expert for The Netherlands in this study) indicated that several surveys in different countries have proven this barrier, just a short selection:

- In a UK survey 68% of litigants wished they could have avoided litigation but most disregarded mediation as an option through lack of awareness. Claimants want to avoid court but still shun mediation – MoJ poll. Legal Gazette. John Hyde 3 November 2015.
- Systematic use of mediation is limited in Europe and most companies are 'poorly educated' regarding the topic. Herbert Smith, 'The Inside Track – How Blue Chips Are Using ADR', 2007.
- In a Dutch survey most companies and their lawyers are not convinced of the effectiveness of legal proceedings. Asked about the most effective form of dispute resolution only 2% of companies and 4% of lawyers mention litigation. Mediation especially in combination with legal proceedings or arbitration (hybrid procedures), is mentioned as an attractive option. ZAM/ACB Study of opportunities and impediments in commercial mediation in the Netherlands. Utrecht University December 2018. Marc Simon Thomas, Marina de Kort- de Wolde, Eva Schutte, Manon Schonewille. In this same survey even judges are not convinced that a court case always helps. Only about 30% of the judges indicate that through a judicial ruling the actual dispute between the parties is resolved. The majority of companies and lawyers are positive about their experience with mediation, which contrasts sharply with their assessment of the effectiveness of a trial. The average score for the mediator, the solution and the process fluctuate around 7.5 (on a

once they have experience with it.<sup>20</sup> Further, the above surveys have been conducted mainly among large corporations with sophisticated general counsels. In fact, there is a deep difference on the management of disputes between a large corporation and a Small-Medium Enterprise (SME) where commercial disputes are managed directly by entrepreneurs and executives or delegated to external lawyers. It is worth to mention that Serbian SMEs represent 99 per cent of registered enterprises and generate some 67 per cent of employment in the country.

#### **4.3. International legislative framework for commercial mediation**

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Having in mind the recognised advantages of mediation and its systemic use, several international instruments, both regulatory and soft law, have been enacted and have influenced national developments in the field of mediation. Although their capacity is primarily standard-setting, they do set a framework for national governments and legislators to take into account. When it comes to mediation of commercial disputes, currently the most important among them for the past and future developments are:

- The United Nations Convention on International Settlement Agreements Resulting from Mediation<sup>21</sup> (hereinafter – the Singapore Mediation Convention);
- The United Nations Commission on International Trade Law (hereinafter – UNCITRAL) Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation<sup>22</sup> (hereinafter – the UNCITRAL Model Law);
- The Directive 2008/52/EC on certain aspects of mediation in Civil and Commercial matters of the European Parliament and the Council of the European Union<sup>23</sup> (hereinafter – the Mediation Directive);
- The European Handbook for Mediation Lawmaking<sup>24</sup>, adopted at the 32<sup>nd</sup> plenary meeting of the CEPEJ Strasbourg, 13 and 14 June 2019, as the most comprehensive guidebook for legislators.

The obligation to transpose the Mediation Directive has influenced many member states of the European Union (hereinafter – the **EU**) to adopt new or amend already adopted legal acts on mediation

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scale from 0-10) and in more than three-quarters of these cases the mediation resulted in an agreement (in whole or in part).

- In a German survey mediation and negotiation were the preferred method, however most companies immediately proceeded to litigation when negotiations fail. Reasons: the other party initiates legal actions or refuses to mediate. PricewaterhouseCoopers and the European University Viadrina Frankfurt/Oder, Commercial Dispute Resolution: A Comparative Study of Resolution Procedures in Germany, 2005.

<sup>20</sup> ZAM/ACB Study 2018,

<sup>21</sup> United Nations Convention on International Settlement Agreements Resulting from Mediation, Singapore, 2019.

<sup>22</sup> While the 2018 version is more likely to affect future developments, the 2002 version, as mentioned above, has already influenced legislation on mediation in more than 30 countries. See: UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002).

<sup>23</sup> The European Parliament and the Council of the European Union, Directive 2008/52/EC on certain aspects of mediation in Civil and Commercial matters, OJ, L-136, 2008.

<sup>24</sup> “European Handbook for Mediation Lawmaking”, CEPEJ(2019)9, 14 June 2019, <https://rm.coe.int/cepej-2019-9-en-handbook/1680951928>;



around the year 2011<sup>25</sup>. The Mediation Directive has established some fundamental principles and rules with regard to mediation in civil and commercial cross-border disputes, in order to ensure that parties having recourse to mediation can rely on a predictable legal framework<sup>26</sup>, such as the confidentiality of the process, the enforceability of mediation settlement agreements, and the effects on limitation and prescription periods. The vast majority of the member states of the EU have ensured that equivalent or higher standards are also applicable to domestic disputes.

The Singapore Mediation Convention and the UNCITRAL Model Law, on the other hand, have slightly different goals. The Convention shall primarily ensure sound enforcement and recognition of foreign mediation settlement agreements, while the UNCITRAL Model Law provides basic standards for a law on mediation. However, in addition to the requirements with regard to confidentiality, limitation period and enforcement of mediation settlement agreements, it also suggests regulation of certain procedural aspects of mediation, such as the moments of commencement and termination of the process, appointment of a mediator or mediators, and others.

Both the Singapore Mediation Convention and the UNCITRAL Model Law are primarily drafted with regard to mediation in international commercial disputes. However, they are both capable of influencing national regimes of mediation regulation. The Singapore Mediation Convention is based on domestic enforcement mechanisms and, thus, requires national legislatures to ensure procedures for the enforcement of the agreements in national legal acts. The explanations provided in the UNCITRAL Model Law also clearly suggest that the provisions of the model law could be adapted in order to be applied to domestic disputes as well<sup>27</sup>.

While the EU Mediation Directive and UNCITRAL instruments have established basic mediation principles that should be reflected in national legal acts, they are not enough to ensure that business is ready to resort to mediation. Studies have shown that companies' representatives are also concerned about the competence of mediators and lawyers in the setting of mediation, indicating the importance of specific training for both groups and certification standards needed to ensure the quality of the service provided<sup>28</sup>. Others have also stated that the unwillingness to resort to mediation comes primarily from such factors as lack of experience in mediation in the company and lack of support from the top management<sup>29</sup>, which in itself indicates lack of awareness. These factors show that, regardless of the basic standards set at international and European level, there are many other ways to improve institutional and regulatory framework of mediation in commercial disputes on a national level.

With respect to commercial mediation, it is also useful to note that the UNCITRAL Secretariat has worked with mediation experts to develop Draft Mediation Rules,<sup>30</sup> which were published on 3 January

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<sup>25</sup> While the Mediation Directive was due for transposition in May 2011 (see art. 12 of the Directive), Croatia, Cyprus, the Czech Republic, Finland, Germany, Spain have all introduced new or amended laws on mediation between the years 2011-2012.

<sup>26</sup> The Mediation Directive, para. 7.

<sup>27</sup> The UNCITRAL Model Law Art. 3, footnote No. 3.

<sup>28</sup> FIDAL and American Arbitration Association, *Dispute Wise Management: Best Corporate Practices in Dispute Management from France <...>*, p. 18.

<sup>29</sup> FIDAL and American Arbitration Association, *Dispute-Wise Business Management: Vers un Management Optimisé des Litiges <...>*, p. 24.

<sup>30</sup> United Nations Commission on International Trade Law Fifty-third session New York, 6–17 July 2020 Settlement of commercial disputes, International commercial mediation: draft UNCITRAL Mediation Rules, Note by the Secretariat, <https://undocs.org/en/A/CN.9/1026>;



2020 and scheduled to be adopted at the Fifty-third session in New York, 6–17 July 2020. Just as is the case with UNCITRAL Arbitration Rules, this document is a useful tool and a best practice example for both parties and mediators in conducting mediation, as well as for the legislator on what should be legislated or left to the flexibility of party autonomy, and what should be left to be regulated between themselves and the mediator/ mediation centre they choose to resolve their dispute with.

Finally, in the challenging times caused by the COVID-19 pandemic, which has drastically affected the functioning of judiciaries throughout the world,<sup>31</sup> effectively putting commercial litigation at a standstill, a significant movement to online mediation practice is witnessed globally.

International Mediation Institute (hereinafter - IMI)<sup>32</sup>, a standard setting body, has established criteria for online mediation / e-mediation, and is working to offer a new IMI Specialisation in Online Mediation<sup>33</sup>. Prominent mediation centres and providers such as CEDR have issued useful guides for online mediations, both for clients and mediators.<sup>34</sup> The 2017 UNCITRAL Technical Notes on Online Dispute Resolution<sup>35</sup> offer further insight into the benefits and possibilities which lie in this field.

The advantages of online mediation are certainly flexibility, dispute resolution from the comfort and safety of one's own home, and the possibility of coming to a workable, creative solution to the dispute, which would take into account the future business relationship, all things considered.

#### **4.4. The need of proven effective public policies and legislation to increase the recourse to mediation**

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Due to the indisputable advantages of systematic access to mediation, international organizations, governments, courts, and companies have spent tens of millions of euros trying different approaches to strike a balanced relationship between mediation and judicial proceedings. To plan for the adoption of the most effective public policies and legislations to promote commercial mediation in Serbia, it is worth analysing objectively which policies have worked and which have failed during the past few decades. Twenty years ago, there was little relevant data available, so the debate on the growth of mediation was based mainly on opinions or anecdotal evidence. Now, however, studies and other research have been published with quantitative and qualitative data on the success or failure of various adopted policies.

Serbia's track record on enabling of mediation is not an exception in Europe. Several studies have indicated that the balanced relationship between civil and commercial mediation and judicial proceedings, as foreseen in the EU Mediation Directive, was never reached in the majority of European countries<sup>36</sup>. Compared to the initiated judicial proceedings, available data still demonstrates that only

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<sup>31</sup> Please see a comparative overview of the effect of the pandemic on judiciaries in Europe,; CEPEJ: COVID19 Management of the judiciary - compilation of comments by country, <https://www.coe.int/en/web/cepej/compilation-comments>;

<sup>32</sup> [www.imimediation.org](http://www.imimediation.org)

<sup>33</sup> <https://www.imimediation.org/orgs/cag-odr/>

<sup>34</sup> <https://www.cedr.com/commercial/telephone-and-online-mediations/>

<sup>35</sup> [http://www.uncitral.org/pdf/english/texts/odr/V1700382\\_English\\_Technical\\_Notes\\_on\\_ODR.pdf](http://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf)

<sup>36</sup> See, for example: Flash Eurobarometer 347 - TNS Political & Social, Business-to-business Alternative Dispute Resolution in the EU: Report, 2012 [accessed 2019-08-21], available at:

around 1 percent of these disputes go to mediation. The only countries that stand out in the European context are Italy<sup>37</sup> and Turkey<sup>38</sup>, both of which have implemented similar legislation reforms based on the introduction of a required first mediation meeting with a mediator as a condition precedent to judicial proceedings in certain dispute types.

It is evident that most efforts in previous decades overwhelmingly failed to overcome strong barriers to access to mediation. Like in Serbia, many countries have adopted both public policies (like awareness campaigns and fiscal incentives) and legislative reforms to address this. However, these have generated only a few hundred mediations per year, compared to the hundreds of thousands or even millions of litigations in court. Another practical indicator of the failure is that very few individuals and providers in civil jurisdictions can afford to be full-time professional mediators or mediation providers.

The approach that has effectively broken the status quo and generated a substantial number of mediations has been the joint adoption of a legislative reform based on two pillars:

- The integration of an initial mediation session with a trained mediator as a prerequisite to initiating or proceeding with a litigation case in court, as the main driving force to break the barriers to mediation (the demand side).
- The implementation of provisions to ensure high-quality mediation service with minimum requirements—specifically by training mediators, lawyers in representing clients, and judges in referring cases - and introducing accreditation schemes (**the supply side**).

As we will illustrate in the country reports, in Italy and Turkey, the requirement to attend an initial mediation meeting before going to court generates thousands of mediations per year and has forever changed the legal landscape. From 15 January 2020, Greece has been implementing the same provision for family disputes and then from 1 July 2020 for civil commercial disputes. In 2019, Azerbaijan passed a similar law that will enter in force, after being postponed due the Covid-19 emergency, on 1 January 2021. Like Serbia, Spain is considering following the same route.

After decades of trials and errors in the field of mediation, the old debate around mandatory versus voluntary mediation should be put to rest. Participation in an initial mediation session is not in contradiction with the unquestionably voluntary nature of mediation in reaching a consensual settlement. In fact, it truly enables the parties to make

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Parties of the dispute shall be able to make informed decisions and choose a method of dispute resolution that suits their needs.

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[https://ec.europa.eu/comfrontoffice/publicopinion/flash/fl\\_347\\_en.pdf](https://ec.europa.eu/comfrontoffice/publicopinion/flash/fl_347_en.pdf), p. 7; The European Union, Directorate General for Internal Policies, 'Rebooting' the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU: study [interactive], 2014. Available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL- JURI\\_ET\(2014\)493042\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL- JURI_ET(2014)493042_EN.pdf), p. 6.; CEPEJ, The Impact of CEPEJ Guidelines on Civil, Family, Penal and Administrative Mediation. CEPEJ-GT-MED(2017)8, available at: <https://rm.coe.int/report-on-the-impact-of-cepej-guidelines-on-civil-family-penal-and-admini/16808c400e>, p. 10;

<sup>37</sup> From 01 January to 30 September 2019 there were 101,680 civil and commercial mediation processes in Italy with a settlement rate of 45% when the parties agree to go to full mediation after the first meeting. Source: Minister of Justice of Italy.

<sup>38</sup> From 02 Jan 2019 to 24 Oct 2019 there were 119,787 commercial mediation processes in Turkey with a settlement rate of 57% (57,525 settlements). Source: Ministry of Justice of Turkey

an informed choice. The European Court of Justice has already made it clear in two different cases<sup>39</sup> that a provision of required first mediation session does not constitute a barrier to justice, subject to the condition that the mediation process is non-binding, occurs quickly (in fewer than 90 days), suspends the period for time-barring of claims, and is free of charge or for limited cost for any party that decides to opt out at the initial session.

However, one model does not fit all needs. The initial mediation meeting practiced in Italy and Turkey and about to be introduced in Greece is not organized in the same way and has different variables: duration, costs, place, experience of the mediator, who should attend, prerequisite to access to court, referred by a judge, possible economic sanctions for the absent party, presence of lawyers, dispute types and many others. Nonetheless, the common key success factor is that all litigants are required to meet in the same place at the same time with a trained mediator to make an informed decision – whether to voluntarily proceed or not with a full mediation process.

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<sup>39</sup> The CJEU has adopted two separate decisions concerning compulsory out-of-court settlement of disputes in the light of the principle of effective judicial protection, namely the judgement of 18 March 2010 in cases C-317/08 to C-320/08 *Alassini and Others* and the judgement of 14 June 2017 in case C-75/16 *Menini and Rampanelli v. Banco Popolare Società Cooperativa*. In neither one of them did the CJEU come to a conclusion that compulsory mediation infringes the principle of effective judicial protection, the principles of equivalence and effectiveness or the EU law in question.

## 5. THE STATUS QUO OF COMMERCIAL MEDIATION IN SERBIA

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Fifteen years after the first mediation law was introduced and six years after the current mediation law was enacted<sup>40</sup>, mediation still remains a negligible dispute resolution pathway in Serbia, including for resolution of commercial disputes.

Despite efforts at promotion of mediation and institutional support aimed at increasing court-connected mediation<sup>41</sup>, in 2019 only 40 commercial mediations<sup>42</sup> were reported in the country, conducted by a total of 16 mediators (both court-connected and out-of-court cases). In total, in 2019, 186 civil and commercial court-related mediations have been reported<sup>43</sup>.

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For every 3,121 cases received by commercial courts in Serbia, only 1 dispute is resolved in mediation (i.e. only 0.03%)

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By contrast, in 2019, commercial courts received 124,820 cases<sup>44</sup>, a slightly smaller number than the significantly high number of cases in 2018 – 128,681 (compared to 2017 when the total number of incoming cases was 99,903), which led the Supreme Court of Cassation (hereinafter – SCC) to conclude in its 2018 Report that it is necessary to conduct an analysis of the structure of these cases and react with timely systemic measures, so that the commercial courts wouldn't start losing track of the caseload, having in mind their particular importance. Building a sustainable commercial mediation system would precisely contribute to this goal, in addition to offering a more business-friendly, resource-efficient and flexible pathway to dispute resolution.

Serbian courts receive 4.2 civil and commercial cases per 100 inhabitants compared with an average of 2.5 cases of the 47 Member States of the Council of Europe (hereinafter - CoE), indicating a high demand for dispute resolution, which is currently practically exclusively channelled to the courts<sup>45</sup>. On

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<sup>40</sup> Law on Mediation and Dispute Resolution ("Official Gazette of Republic of Serbia" no. 55/2014) available at: [https://www.paragraf.rs/propisi/zakon\\_o\\_posredovanju\\_u\\_resavanju\\_sporova.html](https://www.paragraf.rs/propisi/zakon_o_posredovanju_u_resavanju_sporova.html)

<sup>41</sup> Please see: Joint Guidelines for Enhancing the Use of Mediation, <https://www.mpravde.gov.rs/files/20170628%20Joint%20Guidelines%20for%20Enhancing%20the%20Use%20of%20Mediation%20SCC%20MoJ%20HCC.PDF>;

<sup>42</sup> Understood as "mediations of cases which would fall under the purview of commercial courts"; Ministry of Justice of the Republic of Serbia, Annual Report on the Work of Mediators for 2019, April 2020., pg. 8; In total during 2019, **569 mediation agreements were concluded (agreements to enter into mediation), while 403 cases successfully finished with the conclusion of a settlement agreement.** Despite a high success (settlement) rate (71%), comparatively, even a slight decrease of the total number of cases has been noted since 2018, when 638 mediation agreements were reported as concluded.

<sup>43</sup> Ministry of Justice of the Republic of Serbia, Annual Report on the Work of Mediators for 2019, April 2020.

<sup>44</sup> Please see: „ANNUAL REPORT ON THE WORK OF THE COURTS IN THE REPUBLIC OF SERBIA FOR 2019”, March 2020, Supreme Court of Cassation, <https://www.vk.sud.rs/sites/default/files/attachments/Annual%20Report%20ENG.pdf>, p. 15.

<sup>45</sup> Currently, no relevant comparative study addresses in more depth the issue of the structure of cases in civil and commercial matters. Having in mind the fact that in the last ten years the Serbian judiciary has been overwhelmed with "repetitive cases", the statistics do not clearly indicate how many cases are eligible for mediation, as not all cases that come to court are suitable for mediation. Nonetheless, the stated data are indicative of the general burden on the courts and that further analysis of the case data is necessary, including how many cases could be suitable for mediation.

the other hand, no more than 1 dispute goes to mediation for every 3,121 cases received by commercial courts (i.e. only 0.03%). The high number of yearly incoming cases has a direct consequence on the high number of pending cases – 3.4 per every 100 inhabitants compared respectively with a CoE average of 1.6. The average duration of a court case is 315 days, compared to the 233-day average of the CoE Member States<sup>46</sup>.

	Incoming Cases (every 100 inhabitants)	Pending Cases (every 100 inhabitants)	Disposition Time in days	Estimated nr. of mediations (every 100 inhabitant)
Serbia (difference in % with Member States CoE average)	4,2 (+68%)	3,4 (+113%)	315 (+35%)	0,008 <sup>47</sup>
Average CoE Member States	2,5	1,6	233	NA

*Tab. 2: Data from CEPEJ 2018 Report on the Efficiency and quality of justice. First instance civil and commercial litigious cases in 2016 with the addition of estimated number of mediations*

The SCC Report further states that “Commercial courts still have some pending backlog cases with proceedings longer than 1 year (in 2012 there were 214 such cases, and in 2018 there were 216)” and that “due to the importance of cases in this special type of disputes, it would be necessary to re-examine the organization of these courts, and the number of judges in them, as well as the competence to make decisions before this special type of courts, and some individual measures that the court presidents are undertaking due to the increased number of incoming cases, in order to avoid prolonging the duration of proceedings in the oldest cases”.<sup>48</sup> This chapter lays out the status quo of mediation in Serbia, as a basis for sustainable future development.

### 5.1. Mediation public policy and legislative reform

In December 2018, the Minister of Justice established a Working Group for drafting of amendments to the Law on Mediation in Dispute Resolution (hereinafter - the **Working Group**) with the task of drafting a working text of amendments and supplements to the law, followed by accompanying bylaws. As the annual reports of the SCC are clear on the fact that the inflow of first instance litigation cases is increasing from year to year, and an overview of the statistics of courts in Serbia indicates that there

<sup>46</sup> Data from the Council of Europe – CEPEJ study, European Judicial Systems - Efficiency and Quality of Justice, 2018 Edition (2016 data). Available at: <https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c>.

<sup>47</sup> The Statistical Office of the Republic of Serbia estimates the number of inhabitants on 1 January 2019 to be 6,963,764; compared to the 569 concluded mediation agreements in 2019.

<sup>48</sup> „ANNUAL REPORT ON THE WORK OF THE COURTS IN THE REPUBLIC OF SERBIA FOR 2018”, March 2019, Supreme Court of Cassation, [https://www.vk.sud.rs/sites/default/files/attachments/Annual%20Report%20on%20the%20Work%20of%20Courts%202018\\_2.pdf](https://www.vk.sud.rs/sites/default/files/attachments/Annual%20Report%20on%20the%20Work%20of%20Courts%202018_2.pdf)

is a great room for the use of the alternative dispute resolution mechanisms, including mediation as an effective way of resolving disputes, the ministerial decision directs that the new law must create a significant “push” for mediation demand, on the one hand, through various mechanisms, as well as ensure adequate mediation quality standards, on the other hand, which will ensure that the number and quality of mediators match the expectations, in order to create a sustainable system.

The working group was further instructed to be guided by mediation standards provided in relevant acts of the United Nations, the EU and the CoE, as well as by the need for adapting standards and best practices to local possibilities and needs, while especially taking care that changes to the legal framework encompass:

- 1) transparency and clarity of the content of the mediation law in relation to how mediation is started, the mediation procedure itself, standards and qualifications for mediators, mediation centres and mediation training providers, as well as rights and obligations of participants in the mediation process;
- 2) specifying the position of judges in the mediation procedure;
- 3) enforceability of clauses on settling disputes through mediation;
- 4) the principle of confidentiality;
- 5) the enforceability of agreements reached in mediation and agreements reached in international mediation; and
- 6) the impact of mediation on the course of a lawsuit, including the possibility of prescribing the first obligatory meeting as a procedural precondition for initiating litigation in certain types of cases, as well as other ways in which the objective of Directive 2008/52/EC may be achieved.

In 2019, the working group held nine plenary meetings and almost an equal number of sub-group meetings; it adjourned its official work in August 2019 due to important public policy considerations which needed to be decided on within the MoJ.

Namely, in order to overcome the current barriers to the recourse to mediation in Serbia, in March 2019 a “White Paper for Mediation Legal Reform” (hereinafter – White Paper) was approved by the Working Group with the main goal to propose a legal reform to introduce some trigger mechanisms to gradually increase the recourse to mediation in order to reach a balanced relationship between number of mediations and judicial proceedings, as stated in Article 1 of the 2008 EU Directive on Mediation. One of the main legislative proposals of the White Paper was to gradually introduce over five years a required first mediation meeting with an easy opt-out provision, as a precondition for access to litigation in certain dispute types. However, it is important to note that this proposal has encountered a strong resistance from lawyers’ bar associations and certain groups of lawyers and is currently under consideration of the MoJ.

The recommendations of the White Paper refer broadly to mediation for all types of disputes, and are to be elaborated on once a working group on the strategic framework for mediation is established. Namely, both the **Revised Action Plan for Chapter 23**, adopted by the Serbian Government on 10 July 2020 and the new **Judicial Development Strategy for the period of 2020-2025**, adopted on 22 July 2020 call for further development of mediation as a measure which is to further increase the level of efficiency of the judicial system. Most importantly, the Action Plan for Chapter 23 provides for “Development and adoption of a strategic framework for improving the application of mediation” (activity no. 1.3.6.13.) by II quarter 2021 and “Creation and adoption of laws regulating mediation, mediation conditions, rights and duties of mediators, and training program for mediators” (activity no.

1.3.6.15.) by II quarter of 2021. Therefore, as the specific focus of the present study is on commercial mediation within the business sector, it aims to support the MoJ in its future deliberations on the matter.

## 5.2. Legal framework in the field of commercial mediation

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As part of the National Judicial Reform Strategy for the period 2013-2018, the Law on Mediation in Dispute Resolution (*“Official Gazette of RS” no. 55/2014*) (hereinafter the “Law”), was enacted and made applicable from January 1<sup>st</sup>, 2015, improving the legal framework in the area of mediation and harmonising it to a greater extent with the EU *acquis* than the previous legal framework from 2005.

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Despite a high success (settlement) rate (71%) and promotional activities, the number of mediations remains low

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Major novelties of the Law on Mediation in Dispute Resolution were 1) licensing system for mediators by the MoJ 2) introduction of a Register of Mediators 3) establishing a decentralised system of training for mediators, with training organisations accredited by the MoJ 4) possibility of enforceability of a mediated settlement agreement and 5) recommended Tariff on Mediation Fees, issued by the Minister of Justice. Likewise, the law provides that judges may mediate outside of working hours and free of charge.

The basic procedural framework for commercial mediation also encompasses:

- The Law on Civil Procedure (*“Official Gazette of RS”, no. 72/2011, 49/2013 - Decision of Constitutional Court, 74/2013 - Decision of the CC and 55/2014, 87/ 2018, 18/2020*),
- The Law on Bankruptcy Procedure (*“Official Gazette of RS”, no. 104/2009, 99/2011 – other law, 71/2012 – Decision of CC and 83/2014*), as well as the Law on Consensual Financial Restructuring of Companies (*“Official Gazette of RS”, no. 36/2011*), which regulates specific mediation in consensual financial restructuring of companies, conducted before the Serbian Chamber of Commerce.

Likewise, it is important to note that the Law on Amendments and Supplements to the Law on Court Fees (*“Official Gazette of RS”, no. 95/2018*), applicable from 1 January 2019, was enacted, encouraging parties to resolve their disputes by amicable means, through mediation, negotiated settlement, court settlement or any other amicable way, by postponing the collection of court fees and exempting parties from paying them if they achieve a settlement by the time of the first hearing. Likewise, equally important is that the Republic of Serbia signed the Singapore Mediation Convention on 7 August 2019, as one of the first signatories, showing important initiative in promoting mediation as a dispute resolution process which enhances the business climate and the rule of law.



### 5.3. The demand side of commercial mediation: recourse by law, by contract clauses, by judge referral and by voluntary agreement

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During 2019, 569 mediation agreements were concluded in total in Serbia (agreements to enter into mediation), while 403 cases successfully finished with the conclusion of a settlement agreement. Despite a high success (settlement) rate (71%), comparatively, a slight decrease of the total number of cases has been noted since 2018, when 638 mediation agreements were reported as concluded.<sup>49</sup>

Since 2015, the MoJ has continuously provided support to the nascent mediation system under the new law, supported by various projects of modest capacities (Multi Donor Trust Fund for Justice Sector Support in Serbia project, hereinafter: MDTF-JSS; EBRD project “Commercial Mediation in Serbia”, funded by the UK Investment Climate and Governance Fund, hereinafter: EBRD project; IPA 2012 Judicial Efficiency Project; IPA 2015 “EU For Justice”: Strengthening the Capacities of the Ministry of Justice in line with the Requirements of the EU Accession Negotiation Process – hereinafter: IPA 2015 “EU For Justice”; IPA 2016: EU for Supreme Court of Cassation, etc.). However, after a five year period of implementation of the law, recourse to mediation by provision of the law still does not exist in commercial cases and recourse by voluntary agreement/contract clause is rare, as evidenced by the above statistics. Judges are required to inform the parties of a possibility of mediation, but cannot order it.

In order to promote recourse by judge referral, notably, on June 28<sup>th</sup> 2017, the Joint Guidelines for Enhancing the Use of Mediation were issued by the SCC, High Court Council (hereinafter – HJC) and the MoJ (hereinafter - MoJ-HJC-SCC Guidelines)<sup>50</sup>, followed by a Mediation Week organised in two basic courts, tripling the number of mediations compared to the previous year. Namely, in accordance with Article 9 Paragraph 2 of the Law, the court is obliged to provide all necessary information to the parties in dispute about the possibilities of mediation, which can also be done by referring the parties to the mediator; however, these provisions have seldom been applied, which is why the MoJ-HJC-SCC Guidelines were issued.

On June 25, 2018, the Protocol on Cooperation to Enhance the Use of Commercial Mediation between the Serbian Chamber of Commerce and the Commercial Court of Appeal was signed. The agreement includes the opening of Mediation Info Services in all 16 commercial courts throughout the country<sup>51</sup>. The first was opened in the Commercial Court in Belgrade<sup>52</sup> on October 11<sup>th</sup>, 2018, however predominantly focused on facilitating out-of-court procedures and mediation related to bankruptcy cases, and without measured/evidenced results to date. Unfortunately, due to lack of capacities and project support, envisioned activities within the courts have not taken place.

Finally, on May 28<sup>th</sup>, 2020 the Commercial Court in Belgrade, the Commercial Court of Appeal in Belgrade, the Court of Appeal in Belgrade, the High Court in Belgrade, the Ministry of Justice of the

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<sup>49</sup> Ministry of Justice of the Republic of Serbia, Annual Report on the Work of Mediators for 2019, April 2020.

<sup>50</sup> The Supreme Court of Cassation, High Court Council and the Ministry of Justice Guidelines for Enhancing the Use of Mediation may be accessed through the following link: <https://www.mpravde.gov.rs/tekst/16729/uputstvo-za-unapredjenje-medijacije-u-republici-srbiji-po-zakonu-o-posredovanju-u-resavanju-sporova.php>.

<sup>51</sup> <https://www.mpravde.gov.rs/vest/19797/potpisan-sporazum-o-saradnji-izmedju-privredne-komore-srbije-i-privrednog-apelacionog-suda.php>.

<sup>52</sup> Supported by Western Balkans Debt Resolution and Business Exit Project, an advisory service provided by the International Finance Corporation (IFC), a member of the World Bank Group, under the auspices of the Swiss State Secretariat for Economic Affairs (SECO)



Republic of Serbia and the Intellectual Property Office concluded a Cooperation Agreement with the aim of promoting mediation in the field of intellectual property, assisted by the IPA 2015 "EU For Justice" project.

With respect to promotion of commercial mediation, most notably, the EBRD project organised three larger conferences, including a final conference during which the Chamber of Commerce and Industry of Serbia officially signed a Mediation Pledge. On November 2<sup>nd</sup>, 2018, the conference "Mediation in the Field of Financial Services" was organized by the MoJ and the National Bank of Serbia, supported by Weinstein International Foundation and MDTF-JSS in the framework of a joint initiative to launch a strategic approach to advancing the use of mediation in the Republic of Serbia. In September 2019, at the Annual Conference of Serbian Commercial Courts, a panel discussion on mediation was organised for the first time, with the support of a joint initiative of EBRD and IDLO and IPA 2015 "EU For Justice" projects.

Nonetheless, although efforts have been made at promotion, they have been few and far between. The statistics evidently show that without continuous support and follow-up, results of these activities, in the sense of significantly greater increase of the number of mediations, are negligible.

#### 5.4. The supply side of commercial mediation

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##### *Mediation Providers*

Pursuant to the Report on Action Plan for Chapter 23<sup>53</sup>, by December 30, 2019, 1,349 mediators had been registered in the Register of the Ministry of Justice<sup>54</sup>. Most of the mediators are from the City of Belgrade (477), while 131 are from Novi Sad, 136 from Nis, and 65 from Kragujevac. The highest number of mediators is from the ranks of lawyers - 277<sup>55</sup>, while licences are issued also to 29 judges, 6 judicial associates, 10 enforcement officers, 832 graduate lawyers and 2 ombudsmen.

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Out of 1,349  
mediators in Serbia,  
only 124 mediated  
in 2019

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The constant rise in the number of registered mediators may be considered a result of various promotional activities of the MoJ, continuous training of mediators, and the anticipation that more mediations will be demanded in the future. However, it is important to note that pursuant to the Annual Reports of Mediators,<sup>56</sup> filed to the MoJ, only 124 mediators stated that they mediated in 2019, 34 of which mediated in cooperation with a co-mediator. Therefore, compared to the number of registered mediators in the country, an extremely low number of mediators have had any mediation experience in the past year (9%) and can be considered "active" mediators.

Mediators are registered in the MoJ Register of Mediators for all types of mediation – not only court-related mediation or for specific specialised areas, such as commercial mediation. Although the

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<sup>53</sup> Ministry of Justice of the Republic of Serbia, Report on Action Plan for Chapter 23 for IV Quarter 2019, 14 January 2020. The Action Plan for Chapter 23: Judiciary and Fundamental Rights was adopted in 2016 by the Republic of Serbia, after public consultations and consultations with the European Commission. A revised version of the Action Plan is set to be adopted in 2020. Please see: <https://www.mpravde.gov.rs/files/Action%20plan%20Ch%2023.pdf>.

<sup>54</sup> <https://www.mpravde.gov.rs/intermediaries.php>.

<sup>55</sup> By comparison, in 2019, there were **10,513 lawyers** registered in the Bar Association of Serbia Registry of Lawyers.

<sup>56</sup> Ministry of Justice of the Republic of Serbia, Annual Report on the Work of Mediators for 2019, April 2020.

Register search criteria do not allow for search and selection of mediators according to specialisations, information on the attended courses is publicly available in the Register. In 2019, the MoJ was undertaking efforts to improve the functionality of the Register of Mediators by enabling the possibility of selection of mediators by the territory of courts.

Registration of mediation centres is not provided in the law. The Bar Association of Serbia enacted the Rules on the Operations of the Centre for Mediation ("CM") of the Bar Association of Serbia on 30 May 2018, regulating the establishment, organization and operation of the Mediation Centre at the Bar Association of Serbia in which only lawyers can be mediators, thereby joining local bars, such as the Bar Association of Čačak in these endeavours. Other centres (NGO's, LTD's) also exist.

The system currently requires mediation licencing and training criteria which are drastically lower than European standards, as determined by the legislative working group.

### ***Mediation training providers and trainers***

By December 30, 2019, 17 organizations received accreditation from the MoJ for conducting training for mediators, but up to now, only 12 organizations have actually conducted training, with the total number of participants being 2,941. Out of these, 292 participants attended specialized training on mediation in commercial disputes, 25 attended specialized training on bankruptcy mediation and 71 attended specialized training on mediation in dispute resolution in the field of banking services, leasing and insurance.<sup>57</sup> However, it must be noted that the basic training requirements in Serbia are currently significantly below the European standard (lacking 20 hours to meet the minimum requirements as prescribed by CEPEJ) and none of the training providers or trainers have been audited to date.

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<sup>57</sup> Ministry of Justice of the Republic of Serbia, Report on Action Plan for Chapter 23 for IV Quarter 2019, 14 January 2020.

## 6. RECOMMENDATIONS FOR SERBIA ON ADOPTING AN EFFECTIVE NATIONAL POLICY ON COMMERCIAL MEDIATION

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The analysis conducted in Austria, Greece, Italy, Netherlands, Turkey, Singapore and Western Balkan countries clearly reveals many unsuccessful practices and few successful ones which can be very useful for the development of commercial mediation in Serbia, with proper adaptations to the local context.

Promotion, judicial support, strong institutions and infrastructure, talent and expertise are all necessary for the development of mediation. However, a firm foundation of the legal framework has to be put in place. What is more, for an actual breakthrough to be achieved, an impulse is needed in the form of certain legislative measures. First and foremost, evidence was not found in any civil law country proving that a significant demand of commercial mediation has increased spontaneously by offering and promoting a high-quality mediation service. Due to several barriers and the easy alternative of the recourse to court, the demand and supply of commercial mediation service are not able to grow and flourish by themselves without the driving force of an effective legislative reform that can increase significantly the number of mediations in a 3-5 years timeframe, like the cases of Italy, Turkey and, most recently - Greece, prove. In economic terms, the so called “market of commercial mediation” is very similar to many other sectors (e.g. incentives for green energy or required insurances) that have great advantages on public and private levels, but need to be strongly incentivized with effective legislative reforms. In short, while high-quality mediation services and long-term education programs are necessary for strengthening commercial mediation, they are not sufficient.

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While quality mediation services and long-term education programs are necessary for strengthening commercial mediation, they are not alone sufficient to create the needed demand for mediation.

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In the light of the lessons learnt from the jurisdictions taken into consideration, it is clear that without the adoption of effective legislative reform on mediation that increases the number of mediations, as recommended in the White Paper - similar to the one adopted in Italy, Turkey and Greece, it would not be possible for Serbia to enhance substantially the recourse to commercial mediation. For this reason, the first two groups of recommendations on the demand and supply side of mediation market have the main goal to prepare the business arena for the needed broader legislative reform of mediation described in the third group of recommendations, as provided below:

For each group of recommendations, specific actions have been identified based on the findings of the country reports considered.

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Recommendations are divided in the following three groups:

1. Increasing the demand for commercial mediation;
  2. Increasing the quality of supply of commercial mediation services;
  3. Improvement of commercial mediation regulatory framework
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### **6.1. Increasing the demand for commercial mediation**

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The national reports provided in this study and the research cited demonstrate that both small and medium enterprises and large companies, even though acknowledging that mediation can be beneficial to their business, are still reluctant or unwilling to engage in mediation. On the other hand, the statistical data provided in the national reports<sup>58</sup> and external studies<sup>59</sup> show that if the parties are obliged to initiate a mediation process, they still stand a good chance of reaching an agreement (hence, high settlement rate), as opposed to a wide-spread myth that if parties were unwilling to try mediation from the beginning, it is unlikely that they will end up reaching an agreement. The lack of stimulus for the businesses to engage in mediation works against both their interests and the interest of promoting mediation as an effective dispute resolution tool.

Hence, even in the period leading to the new legislative reform in mediation, actively taking on the following recommendations could prepare the judicial, regulatory and business actors and provide a smooth implementation of the legislative reform once the new legislation is enacted. These activities should be conducted on an ongoing basis:

1. **Establish more effective judicial referral protocols in commercial courts**
2. **Conduct specific mediation awareness campaigns focused on selected business sectors**
3. **Promote greater use of mediation and multi-step dispute resolution clauses in commercial contracts**

#### **6.1.1. Establish more effective judicial referral protocols in commercial courts**

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The main premise of the recourse to mediation by judge's referral or order is that the judge has the time and is able to evaluate the suitability of the case to mediation, evaluate the likelihood of parties settling, and preventing the cases that for certain reasons might not be suitable for mediation from entering the process. However, the reality is that only very few judges use this possibility. It is clear

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<sup>58</sup> See, for example, Turkey.

<sup>59</sup> State-wide ADR Advisory Committee, State of New York, *Interim Report and Recommendations*, February 2019 [accessed 2019-08-21]. Available at: <https://ww2.nycourts.gov/sites/default/files/document/files/2019-05/InterimReportRecommFeb-2019.pdf>, p. 8.

that such a method might be effective and generate a large number of cases directed to mediation<sup>60</sup>, but that requires dedication from judges, staff court for administrative support and availability of proper meeting rooms to conduct the mediation sessions.

Most court-annexed projects where mediations are conducted within the courts, have not been able to generate enough referrals over the years and, most importantly, are not sustainable in long term when the funds and resources of a sponsored international project come to an end. This was the case with all the court-annexed mediation pilot projects conducted in Serbia to date. Further, the current court-annexed mediation pilot project at the Niš Basic Court is focused on small claims (mostly parking tickets and utility bills) using external mediators that offer their service free of charge, thereby rendering the impact and sustainability of these excellent initiatives questionable. Namely, in 2018, out of 30,567 pending cases at the Court of Niš only about 200 cases were referred to mediation, making about 0.7% of the total pending cases. For this reason, such court-annexed mediation models might not be best suited in the long run for commercial disputes in Serbia.

Nonetheless, studies on effective mediation policy<sup>61</sup> have long underlined the benefits that a functional interrelationship between public and private sector mediation initiatives can have. They include the following:

- business—based mediation initiatives build demand for mediation systems in judicial reform programs.
- court—based mediation initiatives create a context in which private sector awareness of mediation may be increased.
- Each creates a context in which the other gains credibility.

Having in mind this symbiosis between private and public sector initiatives, properly diagnosing the possibilities in each sector and the added value that each might lend to the other is important in developing mediation regulatory interventions.

Like in Italy, Turkey and Greece, in a jurisdiction like Serbia, with a very high number of incoming and pending cases in courts, the valuable time of judges and the limited resources of courts should be dedicated primarily to holding hearings and writing sentences. One should also bear in mind that an average commercial mediation session takes at least half a day (the same time of several hearings in court). In the light of the goal stated in the White Paper to reach at least 10% of mediations of the incoming cases (that makes about 30,000 mediations annually), a model based, primarily or predominantly, on judicial mediation is not sustainable and will likely result in a major delay in judicial proceedings. Judicial mediation for a high number of mediations works only in jurisdictions with a low number of incoming cases trialled, where judges have enough working time to dedicate to mediation. Such is the case of the Slovenian model of judicial mediation where judges offer mediation services within their working hours, which can function in a system with much lower numbers of incoming

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<sup>60</sup> DE PALO, G. A Ten-Year-Long “EU Mediation Paradox” When an EU Directive Needs to Be More ... Directive: Briefing requested by the JURI committee, European Parliament [interactive], 2018. Available at: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL\\_BRI\(2018\)608847\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf), p. 10-11.

<sup>61</sup> Alexander, Nadja; Steffek, Felix. 2017. *Making mediation law (English)*. Mediation series. Washington, D.C. : World Bank Group. <http://documents.worldbank.org/curated/en/899611503551941578/Making-mediation-law>, 18; IFC (International Finance Corporation). 2011. *Alternative Dispute Resolution Guidelines*. Washington, DC: IFC, 6.

cases<sup>62</sup> in courts and consequently fewer pending cases. However, that is not to say that specific models of judicial and court-annexed mediation should not be complementary to other models to be developed.

For example, as illustrated in the Italian national report, the Court of Florence has established a mediation referral protocol with the local University that has produced excellent results in more than one thousand mediation referrals annually with an almost 70% settlement rate. The project is based on three pillars:

- a) a protocol with the local School of Law of the University of Florence under which new law school graduates (properly trained) assist judges in screening for “*mediability*” of pending cases on a daily basis, and propose that judges evaluate whether a motivated judicial order can be signed requiring the litigants to attend the first mediation meeting before the next scheduled hearing;
- b) when the judicial order is received according to para 2, art. 5 of Legislative decree No. 28/2010<sup>63</sup>, parties submit a request to mediate to a mediation provider accredited by the Minister of Justice with an office in the same district of the Florence court (without any burden to staff court and without using the court spaces);
- c) the President of the Court of Florence includes the number of referrals and their percentage of settlements among the criteria for the periodic performance review of the judges. The Florentine court-connected mediation project is being replicated in different Courts of Italy (Perugia, Verona and Rome).

In other words, this protocol provides significant external resources to courts in resolving disputes outside the courts. The implementation of efficient protocols in Serbian commercial courts with law schools (ex. Law graduate students of masters programs), outside mediators and mediation centres is possible under the existing legal framework, elaborating on the existing MoJ-HJC-SCC Guidelines, with little additional administrative support needed to set the system going (ex. selection of students, conclusion of contracts on internship-volunteer work with the court providing for confidentiality, and training of the student-volunteers, etc.). Likewise, provision of assistance in a selection of cases to be mediated can be part of the regular training of candidates within the Judicial Academy (hereinafter - JA). Such a system would be easy to set up and run, and would be sustainable in the long run without the funding of international donors.

The applicability of protocols can be substantially improved by identifying the mediators (ex. more credentials than the registry provides, where they can mediate – in the court or in their own offices, what their fee is, etc – it can, for example, be that a mediator will work pro bono if a case is referred to them.

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<sup>62</sup> Slovenia has 2.5 incoming cases in court for every 100 inhabitants, exactly in line with the average CoE's Member States.

<sup>63</sup> According to the Italian law on mediation, at his/her discretion the judge could order the parties at any time during the judicial proceeding to begin a mediation procedure within 15 days the date of the judge order. However, the law doesn't clearly state if the parties should attend only the first meeting or the entire procedure and for this reason the judge can be more specific in the order. The mediation provider is chosen by the party who files the mediation request first (in case the parties file the mediation request in two different mediation providers the competent provider is where the request was filed first by date and time). The mediation fee is divided by the parties. If the parties attend the mediation procedure and do not find an agreement the judicial proceeding continue. If the plaintiff does not attend the mediation procedure the judicial procedure can be dismissed.

On the other hand, expansion of the existing enthusiasm and capacities in the courts for judicial mediation (conducted by a judge) should not be suppressed (please see recommendation no. 5.3.3.: “Judges as mediators/conciliators”), and, even under the current legislation, a court president can determine which judges can be on the court’s list of mediators, although this should, likewise, be limited to a small, select number of judges who are able to demonstrate their commitment. It is particularly useful to note the benefits of judicial mediation/conciliation in second instance proceedings, as mediation is often possible at this stage but parties are less likely to pay additional costs, and more likely to benefit from an authoritative, directive approach to mediation, rather than a facilitative one. The Croatian legislator has recognised this and provided that the parties may unanimously submit a proposal for resolving the dispute in the conciliation procedure before the judge conciliator of the court competent to decide on the legal remedy.

It has long been recognised that judges play a crucial role in fostering a culture of amicable dispute resolution through providing information to the parties, arranging information sessions on mediation and inviting the parties to use mediation and/or referring cases to mediation. It is essential therefore that they have a full knowledge and understanding of the process and benefits of mediation. CEPEJ Mediation Awareness Programme for Judges<sup>64</sup> outlines the Basic Curriculum for judicial referral, its length (four half-days (two days total) is recommended whenever possible for initial training programmes and one or two half-day sessions are recommended at a regular frequency for continuous training programmes). For ensuring the efficiency of the awareness/training programmes (i.e. their durability, their frequency and their quality), it is appropriate to take the following measures (as also provided in the MoJ-HJC-SCC Guidelines):

- 1) To appoint, in each Appeal Court, a judge responsible for mediation, for the survey of the awareness of the judges and of pilot projects,
- 2) To appoint, in each jurisdiction, a judge in charge of the organisation of these programmes,
- 3) To ensure that this judge will receive himself/herself a complete mediator’s formation, in order to be able to become the main mediation awareness trainer of his/her tribunal and to be able to organise the mediation pilot project in his/her jurisdiction.

The measures for increasing lawyer and judge participation, including introducing referral to mediation as part of judges’ assessment, introducing tools to set targets and measure achievements such as determining the Balanced Relationship Target Number (BRTN), comparing the number of cases of mediation and litigation, on both the court and national levels, and introducing a mediation promotion training programme as part of mandatory initial and continuous training for judges, should also enable greater effect of implementation of court-related mediations.

Therefore, the following is recommended:

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### Recommendations on establishing more effective judicial referral protocols in commercial courts

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<sup>64</sup> CEPEJ Mediation Awareness Programme for Judges, CEPEJ(2019)18, <https://rm.coe.int/cepej-2019-18-en-mediation-awareness-programme-for-judges/168099330b>

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1. Coordination and expansion of court-annexed mediation programmes within the specialised commercial court system (both first instance and appellate) (establishing pilot mediation schemes in selected courts);
  2. Revision of MoJ-HJC-SCC Guidelines and their promotion, to ensure widespread implementation;
  3. Establishing of cooperation agreements between courts, on the one hand, and faculties of law and commercial mediation centres on the other;
  4. Requiring in the Court Rules of Procedure and Mediation Guidelines that court presidents reach a balanced relation between mediation and judicial proceedings at every court level, which would also be set out nationally, within the MoJ-HJC-SCC Guidelines or a strategic document. A repercussion could be provided for failure to set and reach the BRTN;
  5. Skills training for commercial judges and court administrators by the JA on case referral, pursuant to the CEPEJ Mediation Awareness Programme for Judges;
  6. Advanced mediation training of a limited number of judges on ADR skills;
  7. Introducing precise provisions on referral to mediation as part of judges' assessment in the Court Rules of Procedure and HJC documents (including when a case is considered as referred; target numbers and incentives);
  8. Supporting the Commercial Appellate Court in dedicating a section on mediation at the Annual Conference of Commercial Courts organised annually in September as well as promotion and publication of the proceedings;
  9. Supporting the Bar Academy in offering lawyers' commercial mediation advocacy training, especially on territories of courts where commercial court-annexed mediation programmes are established;
  10. Identifying the mediators who are available to offer their services to the court (ex. court lists should provide more mediator credentials and information than the Registry provides; information on where they mediate – in the court or in their own offices; what their fee is, if any, etc.;
  11. Allowing parties to have the right to choose a mediator from the panel at a private mediation provider/or choose the independent out-of-court registered mediator whereas if they choose judicial mediation by a judge, they cannot have this right (Singapore model)
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#### **6.1.2. Conduct specific mediation awareness campaigns focused on selected business sectors**

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As already evidenced in Serbia and all other countries taken into consideration, generic promotional campaigns or awareness programmes towards the public on the advantages of the recourse to mediation have proved to be ineffective. As noted, the decision to participate in a mediation process after the dispute arises is not an individual decision, but rather a “collective” decision by all litigants



and their lawyers who have to sign a contract with a mediator or a mediation centre that will have to provide the service. For this reason, generic promotional campaigns have never generated significant results in terms of number of mediations.

Promotion campaigns on mediation are effective only when they are target-focused and strictly related to the awareness of specific initiatives like the introduction of new legislation on mediation, a court-connected programme, promotion of mediation centres, or mediation of a certain type of disputes, with readily available and recognizable mediation providers to address the invoked demand.

Relevant stakeholders have to be identified and nudged to participate in the reform process and in the process of creating “demand” (banking, trade, B2B, consumer, etc). The Turkish Grand Bazaar Mediation Project is a best practice example how targeted support to a specific business niche, and promotion going hand-in-hand with available mediation supply (mediators and infrastructure for mediation), can have positive effects.

In choosing the particular sectors to address, the analysis of the current court caseload of various dispute types which would be effectively resolved in mediation must be performed (number of disputes in Serbia, and in select pilot courts, their length, costs of litigation – both total court tax and lawyers’ fees) (please see section 5.3.1 of the Study).

For the above considerations, in the light of upcoming legislative reform on mediation, it is advisable that the MoJ spearheads designing, running and supporting promotion and awareness campaigns targeting both specific business sectors and connected to judicial referral programmes in selected commercial courts.

For example, Belgrade courts continuously have the highest incoming caseload and have the biggest backlog<sup>65</sup>. It is not expected that the situation will be any better once the regular activities resume after the state of emergency standstill caused by the COVID-19 outbreak. Having in mind also the highest concentration of mediators on the territory of this Commercial Court, promotional activities can at first be limited to this territory.

More concretely, the following should also be considered:

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### Recommendations on conducting specific mediation awareness campaign focused on selected business sectors

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1. Targeting specific business sectors in partnership with the related national or local business associations (the Chamber of Commerce and Industry of Serbia and regional chambers, as well as other relevant associations within relevant sectors, such as construction, agriculture, manufacturing, banking, related to intellectual property,

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<sup>65</sup> SCC, 2020 “ANNUAL REPORT ON THE WORK OF ALL COURTS IN THE REPUBLIC OF SERBIA IN 2019” <https://www.vk.sud.rs/sr/%D0%B3%D0%BE%D0%B4%D0%B8%D1%88%D1%9A%D0%B8-%D0%B8%D0%B7%D0%B2%D0%B5%D1%88%D1%82%D0%B0%D1%98-%D0%BE-%D1%80%D0%B0%D0%B4%D1%83-%D1%81%D1%83%D0%B4%D0%BE%D0%B2%D0%B0>, <https://www.mpravde.gov.rs/cron/files/O/2019/O2019Y00.html>

corporate, employment, information technology, insurance, etc.) by the MoJ and relevant stakeholders and partners;

2. Targeting promotion connected to the judicial referral programmes in selected commercial courts (i.e. limited to “pilot” territories).
3. Support the Bar Associations in organising mediation related panel discussions at the Lawyers’ Conference and seminars of the Bar Academy of the Bar Association of Serbia, as well as in mediation advocacy training for commercial lawyers;
4. Active promotion of signing of “mediation pledges” by major companies;
5. Conduct a study among lawyers (in their capacity of referrers to mediation and advisers to companies) and companies (users of the services) that have experience with business mediation, and also among judges, to provide knowledge and gain insight into opportunities and barriers to commercial mediation.

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#### 6.1.3. Promote greater use of mediation and multi-step dispute resolution clauses in commercial contracts

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As noted, one of the main barriers to the recourse to mediation is the failure to reach a consensus of all parties involved (usually the two litigants and their respective lawyers) after the dispute arises to sign the “agreement to mediate” with a mediator or a mediation provider to participate in a mediation process. For many reasons, at least one of the parties involved in the dispute perceives recourse to court or resisting in court as a better option (or even delay the dispute resolution). In commercial disputes this main barrier can be easily resolved with the introduction of binding mediation clauses in contracts before the dispute arises. In theory, companies and business associations can massively introduce mediation clauses in their standard contracts and take advantage of the recourse to mediation before arbitration or litigation. Surprisingly, in most of the countries taken into consideration, mediation clauses have not been introduced systematically in commercial contracts. Only the Netherlands and Singapore have started to move towards this route.<sup>66</sup>

##### Examples Of Standard Multi-Step Dispute Resolution Clauses In A Commercial Contract:

Any dispute arising out of or relating to this contract shall be subject to a preliminary mediation attempt according to the Mediation Rules of a mediation provider accredited by the Minister of Justice of Serbia selected by the initiated party [*alternatively a name of one or more pre-selected mediation provider(s)*].

If Parties fail to reach a mediation settlement after 30/60/90 days of the commencement date of the mediation process, the dispute shall be referred to Rules of Arbitration of [*name of a pre-selected mediation provider*].

*or alternatively to arbitration*

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<sup>66</sup> Singapore Mediation Charter <http://mediation.com.sg/about-us/#singapore-mediation-charter>

If Parties fail to reach a mediation settlement after 90 days of the commencement date of the mediation process, the dispute shall be referred to the court with proper jurisdiction in \_\_\_\_\_  
[insert city and court].

#### **UNCITRAL Draft Model Multi-tiered clause**

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be submitted to mediation in accordance with the UNCITRAL Mediation Rules.

Note: Parties should consider adding:

- (a) The selecting authority shall be (name of institution or person);
- (b) The language of the mediation shall be ...;
- (c) The place of mediation shall be... .

If the dispute, or any part thereof, is not settled within [(60) days] of the request to mediate under these Rules then the parties agree to resolve any remaining matters by arbitration in accordance with the UNCITRAL Arbitration Rules.

Note: Parties should consider adding:

- (a) The selecting authority shall be (name of institution or person);
- (b) The number of arbitrators shall be (one or three);
- (c) The place of arbitration shall be (town and country);
- (d) The language of the arbitration shall be... .

#### **Example of a Mediation Only Clause: UNCITRAL Draft Model Mediation Clauses<sup>67</sup>**

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be submitted to mediation in accordance with the UNCITRAL Mediation Rules.

Note: The parties should consider adding:

- (a) The year of adoption of the version of the Rules;
- (b) The parties agree that there will be one mediator, appointed by agreement of the parties [within thirty days of the mediation agreement], and if the parties cannot agree, then the mediator shall be selected by [relevant selecting authority];
- (c) The language of the mediation shall be ...;
- (d) The place of mediation shall be ... .

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<sup>67</sup> United Nations Commission on International Trade Law, Fifty-third session New York, 6–17 July 2020 Settlement of commercial disputes, **Draft UNCITRAL Mediation Rules**, Note by the Secretariat, <https://undocs.org/en/A/CN.9/1026>

Encouraging companies to include mediation clauses will gradually raise the number of mediations in commercial disputes when disputes arise. As indicated in the Austrian national report, in line with the answers provided by the stakeholders in the Global Pound Conference<sup>68</sup>, in certain cases companies might even be more willing to introduce mixed dispute resolution clauses, such as Med-Arb, Arb-Med-Arb or even include judicial proceedings. Some studies suggest that making the inclusion of mediation clauses a standard practice in the corporate policy could save a lot of effort for in-house lawyers, otherwise spent persuading the managers on case-by-case bases of the benefits of mediation.

Additionally, the following should be considered by the MoJ and other relevant stakeholders:

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#### Recommendations on promoting greater use of mediation and multi-step dispute resolution clauses in commercial contracts

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1. Advocating and educating on the benefits of using mediation and multi-step dispute resolution contract clauses which include mediation;
  2. Collaboration with the established arbitral institutions, such as the Arbitral Court of the Chamber of Commerce and Industry and the Belgrade Arbitration Centre should also be encouraged and joint outreach campaigns designed and held by the Ministry, representatives of the commercial courts, and arbitral and mediation centres.
  3. Targeting in-house legal departments and commercial law firms by offering workshops on Negotiation and Mediation Advocacy Advanced Techniques in order to familiarise them with the benefits of mediation and prepare them to participate in the procedure;
  4. Public administrations, agencies and companies should consider signing a mediation pledge and should be nudged by the MoJ to consider systematically the option of integrating mediation clauses in their contracts.
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## 6.2. Increasing the quality of supply of commercial mediation

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The quality of mediation services is of utmost importance to the success of mediation in commercial disputes. While, in theory, the market should be able to self-regulate and ensure that only qualified individuals are providing mediation services, it is not working in that manner in practice. This is especially true when the volume of disputes brought to mediation rises overnight possibly tens of hundreds of times, which is the case with the introduction of mandatory mediation or the first information session with a mediator. Also, this is the case with the countries without a long history of

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<sup>68</sup> International Mediation Institute, 2016 INTERNATIONAL MEDIATION & ADR SURVEY: Census of Conflict Management Stakeholders and Trends, 2016 [accessed 2019-08-22], available at: [odreurope.com/assets/site/content/IMI\\_survey\\_2016.pdf](https://odreurope.com/assets/site/content/IMI_survey_2016.pdf), p. 3.

professional commercial mediation services. Hence, it is the responsibility of the state to introduce safeguards capable of ensuring that mediation services provided live up to the expectations and international standards. Not enough qualified mediators, as has been the case in Turkey where mediators, despite 80-hour initial training still need more training, can distort and compromise the system and deter potential users and other stakeholders, such as external counsels from using mediation services.

The quality of mediation essentially lies on two pillars – 1) selecting qualified individuals and institutions and 2) supervising and supporting their activities further in practice. This includes, for example, proper office space suitable for providing mediation services, which can be offered by the mediation providers, as is the case in Austria, Italy or Singapore, or, if some mediation providers are too small, these can also be ensured by the public infrastructure, by, for example, providing equipped rooms in the courthouses, as is the case in Turkey.

While reports from Singapore and Austria show that entirely voluntary recourse to commercial mediation, without providing additional incentives, can also attract a certain number of companies to mediation, they also indicate that cultural environment, as well as work of public and private mediation centres with excellent reputation, play an essential role. However, most importantly, the reports also demonstrate instances of gradual but slow development, continuing for more than twenty years. Such continuous development may open the doors for grounding mediation practices, ensuring that the mediation infrastructure is well developed and mediators have enough practice.

#### **6.2.1. Support the Ministry of Justice in developing its capacities and expanding the role of the Mediation Registry and Standard Setting Body**

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Examples of Austria, Greece, Italy and Turkey demonstrate that effective implementation of a nationwide mediation infrastructure requires an authority in charge of the quality and monitoring of mediation service that acts as a reference point for all stakeholders. In Serbia, there is a clear need to strengthen and expand such a body, which has been concentrated within the MoJ since 2015. The Austrian and Greek country reports show how the capacities of the MoJ may be strengthened and expanded by establishing a Mediation Commission or Mediation Council, as an expert body of the MoJ.

The Turkish example particularly shows how a functioning regulatory body for mediation (in their case, two bodies) is responsible for, among other things, efficiently regulating the mediation activities, performing the coordination and secretary services for the institutions (such as the Ministry, universities, professional organisations and others), monitoring the country-wide mediation practices, keeping the register of mediators and publishing relevant statistics. The Turkish experience also shows that more training is needed for mediators to increase the quality of their service as well as the need for higher standards and monitoring of mediation training institutions and trainers. First, they should be bound to submit annual reports. Second, they may be audited by the Ministry at any time, as well as possibly sanctioned or struck off the Register.

The capacities of the MoJ will particularly have to be strengthened if the first information session requirement is introduced. Short and mid-term capacity support may be supported by donor-funded projects. However, the main aim of the projects, beside momentary assistance and filling in capacity gaps should be to ensure capacity building and sustainability of the MoJ work itself, which likewise

requires commitment from the beneficiary. Therefore, MoJ, in addition to developing internal capacities, particularly through a separate Mediation Department, could consider being supported by an expert body, such as a Council or a Commission, established by the law.

The main roles of the MoJ could be grouped in the following areas:

- ***Manage the accreditation process of mediators, mediation centres and training organisations.*** In order to ensure high level of quality of service, an important function of the Registry is to maintain the roster of mediators, centres and training institution with the powers to add and remove individuals and entities to and from the list. That means that the body in charge should also be responsible for conducting mediator's examination, ensuring that mediators meet specific requirements both at the moment of enrolment and further into their practice, or, in other words, monitoring and supervising. Moreover, as could be drawn from the national reports on Greece and Turkey, these bodies can also be responsible for maintaining an adequate legal framework, implementing mediation policies, proposing solutions for its improvement, acting as disciplinary bodies, as well as for raising awareness of mediation among general public and businesses. The running costs of the Register could be financed by annual registration fees of mediation providers, mediators and training entities.
- ***Ensure effective monitoring and supervision.*** While effective training, list and examination can add up significantly to a better quality of mediations, a probability still remains that some mediators will misuse the process, disrespect the basic principles of mediation or simply will not be capable of delivering high quality services due to lack of practice or skills. Hence, effective monitoring and supervision tools should be in place, including unambiguous grounds for disciplinary liability. While Austrian example demonstrates that disciplinary proceedings might be handled by non-governmental organisations – associations of mediators, it also shows that the end users may be faced with a certain level of confusion, as the associations can only take action with regard to their members. Moreover, mediators are not obliged to become members of these private bodies. Like in Italy, the Registry should have the power to conduct “surprise” inspection to mediation centres in order to control on the ground the maintenance of the required standards. In addition, the Registry should design and manage a grievance mechanism where users of mediation services can file a complaint versus a mediator, mediation centres and training institutes.
- ***Collect statistical data on the national level based on the CEPEJ model.*** Statistical data, where it is collected, shows more than promising results. In Turkey the settlement rates in mandatory mediation in commercial disputes are around 57 percent, in Italy the success rate in mandatory mediation is around 45 percent, while in cases of voluntary mediation it reaches 63 percent. The statistical data provided by the Singapore Mediation Centre is even more promising – more than 85 percent of disputes are settled in mediation. However, not all the countries collect such data, making the comparison between the practices extremely hard. Such a shortcoming could be drawn from the national reports on Austria and Greece, both of which could only provide some rather fragmented data. Hence, it is recommended to introduce a framework for periodical collection of nationwide statistical data according to the **Baseline Grid for Mediation Key Performance Indicators developed by CEPEJ**<sup>69</sup>

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<sup>69</sup> The Baseline Grid for Mediation can be found at page 40 of the Mediation Development Toolkit of CEPEJ, available at <https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52>

Namely, the CEPEJ Baseline Grid advises to make a split of numbers of mediators and mediation providers per different cities and regions of the country to monitor performance of a network. With respect to the mediation process statistics, it advises to collect statistics on:

- Number of filing or requests of mediation in commercial matters requested at least by one party or mediation referrals by courts/other institutions/officers
- Number of introductory mediation information sessions or meetings where information on mediation was provided to parties
- Number of mediations with the presence of all parties
- Number of mediations totally or partially settled
- Number of settlements and settlement rate based on type of recourse to mediation, i.e. (a) Required by the law as a pre-condition for access to the Court, (b) Court related, referral or ordered by judge or prosecutor in the course of a judicial proceeding, (c) Voluntary mediation by an agreement to mediate after the dispute arose, (d) Voluntary mediation by a contract clause signed before the dispute arose.

Likewise, it is advised to collect data on the number, ownership and specialisation of mediation providers:

- |                        |                           |
|------------------------|---------------------------|
| - Private              | - Bar associations        |
| - Court-related        | - State or Municipalities |
| - Chambers of Commerce | - Other                   |

- ***Coordinate stakeholders to improve the quality of service.*** Another role of the Registry should be to hold regular meetings with all stakeholders and in particular with mediators' associations, BAR and lawyers' associations, judiciary representatives, training institutes, business associations and relevant public authorities. The ultimate scope of these meetings should be a constant interaction among the operators in the mediation market and the Registry in order to solve any operational problems, set quality standards and share best practices.

The selection of mediators in the Register by specialisation should be allowed, once adequate specialised training programmes have been approved and conducted. The CEPEJ Baseline Grid provides for the following specializations:

- Civil and commercial
- Family
- Administrative
- Labour
- Consumer
- Pen

Having the above in mind, the MoJ might consider the following recommendations:

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### Recommendations on supporting the Ministry of Justice in developing its capacity and expanding the role of the Mediation Registry and standard setting body

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1. Establishing and developing an MoJ Mediation Department and building its capacities;
  2. Establishing a Mediation Commission or Mediation Council by law, in order to provide expert support to the MoJ for the development of mediation and for outsourcing the management and monitoring of the accreditation process of mediators, mediation centres and training organisations;
  3. Establishing and promoting partnerships with international mediation standard-setting organisations in order to ensure international recognition of Serbian mediators;
  4. Higher standards must be prescribed and monitored for training bodies;
  5. Training bodies should be bound to submit annual reports and should be periodically audited by the MoJ, and possibly sanctioned and struck off the Register.
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#### 6.2.2. Set up an online platform and a national website on mediation with different functions

Among the countries taken into consideration, Italy, Greece, Singapore and Turkey have an online platform managed by the respective ministries of justice<sup>70</sup>. These platforms can be used as a reference for the Serbian MoJ, and have three main functions:

- **Managing the accreditation process.** Mediation centres, mediators and training entities can file online their request for accreditation at the Registry and upload all documents needed (with a dedicated password). Then, the Registry can manage the entire paperless accreditation process online.

- **Publishing the roster of mediators and mediation centres with a search function.** The second function is the updated publication of the names of accredited mediators, mediation centres, trainers and training entities on mediation with the possibility for users to search online mediation centres for each court district, as well as according to other criteria, such as specialisation.

- **Publishing relevant information about mediation.** The third function is the publication of relevant news, laws and decrees, and quarterly statistics on mediation.

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<sup>70</sup> Available at <https://mediazione.giustizia.it/>



Adapting a similar platform could be very useful for Serbia, to both streamline the administrative processes and enable more transparent and efficient gathering and publication of statistics and other information. Further, like in Greece<sup>71</sup>, the MoJ may consider adding an additional function of a national case management platform for mediations. Users and lawyers can choose a mediator/mediation centre in a given location, file the mediation request and receive relevant information and communication online (date and time of the mediation session, name of mediator, they can file and receive relevant documents, etc...). This platform can be linked to the software of the courts in case of referrals and, above all, it can automatically gather the relevant statistics. The Turkish MoJ has developed a useful, integrated platform, which is user friendly and allows for timely gathering of statistics, which is particularly important for monitoring of the implementation and success of the first information session reform.

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#### Recommendations on setting up an online platform and a national website on mediation with different functions

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1. Design, implement and run a comprehensive online platform that manages online the entire accreditation process of mediators, providers and training entities;
  2. Publish a website, linked in real time with the online platform for accreditation, with the roster of accredited mediators, providers and training entities;
  3. Publish a website with relevant information on mediation (news, laws and decrees, and quarterly statistics on mediation);
  4. Consider adding a further function to the online platform as a national case management platform for mediations where users can choose a mediator or provider and file a mediation request (similar to the current Serbian court IT system).
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#### 6.2.3. Develop and promote advanced training, assessment and credentialing for commercial mediators

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Austria, Greece, Italy, and Turkey have rosters of accredited mediators in place. While in Greece, Italy and Turkey only individuals on the list can provide mediation services, especially when it comes to mandatory mediation, Austria is slightly more liberal in that sense. Those individuals who are not on the list of mediators can also provide mediation services; however, they are not allowed to have certain benefits of mediation, such as automatic interruption of prescription periods and protection of confidentiality beyond the scope of mediation, i.e. effectively such mediators are not referred to by the court. Italy has three “sub-rosters” for accredited mediators: **general, international and consumer**

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<sup>71</sup> Available at <http://www.diamesolavisi.gov.gr/>

**disputes.** Internationally, IMI<sup>72</sup>, Singapore International Mediation Institute (hereinafter - **SIMI**)<sup>73</sup> and Resolution Institute (Australia)<sup>74</sup> are all good examples of successful credentialing schemes, while in Europe, the work of the Czech Republic Ministry of Justice could be a useful reference. SIMI, which was established (but not run by) the Ministry of Justice, with the task of introducing the highest international standards for professional mediators is a particularly good example. SIMI's role is to certify the **competency of mediators, set standards of professional mediator ethics, require continuing professional development for SIMI accredited mediators, increase awareness about mediation, and develop tools available to assist parties in making basic decisions about mediation.** Criteria are variable but typically involve candidates putting together a portfolio of their training and experience verified by institutional and client attestations and a log book of mediation cases.

It should be noted that even in the Netherlands, where regulation is left to the market, registration with the Mediators Federation Netherlands (hereinafter - MfN) is possible only after successfully completing a MfN recognized training course, followed by a written exam as well as a performance-based assessment. Further, mediators who are eligible for court-referred cases need to be MfN registered mediators who adhere to additional requirements like having submitted themselves to a peer review.

The Turkish experience particularly points out to the need of substantial additional training and specialisation of the mediators. The significant increase in the number of complaints made to the Turkish Ministry of Justice after the introduction of the first information session model shows that even 84 hours of mediation training and passing an aptitude test is not enough to prepare many mediators for the demanding task of daily mediation practice. This is why the Turkish Ministry has chosen to introduce an additional requirement of obtaining a special certification for mediating commercial disputes. In the beginning of 2019, five working group committees were established under the Mediation Department in the Ministry of Justice for designing the curriculum and the content of the specialized certificate programmes for commercial dispute mediations. The first five specialization areas for commercial disputes were identified as Insurance, Corporate, Energy, Construction and Health.

The Working Group of the MoJ in Serbia already in 2019 made significant progress with the review of the rules on training for mediators in line with the best practices described in the Basic Guidelines on Designing and Monitoring Mediation Training Schemes<sup>75</sup> and the Basic mediator training curriculum<sup>76</sup>, adopted by the European Commission for the Efficiency of Justice. However, after the basic mediation course, it is recommended to require specialized advanced training for certain areas of practice: civil, commercial, labour, consumer, administrative, criminal and family law. The current Law already allows for the possibility of prescribing by law special requirements for conducting mediation in certain areas (Article 33 Para 3). However, no such areas have been identified or established to date. Therefore, this possibility may be gradually used for commercial cases.

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<sup>72</sup> [www.imimediation.org](http://www.imimediation.org)

<sup>73</sup> <http://www.simi.org.sg>

<sup>74</sup> <https://www.resolution.institute/accreditations/mediation-australia>

<sup>75</sup> CEPEJ, Guidelines on Designing and Monitoring Mediation Training Schemes, CEPEJ(2019)8, available at: <https://rm.coe.int/cepej-2019-8-en-guidelines-mediation-training-schemes/168094ef3a>;

<sup>76</sup> European Commission for the Efficiency of Justice (CEPEJ) Basic Mediator Training Curriculum, adopted in June 2018, available at: <https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52>;

Consequently, in the context of increasing the recourse to commercial mediation, specialized advanced training for commercial disputes (and, possibly, its various particular categories) should be carefully designed and its delivery supported and monitored, in order to comply with international standards. As no training organisation in Serbia currently offers programmes which are harmonised with European standards (the basic training is less than 20 hours long, encompassing half of the recommended curriculum; the approved commercial mediation training programmes are around 10 hours in length), substantial capacity building must be effected, including establishing co-mediation programmes, more simulations within the training, etc.

Particularly, the following is recommended:

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#### **Recommendations on developing and promoting advanced training, assessment and credentialing for commercial mediators**

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1. Accredited mediators should be divided in specialized rosters in order to increase the confidence of sophisticated users, especially if any of these categories will be encompassed by the requirement of attending the first information session, or when the court refers the case, in which case the specialisation should by law be provided as a precondition for conducting mediation.
2. Specialized advanced training for commercial disputes (and, possibly, their various particular categories) should be carefully designed and its delivery supported and monitored, in order to comply with international standards.
3. Substantial capacity building of commercial mediation trainers and institutions must be effected, including establishing co-mediation programmes, more simulations within the training, etc.
4. The practical part of specialised commercial mediation training should include:

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- *Individual self-awareness and practical experience seminars to practice techniques of mediation through the use of role play, simulation and reflection;*
  - *Peer group work;*
  - *Case work and participation in practice supervision in the area of mediation;<sup>77</sup>*
  - *Competency assessment for commercial specialisation may be outsourced to independent institutions.*
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If mediators deliver effective processes, and if they are appropriately presented to the rest of the business community (respecting confidentiality) the demand will grow.

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<sup>77</sup> The Republic of Austria, Law on Mediation in Civil Law Matters. Bundesgesetzblatt I Nr. 29/2003, Art. 29, Handbook <https://rm.coe.int/cepej-2019-9-en-handbook/1680951928>, 13

### **6.3. Improvement of the commercial mediation regulatory framework**

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The first two groups of recommendations described above have the main goal to pave the way for the third group of recommendations focused on an effective legislative reform described in the White Paper.

Judging from low recourse to mediation up to now in Serbia and the example of the EU Mediation paradox<sup>78</sup>, a substantial threat exists that there will be no development at all, and that potential users of commercial mediation will not only be unable to benefit from it, but will also remain completely unaware of such an alternative. The findings of the present study on Austria, Greece, Italy, Netherlands, Singapore, Turkey and Western Balkans confirm the validity of the recommendations of the White Paper adopted by the Working Group. Austria, Greece, Netherlands, Singapore and Western Balkans have not been able to reach a substantial number of civil and commercial mediations compared with the number of judicial proceedings in court. Like Serbia, all these countries have experienced only few hundreds of mediations annually compared with hundreds of thousands of litigations in courts.

Only Italy and Turkey have put in place quite similar legislative reforms that Greece has decided to adopt in 2020 and that have effectively broken the status quo and generated a substantial number of mediations. Such reform consists of the joint adoption of the following two public policies in parallel:

- The integration of an initial mediation session with a trained mediator as a prerequisite to initiating or proceeding with a litigation case in court, as the main driving force to break the barriers to mediation (the demand side).
- The implementation of provisions to ensure high-quality mediation service with minimum requirements—specifically by training mediators, lawyers in representing clients, and judges in referring cases - and improving accreditation schemes (the supply side).

As a consequence, the first important step in making a shift to the new approach would be to recognise the general failure, not only in Serbia, of most public policies and private strategies adopted so far in civil law jurisdictions. Unfortunately, approaches involving promotion of voluntary mediation after a dispute arises—creating a “culture of mediation”, or stimulating a “mindset change”, training mediators, and encouraging accreditation schemes to ensure high-quality mediation services—have proved to be insufficient to overcome barriers to access. To continue on this path is ineffective as it inhibits the right to access mediation in those cases that are suitable for mediation, by creating an illusion among stakeholders and policymakers that with more commitment and resources these strategies can work.

#### **6.3.1. Gradually introduce the obligation of attending the first mediation meeting with easy opt-out as a pre-condition for recourse to court for certain commercial dispute types**

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<sup>78</sup> The European Union, Directorate General for Internal Policies, ‘Rebooting’ the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU: study [interactive], 2014. Available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI\\_ET\(2014\)493042\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf), p. 118-119.

Gradual introduction of the requirement to attend the first mediation meeting with easy opt-out as a precondition to recourse to court in selected dispute types has demonstrated that wide-spread use of mediation can not only be achieved relatively quickly, but as well bring high settlement rates. The statistical data acquired from Turkey and Italy demonstrates that more than half of the parties, even if reluctant to resort to mediation in the first place, are able to come to an agreement through mediation. In Turkey, given that mandatory mediation was only implemented in the beginning of 2019, and taking into account the issues outlined in the report, the settlement rate in commercial cases is still as high as 57 percent, while Italy, benefiting from the model for more than 5 years, demonstrates the success rate equal to around 45 percent in commercial cases subject to mandatory mediation.

In the outset, it is important to underscore that the free will of the parties in reaching a consensual settlement is an essential element of mediation. Participation in a mandatory initial mediation session is not in contradiction with the unquestionably voluntary nature of mediation in reaching a consensual settlement. In fact, it truly enables the parties to make an informed choice.

Transnational experience shows that most people are subject to the status quo bias—that is, they resist change and prefer the familiar.<sup>79</sup> Therefore, they are reluctant to begin a mediation procedure without incentives or triggers being present. In most common law jurisdictions, a range of incentives— from mediation information sessions to mandatory court mediation referrals (referral without consent of the parties)—is available to convince disputants to engage in mediation.<sup>80</sup> When consideration of entering into mediation is made “mandatory” (by contract, a decision of the judge or the law), the obligation for the parties should be limited to the good faith participation in a meeting with the mediator with the objective to explore the applicability of mediation to the specific case. In all cases, parties should be allowed to “walk away” and at reasonable cost.<sup>81</sup>

This mediation model in no way infringes upon the above-mentioned basic principles of mediation. The model requires the plaintiff to first file a mediation request with an accredited mediation provider and attend an initial mediation session before recourse to the courts may be granted. In Italy the initial mediation session must be held within 30 days of the filing and in the presence of an accredited mediator. At this stage, a small administrative filing fee is requested to cover the costs. There is no obligation to pay more, unless the parties decide to voluntarily proceed with the full mediation procedure. In the initial session, the mediator explains to all parties and lawyers, if present, the process and its benefits for their case. The duration of this first meeting can vary up to the mediator’s discretion and the parties’ wish. If one party does not attend this initial session for an unjustified reason, the judge will sanction that party in subsequent judicial proceedings. If during the initial session, one party decides not to proceed with mediation, then the party has fulfilled the mediation requirement and is able to “opt-out” and file the case in court without any sanction. There is no obligation to pay any additional fees. If the parties decide to proceed with mediation, the fees are determined by the case value and the process should last no more than 90 days.

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<sup>79</sup> Alexander, Nadja; Steffek, Felix. 2017. *Making mediation law (English)*. Mediation series. Washington, D.C. : World Bank Group. <http://documents.worldbank.org/curated/en/899611503551941578/Making-mediation-law>, 27

<sup>80</sup> Alexander, Nadja; Steffek, Felix. 2017. *Making mediation law (English)*. Mediation series. Washington, D.C. : World Bank Group. <http://documents.worldbank.org/curated/en/899611503551941578/Making-mediation-law>, 27; In Australia; Hong Kong SAR, China; and the United Kingdom, there are provisions encouraging parties to reasonably engage in mediation before trial with penalty costs if they fail to do so.

<sup>81</sup> [http://www.eurochambres.eu/objects/3/Files/EUROCHAMBRES\\_Position\\_Paper\\_B2B\\_mediation.pdf](http://www.eurochambres.eu/objects/3/Files/EUROCHAMBRES_Position_Paper_B2B_mediation.pdf)

Users are given the opportunity to make an informed choice to voluntarily opt in or opt out of mediation before engaging in litigation or arbitration proceedings. As stated previously, such an initial process step is fully consistent with the consensual nature of mediation. Mediation and its implications for a specific case is something parties to a dispute need to fully understand before they “get” it.

Serbia should find its way to gradually introduce the best model of the required initial mediation meeting that suits local needs and past experiences by testing it in some dispute types, monitoring results and making corrections with the involvement of the main stakeholders. Moreover, the judgments of the Court of Justice of the European Union should be taken in consideration that prescribe *“[mandatory mediation] procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or gives rise to very low costs – for the parties, and only if electronic means is not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires”*<sup>82</sup>.

Therefore, even though in principle this model can render excellent results, it must be carefully weighed and prescribed to fit the particular legal, judicial and mediation system. Choosing the type of cases carefully is part of the formula for success, including having in mind the envisioned number of cases which will be referred.

Therefore, an analysis of the expected number of mediation cases must be performed in order to prepare adequate capacities of the system. Upon selecting a pool of commercial mediation dispute types for which it would be useful to require the information session, an analysis of the current caseload of such dispute types must be performed (number of disputes in Serbia, and in select pilot courts, their length, costs of litigation – both total court tax and lawyers’ fees) in order to 1) select an appropriate number of dispute types to start with and gradually increase, in order have positive and noticeable effect without overwhelming the system and 2) have a baseline assessment which will be useful in future promotional and public policy activities, i.e. to have tangible, comparable data of litigation vs. mediation.

The Turkish experience shows that gradual introduction over time is most beneficial to allow for an increase of the quality of mediation. It also shows the need to be open to amendments and adjustments of the system after a few years of piloting of the mediation law.

With respect to the types of cases to be chosen, it should be noted that in Singapore, commercial dispute categories which have a successful settlement track include banking, construction, healthcare, employment, information technology, insurance, partnerships, shipping and tenancy disagreements. However, cases which require a precedent (for example, a class action situation) and cases where only the courts can give an appropriate remedy (for example, an injunction) may be better suited for litigation, and a legislative mechanism for their exemption should be considered. It is useful to note that construction disputes account for about 40% of the cases that Singapore Mediation Centre handles.

In Turkey, the following case categories were chosen for the first information session:

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<sup>82</sup> The CJEU, judgement of 18 March 2010 in cases C-317/08 to C-320/08 Alassini and Others, para. 67.

- a) acquisition of property or business enterprises and merger of business enterprises and their form changes; the letter of credit and credit orders; commission agreements; commercial agents,
- b) intellectual property law,
- c) special provisions concerning the stock market, exhibitions, fairs and markets, warehouses and other places that pertain to trade,
- d) cases related to loans or concerning banks and other credit institutions and financial institutions and businesses.

Like in Italy, Turkey and Greece, in order to overcome the initial resistance from the lawyers it is advisable to introduce the required initial mediation meeting with the following characteristics:

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**Recommendations on gradually introducing the obligation of attending the first mediation meeting with easy opt-out as a pre-condition for recourse to court for certain commercial dispute types**

1. Introduce in some carefully selected commercial and B2B dispute types the requirement for the parties to attend a mediation meeting with easy opt-out (to be held within 30 days with a small filing fee for mediator or mediation centre) as pre-requisite to file the case in court together with the following provisions:
  2. Carefully draft the requirement concerning the first mediation session in order to make sure that the obligation is on all disputing parties, as imposing it on just one of the parties may contribute to using such provision as a delaying tactic, as well as in order to not extend the duration of the proceedings nor increase the costs notably.
  3. Spell out in the relevant law (e.g. Civil Procedure Code) the consequences for failing to attempt the first mediation session. If presence of a lawyer is desired or required, promote the presence of lawyers or corporate counsels trained in “mediation advocacy” to assist their clients within a mediation process;
  4. Promote the opening of a mediation centre in every Bar Association;
  5. Introduce specific lawyers’ fee and incentives that encourage consensual settlement in mediation instead of litigation with the presence of lawyers;
  6. The MoJ must closely follow the implementation of the law, including through feedback from lawyers, mediators, judges and end-users and regularly publish an assessment with recommendations;
  7. The MoJ should be committed to drafting of amendments of the regulatory framework if the assessment shows it necessary, as well as to making other beneficial adjustments of the mediation system.
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Further, the quantitative and qualitative data of the required first mediation meeting should be carefully monitored during the first years of implementation in order to evaluate the results and introduce any possible amendments of the law.

### 6.3.2. Judicial order of mediation

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Judges should be granted the power to order litigants to try mediation (with the ability to opt out at little or no cost during the first meeting). They should be granted the power to ask the parties about the reasons for refusing to try mediation and possibly condemn the refusing party to the litigation costs.

The European Handbook for Mediation Lawmaking advises to allow judges, after assessing the nature of the case and where they see it fit, to refer the parties to the initial mediation session before going further with the judicial proceedings.<sup>83</sup> It likewise advises to allow judges to disregard ‘loser pays’ principle (if applicable) and distribute the costs of the judicial proceedings and (or) mediation taking into account parties behaviour in bad faith with regard to or during mediation.<sup>84</sup> The handbook also instructs that legislators should “provide a non-exhaustive list of what could constitute behaviour in bad faith. Include at least (unless inapplicable):

- rejecting a recommendation or invitation to try mediation without a good reason;
- not being present at a mandatory mediation or information session.
- leave evaluation of other instances to the discretion of a judge on a case by case basis.

Judicial order, or recommended referral is often of no consequence if smart sanctions are not envisioned. For example, even in the United Kingdom, a Practice Direction on Pre-Action Conduct lists unreasonably refusing to consider ADR as an example of noncompliance with the Practice Direction or relevant pre-action protocol.<sup>85</sup> In the UK pilot Court of Appeal Mediation Scheme, mediation is voluntary but parties may be required to justify to the Court of Appeal their decision not to attempt mediation at subsequent court hearings.<sup>86</sup> In Singapore and Slovenia, if courts decide that parties unreasonably declined the use of mediation, they might be sanctioned by bearing the costs of the judicial proceedings irrespective of the outcome of the dispute (“smart sanction”).

In Montenegro, even though the court is obliged to refer the parties to a meeting with a mediator to be held before the scheduling of the preparatory hearing or the first hearing for the main hearing in certain cases, including commercial disputes, disputes in which Montenegro is sued and disputes in which more than five parties appear on one side, the system is not complete because no sanction exists for refusal of attempt. A more complete legislative model has recently been introduced in Croatia. The

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<sup>83</sup> European Handbook for Mediation Lawmaking, CEPEJ(2019)9, 14 June 2019, <https://rm.coe.int/cepej-2019-9-en-handbook/1680951928>, p. 21

<sup>84</sup> European Handbook for Mediation Lawmaking, CEPEJ(2019)9, 14 June 2019, <https://rm.coe.int/cepej-2019-9-en-handbook/1680951928>, p. 32

<sup>85</sup> See para 4.4(3) Practice Direction on Pre-Action Conduct, [https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd\\_pre-action\\_conduct#8.1](https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct#8.1)

<sup>86</sup> <https://www.cedr.com/commercial/mediationschemes/courtsofappeal/>



Civil Procedure Act<sup>87</sup> since 1 September 2019 provides that a court may, considering all the circumstances, especially the interests of the parties and of the third parties related to them, the duration of their relations and the level of their mutual reliance, issue a decision, at a hearing or otherwise, instructing the parties to launch mediation proceedings within eight days or proposing that they seek to resolve their dispute through mediation proceedings. Such a decision may be issued at any time during the litigation proceedings. The sanction/repercussion provided by the law in case of not complying with such a decision is most important to note. The party/parties which are instructed to initiate mediation/conciliation proceedings, and which do not attend the meeting for an attempt at mediation/conciliation, lose the right to claim compensation for further costs of the proceedings before the court of first instance. Furthermore, in certain cases, the court referral to engage in mediation is mandatory. Namely, when both parties are either joint stock companies or legal entities whose majority owner is the Republic of Croatia or a unit of local and regional self-government, the court shall, upon receipt of the response to the lawsuit, instruct the parties to initiate conciliation proceedings within eight days.<sup>88</sup>

The following legislative interventions are recommended:

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- Introduce mandatory court referral in certain cases;
  - Introduce court referral based on assessment of the judge, considering all the circumstances, especially the interests of the parties and of the third parties related to them, the duration of their relations and the level of their mutual reliance.
  - Introduce a sanction for the party/parties if they do not attend the meeting for an attempt at mediation/conciliation, whether as a result of mandatory or assessment-based referral – they lose the right to claim compensation for further costs of the proceedings before the court (hold these parties liable for litigation costs even if they prevail in the subsequent trial of the case).
  - Require parties who refuse to participate in mediation to provide a reason for this refusal.
  - Such granting of judges the power to order litigants to try mediation, with the ability for the parties to opt out should be at little or no cost during the first meeting;
  - Require judges to state why they did not refer a case to mediation (change in Law on Civil Procedure, Court Rules of Procedure and bylaws of the High Judicial Council).
  - Make sanctions possible for parties' refusals to attend mediation proceedings (upon judicial referral or based on mandatory mediation), such as holding the refusing parties liable for litigation costs even if they prevail in the subsequent trial of the case. (This is to

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<sup>87</sup> Article 186(d) of the Civil Procedure Act (*Zakon o parničnom postupku* (Narodne novine Nos 53/91, 91/92, 112/99, 129/00, 88/01, 117/03, 88/05, 2/07, 84/08, 96/08, 123/08, 57/11, 25/13, 89/14 and 70/19)). The Act on Amendments of the Civil Procedure Act in Croatia entered into force on 1 September 2019 and brought the most substantial changes of the provisions governing civil procedure since the reform in 2013.

<sup>88</sup> Article 186(d)(7) of the Civil Procedure Act (as amended in 2019)

be distinguished from failure by all parties to attempt mandatory mediation if required by law, see section above)

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The following legislative and other interventions should also be considered:

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- Redefining referral to mediation as part of judges' assessment (amendments in Court Rules of Procedure and bylaws of the High Judicial Council).
  - Introducing a mediation promotion training programme as part of mandatory initial and continuous training for judges.
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### **6.3.3. Stipulate the mandatory nature of contractual mediation and the enforceability of the mediation settlement agreement**

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Mediation clauses are only truly effective if they are upheld by courts. As can be seen from the Austrian, Greek and Dutch example, the situation is not always clear. Unlike these countries, Italy has a specific provision of the law that requires judges and arbitrators to suspend the judicial or arbitration process when a mediation clause is present in a contract and mediation has not been attempted.

Hence, this type of recourse to mediation would benefit from a clear provision in the legal framework indicating that a claim should be dismissed by the court unless a proof of attempted mediation is presented. In that respect, a standard of good faith should be established, for example mediation clauses should be binding in the sense that at least one mediation meeting of 3-4 hours should be held. The European Handbook for Mediation Lawmaking advises that States should ensure adherence to the mediation clause stating that a claim in a court or an application to an arbitration institution shall be inadmissible unless mediation was attempted, or the period of time, specified in the mediation clause, has come to an end.<sup>89</sup>

However, unlike the Serbian Law on Arbitration that excludes access to court in case of a valid arbitration clause, the current 2014 Law on Mediation in Dispute Resolution in Article 30, para. 3, regrettably stipulates that “... *if the parties have committed by a contract that they would first attempt mediation in case of a dispute, before initiating judicial procedure or other legal recourse, any party can decline the mediation process at any time.*” This provision is so unfortunately drafted, that it not only excludes any sanction for the breach of the contractual mediation provision, but it also effectively encourages the parties to file a case in court, thereby circumventing a contractual mediation clause. This situation must be remedied by a legislative amendment clearly stipulating the mandatory nature of contractual mediation clauses and giving authority to a court not to proceed with the court process in case of such clause.

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<sup>89</sup> European Handbook for Mediation Lawmaking, CEPEJ(2019)9, 14 June 2019, <https://rm.coe.int/cepej-2019-9-en-handbook/1680951928>, p. 19.

An alternative best practice example may be found in the Croatian Mediation Law: << *If the parties have agreed on mediation and have expressly undertaken not to institute or continue judicial, arbitral or other proceedings during a specified period of time, or until the fulfilment of precisely determined conditions, such an agreement shall have a binding effect. In that case, the court, arbitrators or other bodies before which the proceedings are initiated regarding the same subject matter, shall reject, at the request of the other party, any submission by which the proceedings are instituted or continued.*>>

Fifty-one percent of respondents of the survey in the Global Pound Conference have indicated that legislation and conventions, especially those that promote recognition and enforcement of mediation settlements, are capable of improving commercial dispute resolution the most <sup>90</sup>. While enforcement mechanisms usually include homologation by a court or a notarial deed, Italy and Turkey<sup>91</sup> allow making mediation settlement agreements directly enforceable, provided that parties are represented by lawyers who can ensure that the provisions of the agreement are in line with the public policy. This helps parties save time and costs emerging from additional procedural steps and will be a further incentive to recourse to mediation in all that settlements with execution over the time are like an agreed payment in instalments. Therefore, this option for enforcement should be considered as a possibility, in cases when both parties are represented by lawyers. In other cases, the option of court homologation should be allowed.

The European Handbook for Mediation Lawmaking stipulates that states should “allow direct enforceability of mediation settlements only if parties so agree therein and provided that the parties are represented by lawyers who can assure that the provisions of the settlement agreement are not contrary to mandatory law.”<sup>92</sup> However, the grounds on which enforcement may be refused must be clearly defined, including at least the agreement being contrary to mandatory law or public order.

The Singapore Mediation Convention provides a uniform and efficient framework for the enforcement of international settlement agreements resulting from mediation and for allowing parties to invoke such agreements, akin to the framework that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) provides for arbitral awards. To date, 52 states in total have signed, including Serbia. Singapore, Fiji, Qatar, Saudi Arabia and Belarus<sup>93</sup> have to date deposited their instruments of ratification and the Convention entered into force on 12 September 2020.

Reports on Austria, Turkey and Singapore emphasise the significance of the Singapore Mediation Convention, and its importance for the promotion of mediation in general, and for effective settlement of international commercial disputes. As Serbia has already signed the Convention, the only further recommendation in that regard is for the country to continue to follow the developments in this field and to thoroughly analyse and develop the relevant implementing legislation, in view of the Convention’s ratification. It is worth noting that even though the Singapore Convention is applied only

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<sup>90</sup> International Mediation Institute, 2016 INTERNATIONAL MEDIATION & ADR SURVEY: Census of Conflict Management Stakeholders and Trends, 2016 [accessed 2019-08-22], available at: [odreurope.com/assets/site/content/IMI\\_survey\\_2016.pdf](https://odreurope.com/assets/site/content/IMI_survey_2016.pdf), p. 14.

<sup>91</sup> In Turkey, two alternatives exist for the agreement to be enforceable: 1) the parties must apply to the court in order to obtain an enforceability decision. 2) if the parties and lawyers sign the agreement, the agreement becomes an enforceable document and there is no need for subsequent approval of the court.

<sup>92</sup> European Handbook for Mediation Lawmaking, CEPEJ(2019)9, 14 June 2019, <https://rm.coe.int/cepej-2019-9-en-handbook/1680951928>, p. 30; ex. The Republic of Italy, Legislative Decree of March 4, 2010, n. 28, Art. 12 (1)

<sup>93</sup> As of end of August 2020, for further updates see: <http://www.unis.unvienna.org/unis/en/pressrels/2020/unisl299.html>

to international commercial mediation, its ratification is hoped to likewise have a significant impact on the increase of domestic commercial mediation, as the number of companies and their positive experiences in participating in mediation increases.

Therefore, the following is recommended with respect to improving provisions on enforceability of settlement agreements:

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#### Recommendations on introducing the stipulation concerning mandatory nature of contract mediation and enforceability of the mediation settlement agreement

1. Amend the relevant Serbian law by introducing a provision where in adherence to the mediation clause stating that a claim in a court or an application to an arbitration institution shall be inadmissible unless mediation was attempted, or the period of time, specified in the mediation clause, has come to an end
  2. At least two alternatives should be provided by the law to allow for direct enforcement of a settlement agreement:
    - a) the parties may apply to the court in order to obtain an enforceability decision (if, for example, one party is not represented by a lawyer);
    - b) if the parties and lawyers sign (and seal) the agreement, and a mediator issues a confirmation that it originates from a mediation, the agreement may become an executory document, with no need for subsequent approval by the court (in which case the lawyers of the parties guarantee the legal qualities of the agreement).
  3. The MoJ should thoroughly analyse the grounds for refusing of enforcement provided in the Singapore Convention and other best practices in order to ensure an informed ratification process and smooth implementation, harmonised with international trends.
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## 7. ANNEX I - COMPARATIVE ANALYSIS OF COMMERCIAL MEDIATION LEGISLATION AND STATE OF PLAY

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### 7.1. Austria<sup>94</sup>

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#### Austria - Commercial mediation law and practice, key information

Topic	Description	Comments
<b>Legal framework</b>	<p>The 2003 Austrian Mediation Act regulates the profession of so called 'listed' mediators in civil and commercial matters and sets out some procedural benefits in the context of the mediation process, like the interruption of prescription periods and confidentiality.</p> <p>Also, the transposition of the Mediation Directive 2008/52/EC was done in the form of the EU-Mediation Act that only regulates EU-cross-border mediation by non-registered mediators, while cross-border mediation by registered mediators is still exclusively governed by the 2003 Austrian Mediation Act.</p>	<p>The 2003 Austrian Mediation Act is considered to be the first codification of mediation law in Europe and was the model for numerous pieces of mediation legislation in other European countries.</p> <p>Austria upholds a dual approach to mediation differentiating between registered and non-registered mediators in EU-cross-border disputes.</p>
<b>Private v judicial mediation</b>	In Austria, only private mediation is practiced.	It is not surprising that the 2011 EU-Mediation Act did not transpose the subsection in the Mediation Directive 2008/52/EC concerning mediation conducted by judges as this variant of mediation is not practiced in Austria.
<b>The role of courts</b>	Courts are largely supportive of mediation but most lack well developed mediation programmes with a formal, effective and	

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<sup>94</sup> By Anne-Karin Grill, an Austria-qualified attorney specializing in international dispute resolution and a CEDR accredited mediator. This national report is based on previous articles published by the author and specifically adapted for this study.

	transparent referral process to mediation. Some courts have informal or ad hoc referral procedures to divert cases into mediation.	
<b>Mandatory v voluntary mediation in commercial cases</b>	There are no statutory provisions that would make mediation a mandatory requirement before a case can move to the commercial courts. The commercial mediation landscape in Austria is mainly based on the voluntary decision of the parties to the recourse to mediation and on judge referrals.	The power of judges to refer parties to mediation is rather weak. There is no explicit general legal provision that enables courts to invite the parties to attend a mediation session on the use of mediation.
<b>Legal and institutional barriers for mediation</b>	/	
<b>Mediation licences and certificates</b>	<p>The procedure for registration of a training facility or a course in mediation in civil law matters should be made on the basis of the written request of the applicant to the Federal Minister of Justice. An applicant should submit the proof of training for mediators that was attended and pay a fee of 324 euros.</p> <p>Registered mediators can be found on the electronic list on the website of the Ministry of Justice.</p> <p>The supply side of mediation landscape is rather inhomogeneous. Parties can appoint mediators listed on the roster of the Austrian Ministry of Justice, or mediators who meet the requirements set by the provisions of the Austrian EU Mediation Act or simply who have their trust.</p>	<p>In order to be listed on the roster of mediators administered by the Austrian Ministry of Justice, candidates must fulfil the following criteria:</p> <ul style="list-style-type: none"> <li>- written application</li> <li>- minimum age: 28 years</li> <li>- qualification as mediator</li> <li>- extract from police records/disclosure</li> <li>- professional liability insurance (min. coverage: EUR 400,000)</li> <li>- information as to where the mediator will offer his/her services.</li> </ul> <p>Candidates will be considered qualified if they</p>

		<ul style="list-style-type: none"> <li>- have completed relevant training</li> <li>- display knowledge and skills in mediation</li> <li>- have completed basic legal and psycho-social training.</li> </ul>
<b>Supervisory authorities</b>	Section II of the Mediation Act contains specifications on the establishment of an advisory committee at the Ministry of justice.	
<b>Number of mediators in the country</b>	There is no statistical data available on the number of mediators in Austria.	
<b>Number of Mediation Centres in the country</b>	There are professional and non-professional associations offering mediation services and a few non-governmental organisations offering support to mediators.	Entry in the list of mediators at the Federal Ministry of Justice is not linked to membership in professional associations or mediator associations.
<b>Number of mediation cases</b>	There is no statistical data available on the number of commercial mediations commenced each year in Austria. However, despite the lack of official statistics, in the professional assessment of the author the total number of commercial mediations in Austria is lower than 500 per year.	The circumstance that there is virtually no statistical data available about the use of commercial mediation as a tool of dispute resolution presents a problem in the recently commenced process for the revision of the Austrian Mediation Act. An expert group is currently being formed at the level of the Austrian Ministry of Justice with the aim of adapting the law to modern user requirements.
<b>Settlement rate</b>	There is also no data available as regards the success rate of commercial mediation in Austria.	According to a study published by the Centre for Effective Dispute Resolution (CEDR) approximately 70% of all mediations conducted under

		the auspices of CEDR ended with a settlement on the day of the mediation session. Taking into account all other cases that settled shortly after the day of the mediation session, the percentage is about 90%. The significance of such statistics may be relative considering that cases brought to mediation are usually prone to a settlement solution. The CEDR statistics appear to be quite reflective also of the Austrian experience.
<b>Enforceability of mediation settlement agreement</b>	The mediation settlement agreement is a civil law contract between the parties which reflects the terms of how the parties intend to solve their dispute. Whether the mediation settlement agreement will be directly enforceable or not, essentially depends on the chosen legal form. Unless the mediation settlement agreement is concluded before a competent Austrian court or integrated in a notarial deed, it will not be directly enforceable.	
<b>Signatory to the Singapore convention</b>	Austria has not signed the Singapore convention.	Austria has not ratified the Singapore convention.
<b>Incentives for use and enforceability of mediation</b>	One of the key challenges in terms of policy remains that the Austrian mediation legislation still does not provide parties with any incentives - neither positive nor negative - to refer their cases to mediation.	

#### **Lessons learned and recommendations for Serbia**

-The Austrian legal framework on mediation was not able to foster a substantial increase in the recourse to commercial mediation.



- ADR hybrid procedures are becoming significantly more relevant.
- More incentives are needed to promote recourse to mediation.

#### 7.1.1. Legal framework in the field of commercial mediation

The 2003 Austrian Mediation Act, which regulates the profession of the so-called 'listed' mediators in civil and commercial matters and sets out some procedural benefits in the context of mediation proceedings (e.g. interruption of prescription periods), was one of the first codifications of mediation laws in Europe and also served as a model for other European jurisdictions. The UNCITRAL Model Law on International Commercial Conciliation was not enacted by Austria since the Austrian mediation approach seeks to be predominantly interest-based with the mediator's role being limited to the facilitation of negotiations between the parties. The Model Law, by contrast, promotes a more evaluative style of mediation. The rules pertaining to mediation in cross-border cases within the EU are codified in the Austrian EU Mediation Act. It defines the scope of application and the consequences arising from its use identically to the EU Mediation Directive 2008/52/EC. Furthermore, Austria was the first of the European civil law jurisdictions to enact legislation regulating the obligatory qualifications and training of mediators in the By-Law on Training for Mediation in Civil Matters (*Zivilrechts-Mediations-Ausbildungsverordnung – ZivMediatAV*). More generally, also the Austrian Code of Civil Procedure (*Zivilprozessordnung – ZPO*) and the Austrian Code of Criminal Procedure (*Strafprozessordnung – StPO*) contain mediation related provisions, most notably as regards the right of mediators to refuse to give evidence.

For mediations falling within the scope of the Austrian Mediation Act or the Austrian EU Mediation Act, the procedural rules laid down in those statutes are only very rudimentary in order to provide the parties with a great degree of flexibility. They, *inter alia*, concern:

- the mediator's duty to inform the parties about the process and its potential legal consequences;
- the mediator's duty to inform the parties of the form of the final mediation agreement and its enforceability;
- the keeping of records regarding the commencement and termination of the mediation, and
- confidentiality obligations.

Without being exhaustive, the main characteristics of the current Austrian legal framework on mediation are the following:

*Interruption of limitation periods for court or arbitration claims.* The commencement of mediation does interrupt the limitation period for a court or arbitration claim. The commencement and the continuation of a mediation that is conducted by a mediator listed on the roster of mediators administered by the Austrian Ministry of Justice interrupts the limitation period so that it will not continue to run for the duration of the mediation and will only resume (where it has left off) once the mediation has ended (Section 22 of the Austrian Mediation Act; *Fortlaufshemmung*). In mediations that fall within the scope of application of the Austrian EU-Mediation Act, the mediation proceedings lead to a suspension of the expiration of the limitation period of the rights and obligations that are subject to the mediation

proceeding (Section 4 of the Austrian EU Mediation Act; *Ablaufshemmung*). If the mediation is conducted by a mediator that is not listed on the roster of mediators administered by the Austrian Ministry of Justice, the conduct of settlement negotiations *per se* leads to the suspension of the expiration of a limitation period (Section 1497 of the Austrian Civil Code; *Ablaufshemmung*).

*Privacy and confidentiality.* Confidentiality is one of the most relevant principles governing mediation processes and must therefore be upheld at all times. As a basic rule, any information that was revealed during the mediation process shall remain confidential between the parties, unless they expressly waive confidentiality. In accordance with the provisions of the Austrian Code of Civil Procedure (*Zivilprozessordnung – ZPO*) and the Austrian Code of Criminal Procedure (*Strafprozessordnung – StPO*) mediators may, under certain circumstances, not be heard as witnesses in court proceedings. Whether a mediator may refuse to give evidence essentially depends on whether he/she is listed on the roster of mediators administered by the Austrian Ministry of Justice:

- Non-listed mediators who otherwise practice a profession that does not include elements of mediation are solely bound to confidentiality by the terms of the written mediation agreement entered into with the parties. They may not refuse to give testimony in court. Non-listed mediators who otherwise practice a profession that does include elements of mediation (e.g. lawyers), may refuse to testify in court by reference to professional privilege and the relevant deontological rules.
- Listed mediators are under a strict obligation of confidentiality. Therefore, mediators practicing within the scope of application of the Austrian Mediation Act must not testify in court regarding any information that was imparted to them in their role as mediator.

*In-writing requirement as a requirement for enforceability.* There are no formal requirements that must be met regarding the mediation settlement agreement. Such agreement is essentially a civil law contract between the parties and reflects the terms of how the parties intend to solve their dispute. Whether the mediation settlement agreement will be directly enforceable or not, essentially depends on the chosen legal form. Unless the mediation settlement agreement is concluded before a competent Austrian court or integrated in a notarial deed, it will not be directly enforceable. In the context of institutional commercial arbitration, settlements agreed by the parties in the so-called "mediation windows" built into the arbitration process, are regularly issued (by a separately constituted arbitral tribunal) in the form of awards by consent. Thus, mediation settlement agreements will only have *res judicata* effect if they take one of the aforementioned forms. If this is not the case, the only way to hold a non-compliant party to its contractual obligations is to file a claim before the competent state court or arbitral tribunal.

*Challenging mediation settlement agreements in court.* If the mediation settlement agreement was concluded before a competent Austrian court or a notary public, or if it is issued in the form of an award by consent, it will be directly enforceable and may not be challenged in court. Otherwise, the mediation settlement agreement constitutes a civil law contract between the parties which is not directly enforceable and may therefore still be challenged in court.

*Appointment of mediators.* Mediators are usually appointed by the parties in dispute. If mediation is recommended/directed by a court, the parties are usually referred to experienced professionals directly by the sitting judge. If a commercial mediation is commenced under the auspices of the Vienna International Arbitral Centre (VIAC), the institution may, upon the parties' request, assist in the process of selecting a neutral mediator by providing lists of suitable candidates.

*Immunities and potential liabilities of mediators.* There are no specific rules that govern mediator liability. A mediator may, however, be held liable in accordance with the relevant provisions of Austrian civil law (e.g. claims for damages) for any conduct that is not in accordance with best practice standards or recognized methods. Professional liability insurance is compulsory for all professionals listed on the roster of mediators administered by the Austrian Ministry of Justice. The minimum level of insurance required is EUR 400,000.

*Parallel state court proceedings.* Austrian state courts will stay pending proceedings in favour of mediation if the parties reach an agreement to do so for a short period of time. If the issue arises in a matter that is subject to the Austrian Non-Contentious Proceedings Act (*Außerstreitgesetz – AußStrG*), which *inter alia* governs family law disputes, the courts will stay proceedings *ex-officio* if the parties state their interest in referring the case to mediation.

*Mediators' fees.* As regards the field of commercial mediation, mediators' fees are not regulated in Austria. Some mediators apply hourly rates, others charge daily rates or enter into lump sum fee arrangements. As mediators' fees are freely negotiable, it is impossible to indicate a range that would be considered usual with regard to the Austrian market.

#### **7.1.2. The demand side of commercial mediation: recourse by law, by contract clauses, by judge referral, by voluntary agreement**

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##### ***Recourse by law***

There are no statutory provisions that would make mediation a mandatory requirement before a case can move to the commercial courts. The Austrian mediation legislation does not provide parties with any incentives (neither positive nor negative) to attempt mediation.

##### ***Recourse by contract clauses***

Dispute resolution clauses providing for mediation are not enforceable in Austria. In other words, a non-compliant party cannot be forced to participate in mediation proceedings by way of a court order. Austrian legal doctrine is not unanimous as to the question of admissibility of a claim that is brought before a court, despite a clear provision in favour of an initial mediation phase in a multi-tier dispute resolution clause. Some argue that observance of the mediation phase must not be seen as a *sine-qua-non* for the initiation of court procedures. Others propose that a valid agreement to mediate constitutes a temporary waiver of the right to file suit and that the court should either reject the claim as temporarily inadmissible or stay the proceedings. The Austrian Supreme Court has yet to issue a ruling on this pertinent question.

##### ***Recourse by judge referral***

The Austrian courts are vested with the authority to propose mediation to the parties on the basis of the following provisions in the Austrian Code of Civil Procedure (*Zivilprozessordnung, ZPO*)

- Section 204 (1) ZPO: The court may, during the course of the oral hearing and at any stage, upon the request of a party or on its own motion, attempt to settle the legal dispute or any aspect of it in an amicable manner. In doing so, the court may, if this appears appropriate, point out organizations available for the amicable settlement of disputes. [...]
- Section 258 (1) Z 4 ZPO: The purpose of the preparatory hearing, as part of the main oral hearing, is to provide a forum to attempt a settlement [...]

Against the background of these provisions, some Austrian civil courts have started a pilot project for a so-called "conciliation procedure" (*Einigungsverfahren*).<sup>95</sup> In this procedure, which is entirely voluntary and not open to the public, alternative dispute resolution methods, in particular mediation, are employed to deal with the parties' dispute and help them resolve it. The conciliation procedure is conducted by specifically trained judges who support the parties in finding an amicable solution to their problem without any competence to decide the dispute. Quite importantly, the judge in the conciliation procedure is not the same judge as in the regular civil proceedings originally initiated by the parties. The conciliation procedure usually spans two sessions with the conciliation judge (*Einigungsrichter*) and can be concluded by signing a written agreement. In order to turn such agreement into an enforceable legal title, the parties need to make an appointment with the judge hearing their case in the regular civil proceedings. If it is the wish of the parties, the conciliation judge may refer them to mediators outside of the court setting, in order to deal with more complex issues in a different forum. If the conciliation procedure is unsuccessful, the regular civil proceedings will continue. No additional registration and court fees are charged if the parties decide to try out a conciliation procedure. Information (in German) can be found at [www.einigungsverfahren.at](http://www.einigungsverfahren.at).

### ***Recourse by voluntary agreement***

In Austria, to initiate a mediation process is always a full voluntary decision of all parties involved. The recent rise in commercial mediation cases in Austria – which is not recorded in any official statistics<sup>96</sup> and solely noticeable in the author's (international) mediation practice – can be attributed to the open-mindedness of the Austrian courts as well as Austrian dispute resolution professionals, in particular lawyers, who actively integrate alternative methods of dispute resolution into their service portfolio. There are no sanctions if a party to a dispute proposes mediation and the other ignores the proposal, refuses to mediate or frustrates the mediation process.

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<sup>95</sup> The following courts participate in the pilot project: District Court Inner City (Vienna); District Court Donaustadt (Vienna), District Court Floridsdorf (Vienna); District Court Josefstadt (Vienna); District Court Liesing (Vienna), Regional Court for Civil Matters Vienna; District Court St. Johann im Pongau.

<sup>96</sup> The circumstance that there is virtually no statistical data available about the use of commercial mediation as a tool of dispute resolution presents a problem in the recently commenced process for the revision of the Austrian Mediation Act. An expert group is currently being formed at the level of the Austrian Ministry of Justice with the aim of adapting the law to modern user requirements.

### **7.1.3. The supply side of commercial mediation: how to ensure the quality of mediation services**

The legal mediation landscape in Austria is rather inhomogeneous. There are essentially four ways in which mediations can be conducted:

- with a mediator who is listed on the roster of mediators administered by the Austrian Ministry of Justice (enjoying the privileges granted under the Austrian Mediation Act);
- with a mediator who is not listed on the roster of mediators administered by the Austrian Ministry of Justice;
- with a mediator in accordance with the provisions of the Austrian EU Mediation Act, and
- with a professional who may not even be qualified as a mediator but who enjoys the trust of the parties.

Mediators trained in accordance with the requirements set out in the Austrian Mediation Act can apply to be listed on the roster of mediators administered by the Austrian Ministry of Justice. It is not compulsory to be listed on the roster. However, non-listed mediators do not enjoy the benefits expressly granted under the Austrian Mediation Act (e.g. automatic interruption of prescription periods, protection of confidentiality beyond the scope of the mediation).

In order to be listed on the roster of mediators administered by the Austrian Ministry of Justice, candidates must fulfil the following criteria:

- written application
- minimum age: 28 years
- qualification as mediator
- extract from police records/disclosure
- professional liability insurance (min. coverage: EUR 400,000)
- information as to where the mediator will offer his/her services.

Candidates will be considered qualified if they

- have completed relevant training
- display knowledge and skills in mediation
- have completed basic legal and psycho-social training.

Training is considered 'relevant' if completed with registered training institutions, including universities. The Austrian Ministry of Justice keeps a list of those training institutions. The content of the training is laid down in Section 29 of the Austrian Mediation Act and in the respective By-Law. By international standards, the training requirements laid down in the Austrian Mediation Act are quite rigorous. This is owed to the fact that mediation is not a regulated profession in Austria and that the Austrian Mediation Act was implemented to introduce uniform quality standards for individuals coming from diverse professional backgrounds who seek to qualify as mediators. Any listing on the roster is limited to a period of five years. Listed mediators may apply for the extension of their listing for a period of a maximum of ten additional years.

The law faculty of the University of Vienna offers a number of elective courses that focus on mediation as a method of alternative dispute resolution (*Wahlfachkorb Mediation*)<sup>97</sup>. There are also a number of non-academic institutions offering mediation training. Courses are not exclusively geared towards the requirements of a legally trained audience (lawyers). The website of the Austrian Ministry of Justice provides information as regards various trainings offered in Austria (all designed to provide participants with the qualifications required for a listing on the roster of mediators administered by the Austrian Ministry of Justice in accordance with the Austrian Mediation Act)<sup>98</sup>

Mediators trained in accordance with the requirements set out in the Austrian Mediation Act can apply to be listed on the roster of mediators administered by the Austrian Ministry of Justice.<sup>99</sup> It is not compulsory to be listed on the roster. However, non-listed mediators do not enjoy the benefits expressly granted under the Austrian Mediation Act (e.g. automatic interruption of prescription periods, protection of confidentiality beyond the scope of the mediation).

The role of the Austrian Ministry of Justice is purely administrative. In particular, it does not serve as a gatekeeper when it comes to the observance of certain ethical standards by mediators listed on its roster. Section 14 paragraph 1 of the Austrian Mediation Act vests the acting Minister of Justice with the authority to order – if necessary upon the issuance of a report by the Mediation Commission instituted at the Ministry of Justice – that a certain mediator is struck off the roster, if it is brought to the Minister's attention that (i) any of the criteria for a listing on the roster as set out above has fallen away, or that (ii) the mediator in question has failed to continue professional training, or that (iii) the mediator in question, despite admonition, has repeatedly violated his or her duties. As can be seen from the wording of the provision, it is not designed for monitoring the ethical conduct of "listed" mediators.

Overall, the situation in Austria is such that there is no codification of rules of ethics that would enjoy universal applicability or have legally binding force for mediators. When it comes to the issue of safeguarding best practices and ethical standards in the conduct of mediations on the basis of the Austrian Mediation Act, the website of the Austrian Ministry of Justice provides a link to *Servicestelle Mediation*.<sup>100</sup> *Servicestelle Mediation* is a platform offering mediation-related services that is run by *Österreichisches Netzwerk Mediation* ("**ÖNM**" – the Austrian Mediation Network).<sup>101</sup> ÖNM is a non-profit organization that organizes and funds *Servicestelle Mediation*. Via *Servicestelle Mediation*, users of mediation services find access to general information about mediation and the Austrian Mediation Act, about financial assistance through public funding, and about the ethical guidelines for mediators developed by ÖNM and its affiliated associations. In particular, *Servicestelle Mediation* offers parties assistance in the selection of mediators and handles complaints about mediators. All services are free of charge.

In November 2005, ÖNM published ethical guidelines for mediators (the "**Guidelines**" – *Ethikrichtlinien für MediatorInnen*).<sup>102</sup> The Guidelines are based on the considerations of the working group "Quality

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<sup>97</sup> See, for example: <https://zvr.univie.ac.at/lehre/wahlfachkorb-mediation-und-andere-formen-alternativer-konfliktbeilegung/lehre-ss-wahlbereich/mediation-for-lawyers/>.

<sup>98</sup> See: <https://mediatoren.justiz.gv.at/mediatoren/mediatorenliste.nsf/contentByKey/VSTR-7DYGVZV-DE-p>.

<sup>99</sup> See <https://mediatoren.justiz.gv.at/mediatoren/mediatorenliste.nsf/docs/home>.

<sup>100</sup> See <https://www.servicestellemediation.at/>.

<sup>101</sup> See <https://www.netzwerk-mediation.at/>.

<sup>102</sup> See <http://www.netzwerk-mediation.at/fileadmin/pdf/Ethikrichtlinien.pdf>.

in Mediation" initiated by ÖNM. They were revised in 2017 with an express reference to the European Code of Conduct for Mediators developed by a group of stakeholders with the assistance of the European Commission. The Guidelines define ethical standards for mediations conducted in accordance with the Austrian Mediation Act by mediators listed on the roster administered by the Austrian Ministry of Justice. They were drafted for the purpose of providing Austrian mediators with a generally acceptable deontological framework for their professional activities that they may adopt on a voluntary basis.

The Austrian Federal Association for Mediation ("**ÖBM**" - *Österreichischer Bundesverband für Mediation*) also runs a complaint office for disenchanted users of mediation. ÖBM, which was founded in 1995, is the largest professional mediation association in Europe. It is firmly committed to both ÖNM's ethical guidelines for mediators as well as the European Code of Conduct for Mediators.

#### **7.1.4. Relevant case law / jurisprudence and success stories on commercial mediation**

Mediation-related jurisprudence of the Austrian Supreme Court is very scarce. The few decisions that have been handed down were made in the context of family law and dealt with the question whether mediation can be made mandatory by court order. The Austrian Supreme Court has answered this question in the negative.<sup>103</sup> On the other hand, it has held that a court's order for the parties to participate in a first informative session about the benefits of mediation is enforceable as long as the order includes specific information, namely that the first session is to be attended by both parties with the same mediator or institution.<sup>104</sup>

In 2018, *Servicestelle Mediation* registered two complaints against mediators.<sup>105</sup> Both were forwarded for handling by the competent units within the professional association of which the mediator in question is a member.<sup>106</sup> In so far as no such unit exists within the relevant association, complaints are handled directly by *Servicestelle Mediation*. As a first step, the complaining party is invited to tell its story in a fact-finding interview that is usually conducted via telephone. All relevant information is collected by experienced mediators who will also explore the complaining party's needs and assist in developing options of how to remedy the situation that lead to the complaint in the first place. Upon completion of this first step, the complaining party will be requested to decide on how it wishes to proceed. If the complaint was raised against a mediator during the course of an ongoing mediation, points of grievance may ideally be addressed directly during the next mediation session. If this is not an option, *Servicestelle Mediation* will ask for disclosure of the name of the mediator in question and check whether he or she is a member of ÖNM. If so, the complaining party will be requested to file a written brief setting out the details of its complaint. The mediator in question will in turn be invited to submit a written response. *Servicestelle Mediation* also offers the possibility of dealing with the complaint within the framework of a so-called "extended mediation" (*erweiterte Mediation*), which is conducted as a co-mediation. The parties to the extended mediation are the complaining party and the mediator concerned by the complaint. The co-mediators, who will both be "listed" mediators, are

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<sup>103</sup> See, OGH 26.04.2017 7 Ob 46/17s; OGH 14.12.2011, 3 Ob 196/11m.

<sup>104</sup> See, OGH 22.09.2016, 3 Ob 122/16m;

<sup>105</sup> Information provided by *Servicestelle Mediation*.

<sup>106</sup> No further publishable information available.

nominated by *Servicestelle Mediation*. As a basic requirement, all parties must agree to the extended mediation. Participation is entirely voluntary. The costs involved for a first two-hour session are covered by *Servicestelle Mediation*. Under the described procedures, no sanctions are foreseen against the mediator concerned by the complaint.

#### 7.1.5. Key achievements and statistical data on commercial mediation

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**There is no statistical data available on the number of commercial mediations commenced each year in Austria.** According to informal records kept at the Commercial Court of Vienna, the courts expressly recommended to commence commercial mediations in less than twenty cases in 2018. In the same year, the number of commercial disputes mediated under the Rules of Mediation of the Vienna International Arbitral Centre (VIAC) was below ten. By comparison, in 2017, the ICC International Centre for ADR registered 30 new filings under the ICC Mediation Rules (ICC Dispute Resolution Bulletin 2018, Issue 2, page 64).

Despite the lack of official statistics, in the professional assessment of the **author the total number of commercial mediations in Austria is lower than 500 per year.** For this reason, **there are very few individuals in Austria who are full-time professional mediators.**

There is also no data available as regards the success rate of commercial mediation in Austria. However, according to a recent study published by the Centre for Effective Dispute Resolution (CEDR), United Kingdom, approximately 70% of all mediations conducted under the auspices of this institution ended with a settlement on the day of the mediation session. Taking into account all other cases that settled shortly after the day of the mediation session, the percentage is about 90%<sup>107</sup>. The significance of such statistics may be relative considering that cases brought to mediation are usually prone to a settlement solution. However, the CEDR statistics appear to be quite reflective also of the Austrian experience.<sup>108</sup>

#### 7.1.6. Lessons learnt and recommendations

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**The Austrian legal framework on mediation was not able to foster a substantial increase of the recourse to commercial mediation.** The author's perception of the Austrian mediation landscape – which is through the lens of a dispute resolution professional working predominantly in an international setting – is not entirely positive. **While the current legal framework was created with the intention of setting a high bar in terms of quality and professionalism, commercial mediation practice in Austrian has not lived up to the expectations.** On the one hand, the way commercial mediation was promoted in the context of disputes brought before the Commercial Court of Vienna was met with stark opposition by the legal community, as lawyers felt side-lined by judges promoting a very limited group of mediators, most of which did not have a legal background and – in that sense – did not meet the

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<sup>107</sup> (Centre for Effective Dispute Resolution, The Eighth Mediation Audit: A survey of commercial mediator attitudes and experience in the United Kingdom, CEDR, 2018, page 6)

<sup>108</sup> According to information published on the website of the Austrian Ministry of Justice, the mediation success rate is about 60%, see <https://www.justiz.gv.at/web2013/home/justiz/aktuelles/archiv/2011/mediation-in-gerichtsanhaengigen-verfahren-projekt-am-handelsgericht-wien~2c94848533c59e280133c6d07e580040.de.html>.



expectations and requirements of the parties and their legal counsel. The judges promoting mediation seemed unmindful of the crucial detail that mediation is a voluntary process – which also goes for the very important aspect of selecting the mediator. On the other hand, access to justice in Austria is guaranteed by comparatively low court fees and a functioning system of legal aid available to impecunious parties (*Verfahrenshilfe*). Litigation is thus a truly affordable option with no immediate pressure to take recourse to cost and time saving alternatives such as mediation.

***ADR hybrid procedures are becoming significantly more relevant.*** In the author's daily work, commercial mediation is growing in importance in so far as clients (usually corporate entities with experience in dispute resolution) increasingly request "mediation windows" to be integrated in more formal procedural settings (usually international arbitration proceedings). Such hybrid proceedings usually occur in an institutional setting, meaning that the mediation is conducted in accordance with the mediation rules of international disputes resolution service providers such as the ADR Center of the International Chamber of Commerce (ICC) in Paris, France, or the Vienna International Arbitral Centre (VIAC) in Vienna, Austria. In this particular context, the legal framework in Austria is not satisfactory, especially when it comes to the international enforcement of settlements generated in mediation.

***More incentives are needed to promote recourse to mediation.*** One of the key challenges in terms of policy remains that the Austrian mediation legislation still does not provide parties with any incentives to refer their cases to mediation. Also, the Austrian state continues to collect a contract levy (*Rechtsgeschäftsgebühr*) in the amount of 1% of the settlement volume if the settlement concerns a litigious matter pending in court and 2% of the settlement volume if the latter is not the case (Section 33 tariff item 20 (1) of the Austrian Fees Act – *Gebührengesetz*).

In terms of anticipated developments, Austria will likely see mediation on the rise in the SME segment as well as in shareholder disputes (multi-party constellations), disputes concerning matters of corporate and asset succession and, in particular, family trusts.

### Greece - Commercial mediation law and practice, key information

Topic	Description	Comments
<b>Legal framework</b>	Law 4640/2019 (“Greek Government Gazette” 190/A/30-11-2019) from November 30 <sup>th</sup> , 2019	<p>The new law, which has replaced all previous legal provisions on mediation</p> <p>gives mediation greater prominence in the Greek legal system and aims to address the huge backlog and problems in the Greek courts’ system</p> <p>The law is set to come into effect on 15 January 2020</p>
<b>Private v judicial mediation</b>	Private and court-connected mediation is available. Judicial referral has been rare and judges do not practice mediation.	
<b>The role of courts</b>	<p><b>The court may at any stage of the trial invite the parties to attempt mediation (private or judicial) in order to resolve their dispute.</b></p> <p>Also, mediation can be initiated if recourse to mediation is ordered by the judicial authorities of another EU member-state.</p>	<p>The court proceedings can be suspended for a minimum of three months varying up to six months.</p> <p>The courts have not been active in referral (only 5.2% of the judges proposed mediation to the litigants in 2019, according to a survey).</p>
<b>Mandatory v voluntary mediation in commercial cases</b>	The new law foresees both voluntary and mandatory mediation, with <b>majority of cases falling under the “first mediation information session” obligation</b> , with the penalty of	<p>The following categories fall under the “first mediation information session”:</p> <p>1) Civil and commercial disputes under the</p>

<sup>109</sup> By Dr. Elena Koltsaki, a lawyer – mediator and an Adjunct Professor on ADR & Negotiations at ALBA Graduate Business School at the American College of Greece. She is a mediators’ trainer at the Bar Association of Athens and has served as a Mediation Expert in Committees at the Greek Ministry of Justice (E.elena.koltsaki@eklaw.gr)

	<p>inadmissibility of the hearing of the case in the court if it is not attended.</p>	<p>standard civil procedure falling under the competence of the Single-Member Court of First Instance when the value of the dispute exceeds 30,000 euros, or falling under the jurisdiction of the Multi-Member Court of First instance,</p> <p>2) Disputes for which a mediation clause is provided for in a written agreement between the parties and is in force.</p> <p>The law foresees minimal fees for the first session with the mediator (50 Euros if not otherwise agreed).</p> <p>This session shall take place no later than twenty (20) days after the mediator has received the request of a party seeking to recourse to mediation. If any of the parties resides abroad, the said deadline shall be extended up to thirty (30) days, following the day on which the request is sent to the mediator.</p>
<b>Legal and institutional barriers for mediation</b>	<p>Barriers which have so far prevented an increased use of mediation have been</p> <ol style="list-style-type: none"> <li>1) lack of political will</li> <li>2) negative stance of the legal community (lawyers)</li> <li>3) lack of support from the judiciary</li> </ol>	
<b>Mediation licences and certificates</b>	<p>Accreditation is conducted by the MoJ.</p>	<p>The requirements for licencing are</p>

		<ol style="list-style-type: none"> <li>1) successful completion of training by one of the licenced Mediation Training Providers (of at least 80 training hours (a minimum of 50 hours in-class)) and</li> <li>2) successful passing of the National Accreditation Mediation Exam.</li> <li>3) CPD<sup>110</sup>: 20 hours of training every three years</li> </ol>
<b>Supervisory authorities</b>	<p>The Central Mediation Committee, a body set up by a decision of the Minister of Justice in June 2018 composed of 13 members (high court judges, government officials and mediators), responsible for addressing all issues related to the implementation of the law and the lawful application of mediation in general, which may set up, at its discretion, subcommittees for the effective resolution of all issues arising from the application of the Law</p>	<p>The Central Mediation Committee has extended powers including the following:</p> <ol style="list-style-type: none"> <li>1. Decision making power over the appointment of the mediator in case of a disagreement between the parties in the cases falling within the scope of mandatory mediation<sup>111</sup></li> <li>2. Disciplinary Control of mediators - Power of imposing sanctions such as suspension, temporary and permanent removal from the official Register</li> <li>3. Monitoring of the Mediators' Annual Reports</li> <li>4. Licensing and Monitoring of Mediation Training Providers</li> <li>5. Accreditation of all candidate mediators (including the assessment process)</li> </ol>

<sup>110</sup> Continuous professional development

<sup>111</sup> This provision, when initially introduced by law 4512/2018, has been highly criticized as contrary to the voluntary nature of mediation.

		6. Obligation for the dissemination of information on mediation to the public
<b>Number of mediators in the country</b>	Over 2,000	The exact number of practicing mediators is unknown. However, the majority of the licenced mediators indicate that they have not practiced mediation.
<b>Number of Mediation Centres in the country</b>	<p>The Law does not provide for registration of Centres, although they can be established (exclusively by one or more mediators). The current number is unknown.</p> <p>For example, the Greek Banking Association introduced an independent body to resolve financial disputes through mediation, in an attempt to respond to the need to settle debtors' financial disputes amid a prolonged period of economic crisis in the country.</p>	Mediators do not have to be a part of a mediation centre as their role is not regulated.
<b>Number of mediation cases</b>	In the period from 2010 to 2018 the total number of mediations conducted under the provisions of the previous mediation law (not only commercial but all cases) were no more than 1,000 in the entire territory of Greece.	The number of mediation cases is negligible compared to the judicial workload.
<b>Settlement rate</b>	The few cases that have only recently been monitored, as the reporting system has been set in June 2019, show a very encouraging rate of success, which nevertheless remains to be confirmed when volumes increase.	

Enforceability of mediation settlement agreement	N/A	
Signatory to the Singapore convention	No	Member of the EU
Incentives for use and enforceability of mediation	<p>Incentives exist for <b>lawyers</b> -with the exception of consumer disputes and small claims) parties <b>must be assisted (represented) by their lawyers during the mediation process (however, this is likewise the case for court proceedings).</b></p> <p>According to Article 4 of Law 4640/2019, recourse to commercial mediation is possible if there is a mediation clause (a mediation clause is enforceable).</p>	One of the most significant reforms introduced by the law in 2019 is the clarity given to the legal nature and validity of a mediation clause that was lacking from all previous legislative texts.

#### Lessons learned and recommendations for Serbia

- In the last 10 years, legislation which focused only on the voluntary recourse to mediation failed to generate a sufficient number of mediations.
- Despite the involvement of the Chamber of Commerce, the businesses community is still not aware of advantages of the recourse to commercial mediation. The EU Directive 2008/52 has been transposed at the minimum level possible in order to preserve the “status quo” of litigation in court.
- Eight years of constant failure of the 2010 law to increase the demand of mediation has convinced the Government to adopt the mandatory first mediation meeting.
- The Greek experience proves **the need of a strong political will** to overcome the opposition from the current establishment and various barriers towards the effective increase of the recourse to mediation (from lawyers and judiciary).
- **The trade-off in 2010 between lawmakers and lawyers for the mandatory presence of advocates in the mediation process in, as it proved, fruitless hope that the legal community will favour mediation over adversary judicial proceedings not only failed but may have even deterred disputants to use mediation as it simply increased its cost, especially in low value disputes.**
- **Efforts to confine and over-control the mediation market should not be encouraged, financial incentives to individuals and companies using mediation must be further legislated and stakeholders must display a real commitment to promote mediation.**
- **It takes more than just a law to make mediation happen.**

It should be clarified from the outset of this study that there is no specific definition in the Greek law as to what constitutes a “commercial dispute”. Commercial law in Greece is a special, nevertheless separate, branch of general private law. It is namely a set of legal rules that regulate commercial actions and the activity of merchants (both private and legal persons), governing also distinct concepts such as negotiable instruments, companies, bankruptcy, insurance, maritime and air commerce, transfer of goods, banking and stock exchange transactions, intellectual and industrial property and competition<sup>112</sup>. All legal texts that regulate mediation in Greece that have been introduced so far quote the EU Mediation Directive and therefore apply equally to all civil and commercial disputes. Practically, this means that the analysis provided below applies in essence to all disputes that could qualify for resolution through “commercial mediation”.

### 7.2.1. Legal framework in the field of commercial mediation

The existing legal framework in civil and commercial matters in Greece is now primarily foreseen by Law 4640/2019 (Published on the Greek Government Gazette on November 30<sup>th</sup>, 2019 and in force since that date) (hereinafter: “the Law”)<sup>113</sup>. The new Law, which has replaced all previous legal provisions on mediation (Law 4512/2018<sup>114</sup>, Law 3898/2010<sup>115</sup>, Presidential Decree 121/2011 and several ministerial decisions), apart from an ambition for all past legislation to be codified in one single, distinct and concise legal text, reflects also the decisiveness of the country to reform the institutional framework of mediation and effectively enhance its use by the parties. Along with giving mediation greater prominence in the Greek legal system, one of the biggest challenges the Law also aims to address is undoubtedly the huge backlog and problems in the Greek courts’ system. All legal texts on mediation passed by the Greek Parliament back in 2010 and subsequently in 2018 and 2019 are focused on the achievement of the objectives set by the Directive 2008/52/EC (Mediation Directive) and fulfil Greece’s obligation to transpose it effectively into the Greek legal system.

The new Law, as compared with the previously existing legal framework, has introduced several novelties. As opposed to the mediation law that was passed back in 2010 and provided only for voluntary mediation, the new Law foresees for both voluntary and mandatory mediation, which stands among its most prominent and breakthrough changes. It is worth mentioning that mandatory mediation was initially introduced by Law 4512/2018, a legislative change that prevailed over other

<sup>112</sup> The application of the Civil Code is generally accepted when the rules and provisions of commercial law have gaps or demand a more clear interpretation.

<sup>113</sup> Law 4640/2019 (Greek Government Gazette 190/A/30-11-2019) [http://www.et.gr/ids-nph/search/pdfViewerForm.html?args=5C7QrtC22wFqnM3eAbJzrXdtvSoCrlR88Y71z40Jk5d5MXD0LzOTLWPU9yLzB8V68knBzLCmTXKaQ6fpvZ6Lx3UnKl3nP8NxdnJ5r9cmWyJWelDvWS\\_18kAEhATUkJb0x1LldQ163nV9K--td6SludWYgsLcPnSXB6Fet9jMfz\\_M8voV4Y5FTdpoZ6kKHv3i](http://www.et.gr/ids-nph/search/pdfViewerForm.html?args=5C7QrtC22wFqnM3eAbJzrXdtvSoCrlR88Y71z40Jk5d5MXD0LzOTLWPU9yLzB8V68knBzLCmTXKaQ6fpvZ6Lx3UnKl3nP8NxdnJ5r9cmWyJWelDvWS_18kAEhATUkJb0x1LldQ163nV9K--td6SludWYgsLcPnSXB6Fet9jMfz_M8voV4Y5FTdpoZ6kKHv3i) (in Greek)

<sup>114</sup> Law 4512/2018 (in particular Chapter B, articles 178-206) on Arrangements for the Implementation of the Structural Reforms of the Economic Adjustment Programmes and Other Provisions (Published on the Greek Government Gazette in January 17, 2018 and in force since that date). [http://www.et.gr/ids-nph/search/pdfViewerForm.html?args=5C7QrtC22wG3UHK-ZeQumndtvSoCrlR8zhQSOP9tRnopCCmqt4mgGEHlbmahCJFOEmRQwePEviF8EeCoaTOMAKztT3Sb63xk3Vkl3PiCQ3RL0VYQqjKiogfu8Gq1RKKOmyoZK8o4WONUgh1P\\_UC2PlsRnm7i\\_mfDLIGMvFzF7O6YXX2d\\_7KoA..](http://www.et.gr/ids-nph/search/pdfViewerForm.html?args=5C7QrtC22wG3UHK-ZeQumndtvSoCrlR8zhQSOP9tRnopCCmqt4mgGEHlbmahCJFOEmRQwePEviF8EeCoaTOMAKztT3Sb63xk3Vkl3PiCQ3RL0VYQqjKiogfu8Gq1RKKOmyoZK8o4WONUgh1P_UC2PlsRnm7i_mfDLIGMvFzF7O6YXX2d_7KoA..) (in Greek)

<sup>115</sup> Greek Government Gazette, Series I, No 211, 16.12.2010

significant reforms<sup>116</sup>, which nevertheless attracted many reactions and criticism<sup>117</sup>. As the Explanatory Memorandum of the New Law 4640/2019 that replaced the Law 4512/2018 states, “Law 4512/2018 failed to achieve the goals it had set, primarily the implementation of the provisions prescribing mandatory mediation<sup>118</sup>”. Indeed, Article 182 of Law 4512/2018 that provided for mandatory mediation suffered far too many “modifications” resulting in an ongoing suspension of its application (last one being November 30<sup>th</sup>, 2019<sup>119</sup>) which equalled to its non-implementation.

The new Law introduces some breakthrough changes to the already much discussed and criticized Law 4512/2018<sup>120</sup>. What ranks as most important is the scope of disputes where mandatory first meeting is required as a pre-condition for the hearing of a case in court. The new Law is apparently taking a different direction to include a much wider range of disputes, an approach that deviates clearly from the limited listing of the previously prescribed seven categories of disputes that the Law of 2018 attempted to introduce.

The new Law now foresees that the mandatory first meeting shall be applicable to family disputes in addition to a wide majority of cases that fall under the provisions of what the Greek Code of Civil Procedure prescribes as “ordinary proceedings” before the (Single Member and Multi Member) Court of First Instance, which include, *inter alia*, a wide range of commercial disputes. As the New Explanatory Memorandum clearly states, this is deemed necessary to enhance the use of mediation as an alternative dispute resolution method with the aim to alleviate the court burden and ensure a balanced relationship for both judicial and out of court settlement proceedings. Along with the widening of the scope of the disputes where parties are required to attend a mandatory first meeting, and in an effort to align fully with ECJ case law, the law foresees minimal fees for the first session with the mediator (50 Euros if not otherwise agreed). Among the other pillars of the new legislation lie the new provisions regulating mediation training providers and further modifications that clarify the mediation process, rules on limitation periods and mediation clauses.

#### **7.2.2. The demand side of commercial mediation: recourse by law, by contract clauses, by judge referral and by voluntary agreement**

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According to Article 4 of Law 4640/2019, recourse to commercial mediation is possible

- if the interested parties agree to refer their case to mediation (voluntary mediation),

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<sup>116</sup> Introduction of mandatory mediation, reform of the training system and accreditation system, the setting up of a Central Mediation Committee, collection of statistical data etc

<sup>117</sup> As specifically stated in the latter’s Explanatory Memorandum (preamble), Law 4512/2018 “mark(ed) a milestone on the road towards a balanced promotion of a comprehensive justice system which can be expeditious, cost effective and in line with the international and European goals for better access to justice. Explanatory Memorandum (in Greek) page 68 seq. <https://www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/r-dimetr-eisig-synolo2.pdf>

<sup>118</sup> Explanatory Memorandum of Law 4640/2019 <https://www.hellenicparliament.gr/UserFiles/c8827c35-4399-4fbb-8ea6-aebdc768f4f7/11134593.pdf>

<sup>119</sup> First suspension was for October 2018, second one for September 16<sup>th</sup>, 2019 (by Law 4566/2018 and in force since 8.10.2018), last one for November 30<sup>th</sup>, 2019.

<sup>120</sup> Public deliberations were put in place before the passing of the new law by the Greek Parliament <http://www.opengov.gr/ministryofjustice/?p=10849> (in Greek)



- if a private dispute is pending before a court, and the court invites the parties to mediation to resolve the dispute and the parties agree,
- if recourse to mediation is ordered by the judicial authorities of another member-state
- if recourse to mediation is required by law
- if there is a mediation clause.<sup>121</sup>

### ***Recourse by law***

As the new Law stands now, in particular Article 7<sup>122</sup>, modelled after the Italian provision, it provides for a “required first mediation meeting” or alternatively called “mandatory initial mediation session”, upon the penalty of inadmissibility of the hearing of the case in the court<sup>123</sup>, in the following types of disputes:

- a) Disputes regulated by family law, other than those of Article 592 (1) (a), (b) and (c), and Article 592 (2), of the Code of Civil Procedure (with the exception of matrimonial disputes and disputes arising out within the context of parent and children relationships)
- b) Disputes that would be heard according to the ordinary proceedings and fall under the jurisdiction of the Single-Member Court of First Instance when the value of the dispute exceeds thirty thousand (30,000) euros, or fall under the jurisdiction of the Multi-Member Court of First instance, in accordance with the provisions of the Code of Civil Procedure,
- c) Disputes for which a mediation clause is provided for in a written agreement between the parties and is in force.

In the above cases, the document proving that the “mandatory initial mediation session” took place must be filed together with the proposals for the hearing, as a prerequisite for the admissibility of the hearing for any action that might be brought.

### ***Recourse by Contract Clauses***

According to the new Article 7, disputes for which the parties have contractually agreed to be resolved through mediation fall within the provisions applicable for mandatory mediation and must abide by the process provided therein.

It seems to become popular for a small part of lawyers (mostly those who have been also trained as mediators) to include mediation clauses in business contracts but there has been no record of whether these clauses have initiated a mediated case or not. There has been no data to give a clear picture either whether these mediation clauses were upheld by court. Still, scholars seem to have advocated – even before the introduction of the new Law- that they should be interpreted in a way that courts

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<sup>121</sup> One of the most significant reforms introduced by the law in 2019 is the clarity given to the legal nature and validity of a mediation clause that was lacking from all previous legislative texts.

<sup>122</sup> Art 182 of the Law 4512/2018 (now abolished) provided for mandatory mediation only in seven types of disputes a) landlord – condominium cases, b) road traffic accident cases unless the harmful event resulted in death or personal injury, c) professional fees/remuneration, d) certain family law matters, e) medical liability cases related to malpractice, f) disputes arising out of industrial property rights (trademarks, patents, designs), and g) stock exchange transactions.

<sup>123</sup> As opposed to the Italian model which foresees the initial mediation meeting to take place prior to the initiation of legal proceedings.

should reject a claim (or suspend the hearing) in the cases where parties, in violation of a stipulated mediation clause in the contract, file a claim without prior recourse to mediation<sup>124</sup>.

### ***Recourse by Judge Referral***

Pursuant to Art. 4 Para. 2 of the Law, the court may at any stage of the trial invite the parties to attempt mediation (private or judicial) in order to resolve their dispute. In case the parties agree, this is recorded in the court minutes. Parties are also free at their own initiative to ask the court to suspend the hearing of their case until they have tried mediation. In either case, court proceedings can be suspended for a minimum of three months varying up to six months. The low number of mediated cases in addition to the findings of available surveys<sup>125</sup> indicate that the courts have not at all been active in referral<sup>126</sup>.

### ***Recourse by Voluntary Agreement***

As a rule, all private civil and commercial disputes, both domestic and cross-border, existing or future, can be subject to mediation, after a written agreement has been signed by the interested parties, provided the parties have the power to dispose of the object of the dispute (authority to settle), in accordance with the provisions of substantive law.

#### **7.2.3. The supply side of commercial mediation: how to ensure the quality of mediation services**

Quality of mediation in Greece is intended to be achieved on several levels, namely through the detailed provisions that regulate training and the accreditation process of mediators, the Code of Conduct and the applicable Disciplinary Law, the continuous professional development (CPD) requirement for accredited mediators, and the overall supervision of the mediation practice by the Central Mediation Committee, a body that was set up by a decision of the Greek Minister of Justice in June 2018.

### ***Mediation Monitoring Body***

The Law called for the creation of a new statutory body called the “Central Mediation Committee”, a 13-member institution comprised of high court judges, government officials and mediators (Articles 10 & 11) which is responsible for addressing all issues related to the implementation of the law and the lawful application of mediation in general. Article 11 provides in particular that “the Central Mediation Committee is competent to deal with any issue concerning the implementation of mediation”. Furthermore, the Central Mediation Committee may set up, at its discretion, sub-committees for the effective resolution of all issues arising from the application of the Law. These sub-

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<sup>124</sup> The new Law clarified all previous uncertainty in the interpretation of mediation clauses.

<sup>125</sup> “Rebooting” the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU”, Study (2014), [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI\\_ET\(2014\)493042\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf), page 182.

<sup>126</sup> According to unofficial data in the Court of First Instance in Athens and with regard to judicial mediation, which was introduced in May 2012, there were 31 cases in 2012 (14 settled); 94 cases in 2013 (42 settled); 82 cases in 2014 (35 settled); 63 cases in 2015 (35 settled); and just a handful of cases in 2016 owing to the prolonged strike of lawyers. Cited also in “The implementation of the Mediation Directive, 29 November 2016”, Chapter on Achieving a balanced relationship between mediation and judicial proceedings by Professor Giuseppe de Palo and Dr Leonardo D’Urso. [http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/571395/IPOL\\_IDA\(2016\)571395\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/571395/IPOL_IDA(2016)571395_EN.pdf) page 20, report on Greece, authored by Dr Elena Koltsaki. Also, a recent survey run by the Association of Greek Mediators (Nov 2019), revealed that only 5.2% of the judges proposed mediation to the litigants ([www.sedi.gr](http://www.sedi.gr))

committees are composed of members of the Central Mediation Committee, unless otherwise specified. Such committees are expressly empowered by the Central Mediation Committee for the final settlement of issues, unless specifically stipulated in this Law that these shall be dealt by the Central Mediation Committee in plenary. As of today, the Central Mediation Committee has already set up four (4) subcommittees, with a term of office of two years, with the following roles and responsibilities:

(a) **"Sub-Committee for the Registry of Mediators"**, with the responsibility of keeping and monitoring the Register of Mediators and the annual activity reports, in accordance with Article 21.

(b) **"Ethics & Disciplinary Law Sub-Committee"**, which is responsible for the compliance of mediators with the obligations arising from the Law and the imposition of disciplinary sanctions. (c) **"Sub-Committee for the Monitoring of Training Providers"**,

(d) **"Sub-Committee for the National Mediation Accreditation Exams"**, which is responsible for carrying out the written and oral examinations for the purposes of the accreditation of candidate mediators.

In line with the above, the Central Mediation Committee has been vested by the law with extended powers including the following:

1. Decision making power over the appointment of the mediator in case of a disagreement between the parties in the cases falling within the scope of mandatory mediation (Art 7 Para 1)<sup>127</sup>
2. Disciplinary Control of mediators - Power of imposing sanctions such as suspension, temporary and permanent removal from the official Register (Art 17)
3. Monitoring of the Mediators' Annual Reports (Art 21)
4. Licensing and Monitoring of Mediation Training Providers (Art 22)
5. Accreditation of all candidate mediators (including the assessment process) (Art 22)
6. Obligation of dissemination of information on mediation to the public (Art 29)

### ***Registry of Mediators***

The Ministry of Justice keeps a public electronic online Registry<sup>128</sup> that counts today over 2,000 Accredited Mediators. This Registry includes the names and contact details of all mediators that have been accredited by the Ministry of Justice since 2012, following the successful completion of their training by one of the licenced Mediation Training Providers and after having successfully passed the National Accreditation Mediation Exams<sup>129</sup>.

Accredited Mediators that are listed on the Registry can practice mediation as self-employed professionals (that is, as individuals). According to a new tax-content provision (Art. 19), new tax declarations shall provide for a specific code that relates to the income that derives from mediation, which is therefore treated as a separate professional activity. Mediation services can also be provided by entities (companies), only if these are set up exclusively by accredited mediators (Art. 20). Although

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<sup>127</sup> This provision, when initially introduced by law 4512/2018, has been highly criticized as contrary to the voluntary nature of mediation.

<sup>128</sup> Registry (in Greek "Mitroo Diamesolaviton") <http://www.diamesolavisi.gov.gr/anazitisi-diamesolavitwn>

<sup>129</sup> These are **run at least twice a year by the Greek Ministry of Justice**, according to the specific conditions provided by the law

there are several entities already set up in the country - mostly known in the business arena as mediation centres, **there is no official list or record of them.**

### ***Mediation Process***

The quality of the process is guaranteed through the stipulation of strict confidentiality rules as well as rules safeguarding the voluntary nature of mediation. Mediation process is confidential by law and mediators are bound by professional secrecy, and it is the parties' free will to decide whether they wish or not to come to an amicable settlement of their dispute. According to Article 6, in principle, none of the participants can give evidence to court as a witness, and no court can accept as evidence any information revealed during the process (any admissions, proposals, acknowledgments, offers, opinions, etc).

### ***Role of lawyers in mediation***

It should also be noted that the Law (**with the exception of consumer disputes and small claims**) stipulates that **parties must be assisted (represented) by their lawyers during the mediation process.** That means that lawyers play a crucial role in the initiation of mediation proceedings, regardless of the preferred type of recourse to mediation (Article 5).

### ***Required training and qualifications for mediators***

As far as the training is concerned, the law provides for specific conditions that have to be met for those wishing to become mediators that require, *inter alia*, that the candidate should be a holder of a higher education degree and should have a clean criminal record before he/she can apply with a licenced training provider to be trained. Minimum duration of training is set with an attendance of at least 80 training hours (a minimum of 50 hours in-class), whereas the content of the training ranges from learning basic principles of civil and commercial law to a deeper understanding of the theoretical and practical aspects of the mediation process, mediator skills, and its international legal framework and practices.

The minimum content of the basic mediation is the following:

- Mediation and other forms of alternative dispute resolution. The development of mediation internationally.
- The Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.
- Basic characteristics, key concepts and principles, and definition of mediation according to the Greek and European Law.
- Scope – Conditions under which a case may be referred to mediation.
- Ways to refer a case to mediation – Agreement to mediate - Legal Consequences.
- The mediation process - Stages in mediation - The role of Legal Counsels and third parties.
- Settlement agreement - Enforceability
- Mediator - Role - Liability
- Disciplinary Law and Mediators' Code of Conduct.

- Mediation Skills and Techniques - Negotiation Techniques and Communication skills - Basic concepts of psychology in mediation
- Simulations/Role plays. Practical application of mediation.
- Fundamental principles of Private Law.
- General Commercial Law, Company Law, Law of bills of exchange.

As already mentioned, it is only upon the successful completion of this training conducted by the training providers that candidate mediators are eligible to sit at the National Accreditation Mediation Exams organized by the Central Mediation Committee (both written and oral) in order to become accredited and therefore listed in the Registry of the Greek Ministry of Justice (see Article 28). The Central Mediation Committee is responsible for monitoring mediators' performance.

To ensure the quality of mediation services, the law further foresees (Articles 12-16) that mediators are required to undertake mediation cases only if they can meet the requirements and challenges of a specific case and can perform their role in accordance with their professional qualifications, skills and experience. In addition, mediators, by law:

- are subject to the 'Code of Conduct', a code that sets out the ethical framework within which mediators operate, as well as the European Code of Conduct
- fully abide by the principles of neutrality and impartiality
- cannot impose a solution, or even suggest one (however, the latter may be permitted if all parties involved agree and on condition that it is non-binding)
- cannot be involved in the dispute in any way
- cannot have any interest (personal, professional or other) in the outcome
- cannot have any previous professional involvement with any of the parties, with the exception of having acted as mediators to a case involving one or more of the parties,
- cannot be engaged in any way with any natural or legal person that is involved in consulting any of the parties

The law also provides for the continuous professional development of accredited mediators. This equals to **20 hours of training every three years**. Many of them have already attended advanced and specialized trainings in several fields of mediation, the most popular ones being family mediation, banking mediation and negotiations. These trainings are usually offered as **two or three-day advanced courses** by the Mediation Training Providers.

### ***Mediation Training Providers***

As indicated above, only licenced Mediation Training Providers can offer basic mediation training that can lead to national accreditation. In other words, all candidates that complete the minimum required training and exams are awarded a Certificate of Successful Attendance, which the law demands to be presented in order for them to be eligible to sit at the National Accreditation Mediation Exams run by the Ministry of Justice.

Mediation Training Providers are licensed by the Central Mediation Committee<sup>130</sup>. Training Providers can be set up by any natural or legal person or by Continuous Professional Development Centres that operate in line with the respective State-owned University regulation frameworks<sup>131</sup>. Training providers are administratively and financially independent and must be staffed accordingly so that they can provide appropriate services:

- be able to plan, organise, and provide the basic mediation training course (80 hours),
- be able to plan, organise, and provide continuous professional development mediation courses,
- be able to cover the teaching needs for a maximum of 21 mediation trainees (minimum 2 trainers in each class)

In parallel with the basic mediation training, which is provided exclusively by the licenced Mediation Training Providers, state-owned Universities have recently added to their post graduate programmes courses that are related to mediation<sup>132</sup>, although it still remains a challenge for mediation to become an autonomous module in their undergraduate programmes. Private educational institutions offering degrees in higher education have also grown a particular interest in adding ADR teaching and mediation in their curricula<sup>133</sup>. These initiatives, long-awaited but still at a relatively low level and definitely in their first steps, mark a signal of moving forward, a recognition of the need to raise awareness of ADR processes at the educational level, not only for future legal professionals but also for future professionals from other fields (esp. in the business sector). It is also noteworthy that this has been the case for similar initiatives in the primary and secondary education, where both public and private schools have endorsed either open information events on peer mediation, with some of them having introduced and currently offering specialised training programmes and clubs in their curricula<sup>134</sup>. Apart from these pilot projects, no relevant legislation regarding peer mediation at schools exists.

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<sup>130</sup> A detailed licensing process is stipulated in Articles 23-25 of the Law.

<sup>131</sup> The new provisions aim to conform the Greek legislation with the Judgment of the Court (Fourth Chamber) of 26 June 2019 – European Commission v Hellenic Republic (Case C-729/17), Official Journal of the European Union, C 280, 19 August 2019, whereby the Court declared that by restricting the legal form of mediation training service providers to non-profit companies, which have to be set up jointly by at least one association of lawyers and at least one Professional Chamber in Greece, the Hellenic Republic has failed to fulfil its obligations under Article 15(2)(b) and (c) and Article 15(3) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. Proceedings against Greece were initiated by the European Commission against the legislative framework in force by virtue of law 3898/2010.

[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2019.280.01.0005.01.ENG&toc=OJ:C:2019:280:FULL](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2019.280.01.0005.01.ENG&toc=OJ:C:2019:280:FULL)

<sup>132</sup> See International Hellenic University, LLM in Transnational and European Commercial Law, Banking Law, Arbitration/Mediation, <https://legal.ihu.edu.gr/index.php/en/llm-in-transnational-and-european-commercial-law-banking-law-arbitration-mediation>, Master's Degree in the Department of Accounting and Finance, [http://master-ebi.ihu.gr/docs/fek\\_dikaio.pdf](http://master-ebi.ihu.gr/docs/fek_dikaio.pdf), and University of Western Macedonia, Master's Degree in Education Sciences: Training in Human Resources Management-Mediation, <https://nured.uowm.gr/en/undergraduate-and-post-graduate-studies/>

<sup>133</sup> See ALBA Graduate Business School (American College of Greece), [www.alba.acg.edu](http://www.alba.acg.edu), MSc in Business for Lawyers <http://www.alba.acg.edu/degree-programs/masters/msc-in-business-for-lawyers/> by Dr Elena Koltsaki

<sup>134</sup> See Pierce Leadership Academy Program for high school students at the American College of Greece and its mediation module <https://pla.pierce.gr/discover-our-modules/entrepreneurship/description-of-courses/> and negotiations and mediation club at the American High School (Anatolia) <https://gmi-mediation.com/πρόγραμμα-σχολικής-διαμεσολάβησης-α/> &

#### 7.2.4. Relevant case law / jurisprudence and success stories on commercial mediation

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Although scholars have demonstrated a growing interest in publishing articles about mediation, particularly after the introduction of the new law, in so far that the use of mediation by the stakeholders (lawyers and their clients) remains extremely low, there has been no jurisprudence or case law that would provide further guidance on the application and interpretation of the law.

In the same line, few success stories of commercial mediation were made public either by its users or through anonymised articles and publications. Nevertheless, either through word of mouth or informal channels, it is not rare that one hears of settlement agreements reached in disputes that were mediated by experienced mediators, with the majority of them addressing banking disputes (simple or more complex loan/debt restructuring) or disputes arising between shareholders of companies. In all of these cases, one can easily identify the benefits for those involved, which include *inter alia* the speedy, cost effective resolution of their dispute plus the high degree of satisfaction regarding both the outcome and the process. It should not be underestimated that the users of mediation, regardless of whether they reached an amicable settlement of their dispute or not, become huge supporters and demonstrate a genuine enthusiasm in further recommending it to others. Unfortunately, nearly 10 years after the activation of mediation as an out-of-court settlement process, sporadic data on success stories only confirm how weak the practice of mediation remains in the country and reaffirm the necessity for the brave reform which led to the introduction of rules on mandatory initial mediation session.

#### 7.2.5. Key achievements and statistical data on commercial mediation

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**There are no official public statistical data regarding the number of mediations conducted in Greece,** either on a yearly basis or in total, since the introduction of the first law on mediation in Greece that came into force in 2010. Nor are there anywhere made available any data that would indicate which type of recourse to mediation can be seen as more successful than the other. Unfortunately, lack of data allows for little room for drawing accurate conclusions. We can roughly estimate (for excess) that from 2010 to 2018 the total number of mediations conducted under the provisions of the previous mediation law did not exceed 1,000 in the entire territory of Greece.

Lack of data seems to reflect also the harsh reality of the lack of mediations that were reported before the introduction of the new law in early 2018. As one can read repeatedly in almost all press releases of the Association of Greek Mediators<sup>135</sup>, the disappointingly low number, reveals that “during all these years, stakeholders appear to be enthusiastic and willing to endorse and promote mediation, as long as mediations don’t happen”. Such statements came as the response to the fierce and negative

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<https://anatolia.edu.gr/el/high-school/nea/3472-Οι%20μαθητές%20μας%20εκπαιδεύονται%20στη%20Σχολική%20Διαμεσολάβηση>

<sup>135</sup> Press releases by the Association of Greek Mediators can be found on <http://sedi.gr/index.php/el/news-el/new-el> (in Greek)



reaction of the legal community<sup>136</sup> and in particular bar associations<sup>137</sup> against the introduction of any form of mandatory mediation, that stood up against it when voted in January 2018, while at the same time kept stressing how supportive of mediation they all have been in the past and still are.

A study from the Association of Greek Mediators (AGM-SEDI) that was conducted in 2017<sup>138</sup> revealed that 424 out from the total number of 487 mediators registered with the Ministry of Justice who responded to the survey, indicated that since their accreditation by the Ministry of Justice they had not resolved any dispute through mediation; 57 mediators stated that since their accreditation they had resolved between 1 and 7 disputes and it was 2 mediators that indicated they had successfully conducted 10 mediations.

It was not until mid-July 2019 that, following the application of the relevant provision of the new law (Art. 197), mediators were asked to fill in a spreadsheet (Anonymous Annual Report on Mediation Activity) in order for the Greek authorities to be able to collect statistical data on mediation that relate to the period from January 1<sup>st</sup> to December 31<sup>st</sup> 2018<sup>139</sup>. All registered mediators were under the obligation to provide information on the number of mediations that were conducted or were initiated during the year 2018 and are still pending, success rates on those cases, including information on full or partial agreements, the subject matters of the cases that were brought to mediation (family, banking, b2b, etc), the duration of the mediation process and the type of the referral to mediation. There has been no official record or publication of any outcome so far following this data collection process.

#### 7.2.6. Lessons learnt and recommendations

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**In the last 10 years, legislation focused only on the voluntary recourse to mediation has failed to generate a sufficient number of mediations.** Regretfully, the number of commercial mediations in Greece is disappointingly low. However, a fine distinction should be made between lack of cases and lack of success. The former clearly indicates the current situation in Greece, where mediation almost a decade after being enacted as a national law still remains mostly unknown to the vast majority of businesses and, surprisingly enough, even to a considerable number of lawyers. The latter cannot even be measured, as we lack the volume of cases adequate to produce safe results as to the efficiency of mediation. However, the few cases that have only recently been monitored, as the reporting system was set in June 2019, show a very encouraging rate of success, which nevertheless remains to be

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<sup>136</sup> Judge's union also opposed to the new provisions of the law introducing mandatory mediation. One can reasonably argue, though, that judges' negative reaction stems rather from a fear of loss of power and less from any constitutionality-context arguments, as they strongly advocate mandatory judicial mediation. Full text on their proposal can be found here <http://ende.gr/προταση-της-ε-δ-ε-για-την-δικαστικη-μεσ/> (in Greek).

<sup>137</sup> Press releases by the Bar Associations can be found on Plenary Session of Greek Bars portal <https://portal.olomeleia.gr/en> and <http://www.dsa.gr/δελτία-τύπου?page=1> (in Greek)

<sup>138</sup> The Association of Greek Mediators (sedi.gr) was founded in 2014 and is a lawfully registered association at the Court of First Instance of the city of Thessaloniki. More on the survey can be found on <http://sedi.gr/index.php/el/news-el/initiative-el/76-apotelesmata-tis-erevnas-tou-sedi-gia-ti-diamesolavisi> (in Greek)

<sup>139</sup> Annual Report (in Greek) <http://www.diamesolavisi.gov.gr/nea/anartisi-ekthesis-pepragmenon-toy-n-45122018>



confirmed when volumes will increase. The lack of cases rather than the lack of success is not without a reason. Mediation has been very reluctantly welcomed by the legal community.

**Despite the involvement of the Chamber of Commerce, the business community is still not aware of advantages of the recourse to commercial mediation.** Equally, the entrepreneurial community has not been acquainted with mediation although the major chambers of commerce were constituent parts in the formation of the mediation training providers. The 2017 survey by the Association of Greek Mediators showed that less than 20% of the businesses were aware of the existence of mediation. The Ministry has chosen to promote mediation through soft activities and panels of speakers which most of the times recycled the same audience of mediators and were run in the absence of a greater audience of the business community. In addition, the required shift in the mindset of corporate lawyers to drive disputes through the mediation channel has proved a long lasting and slow process, while one can rarely see mediation clauses in domestic commercial contracts. Lack of actual incentives to the promotion of mediation was another contributing factor which clearly reflects the sectorial interests driven political reluctance to put the implementation on hold, making one step forward and one step backwards. Lastly, chambers of commerce may to a great extent be held accountable for not insisting and exerting their power as stakeholders to boost mediation. Their involvement in the training process of the mediators, their acknowledgement of the importance of out-of-court settlement for commercial disputes and the cross-border nature of many commercial cases has remained at the side of their agenda as a subject of lower priority.

**The EU Directive 2008/52/EC has been transposed at the minimum level possible in order to preserve the “status quo” of litigation in courts.** The legal framework in Greece was set up in 2010 incorporating the EU Directive. Not surprisingly, as it involved the introduction of a dispute resolution system in the shadow of the judicial one, lawmakers were not very generous in adopting the substance of the directive and confined themselves to transposing the “minimum possible” that would discharge the national obligation. Legislating at the borderline of the minimum requirements of the Directive has produced a law that never actually worked. The trade-off between lawmakers and lawyers for the mandatory presence of advocates in the mediation process, in, as it proved, fruitless hope that the legal community will favour mediation over adversary judicial proceedings not only failed (bar associations still oppose to mediation reforms and threaten with strikes) but may have even deterred disputants to use mediation as it simply increased its cost, especially in low value disputes. The boldest provisions, such as the right of a judge to mandate and not simply to suggest mediation to litigants, were rejected from the outset.

**Eight years of constant failure of the 2010 law to increase the demand of mediation has convinced the Government to adopt the mandatory first mediation meeting.** In 2018, after eight years of mediation law and the overwhelming (and hypocritical) admission by all that mediation is a great idea “as long as it doesn’t work”, the time matured (unlike the majority of bar associations and part of the judiciary) to make a law reform that would also introduce for the first time mandatory consideration of mediation. The Ministry managed momentarily to outlive a revolution of the “establishment” but, as expected, gradually retreated under more pressure that it was willing to afford. The mandatory element was contested as unconstitutional on the grounds of obstructing access to justice through extra costs; although the high court rapporteur thoroughly rejected such allegations, it was marginally sent for reform. Many provisions of the law 4512/2018, which is now replaced, were phobic and group-interest driven and drafted in a way that practically threatened basic EU values and principles. Mediation training was restricted (confined basically to bar associations and non-profit types of organisations),

private mediation centres were almost outlawed and treated as an anathema, mandatory consideration of mediation had been unduly over-postponed and restricted to fields with questionable scope and limited volume of cases, and the mediation law was apparently in danger of being overly scanned with a legalistic approach to an extent that would resemble more a judicial than an extra judicial process.

**The Greek experience proves the need of a strong political will to overcome the opposition from the current establishment and various barriers towards the effective increase of the recourse to mediation.** The immediate conclusion is that the lack of political will withheld the progress of mediation in Greece for too many years. The law-making process had spent too much time taking the next step to mandatory consideration of mediation and even when it did, it was confronted by group interests opposing mediation. Many of the provisions were drafted with a view of compromising interests rather than promoting out-of-court settlement, law drafting committees and working groups were consisted of a majority of judges and lawyers in the absence of mediators with extensive experience in the field, the legal framework itself and the provisions were carefully weighed in terms of their impact in the judicial system and many were worded in a way that would limit the use of mediation. Finally, mandatory consideration of mediation is now *ante portas* but it must be implemented as widely as possible to the appropriate fields of disputes. Efforts to confine and over-control the mediation market should not be encouraged, financial incentives to individuals and companies using mediation must be further legislated and stakeholders must display a real commitment to promote mediation and present measurable results. It takes more than just a law to make mediation happen. After 10 years of mediation law we are richer in experiences. For all we know the musicians are in place, the theme is known, the conductor has rehearsed his role too many times. We are all set to watch what we hope to be a great performance!

### Italy - Commercial mediation law and practice, key information

Topic	Description	Comments
<b>Legal framework</b>	<p>Civil and commercial mediation is currently regulated under:</p> <ol style="list-style-type: none"> <li>1. Legislative Decree no. 28/2010 (LD 28/2010) – as modified in 2013 – regulating the recourse to mediation, the mediation procedure and the relationship between mediation as required by law and judicial proceedings.</li> <li>2. Ministerial Decree no. 180/2010 (MD 180/2010) regulating the accreditation of mediation providers, mediators, and the setting of mediation fees.</li> <li>3. The mediation process is also regulated by the Mediation Rules and Regulations of the mediation provider chosen by the parties. These rules are approved by the Ministry of Justice.</li> </ol>	<p>In 2013, the Italian legislator reformed the 2010 mediation law with the introduction of a provision on “mandatory participation in a first mediation meeting” with easy opt-out, as a precondition to proceed with a claim in court in some civil and commercial dispute types.</p>
<b>Private v judicial mediation</b>	<p>Private mediation is commonly used in Italy. In any case, courts are largely supportive of mediation though do not have integrated mediation programmes. Formal and relatively transparent referral processes exist but the implementation and effectiveness of these varies between different courts.</p>	
<b>The role of courts</b>	<p>Judges, at their discretion, and after assessing the nature of the case, the stage of the trial, and the conduct of the parties, can order the parties to</p>	

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<sup>140</sup> By Leonardo D'Urso, Co-founder and CEO of ADR Centre, scientific expert at the working group of mediation at CEPEJ of the Council of Europe and Adjunct Professor at Straus Institute for Dispute Resolution at Pepperdine University - [leonardo.durso@adrcenter.com](mailto:leonardo.durso@adrcenter.com)

	<p>attempt mediation. If ordered to mediate, the parties must file a request for mediation within 15 days with a mediation provider. A judge is able to refer a case to mediation at any time before the closing arguments, or, otherwise, if a hearing is not expected, before oral discussion of the pleadings even in the Court of Appeal. In these cases, mediation is a condition of admissibility.</p>	
<p><b>Mandatory v voluntary mediation in commercial cases</b></p>	<p>In 2013, the Italian legislator reformed the 2010 mediation law with the introduction of a provision on “mandatory participation in a first mediation meeting” as a precondition to proceed with a claim in court in some civil and commercial dispute types.</p> <p>About 85% of mediations processes are requested due to the mandatory first mediation session provision. The remaining 15% are divided among voluntary recourse, judge referral and by contract clause.</p>	<p>In limited civil and commercial matters, regardless of the value of the dispute, a party (generally the plaintiff) must first file a request for mediation with a mediation provider and attend an initial mediation session before recourse to the courts may be allowed. Commercial and civil disputes types that require an initial mediation session before filing a case in court are the following:</p> <ul style="list-style-type: none"> <li>• Joint ownership of real estate</li> <li>• Real estate rights</li> <li>• Division of assets</li> <li>• Inheritance</li> <li>• Transfer of business ownership to family members</li> <li>• Leases (e.g. renting apartments)</li> <li>• Bailments</li> <li>• Business or commercial leases</li> <li>• Medical malpractice liability</li> <li>• Damages from libel</li> <li>• Damages from insurance, banking or financial contracts.</li> </ul> <p>The initial mediation session must be held before an</p>

		<p>accredited mediator and the presence of legal counsel is mandatory. Before attending this initial session, each party must pay a filing fee of 40 Euros (or 80 Euros for claims above a value of EUR 250,000). There is no obligation to pay more, unless the parties decide to proceed with the full mediation procedure. If the parties decide to proceed with mediation the fees are determined by the value of the case and regulated by law.</p>
<b>Legal and institutional barriers for mediation</b>	/	
<b>Mediation licences and certificates</b>	<p>The mediation process must be administrated by one of the 600 public or private mediation providers accredited by the Minister of Justice and conducted by a mediator accredited by the Minister of Justice after attending a 50-hour basic mediation course with final exam.</p> <p>In order to be registered, mediation providers must show that they have the financial and operational capacity to provide mediation services in at least two regions or provinces in Italy, an insurance liability policy of at least 500,000 euro, at least five mediators in their roster, and physical offices.</p>	<p>Mediators are required to possess a bachelor's degree or alternatively be a member of a professional association; they must not have been convicted of any crime; must not be disqualified from public office; must not have been subject to disciplinary measures or sanctions; and must not be subjected to any preventative measures. In addition to these requirements, mediation providers are permitted to establish their own requirements which may be stricter than those in the decree. Mediators are limited to being on the rosters of no more than five mediation providers and must sign a declaration of impartiality before every mediation. Mediators must also have participated in a training course containing both theoretical and practical sections, of at least fifty hours,</p>

		through an accredited mediation training provider. Mediators must participate in continuing education courses and are required to take 18 hours every two years and participate in at least 20 mediations with accredited mediation providers.
<b>Supervisory authorities</b>	An office of the Minister of Justice is fully dedicated to process the accreditation requests and keep the registers online and updated.	The Italian Minister of Justice's website dedicated to mediation: <a href="https://mediazione.giustizia.it/">https://mediazione.giustizia.it/</a>
<b>Number of mediators in the country</b>	N/A	
<b>Number of Mediation Centres in the country</b>	<p>There are several Mediation Centres, registered in the MoJ.</p> <p>The BAR Associations can establish, within the tribunal in which they are, chambers of mediation, directly managed by the BAR Association staff. These bodies may be included in the Register, which is kept by the Ministry of Justice, of the bodies authorized to manage mediation procedures on civil and commercial disputes.</p> <p>To resolve disputes relating to specific subjects, mediation chambers may be established by other professional Associations.</p>	Mediation providers created by Chambers of Commerce and Bar Associations are automatically registered at the Minister of Justice as public mediation providers.
<b>Number of mediation cases</b>	About 150,000 mediation requests were submitted in 2019.	In 2018 the combination of all three types of recourses produced a total of 144,935 requests of mediations. Out of 144,935 mediations, only about 16,237, were initiated in 2018 by the parties' agreement to attempt to mediate when the dispute arose, or due to a contract clause.
<b>Settlement rate</b>	The voluntary mediation has a success rate of 63%. Regarding the mandatory	

	<p>mediation, an incredible 85% of mediations – about 127,000 – were initiated due to the first required mediation attempt in the total matters mentioned above, while the average success rate was almost 45% when the parties voluntarily agreed to initiate the full process during the initial meeting.</p>	
<b>Enforceability of mediation settlement agreement</b>	<p>If an amicable settlement is reached, the mediation agreement is an automatically enforceable title if signed concurrently by:</p> <ul style="list-style-type: none"> <li>• the parties with the proper power of attorney, if needed;</li> <li>• the lawyers, who attest and certify that the agreement complies with the mandatory rules and public order;</li> <li>• the mediator, who certifies the authenticity of the parties' signatures.</li> </ul> <p>In the case that the mediation agreement is not signed by the lawyers, in order to be an enforceable title, the agreement is sent to the President of the Court with jurisdiction over the dispute. The President of the Court attests to its conformity with the law and approves it.</p> <p>Under voluntary mediation, lawyers are not required to be present, however if the parties would like an automatically enforceable title, lawyers must sign the mediation agreement.</p>	<p>Article 12 of Legislative Order No 28/2010 states that the record of the agreement, provided it is not contrary to public policy or to overriding rules of law, is to be approved, on application by either party, by the president of the lower court (tribunal) in whose district the mediation organisation is based. In the case of a cross-border dispute of the kind referred to in Article 2 of Directive 2008/52/EC of the European Parliament and of the Council, the record of the agreement is to be approved by the president of the lower court in whose district the agreement is to be implemented.</p>
<b>Signatory to the Singapore convention</b>	Italy has not signed the Singapore convention	Italy has not ratified the Singapore convention

<b>Incentives for use and enforceability of mediation</b>	<p>Parties who refuse to attend the initial meeting without justification will face sanctions in subsequent proceedings. A judge will order the party or parties who do not attend the initial meeting to pay into the state budget an amount corresponding to the amount of court fees due for trial. Parties who attend the initial meeting and then decide to opt-out of mediation will not face any sanctions or consequences for opting-out. Furthermore, parties who proceed with the mediation may receive fiscal and economic benefits.</p> <p>In the case that the parties have requested a written settlement proposal from the mediator (as described above) and the parties reject the proposal, if the subsequent judicial decision is the same as the mediator's proposal then the court may order the winning party to pay the losing party's costs and fees.</p>	<p>In the case of a successful mediation parties will receive a tax credit of up to € 500, in the case of a failure, the credit is reduced to € 250. Furthermore, any mediation agreement with a value below € 50,000 is exempt from registration fees, and all of the mediation documents are exempt from a stamp tax.</p>
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#### Lessons learned and recommendations for Serbia

- The Minister of Justice's legislative office has been the driving force in introducing mediation in Italy.
- After six years, the required initial mediation session is still the main recourse to mediation.
- The experience on the field has underlined the key success factor of this model.
- The best practice of the pilot court-connected mediation project at the Court of Florence with the School of Law of the University of Florence.
- Efficiency in using accredited public and private mediation providers outside the courts.

As in many European jurisdictions, the Italian law does not make a clear distinction between civil and commercial disputes and, consequently, between civil and commercial mediations. Most of the disputes arising out of relationships of commercial nature<sup>141</sup> are governed by the Italian civil code (*Codice Civile*) and the Italian civil procedure code (*Codice di Procedura Civile*). In 2012, the Italian legislator introduced in each region a specialized court called "Businesses Court" (*Tribunale delle Imprese*). Despite their name, these courts are competent only to very limited types of disputes as: intellectual property and copyright claims, disputes between shareholders and directors, antitrust and few others. As explained in more detailed below, both civil and commercial mediations are subject to

<sup>141</sup> As referred in article 1 of UNCITRAL Model Law 2018



the same legal framework. For this reason, we will try to make a distinction on the impact of the current mediation law on resolving commercial disputes outside courts.

### **7.3.1. Legal framework in the field of commercial mediation**

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Since mid '90s, after more than two decades of sequencing of different legal frameworks on mediation, civil and commercial mediation is currently regulated under:

1. Legislative Decree no. 28/2010 (LD 28/2010) – as modified in 2013 – regulating the recourse to mediation, the mediation procedure and the relationship between mediation as required by law and judicial proceedings.
2. Ministerial Decree no. 180/2010 (MD 180/2010) regulating the accreditation of mediation providers, mediators, and the setting of mediation fees.
3. In addition, the mediation process is also regulated by the Mediation Rules and Regulations of the mediation provider chosen by the parties. These rules are approved by the Ministry of Justice.

In 2013, the Italian legislator reformed the 2010 mediation law with the introduction of a provision on “mandatory participation in a first mediation meeting” as a precondition to proceed with a claim in court in some civil and commercial dispute types. This new provision – limited in time and scope and contained in just one paragraph – deeply shaped the market of mediation and was able to generate alone more mediations than judicial proceedings in the disputes in which the process was applied.

Despite the complexity of the Italian legal framework, this chapter aims to explain in simple terms the so-called “Italian Mediation Model” based on two main pillars in developing the demand and the supply sides of mediation market:

**Developing the demand side of mediation.** The introduction of the required initial mediation session in some civil and commercial dispute types with an easy opt-out as a “pilot” provision for four years (from 2013 to 2017 and then confirmed) has been the driving force in developing the demand of mediation.

**Developing the quality of the supply side of mediation.** All mediation processes are administrated outside courts within public and private mediation providers and trained mediators accredited and monitored by the Minister of Justice based on some qualification criteria.

### 7.3.2. The demand side of commercial mediation: recourse by law, by contract clauses, by judge referral and by voluntary agreement

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Under LD 28/2010, there are four ways to seek recourse to mediation:

#### ***Recourse by law***

In limited civil and commercial matters, regardless of the value of the dispute, a party (generally the plaintiff) must first file a request for mediation with a mediation provider and attend an initial mediation session before recourse to the courts may be allowed (LD 28/10, Art. 5 co 1bis). Commercial and civil disputes types that require an initial mediation session before filing a case in court are the following:

- Joint ownership of real estate
- Real estate rights
- Division of assets
- Inheritance
- Transfer of business ownership to family members
- Leases (e.g. renting apartments)
- Bailments
- Business or commercial leases
- Medical malpractice liability
- Damages from libel
- Damages from insurance, banking or financial contracts.

The initial mediation session must be held before an accredited mediator and the presence of legal counsel is mandatory. Before attending this initial session, each party must pay a filing fee of 40 Euros (or 80 Euros for claims above a value of EUR 250,000). There is no obligation to pay more, unless the parties decide to proceed with the full mediation procedure. If the parties decide to proceed with mediation, the fees are determined by the value of the case and regulated by law.

#### ***Recourse by contract clause***

When a commercial contract or a statute includes a mediation clause, parties must attempt to mediate before they can arbitrate or file a dispute in court. If no attempt to mediate is made, the judge or arbiter can, by his own motion or upon motion by a party, allow the parties a period of fifteen days to file a request for mediation (LD 28/10 Art. 5 co. 5).

#### ***Recourse by judge referral***

Judges, at their discretion, and after assessing the nature of the case, the stage of the trial, and the conduct of the parties, can order the parties to attempt mediation. If ordered to mediate, the parties must file a request for mediation within 15 days with a mediation provider (LD 28/10 Art. 5, co 2). A judge is able to refer a case to mediation at any time before the closing arguments, or, otherwise, if a hearing is not expected, before oral discussion of the pleadings even in the Court of Appeal. In these cases, mediation is a condition of admissibility.

### Recourse by voluntary agreement

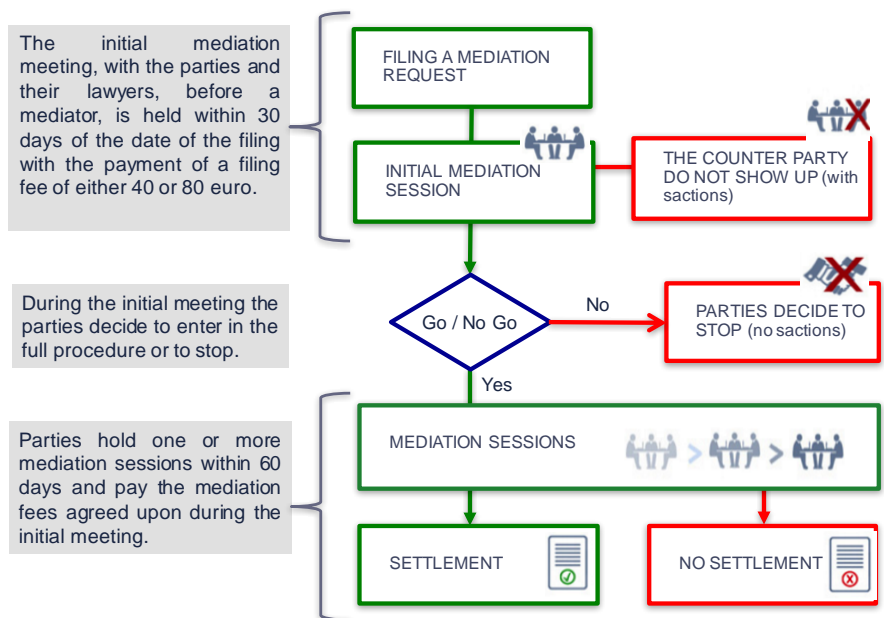
For any disputes concerning disposable rights, parties are always able to seek recourse to mediation under the rules of LD 28/10 (Art. 2). Under voluntary mediation, lawyers are not required to be present, however if the parties would like an automatically enforceable title, lawyers must sign the mediation agreement.

### The mediation procedure

In all four type of recourse, the request for mediation must be submitted with an accredited public or private mediation provider located or having an office in the same locality of the court with territorial jurisdiction over the dispute. The party filing the request for mediation, generally the plaintiff, is able to choose the mediation provider. The secretariat of the selected mediation provider, upon receipt of the request for mediation, appoints an accredited mediator from its roster of mediators. Alternatively, both parties, in agreement, are able to select a mediator of their choosing from the mediation providers roster.

The mediation provider will then send an official communication to the defendant (or opposing party) with the date and the location of the initial meeting and the name of the mediator appointed. The initial meeting must be held within 30 days of the receipt of the request for mediation and the duration of the entire mediation should be no longer than 90 days, although the procedure can be extended upon the consent of both of the parties. If the parties agree to proceed with the mediation, the parties are able to have as many meetings as they agree upon with the mediator. Most importantly, in all mediations, all of the information from the mediation is confidential and cannot be used in court.

If the opposing party does not show up, the mediator will issue a certificate that states that at the initial mediation session the opposing party was absent. With that statement, the requesting party can file the case in court (only necessary in those cases where mediation is a condition precedent to judicial proceedings). In these cases, the presence of the parties' lawyers is mandatory under Art. 8 of the LD, with the exception of consumer disputes (as required by the 2013 EU Directive on consumer ADR).



If both parties are present during the initial session, the mediator explains to the parties the mediation procedure and how it can benefit them, and then asks the parties and their lawyers to discuss the possibility of officially starting and proceeding with mediation. If the parties agree to proceed with the

mediation, the parties are able to have as many meetings as they agree upon with the mediator and pay the full fee requested.

If both parties or even one party decides not to proceed after the initial meeting, and to “opt-out”, then they have fulfilled the mediation requirement and are able to file their case in a court without paying any additional mediation fees. Parties who attend the initial meeting and then decide to opt-out of mediation will not face any sanctions or consequences for opting-out.

*Settlement.* If an amicable settlement is reached, the mediation agreement is an automatically enforceable title if signed concurrently by:

- the parties with the proper power of attorney, if needed;
- the lawyers, who attest and certify that the agreement complies with the mandatory rules and public order;
- the mediator, who certifies the authenticity of the parties’ signatures.

In the case that the mediation agreement is not signed by the lawyers, in order to be an enforceable title, the agreement is sent to the President of the Court with jurisdiction over the dispute. The President of the Court attests to its conformity with the law and approves it (LD 28/2010, Section 12).

### ***Confidentiality***

The statements made or information acquired, even in part, in the course of the mediation procedure, cannot be used in a trial on the same issues, initiated or reinstated after the failure of mediation, unless by consent of the declarant or the person from whom the information originated. The mediator and anyone else who works for the mediation provider have a duty of confidentiality and may not be called to testify. Statements made or information acquired during the procedure may not be used in court.

### ***Incentives and sanctions***

Parties who refuse to attend the initial meeting without justification will face sanctions in subsequent proceedings. A judge will order the party or parties who do not attend the initial meeting to pay into the state budget an amount corresponding to the amount of court fees due for trial. Parties who attend the initial meeting and then decide to opt-out of mediation will not face any sanctions or consequences for opting-out. Furthermore, parties who proceed with the mediation may receive fiscal and economic benefits.

In the case that the parties have requested a written settlement proposal from the mediator (as described above) and the parties reject the proposal, if the subsequent judicial decision is the same as the mediator’s proposal, then the court may order the winning party to pay the losing party’s costs and fees. (LD 28/2010, art. 13.1).

In the case of a successful mediation parties will receive a tax credit of up to € 500, in the case of a failure, the credit is reduced to € 250. Furthermore, any mediation agreement with a value below € 50,000 is exempt from registration fees, and all of the mediation documents are exempt from a stamp tax (LD 28/2010, art. 17).

### ***Mediation fees***

Unless all the parties agree otherwise, mediation fees and their criteria of calculation are regulated by the MD 180/10 Art. 6. Upon filing the mediation request and in order to participate in the initial

mediation meeting, each party has to pay a filing fee of only 40 euro for disputes with a value up to Euro 250,000, or 80 euro for disputes with a greater value. If parties do not want to proceed further, they bear no additional costs.

If the parties agree to proceed after the initial meeting, each party will pay the mediation provider a mediation fee based on the value of the dispute, regardless of number of mediation sessions held. The mediation fee includes both the provider and mediator fees. The mediation fee cannot exceed the amounts in the following table, the fees differentiate between voluntary cases and those required by law. If the parties reach an agreement, the provider can charge a success fee as shown below. In certain cases, the provider can charge an additional fee for complexity and for the issuance of a proposal.

	For filing fee and initial session	Maximum fee that cover all sessions when the parties decide to proceed after the initial session		
Value of the dispute		Voluntary Med.	Mandatory Med.	Success Fee
Up to € 1000	€ 40	€ 65	€ 40	€ 15
Euro 1001 Euro 5000	€ 40	€ 130	€ 85	€ 35
from € 5.001 to € 10,000	€ 40	€ 240	€ 155	€ 70
from € 10.001 to € 25.000	€ 40	€ 360	€ 235	€ 100
from € 25.001 to € 50.000	€ 40	€ 600	€ 395	€ 180
from € 50.001 to € 250.000	€ 40	€ 1,000	€ 660	€ 300
from € 250.001 to € 500.000	€ 80	€ 2,000	€ 1.000	€ 600
from € 500.001 to € 2.500.000	€ 80	€ 3.800	€ 1.900	€ 1.100
from € 2.500.001 € to 5.000.000	€ 80	€ 5.200	€ 2.600	€ 1.500
over € 5.000.000	€ 80	€ 9.200	€ 4.600	€ 2.800

There is no specific institutional framework focused on commercial mediation, neither specialized mediators nor academic programmes available in the field of commercial mediation. As we will explain in more detailed below, all types of commercial disputes can always be resolved under the provision of “voluntary mediation”. Further, some dispute types that are subject to the required initial mediation session or ordered by a judge can be considered commercial mediation when both parties are two businesses. For example, this could be the case of a dispute over the renting of an office space when the tenant and the property are both a legal entity.

### **7.3.3. The supply side of commercial mediation: how to ensure the quality of mediation services**

To ensure quality control, the mediation procedure must be administrated by a mediation provider and a mediator accredited by the Italian Minister of Justice under the regulation of the MD 180/2010 (as amended by the Ministerial Decree 145). An office of the Minister of Justice is fully dedicated to processing the accreditation requests and keeping the registers online and updated<sup>142</sup>.

#### ***Mediation providers***

Mediation providers can be public or private entities. In order to be registered, mediation providers must show that they have the financial and operational capacity to provide mediation services in at least two regions or provinces in Italy, an insurance liability policy of at least 500,000 euro, at least five mediators in their roster, and physical offices (MD 180/2010). Mediation providers created by Chambers of Commerce and Bar Associations are automatically registered at the Minister of Justice as public mediation providers.

#### ***Mediator accreditation***

Mediators are required to possess a bachelor's degree or alternatively be a member of a professional association; they must not have been convicted of any crime; must not be disqualified from public office; must not have been subject to disciplinary measures or sanctions; and must not be subjected to any preventative measures (MD 180, Section 18). In addition to these requirements, mediation providers are permitted to establish their own requirements which may be stricter than those in the decree. Mediators are limited to being on the rosters of no more than five mediation providers and must sign a declaration of impartiality before every mediation. Mediators must also have participated in a training course containing both theoretical and practical sections, of at least fifty hours, through an accredited mediation training provider. Mediators must participate in continuing education courses and are required to take 18 hours every two years and participate in at least 20 mediations with accredited mediation providers. (MD 180, Section 18).

#### ***Mediation training providers and trainers***

Mediation training providers must be registered with the Ministry of Justice. Accredited institutions must prove that they have financial and operational capacity, a physical headquarters, at least five trainers, establishment of a training programme of at least fifty hours for a maximum of thirty participants with a final exam, and the establishment of continuing education courses of at least 18 hours (MD 180/10, Chapter V.) Mediation trainers must also be accredited and are listed in a registry at the Ministry of Justice. They must have a proven record of training in the field of ADR and at least three published articles on mediation. (MD 180/10 Art. 18).

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<sup>142</sup> The Italian Minister of Justice's website dedicated to mediation is at <https://mediazione.giustizia.it/>

#### **7.3.4. Relevant case law / jurisprudence and success stories on commercial mediation**

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Italian judges have produced relevant jurisprudence in First Instance court, Appeal court and Court of Cassation concerning implementation of the law on mediation <sup>143</sup>. The most relevant case law is about:

- The compulsory presence of the parties during the required first mediation meeting. The law is not clear whether lawyers can assist and, at the same time, represent the client in his/her absence.
- The need to enter directly in an effective mediation (without the prerequisite of a first meeting) in case of referral from a judge in a pending case.
- In case of judge referral, the order from the judge to a mediator to make a proposal if the parties do not reach an agreement shall be upheld.
- A party in a dispute cannot justify his/her absence in the first mediation meeting because “it is not possible to find an agreement” or “they have already tried to negotiate without success”:

Mediation processes are confidential and only few times mediators are allowed to share specific success stories. In general terms, the main failure of commercial mediation is the lack of the massive use of mediation contract clause in commercial contracts.

#### **7.3.5. Key achievements and statistical data on commercial mediation**

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Six years after this law was introduced, in 2018 the combination of all three types of recourses produced 144,935 total requests of mediations. To better understand the approaches that worked, we need to break down that number of mediations and closely analyse it with the four types of recourses described, which show different levels of success.

(1) **Results from recourse by Voluntary Agreement.** Out of 144,935 mediations, only about 16,237, were initiated in 2018 by the parties' agreement to attempt to mediate when the dispute arose, or due to a contract clause. When initiated, these types of mediation reached a success rate of 63%. If we divide the number of “voluntary mediations” by the two million yearly filings of civil and commercial cases in the Italian courts where the recourse to mediation is completely voluntary, the average ratio is less than 1%. In these dispute matters that account for over 90% of all disputes in Italy (e.g., breach of contracts, extra contractual damages, partnership dissolutions, etc...), there has not been a recorded substantial decrease of incoming cases in court from 2013.

(2) **Results from recourse by a Contract Clause.** In 2018, only 828 mediations were initiated due to a mediation contract clause. There are no detailed statistics on the success rate.

(3) **Results from recourse Ordered by a Judge.** Out of 144,935 mediations, only about 1,900 of mediations were initiated by an order of a judge. Compared to about three million civil cases pending in the Italian courts, the ratio is less than 0.1%. So out of each 1,000 pending cases

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<sup>143</sup> On this page of the website MondoADR are collected almost 300 case law on mediation  
<https://www.mondoadr.it/giurisprudenza>

in court, only one judge ordered the litigants to attempt a mediation process. It is evident that there has not been a substantial decrease in pending cases due to mediation from judge referrals. It's clear that Italian judges should be trained more to use their power to refer parties to mediation.

(4) **Results from recourse by Required Initial Mediation Session.** An incredible 85% of mediations – about 127,000 – were initiated due to the first required mediation attempt in the total matters mentioned above. The average success rate was almost 45% when the parties voluntarily agreed to initiate the full process during the initial meeting. If the number of these mediations is divided by the 140,000 yearly incoming civil and commercial cases in dispute matters where the first meeting is mandatory, the ratio is almost 100%. This information verifies for the first time in Europe that Italy has more mediations than cases in court—at least in this category.

Since 2013, in the dispute types that require participation in the first mediation meeting as a precondition to proceed in court, a substantial decrease was recorded of cases filed in court. There was a 30% decrease in disputes over joint ownership of real estate; a 40% drop in disputes over rental apartments, and a 60% plunge in adverse possession disputes. It is worth noting that the European Court of Justice ruled twice that this Italian provision on the mandatory first meeting is fully compatible with the right of access to justice.

In short, the Italian statistics from the past six years give a clear illustration of drastically different results from the four different types of recourse to mediation currently in place. The contrasting results occur within the same jurisdiction - with the same citizens, lawyers, judges - and prove the number of mediations is not dependent on the “culture” or quality of mediators, but the most effective legislative mediation in place. However, the existing mediation legal framework and the statistics do not clearly differentiate between civil and commercial mediations.

#### **7.3.6. Lessons learnt and recommendations**

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***The Minister of Justice's legislative office has been the driving force in introducing mediation in Italy.*** With five different legislative frameworks on mediation in the past twenty years, Italy has been a “laboratory” of mediation. After various unsuccessful “tests”, it is evident that the success in Italy was due to the strong will of the Minister of Justice's legislative office in introducing the “required first mediation session” as a pilot law for four years and in a limited number of dispute types.

***After six years, the required initial mediation session is still the main recourse to mediation.*** The key success factor of the required first mediation session is the opportunity to have all decision makers in the dispute together in order to decide if they want to opt-out and go to court or continue with the full mediation process. After talking with the parties and their lawyers about the advantages of mediation for their case, in a joint or separate meeting, in almost 50% of the cases the mediator is able to convince the parties to give mediation a chance. Without having all parties in front of the mediator, present at the same time, and around the same table, it would be impossible to reach so many agreements to initiate a mediation process, as the statistics prove.



After six years of the current mediation law in place, in 2018 the statistics gathered by the Minister of Justice indicate clearly that 87% of mediation processes were generated from the provision of the required initial mediation session, 11.1% from voluntary mediation, 1.3% from judicial referral and 0.6% from mediation contract clauses. In terms of mediation settlement reached, higher settlement rates are observed in dispute types concerning real estate rights, division of assets, transfer of business ownership to family members.

***The experience in the field has underlined the key success factor of this model.*** Statistics available show that currently, the introduction of “Required Initial Mediation Session” in 2013 was able to generate a high enough number of mediations in a relative short time for an entire jurisdiction. This first meeting works well with five important conditions:

1. The relevant parties of the dispute should be present in person; if the lawyer is without the client there is little chance to proceed to the full mediation process;
2. The session should be administered by an experienced and well-trained mediator;
3. The session should be held in a short period of time since the filing of the request and the fee should be minimal in order not to be considered a barrier to the access to justice;
4. The parties, when present, can decide to easily “opt-out” without sanctions or voluntarily continue the process; and
5. Substantial sanctions should be given in the case of an absent party during the subsequent judicial proceeding.

The Required Initial Mediation Session, with an easy opt-out, has been proven to generate a substantial number of mediations in a given jurisdiction in two or three years, providing the best advantages of mandatory and voluntary mediation without their disadvantages.

***The best practice of the pilot court-connected mediation project at the Court of Florence with the School of Law of the University of Florence.*** Statistics show that despite the possibility for judges to refer to mediation any pending dispute they have in their docket, the number of referrals has been modest. One of the main problems was the lack of court staff that can assist judges in screening for “mediability” of a pending case and draft a motivated order to the parties. To overcome this problem, the President of the Court of Florence has initiated a pilot project with the School of Law of the University of Florence with the aim to allow fresh law graduates to assist judges in this task. After one year, the results are net positive with more than 1,000 referrals with more than 70% settlement rate.

***Efficiency in using accredited public and private mediation providers outside the courts.*** The model used in the law toward administered mediation outside the courts has proved to be very efficient since it does not require using staff or resources of the courts. Public and private mediation providers compete with each other, under the monitoring of the Minister of Justice, with the result of increasing the quality of the service.

#### 7.4. Singapore<sup>144</sup>

##### Singapore - Commercial mediation law and practice, key information

Topic	Description	Comments
<b>Legal framework</b>	Mediation Act 2017 (Republic of Singapore Government Gazette No. 1 of 2017) and Singapore Convention on Mediation Act (Bill no 5/2020)	The Mediation Act 2017 establishes a legislative framework to support domestic mediations carried out in Singapore. The Act aims to strengthen the enforceability of mediated settlements and provide greater clarity and certainty for parties on issues such as the confidentiality of communications in mediation.
<b>Private v judicial mediation</b>	<p>Commercial court-based mediations in the State Courts are conducted by the Centre for Dispute Resolution (SCCDR) after parties have commenced legal proceedings. Such disputes are mediated by State Courts judges and volunteer mediators who have been accredited by the SCCDR.</p> <p>If judges in the Supreme Court or the Singapore International Commercial Court (SICC) consider mediation to be appropriate, they may encourage parties to pursue private mediation at the Singapore Mediation Centre (SMC) or Singapore International Mediation Centre (SIMC).</p>	Unlike in the SCCDR, parties have the right to choose a mediator from the panel at SMC and SIMC to conduct the mediation, subject to payment of the mediator's fee and institution's administrative fee.

<sup>144</sup> By Lim Tat, a dispute resolution practitioner based in Singapore. He is a partner of Aequitas Law LLP and a member of Maxwell Mediators. He is an accredited mediator with many distinguished mediation institutions and has successfully mediated a broad spectrum of disputes. He is recognised as a *Who'sWhoLegal* Global Leader in mediation and ranked in *The Legal 500*.

	<i>Ad hoc</i> private mediations are also available.	
<b>The role of courts</b>	Refer cases and strongly support mediation. Most mediations are referred by judges.	
<b>Mandatory v voluntary mediation in commercial cases</b>	There are no provisions for mandatory mediation per se but in the <b>practice directions and rules of court</b> provide for <b>costs sanctions against parties who refuse mediation without reason</b> .	
<b>Legal and institutional barriers for mediation</b>	Singapore is an example of a system thriving with strong judicial, governmental and legislative support.	
<b>Mediation licences and certificates</b>	<b>Singapore International Mediation Institute (SIMI)</b> , established (but not run by) the Ministry of Justice, runs a credentialing scheme which provides certification for mediators.	Successful completion of an accredited mediation course and assessment is required  Trainee lawyers are provided with an opportunity to be trained in mediation advocacy through an elective module administered by the Singapore Institute of Legal Education.
<b>Supervisory authorities</b>	Singapore International Mediation Institute (SIMI) oversees the work of mediators through its credentialing scheme	SIMI is a particularly good example of a successful credentialing scheme. SIMI's role is to certify the competency of mediators, set standards of professional mediator ethics, require continuing professional development for SIMI accredited mediators, increase awareness about mediation, and develop tools

		available to assist parties to make basic decisions.
<b>Number of mediators in the country</b>	There is a growing pool of recognised mediation practitioners, many of whom are practitioners based outside Singapore, who mediate domestic and international disputes.	
<b>Number of Mediation Centres in the country</b>	The main institutional commercial mediation centres are Singapore Mediation Centre ("SMC", a not-for-profit organisation for private institutional mediations) and Singapore International Mediation Centre (SIMC).	
<b>Number of mediation cases</b>	Between 2012 and 2017, around 6,700 matters were handled by the SCCDR, with a settlement rate above 85%.  More than 4,000 matters have been mediated at SMC.	
<b>Settlement rate</b>	Between 2012 and 2017, around 6,700 matters were handled by the SCCDR, with a settlement rate above 85%.  The rate of settlement at SMC is about 70%, with more than 90% of cases being resolved within one working day.	In surveys conducted by the State Courts in 2015, 98% of parties agreed that the dispute resolution services provided by the State Courts met their expectations in providing satisfactory resolution of disputes.
<b>Enforceability of mediation settlement agreement</b>	A privately mediated settlement agreement can be recorded as a court, consent order.  The expedited enforcement mechanism is currently available to mediations administered by Designated Mediation Service	Section 12 of the Mediation Act (2017).  In order for a mediated settlement agreement to be recorded as a court order, all parties to the mediation must agree to the application to

	Providers and mediations conducted by a mediator certified by the Singapore International Mediation Institute.	<p>court, and the mediated settlement agreement must be in writing signed by the parties. The application must also be made within 8 weeks after arriving at the settlement, unless the court grants an extension of time.</p> <p>The Singapore Convention on Mediation Act provides a “court order mechanism” for parties seeking to enforce or invoke their international commercial settlement agreement. A party can apply to the High Court to record its settlement agreement as an order of court, which can thereafter be used for the purposes of enforcement, or as a defence.</p>
<b>Signatory to the Singapore convention</b>	Yes	Yes
<b>Incentives for use and enforceability of mediation</b>	Agreements to mediate are enforceable by the courts.	

There are no constraints on the type of commercial disputes that can be settled by mediation in Singapore, nor are there limits placed on disputes that can be mediated in mediation institutions such as Singapore Mediation Centre. Commercial disputes which have been settled include banking, construction, healthcare, employment, information technology, insurance, partnership, shipping and tenancy disagreements. However, cases which require a precedent (for example, a class action situation) and cases where only the courts can give an appropriate remedy (for example, an injunction) may be better suited for litigation.

#### 7.4.1. Legal framework in the field of commercial mediation

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The Mediation Act 2017<sup>145</sup> (“Act”) establishes a legislative framework to support domestic mediations carried out in Singapore. The Act aims to strengthen the enforceability of mediated settlements and provide greater clarity and certainty for parties on issues such as the confidentiality of communications in mediation. However, there are no specific legal frameworks for commercial mediation in Singapore. Mediation institutions such as Singapore Mediation Centre and Singapore International Mediation Centre provide rules governing the process of commercial mediation carried out within the institutions.

The unique features of the Act are highlighted below:

Section 8 of the Act provides for the stay of court proceedings when a mediation has commenced. As is the case with arbitration, the parties must have a “mediation agreement” before the stay is granted. Section 4 elaborates that the mediation agreement may take the form of a mediation clause within a contract or a bill of lading. The mediation clause must oblige the parties to refer “the whole or part of a dispute” for mediation. The court may make the usual interim orders to preserve the parties’ rights pending the completion of the mediation.

Sections 9 and 10, in setting out the restrictions on disclosure and admissibility of mediation communication in evidence, provide that:

- Confidentiality will not apply in the ten situations listed in section 9(2). These include well-accepted exceptions such as party consent, disclosure to protect a person from injury and disclosure relating to a potential offence. In all other situations, a person who wishes to disclose mediation communication must obtain the leave of the court or the arbitral tribunal.
- The Act’s framework on admissibility is *in pari materia* with Hong Kong’s Mediation Ordinance. Section 10 states that a person must obtain the court’s or arbitral tribunal’s leave before admitting any mediation communication as evidence, providing an additional layer of protection over and above the common law, under which admissibility is automatically allowed for accepted exceptions to the “without prejudice” rule without the need to obtain leave.
- Section 9(2)(b) of the Act also includes the phrase “at the time of disclosure” after the phrase “made available to the public”. This makes clear the drafters’ intent on preventing people from escaping liability by claiming that the mediation communication is at present publicly available, but which was not so when they made the disclosure, and highlights Singapore’s strict view on ensuring that any information falling within the ambit of mediation communication is strictly protected. Further, in section 9(3), a person may only disclose a mediation communication to a third party with the leave of a court or arbitral tribunal, cementing Singapore’s stringent position relating to disclosure.

#### ***Recording a private mediated settlement agreement as a consent order***

Section 12 of the Act provides a process for a **privately mediated settlement agreement to be recorded as a court, consent order**. This process provides parties in mediation with the assurance of the finality and enforceability of their mediated settlement agreements.

The **expedited enforcement mechanism** is currently available to mediations administered by Designated Mediation Service Providers and mediations conducted by a mediator certified by the

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<sup>145</sup> The Mediation Act 2017 (Republic of Singapore Government Gazette No. 1 of 2017)  
<https://sso.agc.gov.sg/Act/MA2017/Uncommenced/20170709?DocDate=20170512>

Singapore International Mediation Institute. Designated Mediation Service Providers include Singapore Mediation Centre, Singapore International Mediation Centre, WIPO Mediation and Arbitration Centre and Tripartite Alliance for Dispute Resolution.

In order for a mediated settlement agreement to be recorded as a court order, all parties to the mediation must agree to the application to court, and the mediated settlement agreement must be in writing signed by the parties. The application must also be made within 8 weeks after arriving at the settlement, unless the court grants an extension of time.

#### **7.4.2. The demand side of commercial mediation: recourse by law, by contract clauses, by judge referral and by voluntary agreement**

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##### ***Recourse by law***

There are no provisions for mandatory mediation in Singapore. In the State Courts and Supreme Court, **practice directions and rules of court** provide for costs sanctions against parties who refuse mediation without reason.

##### ***Recourse by contract clauses***

Parties may delineate that disputes will be resolved by mediation or other ADR methods before resorting to litigation. Contractual clauses that stipulate negotiation in good faith before the dispute is to be resolved by expert evaluation have been held to be enforceable by the courts in *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738.

Similarly, in *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2013] SGCA 55<sup>146</sup>, parties had contractually agreed to mediate the dispute before referring it to arbitration. When an actual dispute arose, however, the parties did not comply with the mediation precondition. As a result, the judge held that the arbitral tribunal lacked jurisdiction to resolve the issue.

##### ***Recourse by judge referral***

Court-based mediation takes place in the courts after parties have commenced legal proceedings. This type of mediation is carried out by the State Courts and the Family Justice Courts. Mediations in the State Courts are conducted by the Centre for Dispute Resolution (SCCDR). Mediations in the Family Justice Courts is conducted by the Family Resolution Chambers (FRC), the Maintenance Mediation Chambers (MMC) and the Child Focused Resolution Centre (CFRC).

For court-based mediation, only the SCCDR conducts mediation of commercial disputes which are the subject of litigation proceedings commenced in the State Courts. Such disputes are mediated by State Courts judges and volunteer mediators who have been accredited by the SCCDR.

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<sup>146</sup> Please see: <https://singaporeinternationalarbitration.com/2013/10/21/%EF%BB%BFcase-update-compliance-with-multi-tier-clauses-must-be-adhered-to-strictly/>; <https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/2012-sghc-226.pdf>

Apart from the SCCDR, there are no other court-based mediations for commercial disputes. If judges in the Supreme Court or the Singapore International Commercial Court (SICC) consider mediation to be appropriate, they may encourage parties to pursue private mediation at the Singapore Mediation Centre (SMC).

#### ***Recourse by voluntary agreement***

The main institutional mediation centres in Singapore are SMC and Singapore International Mediation Centre (SIMC). Parties who wish to pursue mediation of litigated cases commenced in the Supreme Court or the SICC may do so through private institutional mediations conducted through SMC or SIMC. However, unlike in the SCCDR, parties have the right to choose a mediator from the panel at SMC and SIMC to conduct the mediation, subject to payment of the mediator's fee and institution's administrative fee. Apart from institutional mediations, parties and lawyers may also appoint mediators directly to conduct *ad hoc* private mediations.

#### **7.4.3. The supply side of commercial mediation: how to ensure the quality of mediation services**

**Singapore International Mediation Institute (SIMI)** runs a credentialing scheme which provides certification for mediators. Subject to fulfilment of specified requirements (such as the successful completion of an accredited mediation course and assessment), SIMI certified mediators may apply to become International Mediation Institute (IMI) certified mediators.

The main institution in Singapore which provides an accredited mediation course and assessment is SMC. The course and assessment focus on the facilitative style of mediating a broad spectrum of disputes. Mediation training is not compulsory for lawyers. While practicing lawyers are required to comply with annual CPD requirements, there is no requirement for such CPD points to be acquired through mediation training.

The law schools of National University of Singapore, Singapore Management University and Singapore University of Social Sciences provide elective courses which incorporate negotiation and mediation. Practice trainee lawyers are also provided with an opportunity to be trained in mediation advocacy through an elective module administered by the Singapore Institute of Legal Education.

#### **7.4.4. Case law / jurisprudence and success stories on commercial mediation**

Settlement agreements arising from domestic mediation can be enforced as a normal contractual agreement. Proceedings must be instituted to enforce the settlement agreement. The stipulated settlement must not be unenforceable due to illegality, public policy, duress, fraud, and incapacity. If specific performance is also required to enforce the settlement agreement, damages must not be an adequate substitute remedy, and the person required to perform must not suffer substantial hardship (see *Quek Kwee Kee Victoria and another v Quek Khuay Chuah* [2014] SGHC 143). As a result, the court has significant latitude to assess the fairness of the agreed settlement.



For example, in the above *Quek Kwee Kee Victoria* case, the court embarked on a discussion of whether the defendant should be specifically ordered to sell his shares as per the mediated settlement agreement.

The policy rationale behind judicial non-intervention in section 8 is respect for party autonomy in contractual relations: *Ling Kong Henry v Tanglin Club* [2018] 5 SLR 871.

In this case, the defendant (Tanglin Club) was a social club registered under the Societies Act. The plaintiff (Mr Ling) had been a member of the club since 1992. The club prescribed rules which provided for disciplinary actions to be taken upon by complaint by members. The rules contain a dispute resolution clause (Rule 45B) dealing with disputes for which no express provision in the rules has been made. Rule 45B contained a dispute resolution clause which employed a multi-tiered dispute resolution mechanism: first by way of conciliation, followed by mediation, and then finally, arbitration.

In February 2017, a group of around 30 club members requisitioned for a Special General Meeting (“SGM”), seeking a members’ resolution that one of the club rooms remains exclusively for card and board games. Prior to the SGM, Mr Ling sent several messages and emails to some club members, urging them to vote against the resolution. The group of 30 club members failed to secure a majority vote for their proposed resolution in the SGM on 15 March 2017 and had to vacate the club room as a result. Some of the 30 club members then complained to the club, asserting that Mr Ling had sent offensive and disrespectful messages. The club enquired into these complaints and took disciplinary proceedings against Mr Ling in accordance with its rules. On 31 August 2017, the club issued a letter of reprimand to Mr Ling.

On 19 January 2018, Mr Ling filed an originating summons in court for a declaration that the club had breached the rules of natural justice and fairness in its conduct of the disciplinary proceedings. On 2 February 2018, the club filed an application in court for Mr Ling’s application to be stayed under section 6 of the Arbitration Act, on the ground that Rule 45B constitutes an agreement to arbitrate Mr Ling’s dispute.

At first instance, the Assistant Registrar dismissed the club’s application, and agreed with Mr Ling that Rule 45B was not engaged where a dispute arises over the conduct of disciplinary proceedings under the club’s rules.

On appeal, the High Court affirmed the prevailing common law position that a multi-tier dispute resolution clause constitutes an agreement to arbitrate. The High Court noted that Rule 45B employs a multi-tier dispute resolution mechanism: first by way of conciliation, followed by meditation, and then finally, arbitration. There were two prevailing conceptual perspectives as to whether a multi-tier dispute resolution clause constitutes an agreement to arbitrate: (i) the first is that the entire multi-tier resolution clause is an agreement to arbitrate; (ii) the second is that there is no agreement to arbitrate at the outset. Instead, the agreement is limited to the first-tier dispute resolution forum chosen by the parties and the agreement to arbitrate only arises after the preconditions have been exhausted.

The High Court found that English, Hong Kong and local authorities were consistent in regarding multi-tier dispute resolution clauses to constitute agreements to arbitrate. If a dispute resolution clause seeks to avoid litigation by ultimately having a matter adjudicated by arbitration, this intention ought to be upheld. This must apply with equal force to clauses which include conciliatory steps as a preface. Accordingly, the High Court held that although it required conciliation and mediation steps to be taken

as preconditions to arbitrate, Rule 45B was nevertheless an agreement to arbitrate which would be upheld by the court.

#### **7.4.5. Key achievements and statistical data on commercial mediation**

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**Court-based mediation has had a significant impact on the Singapore judicial system.** Between 2012 and 2017, around 6,700 matters were handled by the SCCDR, with a settlement rate above 85%. In surveys conducted by the State Courts in 2015, 98% of parties agreed that the dispute resolution services provided by the State Courts met their expectations in providing satisfactory resolution of disputes.

Within the Family Justice Courts, the Child Focused Resolution Centre managed 1,530 families with children under 21 years in 2014 and 1,380 families with children under 21 years in 2015. For cases that have to undergo mandatory mediation, 75% achieved a full resolution of all contested issues in 2014 while 80% achieved full or partial resolution of contested issues. In 2015, the figures were 77% and 82% respectively. Disputes concerning maintenance of spouses and children were also settled with high settlement rates of 85% and 87% in 2016 and 2017 respectively.

**SMC is a not-for-profit organisation providing commercial mediation services.** SMC was launched by the then Chief Justice Yong Pung How on 16 August 1997. Over the years, SMC has acquired a reputation for the success of private institutional mediations conducted through SMC:

- More than 4,000 matters have been mediated at SMC. The rate of settlement is about 70%, with more than 90% of them being resolved within one working day.
- Of the more than 1,700 disputants who took part in the mediations held at SMC's offices at the Supreme Court, more than 84% reported saving costs while more than 88% said they saved time. Also, more than 94% said they would recommend the process to other persons in the same conflict situation.
- Testimonials provided to SMC reveal that most parties and lawyers were pleased with the mediations conducted at SMC. The majority of parties and lawyers mentioned that they would recommend mediation to other disputants. An example of such a reference comes from Mr Michael Hwang (Senior Counsel, Michael Hwang Chambers) who stated: "SMC undoubtedly plays a pivotal role in fostering mediation as an expedient and efficacious means of settling disputes. In this respect SMC has fulfilled its role admirably. I am confident SMC will build on its recognition and make mediation the preferred choice of dispute resolution."
- **Construction disputes account for about 40% of the cases that SMC handles.** Other types of cases run the gamut of banking, contractual, corporate, employment, information technology, insurance, partnership, shipping and tenancy disagreements. SMC also intercedes in contested divorces and its related matters, family feuds, and negligence and personal injury claims.

The positive effect of commercial mediation is its reduction of the costs and risk for litigating parties. Mediation is quick to convene, and disputants can obtain a faster outcome than court proceedings.

#### 7.4.6. Lessons learnt and recommendations

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Mediation in Singapore is supported by legislation and the Singapore judiciary and widely endorsed by users and lawyers. There is also a growing pool of mediation practitioners, many of whom are practitioners based outside Singapore, who mediate domestic and international disputes.

***Similar to many common law jurisdictions, the judiciary in Singapore has been the driving force of mediation.*** The establishment of court annexed mediations in the State Courts of Singapore brought familiarity of the mediation process to disputants and lawyers with litigated cases filed in the State Courts. In 1997, then Chief Justice Yong Pung How mentioned that the Singapore court mediation model was an adaptation of the western style of mediation to the Asian and Singaporean context, where there is a tendency to have high regard for persons in positions of authority. Retired Chief Justice Chan Sek Keong also highlighted how Singapore's model of court mediation is *sui generis* and is particularly suited to a jurisdiction where litigants respect the impartiality of judges in giving objective views on the merits of the claim and defence respectively.

***Few selected mediation institutions have gained the trust of lawyers and users.*** Apart from court annexed mediations, the work of Singapore Mediation Centre (SMC) – a non-profit organization - has resulted in widespread acceptance among disputants and lawyers of the benefits of mediation in enabling parties to resolve their disputes in a timely and cost-efficient way.

***The Singapore Convention on Mediation has contributed to further promotion of the recourse to mediation in Singapore.*** In the realm of international disputes, a significant development took place on 7 August 2019, when 46 states signed the United Nations (UN) Convention on International Settlement Agreements Resulting from Mediation (also known as the Singapore Convention on Mediation). The advent of the Singapore Convention on Mediation provides parties and lawyers, who may have been reluctant to use mediation to resolve international disputes, with the assurance that their mediated settlement agreements will be enforceable internationally in states which have signed and ratified the Convention.

## The Netherlands – Commercial mediation law and practice, key information

Topic	Description	Comments
<b>Legal framework</b>	<p>Mediation is not regulated by a specific law in The Netherlands. The Dutch regulatory approach has traditionally been 'private' ADR: meaning regulation by the mediation market itself, resulting in hardly any mediation legislation or public regulation and no mediation laws.</p> <p>The Directive 2008/52/EC has solely been implemented for cross border cases.</p>	In 2013 The Dutch Mediation Draft Act was proposed but not yet adopted. It aims to professionalise the profession of mediator and introduce various incentives together with sanctions when parties have not tried mediation without a good reason before going to court.
<b>Private v judicial mediation</b>	Most of mediations are initiated by the voluntary consensus of the parties and administrated under the rules and code of conduct that are applicable to the chosen mediator or mediation institution.	
<b>The role of courts</b>	All courts have implemented a mediation referral system. However, the practical relevance of court connected mediation for commercial cases is limited.	Each court has a mediation officer who provides information and helps parties arrange a mediation if they wish so. This officer also keeps a list of official court mediators.
<b>Mandatory v voluntary mediation in commercial cases</b>	In commercial cases, there is no requirement to attempt mediation as a pre-condition for the recourse to Court.	

<sup>147</sup> By Manon Schonewille, a commercial mediator for more than 20 years and has been working in various countries. She is a partner in the Academy Legal Mediation of Schonewille & Schonewille, S&S Business mediators and a partner in Toolkit Company. This national report is mostly based on previous articles and books published by the author and adapted for this study.

	A judge can advise parties to try mediation but cannot oblige parties to go to mediation.	
<b>Legal and institutional barriers for mediation</b>	Resistance of the parties due to lack of incentives/sanctions/triggers.	
<b>Mediation licences and certificates</b>	<p>In order to ensure the quality of mediation services provided to the users, there are several organisations who accredit mediators. Most Dutch mediators are since 2014 merged into a register of a <b>Dutch Mediation Federation (MfN)</b> as a 'MfN registered mediator.' The second widest used register is the <b>ADR Register</b>.</p> <p>Additionally, international certification by the <b>International Mediation Institute (IMI)</b> accredits mediators.</p>	<p>MfN registration is possible after successfully completing a training course, recognized by the MfN, followed by a written exam as well as a performance-based assessment.</p> <p>Mediators who are eligible for court-referred cases need to be MfN registered mediators who adhere to additional requirements like being registered at the Legal Aid Council and having submitted themselves to a peer review based on at least 9 formal mediations in the 3 years prior to registration.</p>
<b>Supervisory authorities</b>	There is an official complaint scheme of the Mediators federation Netherlands, followed by the option to escalate to the foundation's Disciplinary Court for Mediators, consisting of two instances: a Disciplinary Committee and an Appeals Board.	Sanctions include warnings, reprimands, suspension of mediator registration with the relevant affiliated institution for a maximum period of one year or being struck off the list of mediators kept by the relevant affiliated institution.
<b>Number of mediators in the country</b>	No centralised licencing exists. Mediators are registered mostly by MfN, however also IMI or ADR Register mediators are active and there are also informal mediators that are not members of any mediator organisation.	In 2015 there were around 3,000 mediators registered at MfN. Less than 8% of all mediators are commercial or business mediators. Less than ¼ of the MfN mediators reported in 2016 to be

		mediating as their sole full-time occupation.
<b>Number of Mediation Centres in the country</b>		
<b>Number of mediation cases</b>	No official statistics available. It is estimated that not more than 15,000 mediations in commercial matters are administered each year.	
<b>Settlement rate</b>	Based on 2018 research, in more than three-quarters of the cases (in whole or in part).	
<b>Enforceability of mediation settlement agreement</b>	NA	NA
<b>Signatory to the Singapore convention</b>	No	No
<b>Incentives for use and enforceability of mediation</b>	Most Dutch courts – including the Supreme Court (Hoge Raad) – generally rule that as mediation is of a voluntary nature, an oral or a written mediation clause is not binding for the parties, especially not if it concerns private persons.	

#### **Lessons learned and recommendations for Serbia**

- The “mediation paradox” was confirmed: companies like mediation, but rarely use it.
- Commercial mediation has much potential for businesses.
- Mediation requires the commitment to actively get off the beaten track. If that does not happen, parties automatically fall into judicial proceedings as the default procedure. It is still unclear why.
- Mediation needs a legislative impulse - incentives/sanctions/triggers.
- It is important that a mediator is affiliated with a mediator association, or that a mediator is part of a mediation office or partnership of mediators that ensure his/her professional training and expertise.
- A positioning as a specialized, experienced and professionally working mediator is an advantage.

### 7.5.1. Legal framework in the field of commercial mediation

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Mediation is not regulated by a specific law in The Netherlands. The Dutch regulatory approach has traditionally been 'private' ADR: meaning regulation by the mediation market itself, resulting in hardly any mediation legislation or public regulation and no mediation laws. The reasoning for this was to preserve the flexibility of the process. Code of conduct developed by mediator associations are used to govern mediator's task and role. There is an official complaint scheme of the Mediators Federation Netherlands (Mediatorsfederatie Nederland, MfN) for parties who are not happy with the performance of their mediator. This is followed by the option to escalate complaints to the foundation's Disciplinary Court for Mediators (Stichting Tuchtrechtspraak Mediators, STM), consisting of two instances: a Disciplinary Committee and an Appeals Board. Sanctions include warnings, reprimands, suspension of mediator registration with the relevant affiliated institution for a maximum period of one year, or being struck off the list of mediators kept by the relevant affiliated institution.

The strictly 'private ADR' approach has changed over time and since in 2013 the Dutch Mediation Act has been drafted and discussed among various stakeholders and in the Parliament. This draft law aims to stimulate and especially to professionalise the profession of mediator and would introduce various incentives together with possibly sanctions when parties have not tried mediation without a good reason before going to court. However, the Dutch Mediation Act still has not been approved and to date it is still unclear when adoption of mediation legislation can be expected and what final form it will take.

The Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 has in the Netherlands solely been implemented for cross border cases. The original mediation draft law (No. 32 555) aimed to implement this EU Directive through 'light implementation' which would only govern the mandatory aspects of the EU Directive, awaiting the introduction of a comprehensive mediation law. However, after the draft mediation law had been adopted by the House of Representatives (Tweede Kamer), the Senate (Eerste Kamer) rejected it mainly because there were not sufficient professional standards in place for mediators and under this draft law, mediators would be given a broad range of privileges, such as the refusal to testify in court (the Senate does not have the power to propose amendments but is only allowed to accept or reject a draft law).

The draft law proposed introducing facilitative aspects like the exclusive (digital) access for the registered mediator to a special judge that solves disputes for the parties quickly in case they need a decision, the option of getting an enforcement order for their agreement easily and – in divorce cases – the option of getting through the necessary formalities rapidly – and at considerably lower cost. The original draft law also proposed some mandatory aspects like 'urging' judges to refer parties in all cases to mediation in any stage of the proceedings if they have not attempted mediation before going to court, lawyers having to make clear in their summons whether parties tried mediation before starting a civil procedure and some (indirect) sanctions if parties have not tried mediation without a good reason.

#### 7.5.2. The demand side of commercial mediation: recourse by law, by contract clauses, by judge referral, by voluntary agreement, other

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##### ***Recourse by law***

In commercial cases, there is no requirement to attempt mediation as a pre-condition for the recourse to Court.

##### ***Recourse by contract clauses***

Most Dutch courts – including the Supreme Court (Hoge Raad) – generally rule that as mediation is of a voluntary nature, an oral or a written mediation clause is not binding for the parties, especially not if it concerns private persons. It may, however, be assumed that this line in the present Dutch case law is strongly influenced by inadequate quality of mediation clauses which in most cases are short, vague and not specific.

##### ***Recourse by judge referral***

Each judge can advise parties to try mediation but cannot oblige parties to go to mediation. If the parties refuse to mediate the court proceedings will continue. After a court-connected mediation project (Mediation naast Rechtspraak), accompanied by substantial research at the start of this century, all courts have meanwhile implemented a referral system to mediation. Each court has a mediation officer who provides information and helps parties arrange a mediation if they wish so. This officer also keeps a list of official court mediators.

Parties can request the court to refer a case to a mediator and judges can also propose parties (in writing or at the hearing) to opt for mediation. Court connected mediation is possible for all civil affairs, family law matters, administrative matters and tax matters. Also, in some criminal cases, court connected mediation is possible. The prosecutor can advise parties to opt for mediation. Only in immigration cases it is not possible to opt for mediation. The court proceedings are suspended during court connected mediation and will continue only if the mediation fails. In criminal cases, the date for the court hearing remains unaltered.

In spite of these arrangements, in every court the amount of court referred mediations is limited. According to the 2018 annual report of the Council of the Judiciary, **in total 3,686 cases were referred by judges to mediation**. The majority of them were concerned with family law matters (1,911) and criminal matters (1,472). This means only 303 of more than 1.5 million court cases were referred to mediation for all other legal disciplines combined. The report states that in some of these cases mediation also did not take place because one of the parties rejected mediation pending the referral process.

Research "ZAM / ACB Research into opportunities and obstacles for commercial mediation"<sup>148</sup> (ZAM/ACB), involving 62 commercial court judges, showed that 40 judges had experience with referral to mediation and 22 had no experience at all. The majority of these judges has over 10 years of experience as a judge. Of them, 60% referred a commercial case to mediation 1-5 times, 25% did it 6-10 times, and only 15% more than 10 times. These commercial case referrals also include employment cases. Hence, the practical relevance of court connected mediation for commercial cases

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<sup>148</sup> [http://www.vereniging-zam.nl/wp-content/uploads/2018/12/English-Summary-ZAM\\_ACB-Study-2018-def.pdf](http://www.vereniging-zam.nl/wp-content/uploads/2018/12/English-Summary-ZAM_ACB-Study-2018-def.pdf)



is limited. The single most important reason for which these judges did not refer commercial cases to mediation, according to them, is the resistance of the parties.

### ***Recourse by voluntary agreement***

Due to the lack of specific legislation, besides court referral, most of mediations are initiated by the voluntary consensus of the parties and administrated under the rules and code of conduct that are applicable to the chosen mediator (mostly MfN, however also IMI or ADR Register mediators are active, and there are also informal mediators that are not members of any mediator organisation).

#### **7.5.3. The supply side of commercial mediation: how to ensure the quality of mediation services**

In order to ensure the quality of mediation services, there are several organisations which accredit mediators. Most Dutch mediators are since 2014 merged into a register of the Dutch Mediation Federation (MfN, Mediationfederatie Nederland) as an 'MfN registered mediator'. MfN registration is possible after successfully completing a training course, recognized by the MfN, followed by a written exam as well as a performance-based assessment. Mediators who are eligible for court-referred cases need to be MfN registered mediators who adhere to additional requirements like being registered at the Legal Aid Council and who have submitted themselves to a peer review based on at least 9 formal mediations in the 3 years prior to registration.

The second widest used register is the ADR Register which certifies ADR practitioners (arbitrators, conflict coaches, mediators, negotiators) and their companies worldwide. For ADR Register accreditation, a specific number of years of experience, as well as a number of client experience is required, proof of prior education, training and minimum higher or university level education, as well as a knowledge test (theory) and a skills test. Both ADR Register and MfN require a background and identification audit of the mediator.

In addition to these Dutch organisations, international certification by the International Mediation Institute (IMI) accredits mediators. IMI certified mediators are accredited based on accreditation by an IMI qualified assessment programme, a performance-based assessment for experienced mediators who have completed 200 hours of mediation or 20 mediations (e.g. offered by the ACB Foundation) is generally part of the assessment programme.

The organisations of mediators referred to above all have their own training standards which differ from each other. All organisations, however, seem to maintain a basic standard that obliges new mediators to first complete an initial mediation training of about 50 hours. Some institutes, like Academy Legal Mediation of Schonewille & Schonewille, offer an initial course of at least 80 hours, followed by specialisation courses of 40 hours minimum.

#### **7.5.4. Relevant case law / jurisprudence and success stories on commercial mediation**

The common thread in case law is formed by the relationship between mediation as a relatively new legal phenomenon and the legal system. The most relevant case law on mediation deals with the voluntary nature of mediation, confidentiality and the "non-binding" nature of a mediation contract clause or agreement to mediate.

Kluwer publishes a magazine (Nederlandse Mediation, NM) that gives an extensive overview of the outcomes (settlements) of mediations in the most important mediation disciplines. Mediation cases are dealt with in a structured manner and accompanied by professional commentary and analysis. The aim of this magazine is to give insight into the mediation process and its outcomes and to contribute to providing data for research.

#### **7.5.5. Key achievements and statistical data on commercial mediation**

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Despite the lack of official statistics, the MfN occasionally publishes a survey based on data collected among its member mediators on the number of mediations administered. The last survey stems from 2016, however the total amount of cases was not published in this report. In the year 2011, the officially registered mediators reported to have done 51,690 cases across all mediation disciplines. The estimate for 2019 is 200,000 mediation cases in total for 2019. In the 2016 survey nearly 55% of the MfN mediators state that they are specialised in family cases, 21% employment cases, and less than 8% are commercial or business mediators. 74% of MfN mediators report to have done less than 6 official mediations in the year 2016 and this amount covers all kinds of mediations including family and employment. Based on this data, we can estimate that in the Netherlands not more than 15,000 mediations in commercial matters are administered each year. In 2015, there were around 3,000 mediators registered at MfN. However, only few individuals can be considered full-time mediators with mediation being their only profession (less than ¼ of the MfN mediators report in the 2016 survey that mediation is their sole full-time occupation).

#### **7.5.6. Lessons learnt and recommendations**

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Some lessons can be drawn from the ZAM/ACB research that was conducted at the end of 2018 with a focus on commercial mediation. The purpose of the research was **to provide knowledge and gain insight into opportunities and barriers to commercial mediation in the Netherlands**. For that reason, this study was conducted among lawyers (in their capacity of referrers to mediation and advisers to companies) and companies (users of the services) that have experience with business mediation and also among judges. However, this research mainly reflects the opinion of experienced users.

***The “mediation paradox” was confirmed: companies like mediation, but rarely use it.*** The majority of companies and lawyers are positive about their experience with mediation, which contrasts sharply with their assessment of the effectiveness of a trial. The average score for the mediator, the solution and the process fluctuate around 7.5 (on a scale from 0-10) and in more than three-quarters of the cases a settlement was reached (in whole or in part). Almost all lawyers in this investigation state that they see the added value of a mediator, even in cases where they themselves failed to reach an agreement with the other party. Most companies and also their lawyers are not convinced of the effectiveness of legal proceedings. Asked about the most effective form of dispute resolution, only 2% of companies and 4% of lawyers prefer litigation as their first solution in dispute resolution. Even judges are not convinced that a court case always helps. Only about 30% of the judges indicate that through a judicial ruling the actual dispute between the parties is resolved. Mediation, especially in

combination with legal proceedings or arbitration (hybrid procedures), is often mentioned as an attractive option. Finally, many users indicate that they are willing to use mediation more often once they have experience with it. Do these results also suggest that commercial mediation will take off in the Netherlands and will soon be the logical first step to resolve a dispute?

The big question that remains after this research is why companies in practice still rarely use mediation, while there are many lawsuits and arbitrations. Why were the lawyers in this survey who have more than ten years of work experience only involved in no more than five mediations during their careers? This offers food for thought and for further research.

*It is important that a mediator is affiliated with a mediator association that ensures his/her professional training and expertise.* It also appears to be important that a mediator is affiliated with a mediator association such as the Mediatorsfederatie Nederland (MfN), the International Mediation Institute (IMI), the ADR Register, or that the mediator is part of a mediation office or partnership of mediators. A business look is necessary and also a business approach. A positioning as a specialized, experienced and professionally working mediator is an advantage. Both lawyers and companies are less enthusiastic about mediators who mediate outside of a professional setting.

*Commercial mediation has a lot of potential for businesses.* The ZAM / ACB study teaches us that there is a need for a different way of dispute resolution than the traditional legal process. There is a lot of potential for business mediation if it is offered in an attractive way for companies and their lawyers. This research provides starting points and business mediators would do well to take this into account. Nevertheless, responding to the needs of the market does not guarantee that business mediation will automatically become a fully-fledged and commonly used method of dispute resolution.

*It is still unclear why the majority of disputes go to litigation and not to mediation first.* From this research there is no clear reason why, compared to the number of cases that go to court, mediation is deployed in only a small part of commercial conflicts. It is an interesting issue for further research. Possible part of the solution lies in combinations of legal proceedings with mediation. It should be investigated how this can best be implemented. Perhaps lawyers have an important role to play. If they have mediation skills and use their involvement to continue asking about the real - not only legal - interests of their client and the other party, and these, with the help of a mediator, can translate into sustainable solutions, then we already are well on our way.

**Mediation needs a legislative impulse.** Finally, mediation requires the commitment to actively get off the beaten track. If that does not happen, parties automatically fall into judicial proceedings as the default procedure. Therefore, for an actual breakthrough of mediation a new impulse is needed in the form of legislation that would regulate, for example:

- Parties having to explain in a subpoena/summons:
  - what has been done up to then to try to find an amicable solution, and / or
  - what the points and facts that parties agree upon are and where they need a legal decision to be made; and / or
  - why they have not tried mediation before going to court;
- Parties (and where applicable their lawyers) having to attend an information meeting under the guidance of a mediator of at least 1 hour before court or arbitration proceedings can be initiated.

- A mediator can directly address, on request of the parties, a judge or arbitrator to make a decision on a specific legal aspect; the ruling is only binding if parties reach a solution in mediation;
- Settlement agreements must be easily enforced if this is necessary, also in cross-border cases (to achieve this all countries, especially also those in the EU, should sign the Singapore Convention);
- Mediation clauses should be binding in the sense that at least one mediation meeting of 3-4 hours should be held;
- Pro bono / Social mediation should be arranged for those who cannot afford a professional mediator.

## Turkey – Commercial mediation law and practice, key information

Topic	Description	Comments
<b>Legal framework</b>	The <b>Law on Mediation in Civil Disputes (2012)</b> outlines the general principles of mediation and defines the procedural aspects. It also regulates the activities of mediators, including training, licencing and monitoring of these activities, as well as describes the main functions of the authorities in charge of mediation.	The law is supplemented by several important legal acts, namely the Regulation on the Application of Mediation in Civil Disputes, Model Ethics and Rules for Mediators and Mediation System and Mediation Fee Tariff.  Law on the Procedure for Initiating Execution Proceedings based on Monetary Receivables Arising out of Subscription Agreement, Code of Civil Procedure and Turkish Commercial Code also govern certain aspects of or related to mediation process.
<b>Private v judicial mediation</b>	Although there are mediation bureaus at the major court houses responsible for taking the mediation applications, Turkey does not have a court-annexed mediation system.	Some courts have mediation rooms that mediators can use free of charge.
<b>The role of courts</b>	Judges can recommend (however, not oblige) parties to try mediation during the court proceedings.	This type of recourse is not generating significant volumes of disputes referred to mediation.
<b>Mandatory v voluntary mediation in commercial cases</b>	Following the success of mandatory mediation as a condition precedent to judicial	For certain commercial actions, application to a mediator before initiating a

<sup>149</sup> By Asiyan Suleymanoglu, specializes in dispute resolution and practices as a professional mediator, negotiator, trainer and conflict management consultant. She is an internationally trained mediator and an independent adviser on mediation policy to international bodies and national governments. [asiyan@akinaconsulting.com](mailto:asiyan@akinaconsulting.com)

	proceedings in labour disputes from January 1, 2018, <b>application of mandatory mediation was extended to commercial disputes from January 1, 2019.</b>	lawsuit for those receivables and damage claims, the subject matter of which is the payment of a certain amount of money, is a condition precedent to filing a claim.  A new draft law is under discussion to extend the current law to family and consumer disputes.
<b>Legal and institutional barriers for mediation</b>	Mediator competence, quality of training providers, Mediator Tariff Fee and need to introduce a lawyers' fee for attending mediation session.	
<b>Mediation licences and certificates</b>	Register of Mediators regulated by the Ministry of Justice  Only faculties of law at universities that have such faculty, Turkish Bar Association and Turkish Justice Academy may be licenced by the MoJ for training	A degree in law and a minimum of five years of legal practice, completion of a relevant mediation training programme <b>of at least 84 hours</b> and succeeding in the <b>aptitude test</b> for mediators held by the Ministry of Justice.
<b>Supervisory authorities</b>	The quality of both trainings and mediation services are under control of the Head of Mediation Department. Model Ethics and Rules for Mediators and Mediation System regulates the ethical standards for mediation.	The main functions of the Mediation Board include identifying ethical standards, monitoring the mediators, and conducting the examinations. It is also responsible for determining the basic principles and standards of the mediation services, mediation training and examination held at the end of such training, as well as adopting the codes of conduct for mediators and determining rules concerning the supervision of mediators.
<b>Number of mediators in the country</b>	There are <b>10,287 registered mediators</b> as of August 2019, while	

	approximately 40,000 lawyers have completed mediation training programme and are now waiting for the aptitude test in order to be registered as mediators.	
<b>Number of Mediation Centres in the country</b>	Several mediation centres have been established in all major cities. ADR centres range from smaller ones consisting of 3 mediators to larger institutions of 100 mediators.	Over 60 Mediation Associations and 75 private ADR centres are actively advising businesses throughout the country on the formation of in-house dispute resolution programmes.
<b>Number of mediation cases</b>	Between January and August 2019 mandatory mediation was initiated in 88,876 commercial disputes, 37,073 of which have resulted in a settlement.	During 2018 - 2019, <b>voluntary use of mediation process has also tripled</b> compared to 2013 - 2017.
<b>Settlement rate</b>	In 2019, for “mandatory” commercial mediations: <b>57%</b> .	
<b>Enforceability of mediation settlement agreement</b>	For the agreement to be enforceable, the parties must apply to the Civil Court of Peace in order to obtain enforceability decision. Then, the mediation agreement is enforceable as a court decision.	However, if the parties and lawyers sign the agreement, the agreement becomes an enforceable document and there is no need for subsequent approval of the court.
<b>Signatory to the Singapore convention</b>	Yes.	No.
<b>Incentives for use and enforceability of mediation</b>	<p>The initial mediation meeting two-hour fee is compensated to the mediator by the State Treasury in accordance with Minimum Fee Tariff for Mediators.</p> <p>Some tax incentives are also given to mediation settlement agreements.</p>	However, if parties decide to continue with judicial proceedings after unsuccessful mediation, the mediation fee paid by the state is included into the costs of proceedings and shall be compensated by the parties.

#### Lessons learned and recommendations for Serbia

- Despite initial resistance from stakeholders, the Turkish mediation law based on the mandatory first mediation meeting has proven to be successful and has led to a shift in perception of mediation.
- Need to introduce a lawyers' fee for attending mediation session.
- More training is needed for mediators to increase the quality of the service.
- Needed minimum standards and monitoring for mediation training institutes and trainers.
- A more gradual introduction of mandatory mediation over time would have been beneficial to increase the quality of mediation services.
- Need to be clear on which dispute types fall under mandatory attempt to mediate.
- Need to be open to amendments and corrections after few years of piloting of the mediation law.
- Successful experience with mediation after attending the first information session leads to greater use of mediation process where the first information session is not mandated (voluntary use of mediation process has tripled compared to 2013 – 2017).

Turkey is a rapidly developing country seeking to build its economic base and improve both the quality of justice and the access to it. Due to the heavy workload of Turkish courts and lengthy adjudication process, the use of alternative dispute resolution mechanisms has increased among Turkish individuals and legal entities facing disputes. Hence, the adoption of the Law on Mediation was a milestone not only in terms of improving the Turkish legal system but also the overall development of Turkish society. Mediation relieves overburdened courts and enhances citizens' access to justice by helping them resolve disputes without high costs and prolonged trials.

There are four main aspects concerning commercial mediation, which are specific to Turkey. Namely: (a) mandatory first meeting with a mediator as a condition precedent to judicial proceedings, (b) limited duration of mediation, (c) provisions with regard to the mediators' fees, and (d) the possibility to transform mediation settlement into an enforceable document. Even though all of them have contributed to the success of commercial mediation in the country, certain issues, which are discussed further in the chapter, still remain.

#### **7.6.1. Legal framework in the field of commercial mediation**

The Law on Mediation in Civil Disputes<sup>150</sup> (hereinafter – the Law on Mediation) is the primary source of legislation regulating mediation in Turkey. It outlines the general principles of mediation and defines

<sup>150</sup> The Republic of Turkey, Law on Mediation in Civil Disputes (including criminal matters). Resmî Gazete,



the procedural aspects. It also regulates the activities of mediators, including training, licencing and monitoring of these activities, as well as describes the main functions of the authorities in charge of mediation. It is supplemented by several important legal acts, namely the Regulation on the Application of Mediation in Civil Disputes<sup>151</sup> (hereinafter – the Regulation on Mediation), Model Ethics and Rules for Mediators and Mediation System<sup>152</sup> and Mediation Fee Tariff<sup>153</sup>. Other legal acts, such as the Code of Civil Procedure, the Code on Labour Courts, and others<sup>154</sup>, also govern certain aspects of or related to mediation process, however, not all of them are applicable to commercial mediation.

In commercial mediation setting, two legal acts are of utmost importance, namely the Law on the Procedure for Initiating Execution Proceedings based on Monetary Receivables Arising out of Subscription Agreement<sup>155</sup> (hereinafter - Law No. 7155) and Turkish Commercial Code<sup>156</sup> (hereinafter - TCC). Based on the provisions of the former, mandatory mediation as a condition precedent to filing a claim in commercial disputes was introduced starting from January 1, 2019. Within that context, some provisions of the TCC and the Law on Mediation have been amended to be in line with the Law No. 7155. As a result, Article 5/A was incorporated into TCC, stating that *“for the commercial actions specified in Article 4 of this Law and other laws, application to a mediator before initiating a lawsuit for those receivables and damage claims, the subject matter of which is the payment of a certain amount of money, is a condition precedent to filing a claim”*.

Article 4 of the TTC mentioned above provides a framework of what should be considered a commercial dispute and, hence, be subject to mandatory mediation. Accordingly, legal actions and non-contested proceedings arising from matters related to commercial operations of the parties (regardless of whether the parties are merchants or not) and regulated in:

- e) the provisions of this code [the TTC],
- f) Articles 962 to 969 of the Turkish Civil Code regulating persons engaged in the business of lending in exchange of a loan,
- g) provisions of Turkish Code of Obligations<sup>157</sup> regulating: acquisition of property or business enterprises and merger of business enterprises and their form changes; the prohibition of competition; publishing agreements; the letter of credit and credit orders; commission agreements; commercial representatives, commercial agents and other commercial deputies; transfer; safekeeping agreements,
- h) legislation relating to the intellectual property law,

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June 7, 2012, No. 6325.

<sup>151</sup> The Republic of Turkey, Regulation on the Application of Mediation in Civil Disputes. Resmî Gazete, January 26, 2013, No. 30439.

<sup>152</sup> The Republic of Turkey, Model Ethics and Rules for Mediators and Mediation System announced by the Ministry of Justice, Mediation Board, March 2013

<sup>153</sup> The Republic of Turkey, Mediation Fee Tariff (annually regulated by the Ministry of Justice Department of Legal Affairs, Mediation Department).

<sup>154</sup> The full list of the laws and regulations governing mediation in Turkey can be found at the webpage of the Head of Mediation Department, available at <http://www.adb.adalet.gov.tr>.

<sup>155</sup> The Republic of Turkey, The Law on the Procedure for Initiating Execution Proceedings based on Monetary Receivables Arising out of Subscription Agreement, *Official Gazette*, 2018 December 19, No. 1755.

<sup>156</sup> The Republic of Turkey, Commercial Code, *Resmî Gazete*, No. 6102.

<sup>157</sup> The Republic of Turkey, Regulation on the Application of Mediation over the Legal Disputes. *Resmî Gazete*, 2011, No. 6089.

- i) special provisions concerning the stock market, exhibitions, fairs and markets, warehouses and other places that pertain to trade,
- j) regulations concerning banks and other credit institutions, financial institutions and business of lending money<sup>158</sup>.

However, there are two exceptions to the requirement to resort to mandatory mediation in commercial disputes. First, legal actions based on grounds of transfer, bailment and any rights relating to intellectual and artistic works, which are not related to any commercial enterprises, are exempt from this rule, as non-contested proceedings are not suitable for mediation. Second, in case arbitration or any other alternative means for dispute resolution are deemed obligatory under special legislation, or in case of existence of an arbitration agreement the mediation shall not be deemed mandatory as well.

#### **7.6.2. The demand side of commercial mediation: recourse by law, by contract clauses, by judge referral and by voluntary agreement**

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##### ***Recourse by law (Mandatory first meeting with a mediator)***

Following the success of mandatory mediation as a condition precedent to judicial proceedings in labour disputes<sup>159</sup>, application of mandatory mediation was extended to commercial disputes from January 1, 2019. If the claimant does not apply for mediation before filing an action, his action will be dismissed without prejudice by the court. The claimant is now also obliged to add final records of mediation to his or her petition if the parties were not able to reach a settlement.

Certain commercial disputes are subject to mandatory first meeting with a mediator as a condition precedent to judicial proceedings. If a party fails to attend the first mediation meeting without a valid excuse, the party who is not participating in such meeting will be held entirely liable for the costs of the proceedings even if the issue is partially or completely resolved in that party's favour. Moreover, if the claimant is not able to provide a proof that he or she has resorted to mediation before submitting a claim to court, his or her action will be dismissed.

The Law on Mediation enables the parties to jointly determine and appoint a mediator of their choice before or after the dispute. In the case of the parties failing to agree on the appointment, the court-administered mediation bureaus (or chief clerk office, if the bureau is not established in that court) shall appoint a mediator from the list of names of accredited mediators registered within the Ministry of Justice<sup>160</sup>. The application shall be made to the mediation bureau where the competent court is

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<sup>158</sup> The Republic of Turkey, Commercial Code, *Resmî Gazete*, No. 6102, Art. 4.

<sup>159</sup> In the first year of the application of mandatory mediation, 562 041 labour cases were mediated while 68 percent of them were settled. The number of voluntary mediations applications reached 124 278, with a 94 percent settlement rate in the last six years.

<sup>160</sup> **The Head of Mediation Department lists the mediators among registered mediators, who wish to mediate in accordance with Article 18/A of the Law on Mediation, indicating their fields of expertise if available**, according to the justice commission of court of first instance they wish to serve, and reports these lists to the relevant commission presidencies. The commission presidencies shall send these lists to the mediation bureaus in their jurisdictions, or to the chief clerk office of the appointed civil court of peace, where there is no mediation bureau established.

located. It is planned that soon only mediators who are trained in commercial disputes will be eligible to be registered on the list of specialized mediators and would be appointed to these types of cases. Under the law, mediators must conclude the process within six weeks following the appointment, although this period can be extended for additional two weeks in exceptional cases. The time bar and the lapse of time shall be interrupted beginning from the date of application to the mediation bureau until the date of issuance of the final records of mediation.

In case the meeting cannot be held due to the fact that the parties cannot be reached, or they do not attend the meeting, or they reach an amicable settlement, or they fail to reach an amicable settlement, the mediator finalizes the mediation proceeding, issues the final records of mediation and informs the mediation bureau about the situation immediately. In case the mediation proceeding ends due to non-attendance of any of the parties without alleging a valid excuse, such party shall be indicated in the final records of mediation at the end of the mediation and shall be held entirely liable for the litigation expenses, even if this party is partially or completely justified in this case. Besides, no attorney fee shall be ruled in favour of this party. In case the mediation proceeding ends due to the non-attendance of both parties at the first meeting, each party shall bear the burden of their own litigation expenses, which will be made during the future litigation proceedings.

#### ***Recourse by contract clauses***

Mediation contract clauses are not popular in Turkey and are neither mentioned nor regulated in the law on mediation.

#### ***Recourse by judge referral***

Judges can recommend (however, not oblige) parties to try mediation during the court proceedings. Beginning with the enactment of the Law on Mediation, judges and court administration provided trainings on court referral mechanisms for encouraging parties to use mediation as well. Even though several judges were actively referring parties to mediation, they were a minority. Hence, this type of recourse is not generating significant volumes of disputes referred to mediation.

Although there are mediation bureaus at the major court houses responsible for taking the mediation applications, Turkey does not have a court-annexed mediation system. Mediators are not connected to the courts; the courts do not have any control over the mediators. In order to support mediation system and mediators, some courts have mediation rooms that mediators can use free of charge. However, these mediation rooms are limited to the big cities. Mediators are free to conduct mediations in their office or mediation centres.

#### ***Recourse by voluntary agreement***

Mediation was first introduced into the Turkish legal system on voluntary basis with the enactment of the Law on Mediation in 2012. The scope of the Law on Mediation has been limited to civil disputes including those with a foreign element except as regards matters which are not at the parties' disposal. Mediation has been defined in the Law on Mediation as *"a voluntary dispute resolution method implementing systematic techniques, enabling a communication process between parties and bringing them together for the purpose of negotiating, reaching an understanding and creating their own resolution, conducted with the assistance of an impartial and independent third person who has relevant expertise and training."*

According to Article 13 of the Law on Mediation, the parties may agree on resorting to a mediator, before filing a lawsuit or during the course of a lawsuit. The Court may also inform and encourage the parties to resort to a mediator. Parties are also free to apply to the mediator, to pursue, to finalize or to renounce the mediation process anytime they want, without prejudice to the provisions of Article 18/A of the said law, regulating mediation as a pre-condition for filing a claim in court. Parties have equal rights while applying to the mediator as well as in the course of the mediation. None of the parties can be excluded from mediation, nor can their right of speech be limited compared to other parties. **Although attending the first mediation meeting is mandatory in some cases, the mediation process itself is still based on voluntariness.**

### 7.6.3. The supply side of commercial mediation: how to ensure the quality of mediation services

The quality of both trainings and mediation services are under control of the Head of Mediation Department, which is part of the Legal Affairs Department at the Ministry of Justice. Model Ethics and Rules for Mediators and Mediation System regulates the ethical standards for mediation. The Mediation Department has a right to remove the record of the mediator who is enrolled in the register if he/she does not demonstrate the qualifications required from a mediator or who loses such qualifications later. Some ADR centres also have their own codes of conduct and complaint procedures for ensuring the quality of mediations.

Commercial mediation does not have a specific institutional setting when it comes to official authorities and falls under the scope of the activities of the Mediation Department and the Mediation Board, both established in 2012. The Mediation Board operates under the control of the Mediation Department.

#### ***Mediation monitoring institution***

The **Mediation Department**, a regulatory body for mediation, is responsible, among other thing, for efficiently regulating the mediation activities, performing the coordination and secretary services for the institutions (such as the Ministry, universities, professional organisations and others), monitoring the country-wide mediation practices, keeping the register of mediators and publishing relevant statistics.

The **Board of Mediation** is responsible for determining the rules concerning the supervision of the mediators, as well as establishing the basic principles concerning the mediation services and the codes of conduct of mediation. The Mediation Department shall warn, in writing, the mediator who is confirmed to have failed to fulfil the liabilities stipulated in the Law on Mediation and in the ethical standards. In case of non-compliance with such warning, the Department of Mediation shall, if necessary, demand the Board to remove the mediator's name from the register after taking the mediator's plea.

The main functions of the Mediation Board include identifying ethical standards, monitoring the mediators, and conducting the examinations. It is also responsible for determining the basic principles and standards of the mediation services, mediation training and examination held at the end of such training, as well as adopting the codes of conduct for mediators and determining rules concerning the supervision of mediators.

### ***Registry of Mediation***

ADR centres themselves are rather different in size, ranging from smaller ones consisting of 3 mediators to larger institutions of 100 mediators. The Istanbul, Ankara, Izmir, Bursa, Kayseri Chambers of Commerce's have established mediation centres, many others are also in preparation of opening new ones. Other mediation providers rarely specialise in one type of disputes and provide a wider scope of services. For now, mediators are only obliged to fulfil specific conditions when willing to specialise in labour disputes. However, as it is explained in chapter 5.5.5, mediators will also soon have to undergo a specific training in commercial mediation if willing to specialise in this kind of disputes.

Otherwise, there are no specific provisions or legal acts regulating mediation of commercial disputes in a corporate setting. However, over 60 Mediation Associations and 75 private ADR centres are actively advising businesses throughout the country on the formation of in-house dispute resolution programmes.

### ***Required training for mediators***

The definition of a mediator is provided in the Law on Mediation. According to Article 2 of the said law, mediator shall mean a real person who carries out the mediation activity and is enrolled in the Register of Mediators regulated by the Ministry of Justice. Requirements for registration include Turkish nationality, a degree in law and a minimum of five years of legal practice, completion of a relevant mediation training programme and succeeding in the aptitude test for mediators held by the Ministry of Justice. The Registry of Mediators includes information and personal details of mediators, such as their names and surnames, contact information and their areas of practice. According to the Ministry's recent statistics, there are 10,287 registered mediators as of August 2019, while approximately 40,000 lawyers have completed 84 hours of mediation training programme and are now waiting for the aptitude test in order to be registered as mediators.<sup>161</sup>

Pursuant to Article 23 of the Law on Mediation, mediation training shall only be organised by the faculty of law in the universities, given that the university has such faculty, Turkish Bar Association and Turkish Justice Academy. These bodies must obtain a licence from the Ministry of Justice to provide trainings. Most of the ADR centres provide mediation trainings in cooperation with the law faculties. List of bodies for which such licence is issued is published in an electronic environment by the Ministry of Justice.

Unlike for mediators of labour disputes, for now completion of an 84 hours mediation training programme is enough to apply for the aptitude test and register as a mediator of commercial disputes. However, obtaining special certification will soon become a prerequisite for mediating commercial disputes as well. In the beginning of 2019, five working group committees were established under the Mediation Department in the Ministry of Justice for designing the curriculum and the content for the specialized certificate programmes for mediators willing to mediate commercial disputes. First five specialization areas for commercial disputes were identified as Insurance, Corporate, Energy, Construction and Health.

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<sup>161</sup> Mediation examination will be conducted on November 24, 2019- <https://www.posta.com.tr/arabuluculuk-sinavi-24-kasimda-5-bin-arabulucu-alinacak-2190192>

The training bodies are monitored in several different ways. First, the training bodies are bound to submit annual reports<sup>162</sup>. Second, they may be audited by the Ministry at any time<sup>163</sup>. Third, the licence issued by the Ministry of Justice to the training bodies may be cancelled by the Mediation Board <sup>164</sup>. The basis for cancellation includes instances when it is determined that the training body is unable to provide adequate service, counterfeiting or critical errors are found in the certificates issued for the persons who participated in the training and other grounds stated in Article 27 of the Law on Mediation.

### ***Duration of mediation***

Although the costs of legal proceeding are not too high, the average length of a commercial case in Turkey is 4-5 years. Not to create similar problems, the duration of commercial mediation was limited. Mandatory mediation in commercial disputes shall be concluded within six weeks, however, if compelling reasons exist, this process can be extended for a maximum of two additional weeks<sup>165</sup>.

### ***Mediation fees***

Since parties of the disputes are obliged to try mediation before going to court, it was decided to make sure that significant costs are not incurred by the parties in case they are unsuccessful in reaching a settlement. Therefore, the initial two-hour fee is always compensated to the mediator by the State Treasury in accordance with Minimum Fee Tariff for Mediators. If at the end of the mediation proceeding, the agreement cannot be reached, or the meeting cannot be held due to the non-attendance of the parties, or if they fail to reach an agreement in result of the meetings which took less than 2 hours, then the 2 hours fee shall be paid from the budget of Ministry of Justice pursuant to the First Part of the Tariff. Unless otherwise agreed, in case the parties fail to reach an agreement as a result of the meetings which took more than 2 hours, the fee for the time that exceeds 2 hours shall be paid equally by the parties, in accordance with the First Part of the Tariff concerning the subject matter of the dispute. The Mediation fee paid by the parties and paid from the budget of Ministry of Justice shall be deemed as court expense. However, if parties decide to continue with judicial proceedings after unsuccessful mediation, the mediation fee paid by the state is included into the costs of proceedings and shall be compensated by the parties.

There are other issues concerning the fee of mediators. First, since there is no monetary limit for any type of commercial disputes, the amount of a claim may be smaller than the mediator's minimum fee according to the Minimum Fee Tariff for Mediators. Second, if the parties manage to reach a settlement, the mediator's minimum fee is based on certain amount of percentage according to the settlement rate in line with the Tariff. Hence, mediators have an interest in the amount of the settlement, which clearly poses risks of conflicts of interest arising between the mediators and the disputants. This can potentially damage the credibility of mediators' neutrality. In June 2019, 9<sup>th</sup> Court of Appeal issued a decision numbered 2019/3694E. 2019/13040 which has annulled one settlement

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<sup>162</sup> The Republic of Turkey, Law on Mediation in Civil Disputes (including criminal matters). Resmî Gazete, June 7, 2012, No. 6325, Art. 26.

<sup>163</sup> The Republic of Turkey, Regulation on the Application of Mediation over the Legal Disputes. Resmî Gazete, January 26, 2013, No. 30439, Art. 47-50.

<sup>164</sup> The Republic of Turkey, Law on Mediation in Civil Disputes (including criminal matters). Resmî Gazete, June 7, 2012, No. 6325, Art. 27.

<sup>165</sup> The Republic of Turkey, Commercial Code, *Official Gazette*, No. 6102, Art. 5A (2).

agreement, which was entered into through voluntary mediation, referring to many ethical problems including the mediator's fee.

### ***Enforceability of the mediation settlement***

If the parties come to an agreement as a result of the mediation, a document reflecting this agreement is to be signed by the parties and the mediator. For the agreement to be enforceable, the parties must apply to the Civil Court of Peace in order to obtain enforceability decision. Then the mediation agreement is enforceable as a court decision. However, if the parties and lawyers sign the agreement, the agreement becomes an enforceable document and there is no need for subsequent approval of the court. Moreover, Turkey has also signed the Singapore Convention on Mediation and opened the doors for the enforcement of international mediation settlements, subject, of course, to the ratification of the convention.

#### **7.6.4. Relevant case law / jurisprudence and success stories on commercial mediation**

Beginning with the enactment of the Law on Mediation, the Department of Mediation under the umbrella of the Ministry of Justice has been making every effort to familiarise the nation with mediation in order to ensure its successful application in practice. These efforts include implementation of several international cooperation projects throughout the country. One of such projects, called *The Development of Mediation Practices in Civil Disputes in Turkey*, was co-funded by the Swedish International Development Cooperation Agency (SIDA) and the Republic of Turkey, and implemented by the Council of Europe. The purpose of the three-year project executed throughout 2015 – 2017 was to improve the efficiency of justice by reducing the cost and time needed to resolve civil disputes through an effective implementation of mediation practices. It included initiation of legislative changes, establishment of court mediation centres, mediation trainings and awareness raising campaigns.<sup>166</sup>

Another international project on Commercial Mediation was implemented in 2015 by the Ministry of Justice, financed by the British Embassy. It aimed at increasing public awareness and improving the implementation of the Law on Mediation for the resolution of disputes arising between traders in the Istanbul Grand Bazaar. With over 550 year's history, the Grand Bazaar is still one of the iconic commercial centres in Turkey, attracting a high number of visitors, approximately 90 million in every year. According to the 2013 report regarding the Grand Bazaar problems, prepared by the Istanbul Chamber of Commerce (ICOC), traditionally, the craftsmen are willing to solve the disputes through amicable ways and the Bazaar culture is the most suitable environment for selecting mediation as an alternative solution. The Commercial Mediation project helped the traders (over 3500 shops are registered in the Grand Bazaar) to resolve their disputes through mediation and inform the public about this new dispute resolution process.

The Department of Mediation has also successfully advocated mandatory mediation in labour disputes through its awareness campaigns, international conferences, mediation advocacy events, and, finally, advanced mediation skills trainings in the last couple of years, not only focusing on the legal community, but also engaging the general public and business community into the mediation process.

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<sup>166</sup> Developing Mediation Practices in Civil Disputes in Turkey project results

[https://www.coe.int/en/web/ankara/developing-mediation-practices-in-civil-disputes-in-turkey#\[%2210277865%22:\[2\]\]](https://www.coe.int/en/web/ankara/developing-mediation-practices-in-civil-disputes-in-turkey#[%2210277865%22:[2]])

Following the successful implementation of mandatory mediation in labour disputes, one year later, mediation became a condition precedent for filing a lawsuit in specific types of commercial disputes as mentioned above. During the term 2018 - 2019, high volume of mandatory applications in labour disputes helped mediators to gain practical experience whereas the disputants and lawyers got familiar with the mediation system. This was one of the main advantages for the mandatory commercial mediation process as now parties are attending mediation and know its benefits like cost and time savings.

Moreover, in commercial disputes, mediation process is still free of charge as, in case parties do not reach a settlement in mediation, the fees for up to two hours are covered by the Ministry of Justice. Some tax incentives are also given to mediation settlement agreements. These are the facts that encourage parties to use mediation and add up to the success of commercial mediation in Turkey.

#### **7.6.5. Key achievements and statistical data on commercial mediation**

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Even before the introduction of mandatory mediation in labour disputes in the beginning of 2018, 85 percent of all the mediated civil disputes were labour disputes, with the success rate equal to approximately 93 percent. Even though it indicates that mediation of commercial disputes was by far not the most popular, the success of mediation in labour disputes paved the path for future developments. High settlement rates of labour disputes through mediation between the years 2013 and 2017 encouraged the Turkish Government to introduce mandatory mediation. Starting from January 2018 and as of August 2019, approximately 440,238 labour cases were resolved through mediation. The settlement rate is 63 percent and the number of cases where mediation was initiated is 127,845. Mandatory mediation in labour disputes brought some significant advancements, especially regarding the caseload in courts: the number of cases decreased by 70 percent this year compared to the last couple of years. Recent changes in Law on Labour Courts, as a result, have tremendously increased the demand for mediation trainings. Mediators especially are willing to gain more practical skills in order to respond to the high number of requests from the parties.

Success of mandatory mediation in labour disputes influenced its extension to commercial disputes in the beginning of 2019. Between January and August 2019, mandatory mediation was initiated in 88,876 commercial disputes, 37,073 of which have resulted in a settlement. While at the time when statistical data was recorded mediation was still ongoing in some of the cases, the success rate of those already closed is equal to 57 percent, leaving 43 percent of the finished mediations without a settlement.

During 2018 - 2019, voluntary use of mediation process has also tripled compared to 2013 - 2017. The unexpectedly high settlement rates outlined above have also created a shift in the perception towards mediation. It is especially true for lawyers who were not in favour of mediation at the beginning; however, they are now attending mediation training programs or mediation advocacy programmes in order to become a part of the system. According to the statistics of the Union of Turkish Bar, there are 116,779 registered lawyers in Turkey, whereas approximately 10 percent are registered as mediators and 40 percent are in the process of becoming registered mediators. Following these developments, the Union of Turkish Bars and several bar associations have also started organizing mediation events. Successful implementation of mandatory first mediation session in labour and commercial disputes encouraged further developments – legislation, which should introduce



mandatory mediation in family disputes and consumer disputes starting from 2020, is now pending in the Parliament.

#### 7.6.6. Lessons learnt and recommendations

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**Despite initial resistance from stakeholders, the Turkish mediation law based on the mandatory first mediation meeting has proven to be successful.** Within that context, the Turkish Law on Mediation of 2012 has been successful in raising awareness on mediation and the use of mediation has steadily increased in recent years in Turkey. Despite the strong resistance of Bar Associations and labour unions' anti-campaigns in the last ten years, today's high settlement rates demonstrate that public is highly interested in resolving disputes creatively and economically, in a timely manner and, finally, in an amicable way. These developments clearly show that mediation as an alternative dispute resolution is not an adventure or a short-term commitment, as it was thought it would be at the beginning by the legal community. Quite the contrary, it will be a part of the legal system for many years.

***Need to introduce a lawyers' fee for attending mediation session.*** Some lawyers are still showing their resistance<sup>167</sup> towards mandatory practice as they are not bringing their clients to mediation meetings, not preparing for negotiations, automatically rejecting any type of settlement negotiations, seeing mandatory mediation as just a procedural step and not informing their clients about the mediation process. Resistance of lawyers is based mostly on economic concerns. In order to address these concerns, lawyers' minimum fee tariff also includes lawyers' fee for attending the mediation sessions. As noted, a growing number of lawyers is now willing to become mediators themselves or are at least attending mediation advocacy training. However, the problem persists.

***More training is needed for mediators to increase the quality of service.*** However, with the widespread use of mediation on the national level, consumer protection and quality issues came to the fore. After meeting with the end-users and evaluating some feedback concerning the mediation process, Department of Mediation published an assessment memo on January 20, 2019. The memo targeted the first month of mandatory mediation applied to commercial disputes. The report stated that the number of application for mediation has increased, however, it also indicated that mediators were holding first sessions between parties without preliminary preparation, they were not able to manage the negotiation process properly, were not coming with a final settlement proposal when parties failed to reach an agreement, and were not able to use 6+2 weeks duration effectively. The number of complaints to the Ministry of Justice has increased significantly after the application of mandatory mediation.

***Need minimum standards and monitoring for mediation training institutes and trainers.*** For the lawyers, one of the main discouragements from referring the disputes to mediation is also the perceived low quality and availability of services, as skilled mediation practitioners are seen as a critical factor for the success of mediation. Even though there is a requirement to pass an examination to be registered as a mediator, there is no such requirement for trainers providing mediation training. Since the demand for training is high, mediation certificate programmes continue without any quality

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<sup>167</sup> For example, there even are some lawyers' blogs on How to abuse the Mediation process, see: <https://www.hukukihaber.net/arabuluculuk-sistemi-nasil-suistimal-edilir-i-makale,6474.html>

control of universities or trainers. Moreover, in the last couple of years, legal framework has changed rapidly. Even though mediators are obliged to take additional training of up to eight hours in three years in order to keep up with these changes, it is not sufficient in practice. Although the Head of Mediation Department under the Ministry of Justice has established ground rules and standards for the mediation trainings, especially for the training curriculum and materials with the specific legal framework,<sup>168</sup> a unified assessment and accreditation system throughout Turkey is needed in order to ensure the quality of mediation training for legal professionals and to increase the capacity of mediators as well as the quality of mediation services for improving the access to justice.

***A more gradual introduction of mandatory mediation over time would have been beneficial to increase the quality of mediation services.*** The scope of mandatory mediation was extended enormously, which created some debates and challenges in practice. The extension meant that many complex commercial disputes also became subject to mandatory mediation. Even though mandatory mediation in labour disputes, introduced in the beginning of 2018, helped the mediators to gain more experience, a significant part of mediators does not yet have special expertise to conduct mediations in these complex commercial cases. If the mediators are lacking necessary knowledge and process management skills, they are not fully able to perform their duty properly and, hence, mandatory mediation is not as effective as it was promoted to be. However, this issue might be solved after additional training in commercial mediation becomes a mandatory requirement for mediators willing to conduct mediations in commercial disputes.

***Need to be clear on which dispute types fall under mandatory attempt to mediate.*** When the law entered into force in 2019, the application was limited to commercial cases. However, parties and lawyers were uncertain about which type of commercial case is part of mandatory mediation. Some special types of cases, such as *action for a negative declaratory judgment*, have formed the basis for such uncertainty. The debate whether these cases fall under the scope of mandatory mediation is still ongoing as even court decisions regarding this issue are contradictory to one another. For example, Istanbul 14th District Administrative Court's decision numbered 2019/521-2019/423 dated March 21, 2019 stated that action for a negative declaratory judgment is not part of the mandatory commercial mediation regime, whereas Istanbul 19th District Administrative Court's decision numbered 2019/1734-2019/1521 stated the opposite on June 28, 2019.

***Need to be open to amendments and corrections after few years of piloting of the mediation law.*** To conclude, the Turkish mediation market is developing quickly while at the same time creating its own model and practice. However, in order to become a global player, following the international standards is also the key to the success of mediation in a longer term. Although Turkey signed the Singapore Convention on Mediation on August 7, 2019, all mediation service and mediation training providers being local, cross-border mediation experience is still limited. Following these developments, increasing the quality of mediators, mediation ethics, monitoring and evaluating the current mediation practices, increasing the cooperation with international organizations, adopting the mediation laws and regulations, developing the cross-border practices are the next steps for the future of mediation. Turkey has introduced many rather specific provisions giving the way to successful mediation of commercial disputes. As explained, certain issues, especially regarding the quality and the calculation of the fee paid for mediation, still need to be addressed. In their reaction to these problems, the

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<sup>168</sup> 84 Hours of Mediation Certificate Program's Participation book prepared within the framework of the EU project is available at <http://www.adb.adalet.gov.tr/arabuluculukkatilimcielkitabi.pdf>

Mediation Department announced that there will be a new law on mediation, which will replace the current Law on Mediation (No 6325).

## 7.7. Western Balkan Countries

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### 7.7.1. Overview of mediation legal frameworks in Western Balkan Countries

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**Bosnia And Herzegovina.** The general purpose of mediation, as described in Article 2 of the Law on Mediation Procedure (OG Bosnia and Herzegovina, No. 76/04), is to conclude a dispute with mutual agreement between the parties. The Law therefore underlines user-oriented goal (to resolve dispute in an amicable way) and court-oriented goal (to increase number of settlements). Article 3 of Mediator's Code of Ethics defines further goals of mediation, namely development and promotion of trust in mediation. Goals of mediation are also mentioned in the Justice Sector Reform Strategy 2014-2018 under section 1.2.3 on how to improve ADR.

**Croatia.** The purpose of Croatian Mediation Act, which is in compliance with the Directive, is mainly to facilitate access to mediation as an appropriate dispute resolution process. Legislation must ensure maximum availability of mediation, but also keep a strong balanced relationship with judicial proceedings. Most importantly, experiencing this alternative procedure's benefits in practice can only be achieved by encouraging the use of mediation, training mediators, disclosing all information on mediation,<sup>169</sup> mediators and mediation institutions and making them available through all types of media.<sup>170</sup> As acknowledged in the Directive, courts and parties benefit from mediation on matters concerning winner/loser outcome for parties, overall costs and time spent in court procedures, reduction of court caseload and thus more trust in justice system and its procedures. The Ministry of Justice website contains relevant information on the mediation system.<sup>171</sup>

**North Macedonia.** The general purpose of mediation, as described in Article 2 of the Law on Mediation, is to conclude a dispute by a mutually acceptable solution for the parties. The Law therefore underlines user-oriented goal (to resolve dispute in an amicable way) and court-oriented goal (to increase number of settlements). More specific goals, as listed in the attached answers to the questionnaire, are supposed to be set in the relevant documents, but it is unclear whether all elaborated goals and benefits appear in those documents, since they were not attached to the questionnaire. The country is a signatory of the Singapore Convention on Mediation.

**Montenegro.** Goals and benefits of mediation are defined by government regulation, strategies and action plans and by professional codes. Court-oriented and user-oriented goals are defined and include, *inter alia*, increased access to justice, decreased court backlogs, saving of time and money of litigants, improved communication between the parties, etc. The Law on Mediation implicitly defines the goal of mediation in Article 11, Paragraph 1. The main mediation institutions are the Ministry of Justice and the Centre for Mediation,<sup>172</sup> established by the Government and predominantly financed from the state budget.

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<sup>169</sup> The Mediation Act (*Zakon o mirenju*), Article 2

<sup>170</sup> Ministry of Justice of the Republic of Croatia, <https://pravosudje.gov.hr>, assessed 23 January 2015

<sup>171</sup> Ministry of Justice of the Republic of Croatia – webpage “mirenje”, <https://pravosudje.gov.hr/mirenje-15925/15925>

<sup>172</sup> <https://www.posredovanje.me/me/o-nama>

In September 2019 Montenegro proposed a Programme for the Development of ADR for the period of 2019-2021,<sup>173</sup> containing many sound proposals. The country is a signatory of the Singapore Convention on Mediation.

**Slovenia.** The overall goal of the Alternative Dispute Resolution Act in Judicial Matters<sup>174</sup> and of the Mediation Act<sup>175</sup> is to encourage the use of mediation. ADR Act in Judicial Matters does so by imposing obligation on all courts of first and second instance to offer mediation in civil, commercial, family and labour disputes. By imposing obligatory design of court-annexed mediation programmes, the legislator facilitated a wider access to Alternative Dispute Resolution. Moreover, mediation and adjudication are put on equal footing. A balanced relationship between mediation and litigation is therefore ensured in a way that mediation is, in principle, still voluntary for the parties; however, courts and judges have to consider mediation in each case, i.e. whether it is eligible for mediation. Besides main goals (wider access to ADR, equality between mediation and adjudication and harmonization with EU policy) the Mediation Act states some clear benefits from implementation of alternative dispute resolutions. Financial benefits, which impact both courts and parties, are substantial. In certain types of disputes parties are, for example offered mediation free of charge (labour, family disputes). As for time spent in court, providing alternative procedures reduces caseloads which again helps courts with their financial plan and gives a better public perception of court efficiency.

#### **7.7.2. Number of mediations as a result of the main mediation model in place (voluntary, soft-mandatory, full mandatory or judicial mediation)**

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**Bosnia and Herzegovina.** Mediation in Bosnia and Herzegovina is a voluntary process. Neither soft-mandatory mediation in which litigants would retain the right to opt out from mediation, nor complete compulsory mediation in selected cases is allowed. Parties can agree to refer their dispute either before or during litigation, until the conclusion of the main trial. This prevents courts with an appellate jurisdiction to invite or refer disputants to mediation.

Due to the selected court-connected mediation model, the demand for mediation in Bosnia and Herzegovina is very low. In 2013, only 15 cases were referred to mediation by courts. Selected court-connected, voluntary mediation model in combination with the risk of increased litigation costs because litigants must pay mediator's fees, prevents any significant increase of mediation referrals.

**Croatia.** Until September 2019, mediation could always be proposed by a judge or an attorney, or it could also be proposed by one party to another, or in a form of joint proposal of both parties for amicable settlement. The commencement of mediation therefore depended on parties' consent, although Mediation Act imposes a provision regarding the start of mediation for special kinds of disputes for which mediation is made compulsory. Therefore, as mediation was purely voluntary and

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<sup>173</sup> <http://www.posredovanje.me/me/publikacije/strateska-dokumenta/file/146-program-razvoja-alternativnog-rjesavanja-sporova-2019-2021?tmpl=component>

<sup>174</sup> The Act on Alternative Dispute Resolution in Judicial Matters (Zakon o alternativnem reševanju sodnih sporov)

<sup>175</sup> Mediation in Civil and Commercial Matters Act (Zakon o mediaciji v civilnih in gospodarskih zadevah)

the legal framework did not provide consequences or sanctions for parties who refuse a mediation referral,<sup>176</sup> not many mediations/conciliations have been recorded to date.

However, it is important to note that significant amendments were introduced on 1 September 2019 by the amendments to the Civil Procedure Act<sup>177</sup> The Civil Procedure Act<sup>178</sup> since 1 September 2019 provides that a court may, considering all the circumstances, especially the interests of the parties and of the third parties related to them, the duration of their relations and their level of mutual reliance, issue a decision, at a hearing or otherwise, instructing the parties to launch mediation proceedings within eight days, or proposing that they seek to resolve their dispute through mediation proceedings. Such a decision may be issued at any time during the litigation proceedings. It is also important to note the sanction/repercussion provided by the law in case of not complying with such a decision. The party/parties which are instructed to initiate mediation/conciliation proceedings and which do not attend the meeting for an attempt at mediation/conciliation, lose the right to claim compensation for further costs of the proceedings before the court of first instance.

Furthermore, in certain cases, the court referral to engage in mediation is mandatory. Namely, when both parties are either joint stock companies or legal entities whose majority owner is the Republic of Croatia or a unit of local and regional self-government, the court, upon receipt of the response to the lawsuit, shall instruct the parties to initiate conciliation proceedings within eight days.<sup>179</sup>

Additionally, a person intending to file a lawsuit against the Republic of Croatia is obliged, prior to filing it, to contact the state attorney's office which has territorial and subject-matter jurisdiction for representation before the court where an action against the Republic of Croatia will be filed, and request an amicable settlement of the dispute<sup>180</sup>, except in cases in which special legislation specifies a deadline for filing an application, or when a special mediation procedure is provided by law. It is important to note that the same applies to situations when the Republic of Serbia has the intention to sue a person/entity residing/having a seat in Croatia.<sup>181</sup> The request for amicable settlement of a dispute must contain all the information required for a standard application to court. A settlement thereby reached is an enforceable title *ispo lege* (by law, without need for any other formalities other than the signature and seal of the competent state attorney's office and signature of the authorized person, on one hand, and the signature of the other party – certified if the party itself is also undertaking certain obligations). The court shall reject a lawsuit against the Republic of Croatia filed before making a decision on the request for an amicable settlement of the dispute, i.e. before the expiration of the deadline of 3 months. Another notable provision of the law is that after filing a request for an amicable settlement of the dispute, the parties may request the court to take evidence which

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<sup>176</sup> Article 6 of the Croatian Mediation Act

<sup>177</sup> Article 186(d) of the Civil Procedure Act (*Zakon o parničnom postupku* (Narodne novine Nos 53/91, 91/92, 112/99, 129/00, 88/01, 117/03, 88/05, 2/07, 84/08, 96/08, 123/08, 57/11, 25/13, 89/14 and 70/19)). The Act on Amendments of the Civil Procedure Act in Croatia entered into force on 1 September 2019 and brought the most substantial changes of the provisions governing civil procedure since the reform in 2013.

<sup>178</sup> Article 186(d) of the Civil Procedure Act (*Zakon o parničnom postupku* (Narodne novine Nos 53/91, 91/92, 112/99, 129/00, 88/01, 117/03, 88/05, 2/07, 84/08, 96/08, 123/08, 57/11, 25/13, 89/14 and 70/19)). The Act on Amendments of the Civil Procedure Act in Croatia entered into force on 1 September 2019 and brought the most substantial changes of the provisions governing civil procedure since the reform in 2013.

<sup>179</sup> Article 186(d)(7) of the Civil Procedure Act (as amended in 2019)

<sup>180</sup> Article 186(a) of the Civil Procedure Act (as amended in 2019)

<sup>181</sup> Article 186(a)(8) of the Civil Procedure Act (as amended in 2019)

they consider are necessary in order to establish the facts and take a position on the merits, on which the amicable settlement of the dispute can depend.

Finally, after filing a regular legal remedy within civil proceedings, the parties may unanimously submit a proposal for resolving the dispute in the conciliation procedure before the judge conciliator of the appellate court competent to decide on the legal remedy.

Generally, the parties to the civil proceedings can mediate before one of the out-of-court mediation centres (ex. Hrvatska udruga za Mirenje) or a judge-conciliator / court conciliator.

**North Macedonia.** Mediation in North Macedonia is a voluntary process. Neither soft mandatory mediation in which litigants would retain the right to opt out from mediation, nor complete compulsory mediation in selected cases, is allowed, although the Law on Mediation envisages the possibility of mandatory pre-filing mediation if prescribed so by the law. Parties can agree to refer their dispute either before or during litigation until the conclusion of the main trial at first instance courts. This prevents courts with an appellate jurisdiction to invite or refer disputants to mediation.

Due to the selected court-connected mediation model, the demand for mediation in North Macedonia is very low. In the period from 2010 to April 2014, only 38 disputes were performed altogether. Selected court-connected, voluntary mediation model, in combination with the risk of increased litigation costs, because litigants must pay mediator's fees in post-filing mediation, prevents any significant increase of mediation referrals.

**Montenegro.** Mediation in Montenegro is a voluntary process. Parties can agree to refer their dispute to mediation either before or during litigation at any stage of the proceedings. Mediation during appellate proceedings is therefore possible.

The court is obliged to refer the parties to a meeting with a mediator to be held before the scheduling of the preparatory hearing or the first hearing for the main hearing in the following cases<sup>182</sup>:

- 1) when it is provided by a special law;
- 2) when it is assessed that it is in the best interest of the child whose rights and interests it is deciding on;
- 3) when litigation has begun in property disputes in which the fulfilment of the obligation to act is required, in:
  - disputes in which Montenegro is sued,
  - small claims disputes,
  - commercial disputes,
  - disputes in which more than five parties appear on one side,
  - disputes over the division of property of spouses.

The mediator is appointed by the Centre for Mediation, in the order from the list of mediators. However, the referral to a meeting with the mediator does not preclude the scheduling of a preparatory hearing or a first hearing for the main hearing. The court shall not refer the parties to a meeting with the

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<sup>182</sup> Article 27a (Referral to mediation) of the Law on Mediation ("Official Gazette of the Republic of Montenegro", No. 30/2005, 29/2012, 18/2019), Please see: <https://www.posredovanje.me/me/normativni-okvir>

mediator in the event that the parties provide evidence that they have attempted to resolve the dispute through mediation or otherwise amicably before initiating court proceedings.

In December 2019, the Government of Montenegro proposed to the Parliament introducing mandatory first meeting with a mediator before filing a lawsuit for several types of disputes, including commercial disputes and ones involving the State and local self-governments. However, it is yet to be seen when and how these provisions will be enacted by the Parliament.

Due to the court-affiliated mediation model, linked to mandatory referral to mediation information session in selected cases, the demand for mediation in Montenegro is relatively high. In the period from 2010 to 2013 the number of performed mediations gradually increased. In 2014, 1,722 disputes were referred to mediation at the National Centre for Mediation. It seems that the court-affiliated, voluntary mediation model in combination with the risk of increased litigation costs, because litigants must pay mediator's fees in post-filing mediation, prevents further significant mediation take-up by disputants.

**Slovenia.** Slovenia does not have a compulsory form of mediation. However, the legal framework leaves enough space for this kind of interpretation. Slovenian legal theory already expressed a favourable opinion on mandatory preliminary session. Article 19 of the Act on Alternative Dispute Resolution in Judicial Matters imposes the following: *'When it is suitable, given the circumstances of the case, and on the basis of consultation with the parties who participate in the informative hearing, the court may decide to suspend the proceedings for no longer than three months and refer the parties to mediation provided by the court in the framework of the programme from Article 4 of this Act'*. This cannot be explained as an obligation to conclude an agreement. Even the name of this Article clearly says compulsory referral to mediation. The obligation thus refers only to the judge's act of referral and parties' cooperation. Parties are given a chance to argue judge's decision. In case any party appeals, the court must repeal its decision.

Slovenian laws impose some other mandatory characteristics. A settlement hearing in which the judge informs parties of their possibility to try ADR is one of them. A judge is not obliged to perform so only if he/she deems this kind of approach would be inappropriate for a particular case. Another such example is the duty of the state, when involved in dispute, to first try mediation. If the State's Attorney's Office thinks mediation would not be an appropriate option for solving a certain dispute, then the question must be forwarded to the Government of Republic of Slovenia.

### 7.7.3. Strengths and weaknesses of the regulatory framework in place

**Bosnia and Herzegovina.** The following **strengths** of the regulatory framework for court-related mediation should be pointed out:

- both court-annexed and court-connected mediation models are allowed;
- courts have a power to invite litigants to consider mediation;
- litigants may request mediation at any time during the judicial process;
- some mediation incentives, after a case is registered with a court, are included in the regulatory framework;



- the law provides for a discretion of courts to order a stay of litigation procedure for certain period in order to allow parties to refer their dispute to private mediation provider;
- duration of mediation (maximum 39 days) is defined;
- judges may refer cases to mediation upon consent of the parties in all disputes;
- scope of confidentiality of mediation as well as inadmissibility of evidence is defined;
- enforceability of mediated settlements is provided.

There are several **weaknesses** concerning regulation of court-related mediation:

- The Law on Mediation Procedure is not fully compatible with the internationally recognized standards, enshrined in the EU Mediation Directive or/and UNCITRAL Model Law on International Commercial Conciliation (no provisions on the effect of mediation on limitation and prescription periods);
- no dispute is *prima facie* considered as eligible for mediation;
- smart sanctions for non-attendance at mediation session are not defined;
- judges may not compel litigants to mediation in any kind of cases;
- judges do not act as mediators;
- there are no common criteria on accreditation of mediators in court-related schemes, or any provisions aimed at providing sustainability of training for court-approved mediators and judges on mediation referrals;
- the law does not encourage courts to design court-related mediation programmes;
- the law does not envisage that courts with mediation programme should adopt local rules of mediation programme;
- the law does not ensure funding for court-annexed mediation schemes;
- there are no financial incentives for mediation demand either for the parties or for lawyers.

**Croatia.** Croatian mediation model is very similar to Slovenian one, since Slovenian regulation was used as a main model regulatory framework. The mediation system is spread to all municipal, commercial, and county courts in the Republic of Croatia. It is considered to be a process in which parties attempt to reach a settlement of their dispute with the assistance of one or more persons who have no authority to impose a binding solution. The last statement clearly excludes a judge, arbitrator, adjudicator or another neutral person with an authority to resolve the dispute by his/her own decision. However, court-annexed mediation could until 2019<sup>183</sup> be organized only at the court where action over the dispute is pending and the mediator could only be a sitting judge of that court who conducts mediation in his/her official capacity as a judge. Since the amendments of the Civil Procedure Act, applicable from 1 September 2019, any of the several existing institutions and centres for mediation may conduct mediation proceedings.<sup>184</sup> According to Article 1 of Croatian Mediation Act, mediation is

<sup>183</sup> Article 186(f and g) of the Civil Procedure Act (*Zakon o parničnom postupku* (Narodne novine Nos 53/91, 91/92, 112/99, 129/00, 88/01, 117/03, 88/05, 2/07, 84/08, 96/08, 123/08, 57/11, 25/13, 89/14 and 70/19)). The Act on Amendments of the Civil Procedure Act in Croatia entered into force on 1 September 2019 and brought the most substantial changes of the provisions governing civil procedure since the reform in 2013. Please see: [https://narodne-novine.nn.hr/clanci/sluzbeni/2019\\_07\\_70\\_1447.html](https://narodne-novine.nn.hr/clanci/sluzbeni/2019_07_70_1447.html);

<sup>184</sup> Please see: Ministry of Justice of the Republic of Croatia – “Mediation Guide”, [https://pravosudje.gov.hr/UserDocsImages/slike/Istaknute%20teme/Mirenje/Vodi%C4%8D%20kroz%20mirenje\\_fin.pdf](https://pravosudje.gov.hr/UserDocsImages/slike/Istaknute%20teme/Mirenje/Vodi%C4%8D%20kroz%20mirenje_fin.pdf)

used in civil, commercial, labour and other disputes about the rights which parties may freely use. Conciliation before the court remains free of additional charges, while mediation institutions regulate their own tariffs.

The mediation triggers introduced by the amendments of the Civil Procedure Act<sup>185</sup> from 2019 may be said to be the biggest strength of this system, as well as an active mediation community. A proactive approach has been evidenced also in reactions taking on the opportunities of the COVID19 crisis<sup>186</sup>, as the first online mediations took place during the pandemic, webinars were organized<sup>187</sup> and the Croatian Mediation Association even issued Instructions for Parties and their Attorneys for Participating in Online Mediation (2 April 2020).<sup>188</sup>

To date, there are 621 registered mediators in the Ministry of Justice registry.<sup>189</sup>

**North Macedonia.** The following **strengths** of the regulatory framework for court-related mediation should be pointed out:

- both court-annexed and court-connected mediation models are allowed;
- some disputes are *prima facie* considered as eligible for mediation (Article 1, Paragraph 2 of the Law of Mediation);
- the law ensures subsidizing part of costs of pre-filling mediation;
- courts have a power to invite litigants to consider mediation;
- litigants may request mediation at any time during the judicial process;
- some mediation incentives, after a case is registered with a court, are included in the regulatory framework (duty of lawyers to inform their clients about the possibility of mediation, legal aid for mediation, pre-filling free of charge mediation for litigants, reimbursement of filling fees);
- the law provides for a discretion of courts to order a stay of litigation procedure for certain period in order to allow parties to refer their dispute to private mediation provider;
- duration of mediation (maximum 60 days) is defined;
- judges may refer cases to mediation upon consent of the parties in all disputes;
- scope of confidentiality of mediation as well as inadmissibility of evidence is defined;
- enforceability of mediated settlements is provided.

There are several **weaknesses** concerning regulation of court-related mediation:

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<sup>185</sup> Article 186(d) of the Civil Procedure Act (*Zakon o parničnom postupku* (Narodne novine Nos 53/91, 91/92, 112/99, 129/00, 88/01, 117/03, 88/05, 2/07, 84/08, 96/08, 123/08, 57/11, 25/13, 89/14 and 70/19)). The Act on Amendments of the Civil Procedure Act in Croatia entered into force on 1 September 2019 and brought the most substantial changes of the provisions governing civil procedure since the reform in 2013. Please see: [https://narodne-novine.nn.hr/clanci/sluzbeni/2019\\_07\\_70\\_1447.html](https://narodne-novine.nn.hr/clanci/sluzbeni/2019_07_70_1447.html);

<sup>186</sup> <http://mirenje.hr/2020/04/21/online-medijacija-efikasni-alat-za-prevenciju-i-riesavanje-konflikata-i-sporova-u-vrijeme-corona-kovid-19-krize/>; <http://mirenje.hr/2020/04/23/online-medijacija-uvodenje-efikasnosti-i-ekologije-u-poslovanje-i-u-konflikte/>

<sup>187</sup> <http://mirenje.hr/2020/04/21/webinar-kako-prodati-medijaciju/>

<sup>188</sup> <http://mirenje.hr/wp-content/uploads/2020/04/Upute-za-stranke-i-njihove-punomo%C4%87nike-za-sudjelovanje-u-online-medijaciji.pdf>

<sup>189</sup> Ministry of Justice registry, <https://pravosudje.gov.hr/registri-i-baze-podataka/6348>

- The Law on Mediation does not include enough incentives for court-related mediation (duty of parties to consider mediation, duty to attend mediation information session) in order to ensure balanced relationship between mediation and litigation, as prescribed by the EU Mediation Directive;
- invitation by the court to consider mediation occurs too late in the litigation;
- smart sanctions for non-attendance at mediation session are not defined;
- judges may not compel litigants to mediation in any kind of cases;
- judges do not act as mediators;
- the law does not encourage courts to design court-annexed mediation programmes;
- the Law does not ensure funding for court-annexed post-filling mediation schemes;
- there are no financial incentives in relation to mediation for lawyers.

**Montenegro.** The following **strengths** of the regulatory framework for court-related mediation should be pointed out:

- both court-annexed and court-connected mediation models are allowed. Nevertheless, court-affiliated model is preferred by the law;
- some disputes are *prima facie* considered as eligible for mediation (Article 27a of the Law on Mediation);
- courts have a power to invite litigants to consider mediation;
- judges may refer cases to mediation upon consent of the parties in all disputes;
- the **courts are obliged to refer** the parties to a meeting with a mediator (mediation information session) to be held before the scheduling of the preparatory hearing or the first hearing for the main hearing, in certain types of cases, including all commercial disputes (Article 27a of the Law on Mediation);
- litigants may request mediation at any time during the judicial process;
- some mediation incentives, after a case is registered with a court, are included in the regulatory framework (duty of lawyers to inform their clients about the possibility of mediation, duty of parties and their lawyers to consider mediation, legal aid for mediation, reimbursement of filling fees in case of mediated settlement);
- duration of mediation (maximum 60 days during litigation) is defined;
- scope of confidentiality of mediation as well as inadmissibility of evidence is defined;
- when a procedure of international mediation is conducted in Montenegro, the Montenegrin Law on Mediation shall apply, unless the parties have explicitly agreed that it will be conducted according to other rules;
- enforceability of mediated settlements is provided.
- additionally, it should be noted that Law on Amendments to the Law on Mediation ("Official Gazette of the Republic of Montenegro", No. 30/2005, 29/2012, 18/2019), enacted in March 2019, provides a very notable novelty and incentive. The costs of mediation in family disputes,

criminal matters and disputes in which one party is Montenegro, which are conducted through the Centre for Mediation, are financed from the budget of Montenegro<sup>190</sup>.

There are several weaknesses concerning regulation of court-related mediation:

- courts are not mandated to adopt court-related mediation rules of court-affiliated or court-annexed mediation programme;
- the Law on Mediation does not include sufficiently effective incentives for court-related mediation (duty of parties to certify to the court that they considered mediation, duty to attend mediation information session, selective pressure mechanisms towards presumed mediation in each case) in order to ensure balanced relationship between mediation and litigation, as prescribed by the EU Mediation Directive;
- invitation by the court to consider mediation occurs too late in the litigation;
- smart sanctions for non-attendance at mediation session are not defined;
- judges may not compel litigants to mediation with a provided sanction in any kind of cases;
- judges do not act as mediators;
- the Law does not ensure funding for court-affiliated or court-annexed post-filing mediation schemes;
- there are no financial incentives in relation to mediation for lawyers.

**Slovenia.** Slovenia has an ADR Act in Judicial Matters which imposes an obligation on all courts of first and second instance to design either court-annexed or court-connected mediation programmes. Judges have also a duty to consider the eligibility of each particular dispute for mediation. **Several thousands of court disputes are settled in court-annexed mediation each year.**

#### 7.7.4. Confidentiality and admissibility of evidence

**Bosnia and Herzegovina.** Protection of information conveyed by one party to the mediator from disclosure to another party is ensured by the law.

Protection of discussions and information from disclosure to outside world is rather weak since Article 7 of the Law on Mediation Procedure shields confidentiality of procedure and does not provide this. Unless otherwise agreed by the parties, all information relating to mediation proceedings is kept confidential, except where disclosure is required by the law or for the purposes of implementation or enforcement of a settlement agreement. This means that it is uncertain whether all information disclosed during mediation, substance and outcome of mediation and also matters which occurred before agreement to mediate (invitation, acceptance, rejection of mediation, terms of mediation agreement etc.) could be considered as confidential.

The rule on admissibility of evidence is very inconsistent as well. Only the testimonies of the parties are prevented to be used as evidence in any other procedure. The Law does not introduce an obligation

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<sup>190</sup> Article 39 Para 19 of the Law on Mediation ("Official Gazette of the Republic of Montenegro", No. 30/2005, 29/2012, 18/2019); Article 3 of the Law on Amendments to the Law on Mediation ("Official Gazette of the Republic of Montenegro", No. 30/2005, 29/2012, 18/2019), Please see: <http://zakoni.skupstina.me/zakoni/web/dokumenta/zakoni-i-drugi-akti/607/1898-11743-23-1-18-10-4.pdf>.

upon parties, mediator or any third person, not to rely on the type of evidence or information, clearly specified in the Law. It also does not prescribe an obligation of courts or arbitral tribunals to treat such evidence or information inadmissible.

**Croatia.** Confidentiality is required for all the information gained during the process of mediation. This information cannot be forwarded to third persons without parties' consent unless the revelation is based on law or if it is necessary for the implementation and enforcement of settlements. The same goes for all the statements and express of parties' willingness that were made in the process of mediation. No one can provide or use those matters as evidence in court, in the arbitration proceedings or any other process. If provided or used, they would be considered inadmissible.

**North Macedonia.** Protection of information conveyed by one party to the mediator from disclosure to another party is ensured by the law. Protection of discussions and information from disclosure to outside world is adequately ensured by Article 9 of the Law on Mediation. The rule on inadmissibility of evidence is defined in Articles 9 and 12 of the Law on Mediation. Exemptions from the principle of confidentiality and from the disclosure and inadmissibility rule are also clearly defined.

**Montenegro.** Protection of information conveyed by one party to the mediator from disclosure to another party is ensured by the law. Protection of discussions and information from disclosure to outside world is adequately ensured by Article 6 of the Law on Mediation. Nevertheless, there are no available sanctions for breaches of the principle of confidentiality, which makes mediation a less attractive option. The rule on inadmissibility of evidence is defined in Article 37 of the Law on Mediation. Exemptions from the principle of confidentiality and from the disclosure and inadmissibility rule are also clearly defined.

**Slovenia.** Confidentiality under Slovenian legislation meets Directive requirements. Mediators can disclose everything they receive from one party to another unless the information is given as confidential. Other than that, information gained in the process of mediation cannot be disclosed to third persons unless disclosure is required by law, parties agree on disclosure or it is necessary for the enforcement of a dispute settlement agreement.

Admissibility of Evidence in Other Proceedings is outlined in Article 12 of the Mediation Act. The Article sets out six inadmissible sorts of evidence. Those kinds of evidence can only be disclosed or used exceptionally in special proceedings.

## 8.7.5 IDENTIFICATION OF GOOD PRACTICES AND ELEMENTS OF COURT-ANNEXED MEDIATION PROGRAMMES IN THE WESTERN BALKAN REGION

Practices	Bosnia and Herzegovina	Croatia	North Macedonia	Montenegro	Slovenia
<b>Existing Regulation/ Legislation on Mediation</b>	The Law on Mediation Procedure, Law on Transfer of Mediation Business to Association of Mediators, Rule on the Training Curriculum for Mediators, Rule on the Registry of Mediators, Rule on the Liability of the Mediator for Damages Inflicted during Performing of Mediation, Rule on Disciplinary Liability of Mediators, Rule on Fees and Compensation of Mediators' Costs, Rule on the List of Mediators, Rule on Referring to Mediation and Mediator's Code of Ethics as well as Civil Procedure Law and Criminal Procedure Law. Under these laws and rules, the Association of	<p>Mediation Act (2003, amended in 2009) and new Mediation Act (2011), Court-annexed mediation is integrated into civil proceedings</p> <p>The Civil Procedure Act and its amendments in force as of 1 September 2019 provide for important triggers for mediation and conciliation.</p> <p>Specific mediation and out-of-court settlement mechanisms and triggers exists when a party is the state/state-related entity.</p>	Law on Mediation. Courts are not explicitly authorized to adopt rules on court-related mediation schemes.	Law on Mediation. Courts are not explicitly authorized to adopt the rules on court-related mediation schemes.	The Mediation in Civil and Commercial Matters Act (2008) and the Act on Alternative Dispute Resolution in Judicial Matters (2009) <b>impose mediation for courts of first instance and courts of appeal in civil, commercial, family, and labour disputes.</b>

	Mediators adopts rules related to mediation business, hence there is no control of the state over it.				
<b>Limitation and Prescription Periods</b>	No prescriptions of the law on limitation and prescription periods.	Limitation period is interrupted during mediation. If mediation ends without a settlement, limitation period continues, and it ends only if a party files a lawsuit within 15 days after the mediation is over.	Effects of mediation on limitation and prescription periods are defined in Article 16 of the Law on Mediation.	The commencement of mediation does not terminate the statute of limitations (unless otherwise agreed by the parties) (Article 38 of the Law on Mediation).	If mediation attempt fails, the party has at least 15 days to bring an action or start arbitration proceedings. Statutory limitation period stops running during mediation, while it starts again if the mediation ends without an agreement.
<b>Enforcement of Mediated Settlements</b>	According to Article 25 of the Law on Mediation Procedure, the mediated settlement is binding and enforceable.	Law on Mediation prescribes that any obligation included in the settlement must be fulfilled and all agreements made in mediation containing enforceability clauses are enforceable at law. Parties may also compose the settlement as notarial deed, court settlement or arbitration award.	Several forms of mediated settlements are allowed:  Notary deed, court approved mediated settlement (only if concluded during litigation), contract, consent arbitral award.  The country is a signatory of the Singapore Convention on Mediation.	Several forms of mediated settlements are allowed: notary deed, court approved mediated settlement (for pre-filling and post-filling settlements) or contract.  The country is a signatory of the Singapore Convention on Mediation.	Parties decide whether to enforce mediation agreements or not. The agreement has to take the form of a directly enforceable notary deed, a court settlement, or an arbitral award.
<b>Incentives and Sanctions</b>	No legal incentives or requirements concerning mediation for disputants.	The sanction provided by the Act on Civil Proceedings (2019) in case of not	No sufficient legal post-filling incentives or requirements concerning	Effective incentives in place for courts and judges, such as	If courts decide, following the criteria stated in Article 19/VI of the Act on

	Only the reimbursement of filling fee applies.	<p>complying with such a mediation referral decision is losing the right to claim compensation for further costs of the proceedings before the court of first instance.</p> <p>The court shall reject a lawsuit against the Republic of Croatia filed before making a decision on the request for an amicable settlement of the dispute, i.e. before the expiration of the deadline of <b>3 months</b>.</p>	mediation for disputants present.	<p>mandatory referral to mediation information session.</p> <p>An important incentive was introduced in 2019 (Art 39): <b>the costs of mediation in family disputes, criminal matters and disputes in which one party is Montenegro, which are conducted through the Centre for Mediation, are financed from the budget of Montenegro.</b></p>	<p>ADR in Judicial Matters, that parties unreasonably declined the use of mediation, one of the <b>parties might be sanctioned by bearing the costs of the judicial proceedings irrespective of the outcome of the dispute</b> (known as “smart sanction”).</p>
<b>Identification of Good Practices</b>	High Judicial and Prosecutorial Council recently adopted a change in the mediation policy strategy from court-connected to court-annexed mediation model. It supported two pilot court-annexed mediation projects at Municipality Court in Sarajevo and at Basic Court in Banja Luka. Both pilots envisage introduction of free of				



	charge mediation for litigants. Pilot courts will adopt Rules of Mediation Programme, stipulating duties of litigants and their lawyers and case management issues, aimed at making mediation as a presumptively considered option by litigants and their lawyers. Each court should refer 500 cases to mediation annually.				
<p>The amendments of the Civil Procedure Act in force as of 1 September 2019 provide for important triggers for mediation and conciliation.</p> <p><b>Court referral</b>, considering all the circumstances, especially the interests of the parties and of the third parties related to them, the duration of their relations and their level of mutual reliance, is introduced, with a sanction for the party/parties if they do not attend the meeting for an attempt at mediation/conciliation – they lose the right to claim compensation for further</p>	<p>Macedonia introduced financial incentive for disputants in pre-filling mediation and developed capacities of free-standing mediation centres. This could ensure higher mediation take-up by disputants if supported by strong message from the courts that they consider mediation.</p> <p>Mediation is almost inevitable and therefore it is cost-effective to try resolving a dispute through mediation earlier.</p>	<p>Montenegro introduced important post-filling incentives for disputants in relation to mediation and developed capacities of court-affiliated mediation centre, established and financed by the state. This ensures higher mediation take-up by disputants if supported by strong message from the courts that they consider mediation as presumed.</p> <p>The courts are obliged to refer the parties to a</p>	<p>District Courts of Ljubljana are identified as an example of good practice in mediation by the Council of Europe. From then on, mediated settlements grew from 800 cases in 2008 to 4300 cases in 2015.</p>		

<p>costs of the proceedings before the court of first instance.</p> <p>The court referral to engage in mediation is mandatory when both parties are either joint stock companies or legal entities whose majority owner is the Republic of Croatia or a unit of local and regional self-government.</p> <p>A person intending to file a lawsuit against the Republic of Croatia is obliged, prior to filing it, to contact the state attorney's office which has territorial and subject-matter jurisdiction for representation before the court where an action against the Republic of Croatia will be filed, and request an amicable settlement of the dispute. The same applies to situations when the Republic of Serbia has the intention to sue a person/entity residing / having a seat in Croatia.</p>	<p>A good practice in regulatory approach is also the obligation of the Government to adopt 4-year mediation development programme, supported by sector specific mediation programmes.</p>	<p>meeting with a mediator (mediation information session) to be held before the scheduling of the preparatory hearing or the first hearing for the main hearing, in certain types of cases, including all commercial disputes.</p> <p>When a procedure of international mediation is conducted in Montenegro, the Montenegrin Law on Mediation shall apply, unless the parties have explicitly agreed that it will be conducted according to other rules.</p> <p>The costs of mediation in family disputes, criminal matters and disputes in which one party is Montenegro, which are conducted through the Centre for Mediation, are financed from the budget of Montenegro.</p>	
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<p>In second instance proceedings, the parties may unanimously submit a proposal for resolving the dispute in the conciliation procedure before the judge conciliator of the court competent to decide on the legal remedy.</p> <p>In 2006, the Strategy of Development of ADR<sup>191</sup> promoted the use of mediation in Commercial Court of Zagreb, then the new law on civil procedure allowed use of mediation in all courts. In 2009, a new Strategy of Developing Mediation in Civil and Commercial Cases was adopted to raise awareness on mediation.</p>			<p>A good practice in institutional policy approach is also the establishment of the Centre for Mediation, funded predominantly from the budget of Montenegro. However, such an approach also has its downfalls.</p>		
Practices	Bosnia and Herzegovina	Croatia	North Macedonia	Montenegro	Slovenia
Existing Regulation/ Legislation	The Law on Mediation Procedure, Law on Transfer of Mediation Business to Association	Mediation Act (2003, amended in 2009) and new Mediation Act (2011), Court-annexed mediation is	Law on Mediation. Courts are not explicitly authorized to adopt rules	Law on Mediation. Courts are not explicitly authorized to adopt the	The Mediation in Civil and Commercial Matters Act (2008) and the Act on Alternative Dispute

<sup>191</sup> [http://www.centar-za-mir.hr/uploads/Medijacija/Razvoj\\_ANRS\\_%20Ministarstvo.pdf](http://www.centar-za-mir.hr/uploads/Medijacija/Razvoj_ANRS_%20Ministarstvo.pdf)

<b>on Mediation</b>	<p>of Mediators, Rule on the Training Curriculum for Mediators, Rule on the Registry of Mediators, Rule on the Liability of the Mediator for Damages Inflicted during Performing of Mediation, Rule on Disciplinary Liability of Mediators, Rule on Fees and Compensation of Mediators' Costs, Rule on the List of Mediators, Rule on Referring to Mediation and Mediator's Code of Ethics as well as Civil Procedure Law and Criminal Procedure Law. Under these laws and rules, the Association of Mediators adopts rules related to mediation business, hence there is no control of the state over it.</p>	<p>integrated into civil proceedings</p> <p>The Civil Procedure Act and its amendments in force as of 1 September 2019 provide for important triggers for mediation and conciliation.</p> <p>Specific mediation and out-of-court settlement mechanisms and triggers exists when a party is the state/state-related entity.</p>	on court-related mediation schemes.	rules on court-related mediation schemes.	<p>Resolution in Judicial Matters (2009) <b>impose mediation for courts of first instance and courts of appeal in civil, commercial, family, and labour disputes.</b></p>
<b>Limitation and Prescription Periods</b>	No prescriptions of the law on limitation and prescription periods.	<p>Limitation period is interrupted during mediation. If mediation ends without a settlement, limitation period continues, and it ends only if a party files a lawsuit within</p>	Effects of mediation on limitation and prescription periods are defined in Article 16 of the Law on Mediation.	The commencement of mediation does not terminate the statute of limitations (unless otherwise agreed by the parties) (Article 38 of the Law on Mediation).	If mediation attempt fails, the party has at least 15 days to bring an action or start arbitration proceedings. Statutory limitation period stops running during

		15 days after the mediation is over.			mediation, while it starts again if the mediation ends without an agreement.
<b>Enforcement of Mediated Settlements</b>	According to Article 25 of the Law on Mediation Procedure, the mediated settlement is binding and enforceable.	Law on Mediation prescribes that any obligation included in the settlement must be fulfilled and all agreements made in mediation containing enforceability clauses are enforceable at law. Parties may also compose the settlement as notarial deed, court settlement or arbitration award.	Several forms of mediated settlements are allowed:  Notary deed, court approved mediated settlement (only if concluded during litigation), contract, consent arbitral award.  The country is a signatory of the Singapore Convention on Mediation.	Several forms of mediated settlements are allowed: notary deed, court approved mediated settlement (for pre-filling and post-filling settlements) or contract.  The country is a signatory of the Singapore Convention on Mediation.	Parties decide whether to enforce mediation agreements or not. The agreement has to take the form of a directly enforceable notary deed, a court settlement, or an arbitral award.
<b>Incentives and Sanctions</b>	No legal incentives or requirements concerning mediation for disputants. Only the reimbursement of filling fee applies.	The sanction provided by the Act on Civil Proceedings (2019) in case of not complying with such a mediation referral decision is losing the right to claim compensation for further costs of the proceedings before the court of first instance.  The court shall reject a lawsuit against the Republic of Croatia filed before making a decision on the request for	No sufficient legal post-filling incentives or requirements concerning mediation for disputants present.	Effective incentives in place for courts and judges, such as mandatory referral to mediation information session.  An important incentive was introduced in 2019 (Art 39): <b>the costs of mediation in family disputes, criminal matters and disputes in which one party is Montenegro, which are</b>	If courts decide, following the criteria stated in Article 19/VI of the Act on ADR in Judicial Matters, that parties unreasonably declined the use of mediation, one of the <b>parties might be sanctioned by bearing the costs of the judicial proceedings irrespective of the outcome of the dispute</b> (known as “smart sanction”).

		an amicable settlement of the dispute, i.e. before the expiration of the deadline of <b>3 months</b> .		conducted through the Centre for Mediation, are financed from the budget of Montenegro.	
<b>Identification of Good Practices</b>	High Judicial and Prosecutorial Council recently adopted a change in the mediation policy strategy from court-connected to court-annexed mediation model. It supported two pilot court-annexed mediation projects at Municipality Court in Sarajevo and at Basic Court in Banja Luka. Both pilots envisage introduction of free of charge mediation for litigants. Pilot courts will adopt Rules of Mediation Programme, stipulating duties of litigants and their lawyers and case management issues, aimed at making mediation as a presumptively considered option by litigants and their lawyers. Each court				

	should refer 500 cases to mediation annually.				
<p>The amendments of the Civil Procedure Act in force as of 1 September 2019 provide for important triggers for mediation and conciliation.</p> <p><b>Court referral</b>, considering all the circumstances, especially the interests of the parties and of the third parties related to them, the duration of their relations and their level of mutual reliance, is introduced, with a sanction for the party/parties if they do not attend the meeting for an attempt at mediation/conciliation – they lose the right to claim compensation for further costs of the proceedings before the court of first instance.</p> <p>The court referral to engage in mediation is mandatory when both parties are either joint stock companies or legal entities whose majority owner is the Republic of</p>	<p>Macedonia introduced financial incentive for disputants in pre-filing mediation and developed capacities of free-standing mediation centres. This could ensure higher mediation take-up by disputants if supported by strong message from the courts that they consider mediation.</p> <p>Mediation is almost inevitable and therefore it is cost-effective to try resolving a dispute through mediation earlier.</p> <p>A good practice in regulatory approach is also the obligation of the Government to adopt 4-year mediation development programme, supported by sector specific mediation programmes.</p>	<p>Montenegro introduced important post-filing incentives for disputants in relation to mediation and developed capacities of court-affiliated mediation centre, established and financed by the state. This ensures higher mediation take-up by disputants if supported by strong message from the courts that they consider mediation as presumed.</p> <p>The courts are obliged to refer the parties to a meeting with a mediator (mediation information session) to be held before the scheduling of the preparatory hearing or the first hearing for the main hearing, in certain types of cases, including all commercial disputes.</p>	<p>District Courts of Ljubljana are identified as an example of good practice in mediation by the Council of Europe. From then on, mediated settlements grew from 800 cases in 2008 to 4300 cases in 2015.</p>		

<p>Croatia or a unit of local and regional self-government.</p> <p>A person intending to file a lawsuit against the Republic of Croatia is obliged, prior to filing it, to contact the state attorney's office which has territorial and subject-matter jurisdiction for representation before the court where an action against the Republic of Croatia will be filed, and request an amicable settlement of the dispute. The same applies to situations when the Republic of Serbia has the intention to sue a person/entity residing / having a seat in Croatia.</p> <p>In second instance proceedings, the parties may unanimously submit a proposal for resolving the dispute in the conciliation procedure before the judge conciliator of the court competent to decide on the legal remedy.</p>		<p>When a procedure of international mediation is conducted in Montenegro, the Montenegrin Law on Mediation shall apply, unless the parties have explicitly agreed that it will be conducted according to other rules.</p> <p>The costs of mediation in family disputes, criminal matters and disputes in which one party is Montenegro, which are conducted through the Centre for Mediation, are financed from the budget of Montenegro.</p> <p>A good practice in institutional policy approach is also the establishment of the Centre for Mediation, funded predominantly from the budget of Montenegro. However, such an approach also has its downfalls.</p>	
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<p>In 2006, the Strategy of Development of ADR<sup>192</sup> promoted the use of mediation in Commercial Court of Zagreb, then the new law on civil procedure allowed use of mediation in all courts. In 2009, a new Strategy of Developing Mediation in Civil and Commercial Cases was adopted to raise awareness on mediation.</p>			
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