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MANDATORY MEDIATION BEFORE LITIGATION IN CIVIL AND COMMERCIAL MATTERS: A EUROPEAN PERSPECTIVE

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The author declares that he is involved in the project Pravo-Justice, Kiev, Ukraine. However, the opinions and views expressed in this article are his own.

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MANDATORY MEDIATION BEFORE LITIGATION IN CIVIL AND COMMERCIAL MATTERS: A EUROPEAN PERSPECTIVE

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Abstract Nowhere in Europe are disputants forced to settle their civil or commercial disputes by way of mediation or any other form of alternative dispute resolution. Settlement is also completely voluntary in light of the fundamental right of access to court of Art. 6 of the European Convention of Human Rights. This does not, however, mean that potential disputants may not be requested to attempt to settle their case before going to court, for example, by way of mediation, especially if strict time limits are observed for such procedure. In some European jurisdictions, attempting mediation or other forms of alternative dispute resolution before court action is initiated is mandatory, at least in certain cases. The present contribution will focus on such preliminary mandatory mediation attempts in a selection of jurisdictions.

Keywords: mediation; mandatory mediation; alternative dispute resolution; civil litigation

1 INTRODUCTION

Nowhere in Europe are disputants forced to settle their civil or commercial disputes by way of mediation or any other form of alternative dispute resolution (also referred to as 'ADR' hereafter). Settlement is completely voluntary, also in light of the fundamental right of access to court of Art. 6 of the European Convention of Human Rights. This does not, however, mean that potential disputants may not be requested to attempt to settle their case before going to court, for example, by way of mediation, especially if strict time limits are observed for such procedure. In some European jurisdictions, attempting mediation or other forms of alternative dispute resolution before court action is initiated is mandatory, at least in certain cases. The present contribution will mainly focus on such preliminary mandatory mediation attempts.

Mediation attempts may occur before or after litigation has started. After litigation has started, courts in most European jurisdictions may stay the hearing of the case for a certain period of time to allow the parties to attempt alternative dispute resolution, including mediation. Most courts in Europe have this power since they have the duty to facilitate the settlement of cases throughout the proceedings.¹ This duty originates in medieval procedure and is part of our common European legal heritage.²

1 See, e.g., Rule 10 of the ELI/UNIDROIT Model European Rules of Civil Procedure (2020).

2 See CH van Rhee, 'Case Management in Europe: A Modern Approach to Civil Litigation' (2018) 8 (1) International Journal of Procedural Law 65-84.

For obvious reasons, mediation or other types of ADR *before* court litigation is started are the preferred routes to settlement. Avoiding litigation is cost-effective and prevents courts from being burdened with too many cases. Additionally, mediation before litigation is started means that relationships between disputants remain as good as possible, therefore increasing the chances of an amicable settlement. Litigation in a court of law, on the contrary, will usually cause relationships to deteriorate due to its adversarial character. It may therefore not contribute to a settlement.

In various European jurisdictions, attempts have been made to increase the use of mediation and other types of alternative dispute resolution. One of the major impediments encountered in countries where mediation is promoted is that disputants are often unaware of the benefits and usefulness of alternative dispute resolution, including mediation. Most parties contact a lawyer when they encounter a legal problem, and this lawyer will, in most jurisdictions, habitually suggest that the parties initiate court action. This is unfortunate given the benefits of mediation and other types of alternative dispute resolution for the parties and for society at large. Various jurisdictions have, therefore, sought to introduce measures to increase the awareness of parties of alternative forms of dispute resolution and encourage them to explore the possibilities of mediation. In several of these jurisdictions, mediation attempts have been made mandatory before a case can be brought before a court of law. This may be done on the basis that certain types of disputes are suitable for mediation because of their specific features, as is the case in England and Wales. In that situation, the list of cases is usually short and often limited to family matters or neighbourhood disputes. In other jurisdictions, mandatory mediation attempts are introduced to combat case overloads, as is the case in Italy, and in this situation, the list of disputes submitted to mandatory mediation attempts is usually long.

In the first section below, the role and statutory framework as regards preliminary mandatory mediation attempts – or, more precisely, a Mediation Information and Assessment Meeting (also referred to as MIAM hereafter) – in England and Wales will be discussed. In subsequent sections, comparable initiatives in a selection of European Union member states will be studied (Italy, Germany, Austria, France, Spain, Norway, and the Netherlands).

2 ENGLAND AND WALES

In England and Wales, Mediation Information and Assessment Meetings are mandatory (with some exceptions) in family matters following separation when working out arrangements for the children and finances.³ Although MIAMs are only mandatory in family disputes, one should note that the so-called 'Practice Direction on Pre-action Conduct' (i.e., the practice direction regulating the conduct of the parties before they go to court)⁴ encourages the potential claimant to inform the potential defendant which form (if any) of alternative dispute resolution, including mediation, the potential claimant thinks to be most suitable. The potential defendant then has to state whether he or she agrees to the potential claimant's proposal for ADR. If the defendant does not agree, an explanation should be provided and

3 Relevant legislation: Children and Families Act 2014, Chapter 6, Part 2, Section 10 <<https://www.legislation.gov.uk/ukpga/2014/6/section/10/enacted>> accessed 5 September 2021; Family Procedure Rules, Part 3 – Non-Court Dispute Resolution <http://www.justice.gov.uk/courts/procedure-rules/family/parts/part_03> accessed 5 September 2021; Family Procedure Rules, Practice Direction 3a – Family Mediation Information and Assessment Meetings (MIAMs) <http://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_03a#para8> accessed 5 September 2021.

4 This 'Practice Direction on Pre-action Conduct' can be found at <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct> accessed 30 August 2021.

another form of alternative dispute resolution should be suggested, unless no other form is considered suitable.

The relevant part of the Practice Direction reads as follows:

8. Litigation should be a last resort. As part of a relevant pre-action protocol or this Practice Direction, the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings.

If an action is brought in court nevertheless, the parties must prove that the pre-action obligations in this respect have been met, and sanctions may be imposed by the court if this is not the case. A possible sanction is that the party at fault may be ordered to pay (part of) the costs of the opponent party.

The relevant part of the Practice Direction reads as follows:

11. If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. A party's silence in response to an invitation to participate or a refusal to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs.

The lawyers of the parties should inform them of ADR (including mediation), and this is reinforced through the so-called 'Directions Questionnaire (Fast Track and Multi-Track)', which aims at allocating the case to the relevant procedural track. In this questionnaire, the lawyer confirms 'that I have explained to my client the need to try to settle; the options available; and the possibility of costs sanctions if they refuse to try to settle'.⁵ The 'Directions Questionnaire (Small Claims Track)' is also very explicit about the benefits of mediation or other forms of ADR.⁶

But let us now focus on mandatory Mediation Information and Assessment Meetings. As stated, in England and Wales, a MIAM is compulsory if a party wants to take a case to court concerning children and finances following separation. In these cases, both parties need to attend a Mediation Information and Assessment Meeting. Usually, spouses prefer to attend separate MIAMs since it is often felt that for emotional reasons, it is difficult to attend the same meeting. However, even when the parties attend the same meeting, at some stage, the mediator communicates with the parties separately since this is important to make the parties feel comfortable with the process and also in order to check whether there are any issues of harm or abuse.⁷

MIAMS are considered necessary in family matters because other than purely legal matters are involved, and since the continuing relationship between the parties is central.

A MIAM is a meeting in which the options are explored for settling the case without court action. This meeting takes place in the presence of a qualified mediator. Mediation is not the only form of alternative dispute resolution discussed during MIAM. The mediator informs the parties how they can settle their case without going to court and provides the

5 The 'Directions Questionnaire (Fast Track and Multi-Track)' can be found at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/953456/n181-eng.pdf> accessed 30 August 2021.

6 The 'Directions Questionnaire (Small Claims Track)' can be found at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/954476/n180-eng.pdf> accessed 30 August 2021.

7 See the website of 'Resolution' (a community of family justice professionals who work with families and individuals to resolve issues in a constructive way) at <<https://resolution.org.uk/looking-for-help/splitting-up/your-process-options-for-divorce-and-dissolution/mediation-information-and-assessment-meetings-miams/>> accessed 30 August 2021.

parties with information on the pros and cons of the alternatives to court action. A MIAM is confidential.⁸

Accreditation of the mediator is necessary, and such accreditation is provided by the Family Mediation Council (FMC).⁹ Accredited mediators can be found online.¹⁰

A MIAM can take place in different places: in the mediator's office or in another place. The parties and the mediator have to agree on this place. A MIAM can also be held online.¹¹

A MIAM is obligatory and has to take place before the parties take their case to the family court. Exemptions to this rule include:

- Domestic Violence;
- Child protection concerns;
- Urgency;
- Previous attendance at ADR in the last four months;
- Dishonesty and lack of disclosure (disclosure can be defined as providing a list of documents that are relevant for the matter at stake);
- The party has contacted at least 3 mediators (or all of them if there are fewer than three) within 15 miles of his or her home, and no mediator is available within the next 15 working days.¹²

Information about MIAMs is provided by the Family Mediation Council, and this same body provides information on situations where it is sufficiently difficult for parties to attend a MIAM that this cannot be asked of them.

At the MIAM, the mediator will:

- Inform the parties about mediation and other forms of ADR;
- Evaluate whether mediation is suitable for resolving the dispute between the parties;
- Consider a risk or previous risk of harm to children or domestic violence;
- Provide information related to matters arising on separation.¹³

After the MIAM, the parties may try mediation. If so, they have to make an appointment for a first session. However, if they do not want to continue, the applicable court form is signed by the mediator, and this is proof of the fact that the parties have thought about mediation. The form is needed to bring court action.¹⁴

Attendance at a MIAM is free for parties who are entitled to legal aid. This should be mentioned to the parties by the mediator. A party that is not entitled to legal aid has to pay a price that is determined by the mediator. At the moment, the average price is 120 British Pounds (ca. 5000 Ukrainian Grivna) per person.¹⁵

It was expected that MIAMs would be very popular among potential litigants, but this is not the case even though a MIAM is compulsory before commencing court action.

8 See the website of 'Resolution' (n 7).

9 The website of the Family Mediation Council can be found at <<https://www.familymediationcouncil.org.uk/>> accessed 30 August 2021.

10 See <<https://resolution.org.uk/find-a-law-professional/>> accessed 30 August 2021.

11 See the website of 'Resolution' (n 7).

12 See for a list of exemptions the website of 'Mediate UK' at <<https://www.mediateuk.co.uk/15-exemptions-to-attending-a-miam/>> accessed 31 August 2021.

13 See the website of 'Resolution' (n 7).

14 The form can be found at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/688194/fm1-eng.pdf> accessed 30 August 2021.

15 See for the costs of mediation <<https://www.familymediationcouncil.org.uk/family-mediation/cost/>> accessed 30 August 2021.

Nevertheless, 6 out of 10 couples just ignore the obligation to have a MIAM and go to court right away. Since its introduction, the number of cases where MIAMs are held has decreased by 60%. One reason is that legal aid for advice in family matters has been abolished in England and Wales (this is due to the Legal Aid, Sentencing and Punishing of Offenders Act or LASPO 2012).¹⁶

The following improvements to the existing situation are suggested by Moore and Brooks in England and Wales:¹⁷

- Litigants should be given access to legal aid for legal advice and representation by a lawyer in the early stages of their family dispute, i.e., at the time when mediation should be considered. Currently, legal aid is not available in these stages (only when there is domestic violence), and therefore there is no one who may inform the parties about MIAMs. Such early legal aid is especially justified since financial aid is available in subsequent mediation.
- Clients should be referred to a MIAM by their lawyers. Lawyers should not encourage clients to exempt themselves from mediation. However, lawyers may have an interest in avoiding mediation since they may want to continue to handle the case, allowing them to charge their clients. It is also problematic that family lawyers have little exposure to non-court dispute resolution and may not be informed about its benefits. Some lawyers may even be of the opinion that the chances of success in mediation are not high and that it mainly causes delay.
- It is also stated that the name MIAM is relatively unknown and that it does not express the idea that the meeting is not only meant to explore mediation but also other forms of ADR. A better name should be chosen.
- The exemptions which allow the parties to avoid a MIAM are felt to be too broad. For example, a MIAM may be avoided based on an attempt to negotiate between the parties or between their solicitors. This should be changed.
- The court is not required to investigate whether the parties have invoked valid reasons to avoid a MIAM. In actual fact, in practice courts often do not investigate this. A solution may be to remove all exemptions to participate in a MIAM unless speed is essential.
- Attendance of both parties at a single MIAM needs to be encouraged: the conversion rate of MIAMs to full mediation increased from 73% to 93% when MIAMs were conducted in the presence of both parties.
- The availability of appropriate mediators should be increased; a lack of timely availability of a suitable mediator is one of the reasons for exemption from attending a MIAM.
- Contact between mediators and clients should be facilitated. This may be effected by allowing MIAMs to take place by way of electronic means. Mediators should also be more flexible by meeting litigants at a location that is easily accessible or convenient. An example is a MIAM in the solicitor's office.
- Although in every stage of the proceedings, the court should consider whether out of court dispute resolution is possible, courts are permitting a wholesale avoidance of MIAMs. Instead, courts should adjourn the proceedings if appropriate, allowing parties to make use of ADR.

16 A Moore, S Brookes, 'MIAMs: A Worthy Idea, Failing in Delivery' (*Family Law Week*, 31 October 2017) <<https://www.familylawweek.co.uk/site.aspx?i=ed182325>> accessed 30 August 2021.

17 Ibid.

- Judges should investigate more strictly whether the parties have claimed a valid exemption from holding a MIAM, and if this is not the case, they should postpone the hearing until a MIAM has been convened.
- Mediators should be present in the court building for holding MIAMs.

3 ITALY

In 2012, the Italian Constitutional Court decided that it would annul the requirement of mandatory mediation in Legislative Decree no. 28/2010. It had found that the Government had gone beyond the scope of the European Mediation Directive and Italian Law 69/2009 allowing the Government to introduce a decree on civil and commercial mediation.¹⁸

In 2013, mandatory mediation attempts were reintroduced, this time based on Decree 69/13 on Urgent Dispositions to Relaunch the Economy (the decree was converted into Law No. 98 of 2013).¹⁹ As the title of this Decree indicates, these attempts were reintroduced for the benefit of the Italian economy by relieving the overburdened Italian courts. Access to justice was and is under threat in Italy.

In Italy, mandatory mediation must be conducted by one of the ADR providers accredited by the Ministry of Justice. Parties must participate in mandatory mediation with the assistance of a lawyer. The lawyer must inform the client in writing about mandatory mediation, as well as about the tax benefits that result from participating in mediation. An omission to do so makes the power of attorney voidable.²⁰

The mandatory mediation session has to be held within 30 days of filing the request for mediation. During this session, the mediator, the parties, and their lawyers must consider whether mediation is feasible.²¹

If the parties decide not to continue with mediation, they may initiate court action. In this case, they do not have to pay the mediator except for the initial fees (currently €40 plus VAT, i.e., ca. 1350 Ukrainian Grivna plus VAT).²²

If the parties decide to continue with mediation, this can be done directly at the initial exploratory mediation session or later. Two different possibilities may be distinguished:

- if a mediated settlement is reached, the mediator drafts a document containing the settlement. That document must be signed by the parties, their lawyers, and the mediator. The document is directly enforceable;
- if no settlement is reached, the mediator makes a non-binding proposal about how the dispute may be solved. The parties are free to accept or refuse this proposal. In

18 E Silvestri, R Jagtenberg, 'Tweeluik – Diptych: Juggling a Red Hot Potato: Italy, the EU, and Mandatory Mediation' (2013) 17 (1) *Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement* 33.

19 E Silvestri, 'Too Much of a Good Thing: Alternative Dispute Resolution in Italy' (2017) 21 (4) *Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement* 77-90.

20 See Art. 4(3) of Legislative Decree No. 28 of 2010 in the text presently in force, after the amendments of 2013. See also Art. 27(3) of the Code of Conduct for Italian Lawyers.

21 See Art. 8(1) of Legislative Decree No. 28 of 2010. See also L d'Urso, 'Italy's "Required Initial Mediation Session": Bridging the Gap between Mandatory and Voluntary Mediation' (2018) 36 (4) *Alternatives to the High Cost of Litigation. The Newsletter of the International Institute for Conflict Prevention & Resolution* 49, 57-58, <<https://www.adrcenterfordevelopment.com/wp-content/uploads/2020/04/Italys-Required-Initial-Mediation-Session-by-Leonardo-DUrso-5.pdf>> accessed 31 August 2021.

22 F Maiorana, 'Mediation in Italy: How does it Differ?' <<https://www.londonschoolofmediation.com/story/2019/02/06/mediation-in-italy-how-does-it-differ-/107/>> accessed 31 August 2021.

case of refusal, mediation is considered to have failed, and court action may be brought. However, if the subsequent judgment of the court is identical to the mediator's proposal, this may affect the liability for judicial expenses. The court will refuse to award all the costs and the expenses to the winning party if that party has previously rejected the mediator's proposal. Instead, the court will order the winning party to pay the costs and court fees of the losing party. Even if the judge's decision is not completely identical to the proposal of the mediator, this may still be done by the court.²³

Mediation is promoted in Italy because the civil courts are overburdened. It is considered beneficial for civil disputes about rights and duties over which the parties can freely dispose. It seems that the current list of cases subject to mandatory exploratory mediation sessions is mainly the result of political bargaining and lobbying. Heavy pressure exerted by lawyers on the members of Parliament (many of whom are lawyers themselves) led, for example, to changes as regards mandatory mediation: civil liability for damage caused by vehicles or ships, which was originally included in the list, was later exempted. Civil liability for medical malpractice, on the contrary, was extended to include all forms of health care malpractice.

Among the disputes in which mandatory mediation attempts are prescribed in Italy are:²⁴

- Landlord and tenant matters;
- Condominium;
- Joint ownership of land;
- Rights in rem (property);
- Partition;
- Hereditary succession;
- Family agreements;
- Loans;
- Lease;
- Damages arising from medical and healthcare liability;
- Defamation through the press or by other means of advertising;
- Insurance;
- Banking contracts;
- Financial contracts;
- Neighbour-disputes;
- Trusts and real estate;
- Family-owned business.

Since 2020, if a defaulting debtor can prove that its behaviour was justified due to compliance with the health and safety rules issued for infection prevention and control (Covid), contract disputes cannot be brought to court unless the parties have previously attempted a settlement agreement through out-of-court mediation.²⁵

If a case is brought before the court without the parties having participated in a mandatory mediation attempt, the judge will suspend the hearing of the case and order the claimant to explore mediation. Failure to comply with this order has the same consequences as those resulting from commencing court action directly while skipping mediation (see below).²⁶

Participation in mandatory mediation attempts or the absence of a party or parties in mandatory mediation will appear from a document signed by the mediator and the parties

23 A Bruni, 'Mediation in Italy' *Lexology*, 9 September 2019 <<https://www.lexology.com/library/detail.aspx?g=d0faf894-e442-46f9-9fee-dfb1f78ddd4a>> accessed 31 August 2021.

24 See Art. 5(1-bis) of Legislative Decree No. 28 of 2010.

25 See E Silvestri, 'Covid-19 and Civil Justice: News from the Italian Front' in B Krans, A Nylund (eds), *Civil Courts Coping with Covid-19* (Eleven International Publishing 2021) 103-11.

26 See Art. 5(1-bis) of Legislative Decree No. 28 of 2010.

that were present at the initial mediation session and their lawyers. If no party attended, no such document can be submitted, and there will not be proof of participation in mandatory mediation attempts.²⁷

Unjustified failure of a party to appear at mandatory mediation will trigger negative inferences in subsequent court proceedings. Additionally, legislation provides that a party who does not make an appearance is obliged to pay the state an amount that equals the amount a party pays when that party would participate in court proceedings.²⁸

In Italy, the use of civil and commercial mediation has increased due to the fact that lawyers have, at least to a certain extent, embraced mediation, also as a result of the successful lobbying for their interests (mentioned above).

The Italian Ministry of Justice regularly publishes statistics regarding civil and commercial mediation. The data for 2020 are as follows:²⁹

A total of 28.7 per cent of mediated cases were successful in that a settlement was reached. When the parties agreed to continue with mediation after the initial exploratory mediation session, a settlement was reached in 46.7 per cent of cases. However, this figure differs per type of case. The percentage of proceedings that ended with a settlement after the parties agreed to continue with mediation is as follows for the topics stated:

- insurance: 67 per cent;
- rights in rem (property): 58 per cent;
- family agreements: 57 per cent;
- lease: 49 per cent;
- partition: 45 per cent;
- condominium: 37 per cent;
- financial contracts: 27 per cent;
- banking contracts: 20 per cent.

The average duration of successful mediation was 175 days.

4 GERMANY

Section 15a of the Introductory Act to the German Civil Procedure Code (*Gesetz betreffend die Einführung der Zivilprozessordnung* or EGZPO) allows the federal states (*Länder*) to experiment with preliminary ADR, including mediation.³⁰ Individual federal states may introduce (and have introduced) legislation on mandatory ADR schemes requiring participation before court proceedings can be started. The individual federal states may themselves decide on the modalities of their mandatory ADR schemes. In this way, different approaches can be tested.

Section 15a EGZPO mentions the following disputes as being suitable for experiments with preliminary ADR: small claims, i.e., claims up to €750 (ca. 25,000 Ukrainian Grivna),

27 See Art. 11(4) of Legislative Decree No. 28 of 2010.

28 See Art. 8(4-bis) of Legislative Decree No. 28 of 2010.

29 Available at <[https://webstat.giustizia.it/Analisi%20e%20ricerche/Civil%20mediation%20in%20Italy%20-%20Year%202020%20\(ENG\).pdf](https://webstat.giustizia.it/Analisi%20e%20ricerche/Civil%20mediation%20in%20Italy%20-%20Year%202020%20(ENG).pdf)> accessed 31 August 2021.

30 § 15a(1) EGZPO: Durch Landesgesetz kann bestimmt werden, dass die Erhebung der Klage erst zulässig ist, nachdem von einer durch die Landesjustizverwaltung eingerichteten oder anerkannten Gütestelle versucht worden ist, die Streitigkeit einvernehmlich beizulegen (...).

disputes between neighbours, defamation that has not occurred through the media, and disputes under the General Equal Treatment Act.³¹

Various German *Länder* have indeed experimented with mandatory preliminary ADR, especially in small claims litigation. Amongst these are Bavaria, Brandenburg, Hessen, Saarland, Schleswig-Holstein, North Rhine-Westphalia, Lower Saxony, Saxony-Anhalt, and Baden-Württemberg. Most experiments have not been successful, and legislation on the topic has been amended or withdrawn. The opposition against the introduction of mandatory preliminary ADR in Germany was considerable, and attempts were made to circumvent the requirement.³²

It has not proved possible to identify relevant statistics on the functioning of mandatory preliminary ADR in Germany.³³

5 AUSTRIA

In 2004, Austria introduced a mandatory attempt at out-of-court settlement as a prerequisite for filing court action in the area of certain neighbourhood disputes. Under Austrian law, a party can obtain injunctive relief in case of deprivation of light or air by trees and other plants situated on its neighbour's property. Before bringing proceedings in court, a neighbour must either (i) refer the matter to a recognised reconciliation centre, (ii) apply for a praetoric settlement agreement, i.e., a settlement by way of judicial conciliation, or (iii) have the matter referred to mediation with the consent of the opponent party. Cases in which this is not done will be dismissed when brought to court. If the parties agree to mediation, such mediation must be conducted by a registered mediator. Three months after attempted settlement, the claim can be brought before the court.³⁴ The claimant must attach to its statement of claim confirmation by the reconciliation board, the court, or the mediator of the fact that no amicable settlement could be reached. It is noteworthy in this context that, according to the Austrian Supreme Court's case law, it is irrelevant whether the defendant became aware of settlement attempts before the action was brought. The claimant only has to show that he or she attempted to reach an amicable settlement and that no agreement could be reached within 3 months.³⁵

A second group of cases where initial mandatory mediation plays a role in Austria concerns the dismissal of apprentices. New rules on the dismissal of apprentices were introduced in 2008. If an employer dismisses an apprentice extraordinarily for reasons other than the ones

31 § 15a(1) EGZPO:

(...) vermögensrechtlichen Streitigkeiten vor dem Amtsgericht über Ansprüche, deren Gegenstand an Geld oder Geldeswert die Summe von 750 Euro nicht übersteigt,

(...) Streitigkeiten über Ansprüche aus dem Nachbarrecht nach den §§ 910, 911, 923 des Bürgerlichen Gesetzbuchs und nach § 906 des Bürgerlichen Gesetzbuchs sowie nach den landesgesetzlichen Vorschriften im Sinne des Artikels 124 des Einführungsgesetzes zum Bürgerlichen Gesetzbuche, sofern es sich nicht um Einwirkungen von einem gewerblichen Betrieb handelt,

(...) Streitigkeiten über Ansprüche wegen Verletzung der persönlichen Ehre, die nicht in Presse oder Rundfunk begangen worden sind,

(...) Streitigkeiten über Ansprüche nach Abschnitt 3 des Allgemeinen Gleichbehandlungsgesetzes.

32 See, e.g., Landtag von Baden-Württemberg, Gesetz zur Aufhebung des Schlichtungsgesetzes <https://www.landtag-bw.de/files/live/sites/LTBW/files/dokumente/WP15/Drucksachen/3000/15_3024_D.pdf> accessed 1 September 2021.

33 Such information is, for example, not included in *Statistisches Bundesamt: Rechtspflege Zivilgerichte (Fachserie 10 Reihe 2.1)*.

34 M Roth, D Gherdane, 'Mediation in Austria: The European Pioneer in Mediation Law and Practice' in KJ Hopt, F Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (OUP 2012) 293.

35 Ris-Justiz RS0122901; OGH 24.02.2015, 10 Ob 58/14y; OGH 11.12.2007, 4 Ob 196/07y.

mentioned in the Austrian Vocational Training Act (*Berufsausbildungsgesetz* or BAG), the employer has to initiate mediation, provided the apprentice does not refuse.³⁶ The new rules seek to balance the interests of the employers to dismiss apprentices and the interest of the public in continued training.³⁷ Mandatory mediation can only be omitted if the apprentice refuses to participate in writing and does not revoke this refusal within 14 days. The employer has to suggest a mediator, using the list of § 8 *Zivilrechts-Mediations-Gesetz* (ZivMediatG). If the apprentice agrees to the person of the mediator, the mediator is deemed to be appointed. Otherwise, the employer has to suggest two further mediators. In accordance with § 15a (6) of the BAG, the mediation process is deemed to have ended when the employer is willing to continue the apprenticeship, or the apprentice declares that he or she will no longer insist on continuation. In addition, the mediation process is deemed to have ended when this is decided by the mediator.

Mandatory mediation also plays a role in Austria in matters concerning child custody and access rights. Section 107 (3) of the *Ausserstreitgesetz* (AusStrG) stipulates that the court must order the measures necessary to safeguard the child's best interests. In accordance with Section 107 (3) (2) AusStrG, such measures may include participation in an initial discussion about mediation (a mediation information session) or another type of ADR. The competent court may order such a mediation information session if it is of the opinion that this is in the child's best interests. An obligation to participate in a subsequent mediation procedure cannot, however, be based on this. The procedure in court can be paused for the time needed for the information session.³⁸ Appropriate documentary evidence of participation has to be submitted to the court. This documentation must confirm that mediation was explained as an alternative means of conflict resolution. Sanctions are available if parties do not participate.

For certain claims related to discrimination under the Austrian Federal Employment of People with Disabilities Act and the Federal Equal Opportunities for Disabled Persons Act,³⁹ an out-of-court settlement attempt, for example, mediation, is mandatory before a claim can be brought in court. Litigation can only be brought if an amicable settlement has not been reached, usually within a period of three months. The claimant should submit a confirmation from the mediator that no amicable agreement could be reached.

Apart from the cases mentioned above, there is no obligation in Austria to attempt mediation or other types of ADR.

It is known from practice that mandatory mediation is not used very often in Austria and that alternative methods of dispute resolution are preferred. Statistics are not available.

6 FRANCE

In France, the Law of 18 November 2016 on the Modernization of Justice for the Twenty-First Century introduces experiments with mandatory mediation and other types of ADR.⁴⁰ Art. 750-1 of the Code of Civil Procedure contains an obligation to attempt mediation or another type of ADR before starting court proceedings for small claims

36 § 15a BAG.

37 M Roth, D Gherdane (n 34) 295.

38 § 107 (4) AusStrG.

39 See § 10 *Bundes-Behindertengleichstellungs-Gesetz* (BGStG) and § 7k *Bundes-Behinderteneinstellungs-Gesetz* (BEinstG).

40 Available at <<https://www.legifrance.gouv.fr/loda/id/JORFTEXT000033418805/>> accessed 5 September 2021.

(i.e., claims of up to 5,000 euros or ca. 170,000 Ukrainian Grivna) or claims concerning neighbourhood disputes.

Claimants who have to pursue mandatory ADR need to take two steps:

Step 1: The parties must choose a specific type of ADR as a prerequisite for introducing proceedings in a court of law. If this is not done, the case will be dismissed when brought before the court.⁴¹ Art. 750-1 is not applicable in the following cases:

- if at least one of the parties is pursuing the court's approval of an earlier agreement;
- if ADR is required by the decision that the claimant wants to contest;
- if there is a legitimate reason not to attempt ADR, for example, in the case of emergency, or where it is impossible to attempt ADR, where a speedy decision is needed, or where judicial conciliators are not available within a reasonable period of time; or
- if a judge or an administrative authority should *ex officio* attempt conciliation when applying a specific legal rule.⁴²

Step 2: When drafting the statement of claim, the claimant must provide the necessary information about attempted mandatory out-of-court settlement. If the claimant does not do so, the statement of claim is null and void.⁴³ However, if the claimant only fails to mention settlement attempts even though these have taken place, the statement of claim may be amended. Given the consequences of not attempting mandatory ADR, a good record of such an attempt should be kept.

Relevant statistics could not be identified.

7 SPAIN

In Spain, Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters resulted in Law 5/2012 of 6 July 2012 on civil and commercial mediation. This legislation and Royal Decree 980/2013 that followed did not, however, introduce mandatory mediation in Spain. There is nevertheless an exception: since November 2020, three kinds of matters are subject to mandatory mediation in Catalonia (so not in the whole of Spain):

- Matters where the parties previously and expressly agreed on submission to mediation;
- Matters related to custody of minors or disabled persons;

41 Art. 750-1: A peine d'irrecevabilité que le juge peut prononcer d'office, la demande en justice doit être précédée, au choix des parties, d'une tentative de conciliation menée par un conciliateur de justice, d'une tentative de médiation ou d'une tentative de procédure participative, lorsqu'elle tend au paiement d'une somme n'excédant pas 5 000 euros ou lorsqu'elle est relative à l'une des actions mentionnées aux articles R. 211-3-4 et R. 211-3-8 du code de l'organisation judiciaire. ...

42 Art. 750-1: ... Les parties sont dispensées de l'obligation mentionnée au premier alinéa dans les cas suivants:

1° Si l'une des parties au moins sollicite l'homologation d'un accord;

2° Lorsque l'exercice d'un recours préalable est imposé auprès de l'auteur de la décision;

3° Si l'absence de recours à l'un des modes de résolution amiable mentionnés au premier alinéa est justifiée par un motif légitime tenant soit à l'urgence manifeste soit aux circonstances de l'espèce rendant impossible une telle tentative ou nécessitant qu'une décision soit rendue non contradictoirement soit à l'indisponibilité de conciliateurs de justice entraînant l'organisation de la première réunion de conciliation dans un délai manifestement excessif au regard de la nature et des enjeux du litige;

4° Si le juge ou l'autorité administrative doit, en application d'une disposition particulière, procéder à une tentative préalable de conciliation.

43 Art. 54 of the French Code of Civil Procedure.

- Matters related to (other) family issues when the judge orders the parties to attempt mediation.⁴⁴

In addition, the Law allows judges in all kinds of civil and commercial matters to encourage parties to attempt mediation whenever this is believed convenient or suitable to the case. The judge may suspend the hearing of the matter for this reason.⁴⁵ As a result, some judges consider such encouragement not only as an invitation but as a (compulsory) order so that the parties are obliged to participate in the mediation attempt. This position is, however, a minority position within the Spanish judiciary. Spanish civil judges generally do not use mediation attempts beyond family matters.⁴⁶

Some special procedures may require the use of specific initial ADR methods different from mediation in order to validly start the respective judicial action.

There have been several attempts to introduce mandatory mediation in Spain at a national level. One attempt failed in 2019. Another attempt started in 2020 and is still ongoing.

The 2019 Project foresaw preliminary mandatory mediation for matters such as family, inheritance, professional negligence, tort, construction defects, shareholder disputes, neighbourhood conflicts, commercial collaborative agreements (supply, distribution, franchise, agency), and some controversies as regards lease. Moreover, claims between individuals up to €2,000 and claims due to the violation of some personality rights (e.g., honour and privacy) were also to be subject to mandatory mediation. The 2019 Project was, however, abandoned.

The ongoing 2020 Project seeks to introduce the concept of 'adequate means of controversy resolution' (*MASC* is the Spanish acronym), which is intended to be a step beyond the 'traditional' ADR concept. This project was announced by the Ministry of Justice in June 2020, and its first text was published back in December 2020. After Public Consultation, the Ministry is now working on a second version. The Project aims at establishing the mandatory use of an ADR method, to be chosen by the parties from a list, in order to validly file a civil or commercial claim. One of the main problems of the Project is a lack of order regarding the classification of the ADR methods. Said methods include mediation, conciliation, direct negotiation, early neutral evaluation, expert determination, or offers of settlement. When parties choose mediation either before or after the dispute arises, at least one mediation session must take place.⁴⁷

The Project establishes the need for documentary evidence of ADR, distinguishing between two different situations:

- If the ADR method implies the intervention of a third person (i.e., a 'neutral'), this neutral should issue a certificate;
- If the chosen ADR method does not involve a 'neutral', documentary evidence can be provided by:

44 J Izaguirre Fernández, 'Hoy entra en vigor en Cataluña la Ley 9/2020, de 31 de julio: nuevas obligaciones en materia de familia y mediación' (*Economist & Jurist*, 4 November 2020) <<https://www.economistjurist.es/noticias-juridicas/hoy-entra-en-vigor-en-cataluna-la-ley-9-2020-de-31-de-julio-nuevas-obligaciones-en-materia-de-familia-y-mediacion/>> accessed 4 September 2021.

45 S Durán Alonso, 'Mediación intrajudicial o por derivación judicial. Novedades introducidas por el Anteproyecto de Ley de Medidas de Eficiencia Procesal' (*Diario La Ley*, 12 July 2021) <<https://diariolaley.laleynext.es/dll/2021/07/26/mediacion-intrajudicial-o-por-derivacion-judicial-novedades-introducidas-por-el-anteproyecto-de-ley-de-medidas-de-eficiencia-procesal>> accessed 4 September 2021.

46 G Murciano Álvarez, 'Una de cal y otra de arena: lo que dicen los Jueces sobre la obligatoriedad de la sesión informativa de mediación' (blog *Sepin*, 25 April 2018) <<https://blog.sepin.es/2018/04/obligatoriedad-sesion-informativa-mediacion/>> accessed 4 September 2021.

47 B Piñar Guzmán, 'Medios adecuados de solución de controversias (MASC)' (*Almacén de Derecho*, 29 December 2020) <<https://almacendederecho.org/medios-adecuados-de-solucion-de-controversias-masc>> accessed 4 September 2021.

- Any document signed by the parties, proving their identity, the date, and the dispute;
- Any document proving that the addressee has received the request to use ADR, indicating its date and content.

Complementary rules suggested within the context of the 2020 Project include:

- The ADR request suspends prescription (statute of limitation) for the entire ADR process or, alternatively, for one month if the addressee does not respond, or the first meeting does not take place;
- If ADR fails, the subsequent court action needs to be filed within three months;
- In the case of further litigation, the judge may consider the parties' attitude towards attempted ADR to decide on the costs of litigation;
- There are three exceptions to the compulsory use of an ADR method:
 - Proceedings initiated for the civil protection of fundamental rights;
 - Measures for the protection of minors;
 - Judicial authorization for forced confinement in the case of psychiatric disorders.

Relevant statistics could not be identified.

8 NORWAY

In Norway, most disputes concerning matters with a monetary or economic value must be brought before a conciliation board as a prerequisite for litigation in the first instance court. The conciliation board may apply different methods of dispute resolution, often mediation or negotiation, although it may also issue formal verdicts in specific cases. The parties themselves decide whether or not to continue with ADR. The applicable rules can be found in the Norwegian Dispute Act (Code of Civil Procedure), Section 6-2.⁴⁸

Furthermore, preliminary mandatory mediation is a feature of family cases for separating couples with children under the age of 16, and where it concerns custody and visitation rights. The relevant statutes for mediation in family matters are the Marriage Law (*Ekteskapsloven*) and the Children Act (*Barnelova*). The aim is a written agreement on custody, residence, and contact, whereas the parents should also be informed of the financial consequences of the agreement.⁴⁹ This type of mediation is often conducted by so-called Family Counselling Offices (*Familievernkontorene*) or by specially accredited mediators. Only one hour of attempted mediation is mandatory,⁵⁰ although an additional three hours may be added when a successful outcome seems likely. The mediator may even decide to add a further three hours, meaning that a total of seven hours for mediation becomes available. It should be remembered, however, that a mediation certificate is issued to the parents after just the first hour. The certificate is valid for six months and allows the parents to instigate court proceedings, apply for separation, and receive benefits for single parents.⁵¹ After the expiry of the 6-month validity of the mediation certificate, parents are again subject to preliminary mandatory mediation when they want to bring court action to address further conflicts.

It seems that in Norway, amicable settlements are often not reached. Most parents decide to terminate mediation after the mandatory first hour.

48 Available in English at <<https://lovdata.no/dokument/NLE/lov/2005-06-17-90>> accessed 8 September 2021.

49 Children Act, Section 52.

50 In 2007, the minimum number of hours for mandatory mediation was reduced from three to one.

51 See Children Act, Sections 51 and 54.

Several law reforms are currently being planned in Norway. In 2019, an expert committee issued its opinion that s.54 of the Children Act should be changed.⁵² It suggested six hours of obligatory mediation for parents who plan to go to court unless such mediation is regarded as unsuitable in the particular case. A later committee supported the suggested reform.⁵³ Furthermore, two expert committees have suggested that the current one hour of mandatory mediation should be changed to one hour of 'mandatory parent's conversation'.⁵⁴

The situation in Norway is different from that in the other Nordic countries. Although Denmark has a system of mandatory pre-trial counselling or mediation, which differs from the Norwegian one, Finland and Sweden only have voluntary mediation.⁵⁵

9 NETHERLANDS

In the Netherlands, no statutory obligation exists for disputants to try mediation; nor are courts allowed to order disputants to try mediation. There are no exceptions to this rule, not for any case category. In a 2006 landmark judgment, the Netherlands Supreme Court laid down that mediation is by its very nature a consensual process, which needs the prior and ongoing consent of all the disputants involved.⁵⁶

There is widespread awareness, though, that in high conflict divorce cases involving minor children, courts should encourage the parents to attempt mediation; experiments are running in several regions with on-the-spot mediation facilities in the court building (*piket-mediation*), but then still, parents are at liberty to turn down the suggestion made by the court.⁵⁷

Furthermore, the Covid-19 crisis has inspired legislation (*Wet Homologatie Onderhands Akkoord* or WHOA)⁵⁸ designated to avert bankruptcies by allowing the joint creditors of a company facing serious liquidity problems to decide by weighted majority to accept a plan on restructuring and repayment of outstanding debts. Provided the plan is reasonable, the court can now endorse such plans, thus overruling those creditors who did not agree. This is not mediation strictly speaking, rather negotiation, but indirectly involving an element of compulsion.

There is a local experiment running in one court with parental plans (*ouderschapsplannen*), which may but do not necessarily involve mediation.⁵⁹ Spouses with minor children who seek to be divorced are statutorily obliged to draw up such a plan detailing, e.g., allocation of care arrangements, costs, choice of education for the children, etc. Children ought to be involved in drawing up such a plan, but the actual involvement of children has not been

52 NOU 2019:20 endringer i de obligatoriske elementene av meklingsordningen.

53 NOU 2020: 14. Ny barnelov – til barnets beste, punkt 14.6.2.

54 NOU 2019: 20 punkt 12.9.1 and NOU 2020: 14 punkt 15.3.2.1.

55 For a comprehensive overview of mediation in Norway, see A Nylund, 'A Dispute Systems Design Perspective on Norwegian Child Custody Mediation' in A Nylund et al (eds), *Nordic Mediation Research* (Springer 2018) 9-26; C Bernt, 'Mediation of Legal Disputes in Norway. Institutionalized, Pragmatic and Increasingly Popular' in C Esplugues, L Marquis (eds), *New Developments in Civil and Commercial Mediation* (Ius Comparatum - Global Studies in Comparative Law 6, Springer 2015) 511-545. Much of the information in this chapter is based on these two publications.

56 HR 20 January 2006, LJN:AU3724.

57 E de Jong, D Brouwer, *Rapport Landelijke Evaluatie Piketmediation* (2018) <https://a-lab.vu.nl/nl/Images/Rapport-Landelijke-evaluatie-piketmediation_tcm205-903519.pdf> accessed 4 September 2021.

58 Available at <<https://zoek.officielebekendmakingen.nl/stb-2020-414.html>> accessed 4 September 2021.

59 Rechtbank Overijssel, zittingplaats Zwolle. See <www.rechtspraak.nl> 'bruggesprek', accessed 6 September 2021.

checked since the introduction of the relevant legislation (2009).⁶⁰ In this experiment, the court requires spouses in a divorce procedure to explain exactly how the children were involved (*bruggesprek*). Since this is merely an experiment, sanctions are unclear.

A recent survey on divorce mediation in the Netherlands revealed that, in 2018 and 2019, courts were substantially involved in deciding controversies in only 5% of all divorces. At the other extreme, 34% of the spouses had made arrangements themselves (with the court merely rubber-stamping the divorce decree). In between these extremes, it is interesting to observe the popularity of mediation in this area; in 41% of all divorces, the spouses had jointly engaged a mediator. In 10% of cases, they were assisted by other professionals (notably each side engaging their own lawyer).⁶¹

10 CONCLUSIONS

- Mandatory mediation should only be prescribed if the relevant prescriptive period (statute of limitations) is halted by the initiation of mediation attempts.
- Mandatory Mediation Information and Assessment Meetings (MIAMs) are a specific feature of litigation in family matters in England and Wales. Such meetings have not been found elsewhere in Europe. However, what can be found elsewhere in Europe are preliminary mandatory mediation attempts. These mediation attempts serve a similar goal to a MIAM: i.e., exploring whether a settlement through mediation is possible and can be attempted.
- Mediation is usually not the only form of ADR that may be explored before bringing a case to the attention of the court. In most jurisdictions, it is better to use the terminology 'preliminary mandatory ADR'. It is often left to the parties what type of ADR will be chosen. Mediation as a form of preliminary mandatory ADR is just one of the possible approaches.
- Mandatory mediation aims at a mandatory attempt to settle cases through mediation. Such mediation may be prescribed before bringing court action according to Art. 6 of the European Convention of Human Rights since it does not prevent access to justice if certain time limits are observed. This is different for mandatory settlement, which is forbidden under Art. 6.
- When mandatory mediation is a prerequisite for court action, proof of attendance of a mandatory mediation attempt is needed. Such proof could be provided by way of a standard form available on the Internet, such as in England & Wales, but other, sometimes less formal methods to demonstrate that mediation has taken place may also be used.
- The parties should be obliged to mention participation in a preliminary mandatory mediation attempt in the statement of case. This may serve as proof that the parties and their lawyers have seriously discussed this option. Courts should address this matter, where possible, directly with the parties themselves and not only with their lawyers. Courts should not accept statements of case where such mention is omitted. Where such mention is omitted, the court should allow the parties to correct their statements. Where mention of preliminary mandatory mediation is omitted since such mediation has not taken place, the court should postpone the hearing for a standard period of time to allow mandatory mediation to take place. If courts do not act in this particular manner, there should be incentives for courts to act accordingly.

60 The relevant legislation is available at <<https://wetten.overheid.nl/BWBR0024844/2009-03-01>> accessed 4 September 2021.

61 S Hooijmans, J Fastenau, 'Hoe zien scheidingen er vandaag de dag uit?' (*Rapport Kantar Research*, 7 August 2020) <<https://www.verenigingfas.nl>> accessed 6 September 2021.

One incentive may be that the caseload of the court is reduced where mediation is successful and, where not successful, cases reach the court better prepared than without preliminary mandatory mediation since parties have focused on the matters that keep them divided (although, of course, mediation is a confidential process and the results of a failed attempt to mediate may not be used in a subsequent court case).

- Theoretically, all civil and commercial cases in which the parties can freely dispose of their rights and duties are suitable for mandatory mediation. In practice, the list of cases subject to mandatory mediation depends on the aims the legislature wants to achieve with its introduction. Where mandatory mediation is introduced in order to reduce the caseload of overburdened courts, the list of cases is long (e.g., Italy). Where mandatory mediation is chosen because of its inherent qualities in addressing non-legal matters as well as legal issues, the list is usually shorter and often limited to family and neighbour matters and small claims.
- Even though mediation is mandatory, disputants are often unaware of this requirement. This may be due to the fact that they lack the relevant legal knowledge. Legal aid should be available for parties in the initial stages of their dispute to be informed about mandatory mediation and its benefits. However, even if legal aid is available, lawyers may not inform parties well enough. In order to make sure that lawyers inform their clients well, it seems that they should have an interest in mediation. Involvement in mediation and the possibility of charging a fee for their services may help lawyers to have a positive attitude towards mediation. In Italy, for example, the attitude of lawyers towards mandatory mediation changed dramatically when it was provided by law that mediation without the assistance of a lawyer is not allowed.
- Mediation needs to take place before a qualified and accredited mediator to increase the chances of success (i.e., a settlement). A sufficient number of accredited mediators should be available. Such mediators should be present in the court building in order to be directly available when mandatory mediation is prescribed.
- Exemptions to mandatory mediation in the particular types of cases in which it is prescribed should be few, and courts should actively test whether such exemptions exist when parties or lawyers claim they do. Courts should not assist litigants in avoiding mandatory mediation and, therefore, they should be convinced of its benefits and possess adequate knowledge on mediation. Courts should suspend the hearing of cases in order to allow mandatory mediation to take place if it appears that the parties have invoked an exemption without sufficient grounds for it.
- Modern technology should make mediation more accessible. Here one could think of mediation through Skype, by way of Zoom, etc.
- Parties who do not participate seriously in mandatory mediation should be sanctioned in subsequent court proceedings, for example, by way of adverse costs orders.

REFERENCES

1. van Rhee, CH, 'Case Management in Europe: A Modern Approach to Civil Litigation' (2018) 8 (1) *International Journal of Procedural Law* 65-84.
2. Moore, A, Brooks, S, 'MIAMs: A Worthy Idea, Failing in Delivery' (*Family Law Week*, 31 October 2017) <<https://www.familylawweek.co.uk/site.aspx?i=ed182325>> accessed 30 August 2021.
3. Silvestri, E, Jagtenberg, R, 'Tweeluik – Diptych: Juggling a Red Hot Potato: Italy, the EU, and Mandatory Mediation' (2013) 17 (1) *Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement* 29-45.

4. Silvestri, E, 'Too Much of a Good Thing: Alternative Dispute Resolution in Italy' (2017) 21 (4) *Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement* 77-90.
5. d'Urso, L, 'Italy's 'Required Initial Mediation Session': Bridging the Gap between Mandatory and Voluntary Mediation' (2018) 36 (4) *Alternatives to the High Cost of Litigation*. The Newsletter of the International Institute for Conflict Prevention & Resolution 49, 57-58 <<https://www.adrcenterfordevelopment.com/wp-content/uploads/2020/04/Italys-Required-Initial-Mediation-Session-by-Leonardo-DUrso-5.pdf>> accessed 31 August 2021.
6. Maiorana, F, 'Mediation in Italy: How does it Differ?' <<https://www.londonschoolofmediation.com/story/2019/02/06/mediation-in-italy-how-does-it-differ-/107/>> accessed 31 August 2021.
7. Bruni, A, 'Mediation in Italy' (Lexology, 9 September 2019) <<https://www.lexology.com/library/detail.aspx?g=d0faf894-e442-46f9-9fee-dfb1f78ddd4a>> accessed 31 August 2021.
8. Silvestri, E, 'Covid-19 and Civil Justice: News from the Italian Front' in B Krans, A Nylund (eds), *Civil Courts Coping with Covid-19* (Eleven International Publishing 2021) 103-11.
9. Roth, M, Gherdane, D, 'Mediation in Austria: The European Pioneer in Mediation Law and Practice' in KJ Hopt, F Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (OUP 2012) 293, 295.
10. Izaguirre Fernández, J, 'Hoy entra en vigor en Cataluña la Ley 9/2020, de 31 de julio: nuevas obligaciones en materia de familia y mediación' (*Economist & Jurist*, 4 November 2020) <<https://www.economistjurist.es/noticias-juridicas/hoy-entra-en-vigor-en-cataluna-la-ley-9-2020-de-31-de-julio-nuevas-obligaciones-en-materia-de-familia-y-mediacion/>> accessed 4 September 2021.
11. Durán Alonso, S, 'Mediación intrajudicial o por derivación judicial. Novedades introducidas por el Anteproyecto de Ley de Medidas de Eficiencia Procesal' (*Diario La Ley*, 12 July 2021) <<https://diariolaley.laleynext.es/dli/2021/07/26/mediacion-intrajudicial-o-por-derivacion-judicial-novedades-introducidas-por-el-anteproyecto-de-ley-de-medidas-de-eficiencia-procesal>> accessed 4 September 2021.
12. Murciano Álvarez, G, 'Una de cal y otra de arena: lo que dicen los Jueces sobre la obligatoriedad de la sesión informativa de mediación' (blog *Sepín*, 25 April 2018) <<https://blog.sepin.es/2018/04/obligatoriedad-sesion-informativa-mediacion/>> accessed 4 September 2021.
13. Piñar Guzmán, B, 'Medios adecuados de solución de controversias (MASC)' (*Almacén de Derecho*, 29 December 2020) <<https://almacenederecho.org/medios-ade cuados-de-solucion-de-controversias-masc>> accessed 4 September 2021.
14. Nylund, A, 'A Dispute Systems Design Perspective on Norwegian Child Custody Mediation' in A Nylund et al (eds), *Nordic Mediation Research* (Springer 2018) 9-26.
15. Bernt, C, 'Mediation of Legal Disputes in Norway. Institutionalized, Pragmatic and Increasingly Popular' in C Esplugues, L Marquis (eds), *New Developments in Civil and Commercial Mediation* (Ius Comparatum - Global Studies in Comparative Law 6, Springer 2015) 511-545.
16. de Jong, E, Brouwer, D, *Rapport Landelijke Evaluatie Piketmediation* (2018) <https://a-lab.vu.nl/nl/Images/Rapport-Landelijke-evaluatie-piketmediation_tcm205-903519.pdf> accessed 4 September 2021.
17. Hooijmans, S, Fastenau, J, 'Hoe zien scheidingen er vandaag de dag uit?' (*Rapport Kantar Research*, 7 August 2020) <<https://www.verenigingfas.nl>> accessed 6 September 2021.