

## **MEDIATING COMMERCIAL DISPUTES: HOT TOPICS AND PRACTICAL TIPS**

**Commission(s) in charge of the Session/Workshop:**

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### **National Report of Liechtenstein**

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## Mediation Procedure

### 1. What is the typical mediation procedure in your country?

Only some months ago the Principality of Liechtenstein underwent quite a strong change with regard to mediation. Until 30 June 2015 it was compulsory to have a mediation proceeding before being allowed to start any civil proceeding. Since 1 July 2015 this obligation that had been introduced already in 1915 does not exist anymore. Any other form of mediation may be found but for sure is not as well known and, thus, not as typical as the former compulsory mediation process.

### 2. Is mediation popular in your country? Why? Why not?

The former compulsory form of mediation was quite popular. It gave people the possibility to discuss their dispute in the presence of a (more or less) impartial mediator. However, in the last couple of years it turned out not to be very efficient anymore. Many people just came to the hearing to collect the confirmation they needed for the court that they had attended the hearing, however, without any intention to solve the dispute at the mediation hearing. This led to the compulsory mediation hearing to be repealed.

Besides this there is also a law on civil mediation providing for the possibility to go in for a *voluntary out of court civil mediation process*. However, there is nothing to be heard that any such proceeding would be very popular.

### 3. How does mediation differ from arbitration/state court proceedings in your country?

The big difference is that the mediator has no power to decide a case. The mediator may only help/lead/support the parties in finding a solution on their own.

### 4. In your country, what are the typical disputes where mediation works? When does mediation not work?

Regarding the former compulsory mediation hearings this was quite helpful for local inhabitants and smaller disputes in the neighborhood. There it often showed to be helpful to have to discuss the dispute in front of a third party that was trying and helping to settle the dispute. However, it normally did not work for bigger disputes where lawyers were involved. This is due to the fact that the lawyers normally already beforehand had exchanged their views leaving no real settlement possibility for the mediator.

### 5. What psychological aspects need to be taken into account in your country like negotiation tactics and cultural aspects?

The former compulsory mediation hearings were held by citizens that had been elected by their fellow citizens of their region to become the official mediator of the region (“Vermittler”). Normally, senior citizens that had proven to be good in

settling disputes were chosen. However, there were no special prerequisites required in the law regarding mediators (“Vermittleramtsgesetz”) to be met by the mediator like a special education or formation of any kind.

This is not the same for the mediators in the *voluntary civil mediation proceedings* that are still in force. In order to have the advantageous effect of suspension of any period to bring in a claim of such a hearing it is to be held by a so called “registered mediator” (“eingetragener Mediator”). In order to become a “registered mediator” a special education regarding mediation has to be completed successfully covering psychological aspects as well as negotiation tactics and communication skills.

**6. Is there a particular style/approach to mediation in your country? Do mediators tend to approach mediations in a neutral/facilitative way (acting as an intermediary between negotiating parties) or do they adopt an evaluative approach (expressing views/opinions as to merits and/or likely outcomes)?**

A mediator is seen to be just a person helping the dispute parties to settle their dispute. Thus, the mediator may work out the intentions of each party hidden behind the respective position in the conflict in order to make it evident to all parties involved. The mediator will also clarify the opinions of the parties involved in order to prevent misunderstandings between the parties. However, it is not part of the mediator’s task/role to express any view about the outcome or adopt an evaluative approach.

## **Mediator**

**7. How is the mediator chosen/appointed in your country? Is there a list?**

As stated above in order to become mediator for the former compulsory mediation hearings one had to be elected among and by the citizens of his/her region. There were no further legal requirements.

In order to become a so called registered mediator for the *voluntary civil mediation proceedings* still in force one has to prove to have successfully completed a special mediation education covering knowledge on mediation, psychology, negotiation and communication. A request to be inscribed into the list of registered mediators has to be addressed to the government together with the respective training certificate. The government then decides about the registration in the list of registered mediators.

**8. Who is an eligible mediator? What hinders a mediator from accepting a mediation?**

For the former compulsory mediation hearings only the specially elected official mediators (or in case of their partiality their representatives) were allowed to hold the hearing. There was no choice regarding the mediator as the regional mediator of the region of the defendant was competent to hear the case.

This is different regarding the *voluntary civil mediation proceedings*: Any mediator registered in the list of registered mediators may be chosen for such a voluntary out of court mediation proceedings with effect of suspension for the period to bring in the claim in the respective dispute. If a person has been party, representative of a party, counsel or decision-maker of a party this person cannot be mediator in the respective case.

**9. Can a lawyer mediate in your jurisdiction? Does he need training to be eligible?**

For the former compulsory mediation hearings also lawyers could be elected to be mediators. However, normally these were senior citizens with quite some social standing and experience in settling disputes and not necessarily lawyers.

Regarding the *voluntary out of court civil mediators* there are even special advantages for lawyers to become such a mediator as they only have to complete a shorter version of the mediator's education. However, they also have to complete a special mediator's education.

**10. Can a Judge/Court be a mediator in your jurisdiction? If so, are there separate mediation sessions or can a mediation also occur within State Court Proceedings?**

Judges always have the obligation to try to settle the disputes brought before court before starting to get into the matter. However, this is not the same like the out of court mediation proceedings. Judges could not be a registered mediator for such a proceeding as this would interfere with their work as judges as they would not be allowed to act as judge in a case they previously worked as mediator.

## **Mediation legislation / Relationship between State Courts and Mediation**

**11. Is there any state law regulation of mediation or mediators in your country? If so, what are the fundamental principles of such law?**

There was a law regarding the compulsory mediator hearings ("Vermittleramtsgesetz"). In this law the rights and obligations of the public mediator ("Vermittler") as well as of the parties involved were set out.

Regarding the still in force *voluntary out of court civil mediation proceedings* there is a law on civil mediation. However, this law does not state anything regarding the content of such a civil mediation proceeding. This law just regulates the conditions on how to become such a registered mediator.

**12. Do the Courts encourage or impose mediation, or impose sanctions for failure to explore mediation, or is it a purely voluntary process?**

The former mediation hearings have been compulsory to start a civil proceeding. The *voluntary civil mediation proceedings* still in force are purely voluntary.

**13. Is an agreement reached during mediation enforceable? Does it need to be confirmed by a Court? What would be the consequences of said confirmation?**

Whereas a settlement agreement in one of the former compulsory mediation hearings has been enforceable without any further confirmation by the court, there is no such possibility in the still in force *voluntary civil mediation proceedings*. If the parties find a solution to settle their dispute in such a proceeding they have to conclude a settlement before court in order for the settlement to become enforceable.

**14. Are the mediation proceedings confidential? Is it possible for a party to submit in court elements revealed during the mediation proceedings? How?**

The mediator of a still in force *voluntary civil mediation proceeding* is bound by the obligation of professional secrecy. However, the parties indeed might use information gathered in such a mediation proceeding before court.

## **Conclusions**

**15. What are the pros and cons of mediation?**

The big advantage of mediation is the fact that any settlement is based on the will of the parties involved. This is the big difference if compared to court or arbitration proceedings. In court or arbitration proceedings the decision is not made by the parties (if it is not a settlement) but by the judges. This can result in both parties involved to be unhappy with the decision.

**16. Is the mediation practice in your jurisdiction influenced by other countries' mediation practices?**

When setting up the law on civil mediation that is still in force, the Austrian law on civil mediation seems to have served as model.

**17. Are costs of mediation perceived to be high/low in your country? Who pays for the mediation?**

There are no special rules regarding the amount of and regarding who pays the *voluntary out of court civil mediation proceeding*. Regularly the costs are divided among all parties involved.

**18. Are there current mediation trends in your country?**

At the moment the only trend is the stated repeal of the compulsory mediation hearings.

**19. Do you use any other forms of Alternative Dispute Resolution ('ADR') in your country? If so, please give a brief description of each of those.**

Besides the court proceedings and mediation proceedings there is the possibility to stipulate disputes to be decided by a court of arbitration based on the Liechtenstein or international rules to that regard.

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