Mediation 2019

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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the seventh edition of *Mediation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria and Spain.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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Austria

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LAW AND POLICY

Definitions

1 | Is there any legal definition in your jurisdiction of the terms 'ADR', 'conciliation' and 'mediation'?

Section 1 of the Austrian Mediation Act gives the following definition of the term 'mediation': 'Mediation is a process in which, based on the parties' voluntariness, a professionally trained neutral (mediator) uses recognised methods to systematically stimulate communication between the parties in order to facilitate the resolution of their dispute in a mutually beneficial manner.' Section 2(1) of the Austrian EU Mediation Act (EU-MeditG) defines 'mediation' as 'a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State'. The term 'ADR' is commonly understood as a catch-all acronym for methods of dispute resolution other than litigation, including both adjudicative and non-adjudicative methods. The term 'conciliation' is commonly used to describe a dispute resolution process that usually shows many of the features of mediation. The important difference is that in conciliation the conciliator may suggest specific settlement solutions. Quite regularly, conciliation occurs in the context of arbitration proceedings where arbitrators may be requested to suggest settlement options to the parties.

Mediation models

2 | What is the history of commercial mediation in your jurisdiction? And which mediation models are practised?

Mediation as a method of dispute resolution was first introduced in Austria as early as 1994/1995 when pilot projects were set up at courts in Vienna and Salzburg. Married couples seeking divorce were invited, on an entirely voluntary basis, to settle both legal and economic aspects of the divorce with the support of a neutral third party. The objective was to conclude a consensual agreement regarding the divorcees' future role as parents, and the wellbeing of their children. Given the success of the pilot projects, mediation proceedings were formally introduced in the context of family law shortly thereafter. The Austrian Mediation Act was passed in 2003, opening up the possibility of resolving disputes by way of mediation in all civil law matters. In terms of practice, Austrian mediators predominantly promote the facilitative and transformative models of mediation. The evaluative model of mediation is rather a feature of hybrid dispute resolution processes (med-arb, arb-med-arb) where mediators are regularly required by the parties to also be qualified lawyers.

Domestic mediation law

3 | Are there any domestic laws specifically governing mediation and its practice?

The Austrian Mediation Act, which regulates the profession of 'listed' mediators (see also question 8) in civil and commercial matters and sets out some procedural benefits in the context of mediation proceedings (eg, 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. More generally, the Austrian Code of Civil Procedure (ZPO) and the Austrian Code of Criminal Procedure (StPO) contain mediation-related provisions too, most notably as regards the right of mediators to refuse to give evidence (see also question 18).

Singapore Convention

4 | Is your state expected to sign and ratify the UN Convention on International Settlement Agreements Resulting from Mediation when it comes into force?

Austria actively participated in the debates for the adoption of the Singapore Convention. If and (if yes) when the Convention will be signed and ratified is not yet decided.

Incentives to mediate

5 | To what extent, and how, is mediation encouraged in your jurisdiction?

Mediation is a voluntary process. 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. The recent rise in commercial mediation cases in Austria can be attributed to the open-mindedness of the Austrian courts as well as Austrian dispute resolution professionals who actively integrate alternative methods of dispute resolution into their service portfolio.

Sanctions for failure to mediate

6 | Are there any sanctions if a party to a dispute proposes mediation and the other ignores the proposal, refuses to mediate or frustrates the mediation process?

No.

Prevalence of mediation

7 | How common is commercial mediation compared with litigation?

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, commercial mediations were commenced by the parties in fewer than 20 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 10. 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).

MEDIATORS

Accreditation

8 | Is there a professional body for mediators, and is it necessary to be accredited to describe oneself as a 'mediator'? What are the key requirements to gain accreditation? Is continuing professional development compulsory, and what requirements are laid down?

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, see question 18);
- 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 has 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 (eg, automatic interruption of prescription periods, protection of confidentiality beyond the scope of the mediation).

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

- submission of a written application;
- minimum age of 28 years;
- qualification as mediator;
- extract from police records or disclosure;
- professional liability insurance (minimum coverage: €400,000); and
- information as to where the mediator will offer his or her services.

Candidates will be considered qualified if they:

- have completed relevant training;
- display knowledge and skills in mediation; and
- 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. 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 10 additional years.

Liability

9 | What immunities or potential liabilities does a mediator have? Is professional liability insurance available or required?

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 (eg, claims for damages) for any conduct that is not in accordance with best practice standards or recognised 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 €400,000.

Mediation agreements

10 | Is it required, or customary, for a written mediation agreement to be entered into by the parties and the mediator? What would be the main terms?

Although there is no express legal requirement, it is indeed customary for the parties to enter into a written mediation agreement with their mediator. The main terms of the written mediation agreement would usually be the mediator's and the parties' mutual rights and obligations, the mediator's fees, administrative aspects of the procedure (in particular, the place of the mediation, its prospective duration, the language to be used) and references to the basic principles governing the mediation process, in particular confidentiality, voluntariness and the without-prejudice nature of the negotiations.

Appointment

11 | How are mediators appointed?

Mediators are usually appointed by the parties in dispute. If mediation is recommended or 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 VIAC, the institution may, upon the parties' request, assist in the process of selecting the neutral by providing lists of suitable candidates.

Conflicts of interest

12 | Must mediators disclose possible conflicts of interest? What would be considered a conflict of interest? What are the consequences of failure to disclose a conflict?

There is no legal (mediation specific) rule that obliges mediators to disclose possible conflicts of interest. However, disclosure is regularly a necessity that flows from the requirement that mediators have to be independent and assist the parties in a neutral manner. Professionals listed on the roster of mediators administered by the Austrian Ministry of Justice must not act as mediator in any dispute in which they are or were involved as a party, a party representative, a third-party adviser or decision maker (section 16 of the Austrian Mediation Act).

Fees

13 | Are mediators' fees regulated, or are they negotiable? What is the usual range of 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. The 'Families and Youth' division of the Austrian Federal Chancellery runs a programme for the promotion of the use of mediation in family disputes (divorce cases). For every mediation conducted (usually by a team of two mediators), the mediators' fees are capped at €220 per hour with further deductibles depending on the joint net income of the parties and the number of children concerned. There is no overall cap on the costs of such government-aided mediation processes.

PROCEDURE

Counsel and witnesses

14 | Are the parties typically represented by lawyers in commercial mediation? Are fact- and expert witnesses commonly used?

It is standard practice that parties in commercial mediation are assisted by lawyers. In cases characterised by a high degree of (technical) complexity, it is also quite typical that the mediator is supported by expert witnesses. Fact witnesses are only rarely seen in commercial mediations.

Procedural rules

15 | Are there rules governing the mediation procedure? If not, what is the typical procedure before and during the hearing?

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 to provide the parties with a great degree of flexibility. They concern, inter alia:

- the mediator's duty to inform the parties about the process and its potential legal consequences;
- the mediator's duty to inform the parties on 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.

In international commercial meditations, it is standard practice that the mediator requests the parties to submit position papers before the actual mediation session. The procedure is entirely in the hands of the mediator, who will, of course, take into account the parties' wishes and needs. Against this background, the mediator will opt for caucus sessions if he or she considers it appropriate and in the interest of a successful outcome.

Tolling effect on limitation periods

16 | Does commencement of mediation interrupt the limitation period for a court or arbitration claim?

Yes, 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 such that it will not continue to run for the duration of the mediation and only resume (where it has left off) once the mediation has ended (section 22 of the Austrian Mediation Act). 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). 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).

Enforceability of mediation clauses

17 | Is a dispute resolution clause providing for mediation enforceable? What is the legal basis for enforceability?

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.

Confidentiality of proceedings

18 | Are mediation proceedings strictly private and confidential?

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 ZPO and the 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 or she is listed on the roster of mediators administered by the Austrian Ministry of Justice:

- Non-listed mediators who otherwise practise 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 practise a profession that does include elements of mediation (eg, 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 practising 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.

Success rate

19 | What is the likelihood of a commercial mediation being successful?

There is no available data as to the success rate of commercial mediation in Austria. However, according to a recent study published by the Centre for Effective Dispute Resolution (CEDR) approximately 70 per cent 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 per cent (CEDR, The Eighth Mediation Audit: A survey of commercial mediator attitudes and experience in the United Kingdom, CEDR, 2018, page 6). The significance of such statistics may be relative considering that cases brought to mediation are usually prone to a settlement solution. The CEDR statistics also appear to be quite reflective of the Austrian experience.

SETTLEMENT AGREEMENTS

Formalities

20 | Must a settlement agreement be in writing to be enforceable? Are there other formalities?

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 on which 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 arbitration, settlements agreed by the parties in mediation are regularly issued (by the separately constituted arbitral tribunal) in the form of an award on agreed terms. 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 settlements

21 | In what circumstances can the mediation settlement agreement be challenged in court? Can the mediator be called to give evidence regarding the mediation or the alleged settlement?

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 that is not directly enforceable and may therefore still be challenged in court. As regards the issue of confidentiality with respect to both the mediation and the mediation settlement agreement, see question 18.

Enforceability of settlements

22 | Are there rules regarding enforcement of mediation settlement agreements? And on what basis is the mediation settlement agreement enforceable?

There are no specific rules governing the enforcement of mediation settlement agreements in Austria. See also question 20.

STAYS IN FAVOUR OF MEDIATION

Duty to stay proceedings

23 | Must courts stay their proceedings in favour of mediation?

Austrian 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, which, inter alia, governs family law disputes, the courts will stay their proceedings ex officio if the parties state their interest in referring the case to mediation.

MISCELLANEOUS

Other distinctive features

24 | Are there any distinctive features of commercial mediation in your jurisdiction not covered above?

In Austria, hybrid procedures are becoming significantly more relevant. They occur predominantly in an institutional context at the interface of mediation and arbitration. As regards the Rules of Arbitration and Mediation of the VIAC, great emphasis was put on ensuring practicability and cost-efficiency in the combined application of different methods of alternative dispute resolution, much in the interest of arb-med or med-arb processes. Furthermore, the drafters very consciously incorporated procedural safeguards designed to ensure the enforceability of settlement agreements generated in mediation proceedings. From a practitioner's point of view, it remains advisable, for the time being, to resort to the method of mediation only during or after the initiation of institutional arbitration proceedings, to the effect that the arbitration is terminated upon the successful conclusion of the mediation or that the outcome of the mediation is taken into account in the resumed arbitration proceedings (arb-med-arb). Within the VIAC context, this means that the first step for parties should be the initiation of arbitral proceedings in accordance with the Vienna Rules. Next, the arbitration is suspended for the purpose of conducting settlement negotiations in a mediation setting. The Vienna Rules do not contain an explicit provision allowing for the suspension of arbitral proceedings for this particular purpose. The approach seems unproblematic though, since the mediation must necessarily be carried by the joint will of the parties and such joint will is also highly relevant to the way in which the arbitral proceedings are designed. The parties are required to notify the VIAC Secretary General of their decision to suspend the arbitration. From an administrative point of view, it will also be sensible to set a concrete time limit for the suspension, always keeping in mind the potential for the extension of the suspension period while the negotiations continue. As a further next step, the mediation is initiated in accordance with the Vienna Mediation Rules. This step does not trigger an additional registration fee. Also, any administrative fees paid for the arbitration will be deducted from the administrative fees payable in the mediation. If the parties succeed in settling their dispute in part or in full during the mediation, the arbitration may, upon the parties' request, be resumed for the purpose of recording the agreement in the form of an arbitral settlement or the rendering of an arbitral award on agreed terms. Also, the 'mere' termination of the proceedings by way of a procedural decision of the arbitral tribunal is a possibility. In the case of a failure of the mediation, the arbitral proceedings may be resumed and conducted as originally foreseen until the rendering of the award on the merits by the tribunal.

UPDATE & TRENDS

Opportunities and challenges

25 | What are the key opportunities, challenges and developments which you anticipate relating to mediation in your jurisdiction?

The Austrian commercial mediation market is notably picking up speed. Professional advice in third-party assisted negotiations is a service that is increasingly sought after by the users of alternative dispute resolution services, especially in cross-border scenarios. One of the key challenges in terms of policy remains that the Austrian mediation legislation does still not provide parties with any incentives – neither positive

nor negative – to refer their cases to mediation. Also, the Austrian state continues to collect a contract levy in the amount of 1 per cent of the settlement volume if the settlement concerns a litigious matter pending in court and 2 per cent of the settlement volume if the latter is not the case (section 33, tariff item 20(1) of the Austrian Fees Act). In terms of anticipated developments, Austria is likely to 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.

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