



Rechtsanwalt & Wirtschaftsmediator

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Alternative Dispute Resolution

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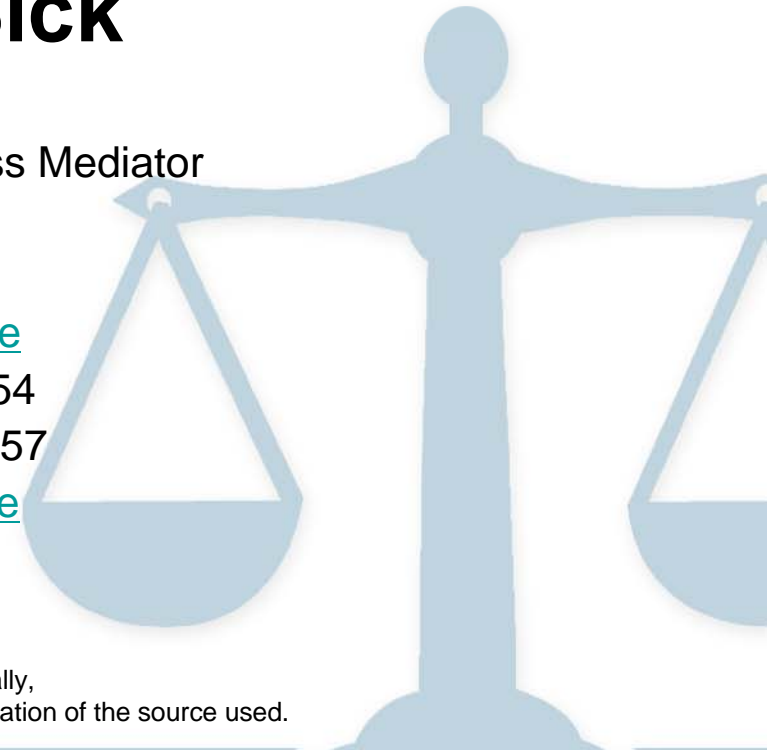
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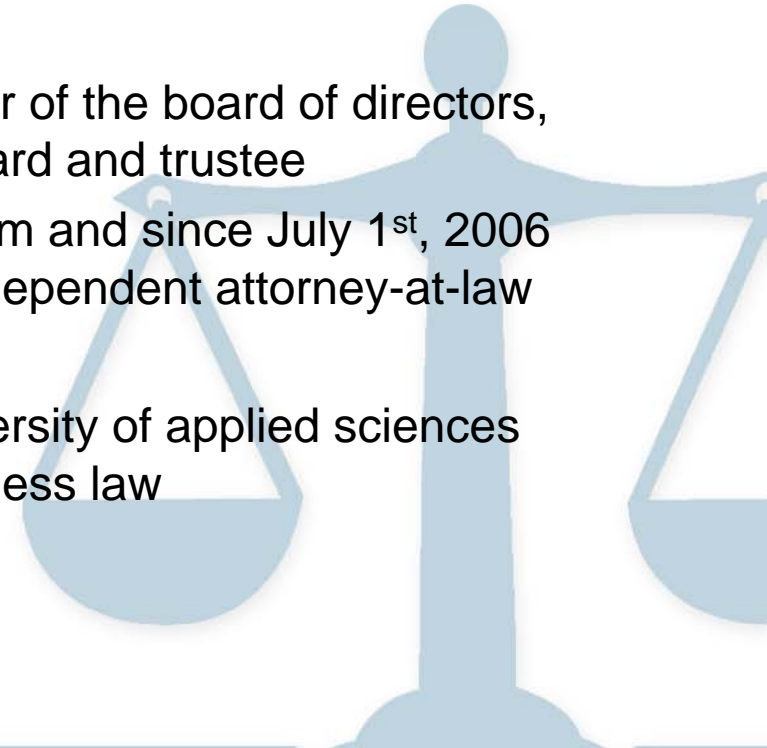
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The Owner of the Law Firm

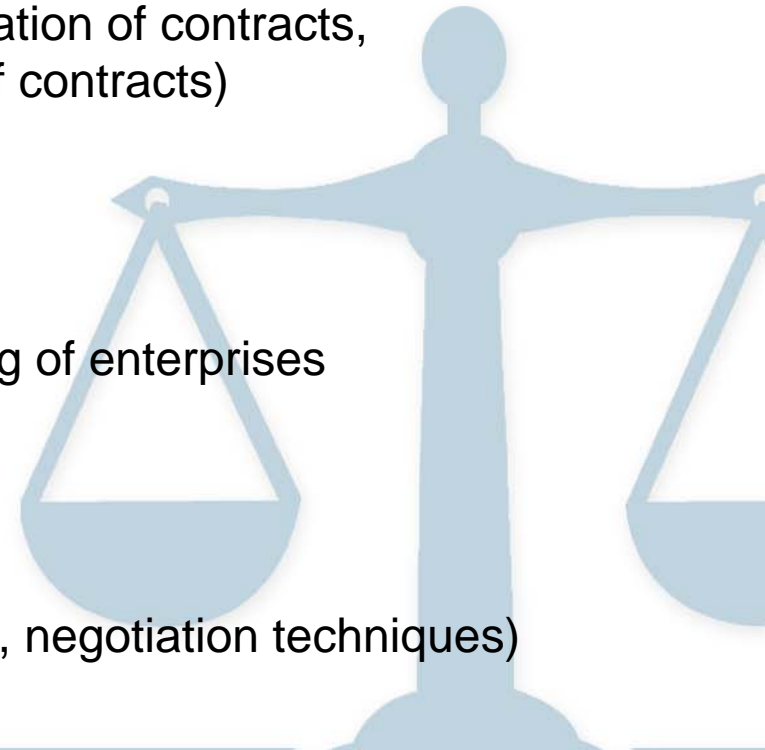
- more than 20 years active in the industry and economy
- thereof 13 years as Vice President Legal Affairs and
- 2 years as President
- numerous positions as member of the board of directors, member of the supervisory board and trustee
- since 1991 owner of the law firm and since July 1st, 2006 main regular occupation as independent attorney-at-law
- business mediator
- assistant professor at the university of applied sciences Gelsenkirchen, faculty of business law





The Law Firm

- business advising mandates
- designing of contracts, legal structuring of projects (drafting, reviewing and negotiation of contracts, support during the execution of contracts)
- commercial law
- corporate law
- M & A
- reorganisation and restructuring of enterprises
- labour law
- arbitration
- business mediation
- training (designing of contracts, negotiation techniques)





Alternative Dispute Resolution in Europe (1)

- Arbitration
- Mediation

as main forms of Alternative Dispute Resolution in Europe for business law matters





Alternative Dispute Resolution in Europe (2)

- currently quite different from country to country
- each country has its own
 - history
 - arbitration rules
 - degree of acceptance regarding mediation
 - experience with arbitration and mediation
 - associations supporting arbitration and mediation
 - legal provisions applicable on arbitration and mediation
- but: increasing influence of the European Union with the purpose of harmonization
- requirement of national transformation allows “the own national way”





ADR, esp. Arbitration in Central Europe (1)

According to my experience concentration on:

- Germany
- Austria
- Switzerland





ADR, esp. Arbitration in Central Europe (2)

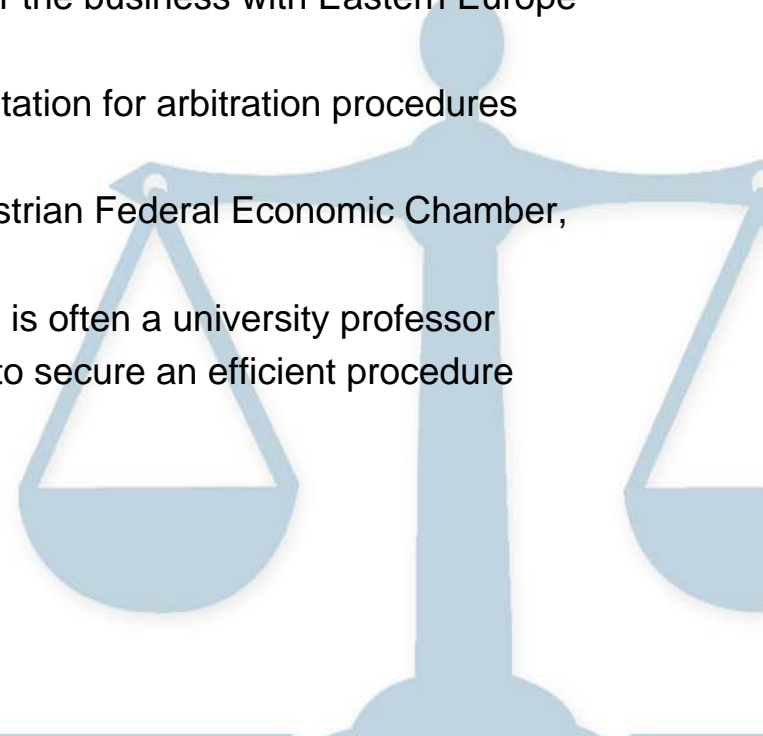
- Germany:
 - traditional alternative way of dealing with conflicts
 - acknowledged by the Code of Civil Law Procedure
 - well reputed association: Deutsche Institution für Schiedsgerichtsbarkeit e.V. (DIS)
–<http://www.dis-arb.de/>
 - with own Arbitration Rules for national contracts (see print-out in the attachment)
 - for international contracts: Rules of Arbitration of the International Chamber of Commerce (ICC) (see print-out in the attachment)
–<http://www.iccwbo.org/court/arbitration/id4199/index.html>





ADR, esp. Arbitration in Central Europe (3)

- Austria:
 - long tradition in arbitration
 - historically main focus in arbitration for the business with Eastern Europe and Asia
 - but meanwhile as well very good reputation for arbitration procedures with other parts of the world
 - International Arbitral Centre of the Austrian Federal Economic Chamber, Vienna
 - chairman of national arbitration courts is often a university professor
 - careful selection necessary in order to secure an efficient procedure (see example)





ADR, esp. Arbitration in Central Europe (4)

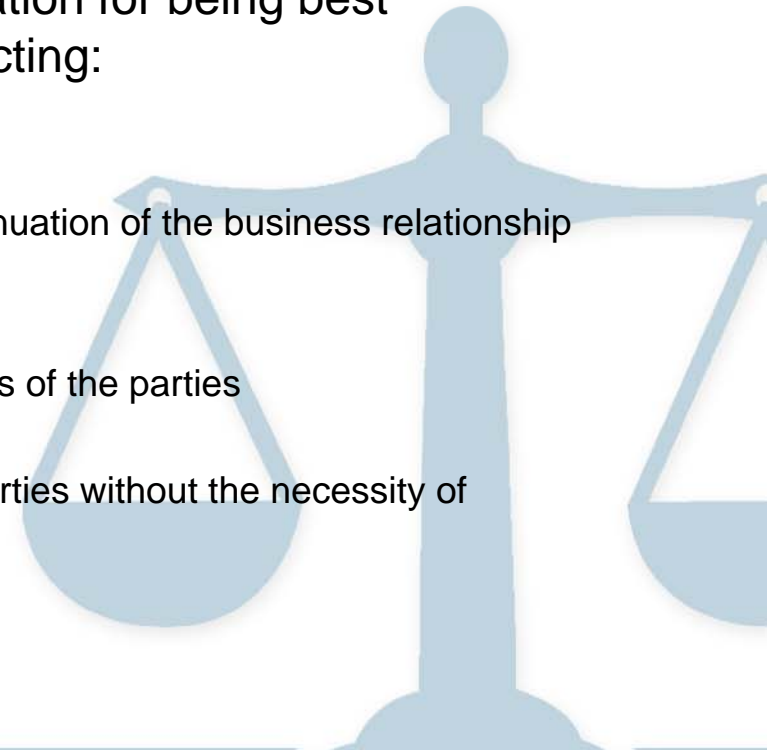
- Switzerland:
 - good reputation for international arbitration (often according to the Arbitration Rules of the ICC)
 - Swiss law as “neutral law” usually combined with place of arbitration in Switzerland
 - careful selection of the place of arbitration necessary
 - due to different languages of supporting laws (German, French, Italian in the various cantons)





Mediation as best practice in international contracting

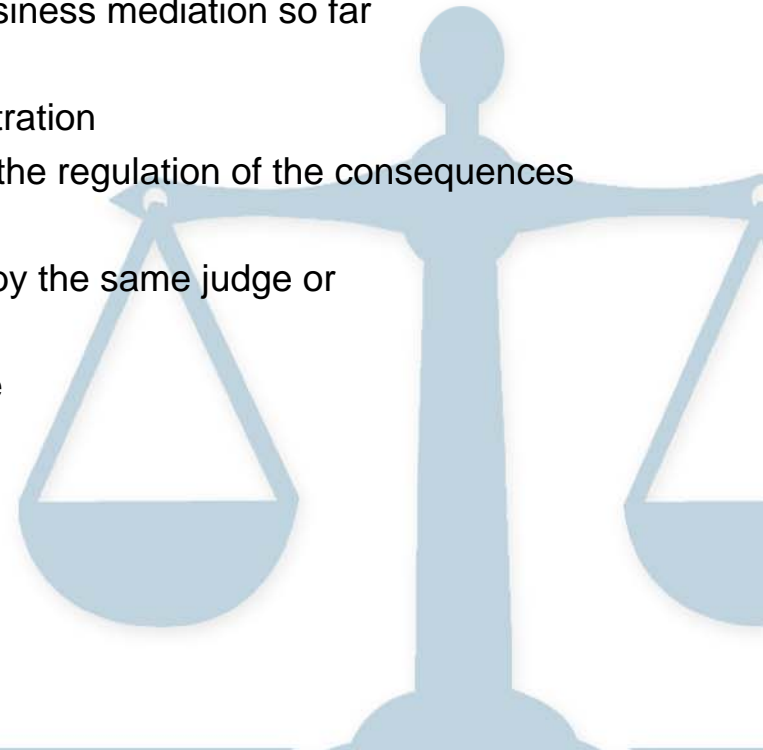
- important advantages of mediation for being best practice in international contracting:
 - time
 - cost
 - orientation to the future and the continuation of the business relationship
 - no formal procedure
 - no public admitted
 - consideration of the business interests of the parties
 - win-win solution
 - solution is usually executed by the parties without the necessity of enforcement





ADR, esp. Mediation in Central Europe (1)

- Germany:
 - known since around 1990 - 1995
 - limited number of cases solved by business mediation so far
 - in industry not yet so known
 - legal advisors tend to litigation or arbitration
 - well known in the field of divorce and the regulation of the consequences of a divorce
 - mediation within the court procedure by the same judge or
 - by an appointed judge
 - mediation outside the court procedure
 - currently not ruled by law
 - legislative initiative is outstanding





ADR, esp. Mediation in Central Europe (2)

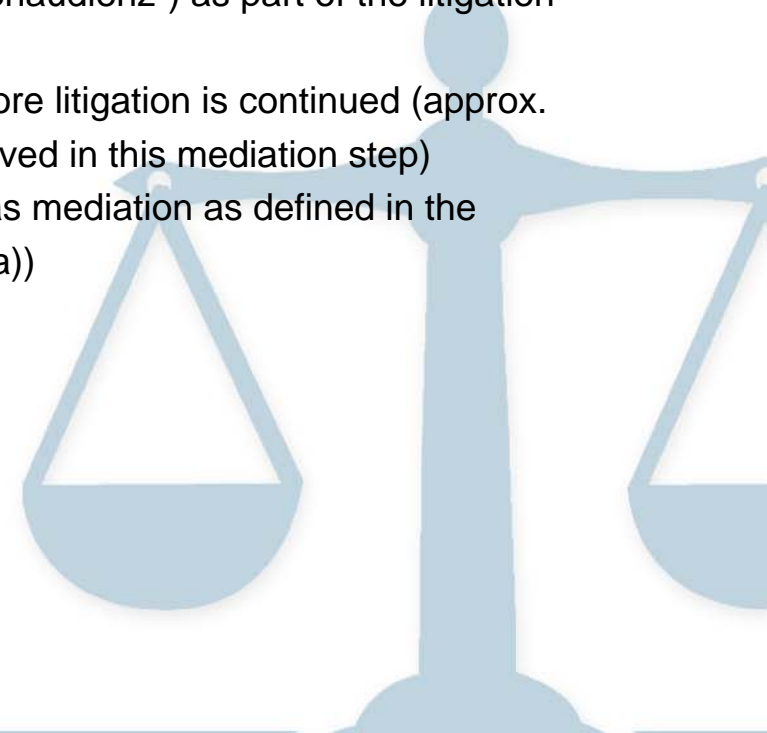
- Austria:
 - specific legal basis (“Zivilrechtsmediationsgesetz”)
 - specific registration requirement for mediators (to secure quality of mediation)
 - scope, content and duration of the professional education of mediators is ruled by the law in detail
 - number of cases is growing





ADR, esp. Mediation in Central Europe (3)

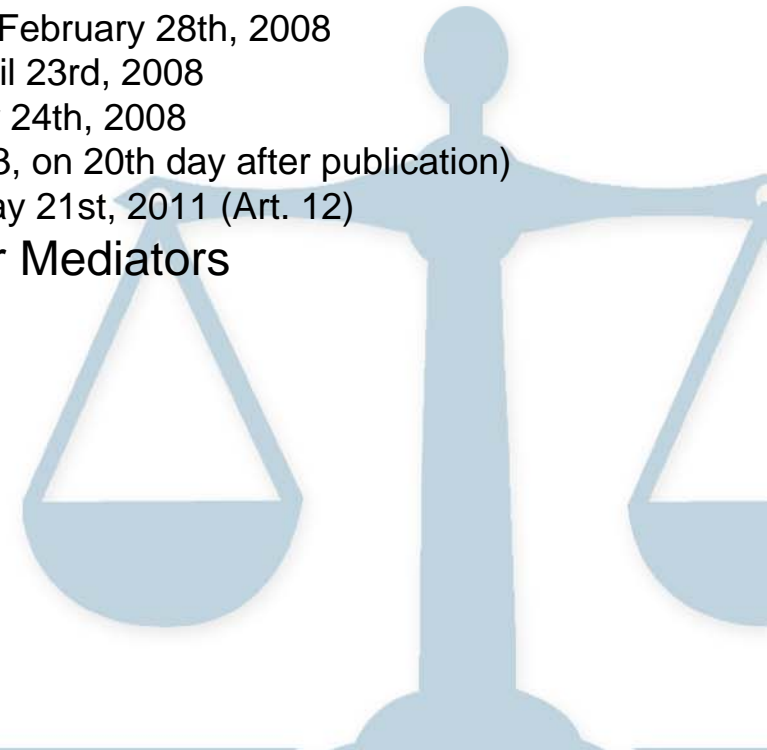
- Switzerland:
 - mediation well known and supported by several organisations
 - mediation applied in court (“Referentenaudienz”) as part of the litigation procedure
 - so mediation is a mandatory step before litigation is continued (approx. 97% of the cases are successfully solved in this mediation step)
 - but this procedure is not considered as mediation as defined in the Directive (see the definition in Art. 3 (a))





The European Initiative for Mediation

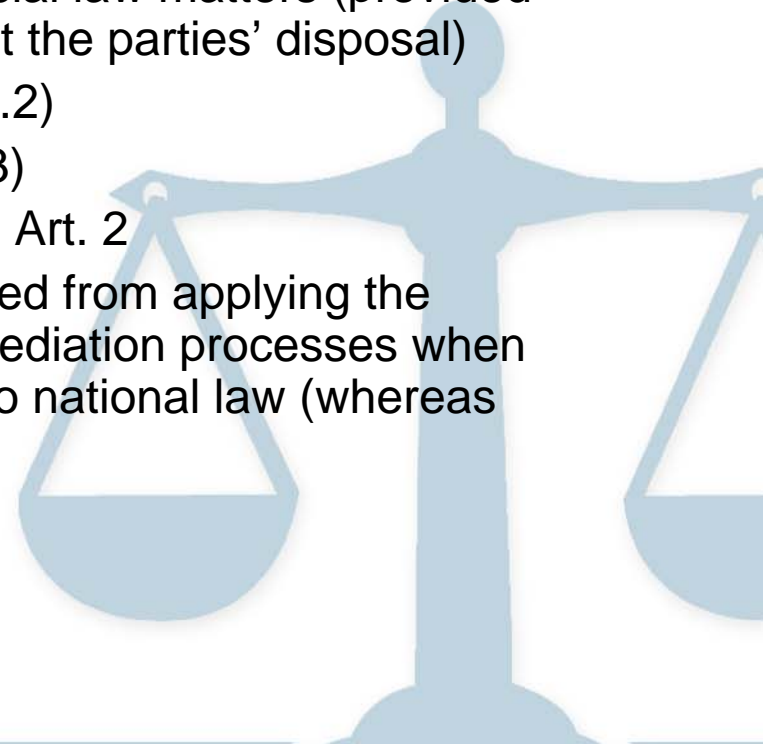
- **EU Directive for Mediation in Civil and Commercial Matters**
 - see print-out in the attachment
 - adopted by the European Council on February 28th, 2008
 - adopted by the EU Parliament on April 23rd, 2008
 - dated May 21st, 2008, published May 24th, 2008
 - in force since June 13th, 2008 (Art. 13, on 20th day after publication)
 - to be adopted as national law until May 21st, 2011 (Art. 12)
- **European Code of Conduct for Mediators**
 - see print-out in the attachment





EU Directive for Mediation in Civil and Commercial Matters (1)

- applicable to civil and commercial law matters (provided the rights and obligations are at the parties' disposal)
- in cross-border disputes (Art. 1.2)
- exception for Denmark (Art. 1.3)
- cross-border dispute defined in Art. 2
- member states are not prevented from applying the provisions as well to internal mediation processes when the Directive is transformed into national law (whereas clause no. 8)

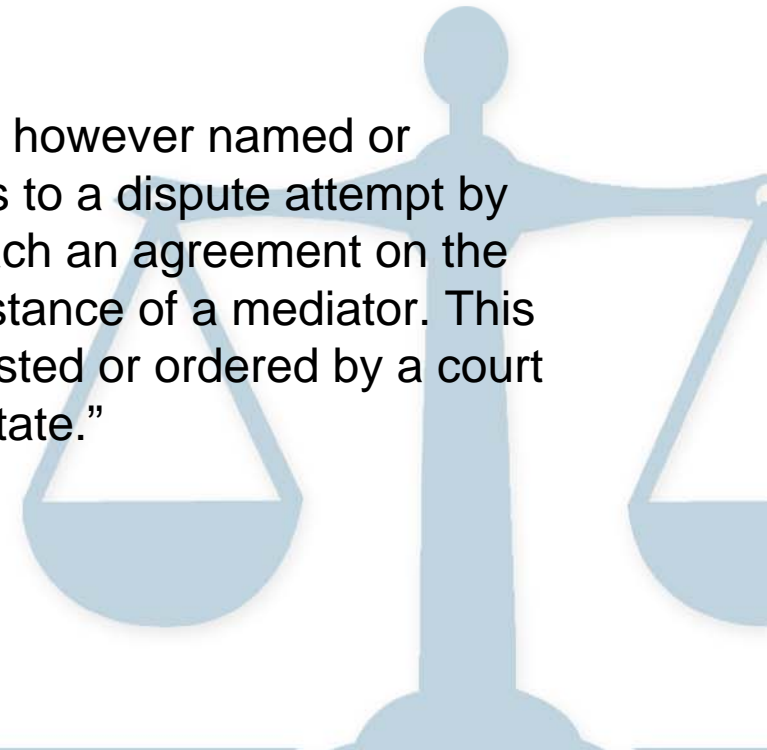




EU Directive for Mediation in Civil and Commercial Matters (2)

- mediation defined in Art 3 (a):

“Mediation means 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 may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.”



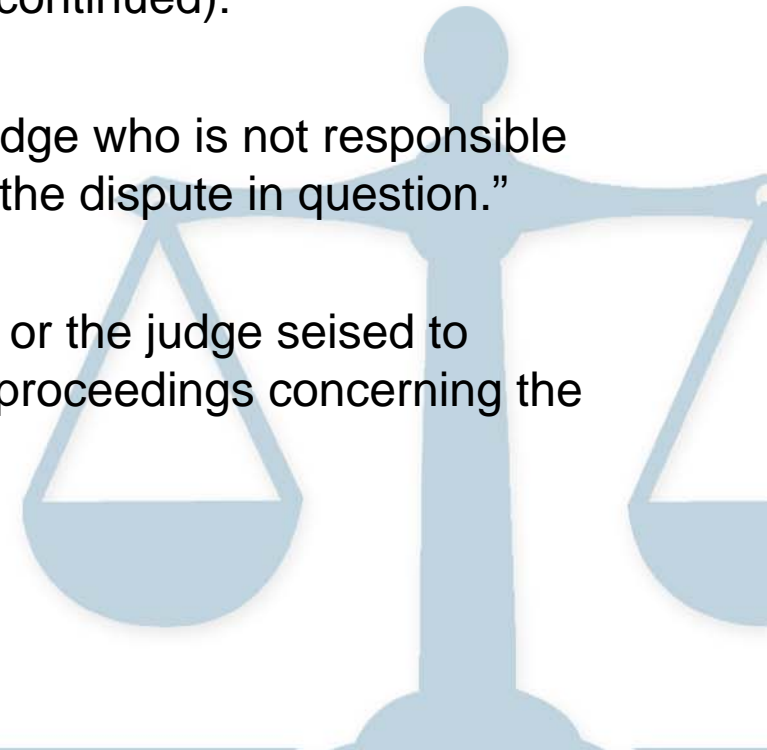


EU Directive for Mediation in Civil and Commercial Matters (3)

- mediation defined in Art 3 (a) (continued):

“It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question.”

“It excludes attempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question.”

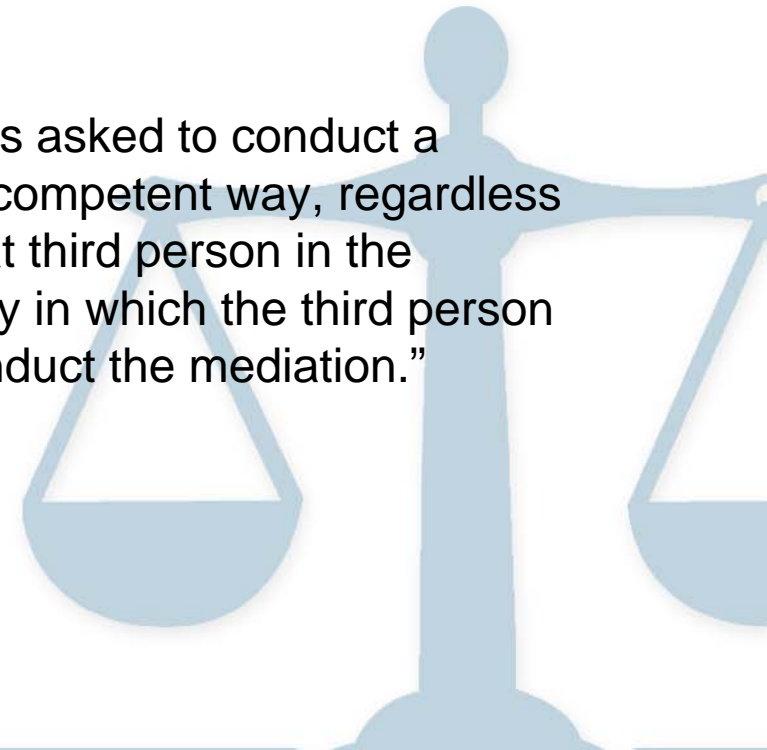




EU Directive for Mediation in Civil and Commercial Matters (4)

- mediator defined in Art. 3 (b):

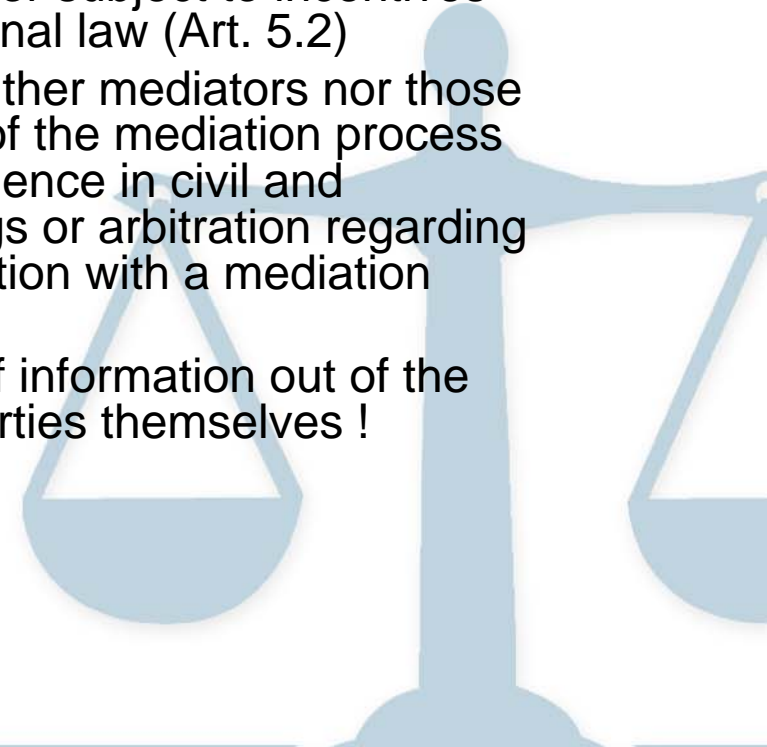
“Mediator means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.”





EU Directive for Mediation in Civil and Commercial Matters (5)

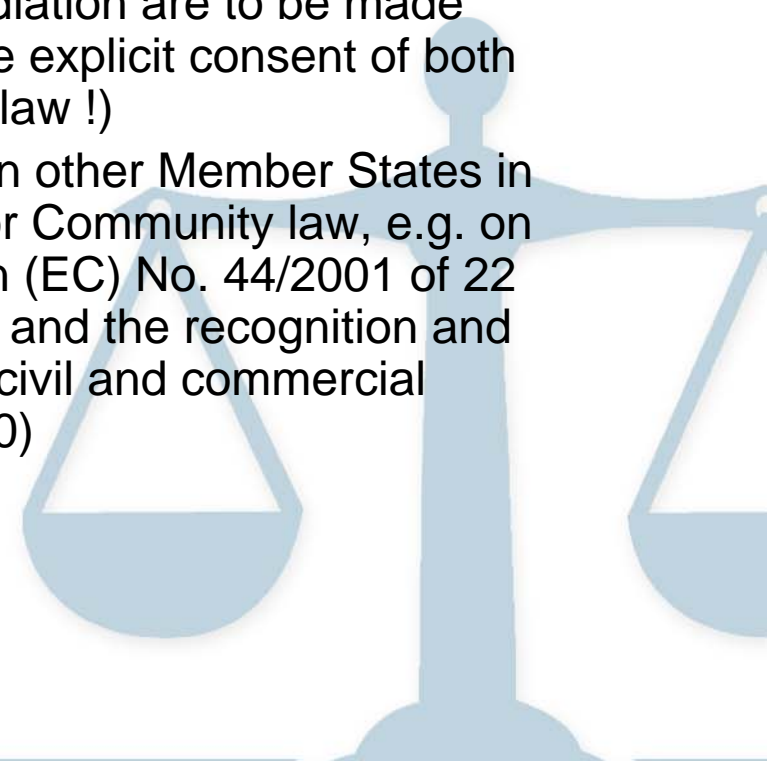
- mediation may be compulsory or subject to incentives or sanctions according to national law (Art. 5.2)
- confidentiality of mediation: neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information out of or in connection with a mediation process (Art. 7)
- but not covered: introduction of information out of the mediation procedure by the parties themselves !





EU Directive for Mediation in Civil and Commercial Matters (6)

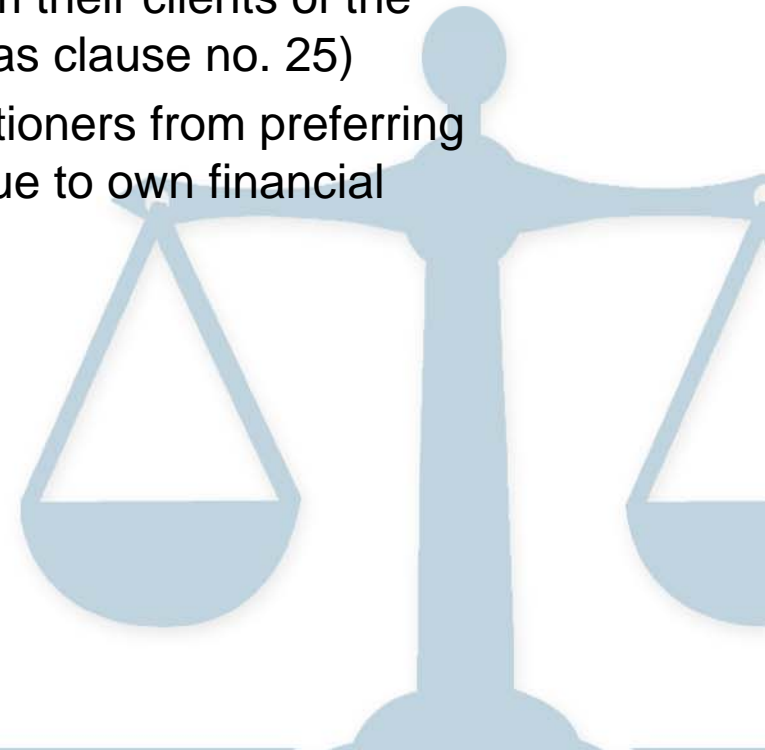
- agreements resulting from mediation are to be made enforceable (Art. 6, but with the explicit consent of both parties and subject to national law !)
- recognition and enforceability in other Member States in accordance with national law or Community law, e.g. on the basis of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (whereas clause no. 20)





EU Directive for Mediation in Civil and Commercial Matters (7)

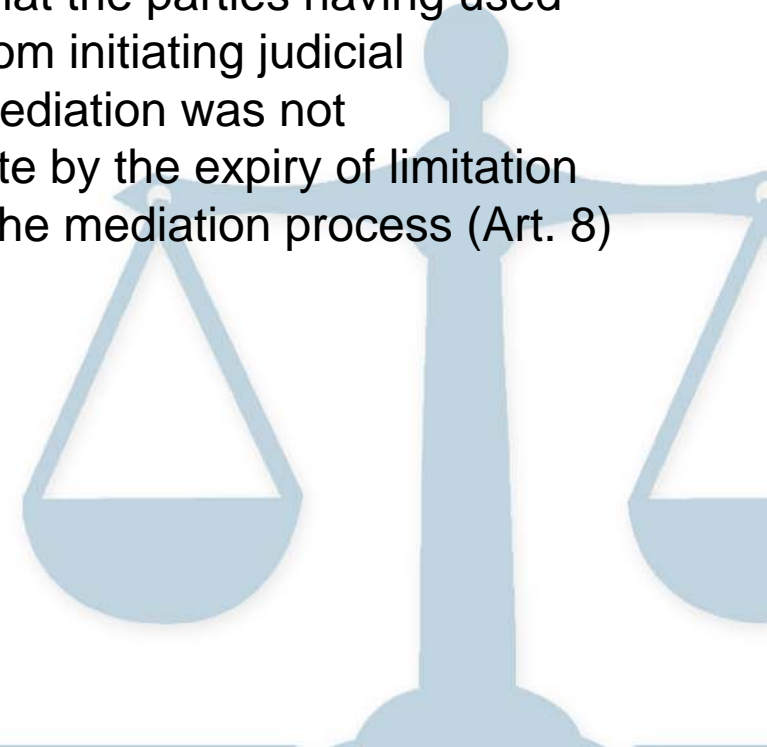
- legal practitioners should inform their clients of the possibility of mediation (whereas clause no. 25)
- this should prevent legal practitioners from preferring contradictory litigation (often due to own financial interests!)





EU Directive for Mediation in Civil and Commercial Matters (8)

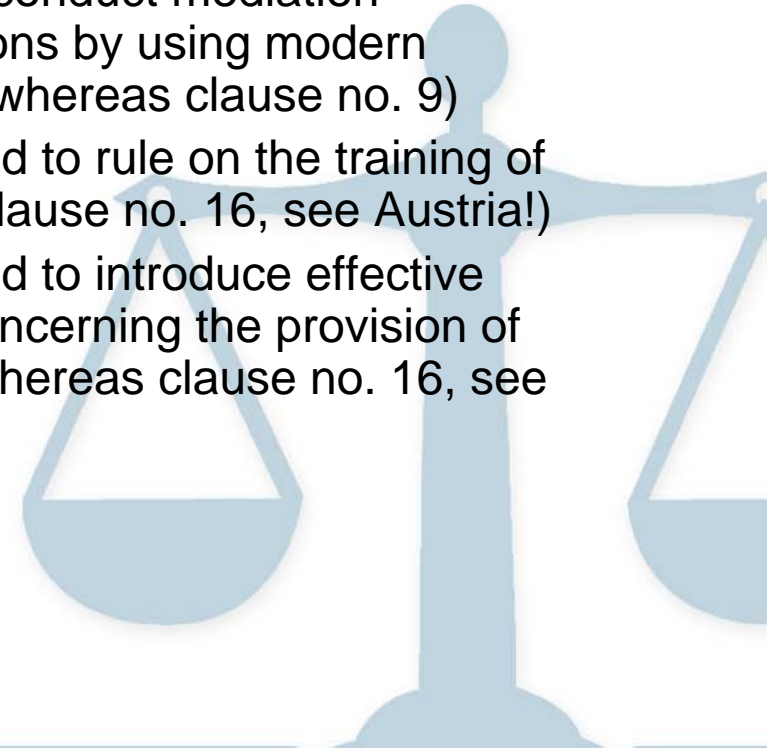
- Member States shall ensure, that the parties having used mediation are not prevented from initiating judicial proceedings or arbitration (if mediation was not successful) for the same dispute by the expiry of limitation or prescription periods during the mediation process (Art. 8)





EU Directive for Mediation in Civil and Commercial Matters (9)

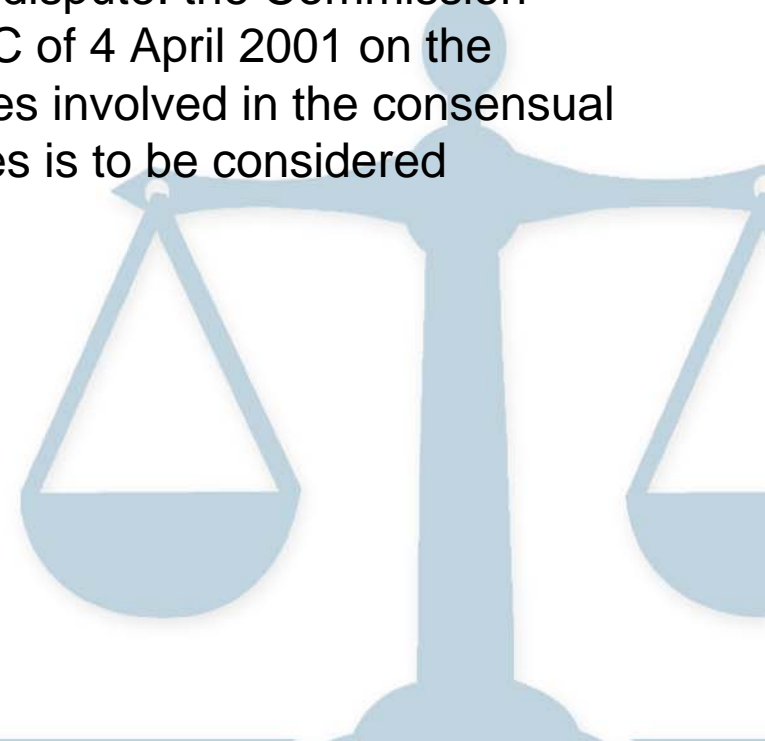
- Directive even encourages to conduct mediation proceedings at different locations by using modern communication technologies (whereas clause no. 9)
- Member States are encouraged to rule on the training of mediators (Art. 4.2, whereas clause no. 16, see Austria!)
- Member States are encouraged to introduce effective quality control mechanisms concerning the provision of mediation services (Art. 4.1, whereas clause no. 16, see Austria!)





EU Directive for Mediation in Civil and Commercial Matters (10)

- if consumers are involved in a dispute: the Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes is to be considered (whereas clause no. 18)





European Code of Conduct for Mediators (1)

General remarks:

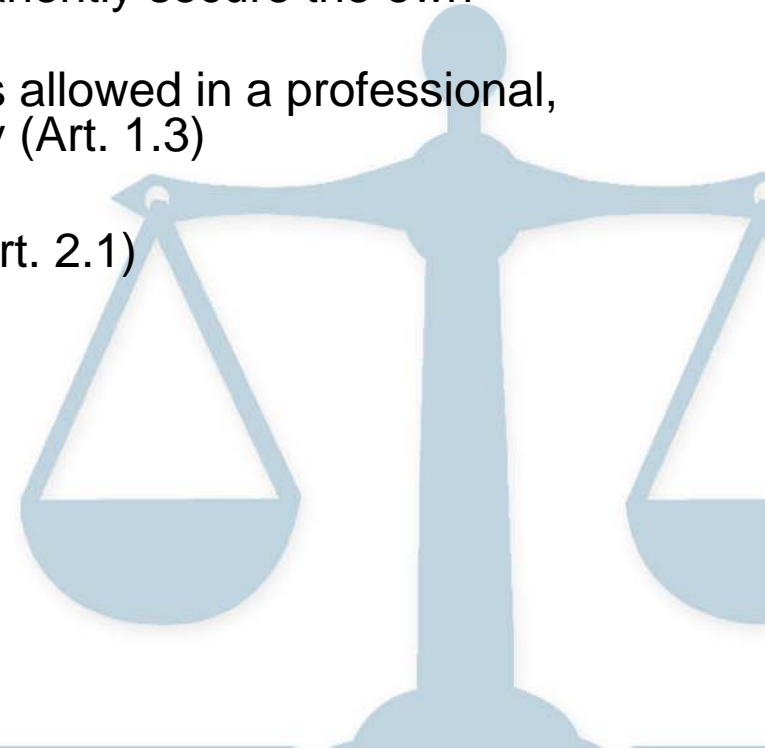
- voluntary commitment by individual mediators
- adherence to the code is without prejudice to national legislation or rules regulating individual professions
- organisations may develop more detailed codes adapted to their specific needs





European Code of Conduct for Mediators (2)

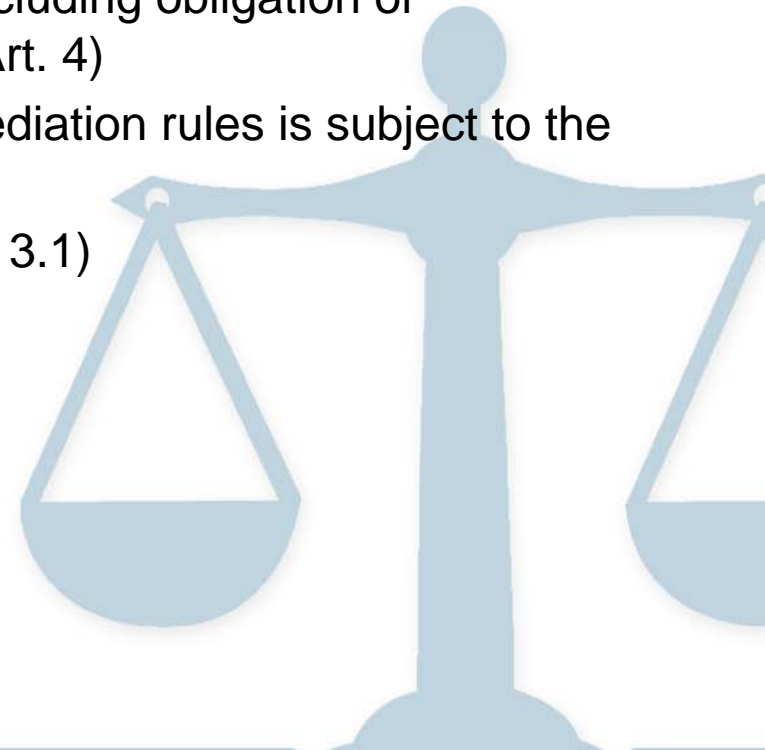
- mediators need to permanently secure the own competence (Art. 1.1)
- advertising / promotion is allowed in a professional, truthful and dignified way (Art. 1.3)
- independence (Art. 2.1)
- no conflict of interests (Art. 2.1)
- neutrality (Art. 2.1)
- impartiality (Art. 2.1, 2.2)
- fairness (Art. 3.2)





European Code of Conduct for Mediators (3)

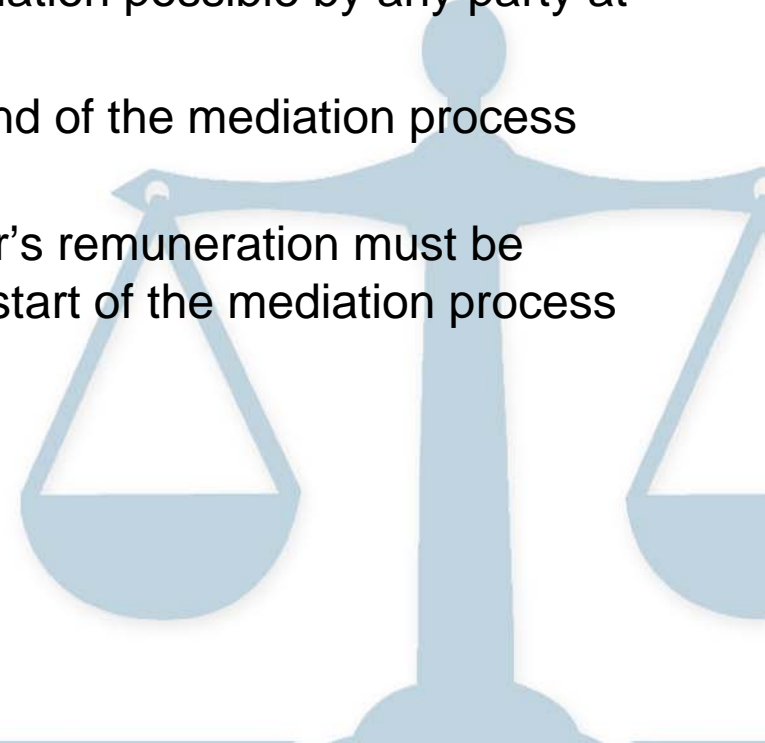
- mediation agreement (including obligation of confidentiality, Art. 3.1, Art. 4)
- agreement of a set of mediation rules is subject to the parties (Art. 3.1)
- “Caucus” is allowed (Art. 3.1)





European Code of Conduct for Mediators (4)

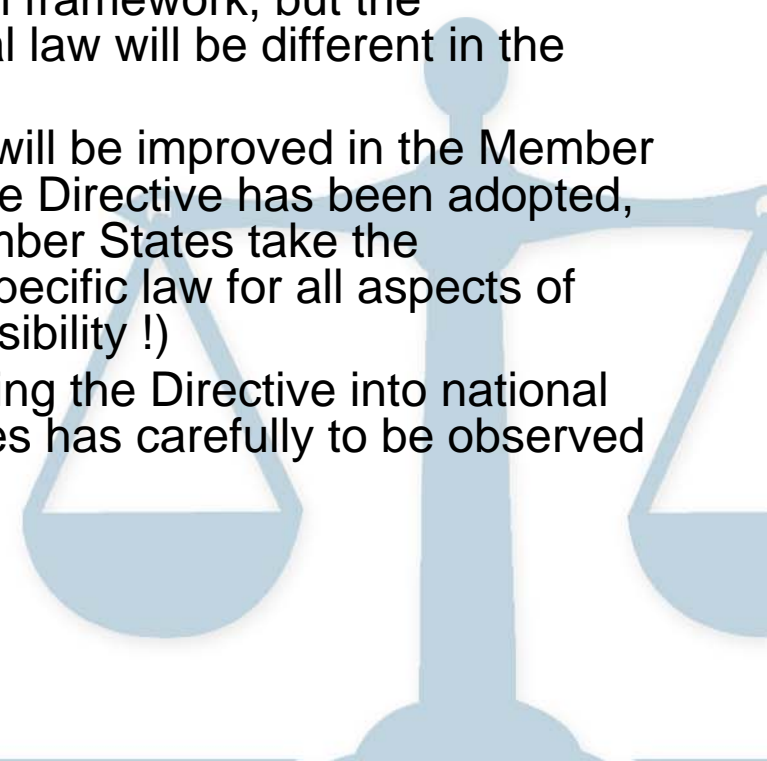
- withdrawal from the mediation possible by any party at any time (Art. 3.3)
- final agreement as the end of the mediation process (Art. 3.3)
- principles of the mediator's remuneration must be agreed upon before the start of the mediation process (Art. 3.4)





Consequences of the European Initiative for Mediation (1)

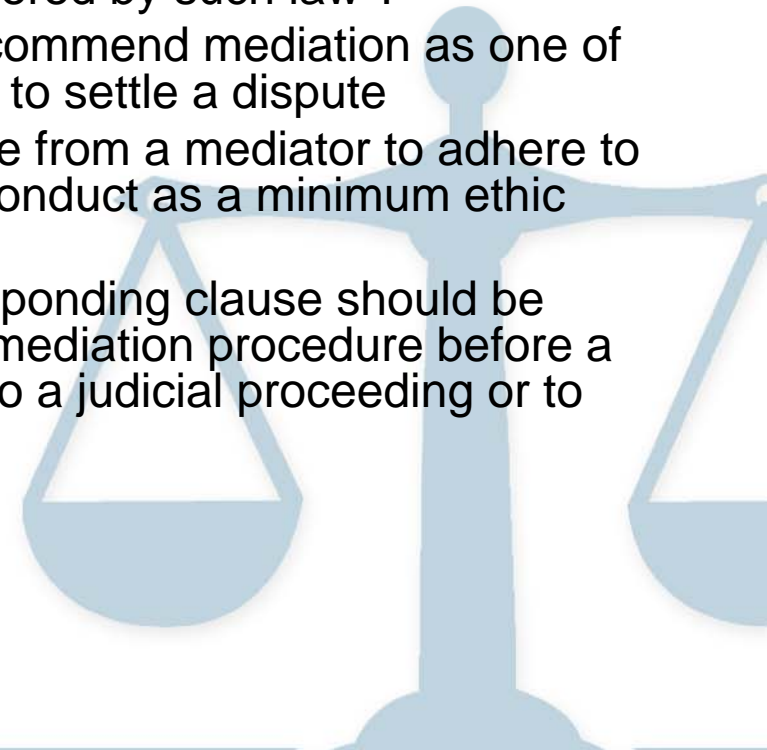
- Directive provides a legal framework, but the transformation in national law will be different in the various Member States
- legal basis of mediation will be improved in the Member States of the EU once the Directive has been adopted, especially when the Member States take the opportunity to create a specific law for all aspects of mediation (increase of visibility !)
- the process of transforming the Directive into national law by the Member States has carefully to be observed





Consequences of the European Initiative for Mediation (2)

- are national conflicts covered by such law ?
- legal advisors should recommend mediation as one of the standard procedures to settle a dispute
- parties are able to require from a mediator to adhere to the European Code of Conduct as a minimum ethic code
- in each contract a corresponding clause should be included providing for a mediation procedure before a dispute can be referred to a judicial proceeding or to arbitration

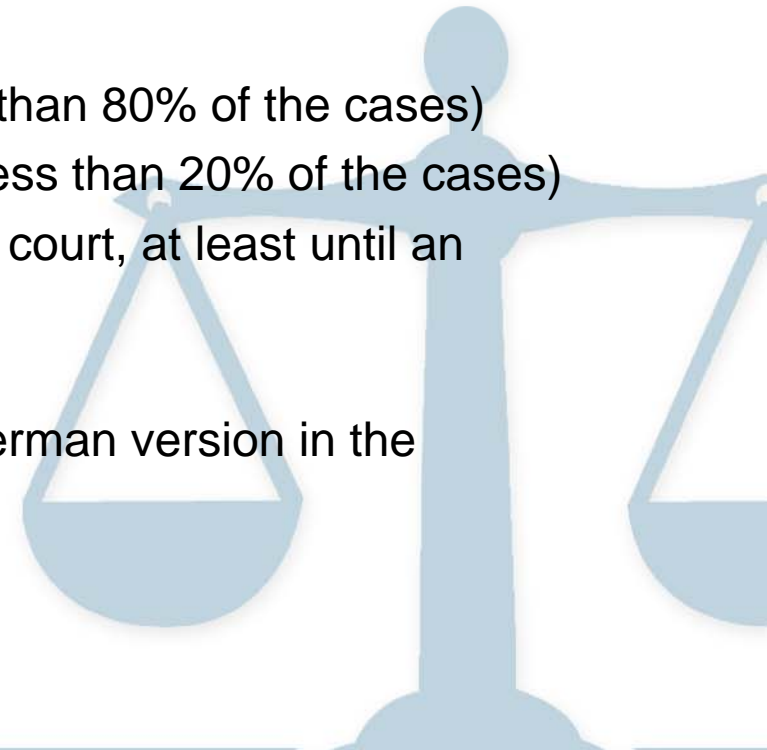




Alternative Dispute Resolution (1)

Clause for the settlement of disputes in 4 steps:

- commercial negotiation
- mediation (successful in more than 80% of the cases)
- arbitration (necessary only in less than 20% of the cases)
- preliminary injunction (by state court, at least until an arbitration court is established)
- see print-out of English and German version in the attachment





Alternative Dispute Resolution (2)

Settlement of Disputes

(1) In case of any disputes arising out of or in connection with this Agreement, including, but not limited to, a dispute about the validity of this Agreement or the application of the Severability Clause in § XX of this Agreement below, the Contract Partners shall endeavour in the first step to find an amicable solution through commercial negotiations as between partners by referring the dispute to the Managing Directors of both Contract Partners.

(2) Should the Contract Partners not have started the negotiations within thirty (30) days after the corresponding written request by one Contract Partner or should the Contract Partners not have found an amicable solution within sixty (60) days after the negotiations had been started, the Contract Partners shall conduct a mediation procedure, except the Contract Partners unanimously agree upon in writing other time limits prior to the expiry of the aforementioned time limits. The details of the mediation procedure shall unanimously be agreed upon by the Contract Partners and the mediator.



Alternative Dispute Resolution (3)

(3) Should the Contract Partners not agree upon a mediator within thirty (30) days after the failure of the commercial negotiations in accordance with § XX of this Agreement or should the failure of the mediation procedure be declared by one of the Contract Partners or by the mediator, the dispute shall be ruled finally and binding without recourse to the ordinary courts in an arbitration procedure in accordance with the provisions of the Arbitration Rules of the International Chamber of Commerce, Paris. The arbitration court shall consist of three arbitrators except the Contract Partners mutually agree upon otherwise in writing prior to the constitution of the arbitration court, and these arbitrators shall be nominated in accordance with the provisions of the aforementioned Arbitration Rules. The Chairman of the arbitration court shall have the qualification to become a judge and sufficient professional practical experience in commercial law. The remuneration of the arbitrators shall be agreed upon in writing between the Contract Partners and the arbitrators prior to the start of the arbitration procedure, if applicable. The award of the arbitration court shall contain a decision on the allocation of the cost of the arbitration procedure. The arbitration procedure shall take place at XX, XX. In the arbitration procedure the English language shall be used.



Alternative Dispute Resolution (4)

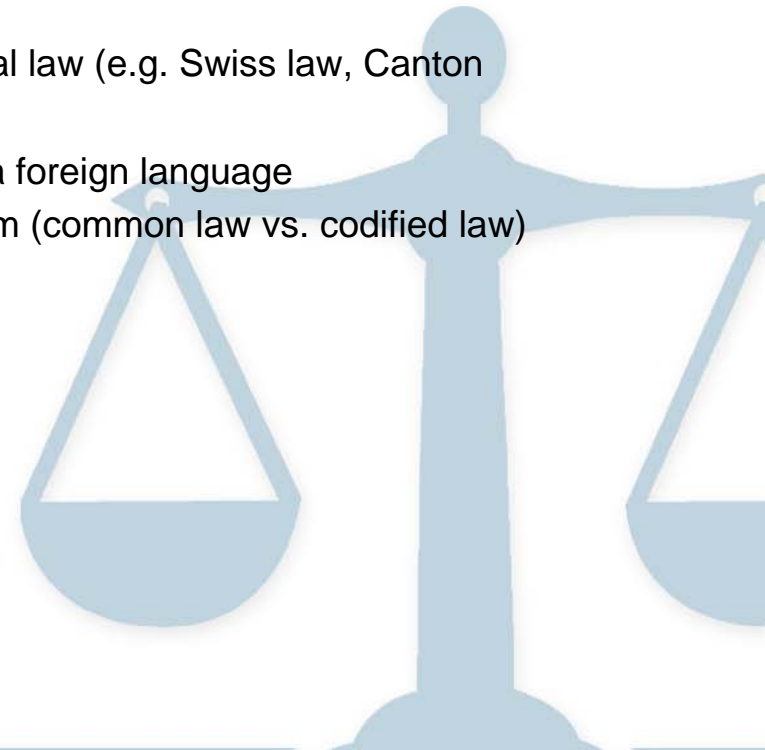
(4) During the commercial negotiations, the mediation procedure and up to the final establishment of an arbitration court being able to decide, the aforementioned provisions shall not exclude the right of any Contract Partner to initiate a legal procedure in order to achieve preliminary legal protection at the ordinary courts in any jurisdiction.





Jurisdiction to be Recommended for ADR

- My advice to my clients:
 - take a jurisdiction to which you are familiar with (mostly the jurisdiction of the own country)
 - international contracts: select a neutral law (e.g. Swiss law, Canton Zürich, or Austrian law)
 - avoid jurisdictions where laws are in a foreign language
 - avoid jurisdictions of a different system (common law vs. codified law)

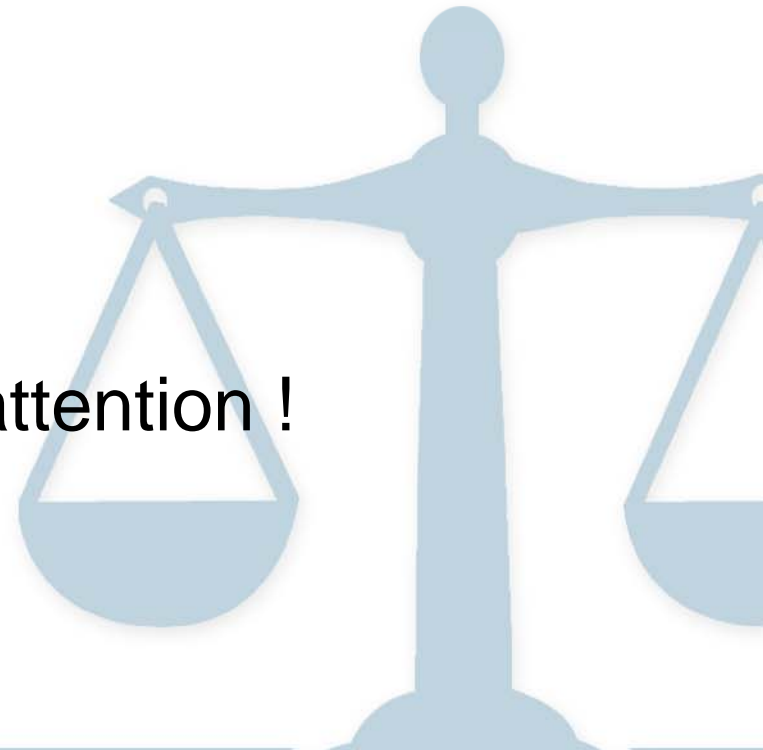




Questions ?

... and discussion !

Many thanks for your attention !





Attachments

- English version of the EU Directive for Mediation in Civil and Commercial Matters
- German version of the EU Directive for Mediation in Civil and Commercial Matters
- European Code of Conduct for Mediators (English)
- English version of the clause “Settlement of Disputes”
- German version of the clause “Settlement of Disputes”
- English version of the ICC Rules of Arbitration
- German version of the ICC Rules of Arbitration
- English version of the DIS Rules of Arbitration
- German version of the DIS Rules of Arbitration