

European Court of Human Rights ruled that there was no requirement to hold a hearing if such an occasion was unlikely to cast any new light on what happened. It commented:

According to the Court's well-established case-law, an oral and public hearing constitutes a fundamental principle enshrined in Article 6 § 1. ... As the Court recognised in that and other cases, however, the holding of a hearing is not an absolute obligation. There may be proceedings in which it is not required, where the courts, or other deciding authority, may fairly and reasonably decide the case on the basis of the parties' written submissions and other written materials. ... Considerations of efficiency and economy may also be relevant in certain contexts. ... The present context is of protection for consumers in the domain of financial services and investment advice. Parliament's intention, clearly stated in the legislation, was to provide for the resolution

of certain disputes quickly and with minimum formality. It notes in this respect the very high number of disputes that FOS deals with annually, which the Government put at 150,000. The Court does not find such a legislative policy inappropriate.

The Administrative Court reached the same result for similar reasons in *Calland, R (on the application of) v. Fin. Ombudsman Serv. Ltd.* [2013] EWHC 1327 (Admin. Ct.) (available at <https://bit.ly/3QlwgNG>).

### The Fourth and Fifth Ways

There are not just three ways of influencing the resolution of securities disputes in the United Kingdom.

The Financial Conduct Authority can also require individual firms or whole sectors to review past business and offer compensation or fix products for their customers. *Bluecrest* above involved an example of first type.

It can also direct businesses to deal with complaints in particular ways or just enforce its own requirements that authorized entities handle complaints fairly in line with what the FOS is saying. Final Notice to Clydesdale Bank PLC (Sept. 24, 2013) (available at <https://bit.ly/41huVOF>).

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The United States can have all these things. It just needs Congressional will to address these issues.

Without it, the Federal Arbitration Act will continue to operate in the consumer space where it basically does not belong. Regulators will be stuck having to hold jury trials when they wish to extract penalties. But they can always encourage those they regulate to waive this right on the basis that a jury might be more likely than an administrative law judge to come up with lurid findings of multiple compliance breaches for each of which the fine can reach \$750,000!

## Worldly Perspectives

# Does Mediation in Austria Need a Jumpstart?

BY GIUSEPPE DE PALO & MARY B. TREVOR

Starting in the early 2000s, the Austrian legislature developed legislation to promote mediation use. Consequently, mediation has a stable foundation in Austria, whether at the level of professional law or with regard to consensus-promoting positioning as a method in both procedural and substantive law regulations.

Development in the past decade or so, however, has been stagnant, leading to a possible need to reassess mediation matters in Austria.

### The Foundations

In the years leading up to 2000, official

recognition of mediation in Austria was largely statute-based.

In the criminal area, for example, the 1988 Juvenile Courts Act authorized a conflict regulator to assist in mediation-styled conflict management between the accused and the victim. Bundesgesetz vom 20.

Oktober 1988 über die Rechtspflege bei Straftaten Jugendlicher und junger Erwachsener (Jugendgerichtsgesetz 1988 – JGG), BGBl 599/1988 idF BGBl I 34/2024; siehe auch AB 929 Blg XXV. GP.

By 1999, the Code of Criminal Procedure was amended to include the procedure for adults as well. Strafprozessordnung 1975 (StPO), BGBl 631/1975 idF BGBl I 96/2024; siehe auch AB 1403 Blg XXV. GP. As another example, in the family law area, mediation was

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This month's column was prepared in collaboration with Sascha Ferz, a Professor of Alternative Dispute Resolution at the Institute of Legal Foundations, Faculty of Law, in Graz (Austria) (see <https://bit.ly/41gbC6E>). With his focus on expertise in administrative law, sociology of law, and mediation, he is interested in how parties can use prelitigation procedures in a more efficient and targeted way. Thus, his preferred research interests are negotiation, mediation, and conflict resolution in civil matters and public law.

Ferz is also head of the interdepartmental Centre for Social Competence at the University of Graz, at which students are taught critical skills in this area, enabling them to deal with social challenges and areas of conflict in a constructive way.

The Rebooting Mediation project, a large-scale study directed by De Palo for DTC, aims to provide policymakers with scientific, data-driven evidence to guide policy recommendations for achieving Access to Justice goal (16) of the United Nations Sustainable Development Goals (see <https://sdgs.un.org/goals/goal16>). In *Worldly Perspectives*, the authors are presenting a summary of a forthcoming country report that has resulted from the Rebooting Mediation project study of individual nations' ADR efforts.

## Worldly Perspectives

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introduced for divorce matters in the Marriage Registry Act 1999.

But the Civil Law Mediation Act (CLMA) in 2003 was the major step in broadening mediation's reach in Austria, providing for the use of mediation in civil law disputes. Bundesgesetz über Mediation in Zivilrechtssachen (Zivilrechts-Mediations-Gesetz – ZivMediatG), BGBl I 29/2003; siehe auch AB 47 Blg XXII. GP; siehe auch Wanderer, *Recht und Mediation in Wanderer* (Hrsg), *Mediation. Konfliktlösung in Familien, bei Erbschaften, in Nachbarschaft und Schule, im Datenschutz, in der Wirtschaft, im öffentlichen Bereich sowie im Strafrecht* (Tatausgleich)2 (2023) 10 ff.

The CLMA provided for the registration, qualifications, and training of mediators, as well as various obligations of mediators and the legal consequences of engaging in mediation. The Code of Civil Procedure and the Code of Criminal Procedure were concurrently amended to support CLMA provisions as needed.

The CLMA has important limits: It only covers mediation for the types of conflicts within the province of the regular civil courts. Furthermore, it does not restrict the ability to mediate to the mediators registered through its provisions, leaving the field open to non-registered mediators as well.

In 2011, the legislature enacted the EU-Mediation Act (see Bundesgesetz über bestimmte Aspekte der grenzüberschreitenden Mediation in Zivil- und Handelssachen in der Europäischen Union (EU-Mediations-Gesetz – EU-MediatG), BGBl I 21/2011; siehe auch AB 1125 Blg XXIV. GP), designed to implement and slightly adapt, in some instances, the provisions of the EU Mediation Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters in Austria (available at <https://eur-lex.europa.eu/eli/dir/2008/52/oj/eng>).

The EU-Mediation Act did not amend or replace the CLMA, but instead was intended to complement the CLMA by applying the Directive's principles of mediation to cross-border disputes in civil and commercial

matters. The Explanatory Report for the Act noted that it was to be implemented “only to the absolutely necessary extent to maintain the high Austrian standard.” ErläutRV 1055 Blg XXIV GP 3.

Other specialized laws, in a few instances, include mandatory mediation aspects. The Genetic Engineering Law (see Bundesgesetz, mit dem Arbeiten mit gentechnisch veränderten Organismen, das Freisetzen und Inverkehrbringen von gentechnisch veränderten Organismen und die Anwendung von Genanalyse und Gentherapie am Menschen geregelt werden (Gentechnikgesetz – GTG),

## Time to Recalibrate

**This month's Worldly Perspectives jurisdiction:** Austria.

**The ADR status:** A solid base, but disappointing use.

**The prospects:** Further regulation to encourage mediation could be a path.

BGBl 510/1994 idF BGBl I 8/2022) and the Neighborhood Law (available at Bundesgesetz, mit dem das allgemeine bürgerliche Gesetzbuch und das Konsumentenschutzgesetz geändert werden (Zivilrechts-Änderungsgesetz 2004 – ZivRÄG 2004), BGBl 91/2003) include mandates to attempt to reach agreements either before a conciliation board or in mediation.

The Apprenticeship Law mandates mediation for the termination of an apprenticeship relationship. Vgl ua Winkler, *Eine neue Möglichkeit der vorzeitigen Auflösung von Lehrverhältnissen*, ZAS 2008, 244ff; praktische Hinweise etwa unter <https://bit.ly/4bfbhG5> [10/2024].

In other specialized laws, mediation plays a significant role, as with the Disability Equality Package, which provides for mediation as an optional but state-supported means of conflict resolution. Bundesgesetz über die Gleichstellung von Menschen mit Behinderungen (Bundes-Behindertengleichstellungsgesetz – BGStG), BGBl 82/2005 idF

BGBl I 32/2018; Ferz/Adler, *Mediation im Bundes-Behindertengleichstellungsgesetz und im Behinderteneinstellungsgesetz*, in Prettenthaler-Ziegerhofer (Hrsg), *Menschen mit Behinderung. Leben wie andere auch?* (2006) 329ff; siehe auch <https://bit.ly/3Xm8YeB> [10/2024].

As of early 2013, under section 107 of the Act on Non-Contentious Proceedings, in proceedings to determine the best interests of a child in custody or personal contact matters, judges are authorized to order participation in an initial meeting about mediation. Bundesgesetz über das gerichtliche Verfahren in Rechtsangelegenheiten außer Streitsachen (Außerstreitgesetz – AußStrG), BGBl 111/2003 idF BGBl I 91/2024; siehe auch AB 2087 Blg XXIV. GP. But since that legislation, the legislature has enacted no further initiatives on mediation.

## Mediators, Registered And Unregistered

Mediators in Austria may be registered under the CLMA, as discussed below. But other, non-registered mediators are active in Austria as well.

Non-registered mediators may be subject to the standards of particular trades governed by the Trade Act that allow mediation without CLMA registration or that can be read to allow such mediation. For example, activities listed for the profession of Life and Social Counseling include mediation, and mediation is an activity for which training may be available in this area.

While the Trade Act standards for the profession of Management Consultancy (which includes business organization) in this regard are less explicit regarding mediation, the process is allowed as long as it involves consultancy for a company rather than an individual.

Notaries, lawyers, accountants, and tax advisers are subject to different regulations but also are not required to be registered under the CLMA. In general, they may act as mediators if they do so in compliance with the standards of their respective professions. Notaries and lawyers are required to acquire training in mediation in order to act as mediators.

## Key CLMA Provisions

The CLMA establishes the legal framework for civil mediations in Austria and includes various measures designed to set a high-quality standard, including an Advisory Council to oversee CLMA-governed matters. The Federal Minister of Justice maintains the list of CLMA-registered mediators.

*The Mediators' List:* To be listed as a mediator under the CLMA, the applicant must be professionally qualified, be at least 28 years old (ensuring a certain level of life experience), be trustworthy, and have taken out professional liability insurance that complies with the CLMA's requirements. Initial registration is for five years, with subsequent renewals available for 10-year periods.

Qualifying training must be completed at institutions registered under the CLMA and must cover both theoretical (200-300 training units) and practical (100-200 training units) parts, although specifics may vary according to expertise. Further training is required every five years.

As noted below, in some instances the rules concerning mediation may differ for registered and non-registered mediators. For example, in the case of a "mixed" cross-border mediation involving both a CLMA-registered mediator and a non-registered EU mediator, the CLMA standards apply concerning the effect of a statute of limitation.

*Confidentiality:* CLMA mediators must maintain confidentiality concerning facts entrusted to them during a mediation. Any documents prepared or given to them during the proceedings must also be kept confidential.

Assistants and trainees involved in mediation also must abide by the confidentiality requirements. Violation of the requirements can result not only in removal from the list of mediators, but also is punishable criminally under the CLMA unless the information revelation can be justified by a public or legitimate personal interest.

Mediators not registered under the CLMA may also be subject to confidentiality requirements. Those acting according to a professional law are governed by that law. Parties engaging in cross-border mediations are governed by the EU-Mediation Act confidentiality restrictions unless they are CLMA registered, in which case they are governed by CLMA confidentiality

provisions. Notably, only CLMA-registered mediators have the right to refuse to give evidence in criminal proceedings.

*Enforceability of Mediation Settlements:* Under Austrian Code of Civil Procedure section 433a, if the parties have achieved a written settlement through mediation of a civil matter, the parties may obtain a court settlement from a district court. Gesetz vom 27. Mai 1896, über das Executions- und Sicherungsverfahren (Exekutionsordnung – EO), RGBI 79/1896 idF BGBl I 136/2023. Section 433a does not distinguish between mediations conducted by registered and non-registered mediators, or national and cross-border mediations.

Non-civil matters are not covered by section 433a. Nor will courts enforce an agreement that violates Austrian law or legal values or that would be otherwise unenforceable.

Notarization of a mediation agreement may also be possible pursuant to section 54 of the Notarial Code. Wagner/Knechtel, Notariatsordnung § 54 NO Rz 1. In such a case, the obligor under the agreement must have agreed to immediate enforcement of the notarial deed that results.

*Statute of Limitations:* For CLMA-registered mediators, the court in question will suspend the running of the statute of limitations during the mediation. The running will resume, as applicable, once the mediation has ended.


With the exception of family law matters, if the parties' dispute involves claims that will not be addressed in the mediation, the parties must sign a written agreement to the effect that the suspension applies to the non-mediated claims as well. In cross-border conflicts that do not involve CLMA-registered mediators, the applicable EU-Mediation Act provision is similar but a bit more nuanced.

*Mediation Duration and Fees:* The CLMA does not prescribe a duration or timeframe for the mediation process, although if the dispute involves any parallel proceedings, they may affect the speed of the process. Nor does the CLMA prescribe mediator fees.

## Means of Recourse

Under the Code of Civil Procedure and the Act on Non-Contentious Proceedings, civil judges are authorized to refer matters for consensual

## The Return

The *Worldly Perspectives* column by Giuseppe De Palo and Mary Trevor returned to *Alternatives* last month with a focus on England and Wales. The column's mission is the same as the original version, which appeared in these pages from October 2009 through January 2013: to advance understanding of how conflict resolution is practiced in countries around the globe. (The original columns are available on Lexis and Westlaw.) The authors, whose credits appear at the top of this article on page 63, seek to advance the mission of the nonprofit [Dialogue Through Conflict Foundation](#), which seeks broader global use of ADR techniques to address conflict, under [United Nations Sustainable Goal 16 on peace, justice, and strong institutions](#). The column previously focused on Europe and included some nations in the Middle East and Africa; now, the authors plan to cover the world more widely. As part of the foundation's [Sustainable Conflict Global Initiative](#), this material will serve as a resource for policymakers and scholars, providing empirical evidence on policies that effectively increase mediation use. By fostering global dialogue and integrating diverse perspectives, the efforts seek to strengthen institutional frameworks and promote long-term conflict prevention, aligning with international sustainability goals. The column is scheduled to appear monthly. 

resolution of their conflict, which can include mediation. In addition, the Act on Non-Contentious Proceedings states that the court may suspend its proceedings for a maximum of six months for this purpose.

As noted earlier, certain statutes may require the parties to seek amicable settlement, which may include mediation or conciliation.

Although there are no laws governing the use of mediation clauses in contracts, either optional or mandatory, such clauses are in use in Austria. In general, the parties to a dispute may simultaneously pursue the matter in court and seek to reach settlement. The exclusionary

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effect of mandatory mediation clauses, however, is currently unclear.

In two recent cases, the Austrian Supreme Court of Justice (Oberster Gerichtshof) (OGH), the top appellate court for civil and criminal cases, addressed contractual mediation clauses. One, addressing mandatory mediation clauses in part, left their status a bit unclear. OGH 22.6.2022, 3 Ob 98/22s iFamZ 2022/192, 258.

The other, addressing the minimum requirements for an enforceable contractual provision on dispute resolution, has been criticized for requiring too many specifics to be included in the provision. OGH 25.9.2023, 6 Ob 229/22b SWK 2024, 930 (Reich-Rohrwig); see Frauenberger-Pfeiler, *ecolx* 2024/5, 382 (383 ff).

## ADR Alternatives

In Austria, parties seeking an alternative dispute resolution process have options other than CLMA mediation.

Conciliation, a mediation-like process in which the conciliator can suggest solutions, is a popular option that some regulations direct the parties to rather than to mediation.

In addition, section 433 of the Austrian Code of Civil Procedure provides for a “pre-toric” settlement. Pursuant to this procedure, any party contemplating a legal action may apply to the district court in the district where the opponent lives for court assistance in attempting to settle the dispute. See Tetiana Tsvina and Sascha Ferz, “The Recognition and Enforcement of Agreements Resulting from Mediation: Austrian and Ukrainian Perspectives,” 4(16) *Access to Justice in Eastern Europe* 32 (Nov. 22, 2022) (available at <https://bit.ly/41fRXUt>).

Also, as discussed above, mediators in a variety of professions, not registered under the CLMA, may conduct mediations.

## Perceptions of Mediators

Mediator responses to the Rebooting

Mediation Project study broadly reflected the reality of the different approaches to mediator regulation and practice in Austria. (Details on the project are available at <https://bit.ly/4kwcxZJ>.)

For example, survey results revealed variation among mediators, sometimes significant, in their knowledge about the laws governing mediation. A significant number of respondents, incorrectly, believed that confidentiality applied to all mediations with no exceptions. Estimates as to how long mediations take varied fairly widely among respondents.

Mediators gave mixed responses to a question about enforcement of mediation settlements that suggested that knowledge varies among different types of mediators, perhaps according to the area(s) in which they have mediation experience. In response to a question about the mediation’s costs, an extensive set of responses were elicited, again perhaps reflective of the different types of mediation that respondents were familiar with.

A majority of respondents said they believed that current standards for mediation are acceptable.

## The Current Assessment

The number of mediators in Austria is not known. The CLMA registry currently shows 1820 listings, but the number of non-registered mediators is a mystery.

There are no reliable data about how many mediations are conducted in Austria, and no comprehensive empirical study has been done yet. But there is one on the way.

Estimates among respondents to the Rebooting Mediation Project survey varied. A recent survey by the Austrian Ministry of Justice (2023) concluded that approximately a quarter of a million disputed civil cases, encompassing family and employment disputes, arise within the civil justice system annually. But likely only a fraction of these disputes make their way to mediation.

Rebooting survey responses suggested a perceived oversaturation of the market, with more than 70% of respondents agreeing with the statement, “The supply of mediation services in civil and commercial disputes is

exceeding the demand for those services.” Notably, the number of mediators in the CLMA registry has declined since 2012.

Respondents to the Rebooting survey, all the same, seemed to suggest that there should be a greater proportion of disputes going to mediation rather than to court. Their sug-

Austria has registered  
mediators under its  
mediation law, but it  
also has nonregistered  
mediators who often are  
subject to different rules,  
rights and obligations.

gestions for how to increase the demand for mediation included providing incentives, such as court fee refunds or tax credits; making pre-litigation mediation information sessions mandatory; making mediation mandatory for certain types of cases; and requiring lawyers to inform clients about mediation. To raise awareness of mediation, respondent suggestions included offering mediation education programs in higher education facilities and implementing pilot programs.

\* \* \*

Early mediation initiatives in Austria were strong, but in some ways short-sighted.

The Civil Law Mediation Act was a reasonably self-contained but not exclusive system. From the very beginning, there has been difficulty distinguishing between registered mediators under the CLMA and non-registered mediators with different rights and obligations, and the addition of mediators for cross border mediations has not made things any clearer.

Furthermore, in addition to mediation, the parties have several procedural options open to them to promote consensus, such as making a claim for a decision of a conciliation body or reaching a special kind of out-of-court settlement almost free of charge under section 433 of the Code of Civil Procedure.

While increased understanding and awareness of mediation may help matters, perhaps regulatory approaches may need to consider a jumpstart.

