

EU Mediation Law Handbook

Global Trends in Dispute Resolution

VOLUME 7

Series Editor

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Introduction

Global Trends in Dispute Resolution offers readers a garden rich in ideas and insights into contemporary dispute resolution principles, processes, and practices. The series leads the way in first-class debate and analysis of dispute resolution trends across our rapidly globalizing world. More particularly, its volumes analyse dispute resolution developments in various geographical regions around the world and in relation to diverse transnational practice areas. These practice areas include not only well-established legal categories such as intellectual property, construction, and resources law, but also emerging dispute resolution trends ranging from dispute systems design to cross-border mediation in private and public law.

Objective

With a particular focus on new initiatives and ADR practices, the *Global Trends in Dispute Resolution* series aims to provide practitioners, scholars, policymakers, and ‘pracademics’ (that elusive yet rapidly emerging category of practical academics and academically-oriented practitioners – you know who you are) with the resources both to cultivate the dispute resolution gardens of the world and to explore new paths within and beyond them.

Frequency

A volume is published whenever an interesting topic presents itself.

The titles published in this series are listed at the end of this volume.

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Regulatory Robustness Ratings for Mediation
Regimes

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Summary of Contents

Editors	v
Contributors	vii
Foreword	xlix
Preface	liii
CHAPTER 1	
Introducing Regulatory Robustness Ratings for Mediation Regimes in the EU	
<i>Nadja Alexander</i>	1
CHAPTER 2	
Austria	
<i>Christina Lenz & Martin Risak</i>	33
CHAPTER 3	
Belgium	
<i>Johan Billiet & Dilyara Nigmatullina</i>	59
CHAPTER 4	
Bulgaria	
<i>Evgeni Georgiev</i>	93
CHAPTER 5	
Croatia	
<i>Boris Jukić & Anamarija Milanović</i>	125

Summary of Contents

CHAPTER 6 Cyprus <i>Victoria – Zoi Papagiannis & George Mountis</i>	141
CHAPTER 7 The Czech Republic <i>Martin Svatos</i>	161
CHAPTER 8 Denmark <i>Louise Lerche-Gredal</i>	191
CHAPTER 9 England and Wales <i>Bill Marsh, Alexander Oddy & Jan O’Neill</i>	203
CHAPTER 10 Estonia <i>Maria Pihlak</i>	239
CHAPTER 11 Finland <i>Petra Hietanen-Kunwald</i>	267
CHAPTER 12 France <i>Delphine Wietek</i>	299
CHAPTER 13 Germany <i>Kristina Osswald & Gustav Flecke-Giammarco</i>	349
CHAPTER 14 Greece <i>Apostolos Anthimos</i>	383
CHAPTER 15 Hungary <i>Manuela Renáta Grosu</i>	403
CHAPTER 16 Ireland <i>Sabine Walsh</i>	435

CHAPTER 17	
Italy	
<i>Carlo Mastellone & Laura Ristori</i>	465
CHAPTER 18	
Latvia	
<i>Dana Rone</i>	493
CHAPTER 19	
Lithuania	
<i>Virgilijus Valančius</i>	509
CHAPTER 20	
Luxembourg	
<i>Jan Kayser</i>	529
CHAPTER 21	
Malta	
<i>Adrian Delia & Michael Muscat</i>	545
CHAPTER 22	
The Netherlands	
<i>Machteld Pel</i>	563
CHAPTER 23	
Northern Ireland	
<i>Brian Speers</i>	587
CHAPTER 24	
Poland	
<i>Rafal Morek</i>	601
CHAPTER 25	
Portugal	
<i>Miguel Cancellia d'Abreu & Sabine Walsh</i>	623
CHAPTER 26	
Romania	
<i>Constantin Adi Gavrilă & Sanda Elena Lungu</i>	637
CHAPTER 27	
Scotland	
<i>Charlie Irvine</i>	659

Summary of Contents

CHAPTER 28

Slovak Republic

Alexandra Kapišovská, František Kutlík & Tatiana Hambalková 697

CHAPTER 29

Slovenia

Aleš Zalar 717

CHAPTER 30

Spain

Mercedes Tarrazón & Marian Gili Saldaña 739

CHAPTER 31

Sweden

Bengt Lindell 761

Table of Contents

Editors	v
Contributors	vii
Foreword	xlix
Preface	liii
CHAPTER 1	
Introducing Regulatory Robustness Ratings for Mediation Regimes in the EU <i>Nadja Alexander</i>	1
§1.01 The EU and Cross-Border Mediation: Selecting Governing Law	1
§1.02 The Regulatory Robustness Rating System	3
§1.03 How the RRR System Works	4
§1.04 Twelve Criteria of the Regulatory Robustness Rating System	5
§1.05 The Mediation Star Matrix	14
§1.06 The Regulatory Robustness Rating System in Action	30
CHAPTER 2	
Austria <i>Christina Lenz & Martin Risak</i>	33
Editors' Note	33
Regulatory Robustness Rating for Mediation	34
§2.01 Introduction	37
§2.02 Basic Terms and Definitions	38
§2.03 Sources of Mediation Regulation	39
[A] Impact of the UNCITRAL Model Law on International Commercial Conciliation	39

Table of Contents

[B]	Civil Mediation Act 2003 (CMA 2003)	40	
[C]	EU-Mediation Act 2011 (EU-MA 2011)	40	
[D]	Professional Regulations	41	
§2.04	Initiating Mediation	41	
§2.05	Process	44	
[A]	Confidentiality	45	
[B]	Neutrality and Fair Treatment	45	
[C]	Transparency and Consequences	45	
[D]	Legal Advice	46	
[E]	Documentation	46	
[F]	Use of Private Sessions (Caucus)	46	
§2.06	Recognition and Accreditation of Mediators	46	
§2.07	Confidentiality and Admissibility of Mediation Evidence	50	
§2.08	Mediated Outcomes and Enforceability	53	
§2.09	Duties and Obligations	54	
§2.10	Limitation Periods	56	
CHAPTER 3			
Belgium			
	<i>Johan Billiet & Dilyara Nigmatullina</i>	59	
Editors' Note			59
Regulatory Robustness Rating for Mediation			59
§3.01	Introduction	62	
§3.02	Basic Terms and Definitions	63	
[A]	Cross-Border Dispute	63	
[B]	Mediation	63	
§3.03	Sources of Cross-Border Mediation Regulation	64	
[A]	The EU Directive	64	
[B]	The Belgian Law on Mediation	64	
[C]	The FMC Code of Conduct	65	
[D]	The Directive on C-ADR and the Regulation on C-ODR	65	
[E]	Belmed: Belgian ODR Platform	65	
[F]	Regulation of Mediation in Areas Other Than Civil and Commercial	66	
§3.04	Disputes Suitable for Mediation	66	
§3.05	Initiating Mediation	68	
[A]	The Law on Mediation	68	
[B]	Other Triggers: Referral by Lawyers	70	
[C]	Use of mediation	70	
[D]	Combination of Mediation and Arbitration	70	
§3.06	The Mediation Process	71	
[A]	The Law on Mediation	71	
[B]	Codes of Conduct	72	
[C]	Institutional Rules	73	

§3.07	Limitation Periods	74
§3.08	Payment of Mediators	74
§3.09	Accreditation and Recognition of Mediators	75
	[A] The Institutional Framework for Accreditation of Mediators	76
	[B] Accreditation Requirements under the Law on Mediation	76
	[C] Accreditation Requirements under the FMC Guidelines	77
	[D] Requirements to Maintain Mediator’s Accreditation	78
	[E] Requirements for a Lawyer to Become Accredited as a Mediator	79
	[F] Benefits of Using an Accredited Mediator	80
	[G] Rights and Obligations of an Accredited Mediator	80
	[H] Liability and Immunity of an Accredited Mediator	81
	[I] Quality Assurance Mechanisms	82
	[1] Complaints Procedures Against Accredited Mediators	82
	[2] Complaint Procedures Against Non-accredited Mediators	82
	[J] Access to information on accredited mediators	83
§3.10	Confidentiality and Admissibility of Mediation Evidence	83
	[A] Insider/Outsider Confidentiality	83
	[B] Insider/Insider Confidentiality	83
	[C] Insider/Court Confidentiality	84
§3.11	Duty of Impartiality of Mediators	85
§3.12	Duties and Obligations of Participants Other Than Mediators	85
	[A] Lawyers/Legal Representatives	85
	[B] Parties	86
	[C] Other participants	86
§3.13	Mediated Outcomes and Enforceability	87
§3.14	Future Developments	89
	[A] New Law on Mediation	89
	[B] Measures Suggested by Stakeholders	90
	[C] Proposals of the Chamber of Representatives	90
CHAPTER 4		
Bulgaria		
	<i>Evgeni Georgiev</i>	93
	Editors’ Note	93
	Regulatory Robustness Rating for Mediation	93
§4.01	Introduction	96
§4.02	Basic Terms and Definitions	97
	[A] Cross-Border Mediation	97
	[B] Other Definitions	98
§4.03	Sources of Mediation Regulation	98
	[A] National Sources of Mediation Regulation	98
	[B] The Mediation Act	99
	[C] Model Laws Following the Adoption of the MA	100
	[D] Order No. 17, Regulation No. 2, Order of 2012	100

Table of Contents

[1] Order No. 17	100
[2] Regulation No. 2	101
[3] Order of 2012	101
[E] Additional Legislation	101
[F] Court Rules	102
[G] Rules of the SMC	103
[H] Private Regulation	103
§4.04 Mediation Triggers	103
[A] Disputes Suitable for Mediation	103
[B] Triggering Provisions	104
[1] Legal Framework	105
[2] Mediation Clauses	105
[3] Parties Voluntary Recourse to Mediation Once the Dispute Has Arisen	106
[4] Initiation of Mediation by an Adjudicative Body	106
[a] Initiation of Mediation by the Courts	106
[b] Initiation of Mediation by Other Adjudicative Bodies	108
[5] Attorneys and Initiation of Mediation	108
§4.05 Process	109
[A] Mediation Agreements	109
[B] Instruments Regulating the Mediation Process	110
[C] The Mediation Process	110
[1] Who Can Mediate a Dispute	110
[2] Who Can Participate in Mediation	111
[3] Payment of Mediator	111
[4] Conducting Mediation	112
§4.06 Recognition/Credentialing/Accreditation of Mediators	113
[A] Regulation	113
[B] Who Can Act as Mediator	113
[C] Does Accreditation Influence Practice	114
[D] Liability and Immunity of Mediator	115
[E] Quality Assurance Mechanisms	115
[F] Mediator Training	117
§4.07 Confidentiality and Admissibility of Mediation Evidence	118
§4.08 Mediated Outcomes and Enforceability	119
[A] Forms of Mediated Settlement Agreements and Their Enforcement	119
[B] Mediation and Statute of Limitations	121
§4.09 Duties and Obligations	122
 CHAPTER 5	
Croatia	
<i>Boris Jukić & Anamarija Milanović</i>	125
Editors' Note	125

Regulatory Robustness Rating for Mediation	125
§5.01 Introduction	128
§5.02 Basic Terms and Definitions	129
[A] Cross-border Disputes	129
[B] Mediation, Mediator and Mediation Institution	129
§5.03 Sources of Mediation Regulation	130
[A] Mediation Act	130
[B] Other Statutory Provisions	130
[C] Ordinance on Register and Accreditation	131
[D] Institutional Rules	131
§5.04 Initiating Mediation	131
[A] Main Mediation Triggers	131
[1] Court Recommendation	131
[2] Mediation Clauses	132
[B] Disputes Considered Suitable for Mediation	132
§5.05 Process	132
[A] Initiation of the Mediation Process	132
[B] Main Principles Governing the Mediation Process	133
[C] Court Annexed Mediation	133
[D] Termination of Mediation	134
§5.06 Recognition and Accreditation of Mediators	134
[A] Prerequisites	134
[B] Requirements	134
[C] Requirements to Maintain Registered Status	135
[D] Implications of Mediator Credentialing for Practice	135
[E] Quality Assurance Mechanisms	135
[F] Public Access to Information on Certified Mediators	136
§5.07 Confidentiality and Admissibility of Mediation Evidence	136
[A] Insider/Outsider Confidentiality	136
[B] Insider/Insider Confidentiality	136
[C] Insider/Court Confidentiality	136
§5.08 Rights and Obligations	137
[A] Mediators	137
[B] Lawyers	138
§5.09 Enforcement of Mediated Outcomes	138
[A] Enforceability Clause	138
[B] Possible Difficulties	139
§5.10 Limitation Periods	139
§5.11 Future Developments	139
 CHAPTER 6	
Cyprus	
<i>Victoria – Zoi Papagiannis & George Mountis</i>	141
Editors' Note	141

Table of Contents

Regulatory Robustness Rating for Mediation	141
§6.01 Introduction	144
§6.02 Basic Terms and Definitions	145
[A] Cross-Border Dispute	145
[B] Mediation	146
§6.03 Sources of Mediation Regulation	146
[A] The 2012 Law	146
[B] European Code of Conduct for Mediators	146
[C] Lawyers' Law, CAP. 2/Lawyers' Code of Conduct Regulations of 2002	146
§6.04 Initiating Mediation	147
[A] Mediation Clauses	147
[B] Court Referral	147
[C] Information of the Public	148
[D] Types of Disputes Considered Suitable for Mediation	148
§6.05 Process	149
[A] Fair Treatment/Natural Justice	149
[B] Use of Private Sessions	150
[C] Reimbursement of Mediator	150
[D] Role of Mediator	150
§6.06 Recognition and Accreditation of Mediators	151
[A] Requirements for Professional Mediator Recognition	151
[1] Common Criteria	151
[2] Lawyers	152
[3] Other Professionals	152
[4] Loss of Accreditation	152
[B] Implications of Mediator Accreditation for Practice	153
[1] Liability and Immunity	153
[2] Mechanisms to Ensure That Mediations Are Conducted in a Fair, Impartial and Competent Way	154
[3] Register of Mediators	154
§6.07 Confidentiality and Admissibility of Mediation Evidence	154
[A] Insider/Outsider Confidentiality	155
[B] Insider/Insider Confidentiality	155
[C] Insider/Court Confidentiality	155
§6.08 Duties and Obligations	156
[A] Mediators	156
[B] Lawyers	156
[C] Parties	157
[D] Others	157
§6.09 Enforcement of Mediated Outcomes	158
[A] The Form and Content of the Mediated Settlement Agreement	158
[B] Enforcement Procedure	158
§6.10 Limitation Periods	159

§6.11	Future Developments	159
CHAPTER 7		
The Czech Republic		
	<i>Martin Svatos</i>	161
	Editors' Note	161
	Regulatory Robustness Rating for Mediation	162
§7.01	Introduction	165
§7.02	Basic Terms and Definitions	166
	[A] Cross-Border Dispute	166
	[B] Mediation	167
	[C] Mediator	167
	[D] Visiting Mediator	168
§7.03	Sources of Mediation Regulation	168
	[A] EU Mediation Directive	168
	[B] Mediation Law	169
	[C] Code of Civil Procedure	169
	[D] New Civil Code	170
	[E] Act on Advocacy	170
	[F] Act on Court Fees	170
	[G] Ordinance of the Ministry of Justice	170
	[H] Mediation Ethics Code for Attorneys-at-Law	171
§7.04	Initiating Mediation	171
	[A] Disputes Suitable for Mediation	171
	[B] Mediation Triggers	172
	[1] Court Referral	172
	[2] First Meeting with a Registered Mediator	173
	[3] Recommendation to Attend Mediation	173
	[4] Agreement to Mediate	174
§7.05	Process	174
	[A] Instruments Regulating Mediation	175
	[B] Issues Covered	175
	[1] Initiation, Rejection and Termination of Mediation	175
	[2] Mediators' Remuneration and Reimbursement of Expenses	176
	[3] Delivery/Service of Documents	177
§7.06	Recognition and Accreditation of Mediators	177
	[A] Requirements for Professional Mediator Recognition	178
	[1] General Requirements	178
	[2] Mediator's Examination	178
	[3] Family Mediation Examination	179
	[B] Implications of Mediator Credentialing for Practice	180
	[C] Liability and Immunity	180
	[1] Civil Liability Exception	180

Table of Contents

[2] Administrative Offences of Registered Mediators	180
[3] Disciplinary Offences of Attorneys-at-Law Acting as Mediators	181
[D] Mechanisms to Ensure Mediations Are Conducted in a Fair, Impartial and Competent Manner	182
[E] Information on Certified Mediators	182
§7.07 Confidentiality and Admissibility of Mediation Evidence	182
[A] Insider/Outsider Confidentiality	183
[B] Insider/Insider Confidentiality	184
[C] Insider/Court Confidentiality	184
§7.08 Duties and Obligations	184
[A] Mediators	184
[B] Attorneys-at-Law	186
[C] Parties	186
§7.09 Enforcement of Mediated Outcomes	186
[A] Mediated Settlement Agreement	186
[B] MSA Enforcement by Court Approval	187
[C] MSA Enforcement by Notarial Deed	187
§7.10 Limitation Periods	187
§7.11 Future Developments	188
CHAPTER 8	
Denmark	
<i>Louise Lerche-Gredal</i>	191
Editors' Note	191
Regulatory Robustness Rating for Mediation	192
§8.01 Introduction	195
§8.02 Basic Terms and Definitions	195
[A] Cross-Border Dispute	195
[B] Mediation	196
§8.03 Sources of Mediation Regulation	196
§8.04 Initiating Mediation	197
§8.05 Process	198
§8.06 Recognition/Credentialing/Accreditation of Mediators	199
§8.07 Confidentiality and Admissibility of Mediation Evidence	201
§8.08 Mediated Outcomes and Enforceability	201
§8.09 Impact of Commencing Mediation on the Statute of Limitations	202
§8.10 Duties and Obligations	202
CHAPTER 9	
England and Wales	
<i>Bill Marsh, Alexander Oddy & Jan O'Neill</i>	203
Editors' Note	203

Regulatory Robustness Rating for Mediation	204
§9.01 Introduction	207
§9.02 Basic Terms and Definitions	208
§9.03 Sources of Mediation Regulation	210
[A] EU Mediation Directive	210
[B] Rome I Regulation	210
[C] EU ADR Directive	212
[D] Court Rules	213
[E] Case Law	213
[F] Mediation Agreements	214
[G] Codes of Conduct	214
[H] Civil Mediation Council	214
[I] International Organisations	214
§9.04 Initiating Mediation	215
[A] Civil Procedure Rules and Court Referral	215
[B] Costs Penalties	216
[C] Pre-action Protocols	219
[D] Court Schemes	220
[E] Ad Hoc Referral by Lawyers	220
[F] Mediation Contract Clauses	221
§9.05 Process	222
[A] Codes of Conduct	222
[B] Institutional Rules	222
[C] Mediation Agreements	222
§9.06 Recognition/Credentialing/Accreditation of Mediators	223
[A] Accreditation Standards	226
§9.07 Confidentiality and Admissibility of Mediation Evidence	228
[A] The EU Mediation Directive	229
[B] The Cross-Border Mediation (EU Directive) Regulations 2011	229
[C] Mediation Agreements	230
[D] The Contractual Position and the General Law	230
§9.08 Mediated Outcomes and Enforceability	233
§9.09 Duties and Obligations	235
CHAPTER 10	
Estonia	
<i>Maria Pihlak</i>	239
Editors' Note	239
Regulatory Robustness Rating for Mediation	239
§10.01 Introduction	242
§10.02 Basic Terms and Definitions	243
§10.03 Sources of Mediation Regulation	244
§10.04 Initiating Mediation	244
[A] Disputes Suitable for Mediation	245

Table of Contents

[B] Triggering Mediation	246
§10.05 Process	247
[A] Instruments Regulating the Conduct of Mediators	247
[B] Main Themes	248
[C] Fair Treatment	248
[D] Use of Private Sessions	249
[E] Role of the Mediator	249
[F] Payment of the Mediator	250
§10.06 Recognition and Accreditation of Mediators	251
[A] Accreditation of a Mediator	251
[B] Becoming a Mediator	251
[C] Role of a Lawyer	252
[D] Influence of Accreditation on Practice	252
[E] Effect of Accreditation on Liability and Immunity	252
[F] Quality Assurance Mechanisms	253
[G] Eligibility Requirements for Mediators	254
[H] Finding a Mediator	254
§10.07 Confidentiality and Admissibility of Mediation Evidence	255
[A] General Principles Regarding Confidentiality	255
[B] Insider/Insider Confidentiality	256
[C] Insider/Court Confidentiality	256
§10.08 Mediated Outcomes and Enforceability	257
[A] Enforcing Mediated Settlement Agreements	257
[B] Agreements That Can Be Validated by the Court Without a Formal Court Hearing	258
[C] Agreements That Can Be Validated by the Court in the Course of a Formal Court Hearing	258
[D] Agreements That Can Be Authenticated by a Notary	258
[E] Mediation During Court Proceedings	259
[F] The Mediated Settlement Agreement as a Legally Binding Contract	259
§10.09 Effect on Limitation Periods	260
§10.10 Duties and Obligations	260
[A] Duties and Obligations of a Mediator	261
[B] Impartiality	261
[C] Confidentiality	261
[D] Prohibition From Representing a Party in Other Proceedings	262
[E] Obligation to Explain the Proceedings	262
[F] Documentation	262
[G] Certificate Stating the Failure of the Proceedings	262
[H] Settlement Agreement	262
[I] Liability	263
[J] Duties and Obligations of a Legal Representative	264
[K] Duties and Obligations of the Participants	264
[L] Forthcoming Changes	264

CHAPTER 11	
Finland	
<i>Petra Hietanen-Kunwald</i>	267
Editors' Note	267
Regulatory Robustness Rating for Mediation	268
§11.01 Introduction	271
§11.02 Basic Terms and Definitions	272
[A] Cross-Border Disputes	272
[B] Court Mediation Versus Out-of-Court Mediation	272
[C] Other Legal Definitions	273
[D] Mediation Outside the Mediation Act	273
§11.03 Sources of Mediation Regulation	273
[A] National Sources	274
[B] European Union Sources	275
[C] Sources of Private International Law	275
§11.04 Initiating Mediation	276
[A] Court Mediation	276
[B] Out-of-Court Mediation	277
[C] Effect of Mediation on Limitation Periods	279
§11.05 Mediation Process	279
[A] Court Mediation	279
[B] Out-of-Court Mediation	280
[1] The Mediation Rules of the Finnish Bar Association	281
[2] Private Agreement	282
[C] Costs of Mediation	282
[1] Court Mediation	282
[2] Out-of-court Mediation	283
[D] Termination of the Process	283
[E] Mediator and Subsequent Court Proceedings or Arbitration	284
§11.06 Recognition of Mediators	284
[A] Court Mediation	285
[B] Out-of-Court Mediation	285
[C] Eligibility Requirements	287
[D] How to Find a Mediator	288
§11.07 Confidentiality and Admissibility of Mediation Evidence	288
[A] Insider/Outsider Confidentiality	289
[1] Court Mediation	289
[2] Out-of-Court Mediation	289
[B] Insider/Insider Confidentiality	290
[C] Insider/Court Confidentiality	291
§11.08 Mediated Outcomes and Enforceability	292
[A] Confirmation of Enforceability Subsequent to Out-of-Court Mediation	292
[B] Confirmation of Enforceability Subsequent to Court Mediation	294

Table of Contents

[C] Arbitral Award	294
§11.09 Duties and Obligations	294
[A] Duties of the Mediator	294
[1] Court Mediation	295
[2] Out-of-Court Mediation	296
[B] Duties of the Parties and Their Lawyers	297
[C] Duties of Other Participants	297
§11.10 Conclusion	298
CHAPTER 12	
France	
<i>Delphine Wietek</i>	299
Editors' Note	299
Regulatory Robustness Rating for Mediation	300
§12.01 Introduction	303
§12.02 Basic Terms and Definitions	305
[A] Cross-Border Disputes	305
[B] Novelty of the Directive: A Uniform Definition of Mediation	306
[C] Difference Between Conventional and Court-Connected Mediation	306
[D] Conciliation	308
[1] The Directive Is Applicable to Conciliation	309
[2] Differences Between Mediation and Conciliation	310
§12.03 Sources of Cross-Border Mediation Regulation	313
[A] Civil Code of Procedure	314
[1] Implementation of the Directive	314
[2] After the Directive	315
[B] Code of Administrative Justice and Employment Code	316
[C] Codes of Conduct	316
§12.04 Initiating Mediation	316
[A] Scope of Mediation	316
[1] Disputes Prima Facie Suitable for Mediation: Civil and Commercial Matters	317
[2] Disputes That Can Be Referred Subject to Restrictions	317
[a] Administrative Mediation	317
[b] Family Mediation	318
[c] Employment Mediation	320
[d] Consumer Mediation	321
[3] Disputes That Cannot Not Be Referred under the Directive: Criminal Mediation	322
[B] Processes Triggering Mediation	323
[1] Court-Connected Mediation	323
[2] Conventional Mediation	324
[C] Validity and Enforceability of Agreements to Mediate and	

Conciliation Clauses	325
§12.05 Process	326
[A] Instruments Regulating the Conduct of Mediation	326
[1] Formal Laws	326
[2] Codes of Conduct and Mediation Rules	327
[B] Themes Covered by the Instruments Regulating the Conduct of Mediations	328
[1] Formal Laws	328
[2] Codes of Conduct, Codes of Ethics and Mediation Rules	330
§12.06 Recognition of Mediators	331
[A] Instruments Regulating Accreditation Mechanisms	332
[1] Formal Laws	332
[2] Codes of Conduct	332
[B] Who Can Act as Mediator?	334
[1] Court-Connected Mediation	334
[2] Conventional Mediation	335
[C] Is Mediation Considered Part of the Role of the Lawyer?	336
[D] Lawyer-Mediators and Non-lawyer Mediators	337
[E] How Accreditation Influences Practice	337
[F] Rights and Obligations and Accreditation Status	337
[G] Liability and Immunity	338
[H] Quality Assurance Mechanisms	338
§12.07 Confidentiality and Admissibility of Mediation Evidence	339
[A] Insider/Outsider Confidentiality	339
[B] Insider/Insider Confidentiality	340
[C] Insider/Court Confidentiality	340
§12.08 Mediated Outcomes and Enforceability	341
[A] Court-Connected Mediation	342
[B] Conventional Mediation	343
§12.09 Duties and Obligations	344
[A] Duties and Obligations	344
[B] Consequences of the Breach of These Duties	344
[C] Duties and Obligations of Lawyers	345
§12.10 Conclusion	346
 CHAPTER 13	
Germany	
<i>Kristina Osswald & Gustav Flecke-Giammarco</i>	349
 Editors' Note	349
Regulatory Robustness Rating for Mediation	350
§13.01 Introduction	353
[A] Family Mediation	354
§13.02 Basic Terms and Definitions	355
[A] Statutory Definition of Mediation	355

Table of Contents

[B]	No Statutory Definition of Cross-Border Mediation	355
[C]	Distinction Between Court-Based and Out-of-Court Mediation	356
[D]	Institutional Mediation	356
[E]	Sources of Mediation Regulation	357
§13.03	Triggering Mediation	357
[A]	Determining the Law Applicable to a Mediation Clause	359
[B]	Enforceability of Agreements to Mediate and Mediation Clauses	360
§13.04	Process	361
[A]	Role of the Mediator	362
[B]	Impartiality and Neutrality of the Mediator	363
[C]	Hybrid Processes	364
[D]	Payment of the Mediator	366
[E]	Co-mediation and Involvement of Counsel	366
§13.05	Recognition/Credentialing/Accreditation of Mediators	366
[A]	Accreditation Mechanisms	367
[B]	Mediator Training	367
[C]	Lawyers as Mediators	370
[D]	Non-lawyers as Mediators	370
[E]	No Eligibility Requirements for Mediators	372
[F]	Continuing Professional Education and Loss of Accreditation	372
[G]	Finding a Mediator	373
§13.06	Confidentiality and Admissibility of Mediation Evidence	373
[A]	Insider/Outsider Confidentiality	373
[B]	Insider/Insider Confidentiality	374
[C]	Insider/Court Confidentiality	375
§13.07	Mediated Outcomes and Enforceability	376
[A]	Enforcement of Mediated Settlement Agreements	376
[B]	Options Available in Domestic Mediations	377
[C]	Options Available in Cross-Border Mediations	378
§13.08	Limitation Periods	379
§13.09	Duties and Obligations	379
CHAPTER 14		
Greece		
	<i>Apostolos Anthimos</i>	383
Editors' Note		
	Regulatory Robustness Rating for Mediation	384
§14.01	Introduction	386
§14.02	Basic Terms and Definitions	388
[A]	Cross-Border Dispute	388
[B]	Mediation and Mediator	389
§14.03	Sources of Mediation	389
[A]	The Mediation Law	389
[B]	Code of Civil Procedure	390

[C] Accreditation Legislation and Code of Conduct	390
§14.04 Initiating Mediation	391
[A] Main Mediation Triggers	391
[1] Mediation Clauses	391
[2] The Mediation Law	391
[3] The Code of Civil Procedure	391
[B] Types of Disputes Suitable for Mediation	392
§14.05 Process	392
[A] Out-of-Court Mediation	392
[B] Judicial Mediation	393
§14.06 Recognition and Accreditation of Mediators	393
[A] Requirements for Professional Mediator Recognition	393
[1] Who May Act as Mediator	393
[2] Certification of Mediators	394
[3] Accreditation According to the Mediation Law	394
[4] Accreditation by Foreign Institutions	395
[5] Accreditation According to Code of Conduct	396
[B] Implications for Practice	396
[C] Mechanisms to Ensure a Fair, Impartial and Competent Process	396
§14.07 Confidentiality and Admissibility of Mediation Evidence	397
[A] Insider/Outsider Confidentiality	397
[B] Insider/Insider Confidentiality	398
[C] Insider/Court Confidentiality	398
§14.08 Duties and Obligations	398
[A] Mediators	398
[B] Lawyers	399
[C] Parties	399
[D] Others	400
§14.09 Enforcement of Mediated Outcomes	400
[A] Out-of-Court Mediation	400
[B] Enforcing the Outcome of Judicial Mediation	401
§14.10 Limitation Periods	401
§14.11 Future Developments	401
CHAPTER 15	
Hungary	
<i>Manuela Renáta Grosu</i>	403
Editors' Note	403
Regulatory Robustness Rating for Mediation	404
§15.01 Introduction	407
§15.02 Basic Terms and Definitions	407
[A] Mediation	408
[B] Cross-Border Dispute	408
§15.03 Sources of Mediation Regulation	408

Table of Contents

[A] Mediation Act	408
[B] Decrees of the Ministry of Justice	409
[C] Civil Code	409
[D] Code of Civil Procedure	409
[E] EU Legislation	410
[F] Conciliation-Mediation Rules	410
[G] Agreement to Mediate	411
§15.04 Initiating Mediation	411
[A] Mediation Clauses	411
[B] Persuasion to Mediate	412
[C] Mandatory Mediation	412
[D] Relevant Articles of the Code of Civil Procedure	415
[E] Financial Motivation	415
[F] Disputes Considered Suitable for Mediation	417
§15.05 Process	417
[A] Agreement to Mediate	418
[B] Appointment of a Mediator	418
[C] Remuneration of Mediators	418
[D] Conclusion of the Mediation Process	420
§15.06 Recognition and Accreditation of Mediators	420
[A] Requirements of Professional Mediator Recognition	420
[1] Requirements for Out-of-Court Mediators: Natural Persons	421
[2] Requirements for Out-of-Court Mediators: Legal Entities	422
[3] Requirements for Court-Based Mediators	422
[B] Maintaining Standards	423
[C] Implications of Mediator Credentialing for Practice	423
[D] Public Access to Information on Certified Mediators	423
§15.07 Confidentiality and Admissibility of Mediation Evidence	424
[A] Insider/Outsider Confidentiality	424
[B] Insider/Insider Confidentiality	425
[C] Insider/Court Confidentiality	425
§15.08 Rights and Obligations	425
[A] Mediators	426
[B] Before Mediation	426
[C] During the Mediation Process	427
[D] Following the Conclusion of Mediation	427
[E] Lawyers	428
[F] Parties	428
[G] Others	429
§15.09 Enforceability of Mediated Outcomes	429
[A] Enforcement of Mediated Settlement Concluded in Hungary	429
[1] Contract	429
[2] Court Approved Settlement	430
[3] Notarial Deed	431

[4] Mediated Settlement Agreement in the Form of an Arbitral Award	431
[B] Enforcement of Mediated Settlement Agreement Concluded Outside of Hungary	432
§15.10 Limitation Periods	432
§15.11 Future Developments	433
CHAPTER 16	
Ireland	
<i>Sabine Walsh</i>	435
Editors' Note	435
Regulatory Robustness Rating for Mediation	436
§16.01 Basic Terms and Definition	440
§16.02 Sources of Mediation Regulation	440
[A] The EU Directive on Certain Aspects of Mediation in Civil and Commercial Matters	440
[B] Domestic Legislation, Court Rules & Practice Directions	441
[1] Rules of the Superior Courts (Commercial Proceedings) 2004	442
[2] S.15 Civil Liability and Courts Act 2004	442
[3] Draft General Scheme of Mediation Bill 2012 and the Mediation Bill 2017	442
[C] Case law	443
§16.03 Initiating Mediation	443
[A] Types of Disputes Considered Suitable for Mediation	443
[B] Judicial Referral Provisions	445
[1] The Civil Liability and Courts Act 2004	447
[2] The Rules of the Superior Courts (Competition Proceedings) 2005	448
[3] Order 19 A Circuit Court Rules	448
§16.04 Process	450
§16.05 Recognition and Accreditation of Mediators	451
§16.06 Confidentiality and Admissibility of Mediation Evidence	455
[A] Insider/Outsider Confidentiality	456
[B] Insider/Insider Confidentiality	456
[C] Insider/Court Confidentiality	457
§16.07 Rights and Obligations of Mediators and Participants in Mediation	459
[A] Mediators	459
[B] Lawyers	460
[C] Parties	460
[D] Others	461
§16.08 Enforceability of Mediated Outcomes	461
§16.09 Limitation Periods	462
§16.10 Future Developments	462

Table of Contents

CHAPTER 17

Italy

Carlo Mastellone & Laura Ristori 465

Editors' Note 465

Regulatory Robustness Rating for Mediation 466

§17.01 Introduction 468

§17.02 Definition of a Cross-Border Dispute 472

§17.03 Sources of Mediation Regulation 473

§17.04 Initiating Mediation 473

[A] Mandatory Pre-trial Mediation 474

[B] Mediation Ordered by the Judge 474

[C] Mediation Clauses 476

[D] Lawyers' Obligations Concerning Mediation 476

[1] Ethical Duty 476

[2] Legal Duty 477

§17.05 Mediation Process 477

[A] Key Features of the Mediation Process in Italy 477

[1] The Significance of the 'First Meeting' 477

[2] Court-Ordered Mediation 479

[3] Consequences of Refusal to Go to Court Ordered Mediation 479

[4] Decisions by Tribunals on Court-Ordered Mediation 480

[5] Tax Incentives 482

[B] Other Issues 483

[C] Some Process Regulations Apply in All Instances 483

[D] Other General Issues 484

[E] Selection of Mediators 484

§17.06 Recognition/Credentialing/Accreditation of Mediators 485

[A] Individual Mediators 485

[B] Mediator by Law 486

[C] Non-lawyer Mediator 487

[D] Maintaining the Qualification of Accredited Mediator 487

[E] Mediation Organisations 488

§17.07 Confidentiality and Admissibility of Mediation Evidence 489

§17.08 Mediated Outcomes and Enforceability 489

§17.09 Effect on Statutes of Limitation 490

§17.10 Duties and Obligations, Liability Issues 490

CHAPTER 18

Latvia

Dana Rone 493

Editors' Note 493

Regulatory Robustness Rating for Mediation 494

§18.01 Introduction 496

§18.02 Basic Terms and Definitions	497
§18.03 Sources of Mediation Regulation	498
[A] International Law	498
[B] Domestic Legislation	498
§18.04 Initiation of Mediation	499
[A] Mediation Triggers	499
[1] ‘Mediation Contract’ and Mediation Clauses	499
[2] Court Referral	500
[B] Types of Disputes Considered Suitable for Mediation	500
§18.05 Process	501
§18.06 Recognition and Accreditation of Mediators	502
[A] Requirements for Professional Mediator Recognition	502
[1] Prerequisites	502
[2] Certification Standards	503
[3] Loss of Accreditation	504
[B] Implications of Certification for Practice	504
[C] Liability and Immunity	504
[D] Quality Assurance Mechanisms	504
[E] Public Access to Information on Certified Mediators	505
§18.07 Confidentiality and Admissibility of Mediation Evidence	505
[A] Insider/Outsider Confidentiality	505
[B] Insider/Insider Confidentiality	506
[C] Insider/Court Confidentiality	506
§18.08 Rights and Obligations	506
[A] Mediators	506
[B] Lawyers	507
[C] Parties	507
[D] Others	507
§18.09 Enforcement of Mediated Outcomes	507
§18.10 Limitation Periods	507
§18.11 Future Developments	508
CHAPTER 19	
Lithuania	
<i>Virgilijus Valančius</i>	509
Editors’ Note	509
Regulatory Robustness Rating for Mediation	510
§19.01 Introduction	512
§19.02 Basic Terms and Definitions	513
§19.03 Sources of Mediation Regulation	514
§19.04 Initiating Mediation	516
§19.05 Process	518
§19.06 Recognition/Credentialing/Accreditation of Mediators	520
§19.07 Confidentiality and Admissibility of Mediation Evidence	522

Table of Contents

[A] Insider/Outsider Confidentiality	522
[B] Insider/Insider Confidentiality	523
[C] Insider/Court Confidentiality	523
§19.08 Mediated Outcomes and Enforceability	524
§19.09 Suspension of Limitation Periods	525
§19.10 Duties and Obligations	526
[A] Duties and Obligations of the Mediator	526
[B] Duties and Obligations of Legal Representatives	527
[C] Duties and Obligations of the Parties to the Dispute	527
[D] Duties and Obligations of Other Participants	527
§19.11 Future Developments	528
CHAPTER 20	
Luxembourg	
<i>Jan Kayser</i>	529
Editors' Note	529
Regulatory Robustness Rating for Mediation	530
§20.01 Luxembourg Introduction	532
§20.02 Basic Terms and Definitions	533
§20.03 Main Sources of Mediation Regulation	533
§20.04 Initiating Mediation	534
[A] Extrajudicial Mediation	535
[B] Judicial Mediation	535
§20.05 Disputes Suitable for Mediation	536
§20.06 Regulation of the Mediation Process	536
[A] Rules Applicable to Mediation in General	536
[B] Rules Applicable to Judicial Mediation Only	537
[C] Reimbursement of Mediators and Other Costs	538
§20.07 Recognition and Accreditation of Mediators	538
[A] Requirements of Professional Mediator Recognition	538
[1] Extrajudicial Mediation	538
[2] Judicial Mediation	538
[3] Private Accreditation	539
[B] Implications of Accreditation for Practice	540
§20.08 Confidentiality and Admissibility of Mediation Evidence	540
[A] Insider /Outsider Confidentiality	541
[B] Insider/ Insider Confidentiality	541
[C] Insider/Court Confidentiality	541
§20.09 Rights and Obligations of Mediators and Participants	541
[A] Mediators	542
[B] Lawyers	542
[C] Parties	542
[D] Others	542
§20.10 Enforcement of Mediated Outcomes	542

§20.11 Limitation Periods	544
CHAPTER 21	
Malta	
<i>Adrian Delia & Michael Muscat</i>	545
Editors' Note	545
Regulatory Robustness Rating for Mediation	546
§21.01 Introduction	548
§21.02 Basic Terms and Definitions	549
§21.03 Sources of Mediation Regulation	550
[A] Mediation Act	550
[B] Other Sources of Mediation Regulation	551
§21.04 Initiating Mediation	552
[A] Mediation Triggers	552
[B] Types of Disputes Considered Suitable for Mediation	553
§21.05 Process	553
[A] Initiation of the Mediation Process	554
[B] Termination of the Mediation Process	554
[C] Principles of the Mediation Process	554
[D] Mediators Remuneration and Registration Fees	554
§21.06 Recognition and Accreditation of Mediators	555
§21.07 Confidentiality and Admissibility of Mediation Evidence	556
[A] Insider/Outsider Confidentiality	556
[B] Insider/Insider Confidentiality	556
[C] Insider/Court Confidentiality	557
[1] Admissibility of Evidence	557
[2] Compulsion of Mediators to Act as Witness	557
§21.08 Rights and Obligations	558
[A] Mediators	558
[1] Impartiality and Independence	558
[B] Lawyers	560
[C] Parties	560
[D] Others	561
§21.09 Enforcement of Mediated Outcomes	561
§21.10 Limitation Periods	562
§21.11 Future Developments	562
CHAPTER 22	
The Netherlands	
<i>Machteld Pel</i>	563
Editors' Note	563
Regulatory Robustness Rating for Mediation	564
§22.01 Introduction	567

Table of Contents

§22.02 Basic Terms and Definitions	568
[A] Cross-Border Disputes	568
[B] Mediation	568
[C] Mediator	568
§22.03 Sources of Mediation Regulation	569
[A] Cross-Border Mediation Law	569
[B] Draft Mediation Bill	569
[C] Civil Procedure Law	569
[D] Other legislation	569
[E] Case law	570
[F] Institutional Rules	570
[1] Netherlands Mediation Institute and Quality Foundation of Mediators	570
[2] Netherlands Arbitration Institute	571
§22.04 Initiating Mediation	571
[A] Referral by Judge	572
[B] Referral by the Legal Desk	572
[C] Advice of Lawyers or Advisers	573
[D] Mediation Advised by Medical Officers in Labour Cases	573
[E] Mediation Clauses	573
[F] Disputes Considered Suitable for Mediation	574
§22.05 Process	575
[A] Appointment of Mediator	575
[B] Agreement to Mediate	575
[C] Procedural Rules	576
[D] Voluntariness and Privacy of Mediation	576
[E] Termination of Mediation	576
§22.06 Recognition and Accreditation of Mediators	577
[A] Requirements for Court Related Mediation	577
[B] Register of Mediators Kept by QFM	578
[C] Implications of Mediation Accreditation for Practice	578
[D] Quality Assurance Mechanisms	579
[E] Public Access to Information on Certified Mediators	579
§22.07 Confidentiality and Admissibility of Mediation Evidence	579
[A] Insider/Outsider Confidentiality	580
[B] Insider/Insider Confidentiality	580
[C] Insider/Court Confidentiality	581
§22.08 Rights and Obligations	581
[A] Obligations on the Mediator	582
[B] Obligations on Lawyers	582
[C] Obligations on Parties	583
[D] Obligations on Others	583
§22.09 Enforcement of Mediated Outcomes	583
[A] Directly Enforceable Mediated Settlement Agreements	584

[B] Enforcement in Form of an Arbitral Award	584
§22.10 Limitation Periods	584
§22.11 Future Developments	584
CHAPTER 23	
Northern Ireland	
<i>Brian Speers</i>	587
Editors' Note	587
Regulatory Robustness Rating for Mediation	588
§23.01 Introduction	591
§23.02 Basic Terms and Definitions	592
§23.03 Sources of Mediation Regulation	592
§23.04 Initiating Mediation	593
§23.05 Process	596
§23.06 Training and Accreditation of Mediators	597
§23.07 Confidentiality and Admissibility of Evidence	598
§23.08 Mediated Outcomes and Enforceability	599
§23.09 Duties and Obligations	600
CHAPTER 24	
Poland	
<i>Rafal Morek</i>	601
Editors' Note	601
Regulatory Robustness Rating for Mediation	602
§24.01 Introduction	604
§24.02 Basic Terms and Definitions	605
§24.03 Sources of Mediation Regulation	605
[A] Legislation	605
[B] Codes of Conduct and Other Standards	607
[C] Private Regulation	607
§24.04 Initiating Mediation	608
[A] Court Referral	608
[B] Agreement to Mediate (Relating to Existing or Future Disputes)	609
[C] Judicial <i>Quasi</i> -Mediation	610
[D] Professional Duties of Lawyers	610
§24.05 Process	611
[A] Commencement of the Mediation	612
[B] Use of Private Sessions	613
[C] Mediator Acting as Arbitrator	613
[D] Co-mediation	613
[E] Payment of Mediator	614
§24.06 Recognition/Credentialing/Accreditation of Mediators	614
§24.07 Confidentiality and Admissibility of Mediation Evidence	618

Table of Contents

§24.08 Mediated Outcomes and Enforceability	619
§24.09 The Impact of Mediation on Litigation Limitation Periods	619
§24.10 Duties and Obligations	620
§24.11 Future Development	621
CHAPTER 25	
Portugal	
<i>Miguel Cancellia d'Abreu & Sabine Walsh</i>	623
Editors' Note	623
Regulatory Robustness Rating for Mediation	624
§25.01 Introduction	627
§25.02 Basic Terms and Definitions	627
§25.03 Initiating Mediation	628
[A] Mediation Clauses and Agreements to Mediate	628
[B] Court Referral	628
§25.04 Process	629
§25.05 Recognition/Credentialing/Accreditation of Mediators	630
§25.06 Confidentiality and Admissibility of Mediation Evidence	632
§25.07 Mediated Outcomes and Enforceability	632
§25.08 Suspension of Limitation Periods	634
§25.09 Duties and Obligations	634
§25.10 Future Developments	636
CHAPTER 26	
Romania	
<i>Constantin Adi Gavrilă & Sanda Elena Lungu</i>	637
Editors' Note	637
Regulatory Robustness Rating for Mediation	638
§26.01 Introduction	641
§26.02 Basic Terms and Definitions	641
§26.03 Sources of Mediation Regulation	642
[A] Law on Mediation and the Mediators' Profession	642
[B] Civil Procedure Code	642
[C] Civil Code	642
[D] Decision of the Constitutional Court	642
[E] Code of Ethics	643
§26.04 Initiating Mediation	643
[A] Mediation Triggers	643
[1] Obligation to Inform	643
[2] Court Referral	644
[3] Agreements to Refer Disputes to Mediation and Mediation Clauses	644
[B] Types of Disputes Considered Suitable for Mediation	645

§26.05	Mediation Process	645
	[A] Basic Principles	645
	[B] Mediation Model	645
	[C] Pre-mediation Phase	645
	[D] Agreement to Mediate	646
	[E] The Role of the Mediator	646
	[F] Presence of Third Parties	647
	[G] Mediators' Fees and Costs	647
§26.06	Recognition and Accreditation of Mediators	647
	[A] Accreditation Mechanism	648
	[1] Mediation Training Standards	649
	[2] Assessment	649
	[3] Ongoing Training Requirements	649
	[4] Suspension and Removal of Accreditation	649
	[B] Foreign Mediators	650
	[C] Implications of Mediator Accreditation for Practice	650
	[D] Quality Assurance Mechanisms	651
	[E] Public Access to Information on Certified Mediators	652
§26.07	Confidentiality and Admissibility of Mediation Evidence	652
	[A] Insider/Outsider Confidentiality	652
	[B] Insider/Insider Confidentiality	653
	[C] Insider/Court Confidentiality	653
§26.08	Rights and Obligations	653
	[A] Mediators	654
	[B] Lawyers	655
	[C] Parties	655
	[D] Others	655
§26.09	Enforcement of Mediated Outcomes	656
	[A] Legal Form of Mediated Settlement Agreements	656
	[B] Enforceability of the Mediated Settlement Agreements	656
§26.10	Limitation Periods	656
§26.11	Future Developments	657
 CHAPTER 27		
Scotland		
	<i>Charlie Irvine</i>	659
 Editors' Note		
	Regulatory Robustness Rating for Mediation	659
§27.01	Introduction	663
§27.02	Basic Terms and Definitions	666
§27.03	Sources of Cross-Border Mediation Regulation	667
	[A] International Treaty Law	667
	[B] Legislation	668
	[C] Court Rules and Practice Directions	671

Table of Contents

[D] Industry Standards	673
§27.04 Initiating Mediation	674
[A] Triggering Mechanisms for Mediation	676
[1] Employment Tribunals	676
[2] Other Administrative Tribunals	676
[3] Small Claims	677
[4] Family Actions	677
[B] Contractual Provisions	678
[C] Indirect Triggers	678
§27.05 Process	678
[A] Voluntariness (7)	681
[B] Impartiality, Independence and Neutrality; Conflict of Interest (7)	681
[C] Competence (6)	682
[D] Confidentiality (7)	682
[E] Understanding of Mediation (6)	683
[F] Advertising and Solicitation; Gifts and Favours (4)	683
[G] Respect and Non-discrimination (2)	683
[H] Complaints (4)	683
[I] Miscellaneous	683
§27.06 Training and Recognition of Mediators	684
§27.07 Locating a Mediator	689
§27.08 Confidentiality and Admissibility of Mediation Evidence	690
§27.09 Mediated Outcomes and Enforceability	691
§27.10 Duties and Obligations	692
§27.11 Conclusion	694
CHAPTER 28	
Slovak Republic	
<i>Alexandra Kapišovská, František Kutlík & Tatiana Hambalková</i>	697
Editors' Note	697
Regulatory Robustness Rating for Mediation	698
§28.01 Introduction	700
§28.02 Background	701
§28.03 Cross-Border Mediation Practice	702
§28.04 Basic Terms and Definitions	703
§28.05 Sources of Mediation Regulation	704
§28.06 Initiating Mediation	705
[A] Dispute Categories and Mediation	705
[B] Agreements to Mediate	706
[C] Court Referral to Mediation	706
§28.07 The Mediation Process	707
[A] Codes of Conduct	707
[B] Payment/Costs	708

§28.08 Registration of Mediators	709
[A] Requirements for Registered Mediators	709
[B] Training of Mediators	710
[C] Lawyers as Registered Mediators	711
[D] Non-registered Mediators	711
[E] Removal of Mediators from the Register	711
[F] The Profile of Practising Mediators	712
§28.09 Confidentiality and Admissibility of Mediation Evidence	712
§28.10 Mediated Outcomes and Enforceability	713
§28.11 Duties and Obligations	714
[A] Duties of Registered Mediators	714
[B] Duties of Lawyers	715
[C] Duties of Parties	716
CHAPTER 29	
Slovenia	
<i>Aleš Zalar</i>	717
Editors' Note	717
Regulatory Robustness Rating for Mediation	718
§29.01 Introduction	720
§29.02 Basic Terms and Definitions	721
§29.03 Sources of Mediation Regulation	722
[A] International Sources	723
[B] Domestic Sources	723
§29.04 Initiating Mediation	724
§29.05 Process	727
§29.06 Recognition and Accreditation of Mediators	729
§29.07 Confidentiality and Admissibility of Mediation Evidence	733
§29.08 Mediated Outcomes and Enforceability	734
§29.09 Limitation Periods	735
§29.10 Duties and Obligations	736
CHAPTER 30	
Spain	
<i>Mercedes Tarrazón & Marian Gili Saldaña</i>	739
Editors' Note	739
Regulatory Robustness Rating for Mediation	740
§30.01 Introduction	742
§30.02 Basic Terms and Definitions	744
[A] Mediation	744
[B] Cross-Border Disputes	744
[C] Mediator	744
[D] Mediation Institutions	745

Table of Contents

[E] Out-of-Court and Judicial Mediation	745
§30.03 Sources of Mediation Regulation	745
[A] The Act 5/2012	745
[B] Legislation Supplementing Act 5/2012	746
[C] Civil Procedure Act	747
[D] Legislation on Mediation in Specific Matters	747
[E] Codes of Conduct	747
§30.04 Initiating Mediation	748
[A] Mediation Triggers	748
[1] Mediation Clauses	748
[2] Agreement to Mediate	749
[3] Court Recommendation	750
[B] Types of Disputes Suitable for Mediation	750
§30.05 Process	750
[A] Initial Stage of Mediation	751
[B] Termination of Mediation	751
[C] Simplified Online Mediation Procedures	752
[D] Fees and Costs	752
§30.06 Recognition and Accreditation of Mediators	752
[A] National Level Recognition	753
[1] Full Legal Capacity	753
[2] Education	753
[3] Insurance Policy	754
[B] Quality Assurance Mechanisms	754
[C] Public Access to Information on Certified Mediators	754
§30.07 Confidentiality and Admissibility of Mediation Evidence	756
[A] Insider/Outsider Confidentiality	756
[B] Insider/Insider Confidentiality	756
[C] Insider/Court Confidentiality	756
§30.08 Rights and Obligations	756
[A] Mediators	756
[1] Impartiality and Neutrality	757
[2] Competence and Duties During Mediation	757
[3] Liability	757
[B] Parties	758
§30.09 Enforcement of Mediated Outcomes	758
§30.10 Limitation Periods	758
§30.11 Future Developments	759
CHAPTER 31	
Sweden	
<i>Bengt Lindell</i>	761
Editors' Note	761
Regulatory Robustness Rating for Mediation	762

§31.01 Introduction	764
§31.02 Basic Terms and Definitions	766
[A] Mediation	766
[B] Mediated Settlement Agreement	767
§31.03 Sources of Mediation Regulation	767
[A] Mediation Act	767
[B] Code of Judicial Procedure	768
[C] Private Regulations	768
[D] European Code of Conduct for Mediators	769
§31.04 Initiating Mediation	769
[A] Mediation Triggers	769
[1] Court Referral	769
[2] Mediation Clauses	770
[3] Request for Mediation	770
[B] Disputes Considered Suitable for Mediation	771
§31.05 Process	771
[A] Initiation of Mediation and Agreement to Mediate	771
[B] Appointment of the Mediator	772
[C] Conduct of Proceedings	772
[D] Termination of Mediation	773
§31.06 Recognition and Accreditation of Mediators	773
§31.07 Confidentiality and Admissibility of Mediation Evidence	774
[A] Insider/Outsider Confidentiality	774
[B] Insider/Insider Confidentiality	774
[C] Insider/Court Confidentiality	775
§31.08 Rights and Obligations	775
[A] Mediators	775
[B] Lawyers	776
[C] Parties	776
§31.09 Enforcement of Mediated Outcomes	776
[A] Enforcement According to the Mediation Act	776
[B] Enforcement According to Institutional Rules	777
§31.10 Limitation Periods	777

CHAPTER 27

Scotland

Charlie Irvine

EDITORS' NOTE

Scotland occupies the unique position of being a separate jurisdiction while not, however, a separate state, and as such has its own regulatory framework for mediation. As in other predominantly common law jurisdictions, much of the regulation of mediation is underdeveloped and can be found in the general law and diverse soft law frameworks, such as codes of conduct. The exception to this is the framework for cross-border mediation, which is contained in formal law implementing the provisions of the EU Directive. This dichotomy is reflected in the regulatory robustness ratings, and must be borne in mind by users of mediation in Scotland.

In contrast to its neighbouring jurisdictions, the Scottish courts have been loath to address or promote mediation, viewing the process as taking place outside the judicial frame and being regulated by agreement between the mediator and the parties. This is reflected in the ratings for the relationship and attitude of the courts to mediation. The State has, however, promoted some regulation of the mediation profession, albeit in soft form, by providing some funding for the Scottish Mediation Register, established and maintained by the Scottish Mediation Network, in order to meet the requirements in the EU Directive to provide for a code of conduct for mediators. This has put some structure on Scottish mediation services and facilitated access to mediators for users, in a more transparent fashion, compared to the approach taken in other jurisdictions of the United Kingdom.

REGULATORY ROBUSTNESS RATING FOR MEDIATION

Criterion	Jurisdictional Description	Star Score and Weighting	RRR
1. Congruence of domestic and international legal frameworks	A specific legal framework exists for international mediation, whereas domestic mediation lacks the same. Existing frameworks are not integrated in many areas; since they are not formally regulated, it thus creates the potential for uncertainty about the applicable law.	★★★ Weighting: 1	2.5
2. Transparency and clarity of content of mediation laws in relation to: i. how mediation is triggered ii. the internal process of mediation iii. standards and qualifications for mediators iv. rights and obligations of participants in mediation	The law applicable to mediation is identifiable or accessible in some of the four listed content areas. It is however underdeveloped or difficult to access in others, particularly as regards domestic mediation. This could cause confusion, particularly for foreign lawyers who might find the common law system difficult to negotiate.	★★★ Weighting: 2	5
3. Mediation infrastructure and services: quality and access	Well-developed and good quality mediation services and infrastructure. Transparent mediation/quality assurance standards exist in the Scottish Mediation Register; other mediation bodies also have complaints and disciplinary processes and Codes of Conduct. Mediation services are mainly offered independently, and there is some integration with existing dispute resolution structures. Mediation services are easily accessible.	★★★★ Weighting: 3	10.5
4. Access to internationally recognised and skilled local and foreign mediators	There is a nationally recognised pool of mediators, primarily consisting of local mediators, who are both appropriately qualified and skilled.	★★★★ Weighting: 2	7

Criterion	Jurisdictional Description	Star Score and Weighting	RRR
5. Enforceability of mediation and multi-tiered dispute resolution (MDR) clauses	<p>These mediators are permitted to work across most mediation services in the jurisdiction. There is some uncertainty about how foreign mediators can join, though it is likely that they can.</p> <p>Users have recourse to complaints and disciplinary processes. It is easy for users to access the local pool; it takes more effort and usually some word-of-mouth recommendations to access foreign mediators.</p> <p>The extent to which the general law of contract supports the enforceability of mediation and MDR clauses is unclear. There is no jurisprudence on this issue to date, but it is likely for courts to follow jurisprudence in England and Wales which would tend to favour the enforceability of such clauses.</p>	★★★ Weighting: 3	7.5
6. Certain and predictable regulation of: i. insider/outsider confidentiality with some flexibility ii. insider/court confidentiality	<p><u>Insider/ outsider confidentiality</u> Formal mandatory regulation of insider/outsider confidentiality is limited and sector-specific. Outside this, the general law of contract applies. Most mediation agreements include detailed provisions on insider/outsider confidentiality. The different approaches here are generally aligned in terms of content, but users should be aware of the differences in regulation of domestic and cross-border disputes.</p> <p><u>Insider/ court confidentiality</u> There is specific formal mandatory regulation in some sectors, which is similar in terms of content. Otherwise regulation varies according to the contents of mediation agreements, which often contain standard clauses on this issue. The regulation is generally aligned in terms of content. However there is potential for some lack of uniformity.</p>	★★★ Weighting: 2	6

Criterion	Jurisdictional Description	Star Score and Weighting	RRR
7. Informed self-regulation of insider/insider confidentiality	Insider/insider confidentiality related to the internal conduct of mediation and is subject to party autonomy. This permits parties to tailor this form of confidentiality to meet their needs. Some regulation exists in codes of conduct, but regulation is default in nature and can be varied by agreement. It is the practice that mediation agreements expressly provide for insider/insider confidentiality on a case-by-case basis.	★★★★ Weighting: 1	3.5
8. Enforceability of mediated settlement agreements (MSAs) and international mediated settlement agreements (iMSAs)	There is a limited range of legal forms for MSAs/iMSAs. Criteria applicable for the recognition and enforcement of these agreements in their various forms are mostly transparent. When documented in the appropriate legal form, MSAs/iMSAs are recognised by the law and are generally enforceable. The scope for challenges to MSAs/iMSAs depends on the legal form adopted but is generally limited.	★★★ Weighting: 3	9
9. Impact of commencement of mediation on litigation limitation periods	The rules applying to the commencement of mediation on litigation limitation periods are inconsistent as between cross-border and domestic disputes. In the latter case, post-filing, parties risk prejudicing their legal right or other negative consequences for litigation by engaging in mediation, unless initiative is taken by the parties or their legal advisers.	★★★ Weighting: 1	2.5
10. Relationship of courts to mediation	Courts are increasingly supportive of mediation, but lack mediation programmes and procedures to facilitate or refer cases to mediation.	★★ Weighting: 2	4
11. Regulatory incentives for legal advisers to engage in mediation	No incentives for legal adviser to engage in mediation, except vague duties in legal professionals' codes of conduct to promote the best interests of the client.	★★ Weighting: 1	1.5

Criterion	Jurisdictional Description	Star Score and Weighting	RRR
12. Attitude of courts to mediation	There have to date been relatively few opportunities for the courts to decide cases on issues dealing with mediation. Judges and courts have not generally made public comments to indicate support for mediation though this could change as the mood about the future of mediation becomes more positive. It is also likely that jurisprudence from England and Wales will have a positive influence on Scottish courts in the near future. At present, there is some evidence to indicate the robustness of the regulatory regime.	★★ Weighting: 3	6

§27.01 INTRODUCTION

The fact that Scotland is a separate jurisdiction from the United Kingdom (the UK) without being a separate state has been a source of confusion, not to mention consternation, to those who come into contact with its law both outside and inside the country. All of this might have changed on 18 September 2014 when Scotland's people voted in an independence referendum. In the event, 55 per cent of the electorate chose to remain with the United Kingdom, meaning that the status quo remains, at least for the foreseeable future.¹ In understanding the impact of the EU Directive on Cross-Border Mediation (hereinafter 'the Directive') on Scots law, it is therefore essential to consider the constitutional position.

Scotland is one of the four constituent countries that make up the United Kingdom of Great Britain and Northern Ireland.² The Act of Union of 1707 abolished the Scottish Parliament but preserved Scotland's separate legal system.³ This oddity meant that, for nearly 300 years, it could be said that Scotland '*shares with the District of Columbia the dubious distinction of having a separate legal system without a separate legislature to regulate it.*'⁴ That changed on 1 July 1999 when a new Scottish Parliament

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1. The powers of the Scottish Parliament are likely to increase, however: see the Report of the Smith Commission, <http://webarchive.nationalarchives.gov.uk/20151202171017/https://www.smith-commission.scot/smith-commission-report/> (accessed 4 Feb. 2017).
 2. The others being England, Wales and Northern Ireland (hereinafter 'UK').
 3. Along with its education system and national church: Union with Scotland Act 1707.
 4. Thomas B Smith, 'Scottish Nationalism, Law and Self-Government' in *The Scottish Debate* (ed. Neil MacCormick, Oxford University Press 1970). Professor Smith was perhaps over-egging the pudding on this point: a Scottish Grand Committee of the UK Parliament dealt with specifically Scottish legislation from 1907.

came into being.⁵ The UK is not, however, a federal system: there is no separate English Parliament and the Scottish Parliament has no legislative competence in relation to 'reserved matters' such as defence, foreign affairs, taxation, social security and employment.^{6,7} All of these remain matters for the UK Parliament. Devolved matters include education, health, housing, social work, and police and justice matters.

This ambiguity is reflected in Scotland's treatment in private international law, where Scotland is described as a separate '*law unit, or legal system, having an independent body of law*'.⁸ When it comes to devolved matters, Scotland is one of three law units in the UK.⁹ Another text is more trenchant: '*For the purposes of Scots private international law England remains, apart from statute, in the position of a foreign country*'.¹⁰ However, in relation to reserved matters, such as company law or immigration, the law unit is the UK itself.¹¹ What is clear is that Scotland is not a 'Member State', meaning that the provisions of the present Directive do not apply to disputes between Scotland and the other law units within the United Kingdom. At the same time, if there is a cross-border dispute between someone domiciled in a Member State other than the UK and someone domiciled in Scotland, Scotland will count as the 'law unit'. It should also be added that, as far as domestic Scots law is concerned, English cases are highly influential.¹²

Since 1999 the Scottish Parliament has power to legislate in relation to non-reserved matters, including private law.¹³ The newly formed devolved administration, the Scottish Government, has related powers to make regulations on such matters. Thus the responsibility for implementing EU directives, such as the subject of the current volume, now lies with Scottish ministers, insofar as they affect devolved matters, but is shared with the UK Parliament when it comes to reserved matters.¹⁴

5. Scotland Act 1998, <http://www.legislation.gov.uk/ukpga/1998/46/contents> (accessed 4 Feb. 2017).

6. *Ibid.* Schedule 5, for a complete list of reserved matters. The respective populations of the four countries of the UK are: England, 52.2 million; Scotland, 5.2 million; Wales, 3 million; Northern Ireland, 1.8 million. This makes a total UK population in June 2010 of 62.3 million. See <http://www.ons.gov.uk/ons/rel/pop-estimate/population-estimates-for-uk--england-and-wales--scotland-and-northern-ireland/mid-2010-population-estimates/index.html> (accessed 4 Feb. 2017).

7. The Smith Commission has recommended expanding the range of devolved powers to include more of the welfare budget but not the overall balance of reserved powers. In 2016, for the first time, the Scottish Parliament set a different rate of income tax for the highest earners – see <http://www.gov.scot/Topics/Government/Finance/scottishapproach/scottishrateofincometax> (accessed 4 Feb. 2017).

8. Elizabeth B Crawford & Janeen P Carruthers, *International Private Law: A Scots Perspective*, 5 (W. Green & Son, 2010).

9. The others being: (1) England and Wales and (2) Northern Ireland.

10. Alexander E. Anton & Paul R. Beaumont, *Private International Law: A Treatise from the Standpoint of Scots Law*, 7 (2nd ed., W. Green 1990).

11. Crawford & Carruthers, *supra* n. 9, at 5.

12. See A Mark Godfrey, *Ratio Decidendi and Foreign Law in the History of Scots Law in Ratio Decidendi: Guiding Principles of Judicial Decisions, Vol. 2: 'Foreign' Law*, 85 (eds Serge Dauchy, W. Hamilton Bryson & Matthew C. Mirow, Duncker and Humblot, 2010).

13. *Ibid.*, at 126 (4) defines what is meant by Scots private law.

14. Scotland Act 1998, S. 57.

This brief introduction also needs to address how the Scottish legal system ('Scots Law' as it is properly known) can be categorised within the range of European traditions. Readers will be familiar with the distinction between the civilian and common law traditions.¹⁵ Scots Law has been characterised as a *'mixed system'*,¹⁶ incorporating elements of both traditions. It would be a mistake, however, to suppose that Scotland's legal institutions resemble those of continental Europe: its courts are vociferously adversarial and look remarkably similar to those of the common law tradition. It can be argued that 300 years of English legal influence have made their mark.¹⁷ Not only did all legislation emanate from Westminster, with its large English majority, but in matters of civil justice the highest court of appeal was, until 2010, the House of Lords,¹⁸ a body based in London and mostly staffed by English judges. Whether this influence has been positive or not is a matter of controversy.¹⁹

Scottish civil courts have two tiers. The superior court is known as the Court of Session: it is both an appellate court and a Court of First Instance, sitting in Edinburgh. It tends to deal with the majority of higher-value or complex cases. The lower tier is the Sheriff Court, and it has both a criminal and civil jurisdiction. Sheriff Courts sit in fifty-two locations throughout Scotland.²⁰ The judges are known as Sheriffs and they sit almost exclusively without a jury in civil matters.²¹ There is no upper financial limit to the Sheriff Court's jurisdiction. Cases with a value of less than GBP 5,000 are subject to *'Simple Procedure'*, designed with unrepresented parties in mind.²² Recovery of legal costs (known as expenses) is limited and, for the first time in Scottish court rules, parties are to be encouraged to resolve their dispute through negotiation or alternative dispute resolution.

It is likely that the majority of higher value cross-border matters will be dealt with by the Court of Session in Edinburgh with its specialist commercial judges.²³ However, following the passage of the Courts Reform (Scotland) Act 2014, the lower limit for raising an action in the Court of Session is to be increased from GBP 5,000 to GBP

15. For a thoughtful commentary on Scotland's place within wider debates on European legal harmonisation, see John Blackie & Niall Whitty, *Scots Law and the New Ius Commune in Scots Law into the 21st Century* (ed. Hector L MacQueen, W. Green & Son Ltd 1996).

16. The term popularised by T. B. Smith; see Douglas J. Osler, *The Fantasy Men*, 10, *Rechtsgeschichte*, 169, 172 (2007).

17. Anton & Beaumont, *supra* n. 11, at 8.

18. Now the UK Supreme Court, see <https://www.supremecourt.uk/> (accessed 4 Feb. 2017). The Supreme Court was brought into existence by the Constitutional Reform Act 2005 and commenced on 1 Oct. 2009. For the 2005 Act see <http://www.legislation.gov.uk/ukpga/2005/4/contents> (accessed 4 Feb. 2017).

19. See Osler, 2007, *supra* n. 17.

20. <https://www.scotcourts.gov.uk/the-courts/sheriff-court/about-sheriff-courts> (accessed 4 Feb. 2017).

21. The same Sheriffs also deal with criminal matters (estimated to take up more than 80 per cent of court time).

22. Courts Reform (Scotland) Act 2014, S. 72; Act of Sederunt (Simple Procedure) 2016.

23. See <https://www.scotcourts.gov.uk/the-courts/supreme-courts/about-the-court-of-session> (accessed 4 Feb. 2017).

100,000.²⁴ This means that from September 2015, a significant number of commercial actions must be raised in the Sheriff Court. The hope is to reduce costs; however, there is some concern that Sheriff Courts will become overwhelmed by this new business, leading to delays. Those mediating in cross-border disputes would be well advised to consult local, Scottish, solicitors for advice on the costs, duration and location of any resultant litigation.

§27.02 BASIC TERMS AND DEFINITIONS

On the face of it, the definition of a cross-border dispute in Scots law is straightforward. Part 1 of the Cross-Border Mediation (EU Directive) Regulations 2011²⁵ applies to the whole of the UK and S.8 specifically states that ‘*cross-border dispute*’ shall have the same meaning as it does in the Directive. This means that a cross-border dispute exists where at least one of the parties is domiciled or habitually resident in a Member State other than the UK.²⁶ This in turn means that the most common form of dispute involving Scotland and another jurisdiction (i.e., England and Wales) is excluded from the definition.²⁷ It would be a mistake, however, to imagine that mediation involving parties from each of the two jurisdictions is a form of domestic mediation. Conflict of law rules apply here as in other areas, and once the law of Scotland or England and Wales is selected, the mediation will take place according to the norms of that legal system. Enforcement of mediation outcomes will run into the same problems as the enforcement of any other contractual agreement: new court proceedings will be required and the courts will have to be asked to declare the mediation outcome to be a binding contractual agreement. It looks, therefore, as if mediation between parties in Scotland and other UK jurisdictions will resemble cross-border mediation in all respects apart from having the protection of the EU Directive.

The situation is not unique to this Directive. For example the European Commission Regulation on the law applicable to non-contractual obligations (Rome II) does not apply to conflicts solely between the laws of individual ‘*territorial units*’ within a Member State.²⁸

24. Scheduled for September 2015 – Court Reform (Scotland) Act 2014, S. 39; for a useful commentary see http://www.macroboberts.com/content/content_2237.html (accessed 4 Feb. 2017).

25. 2011, Number 1133, The Cross-Border Mediation (EU Directive) Regulations 2011, available from <http://www.legislation.gov.uk/ukxi/2011/1133/made> (accessed 4 Feb. 2017).

26. The Directive, Art. 2(1). The term ‘cross-border dispute’ has a further, limited, application in relation to questions of confidentiality and limitation and prescription, where it also refers to court proceedings or arbitration initiated following mediation by parties domiciled in a Member State other than the UK (Directive, Art. 2(2)).

27. Explanatory Memorandum to the Cross-Border (EU Directive) Regulations 2011, para. 4.2. The general rules regarding allocation of jurisdiction between Scotland and other law units are summarised in Crawford & Carruthers, *supra* n. 9, at 188–189.

28. Regulation (EC) No. 864/2007, Art. 25(2).

'ADR' (alternative dispute resolution) is a term credited to US legal academic Frank Sander.²⁹ It embraces a range of dispute resolution processes, including arbitration, mediation, mini-trial, arb-med, med-arb, collaborative law and, in some definitions, negotiation. It has on occasion been used synonymously with the term mediation. This chapter is concerned with mediation and will only use the term ADR to refer to the wider range of processes.

The Scottish legal profession is divided into two branches as in England and Wales. '*Solicitor*' has the same meaning in both jurisdictions, with Scottish solicitors being members of the Law Society of Scotland. '*Advocates*' fulfil the same role as barristers, having rights of audience in the higher courts, and are members of the Faculty of Advocates. Since 1994, solicitors may apply for rights of audience in the Court of Session and High Court of Justiciary,³⁰ and may call themselves '*solicitor advocates*'.³¹

§27.03 SOURCES OF CROSS-BORDER MEDIATION REGULATION

Mediation is lightly regulated in Scotland. By and large the State has left mediation to its own devices, preferring to accept self-regulation until there is a need for more intervention. This laissez-faire attitude was forcefully expressed by one of Scotland's most senior judges, when he said: '*if they [parties] want to use the modern miracle of voluntary mediation, they are free to do so and not to trouble the courts.*'³² Scotland has not experienced anything similar to England and Wales with its regulatory framework for family mediation³³ and pre-action protocols.³⁴

[A] International Treaty Law

Scotland is subject to the same international treaties as the UK. The Lisbon Treaty, finally ratified in 2009,³⁵ sets out, in Article 81, principles in relation to cooperation in civil matters. This provision, at Article 81(2), instructs the European Parliament and Council to:

adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

29. Frank E. A. Sander, *Pound Conference addresses*, 79, Federal Rules Decisions, 83–246 (1976).

30. The highest criminal court in Scotland.

31. Law Reform (Miscellaneous Provisions) Scotland Act 1990, S. 24.

32. Lord Rodger of Earlsferry, *Civil Justice in Scotland: Where have we come from, where to next?* Keynote address at the Conference on Delivering Excellence in Scotland's Civil Justice System held at the Macdonald Holyrood Hotel, Edinburgh, on Friday 20 Jun. 2008. For a critical view of Scottish judicial attitudes to mediation see Charlie Irvine, *Scotland's "Mixed" Feelings About Mediation* (2012), available at SSRN: <http://ssrn.com/abstract=2713346> (accessed 4 Feb. 2017).

33. The Legal Services Commission's Family Mediation Quality Mark – http://www.legalservices.gov.uk/civil/qm/quality_mark.asp#mqm (accessed 4 Feb. 2017).

34. <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/menus/protocol.htm> (accessed 4 Feb. 2017).

35. Treaty on the Functioning of the European Union (TFEU).

- ... (e) effective access to justice;
- ... (g) the development of alternative methods of dispute settlement.

These principles are consistent with earlier European pronouncements, and give clear guidance to Member States that the European Commission views alternative dispute resolution as a significant plank in its support for the internal market.³⁶

[B] Legislation

Prior to the regulations implementing the Directive (which have a fairly narrow ambit),³⁷ there had been no general statute applicable to mediation in Scotland, still less to cross-border mediation. However, mediation has featured in some recent Scottish legislation, and it is useful to consider these sources of regulation for specific purposes.

Following the first wave of enthusiasm for family mediation in the 1980s, a number of practitioners and judges proposed statutory protection to ensure its confidentiality. The result was the Civil Evidence (Family Mediation) (Scotland) Act 1995.³⁸ The Act was innovative in UK terms in its focus on admissibility: *'no information as to what occurred during family mediation to which this Act applies shall be admissible as evidence in any civil proceedings.'*³⁹

The Act contains a regulatory element at Section 2(e), as the protection only applies to mediators working for family mediation organisations specifically approved by Scotland's senior judge, the Lord President of the Court of Session.⁴⁰ Until recently, the Act had not been tested in litigation. However, the 2015 case of *FJM v. GCM*⁴¹ held that the Act does not apply to international child abduction. Lord Stewart examined the background to the 1995 Act and concluded that Parliament had not intended that it should exclude evidence in child abduction matters. The family mediator concerned was ordered to disclose the contents of emails regarding the mediation sessions. This was *not* a cross-border mediation, taking place entirely in Scotland, and so the EU Directive did not apply. Nonetheless, while the seriousness of child abduction may distinguish this case from other family law disputes, concerns have been expressed about the encroachment on mediation confidentiality implied by the judgment.⁴²

The Education (Additional Support for Learning) (Scotland) Act 2004 was the first Scottish legislation to embed mediation into the statutory framework for delivery

36. For example, *see* the Directive, para. 2, referring to the EC's meeting at Tampere on 16 October 1999; Regulation 2201/2203 (Brussels II *bis*), applicable to family disputes.

37. These regulations are discussed below.

38. Available at <http://www.legislation.gov.uk/ukpga/1995/6/section/1> (accessed 4 Feb. 2017).

39. 1995 Act, S. 1.

40. This approval is granted to mediators accredited by Relationships Scotland (RS) (the umbrella body representing not-for-profit family mediation services across Scotland, <http://www.relationships-scotland.org.uk> (accessed 4 Feb. 2017); and CALM Scotland representing lawyer mediators, <http://www.calmScotland.co.uk> (accessed 4 Feb. 2017).

41. *FJM v. GCM* [2015] CSOH 130.

42. Jackie McRae, Mediation Minefield, *Journal of the Law Society of Scotland* (November 2015), <http://www.journalonline.co.uk/Magazine/60-11/1020976.aspx> (accessed 4 Feb. 2017).

of a public service. Under this Act, Scottish local authorities⁴³ must ensure that mediation is available to resolve disagreements between themselves and parents concerning additional support for learning (known in the rest of the English-speaking world as Special Educational Needs).⁴⁴ The regulatory element reinforces the principles of impartiality (requiring that the mediation provider is independent from the local authority's education provision)⁴⁵ and voluntariness (ensuring that no parent is forced to use mediation).⁴⁶

The next sighting of mediation in a Scottish statute concerned complaints against legal practitioners. The Legal Profession and Legal Aid (Scotland) Act 2007 created a new body, the Scottish Legal Complaints Commission (SLCC) to deal with such complaints, and gave that body the power to offer mediation.⁴⁷ Mediation is not available for complaints about more serious matters (conduct), but is offered to all who complain about the 'standard' of the service they receive. To date over 300 mediations have taken place under the scheme, of which over 70 per cent have been successful. Mediators who work for the SLCC follow guidelines based on the Scottish Mediation Network's Code of Practice.⁴⁸

Turning to cross-border mediation, the Scottish Government has implemented the Directive via the Cross-Border Mediation (Scotland) Regulations 2011⁴⁹ (henceforth the Scotland Regulations). Owing to the overlap between UK and Scottish legislation, these regulations need to be read in conjunction with the Cross-Border Mediation (EU Directive) Regulations 2011, (henceforth the UK Regulations) parts of which apply to the whole of the UK.⁵⁰

The Scotland Regulations implement Articles 7 and 8 of the Directive. In relation to the regulation of mediation, the Scottish Government believes it already complies with Article 4, which requires Member States to encourage mediators to operate under a voluntary code of conduct and to encourage the training of mediators.⁵¹ It funded the setting up of the Scottish Mediation Register (SMR),⁵² a voluntary scheme which sets standards for mediators. The Benchmark Standards⁵³ cover matters such as training, experience, continuing professional development, complaints, professional indemnity

43. Scotland has thirty-two unitary authorities responsible for education provision in their area.

44. Education (Additional Support for Learning) (Scotland) Act 2004, S. 15 (1), as amended by the Education (Additional Support for Learning) (Scotland) Act 2009.

45. *Ibid.*, S. 15 (2). This section was amended by the 2009 Act specifically to exclude the possibility of local authorities offering in-house mediation services – see Explanatory Note, para. 44 – <http://www.legislation.gov.uk/asp/2009/7/notes/division/3/11> (accessed 4 Feb. 2017).

46. *Ibid.*, S. 15 (3).

47. Legal Profession and Legal Aid (Scotland) Act 2007, S. 8 (4).

48. See SLCC, *Mediation An effective way of dealing with your complaint...*, para. 9, http://www.scottishlegalcomplaints.org.uk/media/48817/mediation_leaflet_for_complainers.pdf (accessed 4 Feb. 2017).

49. The Cross-Border Mediation (Scotland) Regulations 2011, (SSI, 2011, No. 234), available from <http://www.legislation.gov.uk/sdsi/2011/9780111012444/regulation/1#regulation-1-2> (accessed 4 Feb. 2017).

50. The Cross-Border Mediation (EU Directive) Regulations (SI, 2011, No. 1133), SS. 5 & 6.

51. Executive Note on the Cross-Border Mediation (Scotland) Regulations 2011, S. 5, point 2.

52. See <http://www.scottishmediation.org.uk/find-a-mediator> (accessed 4 Feb. 2017).

53. See <http://www.scottishmediation.org.uk> (accessed 4 Feb. 2017).

insurance and adherence to a Code of Conduct.⁵⁴ The Scottish Government asserts that SMR demonstrates compliance with Article 4: it may be assumed, then, that it considers these Benchmark Standards applicable to cross-border mediation.

To take the Scotland Regulations in more detail, they contain the following provisions:

S.3 Confidentiality

This clause provides for the non-compellability of any mediator or mediation administrator in relation to a cross-border mediation and includes any information at all from the mediation. There are two exceptions:

- 1) where all parties to the mediation agree
- 2) in the circumstances set out in Article 7(1) of the EU Directive⁵⁵

SS. 4-9 Prescription and Limitation Periods

The remaining sections of the Regulations enact the Directive by extending prescription and limitation periods to enable mediation to take place. The Regulations achieve this by amending the following pieces of legislation:

- The Prescription and Limitation (Scotland) Act 1973 (SS. 14 and 19)
- The Civic Government (Scotland) Act 1982 (S.71)
- The Rent (Scotland) Act 1984 (S.37)
- The Family Law (Scotland) Act 2006 (S.29)

In relation to each Act, the Regulations provide that if the prescription period would have come to an end:

- (a) *in the 8 weeks after the date that a mediation in relation to the dispute ends;*
- (b) *on the date that a mediation in relation to the dispute ends; or*
- (c) *after the date when all of the parties to the dispute agree to participate in a mediation in relation to the dispute but before the date that such mediation ends*
then the period shall be extended to a date 8 weeks after the end of the mediation.⁵⁶

This rather convoluted device places considerable emphasis on the date the mediation ends. The Regulations therefore go on to specify how this is to be defined:

- (a) all of the parties reach an agreement in resolution of the dispute;
- (b) all of the parties agree to end the mediation;
- (c) a party withdraws from the mediation, which is the date on which—
 - (i) a party informs all of the other parties of that party's withdrawal,
 - (ii) in the case of a mediation involving 2 parties, 14 days expire after a request made by one party to the other party for confirmation of

54. See <http://www.scribd.com/doc/56381210/Practice-Standards> (accessed 4 Feb. 2017).

55. (a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person.

(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

56. Cross-Border Mediation (Scotland) Regulations 2011, SS. 5, 6, 7, 8 and 9.

- whether the other party has withdrawn, if the other party does not respond in that period, or
- (iii) in the case of a mediation involving more than 2 parties, a party informs all of the remaining parties that the party received no response in the 14 days after a request to another party for confirmation of whether the other party had withdrawn; or
 - (d) a period of 14 days expires after the date on which the mediator's tenure ends (by reason of death, resignation or otherwise), if a replacement mediator has not been appointed.⁵⁷

[C] Court Rules and Practice Directions

The Scottish judiciary have shown little interest in regulating mediation. Apart from the Lord President's supervisory role in family mediation noted above, the laissez-faire approach continues to predominate. The 2009 Scottish Civil Courts Review (hereinafter the 'Gill Review')⁵⁸ specifically rejected the idea of amending the court rules to allow judges to apply costs sanctions for refusal to consider ADR.⁵⁹ The Review noted that such sanctions have been applied in England and Wales, adding: '*We would regret it if such an approach were to become a feature of litigation in Scotland.*'⁶⁰ It seems unlikely, then, that the Scottish courts will become an enthusiastic source of regulation for cross-border mediation.⁶¹

The Review also noted that neither solicitors nor advocates were specifically required to advise their clients about mediation. This has now changed. In September 2013 the Law Society of Scotland approved new guidance for solicitors which, for the first time, proposes an obligation to inform their clients about alternative dispute resolution. The opening paragraph of the guidance reads:

Solicitors should have a sufficient understanding of commonly available alternative dispute resolution options to allow proper consideration and communication of options to a client in considering the client's interests and objectives.⁶²

57. *See ibid.*, S. 5.

58. Report of the Scottish Civil Courts Review (Edinburgh: Crown Copyright, 2009), available from <https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4> (accessed 4 Feb. 2017).

59. *See infra* n. 95.

60. Gill Review, *supra* n. 59, p. 173.

61. For more detail *see* Scottish Civil Justice Council, *Access to Justice Literature Review: alternative dispute resolution in Scotland and other jurisdictions* (2014), <http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-publications/literature-review-on-adr-methods.pdf?sfvrsn=2> (accessed 4 Feb. 2017).

62. Law Society of Scotland, Guidance in relation to Rules B1.4, B1.9: Dispute Resolution. The remainder of the guidance reads:

A solicitor providing advice on dispute resolution procedures should be able to discuss and explain available options, including the advantages and disadvantages of each, to a client in such a way as to enable the client to make an informed decision as to the course of action and procedure he or she should pursue to best meet their needs and objectives, and to instruct the solicitor accordingly.

When it comes to cross-border disputes, Scottish lawyers are subject to the Code of Conduct for European lawyers. S.3.7.1, which states: *‘The lawyer should at all times strive to achieve the most cost effective resolution of the client’s dispute and should advise the client at appropriate stages as to the desirability of attempting a settlement and/or a reference to alternative dispute resolution.’*⁶³

While there are no rules of court specifically dealing with cross-border mediation, there are two rules of court relating to family mediation. Under Sheriff Court rules 33(22), the Sheriff may refer a case to family mediation *‘where he thinks fit’*.⁶⁴ A similar rule exists for the Court of Session.⁶⁵ Family law practitioners tend to believe that these rules have supported the use of family mediation, and led to it being the most developed branch mediation in Scotland (with the possible exception of community mediation).⁶⁶ The Scottish Government, in the course of its consultations on implementing the Directive, raised with the Court of Session Rules Council the possibility of extending these rules to other types of proceedings. This was explicitly rejected by the Rules Council, which noted that Scottish judges already had power to refer cases to mediation.⁶⁷ However, the reforms set in motion by the Civil Courts Review have led to the setting up of a new Scottish Civil Justice Council.⁶⁸ It is possible that this body will review the issue afresh.⁶⁹

In 2009, judicial mediation was introduced for Employment Tribunal cases,⁷⁰ and in 2013 a new procedural rule provided:

3. A tribunal shall whenever practicable and appropriate encourage the use by the parties of the services of ACAS, Judicial or other Mediation, or other means of resolving the dispute by agreement.⁷¹

A solicitor providing advice on dispute resolution procedures is also expected to be able to identify where alternative methods of dispute resolution may not be in the best interests of the client. For example, this may be a particular consideration for mediation or arbitration in the context of family disputes or other situations where one party may be at risk of violence or intimidation by the other.

63. See *ibid.*, p. 166, N. 1.

64. The Ordinary Cause Rules state, at 33.22, *‘In any family action in which an order in relation to parental responsibilities or parental rights is in issue, the sheriff may, at any stage of the action, where he considers it appropriate to do so, refer that issue to a mediator accredited to a specified family mediation organisation.’* Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 No. 1956 (S. 223), available from <http://www.legislation.gov.uk/uksi/1993/1956/made> (accessed 4 Feb. 2017).

65. Court of Session Rule 49.23, <https://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/court-of-session-rules> (accessed 4 Feb. 2017).

66. http://www.scotcourts.gov.uk/civilcourtsreview/Responses_to_the_Consultation_Paper/F/Family_Law_Association.pdf (accessed 4 Feb. 2017).

67. Minutes of the Meeting of the Court of Session Rules Council, Monday 11 October 2010 <https://www.scotcourts.gov.uk/docs/default-source/court-of-session-rules-council---minutes/meeting-of-11-oct-2010.pdf?sfvrsn=8> (accessed 4 Feb. 2017).

68. Scottish Civil Justice Council and Criminal Legal Assistance Act 2013.

69. See <http://www.scottishciviljusticecouncil.gov.uk/rule-making> (accessed 4 Feb. 2017).

70. See detailed discussion at §27.04[A][1] *infra*.

71. See Scottish Civil Justice Council, *supra* n. 62, pp. 27–30.

[D] Industry Standards

There are a number of standard-setting bodies for mediation in Scotland, although none dedicated to cross-border mediation.

The Scottish Mediation Network (SMN) is a member organisation representing a wide range of mediation types. It maintains the Scottish Mediation Register which sets minimum standards for training, practice and supervision.⁷² The Register now includes mediators affiliated to three other bodies: Relationships Scotland, Scottish Community Mediation Network and CALM (see ensuing paragraphs). SMN also publishes a one-page Code of Conduct, which is designed to be consistent with the European Union Model Code of Conduct for Mediators.⁷³

Relationships Scotland was formed following a merger of two national family support organisations: Relate and Family Mediation Scotland. It is the standard-setting body for publicly funded family mediation. It publishes a Code of Professional Conduct and Practice Standards for Family Mediators.⁷⁴ Lawyers who provide family mediation are represented by CALM (Comprehensive Accredited Lawyer Mediators). Its members are solicitors with over ten years' experience in family law,⁷⁵ with standards for ongoing practice and continuing professional development set by the Law Society of Scotland.⁷⁶ CALM's Code of Practice is three pages long, covering matters such as independence, conflict of interest, confidentiality, 'without prejudice', good communication and reasonable fees.⁷⁷

The Scottish Community Mediation Network (SCMN) represents the majority of community mediators in the country. It publishes an eleven-page document setting out the Mediator Accreditation Standards.⁷⁸

The Scottish Legal Complaints Commission offers mediation where a complaint has been made about the standard of service received by a client. The Commission has its own Guidelines for Mediators.⁷⁹

Other bodies maintain panels of mediators: for example the Chartered Institute of Arbitrators, the Royal Institute of Chartered Surveyors and the Law Society of Scotland.⁸⁰ Standards for Scottish mediators are examined in greater detail below.⁸¹

72. <https://www.scottishmediation.org.uk/wp-content/uploads/2016/08/Practice-Standards-for-Mediators.pdf> (accessed 4 Feb. 2017).

73. <http://www.scribd.com/doc/56381336/Code-of-Practice> (accessed 4 Feb. 2017).

74. http://www.relationships-scotland.org.uk/family_mediation.shtml#11 (accessed 4 Feb. 2017).

75. CALM, *Code of Practice*, <http://www.calmScotland.co.uk> (accessed 4 Feb. 2017).

76. See <http://www.lawscof.org.uk/> (accessed 4 Feb. 2017).

77. See <http://www.calmScotland.co.uk/images/calm-code-of-practice-2015.pdf> (accessed 4 Feb. 2017).

78. <http://www.scmc.sacro.org.uk/sites/default/files/page/Training%20Accreditation/training-accreditation-standards.pdf> (accessed 4 Feb. 2017).

79. Mediation, Guidelines for Mediators, Part of Quality Assurance Measures.

80. As well as its family mediation scheme with approximately fifty members, the Law Society of Scotland maintains a commercial mediation scheme with five members.

81. See §27.05 *infra*.

§27.04 INITIATING MEDIATION

The underlying assumption in Scots law is that people with disputes are free to use mediation if they choose.⁸² Mediation is usually triggered by parties or their advisors. Outside family law (and the new Simple Procedure) the courts have made it clear that they do not see referring disputants to mediation as part of their role. Legal advisors are therefore pivotal in helping clients select the most appropriate dispute resolution process. In this respect, there has been a culture change in recent years, with many of the largest law firms changing the name of their litigation departments to ‘dispute resolution’ departments,⁸³ and significant numbers of lawyers being trained in mediation.⁸⁴ The rise of collaborative family law also seems to herald a different approach with its emphasis on cooperation and constructive problem-solving rather than ‘winning’.⁸⁵ However, the use of mediation remains patchy, and it is hard not to conclude that whether a particular dispute is mediated depends more on the advisors’ familiarity with the process than any principled consideration.⁸⁶ This may be changing; a number of the largest Scottish law firms now have English or international owners. Those familiar with the culture of English civil litigation seem more inclined to refer matters to mediation. In fact, one of Scotland’s most significant legal disputes of recent years was settled with the assistance of a London-based mediator.⁸⁷

At present there is no rule restricting the use of mediation to particular kinds of disputes. However, there seems to be widespread acceptance that mediation has its limits; where those limits lie is a matter of debate with different commentators drawing the line in different places. The Scottish Civil Courts Review, for example, asserts that mediation is unsuitable where parties seek a judicial precedent or declaration of legal rights.⁸⁸ The Royal Society of Edinburgh produced a more comprehensive list in 2002:

- Either party is not willing or able to participate.
- Doing so would not be within the public interest.
- Doing so would not enable legal or other precedent that needs to be set.
- Publicity is sought.
- Regulatory proceedings of professional bodies are ongoing.
- Criminal proceedings are ongoing.⁸⁹

82. See Lord Rodger of Earlsferry, *supra* n. 33.

83. See for example <http://www.brodies.com/node/144> (accessed 4 Feb. 2017); <http://www.mms.co.uk/PracticeAreas/CommercialDisputeResolution/commercial-dispute-resolution.aspx> (accessed 4 Feb. 2017).

84. See www.core-solutions.com (accessed 4 Feb. 2017).

85. <http://www.scottish-collaborativelawyers.com/welcome/> (accessed 4 Feb. 2017).

86. Andrew Agapiou and Bryan Clark, *An Investigation of Construction Lawyers Attitudes to the Use of Mediation in Scotland*, Presentation to the Construction, Building and Real Estate Research Conference of the Royal Institution of Chartered Surveyors, Paris, 2–3 Sep. 2010.

87. See <http://www.theconstructionindex.co.uk/news/view/breakthrough-on-edinburgh-tram-mediation> (accessed 4 Feb. 2017); <http://kluwermediationblog.com/2013/01/12/shh-a-good-news-story/> (accessed 4 Feb. 2017).

88. Civil Courts Review, 165 (2009).

89. The Royal Society of Edinburgh, *Encouraging Resolution: Mediating patient/health services disputes in Scotland* (2002), <http://www.royalsoced.org.uk/cms/files/advice-papers/inquiry/negligence/report.pdf> (accessed 4 Feb. 2017).

Scotland's personal injuries lawyers may draw the line further than most, as the Civil Courts Review reports: '*Personal injury practitioners generally took the view that mediation was not particularly useful in PI cases and that any requirement to use it would simply add to expense.*'⁹⁰

There is, on the other hand, a groundswell in favour of greater use of mediation. The Sheriff Court Rules Council produced a report in 2005 recommending amendments close to the English and Welsh model.⁹¹ These proposed rules would have required parties to describe what steps they had taken to resolve their dispute prior to raising a court action.⁹² Crucially Sheriffs would have been given powers to take the reasonableness of parties' conduct into account in assessing expenses.⁹³

These recommendations were put on hold pending the Gill Review, and then rejected by the Review:

Since we consider that parties should be encouraged, but not compelled, to consider ADR in appropriate cases, we reject the idea that parties should have to make averments in their pleadings about the steps, if any, taken to resolve their dispute by alternative means.⁹⁴

All of this tells us that the extent to which the courts should encourage the use of mediation continues to be contested. The Courts Reform (Scotland) Act 2014 is almost silent on the matter.⁹⁵ However, a 2014 literature review commissioned by the Scottish Civil Justice Council reiterates the importance of litigants being fully informed about ADR options and makes the following commitment:

*The Committee will make recommendations to the SCJC as to any ADR policy which it considers should be adopted and where appropriate will provide draft rules for the Council's consideration.*⁹⁶ The new Simple Procedure is the first example of court rules specifically encouraging the use of mediation.⁹⁷

90. See *supra* n. 89, at 165.

91. Report of Mediation Committee to Sheriff Court Rules Council (2005) <https://www.scotcourts.gov.uk/docs/default-source/scr---rules-council/consultations/alternative-dispute/adr-consultation.pdf?sfvrsn=3> (accessed 4 Feb. 2017).

92. *Ibid.*, p. 18.

93. *Ibid.*, p. 19. Proposed Rule 9A5 states: '*In considering any motion for expenses, the sheriff may take account of any unreasonable conduct of any party in relation to the provisions of this rule.*'

94. See *supra* n. 89, at 172. For a detailed commentary on the Review's approach to ADR see Charlie Irvine, *The Sound of One Hand Clapping: Gill Review's Faint Praise for Mediation*, 14, *Edinburgh Law Review*, 85-92 (2010).

95. Sections 103 and 104 do include provision for court rules which:

make provision for or about... (b) avoiding the need for, or mitigating the length and complexity of, such proceedings, including...

(i) encouraging settlement of disputes and the use of alternative dispute resolution procedures.

96. ADR access to justice literature review published, <http://www.scottishciviljusticecouncil.gov.uk/news/2014/12/19/adr-access-to-justice-literature-review-published> (accessed 4 Feb. 2017).

97. Act of Sederunt (Simple Procedure) 2016, 1.2 (4); 1.8 (2); 7.6 (1) a; 7.7 (2) b.

[A] **Triggering Mechanisms for Mediation**

As stated above, currently in Scotland there is no universal provision triggering the use of mediation. This does not mean that mediation is unused: rather that the mechanisms for initiating mediation vary from sector to sector. Below are examples from particular elements of the Scottish legal system.

[1] ***Employment Tribunals***

Although employment law is a reserved matter (and thus UK-wide provisions apply), Scottish tribunals remain separate from those in England and Wales.⁹⁸ In 2008, the Scottish Employment Tribunals decided to adopt an innovation that was already being piloted in England and Wales and offer judicial mediation. The mechanism relies on the identification of ‘*suitable cases*’ by an employment judge at a Case Management Discussion. Initially, only cases that concerned discrimination⁹⁹ and were predicted to last for at least three days were considered.¹⁰⁰ Recently a broader approach has been taken and judicial mediation can be offered in a wider range of cases. Mediation is voluntary, and if it is unsuccessful, the mediating judge cannot preside over subsequent hearings, nor discuss what happened during the mediation with colleagues. Judicial mediation appears to have been well received,¹⁰¹ and Employment Tribunals (Scotland) provided mediation training to the remaining employment judges in 2016.

[2] ***Other Administrative Tribunals***

The Private Rented Housing Panel was created in 2007 to resolve disputes between landlords and tenants;¹⁰² the Homeowner Housing Panel was introduced in 2011 (under the same President) to deal with disputes between homeowners and property factors.¹⁰³ Both tribunals now offer mediation as an alternative to a formal hearing. The website provides detailed guidance for consumers.¹⁰⁴

98. Scottish tribunals are currently overseen by the Scottish Committee of the Administrative Justice and Tribunals Council. This body is about to be abolished, however, and proposals for reforming its functions are contained in AJTC, *Tribunal Reform in Scotland, a Vision for the Future*, <http://www.justice.gov.uk/ajtc/docs/tribunal-reform-scotland.pdf> (accessed 4 Feb. 2017).

99. These are more serious matters with a much higher maximum award than other forms of termination of employment.

100. *Employment Tribunals (Scotland): Judicial Mediation*, <http://www.justice.gov.uk/downloads/guidance/courts-and-tribunals/tribunals/employment/judicial-mediation/JudicialMediationScotland.pdf> (accessed 4 Feb. 2017).

101. See Scottish Civil Justice Council, *supra* n. 62, at 28, 29.

102. The Private Rented Housing Panel (Applications and Determinations) (Scotland) Regulations 2007.

103. Property Factors (Scotland) Act 2011.

104. See <https://www.housingandpropertychamber.scot/> (accessed 4 Feb. 2017).

[3] *Small Claims*

There are two notable exceptions to the general rule that Scottish civil judges do not encourage parties into mediation. One is family mediation (see below), and the other is small claims. The Edinburgh Sheriff Court Small Claims Project began in 1994 and until 2010 handled approximately 100 cases per year.¹⁰⁵ This number doubled in 2011, suggesting that mediation may be gaining greater acceptance among the judiciary. In this instance sheriffs identify cases they believe are suitable for mediation, referring them to the Mediation Coordinator for allocation to mediators.

The Edinburgh project, while positively evaluated and apparently successful, has not been rolled out across Scotland. Mediation for small claims was further piloted between 2005 and 2007 in Glasgow and Aberdeen, two of Scotland's busiest courts. In spite of a thorough (and largely positive) evaluation,¹⁰⁶ the schemes were not continued after the end of the pilot. By then 138 cases had been mediated across the two projects with a success rate of 77.5 per cent.¹⁰⁷ Recent financial pressures and the success of the Small Claims Mediation Service in England and Wales appear to be changing attitudes. The Scottish Government sanctioned another small claims pilot in North Lanarkshire in 2011, and in 2014 the University of Strathclyde Mediation Clinic starting offering mediation¹⁰⁸ in the Glasgow Sheriff Court (Scotland's busiest). The advent of Simple Procedure with its emphasis on ADR¹⁰⁹ suggests a change in policy, and it is likely to have a significant impact on judicial attitudes towards mediation in the coming years.

[4] *Family Actions*

The judge (sheriff) in a family action has the power to refer parties to mediation.¹¹⁰ It is the sheriffs who identify cases suitable for mediation, and at present there is little indication of the criteria they apply in doing so. What is clear is that this power is used rather inconsistently across the country. Some sheriffs seem to have a preference for CALM (lawyer mediators); others for the publicly funded local services of Relationships Scotland. This is an area that is ripe for research and clarification.¹¹¹

105. See <http://www.scotland.gov.uk/Publications/2002/03/14414/1583> (accessed 4 Feb. 2017) for a 2002 evaluation of the project. For a helpful summary of the project see <http://asauk.org.uk/archive/alternative-dispute-resolution/> (accessed 4 Feb. 2017).

106. Margaret Ross & Douglas Bain, *Report on Evaluation of In-Court Mediation Schemes in Glasgow and Aberdeen Sheriff Courts* (2010), <http://www.scotland.gov.uk/Publications/2010/04/22091346/0> (accessed 4 Feb. 2017).

107. *Ibid.*, p. 37; the only reference author of this chapter can find to mediation in a reported case concerns a Sheriff's referral of a case involving a spam e-mail, in which the defenders refused to proceed, <http://www.scotchspam.org.uk/transcom.html>.

108. Mediation that takes place immediately following the first procedural hearing, in a room adjacent to the Court.

109. See *supra* n. 23

110. See *supra* n. 65.

111. For some quite dated research on the matter see Fiona Myers & Fran Wasoff, *Meeting in the Middle: A Study of Solicitors' and Mediators' Divorce Practice* (Scottish Executive Central

[B] Contractual Provisions

There are few examples of Scottish contracts specifying the use of mediation for the resolution of disputes. The standard contracts in use in the construction industry refer to adjudication¹¹² or arbitration.¹¹³ The Chartered Institute of Arbitrators, however, has produced model clauses referring to a wider range of dispute resolution options, including mediation.¹¹⁴ Given the close ties between the jurisdictions, it seems likely that the growth of mediation in England and Wales will influence how Scottish businesses resolve disputes in the future. It is common for Scottish businesses to enter into contracts governed by the law of England and Wales, meaning that English dispute resolution jurisprudence will apply. Outside the family area, there are no examples of the Scottish courts being asked to consider mediation clauses or the conduct of mediation. If such a case were to be brought it is likely that English decisions would be influential.

[C] Indirect Triggers

The recent guidance to solicitors on dispute resolution may act as an indirect trigger for the more widespread use of mediation.¹¹⁵ The younger generation of solicitors may also be more informed about mediation, as two of the five Scottish universities offering the Diploma in Legal Practice¹¹⁶ now include an elective in the subject.¹¹⁷

§27.05 PROCESS

As will be evident from the rest of this chapter, the Scottish courts adhere closely to the adversarial principle. If parties bring an action they will provide a decision: if people choose to negotiate or resolve their dispute in other ways, that is their own affair. The courts will intervene only where agreements reached in this way breach other legal principles, such as natural justice or human rights.

It follows that, within these limits, the courts have not to date shown themselves interested in regulating the process by which disputes are resolved informally. This stands in stark contrast to their attitude to arbitration, where there was already a highly

Research Unit 2000); *see also* Charlie Irvine & Jane Scoular, A Review of 'Meeting in the Middle', 14 Scots Law Times, 125-128 (2001).

112. Housing Grants, Construction and Regeneration Act 1996, S. 108; Scheme for Construction Contracts (Scotland) Regulations 1998 (SSI no. 687).

113. Construction Industry Model Arbitration Rules (2005), <http://www.jctcontracts.com/JCT/cimar.pdf> (accessed 4 Feb. 2017); for an example of a typical dispute resolution clause *see MacDonald Estates Plc v. National Car Parks Ltd* (2010 Session Cases, 250).

114. <http://www.ciarb.org/dispute-resolution/dispute-resolution-contract-clauses/> (accessed 4 Feb. 2017).

115. *See supra* n. 63.

116. The mandatory professional qualification for Scottish solicitors and advocates.

117. University of Strathclyde and University of Edinburgh, both since 2011.

developed jurisprudence prior to the passage of the Arbitration Act (Scotland) 2010.¹¹⁸ Whether this will change in future probably depends on the spread of mediation outside the court system. Decisions of the courts in England and Wales are often influential in Scotland: in this area, they are likely to be even more so, given the faster spread of mediation in that jurisdiction.

The Scottish Government, too, has been content to rely on self-regulation by mediators. It cites its support for setting up the Scottish Mediation Register as evidence that it has met the requirements of Article 4 of the Directive.¹¹⁹ This section will therefore look at how the mediation process is regulated by mediators' own codes of conduct.

The Scottish Mediation Register was established in 2007 to provide a measure of quality assurance for those seeking a mediator. Initially set up on a self-certifying basis, the standards were revised in 2011,¹²⁰ and a sample of mediators' portfolios is examined each year. The Register refers to a set of Practice Standards,¹²¹ which in turn require adherence to a Code of Practice. The Code of Practice is designed to mirror the standards set out in the European Code of Conduct for Mediators.¹²² It contains the following paragraphs:

- Definition of Mediation;
- Voluntary Participation and Self-determination;
- Impartiality, Independence and Neutrality;
- Conflicts of Interest;
- Competence;
- Confidentiality;
- Understanding of Mediation;
- Advertising and Solicitation;
- Discrimination;
- Complaints and Professional Indemnity Insurance.

The Code of Practice does not attempt to prescribe a particular mediation process, simply defining mediation as '*a process in which disputing parties seek to build agreement and/or improve understanding with the assistance of a trained mediator acting as an impartial third party*'.

Other codes of practice in use in Scotland relate to particular contexts, including family mediation, community mediation,¹²³ Additional Support Needs (ASN)

118. See <http://www.legislation.gov.uk/asp/2010/1/contents> (accessed 4 Feb. 2017). This piece of legislation was one plank of the Scottish National Party (SNP)'s commitment to making Scotland a centre of excellence in dispute resolution and create a Scottish International Arbitration Centre, see *SNP Manifesto* p. 65, (2007), <http://www.politicsresources.net/area/uk/ass07/man/scot/snp.pdf> (accessed 4 Feb. 2017).

119. Executive Note on the Cross-Border Mediation (Scotland) Regulations 2011, S. 5, point 2.

120. *Scottish Mediation Register: Review of Practice Standards for Mediators in Scotland* (May 2011) <https://www.scribd.com/document/58901250/SMR-Final-Report> (accessed 4 Feb. 2017).

121. See *supra* n. 55.

122. See http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf (accessed 4 Feb. 2017).

123. The national umbrella body is known as the Scottish Community Mediation Centre, see <http://www.scmc.sacro.org.uk/mediation> (accessed 4 Feb. 2017).

mediation,¹²⁴ Scottish Legal Complaints Commission (SLCC) mediation, commercial mediation¹²⁵ and mediation within a university.¹²⁶ Few provide guidance about the process. However, the Relationships Scotland Code of Professional Conduct for family mediators sets out what is expected of family mediators: *'Mediators must assist participants to define the issues, identify areas for agreement, clarify areas of disagreement, explore the options and seek to reach agreement upon them.'*¹²⁷ It goes further, creating duties to inform clients about confidentiality, the importance of independent legal advice and use of outside experts, the broad principles of the law and relevant court options, and the principles of voluntariness and informed decision-making.¹²⁸ The Scottish Community Mediation Centre (SCMC) also publishes detailed guidance on the mediation process.¹²⁹ Both Relationships Scotland and SCMC have their own processes for training and accreditation; mediators accredited by these organisations are listed on the Scottish Mediation Register.¹³⁰

However, it should not be assumed that there is no scrutiny of the conduct of mediations. The more established bodies require practice supervision, mentoring, observation, case reports and reflective writing. For example, mediators operating under the Scottish Legal Complaints Commission scheme are required to submit a case reflection following each case as well as attending continuing professional development events. Relationships Scotland requires the following:

- Practice – a minimum of fifteen hours per year.
- Supervision – a minimum of two hours per year or 10 per cent or 5 per cent of mediation practice hours.¹³¹
- Continuing Professional Development (CPD) – ten hours per year.
- An annual appraisal including preparation of a training and development plan.¹³²

Scottish Community Mediation Centre accreditation requires:

- Evidence of approved training.
- Minimum of five mediations totalling at least six hours of practice.

124. Additional Support Needs (ASN) Mediation Service Providers Scottish Quality Standards (hereinafter 'ASN Quality Standards').

125. See for example the Core Solutions Code of Conduct contained within their 'Full Guide to Mediation Services', p. 25, see <http://www.core-solutions.com/> (accessed 4 Feb. 2017); or Catalyst Mediation's Code of Practice, see www.catalystmediation.co.uk (accessed 4 Feb. 2017).

126. See <https://www.dundee.ac.uk/edr> (accessed 4 Feb. 2017).

127. *Relationships Scotland Code of Professional Conduct*, S. 6.2.

128. *Ibid.*, S. 6.

129. See <http://www.scmc.sacro.org.uk/sites/default/files/resource/A%20Guide%20to%20the%20Mediation%20Process.pdf> (accessed 4 Feb. 2017).

130. For further information about these organisations, see <http://www.relationships-scotland.org.uk/family-mediation> (accessed 4 Feb. 2017) and <http://www.scmc.sacro.org.uk> (accessed 4 Feb. 2017).

131. This requirement is doubled for newer mediators.

132. See Practice Standards for Family Mediators at <http://www.relationships-scotland.org.uk/family-mediation/what-happens-at-mediation> (accessed 4 Feb. 2017).

- Two case studies.
- twelve hours CPD.¹³³

Some of these Codes of Practice have been in existence in Scotland for over twenty years. Others are drafted relatively recently. In order to understand the most important themes in Scottish mediation regulation, they have been listed by subject. The author of this chapter has examined the seven codes of practice listed above, and the numbers in brackets (in the headings of the following sections) represent the number of these that deal with the particular topic.

[A] Voluntariness (7)

SMN Code of Practice; Relationships Scotland (RS) Code of Professional Conduct; ASN Quality Standards; SCMC definition; SLCC Guidelines for Mediators; Core Consulting Code of Conduct; Catalyst Code of Practice. Voluntariness is clearly perceived to be a core mediation principle in Scotland. This seems to militate against mandatory mediation, which was forcefully ruled out by the Civil Courts Review.¹³⁴ However, when a Sheriff makes a referral to family mediation under Rule 33(22)¹³⁵ the parties may not regard it as entirely voluntary.

[B] Impartiality, Independence and Neutrality; Conflict of Interest (7)

The SMN Code of Practice lists these as separate principles. The RS Code of Professional Conduct lists impartiality and neutrality separately and links independence to conflict of interest. All four terms are also mentioned in the Core, SLCC and ASN Codes. The idea of the mediator as neutral seems to be deeply ingrained, although some academic commentators have questioned the possibility¹³⁶ and desirability¹³⁷ of neutrality. The SCMC definition simply says mediators are ‘*impartial*’ and ‘*do not give answers*’. The Catalyst Code requires the mediator to act ‘*impartially and fairly, without discriminating on any grounds*’.

133. <http://www.scmc.sacro.org.uk/sites/default/files/page/Mediator%20Accreditation/guidance-notes-accreditation-candidates.pdf> (accessed 4 Feb. 2017).

134. Gill Review, *supra* n. 59, at 7:24: ‘*We do not consider that the court should have power to compel parties to enter into ADR. This is entirely contrary in our view, to the constitutional right of the citizen to take a dispute to the court of law.*’

135. *See supra* n. 65.

136. Sara Cobb & Janet Rifkin, *Practice and paradox: Deconstructing neutrality in mediation*, 16 *Law and Social Inquiry* 35–62 (1991); Linda Mulcahy, *The possibilities and desirability of mediator neutrality – towards an ethic of partiality?*, 10 *Social and Legal Studies*, 505–527, (2001); Hilary Astor, *Mediator neutrality: Making sense of theory and practice*, 16 *Social Legal Studies*, 221–239 (2007).

137. Gwyn Davis, *Reflections in the Aftermath of the Family Mediation Pilot*, 4 *Child and Family Law Quarterly*, 371–382 (2001); Marshall, Patricia, *The “partial” mediator: balancing ideology and the reality*, 11 *ADR Bulletin*, 176–181 (2010).

[C] Competence (6)

Most professional ethical codes would contain some injunction to maintain competence, and mediation is no exception. The word appears in the following codes: SMN, SLCC, ASN, Core and SLCC. The RS Code for family mediators refers to Qualifications and Training.

[D] Confidentiality (7)

The idea that mediation should be kept confidential seems to be a pillar of the modern mediation movement. It probably reflects both the privacy of the lawyer's office and the idea of a 'without prejudice' conversation. However, the simplicity and extent of mediation's confidentiality have come under scrutiny recently in Scotland, following courts throughout the common law world.¹³⁸

All of the Scottish Codes refer to the issue, mostly by addressing the compellability of the mediator. For example the SMN Code states: '*Unless compelled by law, or with the consent of all the parties, a mediator shall not disclose any of the information given during the mediation process.*' Similar provisions can be found in the ASN and SLCC Codes. Family Mediators working for Relationships Scotland are protected by the Civil Evidence (Family Mediation) (Scotland) Act 1995, and the RS Code refers to this, while placing a duty on mediators to explain the exceptions to it.¹³⁹ The SCMC Definition simply describes mediation as private and confidential.

The commercial mediation organisations deal with the issue in the most comprehensive way, probably reflecting the involvement of lawyers as both mediators and party representatives. Generally, privilege and confidentiality are dealt with contractually, via a signed Agreement to Mediate: they also feature in the codes. It is common practice for Scottish solicitors to add their own amendments to an Agreement to Mediate with a view to satisfying themselves as to the effectiveness of these provisions. Both Core and Catalyst prohibit the mediator from disclosing the fact that the mediation took place; disclosure of anything said to the mediator in the course of negotiations and the content of any agreement (subject to certain exceptions) is prohibited as well. Their Agreements to Mediate go further, covering everything said during the course of the mediation, and binding anyone attending the mediation to not compel the mediator to attend as a witness in subsequent court proceedings.¹⁴⁰ Whether such clauses would be enforceable remains to be seen. The only Scottish case to date, apart from *FJM v.*

138. See *supra* n. 42; for a useful summary of the complexities of this issue in England and Wales see William Wood, *When Girls Go Wild: The Debate Over Mediation Privilege*, *The Mediator Magazine* (17 Sep. 2008).

139. These include information about any contract entered into in the course of the mediation; where all parties except the mediator agree that the information should be used; certain other types of civil proceedings, such as those raised by a public authority regarding the care of a child. See Civil Evidence (Family Mediation) (Scotland) Act 1995 S. 2, <http://www.legislation.gov.uk/ukpga/1995/6/section/2#section-2-3> (accessed 4 Feb. 2017).

140. See <http://www.core-solutions.com/core/assets/File/Core%20Documents/Outline%20Agreement%20to%20Mediate%202016.pdf> (accessed 4 Feb. 2017); <http://www.catalystmediation.co.uk/mediation-process/> (accessed 4 Feb. 2017).

GCM,¹⁴¹ concerned the use of a children's contact centre managed by the Family Mediation Service. Foreshadowing *FJM v. GCM*, the Sheriff did not regard the Civil Evidence Act as applying, and ordered the disclosure of records.¹⁴² Both these cases suggest that Scottish courts will not uphold mediation confidentiality, where they believe to do so would run counter to the interests of justice.¹⁴³

[E] Understanding of Mediation (6)

Given the newness of mediation and the potentially high stakes for participants, it seems desirable for mediators to ensure that people have a clear understanding of what it involves. This obligation is contained in the following codes: SMN, RS, SLCC, Core, Catalyst, ASN.

[F] Advertising and Solicitation; Gifts and Favours (4)

The SMN Code prohibits mediators from promising particular results and requires accuracy in describing their credentials. It also prohibits accepting gifts or favours. These standards are echoed by the RS Code (which refers to its National Conflicts of Interest Policy). The Core Code simply refers to accuracy in advertising. SLCC only mentions gifts and favours. Some codes contain a general reference to high ethical standards.

[G] Respect and Non-discrimination (2)

These principles are set out in both the SMN and SLCC Codes. It could be argued that they are implicit in a mediator's approach: nonetheless it is intriguing that they are not enunciated in the other codes.

[H] Complaints (4)

The SMN Code requires mediators to provide information about the process for handling complaints. The Catalyst Code has a reasonably detailed three-step complaints procedure. Much briefer mention is made in the ASN and RS codes.

[I] Miscellaneous

To round off this quick survey, some matters are particular to one code of practice. For example, the RS Code refers to the principles contained in the Children (Scotland) Act 1995 and Family Law (Scotland) Act 2006 (the welfare of children and their right to

141. *Supra* n. 42.

142. 2010 Family Law Reports, 112.

143. *See* Wood, *supra* n. 140.

have their views taken into account in appropriate circumstances). It also contains detailed guidance on dealing with abuse within the family and ensuring that parties are legally advised and informed about related court proceedings.

The ASN Code has sections on information for parents, recruitment, referrals policy, monitoring and evaluation, and access to information.

The Core Code is the only one to refer to advice about enforcement. It also contains sections on the withdrawal of a mediator, fees and insurance.

§27.06 TRAINING AND RECOGNITION OF MEDIATORS

The profile of Scottish mediators is mixed. In the commercial field, there appears to be a preponderance of lawyers, although construction matters can be mediated by other professionals. Similar to many jurisdictions, there is no requirement that mediators must attain degree level qualification; however, Scotland's first Masters level programme in mediation and conflict resolution at University of Strathclyde¹⁴⁴ and Relationships Scotland's Certificate in Family Mediation (Registered) are perhaps indicators of the shape of things to come. With one exception,¹⁴⁵ mediation trainers in Scotland do not insist that mediators have prior experience or qualification, although particular bodies may regard experience as desirable in selecting practitioners.

Mediation in its modern form was first practiced in Scotland in the 1980s, although the government's industrial relations body ACAS¹⁴⁶ has been offering something close to it (generally described as conciliation) since the middle of the twentieth century. Both community and family mediation services began to accredit their mediators by the end of the 1980s, and now have developed systems for doing so. Other forms of mediation have operated in a less-regulated environment until recently. There was no common standard of training, and the public had little to guide them in selecting a mediator, other than reputation and what could be found on the Internet.

In 2006, the Scottish Mediation Network set up the Scottish Mediation Register. Recently reviewed, it will be discussed in more detail below. The Scottish Government allocated a proportion of its grant funding to this, thus fulfilling its obligation under the Directive to encourage the development of voluntary codes of conduct by mediators.¹⁴⁷

The initial training requirement for the Scottish Mediation Register states: *'The mediation training will include not less than 40 hours of tuition and role-play, (with a minimum of 20 of these training hours spent in role play or practical exercise) including a formal assessment. The assessment should include direct observation of practice as a mediator in role play.'*¹⁴⁸ These standards were introduced in 2011 along with a process

144. See <http://www.strath.ac.uk/courses/postgraduatetaught/mediationconflictresolution/> (accessed 4 Feb. 2017).

145. See CALM, *supra* n. 41.

146. Advisory, Conciliation and Arbitration Service, see www.acas.org.uk (accessed 4 Feb. 2017).

147. See Executive Note to Cross-Border Mediation (Scotland) Regulations 2011, para. 5.

148. See <http://www.scottishmediation.org.uk/?faq-item=practice-standards> (accessed 4 Feb. 2017).

for approving trainers, who may describe themselves as Approved Mediation Training Providers.¹⁴⁹

The training must cover the following:

- Principles and practice of mediation.
- Stages in the mediation process.
- Ethics and values of mediation.
- The legal context of disputes.
- Communication skills useful in mediation.
- Negotiation skills and their application.
- The effects of conflict and ways of managing it.
- Diversity.¹⁵⁰

To date five organisations have received approval as trainers.¹⁵¹

Relationships Scotland provides training to its family mediators via a Certificate in Family Mediation (Accredited), followed by a Certificate in Family Mediation (Registered). The CFM (A) covers the following:

- the social and legal context of family life in Scotland;
- the diverse needs of children and families, particularly those experiencing separation or divorce;
- conflict management;
- the role of the reflective practitioner and supervision in promoting good practice;
- the process and practice of mediation.

The CFM (R) integrates learning from practice and takes a more academic approach, adding advanced mediation skills and alternative models. RS estimates that the CFM (A) requires 250 hours work over 12–18 months and the CFM (R) requires 250 hours work over 18–24 months, including 30 hours of mediation practice. The training has received professional validation from the College of Mediators and academic credit rating from Napier University, Edinburgh.¹⁵² RS polices this system via its network of verifiers. The Civil Evidence (Family Law) (Scotland) Act 1995 provides a limited form of regulation for family mediators who fulfil the standards described above.¹⁵³

The Scottish Community Mediation Centre has its own system for accrediting community mediators, with similar standards and processes to family mediation.¹⁵⁴

149. See <https://www.scottishmediation.org.uk/wp-content/uploads/2016/03/Training-Providers-2016.pdf> / (accessed 4 Feb. 2017).

150. See <http://www.scottishmediation.org.uk/?faq-item=advice-on-training-accreditation> (accessed 4 Feb. 2017).

151. The Mediation Partnership, University of Strathclyde, Royal Institute of Chartered Surveyors, Catalyst Mediation and Core Solutions.

152. See <http://www.relationships-scotland.org.uk/about-us/training-and-cpd/train-as-a-family-mediator> (accessed 4 Feb. 2017).

153. See *supra* n. 39.

154. See <http://www.scmc.sacro.org.uk/training/accreditation/mediator-accreditation> (accessed 4 Feb. 2017).

Core Solutions offers accreditation as the final element in its ‘flagship mediation, negotiation and conflict management skills training course’.¹⁵⁵ Including the assessment module, this programme provides fifty-four hours of training and leads to a Certificate of Competence in Mediation Skills. The content of the course includes:

- ‘key communication skills (including questioning, listening and observing)
- creative problem solving and lateral thinking
- negotiation strategies
- techniques required to reach an outcome.

Surveyors have their own mediation training and accreditation programme, provided by the Royal Institute of Chartered Surveyors (RICS).¹⁵⁶ The same standards and training apply in England and Wales and Scotland, and training itself is delivered in both jurisdictions.

The minimum training requirement for solicitors seeking to be accredited specialists in mediation by the Law Society of Scotland is thirty hours. The content is not specified. The Law Society claims to have around fifty accredited specialists in family mediation and ‘around five’ (*sic*) accredited specialists in commercial mediation.¹⁵⁷

In the area of family law, lawyer mediators formed their own body, known as CALM, in 1993.¹⁵⁸ CALM mediators must have a minimum of ten years’ experience in family law. They also undertake a six-day initial training and pass an independent assessment before completing three supervised mediations.¹⁵⁹

At present there is nothing to prevent anyone from calling themselves a mediator. While the Scottish Mediation Register allows those fulfilling its criteria to call themselves ‘Registered Mediators’, in practice accreditation can come from a variety of sources: the Law Society of Scotland, Relationships Scotland, Scottish Community Mediation Centre, RICS, Scottish Centre for Community Mediation and Core Solutions. It is not a protected title, and there are those who argue that the boundaries around the practice of mediation are too porous to allow any kind of bright line to be drawn.¹⁶⁰ At the same time the use of quality standards is beginning to create a group of mediators who refer to these standards for credibility. For example, the Scottish Mediation Register allows those who comply with its standards to use its logo. Relationships Scotland’s Certificate in Family Mediation provides a restriction on entry to family mediation, although lawyer mediators have a separated professional body known as CALM.¹⁶¹

155. See <http://www.core-solutions.com/training/> (accessed 4 Feb. 2017).

156. See <http://www.rics.org/cz/training--events/> (accessed 4 Feb. 2017).

157. See <http://www.lawscot.org.uk/members/membership-and-registrar/accredited-specialists/mediation/> (accessed 4 Feb. 2017).

158. See CALM, *supra* n. 41.

159. See *supra* n. 122.

160. Michael L Moffitt, *The Four Ways to Assure Mediator Quality (And Why None of Them Work)* (7 Apr. 2008), <http://ssrn.com/abstract=1117765> (accessed 4 Feb. 2014); Davis, *supra* n. 139, at 371–382.

161. See CALM, *supra* n. 41.

Things are less clear-cut in other areas of practice. Workplace mediation is provided by ‘in-house’ mediators in a number of Scottish organisations.¹⁶² Are these people impartial and independent? What of managers who mediate between their staff? There is nothing to prevent such a person from saying they mediated, or acted as a mediator. Scotland has not been quick to restrict the practice of mediation, and the Scottish Government shows no appetite to change this.

In Scotland, mediation is today seen as quite distinct from the traditional legal role. Lawyers who wish to mediate tend to seek training and accreditation from independent providers, despite the Law Society’s accreditation scheme.¹⁶³ However, Scottish lawyers are proud of a tradition which includes the negotiation of a consensual outcomes by judges as ‘amicable compositors’.¹⁶⁴ One historian describes the role of thirteenth Century arbitrators as ‘*facilitating a settlement between the parties*’.¹⁶⁵ This led to a view that legal practitioners are programmed to negotiate amicably with their counterparts, and it may be one explanation for the apparent lack of enthusiasm for mediation among lawyers in this jurisdiction.¹⁶⁶ The recent Law Society guidance on dispute resolution may have an impact in this regard, although the guidance says nothing about the role of solicitors in mediation.¹⁶⁷

There is little empirical evidence that accreditation has an impact on practice. Family and community mediators would argue that over twenty years of accreditation have raised standards. At the same time, more experienced mediators acknowledge that their seniority gives them confidence to move beyond their basic training. The standard model of mediation in use in Scotland is a facilitative one, but nevertheless, mediators will acknowledge that they provide both process and substantive input in the interests of achieving settlement. The gradual embrace of mediation by the justice system¹⁶⁸ appears likely to encourage the rise of evaluation and the demise of the joint session.¹⁶⁹

The phenomenon has not been well tracked in Scotland, but chimes with findings from other jurisdictions about the gap between mediation rhetoric and reality.¹⁷⁰ It echoes Dingwall and Greatbatch’s research into family mediators in England and Wales, in which they found that practitioners supported self-determination so long as

162. For example University of Dundee, see <http://www.dundee.ac.uk/academic/edr> (accessed 4 Feb. 2017).

163. See <http://www.lawscot.org.uk/members/membership-and-registrar/accredited-specialists/mediation/> (accessed 4 Feb. 2017).

164. Andrew Mark Godfrey, *Civil Justice in Renaissance Scotland: the Origins of a Central Court*, 379 (Brill 2009).

165. *Ibid.*, at 368.

166. Bryan Clark, *Scottish lawyers and mediation, past, present and future*, 13 *Edinburgh Law Review*, 252–277, (2009).

167. See *supra* n. 63.

168. See also Section §27.01 *supra*.

169. See Geoff Sharp, *The Californication of Mediation*, <http://kluwermediationblog.com/2014/12/10/the-californication-of-mediation/> (accessed 4 Feb. 2017).

170. See for example, Kenneth Kressel, *The Strategic Style in Mediation*, 24 *Conflict Resolution Quarterly*, 251–283 (2007); James A. Wall Jr., Suzanne Chan-Serafin & Tal Zarankin, *Do Mediators Walk Their Talk in Civil Cases?*, Paper Presented at the 23rd Annual International Association of Conflict Management Conference Boston, Massachusetts (24–27 Jun. 2010).

parties remained within the ‘*parameters of the permissible*’. If, however, parties proposed settlements beyond these parameters, the mediators used quite forceful, persuasive and even manipulative techniques to bring them back into line with what they regarded as appropriate.¹⁷¹ It seems likely that the same would apply to commercial and court connected practice.¹⁷²

Until the Cross-Border Mediation (Scotland) Regulations 2011 were passed, the rights and obligations of mediators could be understood only in terms of the particular codes of practice discussed above. Mediators are also bound by principles of the general law. For example, the Proceeds of Crime Act 2002 created certain offences designed to prevent money laundering. It is possible that mediators may find themselves at risk of committing an offence, although the English case of *Bowman v. Fels*¹⁷³ limits the reach of the 2002 Act to situations outside the litigation process.¹⁷⁴

The Scottish courts have not, to date, enunciated any special privilege for mediation. The one exception has already been described above: under the Civil Evidence (Family Law) (Scotland) Act 1995, accredited family mediators cannot be compelled to provide evidence of what occurred in the course of a mediation, unless both parties consent.¹⁷⁵ There is no indication to date that the Scottish Civil Justice Council plans any expansion of this privilege to other areas of law.

Mediators in Scotland are subject to the same liabilities as other professionals. There is no assumption of immunity from legal liability. It is therefore standard practice for Scottish mediators to carry professional indemnity insurance. This is a requirement of the SMN Code of Practice and of the Scottish Mediation Register.¹⁷⁶ For lawyers, mediation activities are covered by their existing professional indemnity insurance.

As noted above, members of the Scottish Mediation Register sign up to a Code of Conduct and Practice Standards. The Practice Standards require adequate training, sufficient experience, continuing practice development, maintaining a portfolio and a system for addressing concerns.¹⁷⁷ Even a sole practitioner is required to have a system in place: by default they may adopt the Scottish Mediation Network’s complaints procedure and inform clients that they may ultimately complain to Network.

Family and community mediators are required to adhere to similar standards, and complaints about any of these mediators can be addressed to the accreditation body.¹⁷⁸

171. Robert Dingwall & David Greatbatch, *Family Mediators: What Are They Doing?*, 31 *Family Law* 378, 379 (2001).

172. For a detailed discussion of these issues in the context of Scotland, see Charlie Irvine, *Mediation: Business As Usual*, *The Journal of the Law Society of Scotland* (4 Apr. 2012), http://www.journalonline.co.uk/Preview/1011021.aspx#_VPCItSkrmkQ (accessed 4 Feb. 2017).

173. 2005 EWCA Civ 226 (8 Mar. 2005).

174. See Civil Mediation Council of England and Wales, *Guidance on the Proceeds of Crime Act*, <http://www.civilmediation.org> (accessed 4 Feb. 2017).

175. But see *supra* n. 42; and *supra* n. 43.

176. For Practice Standards for Mediation in Scotland, see *supra* n. 55.

177. Practice Standards, paras 1.1.1; 1.1.2; 1.1.3; 1.1.4; 1.1.6.

178. Code of Professional Conduct for Family Mediators, para. 5.4.

§27.07 LOCATING A MEDIATOR

To locate a mediator in Scotland there are three avenues: the Scottish Mediation Register, other professional bodies and personal recommendation.

Scottish Mediation Register

The Scottish Mediation Register is maintained by the Scottish Mediation Network and can be accessed through its 'Find a Mediator' page.¹⁷⁹ Mediators are listed under geographical area and specialisms.¹⁸⁰ Only mediators who have fulfilled the criteria listed above can obtain entry to the Register.

Other professional bodies

Family Mediation (separation and divorce): Relationships Scotland provides a not-for-profit service which deals with children and, in some areas, finances as well. Mediators can be accessed via local services, which cover thirteen areas of the country.¹⁸¹ CALM (Comprehensive Accredited Lawyer Mediators) is the professional body for legally qualified family mediators. Mediators can be located via its website.¹⁸²

Family Mediation (other): The Scottish Centre for Conflict Resolution is the umbrella body for mediators working with families in conflict and young people at risk of homelessness. Its website lists local services throughout the country.¹⁸³

Community Mediation: community mediators can be located via local services listed on the Scottish Community Mediation Centre's website.¹⁸⁴

Property and Construction disputes: the Royal Institute of Chartered Surveyors offers a dispute resolution service which includes mediation alongside arbitration, adjudication, expert determination and expert witnesses.¹⁸⁵

Chartered Institute of Arbitrators: CI Arb lists a panel of five mediators for Scotland.¹⁸⁶

The Law Society of Scotland: LSS operates two recognised mediation schemes, one with approximately fifty family law mediators, and the other with five commercial law mediators.¹⁸⁷

179. <http://www.scottishmediation.org.uk/find-a-mediator/> (accessed 4 Feb. 2017).

180. Business and commercial, community and neighbour, discrimination, environmental and planning, family, health/NHS, in-court, religious and church, schools and workplace.

181. See <http://www.relationships-scotland.org.uk/find-a-local-service/family-mediation-services> (accessed 4 Feb. 2017).

182. See CALM, *supra* n. 41.

183. To find a mediator see <http://scottishconflictresolution.org.uk/map> (accessed 4 Feb. 2017).

184. See <http://www.scmc.sacro.org.uk/mediation/services-near-you> (accessed 4 Feb. 2017).

185. See <http://www.rics.org/cz/join/member-accreditations/mediation-accreditation-scheme/> (accessed 4 Feb. 2017).

186. See <http://www.ciarb.org/branches/great-britain/scotland/mediation> (accessed 4 Feb. 2017).

187. See <http://www.lawscot.org.uk/members/membership-and-registrar/accredited-specialists/mediation/> (accessed 4 Feb. 2017).

Personal recommendation

Many of the larger Scottish law firms now list mediation among their interests.¹⁸⁸ Those from other jurisdictions seeking a mediator in Scotland could obtain a personal recommendation from this source.

§27.08 CONFIDENTIALITY AND ADMISSIBILITY OF MEDIATION EVIDENCE

In keeping with the *laissez-faire* approach to mediation in the Scottish justice system, questions of confidentiality and admissibility are generally dealt with contractually via an ‘Agreement to Mediate’. There are two exceptions:

- (1) For family mediators affiliated to Relationships Scotland or CALM, under the Civil Evidence (Scotland) Act 1995.¹⁸⁹
- (2) For cross-border mediation, in terms of the Cross-Border Mediation (Scotland) Regulations, 2011. S.3 states:

‘A mediator of, or a person involved in the administration of mediation in relation to, a relevant cross-border dispute is not to be compelled in any civil proceedings or arbitration to give evidence, or produce anything, regarding any information arising out of or in connection with that mediation.’

This statutory protection does not apply to domestic mediation, and anyone engaging in this should take care to ensure that the level of confidentiality they wish to apply is set out in the agreement to mediate.

In general an agreement to mediate in Scotland will provide for the confidentiality of the mediation. There is a wide variety of styles in use, and this chapter can only provide some examples. It is recommended that anyone entering into mediation in Scotland should request for a copy of the agreement to mediate in advance in order to ascertain the exact terms being proposed.

To take one example, Core Solutions’ Outline Agreement to Mediate is published on its website.¹⁹⁰ Section 3 ‘Confidentiality’ approaches the question from a number of angles. First, the entire process of mediation is deemed confidential, including all written and oral communications; second, all communications, in whatever form, are not to be disclosed or used for any purpose; and, third, the mediation is to be conducted on the same ‘without prejudice’ basis as other legal negotiations. A fourth principle,

188. See for example <http://www.brodies.com/legal-services/alternative-dispute-resolution> (accessed 4 Feb. 2017); <http://www.andersonstrathern.co.uk> (accessed 4 Feb. 2017); <http://www.shepwedd.co.uk/expertise/commercial-disputes-and-regulation> (accessed 4 Feb. 2017).

189. See Civil Evidence (Scotland) Act 1995.

190. See <http://www.core-solutions.com/core/assets/File/Core%20Documents/Outline%20Agreement%20to%20Mediate%202016.pdf> (accessed 4 Feb. 2017).

non-compellability, is covered by the company's Terms of Engagement.¹⁹¹ These key elements: confidentiality, without prejudice, admissibility and compellability tend to appear in most agreements to mediate which are in use in Scotland.¹⁹²

Another standard agreement to mediate is provided by RICS. This too covers general confidentiality, non-compellability (of the mediator), admissibility (of anything discussed in the mediation) and deems the process 'without prejudice'.¹⁹³

While the confidentiality of family mediation provided by Relationships Scotland is assumed to be covered by the Civil Evidence (Family Mediation) (Scotland) Act 1995, where parties enter into All Issues Mediation (covering financial matters as well as children) an agreement to mediate is used. This states that financial information is produced on the basis that it is:

- (a) Not confidential.
- (b) Must be disclosed to parties' solicitors and may be used as evidence in Court.

§27.09 MEDIATED OUTCOMES AND ENFORCEABILITY

On the face of it, a mediation outcome is a contract between two parties, having the same status as any other contract in Scots Law. As long as the terms are clear and consent freely given, contracts will be upheld and enforced by the courts.¹⁹⁴

However, Scotland has a distinctive additional procedure which renders agreements enforceable without resort to the court. This is known as Registration for Preservation and Execution in the Books of Council and Session. Essentially this is a way of formally recording the terms of an agreement in the books of the country's highest court in order to provide for 'summary diligence' – meaning that the document becomes enforceable on its terms without further procedure.¹⁹⁵

To take advantage of this procedure, the mediation outcome must be signed by the parties and contain the words, '*the parties consent to registration for preservation and execution*'.¹⁹⁶ The document then has to be sent to the Register. The Register will return an extract of the document (now known as a deed), which contains a docket confirming the date on which it has been registered and another stating '*and the said*

191. See <http://www.core-solutions.com/core/assets/File/Core%20Documents/Core's%20Terms%20of%20Engagement%20and%20Code%20of%20Conduct%20for%20Mediators.pdf> (accessed 4 Feb. 2017).

192. For a fuller review of these concepts, see Charlie Irwin, *Mediation confidentiality: limitations and a proposal*, <http://kluwermediationblog.com/2012/09/12/mediation-confidentiality-limitations-and-a-proposal/> (accessed 4 Feb. 2017).

193. RICS Guidance Notes on Mediation, 2014.

194. For a recent statement on the Scots law of contract see Dot Reid, *General Principles of Contract Law*, in *Scots Commercial Law* (ed. Iain G MacNeil (Ed.), Avizandum Publishing 2014).

195. See <https://www.ros.gov.uk/services/registration/books-of-council-and-session> (accessed 4 Feb. 2017).

196. For a detailed explanation of the process see <http://www.inhouselawyer.co.uk> (accessed 4 Feb. 2017).

Lord grants warrant for lawful execution hereon'. This means the deed can be enforced as if it were a decree of the court.

If a mediation outcome is Registered for Preservation and Execution in the Books of Council and Session, it should be enforceable in any EU jurisdiction as an '*authentic instrument*' in terms of the Civil Jurisdiction and Judgments Act 1982.¹⁹⁷

As far as the writer is aware, the practice of registering outcomes for preservation and execution is confined to higher value commercial mediation. It is not common practice in family, employment, small claim or community mediation. This may be in part because of a surprising phenomenon, revealed in a study of small claims mediations in two Scottish courts: mediation outcomes were significantly more likely to be fulfilled than court decrees.¹⁹⁸

Beyond the special provisions of the Cross-Border Mediation (Scotland) Regulations, mediation has no effect on prescription and limitation periods. This should be borne in mind by anyone considering using mediation to resolve a dispute in Scotland, and legal advice should be sought regarding the prescription and limitation periods that may apply. It is common practice for a court action to be raised and immediately sisted (stayed) in order to preserve a party's legal position.

§27.10 DUTIES AND OBLIGATIONS

As this chapter has made clear, the Scottish legal system has been in no hurry to create special duties and obligations for mediators. The single exception has been discussed above: there are certain limited reporting obligations for family mediators.¹⁹⁹ Beyond this mediators' duties and obligations are expressed either via codes of practice,²⁰⁰ or via their individual agreements to mediate.²⁰¹

To recap the obligations contained in the Scottish Mediation Network Code of Practice for Mediation in Scotland, these are as follows:

- Voluntary participation – the mediator must ensure that it is the parties, and not the mediator, who determine the outcome.
- Impartiality, independence and neutrality – the mediator must remain independent and impartial.
- Conflicts of interests – these must be disclosed and the mediator offer to withdraw.
- Competence – the mediator must maintain the necessary skill level in general and only take on a mediation if he/she has the necessary skills for the particular case.
- Confidentiality – the mediator may not disclose information from mediation unless compelled by law or with the parties' consent.

197. *Ibid.*

198. An average of 90 per cent of mediated outcomes were fulfilled compared to 67 per cent of those with traditional court decrees. See Ross & Bain, *supra* n. 107, at 52.

199. See §27.03[B] *supra*.

200. See Section §27.03 *supra*.

201. *Ibid.*

- Understanding of mediation – the mediator must ensure the parties understand the purpose and procedure of the mediation, the role of parties and mediator, any fee arrangements and the obligation of confidentiality.
- Advertising – mediators must not promise success or specific results, and any information must be accurate.
- Gifts and favours – these should not be accepted from any party to a mediation.
- Discrimination – a positive duty to treat all people with respect.
- Complaints and professional indemnity insurance – obligation to provide information about complaints procedure and professional indemnity insurance cover.

The Code does not list any sanctions for breach of these duties and obligations. Parties unhappy with the service they have received from a Registered Mediator are advised to complain first to the mediator themselves and, if that is not dealt with satisfactorily, to the Scottish Mediation Network.

Lawyers acting for parties in mediation have no special obligation beyond the standard duties contained in the Law Society Rules of Practice.²⁰² These include standards of trust and integrity, independence, and the duty to act in the best interests of the client. The standards of service for Scottish solicitors set out four principles of competence, diligence, communication and respect.²⁰³ Solicitors' conduct is governed by the Law Society of Scotland; those of advocates by the Faculty of Advocates. Complaints against legal practitioners from either branch of the profession are initially dealt with by the Scottish Legal Complaints Commission.²⁰⁴

At the present date, Scots law does not specify any particular duties for parties to mediation. Court decisions in other jurisdictions suggest that failure to act in good faith may render mediation outcomes unenforceable.²⁰⁵

While the Scottish Civil Courts Review was cautious about mediation, and the Courts Reform (Scotland) Act 2014 almost silent,²⁰⁶ there are some signs of change. In 2014-15 the Scottish Government worked through an ambitious reform programme known as 'Making Justice Work'. It had three core strands: enhancing efficiency; modernising the civil court and tribunal system; and widening access to justice. The third strand 'Widening Access to Justice' listed a number of actions, first of which was '*Encouraging the use of resolution services such as mediation and arbitration which can be cheaper and less time consuming than going to court.*'²⁰⁷ As part of this initiative, the Scottish Legal Aid Board had, in 2014, commissioned a desk based research into ADR

202. See Law Society Practice Rules 2011, <http://www.lawscot.org.uk/rules-and-guidance> (accessed 4 Feb. 2017).

203. See http://www.lawscot.org.uk/media/228221/Standards_Booklet.pdf (accessed 4 Feb. 2017).

204. See <https://www.scottishlegalcomplaints.org.uk> (accessed 4 Feb. 2017).

205. Wood, *supra* n. 140.

206. See *supra* n. 95.

207. See <http://www.gov.scot/Topics/Justice/policies/widening-access> (accessed 4 Feb. 2017).

in Scotland.²⁰⁸ As well as an overview of ADR in Scotland, it published an International Literature Review of ADR.²⁰⁹ At almost the same time, the Scottish Civil Justice Council's own Access to Justice Committee commissioned a separate literature review into alternative dispute resolution in Scotland and other jurisdictions.²¹⁰ Whether these exercises will lead to the more wholehearted embrace of mediation by the Scottish courts remains to be seen, but the recent introduction of the Simple Procedure, with its consistent encouragement of ADR, is a promising development.²¹¹

One recent practical change presented itself in the form of an updated guidance issued by the Scottish Legal Aid Board concerning family cases. Since October 2015, before granting legal aid in child contact disputes, the Board requires a statement setting out what efforts have been made to settle the matter without litigation, whether mediation has been considered or attempted, and if there were reasons for *not* doing so.²¹² This is a significant change in approach for a formerly mediation sceptical jurisdiction like Scotland. In part it may be a tribute to the success of family mediation over some twenty-five years. It may also reflect the general increase in the use of mediation throughout the EU; the example of England and Wales; and the inexorable rise in the costs of litigation. The Scottish Government has been supportive of mediation for some time, and currently funds the Scottish Mediation Network, as well as a network of family mediation services.

The EU Directive on Consumer ADR²¹³ may act as a trigger for a new phase of innovation. Professor Richard Susskind, Chair of the England and Wales Civil Justice Council's Online Dispute Resolution Advisory Group (and a Scotsman) suggests that it is insufficient simply to transfer existing court structures to an online environment. He calls for new forms of intervention that provide for conflict containment and avoidance, prior to any resolution phase.²¹⁴ Given its remote geography and relatively sparse population, Scotland may be in a better position than most jurisdictions to take advantage of this next step in the development of better dispute resolution alternatives.

§27.11 CONCLUSION

As this chapter has outlined, after an early embrace of family mediation, Scotland has been, until recently, a 'mediation sceptical' jurisdiction. Senior members of the

208. See <http://www.slab.org.uk/about-us/what-we-do/policyanddevelopmentoverview/AlternativeDisputeResolution/> (accessed 4 Feb. 2017).

209. *Ibid.*

210. See <http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-pubilcations/literature-review-on-adr-methods.pdf?sfvrsn=2> (accessed 4 Feb. 2017).

211. See Charlie Irvine, *And finally... some plain English from Scotland* (10 Sep. 2016), <http://kluwermediationblog.com/2016/09/10/and-finally-some-good-news-from-scotland/> (accessed 4 Feb. 2017).

212. Scottish Legal Aid Board, *Civil Legal Aid Handbook*, Part IV, 4.38 and 4.39.

213. Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

214. See <http://www.legalfutures.co.uk/latest-news/time-state-backed-online-dispute-resolution-says-susskind-led-cjc-group> (accessed 4 Feb. 2017).

judiciary have held stoutly to the view that, in an adversarial system, it is the courts' job to resolve matters before them. If parties wish to use mediation that is up to them; the courts will neither encourage nor compel them to do so.

However, in recent years this position has appeared to soften. A combination of factors may have contributed to its current position: the costs of litigation and cuts to the public purse; the steady success of family mediation and the rise of collaborative family law; the inexorable spread of workplace and employment mediation; increased awareness within the legal profession; and government support. Those wishing to engage in cross-border mediation with a Scottish individual or organisation will now find a developed infrastructure for the activity, and a growing group of committed legal practitioners able to act as 'mediation advocates'. Outcomes will be readily enforceable through the Scottish courts. In the long run, Scotland seems likely to locate mediation within its longstanding tradition of amicable resolution and minimum formality.

