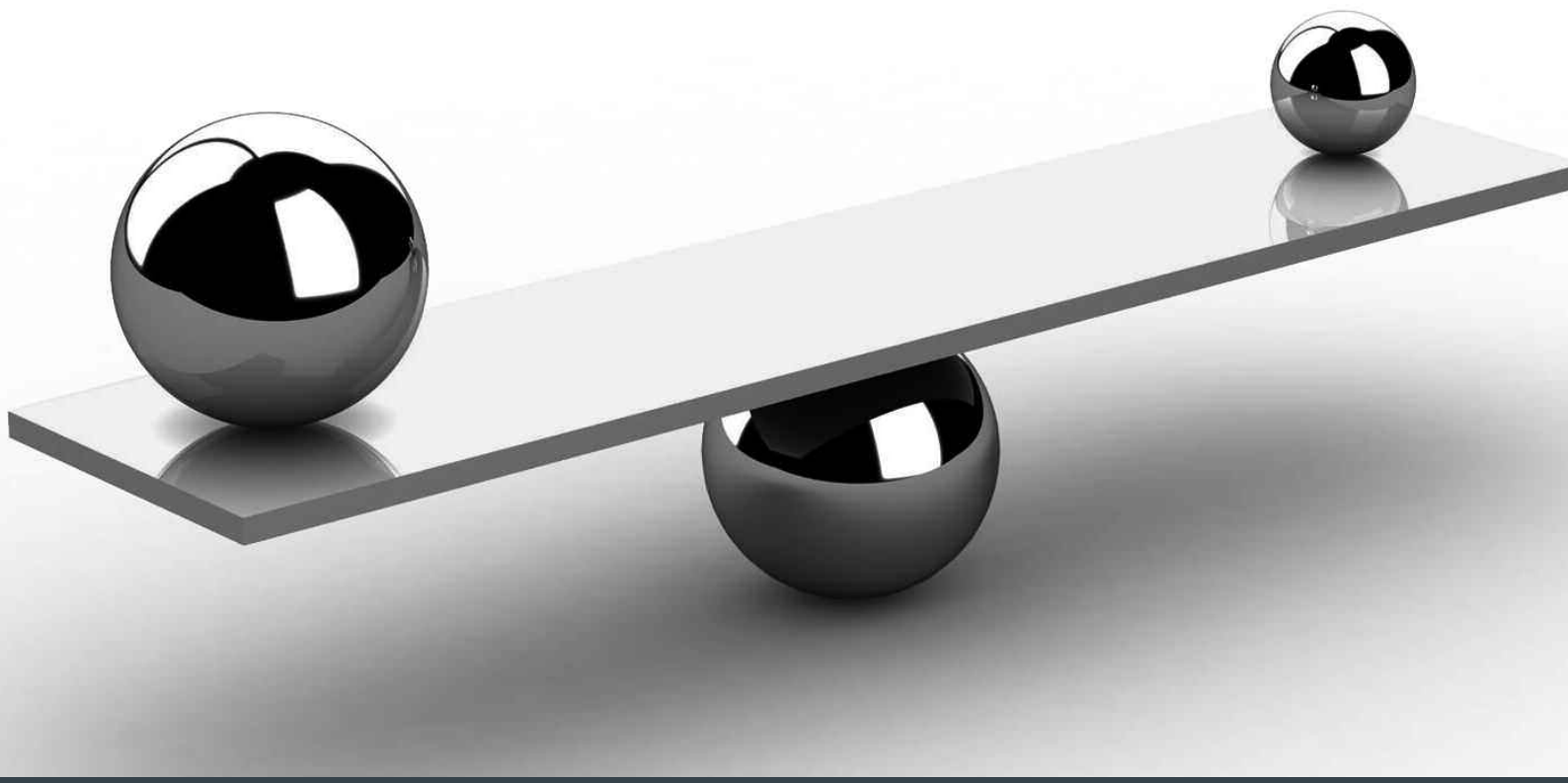

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International Mediation Guide

Second Edition

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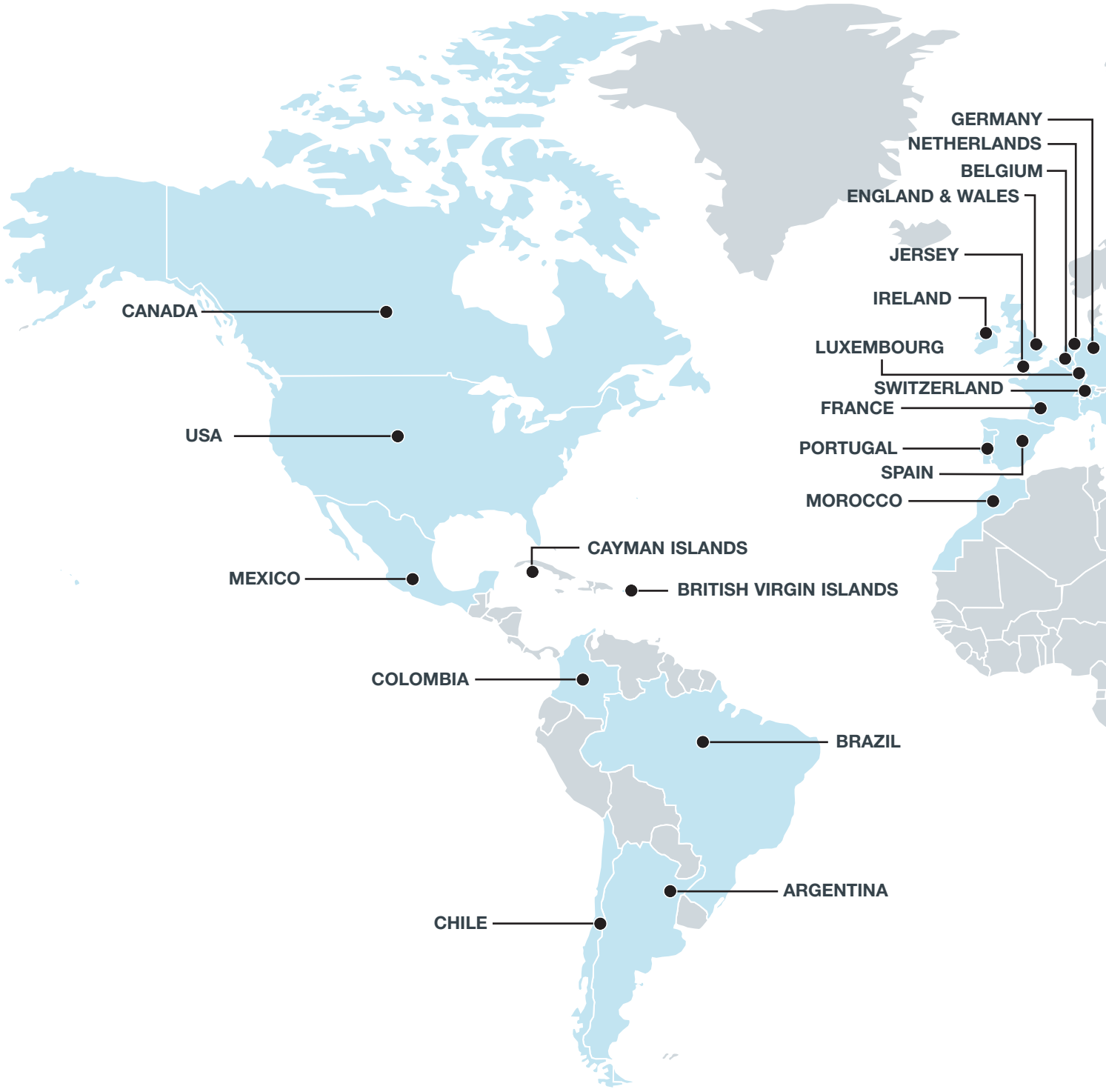
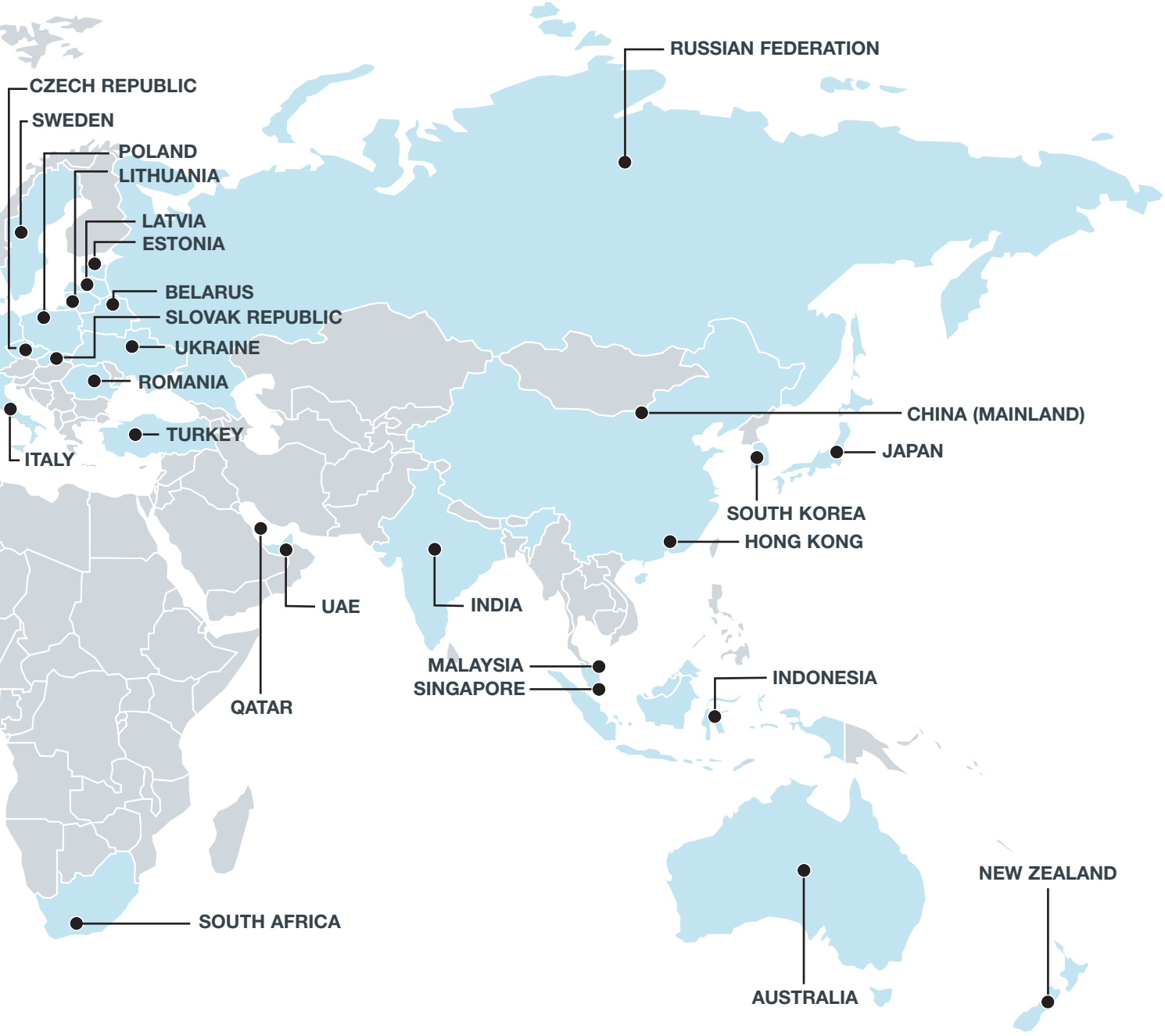




International Mediation Guide: Second Edition

Introduction
Welcome to the second edition of the International Mediation Guide.

The first edition of the Guide, published in 2013, presented an overview of approaches to mediation in 25 jurisdictions. Three years later, we have nearly doubled the size of the Guide to 47 jurisdictions covering six continents, with input from across Clifford Chance's global network as well as from respected local counsel in other jurisdictions.

Mediation remains a hot topic in dispute resolution. Around the world, courts strain under growing backlogs of cases, motivating governments to look for ways of reducing the burden, and inspiring prospective litigants deterred by the prospect of a lengthy court process to pursue alternative options. At the same time, with ever-increasing pressures on businesses' legal budgets, more and more companies are considering how to reduce litigation costs.

Against this backdrop, courts, legislatures, and parties to disputes are more and more receptive to Alternative Dispute Resolution ("**ADR**") mechanisms. A well-timed decision to pursue mediation can be an attractive option for all parties involved. At most, a party risks a day or two of time, with minimal additional costs incurred; in the context of a potentially long and expensive court process, this is a small price to pay. The possible rewards to that party from a successful mediation are myriad: cost and time savings in relation to the in-house employees concerned; curtailing legal bills; and the possibility of a cooperative resolution which preserves the possibility of a future business relationship. The opportunity for a flexible settlement offers many other non-monetary benefits: nuanced, creative agreements may accommodate the particular commercial goals of each party more than a court judgment could. In addition, the opportunity for each side to articulate complaints and potentially explain historic grievances in a moderated yet extrajudicial setting may offer the possibility of each side appreciating the other side's goals and motivations, analysing the shared business relationship, and planning a route forward; alternatively, it gives parties advance warning of how strongly their opponents will fight them.

Moving forward
As this guide illustrates, although mediation and ADR in general is expanding around the world, it is doing so at differing rates. Much has progressed since the first edition of the Guide was published: the "buzz" around mediation is louder than ever, with a blooming proliferation of mediation centres regularly organising seminars, conferences, competitions, training and countless other events to bring together a growing international community of practitioners. The networking, debate, and sharing of experiences and best practices at such events has been invaluable as a way of pushing the mediation agenda forward.

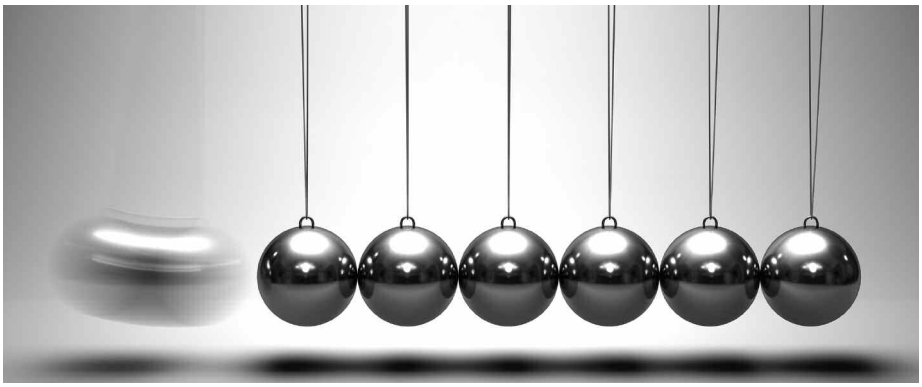
Yet despite widespread official recognition of the potential benefits of mediation (at least in theory), fostering a mediation culture and building trust in practitioners and institutions takes time. In many jurisdictions, litigation culture remains dominant; change may be resisted not only by parties unwilling to submit their disputes to an unfamiliar process, or where business culture may be simply confrontational and aggressive, but indeed by practitioners themselves who may not have bought into the benefits of mediation.

First steps
For jurisdictions in the nascent stages of developing a mediation culture, a common trend is for development to be encouraged through legislation or procedural rules aimed at requiring parties at least to consider mediation as an option, or to make good faith attempts to settle certain disputes before entering into court proceedings. At an early stage, certain types of disputes – for example, in the areas of family law, insurance, or lower-

value commercial disputes – may be considered most suitable for mediation.

Taking root
As a mediation culture becomes more entrenched, jurisdictions see a supporting infrastructure begin to emerge: institutions (either independent or linked to government, court, or business bodies) may offer mediation services or provide lists of recommended practitioners; formal qualifications for mediators as well as ongoing continuing professional development increase; judges and lawyers become increasingly comfortable with mediation as a credible dispute resolution option; and the range of matters and value of disputes considered suitable for mediation expands.

Maturity and beyond
In mature mediation cultures, we see deeper market penetration in all of the areas above. Specific pieces of legislation may be enacted which aim to further embed ADR and mediation practice,



sometimes in relation to targeted types of disputes (see box, "*Spotlight: Key Aspects of Recent EU ADR/ODR Legislation*"). At this stage, although practitioners and the dispute resolution community as a whole may be comfortable with mediation, additional efforts may focus on promoting ADR culture among consumers and businesses; for example, the EU ADR Directive aims to ensure that all consumers, with only limited exceptions, have access to ADR for resolving contractual disputes with traders, and the ODR Regulation promotes ADR processes particularly in relation to disputes about online purchases.

The advantages to consumers of easily-accessible mediation and other ADR mechanisms are well rehearsed: namely satisfactory redress even of low value disputes and simplified enforcement of their rights. However, mature cultures also see the utility of mediation in resolving commercial disputes and, more generally, the importance of effective dispute resolution in promoting commercial activity. Currently, the EU estimates that 60% of traders do not sell online to other countries due to the perceived difficulties of resolving issues arising from such sales. In addition to reducing such obstacles, ADR offers businesses the same cost- and time-saving advantages enjoyed by consumers, as well as an opportunity to minimise reputational consequences from disputes and to preserve customer relations.

Setting the stage

Asking the right questions prior to a mediation process can be as important as anything that takes place at the mediation itself. Some of the key considerations include:

Which mediator? What is required in terms of language ability, mediation expertise, availability, industry-specific familiarity? The choice of an appropriate mediator can make a significant difference to the prospects of success of the mediation.

What kind of mediator? Does the dispute require an evaluative mediator who will examine the merits, or a facilitative mediator who will work more on relationship building between the parties to help them come to a commercial agreement?

Pre-mediation? A preliminary meeting between the mediator and counsel teams can help set the stage, identify areas where further information is needed, and pinpoint key issues for the main mediation meeting. Choices also need to be made as to approach taken in position papers. Depending on the nature of the specific dispute, a party may prefer these to be legal, commercial, or just very brief.

Which team? It is important to decide who to bring along. A decision-maker is required, but should this be a commercial or legal person? What roles should lawyers and clients play? Should there be limits on the decision-maker's power? If so, access to someone who can override the limits is desirable.

Final thoughts

Even the most enthusiastic proponents of mediation readily agree that mediation will not be the right answer in every dispute. Rather, mediation should be thought of as a valuable tool in the disputes practitioner's arsenal, with the potential to be deployed to great effect in appropriate situations.

Spotlight: key aspects of recent EU ADR/ODR Legislation

Directive 2013/11/EU on Alternative Dispute Resolution

Overview

Directive 2013/11/EU on Alternative Dispute Resolution (the "**ADR Directive**") aims to provide European consumers with quick, easily accessible, low-cost avenues to out-of-court redress should a dispute arise in relation to purchases of goods of services. The aim behind this is to increase consumer confidence and in turn to help foster competition and growth.

Scope

The ADR Directive is only concerned with disputes that a consumer has with a business, following a purchase of goods and/or services.

Business-to-business disputes, disputes initiated by a business against a consumer, and disputes regarding health or higher education are not covered.

Entry into force

The ADR Directive was adopted by the European Parliament and the Council on 21 May 2013. The deadline imposed by the EU for implementation by Member States was 9 July 2015.

Key requirements

- Member States must ensure ADR provided by a certified ADR body is available for any dispute concerning contractual obligations between a consumer and a business.
- Although ADR must be available in the situations specified under the ADR Directive, Member States are not obliged to require businesses/consumers to use it.
- Provision of ADR must be free of charge or available at a nominal fee for consumers.
- Disputes must be concluded within 90 days of the ADR body receiving the complete complaint file.
- ADR providers have three weeks from receiving a complaint file to inform parties concerned if they will not be able to deal with a case.

Regulation (EU) 524/2013 on Online Dispute Resolution

Overview

Regulation (EU) 524/2013 on Online Dispute Resolution (the "**ODR Regulation**") provides for a particular ADR procedure, conducted entirely online, designed to help consumers who have purchased goods or services online.

Under the ODR Regulation, the European Commission will establish a European Online Dispute Resolution platform (the "**EODR Platform**") to help consumers and traders refer eligible disputes to certified ADR providers. The EODR Platform allows consumers to submit the details of the dispute via a short, user-friendly complaint form which is accessible on all types of devices, in any of the 23 official languages of the EU. Businesses selling goods or services online are required to carry a link on their website (and in some cases in their contractual terms) to the EODR Platform, and to provide their email address on their website so that consumers have a first point of contact.

The EODR Platform is purely facilitative in that it does not resolve disputes itself, but instead channels them to appropriate national ADR bodies. The system, which applies to both domestic and cross-border disputes, aims to help reduce practical obstacles to obtaining remedy (such as the cost and complexity of bringing court proceedings) and to facilitate resolution of common consumer concerns, such as what can be done when goods are damaged or services are not as described. In addition, the scheme aims to benefit traders: according to the EU, 60% of traders who fall under the Regulation do not currently sell online to other countries due to the perceived difficulties of solving problems arising from such sales.[1]

Scope

The EODR Platform is open to consumers resident in the EU who have bought goods or services online, and traders that are established within the EU and are engaging in online sales or service contracts.

Entry into force

The ODR Regulation was adopted by the European Parliament and the Council on 21 May 2013. The EODR Platform was launched for testing on 9 January 2016, and became accessible to consumers and traders on 15 February 2016.

Process

- Complainant completes an electronic complaint form.
- ODR platform transmits the complaint to the respondent party and invites that party to propose an ADR body.
- Once the ADR body is agreed on by both parties, the ODR platform will automatically transmit the complaint to that body.
- The ADR body that has agreed to deal with the dispute will handle the case entirely online and will reach an outcome within 90 days.

1 http://ec.europa.eu/consumers/solving_consumer_disputes/docs/adr-odr.factsheet_web.pdf

The conversation around mediation continues. Indeed, there is much to discuss: current hot topics include the merits of mediators taking an evaluative versus a facilitative approach and the benefits of a set format as against an evolutive and adaptive format. Meanwhile, the United Nations Commission on International Trade Law ("**UNCITRAL**") is considering developing an international convention or other standardised instrument which would provide for cross-border recognition and enforcement of mediation agreements. The proposals are currently being discussed by a working group, and, while the plans have the potential to make mediation even more widespread, concerns exist about the scope of such proposals and whether standardisation would diminish the advantages of flexibility currently enjoyed by users of mediation. Even among experienced practitioners, varying experiences and approaches in these areas provide plenty of room for debate.

As this Guide illustrates, litigation cultures around the world differ vastly; however, the driving factors inspiring greater recourse to mediation are universal. It is therefore likely that, although contrasting cultural attitudes, established legal practices and prevailing legislative and procedural frameworks mean that the "embedding process" will progress at different rates, over time mediation will become an increasingly well-established form of dispute resolution around the world. It is clear in which direction the tide is moving.

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- Arthur Cox
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The International Mediation Guide: Second Edition is produced by Clifford Chance's Global Mediation Group, coordinated by

Ronnie Austin
Moderator, Global Mediation Group
T: +33 1 44 05 52 52
E: ronald.austin
@cliffordchance.com

Matthew Scully
Partner, London
T: +44 20 7006 1468
E: matthew.scully
@cliffordchance.com

Kevin Smith
Associate, London
T: +44 20 7006 2735
E: kevin.smith
@cliffordchance.com

Ankesh Chandaria
Associate, London
T: +44 20 7006 3412
E: ankesh.chandaria
@cliffordchance.com

Contacts

PLMJ
SOCIEDADE DE ADVOGADOS, RL

PLMJ – Sociedade de Advogados
Lisboa Av. da Liberdade, 224
Edifício Eurolex
1250-148 Lisboa
Portugal

António Júdice Moreira
Sénior Associate
T: +351 213 197 300
E: antonio.judicemoreira
@plmj.pt

Iñaki Carrer
Associate
T: +351 213 197 438
E: inaki.carrera
@plmj.pt

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Portugal

Mediation culture	Mediation, although a growing trend, is still not very common in Portugal. The Portuguese government in recent years has made several efforts to promote mediation, including the creation of the "*Julgados de Paz*", a hybrid mediation-litigation court for civil and claims under €15,000. According to the latest report, 82,466 claims have been filed in these hybrid mediation-litigation courts since 2002 with an average in excess of 10,000 claims on the last three years. Parties are starting to favour mediation as an effective, faster and less expensive alternative to resolve their disputes. Mediation is commonly seen as an optimal solution for labour, family and commercial disputes, where the preservation of the parties' relationship is paramount, notwithstanding, informal conciliation or negotiation is still the most used option in detriment of a structured mediation. Mediation practitioners, public and private, are working closely to promote mediation as a viable alternative.
Legal and regulatory framework	In Portugal, parties have the freedom to settle their own disputes. As mediation is a voluntary consensus-based dispute resolution mechanism it cannot be forced to the parties by the Judicial Courts, Mediation may be triggered by the parties' own initiative or by the court's request – provided none of the parties oppose this solution. Initiating mediation will automatically suspend the judicial proceedings for a period not exceeding three months. Portugal has recently enacted a new Mediation Law (Law 29/2013) establishing the core mediation principles as defined by EU Directive 2008/52/EC.
Infrastructure	There is a growing number of mediators in Portugal. There are more than 200 mediators included on the official mediators list, certified by the Justice Ministry and it is estimated there are twice this number of mediators certified by privately accredited centres. Suitable venues for mediation are available at mediation and arbitration centres and also at the *Julgados de Paz*, available in 24 different locations throughout the country.
Judicial support	It is more common to have judicial courts engage directly in conciliation efforts – which is provided for in law (namely article 594 of the Portuguese Civil Procedure Code), than encouraging parties to mediate outside of court, however, it is possible for a judge to send parties to mediation under article 273 of the Civil Procedure Code, provided none of the parties opposes this solution. There are no adverse consequences to a refusal to mediate; however, if parties reach a settlement before the end of the judicial proceedings there is a reduction of the judicial costs.
Effectiveness and enforceability of contractual provisions	Article 4 of the Mediation Law establishes the principle that participation in mediation is voluntary, determining that the parties may, at any time, jointly or unilaterally, revoke their consent to mediate. The court will not enforce a mediation agreement; however, depending on the language of a contract, the court may suspend or even decline jurisdiction if the parties failed demonstrate efforts to pursue mediation prior to commencing proceedings. A settlement obtained through mediation will be enforceable if the legally established criteria are met (Article 9 of the Mediation Law) or if the agreement is confirmed by a court or tribunal.
How is mediation likely to develop in this jurisdiction in the medium term?	Mediation in Portugal has been growing consistently in recent years. Given its cost effectiveness, parties have shown increasing willingness to engage in mediation – either through the *Julgados de Paz* or autonomous mediation procedures either before or pending litigation. Judges have shown openness to mediation as an alternative to reduce judicial courts' backlog. We believe commercial and civil will continue to grow in the coming years.

CLIFFORD
CHANCE

Worldwide contact information
35* offices in 25 countries

Abu Dhabi
Clifford Chance
9th Floor, Al Sila Tower
Abu Dhabi Global Market Square
PO Box 26492
Abu Dhabi
United Arab Emirates
T +971 2 613 2300
F +971 2 613 2400

Amsterdam
Clifford Chance
Droogbak 1A
1013 GE Amsterdam
PO Box 251
1000 AG Amsterdam
The Netherlands
T +31 20 7119 000
F +31 20 7119 999

Bangkok
Clifford Chance
Sindhorn Building Tower 3
21st Floor
130-132 Wireless Road
Pathumwan
Bangkok 10330
Thailand
T +66 2 401 8800
F +66 2 401 8801

Barcelona
Clifford Chance
Av. Diagonal 682
08034 Barcelona
Spain
T +34 93 344 22 00
F +34 93 344 22 22

Beijing
Clifford Chance
33/F, China World Office Building 1
No. 1 Jianguomenwai Dajie
Beijing 100004
China
T +86 10 6505 9018
F +86 10 6505 9028

Brussels
Clifford Chance
Avenue Louise 65
Box 2, 1050 Brussels
T +32 2 533 5911
F +32 2 533 5959

Bucharest
Clifford Chance Badea
Excelsior Center
28-30 Academiei Street
12th Floor, Sector 1,
Bucharest, 010016
Romania
T +40 21 66 66 100
F +40 21 66 66 111

Casablanca
Clifford Chance
169 boulevard Hassan 1er
20000 Casablanca
Morroco
T +212 520 132 080
F +212 520 132 079

Doha
Clifford Chance
Suite B
30th floor
Tornado Tower
Al Funduq Street
West Bay
P.O. Box 32110
Doha, Qatar
T +974 4 491 7040
F +974 4 491 7050

Dubai
Clifford Chance
Level 15
Burj Daman
Dubai International Financial Centre
P.O. Box 9380
Dubai, United Arab Emirates
T +971 4 503 2600
F +971 4 503 2800

Düsseldorf
Clifford Chance
Königsallee 59
40215 Düsseldorf
Germany
T +49 211 43 55-0
F +49 211 43 55-5600

Frankfurt
Clifford Chance
Mainzer Landstraße 46
60325 Frankfurt am Main
Germany
T +49 69 71 99-01
F +49 69 71 99-4000

Hong Kong
Clifford Chance
27th Floor
Jardine House
One Connaught Place
Hong Kong
T +852 2825 8888
F +852 2825 8800

Istanbul
Clifford Chance
Kanyon Ofis Binasi Kat. 10
Büyükdere Cad. No. 185
34394 Levent, Istanbul
Turkey
T +90 212 339 0000
F +90 212 339 0099

Jakarta**
Linda Widyati & Partners
DBS Bank Tower
Ciputra World One 28th Floor
Jl. Prof. Dr. Satrio Kav 3-5
Jakarta 12940
T +62 21 2988 8300
F +62 21 2988 8310

London
Clifford Chance
10 Upper Bank Street
London
E14 5JJ
United Kingdom
T +44 20 7006 1000
F +44 20 7006 5555

Luxembourg
Clifford Chance
10 boulevard G.D. Charlotte
B.P. 1147
L-1011 Luxembourg
T +352 48 50 50 1
F +352 48 13 85

Madrid
Clifford Chance
Paseo de la Castellana 110
28046 Madrid
Spain
T +34 91 590 75 00
F +34 91 590 75 75

Milan
Clifford Chance
Piazzetta M. Bossi, 3
20121 Milan
Italy
T +39 02 806 341
F +39 02 806 34200

Moscow
Clifford Chance
Ul. Gasheka 6
125047 Moscow
Russia
T +7 495 258 5050
F +7 495 258 5051

Munich
Clifford Chance
Theresienstraße 4-6
80333 Munich
Germany
T +49 89 216 32-0
F +49 89 216 32-8600

New York
Clifford Chance
31 West 52nd Street
New York
NY 10019-6131
USA
T +1 212 878 8000
F +1 212 878 8375

Paris
Clifford Chance
1 Rue d'Astorg
CS 60058
75377 Paris Cedex 08
France
T +33 1 44 05 52 52
F +33 1 44 05 52 00

Perth
Clifford Chance
Level 7
190 St Georges Terrace
Perth WA 6000
Australia
T +618 9262 5555
F +618 9262 5522

Prague
Clifford Chance
Jungamannova Plaza
Jungamannova 24
110 00 Prague 1
Czech Republic
T +420 222 555 222
F +420 222 555 000

Riyadh
Clifford Chance
Building 15, The Business Gate
King Khalid International Airport Road
Cordoba District, Riyadh, KSA.
P.O.Box: 3515, Riyadh 11481,
Kingdom of Saudi Arabia
T +966 11 481 9700
F +966 11 481 9701

Rome
Clifford Chance
Via Di Villa Sacchetti, 11
00197 Rome
Italy
T +39 06 422 911
F +39 06 422 91200

São Paulo
Clifford Chance
Rua Funchal 418 15ºandar
04551-060 São Paulo-SP
Brazil
T +55 11 3019 6000
F +55 11 3019 6001

Seoul
Clifford Chance
21st Floor, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210
Korea
T +82 2 6353 8100
F +82 2 6353 8101

Shanghai
Clifford Chance
40th Floor, Bund Centre
222 Yan An East Road
Shanghai 200002
China
T +86 21 2320 7288
F +86 21 2320 7256

Singapore
Clifford Chance
Marina Bay Financial Centre
25th Floor, Tower 3
12 Marina Boulevard
Singapore 018982
T +65 6410 2200
F +65 6410 2288

Sydney
Clifford Chance
Level 16, No. 1 O'Connell Street
Sydney NSW 2000
Australia
T +612 8922 8000
F +612 8922 8088

Tokyo
Clifford Chance
Akasaka Tameike Tower
7th Floor
2-17-7, Akasaka
Minato-ku
Tokyo 107-0052
Japan
T +81 3 5561 6600
F +81 3 5561 6699

Warsaw
Clifford Chance
Norway House
ul.Lwowska 19
00-660 Warsaw
Poland
T +48 22 627 11 77
F +48 22 627 14 66

Washington, D.C.
Clifford Chance
2001 K Street NW
Washington, DC 20006 – 1001
USA
T +1 202 912 5000
F +1 202 912 6000

*Clifford Chance's offices include a second office in London at 4 Coleman Street, London EC2R 5JJ. **Linda Widyati and Partners in association with Clifford Chance. Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.

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