

2 BELGIUM¹

Prepared by Luc Demeyere²

1. Attempt to mediate

a. Always voluntary

Yes. The Belgian Mediation Act dated 21 February 2005, which entered into force on 30 September 2005, distinguishes between voluntary mediation and court-annexed mediation. It does not preclude the existence of a third category not provided for in the Act and described as 'free mediation: mediation ad hoc'. Even in court-annexed mediation, the mediation is subject to the parties' consent before it can be ordered by the court.

b. Mandatory (in some cases)

No. For labour law disputes, the judge is obliged to attempt to reconcile the parties (Section 734 of the Belgian Judicial Code). In practice, this requirement has been reduced to a procedural formality.

c. Court referral or court-connected mediation possible

Yes. See 1.a.

d. Court-ordered mediation possible

[No]. See 1.a. Only possible when parties consent.

e. Sanctions by the court if mediation is not tried (in good faith)

No.

f. Sanctions by law if mediation is not tried (in good faith)

No.

g. Incentives if mediation is tried voluntarily before going to court

No.

h. Outside counsel presence/representation during mediation sessions allowed

Yes.

i. Outside counsel presence mandatory

No.

1 Last update of information: July 2013.

2 Luc Demeyere practices litigation, arbitration (both as counsel and as arbitrator) and mediation in domestic and cross-border disputes. Contact: luc.demeyere@contrast-law.be.

2. Mediation clause

a. Case admissible in court with a mediation clause

No. Provided that the mediation clause is valid and binding, the court, at the request of a party before any other motion or defence, will suspend court proceedings or declare that it has no competence until the mediation has taken place. The mediation clause does not prevent provisional or conservative measures from being ordered by the court.

b. Case admissible in court, however, the judge may take this into account and there is some supporting case law

No.

c. If parties included a mediation clause in their contract, they have to mediate first before they can go to court

Yes. The wording of the mediation clause is decisive. If the mediation is a contractual obligation, mediation is mandatory; if mediation is phrased as an option, it is not.

3. Mediation procedure

a. Details of mediation procedure, approach and/or specific duties of the mediator described in the law

(No). The Belgian Act requires for voluntary mediation and court-annexed mediation that the 'mediation protocol' be signed by the parties and the mediator. It should specify the points provided for in the Belgian Act, including the fees and costs of the mediation. Once the mediation protocol has been signed, the mediation is conducted in a way that the mediator and the parties deem appropriate and is thus flexible.

b. Mediation procedure, style and approach of the mediator fully flexible/contractual

Yes. See 3. a.

c. Mediator can offer a non-binding opinion

Yes.

d. Mediator can offer a binding opinion

Yes.

e. Predominant mediation style for commercial disputes re substance (facilitative, evaluative, transformative, other)

Mix. Mediation training focus fundamentally on facilitative mediation and develop skills to such effect. In mediation each mediator will develop their own approach, and may be tempted on technical matters falling within /their area of expertise to provide an evaluation of the questions at hand.

f. Predominant approach in commercial disputes re process (facilitative, directive, other)

Mix. Mediation training stress the necessity for the mediator to stay in control of the process, granting each party the opportunity and time to express its views. Be tough on process and open on substance.

- g. Predominant mediation style for civil disputes re substance (facilitative, evaluative, transformative, other)
Mix. See 3.e. In divorce mediation it is common practice that the spouses are not assisted by their lawyers; as a result the mediator will have to point the spouses' attention to issues governed by '*ordre public*'.
- h. Predominant mediation approach for civil disputes re process (facilitative, directive, other)
Mix. See 3.f.
- i. If applicable, how is evaluative mediation used (neutral, general advice, legal opinion, other)?
Mix. No data available.
- j. Predominant mediation process for commercial disputes (caucus (only), joint session (only), mix, other)
Mix.
- k. Predominant mediation process for civil disputes (caucus (only), joint session (only), mix, other)
Mix.

4.1. Mediator accreditation

- a. Accreditation/certification or recognition of mediators
(Yes). The accreditation of mediators is entrusted to the Federal Mediation Commission. The Belgian Act specifies the minimum requirements to be fulfilled by mediator candidates:
- a) on the basis of their present or past activity, they should demonstrate the competence required by the nature of the dispute;
 - b) depending on the case, they should demonstrate adequate training or experience for mediation practice;
 - c) in view of the mediation practice, they should provide necessary guarantees regarding independence and impartiality;
 - d) they must not have a criminal record that is incompatible with the practice of an accredited mediator;
 - e) they must not have been the subject of a disciplinary or administrative sanction that is incompatible with the practice of an accredited mediator, or have had an earlier accreditation withdrawn.

Accredited mediators should attend follow-up training. The Federal Mediation Commission took a resolution adding additional criteria for a candidate to be accredited as a mediator. In case of court-annexed mediation the court may, if the circumstances so require, appoint a non-accredited mediator. No accreditation of the mediator is required for ad hoc mediation cases

- b. Set by market (private certifying bodies)
No.
- c. Set by public regulation
Yes. See 4.1.a.
- d. Number of hours for basic mediator training
90 hours.

- e. Mandatory Continuing Professional Development for accredited/certified mediators
Yes. Accredited mediators must demonstrate to the Federal Mediation Commission that they have attended follow-up training of 18 hours over a period of 2 successive years.
- f. Accreditation through set of rules (e.g., age, education, professional background, experience, etc.)
Yes. See 4.1.a.
- g. Accreditation through written exam
No.
- h. Accreditation through performance-based assessment
No.

4.2. *Mediation advocacy accreditation*

- i. Accreditation/certification or recognition of mediation advocates
No. There are no specific rules or mechanisms to recognise lawyers representing clients in a mediation procedure. The rules referred to under 4.1.a. also apply to advocates acting as mediators.
- j. Set by market (private certifying bodies)
No.
- k. Set by public regulation
No. See 4.1.a.

5. Who can be a mediator?

- a. Set by market (private certifying bodies)
Yes. For 'free mediation' and 'mediation ad hoc' non-accredited mediators can act as mediator.
- b. Set by public regulation
Yes. See 4.1.a.
- c. Only a lawyer/legal professional can be an accredited/certified mediator (domestic)
No. The Belgian Act stipulates that advocates (members of the bar), notaries as well as others can be accredited.
- d. Only a lawyer/legal professional can be an accredited/certified mediator (cross-border)
No. See 5.c.

6. EU Directive

- a. EU Directive implemented for cross-border cases only
No. The Belgian Mediation Act anticipated the contents of the EU Directive and does not distinguish between national and cross-border cases, which implies that it applies to both.

- b. EU Directive implemented for all national and cross-border commercial cases
Yes. See 6.a.
- c. EU Directive implemented for all national and cross-border civil cases
Yes. See 6.a.

7. Mediation legislation besides Directive

- a. Mediation legislation since 2005. The Belgian Act of 21 February 2005, Belgian Official Gazette, 22 March 2005, page 12772 et seq., which entered into force on 30 September 2005.
- b. Legislation updated since EU mediation directive (date update)
No.

8. Bodies providing mediation

- a. Mediation bodies may have various Legal forms
Yes
- b. Individuals may be providers of mediation services
Yes.
- c. Mediation provider qualifications/requirements determined by public regulation
Yes. The Federal Mediation Commission released a resolution on 1 February 2007, amended later, on the conditions and procedure for accreditation as an institution. The institution should have the form of a legal entity. CPD programmes may be accredited separately.

9.1. Mediator fee

- a. Freely contracted
Yes.
- b. Fixed in some cases by public regulation
Yes. The Belgian Act extends legal aid to the costs and fees of mediators acting in a voluntary or court-annexed mediation, provided the mediation is conducted by an accredited mediator. The legal aid is based on a 'value per point' system, and the value per point for the judicial year 1 September 2010 – 31 August 2011 was € 24.03. The number of points for legal services under the legal aid system was established by schedule and will be determined in each case based on the services rendered. For mediation, the standard is 10 points.
- c. Average mediator fee per hour for commercial or cross-border cases
€ 100-300 (estimate). Based on hourly rates in commercial matters, the mediator's hourly fee may vary between € 100 and € 300, but hourly fees outside this range may be agreed.
- d. Average mediator fee per hour in civil cases
€ 50-200 (estimate). Based on hourly rates in civil matters, the mediator's hourly fee may vary between € 50 and € 200, but hourly fees outside this range may be agreed.

9.2. Financing and legal aid

e. Legal aid available for mediation services

Yes. See 9.1.b.

f. Mediator fees covered by legal insurance schemes

(No). Insurance policies covering legal assistance may be understood to cover mediator fees provided the insured can prove that the mediation was successful. Explicit coverage may be provided for as well.

g. Mediator fees subsidised in court-connected schemes

No. Legal aid is available for mediation services, see 9.1.b.

10. Legal context

a. Is there a special relationship between judges and mediators/mediation, apart from court-connected referrals or court-connected mediation schemes?

No. On 1 January 2003 a pilot project on mediation by judges was launched, but later on the High Counsel for Justice advised against judges acting as mediators. This pilot project came to an end.

b. Relationship between mediation and legal system (is mediation seen as part of the legal system?)

Yes. The Belgian Act is incorporated in the Belgian judicial code as Part VII.

c. Mediation procedure has impact on statute of limitations

Yes. The notice sent for starting a voluntary mediation triggers a one-month suspension of the statute of limitations period relating to the claim of the right invoked. For court-annexed mediation, a joint mediation request by the parties causes the procedural deadlines to be suspended as of the date the joint request is filed. As the case may be, new procedural deadlines may be applied for.

11. Mediated settlement

a. Contract

Yes. The mediation agreement is the agreement that is entered into as the result of the mediation. It is to be signed and dated by the parties and by the mediator, if the mediation is governed by the Act.

b. Automatically enforceable

No.

c. Enforceable under some circumstances which are up to the parties

Yes. If the parties have enacted their mediated settlement in a notarial deed, this deed is enforceable just like any other notarial deed.

d. Enforceable under some circumstances defined by public regulation

Yes. The Belgian Act provides that the court can be requested to homologate the mediated settlement if the mediation has been conducted by a mediator accredited by the Federal

Mediation Commission. The homologation has the effect of a 'judgement by consent'. The court can only refuse to homologate the mediated settlement if doing so would be contrary to the *ordre public*, or, in family matters, if the mediated settlement violates the interests of the minors.

12. Confidentiality

a. Regulated by law

Yes. The Belgian Act creates a privilege as well as a duty of confidentiality and professional secrecy.

The privilege concerns the parties to the mediation and implies that documents drafted and communications made during the course and for the purpose of mediation are privileged and confidential. They may not be referred to in court or in administrative or arbitral proceedings, or in any other proceedings for the resolution of conflict, and they may not be admitted as evidence, not even as an out-of-court admission. Deviations are only possible by agreement between the parties, for example, in order to allow the judge to homologate the mediated settlement. Violation of the duty of confidentiality by one of the parties may give rise to a claim for damages. Confidential documents that have nevertheless been disclosed should be excluded from the proceedings *ex officio*.

Mediators as well as experts called upon with the agreement of the parties, during the mediation, are bound by duties of professional secrecy which are criminally sanctioned.

b. Exemption from obligation to give evidence in court proceedings or arbitration (regulated by law or contract)

Yes. See 12.a.

13. Education

a. Mediation education is a common component of the legal education curriculum

(Yes). Most universities offer mediation as an optional course; the University of Antwerp has a mandatory course.

b. Mediation advocacy is a common component of the legal education curriculum

(Yes). A summary introduction to mediation in general is part of the mandatory course for the Flemish bar exam.

14. Most relevant literature or references, case law, articles, law

- Allermeersch, B. en Schollen, P., 'De wet tot wijziging van het Gerechtelijk Wetboek in verband met de bemiddeling', R.W. 2004-05, 1481-1494.
- Gayse, B., 'Bemiddeling. Een veralgemeende wettelijke grondslag', NjW 2005, 434-449.
- Van Leynseele, P. en Van De Putte, F., 'La médiation dans le Code judiciaire', J.T. 2005, 297-308.
- Andries, K., Het bemiddelingsbeding: geldigheid, effect inhoud en afdwingbaarheid, in Bibliotheek Burgerlijk Recht Larcier, Brussel, Larcier 2007, 116 p..
- Renson, P., 'L'agrément définitif des médiateurs: le fil d'Ariane', J.T. 2008, 296-298.
- Renson, P., 'La transcription de certains jugements homologuant des accords de médiation: l'intervention des notaires remise en cause?', J.T. 2009, 509-514.

- Verbist H., Analyse van de Belgische bemiddelingswet in het licht van de Europese richtlijn inzake bemiddeling, TMD (Nederlands Vlaams tijdschrift voor mediation en conflictmanagement), 2010/1, p.33 ff.
- Verbist H., Omzetting van de Europese Richtlijn 2008/52/EG inzake bemiddeling/mediation in de lidstaten van de Europese Unie: een eerste evaluatie, TMD (Nederlands Vlaams tijdschrift voor mediation en conflictmanagement), 2011/4, p. § ff.
- Demeyere L., Mediation in Belgium – an overview, in, Yearbook on international arbitration, volume II, edited by Marianne Roth, Michael Geistlinger, p. 361 ff.

15. Mediation legislation texts

a. Weblink to legislation in national language

- www.belgielex.be
- www.belgiquelex.be
- www.belgienlex.be

b. Weblink to English or other translation

NA.

c. Other references

- www.bemiddeling-justitie.be
- www.mediation-justice.be

16. Country specific remarks

The Federal Mediation Commission plays a central role in the institutional framework introduced by the Act. Its tasks are defined by the Act. It is entitled to release resolutions on the matters provided for in the Act and is assisted by three subcommittees. It accredits mediators and may revoke their accreditation; it accredits institutes for training as well as programmes for CPD.

Section 731 of the Belgian judicial code provides that any lawsuit, the subject matter of which can be settled validly at the initiative of one party or with the parties' consent may be submitted in advance to the court for settlement. This provision is only used very exceptionally.

Belgian law has other acts mentioning or referring to mediation in which mediation is not understood in the sense of mediation as referred to in the EU Directive:

- the Belgian Act dated 5 July 1998 concerning debt mediation;
- the Belgian Act dated 10 February 1994 introduces, under certain conditions, mediation with victims in criminal matters;
- the Belgian Act dated 25 April 2007 established a mediation service for tax matters.

Mediation definition

There is no definition of 'mediation' given in Belgian law.

Mediation regulation and approach

Country: Belgium

Prepared by *Luc Demeyere*

1. Attempt to mediate	a. Always voluntary	Yes
	b. Mandatory (in some cases)	No
	c. Court referral or court-connected mediation possible	Yes
	d. Court-ordered mediation possible	[No]
	e. Sanctions by the court if mediation is not tried (in good faith)	No
	f. Sanctions by law if mediation is not tried (in good faith)	No
	g. Incentives if mediation is tried voluntarily before going to court	No
	h. Outside counsel presence/representation during mediation sessions allowed	Yes
	i. Outside counsel presence mandatory	No
	2. Mediation clause	a. Case admissible in court with mediation clause
b. Case admissible in court, however, the judge may take this in account and there is some supporting case law		No
c. If parties included a mediation clause in their contract, they have to mediate first before they can go to court		Yes
3. Mediation procedure	a. Details of mediation procedure, approach and/or specific duties of the mediator described in the law	[No]
	b. Mediation procedure, mediator duties, style and approach of the mediator fully flexible/contractual	Yes
	c. Mediator can offer a non-binding opinion	Yes
	d. Mediator can offer a binding opinion	Yes
	e. Predominant mediation style for commercial disputes re substance (facilitative, evaluative, transformative, other)	Mix
	f. Predominant approach in commercial disputes re process (facilitative, directive, other)	Mix
	g. Predominant mediation style for civil disputes re substance (facilitative, evaluative, transformative, other)	Mix
	h. Predominant mediation approach for civil disputes re process (facilitative, directive, other)	Mix
	i. If applicable, how is evaluative mediation used (neutral, general advice, legal opinion, other)?	Mix
	j. Predominant mediation process for commercial disputes (caucus (only), joint session (only), mix, other)	Mix
k. Predominant mediation process for civil disputes (caucus (only), joint session (only), mix, other)	Mix	
4.1. Mediator accreditation	a. Accreditation/certification or recognition of mediators	[Yes]
	b. Set by market (private certifying bodies)	No
	c. Set by public regulation	Yes
	d. Number of hours for basic mediator training	90 hrs
	e. Mandatory continuing professional development for accredited/certified mediators	Yes
	f. Accreditation through set of rules (e.g., age, education, professional background, experience, etc.)	Yes
	g. Accreditation through written exam	No
	h. Accreditation through performance-based assessment	No
4.2. Mediation advocacy accreditation	i. Accreditation/certification or recognition of mediation advocates	No
	j. Set by market (private certifying bodies)	No
	k. Set by public regulation	No

Mediation regulation and approach

Country: Belgium

Prepared by Luc Demeyere

5. Who can be mediator?	a. Set by market (private certifying bodies)	Yes
	b. Set by public regulation	Yes
	c. Only a lawyer/legal professional can be an accredited/certified mediator (domestic)	No
	d. Only a lawyer/legal professional can be an accredited/certified mediator (cross-border)	No
6. EU directive	a. EU Directive implemented for cross-border cases only	No
	b. EU Directive implemented for all national and cross-border commercial cases	Yes
	c. EU Directive implemented for all national and cross-border civil cases	Yes
7. Mediation legislation (besides Directive)	a. Mediation legislation since 2005	2005
	b. Legislation updated since EU mediation directive (date update)	No
8. Bodies providing mediation	a. Mediation bodies may have various legal forms	Yes
	b. Individuals may be providers of mediation services	Yes
	c. Mediation provider qualifications/requirements determined by public regulation	Yes
9.1 Mediator fee	a. Freely contracted	Yes
	b. Fixed in some cases by public regulation	Yes
	c. Average mediator fee per hour in commercial or cross-border cases	€100-300 (est.)
	d. Average mediator fee per hour in civil cases	€50-200 (est.)
9.2 Financing and Legal aid	e. Legal aid available for mediation services	Yes
	f. Mediator fees covered by legal insurance schemes	(No)
	g. Mediator fees subsidised in court connected schemes	No
10. Legal context	a. Is there a special relationship between judges and mediators/mediation, apart from court-connected referrals or court-connected mediation schemes?	No
	b. Relationship mediation and legal system (is mediation seen as part of the legal system?)	Yes
	c. Mediation procedure has impact on statute of limitations	Yes
11. Mediated settlement	a. Contract	Yes
	b. Automatically enforceable	No
	c. Enforceable under some circumstances, which are up to the parties	Yes
	d. Enforceable under some circumstances defined by public regulation	Yes
12. Confidentiality	a. Regulated by law	Yes
	b. Exemption from obligation to give evidence in court proceedings or arbitration (regulated by law or contract)	Yes
13. Education	a. Mediation education is a common component of legal education curriculum	(Yes)
	b. Mediation advocacy education is a common component of legal education curriculum	(Yes)

Yes = Yes

No = No

(Yes) = Yes as a rule, but with (informal) exceptions (No) = No as a rule, but with (informal) exceptions