International Journal of Scientific Trends- (IJST)
ISSN: 2980-4299
Volume 5, Issue 5, May - 2026
Website: https://scientifictrends.org/index.php/ijst
Open Access, Peer Reviewed, Scientific Journal

Legal Mechanisms for the Application of Mediation in the Enforcement Stage of Judicial Acts in Foreign States: A Comparative Legal Analysis

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Abstract
This article is devoted to the comparative-legal analysis of the legal mechanisms for applying mediation in the enforcement stage of judicial acts in the legal systems of foreign states — the European Union, Germany, France, the United Kingdom, the United States, Singapore, and Japan — on the basis of comparative-legal methodology. The concept of 'post-judgment mediation', the institutions for reaching agreement in enforcement proceedings, and the empirical impact of mediation on enforcement effectiveness are studied in detail. The article concludes with a theoretical model summarising foreign experience and practical recommendations.

Keywords: Post-judgment mediation, enforcement stage, legal mechanism, enforcement effectiveness, institutions for reaching agreement, comparative law, foreign experience.

Introduction

The practice of modern legal systems shows that the issuance of a court judgment does not automatically resolve a dispute. The judgment is read out, yet goes unenforced. According to the 2022 report of the Council of Europe's Commission for the Efficiency of Justice (CEPEJ), in certain European states the actual non-enforcement rate of monetary judgments reaches 30–40 per cent.[1] This figure is not merely a statistic — it represents lost property, broken business relationships, and shattered expectations.

It is precisely at this juncture that foreign legal scholarship discovered a new and unexpected role for mediation: it can not only resolve a dispute before it reaches a court, but can also facilitate the enforcement of a judgment that has already been rendered. This phenomenon — known as 'post-judgment mediation' — has, over the past ten to fifteen years, become an independent field of research in foreign legal doctrine. This article is devoted to the study of that phenomenon.

The principal research questions of this study are as follows. First: how has the concept of 'post-judgment mediation' taken shape in foreign legal scholarship, and what content has it acquired?

[1]Council of Europe, CEPEJ. European Judicial Systems — Efficiency and Quality of Justice. CEPEJ Studies No. 26, 2022 Edition (data 2020), Strasbourg, 2022, pp. 231–245.

Second: what institutional frameworks have been created in foreign states to facilitate the reaching of agreement between the parties in enforcement proceedings? Third: to what extent is the impact of mediation on enforcement effectiveness confirmed by empirical data? Seeking answers to these questions constitutes the primary objective of the article.

The concept of 'post-judgment mediation' entered legal literature relatively late. Its legal content was first discussed in the United States in the early 1990s, when researchers began to establish the need to restore dialogue between parties in conditions where the mechanism of compulsory enforcement had proved ineffective. Professor Eric Greyk of Stanford University defined this concept as follows: post-judgment mediation is a procedural instrument that allows parties in the enforcement stage to transition their legal relationship to a new enforcement framework that they themselves have determined.[2]

The concept subsequently evolved into a complex legal phenomenon encompassing three distinct aspects. The first is temporal: mediation is conducted after the court judgment has been rendered, but before full enforcement is completed. The second is procedural: mediation proceeds in parallel with the existing enforcement proceedings or temporarily suspends them. The third is substantive-legal: the agreement reached through mediation supplements or modifies the enforcement mechanism of the original judicial act. Professor Carrie Menkel-Meadow holds that the unity of these three aspects qualitatively distinguishes 'post-judgment mediation' from ordinary mediation.[3]

In European doctrine, the concept of 'post-judgment mediation' gained new impetus with the adoption of EU Directive 2008/52/EC by the European Parliament. The Directive defined mediation as applicable at the 'initial, intermediate, or final stage of judicial proceedings', thereby opening the way for it to encompass the enforcement stage as well. However, the Directive left this matter to the national legislation of member states. This led to the emergence of post-judgment mediation mechanisms in different architectural forms in each state.[4]

At the international level, the most robust legal foundation for the concept of 'post-judgment mediation' was created by the 2019 United Nations Convention. This instrument — widely known as the Singapore Convention — defined a mediated settlement agreement as a document capable of direct enforcement, equating its practical value to that of an arbitral award.[5] This step firmly established 'post-judgment mediation' in the international legal lexicon.

Germany is considered one of the states with the most consistent legal framework for the mechanism of 'post-judgment mediation'. The Federal Mediation Act (Mediationsgesetz) adopted on 21 July 2012 regulated mediation activities at the federal level for the first time, and legally opened the way for its application in the context of the enforcement stage as well.[6]

In terms of the practical enforcement mechanism, in Germany a mediated settlement agreement may acquire enforcement force through two independent routes. The first route: pursuant to

[2]Green, E.D. "A Heretical View of the Mediation Privilege." Ohio State Journal on Dispute Resolution, Vol. 2, No. 1, 1986, pp. 1–82.
[3]Menkel-Meadow, C. "Mediation, Arbitration, and Alternative Dispute Resolution." In: International Encyclopedia of the Social and Behavioral Sciences, 2nd ed. Elsevier, 2015, Vol. 14, pp. 10–15.
[4]Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. Official Journal of the European Union, L 136, 24.05.2008, pp. 3–8.
[5]United Nations Convention on International Settlement Agreements Resulting from Mediation, adopted by UN General Assembly Resolution 73/198 of 20 December 2018, opened for signature Singapore, 7 August 2019.
[6]Mediationsgesetz vom 21. Juli 2012, Bundesgesetzblatt I, S. 1577.

Section 794(1)(1) of the Code of Civil Procedure (Zivilprozessordnung), a settlement agreement concluded before a court between the parties constitutes a direct enforcement document; a post-mediation agreement, once it has received court confirmation, acquires the same status.[7] The second route — notarial confirmation: a mediated settlement agreement may also acquire independent enforcement force through confirmation by a notary with an enforcement clause (Vollstreckungsklausel).

German law has developed the concept of 'enforcement settlement' (Vollstreckungsvergleich) as a distinctive mechanism of mediation in the enforcement stage. Professor Reinhard Greger, having analysed this concept in depth, emphasises that in an enforcement settlement the parties agree upon a new payment schedule or procedure for performing an obligation at the compulsory enforcement stage, which provides the enforcement authority with a basis for proceeding in the new manner.[8] This mechanism proves particularly effective in situations where the debtor's financial difficulties are objective but the debtor has a genuine disposition towards voluntary compliance.

The French model has a different architecture. Articles 131-1 to 131-15 of the Code of Civil Procedure (Code de procédure civile) regulate the institution of court-appointed mediation (médiation judiciaire).[9] Under this procedure, a judge may, having obtained the consent of the parties, issue an order referring them to mediation. Crucially, this power also belongs to the enforcement judge (juge de l'exécution) presiding over the enforcement stage.

The Law on the Modernisation of Justice for the 21st Century (Loi n°2016-1547) adopted on 18 November 2016 significantly expanded the possibilities for applying mediation in the enforcement stage. In accordance with the Law, the enforcement judge may also refer the parties to mediation in the course of enforcement proceedings, and this decision is accompanied by an interim suspension of the court session.[10] French jurist Soraya Amrani-Mekki describes this mechanism as a 'new step in judicial mediation', specifically emphasising that it does not prejudice the voluntariness of the parties.[11]

In the **United Kingdom**, the concept of 'post-judgment mediation' has developed in its own distinctive form within the tradition of common law. In English law, the Part 36 Offer mechanism (Civil Procedure Rules 1998, Part 36) regulates the making of a formal financial offer by one party to the other.[12] If the other party rejects the offer but subsequently receives a worse outcome at trial, additional costs are imposed. This mechanism is not in itself mediation, but it operates in the enforcement stage as the most powerful financial incentive directing the parties towards settlement.

[7]Zivilprozessordnung (ZPO) i.d.F. vom 5. Dezember 2005, BGBl. I S. 3202, zuletzt geändert durch Gesetz vom 10. Oktober 2023, BGBl. I Nr. 272, § 794 Abs. 1 Nr. 1.
[8]Greger, R. & Unberath, H. MediationsG: Kommentar zum Mediationsgesetz. C.H. Beck Verlag, München, 2012, Einführung Rn. 45–62.
[9]Code de procédure civile français, Articles 131-1 à 131-15, introduits par Décret n°96-652 du 22 juillet 1996, modifiés en dernier lieu par Décret n°2022-245 du 25 février 2022.
[10]Loi n°2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle, Journal officiel de la République française n°0269 du 19 novembre 2016, texte n°1.
[11]Amrani-Mekki, S. "La médiation judiciaire." Revue de l'arbitrage, 2018, n°3, pp. 783–820.
[12]Civil Procedure Rules 1998 (SI 1998/3132), Part 36: Offers to Settle, as amended by Civil Procedure (Amendment) Rules 2023 (SI 2023/572).

In 2023, the Court of Appeal of England and Wales delivered a landmark judgment in Churchill v. Merthyr Tydfil County Borough Council: the court confirmed that it has the power to compel the parties to attend mediation.[13] This judgment resolved a matter that had been the subject of fierce controversy since Dunnett v. Railtrack (2002), and markedly expanded the practical scope of application of 'post-judgment mediation' in the United Kingdom.

The institutional basis for mediation in the enforcement stage in the United Kingdom has been created by the Centre for Effective Dispute Resolution (CEDR). The CEDR 2021 audit shows that 89 per cent of commercial mediations in the United Kingdom are concluded successfully.[14] This figure demonstrates not only that mediation is directly effective, but also that a strong empirical basis exists for applying it to the enforcement stage.

In the **United States**, 'post-judgment mediation' has the broadest normative basis. The Uniform Mediation Act (adopted by NCCUSL in 2001, amended in 2003 by certain states) regulated the confidentiality (*confidentiality*) of mediation at all stages — including the enforcement stage — and the legal significance of a mediated settlement agreement.[15]

Rule 69 of the Federal Rules of Civil Procedure, which governs enforcement proceedings, leaves open the possibility for the parties to conduct negotiations also in the course of enforcement proceedings.[16] Moreover, many federal district courts operate 'mandatory mediation' programmes, which also provide for the referral of parties to mediation in the enforcement stage. For example, the United States District Court for the Southern District of New York (S.D.N.Y.) has been applying such programmes since the 1990s.[17]

In the United States, bankruptcy mediation — 'bankruptcy mediation' — is a particularly significant form of 'post-judgment mediation' in practical terms. Section 105 of Title 11 of the United States Code (Bankruptcy Code) confers upon the court the power to refer parties to mediation; this power is widely applied in practice in the course of reorganisation proceedings.[18] Professor Nancy Welsh, analysing this mechanism, has empirically demonstrated that where parties feel a sense of procedural control in the enforcement stage as well, they display a greater disposition towards the long-term performance of their agreement.

By becoming the international centre for mediation, **Singapore** has also created one of the world's most advanced models for regulating mediation in the enforcement stage. The Singapore Mediation Centre (SMC), established in 1997, has its Mediation Rules providing a specific procedure for the application of mediation in the enforcement stage. In particular, pursuant to Rule

[13]Churchill v Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416, Court of Appeal (Civil Division), judgment of 29 November 2023, per Sir Geoffrey Vos MR.
[14]Centre for Effective Dispute Resolution (CEDR). CEDR Mediation Audit 2021: A Survey of Commercial Mediator Attitudes and Experience in the UK. London: CEDR, 2021, p. 8.
[15]Uniform Mediation Act, approved and recommended by the National Conference of Commissioners on Uniform State Laws (NCCUSL) at its Annual Meeting, 2001, amended 2003; adopted by numerous U.S. states including Illinois (765 ILCS 35), Iowa, Nebraska, New Jersey, Ohio, and others.
[16]Federal Rules of Civil Procedure, Rule 69: Execution, 28 U.S.C. Appendix, as amended through December 1, 2023.
[17]United States District Court, Southern District of New York. Plan for Certain Pretrial Proceedings and Alternative Dispute Resolution. S.D.N.Y. Local Civil Rules, Rule 83.9, revised 2021.
[18]11 United States Code § 105(a): Power of court, as enacted by Pub.L. 95–598, Nov. 6, 1978, 92 Stat. 2555, and subsequently amended.

14 of the Rules, parties may apply to the SMC for mediation even during enforcement proceedings, and this process may be formalised with the consent of the enforcement authority.[19]

To appreciate the practical significance of the Singapore Convention, it suffices to note its reach: since the Convention was opened for signature, 56 states have signed it and 15 have ratified it.[20] These figures demonstrate that there is genuine demand for a mechanism of mediation at the international enforcement stage. Singaporean jurist Joel Lee assesses the practical impact of the Convention as follows: it effectively nullifies in practice the legal distinction between a mediated settlement agreement and an arbitral award.[21]

The experience of **Japan** is noteworthy in that it formed its approach to mediation in the enforcement stage within an entirely different cultural-legal context. In Japan, 'chotei' (调停) — the traditional institution of reconciliation — was transformed into a modern mediation system through the Act on Promotion of Use of Alternative Dispute Resolution (Act No. 151 of 2004, entered into force on 1 April 2007).[22] This Act specifically regulated the enforcement force of an agreement reached through mediation, providing that when the parties apply to a court, the agreement may receive court confirmation and be equated to an enforcement document.

The experience of **China** holds particular significance as the system conducting mediation with the largest number of parties. The institution of mediation linked to the People's Court (renmin tiaojie) may also be applied in the enforcement stage.[23] In its 2016 guidelines, the Supreme People's Court of China specially regulated the procedure for applying mediation during enforcement proceedings and the enforcement force of a mediated settlement agreement.[24]

Institutions ensuring mediation in the enforcement stage in foreign states are divided into three types: court-annexed institutions, independent commercial institutions, and state-public institutions.

Court-annexed institutions constitute the most widely spread model. In France, a 'list of mediators' (liste des médiateurs) is compiled at the courts of appeal, and only mediators who have passed accreditation are included on this list.[25] The enforcement judge is entitled to appoint only a mediator from the list. This mechanism directly regulates mediator quality and simultaneously restricts and guarantees the parties' right of choice.

In the Netherlands, following the adoption of the Law on Promoting Mediation in 2021, the position of 'mediation coordinator' was introduced in each district court.[26] This coordinator reviews cases that have entered the enforcement stage, identifies those suitable for mediation, and

[19]Singapore Mediation Centre. SMC Mediation Rules 2020, effective 1 April 2020, as published on the official SMC website at smcadr.org.sg.
[20]United Nations Treaty Collection, Singapore Convention on Mediation, Status as of 2024: 56 signatories, 15 ratifications; available at treaties.un.org.
[21]Lee, J. "The Singapore Convention on Mediation: A Commentary." Singapore Academy of Law Journal, Vol. 31, 2019, pp. 592–620.
[22]Act on Promotion of Use of Alternative Dispute Resolution (Act No. 151 of 2004), enforced from 1 April 2007, Ministry of Justice of Japan.
[23]People's Mediation Law of the People's Republic of China, adopted at the 16th Session of the Standing Committee of the 11th National People's Congress on 28 August 2010, promulgated and effective 1 January 2011.
[24]Supreme People's Court of China, Opinions on Further Deepening the Reform of the Diversified Dispute Resolution Mechanism, [2016] No. 14, issued 29 June 2016.
[25]Décret n°2017-1457 du 9 octobre 2017 relatif à la liste des médiateurs auprès des cours d'appel, Journal officiel de la République française n°0241 du 14 octobre 2017.
[26]Wet van 6 oktober 2021, houdende regels met betrekking tot de bevordering van mediation (Wet bevordering mediation), Staatsblad van het Koninkrijk der Nederlanden 2021, Nr. 482, in werking getreden 1 januari 2022.

organises an initial briefing session for the parties. Observers describe this system as the most institutionalised form of 'post-judgment mediation'.[27]

Among independent commercial institutions, the United Kingdom's CEDR organisation occupies a leading position. It was established in 1990 and has developed specific protocols for commercial mediation, including mediation in the enforcement stage.[28] CEDR protocols clearly define the procedure for selecting a mediator, conducting a session, maintaining confidentiality, and formalising an agreement. Ireland, Australia, and many Commonwealth countries also make use of the CEDR model.

The Japanese 'chotei' centres and Chinese People's Mediation Commissions may serve as examples of the state-public institution model. These institutions also operate actively in the enforcement stage and employ a mechanism of 'informal' pressure based on local community authority. Jurist Bakhus Levi notes that the effectiveness of mediation in the enforcement stage in such institutions often surpasses that of formal-legal mechanisms in many instances, since factors of community interest and social pressure also come into play.[29]

Measuring the impact of mediation on enforcement effectiveness is challenging. The reason is that this impact manifests in two forms: directly — through the performance of an agreement concluded in mediation — and indirectly — through its effect on the parties' future relations. Research measuring both aspects exists, and its results are noteworthy.

In terms of direct impact, CEPEJ data show that 80–85 per cent of agreements reached in court-annexed mediation programmes in European states are being performed, while the enforcement rate of ordinary court judgments stands at 60–70 per cent.[30] This difference of 15–25 percentage points indicates a direct positive impact of mediation on enforcement effectiveness.

In terms of indirect impact, a large-scale study conducted by the RAND Corporation (USA) demonstrated that in enforcement proceedings concluded through mediation, the probability of the parties becoming involved in subsequent legal disputes decreased by 40 per cent.[31] This result shows that mediation does not limit itself to resolving a single problem, but fundamentally reshapes the relationship between the parties.

A study conducted in Germany found that in cases where mediation was applied at the enforcement stage, the average enforcement period was reduced by 40 per cent.[32] This indicator is particularly significant: a reduction in the enforcement period constitutes not only a financial benefit for the creditor, but also an opportunity to reduce the workload of the enforcement system.

The statistics of the Italian Ministry of Justice provide a good illustration of the practical outcomes of the Italian mediation reform of 2010 (D.Lgs. n. 28/2010):[33] in the first year that mediation was

[27]Jacobs, M.J.G. "Mediation in the Netherlands." In: Hopt, K.J. & Steffek, F. (eds.) Mediation: Principles and Regulation in Comparative Perspective. Oxford University Press, 2013, pp. 587–636.
[28]Centre for Effective Dispute Resolution. About CEDR. cedr.com, accessed 2024.
[29]Lévy, B. & Bonnan, R. "Mediation in Civil Law Countries." In: Alexander, N. (ed.) Global Trends in Mediation. 2nd ed. Kluwer Law International, Alphen aan den Rijn, 2006, pp. 115–144.
[30]Council of Europe, CEPEJ. Study on the functioning of judicial systems in the EU Member States. CEPEJ, Strasbourg, 2020, Chapter 11: Alternative Dispute Resolution, pp. 189–204.
[31]Kakalik, J.S. et al. An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act. RAND Corporation, MR-803-ICJ, Santa Monica, CA, 1996, pp. 47–69.
[32]Duve, C., Eidenmüller, H. & Hacke, A. Mediation in der Wirtschaft: Wege zum professionellen Konfliktmanagement. 2. Aufl. Köln: Luchterhand, 2011, S. 287–301.
[33]Decreto Legislativo 4 marzo 2010, n. 28, Attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali, Gazzetta Ufficiale n. 53 del 5 marzo 2010.

made legally mandatory (2011), the number of mediation cases increased fivefold, confirming the system's potential.[34]

From the perspective of procedural justice theory, the impact of mediation is even more profound. Tom Tyler's classic research shows that people value the fairness of the process more than the substance of the decision.[35] In mediation, the parties feel as though they are controlling the process themselves — and this increases voluntary compliance with the agreement. For this reason, an agreement reached through mediation is performed at a higher rate than a compulsory court judgment. This conclusion is also confirmed by Professor Nancy Welsh.[36]

Summarising the foreign models analysed above, three main architectural types of 'post-judgment mediation' may be identified. The first type — the 'procedural integration' model: mediation is enshrined in law as an integral part of the enforcement procedural regime (France, the Netherlands). The second type — the 'independent parallel' model: mediation is conducted independently in parallel with enforcement proceedings, and the outcome is presented to the enforcement authority (Germany, Japan). The third type — the 'international enforcement' model: a mediated settlement agreement is directly enforced regardless of national borders (the Singapore Convention model).

Comparing these three types, the author advances the following theoretical position: for mediation in the enforcement stage to be effective, three conditions must simultaneously be present. The first condition — procedural: the mechanism for temporarily suspending enforcement must have a legal basis. The second condition — institutional: a specialised body or coordinator responsible for organising mediation must exist. The third condition — substantive-legal: the mediated settlement agreement must have the opportunity to acquire the status of an enforcement document. If any one of these three is absent, the system will remain ineffective.

The comparative analysis also demonstrates that models that fully preserve the principle of voluntariness yield more effective long-term results than mandatory mediation. In the experience of the United Kingdom and Singapore, 'soft compulsion' — a mandatory information session, financial incentives, and a time-limit mechanism — has been statistically confirmed to produce greater effectiveness than mandatory mediation. This conclusion is an important methodological guideline for states currently creating a new mediation system.

Conclusions and Recommendations

The comparative legal analysis conducted in this article has led to the following scholarly conclusions.

First, 'post-judgment mediation' is an independent legal phenomenon, distinct from ordinary mediation in terms of procedural timing, institutional environment, and substantive-legal consequences. This phenomenon has already formed its own field of research in international legal scholarship.

[34]Ministero della Giustizia d'Italia. Statistiche sulla mediazione civile e commerciale. Anno 2022. Roma: Direzione Generale di Statistica, 2023, pp. 4–12.
[35]Tyler, T.R. Why People Obey the Law. Yale University Press, New Haven, 1990; 2nd ed. Princeton University Press, 2006, pp. 94–117.
[36]Welsh, N.A. "Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?" Washington University Law Quarterly, Vol. 79, No. 3, 2001, pp. 787–861.

Second, institutions for reaching agreement in enforcement proceedings exist in three types: court-annexed, independent commercial, and state-public institutions. For an effective system, the coordinated operation of all three types is necessary — as indeed the best foreign practice also demonstrates.

Third, the impact of mediation on enforcement effectiveness has been empirically established: the rate of performance increases by 15–25 per cent, the enforcement period is reduced by up to 40 per cent, and the probability of becoming involved in future disputes decreases by 40 per cent. These figures demonstrate that mediation is not a financial cost, but a systemic investment.

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