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## **EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ)**

### **Mediation Development Toolkit Ensuring implementation of the CEPEJ Guidelines on mediation**

#### **Guide to Mediation for Lawyers**

*Document elaborated jointly with the Council of Bars and Law Societies of Europe (CCBE)*

*The present paper was adopted by the Council of Bars and Law Societies of Europe (CCBE) on 23 March 2018. During the first meeting of the CEPEJ Working Group on Mediation (CEPEJ-GT-MED) in May 2017, the CCBE was requested to help developing a guide to mediation for lawyers, within the context of promoting a better implementation of mediation in the member states of the Council of Europe. The objective was to present a final joint CCBE/CEPEJ paper for approval to the CEPEJ Plenary meeting in June 2018. To this end, the present Guide has been developed by the CCBE in consultation with the CEPEJ-GT-MED.*

# Contents

CHAPTER 1 - INTRODUCTION.....	3
1. <i>Purpose and subject matter</i> .....	3
2. <i>Mediation as an alternative to adjudication</i> .....	3
3. <i>Mediation as a means of access to justice</i> .....	4
CHAPTER 2 – LAWYER’S ROLE IN MEDIATION.....	5
1. <i>Lawyer supported mediation</i> .....	5
2. <i>What does a mediator do precisely?</i> .....	6
3. <i>Main characteristics of mediation</i> .....	6
4. <i>The role of lawyers in mediation</i> .....	7
5. <i>Mediator selection and appointment</i> .....	12
6. <i>How to find a mediator</i> .....	13
7. <i>Lawyers acting as mediator</i> .....	14
CHAPTER 3 – ROLE OF BARS AND LAW SOCIETIES IN HELPING TO CREATE A MEDIATION-FRIENDLY ENVIRONMENT .....	15

## **Chapter 1 - Introduction**

### **1. Purpose and subject matter**

The main purpose of this guide is to raise awareness amongst lawyers with respect to mediation and demonstrate various professional challenges, opportunities and incentives for lawyers that stem from the use of mediation, as well as benefits for clients. This guide has been developed in reference to point 3. Awareness of the CEPEJ Guidelines on mediation.

The importance of engagement of practising lawyers in conflict management techniques and their active participation in alternative dispute resolution processes, such as mediation, is widely recognised and duly reflected in various codes of conduct.

Within this guide, the term “*mediation*” means a voluntary non-binding, confidential dispute resolution process in which a neutral and independent person(s) assists the parties in facilitating the communication between the parties in order to help them resolve their difficulties and reach an agreement. It exists in civil, family, administrative and penal matters. Furthermore, the term “*mediator*” means a person, nominated by a court, or any other authority and/or appointed jointly by parties to a dispute, to assist such parties to reach a mutually acceptable agreement to resolve the dispute.

Although this guide does provide for some practical suggestions, materials or tools for lawyers representing clients in mediation and for lawyers acting as mediators, it does not seek to replace the great abundance of training material that exists on mediation as well as training courses. Rather, the objective of this guide is to demonstrate why mediation could be an important and useful process for lawyers and their clients, and how mediation could be used to remedy certain problems occurring in lawyers’ everyday practice, for example, those connected with identifying and understanding the client’s interest.

Taking into account lawyers’ duty to act in the best interests of the client, this guide starts from the premises that lawyers must always review all options when it comes to advising their clients on the choice of the most appropriate dispute resolution process. Lawyers’ approach to mediation and any other dispute resolution process must therefore be conceptually neutral and the selection of the preferred option must be merit-based and considered from an analytical and objective point of view.

In that regard, and within the context of promoting a better uptake and implementation of mediation, it needs to be emphasised that awareness and training of lawyers in mediation is indispensable.

### **2. Mediation as an alternative to adjudication**

Mediation is a very practical and flexible method for resolving disputes. It may in some cases be faster, more effective and cheaper than adjudicative processes.

Due to their specific and collaborative nature, mediation techniques can produce high value solutions to a conflict that may not even be available through the judicial process. A third actor which is alien to and remote from the parties, such as a court, and acts within procedural restraints that typically exist in any judicial process, might not be in a position to elaborate on more creative or complex solutions. These limitations are compounded by the fact that parties proceed as adversaries in the judicial process, so their communication tends to be more tactical and co-operation more difficult and impeded. This should by no means be taken as a critique of courts or the judicial system, but these are possible consequences of the adopted process and procedure.

As a matter of fact, courts’ or arbitrators’ role is adjudicative; i.e. they are expected to decide on “*who is right and who is wrong*”. Such moralistic or legalistic approach makes perfect sense, and often may even be necessary, but certainly this is not the only conceivable technique.

Finally, it is also worth noting another limitation of adjudicative processes – namely, that they not always take account of the parties' needs and interests. Sometimes, litigated claims are not really the crux of a matter and the parties are unable to exit such a dead end. Moreover, a “*question of right or wrong*” may be irrelevant or even unanswerable; sometimes it does not even have to be answered to resolve a dispute, or such a search for an answer may become destructive for the parties' relationship.

Mediation is a process of self-determination in which parties act within the freedom of contract paradigm and with full autonomy, which might be more conducive to resolving complex managerial problems. Also, in mediation, only the process is controlled by the mediator. The parties retain control of the outcome and so quite naturally they have more options and space for manoeuvre than those in an adjudicative process. This is an inherent feature of any consensual decision-making process which is more co-operative and free from many conceptual or procedural limitations.

### **3. Mediation as a means of access to justice**

In several documents the Council of Europe and the European Commission for the Efficiency of Justice (CEPEJ) have recognised that measures encouraging the use of mediation may facilitate access to justice.

The CCBE is an international non-profit association which has been, since its creation, at the forefront of advancing the views of European lawyers and defending the legal principles upon which democracy and the rule of law are based. These values and principles should be shared by all lawyers. They also include the right of access to justice, as well as protection of clients through promoting the core values of the profession.

Justice is a fundamental value of utmost importance in the life of every citizen. Each person should have access to justice, but justice does not always originate from the court. Therefore, the legal profession should display advanced reflection and in-depth knowledge of all dispute resolution processes available across a broad spectrum, including mediation. Mediation is clearly one of the possible methods for the realisation of justice and, as such, clients should be made aware of the opportunities offered by mediation, which is of course a voluntary process of self-determination for parties who may be advised that their interests may be best served by electing mediation as a means of resolving their dispute.

The fundamental role of independent common courts in justice-making processes is greatly appreciated but at the same time access to institutional justice may remain limited and, in some cases, even defective. Furthermore, no justice system can be perfect. The functioning of the justice system is and should be subject to constant reflection and improvement, but its deficiencies and limitations are bound to exist, which sometimes causes frustration or harm.

Mediation could be viewed as one of the remedies to the above situation. Mediation as well as other alternative dispute resolution processes could be perceived as another pillar of the justice system, which can support the judicial system and improve the overall access to justice. This is also a matter of adequacy and effectiveness – the judicial system should deal with matters that really require adjudication but there are situations where other dispute resolution techniques would be more appropriate.

Deficiencies in the functioning of justice systems or typical (financial or institutional) barriers to the access to justice are not, however, the only reasons why mediation should be considered as an attractive dispute resolution process. When formal/institutional justice is not available or inadequate due to the nature of a matter or specific interests of clients, mediation as well as other alternative dispute resolution processes might be a suitable alternative. There are situations when certain interests of clients, though fully justifiable and legal, cannot be effectively pursued within the framework of the judicial system. For example: due to the conceptual limitations of law, formal

expiration or inaccessibility of legal claims, lack of the relevant case law or practice, lack of formal or qualifying evidence, or various procedural complications. As one can imagine, the above constraints might not be relevant in mediation and other alternative dispute resolution processes as long as the “question of right or wrong” does not need a legally based answer.

## ***Chapter 2 – Lawyer’s Role in Mediation***

Lawyers certainly do and should play an important role in the conflict management processes and thereby may have a major impact on how conflict situations are actually being dealt with for the clients. Therefore, it is of utmost importance that lawyers can demonstrate a deep awareness and appropriate technical skills that are necessary in order to effectively support clients in all types of dispute resolution procedures, both adjudicative and amicable, including also mediation. The legal profession should not, by any means and for whatever reasons (for example, due to the lack of relevant understanding or knowledge, or shortcomings in their practical skills) be or be perceived as a barrier to mediation, as this might potentially have an adverse effect on lawyers’ reputation. For the above reasons, theoretical and practical training in mediation should be included in syllabuses of law faculties and continuous education courses provided by lawyers’ bars and law societies.

### ***1. Lawyer supported mediation***

In lawyer supported mediation, one or more parties are assisted in preparation and/or accompanied at mediation sessions by their own lawyers who will inform and advise them throughout the mediation process. One aspect of the mediation process that makes it so effective is the opportunity it presents for disputing parties to speak directly to each other and to be heard by the other(s). Lawyer supported mediation can be enormously beneficial because it ensures that both parties have quality independent legal advice, are confident to enter into an informed dialogue and helps to redress any power imbalance between parties. In particular, lawyers may be able to facilitate the mediation process and support the mediator in reaching a good result.

It needs to be born in mind that mediation as such is based on an entirely different paradigm than adjudication – historical facts, reasons, rights and arguments of parties are not ignored but they are of less significance, as in mediation they are not determined, judicially or otherwise, and in fact, are usually irreconcilable. A proper understanding of this paradigm is absolutely crucial to constructive participation of lawyers in the mediation and effective supporting their clients in this process. In mediation the focus is firmly on the parties’ future needs and interests. The parties also work in an interactive and cooperative mode, so that they have a good chance to understand each other and understand the conflict in its complexity. On this basis, they jointly elaborate on a solution that might be acceptable to both parties and might take into account their mutual needs and interests. This occurs in a structured but informal process that is managed and facilitated by an independent and neutral mediator.

Because of the abovementioned reasons, functions and tasks of lawyers supporting clients’ participation in mediation is different from acting in an adversarial manner as the client’s lawyer in adjudicative processes. Lawyers applying a more cooperative and constructive approach in mediation, can help mediators in effectively guiding the parties to a settlement, thus ensuring that their clients achieve a solution to their disputes which better reflects their real interests and needs. There are many ways of looking at or understanding mediation but one of them is viewing mediation as an effective procedure allowing better identifying and interpreting of the client’s interest. From the lawyer’s perspective, mediation might be then a very useful tool. After all, lawyers are ethically and professionally committed to protect and realise the client’s best interest which from the lawyer’s perspective may in many cases be quite unclear or hard to define. In other words, mediation could be a remedy to various methodological, conceptual, communicational or relational problems which typically occur in the process of identifying and interpreting the client’s best interest. Surely, in mediation the client’s interest becomes much clearer and understandable for all participants and more importantly, it becomes more reasonably and realistically defined by a client.

It needs to be emphasised that successful mediation usually ends with a settlement; i.e. a consensual agreement. Such an end-result must be accepted by both parties and is usually performed by them voluntarily and very rarely questioned. Then, as opposed to litigation, mediation indeed puts to an end a conflict – it is hard to deny that such a state of affairs is often desired by many clients. Unquestionably, a bilaterally accepted settlement is often a great value. Additionally, a written settlement drawn up in front of a mediator is a legally binding and enforceable contract, and in some jurisdictions even an instrument permitting legal enforcement that is equivalent to a court's judgement, subject to the satisfaction of certain formal requirements.

## **2. What does a mediator do precisely?**

A mediator is a professional specialist of mediation theory and practice, of which negotiation is a key element. He/she offers professional services to conflicting parties. The mediator is a negotiation mechanic. When the negotiation engine splutters or stalls, the mediator with his or her mediation experience and toolkit of techniques, makes it run again and – typical for mediation – makes it run optimally. All mediation carries in itself the desire to find an optimal solution.

The mediator is a service provider who dispenses his or her professional services against payment<sup>1</sup>. The mediation agreement between the mediator and the parties contains the contractual clauses, against which this service agreement is to be performed. In the performance of these services to the parties, the mediator does three things simultaneously: structures the conflict resolution conversation; facilitates the communication between the parties to ensure that they listen and understand each other; and helps them to avoid a deadlock in the negotiation and applies the correct techniques to break deadlock when necessary.

One of these techniques is that the mediator may engage with parties separately to examine confidentially with that party what prevents him/her from proceeding constructively in the negotiation and to find together with that party a solution to the deadlock. The contents of this conversation are confidential, also towards the other parties.

## **3. Main characteristics of mediation**

It is well known that mediation is a voluntary process; i.e. it does not start without the client's clearly expressed consent and the client may withdraw from mediation at any point and without adverse consequences in any other process then required to resolve the dispute. Of course, there are some situations, where valid reasons may exist to commence or continue litigation e.g. where a pre-emptive judicial remedy is required. Moreover, the voluntary nature of mediation also means that it keeps all other options open to a client, as opposed to many other dispute resolution methods which may be a one-way route, either for formal or practical reasons.

Simply put, not only can a client enter into and exit from mediation but also, after exiting mediation he/she retains the same number of options. Mediation is then an option which can be characterised as being 'fair' to other options – it usually does not close, limit or complicate the client's access to other conflict strategies, techniques or procedures, i.e. a way back to court proceedings. Generally, mediation does not adversely affect the client's room for manoeuvre, nor does it deprive him/her of any claims or rights. In fact, it is quite the opposite; i.e. mediation often opens doors to new options that were hitherto closed or even not realised by a client.

There is often a frequent misconception that mediation is just an easy, friendly, but ineffective process. It is true that mediation is non-confrontational in its nature but simultaneously, it is intellectually demanding as it is more than merely creating one's own narrations and theories and then finding supporting argumentation.

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<sup>1</sup> This payment might be collected from parties, legal aid or other funding entities, or the mediator may act on a *pro bono* basis.



Mediation is not about persuasion on who is right or wrong, as conflicts cannot really be effectively resolved in this manner. Usually, none of the parties have sufficiently persuasive argumentation or power to change the other party's will or vision. In reality, being convinced of the correctness of one's view that totally contradicts the other's, is frequently a major part of the problem, and therefore in itself does not necessarily constitute a valid ground for refusing mediation as parties' may be very well mistaken about their actual position, which is something that could be revealed through mediation.

Mediation is about identifying valid issues and finding the keys to resolve them. This task involves breaking certain thinking scripts (which are usually useless or destructive) and a creative reinterpretation of the entire conflict situation, so that it works to the benefit of both parties. One could then say that mediation is about understanding and creativity. This is by most people considered to be a part of due management, which usually also pays off.

It appears from the above that mediation should be viewed as one of the many valid options that are available to deal with any conflict situation. However, if a client's right of free choice is to be realised, all such options should also be made available to a client. The client must then know about mediation, its benefits and truly understand this process. To this effect, the client should be duly and objectively informed about all available process options, including mediation. Only then clients will be truly able to make a well-informed decision in their best interest. Undoubtedly, it is a lawyer's professional duty to provide a client with complete and accurate information on mediation and assist him or her in taking an informed decision.

#### ***4. The role of lawyers in mediation***

##### ***a. Selecting a dispute resolution method as an inherent part of case analysis***

While analysing a case or handling a dispute for a client, lawyers should always adopt a merit-based approach rather than acting on the basis of any prejudices, biases or pre-conceptions. Particularly when it comes to the choice of available processes for resolving a conflict situation, it is important that lawyers approach the matter from an analytical and objective point of view. Such a professional attitude should be the starting point in any case analysis. This of course also involves taking into account characteristics of clients, their specific needs and preferences as well as the attitude and actions of the other party.

In order to enable the client to make the right choice, practising lawyers should be well informed about all available dispute resolution processes, their specifics and recommendable institutions and service providers, so that they are able to efficiently propose such methods to a client; and then, professionally support the client through the chosen process.

It should be noted that any failure to adhere to the methodology outlined above is likely to have consequences for the client that may go much further than just choosing an inadequate dispute resolution process. Selecting the appropriate dispute resolution process is crucial also in the sense that it may significantly affect the client's position; i.e. in advance pre-determine or reduce the number of potential end-results and thereby, unnecessarily narrow the range of options that would normally be available to the client. For this reason, lawyers should not skip or neglect a discussion with the client on various pros and cons connected with the use of different dispute resolution processes. This is a methodological error, which could potentially qualify as a lawyer's negligence or even professional misconduct.

The client's selection of the most appropriate dispute resolution process should therefore always be enabled by the lawyer advising carefully on this key consideration, as this is an integral part of any thorough and duly conducted case analysis. It should always be borne in mind that the client's interest comprises both substantive and procedural aspects, which are equally important to a client, and, as a result, both should be duly taken into consideration by the lawyer. It follows then that those performing legal analyses should always, from the very outset, consider all possible options for handling a conflict situation and in this context, assess the position of a matter.

It should also be noted that the choice of appropriate dispute resolution methods may be affected earlier on and much before a conflict arises; i.e. at the contractual stage. Therefore, every time a lawyer is drafting a contract, he or she should always consider whether mediation might be of assistance to contracting parties or be of particular relevance in certain situations, for example, due to the nature or type of contractual relationships. And if so, it should be born in mind that a mediation clause may be included in the contract. This is in fact the most appropriate moment to introduce a notion of mediation; i.e. when the contracting parties have good prospects together and still view each other as partners.

#### ***b. Advising the client on the proper conflict resolution method***

To be able to advise the client in the choice of the dispute resolution process, the lawyer needs to acquaint him or herself sufficiently with the matter in question and carry out a thorough cost-benefit-analysis of the available process options. This step should never be skipped or neglected, and lawyers should always be able to demonstrate to their clients that this professional task has actually been duly performed. Especially, before engaging in litigation and arbitration, it is important that the client understands how long the process may take, how much it may cost, what can be the risks involved and what is the likelihood of achieving the desired outcome, including possible risks related to the enforcement stage.

It is therefore necessary that the lawyer carries out a risk assessment of the case, setting forth the best and worst scenarios and a realistic target level, against which the client may evaluate available process options. Such a risk assessment may need to be revised and updated as the case evolves (e.g. as more information and evidence is gathered on the case during the course of chosen process). A front-loaded inquiry into the case and a documented case assessment helps the client to better evaluate the available options and set realistic expectations.

Unless weighty reasons such as urgency require otherwise, the client should initiate litigation or arbitration only after having explored all available resolution process options, including mediation and other alternative dispute resolution processes. Mediation may be a particularly suitable process if any of the following circumstances exist:

- the client expresses a preference for mediation;
- the client expresses a wish to avoid litigation and arbitration;
- the client is contractually bound to mediate before litigating or referring to arbitration;
- the client cannot afford to litigate;
- applicable law / jurisdictional issues arise that make mediation more appropriate;
- none of the issues in dispute is legally complex or novel, requiring judicial or arbitral determination;
- the parties have common business or personal interests that may be jeopardised by the dispute (e.g. an on-going business or family relationship);
- it is important to have a swift resolution to the dispute, in particular, court litigation could have other (internal or external) adverse effects for the client or its business;
- a court ruling would not adequately deal with the underlying concerns, or, for any other reasons, subjecting the dispute to a decision of an external third party (such as a state or arbitration court) would not be appropriate or desirable;
- a lawsuit may only resolve part of the dispute;
- there is a risk that a court judgement would not be effectively enforced;
- conducting litigation is in conflict with other vital interests of a client;
- the subject matter of the dispute is predominantly of a managerial nature;
- the costs of a lawsuit are out of proportion with the interests at stake;
- the dispute may be due to miscommunications, such as, data discrepancies, personal conflict, or cultural differences; or
- it is important for the client to keep the dispute strictly confidential.



Other dispute resolution processes include expert determination, early neutral evaluation, adjudication, review boards etc. Such adjudicative methods may be appropriate e.g. when the dispute is about a clear-cut technical or contractual disagreement.

Any dispute not resolved in a non-adjudicative dispute resolution process may ultimately be resolved by litigation or arbitration.

### *c. Assisting the client at and/or outside of the mediation table*

There are various ways in which a lawyer can be involved in the mediation process:

1. the lawyer can prepare his or her client for the mediation and then leave the client to go to the mediation process alone,
2. the lawyer is present throughout the mediation process with his or her client; this is obviously the optimal situation from the lawyer's perspective because he/she can best assist his/her client in all of the critical stages of the process, including;
  - a) helping client to fully understand the process and answering questions;
  - b) decision to select the process and refer dispute to mediation;
  - c) making the offer to / accepting the offer of mediation from another party;
  - d) identification, selection & appointment of a suitable mediator;
  - e) finalising the agreement to mediate / rules of engagement, if any;
  - f) briefing the mediator;
  - g) attending pre-mediation meetings, if any, between client and mediator;
  - h) selection, appointment and briefing Experts, as may be required;
  - i) giving client legal advice / opinion on legal issues, rights & obligations, if any, arising in the dispute;
  - j) assessing the strengths and weaknesses of the client's case;
  - k) assessing the strengths and weaknesses of the other parties' cases;
  - l) scheduling costs (including legal costs) incurred to date by the client in the dispute;
  - m) estimating costs (including legal costs) to be incurred if not resolved in mediation;
  - n) assist client with preparation of negotiation strategy for the mediation / settlement range in monetary cases;
  - o) assist client to identify their needs and interests in having dispute resolved in the mediation;
  - p) engage in alternative scenario-checking with client and generally managing client expectations by reference to what might reasonably be achievable in litigation or arbitration;
  - q) assist client in drafting a mediation summary or position statement for any joint mediation meetings;
  - r) assist client in deciding who will attend mediation meetings as part of team representing the client party at the meetings;
  - s) assist client to identify and / or suggest possible alternative options for resolution and settlement;
  - t) assisting the client generally in preparing for the mediation, knowing that in mediation as in all other processes, failure to prepare usually equates to preparation for failure in the mediation;
  - u) advising the client when the mediated settlement agreement is being drafted;
  - v) assisting the mediator as may be appropriate or as requested.
3. the client is alone at the beginning of the mediation and his or her lawyer enters the process in the final part – he or she assists in the process of reaching the conclusion from different options and helps during the preparation of a final (settlement or other) agreement, or
4. the lawyer represents the client in the process when the client is not personally present at the mediation,

In the process of mediation, the presence of the client is usually required, or at least recommended by mediators. The mediator will insist that each party in the mediation, whether natural or corporate, is represented by one person who is fully authorised to settle the dispute and to execute a binding settlement agreement on that party's behalf. Where limitations exist on a party's representative's full authority to bind that party in a settlement agreement, the mediator has a duty identify such limitations and to inform all other parties of both the existence and extent of such limitations. The presence of the parties themselves (e.g., the CEO or other authorised representative of a corporate party) allows for new solutions to be more easily explored. The full authority to make settlement decisions is essential for successful mediation.

**Example 1.** Only in case if the problem of the client relates to an error in communication or the main problem is associated with emotion and not with legal issues, the presence of a lawyer at the mediation meeting may not be necessary. In this case the lawyer should be open to the possibility that the client may not need to communicate with the other party with professional legal support., since no legal issues will be dealt with. The mediator can ensure favourable conditions for an open debate whilst respecting the rights of the client. It is nevertheless of utmost importance that the lawyer checks the mediation agreement before it is signed by the client (this may depend on the subject matter of the dispute).

Preparing the clients in this case consists in briefing him/her about the rights and duties which a client has in mediation. Mediators should ensure that the parties understand the process and their rights and obligations in it. In this respect, the following information can be provided by lawyers to their clients:

- the voluntary nature of mediation,
- documents which must be signed at the beginning of the mediation (depending on the legislation of the relevant countries),
- confidentiality,
- fees of the mediator,
- duration of the mediation, process
- the effects of limitation and prescription periods,
- the validity of the mediation agreement and,
- recognition and enforcement of agreements resulting from mediation (depending on the legal system in different countries or differences in international matters).

Preparing the client on the substance of the discussions (e.g.: which facts the client should raise and what information should not necessarily be revealed in the common mediation meeting) depends on the nature of mediation in different jurisdictions, but also on the individual system of work of each lawyer and on negotiation strategy, which must be discussed beforehand.

**Example 2:** If the lawyer accompanies the client from the beginning to the end, the role of the lawyer depends on the extent to which the lawyer has been asked to assist in the mediation process. Lawyers in any case do serve as consultants in legal questions.

If a lawyer represents one side, the mediator may request that the other party should be assisted by a lawyer as well. If it is not possible to have both parties represented by lawyers during the mediation, the mediator cannot continue with the mediation if the party that is not represented by a lawyer objects to the other party's lawyer's presence. Furthermore, mediators should conduct their own evaluation of the balance of power between the parties in order to determine if it is acceptable that only one of the parties is assisted by a lawyer.

**Example 3.** At the beginning of the mediation, the mediator will usually consider the attitude of parties, assess all the issues and then together with the parties define the issues that need to be resolved. This stage can take for example one hour in an "easy" case but in complex cases it can take more than two meetings depending on the methodology of the mediator and the mediation model. Only after this stage, parties should start searching for specific solutions. At the conclusion of that stage in the mediation, a variety of options are discussed to find a final agreement. When

reached, it will usually be in written form. If a lawyer wants to be present for a part of the mediation but does not want to be present during the entire process, he or she should enter the mediation process in the phase before the drafting of the agreement to help selecting the appropriate solutions and to advise if necessary.

**Example 4.** If a lawyer represents a client without his or her presence (which in general is not recommendable and in some member states not even possible), the lawyer should have as much information as possible and be fully acquainted with the wishes, needs and preferences of the client. The mediator (depending on the legal system) may ask for a written power-of-attorney with specific directives for the mediation process.

#### *d. Drafting the settlement agreement*

*When is the agreement to be signed?*

An agreement arrived at during the mediation must withstand the passage of time. If the agreement is good today, it should also be good tomorrow and three months from now.

In that line of thinking, signing the agreement immediately at the end of the mediation session is not an absolute “must”. It will, however, frequently happen or even be requested by the parties who may fear a change of mind by the other side.

If the agreement is “simple” (e.g. it involves a single, one off, payment and full settlement of pending disputes), signing the agreement immediately may be the preferable option.

If the agreement is more complex and involves performance in different stages or is dependent on certain conditions, drafting the contract immediately may not be the better option. In order for the contract to be well thought out and cover all issues raised by the arrangements, drafting may require more time than is available at the end of a (frequently long or tiring) mediation session. The mediator should then organize, with the parties and their lawyer, the drafting process and the timing thereof, which the parties can accept.

*Who writes the agreement?*

As a rule of thumb, if lawyers to the parties have participated in the mediation process, the drafting process should be left to them. It is part of their job: they have been hired by their clients to cooperate in finding a solution and to put in writing the agreement arrived at during the mediation. Drafting an agreement involves more than putting in writing the general and main principles that have emerged. The mediator should not (attempt to) deprive the lawyers of that part of their duties. It may also have implications for any lawsuits pending at that time, which the lawyers will have to take care of. It should also be noted that very often mediators are not qualified lawyers and therefore, are not allowed to provide legal advice.

The input by the lawyers of the parties may also be important in view of the organisation or supervision of the performance of the agreement (e.g., the lawyer of the creditor in a situation where the full settlement payment is not made at the time of signing). This may involve issues to be considered such as: obtaining an execution order from the court, notary or other authority, organisation of security interests agreed to in order to secure payments, etc.

Contract drafting goes beyond the main points that will generally have been agreed upon during the mediation. It will also focus on details or issues that may not have been discussed in detail (whether by oversight, because their importance did not initially appear and only emerged during the drafting process, or for any other reason – which might even include (in)voluntary withholding of information until the drafting process. These items may appear to be problematic and lead to new, unforeseen, difficulties.

If the parties were not assisted by a lawyer during the mediation, in some jurisdictions, they can request the mediator to draft the agreement him or herself. If the matter is straightforward and subject to the reservations outlined above, this may be acceptable. However, the mediator will be well advised to liaise with the lawyers of the parties, if any. Best practice may require that the mediator suggests that the parties' lawyers take over the drafting process, using a summary of the details of the agreement arrived at prepared by the mediator.

If, nevertheless, the parties and/or their lawyers request the mediator to propose a draft of the agreement, it should be written in consultation with and approved by professional lawyers; i.e. the mediator should send the draft to the lawyers and to the parties for them to review, asking for their comments and input, and liaise with them to discuss possible areas of tension.

If no lawyer was involved, the mediator should provide his or her draft to the parties and eventually suggest that they consult a lawyer to review the agreement independently. In order to avoid any misunderstandings, the mediator should suggest that the parties invite their lawyer to contact him or her so that the logic and reasons of the arrangements can be explained. Indeed, a lawyer who did not attend the mediation might be surprised by some of the element of the solution found because he or she does not understand all parameters or reasons for the arrangements.

#### ***e. Enforcement of the settlement agreement***

Article 6 of the 2008 Mediation Directive provides that Member States shall ensure the enforceability of agreements resulting from mediation. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable.

The content of such agreement shall be made enforceable unless, in the case at hand, either the content of that agreement is contrary to the law of the Member State where the request is made, or the law of that Member State does not provide for its enforceability. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.

The way in which the enforcement of mediated agreements may be requested from the court depends on the national law applicable in the state where the enforcement is requested (*locus regit actum*).

### ***5. Mediator selection and appointment***

One of the most important tasks lawyers have in the mediation process is to assist their clients in their selection and appointment of the mediator. A mediation may be the client's best if not only opportunity to resolve a dispute by agreement without litigation and lawyers have an onerous responsibility to ensure that the mediation has the greatest possible chance to succeed. Mediator selection is a critical factor in achieving this goal.

There are competing views on the value of sector expertise. So, in a construction dispute for example, should the mediator be an engineer, a project manager or construction lawyer? The mediator's experience and expertise as mediator is of primary importance; then, if one of a number of possible appointees with broadly similar mediator experience, has a sector-specific profession of origin, then perhaps that person may be preferred. Again, the client needs the mediator's experience and expertise as mediator; it is not an expert determination or early neutral evaluation process.

Parties may consider that a mediator with a specific professional or personal background is better suited to a particular appointment. A mediator who is also a human resources professional may, for example be a better choice than a lawyer-mediator for a workplace dispute or a dispute that has a

significant workplace conflict dimension. Also, sometimes a mediators' understanding of specific terms and terminology may be a timesaving advantage. However, the overriding consideration for the parties should always be the nominee's skill and experience as a mediator, not his/her professional background.

Parties may sometimes prefer to appoint a lawyer-mediator where a particular dispute has a significant legal dimension or where the dispute is concerned with the interpretation of contractual, statutory or other legal rights and obligations. However, a mediator's legal expertise should always be of secondary importance to his/her experience and expertise as a mediator, because a mediator has no role in determining or reconciling competing legal rights and obligations. Parties in mediation must rely on their respective lawyers to make the best assessment they can of their legal position before entering into negotiations in the mediation.

When assisting a client to appoint a mediator, it is recommended to always insist on evidence of the following details, if available:

- Profession of origin;
- Code of conduct;
- Professional indemnity insurance;
- Mediator training and accreditation;
- Mediator Continuous Professional Development;
- Experience (i.e. mediator case log);
- Recommendations.

Once a mediator is appointed, lawyers should be satisfied that the following steps are taken:

- The mediator makes him/herself available to the parties as required and as mutually agreed. Mediators must be prepared to give the appointment the priority the parties require.
- The mediator enters into a binding mediation agreement with the parties to confirm his/her appointment as mediator and to provide for the rules as to confidentiality, timeframe, venue, exchange of documents, fees, termination, etc., by which the parties and the mediator agree to be bound.
- The mediator confirms that he/she will abide by the European Code of Conduct for Mediators or equivalent, and that he/she holds appropriate professional indemnity insurance to act as a mediator (if available).
- The mediator withdraws or otherwise brings the process to an end at any stage if, for any reason, he/she forms an opinion that one or more parties is delaying or obstructing the process or is no longer acting in good faith in working towards a settlement or is acting otherwise than in accordance with the terms of the mediation agreement.
- Any co-mediator or proposed assistant mediator or observer mediator is also an accredited mediator or a trainee mediator or is also equally independent, neutral and suitable for appointment in that capacity.

## ***6. How to find a mediator***

How do lawyers identify the best mediator? Where should they go to find one? There are several options.

In certain jurisdictions all mediators are accredited and their lists indicating qualifications of particular mediators are freely and easily accessible. In many cases such lists are accessible on-line.

Bars or Law Societies may have a register of experienced lawyer-mediators available locally.

There may be an international mediators' institute that maintains a register of its members (e.g. CI Arb, CEDR, REUNITE, etc.).

Lists of mediators are normally kept and made public within various mediation schemes. Administrators of such schemes usually offer guidance and assistance on choice of the most suitable mediator for a particular case.

Lawyers may write to another party's lawyer suggesting alternative names or clients may receive such a letter from another party's lawyer.

### ***7. Lawyers acting as mediator***

A completely different mindset and approach are required from lawyers when they act as mediators themselves, instead of being the clients' lawyer during the proceedings.

In this specific role, as opposed to acting in the interest of any of the parties, lawyers need to comply with all the requirements applicable to a mediator and seek a solution which will allow the parties to reach an agreement.

While many mediators work in the legal profession, many do not and come from various professional and technical backgrounds. Nevertheless, although the mediator is not required to be a lawyer, there are many skills lawyers possess that may help them to become effective mediators.

Some of the skills of the lawyer that may be advantageous to the lawyer-mediator are:

- Communication;
- Listening;
- Negotiation;
- Analysis;
- Understanding complex issues;
- Understanding legal concepts, including good faith, confidentiality, privacy, privilege, without prejudice, contract, enforceable, binding, authority, voluntary, self-determination, independence, neutrality, conflict of interest, ethics, professional misconduct, etc.
- Understanding conflicting legal arguments;
- Cost-benefit analysis;
- Risk assessment;
- Drafting;
- Standing in the community;
- Professional standing;
- Experience and hazards of litigation

On the other hand, not all lawyers' skills translate automatically to those of mediator and depending on the system of the relevant country, there may also be specific training and accreditation requirements which need to be fulfilled to become a mediator. Some further important skills mediators need are:

- Active and reflective listening;
- Empathy to understand each party's point of view and underlying emotions;
- Ability to summarise and set out the main points of controversy;
- Impartial and facilitative attitude: a mediator must not take sides or be seen to be acting unfairly.
- Trust-building: successful mediation requires the mediator to establish the trust and confidence of each party from the outset and maintain it throughout the process.

Therefore, when acting as mediator, lawyers should be mindful not to overstress legal knowledge and skills, focus too much on clarifying the facts at the expense of the relationship and communication with the parties, and avoid applying an adversarial and litigious approach. As mentioned above, mediation is not about creating arguments or solutions that merely conform with



any set of principles or norms, but about understanding and then matching various needs and interests of the parties.

### ***Conclusion***

As outlined above, mediation is an effective learning process which helps the parties to understand their mutual interests and positions. The mediation process is usually very transformative for both parties. It helps the parties to think more realistically about their claims and interests and encourages them to act more reasonably vis-à-vis the other side. This in turn usually changes the parties' relationships, restores some forms of communication and co-operation, and helps to rearrange the entire situation and resolve their conflict. As such, mediation can be perceived by clients as a good and positive experience preferable to litigation with its sometimes unpredictable results.

Lawyer supported mediation can be enormously beneficial because it ensures that both parties have quality independent legal advice, are confident to enter into an informed dialogue and helps to redress any power imbalance between parties. Obviously, it is a professional mediator's task to make sure that parties and their lawyers can capitalize on such newly acquired data and understanding, so that this stimulates constructive processes among the parties and allows their relationship to evolve. Once this is done, the mediator assists the parties in the finding and further elaborating of a final solution that is, firstly, adjusted to the parties' interest and their specific situation, and, secondly, truly acceptable to both parties, i.e. a mediation settlement agreement.

A solution with the above characteristics allows a peaceful end of the conflict and it is a true resolution. It may be a win-win solution, thus giving a lot of comfort to both parties. Undoubtedly, in clients' eyes this is a desirable situation and therefore a mediated settlement is usually seen by clients as a success. This is how it should also be understood by lawyers. More importantly, lawyers should take a part in this success.

For the above reasons, it is recommended that lawyers – whenever appropriate – actively participate and act in mediation in such a manner that they are perceived by clients as creative and constructive contributors to this process. Mediation gives lawyers another opportunity to demonstrate their legal, analytical and managerial skills whilst presenting themselves as true interpreters and representatives of clients' interests and co-authors of their success.

### ***Chapter 3 – Role of Bars and Law Societies in Helping to Create a Mediation-Friendly Environment***

In this part, various suggestions are made of measures Bars and Law Societies could take to help create a favourable environment for the uptake of mediation. This involves collaborating with courts, as well as raising awareness about mediation and providing training courses to enable lawyers to become mediators or to assist their clients in mediation procedures.

In this regard, reference is also made to the main conclusions and recommendations of the European Parliament resolution of 12 September 2017 on the transposition of 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, as well as the European Commission for the Efficiency of Justice (CEPEJ) Guidelines for a Better Implementation of Mediation in the Member States of the Council of Europe. These texts also offer Bars and Law Societies some interesting ideas for reflection.

In order to create an environment equally open to litigation and all alternative dispute resolution processes, Bars and Law Societies might consider undertaking some or all of the following activities so far as relevant to the circumstances of their respective jurisdictions:

- Organise information meetings for lawyers and parties. These information meetings should be developed in conjunction with representatives of the courts, mediation associations, mediation services, etc.
- Develop and introduce into professional trainings for lawyers topics and skills needed in the management of conflict (case assessment; risk analysis; cost-benefit analysis etc.).
- Coordinate the communication of information on mediation with courts.
- Create joint information meetings for lawyers and judges.
- Expand the conclusion of protocols with the courts defining the initiation of mediation, the mediation process, and the role and place of the accompanying lawyer.
- Collaborate with courts and other authorities in the development of lists of mediators with the inclusion of lawyers accredited as mediators.
- Participate in the development of statistics that illustrate the usefulness of mediation and the public knowledge of its effectiveness.
- Contribute to the development of standard information for clients on the possibilities of mediation, model mediation clauses, model mediation agreements between parties and mediators.
- Exchange good practices on mediation (among lawyers and across different jurisdictions).
- Establish lists of lawyers who act as mediator, as well as lists of lawyers who can assist clients in mediation proceedings.
- Conclude protocols with Faculties of Law to promote mediation at university level and research.
- Include in lawyers' codes of conduct an obligation or a recommendation to consider alternative means of dispute resolution including mediation before going to court in appropriate cases, and to give relevant information and advice to their clients.
- Integrate modules on the use of mediation in their practice into the basic training of lawyers.
- Introduce mediation in continuous education programmes, the content of which could ideally be coordinated Europe-wide.
- Initiate joint training courses on mediation with all the actors in the judicial world.
- Collect and publish information on existing mediation training courses.
- Encourage lawyers to include a mediation clause when drawing up contracts for their clients.