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REPORT

# MEDIATION AND BUSINESS

**Opportunity for self-determination:  
Freedom that creates value**

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THIS REPORT WAS PRODUCED AT THE INITIATIVE OF THE CMAP (CENTRE FOR MEDIATION AND ARBITRATION OF PARIS) AND THE CLUB DES JURISTES BY A TEAM OF EXPERTS WHO CONDUCTED AROUND FORTY INTERVIEWS WITH STAKEHOLDERS FROM THE FIELDS OF BUSINESS, LAW AND JUSTICE.

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Mediator



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## SUMMARY

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Mediation is a management tool particularly suited to the needs of companies. Using this alternative dispute resolution method, they can save time and money, but also concentrate on other tasks that are more relevant to their core purpose and maintain links with their partners, even if problems arise.

It is as easy to demonstrate the many benefits of contractual mediation as it is difficult to understand why it is not better or more widely used.

We can better understand this paradox by examining the power struggles that exist within and around companies. There are many obstacles to the growth of mediation, including stakeholders who fear criticism for adopting an attitude that may appear insufficiently aggressive, and those who choose to save time or who prefer to have an, admittedly disadvantageous, solution with which they don't agree, imposed on them.

However, once common misunderstandings about what mediation is are cleared up, we can see that not only can the vast majority of disputes involving companies be resolved using this method, but in addition, the cost of such a resolution is so much lower than any kind of trial or arbitration that company financial officers should see it as an extremely attractive cost-saving opportunity.

This raises the rarely discussed issue of the choice of mediator. Although companies and their Key managers may be convinced of the benefits of mediation, they need to be reassured as to the qualities of the person who will be appointed to carry out such an assignment. Do they need to be an expert in the area of goods or services offered by the company? To be an expert in the area of law under which the dispute falls? To be familiar with the culture of the company and its environment? Or all of the above? All these criteria, as relevant as they are, serve more to reassure the parties than to maximise the smooth running and likelihood of success of the mediation. To this end, it is above all the personality and experience of the mediator that will make the difference.

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# INTRODUCTION

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Mediation has existed since ancient times<sup>1</sup>. There have since been examples of this alternative dispute resolution method in various types of disputes in family law, consumer law and even contract law. In the United States, there is even a meditation training programme for death row inmates and long-term prisoners<sup>2</sup>. From arguments between children over possession of a toy to conflicts between states, there are very few disputes that cannot be mediated.

The number of articles on mediation, mediators, mediation centres, conferences, etc. is evidence, if any were needed, of the interest it can arouse. Furthermore, like all ADR processes, it has been heavily promoted through legislation for many years<sup>3</sup>.

The purpose of this report is not to give a comprehensive overview of all these forms of dispute resolution. Given the profiles of the professionals who make up the audience of the Club des juristes and the CMAP, it seemed more natural for us to focus specifically on mediation in the business world in France.

Mediation is by far the most effective, economical and suitable dispute resolution tool for companies in the 21<sup>st</sup> century.

Most importantly, it offers them the opportunity to resolve disputes with third parties in a particularly flexible, secure, controlled, confidential and economical manner.

Therefore, one cannot help but wonder why this dispute resolution method, perfectly suited to the interests of companies, is so little used in practice.

The work of the commission has given us a better understanding of this aberration. It is rooted in uncertainty about what mediation is (**chapter I**) and exacerbated by issues pertaining to the power relationships of various stakeholders (**chapter II**) as well as problems choosing a mediator (**chapter III**). However, because mediation is carried out within a framework that ensures both the security and freedom of the parties (**chapter IV**), the current trend towards making mediation compulsory tends to undermine rather than promote it (**chapter V**).

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1. See Annex I, p. 68.

2. Prison of Peace, Laurel Kaufer and Doug Noll, cofounders.

3. See Annex III, p. 78 et seq.

The commission is convinced that clarifying certain concepts and principles and emphasising the value created by mediation will give it the growth it deserves.

Nonetheless, it also believes that inter-company mediation can only fully achieve the expected results if it continues to be carried out within a system that promotes freedom without neglecting security, as this report attempts to demonstrate.

## METHODOLOGY

For the purposes of this report, we will use the following definition of mediation, which has arisen from our work:

*‘Mediation is a process whereby two or more individuals or legal entities involved in a relationship entrust to an independent, neutral and impartial third party (and sometimes two parties) the task of helping them to resolve a dispute between them when communication within the relationship has become dysfunctional.’*

Throughout this report, ‘mediation’ will refer to contractual mediation between companies that meets this definition.

This emphasis excludes, on the one hand, judicial mediation and, on the other hand, institutional mediation. This warrants some explanation.

Judicial mediation, provided for in various, mostly very recent legislation<sup>4</sup>, is very different from what we refer to as mediation here. In fact, it is often if not mandatory, at least strongly recommended by the judge. Consequently, the attitude of the parties will be influenced by this key element. Truth be told, the question arises as to whether mediation that is imposed, de jure or de facto, by the judge can still claim to be mediation, since the free and voluntary nature for the parties and their ability to decide whether or not to share information that could be used differently in a trial seems to us part and parcel of the concept of mediation. In fact, it is unusual, even rare, for a party in a trial to refuse mediation recommended, more or less strongly, by the judge hearing their dispute. Truth be told, no examples of this were given by members of the commission or those interviewed. More significantly, and also more seriously, it is often the judge themselves that chooses the mediator, including from other judges or former judges in their jurisdiction. Again, the parties agree to this in the majority of cases. This submissiveness seems to us ontologically incompatible with the core principle of freedom that should be inherent in mediation.

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4. See Annex III, p. 78 et seq.

Furthermore, it is perceived, particularly by the government and judges, as both an effective way to relieve pressure on the courts and as a pre-trial phase. In a way it is thus 'judicialised' inasmuch as it is becoming an integral part of proceedings. Yet, the key advantage of mediation is precisely its nature as an alternative to a trial.

Mediation referred to as institutional (for example: business ombudsman, credit ombudsman, consumer ombudsman, etc.) was set up by the government to facilitate settlement of some disputes where the parties are not on an equal footing (companies vs. public bodies or major clients, suppliers or subcontractors in the first example; companies in difficulty vs. funding bodies in the second example; companies vs. consumers in the third example). This is a public service approach, since the aim is to offer a service (free of charge in most cases) to some groups of citizens in order to restore the balance between the parties in response to specific issues such as, for example, the prohibitive cost of a trial for a consumer dispute, the harm caused to a company or freelance professional by suspension of payments which is often difficult to remedy, etc.

These procedures are often laid down in specific legislation and concern only a fraction of the disputes or disagreements that companies face on a daily basis, which have little strategic value except in terms of image. They provide less room for creativity in finding solutions and, unlike mediation, do not offer a wide range of possibilities. This report therefore focuses only on mediation.

In the same way as the success of mediation lies largely in communication and the reconciliation of interests, we believe it is necessary and more interesting to listen, above all, to stakeholders likely to play a role in settling disputes between companies in order to understand their reluctance. Then, just as enforcement of the rule of law to a dispute submitted to mediation is not central to its success, we believe it is more useful for readers of this report to address the issue of the role of mediation from less legal angles, such as power struggles, semantics, and challenges pertaining to the choice of mediator and their pay, among others.

## FINDINGS

### The first finding is that litigation increasingly does not meet the expectations of companies

At the beginning of the 21<sup>st</sup> century, it seems obvious, even banal, to state that technological and sociological progress has significantly reduced space and accelerated time. The result is that the role of the legal system and court cases in dealing with relationships is in decline and will continue to be so.

It is obviously not just essential to a well-functioning democracy, but also useful to be able to bring a dispute before a judge, a person entrusted by the state to judge and interpret the law.

But for many disputes arising between individuals or legal entities, between whom there is a business relationship, there are significant disadvantages in having recourse to the courts:

- **duration**, stemming from a backlog in the courts, but also potential expert assessments, appeals, incidents and problems with implementation; it can take several years and is therefore largely incompatible with the pace of business in the 21<sup>st</sup> century;
- **actual cost** (fees, expert consultancy fees, etc.), which can be high in France and prohibitive in some *common law* countries;
- **the time, energy and resources** that a company and its management have to devote to the preparation and follow-up of a case. Although often difficult to measure, this expense is significant and does not contribute to the company's purpose or, in most cases, its strategy;
- **risk**, creating uncertainty that is itself incompatible with the foreseeability that company Key managers want and markets require;
- **publicity** exposing not just the existence of the litigation in which the company is involved, but also its nature, the arguments against it, and even some elements it would prefer to keep secret;
- **the damage caused to relationships**. By replacing the communication system that prevailed between the parties before the dispute arose with a system based on conflict, opposition, accusation, the need for compensation and negation of their own responsibilities, legal proceedings damage relationships that are often then impossible to rebuild. Yet companies only exist by virtue of the relationships they form with their suppliers, their customers, their partners, their employees, their peers, the bodies that supervise them, those that protect them, etc. Any destruction of these ties is a loss.

Consequently, it seems that any company Key manager acting rationally must be interested in a solution that allows them to resolve disputes to which they are party without bringing about these disadvantages, which are significant for companies.

That's what mediation is. A dispute resolution method particularly suited to the modern business environment.

 **The second finding is that mediation is almost perfectly suited to the needs of companies.**

This statement is easy to make in light of the many advantages of mediation, in contrast to the disadvantages of litigation:

- the relationship is maintained because it is through this, or through building a new relationship, that the parties can reach an agreement;
- its duration is infinitely shorter than that of a trial. Mediation can last from a few days to a few months, and is most often completed in a few weeks;
- the cost of mediation is moderate and proportionate, particularly with regard to the savings of all kinds that companies can make;
- there is never a 'loser' in mediation. Either the parties come to an agreement and, by definition, it is in their interests; or they do not come to an agreement and find themselves in exactly the same situation as they were before the mediation began;
- they have not lost anything: neither time, nor money, nor rights. This is still true even if they do not reach an agreement at the end of the mediation. There are numerous examples of agreements reached between the parties after this point, obviously fostered by the dialogue established through mediation;
- the parties control everything in mediation: the choice of mediator, the duration, the cost, the process and the solution. In litigation, on the contrary, they control nothing or very little;
- everything is confidential in mediation: nothing that is done, said, discussed, proposed or rejected can subsequently be used against a party;
- mediation widens the possibilities since the agreement reached by the parties may focus on commitments, agreements or aspects of their relationship that did not form part of the initial dispute, which is not possible in litigation;

- finally, and perhaps most importantly, mediation is extremely effective. Although there are no general statistics<sup>5</sup>, all those that have been compiled by mediation centres or company surveys show a success rate of over 70%.

 **The third finding is that mediation is only growing so quickly and strongly because people are aware of the benefits it offers.**

This finding is not new. As early as 2008, Jean-Claude Magendie, then President of the Court of Appeal of Paris, said that 'mediation is nowhere near as successful as expected'.<sup>6</sup> Admitting to being perplexed, he added: 'The limited success of this alternative dispute resolution method that brings a bit of humanity to sometimes Kafkaesque proceedings, even though all legal professionals agree on its merits, is a puzzle'.<sup>7</sup> These remarks referred to judicial mediation, but they could also apply to contractual mediation.

Ten years later, the finding has not changed, but with hindsight, this reality is even more mysterious, incomprehensible and even shocking given the ongoing efforts of governments and stakeholders in the legal system, not to mention the educational efforts of the best mediation centres, to promote it.

**The aims of this report are twofold:**

- on the one hand, to understand why, despite the obvious benefits of this alternative dispute resolution method, mediation is not more widely used by companies to resolve their disputes;
- on the other hand, through a didactic approach, to facilitate understanding by encouraging its use among business stakeholders.

Beyond lawyers, this report is aimed mainly at decision-makers. Our commission would be proud to know, above all, that we had generated the interest of business decision-makers, that many of them had been convinced of the relevance of mediation as a dispute resolution method and, finally, that we had encouraged them to use it whenever possible, i.e. often.

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5. On this point, see Chapter I, 5), p. 23 et seq.

6. J.-Cl. Magendie, "Discours d'installation du groupe médiation de la Cour d'appel de Paris", in *Célérité et qualité de la justice. La médiation : une autre voie*, report of the working group on mediation, 2008, p. 4.

7. *Ibid.*

# CHAPTER I



**WHAT DOES  
IT INVOLVE?**

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# 1

## CULTURAL BARRIER

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Unlike quite a few cultures that have a long history of favouring compromise, French culture is, on the contrary, a culture of opposition.

Some foreign observers go as far as to claim that mediation goes against the grain of French culture.

In her doctoral thesis, Mrs Cardinet reminded us that:

*'What undoubtedly begins to explain this phenomenon [the shift from the concept of mediation to that of negotiation and arbitration] is the fact that practices for managing social relationships in western Europe are not the same as those that had the force of law in the ancient Mediterranean region or in eastern countries, where nomads mainly settled, and are the birth place of the concept of mediation for social issues'<sup>8</sup>.*

In our culture, the merits of a position must be recognised against that of the opposing party and it is the judge, a symbol of authority, who must formalise this by ruling in its favour. Compromise is equated with a position of weakness.

We can easily see the difference between this attitude and one that leads voluntarily to accepting, or at least understanding, the other party's position, in order to find a solution that necessarily involves compromise.

Many interviewees highlighted the still very vertical and hierarchical structure of French society, which leads to the dispute being settled by a third party invested with authority (the judge or arbitrator) and to this solution being favoured over compromise.

This culture, which leads to a confrontational mindset, is clearly present on company boards, many of which do not promote mediation. In fact, lawyers too often believe that their status depends on their ability to ensure their client's claim prevails in court.

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8. A. Cardinet, *La médiation en France, aujourd'hui, et ses applications dans le secteur scolaire : ses références, ses significations, ses pratiques*, dir. G. Avanzini, Lyon 2, 1998, p. 40.

This idea of added value is clearly reflected in the way in which fees are charged since, in business law, the amount of fees is generally set by applying an hourly rate to the time spent by the lawyer(s) on the case. Since the number of hours spent handling protracted litigation is much higher than mediation, we can see why a firm might feel that litigation is in its interests.

This is a reductionist view. Lawyers who act as consultants, specialising in dispute resolution for their clients, know that the greatest added value is that perceived by the client, which itself depends on the lawyer's good understanding of the company's challenges and environment. The effectiveness of the solutions they propose, the trust they build and the long-term nature of their relationship depend on it. Mediation then becomes an asset in the relationship between these lawyers and their clients.

## 2

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### POLYSEMY AND CONFUSION

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The term 'mediation' seems to be used to refer to a wide range of processes that differ from medication as defined in this report<sup>9</sup>.

Article 1530 of the French Civil Procedure Code causes confusion inasmuch as it defines mediation and conciliation in a similar way<sup>10</sup>. The role of a third party involved in finding a solution is different as a matter of principle.

Other processes differentiate themselves from mediation by their binding nature inasmuch as mediation is imposed or the mediator themselves is imposed. These processes therefore occur most often and interfere with the basic principle of freedom that characterises mediation (consumer ombudsman, credit ombudsman, insurance ombudsman, business ombudsman, intra-company mediator, conciliation designated as mediation, etc.).

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9. See supra, p. 13.

10. Article 1530 of the French Civil Procedure Code: 'Contractual mediation and arbitration covered by this title include, pursuant to articles 21 and 21-2 of the aforementioned law of 8 February 1995, any structured process whereby two or more parties attempt to reach an agreement, without recourse to any legal proceedings, with a view to resolving their differences, with the assistance of a third party chosen by them who carries out their assignment impartially, competently and diligently'.

Moreover, the proliferation of mediation and its application to 'low-intensity' disputes seems, by contrast, to discredit its application to high-stakes disputes. The very concept of mediation has been subverted over the last twenty years, both in law and in practice.

Is there still time, and is it still worth, combating this polysemy<sup>11</sup> or must we accept a broad interpretation at the risk of making it a catch-all term?

For a number of interviewees, the broadest possible concept should be used, taking into account the confusion that already exists, particularly at the legislative level. For those holding this view, it is already too late to clear up the confusion. They believe it is more important to promote a general culture of alternative dispute resolution and that the differences between these methods are of little importance.

Yet differences are important. The commission fully agrees with the desire to promote ADR methods, but believes that a specific approach to the definitions of each allows companies to make a free and informed choice, suited to their needs in the case in point, which can only increase understanding and support for alternative methods.

More than that, the commission is of the opinion, having listened to interviewees, that it is not possible to understand and promote mediation in the interest of companies unless it is accurately defined, since its features are the very source of the benefits it provides.

Moreover, any confusion makes it more difficult to break down French cultural barriers related to the preference for opposition over compromise.

## 3

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### IGNORANCE

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The interviews conducted, particularly with business leaders and representatives of SME associations, have exposed widespread ignorance of the existence of mediation as a dispute resolution method in business law.

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<sup>11</sup> The Commission wanted to illustrate this polysemy through a glossary in the annex to this report. It seems many definitions coexist, sometimes for a single term, which unquestionably contributes to the subversion of the concept of mediation as understood in the report. For a basic overview of these definitions, see Annex II, p. 72.

The leaders interviewed are aware of mediation with consumers, sometimes that relating to payment delays (company ombudsman) and even family mediation in divorce cases.

On the other hand, there is clear ignorance of mediation in the business world, both of its very existence and its principles. It is significant that once mediation is explained and its benefits highlighted, all those interviewed were surprised at this ignorance and the fact that it is not offered much more routinely given that it meets their expectations, particularly in terms of speed and cost.

This ignorance on the part of economic stakeholders also demonstrates that it is not recommended enough in disputes by litigation specialists. During a recent international symposium, the question was raised as to the professional liability a lawyer may incur if they neglected to inform their client of the existence of mediation as a method of resolving a dispute submitted to them<sup>12</sup>.

## 4

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### DISREPUTE

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In reality, mediation not only suffers from a lack of knowledge on the part of economic stakeholders, for whom it is of the greatest interest. It is also the victim of a lack of recognition particularly – and paradoxically – among stakeholders in the legal profession, in principle its main converts.

Magistrates and judges, particularly *juges consulaires*, outside lawyers and also in-house lawyers often have a poor opinion of mediation. True, they are increasingly reluctant to admit it, since the mainstream in politics and society encourages and pushes for alternative solutions.

However, this reluctance came out throughout our interviews, sometimes implicitly, but in a way that was clear enough to the shrewd members of our commission. This reluctance can take various forms, from resistance (real disputes can only be addressed by a ruling) to disdain (mediation is good, but for others). Thus, the underlying suspicion focuses above all on quality. The value of the process is as suspect as the legitimacy of the mediator, irrespective of their intrinsic qualities.

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12. New Frontiers of ADR: From Commercial and Investment Matters to Regulatory Violations, 6-7 November 2018, McGill Faculty Club and Conference Centre, Montreal, Canada.

Another, more head-on criticism has emerged: the world of mediation is in the spotlight. According to its detractors, it presents a sorry spectacle that could discredit mediation and the centres whose purpose it is to organise it.

To this end, the proliferation of mediation centres, in and outside of Paris, is presented or perceived as an especially negative sign: 'Mediation is a jungle', we have heard. The same people have even added: 'There are more mediators than mediations!' Others, less harsh, limit themselves to highlighting, with a heavy hint of contempt, that 'mediation is a market...'. In fact, competition has emerged. In this range of criticisms, it is almost the ethical dimension that is questioned.

## 5

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### LACK OF DATA

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As we have seen, there has been a constant promotion of mediation and its many benefits such as saving time, controlling costs, confidentiality and, where possible, the fact that the long-term relationship between the parties to the dispute does not suffer. Promoters and beneficiaries needed to 'see it to believe it', and what could be more effective than statistics demonstrating the unquestionable benefits of the process? The problem is that these tools do not exist or are incomplete, as the case may be.

#### **a. In France**

##### **■ Judicial mediation**

There is no national census on the number of court-ordered mediations (source: *Les Chiffres clés de la justice*; 2017). The Ministry of Justice itself, in a report published in 2015, noted these difficulties in accessing figures, preventing an assessment of the attractiveness and effectiveness of the process at the national level<sup>13</sup>. In particular, this report mentions the discrepancies among statistical tools between jurisdictions, with each one also having their own calculation method.

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13. Ministry of Justice, *Rapport sur le développement des modes amiables de règlement des différends*, April 2015.

Thus, although some appeal courts such as those in Paris, Versailles, Grenoble, Pau and Toulouse collect statistics independently, the data compiled is currently still purely for internal use.

On the Ministry of Justice website, publications relating to mediation are quite old (the most recent date back to 2012-2013) and do not necessarily contain relevant information on the figures.

The Court of Cassation has published a GEMME (European Group of Magistrates for Mediation) study on mediation, which compiles very little data (success rate with and without a lawyer, duration, amount of provisions)<sup>14</sup>.

### ■ Contractual mediation

The aforementioned Ministry of Justice report notes the effectiveness of contractual mediation without giving lots of figures. Those given relate only to 'institutional' mediation, set up by the government and designed to resolve specific types of dispute, which implement different processes and are outside the scope of our study.

Statistics relating to contractual mediation can be compiled either by individual mediators working in a network, or by mediation centres, but there is no centralisation of any kind.

There is no single register compiling all institutions that arrange mediation, but the French Federation of Mediation Centres (FFCM) brings together many mediation centres. Unfortunately, it does not provide information on its members' statistics. These therefore have to be researched centre by centre and, where they exist, they are not easily accessible. The CMAP is the only centre that publishes statistics in the form of an annual barometer, which is easily accessible on its website<sup>15</sup>.

## **b. Abroad**

The situation is the same in many countries. There are no centralised, verifiable government statistics. Only some centres or private organisations provide their own statistics.

### ■ In Europe

A European website offers information on the practice of mediation for each Member State<sup>16</sup>.

The only country that has national statistics is Italy, which made mediation prior to court action compulsory in 2013. There is a register of mediation centres (over 1,000 organisations currently listed), which are the

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14. [https://www.courdecassation.fr/publications\\_26/bulletin\\_information\\_cour\\_cassation\\_27/hors-serie\\_2074/mediation\\_8925.html](https://www.courdecassation.fr/publications_26/bulletin_information_cour_cassation_27/hors-serie_2074/mediation_8925.html)

15. <http://www.cmap.fr/le-cmap/les-statistiques-du-cmap/>

16. [https://beta.e-justice.europa.eu/64/FR/mediation\\_in\\_eu\\_countries](https://beta.e-justice.europa.eu/64/FR/mediation_in_eu_countries)

only ones authorised to arrange civil and commercial mediation. Reporting of annual statistics is a prerequisite for inclusion in the register.

In several Member States, a national organisation keeps a national register of professional associations of mediators, simplifying access to the statistics of each mediation centre (such as Romania and Belgium, for example).

Finally, in Britain, the Ministry of Justice has a directory listing all accredited civil mediators. Some centres, such as the CEDR<sup>17</sup>, have their own comprehensive statistics, but there are no national statistics.

### ■ In the United States

In the United States, where civil and commercial mediation grew after the Second World War, there are no or few statistical databases, both at the federal and state levels. The only existing data is accessed by private organisations and mediation institutions, each acting on their own behalf.

### ■ At the international level

We welcome the initiative of the International Mediation Institute<sup>18</sup>, a private institution whose goal is to develop standards of mediation at the global level. This institute works with organisations all over the world to produce a 'common basis for mediation'. It provides studies on various topics, containing fairly detailed data on the practice of mediation.

The IMI has carried out a wide-ranging awareness campaign on mediation, organising conferences in 40 cities in 31 countries around the world (Europe, Australia, United States, Saudi Arabia, South Africa, Singapore, Hong Kong, etc.). In 2017, the 'Global Pound Conference' published a report presenting the findings of a survey of over 4,000 people carried out over a year (between 2016 and 2017).

The study consisted of dividing those surveyed into five groups (parties, advisers, adjudicators such as judges and arbitrators, non-adjudicators such as conciliators and mediators, and influencers such as teachers and government representatives). Those surveyed answered 20 questions on their motivation for resorting to mediation (for example, the effectiveness of the process, control over the solution, cost reduction, etc.)<sup>19</sup>.

The main findings are, unsurprisingly, that the parties see mediation as, first and foremost, an effective way of resolving their disputes (65%) and that they expect more support from their advisers in the dispute resolution strategy. It is, however, interesting to note that in-house lawyers are generally seen as privileged proponents of mediation, un-

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17. <https://www.cedr.com/>

18. <https://www.imimmediation.org/>

19. <https://www.imimmediation.org/research/gpc/series-data-and-reports/>.

like outside lawyers who do not add value to the process with regard to their clients (70% are considered obstacles to the implementation of processes).

As interesting as this survey is, it is not substitute for a centralised, verified and reliable statistical tool that enables the promotion of mediation and demonstrates its effectiveness. However, it must differentiate between contractual mediation and judicial mediation.

# CHAPTER II



## **POWER STRUGGLES**

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# 1

## STAKEHOLDERS

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Disputes between companies inevitably require, for each company, various internal and external stakeholders.

Foremost among these stakeholders are decision-makers. These are managers and, more generally, those within the company who find themselves, by legal authority or by delegation, authorised to determine the strategy and appropriate method for managing individual disputes. Ultimately, in the case of mediation, decision-makers will have to give their opinion and, above all, their agreement to the recommended solution. The number and positioning of these decision-makers vary depending on the size of the company and the complexity and relative importance of the dispute. Thus, these decisions will be made by the manager of a small company, usually in conjunction with their lawyer. In large companies, on the other hand, if the dispute is of strategic importance, these decisions may be a matter for the Board of Directors. They will be made on the basis of a dossier presented to the Board by senior management, prepared in advance with the legal department and a large number of participants specialising in various fields.

In most companies with a legal department, lawyers will play a key, if not leading, role. In any case, they will participate to varying degrees in the decision-making process. It is often the case that, when the legal department is appropriately positioned, and it enjoys the authority and confidence of operational management, its recommendations on the choice of resolution method and the solution to the dispute are followed. In this regard, it is not unusual to see legal officials acting as spokespeople for their companies during mediation sessions or, at least, forming part of the group representing them.

Litigation between companies is also an opportunity to involve external stakeholders in the management of the dispute. The company and its legal department, if it has one, generally involve a lawyer specialising in litigation. This lawyer also plays a key role in the strategy and management of the dispute before, where necessary, having to plead the case for which they were appointed.

Finally, when alternative means do not resolve the dispute or are, rightly or wrongly, discounted, other third parties intervene in the dispute; foremost among them, the judge or arbitrator. Due to their decision-making power, their potential presence looms over the litigation strategy and inevitably interferes in the choice of resolution method that will ultimately be adopted.

The power of stakeholders in inter-company disputes is in play; we could even say that it is questioned. Thus, when it comes to dismissing traditional processes that involve the use of judges or arbitrators in favour of mediation, the risks relating to the exercise of power by one of the stakeholders or, in contrast, the loss of power, will have a major impact on their behaviour. They may constitute a significant obstacle to the implementation of a possible mediation.

## 2

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## IS POWER BEING CHALLENGED?

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### **a. Within the company**

#### **■ Decision-makers**

The main objective, the golden rule for most companies, is to avoid or even escape litigation. In the business world litigation is generally viewed as a disease or a failure, a malfunction with disruptive effects, resulting in time wastage, costs and risks. Companies also work hard on avoidance, sacrificing a lot on the altar of tranquillity. The usual cliché of a bad deal still has a bright future: direct negotiation is, and will remain, the most commonly practised alternative dispute resolution method, which we can only welcome.

However, failure is possible. Regrettably, their decision reinforced by dead-end discussions or an aborted negotiation, the company and its Key managers will go down the route of confrontation. Surer than ever of the relevance of their point of view, decision-makers will demand to go to court or arbitration, since it is necessary.

At that time, when the dispute has developed, it is clear that relatively few of those within the company are considering mediation. Either they have never heard of it (we have been told this) or they think they know what it's about but, unfortunately, they believe that mediation is not at all suited to their case. In any case, as many people have said to us, what would be the point of resuming a negotiation that has failed – and in the presence of a third party to boot! The time for compromise is over; the aim now is to lance the boil once and for all and use the law.

The decision as to whether or not to begin negotiations in the event of a dispute is the prerogative of decision-makers, usually the company's senior management. This decision, which has a political dimension, is an integral part of their domain. It is not a power that decision-makers are willing to give up easily. However, they often see mediation as a continuation of the negotiation under the auspices of a third party. Abdicating leadership of a

process whose outcome is unknown, to a third party in whom they have little trust but whom they know will force them to compromise, therefore seems at least unnecessary, even bizarre, if not illegitimate. It is perceived as detrimental to their power. This takes us to the heart of a problem that undoubtedly explains the lack of enthusiasm for mediation among many company decision-makers.

This perception shows manifest ignorance on the part of the majority of decision-makers as to what mediation actually is and what it is likely to bring to a dispute when the direct negotiation phase has failed. This finding also applies to the many who claim to be familiar with mediation but rarely, or never, practise it, on the grounds that it is not suitable for their case. In reality, the majority of disputes involving companies can be mediated. Isn't the argument too often put forward that a dispute is not suitable for handling through mediation the best demonstration of the ignorance of the part it plays?

### ■ In-house lawyers

Litigation has long been the domain of in-house lawyers; their favourite playground, which they shared with corporate lawyers. Although the role and recognition of the usefulness of in-house lawyers has come a long way over time, the idea of litigation as their 'preserve' remains largely intact for many lawyers in many companies. Unlike, for example, the negotiation of contracts or external growth operations, where in-house lawyers work alongside many other company stakeholders, litigation that takes place outside the company's normal course of activities gives them a significant advantage. Lawyers devote themselves to the case: they are the experts. The more complex the litigation, the longer and more challenging the procedure, the higher the stakes, the more they benefit, due to the secretiveness that results, the special feel, a certain prestige, a source of motivation.

In-house lawyers understand and freely admit that in case of a dispute, Key managers primarily want to find a negotiated solution, in which they will certainly participate, but if this fails, they rarely recommend mediation – far from it. This finding may seem surprising since it logically falls to in-house lawyers to explain what mediation involves and to recommend it as a simple solution that saves time, effort and money.

There are two main obstacles for in-house lawyers.

The first is the result of a self-preservation instinct. They know that operational managers have a negative preconception of mediation, seeing it as a poorer version of negotiation. They are afraid to argue in favour of it and be seen as going against the grain as a lawyer, the person responsible for defending the company's interests. They fear being accused of lacking character when the case, of course, cannot be lost.

The second obstacle is a matter of status. What will become of their expertise in procedures and legal tactics? Would they have to give up their

long chats with lawyers on the possible strategic options, their debates on findings or recollections, the buzz of hearings, presenting the case to members of senior management? Wouldn't their usefulness or prestige be affected?

## **b. Outside the company**

### **■ Lawyers**

With the arrival of alternative dispute resolution methods, particularly mediation, business litigation lawyers, trained and built around the idea of defence, experts in confrontation on a legal playing field, find themselves faced with a double loss of bearings: one cultural and the other that questions their technical background. Indeed, they have to adapt to a field where combat, or simply opposition, is banned and the law has become non-decisive in finding solutions. Professionally, it is hard to imagine a more radical, existential re-assessment. There are indeed numerous repercussions; these affect the status of lawyers in the legal ecosystem and their role with clients while, last but not least, also raising economic considerations.

Excluding a minority, lawyers initially put up a kind of passive resistance to mediation. Over the years, with the help of pragmatism, increasing numbers have rallied to the cause. In any case, the very slow growth of mediation is best seen as a godsend. The good old days of judicial and arbitral litigation are long behind us.

### **■ Judges**

In court proceedings, it is up to the judge to suggest mediation. Few do. One of them, in a pithy statement, suggests an explanation: 'In a fairly tribal way, we prefer a wasteland under our control to fertile soil'. This reluctance by the judge to suggest mediation, which is in fact stepping aside in favour of a third party, leads to a quite understandable unease and is a consequence of the intrusion of alternative methods into their sphere of power. This unease is a direct result of the judge's perception of their duty: their role consists of resolving the dispute between the parties. Also, excluding early converts, recourse to mediation is seen as a renunciation with the feeling of going against the grain, or even being guilty of abandoning their position. Judges are also unsure whether to trust the new stakeholder that is the mediator to satisfactorily resolve the dispute that was initially brought before them.

The logic of having registered mediators in each jurisdiction aims to reduce this distrust; it is not clear whether this will be achieved<sup>20</sup>.

Judges also fear presenting a negative image of the justice system where mediation is seen by citizens as an easy way out used to remove excessive workload and criticism of the slowness of legal proceedings.

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20. On this point, see *infra*, p. 33 et seq.

# 3

## EXERCISE OF POWER

### **a. Decision-makers and the authority to fight**

The role of key managers is to make decisions. They have the authority to fight and, when they think they have exhausted alternative methods and the path to a reasonable compromise which, in their opinion, is limited to direct company-to-company negotiation, it's time to bring out the big guns and shell the enemy positions until they surrender, as pitifully as possible.

Suggesting mediation, provided they know this option exists, may seem like a bizarre step, an obvious admission of weakness, a tactical faux pas. Furthermore, would a mediator be capable of identifying and understanding all the many aspects of the case, the company's business, the origin of the dispute, how it developed, the background? Very few company managers think so. Would they have to provide confidential information about the company, its strategy, its business model, its contracts, etc. to a third party? Surely not. Also, the success of a potential mediation would be far from certain. The company would then have both lost time and prematurely revealed the cards it will need the most during the coming legal or arbitral battle. Thus, for questionable reasons, mediation is often dismissed by decision-makers when exercising their power.

In order to make an informed decision and exercise this power wisely, key managers would be well advised to ensure their staff had carried out a dispassionate, multi-criteria analysis. This is rarely the case.

### **b. The power of advisers**

When deciding on their litigation strategy, business decision-makers would be well advised to consider several parameters to give them as fair a judgement of the dispute as possible in order to assess the potential benefits of mediation. This requires an assessment to be carried out, as objectively as possible, of the strengths and weaknesses of the case. How many actions have been filed on a whim, after summary analysis, with disastrous consequences?

It is up to the company's legal advisers, whether they are in-house or outside lawyers, to carry out this assessment. They are, by definition, experts on the dispute and the reasons behind it. Only they are capable of giving the legal side relating to the facts of the case and assessing its potential consequences. Their analysis, as comprehensive as possible, will not just be factual and legal. They will endeavour to put the dispute in a broader context. Advisers must, in particular,

take an interest in the opposing party and assess the strategic value of their relationship to the company.

Litigation encourages lawyers to ponder the conditions that led to a contractual relationship with the other party to the dispute, the nature of the respective obligations, the manner in which these were understood and carried out, and how the relationship progressed until the dispute arose.

Finally, advisers must include in their analysis:

- the likely duration of litigation;
- the internal and external resources required;
- direct costs;
- indirect costs that the company routinely overlooks;
- the maximum possible financial risk;
- the consequences for the company of the loss of a business relationship (and potential replacement options);
- legal or arbitral uncertainty likely to affect the outcome of the litigation.

On the whole, they will have to carry out a dynamic and comprehensive assessment of the consequences of the litigation on the company's operations.

Multi-criteria analysis is absolutely essential. The role of lawyers vis-à-vis Key managers is key here. It may, therefore, be surprising that this methodological approach is so rarely adopted and that they are not asked more often to contribute their ability to shed useful light on the decision resulting from their expertise. In truth, they are not asked and, more surprisingly, they themselves hardly ever suggest it.

The main obstacle for advisers lies in the risk of error. The parameters to consider are often many and complex, while their assessment involves a high degree of subjectivity. Hesitation is therefore advised due to the high risk of a loss of credibility that would result from a recommendation or diagnosis that later proved incorrect. The second obstacle to implementing this methodological approach is the risk of reducing or even thwarting the enthusiasm of Key managers instead of matching it and, above all, having to explain the weaknesses of a case that the company's management are not willing to hear.

Faced with this reluctance, suggesting mediation seems like a risky proposition. In these difficult circumstances, it presents a heightened risk, since a court ruling or arbitration award has the advantage of being able to blame the judge or arbitrators, or even the lawyer, if the company does not get the expected result. Mediation, on the other hand, involves the active and direct commitment of company representatives. In the case of mediation, the instigators and stakeholders of the solution (the lawyers) have to explain it and take responsibility for it. How can they demonstrate that the agreement reached at the end of the mediation was the best possible solution? The company's chief

legal officer and/or lawyer will often find themselves in this uncomfortable position of responsibility. Many will not suggest mediation so as not to take this risk.

This is the core of the paradox, so often stated and never really solved. On the one hand, it is impossible to imagine a more effective and relevant method than contractual mediation for resolving a dispute. On the other hand, too many companies use it infrequently for reasons that have as much to do with the risk of losing power as the risk of exercising it.

Remember that the mediator is a third party chosen by the parties themselves, according to their criteria for their profile and skills, who will take a fresh and cross-disciplinary look at the claims and interests of the various parties. Their presence will naturally develop during the dispute. It will allow the parties to express their points of view, their needs, and what they couldn't – or didn't dare – express in the inter-party negotiations. Mediation allows for a free stance and free speech.

The presence of the mediator can therefore trigger a new dynamic without stripping the parties of their roles. The new system of communication it creates allows the parties to develop their view of the dispute.

In any case, remember that the parties can stop the mediation at any time and await the ruling; litigation remains possible. Mediation is an effective, modern and risk-free tool for companies

# CHAPTER III



## **THE CORNERSTONE: THE MEDIATOR**

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# 1

## CHOOSING THE MEDIATOR

### **a. Choice made by the judge**

Unlike in other countries, the mediation profession is not regulated. This raises the issue of the training and certification of mediators.

Ensuring the growth of mediation requires reassuring its potential proponents and beneficiaries. This has resulted in much debate, mainly between those in favour of as strict a framework as possible, using the law as the best way to promote the development of alternative dispute resolution, and those who adopt a laissez-faire or best-foot-forward approach, for whom it is absolutely essential not to destroy a method based on the principles of voluntariness and freedom. According to the latter, we should not copy the bad example of arbitration and its development.

These hesitations explain the rather flawed middle way adopted by legislators under law no. 2016-1547 of 18 November 2016 establishing, as a minimum, a list of mediators near appeal courts (Law no. 95-125, 8 February 1995, art. 22-1, A; Law no. 2016-1547, art. 8). Seeking to maintain the balance between the freedom offered by mediation and security for legal professionals, the lists were designed only 'to provide information to judges' and the legislation sets few conditions for inclusion on these lists. They are aimed only at appointing a mediator as part of legal proceedings even if, because of their expertise, the recognition thus provided could be used for contractual mediation.

Decree no. 2017-1457 of 9 October 2017<sup>21</sup> adds to the legal requirements contained in article 131-5 of the French Civil Procedure Code<sup>22</sup>. The requirements are laid down in the legislation. It is thus not possible to require a mediator to have a qualification<sup>23</sup>, to be geographically close to<sup>24</sup> or, on the contrary, far from<sup>25</sup> the location of the dispute, or even to meet residence or activity requirements<sup>26</sup>, since mediators can be listed by each appeal court. Those applying for inclusion on the list must not have any convictions, disqualifications or loss of rights

21. Decree no. 2017-1457 of 9 October 2017 on mediators listed by appeal courts. Add. Dispatch of 8 February 2018, no. SG-18-005/05.02.2018

22. It should be noted that there may be specific legal requirements for some fields (decree no. 2015-1382 of 30 October 2015 on the mediation of consumer disputes: *Official Journal (OJ)* of 31 October 2015, text no. 42; decree no. 2015-1607 of 7 December 2015 on the conditions for appointing business ombudsmen: *OJ* of 9 December 2015, text no. 66).

23. Civil Court of Cassation, Second Chamber, 27 September 2018, appeal no. 18-60.091, *forthcoming*.

24. Civil Court of Cassation, Second Chamber, 27 September 2018, appeal no. 18-60.132, *forthcoming*.

25. Civil Court of Cassation, Second Chamber, 06 December 2018, appeal no. 18-60.169, *forthcoming*.

26. Civil Court of Cassation, Second Chamber, 18 October 2018, appeal no. 18-60.128, *forthcoming*.

listed in section 2 of the criminal record check. They must also not have committed any acts contrary to honour, probity or morality. Appeal courts may assess the aptitude of mediators in light of evidence produced without needing to interview applicants<sup>27</sup>.

These lists cover civil, commercial and social mediators (individuals or legal entities), whose applications were accepted following a request for inclusion based on a form to which the required supporting documents are attached. Judges remain, however, free to appoint a mediator who is not included on the list for their appeal court. Mediators may ask to be included on the lists of several appeal courts.

The main condition, which is a source of debate, is evidence of training or experience demonstrating a fitness to practise mediation (article 2, section 3 of the decree). Indeed, the legislation does not specify either the quality of the training or the amount of experience expected. The Court of Cassation has so far had the opportunity to confirm refusals to include mediators on the lists on the grounds of recent training not accompanied by experience<sup>28</sup>.

In practice, requests for inclusion on the lists have received quite varied responses depending on the appeal court, whose understanding of the relevant training or experience criteria for mediation is not consistent.

These difficulties echo those encountered by the legal profession which, by setting up the National Centre for Mediation Lawyers (CNMA), sought to select from its members those who could call themselves mediators according to specific and strict criteria (200 hours of training or 140 hours of training accompanied by practice). However, the French Council of State (CS) has just overturned article 6.3.1 of the national rules of procedure (NRP) for the legal profession formalising the requirement, stating that 'the French National Council of Bars cannot legally lay down new requirements that would jeopardise the freedom of exercise of the legal profession or the basic rules that govern it and would have no basis in legal regulations or those laid down by decrees in the French Council of State provided for in article 53 of the law of 31 December 1971, or would not be a necessary consequence of a regulation listed among the traditions of the profession'<sup>29</sup>.

There is undeniably a disconnect between the legitimate desire to reassure proponents of mediation and the impossibility of limiting the exercise of a duty according to criteria unsuited to the reality of the existing market or the needs of companies.

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27. Civil Court of Cassation, Second Chamber, 18 October 2018, appeal no. 18-60.119, *forthcoming*.  
28. Civil Court of Cassation, Second Chamber, 27 September 2018, appeal no. 18-60.115, *unpublished*.  
Civil Court of Cassation, Second Chamber, 27 September 2018, appeal no. 18-60.116, *unpublished*.  
29. CS, 25 Oct. 2018, no. 411373, finding 3.

The commission believes that these lists are of little benefit<sup>30</sup>. They may reassure some judges, but they already have every opportunity to develop their network of mediators and/or request the assistance of serious and recognised organisations to suggest mediators suited to each case. On the other hand, what certainties will the parties to a dispute have regarding the actual skills of a mediator whose application will have been welcomed because of their inclusion on the list? Regarding contractual mediation, some mediators will highlight their inclusion on the list despite the fact that there is every reason to think the criteria used are insufficient to establish their actual expertise. As for beneficiaries, one can doubt the importance of these lists in choosing a mediator that suits them.

## **b. Choice made by mediation centres**

Parties wishing to resort to mediation have no excuse: there are reputable organisations that are easy to join and contact. There are long-established mediation organisations with indisputable professionalism and high-level mediators. Although there are, conversely, organisations that do not handle enough cases to acquire the quality linked to experience, it is clear that many criticisms of mediation are actually unfair accusations.

Experience shows that it is often difficult for parties to agree on a mediator, or to find the mediator they need on their own. The parties seek reassurance on the mediator's competence, whether in their expertise or professional experience, and their ownership of various stages of the mediation process and therefore training in mediation techniques. These difficulties often lead them to seek the necessary assistance from mediation centres to find the appropriate mediator.

### **■ Example of the CMAP**

The CMAP set up a panel of over 150 people (lawyers, in-house lawyers, former judges, law professors, engineers, experts, auditors, company managers, etc.) who were required to have a minimum of ten years' professional practice and training in mediation, backed up by successful completion of a mediator certification examination designed in partnership with ESCP Europe. CMAP mediators are also required to undergo continuous training every year in order to be included on the centre's lists.

To help them choose their mediator, the parties are consulted by the centre on the required profile in light of the type of dispute, the field of activity concerned, the national or international nature of the case, and any other criteria required.

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30. On the limits already expressed, P. Bertrand, "La liste des médiateurs dans chaque cour d'appel, nouvelle exigence de la loi J21", *Gaz. Pal.*, 14 February 2017, no. 7, p. 17; B. Gorchs-Gelzer, "Regard critique sur le décret n° 2017-1457 du 9 octobre 2017 relatif à la liste de médiateurs auprès de la cour d'appel", *D. et proc.* 2017, 246; F. Vert, "Premières listes de médiateurs dans les cours d'appel : un dispositif légal perfectible", *Dalloz actualité*, 29 October 2018.

After confirming that the mediator has no conflict of interest, the CMAP then offers two options for the appointment:

- They choose a mediator from a list of names that meet the desired criteria;
- If they do not manage to reach an agreement, which is usually the case, the mediator, taken from the list submitted to the parties, is then appointed by the centre's mediation commission, chaired by an honorary judge at the Court of Cassation.

In practice, it is interesting to note that the profile selection criteria adopted by the parties differs if they do not actually share the same view of the issues of the case. For example, when one party prefers a lawyer, but the other insists on the need to request assistance from a technical expert. In any case, the centre takes all these elements into consideration.

### **c. Choice made by the parties: searching for a rare bird**

Anyone can become a mediator; some do. Mediation suffers as a result. The question facing companies, making them reluctant to embark on a mediation process, is simple: is it possible to find the right person, who will be able to move from dispute to solution?

So the issue of the mediator's profile is, understandably, key. It is a legitimate and inevitable concern for all companies when choosing mediation as a dispute resolution method and presenting the reasons for their dispute to this third party.

The mediator has a responsibility. Although their competence does not guarantee that an agreement will be reached, failure will most often be held up as an example of incompetence. No mediators want that.

Of course, the best mediation centres (those that have a wide range of mediators) will help the parties identify the appropriate person according to their criteria. It is ultimately the parties who agree and decide. When making their choice, they consider three criteria: experience, technical skill and personality.

#### **■ Experience**

Companies that resort to mediation know that it is up to the mediator to lead a process within a framework in which they set the rules and they are the gatekeeper. In order to do this, the mediator must be respected and command some sort of authority; just the right amount. In fact, it is up to them to let the parties gain ground in order to build a solution that works for them. For this exercise to be carried out properly, the competence of the mediator, obtained during their career and the situations they have faced, the quality of the mediator's training and their practical experience of mediation must always be taken into account.

### ■ Technical skill

Inevitably, when choosing a mediator, the question arises of the specific skills that this person must have. The answer is the subject of lengthy and difficult discussions between the parties once they have agreed on the principle of mediation. Differences of opinion on the expected qualities of the mediator reveal both their respective understanding of the nature of the dispute between them, but also the ground on which each believes they are better positioned.

The technical skill or expertise criterion covers several aspects. It can sometimes be about a firm grasp of the business sector in which the dispute has arisen, its environment or the type of contract whose enforcement led to its occurrence, applicable law, the country in which the contract is executed or even a good command of the language governing the relationship between the parties. These criteria often overlap, in different ways and degrees of importance according to the situation.

The most frequent dilemma lies in the weighting given to technical expertise, business sector environment and legal expertise. These three types of expertise, which ideally combine, are not often found among mediators.

Technical expertise lies in knowledge of technologies, products, manufacturing methods, but also the language used by professionals in the field (often incomprehensible to the layman), whereas expertise resulting from knowledge of the business sector environment relates to the economic context in which the parties operate. It concerns knowledge of the competitors and partners of the disputing companies as well as their suppliers and customers. This skill relating to technical or business sector expertise is an undeniable asset that gives the mediator credibility in the eyes of the parties. It helps them assert their authority more easily and, in some cases, allows them more rapidly to determine the crux and nature of the dispute, assess its importance and gain a detailed understanding of the points of view expressed.

Legal expertise is also an important factor. All disputes between companies have a legal dimension, which may be more or less pronounced. It is clear that, in all cases, the dispute is framed by the legal aspect. It is one of the structural elements of the dispute, at the heart of the power relationship it represents. However, the legal dimension is rarely the trigger for the dispute; rather, it is the expression and formal representation of it. Thus, failing to comply with a provision in a contract never comes about because of a deliberate desire to commit an infringement. This infringement reflects a substantial divergence: a breakdown in the interests involved, a strategic, economic, financial or commercial divergence that will be translated into legal terms.

Above all, legal debate is the preserve of the judge or arbitrator: it is not, nor should it become, the domain of the mediator. The latter is not in

a position to rule on legal issues. This is the essence of mediation. To have a hope of bringing the parties together, the mediator will have to guide them so they can get to the bottom of their feud, the real cause of their dispute, leaving aside legal considerations or interpretations. In building a solution to the dispute, the legal dimension tends to lose its importance. Failing that, if it cannot be avoided, the legal aspect has every chance of remaining a disruptive element in the progress of the mediation process. Consequently, the issue of who is legally more right becomes largely secondary, if not pointless. For the mediator, the only question worth asking is whether it is possible to come to a reasonable and fair solution and whether the parties are in the right state of mind to look for it.

In short, in mediation, legal credentials useful but not decisive.

Furthermore, many specialists in mediation believe that technical, occupational, business environment and legal expertise are by no means essential and that the most important aspect is, first and foremost, the personality and professionalism of the mediator and their ownership of the mediation process.

The commission shares this opinion.

#### ■ **Personality**

Skills related to the mediator's personality are not mentioned as often as experience or technical skills, since they are undoubtedly harder to identify, but they are no less decisive; if anything, they are more so.

Furthermore, some parties admit to prioritising this criterion. Hence, they aim to assess the mediator's people skills, demonstrated by their career and, if applicable, their reputation, which they see as a good enough guarantee of credibility. These qualities are the product of a secret process that is difficult to define. They contribute to what might be called presence, the result of a patchwork including: voice; a way of addressing the parties that indicates, to varying degrees, a natural authority; and an ability to build a climate of trust, or even to defuse excessive tension. These features can also affect the mediator's ability quickly and appropriately to assess situations, understand the psychology of those present and how they operate and, ultimately, adapt continuously to the various situations with which they are faced throughout the mediation.

In light of the interviews conducted by the commission, one may wonder whether the answer to this question of which criteria are prioritised by the parties when choosing a mediator lies in their level of experience and understanding of what mediation really is. It could be argued that the more experience they have of mediation, and the more it is included in their foundations and principles, the less technical, business or legal expertise seems essential to the parties, who instead prioritise the mediator's experience and personality. Conversely, parties with less experience

of mediation, who doubt the relevance of this dispute resolution method or are reluctant to rely on the mediator, will tend to see technical expertise appropriate to the case as a guarantee or security in relation to the process over which they have less control.

On the whole, in almost all cases, it would be in the interests of the parties to look for a reasonable compromise between the three criteria of experience, technical skill and personality.

Once chosen, the mediator knows they will also have to work hard to prove their fairness and good sense. It is up to them to be patient and not push too quickly, but be able to seize opportunities instantly. They do not impose anything, but they can shed light on the situation, guide the parties and fire up their imaginations. In this balancing act, they cannot be too flexible or too rigid, nor too weak or too strong. They must be one or the other by turns, as required.

In short, the ideal mediator is a rare bird.

## 2

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### SETTING THEIR PAY

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Far from concerning merely the calculation method and amount of fees, this issue focuses on the role of the mediator, its perception by the parties and the very nature of the service.

Many judicial or institutional mediations concerning individuals or small disputes attract very low, or even no, fees. They reflect the desire of the governments or institutions concerned to offer citizens a free and effective service that relieves pressure on the courts. It also aims to promote alternative dispute resolution methods to people who distrust them. This policy has many public interest benefits, but the disadvantage of conveying the idea that mediation is either an obligation or an inexpensive and low-value service.

Regarding mediation between companies, the issue is that of the fair value of the service. Should - can - the fees received by the mediator depend on the outcome of the mediation? The amount of money at stake? Do such payment methods call into question the principle of neutrality?

The commission has noted that there is an extremely broad range of views on mediators' pay. We can, however, observe some fairly clear trends. When our interviewees belonged to the judicial or institutional

sectors, they tended to believe the mediator's pay should always be very modest, with many arguing for no pay at all. Our interviewees who are general counsels of large groups or chief executive officers tended to believe the mediator's fee was very low given the stakes of the disputes with which they were faced. Some even feel that if the fee is too low, this indicates a lack of experience on the part of the mediator or a lack of understanding of the stakes. Beyond the issue of the mediator's pay, the cost of mediation, if too low, can change the perception of its value.

## **a. Basis for the mediator's pay**

### **■ In judicial mediation**

In judicial mediation, the judge sets the amount the mediator is paid 'at the end of their assignment'<sup>31</sup>. This wording should allow the judge to decide on the amount of the mediator's fees according to the service actually provided. In practice, the judge sets the amount of a service as soon as the mediator is appointed. This amount aims to be 'at a level as close as possible to the expected pay'<sup>32</sup> of the mediator in order to limit any potential disputes related to the amount or collection of the fee. This model was built on that used by experts. In practice, we note a significant disparity, both in the amount of fees received and payment terms. In fact, this practice, provided for by legislators, means the outcome of the mediation cannot be taken into account.

In light of the interviews the commission conducted with various participants, it seems that some judges leave it entirely up to the parties to determine, with the mediator, the amount of the fee or its calculation method, whereas others have a very specific view of what it should be and impose this on the parties.

### **■ In contractual mediation**

In a mediation, the mediator's pay is agreed between the parties and the mediator. There are two cases: the mediation is carried out under the auspices of a mediation centre or it is *ad hoc*, i.e. with no intervention from anyone other than the parties and their mediator.

**Mediation centre.** When the parties contact a mediation centre to attempt to resolve their dispute, they adhere, *ipso facto*, to their mediation regulations, which provide for various rules and payment terms for mediators.

The advantage here is transparency and predictability, which gives the parties the impression that the mediator's pay will be fair since it is the same for all those who contact this centre.

**Ad hoc mediation.** In an *ad hoc* mediation, the mediator's pay is one of many items discussed in advance by the parties or their advisers before signing the engagement letter or mediation agreement.

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31. Article 131-13 of the French Civil Procedure Code.

32. Article 131-6 of the French Civil Procedure Code.

The more experienced and renowned the mediator, the easier it will be for them to secure acceptance of their payment method and amount.

Finally, procedures for setting, paying and sharing the mediator's fee, and the expenses they are likely to incur, are routinely included in the mediation agreement.

## **b. Determining the mediator's pay**

### **■ The baseline: pay based on time spent**

Pay based on time spent is the most commonly adopted method of calculating fees in commercial mediation.

As is the case for legal fees, this calculation method has prevailed over all others mainly because it is fair, objective and easy to understand. Of course, the hourly rate may vary according to the complexity of the dispute, the mediator's expertise or experience and other factors such as, for example, the international, multilingual or multicultural nature of the mediation. Likewise, in the case of co-mediation, the practice varies according to whether it is requested by the mediator or by the parties; in the first case, the fee will generally be the same and in the second, it will be split in half.

The advantage of fees based on time spent is traceability. The disadvantage is unpredictability, since the parties cannot know how long mediation will take.

### **■ The alternative: flat-rate payment**

Flat-rate payment consists of agreeing a fixed amount, paid to the mediator before the start of the mediation, for all their services, however much time they devote to them, over a given period of time, or by setting a maximum number of hours.

The advantage of this method over an hourly rate of pay is the transparency it offers the parties, who know exactly how much the mediation will cost them. It also encourages the parties to devote as much attention as possible to the mediation, since a lack of involvement of their part may result in them having paid the full amount of the fixed fee with no benefit. Finally, it helps make the mediation more effective by setting clear time milestones.

The aim of a flat rate is to replace the quantitative approach related to calculation of time with the qualitative nature of the service. But, evidently, quality is harder to assess than quantity; even more so in advance.

Parties will often tend to think of their dispute as simple and quick to resolve. It will be difficult for the mediator to argue otherwise and therefore to suggest a flat rate that may seem too high to the parties.

One solution is to use a 'safety net' that consists of setting, as a percentage, a higher or lower differential, which can be used to justify increasing or decreasing the flat rate. It will be a time differential compared to the initial estimate that led to the setting of the flat rate. So the concept of time that we thought we'd removed is back...

There is no magic formula and, in any case, the parties must raise the question of payment method and bring it up with the mediator in order to choose the formula with which they feel most comfortable.

### ■ **The taboo: payment by results**

The taboo topic, the controversial issue, is that of higher pay for mediators in cases where the mediation they lead ends in an agreement.

This is not a question of the relationship between the amount of fees and the stakes of the dispute, which is already accepted and practised. Neither the requirement for impartiality, nor independence or even neutrality of the mediator seems to us incompatible with taking into account the amounts involved in the dispute in determining the mediator's pay.

The issue of payment by results is more complex. Can a mediator ask for and receive extra pay solely because the parties reach an agreement amongst themselves? Even better, or worse, can their pay be linked exclusively to the existence of an agreement?

Even within our commission, there were different positions on this issue. This really shows how sensitive it is.

It should firstly be noted that, in the practice of contractual mediation, there is evidence of all possible cases. These range from strong opposition of the parties (or the mediator) to any kind of payment by results to the use of payment by results to the exclusion of all other payments imposed or accepted by the parties.

The main argument of the many opponents of payment by results is that this method of paying the mediator goes completely against their neutrality, which is recognised as a principle which is recognised as a basic and founding principle of any mediation. The more benefit for the mediator in the parties reaching an agreement, the greater the risk that the mediator will unfairly push the parties into agreeing, with little regard for their actual interests. This risk will be even higher if one of the parties is in a position of dependence, economic or otherwise, in relation to the other or is not advised by a lawyer. The mediator's personal economic incentive may take precedence over other considerations. The mediator may no longer pay the necessary attention to the latent and often human, relationship and irrational conflicts that are the basis of the quality or sustainability of an agreement.

The question also arises as to whether payment by results to the exclusion of all other payment should be banned. In addition to giving greater urgency to the issue of the impact of this payment method on the neutrality of the mediator, it can also lead to a situation where the mediator has done their job well, but the parties delay implementation of the agreement, thereby avoiding having to pay them anything.

Supporters of payment by results argue that it would be unfair not to reward the significant time and money savings made by the parties by bringing about an agreement when they had not managed to achieve this on their own, sometimes for a long time, and in cases where litigation would have significant negative consequences for them.

The commission concludes that since mediation is based on the principles of freedom and flexibility, the parties may agree the method of calculation and payment of fees that suits them, but their attention should be drawn to the risk of payment by results having a negative impact on the neutrality of the mediator

# CHAPTER IV



## **MEDIATION: FREEDOM AND SECURITY**

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# 1

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## FREEDOM AND ADAPTABILITY

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The parties are completely free to organise the process themselves as they wish.

The parties can thus choose the discussion forum: plenary meeting, meeting only open to certain parties, unilateral meeting with the mediator, etc. They can also, with the assistance of the mediator, develop this framework, whether it begins with unilateral meetings and moves towards plenary meetings or, on the contrary, begins with plenary meetings and moves on to unilateral meetings with the mediator before, eventually and conclusively, returning to plenary meetings.

The parties, with the assistance of the mediator, may also organise the mediation in such a way as to give it the maximum chance of success.

This free choice is also enjoyed by the mediator, who may change and develop the mediation framework, guided by their experience.

Similarly, and respecting the confidentiality that applies to any mediation, comments made and documents issued by one party may or may not be disclosed to the other party. The mediator may not be the source of the disclosure without the express agreement of the disclosing party.

Moreover, disclosure to the other party is not always necessary, but the information provided by one party and made known to the mediator will allow them to carry out their duties to the best of their ability in order to help the parties reach an agreement.

On the contrary, a party may want the information to be disclosed to the other party by the mediator and in their words, thereby allowing another form of communication.

The number of mediators is also a free choice. The benefit of having multiple mediators is immediately clear, especially in international mediation when the cultures are very different, or there are complex issues, particularly technical matters. Each of the parties can then feel better understood and the mediators' association thus finds it easier to bring the two parties to an agreement.

Finally, last but not least behind freedom, each of the parties, as well as the mediator, can decide to stop the mediation at any time.

All forms of mediation are thus possible, allowing the process to be tailored to best suit the dispute to be handled, the circumstances and the personality of each of the parties. There are a whole range of possibilities to give the best chance for a solution to be developed and accepted.

## 2

## EFFECTIVENESS

Like all alternative dispute resolution methods, mediation has the advantage of giving full freedom in whether or not an agreement is reached. This is one of the key differences with arbitration, which is binding by nature. Furthermore, the mediation agreement is drafted by the parties according to their actual needs, taking into account an overall context. It is not a question of accepting an opinion or recommendation from outside, but in fact drafting a tailor-made agreement.

When the agreement is reached, it has the binding nature and legal status of a contract. In case of mutual concessions, the contract is classed as a transaction, preventing any new legal proceedings for the same purpose (article 2052 French Civil Code).

*'The transaction prevents the introduction or continuation of legal proceedings between the parties for the same purpose.'*

If it is countersigned by lawyers, it even has probative force since it can only be contested through fraud proceedings. Pursuant to article 1374 of the French Civil Code, it is in fact proof of the writing and signature of the parties, with regard both to them and their heirs or assigns. It therefore avoids any writing or signature verification procedures.

*'The act under private signature countersigned by the lawyers of each of the parties or the lawyer of all the parties is proof of the writing and signature of the parties, with regard both to them and their heirs or assigns.'*

*'The fraud proceedings provided for by the French Civil Procedure Code apply to it.'*

*'This act is exempt from any handwritten note required by law.'*

The act could even be registered to be duly dated (article 1377 French Civil Code).

Finally, and most importantly, it is possible for the parties to give the act judicial equivalence by making it enforceable. The act then becomes an enforceable instrument within the meaning of article L. 111-3, para. 1 of the French Code of Civil Enforcement Procedures:

*Judicial or administrative court rulings, when they are enforceable, as well as agreements made enforceable by these courts'.*

The flexibility offered by mediation means the parties are under no obligation to make a request for approval of the agreement because it is possible to settle for enforceability in case of immediate execution or in order to protect the reconciliation achieved. The choice of whether or not to seek approval is thus left to their discretion.

The parties may also apply to the court that would normally have jurisdiction to rule on the underlying dispute to approve the agreement (article 1565 CPC (French Civil Procedure Code)).

They may do so jointly but one party may also apply to the court with the express agreement of the other (article 1534 CPC). It is therefore advisable for the agreement to provide authorisation for one of the parties to apply to the court to request approval. In this case, the person thus authorised may no longer appeal against the ruling of the judge approving the agreement.

The parties may also provide for such authorisation as soon as a clause is drafted providing for the recourse to mediation in case of a dispute. The risk of such an approach, however, is that it may discourage a party from committing in advance to a process whose purpose requires judicial recognition. Yet, since the very principle of mediation is to resolve disputes without the intervention of a judge, approval must remain a mere possibility.

The approval of the judge does not involve an examination of the merits of the case, the terms of which cannot be changed. The judge controls only the existence of the act and its compliance with public order and morality<sup>33</sup>.

When the agreement is made enforceable by a court or entity in another European Union Member State, it is recognised in the same way and declared enforceable in France pursuant to articles 509-2 to 509-7 of the French Civil Procedure Code (article 1535)<sup>34</sup>. It constitutes a European enforceable instrument.

Thus, the solution the parties have chosen for themselves will have the same effectiveness as a ruling if they so wish.

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33. Civil Court of Cassation, Second Chamber, 26 May 2011, appeal no. 06-19-527, *Bull.* 2011, II, no. 120; D. 2011, 2150, Chron. J.-M. Sommer, L. Leroy-Gissinger, H. Adida-Canac and O.-L. Bouvier, *RTD Civ.* 2011, 559, note P.-Y. Gautier.

34. See Art. 6 of directive 2008/52/EC of 21 May 2008.

# 3

## CONFIDENTIALITY

Mediation takes place with due regard to the confidentiality of discussions, which is vital to its smooth running.

This confidentiality is essential to mediation.

During interviews conducted by the commission, we found that too many companies still worry about resorting to mediation for fear of confidentiality breaches. They want reassurance that their secrets will be kept.

They also want to protect themselves against any damage to their image or reputation. This is one of the great attractions of mediation.

Above all, there should be freedom of speech during negotiations in order to find a suitable agreement. The effectiveness of a mediation attempt depends on the trust of the parties in their freedom of speech, which is guaranteed by the confidentiality offered by mediation.

In practice, a formal commitment to confidentiality is entered into by the parties, but also anyone assisting them in the mediation who would not be bound to secrecy by virtue of their duties.

This commitment may result from adherence to the rules of the mediation centre involved or a mediation agreement entered into between the parties and the mediator.

This confidentiality is guaranteed by article 1531 of the French Civil Procedure Code:

*'Contractual mediation and conciliation are subject to the principle of confidentiality under the terms and conditions provided for in article 21-3 of the aforementioned law of 8 February 1995'.*

Article 21-3 of the law of 8 February 1995 states:

*'Unless otherwise agreed by the parties, mediation is subject to the principle of confidentiality.'*

*'The findings of the mediator and statements collected during mediation may not be disclosed to third parties or cited or produced as part of court or arbitration proceedings without the agreement of the parties'.*

With regard to lawyers, the need for confidentiality derives from their ethics. The lawyer is the client's necessary confidant. The professional secrecy to which they are subject is public policy. It is general, absolute and unlimited in time.

Pursuant to the provisions of article 2.2 of the national rules of procedure for the legal profession, the professional secrecy that applies to all lawyer-client relationships covers, on all matters, in the area of legal advice or defence, all materials, whatever they may be (consultations, correspondence, interview notes and, in general, all information or confidences received by the lawyer in the exercise of their profession).

As for the parties, they are bound both by the formal undertaking of confidentiality and by article 1531 of the French Civil Procedure Code. Any information cited in court in breach of this confidentiality would also go against the principle recognised by the Court of Cassation that evidence must be obtained fairly<sup>35</sup>.

However, it is worth remembering that there are two easily understandable exceptions to this confidentiality requirement.

The first concerns compelling public policy grounds or reasons related to protecting the best interests of the child or the physical or psychological integrity of the person.

The second is the need to reveal the existence or disclose the content of the agreement resulting from the mediation in order for it to be implemented or enforced.

It should also be noted that, in this and many other areas, the principle that evidence must be obtained fairly may give way to the right to evidence if the parties have no other way to establish their right.

In order to judge this, the Court of Cassation applies a proportionality test. Of course, the principle that evidence must be obtained fairly may give way to the right to evidence. Indeed, the Court of Cassation has recognised the existence of a real right of evidence enabling the execution of a fundamental safeguard when there is no other way to provide evidence, provided the violation is proportionate to the aim pursued.<sup>36</sup>

However, this limit is not such as to challenge the interests of mediation.

Firstly, except to undermine the enforceability of contracts, case law on the right to evidence shall remain necessarily limited by the proportionality requirement.

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35. Civil Plenary Assembly, 7 January 2011, appeal no. 09-14.316 and no. 09-14.667, *Bull.* 2011, no. 1.

36. Civil Court of Cassation, First Chamber, 25 February 2016, appeal no. 15-12.403: 'Having regard to article 9 of the French Civil Code, taking together articles 6 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and article 9 of the French Civil Procedure Code; whereas the right to evidence can only justify the production of elements that constitute an invasion of privacy on condition that this production is essential to the exercise of this right and that the violation is proportionate to the aim pursued.'

Finally, and above all, these limits to the confidentiality requirement are common to all alternative dispute resolution methods. They are not unique to mediation which, on the contrary, offers greater protection.

The confidentiality attached to mediation remains, in any event, more reassuring for companies than conciliation, which is nevertheless encouraged in commercial courts. Indeed, both the sociological profile of conciliators, who are former *juges consulaires*, and their physical proximity to the court, are often perceived as threats to confidentiality.

## 4

### RIGHT OF ACCESS TO THE COURTS

Mediation attempts are made with the assurance that the right of access to the courts or arbitration is preserved. In fact, the willingness of legislators to promote alternative dispute resolution methods is accompanied by a series of measures aimed at reassuring the parties.

The statute of limitations is thereby suspended pursuant to article 2238 of the French Civil Code when, after the dispute has arisen, the parties decide to resort to mediation or on the day of the first meeting with the mediator.

*The statute of limitations is suspended from the day on which, after the dispute has arisen, the parties agree to resort to mediation or conciliation or, in the absence of a written agreement, from the day of the first mediation or conciliation meeting [...].*

*The statute of limitations begins again, for a period of not less than six months, from the date on which either one or both parties, the mediator or the conciliator states that the mediation or conciliation has finished'.*

The statute of limitations is also suspended when mediation is provided for before the dispute arises, in a mediation clause in the contract, since the agreement is then an impediment to taking legal action within the meaning of article 2234 of the French Civil Code.

*The statute of limitations does not run against a person who is prevented from taking legal action following an impediment resulting from legislation, the agreement or force majeure'.*

Finally, when mediation is put in place even though court action has already been taken, the statute of limitations is interrupted by the legal proceedings pursuant to article 2241 of the French Civil Code and will only resume when the case has been resolved.

*'Legal proceedings, even summary proceedings, interrupt the statute of limitations and the time limit.'*

*'The same applies when legal proceedings are brought before a court that does not have jurisdiction or when court action is cancelled by virtue of a procedural irregularity.'*

Mediation can therefore be carried out without fear of losing the right of access to the courts.

Furthermore, time spent on mediation should not be perceived as time wasted, whether or not it results in an agreement. Indeed, if an agreement is not reached, the dialogue that has been established often at least allows the dispute to settle down. The procedure to follow can thus be improved and accelerated by preparing the case for trial.

# CHAPTER V



## **TEMPTATION TO MAKE MEDIATION COMPULSORY**

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Having identified mediation as an effective process and a serious alternative to litigation, some people are interested in the idea of making the process compulsory.

The aim would be twofold: on the one hand, to create a 'mediation habit' among citizens who had experienced successful mediation, even by force, who would be convinced of its effectiveness and would then resort to it automatically. On the other hand, making mediation compulsory would automatically relieve pressure on the courts since a certain number, even if only a minority, of these disputes would inevitably be resolved successfully.

# 1

## IN FRANCE

It is with this in mind that French legislators have started to put in place compulsory mediation systems.

Thus, under penalty of inadmissibility, the judge may force the parties to resort to a conciliation, mediation or participatory procedure for community disputes or small claims<sup>37</sup>.

The justice system planning bill 2018-2022 also aims to extend the judge's power to order mediation at all stages of the procedure, including appeal and summary proceedings. Thus, the current draft of article 22-1 of the law of 8 February 1995<sup>38</sup> states that: 'At all stages of the proceedings, including in summary proceedings, when an out-of-court settlement of the dispute is deemed possible, if the judge has not obtained the agreement of the parties, he may order them to meet a mediator appointed by him and meeting the conditions provided for by decree in the Council of State. This informs the parties of the purpose and process of a mediation procedure'<sup>39</sup>.

A trial has also been set up from 1<sup>st</sup> April 2018 to November 2020 aimed at testing the effectiveness of compulsory mediation in two types of disputes: social litigation (challenging decisions on the *revenu solidarité* (earned income supplement) and personal housing allowance) and civil service litigation (appeals brought by some public officials against some administrative rulings by a decree of 16 February 2018)<sup>40</sup>.

37. Law of 18 November 2016 on the modernisation of justice in the 21<sup>st</sup> century, article 4. Implementing measures for this article are set out by decree to identify the financial stakes involved.

38. Law no. 95-125 of 8 February 1995 on court organisation and civil, criminal and administrative procedure.

39. Article 2 of the justice system planning and reform bill 2018-2022.

40. Decree no. 2018-101 of 16 February 2018 relating to the trial of a compulsory prior mediation procedure in civil service litigation and social litigation.

Such a trial also exists for some aspects of family litigation at eleven *tribunaux de grande instance*. Article 15 of the law of 13 December 2011 states that 'court action taken by parents for the purpose of changing a decision laying down the procedures for the exercise of parental authority or contribution to child maintenance and education must, under penalty of inadmissibility, be preceded by an attempt at family mediation'. This trial was renewed and extended for a period of three years by law no. 2016-1547 of 18 November 2016 on the modernisation of justice in the 21<sup>st</sup> century.

Finally, some people suggest:

- a requirement to prove that discussions or even negotiations have taken place in good faith before taking court action, which could be penalised by the inadmissibility of the claim;
- removal of article 700 of the French Civil Procedure Code for those who do not agree to take part in a good-faith negotiation to attempt out-of-court settlement of the dispute;
- priority processing, by the judge, of disputes that have been subject to an unsuccessful alternative dispute resolution method<sup>41</sup>.

## 2

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## IN EUROPE

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- ▶ The United Kingdom has opted for purely voluntary mediation. A system has, however, been put in place to (strongly) encourage alternative dispute resolution methods: a party that unreasonably refuses an offer of mediation may subsequently be penalised by the judge<sup>42</sup>;
- ▶ in Germany<sup>43</sup>, states may choose to adopt rules providing for compulsory conciliation and mediation phases for some types of dispute only, which are civil disputes where the amount in issue is less than 750 euros, community disputes and offences against honour and reputation. But in general, recourse to mediation is optional;
- ▶ in Belgium, there is no requirement to resort to mediation. The judge may ask the parties to move towards mediation;

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41. J.-E. Robiou du Pont, "Pour la médiation obligatoire", *Dalloz actualité*, 28 March 2017.

42. Civil Procedure Rules Part 44. See also England and Wales Court of Appeal, *Halsey v Milton Keynes General NHS Trust* [2004], 11 May 2004.

43. Einführungsgesetz zur Zivilprozessordnung, §15 a) (Civil Procedure Code Implementation Act).

► in Slovenia<sup>44</sup>, the judge has the option to ask the parties to attend an information session on mediation, to which only attendance is mandatory. The parties have no obligation to commit to mediation, but must attend this information session. The role of the judge is to inform citizens, and to monitor and govern the work of mediators. Statistics for this country are very positive: 800 mediations in 2008, compared to 2,735 in 2014;

► Italy is the only country that has made mediation compulsory across the board in civil and commercial matters, as a prerequisite for court action<sup>45</sup>. This legislation was adopted in 2010, but was repealed by the Italian Constitutional Court, under pressure from Italian lawyers, in 2012<sup>46</sup>. The legislation has since been revised and the Italians have now opted for a compulsory preliminary information meeting<sup>47</sup> while retaining compulsory mediation for some areas and types of disputes,<sup>48</sup> which must take place before an organisation listed by the Ministry of Justice.

It seems clear that the majority of European countries have chosen not to impose compulsory mediation across the board, but have made it compulsory in some cases according to type of dispute and financial stakes. This is the approach chosen by French legislators.

This trend risks creating the impression that citizens are rejecting mediation even before the advantages of the process have been understood and experienced.

The idea of a compulsory information meeting on the mediation process before resorting to court action is more promising. Awareness is being raised while respecting the wish of the parties to choose whether or not to resort to mediation. The example of Slovenia proves its effectiveness. It has also been tried successfully in France in the social chambers of the Court of Appeal of Versailles.

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44. B. J. Hrastnik, "Mediation in Slovenia", in *Mediation in the EU*, Oxford, 2012.

45. Legislative decree no. 28 of 4 March 2010, implementing article 60 of law no. 69, of 18 June 2009, on mediation in preparation for conciliation of civil and commercial disputes, GURI no. 53, of 5 March 2010 (decree 28/2010).

46. Corte costituzionale, 24 October 2012, judgement no. 272/2012.

47. Decree 69/2013 of 21 June 2013.

48. Banking, insurance, inheritance, medical liability and commercial lease litigation.

# 3

## POSITION OF THE EUROPEAN COURTS

The CJEU and the ECHR have repeatedly considered the pressing issue of whether compulsory mediation complies with the general principles of European law, and the effects of such mediation on the most basic and fundamental right to effective access to the courts. Indeed, it is on this point that the compulsory nature of mediation undoubtedly poses the most problems.

### ■ CJEU

Faced with a similar question on a compulsory conciliation system in telecommunications disputes between consumers and professionals in Italy, the Court of Justice ruled, in a decision on 18 March 2010<sup>49</sup>, that recourse to a compulsory conciliation system was not, in itself, against European Union law. According to the Court, fundamental rights, in particular effective judicial protection, are not absolute prerogatives and can be subject to restrictions provided they meet public policy objectives. In this case, the Court ruled that the regulation imposing compulsory prior conciliation was not disproportionate to the aims pursued.

It also subsequently allowed compulsory mediation, in a case involving a consumer dispute, while imposing several conditions<sup>50</sup> under which such a procedure:

- must not result in a decision that is binding on the parties;
- must not lead to a significant delay in the introduction of an appeal;
- must suspend the statute of limitations of the laws concerned;
- must not generate costs, or may generate only small costs, for the parties;
- must not constitute the only means of accessing the conciliation procedure;
- must not prevent the parties from requesting and obtaining interim measures in exceptional cases where the urgency of the situation requires it.

### ■ ECHR

The European Court of Human Rights has also found that a compulsory prior alternative dispute mechanism is lawful provided it does not substantially affect the right of access to the courts: 'The legal requirement to attempt out-of-court settlement before taking civil court action, under penalty of inadmissibility, does not constitute a substantial impediment to the right of direct access to the courts, provided that the out-of-court settlement process suspends the statute of limitations and, in case of failure, the parties have the option to take action in the relevant court'<sup>51</sup>.

49. CJEU, 18 March 2010, *Rosalba Alassini v. Telecom Italia SpA and others*, C-317/08.

50. CJEU, 14 June 2017, *Livio Menini and Maria Antonia Rampanelli versus Banco Popolare Società Cooperativa*, C-75/16.

51. ECHR, 26 June 2015, *Momčilović v. Croatia*, appeal no. 11239/11.

# 4

## CONCLUSION

Our commission believes that compulsory mediation is the wrong answer, and an illusion

Mediation must, by definition, remain a voluntary process. Each party must express their support for the process and their willingness to commit to it. This is also reflected in European directive 2008/52/EC on some aspects of mediation in civil and commercial matters<sup>52</sup>. Imposing it would go back to forcing the parties and would constitute a real paradox.

As one of our participants, who is also a judge in his country, points out: 'Mediation was founded on the willingness of the parties; it is against its nature to make it a prerequisite to any legal action. The success of the process requires the parties to be convinced from the start of the benefits of mediation in helping them reach an agreement. Forcing the parties to attempt a mediation process would make it a mandatory, routine and purely formal step that would be tantamount to prior compulsory conciliation attempts in industrial tribunals and tribunaux d'instance (district courts) whose objectives have not been met'<sup>53</sup>.

Imposing mediation would have the effect of 'judicialising' it, hence removing its advantage, but also potentially increasing the costs and time required for the procedure, if the parties do not demonstrate a genuine willingness to participate in the process and really want a court ruling. The experience of compulsory conciliation in industrial tribunals is a good example of the ineffectiveness of coercion<sup>54</sup>. The Agostini and Molfessis report highlights the risk of making mediation a purely formal step<sup>55</sup>.

Freedom must always be preserved in mediation. The commission also agrees entirely with the remarks made by a working group established by President Magendie ten years ago:

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52. Directive 2008/52/EC of the European Parliament and the Council on some aspects of mediation in civil and commercial matters, Official Journal of the European Commission (OJEC), L. 136 of 24 May 2008.

53. F. Vert, "Le rapport Magendie sur la médiation : enjeux et perspectives",

*Les Cahiers de l'Arbitrage*, no. 3, 1<sup>st</sup> July 2010, p. 779.

54. The success rate of conciliation boards in industrial cases seems to decrease constantly, as illustrated by several statistical reports: 9% in 2013 (source: InfoStat Justice, August 2015, no. 135), 7% in 2014 (source: notes from the Public Policy Institute, November 2017) and 5.6 % in 2016 (source: Florence Mehrez, "Les affaires aux prud'hommes ont chuté de 15% en 2017", *Dalloz actualité*, 8 June 2018).

55. 'The Group is aware of some expressed reservations. There is a need to prevent recourse to out-of-court settlement as a prerequisite becoming a mere formality, which the parties would prove with a certificate'. See Rapport des Chantiers de la Justice no. 3, *Amélioration et simplification de la procédure civile*, ref. F. Agostini and N. Molfessis, January 2018, p. 25.

*'It seems necessary to provide at least minimal structure to mediation to ensure its development, since individual initiatives have reached their limits, but on the other hand, it would be counter-productive to make it too rigid and lock it into a coding system. This alternative dispute resolution method, where fairness has its rightful place, can only be viewed as a procedure if the informal aspect of mediation is preserved to safeguard its special features, namely flexibility and adaptability. It would also be against the very nature of mediation, based on the freedom and empowerment of its stakeholders, to make it a prerequisite to any court action'<sup>56</sup>.*

In reality, judicial mediation is already classed as forced mediation that no longer meets the criteria of freedom at the level of the parties. Indeed, in front of the judge, no party refuses the mediation suggested or imposed. More seriously, and a new attack on the principle of freedom of the parties, it is often the judge that chooses the mediator! The parties then submit a second time.

Consequently, judicial mediation does not, in our opinion, meet the definition of mediation that forms the basis of this report.

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56. J.-Cl. Magendie (ed.), *Célérité et qualité de la justice. La médiation : une autre voie*, report of the working group on mediation, 2008, p. 12.

# RECOMMENDATIONS



## 1

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### RAISING AWARENESS AND TRAINING

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**D**istrust of mediation and its systems as well as misplaced power struggles, revealed in this report, can be kept to a minimum through better awareness on the part of company decision-makers, whether they are senior management, operational management or, and perhaps especially, financial management and controllers.

Raising awareness could take the form of training modules delivered either internally, by legal departments, or outside the company, by mediation centres<sup>57</sup>.

## 2

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### ETHICAL OBLIGATION TO PROVIDE INFORMATION

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**T**he national rules of procedure for the legal profession should be amended to make providing information on mediation an ethical obligation for lawyers..

The aim of this obligation would be twofold: on the one hand, to allow clients experiencing a dispute to make a fully informed choice between litigation or mediation, and on the other hand, to protect lawyers against the perception by clients of a weakness on their part if they suggest mediation.

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<sup>57</sup>. See Annex IV, p. 80.

# 3

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## CREATION OF A CENTRALISED STATISTICAL TOOL

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The aim is to identify, with an adequate level of reliability, the number of mediations carried out in France and their effectiveness. This could be achieved quite easily by creating a national statistical tool given information by mediation centres and mediators themselves on a voluntary basis, outside of any government intervention or participation.

The list of centres participating and providing data would be public. Each centre would have the right to secure access to the tool.

Basic information in the database should include:

- the nature of mediation (inter-company, intra-company, other);
- the financial stakes involved by bands (five or six at most);
- the existence of judicial or arbitration procedures at the time when the parties decided to attempt mediation;
- the outcome of the mediation.

# 4

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## AMENDMENT OF ARTICLE 1534 OF THE FRENCH CIVIL PROCEDURE CODE

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Article 1534 of the French Civil Procedure Code allows either of the signatory parties to a settlement agreement at the end of a mediation to request its approval from the judge on condition that it has first obtained the express agreement of the other party<sup>58</sup>.

The commission proposes removing this requirement for prior agreement so that approval requests can be made unilaterally. Allowing each party to strengthen the agreement resulting from the mediation would further strengthen its judicial security and the trust the parties can place in it.

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58. Article 1534 of the French Civil Procedure Code: 'Request for approval of the agreement resulting from the mediation is submitted to the judge at the request of all parties to the mediation or one of them with the express agreement of the others'.

# CONCLUSION



Mediation, as defined in this report<sup>59</sup>, has already amply demonstrated its effectiveness. Quick, reasonably priced, confidential, flexible, simple, non-aggressive, non-prejudicial and, above all, effective, it is perfectly suited to the needs and expectations of companies in the 21<sup>st</sup> century, whereas judicial litigation is increasingly less so.

We hope we have shown in this report that the reasons it has not yet developed to its full potential are due mainly, on the one hand, to the mistrust of many stakeholders in the business world and, on the other hand, power or status struggles, often subconscious and in any case unspoken, that come into play at the moment when mediation could, or should, be considered.

We hope that in-house and outside lawyers convinced of its usefulness, before or after reading this report, take the time and effort to explain all its benefits for company managers who have not read it, especially if they think in terms of financial cost, but also in terms of saving time, energy and social capital.

Mediation can then become the main instrument for settling disputes between companies. They would benefit a lot, but so would the courts on whom pressure would be relieved, lawyers who would be considered by their clients as problem solvers and, more generally, their contract partners. There will be something for everyone, which is the very foundation of mediation.

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59. See *supra*, p. 13.

# ANNEXES



## 1

# HISTORY OF MEDIATION

This text is taken from Mrs Cardinet's thesis: *La Médiation en France, aujourd'hui, et ses applications dans le secteur scolaire : ses références, ses significations, ses pratiques*<sup>60</sup>.

The first appearance of a word in a language, in literature, is a good benchmark: the fact that a writer is using it means that, unless they coined it for the purposes of their work, it is drawn from the vocabulary in use around them at that time, even just in a specific field.

The new etymological and historical dictionary cites Jean de Meung, the continuator of *Roman de la Rose* started by Guillaume de Lorris, as the first user of the words mediation and mediator in French literature in the 13<sup>th</sup> century. At the same time, by naming Vulgar Latin as the origin, it gives the assurance that it was not a new construction by the author.

### ■ **Mediator:**

- ▶ 1265, Jean de Meung, from the Vulgar Latin mediator, media, mediate and médius, that which is in the middle.

UA Latin origin is thus suggested. The use of terms with *med-* as a root, meaning something like intermediary, never seems to have been lost, at least in some specific fields.

The construction of words with the suffix *-tor* alludes to an action. The mediator acts; the purpose of their action is revealed by the *-med* root. A mediator is someone who acts in the middle. What is the meaning of the *-med* root common to several Latin words?

### ■ **The Latin root *med-* through the meanings of *medio* and *médius***

The verb *medio*, which did not give rise to the verb in French, may be the origin of the verb *médialter* reported to be in use in the 10<sup>th</sup> century.

#### ■ **Medio-are (medius):**

- ▶ split in two,
- ▶ intransitive,

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60. A. Cardinet, *La médiation en France, aujourd'hui, et ses applications dans le secteur scolaire : ses références, ses significations, ses pratiques*, ed. G. Avanzini, Lyon 2, 1998.

- ▶ to be in the middle, to be in half,
  - ▶ to mediate;
- **Medius, a, um (short e and i):**
- ▶ that which is in the middle → central,
  - ▶ that which constitutes the middle of something,
  - ▶ when talking about time, temporary,
  - ▶ in the meaning of medium:
    - ▶ between two extremes,
    - ▶ between two parties, two opinions,
  - ▶ in direction: participant in two opposing matters:
    - ▶ mediator, one who is in the middle of everything and participates in two extremes at once, hence the use by Tite-Live (59 BC – 17 AD), leading us to the concept of two opponents, both at the same time: "*Medium erat in Anco ingenium et Numae et Romuli memor*", the character of Ancus was somewhere in between, participating in the story of both Numa and Romulus, in *Ab urbe condita libri* 45, 1, 32, 4.

Finally, it is noted that Virgil, in Aeneid, in 29 BC, uses the word *medius* and not *mediator* to refer to one who puts themselves forward as a mediator of peace.

As we can see, the root in itself contains opportunities for ambiguity from the start due to the abstract and intangible notion of middle, which it in fact expresses as an absolute.

Another area for discussion and ambiguity is suggested by the linguist Émile Benveniste, who finds in this Latin root *med-*, the verb *medeor*: to cure, in the sense of restoring order where it has been disturbed (where doctor comes from), and puts this together with the Greek root, which means to take care. Then he brings it together with an Irish root, which gives the meaning of 'judge', and leads us to the concept of authority, power to exercise discretion, another kind of order. The Osci (people of the central Apennines, whose language was similar to Latin) called the main municipal judge a *meddix*: the root is thus related to *iudicium*. In various other forms, we can see the Greek *médomai*: meditate, reflect, invent, therefore mentally weigh up - a meaning shared with the Latin *meditor*. But above all, by linking these various meanings, he sought to extract the concept of a 'measurement' that would allow us to solve quite a few problems in their particular field of application. That led him to consider the similarities in their derivatives, between the two legal terms *med-* et *ius-* (where justice comes from). Gradual developments in the concepts of law and justice, in each country, led to their differentiation and the divergent meanings of their derivatives.

Thus, it seems clear that the use of mediator and mediation in ancient civilisations, the philosophical, theological and legal context of which we are particularly familiar with, is the origin of their use in French. The choice of the construction "*media-tor*", one who acts in the middle, was made in a context in which there were existing concepts of *intemuntius*, the messenger, *conciliator*, one who was favourable, and *medius*, the mediator of peace. Its creation must therefore have met a need not covered by these words. The root is clear: it refers to someone, or something, that is in the middle and/or split in two.

Old French keeps these two extremes: *mediator* represents division and/or a relationship. In the 1<sup>st</sup> century AD, this construction was invented to translate a concept that appeared in this language as far back as the 3<sup>rd</sup> century BC: *mesites* is either an arbitrator, someone who decides between two things; or an intermediary, someone who intervenes and makes connections. Their role is, alternatively and in a complementary way, all at the same time, a contact person, a negotiator, a conciliator of opponents and an arbitrator.

This concept has its origins even further back in the Middle East, where it meant this specific role of making connections, which was absolutely essential because the two parties were too far apart from each other: deities, and humans. Both bottom-up and top-down, this role could only be filled by someone of a human and divine nature, represented firstly by a demi-god, then by the king, and later by the clergy.

Mediation existed at the dawn of our era, in the legal and social spheres, usually at the request of at least one of the parties, when there was conflict, or the risk of conflict, or problems with communication and understanding. Mediation is carried out either through intervention, in the case of unilateral mediation, or the (re)establishment of communication, in the case of bilateral mediation.

A mediator is someone who intervenes in this dispute or problem, being recognised as someone with the authority to do so by virtue of their nature, their role or their knowledge of the circumstances of the problem. In the case of disputes between human beings, mediators separate the warring parties, move the problem from the realm of emotion to the realm of reason, propose solutions, and restore justice by referring not to the law, but to moral values, with the notion of compensation if damage has occurred.

The mediator is necessary if the gap between the ideas of the two parties is too wide to reduce. We expect their presence to restore lasting peace, the dispute having been resolved through a shift in the understanding of the situation by the various protagonists. Their very presence is a sign of mediation; their words take a back seat. This is what distinguishes them from commercial ambassadors or

negotiators, or even mere arbitrators. There is something about the mediator, in their very nature, that sets them apart from other, similar roles. They maintain a proactive role that can be very important.

To summarise this philological study:

Although the tradition of the concept and practices of mediation is very much rooted in the origins of our civilisation, it seems to have been preserved most strongly in Christian theology. Here, the prevailing view is that of a mediator whose unique nature allows them to take on this role and whose duties are twofold: to bring together, from the top down and from the bottom up, parties that are too far apart to build this relationship on their own.

Legally speaking, the concept shifts towards peacemaker, in a conflict setting, and the words 'intermediary' and 'dispute' are associated with it. Although it has not disappeared entirely, the term has been replaced by the concepts of negotiation and arbitration which, moreover, correspond more closely to the practices they cover. It should be remembered, as something that undoubtedly begins to explain this phenomenon, that practices for managing social relationships in western Europe are not the same as those that had the force of law in the ancient Mediterranean region or in eastern countries, where nomads mainly settled, and are the birth place of the concept of mediation for social issues. The abstract concept of mediation began to be visible from the late 18th century. It developed alongside the use of the term to refer to the intervention of a third party between protagonists in conflict or at risk of conflict. The concept of a third party remains important since mediation, in its abstract form, is used to connect those who cannot be connected naturally. The contrast between mediated and unmediated is driven by etymological origin, even if this is not made clear as such by ancient texts. There is a lot of consistency in these various uses. We expect mediators to maintain or build relationships between individuals, parties and ideas that are too opposed for this to be done without their presence. If it can be applied to concepts, thoughts, abstractions, the interpersonal method is not the only possible form of mediation. The role of words is increasingly important compared to the nature of the mediator. Where the latter is enough, talks take centre stage to explain, convince and communicate. We expect mediation to make a change that will be demonstrated through the relationship established.

# 2

## GLOSSARY

Although the French Civil Procedure Code gives a definition of mediation and judicial mediation, we thought it might be useful to give readers of this report an overview of the many other definitions of the various forms of mediation and some terms that are specific or similar to mediation. There are many legal definitions of unequal value, since some are institutional and others purely doctrinal. The sole purpose of this by no means exhaustive selection is to demonstrate both what they have in common, and also what sets them apart.

■ **Arbitration:** although France has one of the most sophisticated legislative and jurisprudential corpora on arbitration, the French Civil Procedure Code does not give any definition of it. Here is ours: 'Contractual dispute resolution method conducted by recourse to one or more private individuals, the arbitrator(s), who carry out the judicial assignment entrusted to them by the parties. The award rendered cannot be appealed. Arbitration is referred to as international when it involves the interests of international trade'.

■ **Judicial conciliator**

- ▶ Private individual who, at the request of the judge or the parties,<sup>61</sup> aims to facilitate out-of-court settlement of the dispute before them. They are often former *magistrats consulaires*.
- ▶ Person whose 'task is to seek out-of-court settlement of a dispute under the terms and conditions provided for in the French Civil Procedure Code'<sup>62</sup> (articles 129-2 et seq.).

■ **Contractual conciliation:** the parties may contractually request the assistance of a conciliator to whom they entrust an assignment that aims to find a solution to the dispute between them. This practice allows the parties to free themselves from the rules or processes of mediation, for example by asking a conciliator to give an opinion.

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61. Conciliation is compulsory for all disputes subject to declaration at the court registry (article 4 of law no. 2016-1547 of 18 November 2016 on the modernisation of justice in the 21<sup>st</sup> century) involving an amount below 4,000 euros, under penalty of inadmissibility that may be pronounced ex officio by the judge. The justice system planning and reform bill refers to a decree to raise the amount to €5,000 and adds community disputes to this provision (article 2).

62. Article 1 paragraph 1 of decree no. 78-381 of 20 March 1978 on judicial conciliators.

■ **Judicial conciliation:** practice carried out mainly in commercial courts and *tribunaux d'instance*. The judge decides whether the litigation presented to them warrants out-of-court settlement. 'It is part of the judge's role to reconcile the parties' (article 21 of the CPC). Conciliation can be initiated by the judge at any time during legal proceedings, when he believes the time is right. He can perform this role himself or delegate his power of conciliation to a conciliator of his choice<sup>63</sup>. The judge overseeing the conciliation of the parties draws up a conciliation report. The appointed conciliator draws up a record of agreement signed by himself and the parties.

■ **Industrial conciliation:** the French Labour Code contains specific provisions making conciliation mandatory and binding. Conciliation constitutes a prerequisite to court action.

■ **Dispute Adjudication Board (or Dispute Review Board):** this dispute resolution method is often used in contracts for long and complex projects. The parties commit in the first instance to submitting their disputes to one or three experts (the panel), chosen by themselves or an independent authority. They ask this expert or panel to issue a recommendation or, more rarely, to decide on a solution. In the latter case, this decision may subsequently be challenged before an arbitration tribunal. Documents and information exchanged during this DAB or DRB procedure may be used as part of subsequent legal or arbitration proceedings.

■ **Business ombudsman:** established in its current form by decree of 14 January 2016, the business ombudsman is a public service under the authority of the French Ministry of the Economy and Finance. Any public or private company encountering problems, particularly in their business relationships with a third party can turn to it. Its role is to help them resolve their contractual or relationship problems. Its intervention is free of charge for the parties.

N.B. The term mediation in this context is used in the sense of intermediary who, as a result of their authority, is tasked with reconciling the opposing parties. This is not the definition of mediation used by our commission.

#### ■ **Mediation**

► The legal definition of mediation is given by article 1530 of the French Civil Procedure Code: 'Contractual mediation and

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<sup>63</sup> The parties may undergo conciliation, on their own initiative or that of the judge, at any time during the proceedings. Unless otherwise stipulated, conciliation is attempted at the place and time deemed beneficial by the judge. The parties can always ask the judge to oversee their conciliation (articles 127, 128 and 129 of the French Civil Procedure Code).

arbitration covered by this title include, pursuant to articles 21 and 21-2 of the aforementioned law of 8 February 1995, any structured process whereby two or more parties attempt to reach an agreement, without recourse to any legal proceedings, with a view to resolving their differences, with the assistance of a third party chosen by them who carries out their assignment impartially, competently and diligently.<sup>64</sup>

Other definitions do not combine conciliation and mediation and endeavour to highlight either the purpose of the latter, or the features of the process itself.

For example:

- ▶ 'Mediation is a voluntary, confidential, out-of-court dispute resolution process. Its aim is to offer warring parties the intervention of an independent and impartial third party trained in mediation, who helps them reach the best negotiated solution and, in all cases, in their respective best interests, ending the dispute. The mediator is not a judge, or an arbitrator, but rather a 'catalyst' whose task is to facilitate and enable negotiations between the parties in order to help them find a solution to their dispute themselves. It is therefore not their job to decide the dispute'<sup>64</sup>.
- ▶ 'Mediation is a clearly structured and organised process to re-establish communication and dialogue between the parties, led by a neutral third party, the mediator, who must help the parties re-establish dialogue, so they can find a solution to the conflict themselves. Mediators are interested in the dispute and not in litigation, unlike conciliators. As such, mediation requires a voluntary approach by the parties, time and, to rule out the possibility of profiting from it, mediators offer the parties a solution to the dispute, unlike conciliators'<sup>65</sup>.
- ▶ In the context of this report, our commission has used the following definition: 'Mediation is a process whereby two or more individuals or legal entities involved in a relationship entrust to an independent, neutral and impartial third party (and sometimes two parties) the task of helping them to resolve a dispute between them when communication within the relationship has become dysfunctional'.

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64. CMAP website

65. See Larribau-Terneyre and A. Lecourt (ed.), *Réflexion sur la notion et le régime de la médiation au sein des modes amiables de résolution des différends à partir des expériences de médiation dans les ressorts des cours d'appel d'Aquitaine, de Paris et de Lyon*, report for the Law and Justice Research Mission, July 2017, p. 199-200.

### ■ Contractual mediation

- ▶ Contractual mediation occurs at the initiative of the parties (often their advisers). The parties choose to appoint a third party, the mediator, to guide their efforts to resolve their dispute. The mediation process can be undertaken at any time, before court action or arbitration, or during proceedings. A contractual mediation agreement may be approved on request submitted to the judge by all the parties or by one of them with the express agreement of the other(s) (article 1534 CPC). Through this request, the parties ask the judge to make their agreement enforceable.

■ **Consumer mediation:** professionals offering consumers the sale of a good or service are obliged to inform them that they have the right of recourse, free of charge, to a consumer ombudsman with a view to the out-of-court settlement of any dispute likely to occur as a result of this sale<sup>66</sup>. In this context, the professional must in particular provide clear and visible contact details of the relevant ombudsman or ombudsmen. Consumer ombudsmen must be accredited by the mediation assessment and review committee. However, in the eyes of the authors of this report, the consumer ombudsman seems more like a conciliator than a mediator.

Here is the definition given by the French Ministry of the Economy, Finance, Action and Public Accounts on its portal<sup>67</sup>: 'Consumer mediation refers to an out-of-court dispute settlement process, whereby a consumer and a professional attempt to reach an agreement to resolve a dispute between them amicably with the assistance of a third party, a mediator. In the absence of an amicable agreement between the parties, the mediator suggests a solution to resolve the dispute. It is therefore an alternative to often lengthy and costly legal action. The consumer nevertheless retains the option of court action if mediation is not successful.

### ■ Family mediation

- ▶ 'Family mediation is a time for listening, discussion and negotiation that allows the needs of each party (children, third parties, grandparents, parents, heirs, etc.) to be taken into account in a very practical way. Its purpose is to quell the conflict and maintain family relationships. It is a structured and confidential out-of-court resolution method for family disputes that aims to reach a mutually acceptable solution'<sup>68</sup>.

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66. See Regulation (EC) no. 2006/2004 of the European Parliament and of the Council of 27 October 2004; Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009; Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013; ruling no. 2015-1033 of 20 August 2015 on the out-of-court settlement of consumer disputes.

67. <https://www.economie.gouv.fr/mediation-conso>

68. <https://www.service-public.fr/particuliers/vosdroits/F34355>

- ▶ Process whereby an impartial third party (the family mediator), who is independent, qualified and has no decision-making powers, endeavours to help those involved in family affairs (the family in all its diversity) to maintain, rebuild or organise peaceful relations. In family law, mediation is a prerequisite to any court action. Family mediation appeared under the law on the exercise of parental authority in 2002 and in divorce cases in 2004. A recognised qualification in family mediation was created in 2003<sup>69</sup>.

### ■ Judicial mediation

- ▶ Judicial mediation is provided for in article 131-1 of the French Civil Procedure Code in these terms: 'The judge hearing a dispute may, after obtaining agreement from the parties, appoint a third person to hear the parties and compare their points of view to allow them to find a solution to the dispute between them'.

Again, other doctrinal or jurisprudential definitions provide different perspectives or useful clarifications.

- ▶ Judicial mediation is a 'contractual dispute resolution method used in court proceedings, whereby the judge hearing a dispute, after obtaining the agreement of the parties, appoints a paid third party under their supervision to compare their respective points of view and help them find a solution to the dispute between them'<sup>70</sup>.
- ▶ 'Judicial mediation involves entrusting to an impartial and qualified third party, with no authority to make a decision on the merits of the case (the 'mediator'), the task of hearing the opposing parties and comparing their points of view through interviews, whether joint or individual, in order to help them re-establish communication and find mutually acceptable agreements themselves'<sup>71</sup>.

■ **Alternative dispute resolution (ADR):** acronym for alternative dispute resolution (equivalent: ACR for conflict). Alternative dispute resolution method is a generic term that is currently understood to include various processes that all allow the parties to attempt, with or without the assistance of a third party, jointly to seek a contractual, out-of-court solution by comparing their

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69. Decree no. 2003-1166 of 2 December 2003 on the creation of a recognised qualification in family mediation.

70. Definition given by J. Joly-Hurard, Vice-President answering directly to the First President of the Court of Appeal of Versailles, entry-level auditor at the Court of Cassation, in "Conciliation et médiation judiciaires", Thesis submitted in 2002 under the supervision of Serge Guinchard – Paris 2.

71. Definition of the Court of Cassation and GEMME, *BICC Hors-série : La médiation*, available at: [https://www.courdecassation.fr/publications\\_26/bulletin\\_information\\_cour\\_cassation\\_27/hors-serie\\_2074/mediation\\_8925.html](https://www.courdecassation.fr/publications_26/bulletin_information_cour_cassation_27/hors-serie_2074/mediation_8925.html).

points of view and their respective claims. It refers to all out-of-court dispute resolution methods as an alternative to litigation or arbitration. It refers mainly to conciliation and mediation.

■ **Participatory process:** process that involves the opposing parties signing a contract whereby they commit to working together in good faith<sup>72</sup> to find an out-of-court resolution to their dispute. Assistance from a lawyer is mandatory. The statute of limitations is legally suspended for the duration of the process.

■ **Transaction:** agreement whereby the parties end a dispute by agreeing, under a contract, to grant mutual concessions (article 2044 of the French Civil Code). An agreement reached in this way has the force of *res judicata*<sup>73</sup>.

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72. Article 2062 of the French Civil Code.

73. Article 2052 of the French Civil Code: 'The transaction prevents the introduction or continuation of legal proceedings between the parties for the same purpose'.

# 3

## LIST OF BASIC LEGISLATION ON MEDIATION

	MEDIATION	CONCILIATION
<b>LEGISLATION</b>	<b>Contractual:</b> art. 1532-1535 CPC <b>Judicial:</b> art. 131-1 to 131-15 CPC	Art. 127-130 CPC
<b>DEFINITION</b>	Structured process whereby two or more parties attempt to reach an agreement with a view to the out-of-court resolution of their differences, with the assistance of a third party chosen by them who carries out their duties impartially, competently and diligently	Structured process whereby two or more parties attempt to reach an agreement with a view to the out-of-court resolution of their differences, with the assistance of a third party chosen by them who carries out their duties impartially, competently and diligently
<b>BINDING NATURE</b>	NO <b>Except for:</b> <ul style="list-style-type: none"> <li>■ family mediation trial at 11 TGIs to request changes to parental authority or the obligation to contribute to child maintenance</li> </ul>	NO <b>Except for:</b> <ul style="list-style-type: none"> <li>■ social cases at industrial tribunals or divorce cases</li> </ul>
	<b>Exception provided for in article 2 of the justice system planning and reform bill 2018-2022:</b> except where a claim relates to a community dispute or payment of a sum of money not exceeding an amount to be set by decree in the Council of State. Under penalty of inadmissibility that may be pronounced ex officio, court action in a <i>tribunal de grande instance</i> must be preceded by an attempt at conciliation, mediation or a participatory process. The legislation does, however, provide exceptions.	

<b>CONDITIONS</b>	<b>JUDICIAL:</b> Period of 3 months, renewable once	<b>JUDICIAL:</b> Period of 3 months, renewable once  Recourse to a judicial conciliator (statute D. 20 March 1978)
<b>PAID FOR BY LEGAL AID</b>	YES	YES
<b>EFFECT ON THE STATUTE OF LIMITATIONS</b>	<b>Contractual:</b> Suspension of the statute of limitations (article 2238 French Civil Code)  <b>Judicial:</b> interruption to the statute of limitations to table the findings or file a cross- appeal if ordered by the judge (article 910-2 CPC)  No effect on the statute of limitations	<b>Out-of-court:</b> Suspension of the statute of limitations (article 2238 French Civil Code)  No effect on the statute of limitations
<b>REQUEST FOR APPROVAL OF THE OUT-OF-COURT AGREEMENT</b>	All parties or One party with the express agreement of the others (article 1534 CPC)	All parties or One party with the express agreement of the others (article 1541 CPC)

# 4

## REPORT ON THE STATE OF PLAY OF TRAINING IN MEDIATION

Training courses vary significantly in both content and number of hours. Some training courses lead to a qualification and others do not. This leads to, if not confusion, at least a significant disparity in training.

Furthermore, the conditions for including mediators on lists drawn up by appeal courts are very vague<sup>74</sup>. Many cases have also been submitted to the Court of Cassation, which ruled in favour of a strict interpretation of the conditions set out by the legislation<sup>75</sup>.

Similarly, the attempt by the National Council of Bars to force lawyers who want to practise as mediators to be listed with the National Centre for Mediation Lawyers (CNMA) has been ruled on negatively by the Council of State<sup>76</sup>.

### ■ For judges and court officials<sup>77</sup>

Judges can only suggest mediation if they know how it works. However, it seems that this knowledge can be improved through training. Judges have only been made aware of mediation in basic training since 2017. Training does at least exist, therefore, but it could be stepped up. Ongoing training has a longer history, but encounters problems associated with the opportunity for judges to attend it, due to lack of time.

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74. See decree no. 2017-1457 of 9 October 2017 on mediators listed by appeal courts. On this point, see also P. Bertrand, "La liste des médiateurs dans chaque cour d'appel, nouvelle exigence de la loi J21", *Gaz. Pal.*, 14 February 2017, no. 7, p. 17; B. Gorchs-Gelzer, "Regard critique sur le décret n° 2017-1457 du 9 octobre 2017 relatif à la liste de médiateurs auprès de la cour d'appel", *D. et proc.* 2017, 246; F. Vert, "Premières listes de médiateurs dans les cours d'appel : un dispositif légal perfectible", *Dalloz actualité*, 29 October 2018.

75. Four judgements: Civil Court of Cassation, Second Chamber, 27 September 2018, appeal no. 18-60.116, *unpublished*; Civil Court of Cassation, Second Chamber, 27 September 2018, appeal no. 18-60.091, *forthcoming*; Civil Court of Cassation, Second Chamber, 27 September 2018, appeal no. 18-60.132, *forthcoming*; Civil Court of Cassation, Second Chamber, 27 September 2018, appeal no. 18-60.115, *unpublished*.

76. Council of State; no. 411373. Listed in the tables of the Lebon report.

77. Ministry of Justice, op. cit. : *proposition 4.3.1.3 Incorporate ADR into training programmes for judges and court officials*.

### ■ For lawyers

Law courses in most universities are based on the culture of litigation and ADR has a less prominent place, even though it should be included in programmes and taught as an integral part of civil proceedings. Reform of CRFPAs (regional bar schools) is moving things in this direction by incorporating alternative dispute resolution methods into civil proceedings<sup>78</sup>. This progress must go even further, in particular by incorporating courses on negotiation.

These are often missing from basic training programmes in bar schools.<sup>79</sup> Ongoing training provides a wider variety of options and bars offer training modules for practising lawyers, which are unfortunately not mandatory. It is true that the Paris Bar set up the EIMA (international school of mediation and arbitration) in 2013. Despite everything, this ongoing training is not mandatory.

### ■ For notaries

There is no specific module on mediation or, more broadly, alternative dispute resolution methods, in basic training for notaries. However, training on mediation offered by private institutions may be counted as ongoing training by the Conseil supérieur du notariat (French Notary Board). It is, however, important to note that neither the ADSN nor the INAFON (the main training organisations for notaries) offer such training. Notary mediation centres (17 in total around the country) may offer training, but there is no coordination at the national level to train all notaries. There is only awareness-raising, which should be strengthened.

### ■ For companies

Mediation still has far too low a profile in basic training modules in business and engineering schools. Some have chosen to include it in the curriculum, but it remains optional<sup>80</sup>, even though these students are future managers and operational staff who will soon be in charge of companies. If they are not made aware of this process, the litigation culture will not change.

Trade unions such as the MEDEF and the CGPME, federations and business organisations (networks, clubs, etc.) do not seem very involved in making their members aware of mediation.

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78. Article 5 of the judgement of 17 October 2016 setting out the syllabus and arrangements for the entrance exam for the centre régional de formation professionnelle d'avocats (regional bar school).

79. It should, however, be noted that basic training at the HEDAC (a law school in Versailles) includes a compulsory module on mediation. The EFB [Paris bar school], for its part, has a very short introductory training course on mediation and offers the option of additional training for a fee.

80. Non-exhaustive list: ESSEC, EM Lyon, Skema, Toulouse Business School, EM Normandie, HEC and EDHEC in partnership with the CMAP, Centrale Paris in partnership with the CMAP.

Mediation is still not well known among those responsible for training in companies. Today, it is up to professionals to take the initiative by taking an interest in mediation and looking for a training course. Furthermore, when lawyers are convinced of the benefits of mediation, there are ad hoc internal company training programmes to meet the needs of decision-makers.

However, there are too many training courses on offer both by universities (in the form of Master II degrees)<sup>81</sup> and in private ongoing training organisations. On the other hand, educational institutions and organisations representing stakeholders in mediation are not very involved in the need to provide training on mediation. It is therefore up to professionals to take up the issue and train themselves.

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**81.** Non-exhaustive list: Paris II, Paris Nanterre, Lyon 2, Institut catholique de Paris, La Rochelle, Toulouse 1 Capitole, Tours, Paris 3 Sorbonne Nouvelle, Nice Sophia Antipolis, Lille, Clermont-Ferrand, Paris Descartes, Montpellier, Luxembourg, etc.

# 5

## EXAMPLE OF A MEDIATION AGREEMENT FROM THE NATIONAL FEDERATION OF MEDIATION CENTRES (FNCM)

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### ■ 3 – Confidentiality

The Parties 'agree that mediation is a totally confidential process, which has the following consequences.

- ▶ 'The Mediator' and all participants who may be associated with the mediation process must maintain the confidentiality of the entire process as well as any information disclosed during it;
- ▶ Confidentiality covers all documents and exchanges of which 'the Mediator' is aware, including outside of plenary and breakout sessions, from the start of discussions and correspondence in preparation for this agreement;
- ▶ Neither of the Parties may ask the 'Mediator' at any time to inform them of conversations held with the other Party during mediation, unless expressly authorised by 'the Parties' or by the 'Party' that made these comments;
- ▶ 'The parties undertake not to ask the 'Mediator' to testify in court or any other proceedings.

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# 6

# MEDIATOR'S CHARTER (CMAP)

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## MEDIATOR'S CHARTER 2019

# 1

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## INDEPENDENCE, NEUTRALITY AND IMPARTIALITY OF THE MEDIATOR

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The mediator must be independent, neutral and impartial with regard to the parties. Where applicable, they must inform them, and the Secretary-General of the CMAP, of circumstances that, in the eyes of the parties, would affect their independence and/or impartiality. Their assignment may only be confirmed or continued following a ruling by the mediation Commission and with the written agreement of all parties.

The mediator appointed by the Commission signs a declaration of independence.

If, during the mediation process, the mediator becomes aware of anything that could call into question their independence and/or impartiality, they must inform the parties of this. If they agree in writing, the mediator shall continue their assignment. Otherwise, they shall suspend the mediation. The mediation Commission shall then suggest a replacement for the mediator.

## 2

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### THE DUTIES OF THE MEDIATOR

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Article 7 of the mediation regulation states that ‘the mediator assists the parties to reach a negotiated solution to their dispute. They are responsible for how they carry out their duties, in good faith and with respect for the interests of each party. If they consider it useful, they may hear the parties separately’.

The mediator has no authority other than that resulting from the trust placed in them by the parties.

They are neither judge nor arbitrator, but seek a negotiated solution along with the parties to reconcile their points of view.

The mediator undertakes to comply with CMAP regulations, in particular with respect to time periods.

The mediator undertakes to provide the CMAP with attendance sheets (with all the contact details of participants in mediation meetings) and fee validation sheets.

## 3

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### THE MEDIATOR AND THE PARTIES

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To organise their duties, the mediator contacts the parties as soon as possible after accepting the assignment.

They obtain the agreement of the parties to hear each of them separately, if they see fit. In this case, they commit to striking a balance between the parties.

The mediator analyses each party's position in the dispute and ensures they fully understand the other's position.

To this end, they may suggest areas for discussion, but the mediator may not, under any circumstances, seek to impose a solution, in particular on a party that is manifestly in a position of weakness.

In their approach, they take into account fairness but also the expectation of the parties with regard to the agreements entered into.

If their assignment is successful, the mediator invites the parties to formalise their agreement in writing. He does not sign this document, to which he himself is not a party. However, at the request of the parties, he may affix his signature to confirm the materiality of the agreement. In this case, he precedes his signature with the words 'in the presence of Mr. X, mediator appointed by the CMAP'.

## 4

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### SECURITY AND CONFIDENTIALITY

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**T**he mediator is bound by secrecy within the context of the dispute brought before him, whether in regard to the existence of mediation or any other aspect.

Secrecy is general, absolute and unlimited in time. The mediator may only be relieved of his duties under the terms provided for by law.

## 5

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### END OF THE MEDIATOR'S ASSIGNMENT

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**T**he mediator is forbidden from maintaining a professional relationship with either of the parties for a year following completion of his assignment.

Once the agreement has been signed or the failure of mediation has been recorded, the mediator's assignment is complete. From this date, the mediator may not intervene in any way in relation to the dispute or its resolution, except at the request of all parties and after informing the Secretary-General of the CMAP.









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