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Mediation for lawyers (e-manual)

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Introduction

The purpose of this paper is to present the reader an outline of how a typical mediation develops.

There are little or no mandatory rules. The mediator is free, with the cooperation of the parties, to organize his role as he thinks is appropriate. Practice shows, however, that, one way or another, there are a number of steps that need to be accomplished in the right order for the mediation process to have a reasonable chance of success. The indications provided in this paper are derived from the practice of mediation in commercial matters and in family conflicts. Notwithstanding some major differences between both types of mediations, generally speaking similar techniques and management of the process will be observed.

When, why and how refer a matter to mediation?

Mediation is possible in all matters in which the parties are free to dispose of their own rights[1]. One would not, for example, see mediation as being possible in a dispute relating to paternity or to matters of public order.

Mediation may be initiated by the parties, by a judge or may be rendered obligatory by law.

CHAPTER ONE – THE ROLE OF THE MEDIATOR

Generally speaking, one can say that the mediator's role is that of a neutral person who helps the parties in their dialogue aimed at solving an existing dispute. He must, in essence, help the parties in their search for an amicable settlement of their differences. He does not judge the parties nor their behaviour; he does not make a ruling over their respective rights and duties; he does not (in principle) issue an opinion on points of law or of facts; he does not act as counsel to the participants. In an ideal world - at least in the model of facilitative mediation - he would not even propose or suggest solutions to the parties as appears best in his view, but he will assist in creating the conditions in which the parties themselves, acting together, will find their own solution, depending on their appraisal of what they think is most appropriate.

The mediator is the conductor of a process in which negotiation, psychology and communication techniques will play as important a part as the rule of law and the history of the relationship between the parties. A mediator shall pay attention to words expressed as much as to non-verbal conduct. He must be a professional of communication; he must be able to listen, to observe, to adapt, to reposition himself when confronted with varying human behaviour[2].

When he perceives that a message issued by one of the parties has not been understood properly by the other (whether or not voluntarily), or has been understood partially only, he will have it clarified. He will try to spot all areas of misunderstandings and make sure they disappear. If he summarizes the words of one party through the "re-formulation" technique, he will ensure that the way he has reformulated does indeed correspond to the message that was issued. In doing so, he will be extremely attentive to all sorts of reactions (verbal or nonverbal) of all the persons involved in the mediation process: experienced mediators know that nonverbal attitudes may reveal lots of one person really has in mind but does not necessarily wish to express in words.

The mediator is devoid of power to constrain or sanction the parties. He has no capacity to intervene other than that bestowed upon him by the confidence that the parties have placed in him. His only power derives from his moral authority and from the strict neutrality he will observe at all times. The parties' confidence validate his intervention and his role. The mediator knows, and the parties know, that any party can terminate the mediation once either participant is no

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1 Jarroson Ch., "*La médiation*", Gaz. Pal., 22 août 1996, p. 36-6.

2 "*Les secrets de la communication*", R. Bandler et J. Grinder, éd. Actualisations, 1982.

longer satisfied with the way things develop. This might lead to the premature ending of the mediation. As contradictory as it may seem, the fact that any participant may terminate the mediation at any time will constitute one of the mediator's most effective tools. It will enable him to constantly remind the parties that if they do not adapt their positions, points of view or attitudes, the process will be stalled and no satisfactory outcome can be expected.

The mediator will at all times attempt to bring the parties to approach the file and the negotiations by focussing on their respective interests and needs rather than to their respective rights and duties. He will bring the parties to think more about the advantages that would derive, for the future, from an immediate and freely accepted solution, rather than on what they perceive - rightly or wrongly – as their rights and duties deriving from the past, and about what they might gain from a trial that their adversary would lose.

The mediator's role will differ depending on the many specific aspects of the matter at stake : the nature of the dispute; the manner in which the parties come to, experience and participate in the mediation process; their level of education ; their personality; their cultural background; their social and cultural values and the environment in which the dispute develops[3]; the nature of the mediation process[4] ; language barriers that may exist; the hierarchy in the team of each party; the moral or social influence that the mediator may exercise over the parties or their representatives (which influence may have played a part in the parties' choice of the mediator), etc.

Depending on all such elements, but also on his experience and personality, the mediator will be more or less "directive". He will "let go" the discussions among the parties or, to the contrary, he will attempt to take a leading role in order to prevent the parties from getting lost into a maze of discussions that foster anger and are based on "the problem" rather than on "the solution". He will suggest that discussions be continued in a joint session, or he will ask to meet with the parties separately. He will influence or impose the order in which the parties will be asked to approach their various differences[5]; he will establish the rules of communications (who speaks and when : the parties or their attorneys ? Do the parties speak to each other or do they speak to the mediator?). He will ask the parties to think about solutions that differ from those that have already been outlined order to be the "normal" result of legal or contractual rules; he will try to enlarge the scope of discussions, etc.

The mediator will also play an important role by assisting the parties in determining their priorities. Knowing that a mediation can be successful only if each party finds an advantage in the solution[6], it is important that the parties be able to determine what is crucial (what they must absolutely obtain), what is important, what is a minor concern and what is futile. The mediator who is able to correctly analyse such values and the way they are perceived by the parties, will have a most important element that he will later be able to use in helping to construe solutions : a major (or something perceived as a major) element obtained by one side may be perceived as something unimportant by the other. A first solution, albeit partial or minor, can generate a solutions oriented dynamic that will favourably influence the rest of the whole mediation process.

Above all, the mediator will pay attention to the correct development of that process. He will see to it that the atmosphere and the spirit of the discussions be constructive and serene. He will intervene (gently or more forcibly if necessary) if the parties do not comply with the communication rules that he will have spelled out at the outset of the meeting (having obtained

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3 In certain societies (e.g. Japan or Africa), there is a true culture of negotiation and compromise. See in that respect the fascinating book of David W. Ausburger, *Conflict mediation across cultures*, Westminster, John Know Press (1992).

4 A mediation that occurs in an "institutional" environment (e.g. for social conflicts and mediation in public entreprises) will differ greatly from a pure commercial mediation.

5 For instance, identify and generate a solution to minor difficulties that the parties can overcome easily in order to generate solution oriented dynamics, settling small differences first and get over to the larger ones thereafter (the "step by step policy").

6 Hence the mediator searches for a "win-win" solution as opposed to a "win-lose" dynamic that typifies the court process.

the parties' prior approval). He will favour reasoned decisions rather than those that are too much charged emotionally.

He will not attempt to quash emotions as they will be expressed during the discussions, quite to the contrary: very often, emotions reveal "hidden messages" to an attentive mediator, which messages he will take into account and about which he will ask for clarification either in joint sessions or in caucus.

Yes, a mediator must have various talents...

CHAPTER TWO – APPOINTMENT OF MEDIATOR

A. Statutory mediation

Following the adoption of the Directive of the European Parliament and the Council No. 2008/52/EC dated May 21, 2008, which imposes the obligation on the Member States to implement it into their legal systems by May 21, 2011, one may now that the vast majority of the EU countries have their own legal set of regulation of mediation in non-criminal cases.

B. Judicial mediation

Judicial mediation must be understood as a mediation suggested or ordered (in some countries) by a judge in a dispute that is pending before him[7].

Thus, it differs from conciliation by the judge as indicated in sections 731 to 733 of the Belgian judicial code, which leaves the initiative to the parties to submit their dispute to a judge with a conciliatory role prior to initiating a trial.

Similarly, “judicial mediation” varies from the Czech regulation in Section 99 of the Czech Code of Civil Procedure that regulates the praetorian settlement.

Mediation does not aim at depriving a judge from his power to conciliate or to judge, but rather as a complement to his function[8,9].

The judge does not delegate his constitutional power to rule when conferring a mediation mission to a third person, thus aiming at attempting to reconcile the parties. To the contrary, he plays a useful part in the administration of justice when attempting to find the best solution to the parties' specific situation[10]. The judge does not have any sort of monopoly over conciliation. In the circumstances in which a judge is not able to assist the parties in a solution to be found by themselves, article 11 of the Belgian judicial code does not prevent the judge from delegating a conciliator's role to a third person[11]. This third person, the mediator, shall not make any sort of binding ruling on any legal or factual issue. He does not have any jurisdictional power.

Hence, the judge might, on the basis of the Belgian section 19.2, order a mediation in order to verify whether the parties truly have attempted to solve their dispute amicably. Such measure will not prejudice the merits of the case. It could be justified by the risk of seeing the situation of the parties degenerate because of the duration or expenses of the trial or due to the likely outcome of

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7 The French statute of 8 February 1995, article 21-5 (as amended by Decree on Nov. 16, 2011), provides that "in case of an agreement (i.e. reached pursuant to a mediation process), the parties may submit it to confirmation by the judge who will thus enforce it" – in Quebec, the law of 1 September 1997 compels couples who wish to divorce, when they have children, to attend an information session about mediation prior to the matter going to court. The information session may occur before or after the filing of the request for divorce. The parties are then free to continue or to discontinue the mediation process.

8 E.g. Ligot F., "*Le pouvoir de conciliation du juge, la médiation et l'autorité des accords*", Ann. dr., 1996, p. 113.

9 See article by I. Van Kerkhove, p. 249.

10 Ligot F., *op. cit.*, p. 103.

11 de Leval G., "*Réflexion sur la médiation civile*", in Liber amicorum Yvon Hannequart et Roger Rasir, p. 33.

the trial that would be imposed upon them in a situation where an amicable settlement might lead to more adequate solutions[12].

More and more judges are sensitive to requests by the parties to attempt mediation before asking for a court ruling. Some judges suggest attempting mediation when they see that communication among the parties has become impossible and when they believe that durably harmonizing their relation is necessary in order to safeguard their interests and those of the children. A judge's decision on the merits can be delayed while waiting to see what mediation brings about[13].

The Czech regulation of judicial mediation (mediation suggested by a court) provides for the following principles:

- It establishes a duty for a court to instruct parties during preparation of the proceedings, Section 114a, par. 2, new letter b) of the code of Civil Procedure (a court will remind the parties of the possibility to use mediation in accordance with the Act on Mediation, if appropriate), and further under the regulation in Section 99 of the code of Civil Procedure (judicial settlement).

- It enables a court to order a first meeting with a registered mediator (Section 100, par. 3 of the code of Civil Procedure) for a maximum of 3 hours and to suspend proceedings in the meantime, however for no longer than 3 months. After the lapse of 3 months the court will continue proceedings (however, mediation may not be ordered during proceedings on preliminary measures in accordance with Section 76b), in particular during the phase of judicial proceedings.
  The first meeting with a mediator may also be ordered under Section 114c, par. 3 (new letter d) at the preparation meeting, should it prove effective and appropriate.
  And finally, a court will order the first meeting with a mediator for a maximum of 3 hours to a person failing to comply voluntarily with a judicial decision or an agreement approved by a court concerning issues of education of minor children, regulation of contacts with children or decisions on return of a child. (Section 273, par. 2, letter a) of the code of Civil Procedure).

- An appeal against the resolution ordering the first meeting with a mediator under Section 100, par. 3 of the Civil Procedure Code is inadmissible.

- If a party refuses to attend the first meeting with a mediator ordered by a court, the court may refuse to award it compensation of costs of proceedings, both in full, or in part.

- Costs of the first meeting with a mediator ordered under Section 100, par. 3 or Section 114c, par. 3, letter d) are paid by parties; the state will pay such costs only on behalf of a party that is exempted from court fees.

- According to the Act on Mediation, the remuneration of a mediator for the first meeting ordered by a court under Section 100, par. 3, is considered as one of the types of costs of proceedings.

- Should proceedings be suspended under Section 110, a court will continue such proceedings upon request of a party after a period of 3 months. Except for divorce proceedings, a court may, upon request of a party, continue proceedings even prior to the lapse of this time-limit, should there be serious reasons for doing so, and even without a proposal in the case of justified interests of a minor child. Unless a request for continuation of proceedings is submitted within one year, the court will discontinue proceedings.

12 Ttrb .Trav. Brussels, 1 June 1991. J.D.S., 1991, p. 473.

13 Charleroi, 23 December 1998, unpublished, rep. 1294.

And finally

- A court will decide whether it approves a mediation agreement concluded under the Act on Mediation within 30 days of commencement of the settlement proceedings at the latest (Section 67, par. 2, new).

Last but not least, it is necessary to mention the interlinked motivating regulation in the Act on Court Fees (Act No. 549/1991 Coll., as subsequently amended): its Section 10, par. 7 allows the return of 80% of court fees that have already been paid in the case of approval of the settlement between the parties to the proceedings prior to adoption of the decision in the case concerned.

C. Voluntary mediation

Voluntary mediation, understood as the willingness expressed by two parties to try mediation, is the most appropriate: indeed, willingness is the essence of mediation.

Such willingness can be brought about by either party or their counsellors[14] or by the parties jointly.

The parties' intent can be expressed in two ways:

1. *Non-contractual*

Outside the scope of a contract, the parties jointly agree that mediation constitutes the most appropriate way to try to solve their differences. Such willingness can be expressed prior to, during or after a trial. Once such agreement exists, the parties would be well advised to sign, together with the mediator they will point, a mediation agreement spelling out the details of the process that they are embarking on.

2. *Contractual clause*

A clause in a contract can provide that in case of dispute, the parties are to first try to mediate their differences. At the time of the signature of the contract, or at the time of the signing of the agreements prior to a divorce by mutual consent, there is necessarily, at least in part, a spirit of cooperation among the parties. This is the most appropriate time to agree that, in case of dispute that cannot be resolved through negotiation, the parties will request the intervention of a mediator prior to taking any further legal or judicial action. Since mediation does remain in essence a voluntary process, this clause must be considered as an undertaking of the parties to try a mediation as a means of alternative dispute resolution, prior to any other means[15]. Several court decisions have enforced such mediation clauses. Article 1725§2 of the Belgian judicial code provides that if a lawsuit is launched in a situation in which the parties are bound by a mediation clause without such mediation having been attempted prior to the lawsuit, the defendant may request the court to suspend the trial and to order the parties to proceed to mediation first prior to continuing the trial. This is an effective way to enforce a mediation clause. It forces the parties to at least sit together with a mediator prior to initiating (or, for that matter, continuing) a lawsuit.

It is recommended that the parties provide in their mediation clause what the role of the mediator shall be, what the mediation rules are and what confidentiality conditions are attached to the whole mediation process. Obviously, the easiest in that respect is to indicate that the mediation

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14 See Descoteaux, S. "*Les avocats et la médiation*", in *Développements récents en droit familial*, Service of the permanent training of the Bar of Quebec, ed. Y. Blois, 1991; Roy S., "*La médiation et le rôle du conseiller juridique…*"

15 H. de Kovachich, H. Clavier, P. Renaud, M. Esposito, *Guide pratique de la médiation*, 1997, ed. Carswell, p. 39.

is to occur in compliance with the mediation rules of a specific mediation institution. In that case, the mediation rules of that institution will be "incorporated" into mediation clause.

If the mediation succeeds, the parties will sign a settlement agreement as referred to in section 2044 of the civil code.

The mediation clause can be defined as an undertaking to use the services of a mediator in order to attempt to settle amicably any dispute that may arise in connection with the performance of the contract. Hence, it is an undertaking to negotiate[16], the breach of which can justify damages for breach of contract[17].

CHAPTER THREE – THE CHOICE OF THE MEDIATOR

It is of utmost importance, whatever the framework of the mediation (voluntary or judicial), that the parties chose a mediator in which they can place their utmost confidence.

Judges and parties will have to verify that disputes be referred to qualified mediation services that are subject to rigorous codes of conducts. Qualification, strict confidentiality and neutrality of the mediators are some of the fundamental criteria that ought to be taken into account in order not to interfere with the eventual continuation of judicial proceedings after a failed mediation.

In Belgium, due to the little number of experienced mediators in civil and commercial matters, the choice will lay upon somebody whose personality and personal qualities have been recognized in other functions, and who has successfully followed a specific training in mediation. His ability in managing the conflict, his credibility, his impartiality and his capacity for empathy should not be questionable for the parties[18].

CHAPTER FOUR – STAGES OF THE MEDIATION PROCESS

Once mediation has been chosen by the parties and once they have agreed on the choice of the mediator, the latter will organise the various stages of the mediation process, starting with the initial contact between himself and the parties and the signing of a mediation agreement or protocol among them. People writing about mediation generally distinguish between 5 to 7 steps in the mediation process. The main purpose of the identification of the stages lies in the thoroughness with which each of them must be followed and in realising the importance of their chronological order. A mediation must be organised with method in order to allow the mediator and the parties to, logically evolve towards a satisfactory solution[19].

Generally speaking, the stages of the mediation process will be very similar, whether in a family mediation or in a civil and commercial matters.

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16 See Cedras I., "*L'obligation de négociation*", Quart. Rev. Comm. Right, 1985, p. 265 ; Liège, 16 January 1998, J.L.M.B., 1998, p. 589 ; Forges, M. "*Principes applicables à la rupture et à l'aménagement conventionnel des pourparlers en droit belge*", Ann. dr. Louvain, 1995, p. 439 ; Van Oevelen, "*Juridische verhoudingen en aansprakelijkheid bij onderhandelingen over commerciële contracten*", D.A.O.R., 1990, book 14, pp. 43-63.

17 The harm caused by the breach of the undertaking to use a mediator should be analyzed as the loss of an opportunity to reach a settlement. The Supreme Court has admitted that the loss of an opportunity can cause harm which justifies the payment of damages (Cass. 19 October 1973, Pas., 1973, I, p. 298). In a decision of 4 March 1975 (Pas., 1975, I, p. 682), the Supreme Court also indicated that the loss of an opportunity of reconciliation between spouses can give rise to damages.

18 See, infra, the use of a preliminary meeting during which the parties will meet with the possible mediator and will, eventually, prefer to choose someone else.

19 H. de Kovachich, op.cit. p.71.

There will be differences, among others, with respect to the duration of the whole process. In family mediation, there will certainly be a number of meetings of one to one and half hour each, spread out over a period of several months. This will guarantee fair chances of success. In civil and commercial matters, to the contrary, the whole process can be concentrated over a couple of hours or days (in itself an argument to convince the parties to resort to mediation as both an expeditious and efficient method).

Beyond the preliminary phase, we have identified the following stages, the first five of which constitutes the mediation in the strict sense.

1. Preliminary exchanges

In essence, two things will be done during these stages: telephone conversations and, eventually, a preliminary meeting.

a) A telephone conversation

Upon its own initiative or on the basis of a choice made in co-operation with a mediation centre, one of the parties or her counsel will contact the mediator by telephone and ask for a preliminary meeting.

If this constitutes the parties' first experience with mediation, the mediator will eventually organise an information meeting in order to explain the process. Depending on his personal perception, he will, after having heard each party, invite them to meet with them, separately or jointly[20].

During this meeting, the mediator will restrict himself to providing information about the mediation process without allowing the parties to dwell on the particularities of their dispute. He will also try to set a calendar for the process.

If the parties are already familiar with the mediation process, it is important that the mediator limit himself to obtaining basic information about the matter and setting out a calendar. He may not run the risk of compromising his impartiality or neutrality, or the perception thereof, by starting the process in less a than ideal setting.

b) Preliminary meeting

This first preliminary meeting is not mandatory for a proper mediation process. It is recommended since it is the occasion for the parties to meet with the mediator. The first contact with the parties is very often crucial. It sets the tone of future meetings. It enables the mediator to acquire control over the process, to get to the parties and to start working within, establishing a proper climate of faith in the process: the mediator "sets the table" [21].

During this meeting, the mediator will identify the expectation of the parties without contradicting them and without attempting to explain them. He must start to understand what the broad spectrum is, what the parties would call a settlement or an acceptable solution, what they are really trying to achieve.

The mediator will then remind or explain the basic rules for a proper mediation process. The parties will either be invited to sign immediately a mediation agreement, or to take with them a draft mediation agreement prepared by himself in order for them to reed and sign it prior to or at the first true mediation meeting.

[20] The Quebec law of 1 September 1997 has made this information session mandatory in family matters. It is also free of charge.
[21] Lévesque, J., Métodologie de la médiation familiale, Québec, Edisem Eres, 1998, p.88.

The date for the first meeting will be set. The mediator will let the parties know which document he wishes to see, if any, either prior to or at the meeting. He may also discuss with the parties what his expectations about the duration of the whole process might be.

Many mediators prefer not to receive any documents concerning the dispute. They know by experience that their reading of such documents might give them some sort of bias has to the dispute, which might prove harmful to the mediation process. They know that documents and files of the parties will provide them an insight of the parties' respective positions, in law and in fact, and the risk is that they will only be given a partial view of the parties' file in an attempt by the parties to influence the mediator's reading thereof. Mediators know that such files and documents will educate them concerning the parties' past history and their respective positions, but that it will not be "solution oriented", which must be the mediator's principal concern. Files concerned the past; mediators are geared towards the future.

c) Mediation agreement

The mediation agreement is a document in which the mediator identifies the parties and the dispute and indicates the rules that the parties will have to comply with during the mediation process. It will contain at least the following:

- Identity of parties, their counsel and the mediator;
- Nature of dispute: a summary is sufficient;
- A reminder that mediation is a voluntary process: it will remind that the parties and the mediator may interrupt the process at any time. It is also useful to state that the fact for the parties to agree to try to find a solution is without prejudice;
- A confidentially clause: the parties and the mediator, as well as all persons participating in the process, undertake to keep everything said or written during the process strictly confidential;
- The acceptance of the principle of caucus or separate meetings;
- A reminder of the role of the mediator and his neutrality and impartiality
- The agreement among the parties to temporarily suspend all judicial proceedings, reserving their rights to initiate or continue them if the mediation fails to reach a solution;
- The right of the parties to consult with their counsellors if these do not attend the mediation sessions;
- The maximum duration of the mediation;
- The fees of the mediator, based upon an hourly fee, the method of payment and who will be responsible for such payment;
- The signature and the date of signature.

The agreement contains the contractual scope of the mediation. It creates enforceable rights and duties for the parties.

Except if the parties agree otherwise, the mediation agreement itself is not confidential. It may be necessary for the parties to prove at the later stage, if the mediation fails, that there has been an attempt to settle the matter through mediation. Depending on the legal or judicial system, this may be necessary in order to avoid sanctions for failure to do so, or in order to prove that the statute of limitation has been suspended while mediation was in course.

2. The mediation process

a) First stage: validation of the process.

The mediation meetings will take place in a location agreed upon with the parties, either in the office of the mediator, in the offices of one of the parties or in a totally neutral setting.

It is important for the mediation process to unwind correctly, that the location chosen be appropriate (nice) and that the mediator invites the parties to sit around the table as he will have chosen. Depending on the personality of the parties, of the dispute and of the number of persons attending the meeting, the mediator will have to think hard what the most appropriate seating arrangements are to be. Mediators generally tend to prefer having the parties' decision-makers sit close to him, one across the other so that's an easy triangular communication among the mediators and these decision-makers can occur.

In principle, during the first stage of the mediation process, the mediator will verify that the parties or their representatives have the necessary power to settle the dispute. The mediator will remind the parties of the principles of confidentiality and will clarify each participant's role in the mediation. Specifically, he will insist on his own role as a facilitator in the communication among the parties, on his role as a guide of the process. He will draw a clear distinction between a mediator's role and that of a judge or an arbitrator.

He will then express his expectation that the parties adopt an attitude of co-operation and "open mindedness". He will remind them that the mediation process must remain civilised and that he expects the parties to follow rules of proper behaviour and communication. This may, however, not limit the open nature of discussions. The mediator's main objective during this first stage is to obtain the parties'confidence and to set the stage for them to explain their respective positions in a relaxed and cooperative atmosphere. He will also secure their consent as to the working rules that he outlines.

Contrary to usual behaviour in front of courts or arbitrators, solemnity and rigidity should remain absent from the mediation process.

b) Second stage: explaining facts and circumstances

During this stage, the mediator will start by clarifying some of the discussion points that he may already have identified during his first contact with the parties. He will briefly summarise the dispute as it stands.

He will then ask the parties, in turn, to explain their position and the way they look at the factual circumstances of the dispute. Usually, if the lawyers attend the mediation sessions, they will be asked to explain the facts objectively, without arguing their client's case. The client will be asked to intervene to clarify certain points of facts and to reply to the open ended questions of the mediator or of the other participants.

The purpose of the mediator at the end of this stage is to have identified all disputed items, both the apparent ones and the unexpressed ones that influence the parties' reasoning. The mediator will attempt, with the co-operation of the parties, to list the various contentious items. This list will have to be validated by the parties so that the scope of the discussions will be clear for all participants.

c) Third stage: creation of options

Once the facts and the subject matter of the dispute have been explained by the parties and when it has been made clear to the mediator – but only then – the mediator will initiate a discussion about possible options, the various possible solutions that may or may not meet the parties' diverging interests and expectations. It is "brain storming" time. All sorts of ideas should be put on the table, without criticism or approval. The mediator must preserve his image of impartiality by keeping a neutral attitude in relation to the various options formulated by the

parties[22]. The lawyers or counsellors' role at that time will be particularly important because their understanding of the legal or technical aspects of the litigation will enable him to co-operate in the formulation of credible options.

d) Fourth stage: decision making

Each option will have to be evaluated and be placed on a sliding scale of the subjective importance attributed to them by the parties.

The mediator will suggest the ways to negotiate and will attempt to bring the parties to come to conclusions.

During that stage, if the parties encounter difficulties in revealing their preferences or positions, the mediator may hear them in caucus in order to try to understand for himself and to assist the parties in understanding how to look upon each option or how to formulate credible proposals or counterproposals that will enable the decision making process not to be stalled. He will assist the parties in comparing the various proposals, noting and analysing them. He will help them to come up with adequate and constructive responses and how to formulate them[23].

The mediator will pay attention to the balance of powers, the parties' diverging objectives, strategies and to the "tactics" used by each of them. Creating or preserving a climate of co-operation is a part of his task. In particular – though this applies throughout the mediation process - he will deal with the parties' emotions, the way they are revealed and what underlying tensions explain them. The mediator will also remind the parties of their personal interests and needs, putting them in focus with the various options that are made a part of the discussions.

Guided by the mediator's knowledge and understanding of all parties' positions, interests and needs, the parties will discard certain options and keep those that seem to best reflect their common vision, objectives and that allow an equitable and balanced solution to the dispute.

e) Fifth stage: the agreement; revision – ratification

After the fourth stage, the mediator summarises and clarifies the various items on which the parties agree and starts putting together what could become the outline of a draft agreement reflecting decisions already arrived at. A settlement or other type of agreement can be drafted by the parties' counsels, under the mediator's control, or, if the parties so require, by the mediator himself.

This draft agreement will then be revised by the parties and their counsellors.

The latter will provide their opinion and make sure that their clients fully understand its legal implications and the rights and duties it embodies. Their intervention is crucial in order to minimize the loss of future rights or to avoid doubts about the understanding of the agreement[24].

All parties may then sign, eventually with the mediator, the agreement thus reached and ratified by all participants.

If the parties' counsellors have not participated in the mediation, the mediator will urge the parties to have a draft agreement revised by counsel. It may be helpful for the mediator to speak with the parties lawyers in order to explain the context and why the agreement submitted should be an

22 H. de Kovachich, Guide pratique de la médiation, p.78

23 H. de Kovachich, Guide pratique de la médiation, p.79

24 H. de Kovachich, Guide pratique de la médiation, p.81

acceptable one for their respective clients. Indeed, having been absent from the mediation discussions, the parties lawyers may not fully understand the reasons why the parties decided to resolve their differences in this way.

f) After the mediation: follow up

After the mediation, it may happen that the understanding requires some amendments. As for any agreement, the parties are free to agree to change certain items. Such amendments can occur through a simple negotiation among the parties or, if necessary, during a discussion lead by the mediator.

CHAPTER FIVE – BACK TO COURTS OR ARBITRATION

a) in case of failure of the mediation

Even if the success rate of mediation is high[25], it may that the parties are unable to agree on something acceptable to both of them or that they are only able to achieve a partial solution.

A solution will be partial if only certain contentious items have been solved either because no global solution has been found or because at the outset of the parties have agreed to discuss only certain limited aspects of their dispute and to submit others to an adjudicatory process.

Remaining bones of contention will be handled through the courts or through arbitration, as the parties may decide or as their agreement calls for. If such proceedings had been initiated prior to the mediation process, they will then be continued.

b) Ratification by the court

If the mediation occurs while proceedings are already pending, the parties can summarise their agreement in joint pleadings to be submitted to the court and ask for the court to enforce that agreement in a judicial order. The same applies if their solution is a partial one only.

CHAPTER SIX – ROLE OF THE LAWYER IN THE MEDIATION

Some lawyers see mediation as an encroachment on an area that they wish to control, that of negotiations[26]. They are wrong. If it is certainly true that many lawyers attempt to de-pationalise debates and to assist in having the parties common will emerge, a typical lawyers' primary role is to assist his client in the battle on the respective positions. Even though he may, in certain specific circumstances, represent two sides, he will very generally assist one side only and will defend that party's position throughout.

What will be the lawyer's role in a mediation process?

a) PRIOR to the mediation

[25] J. Brett, Z. Barsness & S. Goldberg: "The effectiveness of mediation: an independent analysis of cases handled by four major service providers", Negotiation Jouranl, July 1996, 259 indicates a rate of success of 78%

[26] See E. Galton: "Representing clients in mediation", American Lawyer Media, 1994.

When there is an impasse in a negotiation, the role of the lawyer becomes crucial. Prior to initiating a lawsuit, he still has a useful (and billable) role to play[27]. It will be his duty to make his client understand that there are alternative ways to try to solve the matter prior to filing it in court. If the client is willing to consider such options, he will prepare a file by delineating the elements of the dispute and by clarifying what, in his view, would be acceptable. He will organise documents, assist in the choice of the mediator and prepare a presentation of the various aspects of the case as objectively as possible. He will advise his client in an objective and professional manner on the likely results of the case should it proceed to court[28].

b) DURING the mediation

In family matters, the lawyer will generally not attend the mediation session but will serve as a "legal umbrella": he will verify the legal and tax aspects of the mediation and of the understanding or settlement proposed or reached. During the mediation, and at the mediator's request, the lawyer will intervene to assist in clarifying the parties' positions and the legal aspects that may (have to) be a part of the discussion[29]. His role will be crucial since the mediator will wish to rely on the lawyers when the discussion reaches certain legal or technical difficulties. As the mediator must remain neutral and should not favour solutions that could be more favourable to one party than to the other, the prudent mediator will prefer to ask the parties to be advised by their respective counsel. It may be helpful for certain of the family mediation sessions to be attended by lawyers as well when the discussions center on these more technical and patrimonial aspects.

In commercial matters, in most cases, the lawyers will attend the mediation sessions as counsel to their client.

They should then observe three simple rules:

1. Let the mediator take charge of the process;
2. Let the clients be the important players in the discussion;
3. Do not try to "win" an argument at all cost thereby jeopardising some possible opportunities of a global solution[30].

Lawyers should realize that their role in mediation discussions is to assist their clients in trying to achieve a settlement. They are not there to "fight" with the other side but to cooperate with the mediator and their client. The lawyers will also advise their clients as to the legality and enforceability of the various options and solutions that are discussed during the mediation. Thus, the lawyer's role could become of primary importance because it will help his client, the mediator and possibly the other party as well. When practiced well, the lawyer's role is therefore an asset in a mediation.

Mediation is obviously not the only alternative to court litigation. It should, however, be a duty of the lawyer to raise his clients as to its existence and explain it to his clients as one of such alternatives.

CHAPTER SEVEN – COST OF THE MEDIATION

[27] P. Shaposnick, Le rôle e l'avocat en médiation, in Journal du Barreau de Montréal, 15-5-98.
[28] P. Shaposnick, op.cit.
[29] Simon Descoteaux, op.cit. p.115.
[30] See references referred to by Serge Roy In "La médiation en matière commerciale - Médiation et modes alternatifs de règlement des conflits : aspects nationaux et internationaux" Association Henri Capitant, L.Baudouin, Ed. Yvon Blay, p.237; Norman Brand "Learning to use the mediation process – a guide for lawyers" Arbitration Journal, décembre 92, volume 47, n°4, p.12

a) Comparison

It is difficult to provide precise indications as to the cost of mediation. Each case will be different.

From the perspective of the parties, experience learns that the mediation will be perceived as an excellent solution from a financial view point, if it succeeds. In such case, there will be no or hardly any litigation costs, legal fees, expert opinions fees, etc, or at least such future costs will be avoided. The cost of the mediation (legal fees and fees of the mediator – the latter being often split equally among the parties – will represent a fraction only of what court litigation would cost.

If, on the other hand, the mediation does not bring about a solution, the costs incurred by the mediation will only increase the total financial burden of the dispute.

If one takes into account the statistics of the result of the mediations as they exist and if one knows that mediation brings about a solution in three cases out of four, one is lead to conclude that it is worth trying, i.e. when both parties perceive that the elements of the dispute indicate that a negotiated solution may be arrived at.

In addition, experience shows that even a failed mediation may have value: generally, the process of explanation and comprehension that will have been generated during the process will enhance the chances of successfully achieving a settlement at a later stage or might help in avoiding attitudes and positions based upon distrust or vengeance.

b) Fees of the mediator

As a rule, the mediator will be paid only on an hourly fee basis. Most mediation rules and rules of ethics of mediators will prohibit him from charging any sort of "success fee[31]. Allowing the mediator to charge a higher fee in case of success would be tantamount to giving him a personal interest in the solution. Thus, he would lose his neutrality: he risks being inclined to press the parties to conclude a settlement "at all cost", even in situations where they are neither willing nor ready to do so.

Mediation centres generally apply a fee structure taking two elements into account. The first represents a payment to the Centre in order to cover its own cost (generally established on a sliding scale depending on the amount at stake). The other represents the fees of the mediator. These fees will be established per hour (the amount may be based on a sliding scale depending on the amount of the interests at stake) or by day or half a day.

The mediators will often agree that the first meeting with the parties (either together or separately) be charged to them only if they agree to attempt mediation.

In any event, the mediation agreement signed between the parties and the mediator should spell out clearly how the mediator fees and expenses are to be calculated and who pays for them. Eventually, the parties may agree, as part of their global settlement, to spread the burden of the mediator's fees and expenses otherwise.

CHAPTER EIGHT - CONCLUSION

There currently is an irresistible trend in the United States of America, Canada, Europe and elsewhere in favour of mediation. We are convinced that, more and more, the parties will attempt

[31] For example art. 8.3. of the rules of ethics of the BBMC; Commentary on article 8 of the joint code of ethics of the American Arbitration Association, the American Bar Associaiton and the Society for Professionals in Dispute Resolution; See also H. de Kovachich and others, "Guide pratique de la médiation", op.cit. 66.

to prefer a non contentious way to solve their differences rather than having to spend vast amounts of money for litigation, having to deal with the total uncertainty of the result, and having to wait for a solution for years. As we have seen in this article, there are no precise rules that determine when mediation should be attempted. We believe that mediation can be tried in most matters, prior to, during or even after legal proceedings. Ideally, mediation should be initiated as soon as there is an impasse in negotiations among the parties, whatever judicial stage the file is at. Good faith and the willingness of the parties to find a proper solution are the most important ingredients.

Companies and individuals have many reason to prefer mediation over court litigation: preserving trade relations, safeguarding one's reputation, keeping the conflict confidential, safeguarding economic interests rather than legal positions, generating a fast and efficient solution. Sometimes the complexity of a matter will justify mediation as the analysis and understanding of the issues at stake will often be more thorough than what could be obtained from judges who will always lack both time and means to acquire a deep understanding of the issues involved.

Above all, mediation, a consensual process from start to end, allows the parties to remain in control over their own file. It will not be a third party, judge, arbitrator, expert, etc. who will force a solution – good or bad – upon them. Any solution will always be one that both parties have freely endorsed. From the point of view of the parties, that is an essential advantage.

Mediation also has its limits. Sometimes one needs a judgement to set a precedent or to obtain a judicial enforcement of one's rights. Legal proceedings may be an argument in the negotiations. Sometimes, quite simply, a party may have no interests in a negotiated solution. Undoubtly, mediation can untangle blocked situations but litigants do not always wish to invest themselves in solving their own conflicts. As we have seen, mediation requires the clients to be and remain involved in the solution of their dispute, requires a certain ability to communicate and an open mindedness or true will to settle, that will not always be present. It will sometimes be easier for a party to leave the matter in the hands of her lawyer and to simply sit back and wait until a judge has ruled.

It is a duty of the judicial authorities backed by the public sector, to promote mediation as an appropriate means to assist parties in solving their conflicts. The Bar will have to adapt, understanding the use of mediation and how it functions, and in proposing alternative means of dispute resolution to their clients.