

English

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# **MEDIATION**

# **F.A.Q.**

Geneva 2014

Slatkine

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## Message of the President of the Geneva State Council

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Because it is a part of life, a dispute may lead – at least apparently – to disaster or progress. It all depends on one's vision and practice, i.e. the way in which a dispute is managed.

Mediation is based on the positive bet that all parties to a dispute have the resources and competence - with the assistance a third party, *the mediator* -, to find by themselves an advantageous solution to the dispute, in line with their interests. Of course, Mediation cannot replace the state proceedings in every situation, but it can be complementary to them and contribute to their smooth functioning.

In order to achieve a successful mediation, each participant in the process has to play his part and end up a winner in some way: the third party, whose role is to reinstate a dialogue and identify the interests; the lawyers, by assisting their clients in their quest of constructive and long lasting solutions; and, last but not least, the parties who, from adversaries, may eventually become partners in the process.

Because it is an indispensable complement to the jurisdictional and arbitral means of dispute resolution, mediation must be made available to our entire population, to individuals as well as corporations, Swiss and foreign. Therefore, mediation should be better known by the public. Through our Geneva Constitution and the cantonal and federal legislations, our country encourages extra-judicial ways of dispute resolution. This is why the Republic and Canton of Geneva promotes mediation and supports this brochure.

MEDIATION F.A.Q.'s main objective is to inform the public about that mode of dispute resolution. It answers the first questions everyone asks regarding its possible application to a specific conflict. This guide is available in our canton in five languages: French, English, German, Spanish and Russian, in paper or on the Republic and Canton of Geneva website.

François Longchamp  
President of the Geneva State Council

# MEDIATION F.A.Q.

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## 1. What is mediation?

First of all, it is a state of mind. A way of being and behaving differently, when one is confronted to a dispute. Disputes cannot be avoided in human relations, as they are a part of life. It is just as normal to agree as to disagree. As such, disputes are not dangerous<sup>1</sup>: everything depends on how one goes about it. The dispute is not a fatality, but it may become a source of transformation, of added value, of experience and self-discovery and discovery of others. If one reacts to the dispute by applying force on an instinctive basis, by running away or by submission, mediation shows us how to affront a dispute *by favoring dialogue*.

The spirit of mediation is based on the belief that people are capable of finding the resources necessary to get out of a conflict. Once they are confronted to certain disputes however, the persons concerned cannot manage them. Mediation is based on the principle that the presence of an independent third party vested with no power regarding the matter *under dispute* will be in a position to reinstate the necessary dialogue and, if so, enable them to find a solution to their problems.

Mediation requires the active participation of the persons resorting to mediation (the *mediants*) and favours their capacity of self-determination. Hence, it represents a factor of empowerment by inviting the participants to find the acceptable solutions for each party by themselves. Accordingly, it is the parties themselves who are responsible for the adopted solutions. The respect of their choice, within the boundaries of compulsory legislation and public order is an essential part of the mediation process.

On a more technical level, mediation appears as a *voluntary and structured process by which a third party – impartial (multiparty) independent and neutral – facilitates the communication between the parties to a dispute, which allows them to find under the cover of confidentiality the responsibility to find themselves and freely their own solution, based on their own interests*.

Hence, the main purpose of mediation is to restore or to improve the dialogue between the parties to the dispute, which are invited to become partners in the *process*. This objective places mediation *in a special* spot among the modes of dispute resolution, because it operates on another level and in a different context, and with other objectives than the jurisdictional or arbitral proceedings. In the latter two cases, law and facts are playing the main part: as well on the *progress* of the proceeding. As on the *solution* (law applicable on the merits), whilst mediation is mainly centered on the individuals concerned<sup>2</sup>.

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<sup>1</sup> Hence it is essential to properly distinguish between the dispute itself and its *manifestation(s)* (violence, war, etc. or positively an added value resulting from a negotiation or a mediation).

<sup>2</sup> Jean A. MIRIMANOFF (éd.), *La médiation dans l'ordre juridique suisse, Une justice durable à l'écoute du troisième millénaire*, Helbing, Basel, 2011

When confronted to a problem or to a dispute, mediation can already take place independently from any jurisdictional or arbitral environment: this is called the *non-judicial* (U.S.: *ad hoc*) *mediation*. However, mediation is still possible once proceedings have started: the *judicial mediation*. But in both cases, in Switzerland, the organization and the functioning of the mediation process rests entirely with the parties. At least, such is the case with civil mediation.

Mediation is a part of *amicable or participative justice*, i.e. it allows private persons, companies and communities to work *by themselves* towards the solution of their problem. On the other hand, the state (courts of law) and private (arbitration) procedures belong to the *imposed justice*, a justice in which a third party – judge or arbitrator – takes a decision *by himself*. Said decision shall be binding on the parties. Hence today, *by the effect of the law*, justice is plural. Finally, in certain cases, the law foresees the recourse to the procedure provided by the state. This is the case with divorce proceedings, for example. However, this does not prevent the spouses/parents from seeking a durable solution in parallel through a mediation process. This would be a durable solution, because it is oriented towards their common future. However, the parties would have to submit such a solution to the approval (the ratification) of their judge.

*When one switches from the proceeding to the process, it can be considered that the mediation agreements which respect the limits of the compulsory legislation and public order translate the transition from the imposed law to the negotiated law.*

But, in our capacity as citizens or entrepreneurs, do we have a choice between all these methods? And who can help us with it?

When confronted with illness, each patient has a right to know about the possibilities to cure the sickness or to alleviate its effects. The Medical Doctor has an obligation to inform the patient about the pros and cons and about the advantages and disadvantages of the various remedies available. He shall advise his patient, who will have the final say and must be in a position to make his decision freely, after having been fully informed.

Likewise, when confronted to a dispute, every person – individual or corporate body – is entitled to know about the means likely to resolve such dispute. The lawyer is under an obligation to inform his client about the advantages and the disadvantages of the various remedies available. The final choice belongs to the parties to the dispute, who must be in a position to make their decision freely and fully informed.

Nobody is under the spell of the specialist. Everyone is at liberty to choose, in both situations and many others too, in our democratic society. Nothing justifies the suppression of such choice.

In question 6, we shall see what the functions of the mediator are and what he refrains from doing. In question 10 we shall see who can recommend the mediator.

Among the various definitions of mediation, we recommend the following:

*A process of creation and repair of the social link, and of resolution of a dispute ... in which an impartial third (neutral<sup>3</sup>) and independent party attempts, by organizing exchanges<sup>4</sup> between persons or institutions, to help them to improve a relationship or to settle a dispute between them<sup>5</sup>.*

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<sup>3</sup> We added the *neutrality principle*, which is as important as it is misunderstood, which contributes to the distinction between mediation and conciliation : it is a *duty of abstention* from expressing an opinion, a point of view, an advice, which will in no way prevent the mediator to have his opinion, kept for himself, as the case may be.

<sup>4</sup> The organisation of exchanges with the purpose of revealing the interests of the parties.

<sup>5</sup> Cf. Michèle GUILLAUME-HOFNUNG, « Renforcer la médiation familiale », in : Jean A. MIRIMANOFF (éd.), *Médiation et Jeunesse, Mineurs et Médiations Familiales, Scolaires et Pénales en pays francophones*, 1<sup>st</sup> part, chapt. 7, note 10.

## 2. What are the advantages and the assets of mediation?

Mediation has plenty of advantages as compared to the traditional ways of dispute resolution (jurisdictional proceedings and arbitration): first of all, it is *faster, less expensive and more constructive*. As it is often oriented towards the future, *its solutions are more durable* than a judgment or an arbitral sentence, which only settle a situation of the past.

As a speedy process, mediation can start within a few days. It is frequent that one or two meetings are sufficient to find a solution (or to reach the conclusion that mediation is inadequate or premature). Thanks to its speed and efficiency, the cost of mediation is only a fraction of the cost of a jurisdictional or an arbitral proceeding.

Mediation allows the parties (the mediants or mediated parties) to settle their dispute globally, with all its aspects, including the emotions, worries, needs, values and interests (the hidden part of the iceberg), which, in general, are not taken into account in a civil or arbitral proceeding. The traditional proceedings are indeed limited to the review of predetermined facts to be proven. The judge cannot go beyond the conclusions of the parties (the tip of the iceberg). In its functioning (the process) as well as in the building of its solution (the contents of their agreement), mediation appears as a tailor-made method cut for the parties.

Thanks to its *win-win issue*, mediation will help the parties to reinstate or rebuild the social links, or to terminate them in a more adapted way than a jurisdictional and arbitral confrontation with a winner and a loser, and the uncertainties resulting from all sorts of appeals. As participative justice, mediation produces a solution which will last longer than a judgment or a sentence originating in imposed justice.

The purpose of mediation is to allow the parties to reinstate the dialogue. For persons or companies who are likely to have to cooperate at a later stage or to continue to develop links, restarting exchanges in a calmed down climate will avoid many problems in the future. This will be favorable not only for the *mediants* (the persons concerned by the mediation) but also for third parties. One should bear in mind the parents who, after divorce proceedings, must cooperate for their children's education and who will find solutions without their children being a stake of their dispute, as is only too often the case, when the dialogue between parents is disrupted.

The parties remain at liberty to seek a convenient solution, without being blocked by the conclusions of the proceedings, because mediation invites them to pursue their interests, which differ from their initial positions. It allows the *mediants* to create their own definition of justice, taking into account, inter alia, elements which would not be considered relevant in jurisdictional or arbitral proceedings. It favours a feeling of equity and a quest for acceptable – hence durable – solutions for all parties in presence.

Furthermore, mediation offers the possibility of experimenting options, to verify their feasibility and their justification before they are finally adopted, inter alia by the use of provisional test agreements.

Participants to mediation are active actors. Accordingly, they are responsible for the agreements signed, and are all the more ready to abide by them. If, as is the case with divorce, the law makes a *ratification* of the mediation agreements by the judge compulsory, it is noted that mediation agreements reduce significantly the need to revise judgments at a later stage.

What is more, thanks to their learning or learning again of negotiation during the mediation process, the parties shall be better equipped in order to manage their future differences and to adapt consequently to the unavoidable modifications with which they will be confronted, without the need to file jurisdictional proceedings.

Finally, studies show that mediation provides a high rate of agreements satisfactory to the parties, among other things on the psychological level. This can be explained by the fact that the agreements are made by the parties themselves. The rate of success of mediation is important (60 to 80 % in the countries where the process takes place), more specially in commercial matters.

*Thus, mediation provides a triple pacifying effect: it prevents disputes, it solves disputes and it avoids new twists<sup>6</sup>.*

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<sup>6</sup> Cf. Thierry GARBY, *La gestion des conflits*, Economica, Paris, 2004

### **3. When is mediation appropriate?**

Mediation appears to be appropriate in the following situations:

- All persons in a dispute agree to initiate a mediation process.
- The parties do have durable factual relations (e.g.: family, employment, neighbours) or legal relations (e.g.: family disputes, lease conflicts, co-ownership problems, building disputes, partnership, intellectual property or other commercial contracts).
- A lawsuit would only settle a part of the dispute.
- The dispute contains an important part of emotional aspects.
- Because of converging or complementary economic interests, the parties have an interest to organize a cooperation, or to separate their activities.
- The dispute is hiding another dispute.
- A quick settlement rather than protracted jurisdictional or arbitral proceedings are in the interest of both parties; the cost and the duration of the lawsuit are out of proportion with the interests at issue.
- The problems are of an extremely complex nature. They concern several claims or several persons or entities (several persons are liable, insurance, other company of a group, partner, licensee, etc.).
- The dispute touches on several countries.
- There are differences of culture or language to be taken into consideration.
- The parties wish to avoid the publicity of jurisdictional proceedings.

If, on the legal level, mediation can apply to all areas of civil and commercial law, one may resort to mediation in the absence of any litigation (conventional mediation) or, in relation with a lawsuit (at any stage of the lawsuit, which is suspended). Mediation appears to be especially adequate in the following areas:

- A. In family matters: separation, divorce, inheritance (avoidance and resolution of problems, generation conflicts, family disputes, protection of children,
- B. In commercial matters: inter or intra-company relations,
- C. In real estate matters: during a construction or a development, in relation with a commercial lease, in a condominium or in a residential co-operative,
- D. Employment relations: disputes between colleagues, with ones' supervisor or with a subordinate,
- E. In matters of intellectual property, franchise, agency, or representation agreements,
- F. Also, disputes between neighbours (e.g. between tenants and owners of a villa), disputes arising at sporting events, schooling disputes, etc.

Under certain conditions, mediation is also possible in criminal and administrative law.

## 4. When is mediation inappropriate?

In a certain number of cases, it may be inadequate to resort to mediation. There may be good reasons to avoid mediation (A) whereas in other cases, it may only be a pretense in order to avoid the mediation process (B).

A. Good reasons for avoiding a mediation process are:

- The need to establish a legal precedent;
- The possibility of obtaining a court decision or an arbitral sentence quickly or at a reasonable cost;
- Low cost of jurisdictional fees for conciliation, when the value is minimal;
- Need for the weak party to obtain statutory protection (tenant, worker, consumer);
- Serious imbalance between the parties;
- Abusive procedures by one of the parties (established bad faith);
- Denial of violence or reiterated violence;
- Incompetence of one of the parties.

B. Bad reasons often mentioned:

- *Mediation is allegedly considered as a sign of weakness, because a position is abandoned.* Actually, mediation allows the parties to no longer be focused on the point of the dispute (the positions) but to take all of the circumstances (personal, psychological, social, etc.) and the future into account. This enables the quest for and the favouring of common interests. This argument is not applicable, when mediation is recommended by a third party or ordered by an authority.
- *It is allegedly too early (or too late) to try a mediation.* Mediation can be efficient when the conflict is not yet tied up, and also when the parties are exhausted by their battle.
- *The other party is allegedly acting in bad faith because it does not agree with me.* Mediation precisely allows for the parties to realize that their difference of opinion is understandable and that their different positions do not mean that the other party is acting in bad faith.
- *The parties have already negotiated to no avail, and appointing a mediator would not make a change.* Most frequently, it is because the parties have exchanged on positions that the negotiation fails; it is precisely at this stage that the parties should opt for mediation: a negotiation facilitated by a third party and focused on the pursuit of the interests.
- *Mediation would be useless, because the parties are no longer on speaking terms, or detest each other.* This frequent argument finds its origin in the fact

that mediation is not well known. As a matter of fact, this method, by favouring the expression of emotions, will allow the mediants to communicate again, so as to pursue their common interests.

## 5. What guarantees does mediation offer?

There are three types of guarantees for the partners (mediants) in a mediation: they concern the person of the sworn-in or accredited mediator (A), the functioning of the process (B), and the rules of conduct (C).

A. The *officially sworn-in or accredited mediator* (or approved by an umbrella organization) presents a full guarantee of *professional qualifications and ethics*. Thus, he shall be chosen from *a list prepared by official bodies* (see Q, No. 10 C hereafter) which verify whether he meets the statutory conditions, or from a list kept by the top industry associations (FSM-SDM ; CSMC-SKWM ; FSA/SAV), which provide accreditation to their members.

B. The *smooth functioning of the process* is regulated by a few fundamental and quasi-universal principles:

- *Humanity* : the human being is at the heart of mediation, which has as a *goal* to reinstate the dialogue and as *effect* to diminish or alleviate all sorts of suffering and all sorts of waste caused by the dispute;
- *Multipartiality and empathy of the mediator*: the latter undertakes to serve the parties in an equitable manner, without making any unfavourable distinctions between them; he takes over the smooth guidance of the process;
- *Freedom and autonomy*: the parties are free to accept or refuse to join the process, which they can leave at any time; the mediator is free to start, to continue, to suspend the process or to terminate it, in case of necessity;
- *Responsibility*: the parties have a duty to enter the process in good faith, to behave respectfully and in a transparent manner as well as to respect the confidentiality; they are responsible for the issue of the process. The mediator is responsible for the good conduct of the process; he has a duty to verify that the parties have understood the characteristics of the process as well as their part and his own; the mediator must ensure that the parties grant to their final agreement a free and fully informed consent. If necessary, he shall invite them to consult a lawyer; he is under a duty to terminate the process if the proposed solution cannot be fulfilled or if it is against the law;
- *Independence*: the mediator is independent. He must tell the parties about any circumstances which objectively or subjectively, could compromise his independence;
- *Neutrality*: the mediator refrains from participating in the controversy and from making statements regarding the substance of the dispute;
- *Humility or absence of power*: the mediator has no decision authority whatsoever;
- *Confidentiality*: the parties and the mediator shall refrain from informing third parties about any statements, opinions or proposals made during the process, and from producing documents in later proceedings referring to the above. The parties shall refrain from having the mediator cited as a witness. The mediator shall furthermore keep the existence of the process and the names of the parties

confidential. However, there are exceptions in some situations (school mediation, or discovery of a criminal wrongdoing during the mediation process).

C. These principles are reflected in the codes of conduct of mediators, such as the Code of European mediators, in some national legislations and in the non-compulsory instruments of the Council of Europe or of the European Union, or of other governmental or non-governmental organizations (CCI/ICC ; OMPI/WIPO ; UNCTAD/CNUCED, etc.). Sworn-in mediators who would not abide by these principles would be facing sanctions, which could go as far as their delisting.

## 6. What is the role of the mediator?

A. He starts by ensuring that the parties came of their own will and after having been fully informed. The first task of the sworn-in mediator is to assist the parties in initiating a positive negotiation. He facilitates the communication between them and the discussion of the elements of the dispute separating them. He identifies the obstacles to the communication and to an understanding by applying specific techniques. He creates an atmosphere of respect in which the parties shall find the confidence necessary for a fruitful dialogue. He helps them to develop their creative possibilities in order to resolve their dispute in a satisfactory manner for each party.

The mediator applies several specific tools: active listening (verbal, para-verbal and non-verbal), reformulation, redrafting (synthesis), *and* principled negotiation. The latter is a mode of conflict resolution created by Professors Roger Fischer, William Ury and Bruce Patton, from Harvard University, according to which the negotiators focus on the common interest of the parties, not on their respective positions, while it is understood that the claims can rarely be satisfied, while it is easier to do so with the needs. There still needs to be enough room for imagination, too. The purpose is to obtain rational agreements based on objective criteria.

During the mediation process, the mediator borrows the techniques of principled negotiation in order to help the parties to negotiate between them the various options envisioned. In order to achieve this, he carefully respects the dignity of the persons in attendance, by separately treating the questions of persons and the dispute, and he invites them to imagine solutions which present a common advantage.

B. The mediator refrains from:

- giving an opinion on a technical issue, contrary to the expert ;
- providing an advice or a legal opinion, contrary to the conciliator;
- making investigations or taking depositions and making recommendations to the parties or to an authority, contrary to the ombudsman;
- rendering an arbitral decision, contrary to the arbitrator;
- passing a judgment, contrary to the judge.

C. Co-mediation.

In complex matters, when a vast number of parties are concerned, or if the parties so desire, the mediation may be carried out by two sworn-in or approved mediators, e.g. a man and a woman, a specialist and a generalist, a lawyer and a scientist (engineer or technician, etc.).

## **7. The lawyer: his/her role? His/her interest?**

### **A. His role<sup>7</sup>**

The role of the lawyer differs from the usual jurisdictional battle and shall be defined by mutual consent. The parties decide whether their lawyer shall participate in all the steps of the mediation process or only in some of those. His/her presence is important, inter alia when the final agreement is being drafted. The lawyers' presence is more specifically welcome in complex cases, or more generally, when a delicate legal issue must be solved.

#### **Before the mediation process**

In order to avoid a dispute for their clients, and so as to assist them in containing a dispute (as disputes are a part of life), and in order to maintain correct relationships with their family and business partners in spite of a possible dispute, the lawyers shall propose mediation clauses in the agreements they draft (*cf.* attachment 1). This precaution is particularly useful for contracts with a long duration, or when the parties had a long lasting relationship.

*If and when a mediation process was selected, said process must be explained to the client. Among others things, the client must be informed about the autonomy of the parties, the « rules of the game », among which the rule of absolute confidentiality and the respect of the other parties, as the « opponent » becomes a « partner in the process ».*

#### **During the mediation process**

As the client is the most important actor in the process, his lawyer shall mainly act as counsel (or coach) and as advisor (safeguard) while trying to be understood by the other party. He shall act with his colleague in a more traditional function for the common drafting of the mediation agreement.

#### **After the mediation process**

The lawyer shall ponder the necessity of having the mediation agreement homologated, or to give it the form of an authentic enforceable instrument.

#### **After the judgment**

Once a judgment was rendered, the consulted lawyer shall examine the usefulness of initiating a mediation process at this stage, specifically if the judgment passed seems unsuitable to the actual situation or to the real interests of the parties.

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<sup>7</sup> *Cf.* Avi SCHNEEBALG, *Le rôle du conseil en médiation civile et commerciale*, CMAP/ECONOMIA, Paris, 2003

## Codes of conduct

In addition to the question of the costs, *the higher interest of the client* shall motivate the lawyer to start the mediation process when the case permits (see Q No. 3 and 4 above). The codes of conduct of the legal profession tend to this, such as the code of conduct of the European lawyers adopted by the Council of European bar associations as well as national and regional codes. The fact of not proposing a mediation process in situations appropriate for it (see Q No. 3) could today be a case of malpractice pursuant to these codes as well as in line with the injunction of the Federal Council worded as follows:

*Jurisdictional action must remain the last weapon to pacify a litigious situation. (...) Thus, an amicable settlement shall have priority, not because it gives less work to the tribunals but because in general, amicable solutions are more durable and eventually more cost-effective because they can take into account elements a court could not consider<sup>8</sup>.*

The code adopted by the Council of Bars and Law societies of Europe<sup>9</sup> has the following wording:

*At all times, the lawyer must try to find a solution to the clients' dispute, in adequation with the cost of the case, and he must provide the client at the proper time with the advice regarding the possibility to find an agreement or to resort to alternative ways of dispute resolution<sup>10</sup>.*

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<sup>8</sup> FEDERAL COUNCIL, Message concerning the Swiss code of civil procedure (CPC) of June 28, 2006 (FF 2006 6841)

<sup>9</sup> The Swis Bar associations are associated to this and will most probably include this rule in their code of conduct, now that mediation is anchored in the Swiss legal system.

<sup>10</sup> Art. 3.7.1. of the code of conduct of the european lawyers adopted by the Council of Bars and Law societies of Europe updated on 19.5.2006, cf. Jean A. MIRIMANOFF (éd.), *La médiation dans l'ordre juridique suisse, Une justice durable à l'écoute du troisième millénaire*, Helbing, Basel, 2011

## **B. The lawyer's interest<sup>11</sup>**

By rendering his professional services as well as in the relationship with his client, the lawyer will benefit from proposing a mediation process and advising his client in this context:

- 1 The important rate of success of the mediation. In Switzerland and abroad, statistics agree in showing a rate of success of about 70 % in civil and commercial matters<sup>12</sup>. This rate enhances the credibility of the lawyer and of the firm resorting to mediation.
- 2 The profitability of the law firm. Considering that the fees may take into account the success and the quickness of the lawyers' services, the abovementioned rate of success will also be an element of added value for the law firm.
- 3 The reputation of the law firm. Mediation is a new slot, demonstrating the openness, the creativity and the variety of the services provided by the firm to its client. It also shows the care of the law firm to put the superior interest of its client above anything else.
- 4 Customer loyalty. The circumstances described above should also, in times of increased competition in the legal profession, contribute to enhance customer loyalty.

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<sup>11</sup> Cinthia LEVY, « Les avantages de la mediation pour l'avocat », *in* : *Revue de l'Avocat*, november-december 2013

<sup>12</sup> Study by the FSM, year 2008, published in october2009.

## 8. What process? Which steps? What duration?

There is no uniform process, be it for mediation in general, or for special mediations: family, commercial, real estate, etc. Hence, it is not surprising that the practice shows a great variety of approaches, streams and methods.

In the teachings provided in Switzerland and other European countries, one often comes across a model called « the Fiutak wheel »<sup>13</sup>, named after its author. After a preliminary preparation, this model is made of four steps, leading to the execution of the agreement.

*Preliminary preparation:* before signing their mediation undertaking, the mediator, the parties and their advisors introduce themselves, define their objectives and expectations, the rules applicable to the process are explained; the timetable of the process and its various steps is organized.

Phase one: *what?*

This phase allows the parties to communicate their view of their reality. At this stage, the function of the mediator is to allow fair speaking time to the parties and ask questions with a view to clarifying the situation.

Phase two: *what for?*

This phase allows the parties to ask questions of each other in order to check their representation of the reality and start verifying where their true interests may lie. The parties express their emotion freely, as well as their sentiments, values, needs and interests.

Phase three: *and if ..., how?*

In this phase, the parties explore the various options without being trapped and limited by the difficulties of the past. It is an asset to express as many options as possible.

Phase four: *how exactly?*

It allows for the preparation and application of an action plan. The purpose of this plan is for the parties to choose together among the various options those which shall result in a durable agreement. At this point, there are sometimes discussions of points of detail, which are more complex and which were not considered so far. It is only once that the parties are in a position to answer the following questions: « Who does what, when, where and how? » and that they can specify what would be the consequences

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<sup>13</sup> Thomas FIUTAK, Gabrielle PLANES et Yvette COLIN, *Le médiateur dans l'arène, Réflexion sur l'art de la médiation*, Trajets, Erès, Paris, 2009

for each of them in the event of non-fulfillment of the mediation agreement, that the latter becomes feasible.

Between the two first phases and the two following ones there is a – essential – zone, in which the parties specifically express their emotions, which Fiutak calls « the transition point of catharsis ».

*Execution of the agreement:* once the final agreement is reached, the parties can accept a verbal or written agreement, or reinforce the efficiency thereof with an enforceable instrument, or with the homologation in the case of a judicial mediation. However, the ratification by a court of law is always necessary in cases of separation or divorce.

The entire process may take one or several meetings lasting from two to four hours, during which all or part of the above steps are being covered. The timing depends on the decisions of the parties and the subject submitted to the mediation process.

The whole mediation process should not last longer than two to three months.

In order to avoid too extensive intervals between the meetings, the parties can foresee deadlines (a date after which the mediation process ceases, if it has not succeeded by then). Such deadlines can be found in the mediation rules or in certain national legislations.

The shortest mediations are for example (less than one hour or less than one half day): mediations concerning neighbours, followed by commercial mediations (an average of one entire day or from two to four half days), while family mediations, as a rule, are carried out in meetings of about two hours, but with longer intervals, so that the parties can correctly manage what they have been through and so as to better prepare long lasting solutions. School mediations normally take much less time and are informal.

**9. How much does mediation cost?  
What are the economic advantages?  
Can legal aid (LA) be granted?**

**A. Cost of mediation**

The costs of a mediation process include the fees of the mediator and of his possible expenses. The parties and the mediator begin by agreeing on the financial terms. The fees of the mediator are usually split evenly between the mediants, but they can also be differentiated, in order to take into account, for instance, differences of financial status between the mediants.

The setting of the hourly rate of the fees shall, inter alia, take into account the financial situation of the parties, the value of the case, the number of parties in presence, the nature and the complexity of the dispute, etc. Most frequently, the rates are known from the outset, because they are regulated in a set of rules of the mediation institutions (please refer to the links mentioned ad Q No. 10 C).

**B. Financial advantages**

Frequently, and more especially in commercial matters, mediation is oriented towards the maintaining or the transformation of the relations between the parties. However, civil or arbitral proceedings shall very often provoke a disruption (jurisdictional battle), which, in turn, will increase hidden costs which are not included in the costs of the proceedings per se. Indeed, every party will again have to invest time, money and energy in order to find a new commercial partner, a new commercial product, new services, new patents, trademarks or industrial designs, new associates, new financing, new office space etc. All these important costs can precisely be avoided or drastically reduced, when mediation is chosen as a dispute resolution mode.

**C. Legal aid**

When the conditions for granting legal aid are fulfilled, the costs of the mediation process, including the fees of the mediators are covered by this institution. Certain legislations extend the benefit of legal aid to the non-judicial mediation<sup>14</sup>.

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<sup>14</sup> Art. 2 of the regulation on legal aid for the sworn-in mediator (E 2 05 04)

## **10. How to start mediation? When? Who? With whom?**

### **A. When?**

The parties may plan preventively to resort to a mediation process even for a simple problem or a difficult relationship.

Several situations may be considered:

- a) It is recommended to insert preventively a mediation clause into any agreement (*cf.* attachment 1).
- b) They may also pass a mediation agreement once a dispute has arisen, at the stage or instead of the conciliation, or at any time during the court or the appeal proceedings.
- c) Furthermore, in a final mediation agreement consecutive to a first conflict, the parties may foresee that in case of difficulties related to the execution of the agreement or in case of further difficulties, the parties can again resort to mediation.

### **B. Who?**

The mediation process is basically put in motion by the parties and, as the case may be, their advisor. It can also be suggested proposed or ordered by a third party. Which third party? Actually, it could be anybody:

- A private person: a friend, a neighbour, a relative, a colleague, the chairman of an association, a lawyer, an accountant, an insurer, etc.
- An official person: a magistrate, a notary public, the mayor of a commune, a teacher, a qualified representative of the brigade of underage persons etc.

### **C. With whom?**

Lists of sworn-in or accredited mediators, indicating their areas of specialisation are being kept and updated by the authorities of certain countries and cantons, and failing this by umbrella associations on the national or regional level.

Geneva: Commission de préavis en matière de médiation civile et pénale, Département de la Sécurité et de l'Economie, 7 place de la Taconnerie, Case postale 3962, 1211 Genève 3,  
[www.ge.ch/justice/mediation](http://www.ge.ch/justice/mediation)

Fribourg : Commission de la médiation en matière civile, pénale et pénale pour les mineurs, Service de la Justice, 27 Grand Rue, CP, 1702 Fribourg,  
[www.fr.ch/sj/fr/pub/mediation.htm](http://www.fr.ch/sj/fr/pub/mediation.htm)

Vaud : Tribunal cantonal, Liste des médiateurs civils agréés,  
[www.vd.ch/mediation-civile](http://www.vd.ch/mediation-civile)

Swiss Chamber of commercial arbitration (CSMC/SKWM),  
[www.skwm.ch](http://www.skwm.ch)

Fédération suisse des associations de médiation (FSM/SDM),  
[www.infomediation.ch](http://www.infomediation.ch)

Swiss Bar Association (FSA/SAV),  
[www.swisslawyers.com](http://www.swisslawyers.com)

International Mediation Institute (IMI), La Haye  
[www.imimmediation.org](http://www.imimmediation.org)

## ATTACHEMENTS:

### I. MODEL MEDIATION CLAUSES (CCIG)

#### **MEDIATION (FOLLOWED BY AN ARBITRATION)**

*Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, shall be submitted to mediation in accordance with the Swiss Rules of Commercial Mediation of the Swiss Chambers' Arbitration Institution in force on the date when the request for mediation was submitted in accordance with these Rules.*

*The seat of the mediation shall be Geneva.*

*The mediation proceedings shall be conducted in... [specify desired language].*

*If such dispute, controversy or claim has not been fully resolved by mediation within 60 days from the date when the mediator(s) has (have) been confirmed or appointed, it shall be settled by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution in force on the date when the Notice of Arbitration was submitted in accordance with those Rules.*

*The number of arbitrators shall be ... ["one", "three", "one or three"].*

*The seat of the arbitration shall be in Geneva.*

*The arbitral proceedings shall be conducted in ...[specify desired language].*

*(The arbitration shall be conducted in accordance with the provisions for Expedited Procedure [if so wished by the parties]).*

*For more information:*     [arbitration@ccig.ch](mailto:arbitration@ccig.ch)  
                                  [www.ccig.ch](http://www.ccig.ch)

## II. LEARN MORE ABOUT MEDIATION

- Jean A. MIRIMANOFF, Marco PONS, *Amicable Dispute Resolution : Bibliography, Résolution Amiable des Différends : Bibliographie, Einvernehmliche Streitbeilegung : Bibliographie*, Slatkine, Genève, 2014  
[www.infomediation.ch](http://www.infomediation.ch) ; [www.skwm.ch](http://www.skwm.ch) ; [www.mediationgeneve.com](http://www.mediationgeneve.com)
- Esther HAAS et Toni WIRZ, *mediation – Résoudre les conflits par le dialogue*, Ed. Beobachter, 2014, en collaboration avec la SDM-FSM
- Esther HAAS und Toni WIRZ, *Mediation – Konflikte lösen im Dialog*, Verlag Beobachter, 2011, in Zusammenarbeit mit SDM-FSM
- Jean A. MIRIMANOFF (éd.), *La médiation dans l'ordre juridique suisse, Une justice durable à l'écoute du troisième millénaire*, Helbing, Bâle, 2011
- Roger FISHER, William URY et Bruce PATTON, *Comment réussir une négociation*, Seuil, Paris, 1982

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### **SDM-FSM**

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Fédération Suisse des Associations de Médiation

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<b>S K W M</b>	<b>Schweizer Kammer für Wirtschaftsmediation</b>
<b>C S M C</b>	<b>Camera Svizzera per la Mediazione Commerciale</b>
<b>S C C M</b>	<b>Swiss Chamber of Commercial Mediation</b>