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## Mediation Development Toolkit

### Ensuring implementation of the CEPEJ Guidelines on mediation

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#### **MEDIATION AWARENESS AND TRAINING PROGRAMME FOR ENFORCEMENT AGENTS**

##### *ensuring the efficiency of the Judicial Referral to mediation*

Document elaborated jointly with the contribution of the International Union of Judicial Officers (UIHJ)



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## Introduction

For many years the profession of enforcement agent has been active in the field of mediation due to the nature of its functions.

It was recognized that enforcement agents<sup>1</sup>, because of the qualities of impartiality, neutrality and confidentiality inherent to their function, appear to be the ideal professional to act as mediators in the context of alternative dispute resolution.

In the daily practice of their profession, they play a crucial role in the resolution of disputes.

Enforcement agents must in fact daily try to conciliate two opposing interests, on the one hand the interest of the creditor wishing to recover what is owed to him according to an enforceable title and on the other hand the debtor not knowing or not wishing to pay the debt to which he has been condemned. This is what the International Union of Judicial Officers (UIHJ) calls "post-judicial mediation", a method by which the enforcement agent tries to obtain an agreement from the parties by negotiating either a payment plan, or obtain a remission of interest or even obtain a reduction of the debt against a payment of the negotiated sum.

Enforcement agents must therefore be able to communicate in a fair and balanced manner in order to carry out their mainly judicial mission but also regularly in their accessory missions such as, for example, amicable debt collection.

It is therefore essential that enforcement agents have a full knowledge and understanding of the process and benefits of mediation, not only to practice so-called "post-judicial" mediation but also to be able to act as mediators in a broader sense in the context of alternative dispute resolution.

Even if, to date, few member countries of the Council of Europe (France, Belgium, Italy, the Netherlands, Portugal, Switzerland and Spain among others) allow enforcement agents to officially practice as mediators, it is important to raise the awareness of enforcement agents as regards mediation in civil and commercial matters. Such role of the enforcement agent as a mediator is also confirmed by the CEPEJ Guidelines (2009) 11 REC on enforcement (Guideline 8).<sup>2</sup>

The awareness raising and training program has therefore been designed to provide enforcement agents with the necessary tools and techniques not only to carry out their mission of forced enforcement of court decisions by bringing the solution of "post-judicial" mediation to the parties, but also to enable them to integrate this mediation activity in their new competences for those member countries of the Council of Europe which are not familiar with it.

The program is based on the competence-based training model, which, in general is a popular analytical instrument helping to respond to the main question of what enforcement agents have to know, do and feel in a work environment in order to perform efficiently.<sup>3</sup> Work competencies are embedded in individual human

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<sup>1</sup> In some member states of the Council of Europe enforcement agents are civil servants and come under the authority of the civil service and the Ministry of Justice and therefore do not offer training services to enforcement agents (e.g. Germany, Austria, Sweden). The present study is therefore mainly directed to enforcement agents who work under a liberal and independent status and who also carry out other activities such as mediation in addition to their competence to enforce court decisions.

<sup>2</sup> "The enforcement process should be sufficiently flexible so as to allow the enforcement agent a reasonable measure of latitude to make arrangements with the defendant, where there is a consensus between the claimant and the defendant. Such arrangements should be subject to thorough control to ensure the enforcement agent's impartiality and the protection of the claimant's and third parties' interests. The enforcement agent's role should be clearly defined by national law (for example their degree of autonomy). They can (for example) have the role of a "post judicial mediator" during the enforcement stage." Guidelines for a better implementation of the existing Council of Europe's recommendation on enforcement" available from <<https://rm.coe.int/16807473cd>>

<sup>3</sup> Within the European Union, competences are defined as: "the proven ability to use knowledge, skills and personal, social and/or methodological abilities, in work or study situations and in professional and personal development. In the context of the European Qualifications Framework, competence is described in terms of responsibility and autonomy." Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for Lifelong Learning.

capacities but could also be trained and developed to be deployed in a social context. Since such competence-based model is already in use for training programs for enforcement agents, it can be separately used also for the mediation training program. In that respect, we distinguish between different types of competencies: professional, personal, social, methodological and technical. Training for developing such competences involves legal knowledge, but also communication competences and psychological techniques of handling relations with clients and parties, as well as ethics, etc. The emphasis lies on special laws and the deepening the understanding of the profession. The development of professional skills involves practicing in a safe training environment and applying the gained knowledge and working models in situations as close to real life as possible.

The CEPEJ Guidelines for a Better Implementation of the Existing Recommendations Concerning Family Mediation and Mediation in Civil Matters; CEPEJ 2007(14), adopted on 7<sup>th</sup> of December 2007, mention in the point 22, as a minimum, the following items should be covered in mediation training: principles and aims of mediation, attitude and ethics of the mediator, phases of the mediation process, traditional settlement of a dispute and mediation, indication, structure and course of mediation, legal framework of mediation, skills and techniques of communication and negotiation, skills and techniques of mediation, adequate amount of role plays and other practical exercises, peculiarities of family mediation and interest of the child (family mediation training) and of various types of civil mediation (civil mediation training) and assessment of knowledge and competence of the trainee.

Indeed, if enforcement agents wish to act as mediators themselves, they must complete the training program for this purpose. The “Guidelines on designing and monitoring mediation training schemes” adopted by the CEPEJ in June 2019, constitute an important basis for the elaboration of such training (CEPEJ (2019)8).

The proposed training is composed of three parts (general, specific and practical) which the National Chambers or other national organizations of the enforcement agent profession can adapt freely or according to their own needs and circumstances.

It is important to devote sufficient time to practical learning through hands-on exercises and discussions. Therefore, it is recommended that at least 50% of the training time be devoted to these types of exercises.

### **Theoretical general training**

The initial training is a basic training aimed to develop professional skills in mediation. It is a mainly theoretical training that could be the subject of e-learning. However, it is more appropriate to follow this course in person.

The general theoretical training area includes the following minimum contents :

1. Notion of conflict.
    - a. Notion, distinctions, identification of the birth and escalation of the conflict (genealogy of the conflict) ;
    - b. Positions and reactions of each party (mediated and mediator) to the conflict ;
    - c. Approach of the conflict according to the notions of anguish, defense and desire ;
  2. Initiation to mediation :
    - a. analytical study of the different amicable and jurisdictional modes of conflict resolution, including the role of judicial actors, in terms of information and prescription ;
    - b. definition of mediation ;
    - c. general principles of mediation ;
    - d. Phases of the mediation process;
    - e. introduction to interest-based negotiation.
    - f. Analytical study of the different forms of conflict resolution (ADR) ;
    - g. Indication, structure and course of mediation
    - h. Philosophical and psychosocial toolbox for analyzing and intervening in human relationships: principles of analysis and paradigms, the concept of psychosocial actor and psychosocial
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relationships, symbolic interactionism (Goffman), communication theory (Habermas), justification theory (Boltanski and Thévenot), recognition theory (Honneth) and others.

3. Law related to mediation :

- a. mediation in international law ;
- b. mediation in European law ;
- c. mediation in national law ;
- d. law of obligations, contract law and property law in relation to mediation, including in particular the distinction between public policy, mandatory norms and supplementary rules;
- e. civil liability and insurance law in relation to mediation;
- f. the administrative, fiscal and social obligations of the accredited mediator.

4. Sociology in relation to mediation

5. Psychology in relation to the mediator and mediation

- a. Concepts of the mediator's knowledge, skills and self-discipline ;
- b. Concepts of psychology and psychopathology (manipulations / personalities, etc.) ;
- c. Concepts of dynamics and group psychology;
- d. Understanding and apprehending the psychological positions of people in conflict (victim / executioner / saviour), conflicts and personal problems ;

6. Communication in relation to mediation

- a. Analysis of situations the mediator is confronted with (coexisting paradigms - dynamic spiral; context of multicultural / intercultural or normative evolutions; notion of "problem"; social and relational construction of problems) ;
- b. To increase the reflexive capacity in relation to discourses (distancing, meta-position, etc.), devices and practices of mediation ;

7. Deontology and ethics

- a. Distinctions between ethics, morals and law ;
- b. Definitions and principles ;
- c. Concepts of equality, equity and justice ;
- d. Rules of ethics specifically applicable to accredited mediators ;
- e. Respect for the will of the parties;
- f. Scope of the mediator's competences and powers;

8. Mediation process :

- a. The role of the mediator including the difference between informing and advising ;
- b. the input and role of the parties, mediation counsel, experts and other potential stakeholders;
- c. the management of the framework (agenda, venues, logistics, caucuses, emotions, possible use of new technologies, etc.) ;
- d. Practically applying the rules of communication and reasoned negotiation (distinguishing people and issues in dispute, distinguishing positions and interests, identifying individual and/or common needs and interests, etc.) ;
- e. Welcoming and managing emotions ;
- f. Dealing with attempts at manipulation ;
- g. Presentation of different models of mediation practice;
- h. Use of the mediator's specific tools (active listening, distancing (from oneself and the process), observation, hypothesis building, sociogram, genogram, creativity etc.).

When developing the training content and training methodology, the level of training and practical expertise of the enforcement agents involved should be taken into account. It should be remembered that in carrying out their duties, enforcement agents must balance on a daily basis with the rights and obligations of both the creditor and the debtor, whose interests are not easily reconcilable. Enforcement agents are, in the exercise of their function, used to practicing "post-judicial" mediation.

The cross-border aspect of a situation should also be included in this training. A cross-border element may be present from the very beginning of a mediation process or it may appear during the mediation. This issue should therefore be included in the training program.

As part of this initial training, the “Guidelines on designing and monitoring mediation training schemes” adopted by the CEPEJ in June 2019, (CEPEJ (2019)8) are also to be taken into account.

### **Specific theoretical training**

The specific training allows the enforcement agent to be brought to subjects in which he or she can, through his daily experience, take his full place and independently accompany the parties in a conflict situation.

The specific training for mediation in civil cases includes the following minimum contents :

1. Special questions of law of obligations in connection with mediation (special contracts: sale, mandate, business, architecture, leases, etc.; civil liability) ;
2. Special property law issues related to mediation: ownership, co-ownership (including joint ownership), easements, other real property rights, land publicity, conflicts between neighbors (including the urban planning aspects of certain disputes), etc. ;
3. Special consumer law issues related to mediation ;
4. Theory and practice of third-party payor intervention (insurers and others) ;

The aim here is to increase the competence of the enforcement agent, a specialist in enforcement law, in other civil matters.

### **Practical training**

In addition to the theoretical training (general and specific), practical training should be organized with the following minimum contents:

1. Communication skills ;
  - a. Active listening
  - b. Emotional intelligence to understand basic emotions
  - c. Interrogation and clarification
  - d. Clarification itself
  - e. Speaking skills;
2. Negotiation skills ;
3. Steps in the mediation process ;
4. Mediation skills ;
5. Interventions in concrete situations ;
6. The application of the principles of mediation ;
7. Role-playing and situational exercises ;
8. Effective questions, ability to negotiate;
9. Development of possibilities for agreements among parties.
10. Introduction to international mediation in civil matters.

### **Duration of the training**

The training of enforcement agents must include a minimum of 50 hours, of which at least 20 hours must be theoretical and at least 20 hours practical training.

National organizations may allow for some variation in the amount of time spent on each aspect of training, depending on the profile or knowledge of the individuals who will be trained.

In order to enable enforcement agents and candidate mediators to integrate the various "knowledge, skills and attitudes", it is recommended that training institutes do not provide more than seven hours of classes (excluding breaks) per day and that the joint training be conducted over a period of more than two months.

As far as continuing or further training (refresher training) is concerned, a minimum duration of eighteen hours (18 hours) per year is recommended. This permanent training may contain a theoretical part (updating, etc.) and a practical part (practical case studies, role plays, etc.).

### **Quality and skills of the trainer**

The training must be given by a person who has the required qualities of mediators and must, among others :

- demonstrate, on the basis of a folder, that he or she has the necessary skills due to pedagogical experience;
- demonstrate that he or she has at least 5 years of practical experience as a mediator.

The number and quality of (potential) trainers could be encouraged with the introduction of a Train the Trainer program. Such ToT program will focus on learning theories, presentation and facilitation skills, formulating learning objectives, designing training modules and developing training material, but will also offer specialized trainings in the fields of practice of enforcement agents as mediators.

Trainers should come from practice. They should be active enforcement agents mediators if this activity is known in the member state concerned or a mediator in civil and commercial matters.

Experts or specialists (such as non-notaries mediators or specialists in communication or negotiation techniques, or psychologists, or other professionals and/or scholars) may also be invited to provide certain teaching units.

### **Participant Evaluation**

Evaluation is an integral part of the training cycle. To assess a training programme it is important that a training evaluation is linked to certain outcomes. This means that the training program corresponds to specific training objectives and that it is possible to measure whether the training program meets these objectives.

It is recommended that organizations representing the enforcement agent profession use the grids "self-evaluation for mediators" and "final evaluation of mediator candidates".

The key to linking training to outcomes is to obtain feedback on the training on a regular basis by both trainees and trainers, as well as stakeholders.

Evaluation forms need to be developed as templates, for a specific training and distributed at the end of each training session, analyzed and lessons learned summed up. Results must be computerized and annually debriefed with trainers searching for constant improvements.

Evaluation should include:

- Trainers: about their ability to transfer knowledge, meticulousness, and investment in their obligations.
- Trainees: about their involvement in training sessions and results from tests (questionnaires are included into training modules)
- Efficiency and impact of training activities.

### **Resources in terms of trainer-participants**

The resources required will depend on the group size. For a quality and interactive training session, it is advisable to favour a medium-sized group, for example, a maximum of 15 participants could constitute a good average.

For the size of the group, a distinction should be made between the theoretical part and the practical exercises that take place during the training; the latter should take place in small subgroups.

As far as trainers are concerned, at least two trainers should supervise the group. This requirement will allow, on the one hand, to do the practical exercises and, on the other, to observe the participants during the different

parts of the training. The observation phase of role plays during practical exercises is fundamental to the quality of teaching.

A participatory and interactive method will be followed by a debriefing on the practical cases and possible solutions for improvement.

### **Frequency of training**

It is realistic, underlying the importance of mediation, to implement regular training on mediation within the ongoing training program of enforcement agents.

### **Suitable premises**

Training should be organised in premises that allow interaction between participants.

During a training course, it should also be possible to have several rooms available (to prepare practical exercises, etc.).

### **Learning outcomes to be achieved**

Once participants have completed this course, they will be able to:

- ✓ Assess the appropriateness of mediation or other alternative dispute resolution methods for specific cases.
- ✓ Explain the role of the enforcement agent in mediation to clients and other stakeholders.
- ✓ Promote mediation as a dispute resolution process with clients and other stakeholders.
- ✓ List the different roles and tasks that an enforcement agent can have in mediation.
- ✓ Demonstrate appropriate mediation skills such as:
  - Active listening;
  - Planning a negotiation strategy;
  - Managing difficult behaviors;
  - Separate positions from interests;
  - Reality testing and use of BATNA (Best Alternative to a Negotiated Agreement) and WATNA (Worst Alternative to a Negotiated Agreement);
  - Using the mediation appropriately; and
  - Communicating effectively.
- ✓ Manage ethical issues that may arise in mediation.
- ✓ Draft and evaluate mediation documents such as mediation agreements and mediated settlement agreements.
- ✓ Comply with relevant local mediation laws and, where applicable, cross-border mediation laws.
- ✓ Build and implement efficient and fair legal practices which are mediation/ADR-friendly.