MEDIATION
AND EUROPEAN INSTITUTIONS

GEMME 20 years on!

Under the direction of
Béatrice Blohorn-Brenneur

with the collaboration of
François Staechelé and Sarah Hartmann-Lombard

MEDIATION AND EUROPEAN INSTITUTIONS

GEMME 20 years on!

Opening of the proceedings by Éric Dupond Moretti, Keeper of the Seals, Minister for Justice

GEMME France

L'Harmattan

CIM International mediation council Conseil international de la médiation

IX[es] international meetings
Council of Europe
25 and 26 May 2023

Under the patronage of Mr Dupond-Moretti,
Keeper of the Seals, Minister of Justice

The IX[es] international mediation conferences were organised by the French section of GEMME-France and by CIM, with the collaboration of Avocats de la paix and the Fédération française des centres de médiation (FFCM).

The European association of Judges for Mediation (in French, Groupement européen des magistrats pour la médiation -GEMME-) was set up in 2003 to bring together judges working to develop conciliation and mediation in the 28 countries of the European Union. GEMME has observer status with the Council of Europe. Its French section, GEMME-France, is a member of France's National Mediation Council.

The International Council of Mediation (ICM) was set up in 2009 to promote mediation in all legal systems. It encourages cutting-edge teaching and the establishment of a global network of mediation practitioners.

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- Guy CANIVET, Honorary First President of the Court of Cassation and former member of the Constitutional Council
- Béatrice BLOHORN-BRENNEUR, Honorary President of the Chamber, Honorary President and founder of GEMME and CIM, President of GEMME-France, member of the Conseil National de la Médiation (National Mediation Council)
- Éric Battistoni, Honorary Magistrate of the Liège Labour Court, CFM-accredited mediator, former Vice-Chairman of GEMME, founder of GEMME, Chairman of the Scientific Committee of the International Council of Mediation (CIM).
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- Francis DANGEL, Director General of Administration at the General Secretariat of the Council of Europe
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Welcome by Francis DANGEL

Director General of Administration
to the General Secretariat of the Council of Europe

A few words of introduction to welcome the participants and thank Béatrice Brenneur for her initiative in holding the GEMME conference on our premises. The Council of Europe can feel honoured: the programme for these two days is impressive, both in terms of the topics addressed and the high profile of the participants, including the arrival in a few minutes' time o f Mr Dupond-Moretti, the French Minister of Justice.

This event helps to raise the profile of the Council of Europe, and I know that tomorrow you will be meeting one of our colleagues from the European Commission for the Efficiency of Justice, who will be presenting mediation practices in Europe from the point of view of our Organisation.

Welcome the Minister of Justice
by Guy CANIVET

Honorary Senior President of the Court of Cassation, former member of the Constitutional Council,
honorary president and founder of GEMME and GEMME France

Mr Minister, on behalf of the French and international groups of ombudsmen w h o initiated these
"I would like to thank you not only for giving your patronage to this wonderful event, but also for attending the opening session here at the Council of Europe.

We are all the more sensitive to this because we know that your time is short, given your commitment to a major reform of the justice system, drawing on the conclusions of the recent Estates General.

Your presence here today is proof, if proof were needed, of the importance you attach to mediation in this huge project. You expressed it in strong terms in your speeches on 5 and 13 January this year, and you have enshrined it in the draft law on justice programming for 2023-2027, as well as in the guidelines you have announced for the decrees currently being prepared within your ministry; all of this, in order to give substantial content to the desire of the President of the Republic and the Government to do everything in their power to improve the justice system.

to make the justice system faster, more efficient, more protective and closer to our fellow citizens.

I don't need to tell you how enthusiastically the mediators in this room have welcomed, within the framework of this program, your ambition to establish a genuine policy of amicable settlement within the French justice system; which, in your words, calls for a "cultural revolution" for the judicial world, a cultural revolution stimulated by the measures you have already taken and those you are announcing.

But, as you also said, we are not starting from scratch. Since GEMME is today celebrating the 20e anniversary of its creation, we must recall the efforts that its French section has devoted since 2003 to making effective the provisions of the law of 8 February 1995, those of the European directive of 21 May 2008 and the Recommendations of the Council of Europe on mediation. With a great deal of faith, courage and determination, in an often indifferent and sometimes hostile environment, the leaders of this group have initiated and attempted to harmonise practices, trained mediators, forged an ethic and a doctrine of mediation, made themselves available to your Ministry and the Courts of Appeal for the drawing up of lists of mediators, placed their actions in a European and global context and campaigned for the improvement of texts. It can therefore be said that, within its means, GEMME has encouraged a change in attitudes within the judicial institution, its professionals and its users.

In other words, its members are resolutely at your side to contribute to the tremendous impetus you are inspiring to promote peacemaking justice.

Opening speech by Éric DUPOND-MORETTI

French Minister of Justice

It's a real pleasure for me to be here with you for the 9th international Conference of the "European Association of Judges for Mediation.

The topic you will be discussing over the course of these two days is particularly topical : "The development of mediation in the 5 continents : dream or reality ?

I would like to rephrase this question in a more general way, by talking about amicable settlement and not simply mediation.

The question is: "The development of amicable settlement in the 5 continents: dream or reality ?

Well, look no further! I have the answer to your question, at least as far as France is concerned: because I have committed myself to ensuring that amicable settlement in French courts moves from dream to reality.

I would therefore like to thank the GEMME - France association for this invitation, which gives me the opportunity to share with you my commitment since the launch of the amicable settlement policy on 13 January.

I would like to begin by underlining the remarkable commitment of the GEMME association in this area.

Your organisation came into being in 2003 thanks to the impetus, and I would even say the intuition, of a great magistrate, Guy Canivet, to whom I would like to pay a heartfelt tribute here.

Since then, for the past 20 years, your association has been working at national and European level to promote amicable settlement, particularly in the context of the work of the European Commission for the Efficiency of Justice.

GEMME is now a key player in this field, recognised for its expertise and regularly consulted by national and international institutions.

So it was only natural that GEMME should apply to sit on the first National Mediation Council, which will be set up in the next few weeks. And we're delighted, because you'll bring a wealth of perspectives to the Council's work.

In the next few days, I will be signing the decree establishing the composition of the first National Mediation Council.

While GEMME is present at the highest levels, it is also at the heart of the professional practice of magistrates, who make up the vast majority of its 800 members.

In this way, you are providing judges with discussion forums and frameworks that will make their day-to-day work easier and contribute to the development of a new culture of amicable settlement.

I use the term "culture" deliberately. Because yes, the amicable settlement policy is a real change of culture, a revolution in practices for magistrates, but also for lawyers and litigants for whom we all work.

It's true that we're not starting from scratch here, and the amicable agreement didn't come into being last January.

Since the Act of 8 February 1995, the first major piece of legislation on amicable settlement, a number of pieces of legislation have demonstrated the Ministry's determination in this area.

For example, I would like to mention the Act of 23 March 2019, which enshrined the obligation to attempt to reach an amicable settlement before taking a case to court. This law also enabled the judge to order the parties to meet with a mediator in order to

use appropriate information to remove any reluctance to enter into an amicable process.

More recently, we can also mention the contribution of the law on confidence in the judicial institution, which created the National Mediation Council, which I mentioned earlier, and developed online conciliation, mediation and arbitration services, with the aim of making recourse to amicable methods simpler and safer.

But we're going to go further.

The practice of amicable settlement should not be limited to a few disputes.

Nor should it be practised by a few insiders who agree to take time out of their working day to set up pilot projects or good practices. Lastly, it should not result in an increase in stock for magistrates, because yes, amicable settlement does take time.

You know all this from experience, ladies and gentlemen of the judiciary, you who are convinced practitioners of amicable settlement.

So I suggest that together we turn on the friendly lights.

So how are we going to go about it, and by what means are we going to implement this policy?

The first lever I want to mobilise is training, from university through to ENM and bar schools.

Let me put it bluntly: since our first year at university, we have been fed a culture of litigation. We have studied Supreme Court rulings, we have mastered judicial and administrative procedure, in short, we believe that a good dispute is resolved by a fine judgement.

We sometimes forget that justice can and does take place outside the courtroom. This change

of culture will therefore begin with the training of new generations of jurists, lawyers and magistrates in amicable settlement.

The second lever concerns you more directly: it involves encouraging judges and lawyers, but also litigants, to resort to amicable settlement. Out-of-court settlements must pay for themselves.

Paying off for the lawyer, who will see practices evolve, be better remunerated and whose clients will be attracted by the promise of a dispute resolved in a collaborative and controlled manner.

This pays off for the magistrate, whose investment in this area will be recognised when they are recruited, assessed and even in their statistics.

And it pays off for the litigant, who will be able to take back control of his or her case and see it resolved quickly.

The third lever is to embody this amicable settlement policy in our Code of Civil Procedure.

To make out-of-court settlements more visible and easier to understand, we will first of all bring together the scattered provisions governing this area in a single book of the Code of Civil Procedure devoted exclusively to them.

We are also going to introduce the principle of cooperation between those involved in civil proceedings and the principle of procedural proportionality, which derive from our current law and are already found in the European rules of civil procedure.

This will lead to a rethink of the pre-trial procedure. The parties, assisted by their lawyers, will decide whether the proceedings should take a short amicable route or a longer contentious route. If the amicable route is successful, the agreement reached will be ratified within one month of its receipt by the court.

Lastly, I wanted to introduce two new procedural tools to round out the existing range of out-of-court settlements: the caesura and the out-of-court settlement hearing.

The "caesura" consists of having the judge rule on the key points of the dispute and then allowing subsequent points to be resolved through mediation.

The amicable settlement hearing, inspired by Quebec, will give the parties, assisted by their lawyers, the opportunity to talk directly with their judge.

This ARA is distinguished from other alternative dispute resolution methods by the central role of the judge who, by recalling the main legal principles applicable to the matter, will enable the parties to refine their positions and bring them into line.

Feedback from consultations shows that professionals are interested in these new systems. And we have taken full account of the comments made on the draft decree, which was sent to the Conseil d'État this week.

The final pillar of our policy is the introduction o f steering and assessment tools.

These will be operational from the autumn, along with the IT tools needed to set up the caesura and the amicable settlement hearing. This is how we will support and promote the culture of amicable settlement.

Ladies and gentlemen, I'll end by saying that I believe in it.

I think the amicable settlement is moving from dream to reality.

I believe we can bring about this cultural revolution that other European countries have done before you.

I believe in your commitment as magistrates, in the commitment of lawyers, but also in that of conciliators and mediators.

I believe that we can offer our fellow citizens justice that is closer, faster and more humane.

So let's roll up our sleeves and get moving! The policy of amicable settlement is now, with you!

Thank you very much.

INTRODUCTION

Christophe SOULARD
Senior President of the Court of Cassation
Represented by Frédérique AGOSTINI
Judge at the Court of Cassation


Held up by other commitments, the Senior President was unable to take part in the opening of our proceedings.

He has asked me to assure you that he deeply regrets his absence at this high point in the life of our association and to tell you of the interest of the French Cour de Cassation, which houses our headquarters, in the development of amicable dispute resolution methods.

This latest edition of the International Assizes of Mediation is clearly a high point in the life of our association.

These IX[es] meetings, the regularity of which was interrupted by the pandemic, mark the third decade of existence of the European Group of Judges for Mediation, which was founded almost 20 years ago at the Cour de cassation, thanks to the personal involvement of First President Guy Canivet, whose faithful presence honours us. There is no doubt that once again this year, his exceptional experience as a judge and administrator of justice and his ambition for a justice system rooted in both modernity and humanity will enrich our discussions.

The founding members of GEMME and those who have supported them in this adventure can be proud of the European and international dimension that the association now has. Six hundred European magistrates have joined its seventeen national sections, and the association is also supported by many leading figures from the judicial, academic, associative and diplomatic worlds. The speeches announced in the program of our work bear witness to the fact that judicial mediation, which is on the march within the very diverse legal and judicial systems of our five continents, is being deployed to enable the parties involved in individual or collective disputes, opposing public or private, civil, commercial, social or environmental interests, to find mutually satisfactory solutions.

In line with this remarkable development, it was only natural for the French section of GEMME to organize the IX Assises de la Médiation at the heart of the enlarged Europe, in the magnificent city of Strasbourg and even more so on the premises of the Council of Europe.

Over the past 20 years, GEMME has worked to
"A grouping of judges who use or wish to use alternative dispute resolution methods, and who believe that effective, peace-enhancing justice requires, among other things, the promotion and development of these alternative methods, particularly judicial mediation .[1]

GEMME has thus clearly made its contribution to the construction of a European area of justice. Such an area cannot exist effectively without dialogue between those involved in the justice system. This dialogue of course includes the jurisdictional and institutional dialogue that exists between the courts of our countries and between these and the international courts that we share. But it also includes all other exchanges: official and unofficial exchanges; exchanges between judges and prosecutors; exchanges between justice administrators; exchanges between justice partners, whoever they may be; exchanges relating to the law and its application, of course, but also exchanges that extend to jurisdictional methods and practices. To refer to the cycle of conferences on jurisdictional practices in the service of justice that has just been completed at the Cour de cassation, these practices include all those that "*often hide behind the judge's office of saying the law by applying the law*".
In a changing environment, magistrates, backed by their ethics, "*demonstrate their determination to meet the needs of litigants and society*"[2] .

Identifying needs and designing and building solutions based on the needs of litigants is part of the approach taken by mediators, prescribers and other professionals.

[1] Statutes of GEMME.
[2] Presentation leaflet for the 2023 conference series on "Thinking about jurisdictional practices in the service of an area of justice".

As mediation coaches, you are convinced that the judge, without relinquishing his mission to settle the dispute referred to him, not only can, but must, proactively suggest to the parties to the contentious proceedings that they dare to take the route of amicable settlement in an attempt to resolve the conflict between them.

Today, amicable settlement is no longer a degraded mode of legal proceedings. If there is one lesson to be learned from the consultations held in France during the Estates General on Justice[3] , and which the French Minister of Justice fully appreciated last January when he made amicable settlement in civil matters an essential and ambitious part of his plan for faster and more efficient justice[4] , it is that the justice system must give its place to amicable settlement proposed by the judge, to amicable settlement implemented in the shadow of the judge, and to amicable settlement conducted with the support of the judge.

The French representatives will tell you about the recent and forthcoming legislative and regulatory reforms that have enriched and will enrich the range of amicable mechanisms available to judges. They will tell you, I have no doubt, how much they expect from the experience, know-how and strength of training and conviction - in short, from the practices - of those of you who, in Canada, Belgium, Switzerland and elsewhere, have preceded us in setting up the consensus model in family matters or in experimenting with amicable settlement hearings and anchoring them in court practices, sometimes without a text, without being discouraged by the scepticism or disinterest of colleagues or partners. They will also be interested in

[3] The report of the Estates General on Justice: Report on civil justice: point II: building a genuine offer of amicable, structured and high-quality justice Volume_1.docx (justice.gouv.fr).

[4] Presentation of the action plan for faster, more efficient justice.

The lessons learnt from those of you who have tried compulsory mediation beforehand, or the suggestions of those of you who have succeeded in putting new technologies at the service of human interaction, which is inherent to the success of an amicable process.

You will also have to learn from the dynamism of French judges, both judicial and administrative, who are developing innovative practices of injunctions to mediate in civil, commercial and social matters, and who are succeeding in convincing the representatives of administrations to sit down at the table with the users of public services.

The amicable offer of justice is clearly an appropriate and no longer merely alternative means of resolving disputes submitted to the courts. There is no need to remind this House that, for the Council of Europe, the amicable offer of justice is an essential element of the effectiveness of the offer of justice and, for the Union, a criterion of its quality[5] ; for the OECD, it constitutes a fully-fledged service of justice guaranteeing access to justice centered on individuals[6] .

Through the appeals submitted to them i n recent years, the Court's civil divisions have been able to measure the emergence of amicable settlement tools in legal proceedings. But the Court's case law on amicable clauses in employment contracts[7], construction contracts[8], partnership contracts

[5] EU Scoreboard Council of Europe - CEPEJ. Com. 22 June 2022, appeal no. 20-11.846.
[6] Draft recommendation no. 16 OECD ass. Soc. 21 September 2022, 21-14.171.
[7] Cass. soc. Avis, 14 June 2022, 22-70.004.

liberal[9] or on the obligation to resort to amicable settlement or the implementation of its mechanisms[10] which I would like to talk to you about.

Aware of the growing interest in amicable dispute resolution on the part of legal professionals and legislators, but also of our fellow citizens, the French Court of Cassation has asked itself a very simple question: "Mediation before the Court of Cassation, why not? "[11] to consider the reasons why the Court of Cassation should not, in the often-quoted words of Pierre Drai, also a former First President of the Court of Cassation, offer the parties "*a moment of humanity in proceedings that are often Kafkaesque*".

At the instigation of Chantal Arens, then First President of the Court of Cassation, judges from the bench and the public prosecutor's office, avocats aux Conseils and staff from our registry, combining their views and analyses of what a case before the Court of Cassation represents, came to the conclusion[12] that, despite the specific nature of the office of the judge of cassation, judicial mediation could be implemented at the level of the Court of Cassation.

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[8] Civ. 3e , 11 May 2022, no. 21-16.023; Civ. 3e , 16 March 2022, no. 21-11.951.

[9] Cass. Civ. 1, 8 March 2023, 20-10.879.

[10] Art. 750-1 Cass. Civ. 2, 15 April 2021, no. 20-14.106; prescription: Cass. Com. 11 May 2022, no. 20-23.298; suspension of time limits to conclude: Cass. 2, 12 January 2023, 20-20.941; confidentiality: Cass. Civ. 2, 9 June 2022, 19-21.798 compatibility of the functions of mediator and conciliator: Civ. 2e, 15 Dec. 2022, F-B, no. 22-60.140; homologation of agreements Cass. 2e Civ., 2 Dec. 2021, no. 20-14.092.

[11] Dalloz actualité - Mediation before the Court of Cassation, why not? - Chantal Arens, First President of the Cour de cassation and François Molinié, President of the Ordre des avocats au Conseil d'État et à la Cour de cassation - 7 July 2021.

[12] Report 2021 of the working group: mediation before the Court of Cassation.

Their reflections were of course informed by article 21 of the Code of Civil Procedure, which states that "*it is part of the judge's mission to reconcile the parties*", without distinction according to the judge's office. The working group considered that, despite its specific nature, the cassation proceedings could be a suitable time to propose mediation: The end of the trial is approaching and with it the time for enforcing a decision that may not, or no longer, meet the needs of the parties; the cassation procedure sees the involvement of new players with whom the parties, forced to re-examine their dispute and therefore their conflict through the reductive prism of cases opening to cassation, can take a step back. It is against this backdrop that the labour division, commercial division and civil divisions of the Cour de cassation have offered parties and their counsel the opportunity to try mediation. The experiment has been proposed, for example, in social matters in disputes between employer and employee, in an action for trademark infringement and unfair and parasitic competition[13] , in a dispute based on the existence of a defect in consent relating to eligibility for a tax exemption scheme[14] , and in a dispute over the use of a common courtyard[15] . One of these proposals was accepted in the context of an appeal on referral from the Supreme Court: in other words, it is not necessarily too late for a case to be referred to the Supreme Court. The mediation proposal, which may be accompanied by an invitation to the parties to meet with a mediator responsible for to them information,

[13] Com., 7 September 2022, appeal no. 21-12.602.
[14] Com., 22 June 2022, appeal no. 20-11.846.
[15] Information in progress.

free of charge, on the purpose, conduct and outcome of mediation, may be made and mediation ordered by the president of the chamber before the appeal is examined by the chamber hearing the case. The proposal and the mediation may also come from the court itself, after examining the case file, in the context of an appeal to the Supreme Court with a stay of proceedings on the referral back to the judge hearing the case on the merits. All these configurations have already been tried out by the chambers. The measures underway and the successes, whether in the form of withdrawals or homologation of agreements[16] are still modest in number, but the approach, which has been supported by an adaptation of the texts applicable before the Court of Cassation[17], has begun.

The Court of Cassation will also be following with interest the work of the National Mediation Council[18] , which is due to be set up shortly by the Minister of Justice. Bringing together qualified figures, representatives of associations working in the field of mediation, government departments, the courts and the legal professions, with practical experience or training in mediation, the Council will be chaired alternately by a member of the Court of Cassation and a member of the Conseil d'État, and will be responsible for issuing opinions in the field of mediation and, in particular, for proposing a code of conduct applicable to the practice of mediation and national benchmarks for the training of mediators.

I can't delay the next speakers any longer.

I will conclude by paraphrasing the father of article 21 of the Code of Civil Procedure already mentioned, namely the Dean

[16] Pending before the Second Chamber.
[17] Articles 1012 and 1014 of the Code of Civil Procedure, as amended b y Decree no. 25 February 2022.
[18] Art. 21-6 of Act no. 95-125 of 8 February 1995 as amended.

Cornu, who saw judicial conciliation as "*a dream of justice*" and considered that "*Justice and peace embrace rather than clash*", regretted not being able to follow, through your work, "*the very diverse paths that can lead justice to peace, despite the clash of interests and the violence of passions, despite the fire on earth*"[19].

[19] Gérard CORNU R.I.D.C. 2-1997.

CELEBRATION
THE TWENTIETH ANNIVERSARY
OF THE CREATION OF GEMME

GEMME... 20 years already! 2003 - 2023.

SPEECH BY FOUNDERS

Guy CANIVET

Honorary Senior President of the Court of Cassation,
former member of the Constitutional Council,
Honorary Chairman of GEMME and GEMME-France

Every organisation has a history: it is often useful to remember this, and we must pay tribute to the organizers of these "International Conferences on Mediation" for having done so by inviting to this commemorative event, and in the prestigious setting of the Council of Europe, those who witnessed its origins.

For me, the GEMME adventure began in 2003, when Béatrice Brenneur, accompanied by two of her colleagues, visited the Court of Cassation to tell me about her project. At the time, in the absence of an organized implementation policy and guidelines from the Ministry of Justice, the provisions of the Act of 8 June 2003 on the protection of children against sexual exploitation and abuse were not applied.

The law of February 1995, which institutionalized mediation for the first time, and the decree of 22 July 1996 were difficult to apply in the courts. Practices, which were often timid, were very scattered.

At the Paris Court of Appeal, we immediately tried to introduce a mediation policy, by creating a list of mediators, systematically informing the parties of the possibility of requesting mediation, asking the chambers to encourage them to do so in cases where an amicable settlement was possible, and introducing monthly monitoring of the results.

I have to admit that despite all our efforts, the results were modest. The majority of chamber presidents were not prepared for it, solicitors were indifferent if not hostile for understandable economic reasons, and the value of mediation was still little understood by lawyers, who often refrained from advising their clients.

For her part, Beatrice Brenneur, in the labour division of the Grenoble Court of Appeal, had introduced very proactive practices to encourage mediation, which were very successful with the parties and their lawyers, but were disapproved of by its first president.

We were both convinced that mediation had great economic, social, psychological, moral and practical advantages for the parties, but that its development needed to be strongly stimulated. In other words, we needed a propellant... a booster.

This is what GEMME proposed to do: initiate innovative practices, publicise them, identify those that exist in certain jurisdictions, harmonise them, train judges in mediation, bring together quality mediators and train them, make itself available to the jurisdictions and the Ministry of Justice, take action in relation to the courts and the judiciary, and promote mediation.

public authorities to improve the texts and, from the outset, to place itself within a European and then international framework in order to build on the experience of other countries and the support of the European institutions.

The Council of Europe had already published several Recommendations on mediation, which were relayed by the European Commission for the Efficiency of Justice. As for the Commission of the European Union, it had initiated consultations in preparation for what was to become the 2008 directive.

I therefore associated the Cour de cassation with this movement by agreeing to chair it and taking part in its events, giving GEMME intellectual and logistical support, in particular by hosting the association's head office there; while at the same time the Court's rulings were developing case law giving binding force to mediation clauses.

When I left the Cour de Cassation at the beginning of 2007 and handed over the presidency of GEMME, thanks to the commitment, dynamism, inventiveness and organisational skills of its management team, most of what had been planned had been achieved: the French section was active and vigorous, the European network had been set up, contacts had been made outside Europe, a doctrine and an ethic of mediation had been forged, training sessions had been organised and several colloquia had been held, notably in Italy.

The work accomplished in such a short time by this group of pioneers was remarkable. Subsequently, from the Constitutional Council, I naturally continued to take an interest in the progress of the movement. I have to say that I have never ceased to be impressed by the strength of the momentum generated, as well as by the positive spirit and moral quality of those who have perpetuated i t to this day. A

community of thought and action has been created, it is beautiful, it lives intensely.

Thanks to it, mediation has developed considerably in France and Europe. But that's another story...

Béatrice BLOHORN-BRENNEUR

Honorary President of the Labour Section of the Courts of Appeal of Grenoble and Lyon, former mediator for the Council of Europe, Honorary President and founder of Gemme, President of GEMME-France and CIM

GEMME's contribution from 2003 to 2023

Why did you choose Strasbourg to celebrate the 20th anniversary of the creation of GEMME?

Strasbourg is a reminder of the Council of Europe, created in 1949 to guarantee and promote human rights on our continent. The European flag features 12 stars, a symbol of fullness, gathered in a circle, a sign of union: mediation is a link between people in conflict.

But mediation is also to be found in the history of Strasbourg. On 14 February 842, in an attempt to preserve the unity of Charlemagne's empire, two of his grandsons, Louis the German and Charles the Bald, swore loyalty to each other in the **Strasbourg oaths.** The problem was that they did not speak the same language: Louis spoke Tudesque and Charles, Roman. To ensure that each army understood the content of the oath, each gave a speech in the other's language. What a joy for a mediator to hear each party speak the other's language! Louis and Charles were applying the lessons of their grandfather Charlemagne: *"To speak another language is to have another soul"*.

Why was GEMME created?

GEMME's origins lie in the crisis facing the justice system, which is due to two fundamental errors:

– The first, which is commonly accepted, is the belief that the judge's role is to settle disputes and rule the law. On the pediment of the ENM in Bordeaux, we see a judge urging others to join her in "protecting rights".

Applying the law is merely a means given to the judge to fulfil the supreme purpose of his function, which is to **contribute to social peace**. Moreover, article 21 of the French CPC gives the judge the general task of reconciling the parties. But this has been forgotten in favour of something far more exciting: litigation.

– The second mistake is to think that the legal arguments presented before the judge are the sole cause of the conflict. In fact, the deep-rooted reason for the disagreement is very often to be found in the psychological wound suffered by the person bringing the case before the courts. By translating the human into

The legal system does nothing to alleviate his suffering.

The judge, whose only tool is the law, cannot always be the guarantor of social peace. It is time to anchor our justice system on the solid rock of respect and listening to others. We have our backs against the wall, and the violence in our societies bears witness to this. This is where mediation comes into its own.

When we set up a mediation practice in the social division of the Grenoble Court of Appeal in 1996, we came up against resistance, indifference and even hostility from the judiciary: anonymous letters, written insults, a press campaign, death threats and so on have accompanied our mediation experience. How difficult it is to shake up judicial inertia and change mentalities! But as Einstein said, it's harder to change people's minds than it is to split the atom.

Éric Battistoni, our Belgian colleague, had the same misfortune. We both thought that if we wanted to spread a **European culture of peace through mediation**, we had to join forces. According to an African proverb:
"Alone we go faster, together we go further". It was therefore necessary to create an association to **bring together European Judges** and lead to a partnership between judges, lawyers, mediators, court clerks, notaries and bailiffs.

The creation of GEMME

Jacques Clavière-Schiele, Chamber President at the Paris Court of Appeal, has joined us. The three of us wanted to give our association a renowned patron, known for having tried to develop the modes

amicable dispute resolution. The future chairman of GEMME had to have the human qualities to listen to others. One name stood out: Guy Canivet, then First President of the Court of Cassation.

In October 2003, the three of us met with him and, despite his heavy workload, he agreed to support us by taking on the presidency of GEMME, taking part in its events, giving it intellectual and logistical support, accepting its headquarters at the Cour de cassation, in short by associating France's highest court with this movement.

On 19 December 2003, some thirty magistrates from the European Union, from Germany, Belgium, Spain, Portugal, France and Italy, who made up GEMME's constituent assembly, met at the Cour de cassation. Thus was born the Groupement européen des magistrats pour la médiation (GEMME).

The soul of GEMME

People sometimes ask me: "It costs €50 to join GEMME. What do I get for my €50?

And I always reply:

"For €50, you have the right to be part of this great GEMME family.

For €50, you can make a voluntary commitment to help build peace in the world, peace in the judicial system and peace in people's hearts.

With €50, you'll know how to help people in conflict; you'll be able to help your fellow citizens organise social life for the well-being of all".

GEMME has a soul. The members of the association live in communion (etymologically, they are "as one") in the face of human suffering and distress. They react with their feelings, their sensitivities, their emotions, their affects and their love in all its forms. They can then put their spirit and intelligence to work to create a better world. Without a soul, there is no breath of life: "The soul is moved, the spirit moves; the soul resonates, the spirit reasons", said François Cheng, member of the Académie française.

The soul of GEMME is the lifeblood that animates our large family and enables us to create, and without which our actions would not have existed; we would not have been able to bring people together, create symposia, international conferences like the one today, write books, the mediation guide and have the ear of national and European authorities.

Investing €50 to join GEMME and feel useful in creating a more humane and just world is the best human investment we can make. It is dictated to us by the intelligence of our hearts.

Sometimes the person I'm talking to leaves sad, because they don't see any financial return on their €50. They think: "It's a bad investment. I feel like I've thrown my money away.

It's true that they have the cerebral intelligence of good traders and financiers, but perhaps they lack the intelligence of a heart in action. It's this action to which you contribute, which characterises the members of GEMME and which seems to me to be worth a lot more than €50.

Today, more than 800 people in Europe have followed this path within GEMME.

GEMME's epic reminds me of Pierre Corneille's line in the Cid:

"We set out with 500 men, but by the time we reached port we had 3000.
So much to see us walking with such a face,
The most frightened regained courage".

We started out with 30 members at the Cour de cassation in 2003, but thanks to a swift reinforcement, by the time we reach the Council of Europe today, we have 800 members in 26 countries of the European Union and EFTA, walking hand in hand as a united, European team that has been able to transcend national borders.

At GEMME, judges are no longer isolated in their offices to face up to the hostility that prevailed in 2003. GEMME tells them: "Hang in there, we're here! This is what happened when GEMME judges ran into problems with mediation. Colleagues from the Board of Directors went to plead their case before the judicial authorities in their countries. That's what GEMME is all about!

Then, as Pierre Corneille said, *"the most frightened regained their courage"*. Loneliness is overcome within the GEMME family: we're all united for the same cause.

The work of GEMME

To raise awareness of mediation, it was necessary to inculcate a culture of it. For 20 years, GEMME and its national sections have organised conferences and training sessions in numerous European cities.

Today, GEMME is an interlocutor with the European institutions and has observer status with the Council of Europe.

Gemme's work has been decisive. GEMME has been a privileged observatory for mediation, drawing up an inventory of good practices and providing advice.

What now remains to be done is to create a European list of mediators, with selection criteria for mediators, training programmes and accreditation bodies. This is what the French section of GEMME is calling for.

GEMME is an authority on national bodies: its French section is part of the Conseil national de la médiation (CNM), a kind of national mediation observatory, set up by the French Ministry of Justice on 1 January 2006.
25 October 2022; under the terms of an agreement signed with the École Nationale de la Magistrature (ENM), GEMME-France is responsible for training judges in all French courts to preside over amicable settlement hearings (ARA).

GEMME has had some great presidents who have left us

I would like to recall the memory of Sir Gavin LIGHTMAN, President of GEMME between 2010 and 2012, who loved our association and knew how to lead it in humility and listening to others.

Jaime CARDONA FERREIRA, President of the Supreme Court of Portugal, took over from him between 2012 and 2016. He was a great president, who has sadly also passed away.

Great men know how to remain humble. Jaime gave us his loyal friendship, without taking power or deciding for the Board of Directors. He was able to create a close-knit team where all of us, little ants in the shadows, united in trust and friendship, were able to work hand in hand, no one trying to outdo the others.

Jaime, you have gone and left us orphans. During your funeral oration, we emphasised your kindness, your natural humility and your wisdom, which gave you the authority of those who have the intelligence of the heart. You were a great leader, respected and admired.

In 2014, GEMME celebrated its 10th anniversary at the Cour de cassation. What happened between GEMME's 10th and 20th anniversaries?

The theme we chose to celebrate GEMME's 10th anniversary was "Mediation, a path of peace for justice in Europe".

In an editorial, Jaime Cardona Ferreira wrote:

> "GEMME is an international association of people from different cultural backgrounds who are committed to **unity in diversity**. GEMME contributes to the development of a better and more humane justice system in Europe, one that is delivered within reasonable timeframes, thanks to mediation. And this year, we will be proudly celebrating GEMME's 10th anniversary[e] ".

And 10 years later, I repeat this sentence:
"Let's celebrate GEMME's 20th[e] anniversary with pride!

Gavin Lightman

Jaime Cardona Ferreira

Eric BATTISTONI

Honorary magistrate of the Liège Labour Court, CFM-accredited mediator, former vice-president of GEMME, founder of GEMME, chairman of the Scientific Committee of the International Council of Mediation (CIM).

GEMME's contribution from 2003 to 2023:

The test of time is the best measure of the valour of an association and its members.

That's why I'd like to take a look at GEMME in three different ways: in 2003, in 2013 and in 2023.

Looking back, then, but also looking ahead.

2003, the year the GEMME association was founded... fulfilling a categorical imperative of Justice!

In 2003, Fathi BEN MRAD defended his doctoral thesis entitled "Sociology of mediation practices" at the University of METZ. This study remains a pioneering reference document.

With a critical eye, BEN MRAD observes the extent to which positive law is increasingly imposing itself on everyday interdependencies, to the detriment of the autonomous regulation of social interactions. This supremacy of the law dissolves solidarity. The fabric of relationships is becoming tighter and rougher.

At the same time, legal dogma is reducing not only the training of lawyers, but also their scope of intervention, by confusing the law with the law. This dissatisfies the French, who declare a 38% confidence index in the judicial institution (CSA poll, 1997). In turn, mediation makes up for the inadequacy of the rules of a law that is becoming all-powerful.

The implementation of a negotiated legal order is not without its difficulties, because the judicial institution is not at all giving up its ambition to monopolise legal life. It does not support these formalised modes of regulation that would escape its control. It keeps mediation bodies under its tutelage!

Admittedly, our courts were fulfilling their primary judicial function, that "short-term" mission that required them to make a decision (**by separating two adversaries in the middle of their fight**).

However, Mr CANIVET, Ms BRENNEUR and I felt that a second judicial function, our "long-term" mission in the words of Paul RICŒUR, also required us to achieve social peace (**pacify during the time following the dispute**).

Breaking with the prevailing dogma, GEMME could be the "active minority" that would initiate social peace through mediation, conciliation and other amicable methods.

With his concept of "*minority activism modifying social representations*", Serge MOSCOVICI warned us that it would take twenty to thirty years to overturn a dominant social representation!

2013, the year marking the start of the second deanship of the GEMME association... boosting confidence!

By 2013, our GEMME active minority had established itself in more than fifteen countries.

After ten years, it was clear that out-of-court settlements did indeed meet the expectations of litigants.

The words "cooperation" and "trust" were in order: I note that the conference celebrating GEMME's tenth anniversary singled out Niklas LUHMANN and his "trust as a *generalized symbolic medium*", or Kenneth ARROW and his "trust as a *universal lubricant of economic interactions*".

In 2013, out-of-court settlements meant a lot of work for the courts!

2023, the year in which the third deanery of the GEMME association begins... amicable reflexivity!

In the year 2023, there is a general trend in Europe towards resolving disputes by amicable means. The conference celebrating GEMME's twentieth anniversary will demonstrate this in concrete terms.

But amicable solutions are neither magic wands nor sleight of hand! Stimulate mediation and conciliation for reasons of economy,

is bad thinking: it encourages negotiation rather than adjudication. But adjudication and mediation are intended to be "models of justice", not negotiation!

Amicable dispute resolution schemes need to become systems of justice, otherwise they will be wasted. But how can this be achieved?

Negotiation is naturally a conflictual and non-cooperative game. The game only becomes cooperative if it is governed by rules. What rules? Who determines them? Who supervises and sanctions? In 2023, there is no answer.

From 2023 to 2033, it will be the role of GEMME to provide this.

Even if mediation includes values of autonomy, it is important to encourage mediators and conciliating or homologating judges to lay down the right rules, the rules of a fair process, the rules of an agreement that will be perceived as fair by each party.

These rules will prevent the conflict from dissolving into bad-faith negotiation. Rules that reassure good faith and trust in amicable dialogue. Rules that guarantee respect for free, equal and informed rights, as all models of justice, whether amicable or judicial, should practice!

Dragoş CĂLIN
Judge at the Bucharest Court of Appeal, former vice-president of GEMME

It's difficult to set up and run an association, especially a multinational one, with people from different countries, with different cultures, sensibilities, ways of being and thinking. But it is possible to live with this diversity and ensure that unity prevails, because there is a link that binds us together and creates a common spirit between us.

We want Justice and Peace for our countries and for our fellow citizens. And we know that mediation is an indispensable "tool" today, at the service of citizens with interests whose conflicts must be eliminated.

Jaime Octávio Cardona Ferreira, former President of GEMME and former First President of the Supreme Court of Portugal, said ten years ago: "If you want Peace, fight for Justice! And we would add that mediation is a useful way of achieving these objectives. We know that jurisdiction is indispensable and fundamental. But we also know, today, that a single path to justice is not enough to resolve all conflicts.

Full of wisdom, energy, listening skills, kindness and gentleness, the head of our great GEMME family liked to say: "Jaime loves GEMME".

Jaime, along with Gavin LIGHTMAN, Michel BRENNEUR and Ruben MURDANAIGUM, the four whom God remembered too soon, built, with other enthusiastic judges, the foundations of an association of friends, simple people with pure souls.

The founders of GEMME and all the members who have made the association known are invaluable. Guy CANIVET, Béatrice BRENNEUR, Éric BATTISTONI, Jacques SALZER, Michèle WEIL, Danièle GANANCIA, Christiane GUTIERREZ, François STAECHELÉ, Linda Benraîs, Ivan VEROUGSTRATE, René CONSTANT, Isabelle BIERI, Blaise BATISTOLLO, Pascual ORTUNO, Marta NAGY, Evgeni GEORGIEV, Anne-Martiens VAN DER DOES, Éric VAN ENGELEN, Paul GILLIGAN et many others.

They must be valued. Without them, today would have been any day.

Long live GEMME!

COUNCIL OF EUROPE

Mediation and human rights .

Francis DANGEL
Director General of Administration
to the General Secretariat of the Council of Europe

Our House of Human Rights and Democracy was honoured that GEMME chose its premises to hold its IX^{es} International Conference on Mediation. The Council of Europe has a special relationship with mediation in two ways. Among the activities implemented by the Organisation on behalf of its 46 member states, the European Commission for the Efficiency of Justice (CEPEJ) works to improve mediation practices in Europe.

Internally, at the level of our Secretariat, mediation is a means of preventing and resolving difficult situations in the workplace.

Mediation has been offered to our staff for over 25 years. We use the services of external professional mediators, one woman and one man, who are appointed by the Secretary General on the recommendation of the Administration and the Staff Committee. This appointment, by the highest authority in our Secretariat, demonstrates our Organisation's commitment to giving mediation an important place in our internal administrative practice.

In the early days, mediation was mainly linked to respect for human dignity and the prevention of moral and sexual harassment in the workplace. Over the last few years, our mediators have broadened the scope of their work: during their monthly sessions, they are called upon to help prevent conflicts, restore damaged interpersonal relations, deal with communication problems (which can often become more serious in a multicultural organisation like ours) or resolve tensions between staff and managers during the annual performance appraisal exercise.

Today, their mission goes well beyond the advice they can give to staff or the mediation they organise. They are part of an internal network, the Well-Being Network, made up of representatives from the Human Resources Department, the Staff Committee, the medical team, the social worker and the people in the departments we call the People of Trust. This network meets every month to discuss the types of difficult situations reported throughout the organisation. Its members decide together on actions to be taken to raise staff awareness. For example, this network has run three campaigns in recent years: a campaign on the prevention of stress and burn-out at work; a campaign to raise awareness of the need to take action; and a campaign to raise awareness of the need to take action.

on well-being at work; campaign on the importance of respect between colleagues.

The ombudsmen publish an activity report every two years, which they submit to the General Secretary, together with recommendations for improvements to our human resources practices. Their insight into the dysfunctions in our organisation can have a significant impact on changes to our organisational culture.

More recently, the ombudsmen contributed to the discussions that led to the administrative reform. Because of the diplomatic nature of the Council of Europe, our Secretariat has its own legal framework for employment law. Major changes to our internal regulations have been made to strengthen the ethical framework, by putting in place three solid pillars: a Code of Conduct, a policy of respect and dignity and a policy for reporting inappropriate behaviour.

Finally, a few words about the challenges still facing our Secretariat.

Raising staff awareness remains essential if mediation is to become a natural reflex whenever a tension, communication problem or interpersonal conflict arises between colleagues. We have already made a great deal of progress thanks to our successive mediators, who have redoubled their efforts to inform and train staff. That said, there is still a certain reluctance to turn to the mediator. This is often due to a lack of awareness of mediation, but sometimes also to fears, or even the perception that there could be reprisals against people who choose mediation.

Our multicultural environment is also a great challenge. We have 46 nationalities, several locations, including some 500 colleagues in field offices,

mainly in Central and Eastern Europe. It's not always easy to understand each other, despite our differences, and that's why the message of 'living well together' is one of the highlights of our administrative reform and the next Human Resources Strategy 2024-2028.

Council of Europe Mediators.

Conflict prevention and resolution.

Martine VAN DER WIELEN
External mediator of the Council of Europe, trainer

Summary: Mediation at the Council of Europe

Testimonial on the conflict prevention and resolution system that uses an external mediator.

This presentation will develop the scope of mediation and its integration into the organisation, both from a regulatory and ethical point of view, and will enable readers to determine the advantages and disadvantages of this model, which can be replicated in companies and other organisations.

In 1998, almost 25 years ago, the Council of Europe decided to incorporate a system for preventing and resolving conflicts through mediation.

I have been working as an external mediator for the Council of Europe for six years now, and I would like to present this comprehensive model, detailing the scope of mediation and its integration into the organisation.

This will enable participants to gain a better understanding of the advantages and limitations of this model, which can be replicated in companies and other organisations and, to my knowledge, is being replicated in other international organisations.

It is, of course, a mediation that takes place within a conventional framework and not a judicial one.

Article 14 of the Staff Regulations deals with dispute resolution. It states that in the event of a dispute, amicable resolution is encouraged wherever possible. An independent mediation mechanism is established to facilitate the prevention of disputes and their non-contentious resolution.

Another document sets out in greater detail the guidelines for setting up mediation, including the definition of mediation, its scope, the referral of cases to mediators, the appointment of mediators, the progress of the process and the resolution of practical issues.

The definition adopted is as follows and does not differ from the usual definition: "Mediation is defined as an informal, structured, voluntary and cooperative process, based on the responsibility and autonomy of the participants, for the prevention and amicable resolution of conflicts. Initiated by the participants themselves, mediation involves a trained mediator who

is an independent, neutral and impartial third party. The mediation process is confidential.

The particularity of this definition is that it includes the notions of responsibility and autonomy of the parties, which, even though they are part of the credo of mediators, are not generally part of the standard definition of mediation.

As part of these arrangements, two external mediators will be appointed, one male and one female, who will be independent and chosen from 2023 for a single period of five years. Previously, they were appointed for a two-year term, renewable t w i c e . The ombudsmen are supported by a secretariat and submit an activity report to the Secretary General every two years.

The ombudsmen carry out their duties at the Council of Europe's headquarters on a permanent basis three days a month, and may also hold online meetings.

Requests for mediation are made in French or English.

My colleague Christophe Imhoos and I put in place a process that consists of accompanying the parties in a conversation during which each party gradually regains its bearings and confidence in its abilities and becomes more attentive to the way in which the other is experiencing the conflict through understanding and recognition. This transforms the quality of the interaction and the relationship and places the parties in an environment where problems can be discussed and possible solutions explored.

The scope of application is defined by the Organisation. Within the framework of the Council of Europe, the purpose of mediation is: "to assist staff members in reaching an amicable settlement o f an interpersonal dispute or any other situation

which has an impact on their well-being or performance at work".

In the event of a dispute arising from an administrative decision taken by a staff member's superior, the appropriate way to challenge the decision may be through the Council of Europe Administrative Tribunal (CEAT), which is an international administrative court empowered to settle employment-related disputes between Council of Europe staff and former staff, and their dependants, and their employer. Nevertheless, in such a situation, mediation can be useful in dealing with the interpersonal aspects of the dispute, by attempting to restore the relationship that has deteriorated as a result of the dispute.

Here are a few examples of situations that have been the subject of mediation.

- An employee who, following a reassignment and/or sick leave, finds himself in difficulty because he has no support: his team and management do not understand his experience and his need for a gradual return to work.
- A manager who seems unable to objectively assess the duration of the tasks he/she is entrusted with, and this generates situations of chronic work overload: "I'm overworked and when I try to talk about it, my manager refuses any discussion and becomes distant or aggressive"; or again: "I'm hired part-time, but I work full-time and my manager says it's because I want to...".
- An agent in difficulty because he is not given tasks/missions, and some of his activities are entrusted to others without further discussion or explanation.

– An agent who perceives the repeated sick leave of other agents as a calculated choice of comfort, or even a form of revenge against a manager who often ignores the actual suffering of the person, as well as the impact of their own behaviour on this suffering.
– A situation where a member of the team was considered to be "the problem person".

The specific features of this scheme are as follows:

1. The definition and the process of mediation correspond to what is practised in France, but with some particularities. Indeed, given that this is an international organisation in which national laws do not apply, certain particularities can be updated, particularly with regard to the definition, which mentions the autonomy and responsibility of the parties. As regards confidentiality, the principle of confidentiality is of course confirmed. However, it does not apply in situations where there appears to be an imminent risk of harm to an individual. In such cases, the Organisation's doctor and the Director of Human Resources will be informed of the situation as a matter of urgency. This clarification does not appear as such in the texts concerning judicial mediation in France.

In addition, any breach of confidentiality by one of the participants in the mediation is covered by the texts and may be subject to disciplinary sanctions. In addition, any interference in the mediation process or intimidation by another member of staff may be reported to the mediators and/or the Human Resources Director and may result in disciplinary action. Again, I have not encountered such a measure in my work with other c o m p a n i e s .

companies. As this last particularity is part of the new texts that have just been adopted, I have not come across any situation where this applied.

2. The involvement of two external mediators who alternate or work at the same time, which makes co-mediation possible, particularly in situations involving a large number of participants, which is very enriching for the mediators and often beneficial for the participants in the mediation. What's more, as the mediators do not all start their term of office at the same time, the newcomer can integrate more smoothly. Finally, there is always someone with whom you can discuss ongoing cases in confidence.

3. Mediators are appointed by the Organisation's highest authority (SG), on the proposal of a panel made up of representatives of Human Resources and the Staff Committee, for a long-term period (5 years at the Council of Europe) with a budget earmarked for their intervention. This reinforces the notion of independence and allows mediators to intervene without referring to anyone else. This also reinforces confidentiality, since it is possible to set up mediations without the authorisation or intervention of HR. This gives mediators a great deal of freedom and the opportunity to organise their work as they see fit.

4. Regular stand-by duty, i.e. three days a month, with the mediators being very available and giving their numbers and external email addresses to the Organisation. This enables the agents to plan ahead for our arrival, as well as allowing us to be very flexible in our interventions outside our on-call times.

human resources or management. This reinforces confidentiality. It also means that files can be monitored over time.

5. Voluntary participation by mediators in meetings of the well-being network, made up of persons of trust, staff and HR representatives, the occupational physician, a social worker and mediators. This network meets monthly to discuss critical situations, while respecting the confidentiality of information. No individual case is presented. Sectors presenting difficult situations are reported. No one may be named unless they have given their consent. The network's mission is to set up actions to improve well-being at work: surveys on well-being at work, various campaigns (on well-being at work, on stress and burn-out, on respect).

Initially, I must confess to having been reluctant to take part for fear of the repercussions this might have on staff perceptions of my independence. In retrospect, it led to a better understanding of the organisation and enabled me to take part in the various campaigns mentioned above and to position mediation as an alternative method of conflict resolution.

6. Raising awareness. The regular involvement of mediators and the human and financial resources made available to them enable us to raise awareness, particularly on the mediation intranet site, through the publication of newsletters dealing with mediation-related subjects. We have also produced a video on the benefits of mediation and a short clip to encourage mediation. We have also organised meetings

with employees, managers and the various departments, set up numerous training and awareness-raising initiatives on conflict prevention and mediation. This is helping to develop a culture of mediation.

7. The prevention aspect. Like all mediators, I am in favour of implementing conflict prevention measures. I like to use the image of conflict given by linguist Olivier Bernard.[1] For him, the etymology of conflict comes from the word "confluent", an unstable and dangerous place for boats, because the backwash of two rivers mixing together creates a risk zone. When these eddies are overcome, the common current is enriched by the strength of the two combined currents.

As a mediator, I often intervene in companies in the midst of turmoil when the conflict is acute and the most difficult to manage because it is often deep-rooted. At this level, saving the professional relationship is no easy task. It can take time and many conversations and actions over time to get back on track.

It is therefore preferable to act upstream of the upheaval, as close as possible to the source, to prevent the conflict from becoming recurrent and then increasing in intensity.

This is one of the effects that I see as very positive from the introduction of this system, as it enables agents to contact the ombudsman well in advance, which is more complicated when an ombudsman is called in on an ad hoc basis. I have been contacted on several occasions by agents who have asked me to intervene well in advance. In one case, I intervened even before the second agent was aware of the situation. At

[1] Training led by Olivier Bernard on 23/01/2015 "The impact of words".

The interested party had already had occasion to call on a mediator in her personal life and she contacted us quickly. She felt that a certain amount of tension was building up between her and her colleague, that this could damage their professional relationship and that this was not the future she envisaged. The colleague literally fell head over heels, and the mediation meeting enabled them to smooth out their relationship. Here's the message I received after the mediation:

> "On the other hand, I'd like to stress that the meeting we had with you really helped to ease tensions and facilitate team meetings. The working situation has improved, not only for me, but also for my colleagues. And, even if everything isn't perfect, I think we have a better understanding of the way we work. What I've learnt is that mediation is an effective tool for putting an end to conflicts and that it's never too early to ask for it!

8. The submission every two years to the Secretary General of an activity report indicating the number and nature of the problems referred to the ombudsmen, while respecting the principle of confidentiality. In their activity report, the ombudsmen can make recommendations and suggest changes to the rules and administrative practices relating to the settlement of disputes in the workplace. It is also an additional opportunity to talk about mediation.

In conclusion, this system offers many advantages for the organisation, the staff and the mediators.

The fact that this system has been in place and maintained for several decades is a message sent out by the Board of Directors in line with the Organisation's values of integrity, respect and professionalism.

For staff, it provides fast, effective and confidential access to mediators and mediation as a

and resolution of their conflicts, as well as greater exposure to the culture of mediation.

For the mediators, the fact that they are involved over a long period of time means that they can carry out in-depth awareness-raising work and follow up on mediation interventions.

One of the disadvantages could be linked to the mediator's independence. This risk is real, but it depends on the mediator, whose stance will influence the agents' perception of the independence of the mediation. In addition, safeguards have been put in place, such as a single mandate and the fact that ombudsmen only report to the Secretary General every two years.

Group mediation in intra-company disputes.

Béatrice BLOHORN-BRENNEUR

Honorary President of the Labour Chamber of the Court of Appeals of Grenoble and Lyon, President of GEMME-France and CIM, former Ombudsman of the Council of Europe

Summary

A group is not a juxtaposition of people; it is a distinct entity. The collective thinking of the group is not a reflection of the individual thinking of its members.

In a group, the majority often remain silent to maintain harmony. Officially, all is well: the group's "non-thought" is present.

The opponent becomes the scapegoat, responsible for the bad atmosphere.

The mediator's role will be to name the conflict and encourage group members to express themselves freely. He or she will use techniques to encourage the silent majority to express themselves.

When I was appointed mediator for the Council of Europe, I thought I could easily resolve conflicts within the various departments because they were dealt with upstream. In fact, I discovered unnamed conflicts where everyone was apparently satisfied. Yet a survey conducted by the Council of Europe revealed that 25% of staff claimed to have been subjected to b u l l y i n g . How can we act on group conflicts if nobody complains about anything?

1. The group and groupthink

We can't talk about group mediation without starting with the definition of the group.

A group is not a juxtaposition of people; it is a collection of people with common goals: an association of mediators or anglers, for example.

The group is sometimes a legal entity with legal personality (company, association, etc.), distinct from the members that make it up.

It may be divided into sub-groups, clans or families. A structured department sometimes behaves like a group with its own existence and specific behaviours.

It is therefore understandable that intra-company conflicts go beyond relationships between two people.

I remember running a mediation course with another trainer, Claude de Doncker.

He placed the group in a circle. He took a ball of wool, pulled out a thread, held it between his fingers and sent the rest of the ball to a member of the group. This person did the same, and each participant in turn sent the ball to another member of the group. When the whole group was connected by a thread of wool, the facilitator entered the centre of the circle and tangled the threads. In order not to let go of their piece of wool, each participant had to move around.

"That's conflict," concluded our host.
"When two people have a dispute, everyone is involved and moves from their position."

The group has a collective way of thinking and individuals, in order to be accepted and maintain the harmony of the group, hesitate to assert their ideas. Drowned in the mass, they adopt stereotyped behaviour that conforms to the norm set by the majority. Officially, all is well.

Result: the group dynamic is blocked.

We can therefore speak of the "non-thinking" of the group.

Individuals live under the illusion of group superiority and unanimity. Internal dissension is hidden, and they censor themselves.

Anyone who doesn't fit in with the group is shunned. Beware of the opponent who reveals himself: he's the man to be shot; he becomes the scapegoat, responsible for the bad atmosphere in the group.

The weak are tempted to give themselves importance and add to it. What a single person would never have dared to do, they do in a group where individual responsibility is diluted.[1] Sometimes a collective frenzy takes hold of a group.

[1] Irving Janis, 1972.

Private and group interviews

How can we know what people in a group are thinking if we stick to group interviews where there is apparent harmony?

In my capacity as mediator at the Council of Europe, I met a member of staff who was unhappy in his department. In his view, the head of department was megalomaniac and paranoid: he publicly humiliated staff members and nobody said anything. Naturally, he insisted on keeping our conversation confidential.

In the month that followed, 11 people out of the 19 in the department made the same request, each thinking they were the only one to come and complain to the ombudsman. What a surprise it was for the 11^{e} person when I told him that 10 others had already come! The occupational physician confirmed the impressive turnover in this department. Hence the importance of private meetings to find out if a conflict exists.

2. Group conflicts

A. The causes of a poor social climate

They are sometimes the result of personal behaviour on the part of the manager: favouritism (e.g. when choosing a person to go on leave), lack of respect (entering an office without knocking or saying hello), requests for urgent work, critical remarks in the corridors or in public, blocking access to information, refusal to work with certain people, non-objective appraisal interviews (highlighting only the negative points), poor definition of duties, etc. On the other hand, strengthening team spirit (by encouraging regular department meetings), making sure that you say positive things and fighting against favouritism all help to create a good atmosphere in the department and prevent conflicts from arising.

B. Dealing with conflict

Like all living things, a conflict is born, grows and dies. It can also reproduce itself and have offspring. Dealing with the initial conflict by forgetting the children is a pitfall to be avoided.

A newly-appointed head of department asked Peter, whom he knew, to assist him. He gave him some of the duties that were Paul's; Paul refused to give Peter the information he needed to draw up the reports.

Part of the department cries favouritism towards Peter and supports Paul. As a result, the two sides of the company are no longer talking to each other. It's "them against us". The atmosphere is appalling, but nobody complains openly, especially on the eve of appraisals, for fear of reprisals.

The mediator will find himself faced with two conflicts: the initial conflict (poorly defined division of tasks) and the conflict of norms arising from the creation of two clans that no longer speak to each other. By changing the group's behavioural norms, the conflict has "mutated".

Two conflicts require two interventions: the intervention on the initial conflict has no effect on the norms conflict. Even if the tasks are redefined (initial conflict), the conflict will continue if Paul continues to hide information from Peter (norms conflict).

Chronic conflict has created an emergent state. We have moved from a result function to a cause function**:** not talking to each other has become the cause of a conflict.

3. Group mediation

There are several techniques for getting the silent majority to speak:

Employees are free to express themselves either in separate, confidential meetings where they can express themselves more easily, or in plenary sessions which

will make it easier to "shuffle the cards". Individuals tend to form clans around the table; the mediator will be able to allocate different seats to the participants when they return after a break.

The mediator can explain the phenomenon to raise awareness, encourage the leaders to speak less or give them the last word. He or she can also appoint a devil's advocate who will oppose any suggestion, without being stigmatised for doing so. To ensure that disagreements are expressed anonymously, the mediator may use suggestion boxes or anonymous online discussions, or divide the participants into sub-groups and compare the results. The mediator can also involve a third party (an expert), encourage teamwork, use role-playing, organise games to lighten the atmosphere and anything else that can remove individual responsibility...

To get rid of the negative atmosphere that is draining energy, it may be useful to suggest a joint activity: skiing at the weekend, dinner in town, going to the cinema...

As we can see, individual mediation and group mediation obey different rules.

Mediation at the European Bank of the Council of Europe.

Bertrand DELCOURT
Ombudsman of the European Development Bank of the Council of Europe.

The Council of Europe Development Bank (CEB), which has its headquarters in Paris, employs 211 staff from the 42 member states that are its shareholders. It is therefore a working environment with a very strong intercultural dimension. To help resolve disputes through amicable means, the CEB introduced the position of mediator in 2011. The mediator's role is to contribute to the amicable settlement of disputes referred to him or her, and to prevent conflicts from arising in the first place. The

The Ombudsman is appointed by the Governor for a term of two years, renewable twice.

Having had the honour of being appointed to this position with effect from 1er February 2019, and entering my third term of office, I would like to share with you some observations drawn from this experience on the position of the mediator in this organisation, on the specific features that I feel should be highlighted and on the intercultural dimension of the conflicts likely to arise in this context.

The Ombudsman's position within the Bank

The institution of an internal ombudsman at the CEB makes the practice of mediation easier and more accessible to staff members than would the use of an external ombudsman for the following reasons:

- The Bank systematically covers the cost of mediation;
- The ombudsman can be consulted *in situ*, and any member of staff can ask to meet him or her. Bilateral or multilateral meetings can be organised at the place and time of work, without any organisational difficulties; I have occasionally met a member of staff outside the CEB, at his or her request, for example during a period of sick leave when he or she did not wish to visit the Bank;
- Any employee of the CEB may use the system in complete discretion, without his or her superiors necessarily knowing about it, as long as the appointment system is in the hands of the mediator.

A number of provisions guarantee the Ombudsman's independence:

- No link of subordination is is on the mediator;
- Their remuneration is determined in advance, according to the number of hours they work;
- He has a mandate of sufficient duration to feel free from any influence.

While respecting the confidentiality of his role, the Ombudsman maintains an ongoing dialogue with the Director of Human Resources, the Director of Compliance (with laws and regulations, codes of conduct and international standards of good practice) and the elected employee representatives...

On a personal level, this experience has considerably altered my perception of internal mediators with regard to the condition of independence. I remember one agent who told me that although he had come to see me without any illusions, considering that the mediator would necessarily adopt a position aligned with that of the Bank, which appoints and pays him, he nonetheless considered, after two hours of discussion, that he had been welcomed and listened to in a way that reflected an impartiality and neutrality that gave him confidence in the process.

The internal ombudsman's role is one of continuity, so he or she is involved in measures that help to promote organisational justice within the CEB.

Some special features

- Regular stand-by duty

At the beginning of my term of office, the scheme consisted of one day a month. With the development of teleworking, we felt it would be preferable t o include

substitute 2 half-days per month, more if necessary, to increase the opportunities for meetings.

The introduction of regular office hours means that the mediator is so available that it is almost a form of incentive to use him or her. The ease with which the mediator can be contacted even leads to a temptation to deal with a situation over the long term. While limiting the amount of time a mediator can be involved can sometimes have certain virtues, the introduction of a follow-up system is also an advantage. On a number of occasions, I have received an agent several months after having been called in at his request, which has enabled me to learn lessons together from my intervention and, sometimes, to make adjustments.

- The preventive dimension

Because of his regular presence and his knowledge of the CEB bodies likely to be involved in dealing with a conflict, the mediator is in a position to be consulted upstream of relational tensions within a work group or difficulties caused, for example, by a change in organisation.

As a result of this ease of access and availability, any member of staff may ask the ombudsman to meet with them alone to discuss the difficulties they are facing, without necessarily requiring a bilateral meeting with a CEB representative. This space for expression acts as a "safety valve" and allows staff members who have contacted the ombudsman to express their feelings and confide their unease, without being obliged to reveal themselves or having any consequences whatsoever at this stage.

Referral to the Ombudsman can therefore be a way for staff to inform the CEB's management of

claims (request for promotion, relationship difficulties encountered with a N+1, etc.) in an indirect and non-confrontational way. By turning to the mediator, the employee signals his or her dissatisfaction, before it degenerates into frustration and then escalates into open conflict.

- The annual report

Pursuant to Order 01/2011 of 4 October 2011, the Ombudsman's duties include submitting to the Governor of the CEB *"a progress report in which he indicates the cases submitted to him and declared admissible"* and, on an annual basis, "*a summary report, in which he summarises the number and nature of the problems referred to him, the extent to which these problems have been resolved or not, and the reasons which, in his opinion, prevent certain disputes from being resolved amicably"*.

In order to draw up this report, the situations and employees concerned must be anonymised. My practice is to distinguish in this report :

- A quantitative section giving information on the number and type of referrals, the number and nature of interviews (in person, by videoconference, working language, French or English, etc.);
- A qualitative section illustrated by *verbatim reports* that give as accurate a picture as possible of the working climate and the impact of the problems encountered on the Bank's workforce;
- Recommendations for improving the effectiveness of the mediation system or identifying areas for improvement.

A concrete example of the preventive dimension of mediation

An agent from a central European country had difficulty with the close control that his No. 1, herself from a country bordering the Mediterranean, exercised over his activities. Highly specialised in his field of activity, he considers that the deadlines for approving the documents he produces and the corrections she asks him to make to them are the result of micro-management which he cannot live with. She herself, although less competent in this field of activity, has a great deal of experience in financing international projects and would like to perfect and harmonise the formal presentation of the deliverables produced by her department. Added to this are personal behaviours that reflect distinct cultural practices: reserve and discretion bordering on modesty for one, joviality that can be perceived as exuberance for the other.

When the case was referred to the mediator, the employee, who was experiencing a lack of trust and consideration, was showing clear symptoms of unhappiness at work, and her N + 1 was at a loss, having a very hard time with the accusations made against her, given the benevolence she was convinced she was showing. The preparatory individual interviews and the two plenary sessions took place over several months, which proved to be a decisive factor in changing everyone's perceptions. These sessions enabled the facts to be clarified, with each person being led to reconsider them through the other's cultural and professional prism, and to restore mutual trust and the desire to work together. In the end, there was no work stoppage and no report o f moral harassment. I remember that at the end of the process, one of them concluded the session with these words: *"this mediation has enabled us to find a way to live our disagreements"*.

Actions of the European Commission for the Efficiency of Justice (CEPEJ).

Muriel DÉCOT
Council of Europe official
and Executive Secretary of the European Commission
for the Efficiency of Justice (CEPEJ)[1]

Summary

Mediation is fully in line with the mission of the European Commission for the Efficiency of Justice (CEPEJ) to enhance the efficiency and quality of the

[1] The CEPEJ celebrated its 20th anniversary last year.

To improve the quality of justice in Europe, in particular by seeking ways to relieve congestion in the courts. Offering States effective solutions to prevent violations of the right to a fair trial within a reasonable time (Article 6 of the European Convention on Human Rights), and thus helping to limit appeals to the European Court of Human Rights, is one of the reasons why the CEPEJ was set up. The advantages of mediation are not limited to relieving the courts of part of their workload: it is also, and perhaps above all, beneficial to the parties and the litigants, who are the ultimate beneficiaries of justice policies that seek to best meet the needs of the parties. For all these reasons, the CEPEJ's objective is to work towards developing the use of mediation in Europe by developing, since 2007, guidelines and practical tools for mediation stakeholders and public authorities on subjects such as mediation training and qualifications, access to mediation, and raising awareness among the legal professions and users of the justice system. Some of these tools have been developed jointly with the organisations representing the legal professions concerned.

The European Commission for the Efficiency of Justice (CEPEJ) was set up on 18 September 2002 by Resolution Res (2002) 12 of the Committee of Ministers of the Council of Europe. The creation of the CEPEJ is part of the Council of Europe's desire to promote a Europe based on the rule of law and respect for fundamental rights, on the basis of the European Convention on Human Rights and in particular its articles 5 (Right to liberty and security), 6 (Right to a fair trial), 13 (Right to an effective remedy) and 14 (Prohibition of discrimination).

The CEPEJ's mission is to improve the efficiency and functioning of justice in the member states and to develop the implementation of the instruments developed by the Council of Europe for this purpose. To carry out these various tasks, the CEPEJ develops indicators, collects and analyses data, defines measures and means of evaluation, drafts documents (reports, opinions, guidelines, action plans, etc.), forges links with research institutes and documentation centres, invites qualified personalities and NGOs, conducts hearings and develops networks of justice professionals.

At the third Council of Europe Summit (Warsaw, May 2005), the Heads of State and Government decided "to help Member States to deliver justice fairly and rapidly and to develop alternative dispute resolution measures".

The CEPEJ has therefore naturally included among its priorities facilitating the effective application of the Council of Europe's instruments and standards concerning alternative dispute resolution.

From 1998 to 2002, the Committee of Ministers of the Council of Europe adopted four recommendations on mediation in family, civil, administrative and penal matters. To complement these recommendations, the CEPEJ set up a Working Group (CEPEJ - GT-MED) in 2006, tasked with developing a set of guidelines to support and improve the implementation of the existing recommendations. Three sets of guidelines were drawn up, covering civil and family matters, administrative matters and criminal matters. Then, ten years later, the CEPEJ mandated the CEPEJ-GT-MED, from 2017 to 2019, to evaluate the impact of the guidelines and recommendations in the Member States, and then to complete these instruments with new tools in order to

ensure that Member States wishing to develop mediation in their domestic justice systems receive effective support from the Council of Europe. The impact assessment carried out in 2017 showed mixed results with large differences from one Member State to another. The CEPEJ therefore decided to develop a "Toolbox" for the development of mediation, designed to help all actors working around mediation to develop it, understand it, use it, and use it appropriately and effectively. This Toolbox has therefore been developed for Member States wishing to improve their national mediation systems, but also for mediation service providers, judges willing to refer cases to mediation, and legal professionals working with or close to mediation.

Some tools have been developed in cooperation with professional bodies such as the European Group of Judges for Mediation (GEMME), the International Mediation Institute (IMI), the Council of Bars and Law Societies of Europe (CCBE), the Union Internationale des Huissiers de Justice (UIHJ) and the Council of Notariats of the European Union (CNUE).

Since 2020, the CEPEJ has been working to further develop mediation tools and h a s just published a report on administrative mediation. Work is currently underway on online mediation.

The tools developed by the CEPEJ to promote the practice of mediation focus on several areas.

The first area aims to *help countries develop the use of mediation*. This involves, for example, the Outil "Setting up a pilot judicial mediation project: management checklist", which is intended for Member States wishing to develop the use of mediation in their courts.

setting up pilot projects. It encourages the concerted, coordinated and interactive involvement of judges, lawyers and mediators. It consists of a checklist designed to ensure the availability of the higher judicial authorities and the cooperation of the various players. Another checklist is used to monitor the pilot project. Another tool is included in this area: a

A "Reference Grid of Key Performance Indicators for Mediation", designed to help improve the measurement of the performance of mediation systems and to enable a comparative analysis of the effectiveness of these systems in the different Member States. If Member States have consistent data on performance indicators, it is easier for them to monitor their mediation systems and thus make progress in developing new policies.

The second is to *improve the quality of the mediation services provided*, in particular by training mediators. In the majority of countries, the training of mediators is not unified and homogenous, and it is difficult to ensure the quality of mediation in these conditions. The "Guidelines on the design and monitoring of training programmes for mediators" developed with IMI and the "Basic training programme for mediators" may therefore prove useful. The aim here is to provide guidance to Member States and mediation stakeholders on how to set up and maintain effective, high-quality training programmes for mediators, by harmonising minimum training standards and ensuring an adequate number of well-trained mediators for each jurisdiction in the Member States. It details the main principles, lists the main topics to be covered, the skills required, the length of training, etc. The CEPEJ has

It has also developed a "European Code of Conduct for providers of mediation services", which sets out a series of principles that mediation centres, institutes and other providers of mediation services can voluntarily undertake to respect when intervening in any type of dispute, particularly in civil, commercial, family, administrative and criminal matters. It also calls on legislators in the Member States to incorporate the rules of this code into the legal environment governing mediation in their country. Finally, the "Standard mediation forms" tool includes a model agreement to enter mediation, a model settlement agreement for mediation and a model satisfaction questionnaire for mediation. A model contractual clause providing for the use of mediation as a dispute resolution method is also proposed. The names and concepts used in the model forms and in the various provisions may need to be adapted to the national legislation in force.

The third aim is to *increase awareness of mediation in the legal professions and encourage its use by them*. The issue of raising awareness among judges is fundamental, since in many cases it is judges who refer cases to mediation. Such referrals require in-depth knowledge of mediation and the cases that should be eligible. The document describes the factors that indicate that a referral to mediation may be appropriate (highly emotional cases, need for privacy and confidentiality) and the factors that are counter-indicators (profound imbalance of power, etc.). The "Guide to judicial referral to mediation" is therefore intended for magistrates, but also for court clerks, and has been supplemented by the "Mediation awareness programme".

mediation for judges" developed with GEMME. Other tools for raising awareness among legal professionals have been developed by the CEPEJ: the "Guide to mediation for lawyers" developed jointly with the CCBE. It summarises the advantages of mediation over the judicial process. One section develops the role of the lawyer in the process as an advisor, that of the mediator and the characteristics of the process. Topics covered include: the choice by the lawyer and client of a method of resolution as an integral part of the analysis of the case, advising the client on the appropriate method, practical assistance to the client during the process (with concrete examples), the drafting of the final agreement and its execution, and the selection of the mediator. Generally speaking, the Guide calls for the Bars to be involved in creating an environment conducive to mediation, "including the concrete recommendation" to include in lawyers' codes of conduct an obligation or recommendation to consider alternative methods or mediation before going to court and to provide the necessary information and advice to the client. As with judges, this tool has been supplemented by a "Training programme for lawyers on supporting clients in mediation". Similar tools also exist for notaries and judicial officers, with approaches specific to the different professions: these are the "Mediation awareness and training programme for enforcement agents", developed jointly with the UIHJ, and the "Mediation awareness programme for notaries", developed jointly with the CNUE.

Finally, two Handbooks on specific issues also complete the CEPEJ Toolbox on mediation. The first i s entitled

"It was drawn up following a comparative study of the different systems of administrative mediation in Europe in order to take stock of the situation, identify, compile and disseminate good practice in the field and consider what the CEPEJ could propose in order to better support the Member States in developing and improving the use of administrative mediation. The aim of the Handbook is to promote and facilitate the use of administrative mediation in the Member States.

The "European Handbook for the development of national legislation on mediation" is also an essential document for States wishing to develop a legal framework conducive to the development of mediation by drawing on best practices from other European countries. National legislators are encouraged to introduce legislation on mediation or to amend existing regulations to bring them into line with international standards and to ensure that quality mediation is established in their respective countries. The national legislation of the following 18 countries was studied: Austria, Azerbaijan, Belgium, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Ireland, Italy, Lithuania, Poland, Serbia, Slovenia, Spain, Switzerland and Turkey.

These various instruments would be of limited use without action on the ground, and in particular the enthusiasm and dynamism of mediators. They are most effective when used to support countries where mediation is underdeveloped, and in any case offer those involved in the justice system a basis for action, developed by European specialists in the field.

UNION EUROPÉENNE

Involvement of the European Union in the development of mediation.

Alain PILETTE
Deputy Director, Justice Directorate General
and Home Affairs of the Council of the European Union [1]

A shared understanding of mediation?

Thank you very much for allowing me to take part in your conference as a representative of one of the European institutions: the Council, which is made up of the representatives of the Member States and is a co-legislator, together with the European Parliament.

[1] The opinions expressed by the author are personal and do not commit the institution for which he works.

Within the Council, preparatory work is carried out by specialised working groups before being submitted to the Standing Committee of Ambassadors and then to the ministers.

Several working groups may have to deal with issues relating to mediation:

- the e-Justice working group, with its focus on access to information and electronic communication in the field of justice,
- the Civil Law Working Group on the 2008 Mediation Directive and the 2019 Singapore Convention on Mediation, and
- the Criminal Law Working Group, on the 2012 Victims' Rights Directive, soon to be revised, insofar as it promotes restorative justice such as mediation between the victim and the offender.

I cannot stress enough how important dialogue between the institutions and practitioners is. We need to know the reality of the legal professions, their challenges, difficulties and ambitions, so that we can respond better at European level.

The 2008 directive has been explained by previous speakers.

One of the stated aims of this directive is to encourage the use of mediation.

The European e-Justice Portal (https://e-justice.europa.eu/62/EN/mediation) provides access to a wealth of information on the implementation of the directive in the Member States.

In its introduction, the Portal states: *"Mediation is more or less developed in the various Member States: some States have comprehensive legislation or rules of procedure on the subject; in others, it is more widespread.*

In others, legislative bodies have shown little interest in regulating the issue. Nonetheless, there is a well-established culture of mediation in a number of Member States, which relies heavily on self-regulation.

A report on the application of Directive 2008/528/EC was published by the Commission on 26.8.2016 (COM [2016] 542 final).

In turn, the European Parliament adopted a report on 27.6.2017 on the transposition of the Mediation Directive.

What do these two reports find? That the Directive has made national legislators more aware of the benefits of mediation, but that the extent of the Directive's impact on the Member States varies according to the pre-existing situation of their national mediation systems.

Parliament regrets that "the objectives mentioned in Article 1 of the Directive, namely to encourage the use of mediation and, above all, to ensure 'an adequate relationship between mediation and judicial proceedings', have clearly not been achieved, given that the use of mediation concerns on average less than 1% of cases before the courts in the majority of Member States".

Parliament points out that the measures adopted in the various Member States vary too widely:

– All the Member States allow the courts to invite the parties to a dispute to have recourse to mediation or, at the very least, to take part in an information session on mediation, but some Member States require participation in such a session, on the initiative of the judge or in certain types of dispute provided for by law, particularly in family cases.

– Some Member States require lawyers to inform their clients of the possibility of mediation or require applications to the courts to confirm that mediation has been attempted or that there are reasons which prevent mediation.
– Many Member States financially encourage parties to use mediation, but the methods differ: by reducing costs, offering legal aid or penalising them for unjustified refusal to consider mediation.
– A European Code of Conduct for mediators has been published on the e-Justice portal, which is used directly by interested parties or constitutes a reference for the drafting of national or sectoral codes. However, only some Member States have introduced compulsory accreditation procedures for mediators and/or registers of mediators.

Parliament and the Commission called on the Member States to redouble their efforts to encourage the use of mediation in civil and commercial disputes, in particular through information campaigns and the exchange of best practice.

Parliament called on the Commission :

– assess the need to develop common EU-wide quality standards for the provision of mediation services, in particular in the form of minimum standards ensuring consistency, while taking into account the fundamental right of access to justice as well as local differences in mediation culture, in order to further promote the use of mediation ;

– assess the need for Member States to set up and maintain national registers o f mediation cases, which could be a source of information for the Commission, but could also be used by national ombudsmen to benefit from best practice across Europe;
– to carry out a detailed study of the obstacles to the free practice of mediation agreements within the EU and, as part of the review of the rules, to identify solutions for extending the scope of mediation to other civil or administrative cases, but notes that mediation may lose the attraction and added value that gave rise to it if rules that are too strict are put in place for the parties.

At the same time, certain European instruments encourage the use of mediation. For example, Article 25 of Regulation (EU) 2019/1111 of 25 June 2019 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, as well as international child abduction (Brussels IIa recast), which provides that:

> "As early as possible in the proceedings and at any stage thereof, the court or tribunal, either directly or, where appropriate, with the assistance of the central authorities, shall invite the parties to consider whether they are willing to enter into mediation or any other alternative dispute resolution procedure, unless this would be contrary to the best interests of the child, inappropriate in the circumstances or would unduly delay the proceedings."

While there is an interest in mediation and a desire to promote this method of settling disputes, it is also regrettable that it is incomplete and not sufficiently effective.

disparate solutions implemented in different Member States.

As mediators, what would you like to see? A revision of the 2008 directive? A strengthening and development of training programmes? Some regulation of the profession? What support would you like to see from the European institutions and the Member States?

Would you like to see a better evaluation of mediation systems in the Member States? The annual scoreboard on justice in the European Union, which is published every year and fed by the CEPEJ's evaluation sheets, measures the efforts made by the Member States to promote and encourage the use of alternative dispute resolution methods, to set up victim support systems and, in particular, to offer mediation and conciliation procedures.

Would you like to see the impact of the use of mediation on the efficiency of judicial systems better assessed and highlighted?

Neither the European Union nor its Member States have yet acceded to the 2019 Singapore Convention. Do you recommend that the European Union and/or its Member States accede to it?

The e-Justice working group has, among other things, facilitated the creation of national professional registers according to a uniform scheme so that European search engines such as "find a lawyer", "find a bailiff" and "find a notary" can be grafted onto them.

Judicial experts are busy setting up national registers and are working on the convergence of these registers, by determining qualification criteria, the standards expected of the bodies responsible for registration, and registration and deregistration procedures.

The experts are willing to share their experience with mediators so that you too can work towards creating registers or directories of mediators and so that search engines can make it easier to find mediators.

How can you find, call upon and/or appoint a mediator in another Member State, precisely in the context of a cross-border dispute, if there are no registers of mediators in all the Member States and no multilingual European search engine like the one that exists for lawyers, notaries and bailiffs?

Such registers and a European search engine would facilitate cross-border mediation, but would also have another advantage.

The digital transformation of the justice system is progressing, and tools for interconnecting judicial systems and for electronic transmission, such as e-CODEX, are set to be deployed rapidly.

A secure digital identity is required to connect to such systems. Without registers, mediators will not be able to access these secure communication platforms.

Such registers and search engines exist in some Member States, such as Belgium and Austria.

If you would like to set up such registers, which is a complex undertaking, we would be delighted to hear from you. Don't hesitate to call on us to draw the attention of the Member States to your projects and convince them of the importance of mediation, and therefore to involve mediators in the work of making justice more efficient and closer to the people.

Mediation at the European Union Intellectual Property Office (EUIPO). From pilot project to mediation centre.

Virginia MELGAR

Chairwoman of the 5e Board of Appeal of the EUIPO (European Union Intellectual Property Office), accredited mediator, European Union Intellectual Property Office

Ms Melgar will present the history of amicable trademark dispute resolution at the EUIPO, the European Union agency responsible for trademark registration. Begun in 2011 as a pilot project, the office is preparing to launch the EU Mediation Centre. More than 600 mediations and conciliations offered with a success rate of 75% are preparing this office, one of the 5 largest in the world, to face a new era in the amicable resolution of trademark disputes.

The EUIPO is the European Union Intellectual Property Office responsible for managing the EU trade mark and the registered Community design. It is the largest EU agency with 1,200 employees and is financially independent. The Office, then called the Office for Harmonisation in the Internal Market (OHIM), was established by a 1993 regulation and opened its doors on 1/1/1996. Today, it handles 20,000 oppositions, 2,500 invalidity applications and 2,700 appeals at second instance every year. It is based in Alicante (Spain).

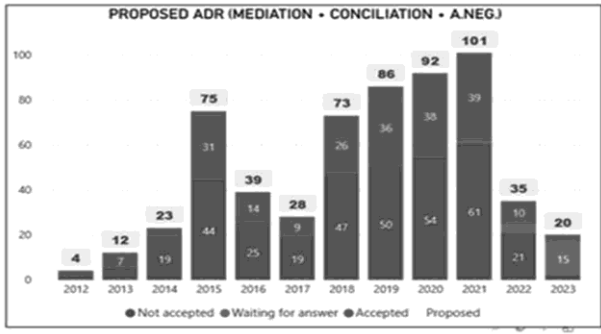
The informal resolution of trademark disputes will begin in 2011 with a pilot project at the Boards of Appeal, which are the Office's second body responsible for handling appeals against first instance decisions. It follows the adoption of the European Directive on mediation. The first mediators are OHIM staff trained externally by specialised institutions and organisations. Initially, only mediation was offered, followed by conciliation and expert determination.

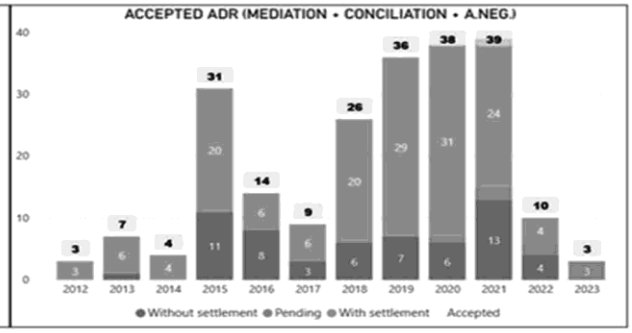
In 2016, a further step was taken with the introduction of a legal basis in its own right in the reform of the European Union Trade Mark Regulation: Article 170. The number of amicable settlements rose sharply in the following years, reaching a record in 2020 when 100 proposals for mediation were sent out.

It should also be noted that amicable settlement is at the heart of all the European Commission's legislative initiatives in the field of industrial property, whether for geographical indications or patents.

Last refreshed on 28/04/2023

ADR (MEDIATION + CONCILIATION + A. NEGOTIATION)





	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	Total
Not accepted	5	19	44	25	19	47	50	54	61	21	2	348
Waiting for answer									1	4	15	20
Accepted	7	4	31	14	9	26	36	38	39	10	3	220
Total Proposed	**12**	**23**	**75**	**39**	**28**	**73**	**86**	**92**	**101**	**35**	**20**	588

Outcome	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	Total
Without settlement	1		11	8	3	6	7	6	13	4		59
Pending								1	2	2	3	8
With settlement	6	4	20	6	6	20	29	31	24	4		153
Total Proposed	**7**	**4**	**31**	**14**	**9**	**26**	**36**	**38**	**39**	**10**	**3**	220

	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	202
Accepted	75 %	58 %	17 %	41 %	36 %	32 %	36 %	42 %	41 %	39 %	29 %	15
Waiting for answer										1 %	11 %	75
Not accepted	25 %	42 %	83 %	59 %	64 %	68 %	64 %	58 %	59 %	60 %	60 %	10

Outcome	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	202
Without settlement		14 %		35 %	57 %	33 %	23 %	19 %	16 %	33 %	40 %	
Pending									3 %	5 %	20 %	100
With settlement	100 %	86 %	100 %	65 %	43 %	67 %	77 %	81 %	82 %	62 %	40 %	

Mediation

Mediation at the Office is a structured, confidential procedure in which the mediator guides the parties to identify a solution to their dispute. The mediator is neutral and it is the parties and their representatives who seek and propose a solution. The mediator's objective is for the parties to reach an amicable agreement that settles the dispute.

The parties, who by definition have an appeal pending before the Boards of Appeal, may include in their mediation agreement any other dispute between them, regardless of the jurisdiction or level at which these other disputes arise. Mediation complements the decision-making bodies and does not replace the traditional decision-making role. If mediation is unsuccessful, a decision will be taken to formally settle the dispute. Mediation is entirely voluntary, at the request of the parties or at the suggestion of the chamber's rapporteur.

It is a totally flexible process that can be suspended at any time. Mediation is much more efficient than formal resolution in terms of time management. It can take place online or in person. Mediation is completely free of charge if it takes place online or in person at the Office's headquarters in Alicante, but a fee is charged if it takes place at the Office's liaison office in Brussels.

As the mediators are employees of the Office, they are highly qualified in the field of industrial property.

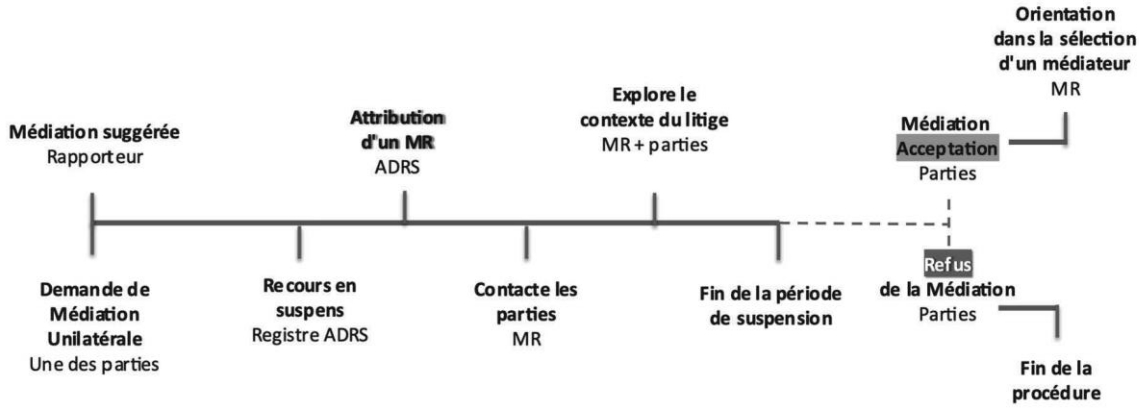
Conciliation

Conciliation is proposed by the rapporteur of the appeal, who confronts the parties. The rapporteur proposes a solution that is discussed by the parties, so the conciliator is not neutral, but works proactively with the parties and their representatives towards an agreed solution. In the end, it is up to the parties to accept these proposals.

Expert determination

Determination by an expert is the latest form of amicable settlement set up at the Office. It involves overcoming a technical or legal obstacle that is preventing the parties from moving forward. An expert is therefore usually chosen by the parties to give an opinion on the technical issue that is blocking negotiations. The expert's opinion may be binding or non-binding.

Processus de nomination du médiateur



How do we guarantee the confidentiality of the process?

- The mediator is also bound by the confidentiality clause
- Information obtained during private meetings with one party shall not be disclosed to another party unless authorised.
- Mediators destroy/delete documents after mediation has ended
- Only authorised tools are used for online meetings
- Mediators use a specific email address consisting of the name@mediateur.

What measures have been taken to ensure the independence of ombudsmen?

Examiners and members of the Opposition Divisions, Cancellation Divisions, Invalidity Divisions, Boards of Appeal or any other person may not be appointed as mediators if they have a personal interest in the case or if they have already been involved in the case under appeal.

The members of the Board of Appeal to which the appeal is assigned may not act as mediators in this case.

The mediator shall not be disqualified if the parties have been informed in writing of these circumstances and have subsequently expressly consented in writing to the appointment of the mediator.

The mediator may not be involved as an examiner, member of the Opposition Divisions, Cancellation Divisions, Invalidity Divisions or Boards of Appeal in any subsequent proceedings in the case in question or in any related case.

The mediator conducts the mediation in accordance with the Mediation Rules drawn up by the Presidium.

What training do EUIPO mediators receive?

- All EUIPO mediators have received special training from the *Centre for Effective Dispute Resolution (CEDR) or the Chartered Institute of Arbitrators (CIARB)* in London.
- All mediators are accredited with CEDR or CIARB and have access to webinars and video sessions, the opportunity to observe a mediation and receive monthly e-newsletters on mediation.
- Annual fictional mediation to learn through a real-life case scenario.
- Additional external training
- Regular experience-sharing exercises

Project to create a European mediation centre: 4 Projects

- **Operating structure - Mediation centre**
- **Covering all inter partes proceedings before the EUIPO - progressive approach**
- **More mediators/More EU languages**
- **Online ADR platform**
- **Promoting a culture of mediation by raising awareness**

For more information, see :

Summary
par Béatrice BLOHORN-BRENNEUR

This European conference on mediation and the European institutions is an opportunity to reflect on the importance of mediation in contemporary society. We have had the opportunity to celebrate the 20e anniversary of the European Association of Judges and Magistrates for Mediation (GEMME), which has played a key role in the development of mediation in Europe. We also noted the impetus given by European institutions, in particular the Council of Europe and the European Union, to promote and encourage the use of mediation in conflict resolution.

The conference highlighted the many advantages of mediation as an alternative dispute resolution method. Mediation offers a collaborative approach, enabling parties in conflict to find mutually acceptable solutions themselves, while preserving their relationships. It also encourages communication and active listening, essential skills in the peaceful resolution of disputes.

GEMME has played a key role in promoting mediation in Europe over the last two decades. Thanks to its hard work, the association has

helped to raise awareness of the importance of mediation among the judiciary and our fellow citizens, and to promote its use in European judicial systems, even before cases are referred to the courts. GEMME has also facilitated the exchange of best practice and experience between European magistrates, strengthening collaboration and mutual learning.

At European level, European institutions such as the Council of Europe and the European Union have played a major role in promoting mediation in Europe. They have recognised the advantages of this method of dispute resolution and have encouraged Member States to adopt legislation favourable to mediation. They have also provided financial support for projects aimed at promoting mediation and training qualified professionals in the field.

The impetus given by European institutions has been decisive: the Council of Europe has set up an effective mediation service for its own staff and for the European Development Bank, while the European Commission for the Efficiency of Justice (CEPEJ) has developed guidelines and practical tools for those involved in mediation.

In addition, the European Union has set the framework for mediation in Europe by enacting the 2008 Directive, which marked a major step forward. Finally, the European Union Intellectual Property Office (EUIPO) has set up the Union's first mediation centre for the amicable resolution of trademark disputes.

In conclusion, the conference highlighted the crucial role played by GEMME and the European institutions in the development of mediation in Europe. This measure offers a valuable alternative to traditional legal proceedings and contributes to the peaceful resolution of disputes. It is essential to continue to promote mediation and to strengthen collaboration between the various players, in order to ensure its effective and widespread use throughout Europe. Mediation has the potential to transform our justice system by promoting quicker, more cost-effective and more satisfactory solutions for all parties involved.

We hope that this conference has been a source of inspiration for all the participants and that we will continue to work together to advance mediation in Europe.

BY THE SAME AUTHORS,
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Béatrice Blohorn-Brenneur :

- *Stress and suffering at work, a judge testifies*, 2010.
- *From unhappiness to divorce - Judgment, conciliation, mediation*, 2013
- *Mediation for all in OHADA and West Africa*, 2018
- *Letter to Michel - Testimony*, 2019
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- *Panorama des médiations du monde*, Béatrice Blohorn-Brenneur, 2010
- *Practical guide to judicial mediation and conciliation*, 2012.
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- *Conciliation and mediation before the administrative court* - Proceedings of the Conseil d'État colloquium of 17 June 2015, Dir. Béatrice Blohorn-Brenneur and Jacques Biancarelli, 2015
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– *The spiritual sources of mediation*, Béatrice Blohorn-Brenneur, 2022
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