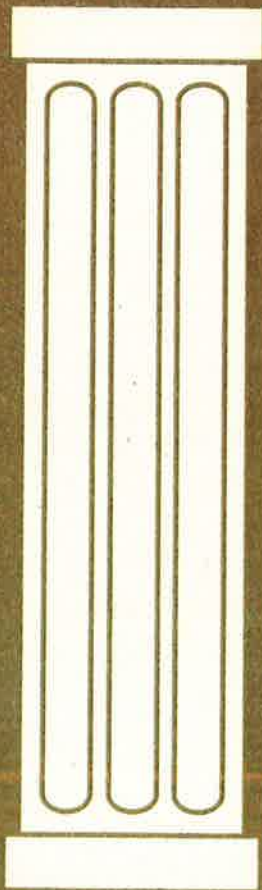


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CONTENTS
**AMERICAN
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Articles:

- THE ROLE OF THE FAMILY BUSINESS LAWYER IN FAMILY
BUSINESS DISPUTES 1
Stuart Duhl, Esquire
Harrison Held Carroll & Wall, LLP, Chicago, IL
- OVERVIEW OF THE NEW NORMATIVE
ON MEDIATION IN SPAIN 9
Aura Esther Vilalta, PhD, Open University of Catalonia
Barcelona, Spain
Rosa Pérez Martell, PhD, University of Las Palmas de Gran Canaria
Las Palmas de Gran Canaria, Spain
- ETHICS FOR LAWYERS REPRESENTING
CLIENTS IN MEDIATION..... 29
John A. Sherrill, Fellow
Seyfarth Shaw LLP, Atlanta, GA
- MAKING THE BRAIN A FRIEND NOT A FOE: WHAT
INTERVENTIONISTS SHOULD KNOW ABOUT NEUROSCIENCE... 41
Emily Fusting, Student
Benjamin N. Cardozo School of Law
Emeritus Fellow Sponsor: Professor Lela P. Love
- THE SEASONS OF ALTERNATIVE DISPUTE RESOLUTION:
A STUDY OF MEDIATION TACTICS IN THE CONTEXT OF
ANCIENT GREEK MYTHOLOGY 65
Annalisa Gutierrez, 2012 Graduate
University of Miami School of Law
Distinguished Fellow Sponsor: Melvin A. Rubin
- MEDIATION BETWEEN VERNON & PETUNIA DURSLEY
AND HARRY POTTER 85
Christina Krandick, Exchange Student
University of Miami School of Law
Distinguished Fellow Sponsor: Melvin A. Rubin

OVERVIEW OF THE NEW NORMATIVE ON MEDIATION IN SPAIN¹

Aura Esther Vilalta
Rosa Pérez Martell

I. Introduction. General Issues.

Mediation is an effective tool for the resolution of conflicts involving subjective, unrestricted rights. Many advantages have been attributed to the process of mediation, including the ability to provide practical, effective and profitable solutions to a broad range of disputes between parties²³.

In Spain, the Law on mediation (5/2012, 5th july)⁴ incorporated into the Spanish law the European Parliament and Council Directive 2008/52/EC, of 21 May 2008, on certain aspects of mediation in civil and commercial matters⁵. The mentioned Directive was set up to establish a range of minimum standards to encourage the use of mediation in cross-border disputes in relation to civil and commercial matters.

The Law aims to reach beyond the content that was expected to be applied to our legal system by Directive 2008/52/EC. In fact, it has developed a comprehensive scheme of mechanisms for civil and commercial mediation that ensures the quality of justice and the judicial protection of the rights of citizens. In this sense, it is argued that mediation is an institution designed to achieve legal peace, resorting to the use of courts as a last option. This, consequently, contributes to the reduction of the workload of the courts as it limits its participation in the process to only those cases when the parties involved in a conflict are unable to find a resolution by means of an agreement. This is why the recently enacted rule recognises mediation to be a complementary tool to the Administration of Justice and an alternative to court proceedings or arbitration.

Based on the provisions of the 2002 UNCITRAL Model Law on International Commercial Conciliation, it has been formatted as a law with some urgency given that the deadline for transposition of Directive 2008/52/EC into Spanish law ended on 21 May, 2011. Thus

having selected a Law as the appropriate format has been the result of the necessary and urgent adaptation to our legal system.

The international environment has also contributed decisively⁶ to the adoption of this particular legislative initiative. After several years of only taking what could be described as timid steps in the form of Recommendations 98/257/EC⁷ and 2001/310/CE, the European Union enacted a major Mediation Directive (Dir. 2008/52/EC) and is currently drafting three important statutory texts:

1. A directive proposal pertaining to alternative dispute resolution in consumer cases (ADR Directive for consumers)⁸;
2. A proposal for a European common law for matters affecting commerce transactions⁹ and;
3. A proposal for a law on online dispute resolution (ODR Regulation for consumers)¹⁰, which will grant consumers and merchants free access to online resolution centres in all official EU languages.

Beyond European borders, the United Nations is also considering adopting a system of regulations to encourage the rapid development of inexpensive and effective electronic mechanisms to successfully resolve small disputes between businesses (B2B), and between businesses and consumers (B2C). With this aim in mind, the United Nations has created a working group (WG III of UNCITRAL) entrusted with the task of proposing specific rules and preparing legal standards, a project that is sure to bring positive results in the near future.

The above context frames the recent Law 5/2012 on Mediation in Civil and Commercial cases approved in Spain on 5 July, a document which fills a legal vacuum and presents a pioneering initiative: The online resolution of disputes involving specific sums of money. This legal instrument adopted, inter alia, the much needed establishment of online resolution mechanisms in all institutions already practicing mediation. At the same time, it expects any mediation involving a claim not exceeding €600 should be preferably conducted by electronic means (except in cases where these are not available to one or both parties). The government's intentions involve encouraging the generalisation of online dispute resolution in financial claims through simplified and

brief mediations that are to last no longer than a month, and are to be conducted exclusively by electronic means.

This initiative aligns with European trends towards strengthening online dispute mechanisms in the European common market and towards attempting to gain the confidence of consumers purchasing goods and services online and across borders in order to ensure that distance, borders and language diversity are not impediments to trade or conflict resolution¹¹.

To the extent that online dispute resolution becomes the most appropriate way - if not the only effective way in existence today - to satisfy parties involved in disputes involving small claims, this mechanism should be made accessible to all citizens, particularly consumers. The use of extra-judicial means of dispute resolution and their electronic applications, far from implying a decrease in legal protection or a limitation in consumers' access to justice, provides a channel conducive to the exercise of people's rights, something that is non-existent today in small claims courts or in conflicts across borders.

The proposal is ambitious. To ensure that online mediation does become a reality, all institutions providing mediation services should introduce appropriate online mediation, especially those involving small claims disputes. Article 24 also delineates that the parties should be given the option to agree to all or some of the mediation sessions to be carried out electronically, as long as the identity of the participants and the respect for the principles of mediation are guaranteed. And finally, mediations involving claims not exceeding 600 euros should preferably be held by electronic means, unless these devices are not accessible to the parties involved.

Spanish legislation defines mediation as "a means of settling disputes, whatever their description, whereby two or more parties attempt to voluntarily reach an agreement of their own accord with the intervention of a mediator." Besides a definition, they present a regulatory framework applicable to the process of mediation in civil or commercial cases (including border disputes) provided they do not affect any rights and obligations that are not available to the parties under applicable law. The legislation excludes: (i) criminal mediation, (ii) mediation with public administrations, (iii) industrial mediation,

(iv) and mediation pertaining to consumer affairs.

As it can be observed, the text neglects the greater bulk of potential beneficiaries of this measure - consumers and users – by explicitly excluding mediation for consumers from its scope of application. It should here be noted that the above mentioned European Directive 2008/52/EC on Mediation in Civil and Commercial matters (the transposition of which into a Spanish law resulted in the recently enacted Law), promotes amicable settlements in all civil litigation cases, including consumer disputes. This issue is presently undisputed and is reinforced by the proposed Directive pertaining to alternative dispute resolution in consumer cases (Directiva sobre RAL en Materia de Consumo) because mediation does not prevent consumer access to the courts.

The fact that the defensive regime applied to consumers justifies the existence of a structural asymmetry in contractual relations between employers and consumers cannot be overlooked. Currently, this asymmetry extends to small businesses dealing with large companies (B2B, B2C), particularly in the context of an electronic commerce that is articulated through contracts of adhesion and imposed conditions of general nature. Both legal protection and the means available to this people for the realisation of their rights should be standardised. As in the case of countries like Italy, which share a similar cultural environment to Spain, there is a widespread understanding and discussion about “the weaker party.”

Finally, and in order to prevent that no rights or actions were impinged upon by using mediation, Article 4 of the Law prescribed that the commencement of the mediation process shall suspend the order or cancellation of any other actions. To this effect, a mediation is considered to have been initiated when one of the parties submits the corresponding form to the mediating institution. The suspension will continue while mediation takes place until the date the mediation agreement is signed or, failing that, when the final writ is signed or when the mediation is terminated on the grounds of any reasons provided for in this law.

II. General principles and rules of conduct

Document II of the above mentioned Law identify the main guiding principles of a mediation process¹² as:

- voluntary intent and free will;
- impartiality;
- neutrality;
- and confidentiality.

In addition to these principles, the parties involved in the process of mediation are to observe a series of rules of conduct such as good faith, mutual respect, and willingness to cooperate and support the mediator.

Voluntary intent and free will

The mediation model selected in Spain is based on the principle of voluntary intent, free will of the parties and respect for the autonomy of their will, hence its affirmation that mediation is a voluntary process.

This key principle does not prevent the parties involved from having different opinions. The existence of a written agreement indicating the willingness to participate in the mediation – both in cases when disputes have already arisen (ex-post conflict) or when disputes are yet to arise (ex-ante conflict) – compels the parties to participate in the agreed process in good faith before resorting to their corresponding jurisdiction or to another extrajudicial means of resolving their dispute. This applies even if the dispute pertains to the validity or existence of the contract itself. None of the participants are obliged neither to remain in the process nor to finalise an agreement once a mediation session has been attempted.

However, this does not prevent judges and courts to compel parties to attend mediation briefings whenever they see fit. In this sense, the Spanish mediation model states that the judge will inform the parties involved in the dispute that they have the option to negotiate to solve their conflict, including the use of mediation. The parties are to inform the judge of their decision and their reasons for reaching such decision. At the hearing, the court may invite the parties to seek an agreement that concludes their dispute by means of a mediation, urging them to

attend an information session.

On the basis of the principle of disposability at will, the above mentioned normative encourages parties to opt for this alternative instead of a judicial resolution of their conflict. This is, in fact, the second axis of the mediation - the "delegalisation" or loss of central role given to the law in favour of a governing principle also ruling on the relations that are the subject of the dispute.

Impartiality and Equality of Arms

With the object of guaranteeing the impartiality of the professionals involved in the mediation process, the Law, reproducing here the model set up by the European Code of Conduct for mediators, outlines the circumstances of which a mediator will have to inform the parties in a dispute. Therefore, before starting or proceeding with their activity, mediators must disclose any possible circumstance that could affect their impartiality or create a conflict of interest amongst them, such as:

- (i) Any personal, contractual or business relationship with one of the parties.
- (ii) Having a direct or indirect interest in a specific outcome of the mediation.
- (iii) The mediator or someone in their company or organisation having previously acted in favour of one or some of the parties in any other circumstance except the mediation itself.

In any of the above cases, mediators will only be able to accept or continue the mediation when they guarantee their complete impartiality and only if the parties involved in the dispute agree in writing to their involvement in the mediation. The duty to disclose this type of information applies throughout the duration of the mediation.

The principle of Equality of Arms entitles parties in the mediation to equal opportunities. The mediator must ensure they are given a fair chance to participate equally and that the expressed opinions are respected and exposed equitably. The mediator must not behave in any case in a manner that is detrimental to or in favour of any of the parties.

Neutrality

The preamble of Law 5/2012 emphasises the requirement that all professionals involved in the process of mediation must be “neutral”. This characteristic defines the role of the mediator to the point that in many countries, a person acting as a mediator is called “neutral”. According to article 8 of the Law, specifically devoted to the principle of neutrality, a mediation must take place in a way that it allows the parties involved in the conflict to reach an agreement on their own accord.

The role of the mediator, according to this principle, is, ultimately, to facilitate the communication between the parties and to ensure that the necessary information and advice is made available to them. It is the duty of the mediator to assist the parties with all means available to him/her in achieving a resolution of the conflict on their own. If this is achieved, not only are the chances of maintaining the underlying relationships between the involved parties higher, they are also in control of the process until the final resolution.

In order to reinforce neutrality on mediating institutions, Article 5 stipulates that should they also be involved in providing arbitration services, they are to adopt the necessary measures to ensure a clear separation between both activities.

Confidentiality

At the core of any mediation process rests the principle of confidentiality, a privilege that encouraged quite a number of legislators to attempt a regulation of this process in order to make it a guarantee in their systems. According to the principle of confidentiality, any documentation used during the process of mediation is rendered confidential. This obligation extends to all information that might have been produced during the course of the mediation and subjectively to the mediator and intervening parties.

The principle of confidentiality binds mediators and those participating in the mediation process to refrain from declaring or presenting documentation in a judicial or arbitration process on the documents that have resulted from a mediation or related to it.

This principle anticipates some of the exceptions already foreseen in comparative law:

- (i) In those cases when the parties expressly and in writing agree to have the principle of confidentiality revoked;
- (ii) or in those cases when it is requested by the judges of the corresponding criminal jurisdiction by means or judicial resolution.

This principle prevents expert witnesses from providing any information obtained in a mediation or arbitration that bears a relationship with the case, except if agreed by the parties. To this end, the Decree prevents judges and courts from refusing to grant applications for assistance made by the parties or their representatives.

The conciliation does not affect the expert's natural duty to preserve and protect the expedient for a reasonable period of time. The Law stipulates that when the mediation process comes to a close, the mediator or the mediating institution is to return the documents presented to each of the parties and preserve and protect the expedient for a period of six months.

Simplicity, swiftness and affordability

Even if the Law does not classify *simplicity, swiftness and affordability* as principles by which to govern and inform the process of mediation, it implicitly intends to establish the bases for a simple, fast and affordable process that ultimately encourages parties involved in a dispute to use it to resolve their differences before resorting to the courts. For this purpose, it provides for simplicity in processing, flexibility, low cost and short duration while encouraging the involved parties to determine the iter or its main phases.

One of the clear manifestations of the above principles found throughout the text is the "delegalisation" or loss of the central role played by the law in favour of alternative methods of dispute resolution.

Another expression of these principles is that the Law only sets out those requirements that are needed in order to validate the agreement, as well as the fact that the mediation is organised in a manner that is convenient to all parties.

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Good faith and mutual respect

According to the Law, parties involved in a dispute must behave according to the principles of good faith and mutual respect.

These principles are translated in practice through the obligation imposed on parties to stop them from filing any judicial or extrajudicial actions related to their object for the duration of the mediation. Having committed to a mediation and having started participating in such process prevents parties in the mediation from having access to the courts, institutions which would have been informed of the cases undergoing mediation and their duration.

Another important consequence of the principle of good faith and mutual respect is that parties are obliged to cooperate and support the mediator throughout the process, always maintaining the appropriate deference towards his/her activities.

Finally, parties will be deemed to have acted in bad faith if they make a valid and justified payment request prior to taking the matter to court or if they start a process of mediation or conciliation against the other party.

III. THE ROLE OF THE MEDIATOR: STATUS, FEES AND RESPONSIBILITY

The mediator referred to in Law 5/2012 is a third party around whom revolves the process of mediation. This person advises, proposes and actively guides the parties involved in the dispute to achieve a resolution of their own accord. One of the main objectives of the mediator is to reach an agreement between the parties.

In order to guarantee an appropriate level of professionalism and quality to the process of mediation, the Law sets out the following prerequisites for mediators:

- (i) To have full civil rights and do not have any criminal records;
- (ii) To have an university education or similar education
- (iii) To be formally trained to act as a professional mediator;
- (iv) To respect the principles of equality, impartiality,

confidentially, neutrality and independence;

(v) To hold a civil liability insurance for those conflicts they mediate in;

(vi) To be enrolled in a public registry.

Objective enabling requirements

The role of the mediator, as stated in Law 5/2012, exists by virtue of the will of the parties involved in a dispute and by the recognition granted, by national and international legislators, to perform the duties bestowed upon him/her. Therefore, their participation in a process of mediation derives from the will of the parties who voluntarily appeal to them to facilitate the communication channels amongst them; to ensure that the information is sufficiently accessed and adequately conveyed to them during the mediation; and to be active in bringing the parties closer together. In this sense, it is crucial that mediators enjoy full civil right as long as they are not prevented by the legislation by which they abide during the course of their work.

Mediators must be formally trained to act as professional mediators by successfully completing one or various specific courses imparted by duly accredited institutions. This training will provide mediators the necessary knowledge on a range of subjects including law, psychology, communication, conflict resolution and negotiation techniques, as well as mediation ethics, both at in practice and in theory. In relation to this matter, the final fifth (5th) provision of the Law states that “The Government, under the initiative of the Ministry of Justice, will be able to determine the duration and content of the course or courses that mediators will have to attend prior to being able to carry out their professional duties, as well as the type of continuous education they will have to attend throughout their professional life”. Therefore, mediators will need to comply with a pre-set number of fixed, including the fulfilment of specific training requirements, partaking in courses that include the aforementioned subjects. Other than courses that entitle mediators to exercise their profession, and learning from the experience of neighbouring countries like Italy, the established rules demand a continuous professional development from mediators in order to guarantee their adequate preparation, development and constant improvement.

Subjective enabling requirements

Besides the objective prerequisites and conditions set out by the Law to exercise the role of a mediator, they are also expected to present a number of moral and professional qualities to fulfil their duties adequately, including trust, loyalty, suitability, confidentiality, social and professional reputation or moral integrity.

The principle of confidentiality is key in this context as it takes centre stage during the mediation. As such, Article 9 indicates that "The process of mediation and the documentation used during this process is confidential. The obligation to remain confidential extends to the mediator and the intervening parties and as such they will not be prevented from disclosing any information they may have obtained during the course of the mediation". This implies that mediators or other persons participating in the process of mediation are not under the obligation of declaring or presenting documents in any legal proceedings or in an arbitration relating to the information obtained during the process of mediation or in any other area related to this process. There are, however, two important exceptions drawn from two sets of circumstances. In the first case, parties involved will be given the option to present the information obtained during the mediation, while in the second option, they will be obliged to do so.

Other enabling requirements

The position of mediators could be classified as subjective given that the conflict for which they try to facilitate communication channels and to bring parties closer to each other is intersubjective. That is, their position and their activity is born, develops and concludes within a particular conflict and depends on the level of self-determination granted by the parties to them to conduct their functions. The role of the mediator is informed by the specific conflict he/she is trying to resolve. As far as which are the enabling requirements on which the legitimacy of the mediator rest, these include impartiality, an essential element, and neutrality or independence. But while impartiality is a predisposition of the mediator, his or her independence and equality is needed in order to respect the balance of positions which must be present at all times.

Responsibility of mediators

Article 14 states that «acceptance of a process of mediation compels mediators to dutifully fulfil their obligations. In case of default they will incur liability for damages caused. Therefore, as a consequence, a mediator could be found liable and be obliged to pay compensation for damages to the parties to a mediation.

Section 3 of Article 11 demands, in this regard, that “mediators hold an insurance or equivalent guarantee to cover their civil liability in the conflicts they intervene.” Injured parties or mediating institutions are granted direct action against the mediator regardless of any reimbursement actions against the mediators. In this sense, the final fifth (5th) provision of the mentioned Law adds that it will be possible to develop the extent of the obligation of mediators to ensure their civil liability in accordance with the pertinent regulations.

Plurality of mediators

According to Article 18, a mediation may be conducted by one or various mediators. This plurality, however, tends to be better suited to conflicts of a very complex nature or to those disputes that require the intervention of experts in specific fields, as in the case of family mediation, which generally uses the combined services of a professional psychologist and a lawyer. Generally, the rule that tends to apply is that “if the subject matter is complex or because it is deemed to be more convenient by the parties that the mediation process be guided by more than one mediator, the professionals involved need to act in a coordinated manner.” In any case, it is important that the parties involved are informed of the considerable additional costs that represent using various mediators in a process so they can make an informed decision.

Incorporating mediation institutions

The process of mediation is generally channelled through mediation institutions that offer professional mediators and guarantee the quality of their services. Article 5 of the above mentioned Law classifies mediation institutions as those public or private entities and public corporations that aim to promote mediation, facilitating its access and administration, including the appointment of mediators. The same

article states that if these type of institutions also conduct arbitrations, they should adopt the necessary measures to keep both activities separated from each other.

The final fifth provision of this Law announces the future adoption of a set of development rules that will accompany this legal provision with the aim to adopt a number of measures that guarantee such objectives and requirements. Known as "Regulatory development for the guaranteed observance of mediation requirements", this provision bestows upon the government the task to "establish a normative that provides the necessary tools to warrant the observance of the requirements laid out in the aforementioned Law from mediators and mediation institutions as well as their publicity". This provision hopes that mediation institutions become quickly familiarised with these requirements so that they can be called upon by individuals to act in the process of mediation. "These instruments could include the creation of a Registry of Mediators and Mediation Institutions that would report to the Ministry of Justice and would coordinate with the various Mediation Registries of each of the Autonomous Communities. It will fall under the scope of tasks of this Registry to remove from office any mediator who does not comply with the requirements established by the Law.

IV. THE PROCESS OF MEDIATION

The Law establishes that mediation is to be a very simple and brief process, extending over a minimal number of sessions. This format is designed to guarantee a trouble-free, affordable and short process.

As earlier suggested by article 24 of the draft bill, it is here stipulated that the parties involved in the dispute will make a decision as to whether all or some of the mediation sessions will take place online, as long as the identity of the participants and the compliance with the principles of mediation laid out in the Law are guaranteed.

Also, mediations involving claims not exceeding 600 euros will take place by electronic means, except in cases when one of the parties is unable to access these.

It is also established that when one of the parties voluntarily sets a mediation process in motion while court proceedings are already taking

place, out of common accord, the parties will be entitled to request its suspension as prescribed by procedural law.

A mediation process can be initiated:

- a) By common agreement between the parties
- b) Or by one of the parties in compliance with an order of submission to mediation.

The application will be lodged through the corresponding mediation institutions or through the mediator proposed by one of the parties to the others, or a mediator appointed by both parties.

Procedures during the mediation sessions

Soon after having received the application – except when agreed by the involved parties - , the mediator or the mediation institution will arrange an informative session with the parties. Should any of the parties not attend the initial session without a valid reason, it will be assumed they have no intention to continue with the process.

During the informative session the mediator is to inform all parties about: (i) any possible reasons that may impair his/her impartiality, (ii) the nature of his/her profession, training and experience, (iii), the features of the mediation process and related costs, (iv) how the process is organised, (vi) the legal consequences of the agreement they may reach, (vii) the period of time they will be granted to sign the establishing session.

Mediation institutions may organise open informative sessions for those persons who might be interested in resolving their disputes using this alternative method.

The process of mediation will start with an introductory session in which parties may express their wish to continue with the mediation and will put on record the following aspects: a) identity of the parties, b) the appointment of the mediator and, if pertinent, of the mediation institution or the acceptance of mediator appointed by one of the parties, c) the object of the conflict about to undergo mediation, d) the order of the mediation and the maximum period of time the process is expected to last, irrespective of possible amendments, e) the cost of the mediation or the bases to be able to determine it, differentiating

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Overview of the New Normative on Mediation in Spain

between the mediator's fees and other expenses, f) the voluntary nature of the acceptance of the declaration by the parties and that they are bound by the obligations resulted from the agreement, g) the place where the mediation will convene and the language used during the process.

The mediator and the parties will sign the minutes of the introductory session. In other cases, the minutes will be used to declare that, for instance, the mediation was unsuccessfully attempted.

Mediators will convene the parties to each session with sufficient notice. It is their duty to chair the sessions and to facilitate the statement of their positions.

The exchanges between mediators and the parties involved in the disputes may or may not occur simultaneously. The mediator is to inform all parties if any meetings with one of the parties have occurred separately without prejudicing the confidential nature of the matters discussed. The mediator will not be able to and shall not inform nor disclose the information or documents given to him/her unless clearly authorised by the involved party.

The mediation process may reach an agreement or may conclude without having reached an agreement. There are various reasons why a mediation session may not come to a successful resolution, including: all or some of the parties decide to inform the mediator that they prefer to exercise their right to terminate the sessions; or because they have reached the maximum allowable period of time allocated to the process; or because the mediator justifiably considers that the positions of the parties is irreconcilable, or in any other case he/she deems important enough to terminate the process.

In concluding the mediation, all documents brought to the table by each party will be returned to them. Those documents that do not need to be returned to the participants will be compiled in a folder that the mediator or the mediation institution need to save and guard for a period of six months, commencing as soon as the process is concluded.

The process concludes with the final act, document which clearly and comprehensibly reflects the agreements reached or the reasons for the termination of the mediation. The act will be signed by all parties and

session and the conclusion of the process.

(ii) That the notary public must certify the facts; verify that the agreement complies with the requirements of the Law and that its contents are not unlawful. The public enforceability of the mediation agreement requires that its contents be granted the character of public deed. For that purpose, notary requirements are considered equal in terms of appearance, control of legality, capacity, etc. This means, ultimately, to grant the notary public the role of guardian of the legality of the agreements (a filter of their legality). On the other hand, an arbitration award only expects that any of the interested parties include the final resolution in its protocol.

Article 211 of the Notary Rules and Regulations states that the declaration of the will of the applicant is sufficient to certify the compliance to the pertaining regulation and that a confirmation of the Notary that a document to that effect has been submitted to him/her should suffice. The certification aims to ensure the identity and existence of the document on the date of the certification. This can be done either by transcribing such details in the act or by annexing a document to such act.

Also, having to qualify the agreement as a public deed implies, according to Article 147 of the mentioned regulation, the drafting of a public document outlining the common will of the participants which, will have to be investigated, interpreted and suited to the applicable legal system. The notary will also have to advice and inform about the value and implications of this document. At the same time, and without having his/her impartiality compromised, the notary will need to make his/her duty to respect the clauses in the deed very clear, ensuring they will not include any unacceptable general conditions. The notary is also entrusted with respecting the basic rights of consumers and users.

(iii) Besides, as a consequence of the principle of immediacy, the parties involved in the dispute will have to agree on, convene and attend the confirmation of the agreement as a public deed, having already signed a prior mediation agreement.

(iv) However, the demand imposed upon the parties to engage the services of a second professional (the notary) will see the costs of the

mediation rise considerably. The fees charged by the notary for his/her services to formalise the mediation agreements will correspond to the fees established by section 1 “Documents without specific amount” of the Royal Decree 1426/1989 of 17 November which, approves the fees charged by notaries.

(Endnotes)

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