



**NORWEGIAN COURTS
ADMINISTRATION**



**Seminar on “The role of judges in mediation”
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The role of the judge in intra-litigation mediation.

After Ms OLIVEIRA's illuminating presentation on the tools developed by the CEPEJ, I wanted to tackle the challenging issue of what these tools mean for judges in terms of their use and the questions that may arise. Rather than focusing on the benefits of mediation, which have doubtless already been covered, I will look at the difficulties faced by judges, from what I hope will be a positive and constructive perspective, based on joint reflection.

1) Promoting mediation: assessing whether a case should be referred to mediation

The primary function of the judge in mediation is to promote it, something that is reflected in the various recommendations and also the mechanisms created within the framework of the CEPEJ. It is the responsibility of the judge to provide information, organise information sessions and even refer the case to mediation, once proceedings have begun.

It is extremely important, therefore, that the judge be trained and equipped to assess at any stage of the proceedings where the parties stand in relation to the dispute and the actual nature of their conflict, whether it is contained within the strict limits of the proceedings, or whether it has a broader scope, including whether it extends into other judicial proceedings, other non-judicial situations, or to what extent it is a purely subjective matter. A close working relationship with the mediator is vital therefore. Co-operation with the mediator must be a key feature of the process, as the judge needs to be fully aware of what mediators do and have confidence in them if he or she is to promote mediation. There is much

to be said, indeed, for creating mechanisms that would allow the judge to send certain information and documents to the mediator before the parties even agree to engage in mediation, so that the mediator and the judge can together determine whether the proposal to refer the case to mediation is a sensible one.

Something else to be considered once the judicial process has commenced is that the parties have already set out their claims in concrete terms before the court and the fact that they are being asked to enter into mediation, where there will inevitably be concessions, may be perceived by one of the parties as an attempt to settle the dispute prematurely. The parties involved in the proceedings should not feel that the judge has already decided against them. Accordingly, it is important that the judge take a balanced approach to promoting mediation, refrain from prejudging the merits of the case and treat the parties even-handedly because at this stage, he or she has made no decision on the claims, and it may be that no evidence has even been presented. In a sense, agreeing to mediation is an acknowledgement of involvement in a particular act.

Mediation, however, is not simply about reconciling the parties on the issues set out in the request, but rather aspires to a deeper and more permanent resolution of the conflict. It may therefore encompass other proceedings, possibly in other jurisdictions, or even aspects that have not yet been addressed in the current process. In order to really promote mediation, one needs to be able to make a joint and comprehensive assessment of the dispute between the parties, if only to ascertain the right time to reach an agreement in the proceedings, when it is still possible to halt the dispute. Although this is very challenging, the aim should be to find solutions to entrenched disputes and not simply to resolve minor ones. As well as working with the mediator, therefore, there is a need for judges to work with one another and communicate among themselves in cases where multiple court actions have been consolidated into a single mediation procedure.

The question is whether judges are capable of assessing the appropriate time for mediation. The judge is an expert in law and procedure but is not trained to identify the deeper emotions that can lead parties to keep a dispute going. Choosing the right time for mediation requires skills that are not inherent to the legal profession. Any mediation training for judges must include, of course, an explanation of the benefits of mediation and how it works, but it must also equip us to deal with the emotions and feelings of third parties, and teach us to identify and avoid manipulation. The questionnaire provided in the CEPEJ toolkit is a good starting point, but judges also need to be trained to interpret the litigants' replies as to whether referral to mediation is a realistic option.

Introducing mediation into the judicial process requires the judge to study and acquire a thorough knowledge of the case from the outset. In some legal systems, it is the judicial assistant or other members of the court who handle the case until a judicial decision is made regarding the admission of evidence or even until the sentence is drafted. With this new mechanism, the judge's intervention occurs

earlier, as he or she must be able to assess the potential for mediation, which requires knowledge of the dispute and the parties.

Promoting mediation will mean engaging with the parties to the proceedings in person and in a broader context than that provided for in the procedural codes. It is important, therefore, that the procedural formalities afford the judge an opportunity to meet with the lawyers and/or litigants, so that he or she can ascertain their deeper needs and form an idea of the potential for mediation, in order to prepare for the referral hearing, and effectively promote and encourage the parties to make use of this dispute resolution mechanism. Some flexibility in terms of the judge's ability to initiate meetings with the parties to explore the nature of the conflict would be helpful here.

Although it reduces the length of proceedings and formalities and the workload overall, referring a case to mediation involves extra work for the judge who must participate in the referral hearing to the extent necessary to acquire knowledge and understanding of the relationship between the parties, in order to determine whether they are in an equal position and, hence, whether the issues initially raised in the case can be referred to mediation without infringing any rights that the litigants in the proceedings might have. Making such an assessment involves more than just reading the case-file and will likely require the judge to meet with the lawyers and also the litigants. Indeed, the Tools that have just been described invite the judge to encourage mediation, to "ask how each party feels". We have to appreciate that identifying and interpreting the deeper needs of the parties is neither quick nor easy and requires significant involvement on the part of the judge.

The judge is no longer judging a particular act but rather the conflict, with all its subjective and irrational elements, having regard to the consequences that allowing the situation to continue would have not only for the parties, but also for third parties and for the future.

2) Promoting mediation: referral to mediation

The judge is in an eminent position relative to the parties involved in a court case, so litigants may feel obliged to go along with the proposed mediation. It is important, therefore, that judges be able to identify cases that are capable of being resolved through mediation, and in particular the appropriate time to introduce it. In this sense, mediation should be a good mechanism for defusing tension between litigants. It is important that the latter do not perceive mediation as impeding access to justice or as an obstacle to securing a judicial settlement, if the process is already under way.

The Guide to the Judicial Referral to Mediation, says that judges should be able to “counter any objections raised to mediation by the parties or their lawyers”. The judge must explain the advantages and potential of mediation but he or she must also be capable of acknowledging the downsides of the mechanism, so that the parties can decide whether or not they wish to try to reach an agreement through mediation. The judge should try to overcome any reluctance that stems from the parties feeling they have no choice but to go through with the court case, but this must be done in a way that is transparent. It is very important that the parties do not feel misled but, rather, are supported in their decision to find an alternative solution to the conflict, a decision that they should be able to make of their own free will because otherwise, the dispute will never be permanently resolved.

Mediation is not a mandatory conciliation mechanism, but an alternative means of dispute resolution. Accordingly, once criminal proceedings have begun, care is needed with regard to information and the implications of the parties' decisions. Mediation must be a mechanism that is sensitive to the relationship between the parties, it must reflect the situation of conflict in which the parties find themselves, but should not become an automatic feature of proceedings.

Mediation is more about rebuilding the relationship between the parties and getting back to a pre-conflict reality than about seeking the truth in the sense of the criminal process or proclaiming the best law to deal with a particular civil or administrative matter. Mediation seeks to resolve the conflict, whereas a court decision merely ends it. The judge, therefore, must be able to explain mediation to the parties, so that they understand the ramifications of their decision.

Accordingly, when promoting mediation, the relationship between the judge and the lawyers is crucial because, in some cases, the initial exploratory moves towards mediation are directed at the lawyers, so that they can provide information on where their clients stand and the tensions between the parties. Sometimes lawyers are who oppose more resistance to mediation. Mediation is only viable when the parties are able to maintain a certain balance between themselves, when their ability to understand one another and assert themselves does not create an imbalance that leads them to feel pressured or bullied into agreeing to an arrangement that is unfair. Also, if the dispute relates to an administrative matter or if one of the parties is a corporate entity, care needs to be taken to ensure that the person attending the mediation has sufficient authority to bind the party concerned and to ensure that any agreements reached are honoured. It is also important that the person refrain from making any exploratory moves that, ultimately, might not be accepted by a higher authority, because this position would itself lead to an imbalance between the parties.

3) Interim measures and mediation

The adoption of interim measures is one of the factors that must be considered in intra-litigation mediation. The need to adopt an interim measure will only arise in cases where there is an objective “danger in delay” (*periculum in mora*), because from a subjective point of view, distrust towards one of the parties will make it impossible, or at least very difficult, for the matter to be referred to mediation.

Ideally, the adoption of an interim measure is something that is agreed in the initial stages of the mediation process, but in some cases the urgent nature of the precautionary measure will require it to be ordered by a court, including possibly “*inaudita parte*”. Such situations are highly contentious, as the adoption of an interim judicial measure means that there is also a “presumption of sufficient legal basis” (*fumus boni iuris*), and so introduces certain legal parameters, different from those used in mediation, into a decision that changes the existing situation, and consequently, the starting point from which the conflict was assessed. The judge must be very careful, therefore, when ordering an interim solution and, at the same time, considering a referral to mediation.

4) The mediation process ends without agreement

The judge must see to it that a balance is struck between the quest to reach an agreement and the time allowed for resolution. In the sense that the search for an agreement cannot be extended beyond a reasonable period of time, and nor should the proceedings into which the mediation has been inserted be longer than the average for similar cases. Although the judge does not participate in the mediation and has no knowledge of what transpires at the meetings, he or she must communicate closely with the mediator regarding the possibility of an agreement and not allow the proceedings to become unduly protracted.

Where mediation ends without an agreement, the proceedings resume where they left off, regardless of whether the parties have managed to frame the dispute in different, broader or more specific terms, or whether their positions have altered. Subjectively speaking, the procedure has changed for the parties, but not for the judge, who is not involved in the meetings.

The judge also refrains from acknowledging any acts that may have taken place or circumstances that may have arisen in connection with the matter at issue. Only if the parties unanimously agree may a new element be introduced into the proceedings because, by definition, the judge can only revert to the situation as it stood on the day the referral was made.

5) Agreement without judicial intervention

If the mediation process ends in an agreement, in systems where there is no requirement to obtain judicial approval, the question arises as to whether the agreement is effective in relation to the ne bis in idem principle. Agreements reached through mediation should be covered by the ne bis in idem rule in respect of all court proceedings but in some jurisdictions they can lead to constitutionality issues, with the result that a decision reached between the parties, without judicial approval to confirm that it meets the public interest, legality and proportionality criteria, may effectively prevent the parties from seeking relief in the courts at a later stage.

6) Public interest review

In other systems, judicial review of the agreement is required only for the purpose of ensuring that it is not contrary to the public interest. Accordingly, the mediator reports on the measures taken and the outcome of the mediation, with no mention being made of the mediation sessions, or the reasoning or arguments that led to the agreement.

In this “in-between” system, the judge reviews the legality of the outcome and the mediator the proportionality between the parties while seeking to strike a balance between the effectiveness of the mediation, respect for the parties’ wishes and the public interest. Approval does not provide a definitive answer to the ne bis in idem problem. Since the agreement contains no information about the reasoning on which it is based, or what transpired at the sessions, it is difficult to determine which facts it covers and whether it involves waiving the opportunity for future litigation. This is complex because it may mean renouncing claims concerning matters which were not even raised by the parties in the mediation process.

7) Public interest and proportionality review.

This judicial approval arrangement requires the judge to be aware not only of the extent of what was discussed during the sessions, but also of how the parties conducted themselves during mediation. In my view, it amounts to a “judicialisation” of the mediation process that prevents it from operating freely. The mediator cannot create a climate of dialogue that is sufficiently open for the parties to set out and resolve the underlying conflict if their meetings do not afford the confidentiality that is vital for the mechanism to be effective.

This is only a first step, however, towards the introduction of a dispute resolution mechanism that is still in its infancy and is set to grow in importance as interaction between judges and mediators helps to dispel any initial reluctance and paves the way for collaboration based on valuing and trusting each other's work.

I have thus tried to offer a series of reflections on the role of the judge in intra-litigation mediation, in the hope of initiating a debate on the role of judges and

courts. I await with interest, therefore, your questions and discussions on this subject.