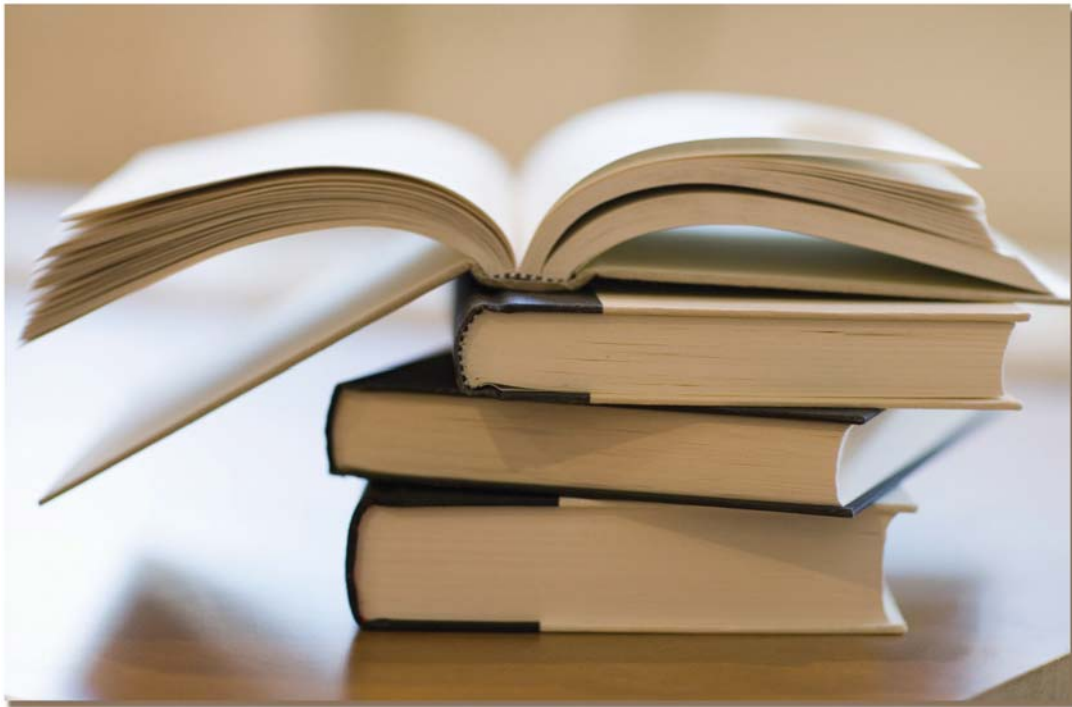


Mediation in Healthcare



Mediation in Healthcare



CONTENTS

FOREWORD	3
OVERVIEW. DEFINITIONS AND CURRENT TRENDS	4 - 6
PART 1. RECOURSE TO MEDIATION IN HEALTHCARE MATTERS	7
Box 1. Typologies of disputes leading to the use of mediation	8
PART 2. GROUNDS FOR MEDIATION IN HEALTHCARE MATTERS	9 - 11
COURT-RELATED MEDIATION	12
Box 2. Grounds for mediation	13 - 14
PART 3. PROVISION OF MEDIATION SERVICES	15 - 16
Box 3. Provision of mediation services	17
PARTIES TO MEDIATION	18
MEDIATION DOCUMENTS	19 - 20
Box 4. Mediation documents	20
INFORMATION ON MEDIATION	21
Box 5. Country websites with information about mediation	21
MEDIATION COSTS	22
QUALITY OF MEDIATION	23
Box 6. Instruments and rules to ensure quality of mediation	24
Box 7. Example of requirements for mediators in the UK	25 - 26
PART 4. ASSESSMENT OF USING MEDIATION	
NUMBER OF DISPUTES IN HEALTHCARE MATTERS SETTLED THROUGH MEDIATION	27
MAIN DIFFICULTIES RELATING TO USE OF MEDIATION IN HEALTHCARE MATTERS	27 - 28
CURRENT DEVELOPMENTS AND FUTURE CHANGES	28 - 29
FOOTNOTES	30

FOREWORD

HOPE, the European Hospital and Healthcare Federation, is an international non-profit organisation representing national public and private hospital associations and hospital owners, either federations of local and regional authorities or national health services. Today, HOPE gathers 35 organisations – national hospital associations, national federations of local and regional authorities and national health services – coming from the 27 Member States of the European Union, Switzerland and the Republic of Serbia.

HOPE mission is to promote improvements in the health of citizens throughout Europe, high standard of hospital care and to foster efficiency with humanity in the organisation and operation of hospital and healthcare services. To do it, HOPE promotes and realises research activities among its members. Topics are identified by members' representatives, with the final aim of supporting the exchange of knowledge and expertise throughout Europe.

In September 2011, HOPE members decided to develop a survey about Mediation in Healthcare, comparing the scope and methodology of conflict resolution in the healthcare sector in the different EU Member States. The specific aim of the survey was to collect information on characteristics and use of models of mediation in healthcare matters in the Member States of the European Union. For the purposes of this survey the institutions of patients' rights ombudsman and patients' rights representatives, primarily defending patient's rights, were not considered mediation models.

A questionnaire was prepared and sent to HOPE members. Answers were received from 12 countries: Belgium, Estonia, Finland, France, Hungary, Latvia, Luxembourg, Malta, Slovenia, Spain, Sweden and the United Kingdom. In Portugal, systems of arbitration are in place but there is no mediation as defined later on.

This publication summarises the findings of this survey. After a general overview, the report is divided in three sections that, following the structure of the questionnaire, investigate the typologies of mediation services, analyse and the features of healthcare mediation services, conclude with an assessment of the future of mediation.

OVERVIEW: DEFINITIONS AND CURRENT TRENDS

In case of conflicts occurring at any level of the society, mediation is becoming a quite diffused method of Alternative Dispute Resolution, both because of its effectiveness and because its efficiency. Indeed, it is proven that this method allows reaching a more satisfying agreement between the conflicting parts, saving time and money, but also in many cases reducing the factors of stress.

When a conflict occurs, the 'classic' way of resolution is the legal process, referred to also as litigation. The litigation or legal process is defined as the process of taking a case through court. It is most common in civil lawsuit. In litigation, there is a claimant, who brings the charge, and a defendant, one against whom the charge is brought. To litigate is to file a charge against someone and bring a case to court¹.

The set of alternatives to litigation or formal court hearing are called Alternative Dispute Resolution (ADR). ADR includes dispute resolution processes and techniques that act as a means for resolving disputes and come to an agreement outside the judicial process (formal litigation – court), with or without the help of a third party. The main types of ADR are negotiation, mediation (sometimes referred to as conciliation), collaborative law, and arbitration².

Negotiation is a dialogue between two or more people or parties, intended to reach an understanding, resolve point of difference, produce an agreement upon courses of action, bargain for individual or collective advantage. It occurs in business, non-profit organisations, government branches, legal proceedings, among nations and in personal situations such as marriage, divorce, parenting, and everyday life.

In collaborative law, the parties reach agreement with support of lawyers (who are trained in the process) and mutually agreed experts who facilitates the resolution process within specifically contracted terms. No one imposes a resolution on the parties. However, this is a formalized process, rather than an ADR methodology; it is part of the litigation and court system. It is normally used for divorce and family issues³.

Mediation means a structured process whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties, suggested or ordered by a court, or prescribed by the law of a Member State⁴. Mediation is used in a variety of cases, such as commercial, legal, diplomatic, workplace, community disputes and family matters.

A mediator is any third person who is asked to conduct mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person may have in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation⁵. The mediator assists the parties to negotiate their own settlement (facilitative mediation) and in some cases may express a view on what might be a fair or reasonable settlement, generally where all the parties agree that the mediator may do so (evaluative mediation)⁶.

In arbitration, the parties refer the dispute resolution to a third party, one or more persons (the "arbitrators", "arbiters" or "arbitral tribunal"), who review the case and impose a decision that is legally binding for both sides. Arbitration is often used for the resolution of commercial disputes, particularly international commercial transactions, and in consumer and employment matters, where arbitration may be mandated by the terms of employment or commercial contracts. Arbitration can be either voluntary or mandatory and can be either

binding or non-binding. Non-binding arbitration is very similar to mediation, the principal distinction is that whereas a mediator will try to help the parties find a compromise, the (non-binding) arbitrator will only give a determination of liability and, if appropriate, an indication of the quantum of damages payable⁷.

Some Courts now require some cases to go through some types of Alternative Dispute Resolution before permitting the parties' to present to a judicial court. Mediation is becoming the preferred method of ADR; indeed the European Mediation Directive (Directive 2008/52/EC) expressly contemplates so-called "compulsory" mediation.

There are many advantages to mediation over other forms of alternative dispute resolution or civil litigation. The most important and most obvious ones are the cost and time saving achievable. Mediation is much less costly than civil litigation. The mediation process, in fact, can take only a couple of days. It is an informal process. Preparation is easy and simple. No particular location is needed and lawyers are not necessary (although they may participate at the request of a party). No less, mediation can protect parties from some of the extra problems associated with civil litigation, such as punitive awards, if applicable.

Secondly, mediation allows a more transparent process. It is more suitable to answer the needs of the parties and ensures both of them bring their needs, problems, concerns and expectations on the table. Indeed, in mediation the parties are full participants and can express their own opinions and concerns, where in civil litigation the parties' lawyers are the only ones who represent their party unless the party "takes the stand" and is subject to cross-examination by the opposing lawyer. In this way, mediation allows parties to have a direct confrontation, work together and reach a settlement even in a friendly way, while in civil litigation most often there is a verdict or decision by a judge or jury which the parties accept, but their relationship comes to an unfriendly end.

Finally, mediation is a private process, not subject to public knowledge and possible media attention as can be the case with civil litigation. In summary, mediation is widely recognised as being a cost effective and efficient method of parties achieving a satisfactory result of a dispute, and it has the additional advantage of flexibility⁸.

In periods of financial difficulties and resource shortage conflicts tend to escalate. As far as healthcare is concerned, the costs of unmanaged and unresolved conflicts might be considered. They can lead to staff shortages, strikes, financial losses, increased malpractice costs, and the potentially devastating impact of litigation⁹. Letting them un-discussed and unsolved brings to wasting a lot of hospital professionals' time and might hinder quality of patient care and productivity.

Predominantly, claims are based on tort of negligence where clients seek compensation, the medical technicalities and expertise involved lengthen the time it takes to process a claim and adds significantly to higher costs. A professional body such as a medical council may have disciplinary functions to oversee and prevent poor professional practice that would evidently lead to a dispute¹⁰.

In short, mediation enables hospitals, healthcare institutions, nursing homes and other healthcare facilities to:

- prevent conflicts before they occur or explode;
- reduce the risk and cost of escalation;
- discuss settlement before costs and attorney's fees have accumulated;
- provide a forum for final resolution outside the courts;
- create (inexpensive) internal mechanisms to resolve conflict;
- pinpoint and resolve the underlying reasons which created the problem.

Many contemporary healthcare problems may be alleviated through the introduction of mediation, linking it as an integral part of patient care. It has been described as the “Power of an Apology” in what has become a “blame-orientated culture” to redress a wrong on these grounds and although it may not be suitable for every dispute it conveys the many merits of mediation that would not be achieved through the court such as an account given of emotional aspects of the dispute which provides a “therapeutic sense of closure”¹¹.

PART 1

RECOURSE TO MEDIATION IN HEALTHCARE MATTERS

Conflicts in the healthcare industry occur regularly between providers and patients, staff and family members, co-professionals, labour and management, physicians and administrators, claimants and carriers and mediation is a useful method to come across these issues.

The survey conducted by HOPE investigated in which healthcare disputes mediation is used in each country (Box 1). It shows the following results.

- In the majority of countries, mediation is used to solve disputes between the patient or the patient's relatives and the healthcare provider. This is in particular the case of Belgium, Denmark, Estonia, France, Hungary, Latvia, Malta, Slovenia, Spain and the UK.
- The use of mediation is also diffused in case of collective labour disputes, i.e. when disagreements occur between the management of healthcare establishments and trade unions. This happens in Belgium, Estonia, Finland, France, Luxembourg, Malta, Slovenia, Sweden and the UK.
- More rarely, mediation is used in case of individual labour disputes, happening between the employer and a member of healthcare staff. This is the case only in Estonia, Malta, Slovenia and the UK.
- In addition, in Estonia, Malta and Slovenia mediation also helps to solve conflicts among members of healthcare staff within teams and departments.
- Finally, mediation may also be used to solve conflicts between healthcare establishments and other legal entities such as insurance companies, contracting parties, suppliers, founders of healthcare establishments, public sector, etc. This happens in France, Luxembourg, Malta and Slovenia.

BOX 1. TYPOLOGIES OF DISPUTES LEADING TO THE USE OF MEDIATION

Belgium	<ul style="list-style-type: none"> - Patient or patient's relatives and the healthcare provider - Management of healthcare establishments and trade union - collective labour disputes
Denmark	<ul style="list-style-type: none"> - Patient or patient's relatives and the healthcare provider
Estonia	<ul style="list-style-type: none"> - Patient or patient's relatives and the healthcare provider - Members of healthcare staff within teams and departments - Employer and a member of healthcare staff – individual labour disputes - Management of healthcare establishments and trade unions – collective labour disputes
Finland	<ul style="list-style-type: none"> - Management of healthcare establishments and trade unions – collective labour disputes
France	<ul style="list-style-type: none"> - Patient or patient's relatives and the healthcare provider - Management of healthcare establishments and trade unions – collective labour disputes - Healthcare establishments and other legal entities such as insurance companies, contracting parties, suppliers, founders of healthcare establishments, public sector, etc.
Hungary	<ul style="list-style-type: none"> - Patient or patient's relatives and the healthcare provider
Latvia	<ul style="list-style-type: none"> - Patient or patient's relatives and the healthcare provider
Luxembourg	<ul style="list-style-type: none"> - Management of healthcare establishments and trade unions – collective labour disputes - Healthcare establishments and other legal entities such as insurance companies, contracting parties, suppliers, founders of healthcare establishments, public sector, etc.
Malta	<ul style="list-style-type: none"> - Patient or patient's relatives and the healthcare provider - Members of healthcare staff within teams and departments - Employer and a member of healthcare staff – individual labour disputes - Management of healthcare establishments and trade unions – collective labour disputes - Healthcare establishments and other legal entities such as insurance companies, contracting parties, suppliers, founders of healthcare establishments, public sector, etc.
Slovenia	<ul style="list-style-type: none"> - Patient or patient's relatives and the healthcare provider - Members of healthcare staff within teams and departments - Employer and a member of healthcare staff – individual labour disputes - Management of healthcare establishments and trade unions – collective labour disputes - Healthcare establishments and other legal entities such as insurance companies, contracting parties, suppliers, founders of healthcare establishments, public sector, etc.
Spain	<ul style="list-style-type: none"> - Patient or patient's relatives and the healthcare provider
Sweden	<ul style="list-style-type: none"> - Management of healthcare establishments and trade unions – collective labour disputes
United Kingdom	<ul style="list-style-type: none"> - Patient or patient's relatives and the healthcare provider - Employer and a member of healthcare staff – individual labour disputes

PART 2

FOUNDATIONS FOR MEDIATION IN HEALTHCARE MATTERS

As already examined, mediation in healthcare can apply to many areas where conflicts may arise. In individual countries, mediation in healthcare matters may be regulated as follows:

- by general rules governing mediation,
- by specific rules in healthcare, or
- by mediation providers themselves, in this case there are no formal rules.

The survey conducted by HOPE investigated these aspects; a synthesis of the results can be seen in the Box 2.

Belgium, Estonia, Finland, Luxembourg, Malta, Slovenia and Sweden have a general legislation governing mediation. This legislation generally aims to provide a ground for solution of both individual and collective labour disputes, whatever the sector or industry in which they occur be. In some cases, general legislation also addresses the use of mediation in civil matters.

In **Belgium**, a law of 5 December 1968 on the collective labour agreements and the joint commissions foresees mediation concerning collective labour disputes. More recently, the Mediation law of 21 January 2005 foresees the possibility of general mediation.

In **Estonia**, disputes between trade unions and employers are resolved according to the Collective Labour Dispute Resolution Act ; disputes between employer and member of healthcare staff are resolved according to the Individual Labour Dispute Resolution Act , whereas the Reconciliation Act regulates reconciliation in civil matters and by voluntary basis.

In **Finland**, the arbitration system is based on Act on Mediation in Labour Disputes. The National Conciliator and the Conciliators assist the negotiating partners in the conciliation of labour disputes if a collective agreement cannot be reached without outside help. The central labour market organisations can also be assisted by the National Conciliator when drawing up comprehensive incomes policy agreements. It is compulsory to participate in the mediation of labour disputes: Finland has a system of compulsory conciliation, but the settlement of labour disputes is not compulsory. The parties to a dispute do not have to accept the Conciliator's proposal.

In **Luxembourg**, the article L. 163-1 and following of the "Code du Travail" – Office National de Conciliation - establishes a legislative ground for collective labour disputes. Its specific aim (concerning mediation) is to resolve collective disputes concerning working conditions and resolve collective labour disputes where no collective wage agreement or collective agreement could be found. For disputes with the public authorities, the Law from 22 August 2003 establishes a mediator, whose mission is to receive complaints from all physical or moral persons of private law who considers that in an affair in which it is concerned, a public authority has not functioned according to its missions or violates current conventions, laws or regulations (in these cases, public authorities can be administrations of the State and of the municipalities, public institutions depending from the State and the municipalities, with the exception of their industrial, financial and commercial activities).

In **Malta**, mediation is governed in the general legislation by the Mediation Act Chapter 474, which regards mediation at any level, including healthcare, and refers to any disputes would occur in this area.

In **Slovenia**, mediation is governed by the Law on mediation in Civil and Commercial matters (2008). Before 2008, there was no general regulatory framework for mediation in Slovenia. This did not impede the development of mediation in practice; on the contrary, from 2001 onwards Slovenia has developed in particular court-related mediation. The revolution in the field of civil justice is The Act on Alternative Dispute Resolution in Judicial Matters, which became applicable on 15 June 2010, which introduced alternative dispute resolution schedules at all courts of first instance; courts of second instance are due to adopt and begin to use such schedules by no later than 15 June 2012.

In **Sweden**, in 2000 the Government established the National Mediation Office that covers the whole labour market, including the healthcare sector. Its tasks are regulated in the Co-Determination Act, which has been supplemented by an ordinance containing instructions for the work of the National Mediation Office. The task of mediating in labour disputes was previously discharged by the National Conciliator's Office. State Mediation in industrial conflicts has been provided by law since 1906. In Sweden, the National Mediation Office can appoint mediators at the request of the parties concerned. Under the new legislation dating 1 June 2000, the National Mediation Office can also appoint mediators without the consent of the parties. This may be done if one of the parties has given notice of industrial action and the National Mediation Office decides that mediators can satisfactorily resolve the dispute. Organisations that have signed an agreement on bargaining procedure and have registered the document with the National Mediation Office are exempted from this rule. However, the intervention of mediators against the wishes of the social partners is not common practice.

Together with the general legislation on mediation, Belgium, France, Hungary, Luxembourg and Slovenia have a special legislation governing mediation in healthcare. This legislation generally aims to provide further ground to patient rights protection and to establish alternative pathways of resolution in case of damages caused by healthcare, preventing court-related causes.

In **Belgium**, Law of 22 August 2002 on patient rights (art. 11) and Royal decree of 19 March 2007 on the requirements for the mediator in hospitals foresees mediation between patient (or relatives) and healthcare providers concerning patient rights. Law of 31 March 2010 on the compensation for damage caused by healthcare (art. 8, 5°) foresees mediation between patient, healthcare providers and insurance companies in case of damage caused by healthcare.

In **France**, mediation in healthcare is defined by a special legislation, Law of 4 March 2002.

In **Hungary**, the Act of Healthcare includes some provisions about mediation.

In **Luxembourg**, the article 77 of the "Code de la Sécurité Sociale" – Commission des Budgets - establishes rules concerning healthcare establishments and National Health Insurance, following the mission of conciliation in the context of the establishment of the budgets of hospitals. More precise provisions are agreed on in a convention between the National Hospital Association (EHL) and the National Health Insurance. According to this convention, the EHL has the mission to attempt a mediation before the dispute goes to the Commission des Budgets.

In **Slovenia**, the Patient Rights Act and Rules on mediation on area of healthcare (deriving from the Patient Rights Act), both from 2008, establish rules on mediation in healthcare.

In Latvia, legal rules for mediation are not provided at any level. In the UK there are neither legal rules; however, mediation is a recommended good practice. In Denmark, mediation is a voluntary activity and there are no binding rules concerning this matter.

In **Latvia**, mediation services are mainly in the responsibility of NGOs and no profit organisations, which are free to manage them in the best way.

In the **UK**, mediation is a voluntary aspect of the local NHS organisation's complaints process; either party can request it. For health, place employment matters it is encouraged that mediation forms part of an organisational policy though there is no overarching legislation.

In Estonia and Luxembourg, the autonomous provisions of hospitals and healthcare institutions complete the general and special legislations.

In **Estonia**, hospitals have their own systems for resolving disputes between different parties, but there is no central system and there is no legislation for healthcare matters. In case of any dispute between different parties, the first step is to try to resolve the problems internally in healthcare establishments. Most of the hospitals employ independent mediators. There are special mediation processes for labour disputes and disputes between trade unions and employer organisations (Conciliator), and mediation processes for disputes between workers and employers (Labour dispute committees). The parties have the right to go to court if the disputes are not resolved in hospitals or during conciliator or labour dispute committee sessions.

In **Luxembourg**, concerning healthcare establishments and contracting parties - for instance the medical doctors which are self-employed but are bound to the hospital via a convention - there is always an attempt for mediation by the president of the conseil médical of the hospital. The members of the conseil médical are elected by law by the medical doctors in order to represent their interests with the management of the hospital.

In Spain, healthcare matters fall under the responsibilities of the Autonomous Communities. Some of them, by their own initiative, have introduced rules and provisions concerning mediation. For example, rules concerning mediation are provided by the Regional Ministry of Health of Castilla La Mancha, with the order of 20.02.2003 (Article 4.4.C) of claims, complaints, initiatives and suggestions on the performance of services, centres and establishments of the Health Service of Castilla la Mancha. The College of doctors of Orense, in Galicia, has created the "Mediation and Arbitration Service"; the College of doctors of Vizcaya, in the Basque Countries, has created the "Arbitration Service"; the College of doctors of Cordoba, in Andalusia, has created the "Mediation Service"; the College of doctors of Vizcaya, in the Basque Countries, has created the "Arbitration Service"; the Autonomous community of Cantabria has established a "unit of healthcare mediation"; la 'Ley de Ordenación Sanitaria de la Comunidad de Madrid (LOSCAM)' foresees the "Patient defendant", which is a member of the healthcare institution in charge of managing the complaints and suggestions of patients concerning the rights and duties of patients as established by the Spanish Constitution (art. 43 and 51) and by the Law of users and consumers (art. 28). The LOSCAM also establishes that the "patient defendant" has the main objective of mediate in case of disputes involving the citizens of the community of Madrid as users of healthcare system.

COURT-RELATED MEDIATION

There are two main mediation models according to which mediation can be conducted in European Member States:

- mediation within court schemes (i.e. court-related mediation) and
- mediation conducted outside of court schemes (i.e. independent mediation).

The term court-related mediation is used for mediation that is conducted in connection with a court. It is usually offered within court schemes as an option of alternative dispute resolution without recourse to judicial proceedings where a case is decided by a judge.

The study investigated if disputes in healthcare matters can be resolved also through court-related mediation. The results show that:

- in Estonia, France, Luxembourg, Latvia, Malta, Slovenia, and the UK healthcare disputes can be resolved through court-related mediation;
- in Belgium, Denmark, Hungary, Spain and Sweden court-related mediation does not exist.

BOX 2. GROUNDS FOR MEDIATION

Belgium	<p><u>General legislation</u></p> <ul style="list-style-type: none"> - Mediation law of 21 January 2005 <ul style="list-style-type: none"> ⇒ foresees the possibility of general mediation - Law of 5 December 1968 on the collective labour agreements and the joint commissions <ul style="list-style-type: none"> ⇒ foresees the mediation concerning collective labour disputes <p><u>Special legislation</u></p> <ul style="list-style-type: none"> - Law of 22 August 2002 on patient rights (art. 11) and Royal decree of 19 March 2007 on the requirements for the mediator in hospitals <ul style="list-style-type: none"> ⇒ foresee mediation between patient (or relatives) and healthcare provider concerning patient rights - Law of 31 March 2010 on the compensation for damage caused by healthcare (art. 8, 5°) <ul style="list-style-type: none"> ⇒ foresees mediation between patient, healthcare provider and insurance company in case of damage, caused by healthcare
Denmark	<p>The regions - healthcare provider – are by legislation committed to offer a mediation- dialogue with patients who have sent a complaint to the national patient complaint system. It is up to the patient or the patient’s relatives to decide if they want the mediation-dialogue. If the patient wants to participate in the mediation-dialogue the healthcare provider has to implement the mediation within 4 weeks.</p>
Estonia	<p><u>General legislation</u></p> <ul style="list-style-type: none"> - Collective Labour Dispute Resolution Act <ul style="list-style-type: none"> ⇒ disputes between trade unions and employers - Labour Dispute Resolution Act <ul style="list-style-type: none"> ⇒ disputes between employer and member of healthcare staff - Reconciliation Act <ul style="list-style-type: none"> ⇒ reconciliation in civil matters and by voluntary basis <p><u>Other grounds</u></p> <ul style="list-style-type: none"> - Hospitals have their own systems for resolving disputes between different parties
France	<p><u>Special legislation</u></p> <ul style="list-style-type: none"> - Law March 4, 2002
Hungary	<p><u>Other grounds</u></p> <ul style="list-style-type: none"> - Act of Healthcare
Latvia	<p>No legislation involving mediation is in place.</p>
Luxembourg	<p><u>General legislation</u></p> <ul style="list-style-type: none"> - Article L. 163-1 and following of the “Code du Travail” – Office National de Conciliation <ul style="list-style-type: none"> ⇒ collective labour disputes - Law from 22 August 2003 establishing a mediator <ul style="list-style-type: none"> ⇒ disputes with the public authorities <p><u>Special legislation</u></p> <ul style="list-style-type: none"> - Article 77 of the “Code de la Sécurité Sociale” – Commission des Budgets - More precise provisions are agreed on in a convention between the national hospital association (EHL) and National Health Insurance <p><u>Other grounds</u></p> <ul style="list-style-type: none"> - Intervention of the “conseil medical” of the hospital <ul style="list-style-type: none"> ⇒ healthcare establishments and contracting parties disputes

Malta	<u>General legislation</u> - Mediation Act Chapter 474
Slovenia	<u>General legislation</u> - Law on mediation in Civil and Commercial matters (2008) - Act on Alternative Dispute Resolution in Judicial Matters <u>Special legislation</u> - Patient Rights Act and Rules on mediation on area of healthcare
Spain	<u>Other grounds</u> - Specific legislation of the Autonomous Communities
Sweden	<u>General legislation</u> - Co-Determination Act ⇒ established in 2000 the National Mediation Office
United Kingdom	<u>Other grounds</u> - Mediation is a voluntary aspect of the local NHS organisation's complaints process, either party can request it

PART 3

PROVISION OF MEDIATION SERVICES

Healthcare providers may engage mediators in healthcare disputes and provide mediation in different ways.

- Where mediation is provided by a healthcare provider, it may be conducted either by mediators working for that healthcare provider (internal mediators of the healthcare provider) or by contract mediators who are requested to assist in dispute resolution (external mediators). A mixed system of mediation services can also exist, where mediation is conducted by mediators of the healthcare provider as well as by external contract mediators.
- Mediation in healthcare matters may be provided within various associations, chambers or other organisations operating in healthcare sector.
- Other providers of mediation services that operate primarily outside of healthcare sector, e.g. mediation companies, etc., can provide mediation in healthcare.

The research conducted by HOPE investigated these aspects (Box 3), highlighting the following results.

In almost all countries, mediation is provided within healthcare institutions. This is the case of **Belgium, Denmark, Estonia, France, Hungary, Luxembourg, Slovenia, Spain** and the **UK**.

In the majority of countries analysed there are institutions providing mediation services in all sectors, including healthcare. Here, mediation can be provided:

- by these providers of mediation services alone; this is the case of **Malta** and **Sweden**;
- by these providers of mediation services alone or together with mediators of the healthcare provider; this is the case for **Belgium, Estonia, Hungary, Slovenia** and the **UK**;
- by these providers of mediation services, within or outside the healthcare provider institution; this is the case of **Luxembourg**.

Mediation is only provided by organisations operating in the healthcare sector in **Latvia**.

Mediation is only provided by mediators, which are employed within the healthcare institution in **France**.

In **Slovenia**, mediation can be provided by providers of mediation services alone or together with mediators of the healthcare provider or by other organisations operating in the healthcare sector.

In **Belgium**, there is an “internal” mediator for hospital care and mental healthcare who is on the payroll of healthcare providers but is independent (cannot take a position). However, for other types of healthcare, the mediation concerning patient rights is conducted by a government authority, the “Federal Ombudsdepartment”, installed within the “Federal Patient Rights Commission”. There is also a list of “official, authorised” mediators in general affairs (cf. Mediation law of 21 January 2005); parties can however choose to rely on a non-official mediator.

In **Estonia**, the external mediator is identified between national conciliators and labour-disputes committees.

In **Hungary**, as well there is a State-organised mediation service.

In **Malta**, a Mediation Centre is set up by law; mediatory services are laid down by the Mediation Act.

In **Slovenia**, healthcare disputes can be resolved by mediators who otherwise act outside of health sector. They can appear in the context of (their) companies or as sole proprietors. In many cases, mediation services for resolving healthcare disputes are offered by the Association of Health Institutions of Slovenia - the interest group of all healthcare providers in the Republic of Slovenia - as one of the important areas of their work.

In **Sweden**, the National Mediation Office covers the whole labour market, including the healthcare sector and has three tasks: mediate in disputes occurring in the Swedish labour market; promote an efficient wage formation process; be responsible for public statistics relating to wages and salaries. The National Mediation Office appoints mediators in the event of a dispute between the parties in the labour market (the 'social partners') during bargaining over pay and terms of employment. Nowadays, management and labour negotiate at national association level. Mediators are expected to keep abreast of the economic situation in the country. Their task is to ensure that the social partners reach agreement and thereby preserve industrial peace. However, this is not to be achieved at any price – mediators are also required to strive for agreements that are compatible with an efficient wage formation process. Mediators are not permanently employed by the agency but are appointed for each individual dispute. Most of them have previously served as negotiators with one or other of the social partners. The National Mediation Office has six regional mediators at its disposal. They are called in when local disputes occur at company level. A typical conflict at this level involves a company refusing to sign a collective agreement with a union organisation. Regional mediators are attached to the National Mediation Office for 12 months at a time and carry out mediation assignments in addition to their regular employment. Several of them have held such posts for many years and are or have been court lawyers.

In the **UK**, charities also operate across the health and social care landscape providing these services on behalf of the NHS organisation. It is an NHS organisation's decision as to whether and how these services are provided.

BOX 3. PROVISION OF MEDIATION SERVICES

Belgium	<ul style="list-style-type: none"> - Internal mediation for hospital care and mental healthcare - “Federal Ombuds-department”, installed within the “Federal Patient Rights Commission” for mediation concerning patient rights in others areas of healthcare - List of “official, authorised” mediators in general affairs
Denmark	<ul style="list-style-type: none"> - Mediation is provided by mediators employed by the healthcare provider
Estonia	<ul style="list-style-type: none"> - Mediation can be conducted by both mediators of the healthcare provider and external mediators - External mediators are identified between national conciliators and labour-disputes committees
France	<ul style="list-style-type: none"> - Mediation is provided by mediators employed by the healthcare provider
Hungary	<ul style="list-style-type: none"> - Mediation can be conducted by both mediators of the healthcare provider and external mediators - External mediators are identified within organisations providing mediation services to all sectors, including healthcare (e.g. mediation companies, etc.) - There is a State-organised mediation service
Latvia	<ul style="list-style-type: none"> - Associations, chambers or other organisations operating in healthcare sector provide mediation
Luxembourg	<ul style="list-style-type: none"> - Mediation is provided by external mediators - External mediators are identified within organisations providing mediation services to all sectors, including healthcare (e.g. mediation companies, etc.)
Malta	<ul style="list-style-type: none"> - Mediation services are provided by a Mediation Centre, which is set up by law. Mediatory services are laid down by the Mediation Act
Slovenia	<ul style="list-style-type: none"> - Mediation is provided by healthcare institutions, which can offer these services through an internal and an external mediator - Mediation services for resolving healthcare disputes are offered by the Association of Health Institutions of Slovenia - Mediators operating outside of health sector can appear in the context of (their) companies or as sole proprietors
Spain	<ul style="list-style-type: none"> - In the majority of cases, mediation is provided within the Autonomous Communities
Sweden	<ul style="list-style-type: none"> - The National Mediation Office appoints mediators in the event of a dispute between the parties in the labour market (the ‘social partners’) during bargaining over pay and terms of employment - Mediators are not permanently employed by the agency but are appointed for each individual dispute - Regional mediators are attached to the National Mediation Office for 12 months at a time and carry out mediation assignments in addition to their regular employment
United Kingdom	<ul style="list-style-type: none"> - The provision of mediation services is in the responsibility of the NHS organisations, who decide whether and how these services are provided - In the UK, charities also operate across the health and social care landscape providing mediation services on behalf of the NHS organisation

PARTIES TO MEDIATION

Mediation as a form of alternative dispute resolution is a structured method of settling disputes by means of a third independent person. Although a mediator cannot issue a binding decision, s/he uses mediation techniques and assists parties to a dispute to achieve an agreement resolving the dispute and redefining mutual rights and obligations, especially in view of future relations.

In order for parties to a dispute to accept and trust in mediation, they should be provided with the possibility of having a say in determining a mediator in their case. For this reason, the parties have the possibility of choosing a specific mediator or they may decide to have a co-mediation that is mediation conducted by two or more mediators working together as a team to assist the parties in dispute resolution. Co-mediation is usually used for complex cases involving several parties or strong unpleasant emotions (anger, sadness, seeking vengeance, etc.), where it is necessary the mediators share roles.

The results of HOPE research show that:

- in general, the parties cannot choose a mediator by name; this is the case in **Belgium, Denmark, Estonia, France, Hungary, Sweden** and the **UK**;
- the parties can choose a mediator by name in **Luxembourg** and **Malta**;
- the parties can opt for co-mediation in **Latvia**;
- the parties can choose a mediator by name or opt for co-mediation in **Slovenia**.

In **Belgium**, there is no choice except in the case of mediation on general affairs.

In **France**, as well the mediator is provided by the healthcare facility.

In **Hungary**, the healthcare provider has specific person appointed for mediation.

In **Sweden**, the National Mediation Office appoints mediators.

In **Estonia**, it depends on the local system; however during mediation in hospitals or in the pre-court mediation process it is not possible for patients and patients' relatives to choose mediators, because the mediators are assigned to them or there may only be one mediator (in hospitals), for example the head of health services quality management department.

MEDIATION DOCUMENTS

Mediation documents encompass all documents required for a good preparation, implementation and outcome of a mediation process (including an agreement on the settlement of dispute). The scope and form of the documents may be prescribed by rules or be subject to an arrangement between the mediator and the parties to the dispute. However, any prescribed rules normally serve to ensure better transparency of the process and to protect interests of the parties.

The following mediation documents can be drawn up.

- **Mediation contract**
Agreement on the course of a mediation process.
- **Mediation agreement**
Written agreement on the settlement of dispute.
- **Enforceable mediation agreement**
Written agreement on the settlement of dispute which is directly enforceable. In this case “enforceability” means a fact enabling direct enforcement of a mediation agreement even though the agreement failed to be implemented by the parties, and making such mediation agreement equivalent to a court decision. The enforceable mediation agreement is then a written agreement resulting from mediation which is directly enforceable (e.g. by means of a notary, court dispute resolution, etc.).
- **Attestation**
Delivered to the parties certifying their involvement taking part in a mediation process.

The results of HOPE research (Box 4) show that in the majority of countries only one type of mediation document is used.

- The mediation agreements are the only documents provided in **France, Luxembourg, Latvia, Sweden** and the **UK**.
- The mediation enforceable agreement is used in **Malta**.
- The mediation contract is used in **Hungary**.
- Different kinds of documents can be drawn up in **Belgium, Estonia** and **Slovenia**.
- In **Denmark**, the five regions (healthcare providers) have developed different kinds of guidance for and e-learning material about how to obtain a successful mediation/dialogue. At the end of the mediation session, the representative of the healthcare provider has to fill out a form about the outcome of the mediation. This form is sent to the national patient complaint unit (Patientombuddet). In Spain, the situation differs depending from the Autonomous Communities; however, it seems that in general the mediation agreement is provided.

In **Belgium**, mediation contracts, mediation agreements and enforceable mediation agreements are used in the case of general mediation. Conversely, for the mediation concerning patient rights or labour disputes no documents are needed, because it is mainly an oral procedure.

In **Estonia**, mediation contracts and mediation agreements are used. Mediation agreements can be proved by notary of parties asking for it. When parties have signed the mediation agreement, they are obliged to act according to it and these agreements fall under the outreach of the Law of Obligations Act. An obligation is a legal relationship which gives rise to the obligation of one person (obligated person or obligor) to perform

an act or omission (perform an obligation) for the benefit of another person (entitled person or oblige), and to the right of the oblige to demand that the obligor perform the obligation. Notary can prove mediation agreements if parties ask for it. If the parties do not fulfil their obligations, they have to bring the enforcement matter to the country court. For the mediation agreements to be enforceable (in financial matters), they have to be enforced by county court.

In **Slovenia** mediation contracts, mediation agreements as well as enforceable mediation agreements are available. Mediation agreements are usually drawn up in writing and the parties are instructed of possibilities to ensure its immediate enforcement. This is in most cases achieved in two ways:

- agreement is drawn up in immediately enforceable notarial record before a notary public;
- agreement is transformed into court settlement before the court.

The essence of the agreement, which has instruments permitting enforcement, is the fact that any potential failure to comply with agreed commitments does not have to be initially pursued through action in civil proceedings, but rather the execution of the agreement can be reached directly in judicial execution proceedings as the Enforcement and Securing of Civil Claims Act stipulates.

In **Sweden**, there are no initial contracts in a mediation based on bargaining between social partners. The practice is that what is said between the parties and the mediator stays between them. There have never been any problems concerning roles, processes, confidentiality etc.

BOX 4. MEDIATION DOCUMENTS

Belgium	- Mediation contract, mediation agreement and mediation enforceable agreement used in case of general mediation - No documents are needed for mediation concerning patient rights
Estonia	- Mediation contract and mediation agreement
France	- Mediation agreement
Hungary	- Mediation contract
Latvia	- Mediation agreement
Luxembourg	- Mediation agreement
Malta	- Mediation enforceable agreement
Slovenia	- Mediation contract, mediation agreement and mediation enforceable agreement
Spain	- Mediation agreement
Sweden	- Mediation agreement
United Kingdom	- Mediation agreement

INFORMATION ON MEDIATION

For the purposes of being transparent, but also to promote the use of mediation in case of conflicts, detailed information about mediation can be delivered to patients, employees and citizens by different means, in particular using information and communication technologies (ICTs).

HOPE research shows that:

- In almost all countries, information about mediation is available in writing on the premises of the healthcare provider, in other institutions or it is sent to clients. This is the case of **Estonia, Hungary, Latvia, Slovenia, Spain and France** (here the law foresees as an obligation for hospital to propose mediation).
- In other countries, **comprehensive information is provided through the websites of each hospital or healthcare provider (Box 5)**. This is the case of **Luxembourg and Sweden**.
- In the **UK**, written information is provided but also individual NHS organisation websites detail the local mediation options for patients/citizens.
- Information is only available on the internet with a list of mediators and information on them in **Malta**.
- All information is available via website, in the case of general mediation it is also possible to find on the internet a list of mediators and information on them in **Belgium**.
- Information about the opportunity of using mediation services is provided by telephone in **Denmark**. Patients are also informed from websites and from the patient supervisors at the hospitals.

BOX 5. COUNTRY WEBSITES WITH INFORMATION ABOUT MEDIATION

Belgium	<ul style="list-style-type: none"> - www.patientrights.be - www.voba.be: reports the list of mediators and information on them in the case of general mediation
Luxembourg	<ul style="list-style-type: none"> - www.centre-mediation.lu - www.mediation.lu - www.ombudsman.lu
Sweden	<ul style="list-style-type: none"> - http://www.mi.se/main/main_engl.html
United Kingdom	<ul style="list-style-type: none"> - Individual NHS organisation websites detail the local mediation options for patients/citizens - A specific Mediation Network - which is a professional body for mediators - is established in Scotland. Their website is very informative: http://www.scottishmediation.org.uk/about/types-of-mediation/healthnhs-mediation

MEDIATION COSTS

Costs of mediation in healthcare matters may be allocated in different manners. Mediation can be free of charge, otherwise mediation costs can be fully or partly borne by the parties.

HOPE research shows that:

- Mediation costs are free of charge in **Belgium, Denmark, France, Luxembourg, Spain, Sweden** and the **UK**.
- Mediation costs are fully borne by parties in **Estonia, Latvia** and **Malta**.
- In **Slovenia**, mediation is regulated by the Patient Rights Act takes place before the Commission of the Republic of Slovenia for protection of patient rights. If the healthcare provider decides to offer mediation irrespective of the Patient Rights Act, the costs of mediator and its payment is a matter of agreement between mediator and mediation participants (mediants).

In **Belgium**, costs are covered by hospital or state budget (for non-hospital care).

In **Denmark**, costs are fully borne by the healthcare provider.

In **France**, costs are covered by the hospital.

In **Luxembourg**, costs are covered by the National Health Insurance if the “Commission des Budgets” is concerned and by the Public State Budget if the “Office National de Conciliation” is concerned.

In **Sweden**, costs are borne by the Government and the office does not charge any fees for its mediation services.

In the **UK**, costs are borne by the NHS organisations.

QUALITY OF MEDIATION

The effectiveness and success of mediation processes depend on their quality, which is based on the environment in which mediators are trained and operate. Therefore individual countries put in place various measures and regulations to assure the quality of mediation services (e.g. determining mediation training programmes and their scope, setting out requirements for maintaining mediator status, etc.).

In each country, a number of rules and strategies have been introduced in order to ensure the quality of mediation. They generally are:

- integrated dispute management systems (e.g. state-of-play assessment and risk analysis, estimated dispute costs, etc. A dispute management model is a concept that integrates various activities (such as dealing with patients' complaints, mediation models, etc.) aimed to manage risks arising from disputes related to a particular entity, for example a healthcare establishment.
- requirements and criteria set for trainers of mediators in healthcare matters;
- requirements and criteria for mediators to be able to do this profession, for example:
 - o a minimum number of hours of training (pedagogical hours)
 - o specific subjects/matters to be included in training
 - o a minimum number of mediation processes assisted in order to be officially qualified as a mediator and included in the list of mediators
 - o a minimum number of supervision and intervision sessions to attend
 - o mediator trainees to be mentored by an experienced mediator
- minimal requirements for facilities and equipment used for the purposes of mediation;
- complaint procedure concerning mediation services;
- liability insurance against mistakes provided to mediators.

The results of HOPE research (Box 6) show that:

- In general, precise requirements for mediation are set up in many countries; in particular, rules are established concerning the hours and/or the subjects of training. This happens in **Hungary, Luxembourg, Latvia, Slovenia** and the **UK**. In some cases, rules are established also referring to education, age and supervision of mediators.
- Integrated dispute management systems are in place in **Estonia, France, Hungary** and **Slovenia**.
- Formal complaint policies and procedures are in place in some countries, such as **Belgium** and the **UK**.

In **Belgium**, specific requirements for mediators concern patient rights:

- higher education (however no university degree needed);
- cannot be involved in facts and persons of the complaint;
- professional secret, independency and neutrality ;
- incompatibilities: member of hospital management committee, hospital healthcare provider, active in a patient rights' association.

In **Estonia**, different healthcare providers have different systems to manage disputes. In general, according to the law of obligations, every time a person receives health services, a contract between service provider and patient is "signed". If there are disputes about provided health services, the first level of negotiations is with the service provider. If service providers and patients cannot reach an agreement, the patients has the right to ask for expert opinion from Expert committee on quality of health services (located in the Ministry of Social Affairs), but the decision of this committee is nearly a recommendation and is not enforceable.

BOX 6. INSTRUMENTS AND RULES TO ENSURE QUALITY OF MEDIATION

Belgium	<ul style="list-style-type: none"> - The mediator has to comply with specific requirements when involved in procedure concerning patient rights - Complaint procedure concerning mediation services can be activated at the "Federal Commission of patient rights"
Estonia	<ul style="list-style-type: none"> - Integrated dispute management systems
France	<ul style="list-style-type: none"> - Integrated dispute management systems
Hungary	<ul style="list-style-type: none"> - Integrated dispute management systems - Specified subject matters required to be included in training - Mediators need to attend supervision and intervision sessions - Mediator trainees are mentored by an experienced mediator
Latvia	<ul style="list-style-type: none"> - Specified subject matters required to be included in training
Luxembourg	<ul style="list-style-type: none"> - Mediators need to have a minimal number of hours of training - The mediator needs to have a professional experience of at least 10 years and must be older than 72 years
Malta	<ul style="list-style-type: none"> - Mediators are chosen by a board of directors as provided by law
Slovenia	<ul style="list-style-type: none"> - Integrated dispute management systems - The Association of Health Institutions of Slovenia, that trains healthcare mediators, complies with standards formed by MEDIOS - the Association of Mediation Organisations of Slovenia
United Kingdom	<ul style="list-style-type: none"> - There is no over-arching regulator of the quality of mediation. Local NHS Trust's will have formal complaint policies in place, which may allude to mediation. In some trusts specific mediation policies do exist which include reference to the mediators employed and their training but this is locally decided.

In **Slovenia**, a dispute management system is currently established in the University Medical Centre of Ljubljana, the leading medical institution in Slovenia. Over the next years, other healthcare institutions will embrace it as the future conflict resolution method.

In order to ensure quality and reliability of mediation services, the Association of Health Institutions of Slovenia, that trains healthcare mediators, complies with standards formed by MEDIOS- the Association of mediation organisations of Slovenia. Namely, to join the training, candidate must have (cumulatively):

- successfully completed the basic mediation training (100 teaching hours);
- successfully completed at least one advanced mediation training in the duration of at least 50 teaching hours (regardless of whether the training enables obtaining a title or not) and
- at least 2 years of active mediating experience, 10 mediation cases and at least 50 teaching hours of carrying out mediation.

To obtain the title of trainer, the candidate must have completed the training course in duration of 100 teaching hours.

In **Sweden**, mediators are not permanently employed by the agency but are appointed for each individual dispute. Most of them have previously served as negotiators with one or other of the social partners. The National Mediation Office has six regional mediators at its disposal. Several of them have held such posts for many years and are or have been court lawyers.

In the **UK** there is no over-arching regulator of the quality of mediation. Local NHS Trusts will have formal complaint policies in place which may allude to mediation. In some trusts specific mediation policies do exist which include reference to the mediators employed and their training but this is locally decided. **An example is given in box 7.**

BOX 7. EXAMPLE OF REQUIREMENTS FOR MEDIATORS IN THE UK

TRAINING

Each Mediator and Mediation Co-ordinator will have been trained for a minimum of three days. The initial three mediation sessions, carried out by an [trust] Mediator will be, where possible, conducted in co-mediation. This means that two Mediators will be made available, and will work together, throughout the mediation session. Co-mediation is aimed at developing individuals' skills and where possible will be used to reflect the diversity within any given organisation.

The trust will operate a Mediation Development meeting that will be held once every three months. At these meetings, Mediators will receive further training and advice. It is a requirement that [trust] Mediators attend a minimum of half the Mediation Development Meetings in any one year, to ensure skill maintenance and development.

CO-ORDINATION OF THE SERVICE

The Mediation Co-ordinator will:

- i. be a trained individual and a member of the Personnel Department;
- ii. decide whether mediation is suitable or appropriate for the referred case;
- iii. be impartial to situations potentially requiring mediation;
- iv. be supportive to employees seeking mediation;
- v. be able to provide clear advice as to the process and detail of the mediation procedure;
- vi. inform and educate Trust managers as to the implications to their staff when entering the mediation procedure. This will include information about the time required to complete the mediation process for the Mediator, and any individual or member of a team;
- vii. explore whether those parties engaged in the mediation procedure have the means to implement any decision made within the mediation process. This preparation is aimed at avoiding the agreement or decision being undermined by requiring endorsement from a higher authority;
- viii. select a suitable date, time and venue;
- ix. monitor the service;
- x. at the request of either party, exclude themselves in their role as Personnel Manager from involvement in any formal procedure that may follow in from any stage of the mediation process.

The Personnel Department will:

- i. receive the initial referrals;
- ii. locate and allocate the Mediators to the case;
- iii. make bookings;
- iv. ensure that the relevant background preparation is completed;
- v. supply questionnaires after the mediation process;
- vi. destroy any records of phone calls, requests for mediation or other written communications.

SUPPORT FOR MEDIATORS

Mediators are encouraged to seek peer support, and access an experienced Mediator (either from within, or external to, the Trust) for confidential debriefing and support following mediations.

A de-briefing sheet will be made available to the Mediator enabling her / him to raise development issues within the Mediation Development Meetings.

ROLE OF MANAGEMENT

Managers have a responsibility to support the mediation process by ensuring, where possible, that individuals roles are back-filled or covered when staff are engaged in the Trust's mediation procedure. This is applicable to both Mediators and those being mediated.

There will be occasions where the presence of a manager is required at a Mediation, as a decision-implementer in terms of resource allocation. It is expected that the manager will fully co-operate with the Mediation Co-ordinator in agreeing to attend the Mediation.

PART 4

ASSESSMENT OF USING MEDIATION

NUMBER OF DISPUTES IN HEALTHCARE MATTERS SETTLED THROUGH MEDIATION

This information seems particularly difficult to collect across countries, particularly because normally there are no organisations or institutions gathering it, with the only exception of **Belgium** and **Sweden**.

- In **Belgium**, 576 mediation cases were registered in the year 2010 .
- In **Sweden**, according to the annual report, the National Mediation Office appointed special mediators in 27 sets of negotiations between national partners in 2010. Of these 27 conflicts, one conflict involved the healthcare sector (conflict between the Association of Private Care Providers and the Swedish Municipal Workers' Union). In this specific case, mediators were appointed in June 2010 and an agreement was reached in August 2010. In 2011, mediators were appointed to solve seven labour market conflicts at national level, none in the healthcare sector.

MAIN DIFFICULTIES RELATING TO USE OF MEDIATION IN HEALTHCARE MATTERS

The difficulties relating to healthcare are of different kinds.

- In general, mediation is still a rather new method of dispute resolutions and this leads to a lack of procedures in some areas, uncertainty about where and when using it and consequently, in some cases, some scepticism about it.
- In some countries, as mentioned in **Belgium** and **Malta**, there is a lack of information, and a consequent lack of awareness of people concerning the possibility of using mediation. This may lead to more litigation processes or people to give up.
- In **Luxembourg** and in **Belgium** the reliability and independence of mediators tend to be questioned, in the first case due to structural small size of the country, in the second case due to the fact that the mediators are directly employed from hospitals.

In **Belgium**, the main problems identified are the following:

- perception that the internal mediators cannot be independent because they are on the payroll of the hospitals (which is on the other hand indispensable for quality improvement);
- Patients seem to have a lack of knowledge of existence of the mediation system;
- There is a lack of a true mediation system for non-hospital care (excl. mental healthcare, here we do have an internal mediation system).

In **Luxembourg**, independence of the mediator is a major issue due to the small size of the country.

In **Malta**, problems relate to lack of awareness and lack of formal procedure.

In **Slovenia**, mediation in the Republic of Slovenia has undergone an unbelievable rapid development in the last decade but unfortunately this is not the case in the area of healthcare mediation. Therefore, mediation in healthcare as a dispute resolution method is indeed something new but in the last two years management of healthcare institutions as well as healthcare workers consider mediation a highly desirable and indispensable method that will certainly experience steep development in the following years.

In the **UK**, formal mediation is still a relatively new feature in the NHS. More traditional forms of mediation have consisted of informal meetings between patients and clinicians in the hospital setting, referred to as negotiation, with mixed results. There has been a push for more mediation specifically prior to litigation. The NHS Litigation Authority (NHSLA) has been offering to mediate on cases since 2002 although claimants generally do not take it up. However, when it is used, it usually produces good outcomes, although these cases are where claimants have recognised that they are unlikely to succeed. Its appeal as a costs saver lies in comparing its cost to that of litigation, but very few cases - around 2% - dealt with by the NHSLA go to trial. Claimed saving potential depends on mediating sufficiently early on in the process. Claimant lawyers are understandably reluctant to advocate mediation without investigating cases in full i.e. to the immediate pre-trial state of readiness with all costs incurred already. To do otherwise may leave them with a potential professional negligence risk for not doing their best for their client. Neither defendants, nor the courts, can force claimants to mediate. Where claimants have received expert advice that mediation would be of little benefit, then they may attend and stonewall so as to avoid litigation costs exposure. There is no evidence to suggest that making it compulsory would alter this position. Mediation therefore runs the risk of inflating costs.

CURRENT DEVELOPMENTS AND FUTURE CHANGES

Despite not all countries have answered this question, the results of HOPE research show that the importance of mediation in the healthcare sector is raising and the discussion around this topic is increasing all over.

Mediation is progressively acknowledged as a method to solve conflicts and to reach to solutions which are more satisfying for both parties. New bodies are being established in order to manage mediation, or new, appropriate organisations extend their responsibilities in this area. New legislative bodies are taking care of the issue and the width of some pieces of legislation regarding healthcare are specifically embracing the matter of mediation.

In **Belgium**, currently there is a debate about whether or whether not to reform the existing mediation system, e.g. improving the accessibility of mediation for non-hospital care, elaboration of the statute of the mediator (more professionalization). Moreover, the elaboration of mediation in the context of damage caused by healthcare (in execution of the Law of 31 March 2010 on this topic) is coming up.

In **Denmark**, a new law on patient complaints has been implemented as of 1st January 2011. Now the healthcare providers (regions) have to offer a local dialogue with the complainer.

In **Hungary**, the Mediation Centre has changed because the original Foundation office transferred to the new government based organisation. The New office name is National Rehabilitation and Social Office Nemzeti Rehabilitációs és Szociális Hivatal (ORSZI).

In **Luxembourg**, a project for a new law on patients' rights is pending. One of the chapters concerns mediation in the specific field of healthcare. It is too early to know what the content of the final text will be as for the moment the text is in the phase of pre-consulting of the various concerned parties.

In **Slovenia**, mediation in healthcare matters was codified by the Patient Rights Act in 2008 and the Rules on mediation on area of healthcare regulate it in more detail. The patient who considers that any of the rights from this act has been infringed is entitled to a hearing of the alleged violation, at first at the healthcare provider. If at this stage an agreement on the method of dispute resolution is not reached, the patient may file a request for treating the infringement of his right before the Commission of the Republic of Slovenia for protection of patients' rights. Starting from this phase the legislator offers mediation as one of the potential methods of dispute resolution between the patient and the healthcare provider. Conflict resolution through mediation sometimes did not come to life in practice due to the fact that the legislator foresaw the mediation in relatively late stage of the conflict, when it has already escalated.

Irrespective of the options offered by the legislation, the mediation began to develop under the auspices of the Association of Health Institutions of Slovenia. The Association is aware that disputes are an integral part of working environments and greatly affect quality and wellbeing of both providers and users of healthcare services. Therefore, the Association acts towards introducing mediation as a verified good method for healthcare institutions environment. In the field of mediation the Association has undertaken a vision of establishing the Centre for communication and mediation in healthcare (hereinafter referred to as the Centre), that started operating in 2010. Within the frames of mediation, the Centre offers its members counselling, assistance and guidance in relation to the use of mediation for resolving disputes in healthcare sector. In 2011, it also started providing mediation services, which are available at headquarters of the Centre as well as in individual healthcare institutions outside the Centre («the concept of mediator on site»). The Centre also provides education and training, specific for healthcare area: training referred to mediation skills and education for obtaining the title of "healthcare mediator" whose participants are managerial workers of healthcare institutions as well as other healthcare professionals and co-workers. The Centre will upgrade the existing activities during 2012 through organised model of mediation trainings and mediation services for their clients.

In the **UK**, the House of Commons' Health Select Committee recently reported on the working of the NHS complaints system in England. The use of mediation was not specifically addressed; rather the emphasis was on securing speedy local resolution of the complaint. Mediation certainly forms part of a local NHS organisation's portfolio of tools to achieve prompt and amicable local resolution, and as the focus is concentrated on the rising number of complaints about NHS services, the length of time taken to resolve these complaints and the costs involved, it is sensible to conclude that the benefits of mediation will be discussed more widely at national and a local level.

Regarding workplace disputes, the government proposed earlier in 2011 the Resolving Workplace Disputes consultation ([link to: Resolving Workplace Disputes consultation](#)) that 'there is evidence to show that where a problem has arisen that could not be resolved by discussion between the parties (and that should always be the first step), inviting a mediator – an independent and impartial third party – to work with the two people involved can bring about a swift resolution of the issue.' The government has not responded to the consultation yet but it is highly likely that mediation will form a part of their new proposals to resolve disagreements that arise in the workplace.

FOOTNOTES

1. <http://biztaxlaw.about.com/od/glossary/g/litigation.htm>
2. http://en.wikipedia.org/wiki/Alternative_dispute_resolution and <http://www.answers.com/topic/alternative-dispute-resolution>
3. http://en.wikipedia.org/wiki/Collaborative_Law
4. Article 3(a) of the Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters.
5. Article 3(b) of the Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters.
6. <http://en.wikipedia.org/wiki/Mediation>
7. <http://en.wikipedia.org/wiki/Arbitration>
8. More in-deep information about the role and advantages of mediation at: http://www.cdr-mediation.com/cdr-mediation/What_is_mediation.html, http://www.constructiondisputes-cdrs.com/advantages_of_mediation.htm, <http://www.mediate.com/articles/sadler.cfm>
9. Kenneth Cloke <http://www.mattkramermediation.com/pages/health.html>
10. Caitriona Heffernan <http://www.cpdseminars.ie/mediation/mediation-in-ireland-current-trends-future-opportunities/>
11. Caitriona Heffernan <http://www.cpdseminars.ie/mediation/mediation-in-ireland-current-trends-future-opportunities/>



HOPE Publications, December 2012

Chief Executive: Pascal Garel

Avenue Marnix 30, 1000 Brussels
Belgium

Tel: +32 2 742 13 20

www.hope.be

All rights of reproduction, translation and adaption, even in part,
reserved for any country, no matter in which form.