

ANNEX 1

Mediation case diagnosis for the judges A tool to assess disputes suitability for mediation

Excerpt from the “[Mediation meets Judges EU toolkit](#)” available on

www.mediationmeetsjudges.eu

Disclaimer

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Methodology

Provide answers when possible to the following questions. When the question is not relevant or the answer is not clear choose the middle column “doubt”.

Section A - Framework conditions	Yes	Doubt	No
1. Can the dispute be subject to a mediation settlement under the current legal framework?			
2. Can parties be referred to mediation at this stage of the proceedings?			
3. Are there any other pending proceedings involving the same parties or one of the parties on the same or cross related issues?			
4. Are there many parties involved in the trial or is it highly probable that the judge will order (a) third party/ies to join the action?			
5. Is there a mediation clause in the contract?			

Section B - Suitability of the dispute	Yes	Doubt	No
6. Based on your experience, is the settlement of this dispute possible?			
7. Is a quick resolution of the dispute important?			
8. Will the litigation costs significantly reduce what can be recovered through judgment?			
9. Do one or both parties have little resources to dedicate to the litigation process?			
10. Is there a high probability that the case will be complicated to rule upon (lack of evidence, complex or technical factual issues...)?			
11. Is it likely that the judgement will be difficult to enforce?			
12. Is it unlikely that a legal precedent from a court is needed by at least one of the parties?			
13. Is there any likelihood that the decision will lack equitability or will be unfair for at least one of the involved parties? (e.g. it won't take into account factual elements due to poor evidence, procedural errors...).			
14. Is there a need for privacy/keeping elements of the dispute confidential?			
15. Does the case concern a matter of principle?			
16. Is it likely that the dispute only represents a part of other underlying /not expressed conflicts?			
17. Do emotions play a central role in the dispute?			

Section C - Parties' willingness conditions	Yes	Doubt	No
18. Is it important for the parties to maintain a relationship with each other in future?			
19. Is the outcome of the court decision particularly uncertain for the parties?			
20. Is it important for the parties to be in control of the outcome of the dispute?			
21. Is it important for the parties to be in control of the timing and organisation of the decisional process?			
22. Is public vindication important for either party?			
23. Do the lawyers or the parties support the idea of a negotiated solution/mediation?			

Section D - Benefits of mediation to this dispute	Yes	Doubt	No
24. Would mediation help parties to restore dialogue/relationship between them?			
25. Would mediation help parties to find a tailored solution that goes beyond the pure applicable legal framework?			
26. Would mediation help parties to disclose sensitive information in a confidential setting?			
27. Would mediation help parties to set the conditions for an apology?			
28. Would mediation provide the opportunity for the parties to perform a "reality check" with regard to their positions and/or chances to prevail in the dispute?			

Results interpretation

Where a "yes" answer is given to one of the question, this is an indication that mediation should be envisaged. Where a "no" answer is given, this is an indication that litigation may be more appropriate. A significant number of "yes" should therefore induce trying to refer parties to mediation.

If a majority of "yes" is given for the section **framework conditions**, this indicates that the legal and procedural framework does not impede and may even encourage mediation.

If a majority of "yes" is given for the section **suitability of the dispute**, this indicates that the nature of the dispute is particularly adapted to mediation and that there are a number of leverages that will naturally help the parties find a settlement.

If a majority of "yes" is given for the section **parties' willingness conditions**, this indicates that the parties should be interested in finding their own settlement. This is also an indication that the parties should be easier to convince about the pros of mediation.

If a majority of “yes” is given for the section **benefits of mediation to this dispute**, this indicates that a mediation settlement is likely to bring higher value to both parties than a judicial/arbitration decision.

Elucidation

Section A - Framework conditions

Question 1 - Can the dispute be subject to a mediation settlement under the current legal framework?

There are a few situations where mediation is not allowed by law¹. When the dispute or part of the dispute concerns public order (mandatory law), matters or inalienable rights mediation can make sense depending on the context. However, the settlement agreement must respect the mandatory law or inalienable rights.

Question 2 - Can parties be referred to mediation at this stage of the proceedings?

Before verifying the suitability of the dispute for mediation, the judge should verify whether under the applicable provision of the Code of Civil Procedure (CCP), parties can still be referred to mediation².

Question 3 - Are there any other pending proceedings involving the same parties or one of the parties on the same or cross related issues?

Mediation provides flexibility to the dispute resolution process. Unless parties prefer otherwise, the mediator will encourage the parties to deal with the dispute in a comprehensive way. When relevant, the mediation can help solving several concurrent proceedings and generate a settlement on the whole of the parties' relations.

Question 4 - Are there many parties involved in the trial or is it highly probable that the judge will order (a) third party/ies to join the action?

The complexity and the duration of the trial increase significantly when multiple parties are involved. Mediation is a flexible process where multiple parties can participate trying to find a balanced solution to diversified interests or to find a partial settlement.

Question 5 - Is there a mediation clause in the contract?

When a mediation clause is included in the contract the judge shall refer parties to mediation unless the clause is challenged by the lawyers.

¹ Insert reference to national applicable law.

² Insert reference to national applicable law.

Section B - Suitability of the dispute

Question 6 - Based on your experience, is the settlement of this dispute possible?

Based on a first analysis of the case, the relationship among the parties involved, the nature of the dispute as well as other external factors (time constraints, financial distress of the company etc.), the judge can see “beyond” the pure legal framework and read the dispute differently.

Question 7 - Is a quick resolution of the dispute important?

It is demonstrated that one of the most important reasons to go to mediation is the need to find a quick solution to the dispute (along with saving money). Mediation may take as little as a few hours, once all participants have agreed on a meeting date.

Question 8 - Will the litigation costs significantly reduce what can be recovered through judgment?

Mediation is, with few exceptions, significantly cheaper than arbitration or litigation. When litigation generates disproportionate cost in relation to the value of the conflict, mediation will often be a good option. The lower the value of the dispute, the more mediation can help parties in defining the dispute in a faster and cost-effective way. The absence of litigation cost will actually open a window of opportunity for negotiation. The cost of lawyers and other professionals (e.g. technical advisers or experts) will be limited with mediation since the duration of the process is significantly lower and more predictable.

Question 9 - Do one of the parties have little resources to dedicate to the litigation process?

Mediation is, with little exception, significantly cheaper than litigation. Mediation will be in most cases a more affordable dispute resolution mechanism.

Question 10 - Is there a high probability that the case will be complicated to rule upon (lack of evidence, complex or technical factual issues...)?

Where evidence is scarce or missing and might lead to a difficult decision taking, mediation is likely to bring a better outcome to the parties. Similarly, when the case is highly complex and technical, it may be difficult for the judge to come to a decision without the intervention of experts which in turn will generate higher costs and might lead to contradictions. The intervention of the mediator enables technical discussion between the parties to take place. Parties often don't speak to each other but through their lawyers.

Question 11 - Is it likely that the judgement will be difficult to enforce/appealed?

Parties do not always enforce the judicial decision for different reasons (difficulty of implementation, lack of resources, voluntary opposition to the decision...) or will be appealed whatever the decision is. Mediation does not suffer the same difficulties. It has a rate of voluntary enforcement that is very high. Parties, by working on a settlement, take ownership on the decision and work with the mediator on the implementation and workability of the common agreement.

Question 12 - Is it unlikely that a legal precedent from a court is needed by at least one of the parties?

Some cases are brought to the court with the intention of setting a new legal precedent which will have a broader social impact than the case itself. Results reached through mediation are not known or binding on other parties, so even if the mediation brings a successful result, it will not have much bearing on future cases. Mediation is therefore not beneficial for such cases. Legal precedent cannot be set in mediation.

Question 13 - Is there any likelihood that the decision will lack equitability or will be unfair for at least one of the involved parties? (E.g. it won't take into account factual elements due to poor evidence, procedural errors...)

In some cases, the judge decision can be unfair for at least one of the parties due to the impossibility for the judge to rely on a number of elements or evidence (e.g. procedural reasons). In such cases, mediation can be beneficial to the parties as it is not limited by procedural law and the rules of evidence can sometimes be overcome.

Question 14 - Is there a need for privacy/keeping elements of the dispute confidential?

Mediation is completely confidential and is backed up by law and a confidentiality statement by the involved parties. Parties that want to retain discretion on the dispute and the discussion thereby related will see an interest in mediation.

Question 15- Does the case concern a matter of principle?

Some cases are highly emotionally charged or motivated by core principles. Parties must obtain a tailored approach that sufficiently recognises and validates the underlying principle (sometimes self-defined core value) driving the case. If unaddressed, a party may have a feeling of unfairness or defeat even when a court decision is taken in their advantage. Mediation will more likely bring satisfaction on these types of cases.

Question 16 - Is it likely that the dispute only represents a part of other underlying /not expressed conflicts?

When requested to settle a case, the judge is limited by the petitions of the parties even if there are clear (or less clear) underlying causes or needs. Unexpressed needs may spark a new conflict as soon as the decision is taken. Mediation is not limited by the initial demand of the parties. It is the work of the mediator to understand and address underlying interests and possible related conflicts with the objective of reaching a comprehensive settlement.

Question 17 - Do emotions play a central role in the dispute?

Some disputes are highly emotionally charged. Parties require a tailored approach that sufficiently recognises and validates the underlying emotional issues driving the case and therefore produces a more complete resolution. If emotional needs are left unaddressed, a party may experience a feeling of unfairness or defeat even when the court decision is taken in their advantage. Mediation is more likely to bring satisfaction in these cases.

Section C - Parties' willingness conditions

Question 18 - Is it important for the parties to maintain a relationship with each other in future?

Confrontational court battles and arbitration proceedings damage business or personal relationships almost every time. Sometimes the proceedings will also affect relationships with third parties. In mediation, the stakeholders will sit together, communicate about their dispute and collaborate on a resolution. There is a greater likelihood of saving or restoring an ongoing business relationship. Individuals in conflict are also likely to preserve and even improve their personal relationships with one another as a result of mediation.

Question 19 - Is the outcome of the court decision particularly uncertain for the parties?

Businesses don't like uncertainties. They need predictability on their finances to make investment possible or to adapt their business strategy to possible losses. Uncertainties may also generate additional stress for the entrepreneur.

Question 20 - Is it important for the parties to be in control of the outcome of the dispute?

Parties that address a case to the court delegate the resolution of the conflict to a judge. With mediation, the parties retain control of any decision to resolve their dispute. When parties wish to retain control over the solution given to the case, mediation will be appropriate.

Question 21 - Is it important for the parties to be in control of the timing and organisation of the decisional process?

When parties wish to retain control over the speed of the process and over costs, mediation will be appropriate.

Question 22 - Is public vindication important for either party?

Parties that are looking for public vindication may choose either way: court or mediation. The court decision is public and can bring satisfactory vindication. The mediation settlement is confidential but parties may in the framework of their agreement foresee that one of the parties will make a public apology or that they will issue a common press release. The advantage of mediation is that the public announcement can be drafted jointly by the parties.

Question 23 - Do the lawyers or the parties support the idea of a negotiated solution/mediation?

There are cases where the lawyers are convinced about the interest of negotiation or mediation but the parties are hesitant or reluctant. The support of the judge may help the parties to overcome their doubts. The question does not imply that mediation is not appropriate for the dispute, but it gives an indication to the judges to take into consideration the lawyers' attitude.

Section D - Benefits of mediation to this dispute

Question 24 - Would mediation help parties to restore dialogue/relationship between them?

Mediation can help parties to restore relationship and have an open discussion. This in turn helps in developing a sustainable agreement.

Question 25 – Would mediation help parties find a tailored solution that goes beyond the pure applicable legal framework?

In mediation, the law is a point of reference throughout the entire process. However, within that legal framework, mediation provides space to craft highly individualised agreements that reflect the parties' understanding of the conflict.

Question 26 - Would mediation help parties to disclose sensitive information in a confidential setting?

The deficit of information may be a source of conflict. Mediation can provide the secure environment that will ease the exchange of information. Mediation is a confidential process protected as such by the law and by a signed statement between the parties.

Question 27 - Would mediation help parties to set the conditions for an apology?

An apology implies the acknowledgement of injury and an acceptance of responsibility, effect and vulnerability. Apology is sometimes necessary but difficult. Mediation makes space for apologies.

Question 28 - Would mediation provide the opportunity for the parties to perform a “reality check” with regard to their positions and/or chances to prevail in the dispute?

The over expectation by some parties on the litigation outcome can lead the parties to behave unreasonably. Such attitude can be fuelled, maintained or increased by the parties' lawyers. One of the jobs of a mediator is to help them doing a "reality check". As a neutral, dispassionate third party, he can be objective and discuss with a party the downsides or possible adverse consequences of dispute that a party may have overlooked.