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Irish Toolkit for Court Annexed Mediation Schemes

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This toolkit has been produced with the financial support of the Civil Justice Programme of the European Union. The contents of this publication are the sole responsibility of the "Mediation meets Judges" Consortium and can in no way be taken to reflect the views of the European Commission.

PRELIMINARY NOTICE

The European toolkit is a template for the "Mediation meets Judges" project partners. It has been designed with the objective to provide basic material on the basis of which they can work to implement mediation court annexed schemes in collaboration with the judges.

This toolkit has been developed by EUROCHAMBRES, the European Association of Chambers of Commerce and Chamber Ireland. It can be used by the Mediation meets Judges project partners and other interested persons as long as (1) EUROCHAMBRES is informed and (2) a reference is made to the Mediation meets Judges project and to the co-funding of the European Commission. Any suggestion for improvement of the template is welcome and can be addressed to tilman@eurochambres.eu.

SECTION 1. Why should judges promote mediation?

The **Mediation meets Judges Toolkit** has been drafted as a support to judges and courts that are willing to encourage parties in a conflict to try mediation before they begin litigation.

For the purpose of this toolkit (and according to the EU Directive on mediation):

- "Mediation" means a structured process whereby two or more parties to a dispute attempt by themselves, and on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.
- "Mediator" means any third person who is asked to conduct mediation in an effective, impartial and competent way.

When ruling a case, the judge applies the law and rules of evidence and ensures that justice has been served. Sometimes, however, even the winning party to a dispute remains unsatisfied with the outcome, as the underlying reasons of the conflict have not been addressed in court.

The role of the Courts in mediation

For the judges, referring parties to mediation represents an opportunity to:

- give parties the opportunity to be responsible for the outcome of their dispute by defining a tailored and definitive solution
- define and settle more cases/disputes at a very early stage
- better manage time and assigned resources within their mandate.

When a judge invites the parties to consider mediation, he/she does not renounce or relinquish any part of his/her institutional role. The judge:

- identifies whether the case is suitable for mediation
- identifies, within the limits set by the legislation and by the relevant Rules of Court[1], the most appropriate timing for mediation to be suggested to the parties
- can invite the parties to attend an information session on mediation where they can be provided with a list of suitable/qualified mediators[2]
- sets the timeframe within which parties (and the mediator) are expected to find an agreement (or to refer to the judge about the need of an additional period of time to continue the mediation)[4]
- adjourns the set hearing date in case a mediation agreement has not yet been found but parties are still willing to mediate
- sets the date for the resumption of proceedings in case the mediation fails
- If necessary, the parties can apply to the courts to ratify the mediation agreement in case mediation was successful [5]

Moreover

- **In case the mediation fails:**

  The case can be referred back to the courts for hearing
- **In case mediation is successful and a settlement is reached:**

[1] Rules of the Superior Courts, Circuit Court Rules or District Court Rules as applicable http://www.courts.ie/rules.nsf/LookupPageLink/index?OpenDocument

[2] As set out in S.I. 209/2011 European Communities (Mediation) Regulations 2011 (Cross border disputes only. Potential for this to be further clarified in law in the proposed Mediation Bill, see Annex 4.) Order 19A Rule 7 of the 2009 Circuit Court Rules also provide for the adjournment of a case to that parties can consider mediation

[4] S.I. 209/2011 or S.I. No. 539 of 2009 Circuit Court Rules

[5] See Section 5 of S.I. 209/2011- European Communities (Mediation Regulations 2011 and SI 502 of 2010 Rules Of The Superior Courts)

The judge initially applied will be able to decide whether the settled dispute can be included, even for statistical and case management purposes, in the number of positively solved cases.[6]

A mediation case diagnosis (**ANNEX 1)** has been developed to better support the parties, legal practitioners and the judiciary , in identifying cases that are suitable for mediation. By answering the provided questions it will be possible to quickly assess the cases that could best be solved through mediation. The questionnaire has been specifically conceived for civil and commercial cases, but some of the questions could be adapted and used as well for social and labour disputes. Family cases should be addressed separately and a specific mediation case diagnosis applied.

[6] This is an administrative matter for the Courts Service. Currently there is a precedent to include statistics on mediation in the Annual Report. The Courts Service Annual Report in recent years included mediation statistics on civil law and family law cases at district court level

SECTION 2: Informing parties about mediation

The Courts Service or the judge can inform parties about mediation orally during the hearing or in writing. The preferable option is likely a combination of the two.[7] This toolkit therefore annexes 2 documents that can be sent by the Court/Judge to the parties:

- A letter or a document informing parties and lawyers about mediation (**ANNEX 2).**
- A self-assessment questionnaire that can be used by parties and/or their lawyers to understand whether mediation might be beneficial to their or their clients' case (**ANNEX 3**).

Such an approach systematises the information and ensures the systematic provision of information to the parties about mediation. It encourages them to evaluate their case and to assess the potential advantages of mediation.

A systematic approach may imply the involvement of the court clerks and coordination with the other judges of the Court. Ideally, the letter or document providing information about mediation will be sent to both parties along with the notification of the date of the first hearing (or other act that the court sends to all parties to the dispute).

[7] Note: In the Draft General Scheme on Mediation Bill 2012, Head Four provides that the duty is on the solicitor or barrister to advise the client to consider mediation as an alternative means of resolving the dispute. See Annex 4 for more information

SECTION 3: At what stage of the proceedings should mediation be proposed?

Mediation can be entered into at almost any stage of the proceedings but best practise shows that it is most effective early on in the process, where it can be less time-consuming and more cost-effective.

The following statutory instruments and legislation detail when and how mediation can be entered into

- Order 19A of S.I. No. 539 of 2009 Circuit Court Rules Case Progression (General) 2009
    - Rule 7 states that the Judge or County Registrar may, on the application of any of the parties or of his own motion, order that the proceedings be adjourned for a time, ordinarily not exceeding 28 days, and invite the parties to consider ADR processes
- Order 56A of SI No. 502 of 2010 Rules Of The Superior Courts Mediation And Conciliation 2010
    - Came in to force on 16th November 2010 and is similar to the procedures in the Irish Commercial Court whereby a High Court judge may now adjourn legal proceedings to allow the parties to engage in an ADR process. These rules contain a costs sanction for those who fail or refuse without good reason to participate in an ADR process.
- SI 209 of 2011 European Communities Mediation Regulations 2011
    - Came into force on the 18 May 2011
    - The Regulations reinforce the right of the parties to recourse to mediation. The courts may invite the parties to use mediation to resolve disputes where the court considers it appropriate, having

regard to all of the circumstances of the case and with the parties consent.

- The parties, by agreement, can also request adjournment of the proceedings to explore mediation. Where the parties decide to use mediation, the courts may also then make such necessary orders or directions so as to facilitate mediation. The courts may invite the parties to attend an information session on the use of mediation.
- All written mediation agreements can be enforced through the courts. The Regulations provide a time limit on applications for enforcement of mediation agreements (six years from the conclusion of the mediation).
- The Regulations also support the principle of confidentiality of mediation, except in specified limited circumstances, such as public policy and where necessary to enforce the mediation agreement.
- So far only applies to cross-border civil and commercial disputes and has not yet been applied domestically.

Note: The Department of Justice published the Draft General Scheme of Mediation Bill in 2012. The proposed legislation aims to consolidate existing instruments/statutes on mediation into one piece of law. The Bill is yet to be published but has been included n the autumn legislation programme for 2014/15.[8] For more information, please see **ANNEX Four**.

[8] http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/Legislation_Programme_Autumn_2014.pdf

SECTION 4: How to appoint the mediator?

Mediation organisations are set up to promote quality mediation and to provide a secure framework to the parties (certification of the mediators, mediation appointment rules, process rules, ethical rules…).

Although the engagement of any of these organisations is voluntary, working in collaboration with such organisations will ensure that mediation is conducted in a professional and uniform manner.

Please find below a list of bodies and organisations that can provide mediation services in civil and commercial cases

The Law Society of Ireland
Blackhall Place, Dublin 7
Tel +353 1 672 4800
Email: general@lawsociety.ie

The Bar Council of Ireland
Bar Council Administration Office
Four Courts
Dublin 7
+353 1 817 5000
barcouncil@lawlibrary.ie

Dublin International Arbitration Centre
Distillery Building
145-151 Church Street
Dublin 7

+353 1 817 4663

info@dublinarbitration.com

Chartered Institute of Arbitration Irish Branch

Merchants House

27-30 Merchants Quay

Dublin 8

+ 353 1 7079739

ciarb@arbitration.ie

The Mediators' Institute of Ireland

Pavilion House, 31/32

Fitzwilliam Square South

Dublin 2

+ 353 1 609 9190

Info@themii.ie

CEDR (Centre for Effective Dispute Resolution) Ireland

Ormond Building

31-36 Ormond Quay Upper

Dublin 7

+353 1 8717550

info@cedr.com

SECTION 5: How to report mediation results and statistics

Reporting on mediation results

Mediation is a **confidential** process. Confidentiality may encompass the fact that the mediation is to take place or has taken place. It certainly covers all information arising, out of or in connection with the mediation, possibly including any settlement and the terms thereof. The Court will therefore refrain from asking the parties or the mediator about the content of the discussion or the details of a possible settlement agreement.

The judge shall request, within the limits of the law, that the mediator declares (or obtains from the parties a declaration) that his or her mission came to an end. This could be as a result of a partial or full settlement being reached or of the absence of any agreement. Depending on the mediation results, the Court will either continue with the proceedings or not.

Statistics

It is of importance to the Court to gather mediation related statistics in order to assess the effectiveness of Court annexed mediation schemes. Such statistics may include:

- The number of parties which received information about mediation and in which format (e.g. in writing, orally at the scheduled hearing etc.)
- The number of cases in which the Court or parties applied the mediation case diagnosis
- The number of mediations facilitated by the Courts Service

- The sector/types of conflict (Banking / Finance/ Insurance contracts/ civil liability/ construction/ handicraft/ ICT/property rights and ownership/ commercial partnerships etc.)
- The number of successful, partially successful or unsuccessful mediations
- The duration of the mediation process (from appointment of the mediator to report of the mediator to the court).
- The number of homologations/ratification of mediation settlement requested[11].

[11] Where law foresee, homologation is an act by the judge that secures enforcement of the settlement.

SECTION 6: National applicable law

This section will be developed according to national law. It will cover among others:

- Any possible restriction to using mediation
- Any possible obligation to use mediation.
- Possible specific provisions for mediation proposed/ordered by a judge
- Limits of confidentiality of mediation
- Effect of mediation on limitation and prescription periods
- Possible accreditation of mediators
- Enforceability of mediation settlements

Mediation in Ireland is currently regulated by:

- Order 19A of S.I. No. 539 of 2009 Circuit Court Rules Case Progression (General) 2009
- Order 56A of SI 502 of 2010 Rules Of The Superior Courts Mediation And Conciliation 2010
- SI 209 of 2011 European Communities Mediation Regulations 2011 (cross-border disputes only)

Restrictions to use of mediation

- At present, there is nothing in statute that restricts the use of mediation.[12]

Obligations to use Mediation

[12] . However, Head 15 of the General Scheme of Mediation Bill 2012 proposes that an application to the courts to stay proceedings and revert to mediation can only be made "at any time after an appearance has been entered, and before delivering any pleadings or taking any other steps in the proceedings". This is based on a recommendation made by the Law Reform Commission. See Annex 4

- Order 19A, Rule 7 of S.I. 539 of the Circuit Court Rules 2009 states that the Judge or County Registrar may on the application of any of the parties or of his own motion, order that the proceeding be adjourned for a time, ordinarily not exceeding 28 days, and invite the parties to consider ADR processes

- Order 56A of S.I. 502 of The Rules of the Superior Courts Mediation and Conciliation 2010 enables a High Court judge to adjourn legal proceedings to allow the parties engage in an ADR process. The judge can invite or direct parties to attend an information session on mediation. These rules contain a costs sanction for those who fail or refuse without good reason to participate in an ADR process.

Effect of Mediation on Limitation or Prescription periods

- SI. 209 (2011) European Communities (Mediation) Regulations includes provisions to disregard the Statute of Limitations where a dispute has been referred to mediation.[13]
- Provisions are also being proposed under Head 14 of the Draft Mediation Bill to disregard the Statute of Limitations where a dispute has been referred to mediation

Limits of Confidentiality of Mediation

- The SI. 209 (2011) European Communities (Mediation) Regulations also support the principle of confidentiality of mediation, except in specified limited circumstances, such as public policy (i.e. the protection of children or the prevention of physical/psychological harm to a person). A mediator or person involved in mediation may also be compelled by the court to give

[13] As per section 6(i) of S.I. No. 209/2011- European Communities "Mediation) Regulations 2011 (In reckoning any period of time for the purposes of any limitation period specified by the Statute of Limitations 1957 (No. 6 of 1957) or the Statute of Limitations (Amendment) Act 1991(No. 18 of 1991), the period beginning on the day on which the relevant dispute is referred to mediation and ending on the day which is 30 days after the mediation process is concluded shall be disregarded."

evidence where it is necessary for the enforcement of the mediation agreement.[14]

Possible Accreditation of Mediators

- At present there is no code of conduct provided for in law to govern the accreditation of mediators operating in the Irish jurisdiction. However, as part of the Draft Mediation Bill, a section has been included whereby the Minister may prepare and publish a Code of Practise or approve of a code of practise drawn up by another body[15]

Enforceability of Mediation Settlements

- SI. 209 (2011) European Communities (Mediation) Regulations states that all written mediation agreements can be enforced through the courts. The Regulations provide a time limit on applications for enforcement of mediation agreements (six years from the conclusion of the mediation).[16]

[14] Section 4, S.I. 209/2011 European Communities (Mediation) Regulations
[15] Head9 of the Draft Mediation Bill provides that the Minister may- prepare and publish a code of practise or approve of a code of practise drawn up by another body for the purposes of setting and maintaining standards for the provision and operation of mediation services. See Annex 4.
[16] See Section 5 of S.I. 209/2011- European Communities (Mediation) Regulations 2011 and SI 502 of 2010 Rules Of The Superior Courts)

ANNEX 1. Mediation case diagnosis for the judges

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 could be recovered through judgment?			
9. Do one or both parties have limited 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 there a need for privacy/keeping elements of the dispute confidential?			
12. Does the case concern a matter of principle?			
13. Is it likely that the dispute only represents a part of other underlying /not expressed conflicts?			

Section C - Parties' Attitude to Mediation	Yes	Doubt	No
14. Is it important for the parties to maintain a relationship with each other in future?			
15. Is the outcome of the court decision particularly uncertain for the parties?			
16. Is it important for the parties to be in control of the outcome of the dispute?			
17. Is it important for the parties to be in control of the timing and organisation of the decisional process?			
18. Is public vindication important for either party?			

Section D - Benefits of mediation to the parties	Yes	Doubt	No
19. Would mediation help parties to restore dialogue/relationship between them?			
20. Would mediation help parties to find a tailored solution that goes beyond the pure applicable legal framework?			
21. Would mediation help parties to disclose sensitive information in a confidential setting?			
22. Would mediation help parties to set the conditions for an apology if relevant?			
23.			

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 law, such as criminal or constitutional cases..

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 legislation or under the relevant Rules of Court), parties can still be referred to mediation.

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.

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 a dispute). 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 could be recovered through litigation?

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 likely it is that mediation can help parties in resolving the dispute in a faster and more cost–effective way. The cost should be lower with mediation since the duration of the process is significantly lower and more predictable.

Question 9 - Does one or both of the parties have little resources to dedicate to the litigation process?

Mediation is, with a few exceptions, 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…)?

Complex cases are often more suited to a more flexible process, like mediation.

Question 11 - 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 12- 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 13 - 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.

Section C - Parties' Attitude to Mediation

Question 14 - 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 o 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 15 - 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 16 - 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 17 - 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 18 - 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.

Section D - Benefits of mediation to this dispute

Question 19 - 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 20 – 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 21 - 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 22 - 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.

ANNEX 2. Document or letter informing parties about mediation

To whom it may concern,

Have you considered trying to solve your dispute through mediation? Mediation is an alternative to litigation that allows you to find a tailored and presumably more satisfying solution to your disputes, avoiding litigation, uncertainty and large costs.

Mediation is an informal process in which an impartial third party (the mediator) chosen by the parties and facilitated by the Courts Service, assists disputing parties in reaching a mutually acceptable agreement.

Mediation aims at restoring the dialogue among parties in a confidential way, at identifying the interests of the parties beyond the law, at creating solution options, at assisting parties in the negotiation and at drafting an implementable settlement.

As long as mediation lasts, limitation periods are suspended[20]. The court proceedings will still pend and, if mediation fails, will continue thereafter.

Why should you try mediation?

EFFICIENCY

- Mediation is efficient. Statistically an agreement is found in 75% [22]of the cases.

[20] As per section 6(i) of S.I. No. 209/2011- European Communities "Mediation) Regulations 2011 (In reckoning any period of time for the purposes of any limitation period specified by the Statute of Limitations 1957 (No. 6 of 1957) or the Statute of Limitations (Amendment) Act 1991(No. 18 of 1991), the period beginning on the day on which the relevant dispute is referred to mediation and ending on the day which is 30 days after the mediation process is concluded shall be disregarded."

PROCESS CONTROL

- You keep control over the outcome of the conflict
- You find a solution that best fits your interests and needs
- You can opt-out of the mediation process and go back to court without negative consequences for you at any moment. You avoid any difficulty in enforcing the final decision
- All information disclosed during mediation is confidential and cannot be used in the trial if mediation fails
- You can be assisted by your lawyer

TIME AND COST SAVINGS

- In some cases, mediation can last only a few hours; you can arrange the mediation schedule according to your schedule.
- Mediation cannot last longer than provided by the law, the judge's decision or the mediation institution rules[23]
- Mediation costs are defined in advance and shared between the parties[24].
- Because mediation is less time-consuming, you save on technical experts and staff resources. You also gain certainty on the financial consequences of the solution (cash availability or provision for losses).
- You avoid potential hidden cost

PRESERVE RELATIONSHIP AND PROMOTE FAIRNESS

[22] "The Cost of Non ADR: Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation", survey funded by the European Union and led by ADR Centre, June 2010
[23] Section 6 (2) of The S.I. European Communities (Mediation) Regulations 2011 allows for the mediator to set the date on which a mediation concludes. This will be subject to the permission of the court
[24] The Draft General Scheme of Mediation Bill 2012, under Head 16, sub-heading 1, makes provision in law for the sharing of costs/fees which will be indentified in advance of mediation. See Annex 4.

- Mediation promotes better relationships through cooperative problem-solving.
- When the dialogue is restored you can strengthen the relationship with the other party.
- Your company promotes an image of fair trade practices

How to start the mediation?

Mediation must be accepted by all parties involved in the dispute. Once this is agreed, contact a mediation centre to find an appropriate mediator. If necessary, the mediation centre or the Courts Service will appoint a mediator for you.

Once the mediator is appointed, the judge will set a new hearing date and define the period within which the relevant parties will report on the success or failure of the mediation process.[25] Neither the parties nor the mediator may report on the nature or content of the discussion and the content of the settlement agreement which remain confidential.

For further information on mediation, please contact Chambers Ireland atwww.chambers.ie

Yours Sincerely

[25] Section 3 of the Mediation Regulations 2011 states that the judge, wither on the application of the parties or of its own motion, may, when it considers it appropriate to do so...order that the proceeding be adjourned for such time "as the Court considers just and convenient". The relevant Rules of the Superior Court and Circuit Court Rules also apply in this case. The Circuit Court Rules note that 28 days is often the normal length of the adjournment.

ANNEX 3. Self-assessment questionnaire for parties to a dispute

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".

	Yes	Doubt	No
1. Is this dispute delaying any decision or development opportunity for you and your business?			
2. Is a quick solution to the dispute important for you?			
3. Are you looking for a long-lasting solution to the dispute?			
4. Is there an interest in saving/maintaining the business relationship with the other party?			
5. Is there any point of the dispute that you would like to discuss/clarify with your counterpart outside the strictly legal aspects of the dispute?			
6. Would you prefer some elements of the dispute not to become public/remain confidential?			
7. Have you any doubt about the outcome of the trial?			
8. Do you consider that the litigation costs will reduce or even exceed what you could recover through the lawsuit?			
9. Do you have enough resources to dedicate to the dispute and to invest in litigation costs (including lawyer/technical experts etc.)?			
10. Is it important for you to maintain control of the outcome of the dispute?			
11. Is there any fact/aspect of the dispute that you consider would not be sufficiently discussed/dealt with during the trial? Would you have the opportunity to discuss it?			
12. Do you fear that a Court decision may be difficult to enforce?			
13. Will your allegations be easy to prove to the judge? Do you have strong evidence to support your allegations?			
14. Can you handle the emotional burden generated by litigation?			
15. Is there any likelihood that you don't need a legal precedent over the legal aspects of the dispute?			
16. Are you looking for public vindication?			
17. Is there any other underlying reason for the trial?			
18. Are you looking for an apology from the/one of the counterparts?			
19. Did your lawyer give you a clear diagnostic about the procedure and all aspects concerning the judicial proceedings? (Time, money,			

odds,)			

Results interpretation

Where a "yes" answer is given to one of the question, this is an indication that mediation would be preferable. Where a "no" answer is given, this is an indication that litigation is more appropriate. A significant number of "yes" therefore suggests trying to solve the case through mediation.

Elucidation

Question 1 - Is this dispute delaying any decision or development opportunity for you and your business?

A dispute can have as effect to freeze the taking of strategic decisions of a company. Reasons can be uncertainty on the amount of money at stake but also on the rights and duties related to the business model itself (e.g. dispute relating to intellectual property rights, dispute between shareholders…). Mediation has the advantage of being much faster than litigation and therefore provides the security needed to pursue the business.

Question 2 - Is a quick solution to the dispute important for you?

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 3 - Are you looking for a long-lasting solution to the dispute?

Parties, by working on a settlement, retain ownership on the decision and work with the mediator on the implementation and workability of the common agreement. Mediation can help parties to restore dialogue and have an open discussion. This helps in developing a workable settlement.

Question 4 - Is there an interest in saving/maintaining the business relationship with the other party?

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 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 using mediation.

Question 5 - Is there any point of the dispute that you would like to discuss/clarify with your counterpart besides the strictly legal aspects of the dispute?

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 6 - Would you prefer some elements of the dispute not to become public/remain confidential?

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 involved. 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 7 – Have you any doubt about the outcome of the trial?

Parties that send 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 8 - Do you consider that the litigation costs will reduce or even exceed what you could recover through the lawsuit?

Mediation is, with few exceptions, significantly cheaper than arbitration or litigation. When litigation generates disproportionate costs as compared 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 less and more predictable.

Question 9 - Do you have enough resources to dedicate to the dispute and to invest in litigation fees (including lawyer/technical experts etc.)?

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

Question 10 - Is it important for you to maintain 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 11 - Is there any fact/aspect of the dispute that you consider would not be sufficiently discussed/dealt with during the trial? Would you have the opportunity to discuss it?

Mediation can help parties to restore dialogue and have an open discussion. This in turn helps in developing a workable settlement.

Question 12 - Do you fear that a Court decision may be difficult to enforce?

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 13 - Will your allegations be easy to prove to the judge? Do you have strong evidence to support your allegations?

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. The capacity to provide evidence can sometimes be overcome.

Question 14- Can you handle the emotional burden that comes from litigation?

Some disputes are highly emotionally charged. Parties may require a tailored approach that sufficiently recognises and validates the underlying emotional issues that are 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 if a court rules in its favour. Mediation is more likely to bring satisfaction in these cases.

Question 15 - Is there any likelihood that you don't need a legal precedent over the legal aspects of the dispute?

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 16 - Are you looking for public vindication?

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 the parties will issue a common press release. The advantage of mediation is that the public announcement will be drafted jointly by the parties.

Question 17 - Is there any other underlying reason for the trial?

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 18 - Are you looking for an apology from the/one of the counterparts?

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

Question 19 - Did your lawyer give you a clear explanation about the procedure and all aspects concerning the judicial proceedings? (Time, money, odds,)

Parties may not always opt for litigation if they knew the costs it involves, both from a financial, emotional and time perspective. As supported by various studies, mediation is often faster, cheaper and involves, if successful, a final agreement that satisfies all parties involved in the dispute.

ANNEX 4. Proposed Legislative Developments in Ireland

The **Draft General Scheme of Mediation Bill**[28] was published by the Department of Justice in 2012. The proposed legislation aims to consolidate existing instruments and statutes on mediation into one piece of law.

The Bill itself is yet to be published but has been included in the autumn legislative programme for 2014/15 it is hoped it will be before the Houses of Oireachtas early in the New Year.[29]

The enactment of the Bill would see more commercial and civil disputes using ADR and mediation processes rather than seeking action through the courts system. Some of the main provisions in the Bill are similar to the EU statutory instruments which were signed into Irish law in 2011.

The main provisions for mediation in the Bill include some of the following measures:

- Imposes a duty on solicitors/barristers to provide information and advice on mediation "prior to commencing civil proceedings on behalf of the client".
- Enables judges to direct parties to attend an information session on mediation
- Allows a party to apply to the court, at any stage of the proceedings, (with a few exceptions) to stay the proceedings
- Mediators will be obliged to disclose their qualifications to both parties before the mediation begins

[28] http://www.justice.ie/en/JELR/MedBillGSFinal.pdf/Files/MedBillGSFinal.pdf
[29] http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/Legislation_Programme_Autumn_2014.pdf

- The Minister may prepare and publish a Code of Practise or approve of a code of practise drawn up by another body
- Mediators will not be compelled to provide evidence in civil or commercial proceedings in most cases. However, confidentiality will not apply if disclosure is required by law
- Obliges the mediator to prepare and submit a report on the outcome of mediation without comment or recommendation.
- Agreements from mediation may be enforceable through a court order.