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European toolkit for Court annexed mediation schemes

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Disclaimer
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 requires customisation on 2 levels. First, when national law provisions apply in this context, the provisions will be inserted (e.g. possible suspension of limitation periods…). Second, the toolkit will be adapted to each specific scheme, ideally in consultation and collaboration with judges.

This toolkit has been developed by EUROCHAMBRES, the European Association of Chambers of Commerce. 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 who 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 judges 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 and decrease workload

When a judge proposes to the parties to go to 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 Code of Civil Procedure, the most appropriate timing for mediation to be suggested to the parties (E.g. in some countries mediation cannot be proposed when the case is pending before the Supreme Court...)
- can appoint the mediator or the mediation provider[1]
- 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)
- postpones the set hearing date in case a mediation agreement has not yet been found but parties are still willing to mediate

[1] To be customised according to applicable national law.

- sets the date for the resumption of proceedings in case the mediation fails
- eventually ratifies the mediation agreement in case mediation was successful and parties require the ratification

Moreover

- **In case the mediation fails:**
  The judge initially applied will have jurisdiction and will adjudicate the case.
- **In case mediation is successful and a settlement is reached:**
  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.

A mediation case diagnosis (**ANNEX 1)** has been developed to better support you, the judge, in identifying cases that are suitable for mediation. By answering the provided questions it will be possible to quickly sift 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.

SECTION 2: Informing parties about mediation

Once a court or a judge is willing to promote mediation, it should inform parties about what mediation is and what benefits they could derive for their case.

The judge can inform parties about mediation orally during the hearing or in writing. The preferable option is likely a combination of the two. This toolkit therefore annexes 4 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**).
- A letter for the parties and their lawyers explaining the role of legal counsels in mediation **(ANNEX 4)[2].**
- A document informing you about existing mediation services within civil and commercial courts in your or in other European countries **(ANNEX 5)[3].**

Such approach systematises the information of the parties about mediation. It encourages them to evaluate their case differently and to assess the advantages of mediation.

The self-assessment is a basis for discussion with the judge. The judge can go through the questionnaire with the parties or request the parties to send it back filled ahead of the hearing.

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 informing parties about mediation will be sent to 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).

[2] Annex 4 has been added and drafted. However before publishing it we prefer to collect the feedback of the lawyers/ Bar association

[3] Annex 5 will be annexed at a later stage and updated all along the project life-cycle, as soon as MmJ partners will have implemented court annexed schemes/mediation services/mediator on call services/pilot schemes etc.

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

In principle, cost and time savings are highest when mediation is started early. The relationship tends to worsen with the time. Restoring a constructive dialogue requires more energy. Time is money. A dispute generates costs such as locked-in money, cash flow difficulties, conservation or preservation of goods and taxes. Professional fees (lawyers, experts) will also increasingly distort the substantive issues.

Sometimes, it will be preferable to wait for the parties to have vented their hostility before proposing them to go to mediation: this can even, at a later stage, increase their readiness to settle. Sometimes parties will decide to go to mediation when the judicial proceedings are at a very advanced stage as they will have discovered most of the strengths and weaknesses of their respective dossiers.

Waiting, however, remains hazardous since mediation requires both parties to be ready for it. The ability to contain emotional aspects of a dispute varies with each person.

This section will be developed according to national law and should include:

- A reference to the major steps of the proceeding
- Any possible legal provision limiting the possibility for the judge as to propose/order mediation at a certain stages of the proceedings

SECTION 4: How to appoint the mediator?

This section will be developed according to each mediation Court annexed scheme and should include:

- Contact details of accredited mediation organisations or a list of mediators accredited by the State/Court with contact details/field of specialisation/languages etc.
- Possible negotiated mediation fees
- Possible mediator on call service with contact details
- Possible hotline service with contact details

This section will include a checklist along these lines to support the judge to:

- Provide the parties with the name of the mediation organisations or the list of mediators that are accredited by the State/Court
- Order the parties to choose a mediator within […] days and in absence of choice, foresee that the mediation organisation […] will appoint a mediator for the parties[4]
- Appoint the mediator and give a timeframe on the basis of which he or she will report to the judge on whether the mediation ended up or require an extension of his or her mission

Note: *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…). While these organisations can be bypassed, working in collaboration with such organisations sustains the development of mediation in the long term.*

[4] To be customised according to applicable national law

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 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 judge will therefore refrain from asking the parties or the mediator about the content of the discussion or the details of a possible settlement agreement.

Though the judge shall request[5], 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 as a result of the settlement or of the partial settlement or of the absence of any agreement. Depending on the mediation results, the judge will either pursue the judiciary proceedings or not.

Statistics

It is of importance to the Court to gather mediation related statistics in order to assess the mediation Court annexed scheme. 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 judge applied the mediation case diagnosis
- The number of mediations ordered/recommended by the judge
- The sector/types of conflict (Banking / Finance/ Insurance contracts/ civil liability/ construction/ handicraft/ ICT/property rights and ownership/ working relationships 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[6].

Note that an easy reporting system is to build the reporting of mediation cases into a Google form or any similar tool (free to use and easy to export into an Excel format).

[5] To be customised according to applicable national law.
[6] 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

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 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 law[7]. 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 mediation[8].

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.

[7] Insert reference to national applicable law.
[8] 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 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 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.

ANNEX 2. Document or letter informing parties about mediation

[Introductive comments[9]…]

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 costs.

Mediation is an informal process in which an impartial third party (the mediator) chosen by the parties and/or appointed by the judge, 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[10]. The court proceedings will still pend and, if mediation fails, will continue thereafter. The judge will take into account that mediation has taken place and set a priority for the case in such a way that it will not suffer further delays[11].

Why should you try mediation?

EFFICIENCY

- Mediation is efficient: statistically an agreement is found in 75% [12]of the cases.

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

[9] Customised by the judge according to Court practice.
[10] To be customised according to applicable law.
[11] If applicable according to the Court/judge policy.
[12] "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 Center, June 2010

TIME AND COST SAVINGS

- Mediation can last a couple of hours; you fix the mediation schedule according to your agenda.
- Mediation cannot last longer than provided by the law or the judge's decision or the mediation institution rules[13]
- Mediation costs are defined in advance and shared between the parties[14].
- Because of the shortened time to find a solution, you save on technical experts, your own staff involvement and you 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

- 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 judge will appoint a mediator for you. Once the mediator is appointed, the judge will set a new hearing date and define the delay within which you will report about the success or failure of the mediation process. Neither you nor the mediator may report on the nature or content of the discussion and the content of the settlement agreement which remain confidential.

Among existing mediation centres, the followings have agreed to our Court annexed mediation scheme and fees:
[Enter the name of the centres, website and contact details].

If you are entitled to benefit from a legal aid, it will apply also for the mediation process[15] .

[Conclusive comments and appropriate salutations[16]…].

[13] To be customised according to applicable national law/Court practice.
[14] To be customised according to the mediation scheme negotiated with the Court.
[15] To be customised according to applicable law.
[16] Customised by the judge according to Court practice.

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 diagnostic about the procedure and all aspects concerning the judicial proceedings? (Time, money, odds,…)

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

ANNEX 4. The role of lawyers in mediation

Lawyers have in mediation, as in litigation, a pivotal role as they actively promote their clients' interests. What essentially differs is how lawyers promote their clients' interests.

In mediation, however, lawyers will have to shift from a purely legal and controversial attitude to the dispute to a more collaborative and client interest-based approach, thus switch they role from advocates to advisors.

In mediation, lawyers shall no longer be focussed on succeeding in litigation or in dismantling other parties' positions. On the contrary, mediation counsels should identify their client's underlying interests which may or not be consistent and which may go far beyond the legal aspects of the dispute.

Mediation is a win-win situation in which both parties and lawyers will benefit from:

- settling a dispute faster than through litigation
- finding a more workable solution that satisfies all parties
- avoiding being the losing party

Lawyers are the depositaries of an important part of their clients' life and their activity affects them in countless ways. No matter the value of the dispute, clients often suffer more from the emotional burden that a judicial proceeding brings than from the economic loss the dispute could entail.

For a lawyer, a definitive solution to his/her clients' problems will certainly be more professionally "rentable" than dragging a dispute along the years with the risk of resulting, at the end, the losing party.

If you're a party committed to go to mediation or if you are a lawyer keen to advise your client to go to mediation, it is important you clearly envision what is the role, or better the attitude, of legal counsels in mediation.

In mediation the role of lawyers does not differ, for some aspects, from what legal counsels do when they prepare themselves and their clients for litigation.

As for litigation, in mediation the lawyer will counsel, strategize, problem-solve, write and advocate. Indeed the lawyer will

A. *Preliminary to mediation* (as for litigation)
   - Help you identifying a suitable mediator
   - Help you in understanding how confidentiality applies to the mediation and what are its limits
   - Study the mediation dossier and identify weaknesses and strengths of the client's demands
   - Review the history of the dispute and the reasons behind it
   - Involve other stakeholders that she/he considers could be called to participate in the mediation (e.g. experts/accountants etc.)
   - Prepare documents and draft persuasive arguments to support his/her client's positions.

As mediation is more than a confrontation of parties' positions the legal counsel will investigate his/her clients' needs and interests rather than the factual aspect of the dispute. In doing so, he /she will be able to identify with you the points that shall be included in a future mediation agreement and define a provisional "bottom line" that is the point below which the negotiation or an agreement would be worthless for you, the client.

- Meet you and help you in preparing your opening statement and in identifying what and how to communicate the other parties about your needs
- Help you identifying possible solutions that could be accepted by you and the other party/ies (as they meet its/their interests as well)
- Assess the litigation risks in a business driven perspective and develop a negotiating plan
- Identify and anticipate what the counterpart/s will say
- Prepare the mediation session with you to better eventually manage your emotions/reactions/arguments.
- Anticipatively work and identify creative solutions that fit your needs

B. *During the mediation*

- Advise you on possible alternative solutions/agreements not yet explored
- Adapt negotiating strategies if needed
- Discuss with you, if needed, privately and during the mediation how to further progress the discussion/negotiation
- Build a constructive environment to negotiate
- Advise you in the solution elaboration phase and suggests as many creative options as possible
- Identify and define with the counterpart or with the counterpart's lawyer/s the terms/points to be included in the mediation agreement to reach a workable solution
- Carry out a "reality check" over the suggested solution

C. *After the mediation:*

- Write the mediation agreement (in case an agreement is reached)
- Assist you in the application/enforcement of the mediation agreement
- Assist you in case a modification to the initially signed mediation agreement is required
- Defend you in court in case mediation is not successful

All information discovered in mediation shall in no way be used during the following judicial proceeding in case an agreement is not reached, as mediation is confidential and the lawyer will certainly help you in identifying what can be and what cannot be included in your future statements.

Should you need more information about mediation you can call the following mediations services:

1. …[17]
2. …

[17] To be customized according to local/regional/national mediation services or mediation centers.