

Judges and mediation

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Legitimacy on mediation?

- Competitiveness of the European economy
 - « Rebooting the mediation Directive » study published by European Parliament in January 2014
 - Social, developmental, environmental, strategic costs
- Chambers of Commerce are ADR services providers

Priorities

- Lobbying
 - Robust market data
 - Balanced Relationship Target Number
- Awareness raising
- Increase quality (standards-accreditation)
- Collaborate with possible prescribers
 - Lawyers, judges...

Balanced relationship target number (BRTN)

- Article 1 mediation Directive: (...) to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.

Mediation meets Judges

- Large scale project
 - Creation of a toolkit
 - Set up of court annexed pilot schemes
 - Permanences in the courts
 - Mediators on call
 - Strengthen Gemme

The toolkit



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Diagnosis

- Elucidation

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?			

Model letters



ANNEX 2. Document or letter informing parties about mediation

[Introductory comments⁹...]

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 suspended¹⁰. 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 delays¹¹.

Why should you try mediation?

EFFICIENCY

- Mediation is efficient: statistically an agreement is found in 75% ¹²of 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

Self assessment tool



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			

Role of lawyers



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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

Examples

- In Brussels with bMediation
- In Paris with CMAP
- In Milano with Milan Arbitration Centre
- ...

Conclusion

- Need for a mixed approach to promote mediation
 - Bottom up but also top down!
- European Union policy on ADR is needed

Thanks!

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