



# CPR European Mediation and ADR Guide



**CPR**

International Institute for  
Conflict Prevention & Resolution

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## **Praise for the European Advisory Board Mediation & ADR Guide**

*"I've been involved with CPR's activities in Europe for over 10 years and it has been a long term ambition to develop a user-friendly resource for a European audience to promote mediation and CPR's resources. The European Mediation Guide is the product of genuine collaboration between leading European in house counsel and external counsel. Above all the Guide is focussed on helping corporates understand the benefits mediation has to offer, how to use mediation effectively to resolve commercial disputes and access on-line a wealth of other material to assist."*

**Alexander J. Oddy**

Partner

Herbert Smith Freehills LLP

*"The must-have guide for every in-house counsel regarding Alternative Dispute Resolution. It introduces ADR to the practitioner, increases familiarity with mediation and other ADR processes, and provides advice on each stage of the process, from contract negotiation to building the contractual relationship to conflict resolution: everything in-house counsel, particularly transactional lawyers, need to anticipate and successfully resolve conflicts through ADR."*

**Isabelle Robinet-Muguet**

General Counsel International Laws and Contracts, Group Mediator BtoB, Orange & Vice Chair of CPR European Advisory Board

*"With mediation on the rise internationally, CPR's European Advisory Board has produced the definitive guide to mediation and other forms of ADR. Extremely practical, with access to numerous on-line materials, it is the result of an intense collaborative effort between prominent in-house counsel and law firm practitioners. While primarily focused on mediation the Guide also provides useful insights into other forms of ADR, including arbitration. The Guide's sections on mediation cover each step of the process; of particular use will be the section on mediation case studies, which will assist organisations that are considering using mediation to understand how others have used mediation. In sum, this is an invaluable, user-friendly toolkit for every corporate counsel and practitioner wanting to use mediation and other forms of ADR."*

**Jean-Claude Najar**

Former Chair of CPR European Advisory Board

## USING MEDIATION AND OTHER ADR PROCESSES A GUIDE FOR EUROPEAN CORPORATES AND ORGANISATIONS

### ABOUT CPR

Established in 1977 by general counsel and their law firms to find ways to lower the cost of litigation, CPR is an independent nonprofit organization that helps businesses prevent and resolve commercial disputes effectively and efficiently.

Today, CPR is a collaborative organization that brings together leading corporate counsel, outside attorneys, distinguished neutrals and academics to develop and innovate cutting-edge solutions in dispute prevention and resolution.

This 360° stakeholder engagement and dialogue informs CPR's dispute resolution services—so our rules, tools and protocols are responsive to the field's most pressing concerns.

- **CPR Dispute Resolution** is an ADR provider offering quality, efficiency and integrity via innovative and practical arbitration rules, mediation and other dispute resolution services and procedures—as well as arbitrators, mediators and other neutrals, worldwide.
- The **CPR Institute**, the world's leading ADR think tank, positions CPR uniquely as a thought leader, driving a global dispute resolution culture and utilizing its powerful committee structure to develop cutting edge tools, training and resources. These efforts are powered by the collective innovation of CPR's membership—comprising top corporations and law firms, academic and public institutions, and leading mediators and arbitrators around the world.

Each element of this unique organization informs and enriches the whole, for the benefit of our members and users.

For more information, please visit [www.cpradr.org](http://www.cpradr.org).

#### **CPR's dispute resolution services include:**

- Resources for drafting pre-dispute alternative dispute resolution (ADR) clauses and custom post-dispute ADR agreements
- Rules enabling parties to conduct administered and non-administered arbitration, appellate arbitration, mediation and other forms of ADR
- Developing selection criteria for neutral selection, as well as generating lists of neutral candidates to meet parties' specific, complex needs
- Procedures for challenging arbitrators (Challenge Protocol)
- Direct appointments of arbitrators and UNCITRAL appointments
- Appointment of special arbitrator for emergency relief
- Fully administered arbitration
- Fund-holding capabilities

CPR has a panel of arbitrators and mediators in over 20 industry practice areas worldwide (for more information about the panels, visit CPR's website at <http://bit.ly/CPRNeutrals>).

For more information about the full spectrum of dispute resolution services offered by CPR, visit CPR's website at <http://bit.ly/CPRDRS>.

## **CPR IN EUROPE**

CPR's European presence dates from the early 1990s and in an effort to continue to efficiently serve the needs of its members in Europe, CPR has created a European Advisory Board (EAB). Via the EAB, CPR seeks to be a leading independent resource in Europe helping businesses and their legal advisers, whether in-house or external counsel, resolve and bring creative solutions to complex commercial disputes more efficiently and cost effectively, and preserve/enhance commercial relations. A list of the EAB members as of October 2018 appears at Appendix 3.

For these purposes, the EAB develops resources, shares knowledge and best practices, collaborates in joint initiatives and activities with other European stakeholders and institutions, all in conformity with the applicable legal, regulatory, and ethical environment. Critically, the EAB provides a forum for in-house counsel to network and exchange ideas and experiences with their peers and with leading practitioners across Europe. For more information, visit <http://bit.ly/CPREurope>.

## **INTRODUCTION**

In furtherance of its goals, the EAB has produced this guide aimed at corporates operating in Europe and beyond to assist them in understanding and taking full advantage of the range of "alternative dispute resolution" ADR processes available. This is intended to be an introductory guide to the most widely used processes and when they might be suitable, particularly mediation, and provides practical suggestions on how to make use of ADR processes. It provides links to an extensive range of additional materials and practical resources for access to more in-depth information. It also incorporates a brief introduction to arbitration.

This guide does not provide legal advice on using ADR processes. There may be variations among the national laws of the European Union Member States as to the treatment of certain matters discussed in this guide. Accordingly, users of this guide should consider taking legal advice in the appropriate jurisdiction(s) on their particular circumstances.

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## 1. **ADR PROCESSES: OVERVIEW**

- 1.1 The term "ADR" is an umbrella term used to refer to a multitude of formal and informal procedures outside of traditional (courtroom) dispute resolution mechanisms. Arbitration is regarded as falling within the range of processes that come within the term ADR in many jurisdictions in Europe. Nothing of substance turns on variations in this approach to nomenclature.
- 1.2 ADR processes are used widely in order to resolve disputes more efficiently, confidentially and at a lower cost than litigation. They can also help parties find practical, commercial solutions to disputes, allowing them to maintain on-going business relationships.
- 1.3 There are a multitude of options available to parties wishing to engage in ADR. Not all processes will be appropriate for all parties or all disputes. The first step in identifying the most appropriate process is to understand what options are available and to determine which option, or options, respond(s) best to the parties' needs and circumstances. This analysis will need to take into account the extent to which the parties have selected through the terms of any relevant contract one or more dispute resolution processes and how such processes are to be conducted. A comparative table giving a high-level overview of some of the most common processes can be found below.
- 1.4 One key distinction to note is between processes which are adjudicative, in that they result in a binding decision (such as arbitration and expert determination), and those which are non-adjudicative, in that they produce non-binding decisions (such as early neutral evaluation and mediation).
- 1.5 One procedural aspect worth noting, is that ADR may either be organised by the parties themselves (self-administered), or the parties may pay a fee to an ADR institution that will arrange the process (administered). Examples of self-administered processes are a mediation or arbitration set up on an *ad hoc* basis by the parties contacting a neutral third-party mediator or arbitrator directly. However, mediation and very commonly arbitration can be arranged with the assistance of an ADR institution.
- 1.6 In deciding which ADR process is most appropriate, parties might consider the following:
  - 1.6.1 the nature of the dispute: whether the issues in dispute are legal, technical, or relate only to quantum;
  - 1.6.2 the extent to which the process is capable of exploring and creating settlement options to meet underlying interests (economic, reputational, personal, emotional) in addition to or instead of the parties' legal rights and obligations;
  - 1.6.3 whether the parties want a facilitative process to assist them in reaching a commercial settlement, or an evaluative process to assess the factual and legal merits of their positions;
  - 1.6.4 whether a neutral third party is required to provide a decision which the parties are compelled to follow and/or which will have precedential value of importance to a party;
  - 1.6.5 the qualifications and experience of any neutral whom they wish to participate;
  - 1.6.6 how much control the parties want over the process and the amount of procedural support necessary;
  - 1.6.7 the timeframe within which the process is to be conducted;
  - 1.6.8 how much they are willing to spend on the administrative elements of the process; and
  - 1.6.9 the ability to enforce the outcome.

## Further resources

- 1.7 CPR's ADR Primer (<http://bit.ly/CPRADRPrimer>) provides an extensive list of ADR processes along with brief accompanying definitions. This document also provides further discussion of the differences between "administered", "self-administered" and "assisted" ADR methods.
- 1.8 *CPR Corporate Counsel Manual for Cross-Border Dispute Resolution* – From CPR's Arbitration Committee, an indispensable new resource providing guidance on drafting and planning for any common form of alternative dispute resolution in international business transactions, including tips on managing specific situations in-house counsel may encounter in international business disputes. To order the Manual, visit <http://bit.ly/2umr2K6>,
- 1.9 *CPR Mediation Best Practices Guide for In House Counsel : Make Mediation Work for You* – Inspiration for the Guide grew out of conversations among the inhouse counsel community over issues too frequently encountered with mediation: How to get recalcitrant parties to the mediation table? What is the best way to communicate to counsel that you will play an active role in the session? What to do when a mediator is not doing their job? And what happens after a mediation when it doesn't settle? The Guide – accessible for free to CPR Members – answers all these questions and includes insider tips from in-house counsel throughout. <http://bit.ly/MakeMediationWork>
- 1.10 International law firm and CPR member Herbert Smith Freehills LLP has produced a series of client guides covering a range of ADR-related topics. The guide - "Common ADR Processes - An Overview" (<http://bit.ly/HSFADRoverview>) discusses the advantages and disadvantages of several ADR methods including mediation, med/arb and arb/med (hybrid processes involving mediation and arbitration), early neutral evaluation, expert determination and adjudication.
- 1.11 CPR has produced an ADR Suitability Guide (<http://bit.ly/suitabilityguide>) to help legal practitioners determine whether or not a particular dispute is suitable for different types of ADR. This document contains a "Mediation Analysis Screen", which consists of a questionnaire for the parties followed by information on how to interpret their responses, in order to assess a dispute's suitability for mediation. The document additionally contains a comparative matrix of other non-binding ADR processes and a brief table comparing litigation against arbitration.
- 1.12 A checklist of factors to consider when determining whether a dispute is suitable or ready for mediation is set out in Section 3 below.
- 1.13 For further information on CPR's administered arbitration rules, see CPR's website at <http://bit.ly/AdministeredArbitration>.  
For information about CPR's administered arbitration rules for international disputes, see CPR's website at <http://bit.ly/IntAdministeredArbitration>.  
For information on CPR's non-administered arbitration rules, see CPR's website at <http://bit.ly/nonadministeredarbitration>.  
For more information about CPR's mediation services, see CPR's website at <http://bit.ly/CPRMediation>.



OVERVIEW OF ADR PROCESSES		Speed	Cost	Enforcement	Finality	Impact on relations
<b>Mediation</b>	Structured settlement discussions with no formal procedural rules facilitated by a neutral third party with no decision-making power	Typically a few weeks of preparation, followed by a one or two day mediation	Due to its short duration, mediation is much cheaper than arbitration or litigation, costs are usually split equally	If settlement is reached, the parties will enter into a binding settlement agreement. Mediated settlements in EU cross-border disputes are capable of enforcement following the Mediation Directive. Judicial enforcement in domestic disputes varies across member states. In practice, disputes under such contracts are rare	If no settlement is reached, litigation or further ADR will typically follow - discussions are usually subject to without prejudice privilege in later or concurrent proceedings	Mediation provides an opportunity to discuss and mend commercial relations
<b>Arbitration</b>	Typically a formal trial-based process with strict procedural rules, usually presided over by one or three arbitrators who make a decision that is binding pending any appeal, differs from litigation as the parties have more procedural choice and the process is confidential	The whole process typically takes one to two years with hearings lasting from a day or two up to several weeks (and subject to delays, e.g. if the tribunal's jurisdiction is challenged)	Costs can be similar to litigation and are higher the longer it takes; sometimes, the unsuccessful party pays costs	Awards may need to be converted into court judgments, plus court permission is often required before enforcement, but enforcing awards in foreign jurisdictions is often easier than a court judgment if the state is one of over 150 parties to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The "New York Convention"), which provides for the reciprocal enforcement of awards	Arbitral awards can only rarely be appealed where there is no such right in the dispute resolution clause, since the grounds for setting aside arbitral awards are limited, e.g. where the jurisdiction of the tribunal is challenged, or serious irregularity is asserted	The legal and adversarial nature of the process does not assist commercial reconciliation
<b>Early neutral evaluation (ENE)</b>	Neutral third party with expertise in the subject matter provides a non-binding evaluation of the dispute	Depending on the complexity of the case, an evaluation could be made in one to three months	The costs of an ENE are typically low, in line with mediation, as it is a summary process usually conducted without disclosure or evidence	This is a non-binding process - the evaluation is not enforceable but may bring parties closer to settlement by helping them to assess the strength of their positions	Litigation or further ADR will follow ENE as it will not resolve the matter – the evaluation is usually subject to without prejudice privilege in later or concurrent proceedings	This may bring parties closer to settlement or alternatively polarise their positions, it is unlikely to mend a relationship
<b>Expert determination</b>	Neutral third party with expertise in the subject matter makes a final binding decision following written (or sometimes oral) submissions by the parties, the procedure is usually less formal than arbitration	Depending on the scope and complexity of the issues, the whole process could take six to 12 months	Costs typically higher than mediation but lower than arbitration, due to shorter duration, curtailed disclosure and evidence	The decision is usually stated to be binding under the applicable dispute resolution clause, as such it will usually be enforceable in the courts except where the expert has not complied with instructions	Though there are sometimes cases where courts are prepared to intervene, in most cases the expert's decision will be accepted as final, making it a potentially swift and cost-effective method of ADR	The speed of the decision means, if it is accepted, that the commercial relationship can often be preserved

## 2. GUIDE TO ADR CLAUSES

- 2.1 Parties may make the decision to use ADR either before a dispute arises (at the outset of their commercial relations) or once it has already arisen. In the former case, it is common practice to incorporate a provision in the relevant contract to use ADR in the event of a dispute (an ADR clause). However, even if the parties do not include an ADR clause in their contract, they are free to use one or more ADR processes once a dispute has arisen, often in parallel with any formal contractually-specified dispute resolution process. Of course, once a dispute has arisen, it may be somewhat more difficult to agree on the appropriate ADR process(es) to be used and such discussions will need to be framed by any legal or procedural requirements of the jurisdiction in which the dispute is to be resolved.
- 2.2 Having a dispute resolution process involving ADR in place from the outset can potentially achieve significant time and cost savings later on. On the other hand, a mandatory obligation to use ADR (e.g. mediation) before the parties litigate in a selected national court (or arbitrate) will not always be effective in practice if the particular dispute that arises is not sufficiently developed or one party is reluctant.
- 2.3 When selecting an ADR clause, one size does not fit all and parties should adopt an approach that is suitable to each particular contract.
- 2.4 In many industry sectors, contracting parties are able to draw on ADR clauses and dispute resolution clauses that have been developed to reflect the needs of those sectors. By way of example, the oil and gas, construction, commodities trading and maritime sectors have all developed contracting structures and dispute resolution rules to limit the scope for conflicts to arise and to resolve them through rules and procedures suitable for the industry in question. See Appendix 1 for a summary of some of these rules and resources by industry sector, including industry sector-specific resources prepared by CPR.
- 2.5 There are broadly three types of ADR clauses: mandatory, escalation and non-mandatory.

### **Mandatory clauses**

- 2.6 Mandatory clauses either put an obligation on the parties to use ADR (usually mediation) prior to arbitration or litigation being commenced, or impose a mandatory binding ADR process, such as expert determination. They are particularly effective where parties wish to ensure that an ADR process is always attempted. The risk is that they will also compel parties to use the process even where one of them does not consider it appropriate. It should be noted that whether a clause of this nature is truly mandatory and effective will depend upon the system of national law governing the clause. Of course, if both parties agree, it is possible to change or dispense with a clause-mandated ADR process.

For example:

*“The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by mediation under the [then current] CPR International Mediation Procedure [in effect on the date of this Agreement], before resorting to arbitration or litigation.”*

### **Escalation clauses**

- 2.7 Escalation clauses set out "multi-step" procedures, for example requiring parties to first negotiate directly, failing which to attempt mediation, before resorting to litigation. These are widely used in a range of commercial contracts across all industry sectors, but are particularly common (and effective) where parties enter into long term contractual relationships where they wish to afford themselves every opportunity to resolve conflict informally before a formal dispute resolution process such as arbitration is invoked.

For example:

**"Between Executives (A)** *The parties shall attempt in good faith to resolve any dispute arising out of or relating to this [Agreement] [Contract] promptly by negotiation between executives who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for administration of this contract. Any person may give the other party written notice of any dispute not resolved in the normal course of business. Within [15] days after delivery of the notice, the receiving party shall submit to the other a written response. The notice and response shall include (a) a statement of that party's position and a summary of arguments supporting that position, and (b) the name and title of the executive who will represent that party and of any other person who will accompany the executive. Within [30] days after delivery of the initial notice, the executives of both parties shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute. All reasonable requests for information made by one party to the other will be honoured. All negotiations pursuant to this clause are confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence."*

**"Mediation (B)** *If the dispute has not been resolved by negotiation as provided herein within[45] days after delivery of the initial notice of negotiation, [or if the parties failed to meet within [20] days,] the parties shall endeavour to settle the dispute by mediation under the International Institute for Conflict Prevention & Resolution ("CPR") International Mediation Procedure [currently in effect OR in effect on the date of this Agreement], [provided, however, that if one party fails to participate in the negotiation as provided herein, the other party can initiate mediation prior to the expiration of the[45] days.] Unless otherwise agreed, the parties will select a mediator from the CPR Panels of Distinguished Neutrals."*

**"Arbitration (C)** *Any dispute arising out of or relating to this [Agreement] [Contract], including the breach, termination or validity thereof, which has not been resolved by mediation as provided herein [within [45] days after initiation of the mediation procedure] [within [30] days after appointment of a mediator], shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention and Resolution ("CPR") Rules for Administered Arbitration of International Disputes [currently in effect OR in effect on the date of this Agreement], by [a sole arbitrator] [three arbitrators, of whom each party shall designate one, with the third arbitrator to be appointed by CPR] [three arbitrators, of whom each party shall designate one, with the third arbitrator to be designated by the two party-appointed arbitrators] [three arbitrators to be appointed in accordance with the screened appointment procedure provided in Rule 5.4] [three arbitrators, none of whom shall be designated by either party]; [provided, however, that if one party fails to participate in either the negotiation or mediation as agreed herein, the other party can commence arbitration prior to the expiration of the time periods set forth above.] Judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The seat of the arbitration shall be (city, country). The language of the arbitration shall be (language)."*

### **Non-mandatory clauses**

- 2.8 Non-mandatory clauses are clauses which only require parties to consider using ADR before arbitration or litigation - the option of ADR is raised, but flexibility to reject it is preserved should it be inappropriate in a given case. Whilst non-mandatory clauses are sometimes criticised as ineffective because they do not compel the parties to the contract to use a particular process, they can be helpful to parties who wish to preserve maximum flexibility in their dispute resolution options – the inclusion of a non-mandatory clause enables either party to propose (for example) mediation without fear of the proposal being taken as a lack of confidence in their case, because the use of mediation is already acknowledged by both parties as an available dispute resolution process through the terms of their contract.

CPR does not favour non-mandatory clauses because they can be the subject of litigation as to whether they have been complied with. In some circumstances contracting parties may nevertheless choose to use a non-mandatory clause given the flexibility it confers.

<b>ADR CLAUSES: KEY CONSIDERATIONS</b>	
<b>Scope</b>	Which dispute(s) will the clause cover?
<b>Time period</b>	The clause may set a maximum timeframe within which ADR should be commenced or concluded, including the timeframe for specific actions or steps to be taken.
<b>Initiating the procedure</b>	How will the process formally be commenced?
<b>Selection of neutral, expert, etc.</b>	How will the third party be chosen, will an ADR institution be used?
<b>Language, location and governing law</b>	Where will the process take place and in what language? It may be appropriate in longer clauses to include an express choice of law for the dispute resolution clause itself.
<b>Attendees</b>	This is relevant in mediation or negotiations - parties will want attendees on both sides to have the requisite authority to settle the dispute.
<b>Confidentiality</b>	Parties will generally want the process to be confidential and, if it is a non-binding process, to be carried out under without prejudice privilege (where that head of legal professional privilege is recognised).
<b>Costs</b>	Who will be responsible for the costs of the process, both in terms of funding the neutral and/or institution and ultimate responsibility for, for example, legal costs?

### Further resources

- 2.9 CPR produces a range of model ADR clauses, including mediation, several types of arbitration, mini-trial and other sector-specific clauses, all of which can be accessed at <http://bit.ly/CPRModelClauses>. These can be used as a precedent when drafting ADR clauses in commercial contracts, though it goes without saying that careful thought should be given to their suitability in any given scenario and whether any variations are appropriate.
- 2.10 Key considerations to bear in mind when drafting ADR clauses, including when making use of model clauses, are listed in CPR's drafting issues checklist (<http://bit.ly/CPRDraftingchecklist>).
- 2.11 CPR further produces a practice-oriented guide to common alternative dispute resolution processes, "Drafting Dispute Resolution Clauses" (see <http://bit.ly/CPRDraftingBook>), which is geared towards transactional and business lawyers. This guide provides accessible and sophisticated information on pre-dispute clause drafting along with example clauses and is available for purchase.
- 2.12 *The CPR Corporate Counsel Manual for Cross-Border Dispute Resolution* provides guidance on drafting and planning for any common form of alternative dispute resolution in international business transactions, including tips on managing specific situations in-house counsel may encounter in international business disputes. To order the Manual, visit <http://bit.ly/2umr2K6>,
- 2.13 The International Mediation Institute (IMI) has pulled together numerous example mediation clauses which are freely available on the internet from various ADR providers. These are accessible here ([bit.ly/IMISampleClauses](http://bit.ly/IMISampleClauses)), together with several pieces of practical guidance on drafting such clauses.

### 3. MEDIATION: SUITABILITY AND TIMING

- 3.1 Mediation is the most popular form of ADR and as a process is readily applicable in different jurisdictions and in cross-border disputes. It is particularly effective where there is an on-going commercial relationship between the parties but can assist parties in virtually all disputes, except where one of the parties requires an outcome or remedy which only a court can provide (such as an injunction).
- 3.2 Mediation will be worthwhile in the vast majority of disputes. Often it is a case of determining *when*, rather than *if*, mediation will best assist parties in reaching or coming closer to settlement. Even where mediation does not result in a settlement being reached (perhaps because it is attempted early in the life of the dispute), mediation can assist parties by enabling them to identify and focus on the key issues between them and identify their respective underlying interests. Parties may negotiate or mediate more than once in the life of a dispute on the journey to reaching an acceptable resolution.
- 3.3 The questions set out below are intended as an informal checklist for parties to refer to in assessing the suitability of a particular dispute for mediation at any given stage. The checklist is not exhaustive, but only indicative. It is not necessary to answer all of these questions; usually answering just one or a few of these questions can identify whether there will be a worthwhile basis for mediation to be used.
- 3.4 The decision of whether to mediate is also closely linked to the decision over when to mediate in the dispute cycle. In summary the earlier the process is carried out, the greater the opportunity to save legal and business costs and avoid escalation of a dispute. However, this always needs to be balanced with an assessment of whether the parties are ready to settle their dispute in the sense of the issues being sufficiently defined and sufficient information being available to allow a sufficient analysis of the risks of proceeding with or escalating the dispute.
- 3.5 This section includes resources to assist both in identifying disputes suitable for mediation and in considering when to mediate (this can be more than once in a larger dispute).

#### CHECKLIST

- Does instinct tell you that settlement is likely, even if not until a later stage in proceedings?  
*Where the probability of eventual settlement is high, mediation often speeds up the settlement process, saving cost, time and potentially the business relationship.*
- How important is the goal of maintaining an on-going business relationship?  
*If this is a key aim of both parties, mediation is likely to be worth pursuing.*
- How much control do the parties want to be able to exercise over the dispute resolution process?  
*Mediation is a flexible process that allows parties to have more control over procedure than arbitration or litigation.*
- Is the case likely to be disposed of summarily, or does one of the parties require interim relief, a particular court financial reward or penalty?  
*Certain types of relief available in court will not be available via mediation so where these are required mediation may not be appropriate.*
- Is a formal disclosure/discovery process likely to be required?  
*Parties to mediation can agree to exchange information, though a full disclosure/discovery exercise is not undertaken. Where the parties believe the case requires full formal disclosure/discovery, it may be that the parties can attempt mediation before or in parallel with this*



*exercise in order to narrow the issues on which documents are required to be produced and thereby save time and costs.*

- Does the dispute only relate to quantum or a specific technical issue?

*Parties may consider using another ADR type if this is the case.*

- Do the estimated monetary costs of litigation or arbitration mean that attempting mediation is worthwhile?

*In the overwhelming majority of cases, the answer to this question will be affirmative.*

- Is there a need for a speedy resolution of the dispute?

*Besides being generally desirable, speedy resolution of a dispute will be necessary where the parties wish to continue or resume a trading or other commercial relationship. Mediation can be convened and conducted quickly, if necessary in a matter of days, although in commercial disputes a mediation will usually be arranged with a few weeks' notice to enable the parties to prepare properly.*

- Is there a need for privacy?

*Mediation is usually a confidential process.*

- Is public vindication a goal of either party?

*The mediation process itself is confidential, however, it is possible (and common) for parties to agree that one element of a mediated settlement is a public statement in an agreed format: perhaps an apology, or just a statement to acknowledge/inform third parties (investors in the market for example) that a dispute has been brought to an end.*

- How certain are the parties that they will prevail in court or in arbitration?

*If the parties are clear on the legal merits, it should be possible for mediation to assist them in negotiating a settlement more quickly than the outcome in litigation or arbitration. If the facts or law remains in dispute, the mediation process can provide an opportunity for parties to test their understanding and assessment of the position in a secure environment with the mediator privately and in confidence. This enables a realistic risk assessment to be undertaken which itself is likely to assist in the process of reaching agreement.*

- How receptive is leadership at the respective organisations to the idea of mediation?

*Companies with a "culture" that encourages ADR and that have had experience with it before are much more likely to be receptive to mediation and enter into it prepared to settle. Most business personnel who participate in mediation find the process effective.*

- What is the current status of the parties' relationship?

*Whilst conflict, distrust and tension may make the mediator's job more difficult, even high levels of such emotions do not present insurmountable barriers to a successful mediation. Often it is the ability of the mediation process to allow emotional and personal factors that are present in many commercial disputes to be acknowledged that allows mediation to assist the parties in resolving their disputes. Neither litigation nor arbitration can acknowledge the role that these human interests play, and frequently the adversarial nature of either process polarises views rather than bringing the parties closer together.*

- Is there a disparity between the parties in terms of financial resources and business sophistication?

*Mediations with great power disparities will require careful handling by the mediator to avoid any risk of unfairness. However, mediation can provide a secure forum for parties of disparate size or resources to engage in an environment that encourages the resolution of the dispute. Some large corporates may in rare circumstances be willing to fund the mediation process simply to encourage a smaller counterparty to engage where conventional negotiation or other settlement efforts have been unsuccessful.*

- Are the opposing counsel's styles compatible?

*The attitudes of external counsel can impact the likelihood of a successful mediation. However, it is incumbent on the parties and their in-house counsel (where present) to set the tone. In some jurisdictions where mediation is not well known or used extensively, external counsel may themselves lack relevant understanding or experience and so that may be an obstacle to be addressed through information/education.*



- Would mediation help the parties by helping them clarify the issues in dispute and understanding one another's real drivers or underlying interests?

*Helping parties to identify the genuine issues that divide them and their underlying goals is a key part of the mediator's role and increases the chances of the parties reaching a settlement.*

- Would mediation give the parties a chance to explain their views, reduce hostility, or even apologise?

*Mediation is a more cooperative, less adversarial process than litigation or arbitration – if parties are given the chance to vent their anger or explain their position, it may be that mediation can help alleviate those tensions. Very many disputes arise or are exacerbated by misunderstandings which can often be resolved more efficiently in mediation than through litigation or arbitration.*

### Further resources

- 3.6 The questions set out in the checklist above, as well as other questions not listed, are discussed further in CPR's ADR Suitability Guide (<http://bit.ly/suitabilityguide>). This guide provides a full mediation analysis screen which can be used to assess the suitability of particular disputes for mediation.

### WHEN TO MEDIATE IN THE DISPUTE CYCLE

- 3.7 Although there is sometimes discussion about the 'right' time to mediate a dispute, in reality mediation can be undertaken effectively at a number of stages in the lifecycle of most disputes. What is necessary is that the parties should understand the different dynamics at play in the dispute at different stages and tailor their expectations, preparation and negotiation strategy accordingly.
- 3.8 It is obvious that the earlier parties are able to mediate in the dispute cycle, the greater the scope for savings of legal costs and management time and the preservation of (or limitation of damage to) commercial relationships. However, the earlier a mediation takes place in the dispute cycle, the less information the parties may have available to help them assess the dispute. Generally, decision-makers prefer to be well informed before taking a decision to compromise a dispute and so there is an inevitable tension between seizing the opportunity to settle at the earliest appropriate stage while having enough information to take an appropriately robust decision (so as to be accountable to management, shareholders etc.).
- 3.9 There will be a range of internal and external factors that affect the decision of a company about when to mediate which include the forum in which the dispute is to be resolved, the system of law governing the disputed issues, and the circumstances and underlying interests of the parties.
- 3.10 Herbert Smith Freehills LLP ADR client guide - "When to Mediate in a Dispute" (<http://bit.ly/HSFwhenmediate>) - discusses some of the factors to consider when determining which stage is the most appropriate to attempt mediation on a particular dispute. This resource is drafted from a common law perspective with English civil procedure as the reference point, but the series of questions that are asked can be readily modified to reflect procedure in the courts of a civil law jurisdiction or arbitration. Whatever the forum for the formal resolution of the dispute, the challenge for each party is to test whether advancing the case through the next procedural steps will move them closer to the point where they can take an appropriately informed decision whether to resolve the matter by agreement in negotiation or mediation, or to continue to a formal resolution of the dispute by a court or arbitral tribunal.

## 4. MEDIATION: PROCESS AND PROCEDURE

### Overview

- 4.1 Mediation is facilitated negotiation, the aim of which is to resolve a dispute on terms mutually acceptable to the parties. The parties jointly select a neutral third party to act as mediator. The mediator's role is to explore the interests of the parties, to discover which of those interests are shared, to alert the parties to a resolution that might further those interests and to assist them in reaching that resolution by agreement.
- 4.2 Mediation provides a number of benefits over direct negotiation between the parties. In direct negotiation, parties are often reluctant to acknowledge weaknesses in their case and make concessions out of a concern that this will undermine their bargaining power. This leads to parties adopting entrenched positions and refusing to acknowledge that there might be alternative ways of assessing the dispute.
- 4.3 Mediators act as diplomats, seeking to engage the trust of both parties and encouraging them to share their real concerns and interests with the mediator in confidence. This allows realistic assessments of the risks to be carried out and alternative solutions to the dispute to be discussed and explored with the mediator privately and safely. The process helps parties engage with each other in a more pragmatic and constructive way. Mediation also provides a flexible timetable and structure that may be harder to achieve in a conventional negotiation.

### Key features

- 4.4 Mediation is a **voluntary process**. Although in some jurisdictions mediation is strongly recommended by the courts or even made compulsory, parties can never be forced to reach agreement via mediation. The role of the mediator is to assist the parties in reaching an agreement, but this is not always possible.
- 4.5 Mediation is **private and confidential**. Nothing said in the course of the mediation can be discussed outside of the mediation or revealed to any third party. Additionally, everything said in the private sessions held between the mediator and one party in the absence of the other will also be confidential vis-à-vis the other party. These conditions are usually set out in the mediation agreement. Of course, that which is said cannot be "unsaid" and information which is imparted in the course of the mediation cannot be "unknown". This is the same as with any settlement negotiation. Be aware that some systems of national law governing mediation agreements take different approaches to the confidentiality of the mediation process.
- 4.6 In addition, in jurisdictions which recognise "without prejudice" privilege (most common law jurisdictions) parties will not be able to rely in any subsequent litigation or arbitration on anything said, done or created in writing solely for the purpose of the mediation. In other jurisdictions, legislation typically provides for broad-ranging confidentiality of information exchanged in mediation. The EU Mediation Directive (2008/52/EC), which deals with cross-border disputes (where the parties are domiciled in different Member States) obliges Member States to provide protection for the confidentiality of the mediation process and protection for mediators and mediation providers from being called as witnesses in legal proceedings. Some Member States have voluntarily adopted the requirements of the Mediation Directive for domestic disputes as well.
- 4.7 The mediator has **no power to make orders**, compel a certain course of action, enforce a settlement or issue a judgment or award. The results of the mediation will only be binding if parties enter into a settlement agreement at the end of the process. This contract will be enforceable via the dispute resolution mechanism set out within it. Enforcing the settlement agreement will typically be much easier than litigating/arbitrating the original dispute (because the action often concerns only a debt – the settlement amount) but in practice it is rare that parties to a settlement agreement entered into consensually at a mediation do not observe its terms. The EU Mediation Directive provides for Member States to provide the means for settlements in cross-border mediations to be enforceable through the courts of Member States.

### Evaluative or facilitative process?

- 4.8 The mediator is independent and neutral and does not usually act in a decision-making capacity unless the parties so request (which is rare).
- 4.9 Mediators can nevertheless approach their role in different ways. A mediator may act only as an enabler of negotiation, managing the process and avoiding expressing views on the merits of the dispute or the approach of either party. This is referred to as facilitative mediation. Facilitative mediation is the most common model of mediation used internationally. A facilitative mediator may nevertheless address the merits of the dispute, often by asking the parties questions (almost always in private) to encourage a realistic appraisal of the strengths and weaknesses of their position.
- 4.10 A mediator may also approach the role with a willingness to express an opinion on the merits of parties' respective positions or give a (non-binding) view on what a settlement could or should look like. Such mediators are often categorised as "evaluative".
- 4.11 In reality, there exists a spectrum of styles reflecting the mediator's personal approach, the wishes of the parties and in some cases expectations based on prevailing practice within a particular jurisdiction. Skilled mediators are also able to adjust their style and approach to suit the parties and the dispute, including adopting facilitative and evaluative approaches flexibly.

### Procedure and rules

- 4.12 Mediation may be arranged by the parties on an entirely *ad hoc* basis or by the incorporation of the rules and procedure of an ADR institution. CPR (along with other ADR institutions) produces mediation rules, links to which can be found below.
- 4.13 Parties may agree to submit to such rules either by the terms of an ADR clause in a contract or by entering into a mediation agreement. Alternatively, parties may decide to apply bespoke procedural rules (for example drafted by in-house or external counsel), the terms of which will be set out in a mediation agreement (see section 6 below for further information on mediation agreements).
- 4.14 Whilst the procedure is flexible and will vary depending on the rules adopted or terms agreed, a typical process is as set out below.

<b>Step 1</b>	<b>Appoint a mediator</b>
	This can be done either by direct joint instruction of the mediator on agreement of the parties, or by enlisting the services of an ADR or mediation service provider who can suggest or appoint a suitably qualified and trained candidate. For more information on how to select a mediator, see section 5 below.
<b>Step 2</b>	<b>Logistics: date, venue and representation</b>
	The next step is to set the date, time and place for the mediation. It is essential that appropriate decision makers with authority are able to attend from each party so that if agreement is reached a settlement agreement can be entered into on the day. Parties will also need to decide whether or not they want their respective lawyers to attend. Lawyers do attend in the great majority of cases and tend to be involved in the preparation process as well. This is not mandatory, however, and some corporations with experienced in-house counsel who are familiar with the process may be happy to attend mediations without external counsel support.

<b>Step 3</b>	<b>Mediation statements and documents</b>
	<p>Parties usually provide the mediator with a core bundle of documents (agreed, if possible) to read prior to the mediation. They also exchange (or submit only to the mediator, as agreed) brief written statements setting out their respective approaches to seek to persuade each other and educate the mediator. Mediation written statements, also referred to as position papers, are not court documents. They should be accessible to the business decision makers who are usually not lawyers.</p>
<b>Step 4</b>	<b>Preparation</b>
	<p>The parties need to prepare carefully for the mediation to give the process the best chance of reaching a successful settlement. This should include an assessment of the legal merits and evidence, carrying out a risk assessment for the dispute, understanding the economics of any litigation or arbitration that is contemplated or is under way as well as preparing a negotiating plan. It is usually helpful to give some thought in advance to what an acceptable settlement could look like. See further discussion at section 7 below.</p>
<b>Step 5</b>	<b>The day itself</b>
	<p>A typical mediation would begin in the morning with an opening joint session at which the parties give short oral statements. These supplement the written statements exchanged in advance.</p> <p>The mediator explains the ground rules for the mediation such as confidentiality, without prejudice privilege where applicable and how the mediation will progress with the agreement of the parties.</p> <p>The parties may continue to negotiate in a joint session but commonly at the mediator's suggestion will separate to different rooms for a series of private sessions during which the mediator discusses the case privately. The mediator engages in shuttle diplomacy, spending time alternately with each party.</p> <p>The mediator may bring the parties (or selected representatives from each party) back together for further joint meetings throughout the day(s) of the mediation if helpful to advance the negotiation.</p> <p>Discussions in private sessions often develop through three stages. First, a period of exploration during which the mediator asks questions of each party to understand their interests and tests their assessment of their position in the dispute. Secondly, a process of bargaining whereby the mediator encourages the parties to make offers and counter-offers in the negotiation, either to each other in face to face joint meetings or being carried by the mediator from one party in private session to the other. Thirdly, a process of concluding agreement to include ensuring that the terms of a settlement are clear, capable of performance and reflected in a written settlement agreement.</p> <p>It should be noted that there is typically some variation in the structure of the mediation day(s) across Europe. The process described above is a typical structure for a mediation conducted in a common law jurisdiction such as England. In some civil law jurisdictions, such as France and Germany, it may be that the mediator encourages the parties to spend a greater part of the mediation day in joint meetings and less time in private or caucus sessions. Either approach can be effective, but it is advisable for parties to understand the mediator's usual</p>

	approach and to make clear their wishes and expectations for the mediation process.
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## Further resources

- 4.15 CPR has produced an International Mediation Procedure (<http://bit.ly/2ozJLO9>) which can be used for European mediations. CPR also provides a Mediation Procedure (<http://bit.ly/CPRMediationProcedure>), specifically developed for mediations in the US.
- 4.16 Herbert Smith Freehills' ADR client guide – "An introduction to mediation – what it is and how it works" (<http://bit.ly/HSFMediationIntro>)- provides a general introduction to key features of mediation and information on what to expect on the day itself. This guide also provides a template "mediation timeline", setting out the key procedural stages which take place before, during and after the date(s) of the mediation and looks in more detail at the procedure on the day of mediation itself.
- 4.17 Several other ADR institutions also provide procedural rules which can be used where either the parties have already agreed to apply such rules under a dispute resolution clause, or are agreeing to mediate at the point of dispute. See for example:
- 4.17.1 Chamber of Arbitration of Milan (CAM): <http://www.camera-arbitrale.it/en/Mediation/Rules.php?id=377>
  - 4.17.2 Centre for Efficient Dispute Resolution (CEDR) in London: [http://www.cedr.com/about\\_us/modeldocs/](http://www.cedr.com/about_us/modeldocs/)
  - 4.17.3 Centre de Médiation et d'Arbitrage de Paris (CMAP): <http://www.cmap.fr/Rules-and-rates/Rules-in-English-164-en.html>
  - 4.17.4 International Chamber of Commerce (ICC) [Mediation Rules](#)

## 5. MEDIATION: FINDING A MEDIATOR

### Locating a mediator

- 5.1 A mediator can be appointed in one of two ways. Either the parties can agree on the candidate and instruct that person directly, or they can enlist the services of an ADR or mediation service provider that can suggest or appoint a suitably qualified and trained candidate, usually in return for a fee.

### Selecting a mediator

- 5.2 The requirements for providing services as a mediator vary across individual jurisdictions in Europe significantly, ranging from jurisdictions (for example the UK) where there are no formal or legal requirements at all to jurisdictions (for example the Netherlands) where mediators require formal training, certification and continuing education training or (for example Switzerland) where mediators must be sworn in.
- 5.3 While it is always advisable to use a mediator that has been trained and accredited by a reputable ADR institution, such accreditation is not in itself any guarantee of quality or experience, nor does it say anything about the personal style and attributes of a particular mediator. It is therefore essential to seek information on the performance of a mediator which may be obtained from a number of sources including the inclusion of the neutral on a list or panel of recommended neutrals maintained by an ADR institution, discussions with that ADR institution, discussions with external counsel or with peers and a review of on-line mediator feedback websites. In some cases, particularly major cases, it might be useful for the parties to interview mediator candidates during the selection process.
- 5.4 Mediators each have their own personal styles and it will be important to choose someone who will be able to work well with and get the most out of the parties' representatives on the

day. Where the dispute is particularly large or complex and if multiple parties are involved, the parties can consider using a team of co-mediators to share the work between them.

- 5.5 The majority of commercial mediators are lawyers by background who have trained as mediators. However, parties may alternatively wish to select a non-lawyer, for their other skills, such as specialist industry sector expertise. Whatever the mediator's background, key attributes will be patience, an ability to listen, energy and determination.
- 5.6 A common question concerns the importance of subject matter expertise for the mediator. The more specialized the subject matter and type of dispute, the more limited the pool of potential candidates to act as mediator. In practice it is desirable for the mediator to have a working knowledge of the subject matter – for example insurance, energy, products liability – so that the mediator can engage efficiently with the issues, but it is rarely essential to have deep subject matter expertise. It is usually equally important that the mediator is appropriately skilled in managing the process.

### Further resources

- 5.7 For parties wishing to agree upon and engage a mediator directly, CPR maintains an extensive and detailed neutrals database (CPR's Panel of Distinguished Neutrals), which can be searched by CPR Members to identify neutrals whose experience, credentials, language ability and geographic location meet the requirements of the parties. The detailed biographies of these neutrals, who are thoroughly vetted for their ADR proceeding and commercial dispute experience, can be displayed online. Non CPR Members can obtain biographies of CPR credentialed neutrals with pre-determined qualifications by contacting CPR. CPR can also assist the parties to a dispute in selecting a mediator. For additional information about CPR's Dispute Resolution Services, see <http://bit.ly/CPRDRS>.
- 5.8 Alternatively, CPR can assist parties in the selection of an arbitrator or a mediator when the parties so provide in their contract or at the parties' request after the dispute has arisen. In that case, CPR will work with the parties to select a neutral who is fully qualified to resolve the dispute and who has been screened for conflicts and availability. See CPR's Neutral Selection Services (<http://bit.ly/CPRSelection>) for further details.  
  
The CPR's Due Diligence Evaluation Tool (DET) is a document of potential questions designed to facilitate a more informed evaluation of potential arbitrator and mediator candidates. See <http://bit.ly/CPRDET>
- 5.9 Herbert Smith Freehills' ADR client guide - "[Selecting your mediator and drafting the mediation agreement](http://bit.ly/HSFMediatorSelection)" (<http://bit.ly/HSFMediatorSelection>)- also sets out factors and criteria to take into consideration when selecting a suitable mediator.

## 6. MEDIATION: MEDIATION AGREEMENTS

- 6.1 The mediation agreement is entered into between the parties either on the day of the mediation or shortly in advance. It sets out the procedural framework governing how the mediation will run and includes other key obligations, such as confidentiality obligations. These documents address a standard list of topics, albeit the precise form may differ from one jurisdiction to another, regardless of the size and type of commercial dispute. As noted above, the agreement will either set out all terms in one document, or may incorporate the procedural rules of an ADR institution by reference.
- 6.2 It is good practice to sign the mediation agreement as early as is practicable after the parties agree upon a mediator, so that pre-mediation activity can also be structured in accordance with the terms agreed. Frequently, however, the agreement is not signed until the first day of the mediation.
- 6.3 Key terms typically covered in the mediation agreement are discussed below.



<b><i>The dispute</i></b>	It is important to be clear about what issues and disputes are intended to be resolved (if possible) at the mediation. This will be straightforward where the matter is in litigation or arbitration where the issue in dispute will be framed by reference to the proceedings. Where no proceedings are under way, or where the parties wish to attempt to resolve other or related disputes, careful drafting will be required so that both parties approach the mediation with common expectations as to what will or will not be discussed (which of course affects preparation).
<b><i>Location, time and date</i></b>	Parties will need to set the time and location and may also wish to specify a time-limit for negotiations. The overriding concern should be to identify a location and facilities for the mediation that are convenient, comfortable and properly equipped to meet the parties' requirements.
<b><i>Confidentiality and Without Prejudice</i></b>	Everything said in the mediation should be confidential and on a "without prejudice" basis (where that head of privilege is recognised). Consider whether it is appropriate or even possible to keep the fact of the mediation a secret.
<b><i>Settlement Authority</i></b>	There is usually a term that those present will have the authority to bind the parties they represent. Typically the agreement includes a provision that no settlement is agreed or legally binding until the parties have entered into a written settlement agreement.
<b><i>Mediator</i></b>	It is typical to provide that the mediator will not have any liability toward the parties in connection with the mediation.  There should also be a term that no party will seek to require the mediator to give evidence in connection with the proceedings or any satellite litigation.
<b><i>Costs</i></b>	Parties will need to agree who will pay the costs upfront (in terms of funding the mediator's costs and the venue for the mediation if a neutral venue is preferred), and who will ultimately be liable for them, including parties' costs of preparation, venue fees, and mediator fees, in litigation or arbitration.
<b><i>Governing law and jurisdiction</i></b>	The mediation agreement should include an express choice of law clause and a clause identifying the forum for the resolution of any disputes arising out of the mediation process (which are rare). It is helpful to select a law and court with an established body of jurisprudence to support the critical elements of the mediation process (for example, confidentiality, the "without prejudice" nature of the negotiations and, if desired, the procedural ability to convert mediation settlement agreements into enforceable judgments).

#### **Further resources**

- 6.4 CPR has produced a Model Agreement for Parties and Mediator which can be found at the end of the CPR Mediation Procedure at <http://bit.ly/CPRMediationProcedure.aspx>.

- 6.5 Herbert Smith Freehills' ADR client guide - "Selecting your mediator and drafting the mediation agreement" (<http://bit.ly/HSFMediatorSelection>)- explains further issues to consider when drafting a mediation agreement.

**7. MEDIATION: PREPARING FOR A MEDIATION**

- 7.1 Prior to attending the mediation day, the parties will need to prepare to give themselves the best opportunity to settle the dispute. This will include preparing the business decision makers, developing a strategy for the mediation and gathering information necessary for the day itself including information of the costs of the dispute to date and going forward if a settlement is not reached. The objective is for both parties, through proper thought and planning with their legal advisers, to remove as many obstacles to a settlement as can reasonably be anticipated.
- 7.2 Below is a checklist of issues and questions that a corporation (usually the in-house lawyer) might wish to consider in advance of a mediation.

**CHECKLIST**

<b><i>Procedure</i></b>
<ul style="list-style-type: none"> <li>• Will there be decision-making authority present at the table and who will those people be?</li> <li>• If not, how are decisions to be made and authority obtained (for example from individuals contactable by telephone)?</li> <li>• Will there be broad equality of decision makers in terms of their status in the respective organisations?</li> <li>• Are third parties interested in the outcome (insurers, others providing financial support to one or more parties) and if so are they appropriately engaged/informed to allow the mediation to proceed efficiently?</li> <li>• Is the mediation venue suitable in terms of facilities to accommodate the parties, provide food, drinks and necessary business services for the duration of the mediation? (A neutral venue is often desirable but is not essential if one or other of the parties or their legal advisers can host the mediation).</li> <li>• How are the costs of the mediation to be borne? These will include the parties' own legal costs of preparing for and attending the mediation and the parties' respective shares of the mediator's fees (and any venue fees).</li> <li>• In the event of an unsuccessful mediation, are the costs of the process to be treated as costs of the relevant proceedings (litigation or arbitration) or to be borne by the parties in any event?</li> </ul>

<b><i>Negotiations</i></b>
<ul style="list-style-type: none"> <li>• Apart from the merits of the case, are there any other issues that should be considered and discussed?</li> <li>• Is there anything that should not be discussed?</li> <li>• What information or documents will the parties need to reach a resolution? For example, are there technical issues that require some specific input for the mediation but outside a court or arbitration timetable? Is there any way to simplify complex information using pictures, charts, diagrams or other non-verbal tools?</li> </ul>

- Have the business decision makers been briefed to familiarise them with the process and prepared to play a role (ideally an active role) in the negotiation?

### **Settlement**

- How will quantum be addressed? The natural focus of the parties before a mediation is often on issues of legal liability, but the resolution will usually require at least some information on quantum, frequently before the parties have addressed the issue in detail in litigation or arbitration. Consider whether a risk analysis tool such as a SWOT (Strengths, Weaknesses, Opportunities, Threats) analysis would therefore assist.
- Apart from the money in dispute are there any other matters that might be included in the settlement (such as apologies, public statements, confidentiality undertakings, future joint ventures/relations)?
- What are the best and worst alternatives to settling the case?
- What is the value of the relevant business relationship and are there any opportunities for further business?
- What will be the cost and other consequences of non-settlement via mediation?
- Will there be any economic or reputational issues in the event that a settlement is not achieved?
- What will be the level of initial offers and how will those relate to the issues in dispute?
- What are the merits of making the first offer?
- What are the anticipated counter-offers?
- What is the range of potential settlements that are likely to be offered?
- What are the commercial bargaining positions of the parties?

### **Further resources**

- 7.3 CPR's Mediation Procedure contains in its "Commentary" section useful information to prepare for mediation. See:  
<http://www.cpradr.org/RulesCaseServices/CPRRules/MediationProcedure.aspx>.
- 7.4 Herbert Smith Freehills' ADR client guide - "[Preparing for Mediation](#)" - discusses many of the issues considered above, and additionally looks at other areas that will need to be addressed in preparation for the mediation, such as understanding the style and approach of the mediator, undertaking a risk assessment, defining a negotiation strategy and preparing the written submissions and opening statements.

## **8. MEDIATION: FREQUENTLY ASKED QUESTIONS**

### **8.1 Will suggesting mediation be taken as a sign of weakness?**

*It is a common concern of corporations that are unfamiliar with ADR processes that proposing mediation may be construed by their opponent as a sign of weakness because the objective of the process is to reach a settlement. Corporations that are experienced mediation users meet this concern by explaining to counterparties that they regard mediation as an effective dispute resolution tool which provides an opportunity to resolve disputes at lower cost, more quickly and with the best chance of preserving business relationships (where relevant).*

*It may also help if the corporation has a formal or informal policy to use ADR and in particular mediation when appropriate. This could include a public commitment such as signing CPR's*

*Corporate Policy Statement on Alternatives to Litigation*©, CPR's 21st Century Pledge or the ADR Pledge of another institution. For more details about the pledges and their signatories, see <http://bit.ly/CPRPledges>.

*Of course, the inclusion of an ADR clause in the contract substantially removes this concern because the parties have already agreed that an ADR process, usually mediation, is either a mandatory step or at least an available step in the event of a dispute.*

*Sharing positive experiences of mediation can also allay concerns. See section 9 and Appendix 2 of this guide for case studies of successful mediation stories.*

## **8.2 Will mediation increase costs?**

*It is inevitable that appointing a mediator, preparing for and attending a mediation will require legal and other costs. However, those costs are usually quite modest as compared with the costs of any litigation or arbitration that is under way or contemplated. If the mediation lead to a settlement, it is likely much greater costs will be saved; even if it does not, it is likely that the dispute will proceed more efficiently in litigation or arbitration with the parties focussing on the issues.*

## **8.3 How likely is mediation to end in a binding settlement agreement?**

*Quite likely. The EAB's experience of mediation when used in commercial disputes is that approximately 50% of disputes settle on the day(s) of the mediation. A material proportion of those that do not settle on the day nevertheless settle in the weeks or months that follow. This is usually assisted by the work that was done at the mediation to focus on the issues, assess the matter critically and realistically and to build relationships between disputing parties.*

## **8.4 Can confidentiality be preserved with respect to the matters discussed?**

*Yes, the process is confidential, and this is recognised in the EU Mediation Directive which has been implemented by all Member States. The extent to which a national court may have the power in litigation to look behind the confidentiality of the process will depend on the law governing the mediation and the law and procedure of the national court in which any related or satellite litigation takes place.*

## **8.5 Is mediation a viable option where the counterparty is reluctant to engage?**

*Mediation is a voluntary process in that the parties cannot be forced to reach an agreement, even if they are encouraged or obliged to participate in it by the law or procedure of a national court. If one party is reluctant to engage, it is often due to a lack of understanding of the process and what it can achieve. However, an initial reluctance to engage and participate can often be overcome by a good mediator who can instil trust in the process. See the Mediation Success Stories of the EAB at Appendix 2, which describe a range of commercial disputes across industry sectors that can be used as real illustrations of the process in action.*

## **8.6 Is it possible to mediate a dispute where the counter-party has committed fraud?**

*Yes. As long as the parties have sufficient trust to engage in the negotiation with each other, fraud cases can be mediated effectively and successfully. Of course the process cannot provide parties with interim remedies such as injunctions to freeze assets which are matters for a national court with jurisdiction.*

## **8.7 Is it possible to mediate a large or complex claim?**

*Definitely! Mediation has been used to resolve some of the largest and most complex*

*commercial disputes. The preparation for and approach to the mediation should be commensurate with the size and complexity of the case: if the matter is very large, consider using co-mediators to share the work and allow the process to proceed more quickly.*

**8.8 How does mediation work where there are multiple parties involved?**

*The process works in the same way except that the mediator needs to afford the multiple parties the appropriate opportunity to participate in joint sessions and private meetings. The more complex the dynamics and range of interested parties in the mediation, the more structure and communication is required from the mediator or co-mediators.*

**8.9 Can you mediate where there are language, cultural or religious differences?**

*The mediation process is flexible and can assist parties from very different backgrounds. The characteristics of the mediator such as background, language skills and training are important to allow parties to communicate with each other – and the mediator – effectively. Parties can consider appointing co-mediators where a mix of skills or experience is likely to assist with a resolution of the dispute (and the dispute is of sufficient size to justify the additional costs).*

**8.10 Is it necessary for external counsel to attend mediation?**

*It is not necessary for external counsel to attend the mediation but it is usual that they do. Some corporations with experienced in-house counsel attend mediations without external counsel.*

**8.11 Where can you get user-generated feedback on mediators?**

*CPR can assist with gathering feedback on neutrals on its lists. Many corporations seek guidance from external counsel on mediator performance.*

**9. MEDIATION: CASE STUDIES**

9.1 The experience of the members of CPR's European Advisory Board (EAB) is that it can assist organisations that are considering using mediation to understand how others have used mediation in resolving disputes in similar jurisdictions, industry sectors or circumstances. However, since mediations are confidential it can be difficult to share information of this nature publicly.

9.2 The EAB has gathered a number of case studies reflecting the experience of the members and their organisations of successful mediations. Each case study, in which the names of the parties have been made anonymous, includes an explanation of the dispute and how mediation assisted in reaching a resolution.

9.3 The case studies are included at Appendix 2 to this guide. They include case studies of disputes in the following sectors:

9.3.1 Commercial

9.3.2 Energy - contractual dispute;

9.3.3 Energy - workplace dispute;

9.3.4 Financial services;

9.3.5 Intellectual property – sales dispute;

- 9.3.6 Intellectual property - licensing dispute;
- 9.3.7 Insurance and reinsurance;
- 9.3.8 Pensions;
- 9.3.9 Pharmaceuticals;
- 9.3.10 Products liability;
- 9.3.11 Real Estate;
- 9.3.12 Service supply.

## 10. **ARBITRATION**

- 10.1 Arbitration is a private adjudicative dispute resolution process that is based on a contractual agreement to submit the relevant dispute to arbitration. It usually results in a binding award given by the arbitrator or arbitral panel (although it may in rare cases be non-binding if the parties so agree). The arbitrator acts as an independent, impartial and neutral third party and the entire process is governed by the arbitration agreement signed by the parties and the rules of the arbitral institution (if any) agreed by the parties. Arbitral awards can rarely be appealed unless permitted by the arbitration agreement (and on limited grounds in some jurisdictions). For example, CPR has an optional appellate procedure which can be incorporated into arbitration clauses (see <http://bit.ly/CPRAppealArbitration>). Arbitral awards can generally be set aside (annulled) by courts of the state of the seat of arbitration on certain, very limited grounds, relating essentially to due process concerns.
- 10.2 Arbitration is characterised by party choice. It therefore allows much more freedom to contracting parties regarding the procedure for resolving their dispute than would be the case if the matter was litigated in national courts. Arbitration offers parties flexibility in being able to choose their own arbitrator or arbitral tribunal, in particular by specifying the qualifications and experience of any arbitrator to be appointed.
- 10.3 Arbitration is generally considered to be a confidential process both as to the arbitration itself and the documents created in connection with the arbitration, although local law and practice and the rules of the relevant arbitral institution may vary in this regard.
- 10.4 Binding arbitration awards are widely enforceable through the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) which requires the courts of contracting states to recognise and enforce awards made in other states subject to certain limited exceptions, generally comparable to those permitting annulment by courts of the state of the seat of arbitration.
- 10.5 For a comparison of the arbitration process with other methods of ADR, refer to the table in section 1.

### **Model arbitration clauses, the selection of procedural rules and appointment of arbitrators**

Any arbitration is based in an arbitration agreement which could be an independent agreement entered into after the dispute has arisen or, more commonly, through the clauses of an existing contract entered into before the dispute has arisen. CPR provides a repository of model clauses suitable for different kinds of arbitration which can be accessed here: <http://bit.ly/CPRArbitrationClauses>.

- 10.6 While arbitrations can be conducted in an *ad hoc* manner where the parties are responsible for agreeing on their own rules of procedure, the parties can also choose from amongst various international arbitral institutions and their model rules to provide a procedural framework for the conduct of the arbitration. CPR has produced procedural rules suited for different situations.



- 10.7 The CPR Administered Arbitration Rules can be accessed here: <http://bit.ly/AdministedArbitration>.
- 10.8 For information about CPR's administered arbitration rules for international disputes, see CPR's website at: <http://bit.ly/IntAdministeredArbitration>.
- 10.9 For information on CPR's non-administered arbitration rules, see CPR's website at <http://bit.ly/nonadministeredarbitration>.

#### **Settlement in arbitration**

- 10.10 Arbitration and mediation are often used to complement one another as part of a sequential dispute escalation process (typically mediation first, then arbitration). These processes may also be used in parallel. The extent to which an arbitral tribunal will raise the subject of settlement with the parties to the arbitration (whether through mediation or otherwise) varies depending upon the characteristics of the tribunal, the procedural rules under which the arbitration is being conducted, and the laws and practices relevant to the proceeding, the parties and the arbitral tribunal.

#### **Further resources**

- 10.11 There is an enormous quantity of material available to assist parties considering using arbitration.
- 10.12 CPR's Arbitration Committee has produced a number of protocols and guidelines to increase the efficiency of arbitration, such as:
  - 10.12.1 The CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration (see <http://bit.ly/CPRDisclosureProtocol>),
  - 10.12.2 The CPR Protocol on Determination of Damages in Arbitration (see <http://bit.ly/CPRDamagesProtocol>),
  - 10.12.3 The CPR Guidelines on Early Disposition of Issues in Arbitration (see <http://bit.ly/CPRDispositionGuidelines>),
  - 10.12.4 The CPR Guidelines for Arbitrators Conducting Complex Arbitrations (see <http://bit.ly/CPRArbitrationGuidelines>).
- 10.13 Herbert Smith Freehills' ADR client guide – "Use of mediation with arbitration" (<http://bit.ly/HSFMedArb>) - provides an overview of the practical aspects of using mediation with arbitration.

## APPENDIX 1

### INDUSTRY SECTOR-SPECIFIC RESOURCES

#### OIL & GAS

Model form contracts of LOGIC (Leading Oil and Gas Industry Competitiveness), including its General Conditions of Contract for Construction for the UK Offshore Oil and Gas Industry, include a stepped dispute resolution provision that provides:

- a) First that the dispute be referred to company representatives who shall seek to reach agreement;
- b) Then, if no such agreement is reached, the dispute is referred to two named individuals as identified in the agreement;
- c) Thereafter, if no agreement is reached, the matter shall be referred to the managing directors of each company; and
- d) Failing the agreement of the managing directors, the parties may settle the dispute by a form of alternative dispute resolution agreed by them.

#### CONSTRUCTION

CPR Construction Advisory Committee has produced three briefings: Partnering: A Management Best Practice; Realistic Allocation of Risks: The First Step in Dispute Prevention; and Dispute Review Boards (DRBs): A Management Best Practice.

Construction disputes are commonly subject to typical multi-tiered ADR processes as reflected in the widely adopted FIDIC Red Book (Construction Contract 1<sup>st</sup> ed. (1999), Conditions of Contract for Construction, for Building and Engineering Works Designed by the Employer, published by the International Federation of Consulting Engineers ("FIDIC") that provides that disputes first be referred to:

- a) A Dispute Resolution Board ("DRB")<sup>1</sup> often structured to provide decisions on an interim basis (recommendations);
- b) A Dispute Adjudication Board ("DAB") that issues binding decisions.

#### COMMODITIES AND MARITIME

There also exist dispute resolution rules tailored for specific sectors of the economy:

In the field of commodities, a widely used set of dispute resolution rules is the National Grain and Feed Arbitration Rules (2009).

In the field of maritime and salvage, there exist various sets of rules including:

- a) The London Maritime Arbitration Association Terms (2012);
- b) The German Maritime Arbitration Association Rules (2013) and
- c) The Society of Maritime Arbitration Rules (2013).

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<sup>1</sup> See DRB Manual in 1996 by the American Society of Civil Engineers ; [ICC Dispute Board Rules in several languages](#) (2004) ; AAA Model Documents (2000)

## **INTELLECTUAL PROPERTY**

The CPR Patent Task Force has published a Protocol in 2012: “Report of the CPR Patent Mediation Task Force: Effective Practices Protocol.” The protocol provides recommendations for the mediation of patent disputes. See <http://bit.ly/CPRPatent>.

CPR has also drafted Fast Track Mediation and Arbitration Rules of Procedures, which are particularly adapted to IP disputes. See <http://bit.ly/CPRFastTrack>.

## **FRANCHISE DISPUTES**

A CPR Procedure for Resolution of Franchise Disputes was developed in 1994 in collaboration with the International Franchise Association, the Asian American Hotel Owners Association, and the American Association of Franchisees and Dealers. It provides for a negotiation phase followed by a mediation phase. It has been used by many leading franchisors, franchisees and franchisee associations. See <http://bit.ly/CPRFranchise>.

## **INSURANCE & REINSURANCE**

CPR has drafted Mediation Principles for Insurer-Insured Disputes, designed to encourage parties to engage in mediation when faced with the prospect of coverage or other insurance-related litigation. See <http://bit.ly/CPRInsurance>.

The CPR International Reinsurance Industry Protocol was drafted by representatives of leading companies and law firms in the London and American insurance markets, and is offered as a statement of “best practices” to encourage the early and efficient resolution of disputes between Reinsurers and the Reinsured. See <http://bit.ly/CPRReinsuranceProtocol>.

## APPENDIX 2

### MEDIATION: CASE STUDIES

As discussed in section 9 of this guide, CPR's European Advisory Board (EAB) has gathered a number of case studies reflecting the experience of the members and their organisations of successful mediations. Each case study, in which the names of the parties have been made anonymous, includes an explanation of the dispute and how mediation assisted in reaching a resolution.

#### **Commercial Dispute**

A Company was facing some strife when one of their resellers was taking advantage of one of the resellers programs. The program allowed partners to re-sell the Company's products and the partner was asking for discounts based on their re-sales. But, there was evidence that the partner was not achieving their stated sales numbers for the products, as contractually required. So, the Company attempted litigation and brought a damage claim against the partner worth millions of dollars. However, the litigation was arduous and the parties and their respective outside counsel had numerous acrimonious exchanges. Furthermore, the partner initially refused an audit, which ultimately forced the Company to obtain a court order requiring the partner to succumb to an audit.

Before the parties agreed to meet for mediation there was a failed roundtable discussion the parties had with their outside counsel. After the roundtable, the parties were about to exchange witness evidence, but sat down and met for mediation before going any further. The mediation succeeded, although interestingly a settlement was not reached until ten days after the mediation concluded. The settlement involved the partner paying the Company a bit less than two-thirds of the original damage claim.

The mediation itself, and the choice to use mediation, was certainly a success because it allowed the lawyers to take a step back and the parties focused on the business issues at hand. The discussions were largely between the relevant individuals (the businessmen), which allowed for a much broader discussion focused on business issues. This was imperative for a settlement to be reached because a trial would have inevitably focused on legal arguments, to the detriment of the parties.

#### **Energy - Contractual Dispute**

A European manufacturer of Wind Turbine Generators entered a long-term supply contract with a Northern European Wind Power Developer. Problems arose when the contractual agreement between the two international companies ran into some issues. The developer had issued a down payment on the date the contract commenced and the manufacturer started production on the goods shortly afterwards. Yet, after the initial supplies were completed by the manufacturer, the developer announced its intention to cancel all long-term agreements due to the crisis. The manufacturer believed it had the right to retain the down payment in full, while the developer insisted it was entitled to recover a percentage of the down payment that corresponded to the amount of supplies that were effectively completed by the manufacturer. Eventually the developer decided to issue a mediation claim asking for reimbursement of the outstanding down payment.

The mediation took four months to complete, but this included all of the preparation leading up to the mediation meetings and the parties only met for one and one half days in Paris. The agreement allowed the manufacturer to retain eighty percent of the down payment, while giving back the remaining twenty percent to the Wind Power Developer. The costs for each of the parties were relatively minimal as the dispute was resolved quickly. They split the mediation filing fees and administrative expenses, and the mediator's fees and expenses. Furthermore, each of the parties had costs for travel and time spent mediating. Lastly, the developer needed to pay for assistance from external counsel.

The mediation was undoubtedly a success. The mediator spoke the native languages of each party fluently, which dispelled any misunderstandings or personal issues. Furthermore, the parties' best alternative to a negotiated agreement (BATNA), or the best option for each party if the mediation was unsuccessful, was a lengthy and costly arbitration process. So, they knew that a resolution during mediation was ideal because it saved them time (this was a highly escalated conflict that could have lasted for years but was resolved in several months) and likely hundreds of thousands of Euros. The mediation process also kept the dispute confidential, which was important to the parties because industry press regarding a dispute, in a small business community, would have been detrimental to the business interests of the parties. When the dispute concluded the parties agreed that mediation allowed them to (1) avoid personal issues, which could have blocked a logical solution; and (2) have an opportunity to work together in the future if new market circumstances allow it.

### **Energy - Workplace Dispute**

A national conflict existed between a power station's managing directors and its workers' council (a body representing the workers of a plant, factory, etc., elected to negotiate with the management about working conditions, wages, etc.). The struggle was long lasting and headed to a non-administered in-house mediation after both parties agreed it was the best option in order for them to reach an agreement. The dispute arose from many factors. Among them was a lack of communication between the managing directors and the workers' council, which led to a lack of trust and information between the two. Furthermore, the rate class for various occupational groups was under dispute. The non-administered in-house mediation was mediated by an in-house pool of mediators and took six full-day meetings over three months to reach a settlement.

The content of the settlement included an extensive written agreement. The contract incorporated a section where both parties needed to keep each other informed as to what was going on in the future, and the power plant was required to craft plans for common presentations to be held for all power station staff. In addition to these all-staff meetings, there was a declaration in the arrangement to regularly hold meetings with defined participants and competencies on specific topics. Finally, the parties agreed to an assignment of occupation groups to rate classes. The mediation format restored the sense of partnership between the executives and the members of the workers' council and an understanding of their mutual roles had risen significantly. The initial misunderstandings were dispelled and constructive solutions were developed based on trust and shared confidence. Another key to the success of the mediation was the parties' recognition that the successful operation of the plant was a common goal both for the managing directors and for the workers' council. At the end of the dispute, most staff members recognized that the relationship between the former disputants had drastically improved.

There were many advantages to having a mediation and using that specific format. First, it allowed the dispute to remain confidential and the power station was able to remain open during the conflict. Second, it saved both parties a considerable amount of money because the conflict was resolved promptly and neither party needed to pay an exorbitant amount in legal fees. Ultimately, the mediation process solved the parties' problems in just six meetings, where a litigation could have lasted years. Because of this, millions of Euros were saved by the disputants as they avoided long-term legal fees and a strike. Furthermore, it was crucial for the dispute to remain confidential because the workers' council had threatened to close down the plant, via a strike, prior to the mediation. If this had happened it would have made headlines in the news, thus making the conflict publicly known, which could have had a problematic impact on the company because the power station's image could have been tarnished both in the public sphere and in its own industry. The mediation ultimately prevented the strike, kept the dispute confidential, and allowed the power stations reputation to remain intact.

### **Financial Service Dispute**

Merchants and banks have been at war, for decades, about the level of fees merchants pay to accept payment cards. The fees (interchange fees) are charged by the payment networks, credit card companies, to the retailer and are generally a percentage of each transaction. They are received by the issuing bank at the time of settlement to partially cover fraud, credit losses, and processing costs.

In 2005, the merchant community challenged the fee's legality in a class action with multiple lead plaintiffs seeking to invalidate the interchange fee along with billions of dollars in damages. The case was further complicated by some large merchants who "opted out" of the class and brought their own actions. Finally, the case was not only brought against the credit card companies, but almost all of the major card issuing banks. The negotiating teams included a large joint defense group, the class plaintiffs and the individual plaintiffs.

The credit card companies sought to initiate a mediation process from the inception of the case having experienced protracted industry litigation in the past. Two highly respected mediators were retained. The key issues were (a) financial settlement regarding alleged damages; (b) the interchange fees; (c) the inability of merchants to surcharge and thereby not pass on all or part of the fees to consumers. A trial could only address some of the concerns i.e. whether the practices at issue were lawful or not, and, as such, an active mediation with creative mediators was essential. The parties took part in several mediation sessions, some individual and numerous joint, over many months. The mediators spent many months trying to bring the parties together. In the process they encouraged active brainstorming and involvement by all parties to find solutions to each and every issue. They continually asked the parties to put themselves in the shoes of the other side on many issues. However, this was not without extraordinary tension, anguish, and in some cases hostility. The ultimate settlement included (1) a straightforward, albeit difficult (due to its zero-sum nature), cash settlement; (2) a very detailed arrangement on the surcharging issue involving when it could be imposed, its maximum levels, what it could be based upon, and other components; and 3- the reduction of interchange fee levels for a short interval to give time for the potential industry practice changes to be absorbed and possibly impact market conditions and fee levels. Moreover, a judge was actively involved, which was unique, and he helped the parties resolve a number of thorny issues and played a dynamic role in finalizing the settlement terms.

As anticipated, this settlement has been challenged by a number of parties and the appeal before the court is pending; yet, the mediation process was resoundingly successful because it yielded creative solutions, was prompt, preserved business relationships or at least didn't further damage them, and allowed the parties control over the outcome. Creative solutions were reached because the parties were drawn into a process emphasizing what mattered to them, each of their interests as opposed to a focus purely on legal rights and obligations. No court imposed remedies could have even approximated the nuance achieved by the settlement terms because they were commercially derived as opposed to the product of a purely legal decision. The mediation was relatively prompt because, although the process took years, when it was finalized there was still no ruling on dispositive pre-trial motions. Accordingly, a full trial followed by an inevitable appeal would have taken many more years. Relationships between some of the parties were actually improved because working through issues and reaching resolutions eased some of the tension between them. Finally, control over the outcome was imperative for both parties. Trial for defendants would have created the potential for massive financial loss and changes in industry practices not ushered into the market in a thoughtful consumer-oriented way and for plaintiffs, a trial could have meant zero financial recovery (all or nothing) and no control over changes in industry practices.

### **Intellectual Property – Sales Dispute**

A supplier brought a claim against another company for over one million dollars because of alleged breaches to written and oral contracts and intellectual property infringement. The dispute was very badly managed from the start and inter-BU finger-pointing stalled the process even further. The monetary claim between the parties was initially assessed at a number shy of one million dollars, but the parties eventually settled at a number slightly higher than one half of one million dollars.

The entire settlement process (from the time the initial action was brought to the time the mediated settlement was executed) took eighteen months. Mediation saved both parties time and money because resolving the conflict in a courtroom, at trial, would have taken much longer and increased legal fees exponentially. The preparation for the mediation was intense and detailed and the evidence-gathering turned out to be critical because it allowed the mediator to engage the BU stakeholder almost immediately and get him/her involved on the right level. This allowed the



mediation process to cut through any bureaucracy and/or politics and to focus on the true issues at hand.

### **Intellectual Property – Licensing Dispute**

A long lasting conflict, between a licensor and licensee over the extent of the scope of a signed intellectual property (IP) licensing agreement, was headed towards a mediation. It was an international business-to-business conflict and there were a few main issues between the disputants. First, an interpretational issue was present because both sides disagreed on the scope of services that were licensed under the already signed licensing agreement. Second, one of the two parties underestimated the other and held a certain level of contempt towards them.

The mediation had a single mediator and only two meetings with the parties were needed to resolve the dispute. With all of the preparation leading up to the mediation sessions, the overall time period, from start to finish, was approximately six short months. Costs were mostly limited to the mediator's fees and the time the participants spent mediating. The fact that the mediator had considerable experience in both mediation techniques and the subject matter contributed greatly to the success of the mediation. At the end of the dispute, it was clear that the mediation created cooperation and helped each of the disputants gain trust in each other once more.

Some of the main advantages to the mediation were the fact that the dispute remained confidential and was resolved very quickly. Being that the conflict was an international business conflict, it was paramount for both parties to remain out of the press and headlines, which could have led to bad publicity. The confidential mediation allowed them to satisfy this need with ease. Furthermore, prior to the mediation the conflict had lasted for a couple of years. Yet, when the parties met for mediation, it took them merely two meetings to resolve the issues that they were facing. Lastly, being that the business relationship was international in nature, failure to use mediation would have triggered an administered international dispute resolution process that would have been lengthy and may not have satisfied the objectives of the parties in the same way the mediation did.

### **Insurance and Reinsurance**

A European offshore contractor was insured under a constructional risks (CAR) insurance policy taken out by a joint venture of international oil companies in respect an offshore construction project in Indonesia. The insurance was underwritten by three Indonesian insurers as required by local law who retained 5% of a risk and reinsured 95% to the London (re)insurance market. In the course of construction of the project, a leak was found in an offshore pipeline. The costs of the leak search and repair campaign were approximately \$100million. A claim was presented under the CAR policy to the Indonesian insurers and was declined based on the instructions of London reinsurers who had full claims control. The issues in dispute included points of policy construction including exclusions of coverage for corrosion. The case involved extremely complex engineering expert evidence as to the cause of the loss.

The European contractor was well-known to the London reinsurers and agreed to mediation in London to see whether the claim could be resolved before proceedings were commenced against the Indonesian insurers in the Commercial Court in London (the Indonesian insurers would in turn have to sue the London reinsurers to pass on the claim, if found liable). The mediation was convened without the Indonesian insurers attending in person but they had to give authority to London lawyers and to reinsurers to represent them at the mediation. The mediation itself provided a forum for both parties to test the competing expert evidence in a confidential and without prejudice environment, to seek to understand areas of common ground and narrow points of difference between them. It also allowed the parties to test competing arguments on the proper construction of the insurance policy with the assistance of a mediator who was highly experienced in both oil and gas projects and insurance disputes.

Ultimately a settlement was negotiated directly between London reinsurers and the European contractor, notwithstanding there was no privity of contract between them. This innovative outcome allowed payments to be made more quickly to the European contractor and avoided difficulties that

could have arisen on enforcement of an English court's judgment in Indonesia against the Indonesian insurers. All parties were satisfied with the outcome and maintained their trading relationships.

### **Pension Dispute**

A legal dispute began when there was a drafting error in the trust deed that existed between a Company and another party. There was a question as to whether the Company was obligated to make increases to members' AVC contributions (Additional Voluntary Contributions). The Company sought to rectify the deed issue without litigation; yet, they also issued negligence proceedings against the law firm that made the error. Eventually there were four parties that were involved in the conflict: the Company, its trustees, a representative beneficiary, and the law firm that made the error. The parties decided to pursue mediation two weeks before the dispute went to trial.

Being that there were four parties, it was difficult for them to agree to anything. In fact, even the mutual decision to mediate was a challenge to obtain. Prior to approving the mediation, the representative beneficiary's attorney was making various and unusual demands. For example, he/she was requesting a commitment for any potential offer to be more than 50% and insisted that he/she would only attend a mediation for a meagre four hours. Despite the initial problems the mediation was a success because of the flexibility of the mediation process. It was essential to allow the parties to select a suitable mediator (who could engage sensibly with the representative beneficiary's attorney) because it showed the parties that they could come to an agreement, together, at the very start of the process. The mediation also allowed the parties to discuss and overcome a number of issues face-to-face, which likely would not have been the case if the parties had opted for trial.

### **Pharmaceutical Dispute**

A €59 million share and asset purchase agreement between two European pharmaceutical companies ran into some problems when accounting issues arose and allegations, from the Purchaser, began to surface that the entity of purchase was not as described. An arbitration clause in the original agreement was temporarily suspended and the two companies appointed a Swiss mediator to mediate the dispute. Prior to the mediation, the mediator held a two-hour call with the parties' attorneys to determine how to approach and structure the mediation. The parties also had a "document exchange" with the mediator and sent a list of interests and needs, for the mediation, to the mediator. Finally, each party agreed to bring three representatives - who had the power to negotiate and approve a settlement - to the mediation.

The mediation began at 9:00 AM. The Seller had brought 3 representatives, the buyer had 17; however, the mediation proceeded with all 20 people in the room. The mediation was conducted in English, but the caucuses were held in the language of each of the parties, as the mediator spoke them. After a short two hours, trust was restored between the parties. Indeed, the initial discussion avoided money and instead focused on and resolved feelings of betrayal, cheating and even crookery based on shared values and ethical codes. It also evolved into a conversation concerning the parties' best alternative to a negotiated agreement (BATNA), or the best option for each party if the mediation was unsuccessful. Both parties had thought of arbitration as their BATNA to mediation; however, the estimated costs of arbitration differed greatly. The Seller had privately calculated the cost of arbitration to be €400,000 whereas the Buyer thought, and voiced in the mediation, that the cost would be closer to £1.6 million. The "reality check" was quick: an amicable solution via the mediation was best, also with respect to the costs involved. The ultimate issue was one of perception and communication about the reciprocal expectations, which was finally solved after each party was able to sit down and listen to the other side. The mediation concluded after a settlement was reached the same day, at 7:30 PM.

The parties then re-drafted the share purchase agreement, which included, notably, re-evaluating the purchase price by agreeing on a formula to calculate the final price. The mediator was copied on the redrafting via email.

The overall cost of the mediation was approximately \$18,000 (€16,000 or £11,500), which was a great savings considering the estimated arbitration costs. Furthermore, the dispute was resolved in one day and the business relationship between the parties was restored. Lastly, mediating the dispute allowed for privacy and essential confidentiality because one of the companies involved was publicly traded, and any ongoing arbitration could have been extremely detrimental.

### **Products Liability**

The UK subsidiary of a European bulk gas supplier was in dispute with a German company that supplied valves and regulators for use with compressed gas cylinders. The claim alleged that the valves were defective and liable to fail catastrophically when gas cylinders were pressurized, posing serious risks of personal injury and property damage. The claimant gas supplier provided gas cylinders to bars and restaurants to dispense beers and other drinks. It would have been liable for third party injury or damage claims in the event of the cylinder valve failures and was obliged to carry out a national recall of gas cylinders from bars and restaurants and institute an urgent programme of replacing the defective valves with valves of a different specification.

Litigation was commenced by the UK gas supply company against the German gas supplier in England and a mediation was scheduled after the parties had set out their respective cases in the pleadings but before the heavy costs of disclosure (discovery) took place. At the mediation there was an opportunity for the parties and their experts to understand differences of view about the likely cause of the valve failures and for the claimant gas supplier to demonstrate the basis of the quantum of its claim.

However, in the course of the mediation, the mediator established in a private meeting with the German valve supplier that it had cash flow difficulties and was unlikely to be able to fund a single settlement payment at a level acceptable to the claimant, or satisfy a judgment if the claimant was successful.

Working with the mediator, the parties agreed to compromise the dispute with a series of staged payments made over a period of 5 years which the German valve supplier could meet. There was an initial cash payment of 50% of the settlement sum and then annual tranches of smaller sums paid in subsequent years. To ensure that the German valve supplier was able to satisfy its payment obligations, the parties agreed that the German valve supplier would open letters of credit with a reputable bank which would enable the claimant to draw down on the letters of credit on demand if the German valve supplier missed an annual payment. In addition, the German valve supplier agreed to offer the claimant a discount on additional products up to an agreed value over a 3-year period to encourage the maintenance of the trading relationship. The parties left satisfied with the outcome and avoided the risk of the case proceeding to trial and a judgment which the German defendant simply would not have been able to satisfy, leading to its insolvency.

### **Real Estate Dispute**

A conflict arose between two real estate companies when, after finding real estate for a common client, the smaller company felt they were owed CHF 120'000.-, by the larger as its share in the brokerage fee. The larger real estate company determined the amount was not owed and the issue was initially brought to court. After some time, the court conciliator recommended the parties attempt mediation.

Prior to the mediation, the mediator structured the mediation process with the parties and requested a list of interests from each party to determine what they desired from the mediation. The mediator then held a preparatory call with both parties almost immediately prior to the mediation. At the mediation day, the parties settled after merely three hours, the trigger being the proposal of the smaller real estate company to give the contested amount to a charity which would represent the shared values of both companies.

Trust being restored, they agreed on principles for future business relationships in their geographically tiny market and formalized them, which was something that would likely have been

ignored in court or arbitration as the focus would have been on the legal issues and not the business relationship. This was important to both real estate companies because it allowed them to maintain control over the dispute and their future dealings.

Finally, the promptness of the resolution benefited both companies because they no longer needed to allot attention, manpower, time and money to the disagreement, and they could focus on business instead.

### **Service Supply Dispute**

A supplier of services and its client had a long lasting conflict and the two decided to attempt to resolve their dispute using mediation. It was an international conflict and there were multiple topics at issue between the parties. To begin with, both parties lacked confidence in the other, and the supplier of the services had some resentment towards its client because the services were being provided in an environment with extremely hectic conditions due to war. Moreover, the parties had differing interpretations regarding the obligation of payment.

The mediation reached a conclusion after only one afternoon session and the preparation leading up to the mediation extended the overall time period to a mere seven days. The settlement consisted of a one-page settlement agreement that was signed by the parties at the end of the mediation session, and the agreement stipulated that the parties needed to regularly keep each other informed of any potential new services that could be offered. There were no external costs other than the cost to lease the conference room where the mediation took place and the time that the parties devoted towards the dispute. The mediation and settlement were successful because the client came to understand the hardship that was endured by the supplier, since the supplier was providing services in such a hectic environment. Additionally, the misunderstandings with payment obligations were dispelled, which restored a sense of partnership between the supplier and the client. It was quite clear the mediation created a restored relationship between the parties because staff members, who did not participate in the mediation, commented on how the idea that the parties were “opponents” had completely disappeared.

Some of the main advantages to the mediation were the fact that the dispute was resolved very quickly and saved both parties a great deal of money. Before the mediation started the supplier had initiated a legal action, but each party recognized that time was of the essence. So, the parties commenced the mediation, which saved the disputants several thousand euros in legal fees, and the mediation allowed immediate payment to the supplier for half the amount originally claimed. A long trial would have lasted years and could have led to bankruptcy for the supplier.

### APPENDIX 3

#### CPR EUROPEAN ADVISORY BOARD MEMBERS AS OF AUGUST 2017

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Vice-Chair:	Isabelle Robinet-Muguet, Orange S.A.
Secretary:	Vanessa Alarcon Duvanel, White & Case LLP
Executive Council:	Olivier P. André, CPR Stefano Catelani, Dupont James Cowan, Shell International Limited Teresa Giovannini, Lalive Noah Hanft, CPR Clifford Hendel, Hendel IDR Ralf Lindbäck, Wärtsilä Corporation Alexander J. Oddy, Herbert Smith Freehills Isabelle Roux-Chenu, Capgemini Service Felix Weinacht, Deutsche Bank
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