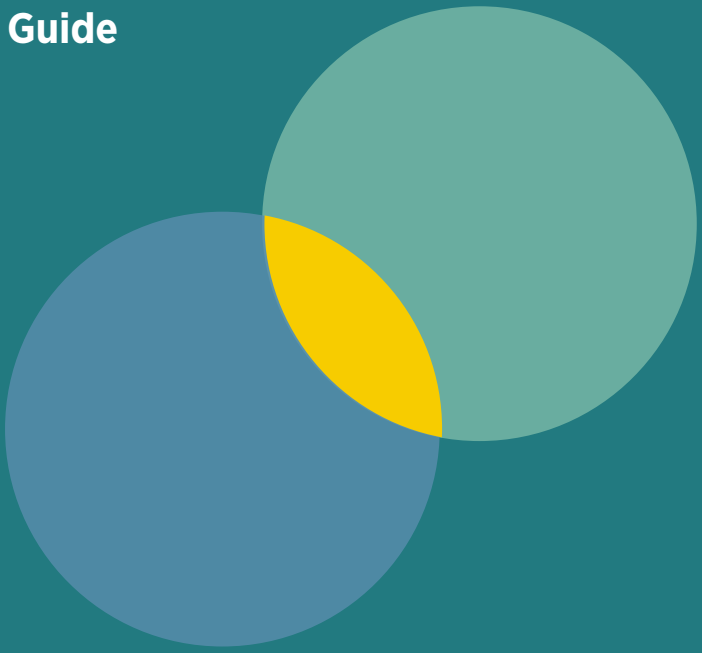
COMMERCIAL MEDIATION & YOU

A Practical Guide



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Cercle Montesquieu
Association des directeurs juridiques

TARGET

This practical guide is designed for all legal professionals, and in particular, in-house counsels. Its purpose is to provide a pragmatic overview of what commercial mediation is, the reasons for its use, as well as when and how to do so.

RATIONALE

While commercial mediation offers numerous advantages, it still remains insufficiently known in business circles. Yet, its potential to resolve disputes in line with the company's objectives should make it the preferred option.

Legal counsels' familiarity with commercial mediation*

2,7/5

METHOD

Three surveys were drawn up and distributed to judges, attorneys, and heads of legal teams at the end of 2022. The surveys were followed, in the first quarter of 2023, by individual interviews with various key figures in the commercial mediation space. The results of these surveys directed the creation of this kit.

ACKNOWLEDGEMENTS

The Cercle Montesquieu along with its partners (law firms Baker McKenzie and Lacourte Raquin Tatar, as well as the business mediation center Equanim International), extends its gratitude to those who participated in the interviews and dedicated their time to respond to the surveys.

**Findings from the Cercle Montesquieu survey conducted in the first quarter of 2023.*

HOW CAN A LEGAL DEPARTMENT CREATE VALUE FOR A COMPANY IN MANAGING ITS DISPUTES ?

01 THE COMPANY AND DISPUTES

The company :
a rational management of its resources to achieve its business goals

- **Creating value** and developing business activities through the production of goods or services for its relevant markets, while respecting its societal commitments.
- **Managing individuals and resources** through a rational, controlled, and optimized business approach.

Disputes :
an obstacle to achieving corporate objectives

The company often entrusts the outcome of a dispute to a third party, judge or arbitrator, who will impose his or her decision. This is a source of :

- **uncertainties :** dependent on a third party's decision, the company resigns itself to not being able to plan ahead and to remain without visibility on the final outcome, its costs, and its deadlines.
- **internal or external tensions,** as well as a mental and financial burden (costs of service providers, general internal expenses, time lost to the detriment of the business, etc.).

Why do litigation reflexes persist?

- **Internal culture and common practices :** in the event of a dispute, operational managers often consider that "it's no longer their business". Their positions can be stalled without sufficient hindsight, with the opinion that the company must "win at all costs" and that it "cannot afford to give up".

- **Collective thinking :** the solution requires to take a firm litigious stance which must be supported by the company's in-house legal department and their outside counsels who are tasked to demonstrate the company's case is right "at all costs".

An alternative exists : mediation !

How do you manage disputes ?

- How often does your company resort to a judge or an arbitrator ?
- How satisfied have you been with such an outcome ?
- Are you also considering an amicable solution ?

Do you know the average cost of legal proceedings for your company ?

- **Your internal costs**
  Time spent by operational and support staff, loss of sales, travel expenses, etc.
- **Your external costs**
  Attorneys, experts and consultants' fees, judicial costs, etc.
  ... multiplied by the number of years of proceedings and judicial reviews !

Average length of litigation

~36 months
Commercial litigation in Paris (lower court and appeal)

~26 months
ICC arbitration proceedings*

Average length of a mediation

~15,6 h
on average**

3 months
renewable once, for judicial mediation***

**ICC Dispute resolution, 2019 Statistics, International Chamber of Commerce, p.17*
***CMAP barometer of mediations, 2022.*
****Article 131-3 of the French Code of Civil Procedure.*

02 MEDIATION, A SOLUTION FOR YOUR COMPANY'S NEEDS

What is mediation ?

Mediation is an amicable and voluntary process in which two or more parties, with the help of a third party, the mediator, seek to put an end to their dispute by reaching an agreement.

Role and qualities of the mediator

- The mediator does not rule on the dispute, nor does he uphold anyone's opinion.
- He assists the parties in reaching an agreement, and may suggest solutions, including extra-legal ones.
- Impartial, independent, competent, and diligent : he is trained in mediation and must meet the requirements set by law.

Main advantages of mediation

Confidentiality

Information and matters discussed/exchanged in mediation may not be divulged to third parties or invoked in any proceedings, unless agreed upon by the parties.

Nonadversarial nature

Each party can communicate information to the mediator without having to disclose them to the other party, and/or may meet separately with the mediator in caucuses.

Giving effect to the intent of the parties

The solution is the one they have worked out together, and will only be accepted if they are satisfied with it.

Flexibility

The parties are free to enter or terminate the process at any time, and design it to meet their specific needs (dates, place, duration, number of parties, etc.).

Preservation of certain merits of judicial proceedings

Mediation may be supported by a mutually agreed expertise, and the final settlement may be subject to the same legal enforceability as a court decision.

The dispute stalls and escalates as the parties clash : each party insists on its position ; neither one hears the other.

Mediation allows the parties to confront each other. Points of view are presented in a setting that allows them to be respectively heard.

All aspects of the dispute and the business relationship are discussed. The points to be dealt with are identified and acknowledged by the parties.

The mediator assists the parties in resolving these issues, by ensuring that a constructive exchange of views is continuously maintained.

Around 70% of mediations end in a settlement, resolving the dispute in whole or in part, or even other matters having arisen out of the exchange between the parties.

Mediation enables disputes to be resolved quickly, while opening up new perspectives for the parties.

Images extracted from the presentation on mediation by Nicolas Fournier, mediator, available on : https://youtu.be/kMjI8XFVbII

02

MEDIATION, A SOLUTION TAILORED TO CORPORATE OBJECTIVES

How does mediation meet corporate objectives ?

Speed and lower costs
The ratio time/cost/success rate is excellent. For example, not having to unearth all the potentially relevant documents (restoring the numerous exchanges, establishing the history, etc.) for their production in the proceedings represents a very significant saving.

Elimination of uncertainties
The solution is co-constructed by the parties and not imposed by a judge or arbitrator, who knows neither their relationship nor their business.

Opportunity to create value
Mediation enables finding practical, “win-win”, business-oriented solutions, integrating business and human elements, unlike litigation.

Calendar in line with the company's needs
Mediation may be implemented quickly, allowing the dispute to be dealt with "on the spot", without the information, team memory and resolution spirit to vanish over time.

Reduced mistrust between parties
Confidentiality and the mediator’s ability to regulate the parties’ exchanges help to restore trust between them.

Control of the company's reputation
Mediation is confidential as a matter of principle, but in the event of success, the parties may agree on joint positive communication.

The point of view of a former president of the Paris Commercial Court
" Mediation is very effective in disputes where litigation would be detrimental to both parties (such as disputes between partners) or when they have common futures to share.”

The executive’s point of view
"Mediation is a no-downside deal, it only has positives."
CEO of a listed group

" Reciprocity prevails in mediation. When it results in a settlement agreement, everyone wins."
A legal director

" Mediation is developing because of CSR. It takes into account the sustainability of business relations... and in any event, much more than litigation."
An attorney

" Mediation should not be perceived as a sign of weakness within a company, because it can be interrupted at any time, everything is confidential, and it shows a constructive approach of the dispute to the other party. "
A legal director

" Mediation is a testimony of company executives’ courage."
A former chairman of a German listed group

Cost

1,5%
Percentage of mediation costs/amounts in dispute*

Success rate

~70%
of mediations end with a settlement agreement**

Satisfaction

70%
of legal departments are satisfied with mediation once implemented***

**Cercle Montesquieu survey results, first quarter 2023*
***Cross-referencing of data between French (CMAP, “Médiateur des entreprises”) and UK (CEDR) sources*
****Result of the above-mentioned survey*

03 WHEN SHOULD MEDIATION BE IMPLEMENTED ?

Which disputes are suitable for mediation ?

Mediation is suitable for any type of conflict and may be used to settle several disputes at the same time (which may not, in case of litigation, fall within the same jurisdiction and/or be at the same procedural stage). It is particularly suitable for the following types of disputes :

- contract and tort ;
- M&A (pre-closing, vendor warranties, earn-outs, etc.) ;
- industrial risks and major projects ;
- governance or conflicts between associates/partners ;
- commercial leases ;
- sudden breakdown of negotiations or established relationships ;
- guarantees and insurance indemnities ;
- new emerging litigation areas :
  - > *with NGOs and associations, for instance in cases relating to the duty of care ;*
  - > *in class action disputes (e.g. consumer rights) with public authorities and regulatory bodies.*

When should mediation be initiated ?

At any time, provided the parties in dispute agree :

- **before any litigation :** when the parties decide to enter into mediation spontaneously, or pursuant to a mediation provision in an agreement ;
- **during proceedings :** a mediation may be ordered by the court or, alternatively, agreed voluntarily between the parties in dispute, with or without suspension of judicial proceedings, depending on each of the parties' individual strategy ;
- **after a court ruling or arbitral award :** to avoid appeals, to settle the dispute differently before an upper court rules on the case, to agree on the interpretation of an unclear judicial decision and/or on the terms of its enforcement.

** Note : An additional option for judicial courts in France, starting from November 1, 2023, is to bifurcate the proceeding. Bifurcation allows the court to partially resolve the dispute so that the parties can amicably settle the remaining issues, particularly through mediation (e.g., the amount of compensation, repairs in kind, etc.).*

The opinion of in-house counsels

The disputes most suited to mediation are :

- **78%, those with a high financial stake or complex cases ;**
- **80%, those involving executives ;**
- **75%, those with an international aspect*.**

The attorneys' opinions

« Mediation is a useful way of agreeing on the interpretation of a court decision that is difficult to implement in practice...and avoiding an appeal. »

« The time saved by mediation is a real asset, especially since pre-trial procedure has grown increasingly complex and lengthy. »

The judges' opinions

100% of judges consider mediation to be the preferred option when the parties have an interest in maintaining their business relationship, or where personal issues appear to be at the root of the conflict.

These numbers are drawn from the results of the Cercle Montesquieu's survey conducted in the first quarter of 2023

03

Some questions to consider in the event of a dispute

WHEN SHOULD MEDIATION BE IMPLEMENTED ?

Does the dispute raise a legal question of principle ?

What are the main actual or potential business implications of the dispute ?

Does the company have an interest in preserving its relationship with the other party? Do the parties have a possible future together for new businesses ? Or other stakes than only business ?

Is it in our interest to discuss in confidence some sensitive issues arising out of the dispute ?

Will this dispute result in a risk for my company's reputation ?

What internal and external resources will this dispute mobilize ?
(time spent by managers and legal staff, consultants and experts, etc.)

What costs will be involved ?
(refer to Appendix 1)

Given the situation, does the time expected for resolving the dispute seem reasonable or appropriate ?

How strong are my legal arguments and/or those of the other party? What are the legal risks ?

What is the best possible outcome in the absence of an amicable agreement ? How likely is it ?

Will a judicial or arbitral decision be easily and quickly enforceable ?

04 HOW TO CONVINCE (ONESELF) TO CHOOSE MEDIATION ?

Mediation is a voluntary process : how do you get people on board?

Convincing in-house senior executive staff

Through mediation, the legal department :

- becomes actively and directly involved in resolving the dispute ;
- affirms its contribution as a strategic partner of the C-Suite for the benefit of their company ;
- positions itself as a value provider, bringing pragmatic and cost-effective solutions. It reinforces its credibility as a business partner to operational staff and senior management ;
- helps identify avenues for improvement of its company (internal or external process, communication between departments or with partners) ;
- provides new perspectives for in-house counsels, boosting their individual motivation, corporate spirit and contribution to the company's business project.

For senior managers and/or top executives, mediation is :

- a business-oriented tool for finding solutions that are more practical than only legal ;
- a means of controlling and managing the risk associated with disputes and becoming pro-active in the search for solutions ;
- a demonstration of corporate maturity and responsibility, not an admission of weakness ;
- a saving in time and costs ;
- a way to establish and develop responsible relations with stakeholders : disputes are no longer the monopoly of the legal department, but everyone's business internally and externally.

TIPS
From the outset, try to add mandatory or optional mediation clauses when drafting your contracts and partnerships (refer to Appendix 2).

Convincing outside the company

Any other party to the dispute

- Explain the many advantages of mediation, by using, if necessary, an independent third party such as a mediation center or mediator.
- Involve relevant managers. They are often in contact with the other parties and calls between peers can be very effective !
- Formally request mediation, thereby demonstrating your good faith (particularly to the court if and when it becomes involved).

Company attorneys

- Explain that they play an important role in mediation by :
  > supporting their clients in risk assessment and strategy ;
  > convincing the other parties' counsel to accept mediation ;
  > drawing up and/or securing the mediation agreement ;
  > advising on the negotiation, drafting, execution of the settlement agreement, its implementation and follow-up, if necessary.
- Mediation offers them the opportunity to :
  > strengthen relations and build loyalty with their client ;
  > avoid the legal uncertainty related to court rulings, and work towards business solutions that satisfy their client ;
  > position themselves as business partners of the management of their client.

TIPS
***Identify Key Performance Indicators* for mediation (savings in time and costs, creation of practical solutions, outcomes focused on the future rather than on the past, etc.).**

For example : going to mediation means giving yourself a 70% chance of bringing a dispute to a swift end with a mutually acceptable solution.

04

HOW TO CONVINCE (ONESELF) TO CHOOSE MEDIATION?

Preconception

> Mediation is a waste of time !

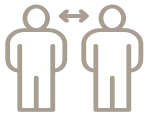
Response

Mediation is never a waste of time. The settlement rate is around 70%, and in all cases, whether it ends in a settlement agreement or not, it allows the parties to :

- have a better understanding of the issues at stake in their dispute, and thus be better prepared for subsequent litigation ;
- re-establish a relationship with the opposing party and better understand its needs and interests ;
- lay the foundations for future steps in the litigation and potentially reach a settlement agreement at a later date.

Preconception

> Judicial conciliation is free in France and amounts to the same service !



Response

Conciliation and mediation are often used interchangeably, yet they differ in at least two aspects :

- a conceptual one : the conciliator offers a solution based on the parties' positions, whereas the mediator works on the real interests and needs of each party and may only suggest a solution if the parties so wish, without ever being able to impose it ;
- another specific to judicial conciliation in France: the conciliator cannot go beyond the scope of the dispute whereas the scope of intervention of the mediator is far more flexible and almost limitless.

Preconception

> It's too complicated to find the most suitable mediator.

Response

The mediator may be selected by the parties themselves, either with their counsel or with the assistance of a mediation center, which can provide the most suitable recommendations drawn from a large and diverse pool of affiliated mediators. Alternatively, the judge can make the selection if all parties agree. If there is difficulty reaching a consensus on a single mediator, co-mediation may be a solution. Additionally, it is also possible to interview the proposed mediator before making a final choice.

Preconception

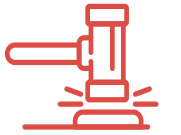
> Mediation is not as effective as a court ruling.

Response

The agreement resulting from a mediation may be given the same enforceability as a court ruling through various quick proceedings that exist in many jurisdictions. This would, as a result, give the exact same effectiveness as a court decision. In practice, as the settlement agreement is always freely negotiated and approved by each party, it is most often spontaneously implemented without any challenge or dispute.

Preconception

> The mediator can't impose anything, it's useless!



Response

The mediator does not rule on the case but may suggest solutions if the parties so wish. In all cases, he/she ensures compliance to a legally protected framework in which he/she organizes and fosters a dialogue and constantly improves its quality and progress by attentively listening and addressing the interests and needs of all parties involved.

05 HOW DOES A MEDIATION PROCESS UNFOLD ?

Step 1 - Reflecting on expectations

What should I expect from the mediator ?

Knowledge of the relevant business field
The match between the mediator's experience and the parties' sector of activity may reinforce their trust in the mediator. Having an additional expert join the mediation process with the parties' agreement, known as co-mediation, may bring in valuable complementary skills.

He is not necessarily a legal professional
The momentum for dialogue that he instills, and the creativity of the solutions that he generates in the parties' minds are more important than legal expertise.

A variable degree of involvement
The parties must ask themselves what they expect from the mediator : is he simply a facilitator, or an advisor suggesting possible solutions? In business mediation, it is generally preferable to have a proactive mediator.

Is an expert opinion advisable at the same time ?

The parties may request an expertise, whether private or joint, that may have the same value as a judicial expertise in certain jurisdictions like France. The expertise may focus on technical aspects or quantum and help the parties reach an agreement.

All these points may be determined in the initial mediation agreement, or with the mediator during the mediation process.

A mediation agreement is almost always signed between the parties in dispute and the mediation center or the mediator. It sets out the mediation fees, the duration of the mediation and can address in greater detail other issues or certain practical arrangements which are deemed important by the mediating parties.

Step 2 - Preparing for mediation

Analyze the dispute and assess its own strengths and weaknesses :

Consider the "Best Alternative to a Negotiated Agreement" : identify the most advantageous available options and measure the range of possibilities if no settlement agreement can be reached.

Designate the individuals who can most usefully represent the company, negotiate, and endorse decisions in the mediation, e.g., operational staff or managers with sufficient distance from the dispute.

Identify all parties involved in the dispute : insurers, subcontractors, etc.

05

The mediation process

Step 3 - The mediation process

The mediator adapts the process with the parties in line with what seems appropriate, alternating between plenary sessions and caucuses. These caucuses may also be requested at any time by one of the parties.

Meetings or caucuses may take place with or without in-house or external counsels, and with all or some of the company's representatives involved in the mediation : any pattern is possible, provided the parties agree.

Locations, dates, schedules, and meeting arrangements (remote or not, etc.) are determined by mutual agreement between the parties.

Step 4 - Outcome of mediation

If a settlement is reached, the parties' counsels (whether in-house or external) draft the legal terms of the settlement agreement. This agreement may be filed with a court and made enforceable by a judicial order in certain jurisdictions like France if the parties request it.

If no settlement is reached at the end of mediation, the process ends (or is suspended) and each party is free to pursue or commence litigation. A new mediation process (or its resumption) may be initiated at a later stage if the parties so wish. A settlement may always be reached after the end of a mediation once the dispute and merits of an alternative amicable resolution have matured in the parties' minds.

In all cases : confidentiality of the information exchanged during mediation persists (unless all parties decide otherwise).

What about the outside attorneys ?

The participation of outside attorneys is not mandatory and in-house counsels may be sufficiently familiar with the mediation process. Nevertheless, their involvement is strongly encouraged, particularly for drafting the settlement agreement, coordinating any potential legal or judicial procedural aspects, or when the dispute involves certain technical (e.g. insurance) or international legal issues.

How do I negotiate ?

In principle, mediation is confidential : everything that is said or exchanged during mediation remains between the parties or with the mediator. This allows you to be creative and to concentrate on the business and financial aspects rather than on legal considerations : the aim is to find a solution to a dispute. If you are reluctant to share information with the other parties, you may always communicate the relevant information to the mediator separately. He will not share them with the other parties unless expressly authorized by you. He may usefully take them into account in his dealings with the other parties to guide the exchanges, without disclosing them.

06 CONCLUSION

Mediation as a preliminary or an alternative to legal proceedings : an inexorable trend…

in Europe, many national judicial incentives for amicable dispute resolution are being implemented such as mandatory prior mediation in certain cases, amicable settlement court hearings, bifurcation of proceedings, reimbursement of legal costs in the event of successful mediation, and new European Union sectoral regulations are imposing or encouraging the implementation of alternative dispute resolution schemes (e.g. Digital Directives*);

in the World, the same trend is noticeable with an acceleration of amicable settlements in a large majority of disputes in the United States**, the creation of new regional centers for international commercial mediation (Singapore, Dubai…), and the growing number of States adopting the 2018 Singapore Convention on International Commercial Mediation.

… that must be fully grasped by businesses

through an internal policy in favor of amicable dispute resolution and its communication to their externale legal counsels, in particular by including and applying mediation provisions in their commercial contracts, so as to avoid being forced to resort to mediation ordered by local courts in the event of litigation, but to freely determine its scope, terms and mediators ;

by informing and training in-house counsels in the field of mediation and raising awareness among the business managers and top executives in order to prepare for amicable dispute resolution in the best possible conditions ;

… which allows General Counsels to add more value to their company !

58%
of companies use mediation to solve their disputes, an increase of 10% since 2017*.

77%
of companies have mediation clauses in their contracts*.

65%
of amicable settlements resulting from mediation include at least one creative element not included in the parties' initial requests**

** New York Law Journal,* august 2023 : *https://www.law.com/newyorklawjournal/2023/08/07/five-indicators-mediation-is-at-a-tipping-point/*

*** Lin Adrian, Solfrid Mykland,* "Creativity in Court-Connected mediation: Myth or Reality?"*, Harvard Negotiation Journal, 2014, Volume 30, Issue 4, pp. 421-439.*

** Article 21 of the European "DSA" directive and article 6.12 of the European "DMA" directive.*
***A transaction rate of 90% is often quoted.*

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APPENDIX

APPENDIX 1

BREAKDOWN OF LITIGATION COSTS*

Litigation generates internal and external costs that vary depending on the chosen method of dispute resolution. Assessing these costs is important to guide the litigation strategy and to choose mediation. The table below lists the associated costs for each step of a dispute and its settlement method.

Inevitable costs

Lower costs

Higher costs

Phase 1 : Preparing the claim/request

Internal costs	External costs
In-house counsels	External counsels/experts (if necessary)
Managers	

Phase 2 : Negotiation

Internal costs	External costs
In-house counsels	Attorneys
Managers	

Phase 3 : Mediation

Internal costs	External costs
In-house counsels	Attorneys
Managers	Mediation fees
Top executives	

Phase 4 : Arbitration/Litigation

Internal costs	External costs
In-house counsels	Attorneys
Managers	External counsels/experts (if necessary)
Top executives	Arbitration/litigation fees
Witness preparation time	Procedural fees (evidentiary fees, etc.)
	Logistical fees (travel costs, etc.)

**This presentation is loosely based on the one found in the ICC Guide for Effective Conflict Management, 2023, p. 42.*

APPENDIX 2

SAMPLE MEDIATION CLAUSES

Recourse to mediation may be anticipated by inserting an optional or mandatory prior mediation clause in contracts. Below are two examples of clauses drafted by the *Equanim International* mediation center, a member of the group responsible for developing this guide :

Example of an optional preliminary mediation clause

In the event of a dispute arising out of or in connection with the Contract (insert the term designating the contract in which the clause is to be implemented), the parties agree to discuss, prior to any further proceedings, the possibility of attempting to resolve the dispute by mediation in accordance with Equanim International's *Mediation Rules.*

Example of a mandatory preliminary mediation clause

In the event of a dispute arising out of or in connection with the Contract (insert the term designating the contract in which the clause is to be implemented), the parties shall, on a compulsory basis and prior to any other procedure, attempt to settle their dispute amicably by mediation in accordance with Equanim International's *mediation rules.*

If the dispute has not been settled under the said mediation rules within [XX] days/ months following the filing of the request for mediation or within such other period as the parties may agree in writing, the dispute will then be settled in accordance with […].

For additional information, you may consult : **https://www.equanim-international.com/?lang=en**

Baker McKenzie.

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