

**WIPO
ARBITRATION
AND
MEDIATION CENTER**



**Guide to WIPO
Mediation**

<http://www.wipo.int/amc>

GUIDE TO WIPO MEDIATION

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INTRODUCTION

Mediation, also known as conciliation in many parts of the world, has a long history in the diplomatic arena. In the commercial world, interest in it has increased sharply in recent years. In part, this growth of interest is attributable to dissatisfaction with the cost, delays and length of litigation in certain jurisdictions. The growth of interest results also, however,

from the advantages of mediation, particularly its appeal as a procedure that offers parties full control over both the process to which their dispute will be submitted and the outcome of the process.

Where mediation has been used, it has enjoyed very high rates of success in achieving a result acceptable to

both sides to a dispute. Because it is a relatively unstructured procedure, however, some hesitate to use it for fear of not knowing what to expect. This booklet seeks to allay such fears by explaining simply the main features and advantages of mediation and how mediation under the WIPO Mediation Rules works in practice.

WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

The WIPO Arbitration and Mediation Center is part of the World Intellectual Property Organization (WIPO), an intergovernmental organization whose mandate is to promote the protection of intellectual property. A largely self-financed organization, WIPO is based in Geneva, Switzerland and has 184 Member States.

WIPO has a history of over 120 years, going back to 1883, when the Paris Convention for the Protection of Industrial Property was adopted, and to 1886, when the Berne Convention for the Protection of Literary and Artistic Works was adopted.

WIPO administers 24 multilateral intellectual property treaties, including the Patent Cooperation Treaty (PCT) and the Madrid System, which facilitate patent and trademark applications and registrations in different countries.

The WIPO Arbitration and Mediation Center

Based in Geneva, Switzerland, the WIPO Arbitration and Mediation Center was established in 1994 to promote the resolution of intellectual property disputes through alternative dispute resolution. To achieve this objective, it created – with the active involvement of many of the foremost ADR and intellectual property practitioners and scholars – the WIPO Mediation, Arbitration, Expedited Arbitration and Expert Determination Rules and clauses.

The Center is the only international provider of specialized intellectual property ADR services. It provides advice on, and administers, procedures conducted under the WIPO Rules. For this purpose, the Center also maintains a detailed database of well over 1,500 outstanding intellectual property and ADR specialists who are available to act as neutrals. Together with its extensive network of relationships with intellectual property and ADR experts, the Center's position within the World Intellectual Property Organization, ensures that the WIPO procedures are at the cutting edge of IP dispute resolution. The Center also plays a leading role in the design and implementation of tailor-made dispute resolution procedures.

The Center's staff consists of highly qualified and multilingual legal professionals with expertise in intellectual property and ADR. Their detailed qualifications and contact are available at <http://www.wipo.int/amc/en/contact/>.

WIPO PROCEDURES

The WIPO Arbitration and Mediation Center offers rules and neutrals for the following procedures:

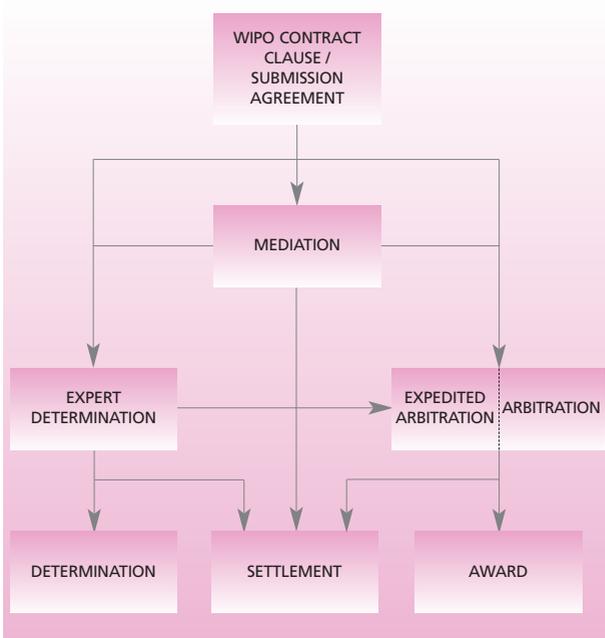
> **Mediation:** an informal procedure in which a neutral intermediary, the mediator, assists the parties in reaching a settlement of the dispute. (Depending on the parties' choice, mediation may be followed, in the

absence of a settlement, by arbitration, expedited arbitration or expert determination.)

> **Arbitration:** a binding procedure in which the dispute is submitted to one or more arbitrators who make a final decision on the dispute. (Depending on the parties' choice, arbitration may be

preceded by mediation or expert determination.)

> **Expedited Arbitration:** an arbitration procedure that is carried out in a short time and at a reduced cost. (Depending on the parties' choice, expedited arbitration may be preceded by mediation or expert determination.)



> **Mediation followed, in the absence of a settlement, by [expedited] arbitration:** a procedure that combines mediation and, where the dispute is not settled through the mediation, arbitration.

> **Expert Determination:** a procedure in which a technical, scientific or related business issue between the parties is submitted to one or more experts who make a determination

on the matter. The determination is binding, unless the parties have agreed otherwise. (Depending on the parties' choice, expert determination may be preceded by mediation or followed by (expedited) arbitration.)

The WIPO Rules are appropriate for all commercial disputes. However, they contain provisions on confidentiality and technical and experimental evidence that are of special interest to parties to intellectual property disputes.

WIPO arbitration and mediation cases have included parties from a multitude of countries. These cases were administered in different languages and took place in venues around the world. General up-to-date information on the WIPO Arbitration and Mediation Center's caseload is available at <http://www.wipo.int/amc/en/center/caseload.html>.

WHAT IS MEDIATION?

Mediation is first and foremost a *non-binding* procedure. This means that, even though parties have agreed to submit a dispute to mediation, they are not obliged to continue with the mediation process after the first meeting. In this sense, the parties remain always in control of a mediation. The continuation of the process depends on their continuing acceptance of it.

The non-binding nature of mediation means also that a decision cannot be imposed on the parties. In order for any settlement to be concluded, the parties must voluntarily agree to accept it.

Unlike a judge or an arbitrator, therefore, the *mediator* is not a decision-maker. The role of the mediator is rather to assist the parties in reaching

their own decision on a settlement of the dispute.

There are two main ways in which mediators assist parties in reaching their own decision, which correspond to two types or models of mediation practiced throughout the world. Under the first model, *facilitative mediation*, the mediator endeavors to facilitate communication

The Function of Rules in Mediation

The WIPO Mediation Rules

Mediation is a relatively unstructured and informal procedure in which continued participation in the process, as well as the acceptance of any outcome, depends on each party's agreement. Rules thus have a more limited function in mediation than in binding arbitration. What is that function?

By agreeing to submit a dispute to WIPO mediation, the parties adopt the WIPO Mediation Rules as part of their agreement to mediate. Those Rules have the following main functions:

- > They establish the non-binding nature of the procedure (Articles 13(a) and 18(iii));
- > They define the way in which the mediator will be appointed (Article 6);
- > They set out the way in which the mediator's fees will be determined (Article 22);
- > They guide the parties as to the way in which the mediation can be commenced and the process can be established (Articles 3 to 5 and 12);
- > They provide the parties with assurances about the confidentiality of the process and the disclosures made during the process (Articles 14 to 17);
- > They determine how the costs of the procedure will be borne by the parties (Article 24).



between the parties and to help each side to understand the other's perspective, position and interests in relation to the dispute. Under the second model, *evaluative mediation*, the mediator provides a non-binding assessment or evaluation of the dispute, which the parties are then free to accept or reject as the settlement of the dispute. It is up to the parties to decide which of

these two models of mediation they wish to follow. The WIPO Arbitration and Mediation Center ("the Center") will assist them in identifying a mediator appropriate for the model that they wish to adopt.

Mediation is a *confidential* procedure. Confidentiality serves to encourage frankness and openness in the process by assuring the

parties that any admissions, proposals or offers for settlement will not have any consequences beyond the mediation process.

They cannot, as a general rule, be used in subsequent litigation or arbitration.

The WIPO Mediation Rules contain detailed provisions directed also at preserving confidentiality in relation to the existence and outcome of the mediation.

HOW DOES MEDIATION DIFFER FROM ARBITRATION?

The differences between mediation and arbitration all stem from the fact that, in a mediation, the parties retain responsibility for and control over the dispute and do not transfer decision-making power to the mediator. In concrete terms, this means two things principally:

1. In an arbitration, the outcome is determined in accordance with an objective standard, the applicable law. In a mediation, any outcome is determined by the will of the parties. Thus, in deciding upon an outcome, the parties can take into account a broader range of

standards, most notably their respective business interests. Thus, it is often said that mediation is an interest-based procedure, whereas arbitration is a rights-based procedure. Taking into account business interests also means that the parties can decide the outcome by reference to their future relationship, rather than the result being determined only by reference to their past conduct.

2. In an arbitration, a party's task is to convince the arbitral tribunal of its case. It addresses

its arguments to the tribunal and not to the other side. In a mediation, since the outcome must be accepted by both parties and is not decided by the mediator, a party's task is to convince, or to negotiate with, the other side. It addresses the other side and not the mediator, even though the mediator may be the conduit for communications from one side to the other.

Naturally, in view of these differences, mediation is a more informal procedure than arbitration.

A WIPO Copyright Mediation

A Dutch company concluded a copyright license with a French company regarding the publication of a technical publication. The license agreement included a WIPO mediation clause. The licensee became insolvent and defaulted on the royalties due under the license. When the licensor requested the mediation procedure, the Center, after consultation with the parties, and with approval of the court appointed liquidator, appointed an intellectual property specialist as the mediator. Following two meetings between the parties and the mediator, a settlement agreement was concluded.

MEDIATION AND ARBITRATION COMPARED

While both mediation and arbitration are private dispute resolution procedures based on party agreement, they differ in a number of important aspects. Mediation is a voluntary process which depends on the continuing cooperation of both parties

since either party can withdraw at any time. Arbitration, in contrast, is an adjudicative procedure and in this respect resembles court litigation. Once the parties have submitted a dispute to arbitration, neither party can opt out unilaterally, and any decision

rendered by the arbitral tribunal will be binding on both parties. One might say that in mediation the parties hire a settlement facilitator, while in arbitration they retain the services of a private decision-maker.

	<i>MEDIATION</i>	<i>Arbitration</i>
<i>PARTIES</i>	Either party can unilaterally withdraw from the procedure (after a first meeting with the mediator).	Once the parties have validly agreed to submit a dispute to arbitration, neither party can unilaterally withdraw from the procedure.
<i>ARBITRATOR / MEDIATOR</i>	The mediator functions as a “catalyst,” a settlement facilitator, but cannot impose a settlement on the parties.	The tribunal has the authority to render a final award.
<i>BASIS</i>	Any settlement is agreed by the parties and is based on the parties’ interests, which may be broader than their legal positions.	The tribunal addresses the parties’ legal positions on the basis of the applicable substantive law.
<i>OUTCOME</i>	Any settlement agreement is binding between the parties as a matter of contract law.	Awards are binding on the parties, final and enforceable on a par with court decisions.

FOR WHICH DISPUTES IS MEDIATION APPROPRIATE AND WHAT ARE ITS ADVANTAGES?

Mediation is not a suitable procedure for settling disputes in all cases. Where deliberate, bad-faith counterfeiting or piracy is involved, mediation, which requires the cooperation of both sides, is unlikely to be appropriate. Similarly, where a party is certain that it has a clear-cut case, or where the objective of the parties or one of them is to obtain a neutral opinion on a question of genuine difference, to establish a precedent or to be vindicated publicly on an issue in dispute, mediation may not be the appropriate procedure.

On the other hand, mediation is an attractive alternative where any of the following are important priorities of either or both of the parties:

- > minimizing the cost-exposure entailed in settling the dispute;
- > the maintenance of control over the dispute-settlement process;
- > a speedy settlement;
- > the maintenance of confidentiality concerning the dispute; or
- > the preservation or development of an

underlying business relationship between the parties to the dispute.

The last-mentioned priority, in particular, makes mediation especially suitable where the dispute occurs between parties to a continuing contractual relationship, such as a license, distribution agreement or joint research and development (R&D) contract, since, as mentioned above, mediation provides an opportunity for finding a solution by reference also to business interests and not just to the strict legal rights and obligations of the parties.

Why Choose WIPO Mediation?

The choice of WIPO mediation offers the following advantages:

- > *a low administration fee;*
- > *an internationally based independent administering authority with specialized expertise in intellectual property;*
- > *an international list of mediators including persons with particular knowledge and experience in the technical, business and legal subject matter of intellectual property, as well as experience in international commercial mediation;*
- > *flexible Rules with provisions sensitive to the need for the protection of confidentiality;*
- > *where the mediation takes place in Geneva, meeting rooms provided free of charge.*

AT WHICH STAGES OF A DISPUTE CAN MEDIATION BE USED?

Mediation can be used at any stage of a dispute. Thus, it can be chosen as the first step towards seeking a resolution of the dispute after any negotiations conducted by the parties alone have failed. Mediation can also be used at any time during litigation or arbitration

where the parties wish to interrupt the litigation or arbitration to explore the possibility of settlement.

Another common use of mediation is more akin to dispute prevention than dispute resolution. Parties may seek the assistance of a mediator in the course

of negotiations for an agreement where the negotiations have reached an impasse, but where the parties consider it to be clearly in their economic interests to conclude the agreement (for example, negotiations on the royalty rate to apply on the renewal of a license).

The Language Used in the Mediation

The parties decide the language in which the mediation will take place. They may choose a single language or they may choose to use two languages and to have interpretation, although the latter choice will obviously increase the costs of conducting the process.

A WIPO Mediation of a Trademark Coexistence Dispute

After a dispute arose between them, a North American company requested mediation with two Italian companies and one Spanish company on the basis of an agreement which the parties had reached for mediation under the WIPO Mediation Rules. The goal of the mediation was to help the parties avoid confusion and misappropriation of their similar trademarks and to regulate future use of their marks. Although Italian was agreed as the language of proceedings, any settlement agreement would be recorded in both Italian and English.

The Center suggested to the parties potential mediators with specific expertise in European trademark law and fluency in Italian and English. The parties selected an Italian mediator with a trademark practice. The mediator conducted an initial telephone conference with the lawyers of the parties in which he scheduled the mediation timing, and agreed on the procedure.

Two months later, the mediator met with the parties in a two-day session in Milan. The meeting was held in joint session with the exception of two brief caucuses. At the end of the second day the parties - with the assistance of the mediator - were able to draft and sign a settlement agreement covering all of the pending issues in dispute.

A WIPO Mediation of a Pharma Patent License

A European university holding pharmaceutical patent applications in several countries negotiated a license option agreement with a European pharmaceutical company. The pharmaceutical company exercised the option and the parties started to negotiate a license agreement. After three years of negotiations the parties were unable to agree on the terms of the license. At that point the parties submitted a joint request for WIPO mediation.

As requested by the parties, the Center appointed as mediator a lawyer who had worked in the pharmaceutical industry for many years and had considerable licensing experience. The parties requested that the mediator help them reach an agreement on the terms of the license.

The one-day meeting session allowed the parties to identify the issues and deepen their understanding of the legal circumstances. On this basis, the parties continued direct negotiations amongst themselves and reached a settlement agreement.

WHY TRY MEDIATION?

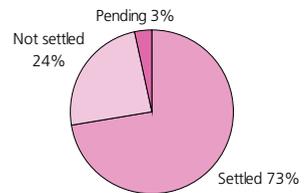
For those parties for which mediation is a new procedure and which may wonder what benefits mediation offers, two factors can usefully be considered:

(i) Where mediation has been used, it enjoys remarkably high rates of success, given its non-binding nature. Indeed, on one view, mediation never fails, even if a settlement is not reached, because the

parties will always come away knowing more about the dispute and, probably, at least having narrowed the issues in question.

(ii) A second factor to be taken into account is that the commitment to mediation involves a *low risk*. The parties remain always in control of the dispute. Each party may terminate the mediation at any stage, if it feels that it is not making

Settlement Rate in WIPO Mediation



any progress, that the procedure is becoming too costly, or that the other party is not acting in good faith. The commitment to mediation is thus controllable at all stages.

WIPO Contract Clauses and Submission Agreements

Referral to WIPO dispute resolution procedures is consensual. To facilitate party agreement, the Center provides recommended contract clauses (for the submission of future disputes under a particular contract) and submission agreements (for existing disputes) in relation to:

- > Mediation under the WIPO Mediation Rules;*
- > Arbitration under the WIPO Arbitration Rules;*
- > Expedited arbitration under the WIPO Expedited Arbitration Rules;*
- > Expert determination under the WIPO Expert Determination Rules;*
- > Mediation under the WIPO Mediation Rules followed, if a settlement is not achieved, by arbitration under the WIPO [Expedited] Arbitration Rules;*
- > Mediation followed, in the absence of a settlement, by expert determination under the WIPO Expert Determination Rules;*
- > Expert determination, binding unless followed by [expedited] arbitration.*

WIPO clauses can be found in a wide variety of contracts involving intellectual property, including patent, know how and software licenses, franchises, trademark coexistence agreements, distribution contracts, joint ventures, research & development contracts, technology-sensitive employment contracts, mergers and acquisitions with important intellectual property aspects, sports marketing agreements, and publishing, music and film contracts. WIPO clauses are found most frequently in licensing agreements entered into by parties from different jurisdictions.

The Center's recommended clauses are reproduced at the end of this brochure. Electronic versions of them are available at <http://www.wipo.int/amc/en/clauses/index.html>.

If appropriate, the Center can assist the parties in adapting the model clauses to the circumstances of their contractual relationship. For example, special clauses can be drafted for commercial situations in which a limited number of companies are frequently involved in disputes with each other that concern overlapping intellectual property rights. Because of the general applicability of the WIPO Rules, WIPO clauses are also suitable for inclusion in contracts and disputes that do not involve intellectual property.

HOW IT WORKS: THE PRINCIPAL STAGES IN A WIPO MEDIATION

There are few formalities associated with a mediation. The structure that a mediation follows is decided by the parties with the mediator, who together work out, and agree upon, the procedure that is to be followed.

As mentioned above, the somewhat unstructured nature of a mediation can be disconcerting to those who may be entertaining the idea of submitting a dispute to mediation, but who may not be sure what to expect. For such persons, some guidance is set out in the following paragraphs, which outline the main steps in the conduct of a WIPO mediation. The procedure outlined should, however, be understood as being for guidance only, since the parties may always decide to modify the procedure and to proceed in a different way. An example of how a WIPO Patent Mediation developed in practice is provided at page 19.

Getting to the Table: The Agreement to Mediate

The starting point of a mediation is the agreement of the parties to submit a dispute to mediation. Such an agreement may be contained either in a contract governing a business relationship between the parties, such as a license, in which the parties provide that any disputes occurring under the contract will be submitted to mediation; or it may be specially drawn up in relation to a particular dispute after the dispute has occurred.

The last section of this Guide contains recommended clauses for both situations, which provide a choice between agreeing to mediation alone or agreeing to mediation followed, in the event that a settlement is not reached through the mediation, by arbitration.

Starting the Mediation

Once a dispute has occurred and the parties have agreed to submit it to mediation, the process is commenced by one of the parties sending to the Center a *Request for Mediation*. This Request should set out summary details concerning the dispute, including the names and communication references of the parties and their representatives, a copy of the agreement to mediate and a brief description of the dispute. These details are not intended to perform the legal function of defining arguments and issues and limiting the requesting party's case. They are intended simply to supply the Center with sufficient details to enable it to proceed to set up the mediation process. Thus, the Center will need to know who is involved and what the subject matter of the dispute is in order to be able to assist the parties in selecting a mediator appropriate for the dispute.

The Main Steps in a Mediation

The Agreement to Mediate

*Commencement:
Request for Mediation*

Appointment of the Mediator

*Initial Contacts Between the
Mediator and the Parties*

- > *setting up the first meeting*
- > *agreeing any preliminary exchange of documents*

First and Subsequent Meetings

- > *agreeing the ground rules of the process*
- > *gathering information and identifying issues*
- > *exploring the interests of the parties*
- > *developing options for settlement*
- > *evaluating options*

Concluding

The Appointment of the Mediator

Following receipt of the Request for Mediation, the Center will contact the parties (or their representatives) to commence discussions on the appointment of the mediator (unless the parties have already decided who the mediator will be). The mediator must enjoy the confidence of both parties and it is crucial, therefore, that both parties be in full agreement with the appointment of the person proposed as mediator.

Typically, the Center would discuss the various matters described on page 15 in order to be in a position to propose the names of suitable candidates for the consideration of the parties.

Following these discussions (which may take place by telephone or in person), the Center will usually propose several names of prospective mediators,

together with the biographical details of those prospective mediators, to the parties for their consideration. If necessary, further names can be proposed until such time as the parties agree upon the appointment of a mediator.

At this stage also, the Center will commence discussions with the parties concerning the physical arrangements for the mediation: where it is to take place (which will usually have been specified in the agreement to mediate), a meeting room and any other support facilities needed.

The Center will also fix, in consultation with the mediator and the parties, the fees of the mediator at the stage of the appointment of the mediator.

Initial Contacts Between the Mediator and the Parties

Following appointment, the mediator will conduct a series of initial discussions with the parties, which typically will take place by telephone. The purpose of these initial contacts will be to set a schedule for the subsequent process. The mediator will indicate what documentation, if any, he or she considers should

be provided by the parties prior to their first meeting and set the timetable for the supply of any such documentation and the holding of the first meeting.

The First Meeting Between the Mediator and the Parties

At the first meeting, the mediator will establish with the parties the ground rules that are to be followed in the process. In particular, the mediator will

- > discuss with, and obtain the agreement of the parties on, the question whether all meetings between the mediator and the parties will take place with both parties present, or whether the mediator may, at various times, hold separate meetings (caucuses) with each party alone; and

A WIPO Mediation of a Biotech Dispute

A French and a German company entered into a collaboration agreement for the development of a human antibody for the treatment of a major disease. Two years later, a US corporation acquired the French company. Alleging that the US corporation shortly thereafter caused certain payments required under the collaboration agreement to be withheld, the German entity filed an action for breach of contract against the US corporation in a district court in the United States. The US corporation filed counterclaims of rescission and breach of contract against the German company. After more than one year of court proceedings, the parties accepted the suggestion of the judge to submit their dispute to mediation and filed a joint request for mediation with the Center.

When the parties could not agree on the name of the mediator, the Center submitted for consideration of the parties a list of five possible candidates, meeting criteria set forth by the disputants in their mediation agreement. After some discussion, the parties agreed on one of the nominees proposed by the Center, an American intellectual property lawyer with considerable mediation experience.

The mediator conducted meetings with the parties in the United States. As a direct consequence of the facilitative role played by the mediator in the course of the case, the parties settled their dispute six months after the commencement of the mediation.

- > ensure that the parties understand the rules on confidentiality set out in the WIPO Mediation Rules.
- At the first meeting, the mediator will also discuss with the parties what additional documentation it would be desirable for each to provide and the need for any assistance by way of experts, if these matters have not already been dealt with in the initial contacts between the mediator and the parties.

Selecting the Mediator

Perhaps the most important step in the whole process is the selection of the mediator. What should the parties consider?

One of the principal functions of the WIPO Arbitration and Mediation Center is to assist the parties in identifying and agreeing upon the mediator. The Center does this through consultation with the parties and by supplying them with the names and biographical details of potential candidates for their consideration.

The parties should consider at least the following matters in deciding whom to appoint as mediator:

- > *What role do they want the mediator to play; do they want the mediator to provide a neutral evaluation of their dispute, or do they want the mediator to act as facilitator of their negotiations by assisting them in identifying the issues, exploring their respective underlying interests and developing and evaluating possible options for settlement?*
- > *Do they want a mediator with substantial training and experience in the subject matter of their dispute, or do they want a mediator more particularly skilled in the process of mediation? This will depend in part on whether they wish the mediator to play an evaluative or a facilitative role.*
- > *Do they want a single mediator or more than one mediator? In particularly complex disputes involving very specialized and highly technical subject matter, the parties may wish to consider having both a subject-matter and a process specialist as co-mediators. Similarly, where the parties have very different cultural and linguistic backgrounds, they may wish to envisage two co-mediators.*
- > *What nationality should the mediator have (or what nationalities should the mediator not have)?*
- > *Are the candidates independent, that is, are they free of any past or present business, financial or other disqualifying connections with either of the parties to the dispute or with the particular subject matter of the dispute?*
- > *What are the professional qualifications and experience, training and areas of specialization of the candidates?*

Subsequent Meetings

Depending on the issues involved in the dispute and their complexity, as well as on the economic importance of the dispute and the distance that separates the parties' respective positions in relation to the dispute, the mediation may involve meetings held on only one day, across several days or over a longer period of time. The stages involved in the meetings held after the first meeting between the mediator and the parties would, where the mediator is playing a facilitative role, normally involve the following steps:

- (i) the gathering of information concerning the dispute and the identification of the issues involved;
- (ii) the exploration of the respective interests of the parties underlying the positions that they maintain in respect of the dispute;

- (iii) the development of options that might satisfy the respective interests of the parties;
- (iv) the evaluation of the options that exist for settling the dispute in the light of the parties' respective interests and each party's alternatives to settlement in accordance with one of the options; and
- (v) the conclusion of a settlement and the recording of the settlement in an agreement.

Naturally, not all mediations result in a settlement. However, a settlement should be achieved where each party considers that an option for settlement exists which better serves its interests than any alternative option for settlement by way of litigation, arbitration or other means.

Parties' Private Consultations

Throughout the process of the mediation, naturally each party will wish to undertake, at various stages, private consultations with its advisors and experts for the purposes of discussing various aspects of the mediation or of evaluating options. It goes without saying that such private consultations may occur during the mediation process.

THE ROLE OF THE WIPO ARBITRATION AND MEDIATION CENTER

The Center performs the following functions as administering authority of a mediation:

- > it assists the parties in selecting and appointing the mediator, as described above;
- > it fixes, in consultation with parties and the mediator, the fees of the mediator;
- > it administers the financial aspects of the mediation by obtaining

a deposit from each party of the estimated costs of the mediation and paying out of the deposit the fees of the mediator and any other support services or facilities, such as fees for interpreters, where they are required;

- > where the mediation takes place at WIPO in Geneva, it provides a meeting room and party retiring rooms free of charge; where the mediation takes place

outside Geneva, it assists the parties in organizing appropriate meeting rooms;

- > it assists the parties in organizing any other support services that may be needed, such as translation, interpretation or secretarial services.

Where Does a WIPO Mediation Take Place?

The parties decide where they would like the mediation to take place. It is not necessary for a mediation conducted under the WIPO Mediation Rules to take place in Geneva.

If the parties do decide to conduct their mediation in Geneva, WIPO will provide them with a meeting room and party retiring rooms free of charge (that is, at no additional cost to the administration fee payable to the WIPO Arbitration and Mediation Center). If the parties choose to conduct their mediation outside Geneva, the Center will assist them in arranging suitable meeting facilities.

WHAT DOES WIPO MEDIATION COST?

Two sets of fees must be paid for a mediation.

The first is the administration fee of the Center, which amounts to 0.10% of the value in dispute, up to a maximum of US\$10,000, which is reached where the amount in dispute is US\$10,000,000.

The second set of fees is those that are payable to the mediator. As mentioned above, these are negotiated and fixed at the time of the appointment of the mediator. They are usually calculated on a hourly or daily basis at a rate which takes into account the circumstances of the dispute,

such as the complexity of the dispute and its economic importance, as well as the experience of the mediator. The Schedule of Fees to the WIPO Mediation Rules sets out indicative hourly and daily rates for the fees of mediators which are as follows:

(All amounts are in United States dollars)

Administration Fee	Mediator's Fees (*)	
0.10% of the value of the mediation, subject to a maximum of \$10,000	\$300-\$600 per hour	\$1,500-\$3,500 per day

() Indicative rates*

Who Pays the Costs?

The WIPO Mediation Rules (Article 24) provide for the costs of the mediation (the administration fee of the Center, the mediator's fees and all other expenses of the mediation) to be borne in equal shares by the parties. The parties are free to agree to change this allocation of costs.

In practice, given the high rate of settlement and the cost/benefit advantages which mediation generally offers in comparison to court litigation and arbitration, the allocation of the costs of a mediation is rarely a significant issue between the parties.

WHAT TYPES OF DISPUTE CAN BE MEDIATED AT WIPO?

The Center offers specialized services for mediation of intellectual property disputes, that is, disputes concerning intellectual property or commercial transactions and relationships involving the exploitation of intellectual property. Common examples of such commercial transactions and relationships are patent, know how and trademark licenses, franchises, computer contracts, multimedia

contracts, distribution contracts, joint ventures, research & development contracts, technology-sensitive employment contracts, mergers and acquisitions where intellectual property assets assume importance, and publishing, music and film contracts.

It should be noted, however, that there is no limitation on the competence of mediators

appointed under the WIPO Mediation Rules to deal with different classes of subject matter. A mediator appointed under the WIPO Mediation Rules is competent to deal with all aspects of any dispute. It is up to the parties to decide whether they consider the subject matter suitable for WIPO mediation.

HOW A WIPO MEDIATOR HELPED PARTIES REACH SETTLEMENT

Dispute

A technology consulting company holding patents on three continents disclosed a patented invention to a major manufacturer in the context of a consulting contract. The contract neither transferred nor licensed any rights to the

manufacturer. When the manufacturer started selling products which the consulting company alleged infringed its patented invention, the consulting company threatened to file patent infringement court proceedings in all jurisdictions in which it was holding patents.

Submission to Mediation and Appointment of Mediator

The parties started negotiating a patent license with the help of external experts but failed to agree on the royalty as the multimillion dollar damages sought by the consulting

company significantly exceeded the amount the manufacturer was willing to offer. In a further attempt to settle the dispute, the parties submitted their dispute to mediation under the WIPO Mediation Rules. The WIPO Arbitration and Mediation Center suggested to the parties potential mediators with specific expertise in patents and the relevant technology, and the parties agreed on one of those mediators.

Preliminary Issues

Following his appointment, the mediator held a preliminary telephone conference with both parties' lawyers to discuss preliminary issues such as the mediation terms of reference, the participants in the mediation session, the decision-making authority of such participants, the role of the mediator, and documents to be exchanged before the

session. The parties further agreed to hold a two-day mediation session in a mutually convenient venue.

Before the session, the consulting company produced a new expert report, which significantly increased its possible damages claim. The other party threatened to abandon the mediation unless the report was withdrawn. The issue was settled through email exchanges and telephone calls between the parties and the mediator with the result that the report was not withdrawn, but given less weight without its author being present at the mediation session.

Informal Opening

To further a constructive working relationship between the parties and the mediator, the mediator met the parties' decision-makers alone at a dinner the night

before the session on the understanding that this get-together would be "without prejudice" and that nothing said by either party was to be taken as an agreement.

Mediation Session

At the mediation session itself each party was represented by a director with full decision-making power. In addition, each party came with several executives, an external expert, and outside counsel. At the outset, the mediator sought and obtained agreement on procedural issues such as the order of presentations, rules of good behavior, and whether there would be scheduled breaks. The lawyers then made formal opening statements for the parties which were followed by various combinations of smaller group meetings at which the mediator met with the parties' lawyers without the parties, and vice versa.



At one stage the lawyers were asked to jointly estimate the cost of parallel litigation in several countries as a likely alternative to the mediation.

Caucuses

Over the two days, the mediator held several caucuses separately with each party including its counsel. The caucus sessions served to canvass each party's alternatives to settlement, the relative strengths and weaknesses of their legal positions, their real interests that would need to be met by any agreement and possible options for settlement. The mediator did not provide his own evaluation of the parties' interests and legal positions. Instead, he questioned both parties' lawyers in the presence of their clients and thus brought the parties to a fuller appreciation of the cost and uncertainty of

litigating as well as of the strengths and weaknesses of their respective positions without himself taking or appearing to be taking a view.

In addition, the caucuses enabled the mediator to appreciate the possibility that the parties' interests might be reconciled, and that each faced internal issues that the other could help resolve. For the consulting company, a court victory would not bring in new consulting work and might even inhibit its business from companies similar to the other party. The manufacturer faced the dilemma of either continuing to exploit the technology pending the outcome, thereby risking even higher damages, or going to the expense and effort of changing to a less suitable technology in order to limit financial exposure. Each party however assumed that the other would not be able

or willing to cooperate in the future. All this was based on information acquired in confidence from the parties in caucus. The mediator now had to find a way, without disclosing confidential information, of enabling the parties to gain the same insight.

Breakthrough

An opportunity to achieve this objective came towards the end of the second day, when the mediator met with both parties' decision-makers alone, without their lawyers being present. Until this moment the parties had been discussing primarily the amount of damages or royalties payment. Now, however, the mediator could ask questions designed to focus both directors' attention on how each party could help the other solve its internal problem. As soon as the parties realized that their

assumptions about the other were incorrect and that they were both willing to cooperate, one side made a suggestion which the other accepted in general terms.

Developing the Settlement

Following this breakthrough, a plenary session was convened at which the lawyers were instructed to draft a document reflecting the basic agreement. This first draft was not in itself intended to be binding, but to serve as a basis for further discussion between the lawyers, the parties and the mediator. A revised version was eventually signed at the mediation session itself. Subsequently the lawyers produced a formal agreement, which the parties executed some weeks later.

Result

Through this process, the parties were able to conclude a patent license and to reach agreement on its financial terms. The manufacturer further agreed to recognize the consulting company's technology on licensed products and marketing material, and the consulting company abandoned its infringement claims. Moreover, the parties agreed to conclude further consulting contracts of a certain annual value over several years.

The mediation was thus instrumental in transforming a hostile situation in which the parties were preparing to engage in prolonged and expensive multi-jurisdictional litigation into one in which they were able to conclude an arrangement which suits the business interests of each party and ensures the profitable use of the technology in the service of those interests.

Web Site and Publications

The Center's web site contains the WIPO Rules and clauses in different languages, as well as guides and models for the procedures administered by the Center. It also offers constantly updated information on the Center's activities. Other features include the full text of all domain name decisions rendered by WIPO panelists as well as a searchable legal index to such decisions. Interested parties can use the web site to register for Center events or to subscribe to the Center's electronic newsletters. The Center's web site receives over a million visits per month and may be accessed at <http://www.wipo.int/amc>.

In addition, it is possible to order several publications about the Center, its services, and ADR. These are listed at <http://www.wipo.int/amc/en/publications/>

WIPO WORKSHOPS FOR MEDIATORS IN INTELLECTUAL PROPERTY DISPUTES

To help increase understanding of the mediation process, the Center offers every year Workshops for Mediators in Intellectual Property Disputes. The Workshops, which are conducted in English, are designed for lawyers, business executives,

and patent and trademark specialists who wish to become familiar with the mediation process and to receive practical training as mediators. Taught by Professors Robert Mnookin of Harvard Law School and Gary Friedman of the Center for Mediation in

Law, the Workshops are based on intellectual property mediation exercises. Further information is available on the Center's web site at <http://www.wipo.int/amc/en/events/>.

WIPO Copyright Mediation Followed by Expedited Arbitration

A publishing house entered into a contract with a software company for the development of a new web presence. The project had to be completed within one year and included a clause submitting disputes to WIPO mediation and, if settlement could not be reached within 60 days, to WIPO Expedited Arbitration. After 18 months, the publishing house was not satisfied with the services delivered by the developer, refused to pay, threatened rescission of the contract and asked for damages. The publishing house filed a request for mediation. While the parties failed to reach a settlement, the mediation enabled them to focus the issues that were addressed in the ensuing expedited arbitration proceeding.

RECOMMENDED WIPO CONTRACT CLAUSES AND SUBMISSION AGREEMENTS

The following pages contain recommended contract clauses (for the submission of future disputes under a particular contract) and submission agreements (for the submission of an existing dispute) for the procedures administered by the WIPO Arbitration and Mediation Center. (The diagram on page 3 of this booklet provides a graphic outline of these procedures.)

Mediation

Arbitration

Expedited Arbitration

Expert Determination

Mediation Followed, in the Absence of a Settlement, by [Expedited] Arbitration

Mediation Followed, in the Absence of a Settlement, by Expert Determination

Expert Determination, Binding Unless Followed by [Expedited] Arbitration

FUTURE DISPUTES

Mediation

“Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to mediation in accordance with the WIPO Mediation Rules. The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].”

Arbitration

“Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules. The arbitral tribunal shall consist of [three arbitrators][a sole arbitrator]. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim shall be decided in accordance with the law of [specify jurisdiction].”

Expedited Arbitration

“Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the WIPO Expedited Arbitration Rules. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim shall be decided in accordance with the law of [specify jurisdiction].”

Expert Determination

“Any dispute or difference between the parties arising under, out of or relating to [describe scope of the matter referred to expert determination] under this contract and any subsequent amendments of this contract shall be referred to expert determination in accordance with the WIPO Expert Determination Rules. The determination made by the expert shall [not] be binding upon the parties. The language to be used in the expert determination shall be [specify language].”

Mediation Followed, in the Absence of a Settlement, by [Expedited] Arbitration

“Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to mediation in accordance with the WIPO Mediation Rules. The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].

If, and to the extent that, any such dispute, controversy or claim has not been settled pursuant to the mediation within [60][90] days of the commencement of the mediation, it shall, upon the filing of a Request for Arbitration by either party, be referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules. Alternatively, if, before the expiration of the said period of [60][90] days, either party fails to participate or to continue to participate in the mediation, the dispute, controversy or claim shall, upon the filing of a Request for Arbitration by the other party, be referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules. [The arbitral tribunal shall consist of [a sole arbitrator][three arbitrators].]* The place of arbitration shall be [specify place]. The language

to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim referred to arbitration shall be decided in accordance with the law of [specify jurisdiction]."
(The WIPO Expedited Arbitration Rules provide that the arbitral tribunal shall consist of a sole arbitrator.)*

Mediation Followed, in the Absence of a Settlement, by Expert Determination

"Any dispute or difference between the parties arising under, out of or relating to [describe scope of the matter referred to expert determination] under this contract and any subsequent amendments of this contract shall be submitted to mediation in accordance with the WIPO Mediation Rules. The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].

If, and to the extent that, any such dispute or difference has not been settled pursuant to the mediation within [60][90] days of the commencement of the mediation, it shall, upon the filing of a Request for Expert Determination by either party, be referred to expert determination in accordance with the WIPO Expert Determination Rules. Alternatively, if, before the expiration of the said period of [60][90] days, either party fails to participate or to continue to participate in the mediation, the dispute or difference shall, upon the filing of a Request for Expert Determination by the other party, be referred to expert determination in accordance with the WIPO Expert Determination Rules. The determination made by the expert shall [not] be binding upon the parties. The language to be used in the expert determination shall be [specify language]."

Expert Determination, Binding Unless Followed by [Expedited] Arbitration

"Any dispute or difference between the parties arising under, out of or relating to [describe scope of the matter referred to expert determination] under this contract and any subsequent amendments of this contract shall be referred to expert determination in accordance with the WIPO Expert Determination Rules. The language to be used in the expert determination shall be [specify language].

The determination made by the expert shall be binding upon the parties, unless within [30] days of the communication of the determination, the matter referred to expert determination is, upon the filing of a Request for Arbitration by either party, referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules. [The arbitral tribunal shall consist of [a sole arbitrator][three arbitrators].] * The place of arbitration shall be [specify place].



The language to be used in the arbitral proceedings shall be [specify language]. The dispute or difference referred to arbitration shall be decided in accordance with the law of [specify jurisdiction]." (* *The WIPO Expedited Arbitration Rules provide that the arbitral tribunal shall consist of a sole arbitrator.*)

EXISTING DISPUTES

Mediation

"We, the undersigned parties, hereby agree to submit to mediation in accordance with the WIPO Mediation Rules the following dispute: [brief description of the dispute]

The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language]."

Arbitration

"We, the undersigned parties, hereby agree that the following dispute shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules: [brief description of the dispute]

The arbitral tribunal shall consist of [three arbitrators][a sole arbitrator]. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute shall be decided in accordance with the law of [specify jurisdiction]."

Expedited Arbitration

"We, the undersigned parties, hereby agree that the following dispute shall be referred to and finally determined by arbitration in accordance with the WIPO Expedited Arbitration Rules: [brief description of the dispute]

The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute shall be decided in accordance with the law of [specify jurisdiction]."

Expert Determination

"We, the undersigned parties, hereby agree to submit to expert determination in accordance with the WIPO Expert Determination Rules the following matter: [brief description of the matter referred to expert determination]"

The determination made by the expert shall [not] be binding upon the parties. The language to be used in the expert determination shall be [specify language]."

Mediation Followed, in the Absence of a Settlement, by [Expedited] Arbitration

"We, the undersigned parties, hereby agree to submit to mediation in accordance with the WIPO Mediation Rules the following dispute: [brief description of the dispute]"

The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].

We further agree that, if, and to the extent that, the dispute has not been settled pursuant to the mediation within [60][90] days of the commencement of the mediation, it shall, upon the filing of a Request for Arbitration by either party, be referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules. Alternatively, if, before the expiration of the said period of [60][90] days, either party fails to participate or to continue to participate in the mediation, the dispute shall, upon the filing of a Request for Arbitration by the other party, be referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules. [The arbitral tribunal shall consist of [a sole arbitrator][three arbitrators].]* The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute referred to arbitration shall be decided in accordance with the law of [specify jurisdiction]." (* *The WIPO Expedited Arbitration Rules provide that the arbitral tribunal shall consist of a sole arbitrator.*)

Mediation Followed, in the Absence of a Settlement, by Expert Determination

"We, the undersigned parties, hereby agree to submit to mediation in accordance with the WIPO Mediation Rules the following matter: [brief description of the dispute or difference between the parties]"

The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].

We further agree that, if, and to the extent that, any such matter has not been settled pursuant to the mediation within [60][90] days of the commencement of the mediation, it shall, upon the filing of a Request for Expert Determination by either party, be referred to expert determination in accordance with the WIPO Expert Determination Rules. Alternatively, if, before the expiration of the said period of [60][90] days, either party fails to participate or to continue to participate in the mediation, the dispute or difference shall, upon the filing of a Request for Expert Determination by the other party, be referred to expert determination in accordance with the WIPO Expert Determination Rules. The determination made by the expert shall [not] be binding upon the parties. The language to be used in the expert determination shall be [specify language].”

Expert Determination, Binding Unless Followed by [Expedited] Arbitration

“We, the undersigned parties, hereby agree to submit to expert determination in accordance with the WIPO Expert Determination Rules the following matter: [brief description of the matter referred to expert determination]

The language to be used in the expert determination shall be [specify language].

We further agree that the determination made by the expert shall be binding upon the parties, unless within [30] days of the communication of the determination, the matter referred to expert determination is, upon the filing of a Request for Arbitration by either party, referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules. [The arbitral tribunal shall consist of [a sole arbitrator][three arbitrators].] * The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute or difference referred to arbitration shall be decided in accordance with the law of [specify jurisdiction].” (* *The WIPO Expedited Arbitration Rules provide that the arbitral tribunal shall consist of a sole arbitrator.*)

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