

## Suitability check<sup>1</sup>

The following list can help to determine whether mediation is suitable for this kind of dispute and these particular parties. **The most important factors favoring mediation:**

- The parties want, in principle, to resolve their dispute.
- They are willing and able to negotiate about the conflict or at least they want to discuss it.
- The conflict is not escalated beyond reconciliation.



### Other factors favoring mediation

- The parties want to end their dispute within a short time period.
- There is a long-term relationship and the continuation, or the considerate termination of the relationship, is important.
- Treatment issue or communication problems.
- The parties have a desire to reach a settlement themselves and on their own terms.
- A legal judgment does not or would not (totally) resolve the underlying conflict.
- Confidentiality or privacy is important.
- There are more than two parties involved in, or having a stake in, the dispute.
- The dispute concerns several claims/conflicts.
- The case concerns substantive technical and/or complex content issues or requires specialist knowledge.
- It is an international case (with unpredictable jurisdiction or enforcement issues).

### Factors challenging mediation as the right dispute resolution process

- At least one party benefits significantly from delay and does not want to disclose this interest (hidden agenda).
- One of the parties is acting in bad faith.
- A precedent is needed (e.g. an explanation of the General Terms) or a principle of law needs to be established.
- A party is particularly concerned with publicly asserting or proving her own right (e.g. in order to send a wider message).
- A party is incapable of taking responsibility for decisions or is insufficiently able to represent or protect her own interests.
- There is an extreme imbalance of power and the stronger party is intent on exerting that power without compromise.

## Cost Benefit Analysis

You can use the cost-benefit analysis in three different ways while assisting corporate clients in resolving a dispute.



- Checklist: Using the form below, check the squares in the costs and benefits sections of both the mediation and the /arbitration columns. This enables you to see at a glance which method to resolve the dispute is likely to offer more overall advantages.
- Calculation of costs: For a quantitative analysis, you can calculate the costs per entry for both cost and benefit columns.
- Reality testing: The form can be used as a tool for reality testing (risk analysis).

<sup>1</sup> Checklists from Toolkit Generating Outcomes, mediation, negotiation. Manon Schonewille, The Hague: Sdu, 2009. ©2009-2014 Manon Schonewille, all rights reserved.

FORM DISPUTE COSTS 1

Mediation

Costs

Litigation/arbitration

Costs

Sunk Costs of the dispute to date

\$

Sunk Costs of the dispute to date

\$

Time

- Missing deadline(s) \$\_\_\_\_\_ (estimation).
- Lost office hours executives/managers involved:  
 Person 1: hours spent on solving conflict \_\_\_\_ x \$ \_\_\_\_\_ (hourly pay/fee).  
  
 Person 2: \$ \_\_\_\_\_ Person 3: \$ \_\_\_\_\_. Person 4: \$ \_\_\_\_\_.
- Office hours spent on dispute by other departments (E.g. Legal services, HR):  
 \_\_\_\_\_ x \$ \_\_\_\_\_ (hourly pay/fee).

True (ie including hidden) costs caused by the dispute

- Reputational damage, negative publicity (estimation) \$ \_\_\_\_\_.
- Negative impact on company relationships (estimation) \$ \_\_\_\_\_.
  - Projects/work postponed/delayed/ cancelled (estimation) \$ \_\_\_\_\_.
  - Negative impact on personal life of parties concerned (estimation) \$ \_\_\_\_\_.
  - Negative impact on quality output of parties concerned (estimation) \$ \_\_\_\_\_.
  - Fees for advisors/lawyers \_\_\_\_ hours x € \_\_\_\_\_. other costs \$\$\_\_\_\_\_.
  - Extra costs spent due to the dispute (E.g. media-consultant, PR campaign, etc.), \$ \_\_\_\_\_ (estimation).
  - Other costs (E.g. personal turnover, adjustment within the organisation or method of working, procedures, sabotage, absence, etc.), \$ \_\_\_\_\_ (estimation).

Time

- Missing deadline(s) \$\_\_\_\_\_ (estimation).
- Lost office hours executives/managers involved:  
 Person 1: hours spent on solving conflict \_\_\_\_ x \$ \_\_\_\_\_ (hourly pay/fee).  
  
 Person 2: \$ \_\_\_\_\_ Person 3: \$ \_\_\_\_\_. Person 4: \$ \_\_\_\_\_.
- Office hours spent on dispute by other departments (E.g. Legal services, HR):  
 \_\_\_\_\_ x \$ \_\_\_\_\_ (hourly pay/fee).

True (ie including hidden) costs caused by the dispute

- Reputational damage, negative publicity (estimation) \$ \_\_\_\_\_.
- Negative impact on company relationships (estimation) \$ \_\_\_\_\_.
  - Projects/work postponed/delayed/ cancelled (estimation) \$ \_\_\_\_\_.
  - Negative impact on personal life of parties concerned (estimation) \$ \_\_\_\_\_.
  - Negative impact on quality output of parties concerned (estimation) \$ \_\_\_\_\_.
  - Fees for advisors/lawyers \_\_\_\_ hours x € \_\_\_\_\_. other costs \$\$\_\_\_\_\_.
  - Extra costs spent due to the dispute (E.g. media-consultant, PR campaign, etc.), \$ \_\_\_\_\_ (estimation).
  - Other costs (E.g. personal turnover, adjustment within the organisation or method of working, procedures, sabotage, absence, etc.), \$ \_\_\_\_\_ (estimation).

Subtotal costs to date \$

Subtotal costs to date \$

**FORM DISPUTE COSTS 2**

Mediation	Costs	Litigation/Arbitration	Costs
(Future) Costs for resolving the dispute		(Future) Costs for resolving the dispute	
\$		\$	
<input type="checkbox"/> Fees for mediator ____ hours \$ x € _____, other costs (e.g. venue, travel expenses) \$ _____. <input type="checkbox"/> Fees for lawyer(s) ____ hours x \$ _____, other costs (e.g. .administration, travel expenses) \$ _____. <input type="checkbox"/> Fees for experts/ assistants ____ hours x \$ _____, other costs \$ _____. <input type="checkbox"/> Damage to reputation, negative publicity \$ _____. <input type="checkbox"/> Negative impact on company relationships (estimation) € _____. <input type="checkbox"/> Negative impact on personal life of parties concerned (estimation) \$ _____. <input type="checkbox"/> Negative impact on quality output of parties concerned (estimation) \$ _____. <input type="checkbox"/> Additional costs (estimation) \$ _____. <input type="checkbox"/> Other costs (estimation) \$ _____.		<input type="checkbox"/> Costs legal proceedings \$ _____. <input type="checkbox"/> Fees for lawyer(s) ____ hours x \$ _____, other costs (e.g. .administration, travel expenses) \$ _____. <input type="checkbox"/> Fees for experts/ assistants ____ hours x \$ _____, other costs \$ _____. <input type="checkbox"/> Damage to reputation, negative publicity \$ _____. <input type="checkbox"/> Negative impact on company relationships (estimation) € _____. <input type="checkbox"/> Negative impact on personal life of parties concerned (estimation) \$ _____. <input type="checkbox"/> Negative impact on quality output of parties concerned (estimation) \$ _____. <input type="checkbox"/> Additional costs (estimation) \$ _____. <input type="checkbox"/> Other costs (estimation) \$ _____.	
<b>Time</b>		<b>Time</b>	
<input type="checkbox"/> Time involvement for resolving dispute for executives/managers: Person 1: hours spent on solving conflict ____ x \$ _____ (hourly pay/fee).  Person 2: \$ _____ Person 3: \$ _____ . Person 4: \$ _____ . <input type="checkbox"/> Time involvement for resolving dispute by other departments (E.g. Legal services, HRM): ____ x \$ _____ (hourly pay/fee).		<input type="checkbox"/> Time involvement for resolving dispute for executives/managers: Person 1: hours spent on solving conflict ____ x \$ _____ (hourly pay/fee).  Person 2: \$ _____ Person 3: \$ _____ . Person 4: \$ _____ . <input type="checkbox"/> Time involvement for resolving dispute by other departments (E.g. Legal services, HRM): ____ x \$ _____ (hourly pay/fee).	
Other potential future costs		Other potential future costs	
\$		\$	
<input type="checkbox"/> Costs for reaching agreement \$ _____. <input type="checkbox"/> Costs involved in reaching a partial agreement \$ _____. <input type="checkbox"/> Costs if no (partial) agreement \$ _____.  <input type="checkbox"/> Cancellation/loss of projects/jobs \$ _____. <input type="checkbox"/> Loss of/ damage on important relationships \$ _____. <input type="checkbox"/> Other \$ _____.		<input type="checkbox"/> Costs for winning the lawsuit \$ _____. <input type="checkbox"/> Costs involved in winning/loosing partially (E.g. damages, negative publicity, etc.). \$ _____. <input type="checkbox"/> Costs for loosing the lawsuit (E.g. damages, negative publicity, etc.). \$ _____. <input type="checkbox"/> Cancellation/loss of projects/jobs \$ _____. <input type="checkbox"/> Loss of/ damage on important relationships \$ _____. <input type="checkbox"/> Other \$ _____.	
<b>TOTAL COSTS</b>		<b>TOTAL COSTS</b>	

**FORM BENEFITS OF THE DISPUTE**

<b>Mediation</b>	<b>Benefits</b>	<b>Litigation/arbitration</b>	<b>Benefits</b>
<b>Benefits of the dispute to date</b>		<b>Benefits of the dispute to date</b>	
\$		\$	
<input type="checkbox"/> Extra revenue(s), projects, work \$ _____ (estimate). <input type="checkbox"/> Costs for the opposing party / competitors (E.g. legal aid, involving experts, media, management time, etc.) \$ _____ (estimate). <input type="checkbox"/> Reputation opposing party / competitors affected \$ _____ (estimate) <input type="checkbox"/> Time taken up from the opposing party / competitor \$ _____ (estimate). <input type="checkbox"/> Positive publicity, PR, create awareness, \$ _____ (estimate). <input type="checkbox"/> Other beneficial effects for the own company \$ _____ (estimate)		<input type="checkbox"/> Extra revenue(s), projects, work \$ _____ (estimate). <input type="checkbox"/> Costs for the opposing party / competitors (E.g. legal aid, involving experts, media, management time, etc.) \$ _____ (estimate). <input type="checkbox"/> Reputation opposing party / competitors affected \$ _____ (estimate) <input type="checkbox"/> Time taken up from the opposing party / competitor \$ _____ (estimate). <input type="checkbox"/> Positive publicity, PR, create awareness, \$ _____ (estimate). <input type="checkbox"/> Other beneficial effects for the own company \$ _____ (estimate)	
<b>Benefits of resolving the dispute</b>		<b>Benefits of resolving the dispute</b>	
\$		\$	
<input type="checkbox"/> Speed. <input type="checkbox"/> (Limited) costs that can be controlled by the parties. <input type="checkbox"/> Own (business) solution, not being bound by (limited) range of legal solutions. <input type="checkbox"/> High compliance rate. <input type="checkbox"/> Opportunity to settle things that are not legally enforceable (E.g. behavior, emotions and communication problems). <input type="checkbox"/> The real (underlying) interests can surface (in a caucus) and options can be explored in confidence <input type="checkbox"/> Confidentiality and privacy. <input type="checkbox"/> Maintaining a (workable) business relationship or cautiously ending it. <input type="checkbox"/> Settlement agreement. <input type="checkbox"/> Settle several disputes at the same time. <input type="checkbox"/> Solve disputes with several parties in one procedure. <input type="checkbox"/> Other _____		<input type="checkbox"/> Public rehabilitation/publicly prove who is right. <input type="checkbox"/> Delay settlement/dealing with consequences (utilize all available procedures). <input type="checkbox"/> Costs incurred to and time taken up from the opposing party / competitor. <input type="checkbox"/> Clear legal solution (win a case, loose a case, damages or not, explanation of (new) legislation or rules). <input type="checkbox"/> Third party who takes a binding decision. <input type="checkbox"/> Possible damages. <input type="checkbox"/> Discharge the responsibility to a third party (internal accountability towards constituency). <input type="checkbox"/> Implementation of acts that need a judicial order to be executed. <input type="checkbox"/> Precedent, leading case. <input type="checkbox"/> Publicity. <input type="checkbox"/> Enforceable title. <input type="checkbox"/> Other _____	
<b>Potential future benefits</b>		<b>Potential future benefits</b>	
\$		\$	
<input type="checkbox"/> Preservation or new start of business relationship. <input type="checkbox"/> New opportunities. <input type="checkbox"/> Potential revenues of business solution \$ _____ <input type="checkbox"/> Other _____		<input type="checkbox"/> Beneficial effects of winning a law suit. <input type="checkbox"/> Awarded damages \$ _____. <input type="checkbox"/> Precedent or leading case. <input type="checkbox"/> Other _____	

**TOTAL BENEFITS**

**TOTAL BENEFITS**