



Promoting Intellectual
Property Rights in the
ASEAN Region

Topic 2: Mediation process - Roles of mediators and parties

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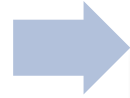
- ❖ Phases of mediation process and methodology
- ❖ Challenges to IP mediation: solving difficulties during the mediation process
- ❖ Roles of mediators and parties involved
- ❖ Q&A



Phases of the mediation process

Request/proposal for mediation

- Request by parties
- Proposal of rapporteur
- Selection of the mediator



Preparation

- Pre-mediation planning
- Contacts with parties



Mediation day

- Opening session
- Caucuses
- Intermittent joint sessions
- Concluding

Mediation process
before the EUIPO BoA

Request/proposal for mediation

Unilateral request

- **One** of the parties asks for mediation and request **transmitted to the other party**
- If proposal **accepted by the other party**, the **mediation** process is **triggered**
- If proposal **declined**, ordinary **appeal proceedings continue**

Joint request

- **Both** parties agree to mediate and a joint **request is sent** to the ADRS
- Parties agree jointly on a **mediator/co-mediators** and may be guided by the ADRS
- Proceedings at the EUIPO are **suspended**

Proposal of Rapporteur

- Communication sent to both parties **proposing mediation**
- If **accepted** by both parties, the process continues as with a joint request
- If **declined** by one or both parties, ordinary appeal proceedings **continue**

Choice of mediator

<https://euipo.europa.eu/ohimportal/en/mediators>

EUPO - Home > [Law & practice](#) > Practice > ADI Service > Mediation > Mediators

Mediators



Nurzio BAMBARA
Nationality: Italian
Languages: IT, EN, ES, FR, DE
Full CV



Christoph BARTOS
Nationality: Austrian
Languages: EN, DE, ES
Full CV



Sophia BONNE
Nationality: Belgian
Languages: NL, EN, FR, DE, ES
Full CV



Marita BRA
Nationality: Greek
Languages: EN, FR, ES, EL
Full CV



Gordon HUMPHREYS
Nationality: British
Languages: EN, FR, ES
Full CV



Philipp von KAPFF
Nationality: German
Languages: DE, EN, ES, FR
Full CV



Arkadiusz MAKAR
Nationality: Polish
Languages: PL, EN
Full CV



Virginia MELGAR
Nationality: French
Languages: FR, EN, ES
Full CV



Alexandra CRAWCOUR
Nationality: British
Languages: EN, DE, ES, IT
Full CV



Stefano di Natale
Nationality: Italian
Languages: IT, EN, ES, FR
Full CV



Julia GARCÍA MURILLO
Nationality: Spanish
Languages: EN, ES, FR
Full CV



Flamenia GEORGIEVA
Nationality: Bulgarian
Languages: BG, EN
Full CV



Klaudia MISZTAL
Nationality: Polish
Languages: PL, EN, ES
Full CV



Cinzia NEGRO
Nationality: Italian
Languages: IT, EN, ES, FR
Full CV



Sophie PÉTREQUIN
Nationality: French
Languages: FR, EN, ES
Full CV



André POHLMANN
Nationality: German
Languages: DE, EN, ES
Full CV

Mediation planning and first contacts

Mediator sends the parties a **letter of introduction**:

- ✓ Requesting selection of the **mediation venue (or online)**
- ✓ Asking for a **range of available dates** for the mediation
- ✓ Insisting that **business decision-takers** be present (authority to bind)
- ✓ Attaching the **mediation agreement** (including **confidentiality annex**) for signature
- ✓ Setting timeframe for receiving a **summary of the case**

The Mediation Day

1. Initial **joint session**
2. Break out into alternating **individual caucuses** (private sessions) with the parties
3. Possible **intermittent joint sessions** (particularly as bargaining progresses)
4. Drafting of heads of agreement/MoU
5. Conclusion on next steps

Challenges to IP mediation: solving difficulties during the mediation process

Prepare!

- Preliminary questions:

What is your client's time frame for concluding this conflict/mediation?

Are there any other proceedings/conflict pending between the parties?

Is there any other issue concerning the other party, such as commercial conflicts?

What are in your opinion your client's prospects of success in these proceedings?

What would be the best possible resolution of the conflict from your perspective and in particular, from a commercial perspective?

What is the worst case scenario and what would your client like to avoid at all costs?

What is your client's leeway for settlement? Would there be a possibility of future co-operations?

Which are the risks associated with this conflict, such as financial impact, loss of reputation, PR fall-out?

Does your client have interests in particular territories within the EU and/or elsewhere?

In the opinion of your client, where lie the interests of the other side?

Where does your client see the highest hurdles for a resolution? How can these hurdles be overcome?

How important is an amicable resolution for your client and why?

- Agenda of the day

Challenges to IP mediation: solving difficulties during the mediation process

Deadlock

Possible REASONS

- Lack of Authority
- Financial situation / difficulty
- Impact of history of negotiation
- Saving face / ego
- Tactical move
- Fear of setting a precedent / internal policies
- Lack of trust in the mediator

Challenges to IP mediation: solving difficulties during the mediation process

Deadlock

Possible SOLUTIONS

- Anticipate authority issues and steps for expanding authority
- Ask for rationale
- Creative options for expanding the pie – non monetary, flexibility
- Reality testing – risk and costs of litigation
- Reframe in time to the future – refer to progress made at mediation
- Consider alternatives to settling at the mediation (BATNA / WATNA)
- Shifting perspectives by considering other party's position / view
- Emphasise neutrality and role of mediator
- Focus on progress made at mediation
- Explore internal policies and understand concerns – discuss wording and confidentiality agreements

Different Actors in a Mediation

Mediator

Parties

Lawyers

What is a mediator?

A MEDIATOR IS:

- **A third party professional**
- **Neutral** (impartial and independent)
- **A process manager** assisting the parties in reaching a voluntary and mutually satisfactory settlement
- **A facilitator** of the communication and discussions between the parties

A MEDIATOR IS NOT:

- **A judge** - **No authority** to settle the case – No **reproaching/criticism** of parties positions
- **An advisor** - **No legal advice** or to represent any party

Role of the Mediator

- **Guides** the mediation process
- **Helps** the parties to capture the overall picture
- **Assists** the parties in preparing the offers and evaluate how they will be received by the other party
- **Identifies** objective criteria for possible solutions
- **Manages** expectations and reactions
- **Exempted** from liability on the outcome, the legality and enforceability of the settlement agreement

Mediation Styles...

Examples :

- **Facilitative mediation**
- **Evaluative mediation**
- **Transformative mediation**

Role of Co-Mediators

Co-mediation is where two or more mediators are working together on a specific case
Co-mediators act as a **team**

Examples where co-mediation may be useful:

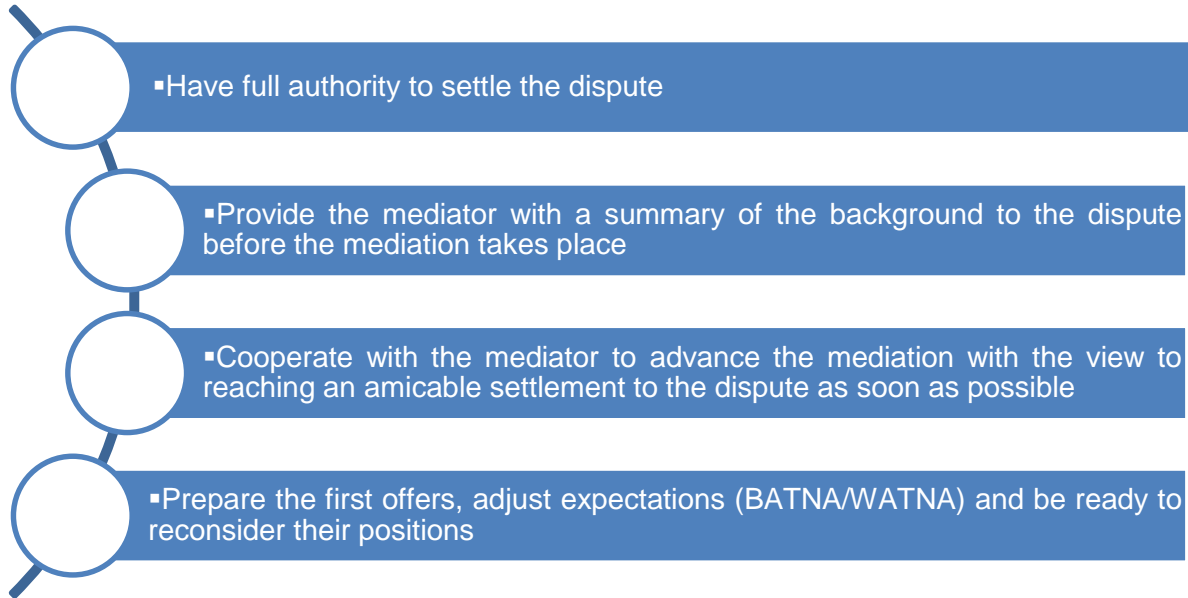
- Complex dispute
- Need for combination of different skills
- Language

Before the mediation starts, **agreement on** :

- Roles and tasks
- Cooperation and communication
- Management of process in case they have different views

Role of the Parties

The parties should...

- 
- Have full authority to settle the dispute
 - Provide the mediator with a summary of the background to the dispute before the mediation takes place
 - Cooperate with the mediator to advance the mediation with the view to reaching an amicable settlement to the dispute as soon as possible
 - Prepare the first offers, adjust expectations (BATNA/WATNA) and be ready to reconsider their positions

Preparation

- Understand **mediation process**: ask questions
- Underline the **important issues** that they want to address
- Understand the **strengths and weaknesses** of their case

During Mediation

The parties should:

- **Listen without interrupting:** parties will get a chance to talk
- **Share their thoughts** with the mediator
- **Be prepared to make an offer**

Role of the Lawyers

Help the client in the different stages of the process (e.g. preparing offers)

Help the client to identify legal issues, strengths and weaknesses

Prepare the case/documents with the client

Participate in drafting the settlement agreement

In particular, the lawyer's role in the preparation phase...

- **Understand** mediation and **advise** the client
- Consider the **advantages** of mediation **in general** : confidentiality, timing, maintaining business relations
- Consider the **advantages** of mediation in the **specific** case: weaknesses and strong points
- Participate in the **choice of mediator/comediators**
- Initial **case summary**
- **Opening statements**
- Participation in the **agenda** drafting because of knowledge of issues

In particular, the lawyer's role during mediation day...

Exploration and bargaining

- Lawyer can be **mediator's ally** (ideally...)
- Advise the client: not only legal advice, also commercial considerations
- Explore solutions and think outside the box
- Assess in a realistic way the strengths and weaknesses of the client's case
- Calculate cost estimates

Concluding : Draft Settlement Agreement, while advising and resolving relevant legal issues



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