



# Mediation process, Persons Involved, and Information Disclosure

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## MEDIATION PROCESS

- **Mediation is a dispute resolution tool offered by the EUIPO in appeal proceedings**
  - ✓ Included in the appeal fee
  - ✓ Voluntary in nature
  - ✓ Available to represented or unrepresented parties
- **Initiation**
  - ✓ **Unilateral request**
  - ✓ **Bilateral request**
  - ✓ **Proposal of rapporteur**



## MEDIATION PROCESS

### Unilateral request

- ✓ **One** of the parties **asks** for mediation
- ✓ Request is **transmitted** to the other party
- ✓ Ordinary proceedings before the Board of Appeal are **put on hold**
- ✓ **Reporting mediator** appointed by ADRS and contacts other party to offer guidance and support to enable an **informed decision** to be taken
- ✓ Proposal to mediate the dispute is either **accepted or declined**
- ✓ If **accepted**, the mediation process is triggered
- ✓ If **declined**, ordinary appeal proceedings resume



## MEDIATION PROCESS

### Bilateral request

- ✓ **Both** parties **agree** to mediate
- ✓ A **request** is sent to the Alternative Dispute Resolution Service (**ADRS**) at the EUIPO
- ✓ Parties **agree** jointly on a **mediator** and may be guided by the ADRS in that choice
- ✓ **Proceedings** at the EUIPO are **suspended** or put on hold pending the completion of the mediation process



## MEDIATION PROCESS

### Proposal of rapporteur

- ✓ Rapporteur in appeal proceedings **case manages** files to select those s/he considers appropriate for mediation
- ✓ A **communication** is sent to both parties proposing mediation
- ✓ Ordinary proceedings before the Board of Appeal are **put on hold**
- ✓ A **reporting mediator** is appointed and s/he **liaises** with the parties to guide them in making an informed decision on mediation (including other ADR tools)
- ✓ If accepted, the process will **continue** in the same way as with a **bilateral request**
- ✓ If declined, ordinary **appeal** proceedings **resume**



## SELECTING THE MEDIATOR

- **Choice of mediator**
  - ✓ **List** of EUIPO mediators + **bios** available on EUIPO website
  - ✓ Always possible to go **outside EUIPO** (but must be paid for)
  - ✓ **Language** needs may mean co-mediation
  - ✓ **Nationality** may be an issue
  - ✓ **ADR Service** or reporting mediator can **help** in the selection



## PRE-MEDIATION PLANNING



Mediator sends the parties a **letter of introduction** (via dedicated email channel):

- ✓ **Thanking** them for the appointment
- ✓ Requesting selection of the **mediation venue** (or **online**)
- ✓ Asking for a **range of available dates** within a certain timeframe for the mediation
- ✓ Requiring identification of **attendees** at 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** (6 pages)



## PRE-MEDIATION CONTACTS

- Mediator calls parties (representatives) individually:
  - ✓ **Follows up** on the letter of introduction, **clarifying** and **responding** to questions
  - ✓ **Explains** how the **mediation process** will **unfold** on the selected day (emphasizing the need to leave the entire day free)
  - ✓ If already received, the mediator will **explore** important points identified in the case summary, trying to understand fully the dispute background and issues, for example:
    - History of **previous negotiations** (including offers made)
    - Party's ideas for settlement
  - ✓ Arrange to **speak** by phone/video with a **relevant person from the client business**





## PRE-MEDIATION CONTACTS

- **Several calls** with the representatives and their clients may be necessary
- Mediator tries to:
  - ✓ **Ensure** that the **right people** will **attend the mediation** and **remain available**
  - ✓ Establish **rapport** and trust with the parties and their representatives
  - ✓ Drive the process efficiently, professionally and impartially
  - ✓ Get the parties to try to **shift** their focus from **past** grievances to **forward looking** possible **solutions**
  - ✓ **Coach** the parties how to get the best out of the mediation process (e.g. role of opening statements, focusing on needs and interests not positions, willingness to consider offers, enlarge the pie solutions, etc)



## 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



# THE MEDIATION DAY



## 1. Initial joint session

- ✓ Mediator explains his/her role and sets the ground rules for the day
- ✓ Parties make opening statements
- ✓ Initial comments and discussion.
- ✓ Mediator draws up a list of issues with the parties



# THE MEDIATION DAY

## 2. Caucuses



- Exploration phase
  - ✓ Fact finding
  - ✓ Needs and interests versus positions
  - ✓ Legal versus business
  - ✓ Historical entrenchment versus future focus
- Bargaining/negotiation/offers phase
  - ✓ Gestalt theory and transitional mediation techniques
  - ✓ Reality resting and evaluative mediation techniques (BATNA, WATNA and ZOPLA)
  - ✓ Reformulating, shuttle diplomacy and facilitative mediation techniques

**=> CONFIDENTIALITY needs to be carefully managed!**



## THE MEDIATION DAY



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### 3. Intermittent joint sessions

- Advanced bargaining
- Apologies and acknowledgements
- Making the pie bigger
  - ✓ Licences
  - ✓ Joint ventures, etc
- Joint problem solving
  - ✓ IP tax issues
  - ✓ Anti trust (competition law) issues
  - ✓ Other legal issues
  - ✓ Possibility of separating the people from the problems (lawyers' conference)



## THE MEDIATION DAY



### 4. Drafting Heads of Agreement/MoU

- Don't leave without getting key points agreed on in writing
- Importance of the role of lawyers
- Role of mediator in drafting
- Choice of law/enforcement issues



## THE MEDIATION DAY



### 5. Conclusion on next steps

- Lawyers continue with drafting settlement agreement
- Enforcement, applicable law and forum (med-arb possibility)
- Availability of mediator to assist
- Mediator destroys all notes
- Formal closure of IP litigious procedures





# THANK YOU



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