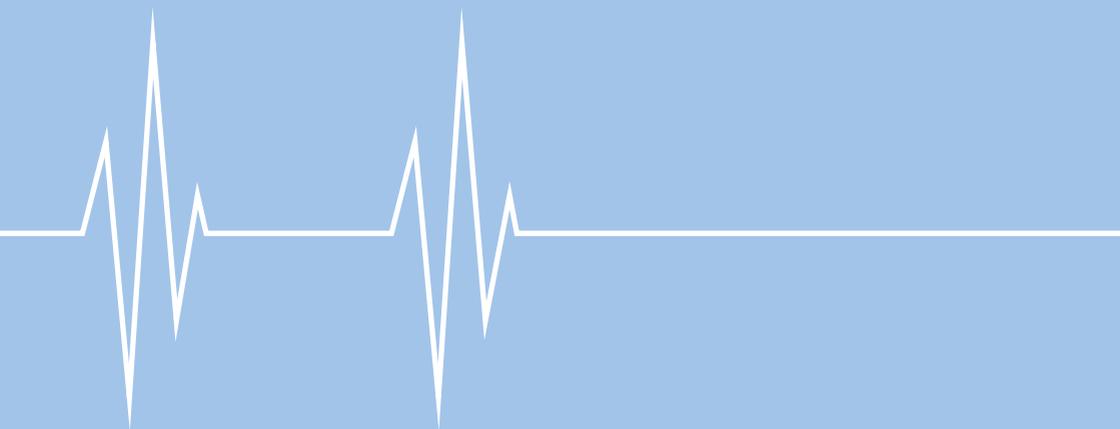


Guide to WIPO Mediation



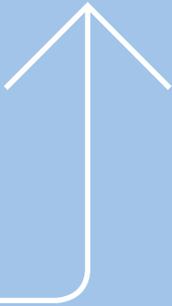


A vertical blue bar on the left side of the page, extending from the top to the bottom, with a white horizontal line near the bottom.

Court litigation is often costly and time-consuming and can harm business relationships.



Increasingly, parties are turning to Alternative Dispute Resolution (ADR) instead.



ADR embraces various ways of resolving disputes between two or more parties without resorting to conventional court litigation.

For most intellectual property (IP) and technology-related disputes, one or more types of ADR – such as mediation, arbitration and expert determination – may be suitable. If well managed, ADR can save time and money as well as provide a range of additional benefits.

The WIPO Arbitration and Mediation Center (WIPO Center) provides neutral, international and non-profit ADR services, helping you to:

- resolve IP, technology and commercial disputes;
- control the dispute resolution process;
- select experienced mediators, arbitrators or experts;
- consolidate disputes in a confidential procedure; and
- begin, continue or enhance profitable business relationships.

The WIPO Center's primary goal is to offer IP stakeholders the means to resolve their disputes in a cost- and time-saving manner.

Mediation as a method for resolving disputes is enjoying increasing use by IP, technology, and other commercial stakeholders.



In part, this growth reflects dissatisfaction with the cost, delays and length of court litigation.

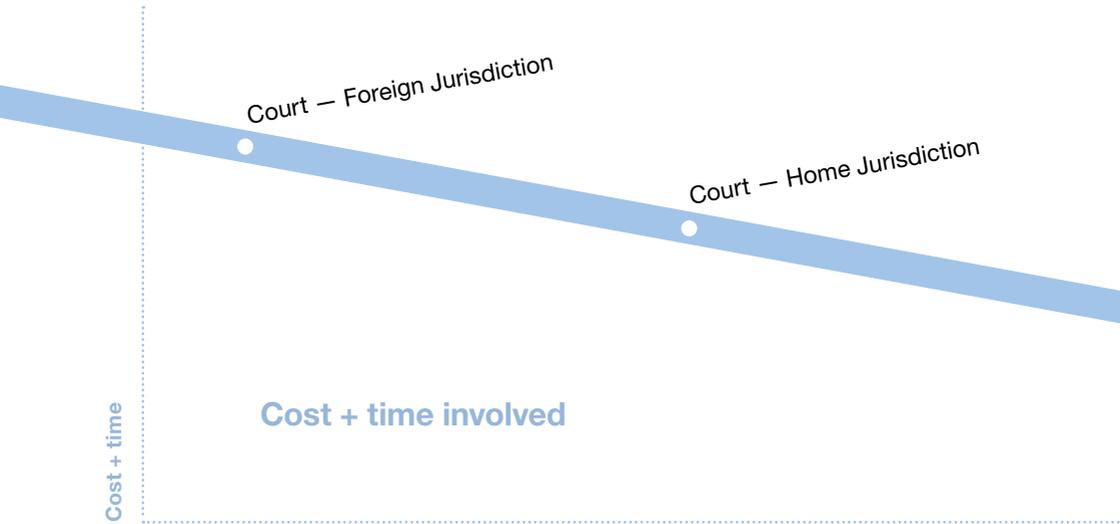
It is also due to the advantages of mediation, particularly its appeal as a procedure that offers parties more control over both the process to which they submit their dispute and the outcome of that process.

Mediation has proved very successful in achieving a result beneficial to both sides to a dispute. However, as a dispute resolution procedure it may still be unfamiliar to many potential users.

This booklet is designed to answer their questions. It provides a straightforward introduction to mediation, based on the extensive experience of the WIPO Center. It introduces the main features and advantages of mediation and explains how mediation under the WIPO Mediation Rules works in practice, with actual examples and case studies.

The aim is to prepare stakeholders who are considering whether mediation is the right choice for their dispute resolution needs.

IP dispute resolution



Source: WIPO International Survey on Dispute Resolution in Technology Transactions (www.wipo.int/amc/en/center/survey/results.html)

Mediation

An **informal** consensual process in which a neutral intermediary, the **mediator**, **assists** the parties in reaching a **settlement** of their dispute, based on the parties' respective **interests**.

The mediator **cannot impose** a decision.

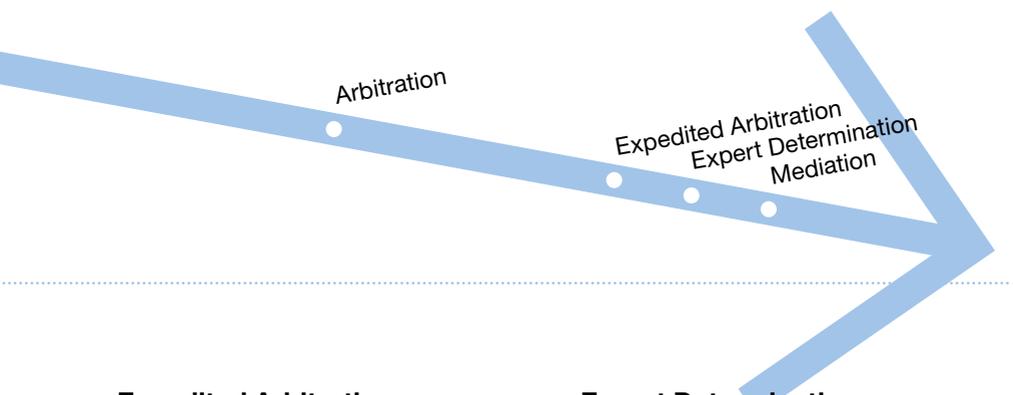
A settlement agreement can be enforced as a contract.

Mediation **leaves open litigation or agreed arbitration** options.

Arbitration

A **more formal** consensual procedure in which the parties submit their dispute to one or more chosen arbitrators, for a **binding and final decision (award)** based on the parties' respective **rights and obligations** and **internationally enforceable under arbitral law**.

As a private alternative, arbitration normally **forecloses court options**.



Expedited Arbitration

An arbitration procedure that is carried out in a **shorter time** and at a **reduced cost**.

The arbitral tribunal will normally consist of a **sole arbitrator**.

Expert Determination

A **consensual** procedure in which the parties submit a **specific matter** (e.g., a technical question) to one or more experts who **make a determination** on the matter.

The parties can agree for such outcome to be **binding**.

What is mediation?

Mediation is an increasingly popular ADR choice, one of several offered by the WIPO Center.

Mediation is a non-binding procedure controlled by the parties

The success of the mediation process depends on the parties' continuing acceptance of it. The non-binding nature of mediation also means that a decision cannot be imposed on the parties. When a mediation results in a settlement between the parties, that agreement can be enforced as a contract under applicable law.

Unlike a judge or an arbitrator, the mediator is not a decision-maker

The role of the mediator is not to decide the dispute, but to assist the parties in reaching their own settlement.

Mediation is a confidential procedure

Confidentiality encourages 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. As a general rule, they cannot be used in any subsequent litigation or arbitration. The WIPO Mediation Rules contain detailed provisions to help preserve confidentiality in relation to the existence and outcome of the mediation.

Mediation is an interest-based procedure

In a mediation, the parties can be guided by their business interests. As such, they are free to choose an outcome that is oriented as much to the future of their business relationship as to their past conduct.

Why consider mediation?

Mediation is an attractive dispute resolution option where any of the following are important priorities for either or both of the parties:

- **minimizing the costs** entailed in resolving the dispute;
- **maintaining control** over the dispute-resolution process;
- achieving a **speedy settlement**;
- maintaining **confidentiality** about the dispute; or
- preserving or developing an underlying **business relationship** between the parties to the dispute.

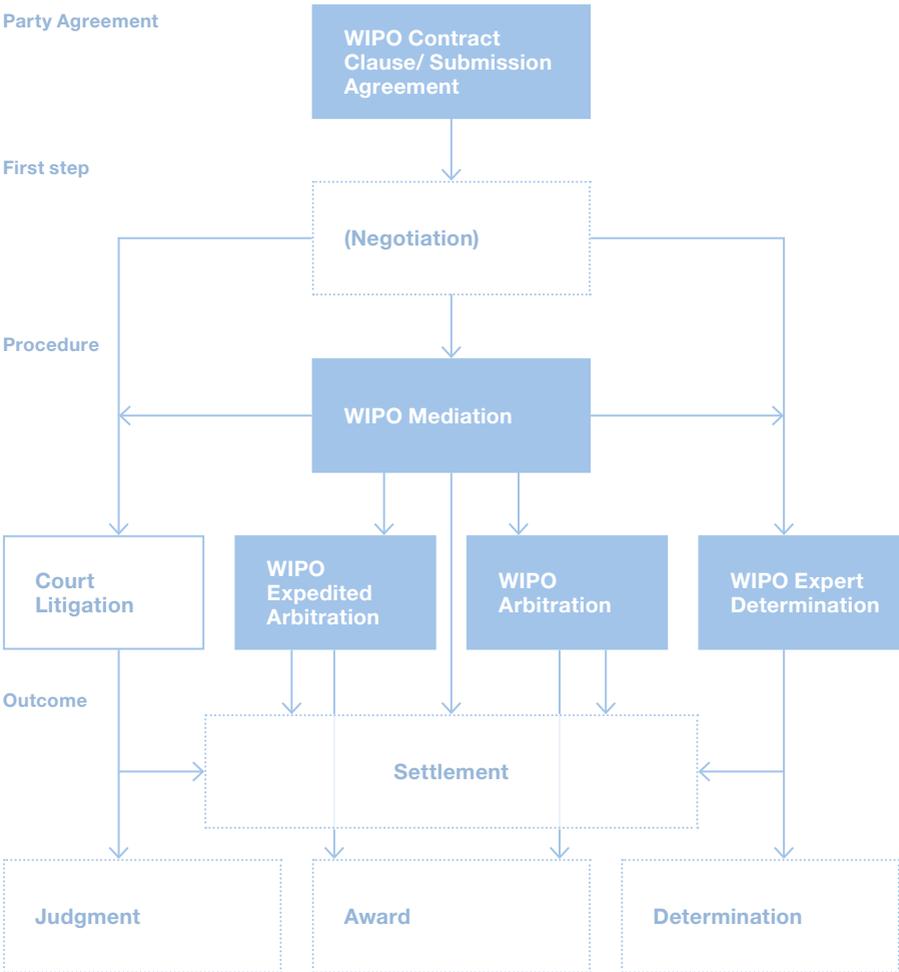
Perhaps most importantly, mediation means that the **parties stay in control** of the procedure. Each party can terminate the mediation at any stage, if it feels that it is not making progress, the procedure is becoming too costly, or the other party is not acting in good faith. The commitment to mediation is controllable at all stages.

Because mediation is **non-binding and confidential**, it entails minimal risk for the parties and generates significant benefits. Some say that even when a settlement is not achieved, mediation never fails, as it causes the parties to define the facts and issues of the dispute so that they are well prepared for any subsequent arbitration or court proceedings.

Mediation helps parties to understand the strengths and weaknesses of each party's case. Mediation also provides an opportunity to find a solution that suits the **business interests** of the parties, not just their strict legal rights and obligations.

However, mediation is not suitable for resolving all disputes. It **requires the cooperation of both sides**, so it is unlikely to be appropriate where deliberate, bad-faith infringement is involved. Similarly, where the objective of one or both parties 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.

WIPO ADR Options



Routes to WIPO Mediation

Parties refer disputes to WIPO Mediation through a **contract clause** or, in its absence, through a **submission agreement** or alternatively a **unilateral request** for WIPO Mediation.

Mediation Contract Clause electing WIPO Rules

This is the most frequent basis for requesting WIPO mediation.

Mediation Submission Agreement electing WIPO Rules

In the absence of prior agreement, parties may still agree to WIPO Mediation after a dispute has arisen.

Unilateral Request for WIPO Mediation by one party

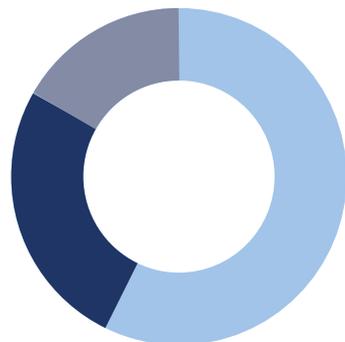
Alternatively, one party can propose submitting a dispute to WIPO Mediation by contacting the other party and the WIPO Center.

Court Referrals

In existing court proceedings, parties may have the opportunity to refer their dispute to WIPO Mediation, either as suggested by the court or by agreement between them.

For each of these routes to WIPO Mediation, WIPO makes available **model clauses and submission agreements** (see page 14). Parties can **shape the mediation process via the clause**, for example by identifying the location and language.

WIPO ADR Cases



- 57% Contract Clause
- 26% Submission Agreement
- 17% Unilateral Request

WIPO Mediation case examples

	Contractual dispute	Non-contractual dispute
Contract	Software licensing agreement	Not applicable
Dispute	Whether licensee was entitled to let affiliated parties have access to software, and whether additional license fees were due in respect of those third parties	Trademark co-existence: to avoid confusion of similar trademarks and to regulate future use
Parties	US software development company and Dutch provider of telecommunications services	US company, two Italian companies, and Spanish company
Basis	Contract included clause submitting disputes to WIPO Mediation followed by Expedited Arbitration	By submission agreement, parties agreed to WIPO Mediation
Process	Taking into account parties' criteria, WIPO Center proposed mediator candidates with experience in software licensing and appointed a mediator in accordance with parties' preferences. Mediator met with parties in two-day session in Washington, DC	Language of proceedings: English, Italian, and Spanish From list of candidates suggested by WIPO Center, parties selected mediator with specific expertise in European trademark law and fluency in English and Italian Mediator met with parties in two-day session in Milan
Result	Parties developed mutually acceptable framework and resolved multiple issues in dispute Using options developed during mediation, direct negotiations between parties continued after termination of mediation to address remaining obstacles	Global settlement agreement covering all issues in dispute
Duration	Two months	Four months

IP Office proceedings

Not applicable

Longstanding cross-border commercial and IP dispute: oppositions to trademark application

Singaporean company (Opposer), and commercially connected companies based in Indonesia, Malaysia and Singapore (Applicants)

Parties agreed to submit all trademark oppositions into consolidated WIPO Mediation, in order to resolve all outstanding proceedings on global basis

Parties agreed to Singaporean IP lawyer proposed by WIPO Center as mediator. One-day mediation session in Singapore

Parties achieved regional settlement of trademark and other commercial disputes

Four months

Court proceedings

Not applicable

Breach of contract arising from collaboration agreement for development of human antibody for treatment of major disease

German and French/US companies

After more than one year of court proceedings, parties accepted judge's suggestion to submit dispute to mediation and filed joint request for WIPO Mediation

WIPO Center submitted list of five candidates to parties, who agreed on US IP lawyer with considerable mediation experience

Parties reached settlement agreement

Six months

Unilateral request (non-contractual)

Not applicable

Allegation that several patents used in manufactured item sold in Europe infringed requestor's patent rights

Chinese and US manufacturing companies

Chinese company filed Request for WIPO Mediation in accordance with Article 4 of WIPO Mediation Rules

Not applicable

Parties re-commenced negotiations following unilateral request. US company stopped sales of subject product in European country

One month

Recommended WIPO contract clauses and submission agreements

Referral to WIPO dispute resolution procedures is consensual. To facilitate such party agreement, the WIPO Center provides recommended contract clauses (for the submission of future disputes under a particular contract) and submission agreements (for existing disputes, further including those referred by courts).

WIPO makes available the following **model clauses for mediation**:

- mediation
- mediation followed, in the absence of a settlement, by [expedited] arbitration
- mediation followed, in the absence of a settlement, by expert determination
- mediation followed, in the absence of a settlement, by court litigation

The recommended WIPO contract clauses and submission agreements are available in different languages, such as Arabic, Chinese, French, German, Greek, Japanese, Korean, Portuguese, Russian, and Spanish.

Typically, 40 percent of the mediation, arbitration and expedited arbitration cases filed with the WIPO Center include an **escalation clause** providing for WIPO mediation followed, in the absence of a settlement, by WIPO arbitration or expedited arbitration.

The WIPO Center also offers **model clauses for its other ADR procedures**:

- arbitration
- expedited arbitration
- expert determination

All WIPO Center model clauses are available at: wipo.int/amc/en/clauses

To assist parties in selecting or adapting clauses and submission agreements, the WIPO Center makes available the **WIPO Clause Generator**: wipo.int/amc-apps/clause-generator

WIPO Model Mediation Clause

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].

Commencing mediation through a unilateral request

In most WIPO cases one or both parties request mediation on the basis of a **clause in their contract**. Where a contract does not include such a clause or the parties do not have a contract between them, they may request mediation through a **submission agreement**. Another WIPO option is for one party to **unilaterally request mediation**.

Article 4 of the WIPO Mediation Rules provides that even **in the absence of a Mediation Agreement, a party may submit** a written Request for Mediation to the WIPO Center and to the other party. In such event, the WIPO Center will assist the other party to consider the Request for Mediation and to understand the mediation procedure.

The unilateral request may be **especially helpful in infringement disputes or in cases pending before the courts**.

The following **model unilateral Request for WIPO Mediation with filing guidelines** can be found at wipo.int/amc/en/mediation/filing

The image shows a screenshot of a form titled "Request for WIPO Mediation (Article 4 of the WIPO Mediation Rules)". The form is on a light blue background and contains the following sections:

- WIPO ADR** logo in the top right corner.
- Request for WIPO Mediation (Article 4 of the WIPO Mediation Rules)** title.
- NOTE:** The requesting party shall complete sections 1 and 2(a). The other party shall complete section 2(b).
- 1. Parties** section, which asks for contact information for the Requesting Party and the Other Party. Each party's information includes Name, Country of domicile, Tel., E-mail, and Address.
- 2. Dispute** section, which asks for a brief description of the dispute.
- 2(a)** section, which asks the requesting party to agree to submit the dispute to mediation in accordance with the WIPO Mediation Rules.
- 2(b)** section, which asks the other party to agree to submit the dispute to mediation in accordance with the WIPO Mediation Rules.
- Fields for **Place and Date** and **Signature** for both parties.

WIPO Mediation Rules

When parties agree to submit a dispute to WIPO Mediation, they adopt the **WIPO Mediation Rules** as part of such agreement. While the mediator and the parties together determine their interaction in the mediation process, those Rules provide a **procedural framework** which allows the mediator and the parties to concentrate on resolving the dispute.

The WIPO Mediation Rules have the following main functions:

- They establish the **non-binding nature** of the procedure (Articles 14(a) and 19(iii)).
- They define the **way in which the mediator will be appointed** (Article 7).
- They set out how the **mediator's fees** will be determined (Article 23).
- They guide the parties **how to begin the mediation and set out the process** (Articles 3 to 6 and 13).
- They provide the parties with assurances that the process, disclosures made during it, and any outcome will remain **confidential** (Articles 15 to 18).
- They determine **how the costs of the procedure will be shared by the parties** (Article 25).

Role of the WIPO Center

The principal aim of the WIPO Center is to **help parties achieve rapid and cost-effective** resolution of their IP disputes. To this end, the WIPO Center actively:

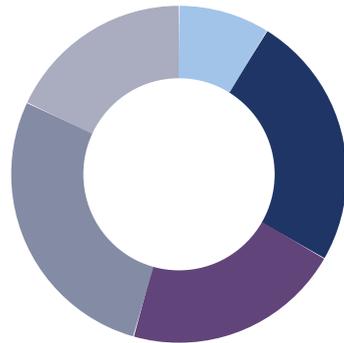
- **helps the parties** submit disputes to WIPO ADR procedures;
- **assists in the parties' choice of specialized arbitrators, mediators and experts** – from the WIPO Center's international list or elsewhere;
- **sets the neutrals' fees**, in close consultation with the parties and the neutrals, and administers the financial aspects of the proceedings;
- **liaises with the parties and the neutrals** throughout the case to ensure optimal communication and procedural efficiency; and
- **arranges for desired support services**, including meeting facilities.

Why WIPO Mediation?

When parties choose the WIPO Center, they benefit from a number of **advantages**:

- an **internationally based, independent administering authority** focused on IP and technology disputes;
- an **international list of mediators** including professionals with specific knowledge and experience in the technical, business and legal subject matter of IP as well as experience in international commercial mediation;
- **flexible Rules** designed to protect confidentiality;
- a **moderate administration fee**; and
- **meeting rooms** provided free of charge for mediations held in Geneva.

**WIPO Cases
Types of Disputes**



- **Copyright 9%**
Art, Broadcasting, Entertainment, Film and Media, Infringements, TV Formats
- **ICT 25%**
Mobile Apps, Outsourcing, Systems Integration, Software Development, Software Licensing, Telecommunications
- **Commercial 21%**
Distribution, Energy, Franchising, Marketing, Sports
- **Patents 28%**
Cross-licensing, Infringements, Licenses, Ownership, Patent Pools, R&D / Tech Transfer, Royalty Payment
- **Trademarks 17%**
Coexistence, Infringements, Licenses, Oppositions, Revocations

Where there is a formal agreement to mediate, the typical settlement rate in WIPO cases is 70%.

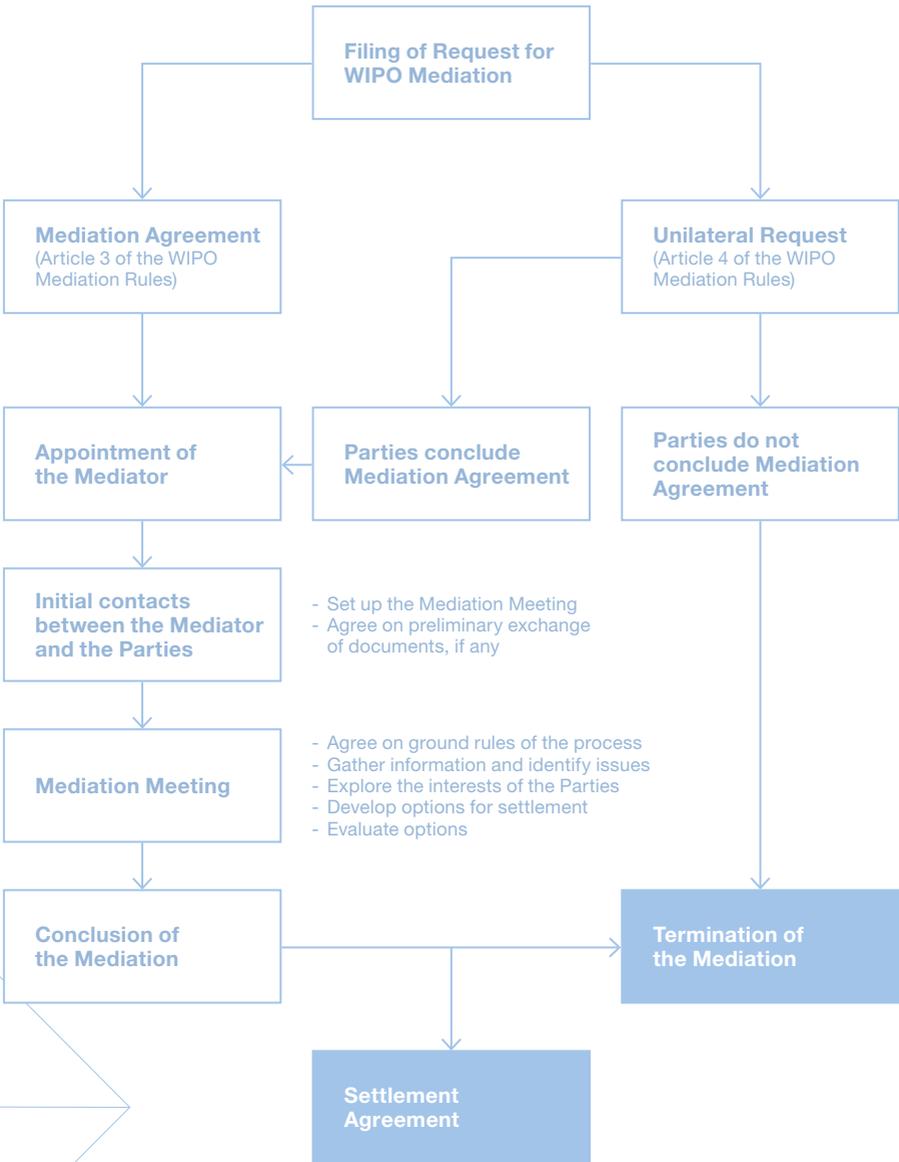
WIPO case experience

Mediators deal with a **wide variety of subject matter** under the WIPO Mediation Rules, not only IP disputes. WIPO mediations have involved patents, trademarks, Information and Communication Technology (ICT), copyright, entertainment, and more general commercial matters such as franchising and distribution.

Where there is a formal agreement to mediate, the typical settlement rate in WIPO cases is 70%. Where settlement is not reached during a mediation, parties can continue to benefit from the experience, and at times agree to a settlement in the course of a subsequent arbitration or litigation, or simply in the course of their follow-up communication.

An important part of the WIPO Center's role is to ensure that the parties have the **right mediator** to expeditiously conduct the mediation and help achieve a positive settlement. Parties to mediations administered by the WIPO Center benefit from **WIPO's list of 2,000 mediators and arbitrators**, with expertise covering the full IP and technology spectrum. Parties to a WIPO case are not limited to choosing a mediator from the WIPO list and remain free to agree to use another mediator of their choice.

Principal steps in a WIPO Mediation



How it works: The principal steps in a WIPO Mediation

There are **few formalities** associated with mediation. The structure of each mediation is **decided by the parties and the mediator**; together they work out and agree upon the procedure that they will follow.

This section outlines the **main steps** in the conduct of a WIPO Mediation. The parties can always decide to modify the procedure and proceed in a different way, but the following gives a good indication of how a mediation can proceed.

1 Getting to the table: the agreement to mediate

The starting point 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 an IP 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 parties' agreement forms the basis for the Request for Mediation to be submitted to the WIPO Center.

Where there is no such mediation agreement between the parties, one party may still file a unilateral request (see page 16 on Article 4) to the WIPO Center and to the other party. If the other party agrees, the mediation may proceed between them.

2 Commencing the mediation process

The Request for Mediation with which the case is started should set out summary details concerning the dispute, including the names and communication details of the parties and their representatives, a copy of an 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; they simply give sufficient information for the mediation to proceed.

The mediator must enjoy the confidence of both parties, and so it is crucial that both parties fully concur with the appointment.

3 The selection and appointment of the mediator

A key step in the process is the **selection and appointment of the mediator**.

Following receipt of the Request for Mediation, the WIPO Center will contact the parties or their representatives to commence discussions on the **appointment of the mediator**. Unless the parties have previously agreed on a mediator, the **WIPO Center will assist** them using the so-called list procedure, which involves the following steps:

- Based on a number of factors such as subject matter, location and nationality of the parties, and language needs, the WIPO Center sends a **shortlist of potential candidates** to each party, with detailed profiles setting out their qualifications.
- If the parties cannot agree on a mediator together, each party may **rank the candidates** in the order of preference.
- After confirming impartiality and independence with the mediator, the **WIPO Center makes the appointment** taking into account the preferences expressed by the parties.

4 Initial contacts between the mediator and the parties

Following appointment, the mediator will conduct initial discussions with the parties, typically by **telephone conference**. The mediator is free to communicate with both parties **together**, which is often the first step, or with either party **separately**.

The purpose of these preparatory contacts is to:

- **introduce the mediator** and the role of the parties;
- ensure the parties have a common **understanding of the mediation process**;
- **set a schedule** for the mediation;
- **agree on documentation** to be sent to the mediator, and the **timetable** for supplying such documentation; and
- **discuss a mediation meeting**, including the date and venue, as well as the representation of the parties.

5 The procedural framework of the mediation

The **WIPO Rules provide a detailed procedural framework** for the mediation and are incorporated by reference in the parties' agreement to mediate. As such, the WIPO Rules form the basis of the relationship between the mediator and the parties. By agreeing to mediate a dispute under the WIPO Rules, the parties and the mediator are bound by provisions on the following topics, for example:

- **confidentiality**;
- the parties' duty to **cooperate in good faith**;
- **fee arrangements**, including the mediator's duty to maintain a record of the work done and the time spent on the mediation, and the parties' duty to pay the mediator's fees and expenses; and
- **liability aspects**.

Some mediators may ask the parties to sign a protocol on the relationship between the mediator and the parties and some further elements of the process. Adding to the applicability of the WIPO Rules, this reflects some jurisdictions' mediation practice or national law.

6 The mediation meeting

Depending on the issues involved in the dispute and their complexity, as well as on the commercial or legal importance of the dispute and the distance that separates the parties' respective positions, the mediation may involve meetings held on one day, across several days or over a longer period of time.

At the outset of their meeting, the mediator will review with the parties the **ground rules** that are to be followed in the process. In particular, the mediator will:

- affirm procedural aspects of the meetings which the mediator may hold with the parties, including **caucuses** (separate meetings with each party alone); and
- ensure that the parties understand their **confidentiality** duties under the WIPO Mediation Rules.

After the mediator's introduction, each party will normally make an **opening statement**. The mediator will then proceed with **joint and private sessions**, depending on the parties' prior agreement and the dynamics of the mediation.

The core of the mediation, these sessions normally involve the following steps:

- **gathering information** concerning the dispute and **identifying the issues involved**;
- **exploring the respective interests** of the parties underlying their positions;
- **developing options** that could satisfy the interests at issue;
- **evaluating settlement options** in light of the parties' interests and alternatives to settlement; and
- **concluding a settlement** and recording it in an agreement.

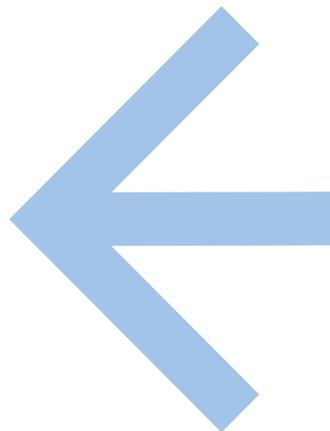
Surely, not all mediations result in a settlement. However, a settlement should be achieved where each party considers that an option for a mediated settlement exists which better serves its interests than any alternative option for resolution by way of litigation, arbitration or other means.

Where does a WIPO Mediation take place?

The **parties are free to decide where** they wish the mediation to take place. A mediation conducted under the WIPO Mediation Rules need not take place at the WIPO Center's premises in Geneva or Singapore. Mediations under the WIPO Rules have been held around the world at locations convenient for the parties.

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

The parties and the mediator are always free to make use of WIPO's online case administration tools – including a secure electronic docket and videoconferencing facilities, free of charge.



How much does WIPO Mediation cost?

Normally two **sets of fees** are payable in a mediation:

- the **administration fee** of the WIPO Center; and
- the **mediator’s fees**. These are negotiated when the mediator is appointed, usually calculated on an hourly or daily basis at a rate that takes into account the circumstances of the dispute such as its complexity and value, as well as the experience of the mediator and the location of the parties.

The Schedule of Fees to the WIPO Mediation Rules sets out the WIPO Center’s fee and **indicative rates** for mediators as in the table below.

To learn more about specific fees for WIPO Mediation and other WIPO ADR procedures, parties may use the online **WIPO Fee Calculator** available at: wipo.int/amc/en/calculator

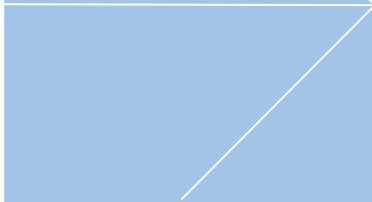
Who pays?

The WIPO Mediation Rules 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 both parties in comparison to court litigation and arbitration, allocating the mediation costs is rarely an issue between the parties.

The filing of a **unilateral** Request for Mediation in accordance with Article 4 of the WIPO Mediation Rules is not subject to an administration fee. Such a fee only becomes payable if both parties then agree to take up the mediation process.

Amount in dispute	Administration fee	Mediator’s fees
Up to \$250,000	\$250	\$2,500 Indicative rate for 10 hours of preparation and mediation
Over \$250,000	0.10% of the value of the mediation, up to a maximum fee of \$10,000	Indicative rate(s): - \$300-\$600 per hour - \$1,500-\$3,500 per day

Managing the time and cost of its proceedings is a primary commitment of the WIPO Center.



Case study

How a WIPO mediator helped the parties reach a settlement

Mediation offers **practical solutions** geared to the parties' **business interests**. It can be difficult to gain a full appreciation of how it works in the abstract.

Here is a more detailed example of the realities of a mediation, based on a settled WIPO case, with all its ups and downs.

Dispute

A **technology consulting company** holding patents on three continents discloses a patented invention to a **major manufacturer** in the context of a consulting contract. The contract neither transfers nor licenses any rights to the manufacturer. When the **manufacturer starts selling products** which the consulting company alleges **infringe its patented invention**, the consulting company threatens to patent infringement court proceedings in the jurisdictions in which it holds patents.

Submission to mediation and appointment of the mediator

The **parties start negotiating a patent license** with the help of external experts but fail to agree on the royalty as the damages sought by the consulting company significantly exceed the amount the manufacturer is willing to offer. In a further attempt to settle the dispute, the **parties submit it to mediation under the WIPO Mediation Rules**. The WIPO Center suggests potential **mediators with specific expertise in patents and the relevant technology**, and the parties agree on one of those mediators.

Preliminary issues

Following his appointment, the **mediator holds a preliminary telephone conference with both parties' lawyers** to discuss preliminary issues such as complementary mediation terms of reference, the participants in the mediation session, their decision making authority, the role of the mediator, and documents to be exchanged before the session. The parties further agree to hold a **two day mediation session at a mutually convenient venue**.

Before the session, the consulting company produces a new expert report which significantly increases its possible damages claim. The other party threatens to abandon the mediation unless the report is withdrawn. The issue is settled through email exchanges and telephone calls between the parties and the mediator with the result that the report is 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 meets the parties' decision-makers alone** at a dinner the night before the session on the understanding that this get together will be “without prejudice” and that nothing said by either party is to be taken as an offer or agreement.

Mediation session At the mediation session itself, **each party is represented by a director with full decision making power**. In addition, each party arrives with **several executives, an external expert and outside counsel**. At the outset, the mediator seeks and obtains agreement on procedural issues such as the order of presentations, rules of conduct, and scheduled breaks. Counsel then make formal **opening statements** for the parties, followed by various **combinations of smaller group meetings at which the mediator meets with the parties' lawyers without the parties, and vice versa**. At one stage, the lawyers are 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 holds **several caucuses separately** with each party including its counsel. The caucus sessions serve to canvass each party's alternatives to settlement, the relative strengths and weaknesses of their legal positions, their core interests that would need to be met by any agreement, and possible options for settlement. The mediator does not provide his own evaluation of the parties' interests and legal positions: instead, he questions both parties' lawyers in the presence of their clients and brings 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 enable the mediator to appreciate that it **may be possible to reconcile the parties' interests**, and that each faces internal issues that the other could help resolve. For the consulting company, any court victory would not bring in new consulting work and might even inhibit its business from companies similar to the other party. The manufacturer faces 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 its financial exposure. However, each party assumes that the other will be unable or unwilling to cooperate in the future. All this is based on **information which the mediator could acquire from the respective parties in caucus**. The mediator now has to find a way of enabling the parties to gain the same insight without the mediator disclosing confidential information.

Breakthrough

An **opportunity** to achieve this objective comes toward the end of the second day when the mediator meets with both parties' decision makers, without their lawyers being present. Until this moment the parties have primarily been discussing the amount of damages or royalty payment. Now, however, the mediator can ask questions designed to focus both directors' attention on how each party could help the other solve its internal challenges. Once the parties realize that their assumptions about the other are incorrect and that **they are both willing to cooperate**, one side makes a suggestion which the other accepts in general terms.

Developing the settlement

Following this breakthrough, a **plenary session** is convened at which the lawyers are instructed to **draft a document reflecting the basic agreement**. This first draft is 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 is eventually signed at the mediation

session itself. Subsequently, the lawyers produce a formal agreement which the parties execute some weeks later.

Result

Through this process, and without needing to address the question of infringement as such, **the parties have been able to conclude a patent license and reach agreement on its financial terms**. The manufacturer has further agreed to recognize the consulting company's technology on licensed products and marketing material, and the consulting company has abandoned its infringement claims. Moreover, the parties have agreed to conclude further consulting contracts of a certain annual value over several years.

The **mediation has been 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 could **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.

Time and cost

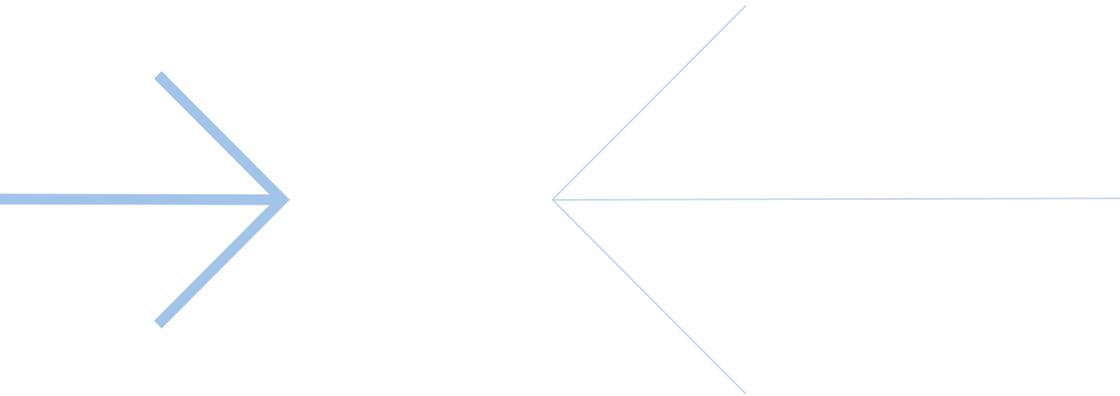
This high-value result was achieved in a mediation engaging the parties intermittently over a few months and costing a fraction of court litigation.



WIPO Good Offices

The WIPO Center regularly provides **procedural guidance** to parties in order to **facilitate direct settlement** between them or submission of an existing dispute to WIPO ADR.

Parties should contact the WIPO Center with any queries on such Good Offices assistance at arbiter.mail@wipo.int or by calling +41 22 338 8247.



Mediation and arbitration compared

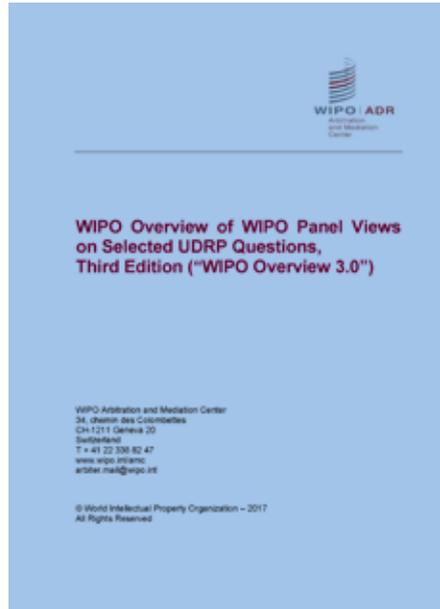
	Mediation	Arbitration
Parties	Either party may unilaterally withdraw from the procedure.	Once the parties have validly agreed to submit a dispute to arbitration, neither party may unilaterally withdraw from the procedure.
Mediator/ arbitrator	The mediator functions as a “catalyst” or settlement facilitator, but cannot impose a settlement on the parties.	The arbitrator(s) (“tribunal”) has the authority to decide the case in a final award.
Scope	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.
Outcome	Any settlement agreement is binding between the parties as a matter of contract law.	Awards are legally binding on the parties, final and enforceable internationally.

Domain name dispute resolution

The WIPO Center also offers a **special procedure** that allows trademark owners to resolve cases of **abusive domain name registration and use** (“cybersquatting”). The WIPO Center is the **leading global provider** under the WIPO-initiated **Uniform Domain Name Dispute Resolution Policy (UDRP)**.

To assist their case preparation, WIPO parties can take advantage of the online WIPO Legal Index and the WIPO Jurisprudential Overview, in addition to model forms. More on WIPO Domain Name Dispute Resolution:

wipo.int/amc/en/domains



WIPO Rules and Neutrals

The WIPO Mediation, Arbitration, Expedited Arbitration and Expert Determination Rules are **generally suitable for all commercial disputes**, and additionally feature provisions to address **specific needs in IP disputes**, such as provisions on **confidentiality** and **technical evidence**. Parties can draw upon an extensive database of **international, independent WIPO mediators, arbitrators, and experts skilled in IP and technology**.

WIPO Arbitration and Mediation Center

With offices in **Geneva**, Switzerland, and in **Singapore**, the WIPO Center offers **ADR** options such as **mediation** and **arbitration** to enable private parties to efficiently resolve their **domestic or cross-border commercial disputes**. The WIPO Center is **international** and **specializes in IP and technology disputes**. It has a strong focus on **controlling the time and cost of its proceedings**.



Photo: Maxwell Chambers Pte. Ltd.

WIPO Center's offices at Maxwell Chambers in Singapore



Photo: WIPO / Barrood

WIPO Headquarters in Geneva, Switzerland

Parties interested in WIPO Mediation beyond this booklet may visit wipo.int/amc/en/mediation

Parties interested in direct assistance on case filing, dispute resolution clause drafting or another ADR matter may contact the WIPO Center at +41 22 338 8247 or arbiter.mail@wipo.int

WIPO Mediation Pledge for IP and Technology Disputes

One of the core motivations of parties considering mediation is the potential to save significant time and expenses caused by disputes.

The WIPO Center makes available the WIPO Mediation Pledge for IP and Technology Disputes to promote mediation as an alternative to court litigation in order to reduce the impact of disputes in innovation and creative processes. Open to individuals, firms, and associations, joining the Pledge shows willingness to consider mediation in IP and technology disputes.

Having joined the Pledge, parties that wish to act on it have the WIPO Mediation Model Clause and Model Submission Agreement at their disposal (see page 14).

Join the Pledge at
www.wipo.int/amc/en/mediation/pledge.html





For more information contact

**WIPO Arbitration and
Mediation Center (Geneva)**

34, chemin des Colombettes
CH-1211 Geneva 20
Switzerland
Tel +4122 338 82 47
Fax +4122 338 83 37

**WIPO Arbitration and
Mediation Center (Singapore)**

Maxwell Chambers
32 Maxwell Road #02-02
Singapore 069115
Tel +65 6225 2129
Fax +65 6225 3568

www.wipo.int/amc
arbiter.mail@wipo.int

© WIPO, 2018



Attribution 3.0 IGO (CC BY 3.0 IGO)

The CC license does not apply to
non-WIPO content in this publication.

Printed in Switzerland

WIPO Publication No. 449E/2018
ISBN 978-92-805-2948-7