

Background document: draft criteria for discussion

ADR-SAB Working Group 4 Criteria for suitability of cases for ADR

Checklist criteria for identifying cases more favourable for mediation

I. Nature of the case

1. Absence of litigation cost when negotiations start at the earliest possible stage of a conflict;
2. Availability of evidence as proceedings progress;
3. Complexity of the case (complex or technical factual issues, cross border dispute, etc.);
4. Difficulties in enforcement (difficulty of implementation, lack of resources, voluntary opposition to the decision, financial instability, etc);
5. Existence of other underlying/not expressed conflicts in the parties' claims;
6. Emotions underlying requiring a tailor made approach;
7. Coexistence of rights, taking into account territories, goods and services;
8. Continuity of a business relationship and protection of confidentiality;
9. Existence of a prior settlement agreement reached through mediation.

II. Favourable legal framework conditions

1. No impediment or obstacle to the parties being referred to mediation at this stage of the proceedings;
2. Other pending proceedings involving the same parties or one of the parties on the same or cross related issues;
3. High probability that third party/ies will be required to join the action;

4. Existence of a mediation clause regulating potential dispute resolution between the parties;
5. Direct link between the authority seized of the particular case and a Mediation Centre.

Checklist criteria for identifying cases where mediation may not be feasible

I. Nature of the case

1. A point of law needs to be resolved and/or need for a precedent;
2. *Ex parte* proceedings;
3. Public interest issues and/or public policy or morality (e.g. overlap of patents and trade marks, a cancellation case based on Article 7(1)(g));
4. Abuse of ADR processes;
5. Urgent action is required (e.g. injunction relief or other interim measures);
6. Request for criminal sanctions (e.g. counterfeiting or piracy);
7. Unethical or unlawful subject matter or allegations of fraud;
8. Subject matter not allowed to be mediated under the applicable national law.

II. Representation

1. Legal incapacity of one of the parties (e.g. mental incapacity, being a minor, etc);
2. No possibility for the party/parties to dispose of its/their intangible assets, including IP rights (e.g. due to impending or ongoing administration, winding up, liquidation or other insolvency proceedings or due to the existence of a charge, lien, or some other incumbrance existing against that IP right).