# Mediation-the Business Perspective

## How companies assess the value of mediation and integrate it into their overall dispute management strategy

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# From an inhouse perspective, at what stage does mediation realistically enter the discussion?

- Mediation is best at the earliest stage
  - When either party gives the other notice of a dispute, deficiency, or default
- Important Consideration for the company
  - What does a “good” resolution look like after assessing the issues (e.g., money, goodwill, development, loss of business opportunity)

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# When a distribution-franchise dispute arises, what is the very first question the business asks internally?

- Even if we are right, what does it cost us to litigate
  - Expensive
  - Outcome is uncertain
- Timing can be critical
  - Loss of business opportunity while embroiled in a dispute
  - Distraction from business growth

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# Cont'd
# Additional Reasons to Consideration Mediation

- Considers the position of both parties
- Seeks a mutually satisfactorily solution
  - Quick, cost effective
  - "Win-win" is possible depending on the issues between the parties
  - Legal arguments and evidence are less important

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# What advice do you have regarding drafting mediation clauses?

- Mediation clause and mediation process should be fully considered at the time the agreement is being negotiated
- Practical considerations
  - Location of mediation
  - Duration
  - Role of the company representative and external counsel
  - Settlement Authority

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# Cont'd
# Location of mediation

- Meeting site
- Meet in the territory of the developer
  - Generate goodwill
    - Gain insight into "on the ground" situation
- Meet in a neutral place
- Use of Zoom or other online platforms
    - Convenient
    - Cost effective, efficient
    - Use of break-out rooms

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# Cont'd
# Duration

- Start and end times
- Opening statement
- Determine if the parties will spend time together (e.g., general meeting rooms v. break-out rooms at the beginning and end of the mediation)
- Look for opportunities to narrow the scope of the dispute or consider "outside of the box" resolutions

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# Cont'd
# Role of the Company Representative and External Counsel

- Title, status, and level of authority
- Determine whether the company representative should participate fully and act as the primary spokesperson of the company
- Use in-country counsel
  - Application of the law to the dispute
  - Speak to practical aspects related to
    - Arbitration or litigation if the matter does not resolv (e.g., length of court proceeding, likelihood of success, execution on a judgment)
    - Expense

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# Cont'd
# Settlement Authority

- Confirm ahead of time that each party has authority to settle the matter

- If one or both of the parties do not fully participate, mediation
  - Will erode any good faith left between the parties
  - Is a costly waste of time

- Participants must be fully engaged in the process
  - Not checking their phone
  - Not distracted by other matters

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# Does the risk of setting “precedent” influence the decision to settle through mediation?

- Mediation is without prejudice
  - Not to be used in any other proceedings, including pending or anticipated litigation
  - Important that all attendees understand their confidentiality obligations
  - Express these obligations in a writing ahead of attendance

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## Cont'd
## Document Any Resolution

- Reduce any resolution to writing immediately
- Map out post-mediation expectations, including any timing elements
- If the developer is to exit, consider non-disparagement, non-compete, non-solicitation, if allowed by applicable law
- Signed document should include a dispute resolution clause
- Execute a formal settlement agreement

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# When is mediation not the right tool?

- Frustrations include:
- Waste of time
  - Delay in filing litigation
  - Lack of good faith in preparing for and attending the mediation
- Cost
- Lack of understanding about the terms of the agreement and/or legal enforceability
  - Unrealistic damages claims
  - Leading with emotion

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# Cont'd
# Avoiding Mediation

- Mediation should be avoided in certain circumstances
- An  immediate resolution is needed to threats of serious damage to the brand
  - Damage to goodwill or trademarks
  - Flipping locations to another concept; passing off
  - Violation of non-compete
- If mediation could result in delays that lead to
  - Inability to develop the territory; loss of existing units
  - Loss of business/expansion opportunities in a region or market

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