Kluwer Mediation Blog

Lawyers and mediation: recommending mediation to clients

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In the previous post I had submitted a check-list published by the Mediation Chamber of the Bar of Canton of Vaud (Switzerland) to the attention of Judges in order to enable them to identify, in civil and commercial matters, situations for which mediation could be appropriate.

Another check-list – closely similar to that for the Judges – has been issued by the Chamber for Lawyers (http://mediation-oav.ch/images/uploaded/file/Check-List-Avocat-tableau.pdf in French). The purpose of this post is to examine and briefly comment the said check-list.

This working document distinguishes two sets of circumstances: the first, depending on the nature of the dispute, the second, on the parties' relationships.

Depending on the **nature of the dispute**, mediation may be recommended:

– **When the outcome of Court litigation or enforcement of a judgement is uncertain.**

Is this not a tautology? In most instances, litigation, by definition, is uncertain. It is always difficult to predict legal outcomes in Court litigation because it depends on the capacity of judges to make their determination on the basis of submissions filed, especially when evidence are not fully available. As regards enforcement, there is uncertainty, especially in cross border disputes, as to the independence of judges, Courts' case-load and, moreover, when the other party lacks financial resources.

– **When the dispute includes a high degree of emotional component.**

This is certainly a key element. By essence, Courts and Judges are neither educated nor prepared to deal with such an issue. In addition, the legal syllogism does not leave any room for emotions and feelings.

– **When litigation is only the visible part of the iceberg.**

The previous element is included in this one: the Court's system is organized to deal with issues of fact and law, i.e. those that are visible and not the contrary.

– **When the dispute hides another one.**

This is one type of circumstances, but most of the time disputes hide the conflict which generally

expresses fundamental and essential underlying needs that are not satisfied.

– **When there is a high probably of recurrence of the conflict.**

In such instances, it is indeed wise to think about alternatives to litigation which, due its adversarial nature, maintains a "positional" dynamic between the parties.

– **When there is a disproportion between the costs to be incurred, the litigation's heaviness and interests at stake.**

This should be the first question to ask to clients from an economical viewpoint. Clients' attention should always be preliminary drawn to the financial consequences that Court litigation represents, as compared to the outcome that is sought.

Depending on the **parties' relationships**, mediation may be recommended:

– **When the parties have an interest in pursuing their relationship after litigation.**

This is also a key factor. *A contrario*, mediation tends to be a difficult exercise when no future opportunities appear to (re)connect the parties.

– **When it is in the parties' interest to re-establish communication for the future.**

This element is linked to the preceding one but, as a general rule, communication is always present in a dispute so that mediation is the most suitable space to deal with issues that arise in this connection. This also corresponds to the essence of mediation which is orientated towards the future and not the past.

– **When the parties seek appeasement and a solution that will last.**

By definition mediation is a method which aims at pacifying relationships between individuals. In addition, to the extent that the agreement reached in mediation usually reflects a mutual and satisfactory outcome for the parties thereto, it warrants efficiency as opposed to a judgement or a compromise where they are not a win-win situation.

– **When the parties' relationship overflows the frame of the litigation.**

A typical example is a dispute between neighbours: legal arguments are generally neither of great help nor of relevance to solve the difference. Mediation often reveals to be a better space for conflict management, save resolution.

– **When the parties wish to end their relationship without a judicial fight.**

Instances such as these are generally not common in mediation, at least in commercial matters. In divorce or separation cases, this is indeed an approach which makes sense, especially when children are in the picture. This enables therefore to avoid negative side effects of litigation.

In sum, such a check-list appears to be useful. As always, the issue here is the capacity and true intent of lawyers to take the time and to consider it, at least for – and sometime in – the best interest of their clients.

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This entry was posted on Monday, May 7th, 2012 at 6:53 am and is filed under Clients, Lawyers, Mediation Users/Clients, Switzerland
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