

C S M C **Chambre Suisse de Médiation Commerciale**
S K W M **Schweizer Kammer für Wirtschaftsmediation**
C S M C **Camera Svizzera per la Mediazione Commerciale**
S C C M **Swiss Chamber of Commercial Mediation**

Mediation of Commercial Disputes



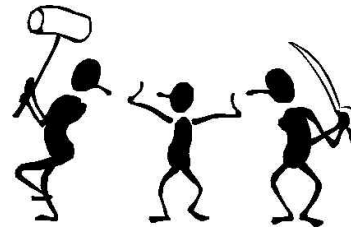
AGENDA

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- 01 | What is mediation?
- 02 | What is the role of the mediator?
- 03 | How does a typical mediation proceed?
 - How do we initiate a mediation?
 - How do we plan and prepare for a mediation?
 - What happens during a mediation?
- 04 | Can you afford **not** to mediate?
- 05 | Why include a mediation clause in a contract?
- 06 | How can the Swiss Chamber for Commercial Mediation help?

WHAT IS MEDIATION?

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A voluntary attempt to resolve a dispute with the help of a neutral third party

A "VOLUNTARY" ATTEMPT

- Whether to participate in a mediation at all
 - BUT the consent can be given pre-dispute (e.g. a contract clause that requires mediation)
- Whether to continue an ongoing mediation
- Whether to agree to a particular resolution

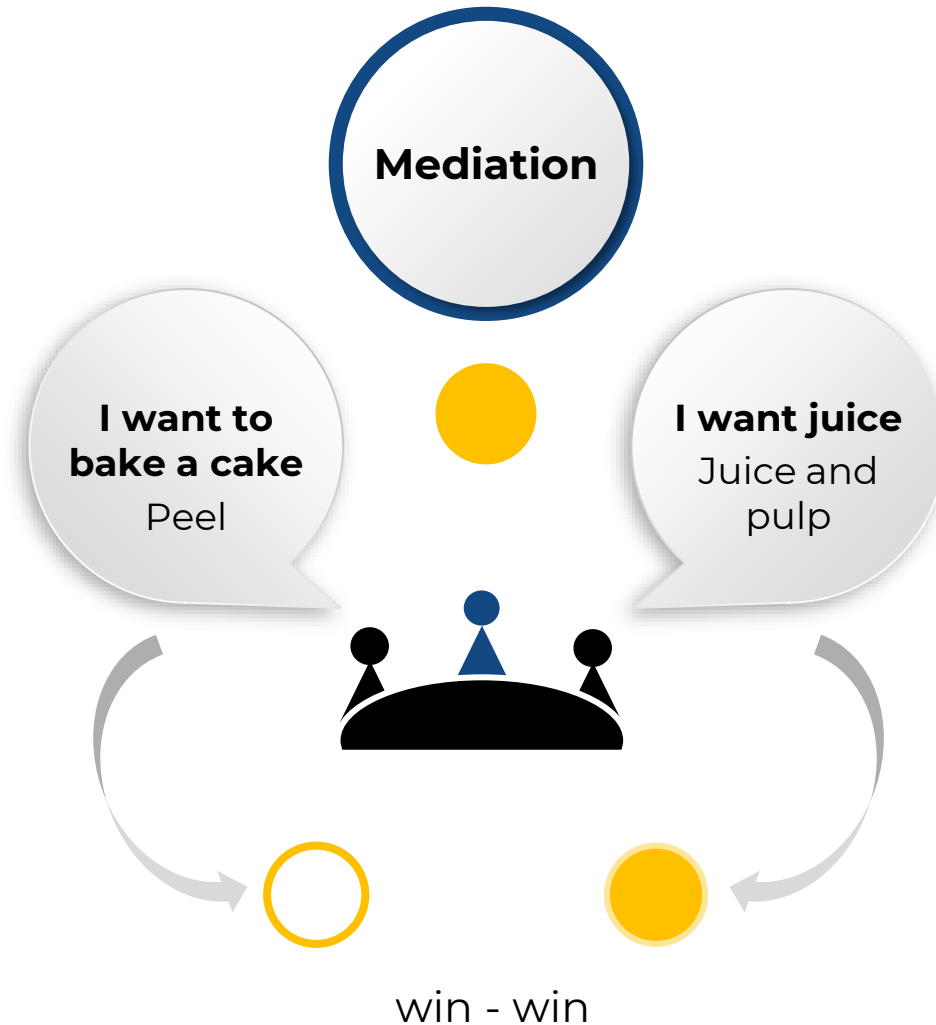
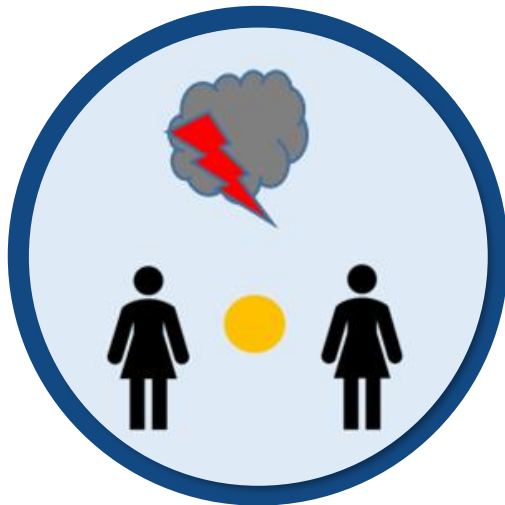
TO "RESOLVE" A DISPUTE

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- Ideally, by creating a win-win solution
 - Inclusion of issues outside the immediate dispute
 - Solutions that a court or arbitrator could not order
- Also highly effective in resolving "zero sum" disputes

A "WIN-WIN" EXAMPLE

Both want the last orange



EXAMPLE: IP LICENSING DISPUTE

Opening Positions

- Business relationship broken
- Mediation goal = terms of contract termination

Process

- Logical explanations for perceived disregard of contract
- Increased understanding of commercial challenges
- Brainstorming re potential solutions
- 2nd mediation session after homework

Outcome

- Amended license that restructured reporting and royalty terms
- Broader scope of business

WITH THE HELP OF A NEUTRAL THIRD PARTY

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Mediator as facilitator

- **Process** expertise v. **substantive** expertise
- Keeps the parties talking
- Helps the parties find an agreed solution

Mediator as deal-broker

- Shuttle diplomat
- Uses various techniques to overcome negotiation dilemmas

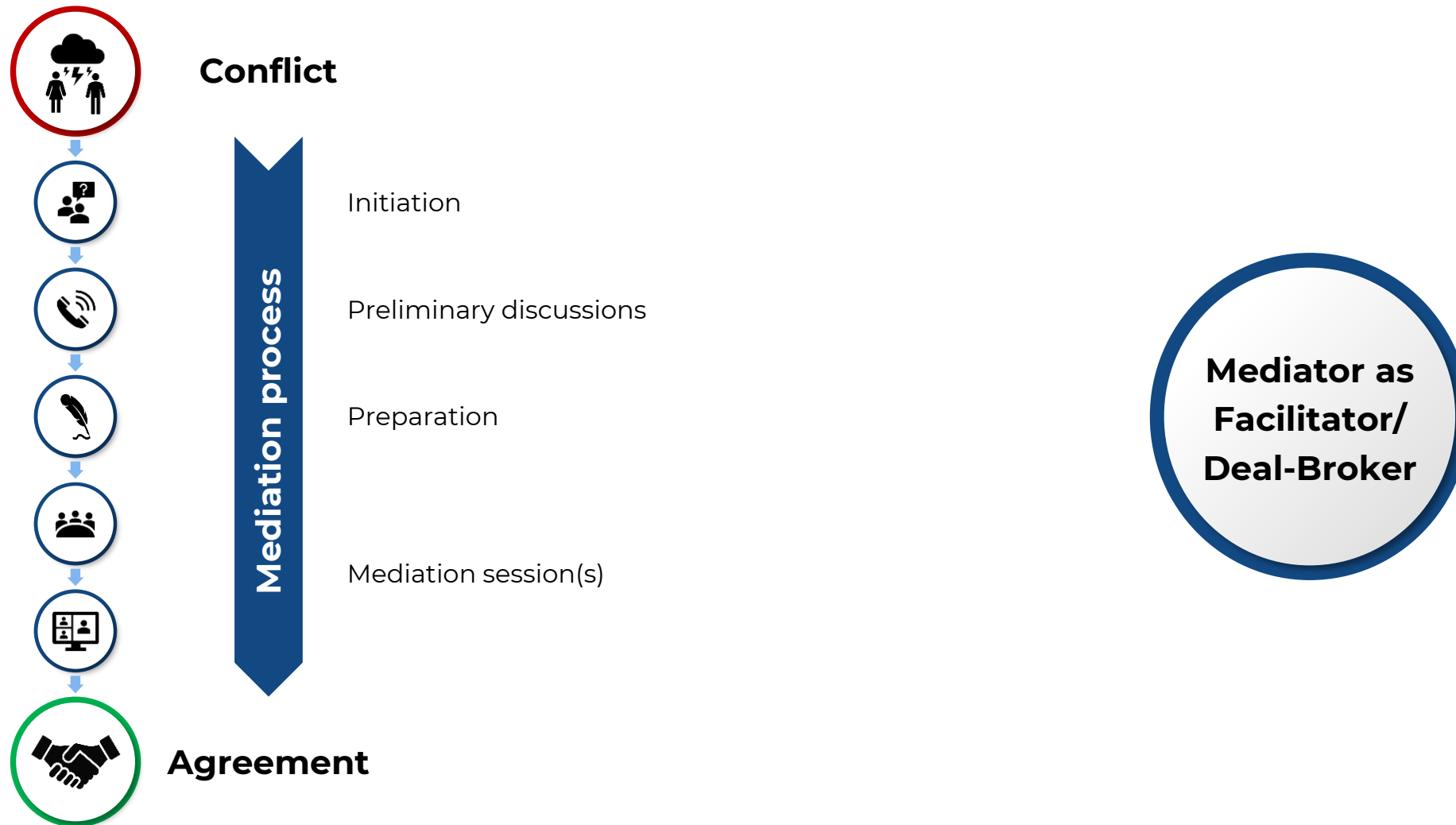
THE ROLE OF THE MEDIATOR

The mediator is not the decisionmaker: There is no need to convince the mediator that you are right or would win in court. Instead, the mediator:

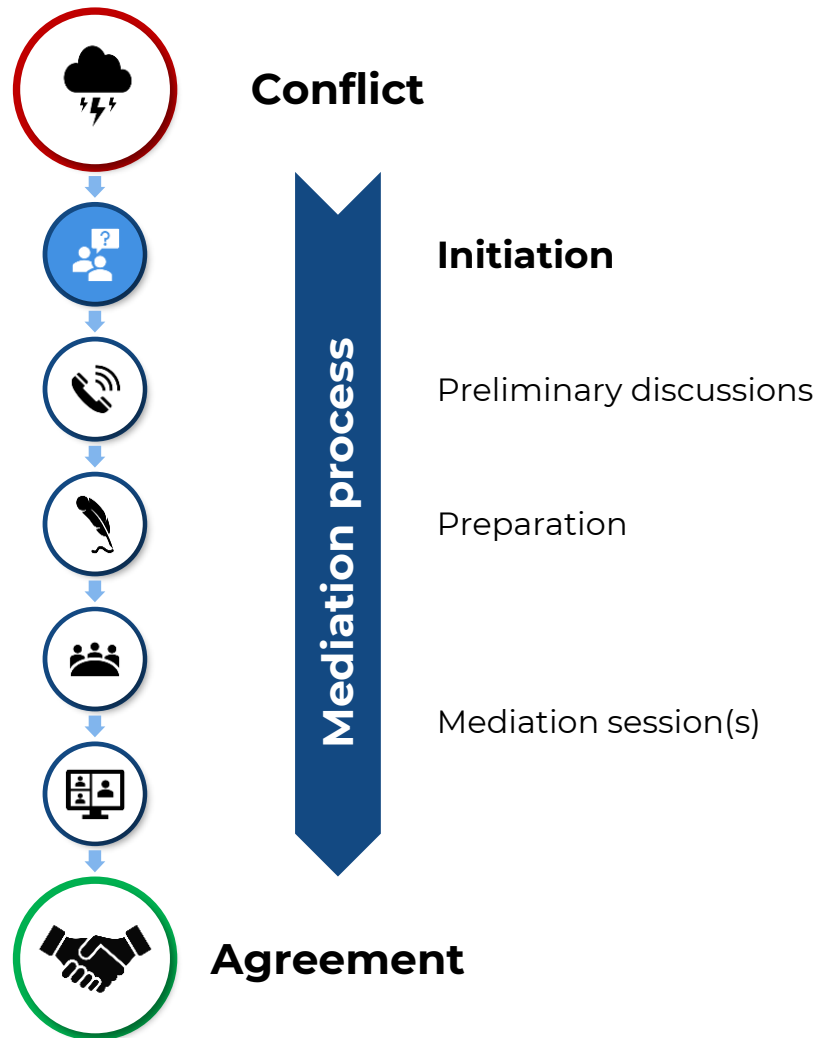
- Leads the mediation session and facilitates the negotiation process (process manager)
- Supports the parties in engaging in and/or continuing discussions notwithstanding negative emotions, lack of trust, etc.
- Helps the parties to identify and express the interests underlying their positions and/or demands
- Assists the parties in generating potential options that could be part of a solution to the dispute
- Supports the parties in analyzing potential settlement options and alternatives
- With the parties (and their legal counsel), ensures that the agreement – or at least key points – are set out in writing and signed before ending the mediation

OVERVIEW OF THE TYPICAL MEDIATION PROCESS

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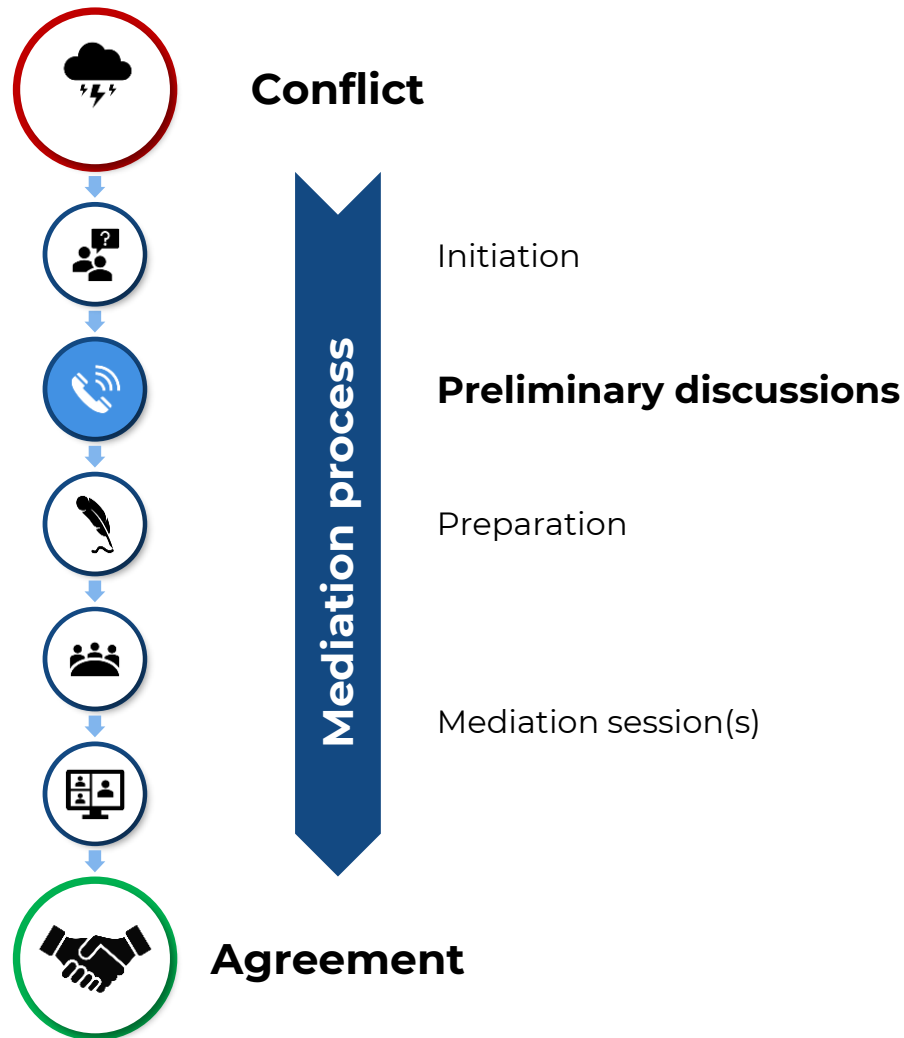


INITIATION



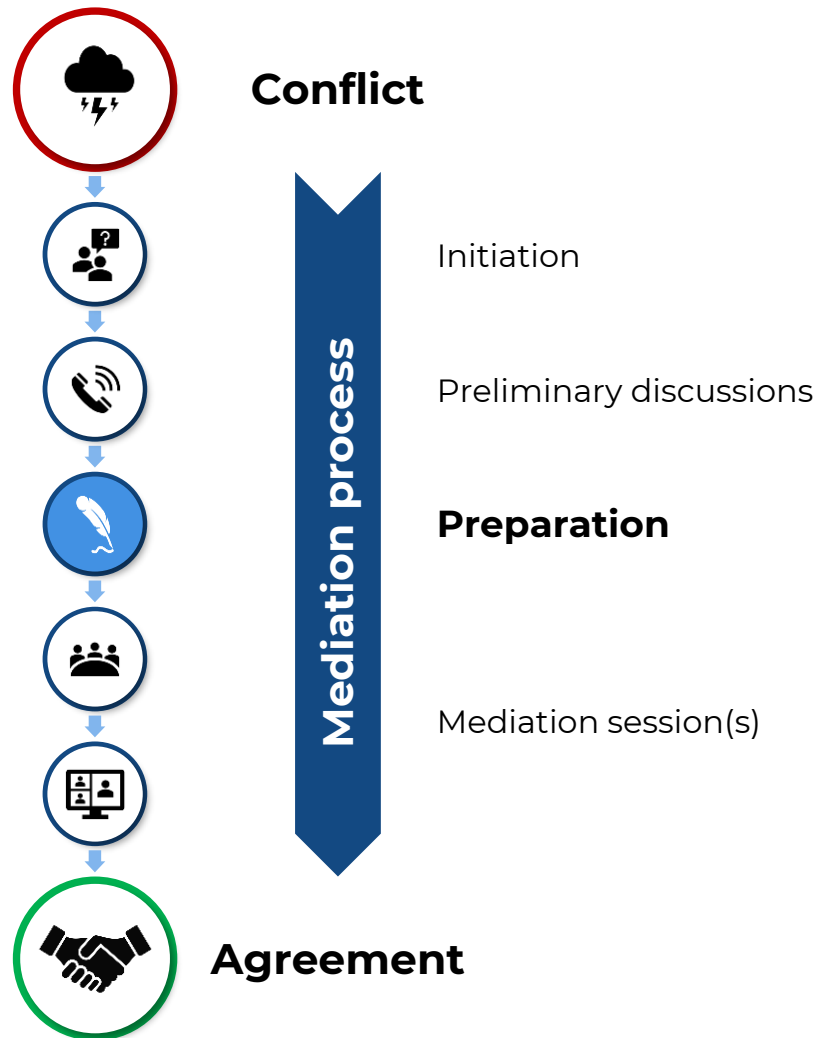
- Mediation can be initiated by the disputing parties, together, or by one of the parties
- Mediation may be required by the parties' contract
- A judge or arbitrator may propose that the parties commence a mediation during a pending case
- Institutional mediation rules (e.g. ICC, SCAI, WIPO) provide step-by-step instructions
- Parties can find potential mediators themselves via various databases (e.g. the SCCM website) or request assistance from an institution
 - Parties should try to agree on a mediator
 - Co-mediation (two or more mediators) may make sense in some cases
- Selection of a mediator is less critical than selection of an arbitrator – not worth impasse!

PRELIMINARY DISCUSSIONS



- Normally proceeds via e-mail, with at least one telephone conference
- Discussion of the conflict is limited to a basic outline of the dispute, to assist in planning the mediation
- Discussion should include the parties' expectations (if any) regarding how the mediation will proceed
- The parties and the mediator agree on the details for conducting the (first) mediation session, e.g.
 - Place, date, time, duration
 - Participants (by name and/or function)
 - Prior submission of written materials
- If institutional rules do not apply, discuss and finalize a written mediation agreement, including:
 - The parties, mediator and nature of the dispute
 - Confidentiality
 - Mediator fees
 - Agreed details re the initial mediation session

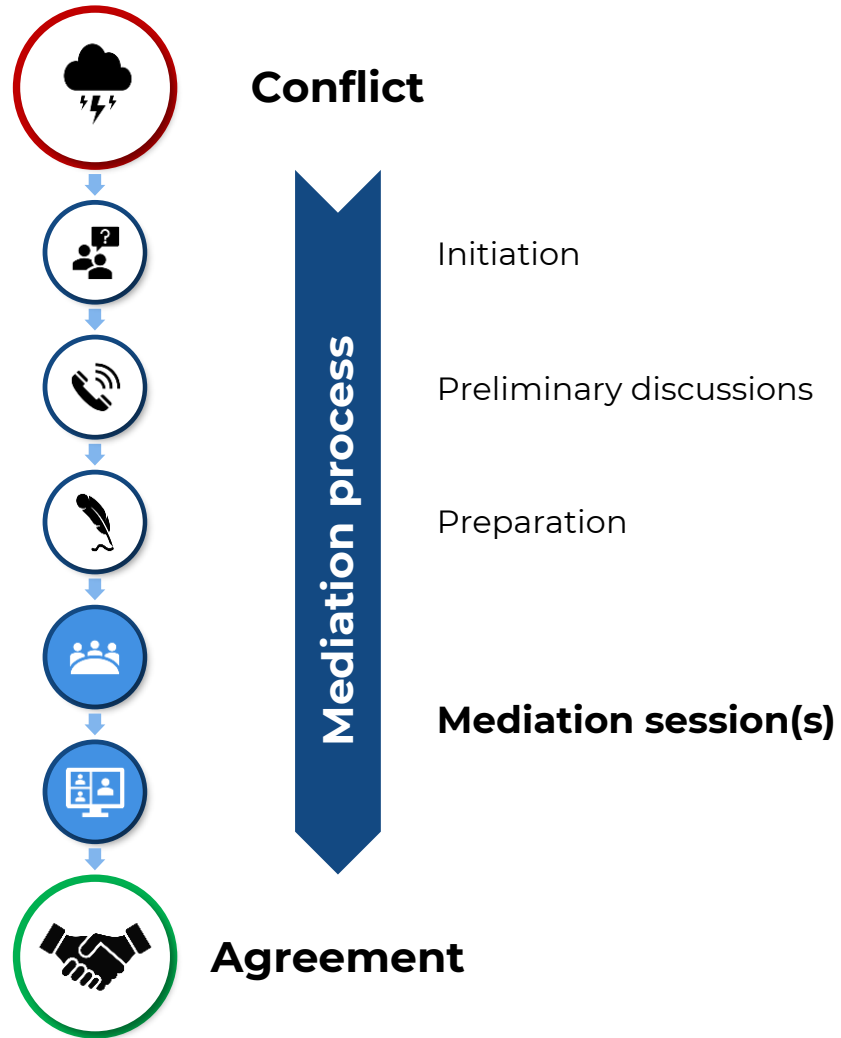
PREPARATION



Each party, on its own:

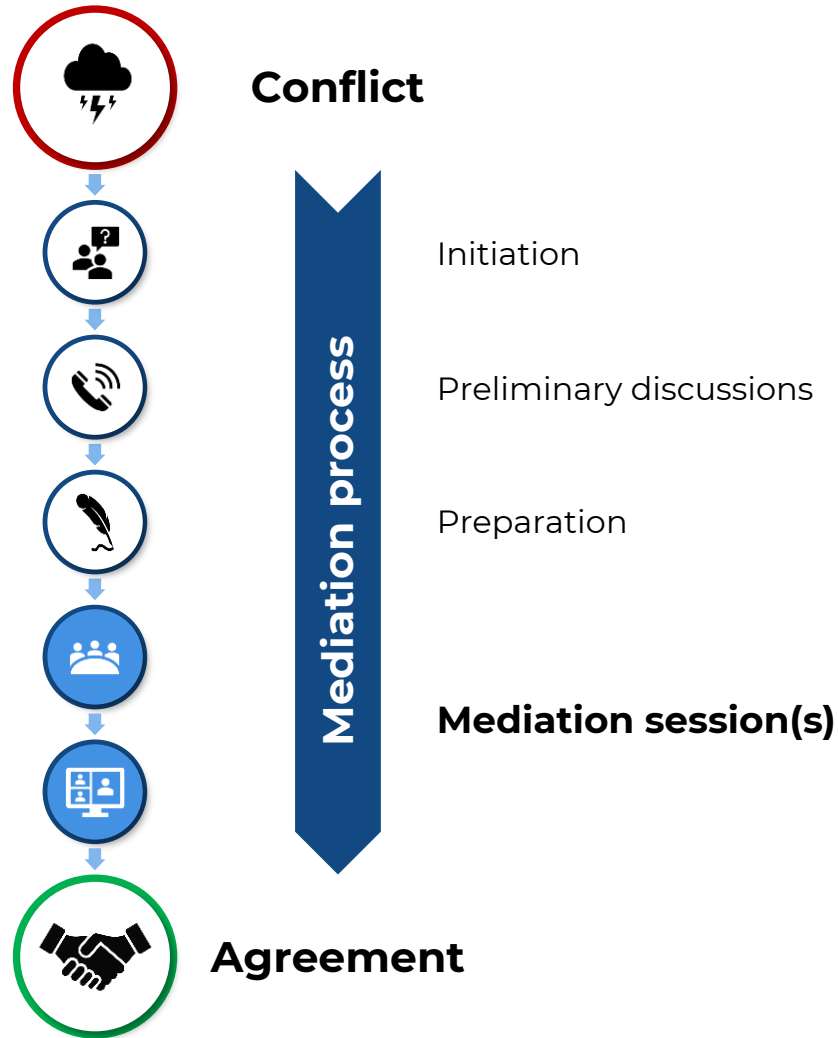
- Finds out more about the underlying facts – internal investigations as needed
- Analyzes best, worst and most likely outcomes if no settlement is reached, including e.g.
 - Business considerations outside the immediate dispute
 - Legal advice, including chances of success and estimated time and costs of legal proceedings
- If agreed, prepares written submission, including e.g.
 - Background context
 - Business and legal positions, demands, interests
 - Prior correspondence and negotiations
- If agreed, participates in initial individual discussions with the mediator

MEDIATION SESSION(S)



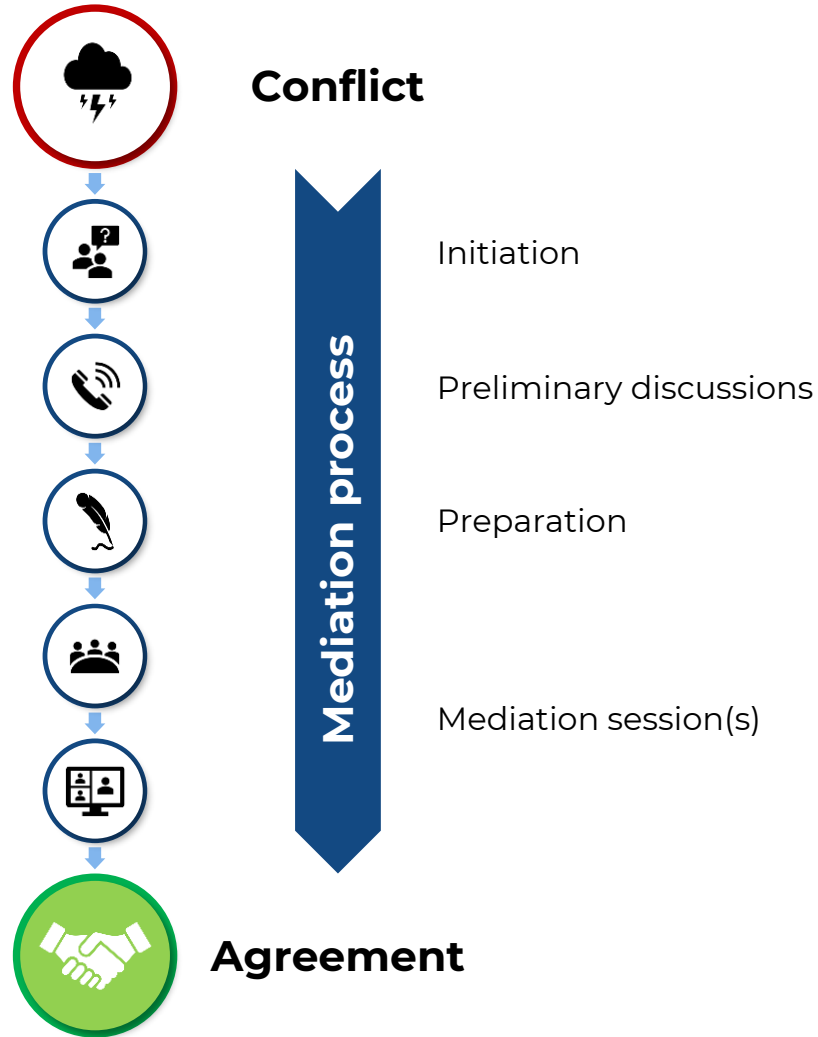
- Should include, for each party
 - Person(s) with knowledge of facts, **and**
 - Person(s) with authority to settle the dispute
- The parties' legal counsel may attend and provide support, but the business representatives should take the lead for each party
- The session normally takes place in one room, with all of the participants. If agreed, the process can include "shuttle mediation"
- Additional mediation sessions may be needed

A TYPICAL MEDIATION SESSION



- The participants introduce themselves and each party gives a brief statement, e.g. a brief response to the other party's written submission
- The mediator asks questions and ensures that all topics and key concerns are on the table that should be addressed if a solution is to be found
- Each party says more about these topics and key concerns – their underlying interests
- The parties brainstorm potential options for resolving the dispute that all parties might accept as part of an agreement
- The parties evaluate and refine possible solutions, determine whether more information or other resources are needed, and negotiate agreement

AGREEMENT



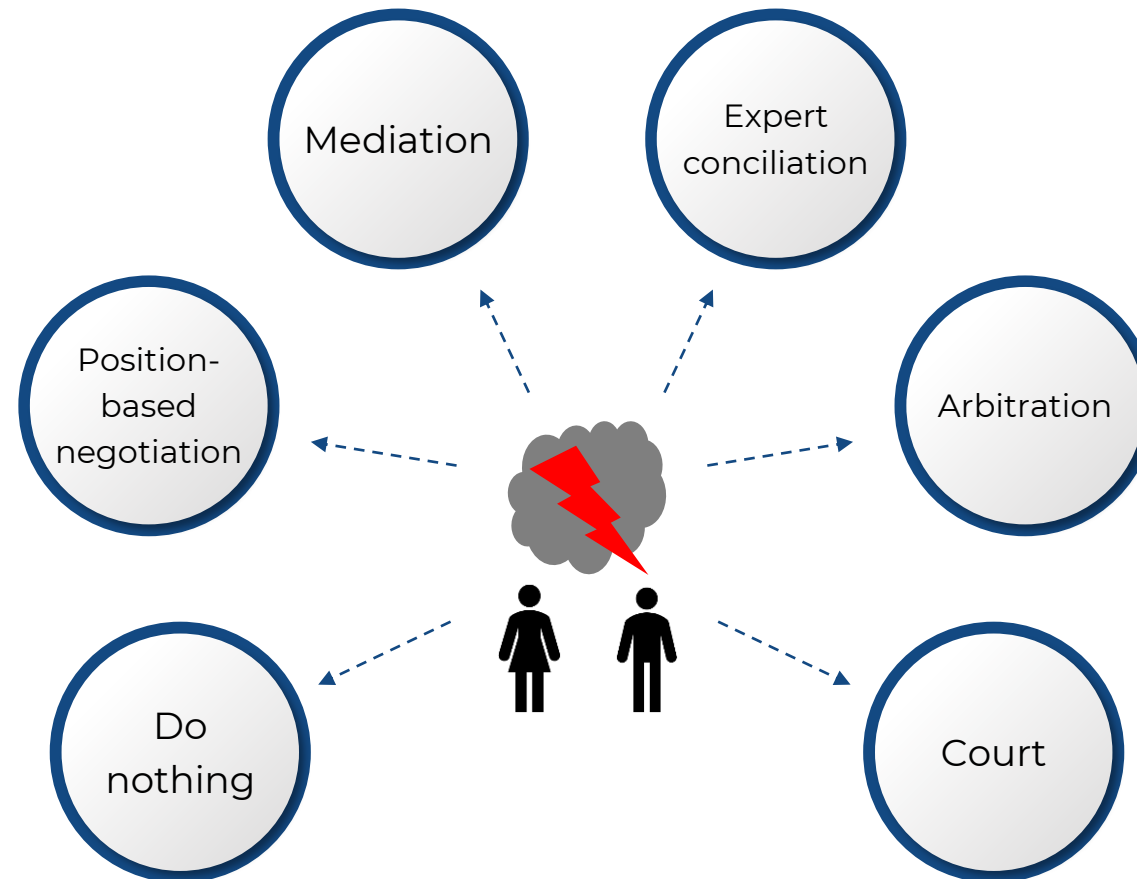
- The parties have developed a solution to their conflict that is acceptable to all of them
- The agreement – or at a minimum the key points – is/are set out in writing and signed during the mediation session
- Each party's own legal counsel assists, as needed, to document the final agreement
- Consider including an agreement to mediate any disputes regarding documentation of the settlement
- Consider options for enhancing the enforceability of the agreement, e.g.
 - Certified notarial deed
 - Singapore Convention

CAN YOU AFFORD NOT TO MEDIATE?

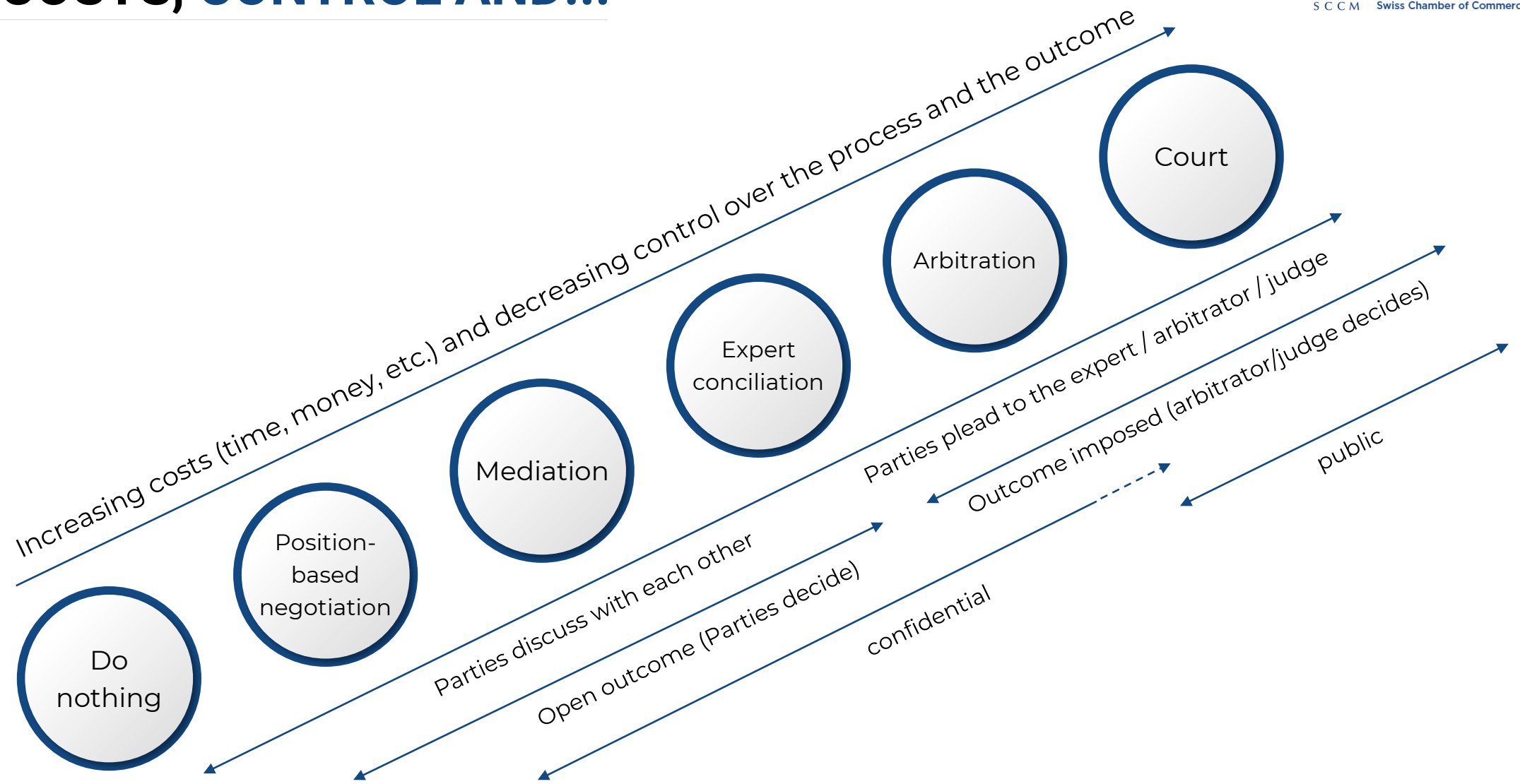
- Mediation makes sense for nearly all types of disputes
- Mediation can address and resolve non-legal topics (emotions, interpersonal relationships)
- Mediation is particularly advisable for ongoing business relationships, e.g.
 - Supply / distribution agreements
 - Licensing / royalties disputes
 - Impasse in a joint venture
- But mediation is also highly successful for resolving one-off disputes, e.g.
 - Past-due payments
 - Damages for breach of contract

MEDIATION VS. NEGOTIATION, ARBITRATION, ETC.

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COSTS, CONTROL AND...



ADDITIONAL ADVANTAGES OF MEDIATION

- Shape the future rather than focus on past events
- The parties retain control over the outcome of the dispute, they stay "in the driver's seat"
- The process is confidential and promotes preservation and expansion of business relationships
- Typically very successful in resolving disputes (70-80% success rates)
- Preparation for mediation may help identify vulnerabilities that allow early, advantageous settlement before the opposing party learns of the weakness
- Even if no settlement is reached, preparation for and participation in the mediation provide each party with valuable information about their conflict and interests and the strength of their litigation or arbitration position
- Avoids lengthy disputes in litigation or arbitration about applicable law or the competent court or arbitral institution
- Mediated settlements face fewer enforcement issues as parties usually comply
- Most commercial disputes referred to court or arbitration also end with settlement, except that it takes longer and costs more to get there

TWO TOPICS TO CONSIDER

Deadlines:

- If mediation is required before filing lawsuit/arbitration, take into account any limitations periods!
- Commence mediation sufficiently in advance of the deadline
- Consider asking the other side to agree to temporary waiver of the deadline

Confidentiality:

- Mediations are typically confidential due to institutional rules and/or the mediation agreement
- However, information shared in a mediation becomes known by the other party (e.g. facts, weaknesses, the existence of documents that might be requested in a future arbitration or litigation if there is no settlement)
- Using break out sessions / shuttle diplomacy to address weaknesses can reduce this risk

MEDIATION CLAUSES IN CONTRACTS

- Require parties to meet and discuss potential settlement despite negative emotions that normally exist once the dispute has arisen
- Allow parties to avoid signaling weakness by suggesting mediation
- Set out the rules and procedures so that mediation can begin quickly and efficiently – reduce the need to negotiate regarding the terms of the mediation
- Best Practices:
 - Designate institutional rules, e.g. Swiss Mediation Rules, ICC Mediation Rules, WIPO Mediation Rules
 - Use the institution's model clause(s)
 - Include the time period after which a party may file a court claim or request for arbitration if the mediation has not resulted in settlement

SWISS ARBITRATION CENTRE MODEL MEDIATION CLAUSE

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"Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, shall be submitted to mediation in accordance with the Swiss Rules of Mediation of the Swiss Arbitration Centre in force on the date when the request for mediation was submitted in accordance with these Rules.

The seat of the mediation shall be... [city] in... [country], although the meetings may be held in... [city] in... [country].

The mediation shall be conducted in ... [specify desired language]."

[Good practice: Also specify the next step if no agreement is reached in mediation within [60] days, e.g. arbitration or litigation in a specified venue.]

SWISS ARBITRATION CENTRE MODEL MULTI-TIER CLAUSE

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The seat of the mediation shall be... [city] in... [country], although the meetings may be held in... [city] in... [country].

The mediation shall be conducted in ... [specify desired language].

If such dispute, controversy or claim has not been fully resolved by mediation within 60 days from the date when the mediator(s) has (have) been confirmed or

appointed by the Swiss Arbitration Centre, it shall be settled by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Arbitration Centre in force on the date when the Notice of Arbitration was submitted in accordance with those Rules.

The number of arbitrators shall be ... ["one", "three", "one or three"].

The seat of the arbitration shall be... [city] in... [country], although the meetings may be held in... [city] in... [country].

The arbitration shall be conducted in ... [specify desired language].

The arbitration shall be conducted in accordance with the provisions for Expedited Procedure [if so wished by the parties]."



The Swiss Chamber of Commercial Mediation supports companies and individuals in avoiding disputes and resolving them quickly, cheaply and better. Whether the parties are already in court or not, we can help - with the assistance of trained, neutral, impartial and independent mediators - to reduce the time and costs involved to a mutually acceptable level. SCCM accredited mediators have a variety of backgrounds and experience in commercial matters. They understand the needs and concerns of parties involved in commercial disputes, from the perspective of company owners as well their employees, and for internal as well as for external disputes.



Questions?

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Thank You

