Question 1

What alternative means are used in your legal system for resolving civil law disputes outside normal court procedures?

a) Mediation (a process in which the parties engage a mediator or conciliator to encourage and assist them towards agreeing a solution)

b) Arbitration (a process in which the parties agree to submit their dispute to a binding decision by an arbiter)

c) Non-binding arbitration (a process in which the parties obtain a decision on their dispute but which is non-binding and does not prevent litigation)

d) Other methods (please describe)

Besides the alternative methods of dispute resolution mentioned in the questionnaire -mediation, arbitration, and non-mandatory arbitration-, the laws of procedure in force establish the following:

1. TRIAL BY AMIGABLES COMPONEDORES [AMICABLE ARBITRATORS]: It is established in the Código Procesal Civil y Comercial de la Nación [National Code of Civil and Commercial Procedure] in articles 766 to 772. It is an informal arbitration procedure, also called "arbitraje libre o no ritual" [free or non formal arbitration], by means of which judges do not apply the pertaining law but instead decide on the conflict according to the best of their knowledge without being bound by legal formalities.

2. PERICIA ARBITRAL [ARBITRATION BY EXPERT WITNESS]: It is established in article 773 of the above mentioned code. It consists of the issuance of an award entrusted to technicians who are to decide exclusively on express and concrete matters of fact. The expert witness who is to perform the arbitration should be qualified in the pertaining subject matter.

3. It is a kind of arbitration. However, it has some distinctive peculiarities related to its object, since it is a parajudicial process aimed at the resolution of a scientific, technical, artistic or industrial dispute, for which special knowledge on the subject matter is required; the decision should be about matters of "FACT" alone.

Question 2

(a) Are any of the alternative means used in your country subject to special regulation by statutory provisions?

Mediators, arbitrators, amicable arbitrators and expert witnesses performing arbitration are subject to specific regulation. As for the first, their performance is governed by national act 24573 and regulatory executive order 91/98. As for the others, its performance is subject to the rules established by articles 736 to 765 (arbitrators), 766 to 772 (amicable arbitrators) and 773 (expert witnesses performing arbitration), of the Código Procesal Civil y Comercial de la Nación. There are also provincial regulations on the matter.

In the case of the Tribunal Arbitral de la Bolsa de Comercio de Buenos Aires [Arbitration Tribunal of the Buenos Aires Stock Exchange], it has its own rules, issued by said institution.

(b) Does a mediator or an arbiter require to have a particular qualification or to have undergone professional training?
A mediator should be a lawyer with a professional practice of at least three years, who should have passed the stages of qualification and evaluation required by the Ministerio de Justicia de la Nación [National Ministry of Justice] through the Dirección Nacional de Medios Alternativos de Resolución de Conflictos [National Office of Alternative Methods for Dispute Resolution] (article 16 paragraph 1 and 2) of Executive Order 91/98). As for "arbitrators" and "amicable arbitrators", no academic degree or professional training is required by law. There is an exception, which is the case of the arbitrator of the Tribunal de Arbitraje General de la Bolsa de Comercio de Buenos Aires [General Arbitration Tribunal of the Buenos Aires Stock Exchange], who should have an university degree issued by a national university or private university acknowledged by the State, and one of its members should be a lawyer with a professional practice of at least ten years (article 17 of the Reglamento del Tribunal Arbitral de la Bolsa de Comercio de Bs. As. [Rules and Regulations of the Arbitration Tribunal of the Buenos Aires Stock Exchange]).

(c) If a mediator requires to undergo training, who provides such training?

The training required for mediators may be obtained in several schools authorized by the Ministerio de Justicia de la Nación through the Dirección Nacional de Medios Alternativos de Resolución de conflictos.

(d) Is there a professional organisation of mediators which lays down rules of professional conduct?

There is no professional organization of mediators laying down rules of professional conduct. Said conduct is governed by Executive Order 91/98.

Question 3

(a) Insofar as alternative dispute resolution procedures are available and are in use in your country, what are the principal areas of law (for example family law, building or construction law, medical negligence claims, consumer cases, etc) in which disputes are settled by the alternative procedures?

Disputes subject to mandatory mediation are those which are more likely to be sorted out. The fact that this procedure, incorporated for the national justice by act 24573, is mandatory, which means that the parties are bound to use it as a prior requirement for filing the suit with the courts, has reduced the number of cases to be heard by the judiciary; the result probably would not have been the same if the procedure had remained optional. Statistics show that in those cases where mediation is optional by law (such as evictions and executions), the percentage of disputes referred to mediation is insignificant. Since this system is applied to civil and commercial cases -and more recently was incorporated in labor matters-, it may be noted that in general it is not by areas of law that there have been more resolution of conflicts, but that instead the greatest success in reaching and agreement is based on the monetary amount being disputed. This is to say, it is in those cases in which the monetary amount being disputed is small where mandatory mediation has proven to be more successful in helping the parties reach and agreement, regardless of the matter involved; this is, of course, logical, bearing in mind the costs implied in a judicial process, as well as the amount of time that a law suit demands. It should be pointed out that, in accordance with our constitutional system, we have a national and a provincial order, and each province dictates its own laws regarding alternative methods of dispute resolution, since it is a prerogative of local law which they have retained.

(b) Are there any types of civil law dispute which cannot be resolved by such alternative means but must be decided by a court?

Yes. It is the case of processes related to family law, where no alternative means of dispute resolution is applicable, either mandatory or not, at a national level. Some examples are trials of divorce and personal separation, nullity of marriage, filiation, parental guardianship, declaration of incapacity and rehabilitation of individuals. As regards the reason for this prohibition in family matters, it is easy to see that since these matters are closely related to changes in the state and capacity of individuals, they may not be
subject to any alternative means of resolution. However, all matters related to the patrimonial effects of these family law cases (such as the division of property owned by the spouses, alimony, etc.), may be referred to a mediator; in that case, judges will split the procedure and refer the patrimonial matters to the mediator. Other cases which may only be decided by a tribunal are those to which the national State or its decentralized entities are a part, the amparos (which is a remedy seeking legal protection against an evident, unreasonable and unlawful violation of constitutional guarantees), where the national public order is at stake, and the interdictos [interdicts, very brief processes]. These exceptions apply to the totality of our legal system, national or provincial. Generally, the rule is that any patrimonial matter may be referred to alternative methods of dispute resolution. As for the non-patrimonial matters, mediation is possible as long as the public order is not at stake. Regarding commercial matters, bankruptcy cases are excluded.

Question 4

(a) Is any publicly funded system of mediation available in your country? In particular, is there any mediation service annexed or attached to the courts?

Yes, at a national level the system of mandatory mediation which we have explained is publicly financed through a Fondo de Financiamiento [Financing Fund] created by act 24573 and administered by the Ministerio de Justicia de la Nación. The mediation service is not part of the National Judicial Branch. In some provinces of our country the system is annexed to the courts, and in others there are Cuerpos de Mediadores en Tribunales de Familia [Mediators' Bodies in Family Tribunals] which are part of the provincial Judicial Branch. The situation varies since each province has the power to organize its justice system, and in the federal level the national government has this prerogative.

(b) If so, for what types of civil law dispute is publicly funded mediation available?

The publicly financed mediation systems are aimed at disputes related to civil matters with patrimonial effects, commercial and labor matters, as well as those pertaining to the patrimonial effects of family law cases.

Besides mediation, there are arbitration tribunals which mediate in some specific conflicts, and they are optional. Such is the case of matters related to the application of the ley de defensa del consumidor [consumer protection act], which have been established at the national, provincial, and municipal level. Obviously, said tribunals are not part of the Judicial Branch, but instead they function in the sphere of the public administration.

Question 5

(a) To what extent, and by what means, are the courts in your system able to encourage or to require parties to attempt mediation or some other form of alternative dispute resolution either as a preliminary to commencing any litigation or in the course of ordinary court proceedings?

Since 1995, mediation as a prior stage before trial is mandatory in the national judicial system in civil and commercial matters and in most of the procedures, as established by act 24573, and it is a requirement for admitting the law suit. Those parties who intend to file a law suit may use the services of a private registered mediator, of their choice, or request that one be drawn from the list established for that purpose. Notwithstanding the above mentioned, taking into account the experience obtained by its implementation in the courts of the District of Columbia, Washington DC, United Sates of America, multi-door systems have been established -both in the context of the Cámara Nacional de Apelaciones en lo Civil [National Court of Appeals in Civil matters], and in the context of the Colegio Público de Abogados de la Capital Federal [Association of Registered Lawyers of the city of Buenos Aires]-, through which the selection and submission of cases for the different alternative methods may be optimized.

Now, regarding what is strictly the judges' function and duties, they have the duty of being in direct contact with the parties at least in one occasion, which is the one of article 360 of the Código Procesal [Code of
Procedure], which establishes that judges should invite the parties "...to a mediation or to find another way of solving the dispute" (paragraph 1); this clearly includes the different alternative methods of dispute resolution. However, it is clear that the judges' degree of skill to explore this last chance depends on their knowledge of the possibilities, strengths and weaknesses of each one of these methods, since this knowledge influences their capacity to evaluate in a proper manner -and properly communicate to the parties- the convenience of using certain method in that particular case.

(b) Is the court administration able to assist litigants, or potential litigants, in using alternative dispute resolution procedures by, for example, explaining the various possibilities of alternative dispute resolution or providing information about mediators or arbiters?

Yes, it is. And it is important for it to do so, since the agreements reached by means of self-mediation of the dispute often offer the parties a more satisfying solution that the one that may be obtained by means of the judge's decision. On the other hand, in our country there is a specific state interest in improving the efficiency of a saturated judiciary, so the implementation of advising systems helps to achieve said aim and to materialize reasonable public policies related to the administration of Justice. Moreover, the multi-door systems, called the "Casas de Justicia" [Houses of Justice] are an initiative in that regard.

Question 6

(a) Has the use of alternative dispute resolution procedures in your country been increasing in recent years?

In Argentina mediation has become very popular, due to the fact that is mandatory, which has helped it obtain a publicity that it would not have had if it had remained optional, because of the mainly litigious training lawyers receive in our universities. Yes, there is a noticeable increase in the use of alternative methods of dispute resolution in the business environment. More often every day, parties to an inter-business agreement include arbitration clauses; but there is no increased publicity of other alternative methods of dispute resolution, which are being used in other countries -such as the juicio privado [private trial]; juicio sumario por jurado [summary trial by jury]; oyente neutral [neutral listener]; experto neutral [neutral expert], etc.

(b) If so:-
(i) are there any particular reasons for the increase in use of alternative dispute resolution procedures?

The increase in the use of these mechanisms in the business environment may be explained with the fact that it allows the parties involved to reach a solution faster than through the judicial system and, on the other hand, that the participants in the economic market have the feeling that judges, though may have a solid legal knowledge, not always possess the necessary training to use the proper criteria suitable to the complex business reality that exists nowadays.

(ii) has the increase in use sufficiently reduced the burden of work on the courts to allow the courts to improve the delivery of justice?

Certainly the increase in the rate of disputes solved outside the judicial system contributes to the improvement of the efficiency levels of the courts, which may concentrate their material and human resources to a smaller number of cases, thus optimizing its usage. To a great extent, this is a consequence of the implementation of the previous mandatory mediation.

(iii) has any alteration been made to the rules of procedure or the practices of the courts in response to the increase in the use of alternative dispute resolution?
Yes, at least in relation to mediation, because act 24573 established it as a prior stage that must be satisfied in order to continue with the proceedings.

Question 7

In your system does the court provide any procedures in which a judge acts as a mediator?

Yes, they offer it at the time of the preliminary meeting, to which we made reference in previous answers; but also when judges deem it pertinent, since the rules of procedure in force grant them the power to convene the parties to the lawsuit at any time of the proceedings, and at that point a judge properly trained in mediation techniques may make a conciliatory attempt of the interests at stake.

Question 8

Are there any proposals to change the law relating to alternative dispute resolution procedures?

In the federal system, which is the backbone of the constitutional government regime of the Argentine Republic, provincial states retain the power to lay down their own rules of procedure, so each local legislative body may establish rules relating to alternative resolution of disputes with judicial destiny. At the national level, an inquiry from the database of the Oficina de Información Parlamentaria de la Honorable Cámara de Diputados de la Nación [Office of Parliament's Information of the Low Chamber of the Nation's Parliament] established that, among others, there is a project to repeal act 24573, filed on December of the year 2000; there is another project that stipulates the creation of a mandatory pretrial stage for the resolution of disputes arising from tourist agreements; there also are initiatives to modify several paragraphs of article 2 of act 24573 (successions and voluntary trials), and to extend the range of family-law cases requiring mandatory mediation; as well as several projects which refer to mediation, even if it is only to determine its non applicability, such as the one that creates the tribunal of professional practice, which establishes an ordinary judicial proceeding without need of previous mediation.

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