

Mediation

Session 3 – The Mediation Proceedings

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1. Participants
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1. Participants

A. Overview

- The participants include:
 - The parties
 - Legal counsel (optional)
 - The mediator(s)
 - Third parties (rarely)

1. Participants

B. The parties

- Two issues need to be considered:
 - Do the parties' legal representatives possess *settlement authority*?
 - Should a person that was involved in negotiating the *underlying transaction* take part in the mediation?

1. Participants

c. Legal counsel

- Should legal counsel participate in the mediation proceedings (or certain stages in the proceedings)?

1. Participants

C. Legal counsel

- At least two reasons *may*, in certain circumstances, support exclusion of legal counsel:
 - The use of legal counsel may be perceived as a hostile act by the other party
 - A party's legal counsel may not be genuinely interested in reaching a settlement

1. Participants

C. Legal counsel

- The participation of legal counsel may of course be beneficial in various respects, especially as regards the drafting of the settlement agreement

1. Participants

D. The mediator(s)

- In most cases, there will be *one* mediator. In some cases, the parties may choose to have *two or several* mediators (co-mediation). What may be reasons to opt for multiple mediators?
 - Note, by the way, that there is no requirement that the number of mediators be uneven

1. Participants

E. Other participants

- In some cases (but this is very rare), the parties and mediator(s) may agree to involve other parties, especially experts (technical, legal, etc.)

2. Stages

A. Overview

- There are *five* principal stages in the mediation proceedings:
 - Initiation of the proceedings
 - Appointment of a mediator (or mediators)
 - Preparation for the mediation meeting
 - Mediation meeting
 - Post-mediation events

2. Stages

B. Initiation of proceedings

- Mediation proceedings may be initiated by:
 - A request for mediation made in accordance with a mediation clause
 - An ad hoc agreement to mediate

2. Stages

C. Appointment of mediator

- A number of practical questions arise in this context:
 - Are there any limitations on the parties' freedom to choose a mediator?
 - Where to find a mediator?
 - How to choose a mediator?

2. Stages

C. Appointment of mediator

- In private mediations, the parties are usually free to choose *any* person as a mediator, i.e. they are not obliged to choose individuals (i) who are registered or certified mediators or (ii) who possess particular mediation training or expertise
 - Note, however, that the benefit of mediation legislation may sometimes be restricted to mediations conducted by registered mediators (e.g. Austria)

2. Stages

C. Appointment of mediator

- In court-annexed mediation, the parties' freedom to choose a mediator is frequently limited by certain mandatory requirements that a mediator must meet
 - *E.g.* in France, the mediator must notably “demonstrate training or experience in mediation”

2. Stages

C. Appointment of mediator

- Information on potential mediators may be available with governmental agencies, private mediation service providers, courts, etc.

2. Stages

C. Appointment of mediator

- What are mediator qualities or skills that the parties may be looking for?

2. Stages

C. Appointment of mediator

- Particular qualities and/or skills that the parties may be looking for in a prospective mediator notably include:
 - Mediation experience or training
 - Industry knowledge
 - Legal expertise
 - Language skills
 - Others?

2. Stages

D. Preparation for meeting

- Firstly, the mediator must *familiarize himself/herself* with the dispute:
 - He/she may invite the parties to submit short statements along with key documents
 - He/she may conduct preliminary meetings with the parties separately

2. Stages

D. Preparation for meeting

- Secondly, the mediator and the parties need to establish a *schedule* and agree on various *organizational matters* (location of mediation meeting, number of rooms, persons in attendance, etc.)

2. Stages

E. Mediation meeting

- Mediation meetings (or conferences) frequently proceed in four stages:
 - Fact finding/information gathering
 - Working through conflict
 - Developing and evaluating options
 - Drafting of settlement (if agreement can be reached)

2. Stages

E. Mediation meeting

- During the fact-finding/information-gathering stage the mediator and the parties notably:
 - Clarify the facts of the dispute
 - Clarify the parties' respective positions
 - Identify relevant legal issues

2. Stages

E. Mediation meeting

- Working through conflict notably involves:
 - Developing an understanding of the other party's views
 - Developing a more realistic evaluation of one's own case
 - Identifying interests (shared and divergent)

2. Stages

E. Mediation meeting

- The parties' differing litigation/arbitration expectations frequently make settlement impossible, i.e. there is no zone of possible agreement or ZOPA (see tables contained in next three slides). One aim of the mediation process is to create or extend a/the zone of possible agreement

2. Stages

Table 1 – USD 1 million claim – identical litigation expectations

Party	Litigation expectation (W/L)	Value of claim/amount of liability	Unrecoverable and/or internal costs	Net value of claim/amount of liability	Settlement?
Claimant	50/50	500,000	100,000	400,000	Above 400,000
Respondent	50/50	500,000	100,000	600,000	Below 600,000
Settlement range					400 – 600,000

2. Stages

Table 2 – USD 1 million claim – slightly divergent litigation expectations

Party	Litigation expectation (W/L)	Value of claim/amount of liability	Unrecoverable and/or internal costs	Net value of claim/amount of liability	Settlement?
Claimant	60/40	600,000	100,000	500,000	Above 500,000
Respondent	60/40	400,000	100,000	500,000	Below 500,000
Settlement range					500,000

2. Stages

Table 3 – USD 1 million claim – sharply divergent litigation expectations

Party	Litigation expectation (W/L)	Value of claim/amount of liability	Unrecoverable and/or internal costs	Net value of claim/amount of liability	Settlement?
Claimant	80/20	800,000	100,000	700,000	Above 700,000
Respondent	80/20	200,000	100,000	300,000	Below 300,000
Settlement range					NONE

2. Stages

E. Mediation meeting

- What is meant by developing and evaluating options?

2. Stages

E. Mediation meeting

- If the mediation meeting is *successful*, the mediator and/or the parties may draft a settlement agreement:
 - The question arises as to what the mediator's task should be
 - The settlement may be full or partial
 - The settlement may be an agreement in principle or a detailed settlement

2. Stages

F. Post-mediation

- If the mediation is successful, post-mediation events may include:
 - Drafting of a detailed settlement agreement (where only agreement in principle was executed)
 - Voluntary performance of settlement obligations
 - Judicial enforcement of settlement obligations

2. Stages

F. Post-mediation

- If the mediation is unsuccessful, post-mediation events may include:
 - Litigation/arbitration
 - Further attempts to negotiate/mediate

3. Confidentiality

A. Recognition

- Confidentiality is a *basic principle* of mediation law recognized in most legal systems (it is notably enshrined in Art. 9 of the Model Law and Art. 7 of the EU Directive)

3. Confidentiality

B. Meaning and rationale

- Confidentiality means that all information obtained and all documents prepared in connection with mediation proceedings must not be disclosed to third parties, including courts and arbitral tribunals

3. Confidentiality

B. Meaning and rationale

- The rationale for confidentiality is to encourage open exchanges between the parties (in particular, the parties do not run the risk of sensitive information being used against them in subsequent court or arbitration proceedings)

3. Confidentiality

C. Scope

- The scope of the confidentiality obligation raises two questions:
 - Who owes a duty of confidentiality?
 - What exactly is covered by confidentiality?

3. Confidentiality

C. Scope

- The duty of confidentiality is owed by all participants (party representatives, mediator, experts, etc.)
 - Example: A mediator cannot in principle be forced to produce a mediation-related document or to testify in connection with mediation proceedings

3. Confidentiality

C. Scope

- The duty of confidentiality covers all mediation-related information and documents specifically established for the mediation (however, it does not cover prior documents such as contracts between the parties or earlier correspondence)

3. Confidentiality

D. Exceptions

- Art. 10(3) of the Model Law provides for two exceptions:
 - Where disclosure is required by law
 - Where disclosure is necessary for the purposes of enforcing the mediated settlement agreement

3. Confidentiality

D. Exceptions

- Example: Where a party alleges that a mediated settlement agreement was entered into as a result of duress or undue pressure, the mediator may be allowed to testify with regard to the circumstances under which the settlement was reached (in this case, one can consider that disclosure is required by law)