

Mediation

Session 1 – Concept; Types; Advantages and Disadvantages

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1. Concept of mediation
2. Types of mediation
3. Advantages and disadvantages of mediation

1. Concept of mediation

A. Definition

- What is mediation?

1. Concept of mediation

A. Definition

- An example of a definition can be found in the 2008 EU Mediation Directive which defines mediation as *“a structured process... whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator”* (Mediation Directive Art. 3(a))

1. Concept of mediation

B. Principal features

- The two principal features of mediation are:
 - It is a process of *negotiation*
 - It is a process that involves the participation of a *mediator*

1. Concept of mediation

B. Principal features

- *A process of negotiation*: mediation can be distinguished from other dispute settlement (DS) mechanisms such as litigation and arbitration which are of judicial or quasi-judicial nature (a decision will be rendered based on the facts and the law)

1. Concept of mediation

B. Principal features

- *A process involving the participation of a mediator:* The involvement of a mediator raises the question of what his or her role is

1. Concept of mediation

B. Principal features

- The EU Mediation Directive's definition refers to “assistance” provided by the mediator. What does this mean?

1. Concept of mediation

B. Principal features

- Generally speaking, one can distinguish two alternative approaches that mediators may take:
 - A facilitative approach
 - An evaluative approach

1. Concept of mediation

B. Principal features

- *Facilitative* mediation focuses on the *process*, not on the *substance* of the dispute (the mediator facilitates communication between the parties)

1. Concept of mediation

B. Principal features

- *Evaluative* mediation focuses on the *substance* of the dispute (the mediator will evaluate the parties' respective positions and claims; he or she may, for example, make a settlement proposal)

2. Types of mediation

A. Overview

- One distinguishes between:
 - Judicial, court-annexed and private mediation
 - Optional and mandatory mediation

2. Types of mediation

B. Judicial, court-annexed and private mediation

- Judicial mediation is mediation performed by a judge

2. Types of mediation

B. Judicial, court-annexed and private mediation

- Example: A dispute arises between A and B. A initiates court proceedings. The court asks the parties whether they would like to mediate. The parties agree and the court appoints a *judge* to serve (exclusively) as a mediator (judicial mediation is notably conducted by Employment Tribunals in the UK)

2. Types of mediation

B. Judicial, court-annexed and private mediation

- Court-annexed mediation is mediation conducted in connection with court proceedings and under the supervision of the court hearing the case

2. Types of mediation

B. Judicial, court-annexed and private mediation

- Example: A dispute arises between A and B. A initiates court proceedings. The court asks the parties whether they would like to mediate. The parties agree and the court appoints a *private individual* to serve as a mediator (often this person will be on a list kept by the court)

2. Types of mediation

B. Judicial, court-annexed and private mediation

- In court-annexed mediation, courts typically have substantial supervisory powers, *e.g.*:
 - They appoint the mediator
 - They set a time frame for the mediation
 - They may terminate the mediation

2. Types of mediation

B. Judicial, court-annexed and private mediation

- Private mediation is mediation that is not connected to court proceedings and conducted by a private individual

2. Types of mediation

B. Judicial, court-annexed and private mediation

- Example: A dispute arises between A and B. The parties agree to mediate and ask a private mediation service provider to appoint a mediator (or ask Mr. or Ms. X to serve as mediator)

2. Types of mediation

c. Optional and mandatory mediation

- In most countries, the use of mediation is generally *optional*, i.e. there is no obligation to resort to mediation

2. Types of mediation

c. Optional and mandatory mediation

- However, mediation may sometimes be *mandatory*
 - One example of mandatory mediation is the system established in Italy under *Decree No. 69 of 21 June 2013* which makes mediation mandatory for a broad range of civil and commercial disputes (notably insurance, banking, inheritance, leases, and medical liability)

2. Types of mediation

c. Optional and mandatory mediation

- What may be some of the reasons why legislators make mediation mandatory (for certain categories of disputes)?

3. Advantages and disadvantages of mediation

A. General observations

- When speaking about the advantages and disadvantages of mediation:
 - We compare mediation to arbitration and litigation
 - We focus on the perspective of the parties

3. Advantages and disadvantages of mediation

B. Advantages

- The main (potential) advantages of mediation are:
 - Cost and time savings
 - Flexibility of outcome
 - Win/win outcomes
 - Control
 - Voluntary compliance
 - Preservation of business relationship

3. Advantages and disadvantages of mediation

B. Advantages

1. Cost and time savings

- Cost and time savings are essentially due to the fact that mediation is not a judicial (or quasi-judicial) process, i.e. it does not involve the submission of legal briefs, documentary evidence, witness testimony, etc.

3. Advantages and disadvantages of mediation

B. Advantages

2. Flexibility of outcome

- Flexibility of outcome refers to the idea that the parties' settlement options are not restricted to the legal remedies courts or arbitral tribunals may grant (in arbitration/litigation, the most frequently granted remedy is damages, while in mediation the parties may agree on amendments to their contract, future deals, etc.)

3. Advantages and disadvantages of mediation

B. Advantages

2. Flexibility of outcome

- Flexibility of outcome also means that “compromise” solutions can be found. Assume, for example, that the parties are in dispute over who has to bear the burden of a levy imposed by the national bank of the seller’s country in connection with anti-money-laundering investigations. A court or tribunal will generally have to allocate this burden to one of the parties. In mediation, the parties may decide to split this additional cost.

3. Advantages and disadvantages of mediation

B. Advantages

3. Win/win outcomes

- In mediation, it may be possible to achieve *win/win* outcomes while arbitration/litigation inevitably leads to *win/lose* outcomes

3. Advantages and disadvantages of mediation

B. Advantages

3. Win/win outcomes

- Take the example of the “orange dispute” (both parties claim ownership of an orange)
 - In arbitration/litigation, either one party obtains the orange and the other nothing or the parties split the orange (*win/lose* outcome)
 - In mediation, the parties may realize that they want different parts of the orange and each party may get the part it wants (*win/win* outcome)

3. Advantages and disadvantages of mediation

B. Advantages

3. Win/win outcomes

- Negotiation theory explains the difference between win/win and win/lose outcomes through the concepts of *distributive* and *integrative* bargaining

3. Advantages and disadvantages of mediation

B. Advantages

3. Win/win outcomes

- *Distributive* bargaining assumes that negotiation is a *zero-sum* game (the parties are dividing a pie). Example: Buyer and seller are negotiating the price of a particular object (a house, a watch, etc.)

3. Advantages and disadvantages of mediation

B. Advantages

3. Win/win outcomes

- *Integrative* bargaining assumes that negotiation can be a *positive-sum* game (the parties are enlarging the pie or “creating value”). Example: the orange dispute

3. Advantages and disadvantages of mediation

B. Advantages

3. Win/win outcomes

- How to enlarge the pie? How to create value?

3. Advantages and disadvantages of mediation

B. Advantages

3. Win/win outcomes

- Negotiation theory tells us that there are two main ways to create value:
 - By pursuing joint interests
 - By exploiting differences of *preference* or *valuation*

3. Advantages and disadvantages of mediation

B. Advantages

3. Win/win outcomes

- Joint interests may notably include:
 - A joint interest in building or preserving a business relationship
 - A joint interest in avoiding an escalation of conflict (which may cause the parties to incur significant litigation/arbitration costs)

3. Advantages and disadvantages of mediation

B. Advantages

3. Win/win outcomes

- The exploitation of differences in valuation or preference is based on the idea that *assets or resources* are valued differently by different people or entities. Example: When A purchases a 5,000 Euro watch in a jewelry store, this means that the jeweler prefers the money and the client prefers the watch

3. Advantages and disadvantages of mediation

B. Advantages

3. Win/win outcomes

- Example: A and B enter into a joint venture agreement to jointly run a business requiring substantial investments. A and B share losses and profits in equal parts (50/50). It turns out that A is very risk-averse, while B is very risk-friendly. What different financial arrangement may be in the mutual interest of the parties (a win/win change)?

3. Advantages and disadvantages of mediation

B. Advantages

4. Control

- Unlike in arbitration/litigation, the parties have *control* over the outcome (any mediated settlement will necessarily be agreed by the parties). Therefore, the parties' *satisfaction* with the outcome is generally higher than in arbitration/litigation

3. Advantages and disadvantages of mediation

B. Advantages

5. Voluntary compliance

- As a result of control and increased satisfaction with the outcome, parties are *very likely voluntarily to comply* with the mediated settlement agreement (this is not the case in arbitration/litigation)

3. Advantages and disadvantages of mediation

B. Advantages

6. Preservation of business relationship

- Arbitration/litigation generally puts an end to the business relationship between the parties. A successful mediation typically allows the parties to *pursue their business dealings*

3. Advantages and disadvantages of mediation

c. Disadvantages

- Does mediation present any disadvantages? Which ones?

3. Advantages and disadvantages of mediation

c. Disadvantages

- One disadvantage of mediation is the *uncertainty* of a successful outcome and, therefore, the possible *waste of resources* (time, money)

3. Advantages and disadvantages of mediation

c. Disadvantages

- However, it should be noted that:
 - A waste of resources only occurs where mediation is not successful
 - The wasted resources are generally rather minor
 - Time and money invested in the mediation may be partly “transferred” to arbitration/litigation

3. Advantages and disadvantages of mediation

c. Disadvantages

- It is questionable whether mediation presents other disadvantages. One argument that could be raised is that mediation may sometimes lead to *unfair outcomes* (notably as a result of unequal bargaining powers)