MEDIATION SERIES

MEDIATION ESSENTIALS

IN PARTNERSHIP WITH

Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Swiss Confederation

Federal Department of Economic Affairs,
Education and Research EAER
State Secretariat for Economic Affairs SECO

WORLD BANK GROUP

IFC International Finance Corporation

2121 Pennsylvania Avenue, N.W.
Washington, D.C. 20433
Internet: www.ifc.org

TABLE OF CONTENTS

FOREWORD

The *Mediation Series* is a celebration of the long-term work of the International Finance Corporation (IFC), member of the World Bank Group, in helping client countries adopt and integrate mediation to increase the effectiveness of their conflict resolution systems. Since 2004, IFC has extended technical assistance to both governments and the private sector to ensure that mediation is established effectively. IFC's projects cover the Balkans, East and South Asia, Sub-Saharan Africa, and the Middle East and North Africa and have led to a considerable increase in the use of commercial mediation.

The success and the expansion of our mediation projects globally and the scarcity of material in Arabic have inspired the *Mediation Series*. The series offers a unique and comprehensive set of Alternative Dispute Resolution (ADR) learning resources for users, policy makers, lawyers, judges, and ADR professionals. The resources aim to support the growth and sustainability of mediation and ADR in the region and beyond.

The *Mediation Series* consists of a three-book-package (*Mediation Essentials, Making Mediation Law, and Integrated Conflict Management Design Workbook*) that explores mediation-related topics in-depth. The *Mediation Essentials* deskbook serves as an orientation guide to ADR generally and to mediation specifically for users, advisers, and mediators. *Making Mediation Law* offers a robust perspective on how to design successful mediation policy and legislation. The *Integrated Conflict Management Design Workbook* offers a hands-on focus for designing efficient and effective dispute management systems with companies and organizations. The publications appear in both English and Arabic, except for the *Integrated Conflict Management Design Workbook,* which is in Arabic only.

ABOUT *MEDIATION ESSENTIALS*

As the title suggest*s, Mediation Essentials* is the definitive deskbook on mediation. It brings together in one compact publication the essential knowledge and know-how on mediation. *Mediation Essentials* is the must-have book for mediators, lawyers, and other advisers, disputants, and anyone involved in conflict. It has been structured to appeal to a wide range of readers.

Jean Denis Pesme
Practice Manager, Middle East and North Africa
Finance & Markets, World Bank Group

PREFACE

Mediation is one of the most frequently used alternative dispute resolution processes worldwide. Mediation provides *faster*, *cheaper,* and *better* solutions than a traditional court decision can. Benefits are important for individuals as well as for disputing businesses from the private sector and for public sector institutions. Understanding the principles, process, and skills of mediation is essential for anyone whose professional role involves managing disputes of any kind.

CHAPTER OVERVIEW

Mediation Essentials comprises five chapters and appears in both English and Arabic:

Chapter 1: How to Manage and Control Disputes: Alternative Dispute Resolution
Chapter 2: How to Make the Most of Mediation
Chapter 3: How Professional Advisors Can Add Value to Mediation
Chapter 4: How to Use Guiding Principles and Ethics to Ensure the Integrity of Mediation
Chapter 5: How to Draft Contractual Documents for Mediation

HOW TO USE THIS BOOK

Mediation Essentials can be read from start to finish in a linear fashion; alternatively, it can be read out of order. The chapters are sequenced so that each chapter builds on the previous one, but they are also written as standalone publications. So if, for example, you already have some basic knowledge about mediation but wish to understand better the role of professional advisers in mediation, you may go straight to chapter 3. Alternatively, if your organization has already committed to engaging in mediation, you might go immediately to chapter 2. If you are a lawyer and wish to draft a mediation clause for your client's business transaction, you might begin with chapter 5. As a result, there is inevitably some overlap among the individual chapters of *Mediation Essentials*. These overlapping sections serve two functions:

- They enable the chapters to function on a standalone basis.
- They reinforce important themes from a variety of perspectives.

ACKNOWLEDGMENTS

The publication of this manual was made possible because of the generous support of the Spain-IFC Technical Assistance Trust Fund and Switzerland's State Secretariat for Economic Affairs (SECO) through contributions to the trust fund supporting the activities of the World Bank Group's Investment Climate Advisory Services.

The conceptualization and preparation of this deskbook was led by Fatma Ibrahim. The finalization was orchestrated by a team composed of Nina Pavlova Mocheva, Akvile Gropper, and Ejona Fuli from the World Bank Group.

We are grateful to our team of peer reviewers: Nina Mocheva, alternative dispute resolution expert at the World Bank Group; Dr. Mohamed Abdel Raouf, director of the Cairo Regional Centre for International Commercial Arbitration (CRCICA); and Dr. Eman Mansour, director of the Investors' Dispute Settlement Center, affiliated to the Egyptian General Authority for Investment and Free Zones (GAFI).

This manual was edited by Publication Professionals, LLC. Design was by Aichin Lim Jones and Amy Quach.

We would also like to thank Alex Azarov and Crystal Chin for their contributions and assistance.

Nadja Alexander, Singapore, May 2016
Academic Director, Singapore International Dispute Resolution Academy
Hon. Professor, The University of Queensland
Senior Fellow, Dispute Resolution Institute, Mitchell Hamline School of Law

Fatma Ibrahim, Cairo, May 2016
World Bank Group

Jean-François Roberge, Montreal, May 2016
Professor and Director of Dispute Prevention and Resolution Program,
Faculty of Law, Université de Sherbrooke

ACRONYMS AND ABBREVIATIONS

ADR	Alternative Dispute Resolution
arb-med-arb	arbitration-mediation-arbitration process
DRC	Dispute Resolution Counselor
IMI	International Mediation Institute
MOU	Memorandum Of Understanding
MSA	Mediated Settlement Agreement
NADRAC	National Alternative Dispute Resolution Advisory Council (Australia)

CHAPTER ONE

How to Manage and Control Disputes: Alternative Dispute Resolution

CHAPTER ONE

How to Manage and Control Disputes: Alternative Dispute Resolution

INTRODUCTION

This chapter will introduce you to different ways of managing conflict when you are involved in general and specific disputes. It also offers a framework for understanding dispute resolution. Disputes are part of life, and we all experience them sometimes. They give us an opportunity to solve problems and to improve relationships, but they carry a risk of being destructive if not managed well.

When we think of disputes, we often think of going to court to obtain a court decision. Lawyers are often involved in this process, assisting each side of the dispute. Courts have demonstrated—and continue to demonstrate—their value by promoting the rule of law, administering people's rights and obligations, and maintaining the relevance of social norms through law reform.

Disputes are part of life, and we all experience them sometimes. They give us an opportunity to solve problems and to improve relationships, but they carry a risk of being destructive if not managed well.

The process of going to court is called *litigation*, and it can also have some disadvantages. Litigation can cost a lot of money and take up a lot of your time. It is a public process, which means that the details of your dispute are on public record. Litigation is also a formalistic and legalistic process in which you will have little say.

This chapter outlines some alternative processes to litigation that offer disputants certain benefits that may not be available in a court. These benefits include informality, low cost, privacy, and a greater say in the outcome of the dispute. These processes are known as *alternative dispute resolution* (ADR) because they offer an alternative to the court process of dealing with disputes.

ADR processes involve a broad spectrum of dispute resolution mechanisms with different characteristics to suit every kind of dispute. These processes range from *facilitative ADR*, which focuses on managing and guiding negotiations between you and the other side, to *advisory ADR*, which involves greater input into the substance and merits of your dispute,

and to *determinative ADR*, which involves someone else, such as a judge, making a decision that is binding on you and the other side.[1]

DISPUTES AND CONFLICTS

The term *dispute* generally refers to a conflict that concerns a specific set of issues and has escalated. The term *conflict* is more general and can refer to a state of tension between you and another person. However, in everyday language the two terms are used interchangeably. Accordingly, in *Mediation Series: Mediation Essentials*, the terms dispute and conflict are used interchangeably and consistently with general usage.

WHAT IS A DISPUTE OR A CONFLICT?

Disputes are a normal part of life. They are often a disagreement about the following:

- Needs or wishes
- Values or beliefs
- Communication styles
- Ways to do things
- Ways to interpret information
- Priorities
- Resources, such as money
- Power such as authority in the workplace or political or institutional positions (for example, the chief executive officer of a corporation who holds a lot of power)

Disputes can involve emotions, which affect how we think and communicate. We can say things we normally would not say, and we can behave irrationally. Disputes can cause physical harm but can also harm our relationships.

It is interesting to note that disputes can also be constructive. If they are managed well, disputes can allow the people involved to learn something new, change their opinion, or improve ways of doing things. So it is important not to be afraid of disputes and not to avoid them. You can use the constructive potential of disputes by managing them yourself or finding someone to help you.

WHAT ARE WAYS TO RESPOND TO CONFLICT?

Think of a recent dispute in your life. How did you react to the dispute, and how did you try to manage it? Each of us has a habitual style of reacting to a dispute. Some people feel strongly about defending themselves in a dispute and will work actively to get what they want. Some people try to ignore the dispute by avoiding conversations with the other person or by changing the subject when the dispute arises. Some people try to find a fair compromise—giving something to the other person but getting something for themselves too. Some people do not like disputes and are willing to lose something just to resolve the dispute. They may do something or give something just to satisfy the other person and make the tension of the conflict go away. Are any of these styles similar to yours?

There is yet another style of managing a dispute, one that involves talking to the other side, trying to understand what the dispute is really about, and trying to find a solution that will satisfy everyone involved. This style is similar to trying to find a fair compromise, but the analysis of the dispute is deeper and the resulting solution better (and often more creative) than a simple compromise. It is described as a collaborative style and is used in some dispute resolution processes such as mediation in certain circumstances.

There is no right style to use when resolving disputes. Different styles may be appropriate for different circumstances. Maybe your style has worked for you and you are happy with it. What is important is to become aware of how you react to disputes and how you manage them so that you can determine whether another style could give you better results.

WHAT ROLE DO EMOTIONS PLAY IN CONFLICT?

Conflict is often fueled by emotions, and, in turn, conflict fuels emotions. A simple argument can escalate to a heated, and even violent, confrontation very quickly. When people suppress negative emotions, even a minor issue can cause them to explode at someone, creating a dispute. Be aware of emotions, both your own and those of others—they can make it difficult to resolve a dispute rationally.

Being aware of your own emotions will help you prevent disputes and manage conflict. We often do not notice how emotional we are until it is too late and we have done or said something we later regret. Awareness of your emotions improves with regular practice. Pay attention to signals (what is visible) and symptoms (what you feel but is not visible). Common symptoms of emotions like anger or fear may include a faster heart rate, sweaty palms, difficulty expressing yourself, an upset stomach, dilated pupils, and tightened muscles. Common signals of anger or fear include crossing your arms, aggressive body language, clenched teeth and fists, scrunched eyebrows, and a loud voice.

Becoming aware of your emotional state gives you more control over your words and actions. You can try different techniques to reduce the physical and psychological effects of emotions on you. For example, the simplest technique is to take some deep breaths while counting slowly to 10 in your head. This technique will slow your heart rate, calm you down, and reduce the effects of emotions on your thinking. You may also need to take a break to calm down and clear your mind—ensure that you take the time to do so. It can be very important to your ability to think and act in a constructive way.

Recognizing when other people are becoming emotional will help prevent disputes and manage conflict. Often when emotions run high, people don't think rationally, and they may make strong statements without thinking things through. Do not take these statements personally. Instead, stay calm and respectful—by doing so, you will help them to gradually do the same. Acknowledging their emotions can make them feel heard and help to diffuse destructive emotions. If you see that emotional outbursts are hindering communication, suggest that everyone take a break and discuss the problem at another time once people have calmed down.

WHAT ARE SOME GUIDELINES FOR PREVENTING DISPUTES AND MANAGING CONFLICT?

Now that you have a better understanding of conflict, here are some suggestions to help you prevent situations in your life from escalating into disputes:

- Give people an opportunity to express their view even if you disagree with it.
- Listen carefully while someone speaks and do not just think about what you want to say.
- Clarify any uncertain issues or ambiguous statements.
- Ask what people want and why they want it.
- Try to see the situation from the other person's point of view.
- Point out any interests you have in common with the other side.
- Ask open questions when possible.
- Ask how the other person wants things to be in the future.
- Deal with problems in a relationship effectively before they cause a dispute.
- Deal with bothersome people or situations effectively and do not let your emotions accumulate.

HOW DO YOU COMMUNICATE CONSTRUCTIVELY?

Disputes are often escalated by destructive communication. This is communication that intends to personally hurt the other person, makes a negative and unfounded judgment, contains exaggerations and generalizations, and is sarcastic or offensive. To prevent disputes, avoid destructive communication such as the following:

- Personally hurtful statements like "You are useless"
- Exaggerations like "You are the worst employee I've ever hired"
- Generalizations like "All these people are liars"
- Negative and unfounded judgments about people
- Statements that change the subject
- Sarcasm
- Offensive or rude language

If you are unsure about your communication, think about what it would achieve. If it is to communicate some information, to obtain information, to clarify an issue, to stimulate a discussion, or to express your interests, then it is likely to be constructive. If the aim of the communication is to put the other side down in the hope of fulfilling your desire for revenge, then it is likely to have a *destructive* rather than a *constructive* impact on resolving the problem. To prevent disputes, choose constructive communication instead of destructive communication as much as possible. If you have been unable to prevent a dispute from developing, you may need to consider methods of dispute resolution.

CHOOSING ALTERNATIVE DISPUTE RESOLUTION

One decision that you will need to make is whether to try to manage your dispute alone or with the help of someone else. If talking to the other person (sometimes called negotiating) is not working, then you could look for help from someone such as the following:

- A person trusted by everyone involved in the dispute
- A lawyer or another professional adviser
- An ADR practitioner, for example—a mediator
- An ombudsman
- A judge

CHOICES ABOUT HOW TO DEAL WITH YOUR DISPUTE

The following questions can help you decide how you want to manage your dispute:

- What relationship do you want to have with the other side in the future?
- How much time and money are you prepared to spend to sort out the dispute?
- How much control do you want over the dispute resolution process?
- How much control do you want over the result?
- How do you think the other side wants to manage the dispute?
- How do you feel about having an independent person helping you resolve the dispute?
- How do you envisage that an independent person might be able to help you and the other side resolve your differences?
- How formal or informal do you want the dispute resolution process to be?

BENEFITS TO ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution processes offer you the following benefits to varying extents:

- Privacy and confidentiality
- Flexibility
- Control
- Cost minimization

Privacy and confidentiality

ADR processes are generally private and largely confidential in contrast to court processes. Most court processes are open to the public, which means that anyone, including the media, can observe your trial and report it. In contrast, participants in ADR processes are bound to keep information about what happens in mediation confidential. This requirement gives disputants a lot more freedom to say what they want without fearing that it could be used against them later. In addition, the principle of confidentiality means that information revealed during ADR cannot be used as evidence

in a later court process. The privacy of ADR makes disputants more comfortable to discuss the dispute without fearing that someone could form opinions or negative judgments about them.

Flexibility

ADR processes offer different types of process structure. At the same time, the private nature of ADR permits you to tailor each ADR process to suit your needs. For example, depending on the specific ADR process, you may be able to have input into the following:

- Time
- Place
- Level of formality
- Choice of ADR professional
- Cost of the process
- Other procedural aspects

A court process usually has a rigid framework one must operate within, and you must seek permission from the judge if you want to change something. In contrast, mediation is bound neither by strict legal rules of evidence nor by set procedures of presenting your case.

Control

When you manage your dispute in court, the most active people will be the judge and the lawyers. You will passively participate, usually doing what your lawyer advises and accepting what the judge says. ADR can give you more control of managing your dispute. Depending on the ADR process, you may be able to make choices such as these:

- The type of process to use
- The ADR practitioner to help you
- The extent to which professional advisers are involved
- The issues to discuss (including nonlegal issues)

Most important, your choice of ADR process influences the type of solution that will be available for your dispute. In court, you either win and get what you want or you lose and have to accept the decision of the judge. In ADR, different processes will offer different types of outcomes. For example, in mediation you control the outcome of the dispute and are empowered to find a creative solution that fulfills your needs. Such agreements are usually more reliable and durable than decisions imposed by a judge, which can be appealed. Mediation also allows for the continuation of your relationship with the other side and for the preservation of your reputation and goodwill. For example, a company can keep a trustworthy relationship with its customers or investors. Moreover, you will improve your conflict resolution skills and possibly prevent disputes in the future.

Cost minimization

The cost of legal advice, legal representation, and court fees is usually high. The long duration of court cases also means that costs add up. ADR has the advantage of being cheaper than litigation in most cases. The more formal and legalistic the ADR process, the more expensive it becomes (although it is usually still less expensive than court). For example, arbitration is a relatively formalistic and legalistic ADR process. Arbitration is generally more expensive than mediation, the latter process being characterized by high levels of flexibility and informality. In mediation, your dispute may be resolved in just a few weeks (preparation for the mediation and the mediation session itself); litigation in court can take several years.

Studies conducted in different countries show that using ADR, including mediation, could save you between 50 percent and 97 percent of the total costs of going through court. Compliance with agreements resulting from mediation (called mediated settlement agreements) is high, usually between 50 percent and 85 percent. There is usually a high level of satisfaction with mediation, and this satisfaction leads to mediated settlement agreements that are sustainable.

TEN GUIDELINES

Here are 10 guidelines to help you choose an appropriate process and help you manage your dispute as effectively as possible:

1. Clarify all of the issues in the dispute and all of the factual details as much as possible.
2. Seek support if you feel that you need it or are unsure.
3. Look for the simplest way to resolve your dispute.
4. Look for ways to minimize the costs of your dispute while still managing it in an appropriate way.
5. Try to resolve your dispute as soon as possible, but do not make hasty decisions.
6. Get as much information as possible before choosing the ADR process that is appropriate for your dispute.
7. Try to resolve your dispute using negotiation. If that is not successful, then use ADR. If ADR does not work out for you, only then use a court or tribunal as a last resort.
8. Expect effective, affordable, and professional ADR services. Complain about ADR services that fail to meet minimum standards.
9. Describe ADR processes to other people accurately and consistently.
10. When you are trying to resolve your dispute, remember to be patient when someone else is speaking and to listen carefully. You will get a chance to speak.

DISPUTE RESOLUTION METHODS

NEGOTIATION

Negotiation is one of seven dispute resolution methods addressed in this chapter. The others are mediation, conciliation, neutral evaluation, use of an ombudsman, arbitration, and use of the courts.

What is negotiation?

We all negotiate. It can be a negotiation between a parent and child about bedtime, between a husband and wife about household finances, between an employer and employee about a pay raise, between potential business partners about a contract, between warring nations about a cease-fire. Negotiation involves people trying to ensure that they get what they want. You and another person can resolve your dispute through direct negotiation. Direct negotiation can include these actions:

- Listening and being heard by each other
- Working out what the disputed issues are
- Working out what everyone agrees on
- Working out what is important to each person
- Aiming to reach an agreement
- Working out options to resolve each issue
- Considering what to do if no agreement is reached[2]

When is negotiation suitable?

When you have a dispute, you can decide that you do not need or want the assistance of anyone else, and you can try to resolve it by negotiating directly with the other side. Various factors will influence your wanting to choose negotiation rather than litigation or ADR to resolve your dispute. These include having a situation in which the following conditions apply to both sides:

- Have the ability and intention to use constructive communication
- Do not need assistance to communicate or make decisions
- Want to maintain a continuing relationship
- Want to control the outcome of the dispute rather than accept an imposed outcome
- Want to keep discussions confidential
- Want to find creative ways to resolve the dispute that satisfy both sides

Even if not all of the above factors are present, you can still try direct negotiation with the other side. If it is not successful, then you can consider alternative methods of resolving your dispute. Negotiation

may not be suitable when your relationship with the other side is very negative and you feel that direct negotiation may cause more harm and make the dispute worse.

How can you negotiate well on your own?[3]

To make the most of your negotiation, you should prepare thoroughly and use constructive communication and strategies during the negotiation. Preparation can include these tasks:

- Thinking about what you want and why you want it
- Thinking about what the other side wants and why
- Thinking of options for outcomes that satisfy what everyone wants
- Thinking about what you will do if you cannot reach an agreement by negotiation
- Seeking advice or a more objective view from someone you trust

During negotiation, you can increase your chances of reaching an agreement by doing the following:

- Be "hard on the problem"—discuss all the issues involved in the dispute.
- Be "soft on the person"—treat the other side respectfully and do not blame or try to dominate the other side.
- Focus on the issues in dispute, not the personalities of the people involved.
- Emphasize any interests or options that you and the other side share.
- Be creative when thinking about options.
- Avoid unfair tactics.
- Manage your emotions.
- Make sure that any ambiguities are clarified and that everyone understands each other.
- Look for an outcome that will work for everybody.

MEDIATION

Mediation is similar to negotiation, but it has some important differences.

What is mediation?

In the previous section, we discussed how you could negotiate directly with another person to resolve your dispute. Mediation occurs when you involve an impartial, conflict resolution intervener—the mediator—to assist you and the other side with negotiations. Hence, mediation can be called facilitated negotiation. During direct negotiations you may reach a point when you and the other side are stuck in your positions and cannot find any middle ground or satisfactory solutions. It's also possible that the communication between you and the other side is so bad that you are not able to constructively negotiate any outcomes.

When direct negotiation is not working, you may be more successful with the help of a mediator. The mediator can help you and the other side to do the following:

- Listen to and be heard by each other.
- Work out what the disputed issues are.
- Work out what everyone agrees on.
- Work out what is important to each person.
- Attempt to reach an agreement that would work.
- Develop options to resolve each issue.
- Develop options that take into account each person's needs and desires.
- Assess the options to find an outcome that everyone can live with.[4]

As stated by the National Alternative Dispute Resolution Advisory Council (NADRAC), "a mediator can help you and the other participants have a respectful, evenhanded discussion and decision-making process. Your role is to listen to the other points of view, contribute to the discussion, and make decisions."[5]

Mediation is not about deciding who is right or wrong, who is innocent or at fault, and who should be declared the winner and the loser. Mediation is about looking to the future. The focus is not on who said or did what in the past. Instead, the goal is to find a practical solution and settlement that is acceptable to everyone involved, considering the different interests while seeking to preserve business or other relationships. The illustration in box 1.1 highlights how mediation can help achieve better outcomes for everyone.

When is mediation suitable?

Mediation should be suitable in most cases and unsuitable in some exceptional cases. Mediation is suitable in most cases because it brings many benefits and is unlikely to negatively affect your dispute even if the mediation does not result in an agreement. Even if you try mediation and do not reach an agreement, you are likely to gain something from the process.

Various factors may make your dispute suitable for mediation. The greater the number of these factors present in your dispute, the higher the success rate you have with mediation. For example, mediation may be a good choice if the following conditions apply to you and the other participants:

- Think a mediator can organize a respectful discussion about the issues
- Feel safe in the presence of each other
- Want a conflict resolution intervener to assist the discussion
- Want to determine the outcome yourselves
- Want to maintain an ongoing relationship
- Want to keep discussions confidential
- Want to find creative ways to resolve the dispute, such as an outcome in which everybody's needs are satisfied (a win–win outcome)[6]

It is usually worth trying mediation, even if many of the listed factors are absent. However, some factors might indicate that your dispute may be unsuitable for mediation. For example, if you

- Do not feel safe when communicating (such as talking or e-mailing) with the other participants, or
- Are forced against your will to participate by the other people involved in the dispute.[7]

Box 1.1: The importance of peeling away to the heart of the dispute

A parent walked into the kitchen and found two siblings fighting over an orange. Both children insisted that they needed the whole orange, but there was just one left. Not having the time to deal with their arguing, the parent just decided to split the orange in two and gave one half to each child, which seemed to be a fair resolution of the argument.

Later that day, the parent realized that both children were still unhappy and understood why. The younger child had wanted the entire orange's peel for a cake and the older child wanted the entire orange's pulp to make juice. With just half an orange, there could be no cake and there could be no juice. Everyone was disappointed.

This story illustrates that it is sometimes not productive to focus only on what people want in a dispute, without understanding their underlying needs. And it is important to be patient, to avoid making too many assumptions based on first impressions, and to dig deeper to find out what outcome will really satisfy everyone and resolve the dispute. Good mediators do all of these things!

Table 1.1 lists the main factors that indicate whether your dispute may be suitable for mediation. It is not exhaustive but gives you a list of factors you can discuss with your adviser to decide whether mediation is an appropriate option for managing the dispute. Using this table, you can make an informed decision about moving forward. Remember to consider all factors in the context of your dispute rather than relying on factors individually to determine the suitability of mediation. Where factors indicate that the dispute may not be suitable for mediation, conciliation or other ADR processes may be suitable.

Even though a dispute may not appear to be suitable for mediation at first, you should remember to review the situation frequently to assess whether or not mediation or another ADR process may become appropriate later. It is not easy to assume that a dispute is unsuitable for mediation. It is wise to assume that practically every dispute is likely to be suitable for mediation at some time in its life cycle.

Table 1.1: Determining suitability of mediation to deal with your dispute

Factors indicating mediation is suitable for your dispute[a]	Factors indicating mediation may NOT be suitable for your dispute
Everyone is willing to negotiate.	At least one side is not willing to negotiate (sometimes this position can change during mediation).
Everyone wants to resolve the dispute quickly.	Conflict has escalated too far.
Everyone wants control of the process and outcome.	Your client has already tried to mediate the dispute unsuccessfully.
Everyone wants a tailored solution rather than a court decision.	At least one side wants to obtain a legal precedent.
Everyone wants a commercial solution.	Impending expiration of limitation period for legal action.[b]
There is a need to focus on a future relationship.	Excessive power imbalance.
Everyone has some common interest(s).	A disputant has health problems preventing participation in mediation.
Everyone is fatigued by the dispute.	At least one side is only interested in delaying the dispute.
Everyone wants to manage (or even terminate) the existing relationship amicably.	At least one side wants to use mediation just to prepare for litigation.
There are multiple conflicts between the two sides.	At least one side participates in mediation only to comply with a court referral.
Everyone wants to resolve dispute confidentially.	At least one side will not participate in good faith.
Everyone wants to minimize costs.	At least one side perceives that going to mediation will be a sign of weakness.
Everyone wants an opportunity to vent and to have emotional closure.	At least one side wants to emotionally hurt the other side.
Everyone wants a durable solution with which everyone will comply.	Complete lack of trust or willingness to comply with any future agreement.

a. If a factor applies only to one disputant and not the other, it could still mean that your dispute is suitable for mediation. However, you should explore why it does not apply to everyone and if this would be a problem during mediation.
b. However, mediation may work after initiation of legal proceedings.

What does a mediator do and not do?[8]

It's important to understand the role of a mediator. Conflicts between a mediator and participant can arise because of unrealistic or inaccurate expectations. A mediator does not resolve the dispute for you or solve your problems. The mediator's role is to help you and the other side solve your problems yourselves. Ideally a mediator acts like a catalyst, bringing disputants together in new ways and opening up new pathways for constructive communication. A mediator *can* help in these ways:

- Designs a mediation process to suit your circumstances
- Helps you decide whether mediation is suitable for your dispute
- Brings the appropriate people together
- Explains the way the mediation process will work
- Provides a supportive environment
- Sets the guidelines or ground rules for how the mediation will work
- Assists you and the other participants in understanding each other's point of view
- Helps you and the other participants stay focused on resolving the dispute
- Helps you and the other participants escape negative communication cycles
- Helps you and the other participants communicate constructively
- Clarifies any uncertainties or misunderstandings during discussions
- Makes sure you and the other participants know and understand what issues have been agreed on
- Manages interactions so that they are fair
- Helps you and the other participants decide whether possible solutions are realistic
- Supports you and the other participants as you try to reach a final agreement that you all agree is appropriate
- Refers you to other services that can assist you[9]

There are some things that mediators do not do. They *do not* do the following:

- Take sides.
  - They are impartial and are there to assist each participant.
- Make decisions.
  - You and the other participants make decisions.
- Dictate what to agree to.
  - You decide what to do, including whether to stay at mediation.
- Decide who is right or wrong.
  - Mediation is not about making judgments; the focus of mediation is on finding an outcome that everyone can live with.
- Give legal, financial, or other expert advice.
  - Your lawyer can give you legal advice before, during, and after mediation if you choose.
  - Your financial adviser can give you financial advice before, during, and after mediation if you choose.
- Provide counseling.
  - Your psychologist, psychiatrist, or counselor can give you support before, during, and after mediation if you choose.

Sometimes the mediator can act as a "messenger." He or she listens to you and the other participants separately and communicates ideas between you. This is called "shuttle mediation" because the mediator shuttles between participants during the process. Unless there are safety concerns, it is always advisable to speak directly with the other side and not rely on messengers like the mediator or a professional adviser.[10]

How does the mediation process work?

When you participate in a mediation process, it is important to remember that the process is essentially an assisted negotiation. Mediation addresses both the factual issues and the legal issues, but "the law" is not the focus of the process. Instead, mediation emphasizes the underlying interests of you and the other people involved in the conflict, such as personal, business and commercial, family, social,

and community interests. Mediation is about creating a safe space and a creative environment in which you and the other side can explore each other's interests. This environment will help you generate options with a view to resolving your dispute. The goal of mediation is to find a mutually acceptable solution that adequately and legitimately satisfies the needs, desires, and interests of both you and the other side.

Because the mediator needs to understand all the different points of view, it is essential that you attend the mediation in person. Mediation requires active participation and decision making; therefore, a corporation should only send to mediation sessions an authorized representative with the instructions and authority to settle. Your lawyer or other professional adviser can attend the mediation with you, but it is not essential.

Although mediation is a collaborative process rather than an opportunity to defeat the other side, you will still have the opportunity to argue your position and express your feelings and concerns—this can be important and cathartic. It is therefore important to come to the mediation process prepared.

You must participate in the mediation process in good faith, be open with everyone, and cooperate actively in searching for a solution. The mediation session is private. Only the mediator, you, and your authorized representatives and advisers will be permitted to be present during the mediation. You may end the mediation process at any time, even unilaterally.

The mediator is not your opponent and is not your lawyer or adviser. The mediator is a guide that you can trust knowing that anything you say will be kept confidential unless or until you allow the mediator to disclose it. The mediator might also ask to have private discussions with you and the other person separately.

The mediation process is confidential because the goal is for everyone to speak freely. No formal record will be made. Information given or statements made during the mediation process cannot be admitted as evidence in any subsequent judicial process. Mediation does not affect your legal rights or the legal rights of the other side in relation to any subsequent proceedings, for example in arbitration or court.

If an agreement to resolve a dispute is reached during mediation, the best practice is to put it in writing. It can then become a binding and enforceable contract between you and the other side. People usually comply with their mediated settlement agreements because they have created a solution that works for them.

You can use mediation as soon as your dispute arises. You can use a mediation center, which handles the administrative issues of mediation (such as hiring mediators and offering mediation rooms), or you can directly hire a mediator who will take care of the administrative issues. In the Middle East and North Africa region, an increasing number of domestic and international institutions, either private or public, administer mediations and maintain a roster of certified mediators. As a general rule, starting mediation earlier is better to avoid escalation of tensions, which tends to occur when the dispute continues for too long. People become stuck in their positions and generally start to fear losing face.

Mediation may be voluntary, court ordered, or required as part of a contract or external dispute resolution arrangement. For example, in some countries, a practice has developed in which courts take the active step of suggesting to the people in dispute the possibility of starting mediation after a case has been initiated. In most legal systems, it is possible for people to ask for the court's permission to pause the proceeding, giving them time to settle their dispute.

Mediators regularly deal with disputes in the following sectors: agriculture, residential property, construction and engineering, energy,

oil and gas, banking, financial services and insurance, intellectual property, technology and telecommunications, maritime, personal injury, professional negligence, shareholder and family business disputes, supply and distribution contracts, transportation, venture capital, and others.

The mediation process generally comprises five stages as shown in table 1.2.

CONCILIATION

Conciliation is similar to mediation in that it involves facilitation of negotiations, but the conciliator has additional expertise and authority.

What is conciliation?

In conciliation, negotiations are assisted by a conciliator. The conciliator has technical or legal expertise and is empowered (usually by law) to offer technical and legal information and advice and even suggestions for an outcome. Advice can take different forms and can be offered on various topics:

- Legal or technical information related to the substance of the dispute
- Procedural matters in conciliation, litigation, or other dispute management processes
- The merits of the dispute
- Information on how other (unidentified) disputants in similar cases have dealt with similar issues
- Recommended out-of-court resolutions to the dispute
- The likely outcome of a dispute if the matter goes to court

Conciliators may prevent you and the other side from entering into an agreement that seems grossly unfair and goes beyond what is considered acceptable by the law. Conciliation can be similar to mediation, although the conciliator's role may be more directive and advisory.

Table 1.2: Mediation process in five stages. What should I expect during mediation?

Stages	What should I expect?
1. Preparation	The mediator will contact the lawyers or you and the other side directly to gather some information about the dispute and the people involved in it. The mediator will explain the process and his or her approach and style as well as give an outline of the day and respond to any concerns.
2. Opening statement	The mediator will begin with an opening statement to introduce the process and the roles of each person. The mediator will confirm your (and the other side's) commitment to attempting to mediate. The mediator will also confirm that everyone is willing to engage in the process in "good faith" and to follow a few guiding principles or rules.
3. Facts and interests	You and the other side will then be invited by the mediator to share your concerns. You will both be given an opportunity to hear and understand each other's perspective of the facts as well as interests, needs, values, priorities, and emotions.
4. Options and negotiation	You and the other side (possibly with their advisers) will be invited to develop options/solutions/ideas that could be acceptable to resolve the dispute so that both sides are satisfied. The mediator will encourage creativity to overcome difficult situations and may help you in finding solutions that work for both sides.
5. Agreement and closing	If you and the other side reach an agreement in the mediation, the terms of the agreement will usually be put in writing and be signed by everyone present.

When is conciliation suitable?

Conciliation is generally suitable for your dispute when you need assistance or guidance with the substance of the dispute. Conciliation may be useful in any of the following situations:

- There is a big power disparity between you and the other side.
- A disputant is not able to articulate what is important (that is, his or her interests) in resolving the dispute.
- Disputants need assistance or guidance with the substance of the dispute and do not have separate expert advisers.
- One side or the other does not want to negotiate or has unrealistic expectations.
- The dispute could benefit from a professional clarification or evaluation.

Table 1.3 lists factors that can help you determine whether your dispute is suitable for conciliation. Remember to consider all factors in the context of your dispute rather than relying on factors individually to determine the suitability of conciliation.

One last point: As you go through the factors in this table, you may notice that some factors are similar to the mediation table; however, other factors are different. This reflects the fact that mediation and conciliation share some characteristics, although they are distinct processes. It is essential therefore to consider carefully the factors indicating suitability (or not) of conciliation. Where factors indicate that the dispute may not be suitable for conciliation, mediation or other ADR processes may be suitable.

What does a conciliator do and not do?

Conciliators are more involved in the substance of the dispute than mediators are. The latter are more focused on helping you and the other side articulate your interests and negotiate your own solution. Conciliators are likely to be experts in the topic of the dispute and are familiar with relevant legislation or have relevant technical expertise. This expertise enables the conciliator to clarify any legal or technical issues related to the dispute. Conciliators will also focus on nonlegal issues that are important to you and will help you articulate your interests. They differ from mediators in that they are able to provide you with legal information and recommendations for a solution. A conciliator usually helps in the following ways:

- Conducts a process that has many similarities with mediation
- Listens to your interests (and those of the other side)
- Encourages you and the other side to talk to each other
- Exercises his or her specialist role under the authority of a specific law
- Conciliates only in one specialist area (for example, workplace and labor disputes or discrimination claims)
- Has specialist knowledge and can give you professional or legal information related to the specialist area of conciliation
- Actively encourages you and the other participants to reach an agreement
- Sets guidelines or ground rules for how the conciliation process will work
- Sets parameters, if needed, for the type of agreement you and the other side are permitted to conclude (For example, in a discrimination dispute, the conciliator may not be able to permit an agreement if respondents do not acknowledge the impact of their discriminatory behavior in some way. Such a requirement may be part of the educational aim of the relevant law and the conciliation program.)
- Manages interactions so that they are fair

NEUTRAL EVALUATION[11]

Neutral evaluation is not a negotiation process. Rather, it involves an independent third-party expert who provides an opinion on the best way to resolve the dispute.

Table 1.3: Determining suitability of conciliation to deal with your dispute

Factors indicating conciliation is suitable for a dispute[a]	Factors indicating conciliation is NOT suitable for a dispute
Disputants are willing to negotiate, but one or more disputants are not able to articulate what is important for them (that is, their interests) in resolving the dispute.	Disputants are willing and able to negotiate within a mediation setting or elsewhere (with or without professional advisers). In this case, go to mediation.
The dispute can benefit from an independent, professional clarification and from preliminary advice in relation to the disputed issues.	Disputants have not tried mediation and are willing and able to do so (with or without professional advisers). In this case, go to mediation.
A disputant has health problems preventing direct and full participation in mediation; however, the disputant could participate in a similar process with greater checks and support.	Disputants have professional advisers who are prepared to support their clients and assist in mediation. In this case, go to mediation.
Disputants need assistance or guidance with the substance of the dispute and do not have separate expert advisers.	An urgent interim decision is required to preserve the status quo, such as an injunction to prevent demolition of property.
Disputants have already tried to negotiate and/or mediate the dispute unsuccessfully.	A repeat player disputant wants to obtain a ruling or precedent to use as a guideline for similar disputes.
Everyone wants a tailored solution to suit the specific circumstances of the conflict rather than an arbitral decision, which would not address the real issues in the dispute.	Impending expiration of limitation period for legal action.[b]
Disputants seek an interest-based solution on an informed legal basis but do not want the delay and expense associated with arbitration.	A disputant wants to use conciliation just to prepare for arbitration or court and is not interested in settlement.
At least one disputant has unrealistic expectations.	A disputant wants to emotionally hurt the other side.
There is a need to focus on relational issues as well as other substantive issues.	Neither side is willing to negotiate at all (although sometimes this position can change during conciliation).
There is excessive power disparity between the disputants.	A disputant will not participate in good faith.
The cost of other dispute resolution processes such as arbitration and litigation outweighs the value of the dispute.	Complete lack of trust or willingness to comply with any future agreement.
Everyone is fatigued by the dispute and wants it to end.	A disputant is only interested in protracting the dispute.

a. If a factor applies only to one disputant and not the other, it could still mean that your dispute is suitable for mediation. However, you should explore why it does not apply to everyone and if this would be a problem during mediation.
b. However, conciliation may work after initiation of legal proceedings.

What is neutral evaluation?

NADRAC explains that neutral evaluation "is a process that may happen before a court or tribunal process is started. Sometimes your professional adviser, such as a lawyer or accountant, will suggest that you may benefit from using neutral evaluation. Courts and tribunals sometimes refer people to neutral evaluation.[12]

Neutral evaluation involves the following:

- The participants present their points of view and facts to an independent person (an evaluator).
- The evaluator will form an opinion about the key issues in the dispute and the most effective way to resolve the dispute.
- The evaluator is often legally trained and may have expertise in a particular area.

Neutral evaluation processes can be confidential and work best if participants try to limit the number of documents they bring.

When is neutral evaluation suitable?

Neutral evaluation may be suitable when the following are true:

- You and the other side seek a technical or legal recommendation.
- Factual questions are at the core of your dispute.
- You feel the need for a risk-analysis assessment given by a credible and impartial, mutually chosen expert who knows about the subject of your dispute (for example, a person who understands the way your business or industry operates and who knows the relevant laws).

Even if you think that legal action is the best option to resolve your dispute, neutral evaluation can still be valuable. It can assist you and the other participants in reducing the number of issues that a court or tribunal has to consider.

A neutral evaluation process does not require that the parties meet with the evaluator. Participants may instead give the evaluator documents that explain the dispute from their point of view. The evaluator then gives all the participants written advice based on the documentation.

What does an evaluator do?

The evaluator's role is similar to that of a conciliator, but the process is more formal and legalistic. The evaluator will conduct a relatively informal process consisting of "summary submissions" by you and the other side, or your lawyers, and will offer nonbinding recommendations that you and the other side are free to follow or not. An evaluator may do any or all of the following:

- Listens to all sides of the dispute and identifies any missing information
- Gives you and the other people involved in your dispute an idea of what he or she thinks a court or tribunal might decide
- Gives you an idea of what an expert in the relevant field would recommend as a solution to the dispute
- Gives you an opportunity to discuss a settlement agreement between you and the other participants
- Makes suggestions about what further ADR process you and the other participants could use

An evaluator does not make a ruling on the dispute. Participants choose for themselves whether to accept any assessment or advice that an evaluator provides and how to use that information.

OMBUDSMAN

An ombudsman is used in cases that involve an agency, usually a public entity or public officials. In addition ombudsmen can also be found across certain industries such as finance and energy.

What is an ombudsman?[13]

An ombudsman is usually someone appointed by the government to investigate and attempt to resolve complaints by the public about government officials. The complaints can relate to infringement of rights or administrative issues and can lead to the ombudsman making recommendations for

systemic change. Although state ombudsmen deal with a range of complaints, there are also specific ombudsmen in some industries (for example, energy and water ombudsmen or financial services ombudsmen). The term *ombudsman* commonly describes both the person who holds the position of ombudsman and the office the person operates. The term comes from the Swedish *ombud*, which means agent, delegate, or commissioner.

An ombudsman office is an independent organization that does the following:

- Deals with disputes or complaints, including consumer complaints
- Often works with government or industry to improve service delivery and administration

Almost all ombudsmen will encourage you to try to resolve your dispute or complaint with the agency or company before asking them for assistance. Generally, when you ask an ombudsman office for assistance you can expect the following:

- The office staff members provide assistance free of charge.
- The office does not require you to be represented, for example, by a lawyer.
- The ombudsman will try to help you resolve your dispute or complaint quickly and informally using a variety of interventions and processes.

Different types of ombudsmen include the following:

- Parliamentary ombudsmen can assist with disputes or complaints about government agencies.
- Industry-based ombudsmen can assist you with disputes or complaints about service providers, such as banks, insurance companies, and utility companies.
- Statutory ombudsmen and commissioners can assist you with disputes or complaints about professionals or how the law applies.

What does an ombudsman do?

Ombudsmen can consider your dispute or complaint and decide what action should be taken. Ombudsman offices may provide a variety of services to assist in resolving disputes or complaints:

- ADR processes, such as assisted negotiation, mediation, and conciliation
- Investigations, either conducted by the office on its own or as part of a larger investigation
- Opinions (for example, whether or not the office agrees with a decision)
- Recommendations (for example, suggesting that a decision be changed)

Some industry-based ombudsmen also make decisions that bind service providers, such as utility companies.

Ombudsmen will try to reach an outcome that is fair to everyone involved in the dispute. An ombudsman takes into account the following:

- The content of the law
- Any codes of practice that apply
- Good administrative or industry practice that applies
- A fair and reasonable resolution considering the circumstances of the dispute or complaint

ARBITRATION

The most important aspect of arbitration from a user's perspective is that the decision is binding.

What is arbitration?

Arbitration is a process in which the following occurs:

- You and the other participants, often through lawyers or other experts, present your arguments and evidence to an independent person (the arbitrator).
- The arbitrator makes a decision on the basis of this information.
- You and the other side agree in advance to be bound by the decision.

Arbitration is a determinative ADR process. This means that the arbitrator will make a decision that is binding on you and the other side. It is generally a more formal and structured process than mediation or conciliation. It can appear similar to a court or tribunal hearing because it follows structured rules, it requires legal arguments in addition to commercial arguments and the presentation of evidence, and lawyers may be present. However, unlike in the public court and tribunal system, you and the other side may select your arbitrator(s), the venue, the law to be applied, and various other matters. Also arbitration is private.

In many jurisdictions around the world, specialized arbitration tribunals arbitrate disputes in specific industries. For example, if you have a commercial or workplace dispute, you may find that an arbitration tribunal can help you resolve that kind of dispute.

Here are some other features of arbitration:

- You and the other participants or your legal representatives will present technical and legal arguments and produce evidence (facts).
- There may be one arbitrator or a panel of arbitrators (usually three) to hear your dispute.
- Arbitration will focus on technical aspects of the dispute and therefore may require arbitrators to be specialists in the subject matter of the dispute.

Usually people involved in a dispute over a contract will use arbitration because they agreed in the contract to use it if such a dispute arose. Alternatively, you and the other side may choose to go to arbitration after a dispute has arisen.

When is arbitration suitable?

Arbitration may be suitable for you if the following is true:

- You and the other participants want a process in which a final and binding decision is made by the conflict resolution intervener (arbitrator).
- The dispute is primarily based on clarification and interpretation of facts.
- You want an expert to make a decision that binds you and the other side.

Arbitration is different from a court process in these ways:

- It may be less formal.
- It may be quicker and less expensive, depending on the extent to which legal professionals are engaged.
- It may be more convenient.
- The hearing and outcomes are private.

Table 1.4 lists factors that can help disputants and their advisers determine whether their particular dispute is suitable for arbitration. Where factors indicate that the dispute may not be suitable for arbitration, other ADR processes (such as mediation, conciliation, or neutral evaluation) may be suitable.

What does an arbitrator do?

Arbitrators may have a legal background or other qualifications in the subject of your dispute.

Arbitrators do the following:

- Confirm the procedure and time frames with everyone involved.
- Listen to the arguments, cross-examine witnesses, and consider the evidence.
- Decide the outcome of the dispute (called "issuing an award").

Once a decision has been made and an award issued, it is final. There are limited circumstances in which a court may hold the award to be invalid or refuse to enforce it.

COURT

Going to court is often seen as a last resort in dispute resolution. Court is a public form, presided over by a judge whose decision is binding.

Table 1.4: Determining suitability of arbitration to deal with your dispute

Factors indicating arbitration is suitable for a dispute[a]	Factors indicating arbitration is NOT suitable for a dispute
Facilitative and advisory ADR processes (such as mediation, conciliation, or neutral evaluation) are unsuitable or exhausted.	The dispute is suitable for facilitative or advisory processes.
A repeat player disputant wants to obtain a ruling or precedent to use as a guideline for similar disputes.	Disputants want to have a say in the conduct of the process and the content of the outcome.
There is a complete lack of trust or willingness to comply with any future agreement.	Disputants want a tailored solution to suit their particular circumstances rather than an arbitral decision, which would not resolve the nonlegal issues in dispute.
There is excessive power disparity.	Disputants require an urgent decision to preserve the status quo, such as to prevent demolition of property.
Ability to easily enforce the outcome is desirable.	There is a need to focus on a future relationship.
A party is only interested in protracting the dispute through nondeterminative processes.	Disputants share some common interests and concerns.
Severe health problems prevent participation in mediation or conciliation.	Disputants want to resolve the dispute quickly.
A party seeks cross-border recognition and implementation of the outcome, such as through the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.	Disputants want a solution with which everyone is likely to voluntarily comply.
Disputants desire the finality of a binding decision.	Disputants want to minimize costs.
Disputants desire privacy but confidentiality is not strictly necessary. (Note: Arbitration may not be confidential in some jurisdictions.)	Disputants want to resolve the dispute on a strictly confidential basis.
The dispute is primarily based on clarification and interpretation of facts.	Disputants are willing to negotiate.

a. If a factor applies only to one disputant and not the other, it could still mean that the dispute is suitable for arbitration. However, you should explore why it does not apply to everyone and if this would be a problem during arbitration.

Note: ADR = alternative dispute resolution.

What is the court process (litigation)?

Generally in court processes, the following occurs:

- You and the other participants present your points of view and facts to an independent judge, usually through a lawyer.
- The judge guides the process according to court rules and procedures, as well as relevant laws (for example, evidence law requirements).
- The judge makes a decision on the basis of submissions made.

You will be required by law to comply with the decision, except if you successfully appeal it. In some jurisdictions, you may be required to take part in an ADR process such as mediation before you go to a court or as part of the court process.

In jurisdictions where mediation is well established, most people who have a dispute resolve it without going to court. Most of those parties who do start a court process settle their dispute by agreement before any final court hearing, sometimes on the steps of the courthouse!

You can use all sorts of ADR processes to try to reach an agreement before a hearing takes place, including the following:

- Negotiation
- Mediation
- Conciliation
- Neutral evaluation
- A combination of ADR processes

When is it suitable to go to court?

Sometimes using a court or tribunal to make a decision on your dispute is necessary. The reasons could include the following:

- Urgent action is required.
- Serious safety risks are involved.
- No agreement can be reached through ADR.
- Your dispute can only be resolved by determining legal issues.
- You want to establish a precedent for use in other related cases.

In a court hearing, a judge or magistrate will make a decision on your dispute according to the law. Using a court to determine your dispute involves a more formal process. The nature of your dispute will determine which court hears your issue.[14]

How do you appeal a court decision?

If you believe that a judge made the wrong decision on a legal issue, you can lodge an appeal of the decision with a higher court. Once your appeal has been decided at the highest court, you have no further appeal options. Appeals are usually costly and time-consuming processes.

SELECTING AN APPROPRIATE ALTERNATIVE DISPUTE RESOLUTION PROCESS

Table 1.5 summarizes the roles of the ADR professional in the various dispute resolution processes introduced previously in this chapter and the relevant factors to take into account when you consider using them.

DESIGNING CONFLICT MANAGEMENT SYSTEMS

INTRODUCTION

So far we have discussed ways to address a dispute once it has already developed. However, there may be times in your life when you will encounter a system that is already in place to manage future conflict and disputes that may occur with a business contract or even in your workplace. Many of these systems are multitiered, consisting of several progressive steps to address a dispute. These systems are referred to as conflict management systems or dispute resolution systems.[15]

Conflict management systems generally involve a combination of different types of ADR. They consist of several steps that progress from simple, less formal, and less expensive ways of addressing disputes to more complex, more formal, and more expensive procedures.

For example, a conflict management system may first require you and the other side to negotiate directly with each other, thereby assuming responsibility for managing your own dispute. Thus the first step may start with a simple requirement for one side to notify the other of a problem and to ask for a response. The next step could be a meeting between you and the other side to discuss the problem and to try negotiation. If you are not able to reach agreement, then there will be a

Table 1.5: Which alternative dispute resolution process is appropriate for your dispute?

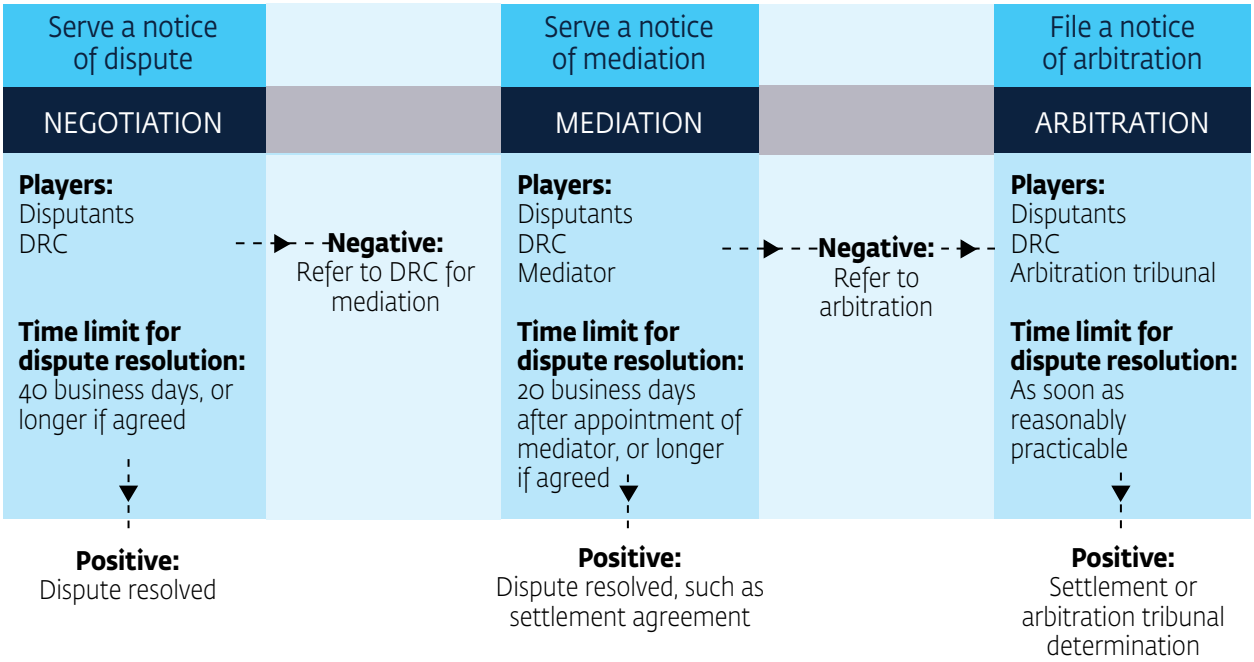
ADR process	Role of the ADR professional	When is this ADR process appropriate for you?
Mediation	■ To facilitate discussions and negotiations between you and the other side without advising on the dispute or making a decision	■ Your relationship with the other side is a priority. ■ You need support from an impartial, problem-solving person to help you talk to and negotiate with the other side.
Conciliation	■ To facilitate discussions and negotiations between you and the other side ■ To offer technical or legal information and advice and even suggestions or parameters for an outcome	■ There is a big power imbalance between you and the other side. ■ Professional advisers are not involved. ■ Either you or another disputant does not want to negotiate or has unrealistic expectations. ■ The dispute can benefit from a professional clarification or evaluation.
Neutral evaluation	■ To hear "summary submissions" by you and the other side, or your lawyers ■ To offer nonbinding recommendations that you and the other side are free to follow or not	■ You and the other disputants seek a technical or legal recommendation. ■ Factual questions are at the core of your dispute. ■ You and the other disputants desire a risk analysis assessment by an impartial expert.
Ombudsman	■ To offer services appropriate to the particular office, usually a combination of various approaches to dispute resolution represented in this table	■ You need flexibility in terms of choices of dispute resolution processes to adapt to the changing context. ■ You have limited financial resources.
Arbitration	■ To make a decision that is final and binding upon you and the other side	■ There are legal or technical questions you want addressed. ■ You want an expert to make a binding decision for you. ■ You may want to enforce the decision in a foreign jurisdiction.

Note: ADR = alternative dispute resolution.

gradual increase of intervention by an independent conflict resolution professional. Mediation is often a next step, with a mediator offering you and your counterpart in conflict a structured process to help you sort out your differences. In case the parties don't reach agreement, an advisory process may follow. This process may involve an evaluation of the issues with a recommendation for you and the other side to consider. Finally, if you are still not able to resolve the dispute, there may be provision for a determinative ADR process such as arbitration, in which an independent conflict resolution professional (an arbitrator) will hear the dispute and make a decision that is binding on you and the other side.

Figure 1.1 shows an example of a conflict management system from the National Electricity Market of Singapore. You will see that the system first requires direct negotiation by those in dispute; in case of no agreement, this step is followed by mediation and then possibly arbitration.

Figure 1.1: Conflict management system for the National Electricity Market of Singapore



Source: National Electricity Market of Singapore. 2006. "Guide to Resolving a Dispute." Energy Market Company, Singapore. https://www.emcsg.com/f168,40852/emc_disputeresolutionbooklet_for_web.pdf.

Note: DRC = Dispute Resolution Counselor.

CONFLICT MANAGEMENT IN THE WORKPLACE

Many organizations have conflict management systems in place to deal with workplace conflict. The systems aim to encourage employees and employers to use dispute resolution as early as possible and as easily as possible by, for example, upgrading the skills of human resource professionals in conflict coaching and other conflict management skills and making conflict management consultations available on a confidential basis for those who have a complaint or find themselves in a dispute.

In a workplace, it is best for productivity and cost-effectiveness to prevent disputes from occurring or to address them as soon as they arise. For example, effective team-building policies can create a positive environment where employees feel comfortable to address constructively any issues that are bothering them. If a dispute does arise, the first step might be to involve the human resources department. If this is not enough, perhaps a conflict management coach can meet with the aggrieved employees to help build their capacity and confidence to resolve problems. If the dispute still persists then mediation may be appropriate.

If a workplace dispute is not resolved through mediation, then a formal complaint may be necessary; this complaint could result in an investigation through the organization's formal dispute resolution processes. The result of the investigation might be a determination by the executive level and decisions imposed on those involved or even on other staff.

A conflict management system should flow smoothly through escalating steps and should give you and others involved maximum opportunities to

resolve the dispute at each step and to go back to earlier processes if and when desired.

CONFLICT MANAGEMENT IN PROJECTS

Dispute management systems are also relevant in relation to the design of dispute resolution procedures for major projects such as joint venture projects, construction, and oil and gas projects. You may be the manager of an internal project within your organization or working on a project with another organization or a collaboration of several organizations.

Planning a conflict management system for a project is similar to planning a dispute resolution clause in a contract. See the section, "Mediation clauses," in chapter 5, which addresses drafting a mediation clause in a contract. The same factors can be applied to planning for dispute management in a project. You should consider the scope of disputes you may face, the use of multitiered dispute management, time frames, identification of independent people to assist with dispute management, potential costs, descriptions of the processes, location, language, and relevant laws.

There is a wide range of possible projects; therefore, no single best conflict management system suits them all. You will need to consider as many factors as possible and apply them appropriately to the context of your project. This process will ensure that the system you design will work effectively in case a dispute arises.

CONFLICT MANAGEMENT DESIGN PRINCIPLES

Conflict management systems should be designed to be simple to use, accessible, efficient, cost-effective, and durable, and designed to provide satisfying outcomes. When designing a multitiered conflict management system, consider the following principles:

- Move from informal to more formal processes.
- Move from low cost to higher cost processes.
- Move from low intervention to higher intervention processes.
- Move from interest-based processes in which the disputants are directly involved toward advisory or adjudicative processes, and not the other way around.
- Move from confidential and private to more public processes.
- Move from nonrecorded and nondocumented processes toward recorded and documented processes.
- Build loops into the system so that disputants can choose to revisit an earlier procedure, for example, so they can move back to mediation even though they are at the arbitration stage.
- Ensure the system or sequence is flexible to accommodate unexpected changes and to build in feedback.

MEDIATION ESSENTIALS—DESKBOOK OVERVIEW

HOW TO MANAGE AND CONTROL DISPUTES: ALTERNATIVE DISPUTE RESOLUTION

This chapter has introduced you to disputes and different ways to manage them, including direct negotiation, mediation, conciliation, ombudsman services, neutral evaluation, arbitration, and going to court. It has also introduced the concept of conflict management systems, including multitiered processes for use in your workplace, projects, and other situations in which you may encounter disputes. The following chapters will explore one ADR process in detail, namely mediation.

HOW TO MAKE THE MOST OF MEDIATION

Chapter 2 prepares you to get the most out of mediation. It explains what you can do before you go to mediation, what you can do during mediation,

and what you can do after you leave mediation. The more you prepare, the more benefit you can get from mediation, as well as making it a more pleasant and constructive experience.

HOW PROFESSIONAL ADVISERS CAN ADD VALUE TO MEDIATION

Chapter 3 is written for professional advisers who want to assist a client going through mediation. It outlines the main principles of mediation from an adviser's perspective. It explains what it takes to be a mediation adviser and the general knowledge an adviser should have. The chapter then discusses how an adviser can assist a client before, during, and after mediation. It contains useful checklists for lawyers and other professional advisers in mediation.

HOW TO USE GUIDING PRINCIPLES AND ETHICS TO ENSURE THE INTEGRITY OF MEDIATION

Chapter 4 explores the fundamental guiding principles at the core of mediation ethics and illustrates them with practical situations. Its goal is to show you that mediation, when conducted properly, is as robust and procedurally fair a process as the court process. The chapter outlines guiding principles such as participant autonomy, good faith and transparency, confidentiality, and fairness and diligence. It also discusses ethics of a mediator that include the mediator's integrity, competence, and impartiality and the mediator's contribution to the advancement of mediation practice.

HOW TO DRAFT CONTRACTUAL DOCUMENTS FOR MEDIATION

Chapter 5 provides guidance on three types of contractual documents used in mediation: mediation clauses, agreements to mediate, and mediated settlement agreements. First, the chapter explains what to do and what not to do when drafting a mediation clause in a contract. Mediation clauses are included in commercial and other contracts in the event that future disputes arise. They provide a framework for managing future disputes. Next, the chapter sets out what to do and what not to do when drafting agreements to mediate. Agreements to mediate are contracts signed by people who are about to participate in mediation. Finally, the chapter outlines what to do and what not to do when drafting a mediated settlement agreement. Mediated settlement agreements are drafted when people have resolved their dispute through mediation and want to finalize and commit to the agreement terms in writing.

NOTES

1. Parts of this chapter are adapted from National Alternative Dispute Resolution Advisory Council (NADRAC), "Your Guide to Dispute Resolution," Australian Attorney-General's Department, Sydney, 2012, http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/default.aspx.
2. Ibid.
3. This subsection is adapted from Ibid.
4. Ibid.
5. Ibid., 16.
6. NADRAC, "Your Guide to Dispute Resolution."
7. Ibid.
8. This subsection is based on Ibid.
9. Ibid.
10. Ibid.
11. This section is based on Ibid.
12. Ibid., 19.
13. This section is based on NADRAC, "Your Guide to Dispute Resolution."
14. Adapted from Ibid.
15. For more information on Integrated Conflict Management Design, see Nadja Alexander and Fatma Ibrahim, *Mediation Series: Integrated Conflict Management Design Workbook* (Washington, DC: World Bank Group, 2016) (in Arabic only).
16. See Ibid.

CHAPTER TWO

How to Make the Most of Mediation

CHAPTER TWO

How to Make the Most of Mediation

INTRODUCTION

This chapter will explain how you can make the most of mediation. Making the most of mediation requires an open mind, good listening skills, and a problem-solving attitude throughout the process. This chapter walks you through what you need to do before you go to mediation, at mediation, and after mediation.

Preparation is key to a successful mediation. Knowing yourself and being able to identify your own priorities and to see the dispute from the other's perspective are an effective starting point. Listening to the other and engaging in a problem-solving conversation are vital to help you move toward a mutually satisfactory solution. After mediation, follow-up procedures may be needed to secure implementation of the agreement and to prevent potential future disputes.

Preparation is key to a successful mediation. Knowing yourself and being able to identify your own priorities and to see the dispute from the other's perspective are an effective starting point.

BEFORE YOU GO TO MEDIATION

THINK ABOUT YOUR OWN POSITION AND NEEDS

When we are in conflict, we typically have a position. We either want something to happen or don't want something to happen. Mediation teaches us to explore positions and to discover underlying needs. Our needs are the reasons we want something. Identifying needs can help us discover a variety of options for achieving what is really important to us. Naturally, a good way to determine our needs is to ask, why do I want this? Table 2.1 contains some examples of positions you might have in a conflict and possible needs underlying them.

Table 2.1: Your positions and needs in conflict

Description of conflict	Your position	Your possible underlying needs (parts relating to needs are in italics)
You and your sister are having an argument over an orange.	You want the whole orange.	You need the *pulp of the orange* to make juice.
Your employer announces a new policy without consulting you, causing a workplace conflict.	You refuse to follow the new policy.	You wanted *to be included* in developing the new policy and feel a lack of *respect* from the employer.
Your father dies and, in his will, leaves the family house to you instead of your older sister. Your older sister cared for your father in the last years of his life. She disputes the will in court.	You want the house for yourself.	You were always jealous of your more successful older sister and *feel empowered* by receiving the house.
Your neighbor had a wall built adjacent to your property.	You refuse to pay half of the costs of building the wall and want it demolished.	You are upset because your neighbor *did not discuss* with you the building of the wall.
You quit the company where you were employed and open your own business. The company sues you for infringing its intellectual property rights.	You want to operate your own business.	Your ideas were not *recognized* at the company, and you felt that you did not have any *autonomy* in your job, and that is why you quit.

We have a range of needs, from basic ones, like health and financial security, to more complicated ones, like self-esteem, respect, and a sense of identity. Some needs are less obvious than others but can be extremely important. For example, people often value a sense of justice or fairness over money; people may also value relationships over material needs. Understanding your needs can help you have more clarity in discussions during mediation and work on solutions more effectively.

THINK ABOUT THE POSITION AND NEEDS OF THE OTHER SIDE

Just as you have needs underlying your position, so do the people with whom you have a conflict. Naturally, we know more about our own situation and tend to make assumptions about the other side. As a result, we may have a fairly simplistic view of what the other side wants and why. That view may make a positive outcome seem unlikely, if not impossible. Furthermore, we sometimes discover that our assumptions are wrong.

To get the most from mediation, you can benefit from exploring the other side's underlying needs. Why do they want what they say they want? Try to be as open-minded as possible in this exercise. Do not make quick judgments, especially emotional ones. You can make a list of questions for the other side and will have an opportunity to ask these questions during the mediation. This exercise can humanize your opponent and make it easier to listen properly during mediation.

Table 2.2 continues from table 2.1, adding the positions and possible underlying needs of the other side.

Table 2.2: The other side's positions and needs in conflict

Description of conflict	Your position	Your possible underlying needs (parts relating to needs are underlined)	The other side's position	The other side's possible underlying needs (parts relating to needs are in italics)
You and your sister are having an argument over an orange.	You want the whole orange.	You need the *pulp of the orange* to make juice.	Your sister wants the whole orange.	Your sister needs *the rind of the orange* to make a cake.
Your employer announces a new policy without consulting you, causing a workplace conflict.	You refuse to follow the new policy.	You wanted *to be included* in developing the new policy and feel a lack of *respect* from the employer.	Your employer wants you to follow the new policy.	Your employer is really *worried about the organization's financial situation* and introduced the new policy *to improve efficiency* as quickly as possible.
Your father dies and, in his will, leaves the family house to you instead of your older sister. Your older sister cared for your father in the last years of his life. She disputes the will in court.	You want the house for yourself.	You were always jealous of your more successful older sister and *feel empowered* by receiving the house.	Your older sister wants the house for herself.	Your older sister feels that you *did not take any responsibility* for caring for your father. She is pregnant and will need a *bigger house* for her new family.
Your neighbor had a wall built adjacent to your property.	You refuse to pay half of the costs of building the wall and want it demolished.	You are upset because your neighbor *did not discuss* with you the building of the wall.	Your neighbour wants you to pay for half the cost of building the wall.	Your neighbour is *scared* of you and your dogs, which *keep coming onto your neighbor's property*. This is why he decided to build the fence and did not talk to you.
You quit the company where you were employed and open your own business. The company sues you for infringing its intellectual property rights.	You want to operate your own business.	Your ideas were not *recognized* at the company, and you felt that you did not have any *autonomy* in your job, and that is why you quit.	The company wants you to close your business and to pay compensation.	The company is concerned that you will take away its *clients* and doesn't want a competitor using the intellectual property you developed *while you were working at the company.*

REFLECT ON THE CONFLICT OBJECTIVELY

If you are too involved in the conflict, you can ask a more objective person to help you analyze the other side's position and underlying needs. If you cannot find an adviser, try to analyze the conflict from the point of view of a more objective person. A more objective person might be someone who knows both you and the other side but is not aligned with either of you. How would that person analyze the conflict? Alternatively, you could think of the situation from the point of view of a judge. How do you think a judge would decide the dispute?

You can also think about what kind of information is important in your conflict. In some conflicts you may want to obtain some objective information or an expert opinion. Examples could include the value or cost of something or facts about an issue that is in dispute. Thinking about the conflict objectively and trying to obtain objective information can make your participation in mediation much more effective.

IDENTIFY ALTERNATIVES TO AN AGREEMENT

Before mediation, good practice dictates that you identify the best and worst alternatives to a mediated settlement agreement, for both you and the other side. In other words, if you and the other side do not resolve your conflict in the mediation, what happens when you walk away? What alternatives are available to you? Knowing your alternatives to a mediated settlement agreement can help you have a more realistic and practical discussion and can motivate you to get the most out of the mediation.

Both sides will probably have several alternatives to reaching an agreement. Some of these are obvious (for example, going to court). Once a conflict has escalated, fewer viable alternatives may appear to be available. How we perceive available alternatives will influence how everyone behaves during mediation. You have to analyze your alternatives carefully. If you have a very good alternative (for example, a good chance of winning in court), then you may not be very interested in reaching an agreement with the other side during mediation. A careful analysis will show how much going to court will cost in time and money and might drive you to reconsider the attractiveness of the alternative.

Mediation is a process that offers people innovative ways to handle difficult situations. As a party to mediation, you should try to let go of the idea that you have to reach a solution. This mindset, paradoxically, is likely to limit your ability to reach an agreement. Focusing too much on a potential agreement can limit your discussions and lead you quickly to a deadlock. This is why it is so important to think about what you might do—and about what the other side could do—if the mediation does not end in an agreement.

CONSIDER USING SUPPORT PERSON(S) AND PROFESSIONAL ADVISERS

If you are not confident or comfortable managing your conflict alone, you can look for support. Support can come informally from friends and relatives or formally from professional advisers. Sometimes support people may even attend the mediation with you.

Informally, you can talk to a friend, relative, or colleague about your conflict. These individuals may be able to give you advice, provide emotional support or motivation, give you a different view of the issues in your conflict, and help you understand any uncertainties. Ask them to be honest with you. They should feel free to challenge any of your views or positions. Make sure that you are prepared to accept constructive criticism and that you do not enter into a conflict with your supporting person.

You may choose to seek more formal support from an expert. This person might be a lawyer or a specialist in an area relevant to your conflict, such as an engineer or a financial expert. For more information on how to work with professional

advisers, see chapter 3, "How Professional Advisers Can Add Value to Mediation."

If you prefer, you may arrange for a support person or professional adviser to assist you during mediation to advise you, help you negotiate, or speak on your behalf. Make sure that you talk with the mediator about anyone you wish to bring to mediation and who might attend from the other side.

CONTACT THE MEDIATOR

If you have not already met with the mediator before mediation, you can ask for a meeting. This meeting will help you clarify issues, answer questions, and manage any concerns. Ask the mediator to describe the mediation process. Make sure you understand how the mediator will conduct the mediation and who will pay the various associated costs.

During the meeting you will find out what the mediator expects from you in terms of preparation, your role in the mediation, and so on. You can also check whether you can bring a support person or a professional adviser. And you should clarify the mediator's role: Will the mediator manage the communication between you and the other side and coach you both through a negotiation? Identify the topics you will discuss? Offer you information about court processes? Give a personal opinion about possible outcomes? Offer expert (for example, legal) opinions about the merits of your case and possible solutions? These points are important to clarify up front because—despite the clear mediation principles set out in chapter 1—people often have different expectations of the mediator, and mediators will have different approaches.

You can also confirm the logistics with the mediator. What time does the mediation start, how long will it go, can you take breaks, where will the mediation be, how do you get there, where can you park, and so on. If you have special needs, make sure you clarify these with the mediator and ensure that they are satisfied on the day of the mediation. This last point may affect the mediator's choice of venue, the arrangement of equipment, and so on.

The level of decision-making authority required on the day of the mediation must be clear beforehand. Will you and the other side have authority to sign an agreement? In some cases you may need to prepare written decision-making authority and bring it to the mediation. The mediator will advise you if this document is needed.

If you have any concerns about your own or anybody else's safety, discuss this with the mediator as soon as possible. The mediator has several options for dealing with safety issues, such as placing people in different rooms, running the mediation by telephone or Internet, or deciding that mediation is not appropriate. For example, a victim of domestic violence may not want to be present in a room with the offender during a divorce mediation. In general, safety could be an issue if someone has made threats of violence or has a history of violent behavior.

Ask as many questions at this meeting as you like and let the mediator know if you are uncomfortable with any aspect of the mediation process. Mediation is flexible, so it can be adapted to suit all participants.

PREPARE MENTALLY AND PHYSICALLY

Being in conflict can be stressful. How you react to and manage the stress will have a big impact on how you manage the conflict. To get the most from mediation, you should go into it mentally and physically prepared. If that is not possible, you may want to ask to postpone the mediation for the sake of everyone involved.

Your mental preparation will depend on you personally. People have different ways of managing stress, and you should find something that works for you. Many people think a lot about their conflict, but you may be better off distracting yourself, thinking about something else, or clearing your mind. Being calm and clear will let you manage your conflict much more effectively and efficiently.

The same rule applies to physical preparation: find something that works for you. Some people manage

stress with sports or vigorous exercise; others prefer a relaxing walk. Getting a good night's sleep before going to mediation is also important.

Table 2.3 summarizes the main personal preparation points that have been explained above.

PERSEVERE IF THE OTHER SIDE IS RELUCTANT TO MEDIATE

Sometimes the person on the other side of the dispute is reluctant to mediate. If you believe that mediation is worth trying, how do you get the other side to agree to use it? How can you persuade the other side to participate in this assisted negotiation process? The answer is simple: propose it! Propose it in a way that focuses on shared reasons for participating so that you avoid conveying a sense of weakness. You can do this by explaining why mediation would benefit the other side as well as you. To maximize your chances of persuading the other side, you can prepare by "putting yourself into the other person's shoes" as suggested in the Mediation Shared Interest Questionnaire in table 2.4. Alternatively, the mediator or your adviser may help you persuade the other side to participate in mediation.

What was your score? If you got 0–3 *Yes* answers, then you do not seem to have many shared interests with the other side. It may be challenging to convince the other side to participate in mediation, and it might not be appropriate for your dispute (see chapter 1, "How to Manage and Control Disputes: Alternative Dispute Resolution"). If many of your answers were *Uncertain*, then you could contact the other side to ask the same questions. This process can help you and the other side decide together if mediation is appropriate for you.

If you got 4–7 *Yes* answers, then you have a good number of shared interests with the other side. You can communicate to the other side those points to which you answered *Yes*. You can raise the *Uncertain* points with the other side to confirm whether mediation can help you both.

Table 2.3: How to prepare for mediation

Questions to ask yourself	Actions the mediator can take to advise and guide you and the other side
What do I want the other side to hear from me? (Positions and facts)	Ask about each side's expectations of the other. Ask everyone to prepare a summary of the dispute, including ideas about how to use the first joint meeting most effectively. Ask if you and the other side share a mutual understanding of the relevant facts. Ask if you and the other side want to share documents before the mediation.
Why have I chosen to start mediation now? (Needs and interests)	Ask about both sides' expectations of the process and the mediator. Ask about each person's previous experience with mediation (if any). Ask both sides to prepare cost information and do a risk analysis. (Your advisers may help you prepare this; see chapter 3). Ask both sides about the importance of a future relationship and reputation. Explore what has prevented both sides from resolving the dispute.
What are likely acceptable solutions for me and the other side? (Options)	Suggest that each side come to the mediation with at least three possible solutions that are likely to be acceptable to the other side. Suggest that each side bring, or even exchange, a draft agreement in a suitable format to be worked on during the day.
What will I do if no agreement is reached? (Alternatives)	Suggest that both sides prepare a realistic alternative in case no agreement is reached. Suggest that each side assesses the practical consequences (financial, psychological, and others) of not reaching an agreement.

Table 2.4: How to persuade the other side to use mediation

Mediation Shared Interest Questionnaire When filling out this questionnaire, please consider the other side's point of view as well as your own perspective. Please answer the questions by Yes, No, or Feeling uncertain.			
	Yes	No	Feeling uncertain
I see opportunities for a creative solution that works for both sides.			
Improving trust between us may be the beginning of new opportunities.			
Improving communication and clarifying misunderstandings can help solve the problem and prevent new conflicts.			
A quick solution would be good for me and the other side.			
We have a common network, and conflict has a negative impact on both of us.			
We have frequent dealings with each other, and conflict has a negative impact on both of us.			
We are concerned about saving money on legal fees.			
We want "peace of mind" and to "move on."			
We believe a judge's decision will not solve our problem efficiently.			
We are concerned about the psychological and emotional stress of a court process.			
Total			

Yes answers might be useful to persuade the other side to participate in mediation.
No or *Uncertain* answers might be useful questions to explore with the other side to better know their interests and priorities and convince them that mediation could satisfy their needs.

If you got 8–10 *Yes* answers, then you have many shared interests with the other side. By discussing all the points to which you answered *Yes*, you will have a fairly good chance of convincing the other side to participate in mediation.

DURING MEDIATION

LISTEN AND ASK GOOD QUESTIONS

In conflict, people have a tendency not to listen and, conversely, have a strong desire to be heard. Until we are able to say what we want, we will not be satisfied and will get more and more upset as our patience runs out. However, the other side has the same need, so communication during conflict often turns into a shouting match. The aim of mediation is to establish effective communication between you and the other side. By listening properly and asking good questions, you can help your mediator achieve this goal.

Have you ever experienced a conversation in which you were simply waiting for the other person to finish speaking so you could speak yourself? In those cases, the other person is speaking, but you are not listening properly. You are thinking about what to say next or waiting for a pause so that you can say what you really want to say. Realizing when you are doing this is important because then you can control yourself and actually listen to the other person.

An old saying notes that because we have only one mouth but two ears, we should listen twice as much as we talk. Interrupting can cut off communication before it has a chance to expand and become more meaningful. If you have an urge to interrupt, try to wait and let the other person finish. You can make a note about the important thing you want to say. The mediator is responsible for ensuring that all parties have an opportunity to say everything that they want to say. If you listen patiently to the other side, you will be given the opportunity to respond.

Certain ways of responding to the other side can make the mediation even more worthwhile. Instead of just waiting for the other person to finish speaking and then saying what you want to say, you can ask some clarifying questions about what the person just said. Your questions may be about something that sounds important to you or something that needs more details. Asking good, clarifying questions will help in these ways:

- Shows the other person that you were listening properly
- Generates better communication between you and the other side
- Makes the other side more likely to listen properly to you

If you don't ask constructive clarifying questions because, for example, you are too upset to focus, you may find that the mediator does so. Box 2.1 offers some examples of typical clarifying questions that you or the mediator might ask.

Sometimes in conflict, the other side says something that really upsets you or offends you. You may experience an urge to immediately disagree or defend yourself. Not interrupting at this stage and continuing to listen properly can be very challenging. However, your nonverbal communication can send a clear signal that you do not like what was said, and waiting for the person to finish speaking will allow you to respond more rationally than emotionally.

KNOW YOUR EMOTIONS

Conflict often activates our emotions. When we feel offended or attacked, we can experience emotions like anger, fear, and surprise. These emotions are accompanied by physical reactions like a surge of adrenalin, faster heart rate, sweaty palms, and more energy. These are natural reactions that increase our chances of survival in a dangerous situation. However, in a heated conversation they can do more harm than good. Research shows that as our emotions escalate in a conflict situation, we start to use shorter sentences and less complicated language. We begin to have more difficulty expressing what we want to say. Our ability to think properly decreases, and the chance of saying something we will regret increases. Thus, to get the most from mediation, you should be prepared to deal effectively with emotions, both your own and those of the other side.

Becoming aware of emotions is the first important step. If you are not aware of them, you cannot possibly manage them. In yourself, you can become

Box 2.1: Clarifying questions

- It sounds as if you are really frustrated with the contractor. Can you explain more about that?
- It sounds as if quality workmanship is really a priority for you. Is that right?
- Could it be that you feel your contributions are not appreciated by the partnership?
- So you feel you have been unfairly treated in this situation?

aware of the physical signs of stress previously mentioned. In others, you can become aware of signals of heightened emotions: agitated movement, crossed arms, emotional facial expressions, redness in the face, simpler speech and shorter sentences, phrases repeated with more emphasis, a louder voice, swearing, and so on.

After becoming aware of emotions, you can try to manage them. Pause, take a deep breath in, and breathe out slowly. Breathing more slowly and deeply than normal can help reduce the negative physical effects of your emotions. Writing down what is upsetting you can shift you into a more rational rather than emotional state. Naming emotions or describing how you're feeling can help you focus the discussion on the causes. For example, you can say, "What you're saying is making me very angry" or "There is no progress and I am getting frustrated." If you notice your emotions are really hindering you, ask the mediator for a break. Stand up and move around, get some fresh air. You can ask to speak to the mediator privately and talk freely about what is bothering you.

If the emotional expressions of the other side are bothering you, then you can mention this at an appropriate time in the mediation. You cannot really control someone else's behavior and emotions, but you can control how you respond to them. Try to stay calm and respectful, and do not get trapped in the other side's drama.

PRACTICE A USEFUL COMMUNICATION SKILL: ACKNOWLEDGING

Acknowledging is a basic communication skill that mediators should be proficient in and one that you can use yourself. It involves simply noting what someone has said or noting an emotion that someone is experiencing. For example, "I can see that this issue really bothers you." This statement may seem trivial and unnecessary, but it can have a powerful effect. When you acknowledge something that is important to someone, that person feels heard and *acknowledged*, an outcome that helps build trust and better communication. Acknowledging people's emotion can help them manage it and reduce their outbursts. People often get more and more emotional when they feel they are not being heard.

When acknowledging, make sure you don't state something as a fact, because you may be wrong. For example, instead of saying "You don't want to discuss it," say, "It seems to me that you don't want to discuss it." This allows the other side to agree or to correct you without getting defensive.

Remember that acknowledging what someone has said or is feeling does not mean you agree. Saying "It seems that you think I'm an unreliable employee" does not mean you agree that you are an unreliable employee. However, it acknowledges your employer's concern and allows both of you to explore what may be causing it.

PRACTICE A USEFUL COMMUNICATION SKILL: SUMMARIZING

Conflict can be chaotic. Another mediation skill—*summarizing*—is useful when you are feeling overwhelmed or confused. Sometimes in a discussion, people jump from one topic to another, start talking about a new issue without having finished talking about the first issue, or say a lot without really having a point. To bring some order to the discussion, you can summarize the main issues that are being discussed and the main points mentioned so far. Ask to discuss each issue in detail, one after the other, but be prepared to be flexible if a new, more important issue is raised.

Summarizing issues also presents an opportunity to identify common ground. Common ground refers to issues that concern both you and the other side; alternatively, it may refer to common needs that you both have. You can focus the discussion on such common ground and make the mediation more constructive.

FOCUS ON THE PROBLEM, NOT THE PEOPLE

Conflicts can escalate and become personal, meaning one person attacks the personality of another. Such attacks can be in the form of personal insults, generalizations, and exaggerations like "You are worthless," "He never listens," "She only cares about herself," or "They never do anything right." Naturally, when people feel attacked, especially with exaggerations, they can react in various defensive ways. Some will become emotional and argue against the attack, others will become angry and silent, others will attack in return to shift the focus away from themselves.

Mediation helps you focus on the problem rather than on the person. Sometimes the problems relate to people themselves, but you can still identify specific behaviors that are bothering you rather than attacking the person. Instead of saying, "You're always late," you can say, "I want us to discuss punctuality."

If the mediation becomes too personal, you can switch the focus to discussing specific problems. However, be aware that some problems are superficial and are the result of a deeper conflict. People may argue over very unimportant things when they have problems with their relationship. If during your mediation you feel that you are not having a constructive discussion, then ask the other side if they have concerns related to your relationship. You can focus the discussion on relationship issues like trust, communication, and respect. Getting to the deeper causes of the conflict will save you a lot of time and energy arguing over superficial problems.

ACT IN GOOD FAITH

Mediation is most effective if you participate in the process genuinely and in good faith with a sincere effort to work toward an agreement. When mediation is voluntarily entered into, such an attitude generally follows.

However, in some situations, mediation may be advised—for example, by a lawyer, arbitrator, or judge—or may be required—such as by legislation or a court referral system. In those cases, you or another participant may be reluctant to engage in the mediation process appropriately. In countries where mediation is compulsory, the law or court practice may require that the parties participate in good faith. This requirement might be imposed by legislation or included as a contractual term in an agreement to mediate. Good faith usually becomes an issue in situations in which the conflict is not resolved at mediation and the matter goes to a court for a decision by a judge. If it can be shown that someone did not put in a sincere effort during mediation (such as not attending the mediation hearings), then negative consequences may result for that person. For example, the court may impose cost penalties or adjust the amount of damages awarded.

Regardless of whether or not you are explicitly obligated to put in a sincere good-faith effort during mediation, you would be wise to do so. Not only will you get more from the mediation, but, in the future, others may judge your attempts to resolve the conflict. "Others" may be a judge in court; however, they could also be an employer, a potential business partner, a new friend, or a relative reflecting on your attempts to deal with your dispute. Better to act in good faith than to develop a reputation for acting in bad faith so that people are reluctant to trust you or deal with you in the future.

MOVE FROM THE PAST TO THE FUTURE

People often get trapped in arguments about the past: What happened? Who did what? Who was right? Who was wrong? If you feel that the mediation is trapped in the past, try to focus the discussion on the future. You could say to the other side, "It seems that we cannot agree about the past right now. What would you like to see in the future?"

When talking about negative events from the past, people are likely to experience negative emotions

related to those events. As discussed in the section "Know your emotions," this can make the discussion more difficult or destructive. Sometimes people cannot let go of the past until they have satisfied some need; for example, they have received an apology or had a chance to vent. If you've tried to talk about the future and the other side keeps returning to the past, you may need to explore what exactly they want from the discussion.

When focusing on the future, focus specifically on a positive future. Discussing positive options, even if they seem unlikely at first, can stimulate positive emotions and make it easier for you and the other side to explore those options. If you cannot even imagine your future with less conflict, then you are likely to continue reliving the conflict of your past.

DON'T FOCUS ON SOLUTIONS TOO QUICKLY

When shifting from the past to the future, be careful about moving too quickly to solutions. People are often taught to be analytical, to find solutions to problems. So when we are in a conflict, we may think that there is an obvious solution. Consider the following example introduced in chapter 1:

> Two siblings are having an argument over an orange. They each want the orange for themselves. Their mother interrupts their argument and wants to resolve the conflict. She thinks that the fairest solution would be for the children to split the orange into halves. What do you think the mother could ask the children before deciding on the "obvious" solution?

If the mother asks the children, "Why do you want the orange?" she will discover that the brother wants the juice and the sister wants the rind for a cake. If you thought that giving half the orange to the brother and half to the sister was the best outcome, then you focused on a solution too quickly. A compromise might seem like a good solution in a conflict, but it often means that nobody is really satisfied.

The mediation process is designed to promote a discussion before thinking about solutions. This is called the *exploration phase*. It is very important during the exploration phase to raise all issues, uncover as much information as possible, and talk through everything that is on your mind. If you focus on solutions that seem obvious, you may be making wrong assumptions and may prevent the underlying issues from coming to the surface.

A common mediation concept is a *win–win outcome*. The aim of mediation is for both sides to find a mutually acceptable solution to their problem that addresses the needs of both. This is called a win–win outcome because both sides win. Thus, both sides in the conflict are happy with the result rather than just being resigned to a compromise. In the example, the brother's getting the juice from the orange and the sister's getting the rind is a win–win outcome—both get what they need. In contrast, with a win–lose outcome, one side gets what it wants and the other side does not. For example, referring again to the orange illustration, in a win–lose outcome, the sister might get the whole orange (juice and rind) and the brother would get nothing. She then would go and peel the rind from the orange to make a cake and throw the rest of the orange away.

A win–win outcome may not always be possible, but there is nothing to lose by trying. Searching for a win-win outcome may require asking good questions, using creativity, and having a thorough discussion. To get the best outcome from mediation, do not focus on solutions too quickly.

MAKE SURE YOUR SOLUTIONS ARE REALISTIC

One way a mediator can help during mediation is by being an objective critic of demands or proposed solutions. A mediator does this in an impartial way to be clear that the mediator is not supporting one

side over the other in the conflict. To get the most from mediation, you should also check whether your own demands or solutions are realistic.

A good way to test whether something is realistic is to explore the details. Our ideas may, at first, seem fantastic but quickly appear flawed and not feasible. We may also be making assumptions that are inaccurate. Be careful about vague statements, and ask clarifying questions. If someone says, "It will be finished as soon as possible," ask about an estimate of time and perhaps suggest a time frame. You may be eager to make a promise to resolve the conflict, but you should think carefully whether you would be able to fulfill it. Be thorough when working on a solution, and you will increase the chance of a successful outcome—not just on the surface but also in the details.

BE THOROUGH AND CHECK ALL DETAILS OF A POTENTIAL AGREEMENT

If you and the other side seem to be making progress toward resolving your conflict, that is a good sign. Ensure that you take the time to carefully consider whether the following are true:

- The mediated settlement agreement you are making is feasible. (See the previous section.)
- The contents of this agreement meet your needs to a satisfactory extent. (See "Before You Go to Mediation" at the beginning of this chapter.)
- The agreement is better than your walk-away alternatives. (See the section "Identify alternatives to an agreement.")

If things seem to be going well, beware of falling into the trap of false confidence and rushing to end the mediation. You need to be certain that what you and the other side have agreed to will work and will last. An agreement should provide enough detail that all parties understand their responsibilities, provide for relevant time frames, and provide for consequences if a party does not fulfill the terms of the agreement.

You and the other side need to decide whether you want a written mediated settlement agreement or just a verbal one. If you (jointly) decide that the agreement is legally binding, make sure you have a lawyer draft it or at least look it over for you before you sign it. If you have a professional adviser with you during mediation, that person can confirm your obligations and rights under the mediated settlement agreement. Make sure you understand the consequences of breaching the mediated settlement agreement. Alternatively, the agreement may be in the form of a memorandum of understanding with no legal implications.

If the mediation ends with no mediated settlement agreement, consider whether you want the mediator to draft a summary of the issues and options discussed during mediation. This document can be confidential and may be useful for future negotiations. If some aspects of the mediation were resolved, a partial agreement on those issues may be possible, noting that disagreement remains on other issues.

AFTER YOU LEAVE MEDIATION

THINK ABOUT WHAT NEEDS TO BE DONE AFTER MEDIATION

After the mediation, you may have some more work to do. Consider the following suggestions:

1. **If there is a mediated settlement agreement at the end of the mediation,** then you will need to implement the terms of the agreement. You can arrange follow-up meetings with the other side to see how certain parts of the agreement are working (or not working). This point might be relevant when aspects of a business partnership have been renegotiated and might need adjustment a few months later.
2. **If a mediated settlement agreement is reached but not formally drafted,** you might arrange to meet with a lawyer to draft the

mediated settlement agreement into a legally binding format, which needs to be signed by you and the other side. You may choose to have a feedback session with the other side and that side's professional adviser (if any), to discuss how the mediation went and to confirm your obligations and rights under the mediated settlement agreement. Make sure you understand the consequences of breaching a mediated settlement agreement.

3. **If you did not reach a mediated settlement agreement,** don't give up. You may need a new mediation. Often, mediation is the catalyst for further negotiations and subsequent agreements. Consider making contact with the other side again. Try to use constructive skills and communication techniques you experienced during the mediation. Also, try to maintain any positive momentum or communication established during the first mediation. Don't be surprised if the other side initiates contact; be open to a signal from the other side. If you start new negotiations, you should preferably work with a mediator. Without the mediator's assistance, you may slip back into your old contentious habits.
4. **If mediation is not working, consider using another dispute resolution process,** such as neutral evaluation, arbitration, or court.

CONDUCT A REVIEW AND ASSESSMENT

Mediation can be challenging and exhausting. To get the most from mediation, you should do some work after it too. The work doesn't have to begin immediately afterwards, but the longer you wait, the less you will remember and the less likely you will do it.

When reflecting on the mediation process, ask yourself the following questions:

- What worked well? Think of specific examples of things you did or others did that helped the discussion move along.
- What didn't go well? Think of anything that seemed to have a negative effect on the discussions.
- If I were to go to mediation again, what might I do differently?

You can discuss the answers with your support people or someone not involved in the mediation. If you cannot find someone to review the mediation with you, simply write down the answers for yourself. The process of analyzing the mediation is important. Reviewing the mediation will help you prevent conflicts from developing in the future, and when conflicts do develop, you will have better skills to manage them.

CHAPTER THREE

How Professional Advisers Can Add Value to Mediation

CHAPTER THREE

How Professional Advisers Can Add Value to Mediation

INTRODUCTION

Professional advisers wanting to act in the best interests of their clients need to know how to make the most out of mediation. Generally, professional advisers such as lawyers have skills that can be very useful for a client in mediation. However, in countries where mediation has yet to be established, professional advisers may have limited experience with mediation and may be reluctant to encourage clients to engage in mediation. They may be worried that mediation advising is less lucrative than court advocacy or that going to mediation may be a sign of weakness.

Actually, experience shows that mediation is effective and makes good sense for clients. Moreover, there is no evidence to suggest that using mediation instead of litigation to help clients resolve disputes is likely to result in less revenue for professional advisers. Rather, mediation advising will involve a significant change in thinking for many professionals, including lawyers, and poses challenges for them in terms of defining their new role and skills as mediation advisers. Mediation advising involves making the following shifts:

- From the adversarial to the collaborative
- From win–lose (satisfying the needs of only one side) to win–win (satisfying the needs of both sides)
- From a focus on the past to a focus on the future
- From a focus on lawyers in the trial process to a focus on disputants in the mediation process
- From the need to convince a judge to the need to reach a consensus with the other side

Mediation advising will involve a significant change in thinking for many professionals, including lawyers, and poses challenges for them in terms of defining their new role and skills as mediation advisers.

Internationally, lawyers are increasingly required (for example, through ethical rules issued by bar associations) to inform their clients of the appropriateness of alternative dispute resolution (ADR), and specifically mediation, throughout court proceedings. On the

suitability of various ADR processes, see chapter 1, "How to Manage and Control Disputes: Alternative Dispute Resolution."

This chapter describes the main principles of mediation to give professional advisers a good understanding of the process and how to contribute constructively. For more details, a training course in mediation advising will be helpful.

Since mediation generally involves a facilitated negotiation, professional advisers should negotiate within a mediation framework to the highest level of skill and technique. This chapter will examine participation in mediation from the perspective of a professional adviser, also known as a *mediation adviser*. Mediation advisers come from various professional backgrounds. They may be lawyers, engineers, accountants, or other professionals. Nonlawyers can assist and support parties to a mediation; however, some of the duties of mediation advisers, as the context indicates, are primarily relevant to legal professionals.

The extent to which professional advisers participate in mediation varies considerably. In many cases, they may not be involved at all. This may be the case in small business or community settings and conflict situations in which the parties have not yet consulted a lawyer before going to mediation. For example, in many workplace disputes, the employer or human resources department of the employer organization may contact a mediation service provider directly without the involvement of lawyers. When litigation is considered a possible course of action, lawyers and other professional advisers such as accountants or engineers, depending on the subject matter, are more likely to be involved in the mediation process.

MAIN PRINCIPLES OF MEDIATION

To provide the best assistance to your client as a professional adviser, you must understand the main principles on which mediation is based. This knowledge will help you prepare for the type of process and attitudes generally expected during mediation. Remember that mediation differs significantly from litigation. These differences become apparent when we consider the mediation principles of process informality, collaborative problem solving, nonlegal interests, and direct party participation, set out below. The principles of mediation are also addressed throughout the deskbook, and particularly in the following chapters: chapter 1, "How to Manage and Control Disputes: Alternative Dispute Resolution"; chapter 2, "How to Make the Most of Mediation"; and chapter 4, "How to Use Guiding Principles and Ethics to Ensure the Integrity of Mediation."

INFORMAL PROCESS

While court processes involve strict, formal procedures governed by legal rules, mediation is designed to be informal. People are asked to speak freely and to provide any information that they feel will help resolve the dispute, without being restricted by evidence laws. The process usually has some structure: opening statements, a discussion phase, a phase to generate options. However, this structure is not fixed and is up to each individual mediator, with input from the mediation participants, to determine.

The flexibility of the mediation process is also what makes it informal. If participants make suggestions (for example, to take a break or to change to a less formal seating arrangement) and everyone agrees, then the process can be changed. However, the mediator is in charge of the process and ultimately makes the decision about how to run the mediation.

Advisers who are accustomed to more formal processes will need to be aware of this principle and avoid introducing formality through their behavior. Participants are expected to treat each other and the mediator with respect, and their efforts to find a mutually acceptable solution to the dispute should not be hindered by unnecessary formalities.

COLLABORATIVE PROBLEM SOLVING

Many advisers will be used to the adversarial style of traditional conflict resolution, in which they fight like a gladiator to win for their client and cause the other side to lose. The other side is seen as an opponent to be conquered and dominated. Often, to win in such a setting requires clever manipulation, strategy, and tactics. Mediation is very different from all of this.

Mediation is based on encouraging both sides in a dispute to collaborate and try to understand their situation as much as possible. The two sides see each other as partners with a common aim to find solutions acceptable to them both. This approach does not mean that the two sides are expected to become friends during mediation, but they do need to—at least—show good faith in trying to resolve their dispute together.

Professional advisers can ensure that their client's interests are satisfied during the collaborative problem-solving mediation. However, advisers must ensure that they do not bring adversarial habits and behaviors into the mediation because that would hinder the process and would not be in their client's best interests.

NONLEGAL INTERESTS

Traditional court-based disputes relate to legal rights and positions. Judges interpret and apply the law to make rulings about the dispute. The outcomes of disputes decided in courts are framed by legal procedures and limited to the types of outcomes that a judge has power to deliver. For example, a judge may award a sum of money (called legal damages) to a person whose business partner has breached a commercial contract. However, a judge cannot help the parties make a new contract to continue a profitable business relationship. Disputes are not always about legal interests, and mediation allows for a much broader exploration of what is important to those in dispute.

Here are some examples of disputes in which nonlegal interests, rather than legal ones, play an important role:

- *Example 1 (commercial)*. Your client quits her job at a company and opens her own business. The company sues her for infringing its intellectual property rights. In court, the focus would be on the legal issues relating to intellectual property and whether or not your client is allowed to operate her own business. However, your client quit her job because she was not being respected, her efforts were not being recognized, and she did not have the autonomy that she wants in her work. Your client's real interests are the need for respect, recognition, and autonomy—in other words, nonlegal interests; and these are things a court cannot provide. Mediation would enable her to discuss these issues with her old company and perhaps result in her going back to work there or collaborating on future projects with the company.
- *Example 2 (workplace)*. Your client's employer introduces new work policies without consulting him. He refuses to follow the new policies and gets fired. He sues his employer for unfair dismissal. A court would focus narrowly on his dismissal and not on the overall workplace relationship. The outcome would be your client's either getting his job back (and not improving the work relationship) or being compensated by his employer but still being unemployed. Mediation would allow your client and his employer to discuss their workplace relationship and issues such as communication, cooperation, and consultation. They might craft a new policy that suits both your client and the employer, and—

having improved the workplace relationship—the employer might agree to have your client's job reinstated.

- *Example 3 (family)*. Your client's father dies and leaves the family house to your client instead of to his sister. Your client's sister was the only one who cared for their father during the last years of his life. The sister disputes the will in court. The judge will only consider your client's and his sister's legal rights and not their relationship. Mediation would enable them to discuss personal interests, needs, and issues they have with each other, such as moral responsibility and feelings of unfairness and jealousy. Your client would be able to work out an outcome that recognizes both him and his sister in their father's will and that satisfies both of them. Furthermore, using mediation they will not waste their father's estate paying for lawyers and court fees.

As you can see from these examples, many types of nonlegal interests and needs can lie at the core of a dispute. While litigation in court deals only with legal interests, mediation allows your client to deal with the nonlegal issues as well and to find solutions that satisfy all the parties. Outcomes that can be reached through mediation, and not court, and that satisfy nonlegal interests include these examples:

- Apology
- Explanation of what went wrong
- Agreement to compromise
- Agreement to keep the outcome secret
- Agreement about how to interact in the future
- Agreement to provide goods or services instead of money

As a professional adviser, you need to be aware that nonlegal interests reflect people's needs and can be just as important (if not more important) to people in dispute as legal interests. People in dispute should be encouraged to discuss any interests that are important to them and should not be persuaded to focus only on interests familiar to the adviser. For further discussion about exploring interests, see the first two sections in chapter 2, "Think about your own position and needs" and "Think about the position and needs of the other side."

DIRECT PARTICIPATION

In litigation, professional advisers are hired by clients because they are experts and have knowledge and skills that the clients do not have. The expectation is that the expert does certain research, investigation, or analysis and that the client then receives advice or the results of this work. The adviser has an active role and the client usually has a passive role in such a relationship. This balance applies especially to lawyers, who are expected to win the case for their client, while the client is mostly a passive participant in the litigation following the lawyer's instructions.

Mediation promotes the opposite relationship: the client is actively involved in resolving the dispute, while any professional adviser has a more passive role, giving support when necessary. This principle is one of the most important in mediation because the success of the mediation and the success of any resulting agreement depend primarily on how much those involved in the dispute participate in the process. If people feel that they did not actively create the solution or were pressured into an agreement, they are unlikely to comply with it. However, if people feel that they participated directly, they have a strong sense of ownership of the outcome and, as a result, any agreement is more durable.

In addition, research from around the world shows that direct participation by clients in mediation contributes to their level of satisfaction with the way disputes are handled and with professional services. Logically and out of habit, you may want to be active during mediation, speaking on behalf of your client, for example, or asking the other side questions. However, clients who feel that they were not given a chance to participate themselves are likely to be dissatisfied with the process and less likely to seek your services in the

future. It is important to consult with your client as much as possible to determine together what level of participation your client wants and to then manage this level depending on how the mediation is proceeding.

GENERAL KNOWLEDGE THAT MEDIATION ADVISERS SHOULD ATTAIN

Mediation advisers should strive to attain a knowledge base that reflects international best practice. Commercial and other clients are increasingly sophisticated users of dispute resolution services. They select legal advisers who have practical problem-solving skills in addition to legal expertise. Table 3.1 lists the best practice standards from the International Mediation Institute (IMI) and the general knowledge to which mediation advisers should aspire. It offers a useful starting point for professionals entering a mediation-advising role. IMI has established a certification program for experienced mediation advisers.

ASSISTANCE BEFORE MEDIATION

As a professional adviser, you can help your clients in many ways before mediation begins. Most important, you can help them prepare for mediation and coach them on how to manage the dispute. Further, you can give advice about legal rights or technical issues in the dispute. How you assist will depend on your area of expertise. However, you can generally be helpful by having your own perspective on a dispute, listening well, and asking good questions. The following two sections discuss your assistance in more detail.

INFORMATION TO PROVIDE TO YOUR CLIENT BEFORE MEDIATION[1]

Your clients may be unaware of some of the principles and benefits of mediation. Providing this information may improve their attitudes toward it and may also help address any concerns or fears they might have about the process. Check through the following list and ensure that your clients are aware of all this important information about mediation.

- Mediation is an opportunity to see if the dispute can be resolved now.
- Mediation differs from litigation: it is informal and involves no judge to please or to make decisions for you.
- The mediator will not decide anything, including who is right or wrong.
- The mediator is impartial.
- Participants must make their own decisions. They will not be compelled to agree to a proposed outcome.
- Mediation is an opportunity to tell the whole story without interruption.
- Mediation provides an opportunity to see how the other side views the dispute.
- The mediator may help the other side better understand the dispute.
- Meetings in the same room with the other side may be stressful. Any participant can request a break at any time. If the assistance of the mediator or lawyers is not reducing stress to a manageable level, then the process may proceed with the participants in separate rooms.
- Lawyers may or may not attend.
- Mediation is confidential.
- Your client can meet with the mediator privately and confidentially.
- Your client can ask for information about the background and qualifications of the mediator.
- Your client will have an opportunity to discuss the costs involved with mediation, including the mediator's fee.
- Your client can get an estimate of the duration of the mediation.

Table 3.1: General knowledge that mediation advisers should aim to attain

Knowledge	Description
Alternative dispute resolution (ADR) process knowledge	Ability to identify procedural options and preferred processes for reaching optimal outcomes
Mediation landscape	Understanding of the nature, procedure, appropriateness, and advantages and disadvantages of mediation schemes and programs, procedural rules, and relevant costs
Suitability of the mediation process	Knowledge of the suitability (or not) of mediation as a process to address particular issues
Timing	Understanding of the best timing, and ability to apply it to each dispute resolution process
Mediation models	Understanding of a variety of mediation practice models and the differences among them
Role of mediator	Understanding of the role of a mediator
Key factors and principles in mediation success	Awareness of the key factors and principles for making the most out of mediation
How to prepare for mediation	Knowledge of forms of written preparation for mediation, such as the Olé Case Analysis & Evaluation Tool available at imimediation.org/ole
Negotiation and participant dynamics	Knowledge of negotiation and processes that help find solutions, as well as knowledge of participant dynamics
Mediation law	Knowledge of relevant laws affecting mediation practice, including structure and enforceability of agreements to mediate, confidentiality and (non) admissibility of evidence of mediation communications, and structure and enforceability of mediated settlement agreements
Interests	Knowledge of interest-based negotiation and the distinction between positions, interests, and issues; also, knowledge of nonlegal interests
Alternatives and solutions	Familiarity with methods of finding solutions, including assessing available options and alternatives to a mediated settlement agreement and preparing the client and self for joint/private mediation meetings
Familiarity with mediation techniques	Familiarity with techniques such as questioning, summarizing, active listening, framing and reframing, reflecting, and paraphrasing
Intercultural fluency	Familiarity with intercultural issues and dynamics
Cross-border mediation	Understanding of cross-border mediation procedures, laws, and regulatory structures
Multiperson mediation	Knowledge of processes when dealing with multiple mediation participants
Ethical standards	Understanding of professional and ethical standards and behaviors and the use of ethics in generating, informing, and setting norms
Mediated outcomes	Ability to understand and interpret mediated settlement agreements and procedural options
Mediation within its regulatory framework	Ability to explain the operation of relevant court-connected mediation schemes, institutional procedural rules, relevant costs, and relevant professional codes of conduct or ethics
Negotiation approaches and styles	Knowledge of the distinctions between distributive (based on positions) and problem-solving (interest-based) approaches to negotiation; also, knowledge of when, why, and how to use each approach
How to make use of mediation processes	Knowledge of techniques to productively support people in a dispute, their representatives, the mediator, and the process, and of how to use the mediator and the process effectively to help find a mutually acceptable outcome

- Mediation may save time and money. It is usually more expedient than going to trial.
- Your client can terminate the process at any time.
- Your client can take time to review and reflect on any mediated settlement agreement, in consultation with you, before entering into a legally binding agreement.
- Your client has little to lose because other process options will still be available if the mediation does not resolve the dispute.

As an adviser, you can help your clients assess the suitability of mediation to deal with a dispute. You need to determine whether your clients have any safety concerns. This point could be relevant if the other side has a history of being violent or making serious threats. You can also check if your client prefers a process different from mediation. Some clients might want a judge's decision to use later as a guideline, or they might think that their dispute needs to be made public through a court case. Mediation could be unsuitable for various reasons, so this topic is important for you to discuss with your client. Refer to the section "When is mediation suitable?" in chapter 1. It lists the factors that make a dispute suitable for mediation as well as the factors that make a dispute unsuitable for mediation.

WRITTEN PREPARATION

Before going into mediation, your client should thoroughly examine all the important details of the dispute. You can help create a written chronology of events that relate to the dispute. Lawyers can write a case summary. You can also help your client write down a summary of the main issues in the dispute.

Another possibility for written preparation is to provide your client with written expert advice. This could be legal advice explaining in detail the legal aspects of the dispute and giving your client advice about various legal options. It could also be technical advice if the dispute involves some technical issues that require an expert to clarify. It could be financial advice relating to issues in dispute or the potential costs of different ways of trying to resolve it.

You can refer to the IMI tool, "Ole!: Concise Case Analysis & Evaluation Tool," to assist you with written preparation for your client.[2] The tool includes sections dealing with the basic facts of the dispute; case analysis; strategy analysis; financial loss analysis; assessment of strengths, weaknesses, opportunities, and threats for each side; alternative outcomes if the dispute is not resolved; options for moving forward; and future strategy.

CONFLICT COACHING

A practice called *conflict coaching* helps individuals who are experiencing conflict. The main difference between conflict coaching and mediation is that a conflict coach works one-on-one with a client only and not with everyone who is in dispute. As an adviser, you can use conflict coaching skills to help clients prepare for mediation by helping them do the following:

- To gain clarity about various aspects of the dispute and the situation
- To understand their own, and the other person's, needs and goals
- To identify and evaluate their choices for moving forward
- To develop confidence and competence in managing conflict and achieving their goals

Conflict coaching skills include the ability to listen actively, acknowledge problems and emotions, provide different perspectives or *frames* for your clients, summarize important issues from a large amount of information, and ask exploratory and challenging questions. Some examples follow.

You can help your clients explore what needs are underlying their positions by listening for what is important to them and asking questions about those points.

You can encourage your clients to consider different perspectives of the dispute, such as the perspective of an independent person or an influential person who is familiar with the dispute (for example, the head of the company in a workplace dispute or the

president of the Chamber of Commerce in a dispute between two corporate members) or the court, or the other side. By challenging your clients to broaden their perspective, you help them open their mind to creative and reasonable options for resolving the dispute.

You can also do something called *reality testing* and *doubt creation*, objectively assessing a client's positions and options. By being on your client's side, yet far enough from the dispute to have a more objective view of it, you can provide a more realistic perspective of problems, issues, and options. People in dispute can be very confident of their position but often have a narrow view affected by emotion. You can carefully challenge your client's view and help expand it.

Another part of your conflict coaching can focus on helping your client identify the most suitable way forward to deal with the dispute. For example, your client may wish to try direct negotiation before entering mediation or another dispute resolution process.

Finally, as a professional adviser you can explain to your client the standard steps of mediation, as well as the main principles of mediation. You can use your conflict coaching skills to explore your client's questions about the upcoming mediation and deal with any concerns. You can help your client prepare an opening statement and a list of questions for the other side to answer during the mediation. You can use the list provided in the section "Information to provide to your client before mediation."

If you wish, you can undertake further training in conflict coaching.

ARGUMENTS TO ENCOURAGE THE OTHER SIDE TO USE MEDIATION

Sometimes the other side or its adviser may be reluctant to use mediation. If so, you may need to talk with them and encourage them to engage in the mediation process (see chapter 2, table 2.4, which includes the Mediation Shared Interest Questionnaire). When suggesting mediation to the other side, you may encounter misunderstandings. Therefore, you need to be aware of common misconceptions about mediation. These misconceptions are set out in table 3.2, along with explanations that may support your conversations with people who are uncertain about participating in mediation.

CONSIDERATIONS FOR CROSS-BORDER MEDIATION

Consider this example. Your client is a multinational corporation doing business with numerous organizations around the globe and is now embroiled in a dispute. You advise your client to try mediation. The international nature of the dispute or the disputants raises an important question: where and according to which law should the mediation best be conducted? In other words, which jurisdictions have the most mediation-friendly law, infrastructure, and service provisions?

Typically, advisers select jurisdictions with which they are familiar, whether for a contract mediation clause or an ad hoc mediation. For example, the choice of jurisdiction might be the lawyer's own jurisdiction or it might be another internationally well-known jurisdiction that has been the standard home for applicable law in dispute resolution clauses for decades.

Table 3.2: How to address misconceptions about mediation

Misconceptions about mediation	The reality of mediation
Mediation is not suitable when the dispute's outcome depends on a point of law.	If you choose to resolve your dispute in court, and the other side produces a defense, the case can likely be resolved by a judge. However, the probability is high (often estimated at more than 90 percent) that you will reach an agreement before a judge hears your dispute. Internationally, reaching an agreement has become the norm, and trial by a judge is the exception in many countries. That is because most cases have nonlegal considerations, such as continuing relationships (commercial, family, labor, and others), that are top priorities for people in dispute—even more important than claiming legal rights.
Mediation will deprive me of my rights.	If you submit your dispute to mediation, you can still use other methods of dispute resolution if you do not reach an agreement. Also, mediation is confidential and does not affect your rights in any subsequent proceeding (arbitration, adjudication, litigation, and others). You can stop mediation at any time if you don't like the path it is taking.
Mediation is not suitable when people's positions are too far apart to be able to reach an agreement.	The main advantage of involving a mediator in your dispute is to enable you and the other side to negotiate on the basis of your true priorities (what you need to be satisfied) rather than the positions you have taken (what you want from the other side). In most cultures, people tend to negotiate from what are called positions. Such negotiation usually involves extreme opening positions and a process of gradual and usually mutual concessions clouded by tactics (exaggerations, disguised and undisguised threats, even lies and trickery). The result is often a compromise somewhere between the opening positions of the two sides. The presence of a skilled mediator changes the negotiating dynamic and helps both sides to keep the negotiation focused and framed positively, and to consider your positions and interests more objectively and realistically.
Mediation is a waste of time if it fails.	If you do not reach an agreement in mediation, it will often be achieved shortly afterwards. The agreement gap will usually be narrowed at mediation through the negotiation and the greater understanding you and the other side will gain of each other's situation as well as your own situation. Mediation almost always helps both sides develop a more realistic view of the situation. It also helps you consider the risks—legal and commercial—of not reaching an agreement.
Mediation is a waste of money if I do not reach an agreement with the other side.	Mediation does involve costs: the mediator's fee, the venue costs, and the fees of advisers for the day (if you have them). However, when an agreement is not reached, the preparation for mediation is useful preparation for court or further negotiations. Most mediations last one or two days, so the additional fee to each side is small compared with the loss of time and the costs of going to court.
Mediation is always suggested by the side that has a weak legal case.	Choosing mediation is a wise option if you want to save time and money to resolve your dispute. Savvy lawyers who suggest mediation because it is a good option in your case hope that the good advice will motivate you to hire them again in the future. In many countries, mediation is a popular process for dispute resolution and is considered a valuable legal service. Mediation is not a soft option for a client or adviser. Mediation is a period of intense negotiation that requires flexibility, concentration, and imagination, as well as other legal and commercial skills. It is an intellectual and professional challenge, but the risks are low and the potential for a successful outcome is high.
Mediation adds nothing to standard negotiations between lawyers.	Many successful mediations follow unsuccessful negotiations between lawyers. Bringing people into mediation is often quicker and cheaper than negotiating through representatives. Mediation gives the people in dispute control of the negotiation and the opportunity for direct dialogue in a safe environment. If people have become stuck in their positions, the involvement of the mediator may be essential for them to evaluate their conflict objectively.
Mediation will prevent me from having my dispute decided in court.	Mediation guarantees the people in dispute an opportunity to present their case to each other, and to a neutral third person, in a way that allows them to highlight the issues important to them and, if they wish, to show the strength of their feelings. In contrast, in a formal trial evidence is limited by rules, and written statements of witnesses mean that there is little opportunity for you to speak. In addition, the mediation may be the first time that you and the other side have encountered each other in person since the dispute began; presenting the case face to face is often a powerful step toward improved communication—and thus to negotiation and to an agreement. If you do not reach an agreement at mediation (mediated settlement agreement) you can still go to court.

But what if the best-known and tried-and-tested jurisdictions don't have the best laws to support a mediation process? What if, for example, the laws on nonadmissibility of mediation evidence in court are unclear? What if the attitude of the courts, while strong and clear in relation to arbitration, remains uncertain and unpredictable in relation to mediation?

Making a choice about the applicable law for a mediation clause should never be a default reaction on the part of a legal adviser. Clients expect that they are paying for reasoned, researched, and rational advice. Professional advisers increasingly need to have a good sense of the law applicable to mediation processes in jurisdictions where they are likely to do business.

Chapter 1, "How to Manage and Control Disputes: Alternative Dispute Resolution," can give you more ideas about helping your client prepare for mediation.

ASSISTANCE DURING MEDIATION

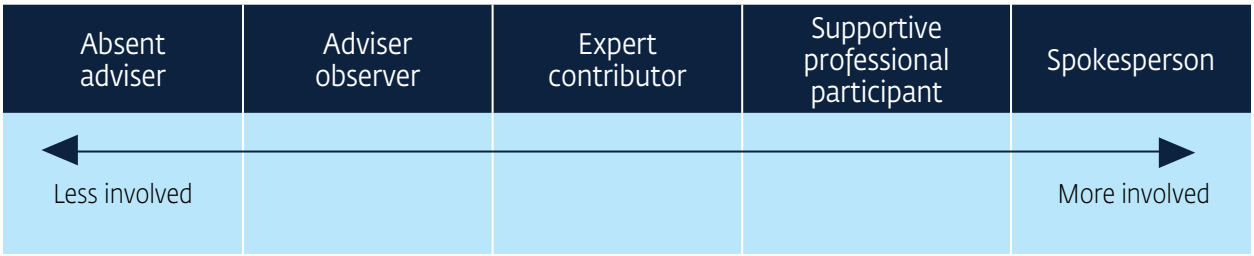
FIVE ROLES OF ADVISERS: WHICH ONE DOES YOUR CLIENT REQUIRE?

Lawyers and other professional advisers can play various roles in mediation. They may attend mediation in person for all or part of the session. Some advisers prefer to be available by telephone, appearing in person only if and when required by the client. Variations may also depend on culture. The range of mediation adviser roles is set out in figure 3.1 according to the adviser's level of involvement in the mediation, from indirect forms of involvement to highly directive participation.

Absent advisers. Absent advisers are exactly that: absent. Advisers in this low intervention role need to ensure that their clients can effectively and efficiently participate in the mediation process, but they do not attend actual mediation sessions. They provide legal, technical, and strategic advice before, during (by phone, text, or e-mail), and after mediation; they also coach clients on how to participate in the mediation itself. Absent advisers may be involved in drafting a formal settlement agreement when this occurs outside of the mediation sessions. Absent advisers are most common when direct client participation in the mediation is needed for a focus on relationships and individual needs without the imposition of legal or technical jargon. Thus, taking on the role of an absent adviser is most suitable when your client has the capacity and willingness to participate actively and effectively in the process. This role also may be an attractive alternative when clients cannot afford the costs of an adviser observer.

Adviser observers. Adviser observers perform the same tasks as absent advisers, and they attend the mediation. As the word *observer* suggests, professionals in this role do not participate

Figure 3.1: Mediation adviser roles



Source: Samantha Hardy and Olivia Rundle. 2010. *Mediation for Lawyers* (Sydney: CCH Australia), chapter 5.

actively in the mediation and do not interact with the mediator, the other side, or any other adviser; they only observe and offer legal or other professional advice to their client when needed. Adviser observers are suitable for more complex mediations in which disputants still wish to speak for themselves during the mediation but wish to be supported by the presence of an adviser. In this role, advisers can help clients keep track of the complexities of issues and offer advice based on new information learned during the mediation. This level of involvement prevents confusion that could arise in communicating with absent advisers, but it comes at increased cost to clients.

Expert contributors. Expert contributors perform the same tasks as adviser observers, but instead of being observers, they participate directly in the process by sharing their professional opinions with the mediator, the other side, and the other side's adviser. An exchange of professional opinions is a form of reality testing, in the hope of narrowing the issues in question so that settlement can be reached sooner. (For example, disputants may be exposed to conflicting views on the applicable law as the lawyers share their opinions.) However, expert contributors are still observers to the extent that they do not negotiate on behalf of their clients. As with absent advisers and adviser observers, clients must be prepared and able to conduct negotiations on their own. The role of expert contributor is well suited to disputes in which legal or technical issues are important or complex enough to warrant the active presence and accompanying expense of an adviser.

Supportive professional participants. Supportive professional participants perform the same tasks as expert contributors, but instead of being limited to sharing professional opinions, they work collaboratively with their clients as a team. This role maximizes the advantages of bringing advisers to mediation because it removes any restrictions on their participation. The precise division of roles between professional adviser and client varies and depends on their respective abilities and skills, the mediation circumstances, and the strategy of the adviser-client team. For example, advisers adopting the role of supportive professional participant could provide legal or technical advice, assist with problem solving and reality testing, and draft a mediated settlement agreement. Their clients could offer their own views on what should be discussed at mediation; explain their priorities, interests, and concerns; generate initial options; and make final decisions after consulting with the adviser. The supportive professional participant role works best when both advisers and clients are well prepared, work constructively together, and share similar views on desired outcomes.

Spokesperson. Professional advisers take on the most directive role of spokesperson when they speak on behalf of their clients throughout mediation. In a way, this role is the inverse of the adviser observer role. In that role, advisers speak only to their clients; with a spokesperson, clients speak only to their advisers to provide instructions as needed. The use of spokespersons should be reserved for mediations in which clients do not have the capacity to participate actively. A person's capacity can be affected by psychological disorders, mental disabilities, and power imbalances between the sides. When the spokesperson role cannot overcome capacity issues, this role should not be adopted as it goes against the fundamental mediation principle of direct disputant participation. In such cases it may be appropriate to manage the dispute through other dispute resolution methods, not mediation.

These five mediation adviser roles demonstrate the spectrum of involvement of professional advisers in mediation. Notably, the presence of professional advisers in mediation does not remove the need for disputants to attend, as may be the case in court adjudication or arbitration.

As a matter of practice, advisers may vary the nature of their involvement in mediation, as the case illustration in box 3.1 demonstrates.

MONITORING THE MEDIATOR

During the mediation, you can help your client by observing how the mediator runs the process and ensuring that the principles of mediation are respected. You can raise any concerns in a professional way so that the mediator does not get defensive or feel criticized. Mediators are expected to promote and practice the principles of mediation, but you can provide extra safety for your client in case a mediator makes a mistake.

Make sure that the voluntary nature of your client's participation is always respected. Your clients should never be pressured into discussing something or agreeing to something. If you see that this is happening, ask to speak to your clients privately and determine if they are happy with how the mediation is proceeding. In any event, you should do this before your clients make any important decision to make sure they are making an informed decision that they will not regret in the future.

Box 3.1: Case illustration[a]

In her capacity as chief executive officer of a financial product development company, Ms. Fastcash is preparing to attend mediation concerning allegations of misrepresentation of one of the company's financial products. She consults a lawyer, Mr. Law. Considering the different mediation advocacy roles outlined in figure 3.1, Mr. Law thinks about the different ways he could approach the mediation with his client. Mr. Law could choose from among these actions:

- Coaching Ms. Fastcash on how to represent herself in mediation and having no further involvement himself
- Attending the preliminary conference with his client, Ms. Fastcash, and then leaving Ms. Fastcash to participate in mediation meetings on her own
- Being physically absent from mediation but being accessible by phone or e-mail
- Being present at the mediation but having restricted participation (for example, observing for the first two hours and offering only legal advice to Ms. Fastcash; from the option generation stage onward, engaging directly with all participants in relation to legal points only)
- Being present during the mediation and participating fully and collaboratively with Ms. Fastcash throughout the process
- Being the "voice" of Ms. Fastcash for the entire mediation
- Joining the mediation only after his client, Ms. Fastcash, and the other side have reached agreement in principle, to give Ms. Fastcash legal advice on what she proposes to do and to draft the mediated settlement agreement

Professional advisers are most helpful to their clients when they are able to discuss the various mediation advocacy roles together with their clients and the mediator and to identify the appropriate approach to suit the needs, circumstances, dynamics, and resources of the particular dispute.

a. This case illustration is taken from Laurence Boulle and Nadja Alexander, *Mediation: Skills and Techniques* (Sydney, Australia: LexisNexis, 2012), chapter 10.

If you get an impression that the mediator is favoring one side over another, ask to discuss this. A mediator must be impartial. If a mediator agrees with one side and not the other, or behaves very differently toward one side compared with the other, you can remind the mediator about the principle of impartiality.

Another important principle to observe is direct client participation. This means that the mediator should be ensuring that the participants are talking to each other as much as possible. If you notice that the mediator is talking to the advisers too much or not asking the participants to speak directly, ask to discuss this. Remind everyone that participants get the most out of mediation if they are talking themselves and to each other. This is not always possible or appropriate (for example, if advisers are discussing some legal issues or if a participant is not confident enough), but this principle should be maximized as much as possible.

You may also need to pay attention to the principle of confidentiality. The principle is often mentioned and briefly explained, but the practical details are important to clarify. The main principle is that any information revealed during mediation cannot be repeated outside the mediation and cannot be used as evidence later in a court process. However, the precise scope of confidentiality depends in part on agreement between your side and the other side. For example, if people agree later not to discuss anything that was said during mediation, does this mean they will not discuss it with their close family, relatives, or friends? Is this realistic? May they post something about the mediation on social media? May they initiate some legal proceedings because they now know some confidential information? The application of confidentiality is not always clear. If you suspect that your client may be likely to inadvertently reveal something in the future, you should discuss any concerns with the mediator before the mediation and before your client reveals the relevant information. Consider this story: A husband and wife operate a shop in a building in a small community and have a dispute with the owner of the building about the lease. The owner is having financial problems but wants to keep this a secret from his partner, who is good friends with the wife. The owner is worried that, if he discusses his financial situation, his partner will find out from the wife or someone in the community will find out from the couple. This issue is discussed and the husband and wife agree with the owner that they will especially not discuss the owner's financial situation with anyone after the mediation. At the same time they all agree that the fact that they were at mediation together does not need to be a secret from the world. For more on confidentiality in mediation see chapter 1, "How to Manage and Control Disputes: Alternative Dispute Resolution"; chapter 2, "How to Make the Most of Mediation"; and chapter 4, "How to Use Guiding Principles and Ethics to Ensure the Integrity of Mediation."

IDENTIFYING AND MONITORING POWER IMBALANCES

As already mentioned, a mediator must be impartial. However, the two sides in a dispute rarely have equal positions of power. One side may be a big company and the other just a single employee. One side may be a wealthy building developer and the other a small community group. One side may be well educated and eloquent and the other side illiterate and lacking confidence. In such situations, the mediator has a duty to ensure that the process is fair and accessible for both sides, while maintaining impartiality. If at any time a mediator believes that the power imbalance is so large that it is impossible to conduct a mediation process to which both sides can meaningfully contribute, then the mediator may need to terminate the mediation.

Power can exist in many forms. It can, of course, be physical strength and presence, but it is often related to wealth, social and professional status and experience, influence, level of education, and ability to speak confidently and persuasively. If you notice that the other side appears to have more power than

your client, pay attention and ensure that this is not inappropriately used to disadvantage your client during mediation. Mediators can deal with power imbalances in different ways. For example, if individuals have difficulty expressing themselves, the mediator could assist by clarifying what is said, summarizing, asking helping questions, or asking parties if they want their adviser to speak on their behalf. If a mediator does not do this, you may use summarizing, paraphrasing, and other active listening skills to help your client articulate their interests and priorities. You may also wish to speak to the mediator in private about the situation if you feel that the mediator is not adequately addressing a power disparity.

If your client is the one with more power in the mediation, then you have an ethical dilemma: Do you allow the power imbalance to continue or do you do something to help create a more balanced problem-solving process? We suggest that an outcome resulting from a power imbalance is not in the best interests of your client because it is likely to create further problems for your client in future. So it may be in the interests of your client to empower the other side and to ensure a power balance during mediation so that the other side is satisfied with the outcome. This can be done only by choosing collaborative problem solving over power-based negotiation.

ASSISTANCE AFTER MEDIATION

How you assist your client after mediation will depend on how the mediation went and on its outcome.

Consider the following suggestions:

1. **If there is an agreement at the end of the mediation (mediated settlement agreement)**, then your client will need to implement the terms of the agreement. You can suggest to your client follow-up meetings with the other side to see how certain parts of the agreement are working (or not working). This might be relevant when aspects of a business partnership have been renegotiated and might need adjustment a few months later.
2. **If a mediated settlement agreement is reached but not formally drafted**, you might arrange to meet with your client to draft the mediated settlement agreement into a legally binding format that will be signed by your client and the other side. You can suggest that you and your client have a feedback session with the other side and its professional adviser (if any) to discuss how the mediation went and to confirm your client's obligations and rights under the mediated settlement agreement. Make sure your client understands the consequences of breaching a mediated settlement agreement.
3. **If there is no mediated settlement agreement**, advise your client not to give up. Further negotiations or a new mediation may be needed. Often mediation is the catalyst for further negotiations and subsequent agreements. Your client can consider making contact with the other side again. Any positive momentum or communication established during the first mediation should be continued. Your client should be open to a signal or contact from the other side. If your client starts new negotiations, working with a mediator is preferable. Without the mediator's assistance, it is easy to slip back into old contentious habits.
4. **If mediation is not working**, advise your client about using another dispute resolution process such as neutral evaluation, arbitration or court.

NOTES

1. Adapted from Samantha Hardy and Olivia Rundle, *Mediation for Lawyers* (Sydney: CCH Australia, 2010), 264–65.

2. The "Ole!: Concise Case Analysis & Evaluation Tool" is available on the International Mediation Institute's website at http://www.imimediation.org/ole.

CHAPTER FOUR

How to Use Guiding Principles and Ethics to Ensure the Integrity of Mediation

CHAPTER FOUR

How to Use Guiding Principles and Ethics to Ensure the Integrity of Mediation

INTRODUCTION

Mediation is used throughout the world by people who are involved in disputes to reach mutually satisfying solutions outside the traditional process found in courts. As explained elsewhere in this deskbook, the advantage of flexibility makes mediation suitable to solve various types of disputes, including in family, community, commercial, construction, insurance, banking, and workplace contexts.

The integrity of the mediation process is guaranteed by several guiding principles and ethics. Regardless of their approach and work style, all mediators must guarantee the quality of the process as well as acquire and maintain professional qualifications required to perform effective mediation sessions. This chapter explores the fundamental guiding principles at the core of mediation ethics and illustrates them with practical situations. It also includes "Did you know?" items, such as box 4.1.

Regardless of their approach and work style, all mediators must guarantee the quality of the process as well as acquire and maintain professional qualifications required to perform effective mediation sessions.

GUIDING PRINCIPLES: MEDIATORS WORK TO ENSURE YOU WILL BE SATISFIED WITH THE PROCESS

Mediators must conduct a mediation process that meets certain professional standards. Your mediator is bound by ethical duties. Every mediator has the duty to acquire and maintain professional skills and abilities. The core professional qualities of a mediator are integrity, competence, impartiality, and contribution to the advancement of mediation practice and professionalization.

Box 4.1: Did you know?

Mediators are bound by a professional code of conduct when certified by a mediation center or association.

Remember, mediators cannot impose a decision on you: this is your ultimate safeguard. Generally, mediators are bound by ethical rules, just like lawyers or doctors.

If accountability to ethical principles is crucial to you, you should consider choosing a certified mediator. Mediators usually are members of a mediation organization and are bound by a professional code of conduct. Look for mediation associations in your country that promote the quality of mediation using a professional code of conduct and a complaint process to enforce it. Many alternative dispute resolution (ADR) centers in the Middle East and North Africa region keep a roster of trained and certified mediators.

Mediators should conduct the mediation so that everyone involved (not only you, but also your lawyer or adviser, if you have one) complies with certain guiding principles. These principles are your guarantee that the process will run smoothly:

- Autonomy of participants, which consists of two subprinciples: direct participation in the process and decision-making power in how the process runs and its outcomes
- Good faith and transparency
- Confidentiality
- Fairness and diligence

On the principles of mediation from the perspective of professional advisers, see "Main principles of mediation" in chapter 3.

AUTONOMY OF PARTICIPANTS: PARTICIPANTS COMMIT TO DIRECT PARTICIPATION AND RETAIN DECISION-MAKING POWER

Autonomy of the participants means that both sides of the dispute must be involved in the mediation process.

Direct participation

As explained in chapter 3, you and the other people directly involved in the dispute (the disputants) are actively involved in resolving the dispute. This is one of the most important principles of mediation because your satisfaction with the process and the success of any resulting agreement depends a lot on how much those involved in the dispute participate in the process. If you feel that you participated directly, you will have a strong sense of ownership of the outcome and, as a result, any agreement is more durable. For more on direct participation see the section "Direct participation" in chapter 3.

Decision-making power over the process

Participants in mediation have the right to make their own decisions on a completely voluntary basis regarding the possible resolution of any issue in dispute. You control the process and the outcome of the mediation. Making your own decisions is a fundamental principle of mediation that every mediator should respect and encourage.

At the outset, mediators provide information about their role and remind you that they don't have any authority to make decisions: you and the other side make the decisions.

Mediators act as facilitators and help you in making the choices about moving forward and reaching a solution to your problem. Your mediator may provide information about the process, ask questions, raise issues, encourage you to review your alternatives to settlement, and help you explore options to solve the dispute. Generally your mediator will not provide you or the other side with legal or professional advice.

You and the other side are given the opportunity to generate and consider a range of options before you commit to anything (see box 4.2). To help you make informed decisions to reach a particular agreement, mediators who follow good practice will make you aware of the importance of consulting other professionals, when appropriate. And remember: you may withdraw from mediation at any time if you feel that the process is not helping you move toward clarity and resolution.

GOOD FAITH AND TRANSPARENCY: ALL PARTIES SHARE INFORMATION OPENLY AND WORK SINCERELY TOWARD A SOLUTION

Transparency is key to efficient mediation. The mediator provides the participants with clarity about the mediation process, including the mediator's own role. The mediator will make it possible for you to discuss issues with the other side and will be clear about how the mediation is run and what you can expect. Openness and clarity are essential for building confidence and a good working relationship between the mediator and the participants. This openness helps the mediator avoid difficulties at a later stage or conflicts with the participants. Because mediation is kept confidential, you should be comfortable about being transparent and sharing important information about your position, your arguments, and the reasons you take a certain view or feel a certain way. In exchange, the other side will do the same. (See the next section, "Confidentiality: participants keep the mediation confidential.")

Box 4.2: Autonomy of participants in practice

Imagine you have a dispute with a landlord or a tenant. If you choose mediation to solve your dispute, you and the other side will have input into the mediation process from beginning to end. You can influence how your dispute is managed in mediation and the content (terms and conditions) of its resolution. Your mediator will help both you and the other side clarify your goals for the mediation. You and the other side will be encouraged to talk directly with each other as much as possible. This effort also includes making sure that representatives or advisers (for example, lawyers) do not dominate the process. Try to speak for yourself and rely on a spokesperson only if you are not feeling confident or cannot express what you want clearly. This principle is called "direct participation."

Generally, mediators do not advise on disputed issues. Rather they will help you and the other side identify issues (for example, repairs, rent arrears, terminating a lease agreement, and so on), consider alternatives to settlement (for example, doing nothing or going to court), and develop options about future actions and outcomes (for example, respectfully communicating, performing tasks in compensation for rent arrears, or sharing contacts to get repair materials at better prices). The decision to settle the dispute or not is in your hands and those of the other side. You may put an end to the mediation at any time. In summary, the purpose of a mediation process is to maximize the decision making of participants.

A mediator should promote honesty and sincerity among all participants and should not knowingly misrepresent any fact or circumstance during mediation. Likewise, you should be honest with the mediator and the other side. You are not "fighting" in a courtroom. Instead, you are trying to find a solution. Understanding what the underlying problem is and sharing the right information are very important. The more you share, the more you'll receive!

You are required to participate in the process in good faith, to be transparent with the other side—including about the information in your possession—and to cooperate actively in searching for a solution. The other side should treat you the same way. In practice, you must agree at the beginning of the mediation session to cooperate in good faith with the mediator and the other side during the mediation. If a legal entity, such as a company, is involved as a participant, the representative attending the mediation must possess the legal authority to settle on behalf of the entity. Thus, if you participate not in your own name but as the president of a company, make sure you arrive at the mediation session with the right authority and mandate.

At the mediation session, you may be accompanied by one or more people, including lawyers, who assist and advise you. The same good faith and transparency rules apply to everyone involved in the mediation.

CONFIDENTIALITY: PARTICIPANTS KEEP THE MEDIATION CONFIDENTIAL

Mediators must clarify the participants' expectations of confidentiality before starting the mediation process. You must be informed of the limitations of confidentiality. For example, in most countries, a mediator who learns information about an actual or potential threat to human life or safety is legally bound to report it to public authorities. This is, of course, an extreme example—most of the time, discussions and documents will be kept strictly confidential. Any written agreement to enter into the process should include provisions concerning confidentiality and its scope.

The duty of confidentiality applies to everyone involved in the mediation process and to the mediator too. The basic principle is that all verbal and written exchanges during mediation are strictly confidential. In addition, a mediator should not communicate any information to any nonparticipant about how participants acted in the mediation. This duty is primarily intended to encourage you and the other side to speak freely during the mediation and to build confidence. Information may not be shared with others outside of the mediation either during or after the end of the mediation unless the participants have made explicit agreements to the contrary with each other and the mediator. Information that was already public or known before the mediation is not covered by the duty of confidentiality (for more information on the duty of confidentiality, see box 4.3). For example, if you prepare a document with confidential information for the purpose of the mediation, this document will be kept confidential. But if you show the contract that led to the dispute—and the contract was not confidential before the mediation—it won't become confidential simply because you use it during the mediation.

If the mediator holds private sessions with one side only (which a mediator can do, unlike a judge) the confidentiality of those sessions should be discussed and confirmed beforehand. Usually, anything said in a private session is confidential. The mediator must obtain your approval before disclosing information from a private confidential session to the other side.

FAIRNESS AND DILIGENCE: MEDIATORS CONDUCT A PROFESSIONAL AND FAIR PROCESS

A mediator should work to ensure a high-quality process and to encourage mutual respect among the participants. The mediator must make a commitment to diligence and procedural fairness

Box 4.3: Did you know?

The duty of confidentiality applicable to mediation makes certain documents or testimony inadmissible in courts.

If you testify in any arbitral, judicial, or administrative proceedings, the duty of confidentiality prevents you from disclosing as evidence any information learned in mediation, including statements made by any of the participants during mediation and meetings held to prepare for the mediation, opinions or suggestions made by participants on a possible settlement of the dispute, or the fact that one of the participants has expressed a willingness to accept a settlement proposal.

There are limited exceptions to confidentiality. These exceptions are important to protect the integrity of the process. For example, mediation information may be disclosed for the purpose of enforcing or challenging a mediated settlement agreement or for the purpose of proving the validity of a formal complaint of professional misconduct made against a mediator or any other person who participated in the mediation in a professional capacity (such as an accountant acting as an expert). This is, of course, very rare.

throughout the mediation. Participants should feel they are able to present their position fully and to express their concerns.

Keeping participants well informed about the mediation process is crucial for procedural fairness. A mediator should ensure that all participants understand the mediation process, the procedures to be followed, the role of the mediator, and their own role in mediation.

Mediators must ensure that all parties to the dispute participate fully. Mediators will conduct the process with fairness to you and the other participants and will ensure that everyone has adequate opportunities to be heard, to be involved in the process, and to seek and obtain legal or other advice before finalizing any resolution. Above all, you will have the opportunity to participate in the discussions and the problem-solving process.

Being treated with respect and dignity is also a crucial expectation of fairness. The mediator should encourage and support balanced negotiations and should understand how to deal with manipulative or intimidating negotiating tactics employed by participants. To enable negotiations to proceed in a fair and orderly manner, or for an agreement to be reached, the mediator will ensure that participants have sufficient time to secure sources of advice or information.

The mediator has a duty to support you in assessing the feasibility and practicality of any proposed agreement in both the long and short term, in accordance with your own subjective criteria of fairness and taking cultural differences and the interests of any vulnerable stakeholders into account.

If you have difficulty understanding the process, the other side's position, or the settlement options being discussed, don't walk away immediately. Ask the mediator for clarification of any aspect that you need help with. A good mediator will notice if a participant is having difficulties and will address this effectively.

Mediators will take reasonable steps to prevent any misconduct that might invalidate an agreement in mediation or that might create or aggravate a hostile environment. Mediators should take appropriate steps including, if necessary, postponing, withdrawing from, or terminating the mediation in any of these circumstances:

- If a mediation session is being used to further criminal conduct
- If a mediator is made aware of domestic abuse or violence among the participants
- If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with mediation ethics.

INTEGRITY: MEDIATORS ARE COMMITTED TO THE MEDIATION PROCESS AND ETHICAL PRINCIPLES

Integrity is a core value for the mediator. The mediator is expected to comply with the professional code of ethics and general social and ethical norms and values, even under external pressure. If several codes of conduct apply (for example, if the mediator is also a lawyer, an architect, a doctor, or a judge) then the most stringent rules will apply. This principle is meant to protect you.

Mediators must be honest and diligent, act in good faith, and put the interests of the participants above their own. Pressure from outside of the mediation process should never influence the mediator. Mediators should never force the participants to agree to something just to boost their reputation as a problem solver. If you feel this pressure at any time, raise your concerns. If they are not addressed satisfactorily, walk away from the mediation. If you feel the mediator has not complied with professional ethical standards, you may make a complaint about the mediator (see box 4.4).

The mediator's role differs substantially from other professional and client relationships. The mediator is neither your lawyer nor your friend. Mixing the role of mediator and the role of a professional adviser is problematic, and mediators must strive to distinguish between these roles. A mediator should not provide expert professional advice (for example, legal or financial) during the mediation process, and you and the other participants should agree in advance about this issue. However, where appropriate, a mediator may recommend that you seek external professional advice, consider resolving your dispute through arbitration or other ADR processes, or go to court. A mediator should not accept another appointment on the same matter (for example, act as an arbitrator after a mediation fails) unless all participants expressly agree.

A mediator should be transparent and honest regarding the fees that you will pay. The mediator should provide the fee structure and explain the likely expenses before the mediation commences. This helps you determine if you wish to hire the mediator. The fees should be reasonable and consider, among other things, the mediation service, the type and complexity of the matter, the expertise of the mediator, the time required, and the rates customary in the community. The same applies if there are co-mediators. The better practice in reaching an understanding about fees is to set down the arrangements in a written agreement to mediate before mediation starts.

To preserve their integrity, mediators should not enter into a fee agreement that depends on the result of the mediation or the amount of the settlement. Likewise, a mediator should not accept a fee for referral of a matter to another mediator or to any other person.

Box 4.4: Did you know?

There are recourses against mediators who behave unethically.

Every mediator has to perform in accordance with the qualities outlined in this chapter (impartiality, competence, respecting the autonomy of participants, confidentiality, and so on). However, in the unfortunate and rare event that mediators do not comply with their duties, what can you do?

Your options depend on the professional status of the mediator. When choosing mediators, it is important to know if they are affiliated with a center or association.

A mediator may be certified by a mediation association or listed on a center's roster. Every certified mediator must comply with a code of conduct. Every association has its own code of conduct and its own complaint procedure through which you can initiate disciplinary proceedings. Some countries even have a national registry of mediators that guarantees the same standards of conduct for every mediator and is enforced by a complaint process. You are encouraged to check with your local mediation centers to learn about how they monitor the ethical practices of mediators and deal with misconduct.

Even though every mediator is bound by the ethical principles, enforcement will likely be more difficult with a mediator who is not certified because there is no mediation association or public organization to assist you. In this situation you may try to make a complaint to another professional association to which the mediator belongs (such as an engineering association or medical association). Alternatively, you may attempt to bring a lawsuit for damages before a court of law.

COMPETENCE: MEDIATORS KNOW WHAT THEY ARE DOING

Mediators have a duty to be competent in terms of knowledge, skills, and ethical understandings. Mediator competence is an ongoing responsibility from the beginning of the mediation to its end. Mediators should not accept an assignment unless they have the necessary qualifications to satisfy the reasonable expectations of the participants. Mediators must feel competent to serve in that capacity and demonstrate that they have relevant knowledge, skills, and ethical awareness. You should feel free to discuss these issues with mediators and satisfy yourself of their knowledge before choosing them. Remember, you and the other side need to agree on whom you wish to choose as your mediator.

A mediator's knowledge includes the nature of conflict; the dynamics of power and violence; communication patterns in conflict and negotiation situations; cross-cultural issues; mediation process stages and functions; the law of mediation (for example, the law on confidentiality in mediation); enforceability of mediated settlement agreements; and the liability of mediators.

A mediator's skills include the following:

- Dispute diagnosis and analysis
- Appropriate communication skills (including listening, questioning, reflecting, and summarizing)

- Negotiation techniques
- Drafting of mediated settlement agreements

For more information about what you should expect from your mediator, see the sections "What does a mediator do and not do?" in chapter 1 and "Monitoring the mediator" in chapter 3.

Mediators should answer your questions regarding their training, education, and experience. Mediators who are certified by a mediation organization usually appear on a publicly available list. When mediators are appointed by a court or another body, the appointing institution has the obligation to make reasonable efforts to ensure that each mediator is qualified for the particular mediation. This appointing institution will usually be in charge of any complaints and disciplinary proceedings against the mediator.

If during the course of mediation, the mediators determine that they cannot conduct the mediation competently, they should discuss this issue with the participants as soon as practicable and take appropriate steps to address the situation (by withdrawing or requesting appropriate assistance, for example). If you have any concerns about the competence of the mediator, you should raise these with the mediator or your lawyer immediately.

IMPARTIALITY: YOUR MEDIATORS ARE NOT YOUR LAWYERS—THEY ARE UNBIASED

Mediators have a duty to act independently and to conduct the mediation in an impartial manner. They should be unbiased, treating all participants with fairness and respect. A mediator should not act as an advocate for any participant.

The mediator has a responsibility to disclose as soon as possible to the disputants any personal interest, conflict of interest, bias, or circumstances likely to give rise to a reasonable apprehension or presumption of bias. Such circumstances include these:

- Financial or personal interests in the outcome of the mediation
- Existing past or future financial, business, or professional relationship with any of the participants or their representatives as far as the mediator is aware
- Any other potential source of bias or prejudice concerning a person or institution that may affect the mediator's independence or impartiality or reasonably create an appearance of bias

Mediators have a commitment to the participants and the process and they must not allow pressure or influence from anyone else to compromise their independence.

If at any time mediators feel unable to conduct the process in an independent and impartial manner, they should express that concern and offer to withdraw from the mediation.

CONTRIBUTION TO ADVANCEMENT OF PRACTICE: MEDIATORS CAN IMPROVE THE REPUTATION OF MEDIATION IN GENERAL

Mediators are said to have a moral duty to educate the public and to improve and advance the practice of mediation. They have an obligation to use their knowledge to assist the public in developing an understanding of, and appreciation for, mediation. Most mediators are committed to making mediation accessible to those who would like to use it, including providing services at a reduced rate or on a pro bono basis as appropriate. Public

communications by mediators should not mislead the public, misrepresent facts, or contain any statements likely to create false expectations.

Mediators often participate in research and should be open to a participant's feedback when appropriate. Mediators have an obligation to continue their education to improve their professional skills and abilities.

Mediators generally make themselves available to assist newer mediators through training, mentoring, and networking. In line with mediation values, mediators should demonstrate respect for different points of view within the field, seek to learn from other mediators, and are committed to work together with other mediators to improve the profession and better serve people in conflict.

As a matter of professional practice, mediators promote cooperation with other professionals and encourage clients to use other professional resources when appropriate. Don't forget that if you are happy with mediation, you should tell people about it!

CHAPTER FIVE

How to Draft Contractual Documents for Mediation

CHAPTER FIVE

How to Draft Contractual Documents for Mediation

INTRODUCTION

Three main contractual documents relate to mediation: mediation clauses, agreements to mediate, and mediated settlement agreements (MSAs). This chapter explains each in detail and provides guidelines for drafting each type of document.

A *mediation clause* is part of a contract (such as a business contract) that describes the process that the people who sign the contract agree to follow if a dispute related to the contract arises between them in the future.

An *agreement to mediate* is a contract that is created after a dispute has arisen and signed by the people who agree to participate in mediation. These people are called mediation participants, and they generally include you and the other side, your lawyers, and the mediator. The agreement to mediate typically defines the specific dispute to be mediated and may take the form of an appointment contract between the mediator and the mediation participants. It outlines the mediation process and the roles and responsibilities of the mediation participants. In practice, the contents of mediation clauses and mediation agreements may overlap.

The agreement to mediate typically defines the specific dispute to be mediated and may take the form of an appointment contract between the mediator and the mediation participants.

A *mediated settlement agreement*, called an MSA, is a contract signed by you and the other side should you reach an agreement through mediation. An MSA contains the contents of your agreement. You and the other side may specify that the terms of the MSA are confidential if both sides desire confidentiality.

MEDIATION CLAUSES

When people sign a contract, they rarely think about dispute resolution clauses. Disputes are usually far from the parties' thoughts as they focus on future business relationships and success. Often, professional advisers are responsible for designing dispute resolution clauses that will be appropriate in case of future disagreements. These clauses are popular in joint venture agreements; construction, commercial, financing, and franchising contracts; and intellectual property transactions.

A mediation clause is a dispute resolution clause that refers the dispute specifically to mediation. A mediation clause may be a standalone clause or it may be part of a larger dispute resolution clause that includes different processes. Mediation clauses can incorporate the rules of a mediation institution or they can be designed by you and your lawyers to suit your specific needs. Using a mediation clause that incorporates a set of institutional mediation rules has a number of advantages: It in simplifies the drafting of the clause and you receive a set of rules that have been tried and tested. At the same time, there may be limitations to using institutional rules, as they may not suit your specific needs. However, institutional rules usually leave room for the parties to adjust them to suit their needs. You will need to decide whether it is more cost-effective for you to design your own clause or to search for one that suits you.

Mediation clauses also carry moral and commercial force. The existence of a mediation clause in a business contract can focus people's minds on sorting out their differences in an amicable way. In places where initiating mediation may be viewed as a sign of weakness by the other side, the insertion of a mediation clause in a contract may be a useful strategy to remove the need for one party to suggest mediation after a dispute has arisen. Research shows that at the mediation table, skilled mediators can guide even the most reluctant participants to recognize opportunities for resolution.

WHAT TO DO

You should consider several important issues when drafting a mediation clause. The following sections contain points that may be useful. Remember that you can tailor the clause to suit your particular contract or relationship. However, to avoid confusion or disagreements in case of a future dispute, the mediation clause should be clear and complete.

Make it clear that mediation will be attempted before litigation

The clause should state that if a dispute arises you and the other side will try mediation before going to court. It is important to require mediation as a prerequisite to court proceedings or arbitration and to allow for the possibility of court action or arbitration if mediation does not result in a mediated settlement agreement.

Consider the scope of disputes to be covered

The clause should clearly define which kind of disputes it will cover. It should be broad enough to apply to any sort of dispute that is somehow connected with the original transactional contract. For example, the mediation clause may define "dispute" as any dispute, difference, or question arising from or in connection with the agreement or its formation. This definition is broad enough to ensure that the mediation clause covers any kind of dispute arising between you and the other side, provided it has some link to the original commercial or other agreement between you and the other side.

Consider a multitiered dispute resolution clause

The clause may outline several steps for dealing with a possible dispute. Such a clause is called a multitiered dispute resolution (MDR) clause. For example, the first tier may start with a simple requirement for one side to notify the other of a problem. The next tier could be a meeting between

you and the other side to discuss the problem and to try negotiation. The following tier could be mediation between you and the other side. The final tier in the clause could be a determinative alternative dispute resolution (ADR) process such as arbitration. In such cases, if you and the other side cannot reach an agreement at mediation, the dispute would go to arbitration, where an independent third person called the arbitrator would hear arguments for both sides and issue a binding decision.

For further information that may help you structure a multitiered dispute resolution process and clause, see the sections "Conflict management in projects" and "Conflict management design principles" in chapter 1.

Set time frames

The clause should contain specific time frames for performing various elements of the mediation or MDR process such as notice of a dispute, appointment of mediation, and conduct of the mediation. For example, a clause could state that if a dispute arises, a disputant must notify the other side within seven days and the other side must respond within seven days. Time frames will also be set for the conduct of the mediation as explained in the section "Decide how to initiate mediation" later in this chapter.

Choose a mediator or a method for choosing the mediator

The clause should either specify the mediator that you and the other side would use or establish the method of choosing the mediator. The clause must specify how a mediator is to be appointed if you and the other side cannot agree on someone. For example, the clause may state that if you and the other side cannot agree on a mediator, then the president of the local dispute resolution institute or bar association has the power to appoint a mediator. This solution is called a default appointment mechanism.

Decide how costs will be allocated and paid

The clause should outline who will pay for the mediation. The standard practice is for each side to cover 50 percent of the costs, but you might change this depending on the financial capacity of each side in the agreement. The clause does not need to specify the exact costs of the mediator because the clause may be written years before a dispute arises.

Decide how to initiate mediation

The clause should outline how and when the mediation process can be initiated. As noted previously in the section "Consider a multitiered dispute resolution clause," there could be several levels of dispute resolution processes, each with specific time frames. For example, the clause might state that mediation must take place within 45 days of the exchange of certain notices between you and the other side; alternatively, the clause might state that mediation must take place within 30 days of the appointment of a mediator.

Include a description of the mediation process

The clause should outline the mediation process to be followed. The process must be described in sufficient clarity that it can be recognized as a mediation process and can be distinguished from negotiation, conciliation, and arbitration. For this reason, many such clauses incorporate the mediation rules or guidelines of a mediation service provider. This alternative enables the mediation clause to remain fairly short while still incorporating the detail necessary to describe the mediation process. For example, instead of explaining the entire mediation process, the American Arbitration Association Mediation Clause refers to the Commercial Mediation Procedures as follows:

"If a dispute arises out of or relates to this contract, or its breach, and if the dispute cannot be settled through negotiation, the disputants agree first to try in good faith to settle the dispute by mediation

administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure."[1]

Decide how to manage disputes about procedural issues

The clause should also deal with the possibility that you and the other side may disagree about certain procedural issues. When drafting each point of the mediation clause, keep in mind the possibility of disagreement and ensure that a reliable option is available to resolve such disagreements. As explained in the previous section, "Choose a mediator or a method for choosing a mediator," the clause may provide that in the event you and the other side cannot agree on which mediator to use, a mediator will be appointed by a nominated mediation service provider or other mutually accepted entity.

Ensure all relevant people sign the mediation clause

The mediation clause is part of a business or other agreement between you and another person or organization. Therefore, both of you will sign the overall agreement and be bound by the mediation clause. It's important to remember that if you have a dispute with a different person who is not a party to the overall agreement, the mediation clause will not bind the other person. For example, if you enter into a business arrangement with person A to establish a furniture business and your business contract contains a mediation clause, then the mediation clause will apply only to disputes you have with person A. If you have a dispute with person B about the delivery of books to the furniture business, the mediation clause will not extend to that dispute because person B did not sign the original contract and is not bound by the clause.

Identify the location of mediation

When you and the other side live or work in different countries, the location for a potential mediation becomes important. In such a case, the clause should specify where mediation would take place, ideally a venue that is suitable for all participants. If it doesn't specify a location, the clause can specify how the disputants would choose the location. In determining the location, each side should consider geographical convenience, travel costs, and time differences.

Choose the language

In the event that more than one language is used in your relationship with the other side, it is important to specify in what language the mediation would be conducted. If necessary, you can also include wording about the use of interpreters during mediation and the associated costs.

Identify the applicable law

The clause may list any laws that might be relevant to the mediation. This is particularly important when you and the other side live in different countries because those countries will have different laws. For example, if you live in Cairo and your business partner lives in Beirut, then you will need to agree what country's law will apply should you both have a dispute in the future. It might be Egyptian law or Lebanese law, but it could also be the law of another country such as England or France. Your legal adviser will be able to recommend the law most suitable for your circumstances.

WHAT NOT TO DO

The section "What to do" outlines the issues that are important to remember when drafting a mediation clause. This section reinforces some of those issues by listing the things you should *not* do when drafting the clause.

Do not try to exclude litigation

Although the mediation clause can compel you to try mediation before going to court, it must not exclude the possibility of litigation. If a mediation clause purports to do this, it may be held to be invalid and unenforceable by a court.

Do not just refer to "mediation" in your clause

Given the flexibility and the newness of the mediation process, a mere reference to mediation in a dispute resolution clause without a process description does not provide sufficient procedural clarity. The clearer the process description in the clause, the less room for misunderstandings about what you and the other side can expect at the mediation table. Moreover, procedural clarity will distinguish mediation from other ADR processes (see chapter 1, "How to Manage and Control Disputes: Alternative Dispute Resolution"). For these reasons, your clause should incorporate the mediation process of an established mediation service provider or alternatively set out the basic structure of the mediation process. For example, in Egypt, both the Cairo Regional Centre for International Commercial Arbitration and the Investors' Dispute Settlement Center under the General Authority for Investment and Free Zones set out a mediation process in their respective mediation rules.

AGREEMENTS TO MEDIATE

Although contracts include mediation clauses to trigger mediation if a dispute arises between you and the other side in the future, agreements to mediate become relevant once a specific dispute has arisen, regardless of whether or not you and the other side have signed a mediation clause. They lay the foundations for the mediation process and the relationships among mediation participants. Agreements to mediate aim to clarify the relationship between you, the other side, and the mediator, as well as your rights and obligations in relation to each other and in relation to your specific dispute. Agreements to mediate establish the mediator's authority and the roles and responsibilities of all participants in the mediation process. Subject to institutional rules to the contrary, an agreement to mediate will usually be signed by the participants in a mediation, namely you, the other side, the mediator, and your professional advisers.

WHAT TO DO

This section outlines the types of matters that may be the subject of an agreement to mediate. The previous discussion of mediation clauses addressed similar information, so this section is more compact. Agreements to mediate can typically include the following items:

- The place of mediation (in what jurisdiction the mediation will take place)
- The participants in the mediation (who will attend the mediation)
- Authority to settle at the mediation and the extent to which participants have legal authority to make decisions to resolve the dispute at mediation (particularly relevant in relation to corporations with representatives attending mediation)
- Mediator selection process and qualifications (addressed in the section "Choose a mediator or a method for choosing a mediator")
- The scope of the mediation (addressed in the section "Consider the scope of disputes to be covered")
- The conduct of the mediation, including forms of communication, documentation, and recording, and representation of the participants
- Professional fees of the mediator and who will pay them
- Other charges in relation to the mediation (for example, venue and who will pay for it)
- A statement of principles of the mediation, which may include fair treatment (procedural fairness), autonomy of participants, confidentiality, voluntariness, speed, and minimal cost principles
- A description of the mediation process, including preliminary meetings, mediation meetings, and postsettlement sessions (as in the description in the section "Include a description of the mediation process")
- Time frames for the mediation (as in the sections "Set time frames" and "Decide how to initiate mediation")

- The legal status of agreements or other outcomes resulting from the mediation (for example, whether an agreement takes the form of an ordinary contract or a consent arbitral award)
- Roles and responsibilities of participants in the mediation, including mediator(s), participants, legal or other representatives, experts, interpreters, witnesses, supporters, and observers
- Good faith participation (requiring that all participants commit to engage in mediation in a genuine and honest way with a view to trying to resolve the dispute)
- Ethical obligations of mediators, such as fairness, impartiality, and managing power imbalances
- Ethical obligations of lawyers and other professionals involved (such as your lawyer is obliged to prepare you for mediation and to advise you in relation to offers made by the other side and to explain the details and consequences of any agreement reached)
- Statement of who can terminate the mediation and how, such as a requirement that you issue a notice of termination of the mediation in writing rather than just saying verbally that you wish to terminate the mediation (Usually the mediator and each of the parties have the power to terminate the mediation.)
- The relationship of mediation to parallel procedures, such as the ability to file court proceedings or conduct arbitration while mediation is continuing and the impact of prefiling mediation on court and other limitation periods
- Description of transitions from one process phase to another and how these should proceed, for multitiered dispute resolution procedures that involve processes such as arbitration (possibly including guidelines about confidentiality between process phases and the extent to which information revealed in one phase can be used in another)
- Relationship between mediators and arbitrators or judges who may deal with the dispute subsequently (For example, an agreement to mediate may allow a mediator to arbitrate the dispute if no agreement is reached in mediation. Conversely, the agreement may prevent the mediator from having anything to do with the dispute in future processes if no agreement is reached in mediation.)

Mediation processes may vary according to how each of the factors is managed. It is therefore important to address each of these factors in the agreement to mediate. A well-prepared agreement, which has been explained to all parties taking part in the mediation, will help to manage expectations about the purpose of the process and the roles and responsibilities of participants. It will also minimize the risk of disputes arising during the mediation process itself.

WHAT NOT TO DO

Like mediation clauses, agreements to mediate are contractual instruments. Therefore, it is useful to keep in mind that the "what not to do" tips relevant to mediation clauses apply to agreements to mediate as well.

In addition, when drafting the agreement, keep the following in mind:

- Don't get lazy and think that an oral agreement to mediate will suffice. Put it in writing.
- Don't forget to read through the agreement to mediate and ensure you understand all of its terms. Ask the mediator if you do not understand something.
- If you are a professional adviser, don't forget to explain to your client the meaning of the terms of the agreement to mediate and the consequences of a breach of the agreement.
- Don't forget to get participants to sign. The agreement to mediate is signed by the mediator, the parties, their advisers, and others who will be present throughout the mediation.
- Don't let people come into parts of the mediation without signing a confidentiality agreement (for example, experts or observers might attend only a small part of the mediation).

MEDIATED SETTLEMENT AGREEMENTS

A mediated settlement agreement (MSA) is an agreement that you may reach during your mediation. It may contain an understanding that you or the other side will do something. It may list issues about which you and the other side agree. It also may list issues about which you and the other side disagree. This section will discuss several important points to remember when drafting an MSA.

Most MSAs take the form of a legally binding contract, which you and the other side are able to enforce in court. However, the legal nature of MSAs can vary. In some countries, you and the other side may submit your MSA to a court and the court will give your MSA the status of a court order. In other circumstances, your MSA may take the form of a consent arbitral award. For further information, refer to chapter 1, "How to Manage and Control Disputes: Alternative Dispute Resolution."

It is also possible that you and the other side may choose to prepare your MSA in a nonbinding form such as a statement of intention or a memorandum of understanding. These documents indicate the joint intention of you and the other side and provide a useful record. However, you cannot enforce such a document in a court of law. Memoranda of understanding can be useful when certain obligations may not be recognized by contract law. For example, they may relate to your or the other side's intention to agree to do something in the future; alternatively, they may relate to your or the other side's behavior in the workplace.

For the stated reasons, it is important to be clear whether you and the other side want the outcome to be legally binding and what will happen if someone does not fulfill an obligation of the agreement. The potentially legal nature of the MSA means that you and the other side should consider asking a lawyer to check all the terms and to explain your rights and responsibilities contained in the MSA. You will need to decide what sort of legal status you want your MSA to have.

If you are not able to resolve your dispute in the mediation session, you could still make an interim agreement with the other side to do something or not to do something before the next mediation or before the dispute proceeds to a different process. For example, if you are involved in a business partnership dispute, you may agree to postpone an application to dissolve the partnership for an agreed time period. In addition, pending the resolution of the dispute, you and the other side may agree on certain communication and decision-making protocols to keep the business turning over in a peaceful way. Further, you may agree on a joint statement to clients, shareholders, or the public during the interim period. In addition, you may ask the mediator to draw up a memorandum of the mediation session that might include the following:

- A summary of the issues that have been discussed in mediation
- A list of the options for resolution that were discussed at mediation
- A clause that the memorandum is confidential and cannot be used in any way in any other proceedings
- A time frame for reflection and an opportunity to resume the mediation at a later date

WHAT TO DO

This section discusses the main issues for you to consider when drafting an MSA. Particular issues may be relevant to the content of your dispute and your MSA. If you are unsure about what to include, what not to include, and what wording to use, consult with your professional adviser before signing the agreement.

Record the terms of the mediated settlement agreement

You and the other side will need to decide how the agreement will be recorded. The most common method is to record the agreement in writing.

Even if your dispute is not complicated and you feel that it has been amicably resolved, it is still a good idea to write down even a simple agreement. Circumstances may change in the future, and you would be wise to have a written agreement to rely on rather than depending on the differing recollections of you and the other side.

Decide who will draft the mediated settlement agreement

It is the mediator's role to help you and the other side reach an agreement. The mediator will test the practicality of the options under consideration and ask questions to identify any potential gaps. In addition, the mediator may record, upon your joint request, the main points of agreement between you and the other side. Although you and the other side may sign this document as evidence of your intention and good faith, this is a summary document, which is not legally binding. The mediator will generally not draft the MSA document because drafting the legally binding terms of an MSA may compromise the mediator's impartiality. It is up to you with the assistance of your professional advisers to draft the detailed terms of your MSA.

If you have any doubts about your rights and responsibilities in the agreement, especially if it is complex, get a professional adviser to review it. You can do this during the mediation session or ask to schedule another session to give you time to seek advice.

Decide on the legal status of the mediated settlement agreement

You and the other side will need to decide if your agreement is to be legally binding and enforceable, or not.

Sometimes you and the other side may be content for an MSA to take a nonlegally binding form such as a memorandum of understanding (MOU). An MOU is like a statement of intention. It is a document that clearly records in writing your joint intention, but it is not a document that can be enforced in a court. An MOU might be useful in a workplace or other dispute in which certain terms of the agreement (for example, in relation to behavior in the workplace) would be too diffuse for a court to enforce. In these circumstances, it can be very helpful to have a signed document that you and the other side can refer to in the future.

An MSA will often take the form of a legal contract. When an MSA is a legal contract, you or the other side can go to court if you disagree about compliance. Taking an MSA to court is an exceptional situation, as most times people who reach an agreement in mediation comply with its terms. At the same time, you may feel "safer" if your MSA is in a legally enforceable form.

In some countries, a special type of contract called a notarized settlement deed requires the lawyers to sign off on the document as well. This addition may effectively provide the MSA with a more straightforward and even expedited pathway to enforcement. Check what the laws in your country and the other side's country state about this option, as the laws vary considerably.

In certain circumstances, your lawyer may advise that your MSA take the form of a consent arbitral award. Participants mainly use this option in relation to mediation of cross-border disputes because arbitral awards are generally easier than MSAs to enforce internationally. An MSA may also take the form of a consent arbitral award in the context of MDR processes such as *arb-med-arb*. An arb-med-arb process commences with the opening of an arbitration, moves into mediation, and concludes with arbitration either to record the MSA as a consent award or, in the event that no agreement is reached between you and the other side, to make a decision that is binding on both sides.

It may be possible to ask a court or a tribunal to make an official order on the basis of your written MSA, giving it an enhanced legal status in terms of enforceability. Sometimes a court or tribunal will offer a mediation service itself with the option to

make any resulting MSAs into court or tribunal orders. When a court endorses an MSA, it may first review its contents to ensure the MSA includes no breach of public order.

Whatever wording and legal format you use, it is crucial that the MSA clearly expresses the intention of you and the other side regarding what will happen if someone does not comply with its terms.

Ensure everyone involved is named in the agreement

The mediated settlement agreement should clearly state the names of the people making the agreement, as well as their legal capacity to sign the agreement. If someone is not available to sign the agreement or does not have the final authority to settle, it could cause problems later. When corporations are involved in the dispute, ensure that a person with the appropriate authority signs the MSA. Make sure that you clarify any issues related to identity and authority to ensure that the agreement will work after the mediation. In some circumstances there may be a requirement for the agreement to be witnessed. Generally, there is no requirement for the mediator or professionals to sign the MSA because they are not bound by it. Remember that only those who sign the MSA can be bound by its terms.

WHAT NOT TO DO

The previous section outlines the important issues to remember when drafting an MSA. This section reinforces some of those issues by listing the things you should *not* do when drafting such an agreement.

Do not forget to discuss the legal status of a mediated outcome in preliminary meetings with the mediator

In preliminary meetings with the mediator, do not forget to discuss the legal status of the outcome of mediation. This is part of your goal as it reflects your intention to be legally bound (or not) by the outcome of mediation. Moreover, the form may affect content. For example, the terms of a memorandum of understanding may be more flexible than the terms of a legal contract. When mediators understand what sort of outcome in terms of content (interests) and form (legal status) you seek, they are in a better position to ensure thorough reality testing of options and alternatives.

Do not include unenforceable terms in the mediated settlement agreement

Do not include in the MSA any terms that cannot be enforced. The nature of the legal status of the MSA will determine what terms are appropriate to include in the agreement. For example, provisions about workplace behavior such as "will improve communication skills" or "contribute to a friendly work atmosphere" or even instructions that one partner say good morning to the other on a regular basis may not be enforceable in an ordinary contractual document because they arguably lack certainty and are too vague.

Do not forget that only people who sign the agreement are bound by it

Make sure you have the signatures of everyone to be bound by the agreement. If the other side promises in the MSA that someone else who is not a signatory to the MSA will pay you money, you cannot demand that money from the designated person. Why not? Because that person has not signed the MSA and therefore he or she is not bound by it.

NOTES

1. American Arbitration Association, "A Guide to Commercial Mediation and Arbitration for Business People," American Arbitration Association, New York, 2013, 12, https://www.adr.org/aaa/ShowPDF?doc=ADRSTAGE2019455.

WORLD BANK GROUP

IFC International Finance Corporation