Handbook - Advanced Training on Commercial Mediation

Center for Alternative Dispute Resolution

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The development of this Handbook was coordinated by Yulia Shapovalova, Counsel, EBRD LTT and Vitalii Svitovyi, Associate, EBRD LTT. The Training Module was prepared by experts Gordana Ristin, Judge of the Appellate Court Ljubljana, Slovenia and Zoran Hajtnik, lawyer, mediator, Ljubljana, Slovenia and with support of the IDLO Project Team, Ljubomir Petruljeskov, Program Lead, IDLO and Ana Bukilic, Program Consultant, IDLO.

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European Bank of Reconstruction and Development
One Exchange Square, London EC2A 2JN, United Kingdom
Telephone: +44 207 338 6783
Email: BradautV@ebrd.com

International Development Law Organization (IDLO)
Viale Vaticano, 106, Rome, Italy
Telephone: +39 06 40403200
Email: lpetruljeskov@idlo.int

Gordana Ristin, M.Sc.

Zoran Hajtnik, M.Sc.

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MEDIATION IN COMMERCIAL DISPUTES - ADVANCED TRAINING

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1. Mediation in Commercial Disputes

Mediation in commercial disputes is neither a special form of mediation, nor a type of mediation that would require special approaches differentiating from other types of mediation (if they are divided pursuant to disputes that are resolved through mediation). However, having in mind there are some important features of these types of disputes, as well as key misconceptions, issues of importance that the mediator should take into account when it comes to these types of disputes will be addressed.

Certain specifics of these disputes in mediation can be categorized into the following manner:

- Specifics concerning the parties;
- Specifics concerning the application of some techniques;
- Specifics concerning the work with lawyers.

2. Profitable Market Activity - Moderate Amounts

Business undertakings are establishing for the purpose of generating a profit on the market. Business undertakings are very seldom pursuing actions, that may be characterized as deviant ones, for generating profit in court benches. The vast majority of "regular" companies, on the other hand, make a profit by selling goods and services, perceiving litigation more or less as the return cost. As a rule, these companies are wasting time in disputes or business related to disputes (meetings with lawyers, associates involved in the dispute, review and preparation of dispute documents, preparation of invoices, reading applications ...) and would rather spend time and energy to improve sales, technical or technological development, education and other needs related to the core business. With reasonable amounts, it can be assumed that business undertakings, as a rule, will not be exhausted by the euro or two - at least not without reason. The parties like to point out that they are reluctant to going to court and that it is a complete loss for them. If there are no strong emotions in these disputes, the parties will, as a rule, try to find a solution on their own. Of course, there will be delays in mediation, and the mediator needs to use the techniques of overcoming the deadlock.

3. Massive Claims from Business without Long Lasting Relationships

On the other hand, there are certain types of disputes with business undertakings in which the potential gain or loss is so massive that the parties will not make concessions just for settling it. Typical examples are nonrecurring occasional transactions related to important equipment, financial investments, takeovers, bankruptcy disputes. There is a strong belief that most construction disputes also fall into this category (with the exception of purely debtor-creditor disputes). In these disputes, however, often, there is no purpose to explain to the parties the time and costs that are insignificant to them given the possible outcome of the litigation. For these parties, victory is more important than relationship, because they do not have it. The mediator should focus on objectification methods and decision-making methods (Decision Tree, Batna, Patna and Watna, etc.). When it comes to a bigger picture, business undertakings (even the largest corporations) are very indecisive and want to make optimal decisions. The job of mediators is to help them with available mediation techniques.

4. Conflicting Business Partners - Possible Business Cooperation

Disputes that are the most suitable for the resolution in the mediation process are conflicting business partners who have the potential or even a history of long lasting business cooperation. Both parties have a commercial interest in continuing their business cooperation, but certain historical opportunities, conflicts and insults prevent them from pursuing it. These examples are an evidence that the belief of some that there are no emotions in business and commercial disputes is completely wrong. In these disputes, however, it is important for the mediator to determine whether the current misunderstanding can be clarified by the parties determining that "there are no villain or bad persons", while presenting and upgrading the possibility of further cooperation.

The authors conducted mediation in a case in which they learned together with the parties that during the dispute, when they did not cooperate, they lost more profit from the disputed termination of business cooperation than the compensation claims of both parties. However, this finding was not enough because the parties did not want to cooperate with the unreliable other party. No one wants to enter a relationship if its troublesome! It is therefore important to achieve communication in which each party is willing to acknowledge to the other that its view of the dispute is to some extent understandable (validation).

The possibility of business cooperation is not only a solution between disputed business partners, but can sometimes be used as a solution to conflicts in mediation and non-contractual claims, infringements of intellectual property rights, neighbour disputes, real estate (e.g. preparing the basis for spatial documents), etc. Specifically, both sides serve in the business and that is the "cake increase", which is the antithesis of negotiations on distribution by the "win – lose" method. If this option is feasible, then it is feasible in commercial disputes.

5. Competences and Decision Makers

In commercial disputes, the eternal problem of mediators is that persons who otherwise have formal competences, but are not holders of independent decisions, take part in the mediation procedure. Examples are the lawyers. These attorneys consult on several occasions with their managements or decision-makers delegated by them, which has at least two significant shortcomings: the first is a waste of time due to obtaining consent (which is necessarily associated with postponing mediation meetings), and the second is a waste of time of obtaining consent from one person (decision-maker), who is deprived of his/her direct perception of all (including non-verbal) messages exchanged in meetings and therefore keeps his/her distance from the disputed matter and the people negotiating in mediation, which means less willingness to understand the needs and interests of the other party. This, of course, deters from a possible solution to the dispute.

The mediator is advised to call the decision maker and explain the importance of his/her presence at the meeting - if s/he is very busy (which is usually true), s/he should only attend the key, last meeting, which will be adjusted to his/her schedule. It is advised to pursue tightening and conditioning: if one decision-maker is present, the decision-maker of the other party should also be present. If mediation is conducted without a decision-maker, then the whole mediation is exposed to the risk that the party without a decision-maker will only be a technical transmitter of information. It is very difficult to negotiate with someone who is not present. In this way of conditioning, mediator brings the other party into an inconvenience that they have to resolve: if the dispute is to be resolved properly, the other party will make sure that its decision-maker is present at the meeting. And vice versa: if one party only wants ritual behaviour (i.e. mediation without a decision maker), the mediator can suggest to the first party to equalize the opposition and that both parties then only pass information and take time to think and obtain the views of the decision maker. Even sometimes these “ultimatums” are imposed by the party that came to mediate with the decision-maker - in this way it helps the mediator to maintain objective attitudes and neutrality, not to put pressure on one party. If the mediator conveys the other party’s request, s/he cannot be accused of anything, and it quickly becomes clear whether the other party has honest intentions to seek an amicable settlement of the dispute. Of course, it should be explicitly emphasized that this is a special feature of commercial disputes and that in labour disputes, as a rule,

the employee will not achieve anything if s/he is conditioning that s/he negotiates directly with the president of the employer.

6. Media Image and Public Communication

Some business undertakings are strongly connected to the public and caring for proper public relations is one of their main concerns. Mediation is a great forum to resolve conflicts because of the confidentiality of the proceedings, precisely because the public, which can be present at any public hearing, does not have unconditional insight into the circumstances of the dispute and what is happening in the dispute. Specifically, it can be noticed that the media are paying more and more attention to events in the judiciary or into specific cases. Journalists review publicly announced hearing schedules and follow them if they assess that a case might be of public interest. The tabloids are particularly in the lead, and even the more serious commercial media are not immune to that. Of course, mediation requires confidentiality of the proceedings, and the parties must agree on whether and how to communicate with the public together. The practice has created the best solution according to which the mediator submits to the media previously agreed press statements that are appropriately "empty" content wise and optimistic.

7. Culpability in Commercial Disputes

Compared to the previous item (media), culpability can also play an important role in disputes. If a commercial entity is reliant upon a good image and good communication, proven culpability in court proceedings can cause huge or even irreparable business damage to it. No one wants to buy a vehicle that is known to have a brake or engine failure as standard. As it is established in general rules, skills and techniques, it is also extremely important in commercial disputes to approach the issue of culpability with extreme caution and avoid it as much as possible. As a rule, for a party with active legal standing (plaintiff), it will be less important to either receive compensation or achieve the same amount with another business, while a party with passive legal standing (defendant), it may be crucial not to be linked to culpability in a specific event.

8. The Problem of Public Entities and Companies in their Predominant Ownership

Mediators know that a mediation with public entities (state and local communities, especially larger ones) and companies, institutions and other organizations that are (predominantly) in their or public ownership is a huge mediation challenge. There are several reasons why mediations are more difficult and on average less successful:

- The gap between the Trustee and the decision-maker: when the state is in the process of mediation, it is clear how rigid and inflexible the system of obtaining consent or attitudes that state attorneys must obtain from line ministries and other bodies within ministries is. This is not only time inefficient, but mediation takes place especially far from decision-makers, who are, of course, conceptually deprived of direct experience from the dynamics and process of mediation;
- The issue of accountability is very much related to this. Legal entities and politicians are happy to delay making unpleasant decisions for the "next term", although this may lead to greater damage. Although it is very easy to point the finger, as it is not the best for society, it is still not

impossible to understand that public functionaries have opposing interests. Their exposure to public criticism and various forms of responsibility is huge. They are accountable with their function, they respond to public criticism (media), they respond under the threat of criminal and other actions. And they need to make decisions for themselves based on risk analysis. And if it turns out that the least risk for them personally is to seek a court decision, instead of reaching an agreement mediators should accept this and look for solutions that would be acceptable for the interests that these persons are protecting.

- The mediator must pay special attention to the principle of legality. The final settlement will of course not be confidential and will be available to the public.

9. Creativity in Commercial Mediations

In commercial disputes, the possibility of creative dispute resolution is the largest and widest. Compensation can be only achieved through future business, financial resources are less limited in the commerce than elsewhere, and in addition it is about the entities that have vast of knowledge and acquaintances. Therefore, according to the personal belief of the author, mediation in commercial disputes is a creative challenge. Mediation in commercial disputes gives the parties the greatest autonomy in resolving disputes. It provides parties with a complete solution to their existing problems and gives the opportunity to transform the business relationship.

The aim of a party in mediation is to reach an agreement that is:

- Fulfilling his/her interests;
- Good to him/her, acceptable to the other party;
- Effective;
- Legitimate;
- Sustainable in the future;
- Better than his/her Batna.

10. Emotions in Commercial Disputes

It is not uncommon for mediators (or judges, for example) to believe that emotions are a "problem" of individuals, while commercial disputes should be purely rational and emotionally unencumbered. When about it comes to the conflicting business partners, it was already mentioned that this is a stereotype that certainly cannot withstand a more serious analysis.

It is necessary to be aware that people equate their work with the idea of themselves. It starts from a bad awareness that essence and action are not one and the same. But what is a dispute over one's own house (real estate) other than a dispute over the rewards of one's work (or the work of one's parents or ancestors)? The same is felt by the manager, who in, let's assume, within three terms of his/her term of office and his team led the company, which was on the verge of bankruptcy, to significant business success. This manager will defend this company with all his/her available capacities and, of course, his/her emotions. The manager will not only defend himself/herself and his/her work, s/he will defend his/her colleagues, their social security, their suppliers and their customers. A very wide social network is developing in business, which has its rights, benefits as well as its debts and obligations. Simplifying that it can be done without emotions is gullible and, above all, wrong.

It is not uncommon for the parties in commercial mediation to agree on the substance of the dispute and get stuck on the issue of costs, with one seeking compensation and the other counting on the usual solution for each party to bear its own costs. Is it possible that such (and similar requests) have grounds to think that someone is "to be blamed" of the dispute? Does a sense of justice then have a place in these attitudes and so on, is this feeling associated with emotions such as anger, disappointment, revenge?

In the light of the above, it is very important that the mediator carefully monitors the parties from the beginning of the proceedings and tries to determine how emotionally involved the parties are in the conflict. Managing emotions in commercial disputes is no different from other mediation practices, but they need to be made aware, because we are sometimes misled by the stereotype that emotions are not present in business. In addition, it is possible that experienced businessmen behave nicely to deny and hide emotions because they consider it inappropriate, and the mediator can be misled by such a formal appearance.

In particular, there are three types of tensions that emerge during legal negotiations:

- The tension between value creation and value distribution;
- The tension between the ability to understand another in his/her emotion (empathy) and unyielding; and
- Tension between the parties and legal representatives (lawyers).

11. TECHNIQUES

Zero-sum Delusion

In the game and economic theory, a zero-sum game is a mathematical representation of a situation where one person's gain would be another's loss. If the total profits of the players are added and subtracted the total losses, they are added to zero. Thus, cutting a cake where taking over an important part reduces the amount of cake available to others, as much as increasing the amount available to that recipient, is played with zero amount. The delusion is that mediation is a zero-sum game.

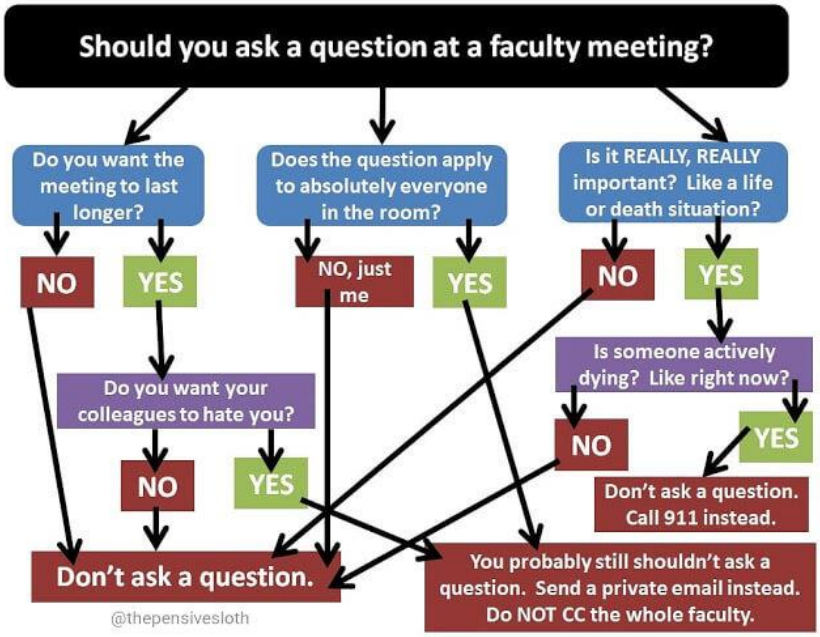
Attention! If we move away from distribution negotiations, the delusion is even greater (e.g. conflict resolution through future cooperation).

The Value Pyramid

The Value Pyramid, as the concept is named, categorizes the elements of value into the levels of pyramid, providing the values and those that offer more subjective value are at a higher level.

The Decision Tree

A decision tree is a decision support tool that uses a tree-like model of decisions and their possible consequences, including chance event outcomes, resource costs, and utility. It is one way to display an algorithm that only contains conditional control statements.



Four Types of Negotiators

The famous Thomas - Kilmann model enables the identification of basic types of negotiators based on two dimensions when choosing the course of action in a conflict situation, namely assertiveness and cooperation. Assertiveness is the degree to which you try to satisfy your needs. Cooperation is the degree to which you try to satisfy the other person's worries and you are attentive to the relationship. When this is done in a table, we get 22 basic types of negotiators.

12. Working with lawyers in commercial disputes

The party has chosen a lawyer tailored to its needs. In a conflict between a lawyer and a mediator, the party always chooses a lawyer.

A mediator needs to build a good working relationship with a lawyer. Mediator's profession is important for building a good relationship, whether s/he is a judge, lawyer, psychologist…

However, there may be tensions between the party and the lawyer, because the interests of the party and the lawyer are not always identical.

A lawyer should receive the following: a recognition for his work, support of the parties and to always maintain faith in the expertise of the lawyer.

13. Mediation clause in commercial disputes

Mediators, and society as such, often wonder how to contribute to the development of mediation. The most accurate answer is that there will be the majority of mediation when the subjects of conflict seek a solution to their conflicts in mediation, but with that answer we do not get many operational ideas on how to stimulate the need of these entities. One operational idea is certainly the mediation clause. It is an article in the agreement, by which the parties agree that all open issues (conflicts, disagreements) will be resolved in the mediation procedure, as defined by the Montenegrin Law on Alternative Dispute Resolution.

Legal transactions in which physical persons participate are, as a rule, oral or subject to general contractual requirements, thus the physical persons have practically no influence on the content of the contract they execute. In contrast, in business transactions much of the business is contracted, or at least consolidated in the form of written contracts. This is especially true for more permanent business relationships, when the parties enter into agreements at the beginning of the joint business or its subsequent period, for example business cooperation agreements.

Parties and their lawyers should think intensively on how to resolve a dispute if direct negotiations fail. It used to be fashionable to write arbitration clauses in contracts, which would later prevent the parties to initiate arbitration proceedings. Nowadays, these clauses are mostly waived, and the parties mostly agree on the final jurisdiction of the court. Since the analysis of the benefits that each of the different forms of dispute resolution could bring outweighed the purpose of presenting the specifics of mediation in commercial disputes, here are some benefits that would be yielded by the use of mediation clauses and consequently the dispute resolution in mediation:

- It should be emphasized to the parties that mediation is a legally favourable way of resolving a dispute, as it requires the party to use the clause of the envisaged mediation procedure. Furthermore, the statute of limitations does not run until the mediation procedure is completed, and some other deadlines do not expire (depending on national regulations). The party therefore is not missing the opportunity to pursue its interests later in the proceedings;
- The relationship with the other party is maintained, because filing a complaint is a socially undesirable behaviour that people perceive as a kind of "attack" and significantly disrupts communication and the relationship or even interrupts business cooperation. During the mediation, however, the parties themselves continue to agree on dispute resolution, which means that they control whether and under what conditions the dispute will be resolved. The parties therefore do not risk an inappropriate decision imposed by a third party (arbitrator or judge). In this way, they retain the possibility of resolving the conflict in a "win-win" manner.
- Timely and cost-effective method, as mediations are relatively cheap, lawyers are not (yet) needed, and mediations are usually resolved within three months, which is much faster than any arbitration, let alone court proceedings.
- It is always possible to try first through mediation and later through a more coercive decision (court or arbitration), while the reverse is rarely possible. As a rule, the party that succeeds in the procedure with a final judgment is no longer willing to negotiate.
- A way of resolving a conflict that is hidden from the public, where the public is informed about the dispute and its circumstances only to the extent that the parties wish to inform.

If people were aware of the benefits of mediation and incorporate clauses in contracts, then they should first conduct mediation before litigation, which would mean spreading the practice of mediation.

Mediators can therefore persuade fellow lawyers, their chambers, commercial lawyers and managers, to put a mediation clause in their contract templates.

The belief is that the main obstacle is that mediation clauses are relatively rare, especially because of the poor knowledge of the benefits of the mediation process. Most business undertakings have not yet participated in mediation; some have not even heard of it. Another obstacle is that the use of mediation in the transaction phase (i.e. the record of mediation clauses) is simply not yet established and that lawyers probably do not even remember. Of course, it is possible that some people think that mediation in a given business is an inappropriate way to resolve conflicts and do not consciously decide to include a mediation clause in the contract, but we believe that such examples are really very few, if any.

We are convinced that the trend of using mediation clauses will continue to grow and that over time, in very important relations, they will, as a rule, resort to this way of resolving conflicts, especially in business relations.

14. Other ways of promoting mediation

Mediation can be promoted in various other ways. Some examples are as follows:

a) PR support: in Slovenia it was noticed, and whenever there was talk in the media about the use of mediation, the number of consents for judicial mediation increased sharply. Therefore, it can be concluded that people are not aware of mediation as a form of dispute resolution and when they are reminded, some decide to do so;
b) Ongoing education: the more educated mediators there are, the greater is their influence and the wider the field of people who will receive exemplary advice on resolving conflict through mediation;
c) Events, reviews, workshops in institutions that are important for business undertakings, such as chambers of commerce, chambers of crafts, accounting associations and services, tax advisors, etc.;
d) Open access to groups in strong conflict situations: e.g. Bill Marsh;
e) Publishing activities: good practices, stories, experiences;

f) Teaching children in schools on Alternative Dispute Resolution (school mediation), to include ADR in various study programs;

g) Informal conversations.

Practical Exercises / examples

Exercise: Red - Blue

This exercise should be played for ten rounds.

The goal of the group is: to achieve the greatest possible positive result . So the more points, the better the score. It should be played in a way that one color should be chosen and played in each round: either red or blue. The result of each individual match (round) is scored as follows:

if the group A plays	if the group B plays	group A gets points	group B gets points
RED	**RED**	+3	+3
RED	**BLUE**	-6	+6
BLUE	**RED**	+6	-6
BLUE	**BLUE**	-3	-3

When you choose a color, write it in your table (below) and wait for your opponent to do the same. The group will not know what color the opposing team plays in the current round until both groups hand over the chosen color in that round to an independent person (coach, referee ...), who only informs them how each group played when receiving both choices. Then you exchange data with the opposing side (you and the opponent), achieve the result on the table and play the next round.

The exercise lasts 10 rounds. The last two rounds (9th and 10th) count double points (both positive and negative).

You start playing independently of the opponent (agreements for the first four rounds are not possible). Negotiations between opponents are allowed during the break after the 4th and 8th rounds, but not between other rounds. Negotiations should ne conducted (maximum 5 minutes) only if necessary if both groups request or agree to negotiate.

REMEMBER: the only goal of the exercise is for your group to achieve as many positive results as possible.

RESULTS

	we played (color)	**our result**		**they played (color)**	**their result**
Round 1					
Round 2					
Round 3					
Round 4					
MEDIUM OUTPUT					
Round 5					
Round 6					
Round 7					
Round 8					
MEDIUM OUTPUT					
Round 9					
Round 10					
IN TOTAL					

Scenario for Role Play

EXAMPLE: The parties agreed to mediation before filing a lawsuit

Parties in dispute: Veletrgovina DOO and Sport DOO

Johann Beck, Director of the Veletrgovina (39 years) and Novak Marković, Director of Sports (58 years)

In mediation without lawyers, although they are consulting with them.

Information for all:

Johann is the director of the company "Veletrgovina", which is a shop in the "Veletrgovina" chain from Germany. Johann is also the owner of a shop in Podgorica. It is a large space, so they partially rent it to other, smaller stores, which pay rent. Novak is the director of the "Sport" doo, which is a tenant in the premises of the "Veletrgovina". 5 years ago, they signed a contract for renting business premises for 10 years. Rent amounts to EUR 3,000.00 per month and other costs are EUR 300.00. The contract stated that Novak should get business space in the middle of the building. But he got a place in the end, where the frequency of customers is lower. But, because of that, it was agreed to have a billboard in front of the building (outside) and the possibility of selling goods at the stand.

They are in dispute, because Johann claims that Novak has not paid the rent for 5 months, and in addition he also owes expenses. The total debt is EUR 16,500.00. Johann turned off the electricity to Sport and demanded payment of the debt.

Novak claims that in the last 2 years, the circumstances have changed because of Korona, but also that they do not allow him to sell at the stand in front of the facility. He asked for a reduction of the costs of rent, and Johann did not even invite him for an interview, and through his lawyer, he informed him that his request was denied. He threatens to sue for termination of contract and eviction.

Task: prepare mediation.

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