"...strive to achieve the most cost effective resolution of the client's dispute."

Manon A. Schonewille

The "Pocket Toolkit Mediation Advocacy" is a practical booklet for every professional. This publication offers a quick "how-to" reference guide to manage the mediation process efficiently, in every stage of the mediation process. This practical pocketbook contains models and checklists from the "Toolkit Mediation for the mediator and negotiator", as well as an overview of the assignments of a lawyer representing his client in a mediation at each phase of the process; based on the "Toolkit Mediation Advocacy". It is completed with a cost-benefit analysis of a mediation process compared to litigation or arbitration.

The Pocket Toolkit Mediation Advocacy

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User manual:

The checklists together with the icons in the text support in quickly browsing through the chapters.

Overview of the icons

"Technical" application and explanation of an intervention, technique or method.

Hint.

Discussions on this issue/contradictory opinion.

Website for more information.
Introduction

Whether you like it or not, in the legal profession mediation is a fact of life. Will it be through international contracts, a proposal of the opponent, corporate policies, a desire from your client or a referral from the judge, in the future you will be confronted more often with the question: ‘Will I be using mediation in this case or not?’ So you have to be very well prepared.

There are many court connected mediation programmes and in some jurisdictions mediation is statutory. As a consequence, it would be wise for you as an advisor to consider in an earlier stage calling in a mediator or doing the negotiations yourself or to let your client negotiate. After all, the gain in terms of time and money will be larger for the client if the mediation has been tried out in an earlier stage. And if you are still opting for a legal solution, it is important having considered in advance why a different approach is not appropriate in this case.

In jurisprudence the first tendencies can be noticed that a party can be blamed for letting a conflict escalate unnecessarily, for example by refusing a mediation or a consultation.

Article 3.7.1 of the European CCBE code of conduct for lawyers states that “The lawyer should at all times strive to achieve the most cost effective resolution of the client’s dispute and should advise the client at appropriate stages as to the desirability of attempting a settlement and/or a reference to alternative dispute resolution.”

A mediation has other success and fail factors than a regular procedure. For instance it is important that the lawyers from both parties are cooperative during the mediation and the introductory phase. It is about how you can reach the best solution considering the future and the underlying interests. It is not about who is having the best (legal) arguments, or who has most power. From the beginning aiming for ‘the largest piece of the pie’ is not a good strategy in mediation or a negotiation. A better strategy would be looking for possibilities to 'enlarge the pie' so all parties can benefit.

So by definition mediation is not the same as compromising. Another important success factor is the client and lawyer who are teaming up with a clear division of roles. For a lawyer it would be sensible having a pragmatic approach for the mediation. As a result you can have a maximal influence and realise the best possible outcome.

Definition of Mediation and ADR

Mediation is part of an extrajudicial dispute resolution. It is a structured negotiating process for resolving a conflict guided by a neutral third party. The mediator does not impose a (legal) decision. The parties maintain control over the solution. The negotiating result is laid down in a settlement agreement, which is legally binding and enforceable.

Mediation

In the Toolkit we define mediation as assisted negotiation to resolve a dispute i.e. the addition of a neutral person to a problem solving negotiation. Through the neutral’s interventions, previous negotiation deadlocks between the parties can be addressed in order to find a solution to the disputed issues.

Some other mediators regard mediation more as a process to improve the communications and interactions between the parties or to clarify the respective perceptions and emotions.
Mediation can be functioning in several development stages of the conflict. It can be used as a management tool to prevent (escalation) a conflict or to conduct negotiations and so preventing disputes. Even if a dispute already has been brought to court or before an arbiter, mediation still can fulfill a role. Mediation is part of Alternative Dispute Resolution (ADR).

**Definition of Alternative Dispute Resolution (ADR)**

ADR is the generic term for dispute resolution methods where parties are having a far-reaching control to solve the dispute and also direct the ultimate solution. Unless parties expressly state they wish to do something else, the third party will not impose a binding decision.

Alternative dispute resolution methods have a long European tradition, for instance if they are executed as a binding advice. These more traditional methods initially received from the United States a new impulse by new developments like mediation.

Originally theories about mediation and mediation techniques have been developed based on contributions from the social sciences, management theories and organization theory. In social psychology and in business administration - for example with the help of game theory - a lot of research has been carried out to the arising and dealing with conflicts. From these new perspectives the approach of problem solving negotiating has arisen.

Meanwhile mediation has developed into an independent interdisciplinary domain with special requirements for the professionalism of the practitioners and with special techniques and theories. Mediation techniques are having wide-ranging applicability's, also outside a formal mediation. They can make a valuable contribution to the result of a negotiation or while communicating during the day-to-day work of a lawyer as well.
Suitability check

The following list can help to determine whether mediation is suitable for this kind of dispute and these particular parties. **The most important factors favoring mediation:**

- The parties want, in principle, to resolve their dispute.
- They are willing and able to negotiate about the conflict or at least they want to discuss it.
- The conflict is not escalated beyond reconciliation.

**Other factors favoring mediation**

- The parties want to end their dispute in a short time period.
- There is a long-term relationship and the continuation, or the thoughtful and considerate termination of the relationship, is important.
- Treatment issue or communication problems.
- The parties have a desire to reach a settlement themselves and on their own terms.
- A legal judgment does not or would not (totally) resolve the underlying conflict.
- Confidentiality or privacy is important.
- There are more than two parties involved in, or having a stake in, the dispute.
- The dispute concerns several claims/conflicts.
- The case concerns substantive technical and/or complex content issues or requires specialist knowledge.
- It is an international case (with unpredictable jurisdiction or enforcement issues).

**Factors challenging mediation as the right dispute resolution process**

- At least one party benefits significantly from delay and does not want to surface this interest during the mediation (hidden agenda).
- One of the parties is acting in bad faith.
  
  Please note that distrust (of the opponent) is not the same thing as bad faith. Often it is hard to be sure that a party in mediation is participating in good faith. This is especially so when parties have come to the mediation table at the request of a third party, such as a judge or the management of a company.
  
  When you doubt anyone’s motives for participation, you can ask the mediator to first explore in a joint session what the parties expect from the mediation. Next the mediator can address the issue in a caucus by asking questions about the commitment to and the expectation for the mediation. If there are strong indications that a party is not participating in good faith, the mediator (or you as a lawyer) can resort to confronting questions.
- There are no new developments and the same representatives have already tried mediation to solve this conflict at an earlier stage without a positive result.
- A precedent is needed (e.g. an explanation of the General Terms) or a principle of law needs to be established.
- A party is particularly concerned with publicly asserting or proving her own right (e.g. in order to send a wider message).
- A party is incapable of taking responsibility for decisions or is insufficiently able to represent or protect her own interests.
- There is an extreme imbalance of power and the stronger party is intent on exerting that power without compromise.
II. Process management, how to keep the mediation on track?

1. The phases and the structure of a mediation procedure

A mediation schematically passes through several phases which during the procedure can differ in length and sequence. So a classification in phases is not predetermined. Sometimes all phases are being completed during one mediation session, but sometimes only a few or even a single phase is being completed. Besides, during a mediation you often have to switch back to an earlier phase, for instance when during generating options emotions between parties are running high or when during reaching an agreement it appears not all interests are on the table.

- **Phase 0 Pre-mediation phase**
  Preparation, making agreements, a directional consultation.
  During the preparatory phase the advisor is playing an active role and so he can make a valuable contribution.

- **Phase 1 Opening phase**
  Introduction by the mediator, parties or their lawyer(s) make their opening statements and a first inventory of conflict matters.
  The role of the party advisor is becoming more encouraging instead of determining.

- **Phase 2 Exploration phase**
  An interchange regarding content between parties and an exploration of interests.
  In this phase the party advisor is primarily coaching his client and he will be acting as a sparring-partner for the mediator.

- **Phase 3 Option and negotiation phase**
  Generating options and developing objective criteria. Subsequently negotiating a solution and reaching an agreement. During generating options the party advisor can make a valuable contribution while playing a more active part in the mediation. Also during negotiations a party advisor can support his client in weighing the options.

- **Phase 4 Closing phase**
  Establishing agreements and finalizing. During finalizing the party advisor can fulfil an active role by taking care the agreements being made are univocal and agreed with the constituency.

- **Phase 5 Follow-up and implementation**

2. The role of the lawyer in a mediation

A jurist can be the initiator motivating the client to choose for mediation. When a client has become a party in the mediation, the jurist can be acting as his coach, preparing him for the mediation. As a lawyer you should be well aware of the dynamics of the many ways conflicts could develop and how the mediation procedures are being followed. During the exploration phase and while assessing the alternatives which could be presented during the mediation, you can make a valuable contribution in your role as a legal advisor. During the mediation it is very important to keep in mind that the mediator does not decide how the conflict is being resolved. Besides in mediation it is mainly about the interests of the parties and not about the legal rights and positions being held. Hereafter you will find a summary of general guidelines for a lawyer in a mediation, followed by the main factors for succeeding in a mediation and also the pitfalls. In the next chapters will be described, depending on the stage of the mediation process, how you can play your part and how to monitor effectively the mediation process in order to optimize the result for your client.
The role of the lawyer during the mediation in general

- The mediator is not deciding, so he has not to be convinced with (legal) arguments.
- The most important task is: taking care all interests are being considered and positions will be transformed in interests.
- The client is the mediation party; the lawyer will be acting as a coach or as an advisor.
- You can especially make a valuable contribution and participate actively in generating options.
- Take care you are part of the solution and you will not become part of the problem, so do everything you can to support your client bringing the mediation to a success through focussing on interests.
- The more you succeed in teaming up with your client and cooperating with the opponent, the more chances you have for success in a mediation.

3. Factors for success and failure in a mediation

The appropriateness for mediation can not only be established by personal characterizations or the factual characteristics of a case (factors disfavouring mediation, see part I. Research is showing that the main factors for success in a mediation are that parties: are willing to look for a solution of their conflict and being prepared to negotiate. Besides it is crucial to select a mediator with the right characteristics and experience.

A big advantage of a mediation is that all parties can jointly participate in one session. It is not necessary to start up a separate process with each party. At the same time the sheer number of parties seems to make it more difficult reaching a solution, however not impossible. More parties also implies more points of view and more options to generate which can contribute to each a solution. The pass rate of multi-party mediations is lower as opposed to conflicts with only two parties.

3.1 Key factors for success in mediation

- Parties want to solve the conflict.
- Parties are prepared to negotiate about a solution and they are having negotiating space.
- Selection of the right mediator.
- Being well prepared yourself, having a pragmatic approach and keeping in mind a clear strategy about how to tackle the mediation.
- Adequate factual knowledge and a realistic approach of the strengths and weaknesses of a case.
- A good preparation of the client.
- Client and lawyer can team up with a good division of roles and clear arrangements.
- Paying attention to the opening statement.
- Being familiar with the real interests of the client (and having thought about the possible interests of the opponent) and let them be a part of the mediation process, if necessary in a caucus. It is about how to reach the best solution considering the future and the underlying interests. It is not about having the
3.2 Key factors for failure in mediation

- Not being prepared, without an overall plan.
- Having not prepared the client.
- A lack of factual knowledge with yourself or your client.
- Having no clear agreement about the division of roles, not teaming up with your client.
- Not wanting or being able to cooperate.
- A too small space to negotiate or a restricted mandate.
- Having no thought for the necessity of an internal legitimization and consultation with the constituency.
- Not being well represented or incompatible participants. Together with your client you will have to identify the issues and assess on which level solutions can be found. Here the right participants should join in, so top management if a strategic approach is required or the management who is directly involved when a solution for a specific project is required. Both sides of the table require the same number of participants with a comparable status and/or impact.
- Making an aggressive opening statement or making unreasonable demands or giving an unrealistic presentation. This is not only the case with respect to the opponent, but this also applies to the lawyer giving his client a too positive impression of the chances 'to win this case'. As a result the client has too high expectations about the potential compensation to be received and will not focus on a realistic win-win result.
- Having no idea about the real interests of the client, BATNA WATNA or leverage.
- Beforehand aiming for ‘the largest piece of the pie’ instead of looking for possibilities to ‘enlarge the pie’ so all parties will be getting more.
- Being content too soon with one possible solution or trying to reach a compromise too quickly.
- Having a very narrow perspective to one’s own role in the mediation (explaining the process, preparing or making an opening statement, giving legal advice and for the rest the client is on his own).
- Wanting to dominate the process, treating the mediation as if it is a legal battle, preventing the client from really participating in the process.
- Not presenting the interests during the mediation.
- Having no idea of the position, perspective or the interests of the opponent.
4. Responsibilities of the lawyer during the pre-mediation phase

As a party advisor you are playing an active and crucial part during the pre-mediation phase:

- Preparing the client.
- A content preparation to the mediation (what facts and figures are important).
- Mapping out the interests of both your client and of the opponent.
- Selecting the participants: the relevant parties and their representatives.
- Checking mandate, authorization and mapping out the constituency.
- Possibly introductory talks with both lawyers or other advisors and the mediator (directional conversation).
- Deciding if the lawyer(s) will be present or not during the actual mediation sessions.

5. Directional consultation with the mediator and the opposing lawyer

When party advisors such as a professional legal firm, accountant, business consultant or an in-house lawyer are involved, you can arrange a directional consultation with them and the mediator before the first mediation session. This introductory discussion can be held by telephone or in person and is especially useful when the advisors have little or no previous experience in representing a client in mediation. Additionally, when advisors are already very experienced in mediation they can play a supportive role for the mediator during the mediation. Accordingly, setting the stage for this in a pre-mediation consultation could be useful.

**Issues to be discussed during a directional consultation with advisors, e.g. lawyers**

- The assignment of tasks for the advisors, their clients and the mediator:
  - The mediator should ensure that the mediation progresses expeditiously.
  - The role of the lawyers or other advisors:
    - An advisor is typically the sparring partner/coach for the clients who are the principal representatives, and who ideally have to speak on their own behalf. Check whether the all parties intend that their advisors will be present during the mediation sessions. And if not, how will they be informed about the progress of the mediation and in what circumstances do they need to be involved or consulted? The mediator needs to observe confidentiality, so probably leaves the briefing of the party advisor to the parties and/or also asks the advisor to sign a confidentiality undertaking.
    - If the advisor is the sole representative of the party or takes the initial lead during the mediation session, the mediator -if he agrees with these terms- will probably want to double-check the authority, mandate or power of attorney of those involved.
    - Who makes the opening statement - the client or the advisor?
    - The mediator does not take or enforce a decision and he does not have to be convinced by legal arguments. His role is to (make) understand, not to judge.
  - The number of participants, who they are, the background of the representatives.
  - Authority to settle the dispute of the participants and their advisors.
  - Who is the constituency of each party and what role do/can they play?
  - Has a party instituted legal or other proceedings in relation to the dispute? If so, will they be postponed, suspended or otherwise managed during the mediation, and if so, how?
  - The mediation agreement and the most important ground rules for mediation: (see below).
6. The mediation agreement and the main rules for mediation

- **Effectively mediation begins with the signing of a mediation agreement**, in the course of which the mediation rules are acknowledged as applicable. Please note that not all mediation rules explicitly state the moment when mediation effectively starts. It is important to achieve clarity on this point, e.g. because of confidentiality and other safeguards. So make sure that the mediation agreement explicitly deals with this aspect.

- **Participation is voluntary but once mediation starts it is not entirely non-committal.**

  In the mediation agreement, there is normally a clause that obliges all participants to co-operate actively and in good faith in trying to resolve their dispute through mediation. However, each participant, including the mediator, can discontinue the mediation at any time and without giving a reason. Accordingly it is advisable to agree in advance that, if this happens, there will be an exit discussion in which issues like next steps, how to inform constituents etc. can be covered before the mediation is formally concluded.

- **The Mediator may obtain information separately from any party through discussions, correspondence or otherwise, e.g. in a caucus.**

- **Confidentiality.**
  - The Mediator will treat as confidential any information provided to him by any of the parties in correspondence, discussions or otherwise, unless agreed to the contrary. This is applicable on information obtained in caucus or otherwise from one party towards the other party as well.
  - Parties, their advisors and everyone else involved in the mediation must sign a confidentiality undertaking in which they commit to keeping confidential any information supplied and/or recorded in any form during or in connection with the mediation, including all positions adopted or proposals made by the parties and the progress made in the mediation, unless otherwise agreed. Confidentiality should also cover any judges, arbitrators or other adjudicators involved in the dispute.
  - The parties are deemed to have waived the right to use as evidence against one another, at law or otherwise, anything that arose during the mediation, including any witness or expert statements.

- **Settlement agreement.**
  - Outcomes should be recorded in writing, preferably in a formal settlement agreement. On signing this agreement, the mediation is concluded.
  - Party representatives who participate in the mediation must be authorized to sign such an agreement.

- **Package deals.**

  Unless otherwise agreed (in writing), the parties cannot be bound by positions they have adopted or proposals they have made during the mediation, nor by any statements they have made. By using package deals, the parties agree not to be bound to anything developed during the mediation until the signing of the settlement agreement (except for express binding agreements made in between). Please note that in some jurisdictions (e.g. The Netherlands) package deals must be agreed in writing in order to be enforceable.

- **Code of conduct and regulations.**

  The mediator is bound to a code of conduct which covers issues like impartiality, confidentiality, professionalism and expedition. In some jurisdictions, a mediator is also subject to a formal complaint scheme and/or disciplinary rules.
7. Process control in the opening phase

Opening phase: Introduction by the mediator, an opening statement by the parties or their lawyer(s) and a first statement of the conflict issues.

In the preparatory phase the party advisor is playing an active role and he can make a valuable contribution.

Preparation to the mediation and making an opening statement

- Make an analysis of the strengths and weaknesses for your client and the other party.

- Try mapping out the interests.

Facts and documents

- Make sure the facts are available and listed. Make a fact sheet and take it with you during the mediation session.
- Restrict the amount of papers and documents: try to list all the relevant issues. Having just 1 sheet in A4 format with the most critical points can support this. Most mediators want to receive only little or no information beforehand. Therefore try restricting yourself to the essence of the information you are submitting.

Opening statement by the other party

- Listen well to the first statement of the opponent. Try mapping out the interests of all parties involved.
- Do you notice in the opening statement of your opponent something different from what you had expected based on your analysis beforehand? Ask questions about things that surprise you. You can gain valuable insights.

Try making an opening statement with impact

- Try to agree beforehand on who will be making the opening statement. Will it be your client, with or without your additions, or will you be making it yourself (for example if your client is very emotional or not being able expressing himself)? Try discussing this with the mediator and the opponent during the directional consultation.
- In the opening statement the tone and atmosphere of the course of the mediation is being set. It is very important pondering beforehand about the right approach and which facts, interests and wishes are being presented. Take care the opening statement does not pour oil on the fire unnecessarily. So do not make an aggressive opening statement, but try having a realistic approach of your client’s desires and expectations of the mediation. If your client will not do so you could make an additional statement pointing out you and your client are having a different perspective on the dispute and a possible resolution, but that your client is willing to start the mediation in good faith doing his best to come to an agreement. Furthermore you are assuming the opponent and his lawyer are having the same attitude.
- Indicating briefly your client’s objectives.
- Not expressing excessive or unrealistic demands, it will damage your and your client’s credibility.
- Do not start a discussion with (the lawyer of) the opponent about their opening statement. Of course it will differ drastically on many issues and the beliefs of your client and you will be tempted asking a argumentation questions, but it is better to leave reality testing to the mediator, especially in this stage. This is much more effective, because the mediator is unbiased. The main purpose of the opening statement is giving your client the opportunity discussing the case from his perspective and getting to know the perspective of the opponent.

During the preparation keep in mind the opening statement is intended for the opponent and not for the mediator! This is your first chance to convince the opponent your client is having a good case, reasonable desires and willing to solve the dispute.
8 Process control during the exploration phase

The exploration phase: a content exchange between parties and an exploration of interests.

During the exploration phase the role of the party advisor is becoming more and more encouraging instead of determining. It is now about both parties (as directly as possible) being able to exchange and communicate. Ideally in this phase the real interests are being discussed, so it is important for parties playing a major part themselves.

Checklist process control exploration phase

- The client preferably is speaking for himself (try to stimulate this). Depending on the type of mediation, the client or the setting a more or less active role of the lawyer is required.
  - Less active: the client is very well able verbalizing important issues, the opponent is doing the same, the process is running smoothly, a “personal conflict” where parties have to communicate or work with one another In the future (e.g. a divorce, a quarrel among colleagues)
  - More active: an internationally operating client being used having the lawyer to play a more active part, a very emotional client or a client having trouble expressing himself. Furthermore business mediations with many legal aspects.
- Coaching of the client.
- Verifying if all interests have been discussed and if they are clear to all parties. Try supporting your client by asking open questions, listening actively and paying attention to non-verbal communication.
- Preventing it is mainly about positions and (legal) demands.
- Check the balance of power.

9. Process control during the option and negotiation phase

Option and negotiation phase: generating of options and developing objective criteria. Subsequently, negotiating about the solution and reaching an agreement (or not).

9.1 Process control while generating options and brainstorming

During the option phase you can fulfil an active role. Probably you have seen already many different solutions to similar problems and now you can fully call forth all your know how in that field. In this phase you can be an important sparring-partner for the mediator. After all he may not introduce possible solutions himself, however you can.

During generating options

- Generating many different options, where it is not necessary to immediately look for the only or the best solution.
- Developing objective criteria for the solution.
- Try to disconnect the search for possible solutions from making a decision about it.
- Fulfilling an active role during brainstorming and finding other methods for generating options.
9.2 Process control during negotiating

While negotiating in a mediation, a party advisor can actively support his client by considering the options.

- Advising the client with considering the options and comparing them with subjective and objective criteria.
- Try verifying the BATNA² of the opponent and compare possible solutions with the BATNA of your client. Also consider the WATNA and RATNA, they might offer you a fall back.
- Use leverage
- Verify if all interests are being attended to
- Reality check
- Actually supporting the client during negotiating and possibly negotiating yourself.

10. Pitfalls during negotiating (how do suboptimal results develop?)

The most treacherous pitfalls during negotiating which cause many negotiations to be concluded with a suboptimal result:

- Being content with a suboptimal solution and/or moving too soon towards a compromise.
- Having an insufficient or a too restricted mandate.
- Consulting the constituency too late or inadequately. Being whistled back from an agreement in principle.
- Being ill prepared (the most important fail factor).

When is it wise consulting the constituency if you are noticing an important issue is not practicable? This should be agreed upon beforehand! Never make promises to your client or the constituency, which are not practicable. By being well prepared and making an analysis of the interests, the alternatives and the negotiating position of both yourself as well as the opponent in principle you could make a realistic assessment of what is realistic. If something unexpected might happen in spite of a good preparation, try consulting both the constituency of your client as well as that of the opponent as soon as possible. Ask the opponent to support you and to help thinking if a solution can be found which meets also the desires of your constituency.

11. Reaching an optimal negotiating result

An optimal negotiating result can be arrived at through

- A very thorough preparation
  Try studying both beforehand as well as during the negotiations the 'field of forces' with all parties (yourself, other parties and the constituency) with all interests in its entire complexity. Try analysing the content and the procedural effects of all relevant themes. Know your alternatives; in case you will not be

reaching a solution. Formulate the interests and the goals you want to reach. However, this is not the same as formulating a specific result.

- **Focus on the future and interests**
  Try identifying as many interests as possible, both your own as well as those from the opponent. You also have to respect the interests of all parties (which does not imply you have to endorse them). Try being aware what your negotiating partner is having in mind. Be able to translate positions and perspectives in underlying interests.

- **Managing imbalances of power, leverage, BATNA's and WATNA's**
  Together with an analysis of the interests, leverage and BATNA's are enabling you to evaluate when to give in to a certain issue and which of the other remaining issues should be further negotiated or explored and in which case you should be emphasizing the content or on the contrary the relationship. Try to look at BATNA, WATNA and leverage as a dynamic combination which is developing during the negotiation. Having an eye for imbalances of power and it’s effect. Approach these imbalances in a constructive manner, so the enduring relationship between parties does not get damaged.

- **Working on the relationship and building trust**
  - Being reliable: transparent, open-minded, involving others in what occupies you.
  - Keeping promises, being clear about (potential) departures from earlier promises.
  - Being careful in interactions with others:
    - Be empathic without adopting the emotions of your negotiating partner. Try supporting the negotiating partners from the opponent, for instance with consulting their constituency and looking for solutions considering their interests.
  - Paying attention to both the content as well as the procedural aspects and make a distinction between these and business contradictions during the negotiations.

- **Developing creativity and options**
  See the negotiation as an opportunity to mutually create value and to enlarge the pie instead of a fixed pie which has to be divided (with the underlying idea: the more you will be receiving, the less will be remaining for me). Develop several possible options. Do not look for the only and right solution; there are more roads that lead to Rome. Disconnect brainstorming and generating options from evaluating options and taking a decision. Work with package deals (look for a solution for all issues first before tying yourself down to an isolated issue). Do not choose the line of least resistance (a quick compromise), but try to reach an optimal deal for all parties if this is feasible and desirable. Try dealing in a creative way with the different themes on the basis of mutual interests. Try using different scenario’s to attain a well balanced package that all parties can comply with.

- **A fully equipped toolkit (and being able to use it)**
  Recognizing several negotiating strategies, knowing which approach can be recommended at a certain moment. Recognizing ‘games’ and tricky tactics and responding to them adequately. Being able to negotiate with all parties in a productive way. Besides the neutral, positive and interests oriented interventions also more confronting interventions should be found in your toolkit. These are only being deployed if necessary and not as a standard trick. These “hard” interventions are being used to motivate the negotiating partners to start negotiating again in a confidence-building and interests oriented way. By commanding several tools, you will be having the right communicative skills to take all the necessary steps to generate outcome.

Do not commit yourself or your constituency beforehand to a specific result which has to be attained. Only formulate goals and interests which should be satisfied. Or, like a professional negotiator for a Dutch employer association says: “How do you mean, a wage increase to a maximum of 2%? Maybe I am prepared to give 10%. It all depends on what I will be getting in return.” (enlarging the pie).
12. Process control during the closing phase

**Closing phase: writing down agreements and conclusion.**

Besides reaching an agreement and establishing this in the right way in a settlement agreement, it is of great importance to pay attention to the constituency. (please see chapter 13 for hints for dealing with the constituency.)

Also during the conclusion stages of the mediation you can fulfil an active role as a party advisor by taking care the arrangements are univocal and consulted with the constituency.

**Checklist settlement agreement**

It is your job to urge the mediator to make a SMART settlement agreement, or you can propose doing this yourself (possibly together with the advisor of the other party).

### A SMART agreement

- **Specific** Everybody knows what has been discussed, who is taking action, when and how.
- **Measurable** It is clear if arrangements are being observed and how all parties will be informed.
- **Achievable** It is achievable and possible.
- **Realistic** Parties probably will keep their promises.
- **Time** A clear time limit has been agreed.

It is important to make sure that the arrangements are consulted (by your client) with the constituency.

If you have made the restriction your client is only committed to certain arrangements after written confirmation, you will have to send this announcement to the mediator and the other party.

Do not include any arrangement in the settlement agreement which is depending on an unexpected event, or uncertain factors (contingencies).

13. Implementation and consulting the constituency

**Follow-up: executing arrangements**

**Facilitating consultation with the constituency**

In almost every mediation you need to take in account the effect of the parties' constituencies (the people or group standing behind the party representatives in a mediation or negotiation and/or those they need to consult before signing a settlement agreement). The constituency can either be obvious or, conversely, can be hardly detectable.

- It is important to determine who comprises the constituency and how they might influence the process. It can be a formal constituency like shareholders, the board of directors, members of an interest group or a business partner. A constituency can also be informal: family members, colleagues, spouse, neighbors, etc. And can also be invisible and undetectable - an undisclosed boy/girlfriend, a private benefactor, a moneylender. Indeed, anyone who a party does not want, at least in joint session, to admit exists.

- The negotiators need to be given the opportunity to deliberate with and to "sell" the result of the mediation to their constituency. If necessary you can assist the negotiators and facilitate their deliberations.

It is more important to clarify who is part of the constituency, with whom a consultation is necessary, and whose consent is required, than to demand that the party representatives have a complete authority. When it is clear how
far the parties’ authorities extend and what steps have to be followed to reach a settlement, you can often accept something less than a complete authority, as long as all concerned know what the limits are.

It is very important to check this issue. If you fail to clarify this matter, the opponent could be using the draft settlement agreement as the starting point for further negotiations, because consulting the constituency could result in additional subsequent demands. Alternatively, your client could get into trouble with his constituency.

It is important to verify whether your client needs help to consider a proposal or with the (tentatively) agreed upon solution with the constituency. Verify whether there are procedures or opportunities for such a consultation. The less formal or clear the consultation process is, the more difficult it may be to reach agreement.

The party representative can be supported while consulting with her constituency:

- Try to find out who comprises the constituencies for your client and the opponent.
- What influence does that constituency have on the course of the conflict, on finding a solution and its sustainability and durability?
- Discuss whether there is a clear internal decision making process. When such a process does not exist, let your client develop a proposal for a procedure and discuss this with his constituency.
- Unambiguously agree on how and when the constituency will be informed about the progress of the mediation. Make sure the constituency is involved on an ongoing basis and is not presented with a fait accompli.
- Develop objective criteria for the solution; they can be explained easily to the constituency.
- Prepare a cost-benefit analysis of alternative solutions and think through case scenarios as thoroughly as possible.
- Clearly stipulate the advantages that a solution can offer to all parties concerned and how it meets their interests (and the interests of the constituents).
- Try to formulate the settlement agreement so that is as balanced and as neutral as possible. All parties need to contribute to the result.

III. Cost Benefit Analysis

You can use the cost-benefit analysis in three different ways while assisting corporate clients in resolving a dispute.

- Checklist: Using the form below, check the squares in the costs and benefits sections of both the mediation and the arbitration columns. This enables you to see at a glance which method to resolve the dispute is likely to offer more overall advantages.
- Calculation of costs: For a quantitative analysis, you can calculate the costs per entry for both cost and benefit columns.
- Reality testing; The form can be used as a tool for reality testing (risk analysis).
### Mediation Costs

#### Sunk Costs of the dispute to date

<table>
<thead>
<tr>
<th>Time</th>
<th>Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Missing deadline(s)</td>
<td>$-------------------- (estimation).</td>
</tr>
<tr>
<td>Lost office hours executives/managers involved:</td>
<td></td>
</tr>
<tr>
<td>Person 1: hours spent on solving conflict</td>
<td>$_________ x $______ (hourly pay/fee).</td>
</tr>
<tr>
<td>Person 2: $_______</td>
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<td>Office hours spent on dispute by other departments (E.g. Legal services, HR):</td>
<td>$______ x $_______ (hourly pay/fee).</td>
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</table>

#### True (ie including hidden) costs caused by the dispute

- Reputational damage, negative publicity (estimation) $_________.
- Negative impact on company relationships (estimation) $_________.
- Projects/work postponed/delayed/ cancelled (estimation) $_________.
- Negative impact on personal life of parties concerned (estimation) $_________.
- Negative impact on quality output of parties concerned (estimation) $_________.
- Fees for advisors/lawyers ___ hours x €_______, other costs $______.
- Extra costs spent due to the dispute (E.g. media-consultant, PR campaign, etc.), $_________ (estimation).
- Other costs (E.g. personal turnover, adjustment within the organisation or method of working, procedures, sabotage, absence, etc.), $_________ (estimation).

### Litigation/arbitration Costs

#### Sunk Costs of the dispute to date

<table>
<thead>
<tr>
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</thead>
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---

**Subtotal costs to date $**
### Mediation

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<tbody>
<tr>
<td>(Future) Costs for resolving the dispute $</td>
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<tr>
<td>- Fees for mediator ____ hours $ x €______, other costs (e.g., venue, travel expenses) $ ______</td>
<td>- Costs legal proceedings $ ____________________</td>
</tr>
<tr>
<td>- Fees for lawyer(s) ____ hours x $<strong><strong><strong><strong>, other costs (e.g., administration, travel expenses) $</strong></strong></strong></strong></td>
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**Time**

- Time involvement for resolving dispute for executives/managers:
  - Person 1: hours spent on solving conflict _____ x $______ (hourly pay/fee).
  - Person 2: $______ Person 3: $______ Person 4: $______
  - Time involvement for resolving dispute by other departments (e.g., Legal services, HRM): _____ x $______ (hourly pay/fee).

**Other potential future costs**

- Costs for reaching agreement $_______
- Costs involved in reaching a partial agreement $_______
- Costs if no (partial) agreement $_______
- Cancellation/loss of projects/jobs $_______
- Loss of/ damage on important relationships $_______
- Other $_______

**TOTAL COSTS**

### Litigation/Arbitration

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  - Time involvement for resolving dispute by other departments (e.g., Legal services, HRM):
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**Other potential future costs**

- Costs for winning the lawsuit $_______
- Costs involved in winning/loosing partially (e.g., damages, negative publicity, etc.), $_______
- Costs for loosing the lawsuit (e.g., damages, negative publicity, etc.), $_______
- Cancellation/loss of projects/jobs $_______
- Loss of/ damage on important relationships $_______
- Other $_______

**TOTAL COSTS**
### Mediation

#### Benefits of the dispute to date

- Extra revenue(s), projects, work $__________ (estimate).
- Costs for the opposing party / competitors (e.g. legal aid, involving experts, media, management time, etc.) $__________ (estimate).
- Reputation opposing party / competitors affected $__________ (estimate).
- Time taken up from the opposing party / competitor $__________ (estimate).
- Positive publicity, PR, create awareness, $__________ (estimate).
- Other beneficial effects for the own company $__________ (estimate).

#### Benefits of resolving the dispute

- Speed.
- (Limited) costs that can be controlled by the parties.
- Own (business) solution, not being bound by (limited) range of legal solutions.
- High compliance rate.
- Opportunity to settle things that are not legally enforceable (e.g. behavior, emotions and communication problems).
- The real (underlying) interests can surface (in a caucus) and options can be explored in confidence.
- Confidentiality and privacy.
- Maintaining a (workable) business relationship or cautiously ending it.
- Settlement agreement.
- Solve disputes with several parties in one procedure.
- Other __________________________

#### Potential future benefits

- Preservation or new start of business relationship.
- New opportunities.
- Potential revenues of business solution $__________
- Other __________________________

---

### Litigation/arbitration

#### Benefits of the dispute to date

- Extra revenue(s), projects, work $__________ (estimate).
- Costs for the opposing party / competitors (e.g. legal aid, involving experts, media, management time, etc.) $__________ (estimate).
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- Positive publicity, PR, create awareness, $__________ (estimate).
- Other beneficial effects for the own company $__________ (estimate).

#### Benefits of resolving the dispute

- Public rehabilitation/publicly prove who is right.
- Delay settlement/dealing with consequences (utilize all available procedures).
- Costs incurred to and time taken up from the opposing party / competitor.
- Clear legal solution (win a case, loose a case, damages or not, explanation of (new) legislation or rules).
- Third party who takes a binding decision.
- Possible damages.
- Discharge the responsibility to a third party (internal accountability towards constituency).
- Implementation of acts that need a judicial order to be executed.
- Precedent, leading case.
- Publicity.
- Enforceable title.
- Other __________________________

#### Potential future benefits

- Beneficial effects of winning a law suit.
- Awarded damages $__________.
- Precedent or leading case.
- Other __________________________

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**TOTAL BENEFITS**