



Co-funded by the  
Erasmus+ Programme  
of the European Union

STRATEGIC PARTNERSHIP PROJECT

Project number: 2014-1-LV01-KA203-000506

# E-Book

## «Mediation to Foster European Wide Settlement of Disputes»

### Chapter XIII

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### Phases of Mediation

SUMMARY: Introduction. – 1. Pre-phase before mediation. – 2. Phase one: introductory part of mediation. – 3. Phase two: exploration stage. – 4. Phase three: clarification of interests. – 5. Phase four: solutions of the conflict. – 6. Phase five: result of the mediation.

#### Introduction

According to the first sentence of the Article 3(a) of the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (hereinafter – Directive) “mediation means a structured process however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator”. There is no further explanation in the Directive what is meant by the “structured process”. The European Court of Justice has not clarified this term either. Nevertheless, most of the scholars are unanimous in opinion that the structure is an essential element in mediation in order to proceed from conflict to settlement.

Mediation consists of several structurally united phases. A mediator shall know the phases and lead parties through them, however not announcing to the parties in which phase they are, as that would sound rather artificial if the mediator would declare to the parties phrases like: “Now you are in a phase three. Let’s start working on your interests.” Structure is essential in mediation, for it is one of the elements which guarantees quality of mediation. Although the parties might feel in the process of mediation as being in multi-party conversation or meeting, the structure is what organizes the process. There is no unanimity on amount of phases, which according to various authors differ from three<sup>1</sup>, four<sup>2</sup> to twelve<sup>3</sup>. However in any case direction of the mediation process remains the same – from introduction, through getting the story, disclosing interests and values of the parties, to searching for solutions which lead to final agreement between the parties.

Knowing sequence of the phases and significance of structure makes it possible to estimate timing for mediation and progress of the process. Length of each phase can differ and it is not necessary to prolong some of the phases artificially, as each mediation process has its unique characteristics.

The fundamental principle of generic mediation is that each stage of the mediation process must be completed before progressing to the next stage. If the process continues without finishing each step, it will become apparent later on, thus requiring the mediator to return to the incomplete stage<sup>4</sup>. At the same time mediation is a flexible process, as it is stated in the Recital 17 of the Directive, which stipulates the “flexibility of the mediation process”. Therefore in the case where at a later stage appears information which should have had to be dealt with earlier, it is still possible for the mediator to return back in the

<sup>1</sup> R. HOFMANS, D.B. ROTFIŠERE, A. TROSENS, *Mediācija. Mediācijas pamati teorijā un praksē*, Rīga, 2007, p. 116.

<sup>2</sup> S. BLAKE, J. BROWNE, S. SIME, *Alternative Dispute Resolution*, Oxford, 2014<sup>3</sup>, p. 270.

<sup>3</sup> See: H. BOSERUP, *Mediation. Six ways in seven days*, Copenhagen, 2007, p. 46.

<sup>4</sup> *Ibid.*

process to a prior phase and complete it. For instance, if in the second phase the parties assure the mediator that all essential facts are disclosed and mediator proceeds to the third phase, during which new information or involved persons appear, thanks to flexibility tool the mediator can return back in the process to the phase two and invite the parties to tell more about the new elements.

There are five phases in the classic division of mediation. The first phase is called introduction, when mediation process begins with an opening session during which the mediator explains to the parties the rules and principles of mediation, rights and obligations of the parties, as well as answers the questions if there are any. In the second phase the mediator invites the parties to describe their situation with the aim to get from both sides the whole story which had lead the parties to the dispute. In the third phase mediator discovers interests, values and needs of both parties. During the fourth phase solutions of the conflict resolution are elaborated. In the final phase agreement between the parties is reached and in the case this is required.

## 1. Pre-phase before mediation

There is a number of issues to be clarified and organized before the parties start settlement of their dispute with a help of a mediator<sup>5</sup>. Therefore mediator's obligations and functions begin even before the first joint meeting with both parties. This can be called a pre-phase before mediation or phase zero before mediation. Some mediators choose not to have a pre-mediation phase and instead cover introductory issues in the first joint meeting with both parties present. However such approach can possibly lead to increased pressure on the mediator and difficult moments for the parties. The benefit of the pre-mediation phase is that the mediator can explain the rules and principles of mediation to the parties, find out individual needs, concerns and expectations of the parties, as well as sign the agreement with each party.

The mediator begins mediation activities in fact from the moment when at least one party contacts the mediator. Most often the first contact is by making a phone call or by writing an e-mail to the mediator and asking for information about mediation or asking for help of mediator. In other cases either the court or the advocate advises the parties to contact the mediator or make the first contact on behalf of the parties. It is necessary to get a consent of the other side to initiate a mediation. Like arbitration and other ADR processes, mediation is a consensual process<sup>6</sup>. The requirement of consent ensures that the intervention of the mediator as a third party is not counterproductive, in that it occurs at a moment when the parties are able to move towards settlement by themselves<sup>7</sup>. It is an obligation of the mediator to make sure that the parties understand the process and principles of mediation before they proceed further. The mediator can explain the process in a phone conversation or e-mail. However, actual meeting with each party separately before the first joint meeting would establish better contact between each party and the mediator.

In the pre-phase mediation session the mediator explains to each party every principle of mediation, so the parties could in calm atmosphere understand the principles and ask possible questions to the mediator. The mediator should also explain rules of mediation sessions, mentioning length of the process, rights and obligations of the parties and of the mediator, procedural impact, if any, on the litigation process court, the meaning and possibilities of joint and separate sessions of mediation, etc. The mediator should invite each party to briefly describe the situation, so as to get prepared for the real first phase of the mediation together with both parties. In fact, description of the situation might have an impact launching a party directly into the phase two of the mediation process. However this could not be considered as a real phase two, because it is not so important that the mediator has heard the story of situation, as that the opponent has heard it with the help of rephrasing and summarizing made by the mediator. Therefore the aim of asking the parties to describe their situation in the phase of pre-mediation is to prepare the mediator for the process and to prepare the agreement for the mediation.

As it was just mentioned, the pre-phase of mediation process is also necessary in order to discuss with each party the contents of the draft agreement among the parties and the mediator. The draft agreement should be presented to the parties in the pre-phase process. Most probably, the parties will need some time to get acquainted with the agreement, so it would not be appropriate to insist that the parties immediately

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<sup>5</sup> C. BÜHRING-UHLE, *Arbitration and Mediation in International Business*. The Hague/London/Boston, 1996, p. 181.

<sup>6</sup> K.P. BERGER, *Private Dispute Resolution in International Business. Negotiation, Mediation, Arbitration*, The Hague/London/Boston, 2006, p. 121.

<sup>7</sup> D.G. PRUITT, J.Z. RUBIN, *Social Conflict: Escalation, Stalemate and Settlement*, New York, 1986.

sign the agreement with the mediator. Instead, a copy of the agreement can be either distributed to each party in a paper form or sent to their e-mail addresses.

During the pre-phase process the mediator should also discover needs, concerns and expectations of both parties engaged in the mediation. The mediator should learn from both parties what are their needs, why do they participate in the mediation process. For instance, a party might answer that participation will only be possible if the supporting person, in the whose presence the party feels safe and comfortable, participates in the process. Or the party might ask for mediation sessions at a certain hour of the day. The mediator should ask for specific needs and should respond to them, when organizing further mediation sessions. Regarding concerns, the mediator should discover are there any fears, hesitation or worries of the parties which need to be taken into account. For example, a party might disclose negative attitude towards the opponent or his representative with a request to organize a mediation process in a way that a particular person is not present. The mediator can try organizing the mediation process in a way to respect these concerns. However in the case it is not possible for the mediator to organize the mediation process which perfectly responds to the needs and concerns of the parties, the mediator should honestly inform the parties in advance about the actual situation. And finally, the mediator should ask the parties about their expectations from the process. Knowing all this, the mediator can better organize environment for the mediation process.

After the mediator has prepared for the mediation process in this pre-phase and the parties have expressed their readiness to participate in mediation, the process can proceed to the first phase.

## **2. Phase one: introductory part of mediation**

When the mediator and the parties have agreed on the first joint meeting session, the phase one can begin. Mediator starts the phase by greeting the parties and welcoming them to the mediation room. If the mediator has already got acquainted with the parties in the pre-phase stage, there is no need to get acquainted repeatedly. If, on the other hand, this is the first meeting with the parties, the mediator introduces himself and kindly asks the parties to call their names. The mediator can also ask the parties how they want to be addressed. For instance, some of the parties might want to be called by their first names - Anna, Juris, Marie Jane. The other parties might prefer more official approach and ask to be called by their last names or titles – Mrs. Smith, Dr. Green, professor Liepa. The choice of the parties should be respected by the mediator and if possible by the other party as well.

Before the mediator proceeds any further, a general warming-up conversation would be helpful to relax the atmosphere and put the parties at ease. The mediator can say some general words about weather or premises, or recent events of the day. Even a couple of nice sentences normally improves communication among the parties and the mediator. Moreover, from the first words the mediator can make observations about the mood and the attitude of the parties with whom the work will begin in a moment.

The mediator should check personal documents of the parties – passports or ID cards, as well as powers of attorney for representatives of legal persons. This is essential to make sure that the right persons are present in the mediation process, and that representatives have full authority. Otherwise there would not be any sense to proceed with mediation, if at the end of the process it would be discovered that yet another person is entitled to have the final say on the reached agreement.

The first phase and opening statements play an essential role in ensuring fairness of the process, which requires that the parties make informed choices during mediation<sup>8</sup>. The most important part of the first phase is the monologue of the mediator in which the principles and rules of mediation is explained. If the parties have already signed an agreement with the mediator where all these terms and principles are explained, the mediator should nevertheless remind the parties about each principle and each rule to make sure this is really acceptable and clear to both sides. The mediator might say:

- although all principles and rules are already included in the agreement, I would still like to remind them just to make sure both of you understand them;
- principles and rules are very important in mediation process, so please let me explain them once again just for double security and clarity reasons.

With introductory statements a mediator also builds up personal credibility and trust *vis-à-vis* both sides by establishing rapport between the mediator and the parties sitting at the negotiation table. Rapport-

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<sup>8</sup> K.P. BERGER, *Private Dispute Resolution in International Business. Negotiation, Mediation, Arbitration*, cit., p. 154.

building relates to the freedom experienced in communication, the level of comfort of the parties, the degree of precision in what is communicated and the quality of human contact<sup>9</sup>. During explanation process the mediator follows reactions of both parties to make sure the process is not too long or too obvious. The mediator shall explain the principle of voluntariness, mentioning that each party is free to participate in the process and free to leave at any time if the process is not acceptable any more. There are exceptions to the rule of consensualism and voluntariness in case of so-called “court-annexed mediation”, where the applicable procedural law provides that courts may or must require the parties to make a good faith effort to mediate their dispute before they can bring it before a court<sup>10</sup>. Also the principle of confidentiality should be explained, saying that everything disclosed in the presence of mediator remains in the mediation room and is not disclosed further, with the exception if information about danger to life or health of other persons, especially of a child, is revealed. The principle of equality and cooperation of the parties should be explained, saying that the parties, not the mediator, can settle the dispute and that the mediator has no powers to give any advice. Emphasizing the parties’ “control” over the process also serves to make them understand that the success of the mediation rests primarily on their shoulders and that participation in a mediation carries with it a sense of responsibility for the goal and outcome of the negotiations<sup>11</sup>. Finally, the principle of neutrality and objectivity is explained to the parties by describing that the mediator is not acquainted with the parties and is not interested in any solution of the case, and that at all stages the mediator will remain equally neutral and objective towards both parties.

Regarding rules the mediator should explain the need to talk one in a time. One of the tips of how to keep the other party silent while giving at the same time opportunity to remember ideas and topical points, is to distribute to the parties paper and pen to write everything down while the opponent talks. Mediator also clarifies timing which each party has for mediation session in a particular day. Mediator asks the parties to use polite language and to show respect towards each other. When the principles and rules are explained the mediator asks if they are clear and acceptable. If any of the rules or principles should be explained further, the mediator answers questions of the parties and thanks them for asking about this very essential issue. Mediator should also ask the parties whether they want to introduce some more rules to the mediation process. For instance, the parties might ask that some persons (for instance, support persons which have come to the mediation process with prior approval from the other party) leave the mediation room. Or the parties might demand that other representative of the party – legal person – is present in the mediation process. If these or other demands appear, the mediator should ask the opinion of the other party and help the parties to resolve these demands.

### 3. Phase two: exploration stage

When principles and rules are explained, the mediator can proceed to the second phase and invite the parties to tell their situation. Although the mediator might know already the story of the parties, which is possible due to prior conversation with parties during pre-phase stage or due to getting acquainted with materials which the parties might have been sent to the mediator, nevertheless the second phase should include free storytelling part by each party. In the case the parties ask the mediator why to tell the story if it is already known to him, one of the best responses would be that it is very important that also the other party hears the opinion and viewpoint to better understand the case.

The mediator can ask the parties:

*Who of you would like to tell your situation first?*

Normally the parties agree between themselves about this simple sequence, which is a small but good ground to conclude that they can agree at least on one issue. However if the parties do not come up with proposals on speaking order the mediator can also ask:

*Mr X, you were initiator of the mediation process. Would you like to be the first to explain the situation?*

*Ms Y, would you agree if Mr X starts the first?*

The mediator explains that both parties will have equal opportunities to speak about their situation and that they will be able to explain their story an unlimited number of times. It is advisable to avoid the word “problem” during mediation process and instead use the words like “situation”, “case”, “story”.

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<sup>9</sup> K.P. BERGER, *Private Dispute Resolution in International Business. Negotiation, Mediation, Arbitration*, cit., p. p. 155.

<sup>10</sup> *Ibid.*, p. 121.

<sup>11</sup> *Ibid.*, p. 155.

Afterwards one of the parties starts free storytelling. During the time one of the parties speaks, mediator shows active listening, however not intervening or stopping the story. The aim of the second phase is to get as much information as possible from both parties. At the same time the mediator should critically follow whether everything the party is telling is essential for the process. For instance, if the party starts the story with events which happened long time ago, the mediator should possibly ask, is this related to the dispute. Or in the case the party talks in too abstract terms, the mediator should rephrase what was said or asks to explain the situation more.

Mediator should use all methods of active listening during the second phase, for instance the method of rephrasing, by saying statements of the parties in slightly other words to help the other party to understand what was said. Mediator should avoid using judgmental language and instead choose neutral and reasonably friendly terminology to keep down emotions and avoid possible offences. All questions asked by the mediator during the second phase should be as open as possible to encourage parties to tell more. However also closed questions would be permitted in the case the mediator checks whether information has been understood correctly. Mediator shall show interest and reasonable support to both parties while they talk just like he would listen to his best friends who needs understanding and support, at the same time not crossing the borders of neutrality towards the other party. One more word to be avoided during mediation process is “why”, as it sounds rather judging and aggressive. Even if the mediator starts the question with “why”, the attitude and tone of the voice should be even more friendly, so as not to scare off the party.

When one party has finished the storytelling, the mediator thanks the party for sharing the information and also thanks the opponent for listening to the story. The mediator can summarize what was said by saying:

*So if I understand you right you are saying that ...*

*Did I get you right that this happened ....*

*So you just explained to us that ....*

*Thank you for telling us this very important issue about...*

Then the mediator asks the other party to describe the situation by asking:

*We just heard what Mr X told us about situation. Can you please tell me about the situation how you see it?*

When listening the story, the mediator should keep good contact with parties, but at the same time make sufficient notes to remember facts, details, names, concerns, interests, values, which are raised during this phase. During mediation process the parties will inform the mediator about many new details, so it is very important to write them down so not to forget them.

The mediator should allocate equal time for speaking of both parties. However in practice this is never possible because of several reasons. For instance, if the first party has already explained the situation there is nothing much to say for the other party, save some comments or opposing views. Or if one of the parties is extremely talkative but the other is very introvert, then the time division between the parties is not equal. The mediator should notice this trend and try to grant additional opportunities for the person speaking less. Also in the case when the mediator has an impression that one party is not saying everything because of the presence of the opponent, the mediator may propose to have individual sessions with each party. During such session the mediator might discover additional information on facts, values, needs, concerns, etc. which was not disclosed in the presence of the opponent.

In the terms of time the second phase can last from a couple of minutes to many days and this depends on complexity and history of the case, and of involved parties. After listening to the opponent, the first party might want to add more facts and information to what was said before. Then the storytelling part can go into the next rounds. The aim of the second phase is to get the whole story of what happened. The mediator's ability to unveil as many topics and issues as possible is important for the success of the mediation. These topics and issues will later form the focus of their negotiations and the substance for trade-offs and package deals, as part of an overall resolution of the dispute<sup>12</sup>. The more issues and topics are unveiled, the more options there are for reaching mutually acceptable settlement, the higher the chance

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<sup>12</sup> K.P. BERGER, *Private Dispute Resolution in International Business. Negotiation, Mediation, Arbitration*, cit., p. 185.

of success for the mediation<sup>13</sup>. However the mediator as a professional can already discover needs, interests, values, possible solutions which the parties mention in their speech even in this phase.

#### **4. Phase three: clarification of interests**

When the parties have told their situation to the mediator, movement of the third phase is possible. The mediator clarifies interests of the parties and according to some authors this is the most difficult part of mediation, because the interests are hidden behind positions of the parties<sup>14</sup>. It is well known fact that interests are not the same as positions. Positions are defined officially in court or arbitration in the claim statements. However the real interests and values are hidden behind these positions, so therefore the mediator can help the parties to discover their interests. The parties in conflict can be viewed as pyramids with layers. At the upper layer of the pyramid there are positions of the parties. In the pyramid's middle layer there are interests justifying those interests above. In the lower layer there are needs and concerns of the parties justifying the interests above<sup>15</sup>.

The mediator helps the parties to disclose and define their interests, needs and concerns. During this phase the mediator shall explore and identify the core issues of the dispute<sup>16</sup>. Mediator shall emphasize common interests of the parties, so they could hear and learn about them. The mediator shall also speak about discrepancies between the parties, at the same time trying to keep the parties positive and motivated towards their possible solution.

#### **5. Phase four: solutions of the conflict**

Observing experienced mediators at work, it may appear that they are skipping phase three of clarification of interests and moving directly from free storytelling to problem solving. What is happening, however, is that the interests are already clarified during the storytelling phase<sup>17</sup>. When interests of the parties are clarified, the mediator can proceed to help the parties to generate possible solutions of the conflict. Especially in the case when interests, needs and concerns are visualized to the parties and written on the flipchart, the mediator can systematically go thru each point and invite the parties to brainstorm ideas and possible solutions of the case. Both parties are asked to come up with ideas and proposals on how to settle the case. The mediator helps in keeping future orienteered perspective encouraging the parties to think not what happened, but how they want to get out of situation and live further on. The brainstorm session generates as much proposals, ideas and options as possible. Afterwards the mediator helps the parties to analyse each position and to assess is it realistic, optimal, attainable and mutually beneficial and acceptable. In the case some point seems not acceptable, it is crossed out of schedule. In the case the mediator uses visual technical tools like flipchart or whiteboard, amount of possible ideas and solutions helps the parties to see how many options they actually have, and that this list of choices is so much wider than that initially written in the purely legal claim to the court.

The mediator talks with the parties about possible solutions and asks them open questions to find out whether they are happy with their choice, how they see their perspective with the choice, how it will work for them, etc. These questions should be asked from one side cautiously, so not to ruin the agreement just reached, but from the other side fairly, so the parties would have clear understanding about the possible agreement. The mediator invites both parties to think from a positive and negative aspect what would happen if the agreement like this would be concluded.

#### **6. Phase five: result of the mediation**

If the parties have reached an agreement, the process can be finalized. Sometimes the parties shake each other's hand and part without any written agreement. Oral agreement is equally valid and if the parties are

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<sup>13</sup> J. RISSE, *Wirtschaftsmediation*, München, 2003, § 7, No. 139.

<sup>14</sup> R. HOFMANS, D.B. ROTFIŠERE, A. TROSENS, *Mediācija. Mediācijas pamati teorijā un praksē*, cit., p. 118.

<sup>15</sup> H. BOSERUP, *Mediation. Six ways in seven days*, cit., p. 57.

<sup>16</sup> R. HOFMANS, D.B. ROTFIŠERE, A. TROSENS, *Mediācija. Mediācijas pamati teorijā un praksē*, cit., p. 118.

<sup>17</sup> H. BOSERUP, *Mediation. Six ways in seven days*, cit., p. 55.

satisfied with it, no other formalities are needed. In other cases the parties want to have a written agreement about their settlement. The agreement can be prepared either by the lawyers of the parties or by the mediator if the mediator is capable of preparing it. In the case the lawyers prepare the agreement, the parties shall disclose information to the lawyers and do it in such a detail sufficient for preparing a contract. Especially in the case if lawyers have not participated in the mediation process, it could be difficult for the parties to explain to the lawyers exactly what should be included in the agreement.

In the case the mediator agrees to prepare an agreement, the mediator shall have all information as detailed as possible to prepare the contract. For instance, if in the mediation process the parties have talked just about a land lot or just about apartment in the city centre, then at the moment of drafting the agreement precise legal data must be presented to the mediator to prepare an accurate document.

When the negotiations have come to an end, through an agreement or otherwise, the mediation has to be wrapped up in a closure session with all participants. The failure to reach an agreement should not necessarily be viewed as a failure of process. The goal of mediation – as in any negotiation – should not be agreement at any price but a rational choice<sup>18</sup>

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<sup>18</sup> C. BÜHRING-UHLE, *Arbitration and Mediation in International Business*, cit., p. 286.