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E-Book

«Mediation to Foster European Wide Settlement of Disputes»

Chapter XV

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Skills of the Mediator

SUMMARY: Introduction. – 1. Getting prepared for mediation session and setting the room. – 2. Form of the questions. – 3. Reflecting in mediation. – 4. Joint and separate sessions. – 5. Notes and tools.

Introduction

Most books on mediation have been written in advanced, rich legal and psychology language, as if their authors would compete among themselves who is more skilled in complicating simple things. However in practice mediators confess that they follow their intuition more than strict rules previously read in the theory books. With all due respect to estimated authors and rules on mediation process, this chapter will concentrate on purely practical aspects of mediation, which are as important in the mediation room as the theory.

1. Getting prepared for mediation session and setting the room

Safe and cozy. These two words best of all characterize how mediation room should look like. The mediator shall create a mediation room in a way the parties feel safe from possible intrusion of third persons, disturbance by others and emotional attacks by either a mediator or by the opponent. The mediation room should also be cozy so the parties would feel in it like at home – relaxed, peaceful and under no unnecessary stress. Therefore the mediator should carefully think how to transform any room in a way to meet these two preconditions. With a little help and creativity any office can be transformed in a room fit for a mediation session. The mediator can look at the room critically and apply a test question: “How would I feel if I would enter this room for the first time to proceed with mediation?” Then, according to particular circumstances, the mediator should improve everything in the room. At the same time a mediation session is not a process of psychotherapy, but effective working round, so the environment should also be fit for writing and checking the documents, especially in business mediation.

There are mediators who do not use a table in their mediation sessions. Instead, the parties sit in a circle with the mediator and concentrate on talking. This might be effective in family mediation or other type of mediation, where emotions and feelings are at stake. However during business mediation a working environment in office-type premises would be more appropriate. Also the effect of safety provided by the table should not be underestimated. So the mediator should set the environment depending on type of dispute under mediation. A mediation session is not a psychotherapy, but effective work where note keeping and checking of documents is essential. Therefore it would be more convenient for the parties to sit around a table for effective work and also for reasonable distance and emotional safety reasons.

There is a grounded belief that a round table is the most suitable for settlement of disputes. There are no statistics available about proportion of settlement agreements concluded at the round tables as opposed to those of other shapes. It is still possible to proceed with mediation process if the table is of another form. The parties should sit in a way they see each other and have an eye contact with the mediator. If there is a square table, the parties can sit opposing each other, although this position can also be criticized as too frontal and aggressive (see picture No. 1).

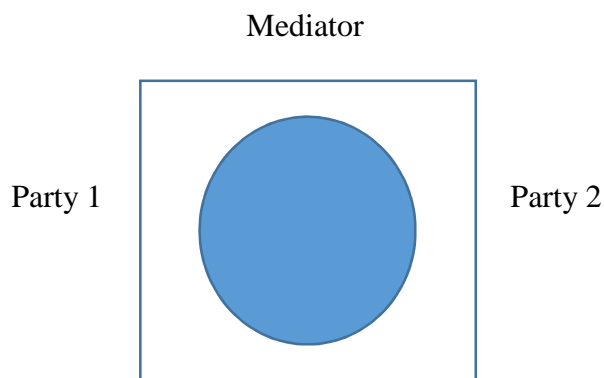


Fig. 1: Square shaped table with frontally placed parties

To avoid a situation where the parties sit aggressively in front of each other, a square shaped table can be also used for to sit the parties closer to each other while the mediator sits in front of them.

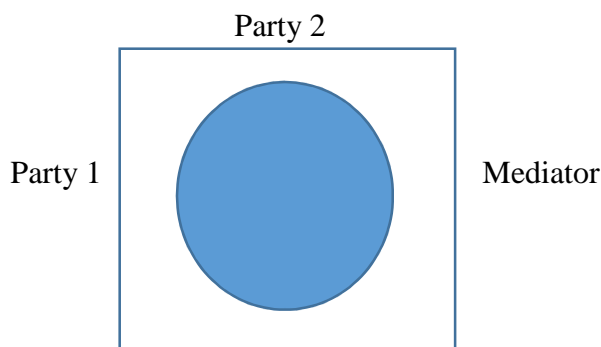


Fig. 2: Square shaped table with parties sitting side by side.

In the case the mediator has a rectangular table, the parties should not be seated at the distant parts of the table, as a distance in physical seats can also cause distance in emotions and therefore hinder progress towards a settlement. Instead, the parties should sit closer to each other (similarly as in the picture No. 2) while the mediator sits in front of them.

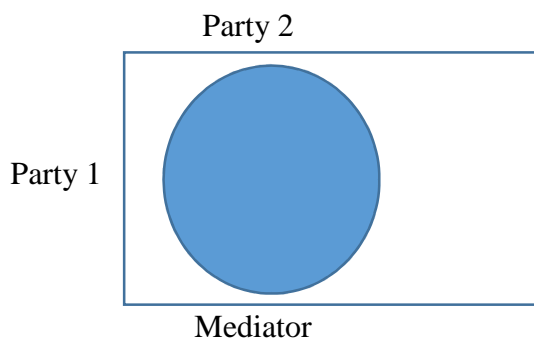


Fig. 3: Rectangular shaped table with parties sitting side by side

In all three previous cases the mediator should seat the parties at the table as if there would be a round table. The parties and the mediator should have an eye contact and comfortable distance among them.

Regarding position of the chairs the mediator should sit in the most uncomfortable place, if there is one. For instance, if one of the chairs has its back towards the doors, the mediator should take it. The parties will feel safer if they will see the doors, and not sit with their back towards the doors. All chairs must be equally comfortable for the parties, because the parties will take any difference in their treatment very personally. It is advisable that mediator physically sits in the each chair of the parties, in order to feel and see how comfortable the parties will be during mediation process. The mediator should know what the parties will see during mediation process – is it a clock on the wall, window scene, modern art painting, a mess on the table, *etc.* The mediator should know what the parties will hear during mediation process – is it a noise in the back office, ticking clock, *etc.* The mediator should consider emotions and feelings of the parties, and set the mediation room as reasonable and appropriate as possible.

A well-set room for mediation does not mean only technical equipment. A room is the environment in which the parties must feel comfortable and well so they can to concentrate for work, gather thoughts, listen to their feelings and work on issues and themes. Therefore the mediator should be not only a lawyer or psychologist, depending on his or her main educational and professional background, but also a skilful interior decorator, by asking, where applicable, consultation of an interior designer. One of the simplest methods that can be used to check whether the parties in mediation will feel comfortable during mediation working session, is for the mediator to come into his own mediation room as if the stranger would come in for the first time and to have a look at premises with the eyes of a newcomer, by posing a question – how do I like it here, what do I see, do I want to stay here, where it would be comfortable for me to sit, what do I see and feel here when I am in this room? The mediator must physically sit in each chair which is prepared for the parties of mediation. Only then the mediator will be capable to feel how the parties will feel themselves when sitting there during mediation. Are the chairs comfortable and stable? What will the parties see and look at when they will look at particular places? What will their eyes be drawn towards? Are the chairs of parties too close to each other? Is it too sunny or too dark in the room? Is there a mess or other element which could possibly disturb concentration and thoughts? Such physical and visual, as well as emotional factors have crucial influence on the process of mediation, especially in the first sessions of mediation.

Also the mediator must be capable to provide for the parties supplementary materials so the parties can work effectively during mediation – a paper, pen, blackboard, flipchart desk, whiteboard markers, highlighters, post-it stickers, *etc.* The 5th chapter of this article explains this in more detail. Also, taking into account the length of time that the parties spend in the room of mediation, it would be advisable for mediator to offer to the parties some water, coffee or tea and some sweets or snacks. To sum up, the mediation room should be a place, where it would be pleasant for the parties to arrive, stay and work efficiently with the aim to settle their dispute.

2. Form of the questions

Questions are means of communication to be used strategically, they structure and control conversation in accordance with the questioning technique¹. A mediator asks questions to motivate the parties to talk, tell, generate ideas, while remaining within the bounds of the main subject of the dispute. Therefore the style in which the mediator asks questions is friendly and inviting with the purpose to acquire as much useful information as possible. The mediator asks open questions. Open questions are the opposite to the closed questions. Open questions invite and motivates the parties to tell more, to disclose and share their thoughts, feelings and intentions. On the other hand, closed questions are the ones which examine, confirm, precise and close the story told. It would not be correct to say that closed questions are bad or worse than the open questions. However the mediator should take into account what impact the closed questions have on the parties of mediation. Namely, closed and narrow questions do not motivate to continue talking, if only the party to the mediation is not naturally very talkative (in that case it is possible to use the closed questions to slow down the talking). Open questions are like: “Could you please tell me more about ...?” “What needs to happen so that your business partner could gain back your trust?” “Have you thought about possible solutions here?” On the other hand, closed questions lead to narrow, short

¹ R. HOFMANS, D.B. ROTFIŠERE, A. TROSENS, *Mediācija. Mediācijas pamati teorijā un praksē*, Rīga, 2007, p. 133.

answers, for instance: “When did you sign the contract?” “What colour was that car?” “Did you submit a claim to the court or no?” During mediation, especially in the beginning of the process, when it is of utmost importance to learn as much information as possible, also non-disclosed information, the mediator can succeed by using exactly open questions. In its turn the closed questions can be asked by the mediator in those phases of mediation when it is necessary to clarify facts or to discipline the party of mediation who is too vague in the answers, evades answering or is in too philosophical mood.

The questions which the mediators are recommended *not* to ask are those beginning with “Why?” These type of questions sound too judgmental and evaluative. However the practice shows that not the wording of the question, but instead the tone of voice and attitude of the person posing this questions is what attributes judging, condemning meaning to the question. It is possible to ask in a nice, understanding and non-judging way a question like “Could you please tell me more on why you decided not to visit your child once a year?” And it is equally possible to ask in a nasty, evaluative tone technically correct question like “Could you please tell me more about this case?” Consequently, rather the attitude, tone, mood, body language and intonation of the voice of the mediator are those parameters which decisively affect the contents of the questions and their impact on the parties of mediation. If the attitude, tone, mood, body language and intonation attest friendly and professional interest of the mediator, and not a judgmental approach, the party will be more willing to come up with a comprehensive and informative answer.

The mediator must simultaneously listen to the parties about the subject told, as well as see the situation in its totality, make conclusions for himself, accordingly pose the next questions and think about the best strategy and methods to be used to progress in the mediation process. In the context of asking questions the work of mediator is similar to the work of journalist, where a good question can help the respondent to think about themes, about which the person have not even though before in the heat of the dispute. However for the mediator this task is very hard, especially if the subject of the dispute is complicated and connected with a list of complicated facts, which the mediator has to learn in a limited period of time. As the basic principle the mediator should actively listen to the parties and ask them questions about subject which the parties describe. The mediator should not switch to the subject B if the party is talking about subject A. Therefore the mediator asks gnostic and inviting, open questions about the subject the parties talk about at a given moment of time. For instance, if a party talks about difficulties in the workplace A, then the mediator should not start asking about the size of computer which the person uses in the office. If the person talks about a particular subject, this means that this theme is important to her and she wants to share this information, talk about it, be heard and listened to, appreciated, supported and respected. Only in the case when the person repeatedly talks about one and the same subject and can not brake away from this spell, the mediator, with different, even provocative questions can move to the other subject and therefore try to focus on other issues.

A mediator should be capable to notice the moments when the party repeats some word, phrase or subject 2, 3 or even 4 times. Normally in those cases when something is repeated 2 or more times, the party is sending a strong signal she or he wants to talk about this more and wants to be helped to disclose. For example, during mediation process a party says that she would like to run away. In a short while the same party repeatedly says that in these circumstances she better runs away. As soon as the mediator hears this repetition and takes it as a signal for subject to be disclosed the mediator can ask a question: “I noticed that today you mentioned twice your willingness to run away. Would you like to tell me more about this and what the running away means to you?” The purpose of such a question is both to help to the party to realise the posed question and to discover the meaning of it, as well as to help to the opponent to hear the wishes, feelings and aims of the first party. Therefore the mediator should notice the willingness of the party to be heard, to give her a chance to talk about this subject, disclosing its content and respecting feelings and wishes of the speaker.

Practice shows that people do not entrust all the information to one person. Instead, people intuitively feel and from experience conclude which listener is ready for what type of information. One friend could be suitable to hear information about private life, especially about raising children, another friend can be ready to listen to professional and carrier life stories, especially those of success, but the third friend is a strong shoulder to cry on about injustice of life. If the partner in conversation demonstrates inability to listen to the particular subject or person, then the next time the speaker will be more cautious on a particular subject or will avoid at all to discuss this subject with that particular person. People choose to whom trust their stories and discuss them only with a person whose opinion matters to them or whose reaction to the story they are willing or ready to accept. Similarly as when a child notices that reaction of

the parents is aggressive and negative when the truth is told, the child either stops telling the truth and starts lying, or discloses the truth to the other persons who can accept it in a decent way. Knowing this, the mediator should behave in a way to respect and motivate the parties to tell about their subjects, letting them to feel heard, understood, appreciated, accepted and not judged. A mediator can also pose to himself questions like: “What exactly the party is trying to tell me now?” “Why the party has chosen me to tell this?” “What do these words mean?” To clarify the answers to these inner questions, the mediator can find a good moment in the mediation process and ask to the parties gnostic and examining questions with the purpose to establish, whether the questions are understood correctly and does the mediator still follows the direction of the mediation.

The way how the mediator listens to the parties and accepts their answers and storytelling affects procedure of mediation. Therefore, before closure of this chapter, the form of questions and the form of listening has to be mentioned, and this is the active listening. Although the sound locator of the human – ears – are placed externally, and technically it is possibly to hear and listen even not looking at the source of sound – to the speaker - or being rather distant, nevertheless it is important for the mediation process to reasonably demonstrate to the parties that they are really heard not only in the audial level of sounds, but also in the level of understanding. The purpose of the active listening is to correctly perceive inner condition, needs, feelings and wishes of the partner in conversation, which mostly are expressed in a rather hidden and indirect way. These messages must be paraphrased to share with the partner of conversation his world of feelings². Active listening means letting the partner in conversation talk, showing gestures, facial expression and body language of mutual understanding, at the same time remembering and respecting the feelings of the opposing party in mediation. Both parties in mediation shall receive the same appreciation, attention and respect of the mediator.

3. Reflecting in mediation

Disputants complain at times that the opponent does not listen to them and does not hear what they say. Such situation speaks about the fact that the parties have difficulties in communication and that the parties can't find a way to the solution. Therefore the mediator shall help the parties to hear each other and to take steps towards amicable agreement. One of the tools how mediator can do this is to reflect what the parties have said. Reflection should be made in a reasonable quantity and frequency, taking into account type of the dispute and personalities of the parties. For instance, if the tempo of mediation is slower the mediator can manage to reflect almost after every second sentence. For example, the party says: “I want to have peace and silence when I am home.” And the mediator reflects what has been heard by saying: “So you say that peaceful atmosphere is important for you.” Or maybe the party says: “I don't want to continue this agreement because I am constantly cheated.” And the mediator reflects by saying: “Do I understand you right that you have lost trust in your business partner?” Reflection can be done in the form of question or of the statement. In both cases the mediator reaches a number of goals. First, the mediator by saying the statement in other words helps the opponent to understand the essence of the dispute slightly otherwise. Secondly, the mediator demonstrates to the mediation party that he is heard and that the information is correctly comprehended. Thirdly, the mediator receives approval for himself that the information have been understood correctly.

There are three most frequent possibilities how the party in mediation can react to the reflection made by the mediator. The first, when the party positively approves that the mediator has understood correctly what was told by the party. The second, when the party negatively responds by saying that that is not what was just told. In this case the mediator should try to clarify the contents of information by asking that party to explain a little more for better understanding of the story. And the third is the reaction of perplexity showed by both of the parties. This is typical to fast speed, precise, business-like mediation processes, when it is almost impossible for the mediator to find the right time for reflection of said information and expressed emotions. Even more, such attempts of reflection can be taken by mockery or incomprehension, because the atmosphere and environment of business mediation is so official that reflection or paraphrasing of one subject – understandable for both disputants – could rather imply that the mediator is not competent, or is childish, with behaviour similar to the parrot who repeats what he has just heard, unable to follow the tempo of mediation and flow of information. Therefore reflection is possible, but not

² R. HOFMANS, D.B. ROTFIŠERE, A. TROSENS, *Mediācija. Mediācijas pamati teorijā un praksē*, cit., p. 131.

a mandatory method for the mediator. It can be used, and the mediator is ready to use it at any time to help the parties to understand each other and themselves.

The mediator reflects to both the parties – contents of what has been said and feelings of the parties. For instance, if the parties react emotionally by crying or screaming, the mediator can reflect this by saying: “I see that you are very sad now.” Or: “You have a lot of anger about this matter.” Naming emotions can help the parties to understand the situation better. Therefore, reflection abilities of the mediator can help the parties to realise the essence or nuances of the dispute, as well as the disclosed information and feelings of the opponent.

4. Joint and separate sessions

It is possible to use joint and separate sessions, so called caucuses in mediation, and their proportion, division and amount depends on the choice of working style of the mediator. Mediators are divided into two camps depending on their attitude towards use of joint and separate sessions in mediation. One camp believes that the mediation process should be used at all times by simultaneous participation of both parties, thus putting the accent on importance of equality of the parties and neutrality of the mediator. Separate sessions should be used only when the mediator discovers or feels that in mutual presence the parties, knowingly or not, evade to disclose complete information or disclose their feelings. The other camp is of the opinion that the mediator shall use separate sessions as much as possible, because the caucus is one of the most important components of mediation: it is the stage where, after having seen parties together the mediator meets privately and confidentially with each party separately³. Therefore in this chapter none of both approaches will be glorified, but instead positive and negative aspects of both will be characterized.

If the mediation process is begun with a joint meeting, then the parties strengthen their confidence in neutrality of mediator and his equal attitude towards both parties, because in the first session they all meet together and explain their situation in obviously equal conditions. The introductory session is especially important because the first impression about the mediator and his abilities to conduct the process of mediation is established. If the first impression is established in equal conditions, there is a higher chance the parties will be able to trust the mediator and take him as a neutral and non-biased professional. However, there is a risk that in the common session, especially in the introductory part/ the disputants will hesitate to disclose to the mediator plenty of valuable information in the presence of the opposing party.

In its turn, when the mediation process is opened by separate sessions, there is a much higher probability that both parties will disclose without delay to the mediator their wishes, aims and interests. However the risk of separate sessions is connected with the fact that the opponent can feel and demonstrate distrust in the mediator and start questioning his neutrality, not knowing what issues the mediator has discussed with the opponent in the absence of the other party. Similarly each party can try during separate session to convince the mediator, knowingly or without explicit purpose, to stand on its side. If the mediator is breaching the code of conduct for mediators and acting non professionally, it becomes possible to manipulate the mediator, consequently the mediator loses neutrality and becomes more like a representative and ally for interests of one party. Although a mediator does not adopt a binding decision, the parties nevertheless keep trying to appropriate the mediator in order to gain dominance and advantage over the opponent. Moreover the mediator may not disclose the information gained in a separate session without explicit consent from the party. Therefore separate sessions, especially in the introductory part of mediation, do not speed up the mediation process, nor makes it more effective, but instead cast doubts on the mediator and increase the risk of distrust, as well as bring into a deadlock the mediator who has gained information from the parties, but is not able and allowed to use it for their mutual benefit.

Usually joint and separate sessions supplement, not exclude each other. Application of just separate sessions could be useful when one or both of the parties have proposed a clear precondition that its participation in mediation is only realistic when both parties will never sit in the same room. This type of situation could arise due to threats, hate, principled positions, *etc.* Individual sessions of equal length, called also shuttle mediation, are organized by the mediator with both parties. This balance between the parties would be destroyed in situation when the mediator would hold individual session just with one

³ F. STRASSER, P. RANDOLPH, *Mediation. A Psychological Insight into Conflict Resolution*, London/New York, 2004, p. 40.

party, ignoring rights, needs and interests or the opposing party. When conducting separate sessions, the mediator must make sure that he is able to maintain his impartiality and neutrality⁴.

5. Notes and tools

The mediation process is not only verbal negotiations of the parties by intermediary of the mediator. To advance communication of the parties and to help them understand their own aims, interests, needs and solutions as well as those of the opponent, the mediator is free to use a variety of technical tools, mainly taking notes, writing down and visualization.

Above all, taking notes is necessary for the mediator himself. Regardless of the fact how excellent is the memory and ability of perception of the mediator, the need to write down information is inevitable in mediation process where previously unknown parties and previously unknown facts are discovered. In the process of mediation the mediator learns about names, titles, dates, numbers, circles of relationship, needs, wishes, purposes, solutions, historical events and future intentions, as well as witnesses generation of ideas, and all of this is connected with a solid amount of new data. Therefore to acquire and better retain this very broad information disclosed by the parties, making notes is a professional skill of the mediator. The mediator, without losing the contact with the parties, can write down the information either in the paper form note-book, or also use an electronic device. Whichever means of taking notes the mediator is using, the most important aspect is to keep at all times the contact with both parties, which includes reasonable, non-staring eye contact, maintenance of understanding attitude, displaying suitable body language. It would not be appropriate if the mediator would write down everything so diligently that he would become a protocolist, thus losing the contact with the parties. Also the mediator should not stop the parties in the middle of their story just in order to be able to write down everything. In the worst case, if the information given by the parties is crucially important for the mediation process, the mediator can explain to the parties that writing down will be helpful for the process and that therefore there is a grounded reason to slightly slow down the process for note-keeping reasons. The mutual communication between the parties and the communication with the mediator, and not the punctual note-keeping, is of primary and decisive importance in the mediation.

When making notes, it would be necessary for the mediator to mark, whose the ideas or story the mediator is writing down in a given moment. Therefore the mediator can divide the page of his note-book into two columns, where in one of them the mediator writes down the story told by one party, but in the second column – that of the other. If an accurate division of the page (or any other marks helping to identify what is said by each party) is not made, there is a risk to forget or mix up the opinions of the parties. Then the mediator can get lost in information in the middle of intensive process of mediation, losing orientation marks which party has told what aspect of the story.

Regarding the parties the mediator can also provide for them sheets of paper and pens, so the disputants could write down their thoughts. The mediator can put a paper and pens on the table in the mediation room, or can put these items already in front of each particular party. The possibility to write down is especially important for the parties at the moment when the opponent is making his monologue speech. The practice shows that during speech of one party the opponent tries to intervene and interrupt the speaker by emotional comments and remarks. One of the tools how mediator can stop the intruder is to remind him about rules of the mediation explained in the introductory part of mediation, namely, to listen when the other party is speaking. The other, more effective tool is to suggest to the intruder that all ideas, remarks and comments can be written down on the paper so to remember them. Thus the intruding party is not losing any ideas which came to his mind during the speech of the opponent.

A common tool, equally useful for the mediation process and for the parties the mediator can use a black or whiteboard or flipchart pages. By using markers of different colours the mediator can write on them themes, aims, interests and other useful points to be discussed in the mediation. Such visualization of the subjects helps to the parties to better perceive the subject of discussion and concentrate on it during the process. Equally as in his personal notes, also the black or whiteboard or the flipchart page can be divided into two parts, thus allocating equal space for both parties to write down their themes and points of discussion.

⁴ R. HOFMANS, D.B. ROTFIŠERE, A. TROSENS, *Mediācija. Mediācijas pamati teorijā un praksē*, cit., p. 147.

In the case the lack of whiteboard is not available for the mediator, or if the parties are opposing the use of such rather childish or scholarly type of instrument, the mediator can equally well write down these points on the pages placed on the working table or even in small and colourful post-it stickers. This equally helps the parties to visualize their dispute and clauses under discussion. These and other methods and tools of mediation should be used with the aim to promote negotiations between the parties and better perception, not just to show how creative the mediator can be