**The IFC Mediator Handbook**

**Credits**: This handbook is based on *The Mediator Handbook* written by the Centre for Effective Dispute Resolution (CEDR).)

The IFC Mediator Handbook

© IFC 2011

**Contents**

Introduction 4

The landscape of dispute resolution 5

A brief history of Alternative Dispute Resolution (ADR) 5

ADR processes 8

Negotiation, litigation and mediation 13

The concept of mediation 17

An overview of mediation 17

Mediation is not 21

Essential foundations for mediation 23

The cornerstones of mediation 23

A process framework for mediation 28

A process with five phases 28

Preparation phase of mediation 28

Opening phase of mediation 31

Exploration phase of mediation 35

Bargaining phase of mediation 39

Concluding phase of mediation 43

The role of the mediator and others 48

Aspects of the mediator’s role 48

The mediator as coach 49

The mediator’s style and approach 51

Roles and responsibilities of parties, lawyers, experts, assistant mediator and co-mediator 55

Process Challenges 58

Communication skills for effective mediation 60

The importance of communication skills in mediation 60

Active listening 60

Working with emotions 73

Using negotiation skills as a mediator 76

Aspects of negotiation 76

The mediator as negotiation coach 81

The IFC Mediator Handbook Page 2 of 110

© IFC 2011

Overcoming common problems in negotiation 87

Competence and good practice 88

Competencies for the effective mediator 88

Ethical and legal responsibilities for mediators 92

Some dos and don’ts for effective mediation 96

Convincing parties to mediate 98

Convincing Corporate Parties 101

Key Messages 106

Building a Mediation Practice 108

Beyond the training course 110

The IFC Mediator Handbook Page 3 of 110

© IFC 2011

**Introduction**

This handbook is essential preparation for the Mediator Skills Training (MST) course you are about to attend. The course operates on the basis that participants are familiar with the contents of the handbook. It is intended to support the learning that takes place during the course through the practice and feedback, and to be a useful reminder for those with some experience. Revisiting the handbook during the course will reinforce participants’ understanding of the role and skills of the mediator and the process of mediation. After the course many mediators keep the handbook for reference.

**ADR and the International Finance Corporation (IFC)**

IFC, a member of the World Bank Group, promotes sustainable private sector investment in developing countries to help reduce poverty and improve people's lives. In recent years, IFC has been at the forefront of establishing Alternative Dispute Resolution (ADR) in emerging markets. The main objective of IFC’s ADR Program is to institutionalize private mediation centres, judicial mediation/conciliation in chambers and court connected mediation and other forms of ADR for more speedy and cost-effective commercial dispute resolution, offering greater access to justice for entrepreneurs.

IFC supports the application of ADR by enhancing the legislative framework and creating more efficient judicial systems by building the capacity at courts to apply ADR. It introduces new best practices in ADR through the establishment of pilot commercial mediation centres and professionalizes mediation by transferring skills and know-how to practitioners.

Successful initiatives in Pakistan, Egypt, Morocco, Bangladesh, Croatia and other countries assisted by IFC have all had a strong element of mediator skills training to both engender the concept of ADR and the capacity to deliver ADR services. Such capacity is without doubt one of the primary steps in building momentum and IFC has thus worked positively with these trained mediators locally, to conduct mediations, build mediation institutions and in developing them to train others in the future.

**Credits**

This handbook is based on *The Mediator Handbook* written by the Centre for Effective Dispute Resolution (CEDR).

The IFC Mediator Handbook Page 4 of 110

© IFC 2011

**The landscape of dispute resolution**

**A brief history of Alternative Dispute Resolution (ADR)**

**Where does ADR come from**?

Alternatives to the resolution of disputes through public court trial have deep and different roots worldwide. Adjudicators in many jurisdictions have, by custom or duty, sought to settle claims by exercising a conciliatory role. In the Middle East and Africa, China, South Asia and South America, the role of the elder-led informal community meeting for resolving disputes is well known.

Mediation in family, community, environmental, international diplomacy and workplace contexts has a range of different and long-standing cultural origins.

In its modern synthesis, commercial mediation developed first in the USA in the late twentieth century, as part of a drive to find alternatives to the delay and expense of litigation as then perceived. Its development since the Pound Conference in 1976, and the visionary speech given there by Professor Frank Sander on the concept of the multi-door courthouse, has been just as much integral to the development of modern civil justice processes as alternative to them. ADR was soon taken up in Australia and Canada and began to take root in England and Wales in the late 1980s, where family and community mediation were already growing.

In the UK, its development has been increasingly symbiotic to civil justice processes rather than in competition with them. This is exemplified particularly by the reforms proposed by the then Chief Justice, Lord Woolf in his ground-breaking “Access to Justice” reports of 1995 and 1996, and the Civil Procedure Rules 1998 that followed and implemented them.

Across Europe, the 2008 EU Mediation Directive by the European Parliament and Council, referring to cross-border disputes between disputants within member states, has had positive consequences for ADR. It has cemented into place the already high standards of ADR that are a pre-requisite in the twenty-first century for aspiring states to join the European Union, on occasion taking the form of court-annexed mediation. Indeed, whilst implementing the Directive, existing member states have been considering how mediation is accessed in their own jurisdictions. This has led to reviews of practice and in some instances quite substantial legislation.

In the Middle East and North Africa (MENA) region, a number of recent projects initiated by donor organisations such as the World Bank/IFC and the UK Department for International Development (DfID) have helped engineer similar reform, including updating civil procedure codes and rules of the courts, launching ADR centres, both independent and court-annexed and training cadres of mediators. Countries in the region where such projects are, or have been, operational include Pakistan, Bangladesh, Egypt, Morocco and India.

Mediation has become familiar in a range of business sectors, including construction, workplace and employment, public law, personal injury, clinical negligence, company and partnership, and applied to a wide range of contractual differences, as well as taking an increasingly significant role in the development of civil justice generally.

The IFC Mediator Handbook Page 5 of 110

© IFC 2011

**The development of ADR processes and uses**

‘ADR’ has become a familiar shorthand label used to designate a whole range of dispute resolution activities. As a definition it has its shortcomings, however. ‘Alternative’ is a much-criticised component of the label. Settlement is in many common law jurisdictions the norm (though by no means in all) and, as was argued for a time in Australia, often it is trial that is the alternative, in the sense of its being the process less frequently used. In England and Wales, trial is officially regarded as a last resort for cases that cannot be settled. Nor is ADR in general or mediation in particular only conducted as an alternative to court trial, as it is often deployed before proceedings have been started or even contemplated.

While it might be expected that tensions would develop between those who promulgate the traditional civil justice system – judges and litigation lawyers – and those who promote ADR, in fact lawyers and judges have played a very important part in the growth of ADR.

Many of the early pioneers in ADR were lawyers seeking to offer a wider and more flexible range of options to clients wishing to resolve their disputes, and many mediators still come from the legal professions. The spectrum is much broader now, and there are trained mediators from all professional backgrounds and all sectors. Also, judges have trained as mediators, both while sitting and also shortly before retirement, whereupon some have developed new careers as mediators. Just as importantly, court decisions everywhere have encouraged the use of ADR. Many jurisdictions are adopting approaches to encourage ADR, for instance by holding information sessions for litigants, through court directions and ADR legislative support such as the EU Mediation Directive.

Problems with the ADR definition still remain. Should the term embrace arbitration – the first modern alternative to public trial to emerge, but undoubtedly an adjudicative process much more closely allied in style to judicial determination – as is the norm in the USA? Should it embrace bilateral settlement discussions without a third-party neutral? This handbook concentrates on mediation, but the next section briefly reviews the other processes usually gathered under the ADR umbrella. Definitions matter less than the need to recognise that the real benefits of ADR, and particularly mediation, lie in the flexibility of practice which it offers, enabling fresh approaches to be developed to suit the needs of the parties and each dispute, making a better ‘settlement event’ available, at less cost in time and money.

Thinking about mediation and how to train mediators has shown that the process involves far more than brokering a deal or banging heads together. This has led to academic analysis from the psychological, anthropological and socio-legal disciplines, along with negotiation and game theory; all these have gained significance. The approach in this handbook is strongly practical requiring intuitive as well as theoretical learned skills, and emotional as well as intellectual intelligence.

IFC, the private sector arm of the World Bank Group providing investment and advisory services, has identified mediation as a significant tool for business support and consolidating economic development across the globe; and CEDR often works closely with the judiciary and policy-makers over locating mediation appropriately in local civil justice systems. What is striking is the ease with which mediation passes across jurisdictional and cultural boundaries. It has always been well regarded as a way of dealing with cross-border disputes, and the enthusiasm with which it has been adopted in so many countries has underlined its value in this context and for business disputes generally.

Internationally we have seen legal developments facilitating the introduction and application of mediation in many jurisdictions, supported by the continued development of ADR bodies in these countries, and with recent interest in all continents of training mediators to an internationally recognised base-line level of competence, mediation is set to flourish worldwide.

The IFC Mediator Handbook Page 6 of 110

© IFC 2011

The growth of mediation has been connected with litigation and civil justice procedure. Increasingly, however, its value is being recognised in areas beyond and outside litigation - in resolving community development issues, in facilitating improved relations within teams or Boards of Directors, and in putting together difficult deals or agreements. The core competencies that underpin mediator training have been found to have wide applicability, and the mediation ‘umbrella’ within which these can operate has ever-growing reach for protecting organisations and individuals from the destructive potential of conflict and difficult conversations.

The IFC Mediator Handbook Page 7 of 110

© IFC 2011

**ADR processes**

This section gives a brief insight into the wide range of ADR processes.

**Variants of litigation**

**Arbitration**

Arbitration was devised to overcome some of the problems encountered in litigation, and is often regarded as part of the ADR repertoire. In England and Wales arbitration is regulated by the Arbitration Act 1996. Although arbitration empowers a third party to decide the outcome of a dispute, it is more likely that the arbitrator will have subject-area expertise, which, for some, makes the decision more palatable. The decision is made according to the relevant law, is binding and is not normally subject to appeal.

Like litigation, the process of arbitration is adversarial and mostly formal; however, unlike a court hearing, the proceedings take place in private, and the parties usually select the arbitrator or panel of arbitrators. In arbitration, the parties agree on procedural choices to suit the nature of the case, and the arbitrator cannot overrule the parties on process matters.

Where a dispute involves complex issues, extensive documentation and large numbers of witnesses, arbitration can be more expensive and more time-consuming than litigation in the courts.

**High-low arbitration**

This is a form of arbitration in which the parties have agreed the parameters for the outcome prior to the arbitration. The arbitrator may or may not know what the parameters are in advance of issuing the award. Should the arbitrator make an award within the range established by the parties, the award made would become final. If the arbitrator awards an amount lower or higher than the range established by the parties, the lower or higher limit set by the parties would apply. This variant is selected when the parties wish to limit their risks.

‘Baseball’ arbitration (or ‘pendulum’ or ‘final-offer’ arbitration) is a variation of high-low arbitration, sometimes used in the USA, named from the method used in player salary negotiations in major-league baseball. Each party names a figure at which they are prepared to settle. The arbitrator must then choose between the two figures, but does not have the authority to modify the figures.

**Potentially binding decisions from a third party**

**Adjudication**

The most common form of adjudication is by written submissions to a neutral third party, who is usually a specialist in the area of dispute. In some cases these submissions are all that the adjudicator has and thus, as there is no opportunity for revision, there is great pressure on the parties to present their best case. In some cases the parties may each give a response to the other party’s submission. There may also be an oral hearing or a site visit. The process is generally short and the decision is binding, although there is usually provision for appeal within a stipulated period. Consumer Adjudication schemes operated by trade associations, industry sectors or large

The IFC Mediator Handbook Page 8 of 110

© IFC 2011

companies with a consumer focus, are also now quite common to help deal with consumer complaints about their members, and generally focus on low value claims and aim to provide efficient results.

**Expert determination (ED)**

Expert determination may be used to decide on a specific matter of contract or other law, or on disputed facts or financial valuations. Usually the expert, who is selected by the parties, investigates and reports on the issue, and does not rely exclusively on submissions made by the parties. The decision is usually binding and cannot be appealed.

**Ombudsperson services**

Originating in Scandinavia, there are now many ombudsperson schemes in the UK and other countries in a range of public and private sector contexts. Decisions are usually based upon written evidence, although there is an increasing trend towards meeting with the parties, both jointly and individually. The process provides a cheap and relatively informal means for individuals to complain of maladministration or improper decisions by major institutions, businesses or government.

Most ombudsperson schemes will not investigate a complaint until the seller of goods or provider of services has been through pre-set steps, making a serious attempt to resolve the complaint, and the parties have become deadlocked. Most ombudsperson services are funded through a levy on the industries they serve, and are free to the individual complainant. Most ombudsperson decisions are binding on the industry member but not on the complainant.

**Med-Arb**

Short for mediation-arbitration, this process gives the parties the opportunity to use mediation to reach a settlement, and then to rely on a decision by a neutral if there are issues on which no agreement can be reached. This process encourages parties to create their own settlement in the knowledge that an arbitrator will otherwise impose an outcome.

Sometimes, the parties choose to have the same person act as both mediator and arbitrator, while others choose one person to be the mediator and another to be the arbitrator. Knowledge that the mediator may eventually act as arbitrator may cause parties to be more restrained in revealing their real needs and positions. There are other potential difficulties if the same person acts in both roles; particularly challenging is the question of how to treat information obtained confidentially in private meetings. It is therefore often desirable for a different neutral to arbitrate on the outstanding issues, even though this will involve a further presentation of the parties’ cases and some further costs.

Occasionally, the reverse arrangement of Arb-Med is used, with the arbitrator given the formal obligation to hear the case and decide on an award, keeping the decision private, and then to operate as a mediator; if the case does not settle, the decision and the award are disclosed.

**Non-binding third-party involvement**

**Early neutral evaluation (ENE)**

Early neutral evaluation is a preliminary assessment of facts, evidence or legal merits by a neutral. It is not binding, but provides an unbiased evaluation of relative positions as well as guidance as to the likely outcome if the case were to be heard in court. The parties appoint an independent

The IFC Mediator Handbook Page 9 of 110

© IFC 2011

person who expresses an opinion on the merits of issues specified by the parties. The process is designed to serve as a basis for further and fuller negotiations or, at least, to help parties avoid unnecessary stages in litigation.

**Judicial appraisal**

This is similar to ENE described above. The most common form of judicial appraisal is where the case is presented in written form to a judge (usually retired), who then gives an appraisal of the likely result if the case goes to court. It is different from obtaining counsel’s opinion in that the judge receives submissions from both sides. The parties must agree the form and extent of submissions and whether the appraisal is to be binding or not; reaching agreement on those preparatory issues may sometimes be a challenge in itself. In the USA this route has been extended to a ‘summary jury trial’. This is a non-binding, abbreviated, mock trial using a panel of actual jurors. Rules of evidence and testimony are usually modified to expedite the process. The ‘trial’ is usually followed by a negotiation or mediation. A ‘judge’ may be selected by the parties to moderate the ‘trial’ and to act as mediator following the jury ‘award’. The parties may question the jurors about the factors that influenced their decision.

**Neutral fact finder**

This process is similar to expert determination, described above, but restricted to the clarification of particular factual issues, and non-binding in that the neutral does not normally make an award.

**Mediation**

Mediation is the primary form of ADR and covered in detail in this handbook.

Variations on mediation include:

**Co-mediation**

In certain situations parties may require the assistance of more than one experienced mediator. From the outset, the two (or more) mediators, both neutral, will work with the parties to design the process to be used during the mediation. They will both act as mediators throughout the process and usually have equal status.

**Project or alliance mediation**

This is a dispute prevention mechanism whereby a mediator is appointed at the outset of a long project, or a new major business relationship, to act as the point of contact when communication problems or disagreements are anticipated or arise.

**Executive tribunal**

Sometimes called the ‘mini-trial’. A senior executive from each party joins the mediator, or neutral, and they sit as a panel to hear the submissions from each side’s advisers in joint meeting. The executives normally have had no previous direct involvement in the dispute and bring a senior management perspective to the issues. After the submissions in joint meeting, the senior executives retire, usually with the neutral, and negotiate a settlement. The neutral may act as chairperson or even adviser.

**Conciliation**

The meaning of the terms conciliation and mediation may differ or be interchangeable, depending on the country or dispute sector involved. In the UK health sector, for example, conciliation is often used to mean a process of neutrally facilitated discussion of complaints, with no agreement

The IFC Mediator Handbook Page 10 of 110

© IFC 2011

over financial compensation normally included in the outcome. By contrast, in civil engineering contracts, conciliation traditionally included a solution to a dispute being recommended by the neutral. Around the world, in many customary and traditional forms of dispute resolution, conciliation by a family or community elder involves the third party making recommendations on potential settlement options to the parties.

**Independent interventions and facilitation**

Often described under the umbrella term of ‘facilitation’, independent interventions are the involvement of an impartial third party to facilitate negotiations, discussions, consensus building, problem solving, or relationship building, or to manage existing or potential difficulties in a wide variety of situations.

The aim of an independent intervention may be to:

* encourage a dialogue, where the intervention allows voices to be heard and issues raised
* plan the next steps to be taken or devise a framework for future action
* enable finality – a decision or agreement
* prepare for other processes such as mediation, ENE or adjudication.

Processes are tailored to the needs of the users, and can draw on a range of models such as:

**assisted stakeholder dialogue** – the neutral uses practical and flexible processes to improverelationships between stakeholders in order to clarify issues, resolve an existing conflict or achieve consensus.

**brokered talks** – a neutral acts as an impartial, creative force to hold ‘talks about talks’, whennegotiations have become deadlocked because of the number of parties or the complexity or sensitivity of the issues.

**deal mediation** – a neutral assists with contractual negotiations between businesses, although thereis no dispute as such.

**independent chairing** - an independent chairperson will manage the process rather than dictatethe content or the outcome. Independent chairing can be an end in itself, or it may lead to formal brokered talks or another form of dispute resolution.

**independent review** - an impartial investigator sets up terms of reference for an inquiry into facts,an identified problem or a difficult set of circumstances, and makes recommendations or reports findings according to agreed terms of reference.

**relationship building** – interventions can be within organisations to strengthen or restore workingrelationships, generate a common purpose and increase trust. Alternatively, the aim can be to enhance external relationships, for example, with suppliers or contractors.

**ADR offers flexibility and has applications beyond an individual dispute**

ADR is flexible and adaptable, and specific ADR processes can be devised to suit complex disputes in commercial and other sectors.

ADR also has a role beyond the individual litigated dispute. Businesses often seek a structure that will provide a sustainable way of preventing or minimising conflict with, for example, employees,

The IFC Mediator Handbook Page 11 of 110

© IFC 2011

suppliers or joint venture partners, and ADR processes frequently feature as an integral part of such designed dispute resolution systems. ADR can also be used as part of a consultative design process.

Where there is a willingness to resolve a dispute, tackle a problem or take preventative action, an appropriate process can be found or designed.

The IFC Mediator Handbook Page 12 of 110

© IFC 2011

**Negotiation, litigation and mediation**

Before looking at mediation in detail, this section draws some comparisons between negotiation, litigation and mediation.

**Negotiation**

Negotiation is often the best, most economical and satisfactory way of resolving a dispute. Negotiation is an everyday activity; some is not recognised as negotiation at the time, and most of it is effective. It is a skill that is central to human interaction and yet has only recently been studied, analysed and refined. Direct negotiation requires the negotiators to communicate with each other about the dispute and about their willingness to compromise.

Negotiation is usually possible where all or most of the following circumstances exist:

* the parties can identify and agree on what issues are in dispute
* the interests, goals and needs of the parties are not entirely incompatible
* the parties need to co-operate to meet their goals
* external constraints, such as time, reputation, cost, and the uncertainty of an imposed decision,
* encourage parties to engage in a private, co-operative process
* the parties can influence each other to act in ways that provide mutual benefit or avoidance of harm
* the parties recognise that alternative procedures are not as desirable as negotiation, which, in particular,
* allows them to determine the outcome.

There are two recognised core strategies for negotiating:

* positional negotiation
* principled negotiation.

**Positional negotiation**

Positional or competitive negotiation is the traditional strategy in the business environment, as well as in political and even social arenas.

The key characteristics of this strategy are:

* each side takes its best (most extreme) position on what it demands or offers
* a period of justification follows, which usually entrenches the position
* parties haggle, and even threaten, bully, cry or lie, in an effort to extract movement or agreement from the other side
* concessions are exchanged, often grudgingly.

Negotiators deploy a range of tactics to improve the results of positional negotiation:

* posturing over positions or interests
* withholding sensitive information, such as any weakness in the case
* engaging in bluff or making threats
* waiting for movement from the other party - digging in or walking out
* never giving without getting

The IFC Mediator Handbook Page 13 of 110

© IFC 2011

* making small concessions slowly.

Positional negotiation is often affected by whether or not the parties will meet again. One-off deals are likely to make parties tougher, more willing to risk the possible downsides of positional negotiation, and more extreme. The result is not necessarily any different, but restraint is reduced and regard for the other party is less of an influence. Negotiators familiar with each other can develop ritual behaviours that become almost a game.

There are many other factors that influence a positional approach, including ego, peer pressure, the need to preserve reputations, and concern for job security or financial targets. The result is sometimes mistrust, damaged relationships, inefficient outcomes and even retaliation.

**Principled negotiation**

Principled or collaborative negotiation has emerged as an alternative strategy of co-operative negotiation.

Probably the most influential event in establishing an alternative to positional bargaining was the publication in 1981 of ‘Getting to Yes’ by Roger Fisher and William Ury of the Harvard Negotiation Project. The philosophy of principled negotiation proposes that, by treating negotiation as a genuine problem-solving opportunity, outcomes more satisfactory for both sides are likely to be achieved and at less cost.

The book describes an evolving strategy, the key characteristics of which are still relevant many years later. Principled negotiation seeks to improve the outcome of negotiations by:

* negotiating on the basis of principles; focusing on interests, not positions, and on needs, not wants
* depersonalising a problem, preserving dignity and making possible a co-operative approach to problem
* solving
* separating the people from the problem; working hard on the problem, and soft on the people
* establishing objective criteria and standards against which to measure any decision, unencumbered
* by subjective opinion

Fisher and Ury argue that by adopting this approach, individuals can avoid some of the inefficient gamesmanship of competitive or positional negotiation, without being exploited.

This requires that, with the help of the mediator, the parties:

* identify or review their BATNA (Best Alternative To a Negotiated Agreement), as a firm foundation for negotiating and decision making, providing each party with a guide as to when negotiations should be terminated because a better result probably lies elsewhere
* invent options for mutual gain, such as payment in kind, future business, agreeing steps to protect reputation, or a particular timescale for action, and discovering how an outcome or deal can be established that meets both or all parties’ real interests. This has been developed in later literature into the concept of ‘creating value’ before ‘claiming value’; that is, extending the scope of the negotiations so as to include extra ideas or elements which can form part of the settlement, before agreeing who gets what
* seek to develop good relationships with the people on the other side; if deadlock occurs, they may reconsider their BATNA and reassess their risks, develop agreement on interests, or agree objective standards as a basis for settlement.

The IFC Mediator Handbook Page 14 of 110

© IFC 2011

Principled negotiation is the basis of the mediator’s ‘neutral negotiator’ strategy, discussed later in this handbook. However, positional negotiation also plays a part in the journey to settlement, and mediators should expect parties to move between these two approaches. It is quite usual for the mediator to work hard to encourage the parties to adopt a principled approach, to see what might be available as part of the settlement, including non-financial elements, and then for the parties to move back to positional bargaining in order to finalise a deal.

**Why negotiations fail**

Negotiations fail for a range of reasons, including distrust between parties or advisers, poor negotiating skills, lack of realistic risk assessment, heightened emotion and other blocks to communication. Sometimes negotiations stall because of the strategies adopted by the negotiators. Two positional negotiators might push themselves into impasse with brinkmanship, refusing to make an offer in case it indicates weakness, waiting until the steps of the court to make an offer, or testing the other side with a challenging formal offer which threatens costs consequences. Two principled negotiators might disagree on the objective standards by which to assess the value of their case.

The mediator has an important role, detailed elsewhere in this handbook, in helping parties to overcome these and other barriers to effective negotiation.

**Litigation**

Litigation is the most familiar form of formal dispute resolution worldwide. It is publicly financed and administered, carried out in a public forum and is bound by detailed rules about procedure and evidence. It is not voluntary – parties have to appear when required or suffer penalty - and the decision is binding, although may be subject to appeal. It is often costly and time-consuming. Depending on the particular legal system, the decision is based upon law and precedent, but the system is subject to human error and other uncertainties, and the outcome is not easy to predict and may sometimes even be perceived as unfair.

Litigation essentially involves a judge deciding past rights as between the parties and granting or refusing a remedy on the facts found. There is almost always a winner and a loser, and accurate predictions about which will be which are difficult.

**Mediation**

**Mediation has established itself as the leading ADR process**

The need for a viable alternative to litigation, which does not deprive any party of its right to pursue a case through to trial if a satisfactory settlement cannot be reached, is broadly accepted. The focus of litigation is on the past, whereas ADR processes can look to the future. Even when settlement is reached through negotiation, the process is sometimes narrowly focused and hurried, especially when conducted on the steps of the court, and the outcome less satisfactory than when negotiations are assisted by a third-party neutral and involve the actual parties directly.

**Why mediation works**

Mediation enables the parties to resume, or sometimes to begin, negotiations. The presence of a mediator changes the dynamics of the negotiating process. The mediator brings negotiating, problem-solving and communication skills to the process, and deploys them from a position of independence and neutrality, making progress possible.

The mediator, as a neutral, can:

The IFC Mediator Handbook Page 15 of 110

© IFC 2011

* win the trust of all parties
* facilitate communication
* focus the parties on the problem
* overcome emotional blockages
* help each party to understand the other party’s case
* probe each party’s case in private for interests and needs
* help parties assess their own weaknesses realistically
* suggest new avenues to explore, including helping parties to create value
* help parties to overcome deadlock
* save face for parties, including when needing to change their stance
* explore settlement proposals in depth
* obtain approval for settlement proposals
* assess realistically the chances of settlement.

Besides being quick and cost-effective, mediation looks forward, encouraging the parties to turn from the history and focus on the future. Most disputes are resolved without continuing or creating a future relationship, but the prospect of a future without the dispute can itself be a powerful driver towards settlement.

In contrast to litigation and arbitration, mediation provides an opportunity for parties to control the outcome of their dispute, even when direct negotiations have failed.

Overall, the benefits of the mediation process include:

* providing a platform for the parties to express how they each see the situation and how they feel about it
* restoring communication and providing a process for negotiation
* giving the parties a chance to decide for themselves a final and certain outcome.

**Comparisons**

Satisfaction for the parties can be achieved in the resolution of disputes on three levels:

* procedural
* emotional or psychological
* substantive, in terms of outcome.

Mediation is probably the only dispute resolution process able to deliver satisfaction on all three counts.

The IFC Mediator Handbook Page 16 of 110

© IFC 2011

**The concept of mediation**

**An overview of mediation**

**Definition**

There are many definitions of mediation. For the purposes of this handbook the following general definition of mediation is used:

Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.

**Mediation is a flexible process**. The venue, the date and the timing are all matters of choice fordiscussion between the parties and the mediator or the service provider. It is for each party to decide, sometimes with the help of the mediator, who should attend in their team (ensuring that the right people come to the table for the negotiations to be effective), what issues will be discussed and what outcomes will be considered. Not all of those aspects will be discussed before the mediation meeting, and all of them can be changed and adapted even after the mediation has begun, if it is recognised that something different is needed to facilitate progress.

The process can be designed, and redesigned, to meet the needs of the parties and the circumstances of the dispute. The standard commercial model is for everyone to gather in one place on one day, aiming to finish on that day – and the references in this handbook to the ‘mediation day’ are to that basic model. During that day the mediator, as the manager of the process, will run the process to suit the parties and the dispute, proposing a range of joint and private meetings and the order in which they occur. However, there are numerous variations available to suit particular situations.

**Mediation is conducted confidentially**, without prejudice and in private. Sometimes the fact thata mediation

is taking place is public knowledge; the details of any discussions and the results of those are rarely made public, although the outcome may be publicised if both parties agree. In addition, mediation usually involves some private meetings between each party and the mediator, in which the mediator commits to preserving the confidentiality of information received from one party in private, unless given express permission to disclose it to another party.

**The mediator is a neutral person** who assists the parties in their negotiations, independently andimpartially. The mediator must have no stake in the dispute or its outcome, nor be perceived as having an inappropriate link with any party. Parties sometimes request a mediator who is a specialist in the particular area of dispute, which might give the parties some comfort and enable the mediator to use industry-specific language. Whatever the level of technical or other expertise the mediator brings, he or she is not there to take sides or to make a decision about the merits of the case or the resolution.

**The mediator actively assists parties in working towards a negotiated agreement**. The mediatorworks hard with the parties, enabling them to widen their perspective, re-appraise their situation, their risks and opportunities, and to consider a range of possible ways of resolving the dispute. The mediator will use negotiation and other professional experience, skills and strategies to assist the parties to negotiate effectively, with a focus on the parties’ goal of reaching agreement on acceptable terms.

The IFC Mediator Handbook Page 17 of 110

© IFC 2011

**A dispute or difference** can bring parties to mediation. There is no requirement that the disputehas been formalised, for example by the issue of legal proceedings. The difference need not have a legal basis at all – it may be a matter of principle or belief, or involve the need for an organisation to make progress on improving relationships, internal or external. Even in a dispute that is close to a court hearing date, where the legal issues are well rehearsed between the parties before and at the mediation, personal or commercial issues may be as significant as legal factors in the parties’ decision to settle.

**The parties are in ultimate control of the decision to settle and the terms of resolution**. Themediator will often have a very full role in overcoming deadlock, in encouraging forward thinking and even in contributing settlement options or ideas for formulating the agreement. However, it is central to the concept of mediation that the parties are the decision makers. Effective mediators use their skill and experience to influence progress and yet, importantly, leave the decision about whether to settle and on what terms firmly with the parties.

Another aspect of the flexibility of the process is that mediation is not binding unless and until an agreement is reached, when settlement terms usually become an enforceable contract. Until that happens, the parties may walk away from the mediation at any time, as entering the process itself does not bind them to settlement. This and the fact that the process is without prejudice allows the parties to explore all options freely, hypothetically, and without commitment. Under CEDR’s Model Mediation Procedure, settlement agreements have to be in writing and signed to be legally binding.

Finally, mediation is often described as ‘voluntary’. Many mediations are initiated by mutual agreement between the parties in dispute. Once a mediation has started, continued participation is always voluntary, in the sense that any party can choose to disengage without adverse consequences, and what goes on at the mediation, however brief, must be kept from the judge or arbitrator, unless all present agree to the contrary.

Many commercial contracts include an obligation to mediate before proceeding to court or arbitration, and such obligations are likely to be enforced against a party who tries to ignore them. In many jurisdictions, courts have the power to order that parties try mediation. Such an order may amount to mandating its use or, as in England & Wales, a ‘robust recommendation’ to do so. Ignoring such an order or recommendation might lead to a costs sanction being imposed, even against a party who is successful at trial. In some jurisdictions, mediation is mandatory before parties are allowed to proceed to trial. So, entry into mediation may be less than wholly voluntary, but even then is still usually effective.

**The mediation process**

A broad framework for the mediation process has been developed and, with experience, a mediator can exploit the flexibility of the process for the benefit of the parties. The following outline provides a safe foundation on which to build.

Preliminary contact between the parties and the mediation organisation or mediator to:

* agree to mediation
* agree terms of the mediation agreement
* agree practicalities including dates, duration, location, representation, legal framework, fees, documentation
* agree on a named mediator.

Brief written summaries of the case, which are without prejudice and cannot be used in evidence in any later litigation, are submitted and exchanged by parties in advance to:

The IFC Mediator Handbook Page 18 of 110

© IFC 2011

* inform the mediator
* inform each other and focus parties on the key issues.

Initial private meetings; welcoming, greeting and settling parties on arrival, during which:

* how parties and mediator will be addressed can be agreed
* the mediation agreement can be signed
* initial comfort factors and other physical needs are dealt with
* the practicalities of the day might be discussed
* any immediate questions can be answered
* confidence in the mediator can be established. This is often followed by an initial joint meeting, at which:
* the mediator clarifies the process and emphasises the ground rules, recognising that the lawyers will have briefed their clients in preparation
* further trust can be developed between parties and the mediator
* the parties present opening statements to each other and the mediator
* some dialogue between the parties might take place
* a joint exercise might be undertaken to establish what needs to be tackled in order to achieve a resolution.

Then, usually, private, confidential meetings take place between the mediator and each party’s team

separately to:

* identify the important issues and needs of each party
* encourage openness about weaknesses as well as strengths
* manage expectations
* work with the full team
* discuss options for settlement.

Further joint meetings, as appropriate, are chaired by the mediator, at which the parties might:

* provide fuller explanations or further information
* set an agenda and agree next steps
* discuss differences, perhaps in understanding of fact or expert opinion, or likely legal outcome, or about the impact of events on a party
* generate ideas and options
* negotiate directly
* set the settlement down in writing or agree further action.

A joint meeting does not have to include all members of all teams. A mediator can use different combinations of those attending throughout the day to maximise opportunities for progress.

**Why mediation works**

The essence of mediation, and the reason for its success, is that it offers a powerful structure – the process described in later chapters - and introduces a changed dynamic into any negotiation or dispute discussion. The mediator acts as a catalyst, being an independent neutral who is committed to helping the parties to reach settlement, but who does not have a stake in the dispute or the outcome.

The IFC Mediator Handbook Page 19 of 110

© IFC 2011

This process:

* gets the right people and the right information to the table
* restores the negotiation process
* identifies and focuses on what really matters to the parties
* facilitates communication
* separates the people from the problem
* helps overcome deadlock and emotional blockages
* helps parties to reassess their risks
* widens the options for resolution
* rebuilds or safeguards relationships, sufficient at least to progress negotiations
* leaves ownership of the problem and the settlement with the parties.

**The space that mediation creates**

The mediator has a role in creating a space in which the parties can work on the dispute, different from what prevails outside the mediation. This concept of making space available has a number of dimensions, all of which contribute to the parties’ reaching a mutually acceptable resolution. The mediator needs to create an environment that includes psychological space for parties to regain a sense of control; physical comfort and privacy in which to relax and to generate the energy needed to make progress; time out with space to think; and a place where perceived power imbalance and other inequalities are cleared away to allow freer communication.

The space needs to be safe enough and comfortable enough for the parties to focus and work hard and, where necessary, face realities and make difficult decisions. The mediation agreement provides much of that safety; it makes the occasion confidential, and the fact that anything at all is taking place can be kept from others. It also makes the process non-binding until settlement is documented and signed. Mediation provides an opportunity for parties to have a break from litigious correspondence and the litigation process; it puts decision makers together, supported by their advisers, for a unique occasion. It provides a fresh starting point, which allows the parties to agree, implicitly or explicitly, to behave differently for a while; it provides an opportunity to change position with the minimum loss of face. It is a safe haven and can provide calm. The mediator must contribute skill and commitment to give this notional space tone and substance.

**Routes to mediation**

Parties may have come to mediation for a range of reasons:

* in accordance with a pledge to use ADR in all suitable cases where it is proposed
* under the terms of a commercial contract providing for mediation as part of the agreed dispute resolution process
* following a court recommendation or order to the parties to try mediation; while the courts have no power to order a wholly unwilling party to mediate on pain of being in contempt of court, they have power to impose costs sanctions, even on a successful party, if they ignore such a recommendation
* the parties agree to mediate, advised by their lawyers – with one or more of them less enthusiastic - but wanting to avoid any risk of costs sanctions for having ‘unreasonably’ refused an invitation to mediate even if they win
* the parties choose mediation, believing it gives them the best chance of reaching agreement in all the circumstances.

The IFC Mediator Handbook Page 20 of 110

© IFC 2011

**Mediation is not ...**

Mediation, even now, can be subject to misunderstanding and misconceptions, which can lead to unnecessary objections to its use. For example:

**Mediation is not a bar to litigation or arbitration**

Mediation does not preclude the use of other methods of dispute resolution, and no one loses any of their accrued rights by participating in mediation.

In many cases an action has commenced before mediation is adopted. Proceedings may or may not be stayed pending the outcome of the mediation, and work towards the litigation or arbitration process can continue if no stay has been ordered or agreed. Parties sometimes litigate to show that they are serious, and then negotiate through mediation.

**Mediation is not mere compromise**

Compromise, meaning splitting the difference down the middle, is not a word respected by many litigators or their clients. It is rare for mediations to settle on this basis. The mediator can assist the parties to develop creative options for settlement, which may not be available through litigation, based on the interests and needs of the parties and on a realistic assessment of risks or on agreed objective criteria.

**Mediation is not a waste of time and money if it fails**

If settlement is not reached in mediation, it is usually achieved shortly afterwards. The settlement gap will usually be narrowed at mediation through the negotiations and through parties gaining a greater understanding of the other party’s case and privately reviewing their own case. Mediation almost always tempers aspirations with realism, and movement towards settlement takes into account the risks, legal and commercial, of not settling.

There are costs involved in mediation; the mediator’s fee, the venue costs and advisers’ fees for the day. However, when settlement is not reached, the preparation for mediation is useful preparation for trial or hearing, or for further settlement negotiations. Most mediations last one or two days so the additional fee to each party is modest compared with the loss of management time and the costs of going through trial.

**Mediation is not a sign of weakness**

Lawyers who use mediation do so as an additional service for clients. It is now a mainstream process for dispute resolution, but it is not a soft option for client or adviser. A mediation is a period of intense negotiation that requires flexibility, concentration, and imagination, as well as other legal and commercial skills. It is an intellectual and professional challenge, yet the risks are low and the potential for a successful outcome is high.

**Mediation does not prevent parties having their day in court – in a way it guarantees it**

Mediation guarantees the parties an opportunity to present their case to each other, and to a neutral third party, in a way that allows them to highlight aspects of particular significance for them and, if they wish, to show the strength of their feelings. Mediation gives parties a better opportunity to do this than a formal trial, where their evidence is constrained by rules, and written witness statements mean that there is little opportunity for parties to speak except when subject to hostile cross-examination, or in limited re-examination. In addition, the mediation may be the first time that the parties have encountered each other in person since the dispute began, and

The IFC Mediator Handbook Page 21 of 110

© IFC 2011

presenting the case face to face is often a powerful precursor to improved communication, and thus to negotiation and to settlement.

**Mediation need not be risky or involve showing your hand**

The fact that parties will learn more about each other’s case is sometimes perceived as a risk of mediation. Mediation does educate the parties about each other’s case; however, the extent of information divulged is within the parties’ control and may be less than that required by the process of disclosure of documents, witness statements and experts’ reports prior to a trial or hearing. Sometimes parties choose mediation specifically to avoid having to disclose commercially sensitive information in public. Parties and especially their advisers will be alert to the fact that, once disclosed, information cannot be retrieved and may inform how parties prepare for trial if the case does not settle. In practice, increased understanding makes settlement more likely, and most parties are prepared to take a measured risk over providing additional information.

Mutual disclosure of information by parties, in preparation or on the day, can assist settlement negotiations. New information can be presented, assimilated and assessed efficiently when all parties and their lawyers are present at the mediation. However, no one at a mediation has to say anything or disclose anything that they wish to keep private.

**Mediation is not what lawyers, managers or judges ‘do all the time’**

A lawyer or party approaches settlement discussions as a negotiator and not as a mediator; no matter how reasonable and approachable, they cannot operate as a neutral. A neutral is detached from the problem, the emotion and the commercial pressures, and can manage the process of searching for settlement in a way that is different from parties, lawyers or managers who are involved in the dispute.

Unlike a judge, a mediator derives authority only from the parties, and is able to have private discussions with each side without breaching the rules of natural justice, since a mediator is not the decision maker. Even where a judge facilitates settlement at a case management conference or pre-trial review, this is done within, and often because of, the judge’s inherent authority and status, which is likely to affect the parties’ perceptions and decisions.

**Mediation is not counselling**

Mediators and psychological counsellors share a number of core skills, and yet the processes are very different and the roles entirely distinct.

Both mediation and counselling can take various forms but, in general, the mediator preserves a neutral relationship with the parties, whereas the counsellor develops an intense relationship with an individual client. The mediator facilitates negotiation of a specific dispute, whereas the counsellor engages in free- ranging discussion on any topic chosen by the client. The mediator enables agreement to be reached, and the counsellor enables coping strategies to be found. The mediator uses problem-solving techniques, while the counsellor applies psychological analysis. The mediator acknowledges feelings, whereas the counsellor explores and works in depth with emotions.

Mediators come from a range of professional backgrounds and bring valuable skills and experience to a mediation. However, it is very important that each mediator is clear about the boundaries of their role, so that, for example, a mediator who is a lawyer does not at any time act as adviser to any party, and the mediator who is trained as a counsellor does not act as a therapist.

The IFC Mediator Handbook Page 22 of 110

© IFC 2011

**Essential foundations for mediation**

**The cornerstones of mediation**

Confidentiality, ownership of the solution by the parties, mediator neutrality and impartiality, and an approach to individuals that demonstrates respect, empathy and genuineness, form the essential basis for the work of the mediator, and underpin the whole process of mediation.

**Confidentiality**

The fact that mediation is a confidential process and conducted ‘without prejudice’ is fundamental.

Confidentiality is on two levels:

* the entire mediation is in confidence; it is held in private. What is discussed remains confidential and the outcome is only publicised if the parties so agree, and furthermore,
* no private information shared with the mediator in a private meeting with one party can be passed on without the party’s express permission.

This places a clear responsibility on the mediator to preserve confidentiality and to treat all information with great care; once disclosed, a confidence cannot be taken back. There are broadly three ways of checking what is confidential:

* asking the party what can be disclosed from the private meeting
* asking the party what cannot be disclosed from the private meeting
* taking the initiative, by identifying specific information that may be useful to pass on to the other party and asking for permission to disclose it.

Revealing a confidence without permission will damage the mediator’s credibility, and could even end the mediation. The safest path is to:

* assume that, unless repeated from the papers exchanged or from a joint meeting, everything is said in confidence and cannot be shared, and the mediator must be given specific permission to reveal something to the other party
* use a summary, as a recap for both the party and the mediator, to check confidentiality at the end of each private meeting
* if you are not sure, go back again to the private room and check with the party before revealing something. This will ensure that you do not break a confidence, and also re-emphasise to the parties that you will not reveal anything that is confidential, thus increasing trust and so encouraging them to be more open with you in private sessions

Of course, in order to make progress, a dialogue needs to take place between the disputants. This may begin with the mediator acting as a conduit and, in an acrimonious dispute, it might remain so; but in most mediations the parties will come together at some stage and talk face to face, and in some mediations do so on several occasions during the day.

Parties will become frustrated or downhearted if there is no flow of information between them; this preserves confidentiality but limits the scope for progress. This can occur if the mediator takes the confidentiality of private meetings too literally and rigidly, and does not seek permission to disclose information. There is a risk, too, that the mediator will take too much responsibility for developing a solution – gathering information from both sides, never sharing it because that feels

The IFC Mediator Handbook Page 23 of 110

© IFC 2011

safer, hoarding it away and hoping eventually to produce an answer that works for everyone. Once the mediator takes on that role, the parties may abdicate their responsibility to resolve their own dispute, relying too much on the mediator. The mediator, therefore, needs to find ways to create a dialogue between the parties, helping them to build understanding and exchange ideas.

**Ownership by the parties**

One of the strengths of mediation is that the parties have a major input into the process and complete control over the final decision. Contrast this with litigation where the system takes over, the parties are sidelined or less central, and someone else determines the outcome.

Mediation leaves control with the parties in three key ways:

* the parties are physically at the heart of the mediation process: contrast the typical mediation joint sessions and the individual sessions in each party’s private room, where parties are as fully involved as they want to be, with the courtroom experience of sitting behind counsel or being isolated in the witness box
* participation is voluntary: the parties can pick their own time and choose what they wish to reveal, and they can even leave at any time. Even when attendance is not voluntary, being required by court or contract, the parties control the level of their participation and can leave when they feel the process is not productive. Significantly, most do stay and most do settle, even if they were unwilling starters
* the parties decide the settlement: although the mediator manages the process, the parties retain control of the direction and pace of the mediation. The mediator’s role is to help the parties to find their own settlement. The mediator brings a clear mind to the process, uncluttered by the detail and the emotion in which the parties are often steeped; that clarity can assist in creating ideas for settlement. However, the parties need to arrive at their solution at their own pace and in their own way, and the mediator must resist the temptation to see a solution and push the parties towards it. The parties rarely reveal all that really drives them and why a particular settlement is more, or less, acceptable than another. A mediator who is wedded to a solution is less likely to be alive to alternative, possibly better, solutions. The mediator needs to believe that the parties know best.

So, empowering the parties, and leaving them with ownership of both the problem and its solution, is central to the process of mediation.

**Neutrality and impartiality**

Neutrality, impartiality and independence are important assets for the mediator. The parties need to understand, both through explanation and through demonstration, these aspects of the mediator’s role and the benefits they bring. The effective mediator must not merely act impartially, but must be impartial, having learned to put aside assumptions, prejudices and premature analysis of what matters to these individuals. Parties often experience it as a relief and a freedom to have someone to work with who is truly non-judgmental.

The mediator comes uncluttered with emotional or factual baggage about the case; with no vested interest, no position to protect, no face to save, no feelings to vent. It is a privileged position, for the parties will eventually see the neutrality of the mediator as a reason to move from their public position, and in private with the mediator to discuss their weaknesses and real needs. As relationships are formed and trust is built, the parties usually become more relaxed and less defensive, and so become more open to new perspectives and movement towards settlement. If the mediator is perceived as being partial, this process will be impeded; it is therefore important for the mediator to:

The IFC Mediator Handbook Page 24 of 110

© IFC 2011

* be even-handed with the parties; this includes resisting the temptation to spend more time with an easy-going party when the other appears difficult or unfriendly
* ensure that questions are phrased so as not to appear critical or judgmental
* ensure that the mediator’s verbal and non-verbal reactions to parties’ comments do not indicate partiality.

Mediator neutrality is sometimes challenged by parties asking the mediator for an opinion or to suggest a solution. There may be justification for the experienced mediator to comment on a particular issue whilst still retaining a neutral stance. The basic rule, however, is that the mediator should avoid giving a view, since the mediator’s neutrality must be overt and constantly reinforced to the parties throughout the mediation.

**Avoiding assumptions**

Associated with the mediator’s neutrality is the need to avoid assumptions. Everyone is conditioned by environment, relationships and experience, and the mediator needs to take care not to allow such influences to have a negative impact on the mediation. For example, stereotyping in relation to gender, race, profession, economic status, age, religion, and other factors, is a common basis for making what may be false assumptions. The mediator needs self-awareness and concentration in order to avoid preconceptions that might affect both attitude and action. The mediator should aim to treat each person as an individual to be valued and respected.

The mediator will almost always have read some background papers beforehand and have spoken to the parties, usually through their advisers, but it is important to enter the mediation with an open mind and:

* be aware of the dangers of preconceived ideas on the merits of the case
* be aware of the risk of being influenced, for example, by the proficiency of a presentation or by personal sympathy with one party or individual
* be prepared to think and act flexibly, and not work to a fixed format for the mediation or a particular structure for a settlement
* beware of coming to the mediation thinking that you know what the answer is.

**Respect, empathy and genuineness**

Mediation is an enabling process. The psychologist Carl Rodgers identified three core person-centred attitudes for the effective enabler: respect, empathy and genuineness. These have a major impact on the mediator’s relationship with individuals and parties.

**Respect**

A party may secretly regard being involved in a mediation as an admission of weakness or failure on their part. If the mediator is able to convey respect and acceptance, it becomes easier for that person to be open and honest. Respect is relevant at two levels of activity, internal and external. Your attitude towards people is respectful if you:

* care about their welfare
* see each person as an individual rather than merely a party in the mediation process
* see them as capable of determining their own fate
* assume the goodwill of people, unless and until this is demonstrated to be wrong
* suspend critical judgment;

and respect is demonstrated when you:

The IFC Mediator Handbook Page 25 of 110

© IFC 2011

* attend and listen actively to a person
* use non-judgmental language
* communicate accurate understanding
* express reasonable warmth and friendliness
* help people to identify and cultivate their own resources
* provide encouragement and support
* help parties to work through each stage of the mediation process at their own pace.

Maintaining respect for parties helps to build trust and create an environment in which they are more likely to disclose hidden agendas and be willing to tackle sensitive issues.

Respect is difficult to maintain when a person is behaving in ways that seem aggressive, manipulative, overbearing, self-destructive or just irritating. However, respect and acceptance are not the same as liking or approving. The mediator does not have to agree with values, opinions or behaviour, but must have a genuine interest in communicating with that person. A party’s behaviour probably reflects their feelings and needs at that moment, and the mediator should be tolerant, patient and responsive.

However, respect does not mean that you have to accept or allow behaviour that you or the other party finds completely unacceptable, and which is likely to be destructive to the process, such as expressions of racial or gender intolerance or other abusive comments.

**Empathy**

Empathy means a capacity for understanding a situation from another person’s point of view and conveying that understanding to the other. In the course of business activities there is often pressure to perform, to be right, to defend and to push your own point of view. However, for a mediator the situation is different and the focus is on understanding in depth the perceptions of the various participants in the mediation. This demands observation, concentration and imaginative effort on the part of the mediator.

Empathy involves understanding the experiences, behaviours and feelings of others as they themselves experience them. It demands the ability to put yourself in the other person’s shoes; not to be the other person, but to experience their situation as if it were your own. The ‘as if’ quality is crucial; you must remain fully aware of your own perspective while trying to imagine and understand the other person’s thoughts, feelings and behaviours from her or his point of view.

Empathy is different from sympathy. Sympathy is concerned with agreeing with another person’s point of view and being emotionally involved. Empathy requires a more detached approach, remaining separate and yet accepting, warm and non-judgmental.

Using empathy helps communicate to people that you understand their situation, and is therefore invaluable in establishing and developing relationships with parties. To be empathetic, you need to listen fully to the content of what is being said:

* the person’s experience - what has happened, as they see it
* the person’s behaviour - what they are doing, what they have done or not done
* the feelings or emotions that arise from, or are associated with, that experience or behaviour.

**Genuineness**

Like respect, genuineness involves activity at two levels; internally, through being honest with yourself about your own feelings, and externally, through open, spontaneous behaviour which does

The IFC Mediator Handbook Page 26 of 110

© IFC 2011

not emanate from an adopted role or persona. By presenting yourself in this way, you provide a model for other people, encouraging them to do the same, and thus both developing the relationship and increasing the other person’s ability to take risks in disclosing and discussing difficult issues.

You are genuine in your relationship with other people when you:

* are authentic
* are spontaneous, but not uncontrolled or haphazard
* remain open and non-defensive, even when you feel threatened
* do not over-emphasise your professional status
* are consistent and avoid discrepancies between your values and your behaviour, and between what you think and feel and what you say, while remaining reasonably tactful
* are willing to disclose your own thoughts and feelings, when appropriate.

These core attitudes are developed through openness to feedback from others, personal reflection and practice.

The communication skills that underpin the mediator’s ability to develop rapport and show empathy are presented in more detail in the chapter ‘Communication skills for effective mediation’.

The IFC Mediator Handbook Page 27 of 110

© IFC 2011

**A process framework for mediation**

**A process with five phases**

The process framework highlights five phases of mediation, outlined below. The rest of this chapter deals with these phases in detail.

**Preparation phase**

The initial enquiry

* engagement with the party or party adviser
* explanation of the process
* persuading reluctant parties

**The contract to mediate**

* selecting a mediator
* agreeing the ground rules for the mediation, including confidentiality, costs, authority, representation and effect on court or arbitration timetables
* entering into a formal commitment to mediate
* agreeing and paying the fee

**Preliminary contact and preparation**

The mediator will make pre-mediation contact, usually by telephone, covering:

* a briefing about the process
* who is attending – and with what prior experience of mediation
* what terms of address will be used – formal or informal
* who will make the opening presentation and for how long
* any previous settlement negotiations or offers
* approval of the mediation agreement
* venue, timetable, refreshments and other practical arrangements
* occasionally, a pre-mediation meeting is arranged
* parties exchange and copy to the mediator written summaries of the case and provide supporting documents, often as an agreed bundle.

**Preparation phase of mediation**

There are three aspects to consider in each of the phases of mediation - the relationship with the parties, the process itself and working with the content of the dispute.

The selection of the mediator is important. Parties may wish to select from a written profile, or even by interview. Parties sometimes ask for a mediator who is a specialist in the area of the dispute, which can have the advantages of familiarity with industry jargon and procedures and can

The IFC Mediator Handbook Page 28 of 110

© IFC 2011

be a comfort to the parties. Alternatively, they may prefer a mediator with broader experience, who can stand back from the detail of the dispute, handle difficult parties, bring a commercial perspective, and not form or be asked to express an opinion.

There is often a lot of work required, whether by mediator or mediator and service provider, before a mediation takes place. Sometimes one or both parties are uncertain or reluctant, and a skilled and experienced mediator or administrator can provide reassurance, encouragement and persuasion.

**Initial contact**

Early contact with the service provider or the mediator needs to leave the parties and their advisers feeling that they are in safe hands. A confident and reassuring manner is essential.

It needs to be established whether parties are to be represented, or if any party is coming without an adviser. In addition it will be important to find out whether legal proceedings are under way, and if so whether they will be stayed or whether there is a legal timetable to adhere to. It is not necessary for proceedings to be stayed for a mediation to take place, though parties often seek to do so.

There will also be discussions about such matters as:

* selection of the mediator (if one has not already been appointed by the parties)
* timetable for mediation, and if one or more days is to be allocated
* venue for mediation that is acceptable to all parties
* confirmation of mediation fees and payment terms
* the mediator undertaking to observe a Code of Conduct.

**The mediation agreement**

The mediation agreement sets the conditions under which the mediation will take place, including confidentiality, authority to settle, immunity of the mediator and privilege.

A draft mediation agreement is usually sent out at this early stage so that parties can consider it and negotiate any changes needed to the standard form. The agreement is often signed at the beginning of the mediation day.

Whatever prior communication takes place, the purpose and terms of any pre-mediation contact should be absolutely clear. Ideally, the mediation agreement or other form of confidentiality agreement should be signed at the outset, so that it is established that the conversations take place under the same conditions as the mediation itself. Even if the mediation agreement has not been signed, the mediator will operate on the basis of strict confidentiality from the first contact with the parties or their advisers, and such contact will in any event be regarded as ‘without prejudice’ and privileged from later disclosure.

**Venue and practical arrangements**

A suitable venue needs to be agreed. A neutral location is perhaps preferable, although increasingly law firms have suitable accommodation, and parties agree to use those premises for the mediation day. The rooms need to be comfortable and preferably have natural light. Each party should have a similar private room that can be used as their base, which the mediator will visit for the private meetings. It is important that the rooms are available late, in case the mediation extends beyond office hours.

The IFC Mediator Handbook Page 29 of 110

© IFC 2011

Refreshments are important. Each room should have drinks and snacks available so that high energy levels can be maintained. Some mediators prefer meals to be served separately in each room. Others like a central buffet, which encourages the parties to meet informally whilst having refreshments. Eating together can sometimes break down barriers and even repair relationships. In most mediations there is no formal break for lunch, and work will continue in one form or another throughout the day.

**Briefing and helping parties to prepare**

This handbook describes the usual situation in mediations of commercial disputes where lawyers will be present. Once appointed, the mediator should make contact with the parties or their lawyers. The mediator needs to build a relationship of confidence and trust. There will also be process arrangements to cover and, perhaps, some content aspects to clarify.

Before the day mediators usually speak to the lawyers on the telephone - or to the parties if there are no lawyers involved. It may also be useful to speak directly to the parties, and it is worth suggesting this to the lawyer. Sometimes conference calls and video links are used to involve clients with their legal and advisory teams. Some parties or mediators will request pre-mediation meetings or site visits. A conference call or pre-meeting can enable some of the exploration to be done prior to the mediation, getting the process off to a good start and saving time on the day.

Pre-mediation contact provides opportunities to cover some or all of the following:

* introductions, and for the mediator to build rapport
* finding out about any mediation experience and parties’ expectations
* explaining the process and the mediator’s approach and style; giving an outline of the day and covering any concerns
* discussing authority, who will attend of sufficient seniority, and the role of decision makers
* getting an idea of the relationships, both within teams and with the other side
* understanding the background and conditions for this mediation; any previous settlement discussions and offers, anything particular about the dispute and, perhaps, what has prevented the parties from being able to settle
* asking the parties to prepare costs information and undertake a risk analysis
* agreeing on documents
* telling the parties that the mediator may be testing positions and options as part of the mediator’s role
* advising and coaching parties on preparation for mediation; the case summary, how they might use the first joint meeting most effectively, discussing who will present the opening statement and for how long
* suggesting parties bring, or even exchange, a draft settlement agreement in a suitable format to be worked on during the day.

**Documents**

Parties will usually each prepare a case summary and send it to the mediator and to each other, by an agreed date before the mediation. This summary will normally be two to ten pages, and is often a valuable exercise in focusing parties on the real issues in dispute. Almost always the summaries will be accompanied by supporting documents. Some parties offer, and some mediators choose to ask for, a confidential paper for the mediator’s eyes only.

Each mediator needs to find the right balance between preparing in sufficient detail to understand the dispute and to be seen to be well informed, yet avoiding being submerged in detail. The

The IFC Mediator Handbook Page 30 of 110

© IFC 2011

amount of reading and preparation is a personal choice for each mediator and the parties in each case.

Some mediators find it helpful to summarise the dispute on one sheet of paper, using a mind map or other technique. Others ask parties for a list of essential reading, which may comprise eight or ten documents out of several files of papers. Another idea for preparation is to spend time, having read the papers, identifying the assumptions you have made, so as to be able to recognise them and set them aside.

Mediation is hard work and preparation is important. Time invested in preparation by the mediator and the parties makes the process run more smoothly, and will probably speed up the journey to settlement.

However, over-preparation can get in the way of working effectively as a mediator; it can clutter the mind, allow assumptions to get in the way of understanding, and prevent the mediator from paying full attention to what is happening in the moment.

Good preparation will enable the mediator to relax and bring energy and commitment to the process, and help the parties to do the same.

**Preparation on the mediation day**

On the day, most mediators will want to arrive early, find their way around a new building, and set up the main room, organising the seating and other features.

Where there is an assistant, the mediator needs to agree in broad terms how the assistant will contribute to the day. It is also appropriate for the mediator to spell out the things that he or she wishes to do personally, such as greeting the parties, or writing on the flipchart. The next chapter of the handbook deals more fully with the role of an assistant.

The mediator needs to check:

* reception arrangements - parties should be shown to their separate rooms
* rooms - location, privacy, temperature, seating, telephone, flipchart and pens
* arrangements for refreshments throughout the day
* location of lavatories and smoking areas.

The mediator needs to feel ready to begin the day.

**Opening phase of mediation**

**Meeting the parties**

The mediator will meet the parties either in the reception area or in their rooms. If no contact has taken place other than with the advisers before the day, introductions will be particularly important, and use of names will need to be agreed. The mediator will often provide information at this stage about what to expect from the day, as well as checking on the parties’ practical and comfort needs. It is essential to give the parties a sense that they are in safe hands; they will inevitably have some concerns about the day, and it is important that they are met by someone who is professional, calm and confident, and who is warm and welcoming.

The parties need time to settle in and get their teams assembled. When they are ready, the mediator will see each party in private, making sure that all parties know what is happening and in

The IFC Mediator Handbook Page 31 of 110

© IFC 2011

what order. The mediator should be aware of parties’ particular needs; breaks for smoking, for example, or time to cope with anxiety or a disability. The mediator should do whatever is needed to make the parties feel comfortable and relaxed.

**Initial private meetings**

At the initial private meetings the mediator is likely to cover the signing of the mediation agreement, confirmation of authority, names by which people wish to be addressed, and any time constraints. It is also useful to flag up the possibility of different combinations of meetings, joint and private, and to cover anything specific that the parties raise.

The mediator needs to prepare the parties for the first joint meeting, if there is to be one, confirming which party will make their opening statement first and who opens for each team. Sometimes these initial private meetings are short, while on other occasions longer initial meetings, or a series of private meetings, take place before the parties come together.

**The first joint meeting**

As part of preparation, the mediator should think about where the parties will sit for the first joint session, perhaps preparing a seating plan that enables each team to feel comfortable and, at the same time, able to speak to the right people. Should parties be next to each other or facing each other, opposite or either side of the mediator? This is important. The room and table may dictate much of the seating, but the mediator needs to decide on the best layout to encourage communication. There may be a large number of people to manage, or several parties, and it is for the mediator to decide where everyone sits.

Occasionally it is decided, in consultation with the parties, that not every member of each team will attend an opening meeting; but this is less usual than using that meeting as an opportunity for everyone to get to know the people they will be working with during the day.

Consider how to invite people into the joint meeting room, perhaps managing introductions informally at the door. It is useful to vary the seating for later joint meetings to change the dynamic and to give a different feel to the meeting.

Other points to bear in mind at the start are:

* maintain reasonably firm management over the proceedings. You are a process facilitator charged with creating an environment conducive to participation and communication. The parties will look to you to exercise control and run a fair process, giving everyone an opportunity to be heard. Balance this with being approachable - someone the parties can talk to and want to work with
* use your intuition. No one can script a mediation, and situations will arise that require tact and creativity. Show flexibility and demonstrate integrity
* keep note taking to a minimum. Taking notes breaks eye contact and concentration on what is being said. If necessary take time between meetings to write up notes
* the mediator sets the scene and sets the tone for the day.

**Mediator’s opening**

The mediator’s opening has four main purposes:

* to set the tone for the mediation, using positive language wherever possible
* to establish the mediator’s role and authority
* to emphasise the ground rules for the mediation

The IFC Mediator Handbook Page 32 of 110

© IFC 2011

* to begin the dialogue between the parties.

Mediators usually plan a mediator’s opening in advance. Make your own checklist for your opening, which will probably include:

* introductions and use of names
* the role of the mediator – impartial, facilitating communication and assisting negotiations
* how the day might run; timing, flexible use of private and joint meetings
* the principles that everyone has signed up to: confidential and without prejudice; non-binding until agreement is documented and signed; parties have come with authority to settle; parties are the decision makers.

Whatever opening has been planned, the mediator must be flexible enough to do something quite different if necessary. The planned opening might be punctuated to allow space for dialogue and certainly for any questions; in some cases the meeting might need to be adjourned or even abandoned altogether, and on other occasions the meeting will usefully last all morning. The mediator’s opening should be brief, perhaps just a few minutes, and yet should establish an environment conducive to effective communication, and it is for the mediator to structure the meeting. A poor opening can have a lasting negative effect on the parties and the process. Properly presented, the mediator’s opening can help to dispel distrust, increase the comfort level of the parties and begin to promote an atmosphere of co-operation.

**Setting the tone for the mediation**

The mediator has an important role in setting a tone that encourages participation, respect and productive interaction. Ideally, the mediator’s behaviour will become a model for how parties and others communicate with each other during the mediation. Inclusive behaviours, such as making eye contact round the table, being responsive to non-verbal cues, and making sure that everyone has a chance to check their understanding of the process, as well as using a touch of humour, will contribute to an environment conducive to co- operative working. The mediator’s level of relaxation and energy will have an impact, creating a sense of purpose that enables progress to be achieved.

**Establishing the mediator’s authority and role**

Usually, the parties will have appointed the mediator, so there is no need for a detailed introduction. It will also have been established in advance of the day that the mediator has no conflict of interest. If a potential conflict emerges during the mediation it is essential to discuss that immediately; the mediator cannot ignore it, hoping that it will not be discovered or will not matter, as a possible conflict could jeopardise the mediator’s credibility and the parties’ faith in the process.

In referring to the mediator’s role, it is helpful to make clear that the problem belongs to, and is shared by, the parties. They also share a responsibility for working together to find the resolution. Some mediators are specific about the fact that part of their role is to challenge and test positions, ideas and options. The mediator’s authority is established primarily from demonstrating confidence, preparedness, and familiarity with the process.

**Emphasising the ground rules – the principles**

It is usual to recap on the ground rules:

* The decision makers are expected to take an active role in the negotiations and to work with the mediator to find solutions; the parties have control over the outcome

The IFC Mediator Handbook Page 33 of 110

© IFC 2011

* The process is without prejudice, and anything said or seen within the process that would not normally be part of disclosure will remain confidential should the dispute move on through litigation
* The process is confidential in two ways. What happens at the mediation is confidential to the parties and the mediator, unless the parties agree otherwise; and private meetings between the mediator and each party are entirely confidential unless the mediator is given permission to pass on information. All those present are bound by the agreement; they will either have signed the agreement themselves or had the representative sign on behalf of all those in the team
* Nothing is finalised or binding until the agreement has been documented and signed. This gives parties the freedom to explore ideas and options without having to commit to them. It introduces the ‘what if...’ approach, so valuable in mediation
* Confirm that all parties have stated that they come with authority to settle the dispute. If authority issues arise at any stage, the mediator should discuss practicalities, such as out-of-hours access to others outside the mediation, should a level of authority need to be changed. The mediator may wish to mention case-specific arrangements about authority, with the permission of the party concerned, as part of the opening.

**Outlining the day – the process**

The mediator might encourage the parties to make full use of the opportunity the day provides. It is a unique chance to bring an end to the dispute and any related proceedings, and to agree solutions not available elsewhere. It is sometimes important for the mediator to manage expectations by saying, for example, that the day may be tough and will be hard work, and that parties may not get all they want but need to find a solution that they can all live with.

It is often useful to paint a picture of a day as being very flexible with no rigid procedure – of spending time in teams in private without the mediator, in separate meetings with the mediator moving between parties, with all parties together round the table, or of having meetings between different combinations of selected members of the teams. It might be, for example, that the lawyers could usefully work together on specific issues while the principals spend time together on other matters. By flagging up these possibilities, the mediator manages expectations and minimises the element of surprise for the parties.

At intervals throughout the opening, the mediator should give parties the chance to ask questions, thus establishing by example the importance of clarity and understanding.

Overall, the opening should be positive and confident so that the parties feel that they are in good hands.

**Parties’ opening statements**

After the mediator’s opening, each party usually makes an opening statement. It will have been agreed with the parties in advance who should go first – normally the claimant - and which member or members of the team will make the presentation.

Whoever delivers the opening statement, the mediator might:

* remind the parties of the agreed or suggested length of time for each team’s opening statement
* ask the listeners to attend carefully to what is being said, suggesting that they jot down any thoughts and saying that there will be time for further exchanges once the opening statements are made
* encourage the parties to speak directly to each other

The IFC Mediator Handbook Page 34 of 110

© IFC 2011

* invite other team members to add to what has been said.

If it is clear from the parties that there are strong emotions attached to the dispute, the mediator may wish to acknowledge this openly. The mediator should not be afraid of strong emotions; an opportunity to express and explain strong feelings may be helpful to the party and to the process.

Whilst each presentation is being made, the mediator needs to direct attention to the speaker; this means taking as few notes as possible and maintaining eye contact with the speaker. It is also useful to scan the table occasionally - someone may need a brief, probably non-verbal acknowledgement that their frustration or disagreement has been noted.

The mediator should manage the presentations, by inviting each team to speak, listening, keeping a gentle eye on the time, and thanking each for their contribution.

After the opening statements, the mediator might encourage the parties to continue talking, and allow that dialogue to run for as long as it is constructive. It might be useful to establish some sort of agenda for the day, perhaps simply listing with the parties what areas will need to be tackled in order to reach a resolution. This can be a first step towards co-operative problem solving. The process is flexible; the mediator might decide to continue in joint meeting with parties together, or have a short comfort break before reconvening, or break for private sessions with each party.

At the end of the initial joint meeting, it might be useful to remind the parties about the additional level of confidentiality in the private sessions. The mediator should decide whom to see first when moving into private sessions, and announce this with confidence either at the joint meeting or to each party in their own room. Sometimes, especially in multi-party mediations, a timetable for private meetings is necessary. Whatever the mediator decides, the parties should leave the initial joint meeting feeling confident that the mediator will handle the day productively.

**Exploration phase of mediation**

The exploration may begin towards the end of the opening meeting, when the mediator might try to establish a working agenda for the day, perhaps using the flipchart. Some common ground might be identified, as well as the areas remaining in dispute, and what has to be covered to reach an agreed outcome. However, even where the parties have worked together with the mediator in this way, each party might also want to discuss confidential aspects with the mediator in the safety of a private meeting.

It may sometimes be tempting to move straight from the opening into bargaining, especially where the parties or their advisers are keen to do so, or where a matter seems straightforward. However, the exploration phase has a number of important purposes, including identifying the underlying interests that will inform parties’ decisions about settlement.

Negotiations will sometimes have been only rudimentary prior to the mediation or will have broken down altogether, and parties need a mediator’s help to clarify what they want to achieve and where they might best start or restart. The mediator’s role here, as so often, is to normalise such a review and give permission to parties to approach the case in a different way.

Typically, the exploration phase will cover a number of meetings and involve:

The IFC Mediator Handbook Page 35 of 110

© IFC 2011

* **a conversation with each party and their team**: about the past, the present and thefuture; about facts as they see them and their feelings; about a range of topics: legal, commercial and personal
* **further building of trust:** the mediator will want to build on and enhance the rapportestablished, in order to gain each party’s confidence that the mediator is unbiased and can be trusted with confidential information, including discussions about weaknesses, although not usually in the first private meeting
* **opportunities for expressing of emotion:** a mediator will build trust by patientlyrecognising and acknowledging each party’s feelings
* **identifying the important issues:** it is easy for parties to lose sight of the real issueswhere a dispute has become clouded and complicated; the mediator should try to understand what really matters to the parties
* **distinguishing each party’s needs from their wants and claimed rights:** mediators shouldencourage each party both to review their own needs and interests and also to reflect imaginatively on what other parties might need. Developing a sense of perspective, and helping parties to do the same, is a vital skill for a mediator
* **checking the quality of past communication, and improving on it:** the mediator can helpparties provide information to each other and gain a clearer picture of how each sees the situation
* **uncovering hidden agendas:** finding out a party’s motivation is valuable for a mediator -even a party’s adviser will occasionally be surprised by what emerges from a client. Mediators must be alert to cues and clues that could help them to discover underlying needs, thus leading to conversations about what might realistically meet those needs
* **working on possible strategies for settlement:** at the exploration phase the mediatormay begin to work with the parties on sketching out the overall shape of a possible settlement, without naming any figures at this stage and keeping open possibilities for alternative routes to settlement. Later, individual elements of an agreement may have to be developed at different speeds
* **preparing for reality testing and revisiting risk assessments:** it is essential for themediator to have good rapport before seeking to test out weaknesses in a party’s case or discuss risk assessment in any detail. Settlement almost always involves adjustment of positions based on a reappraisal of risk. Flagging up reality testing as a possible activity for later in the process (probably in bargaining, if the parties get stuck) can legitimise it and manage parties’ expectations – although some mediations settle without the need for such difficult conversations, because the parties reassess their risks in private, and the mediation moves towards settlement with the mediator assisting in other ways.

**Using joint and private meetings**

Mediators should weigh the potential advantages and disadvantages when deciding when to work in joint or private session. There is no fixed pattern. Mediations may comprise anything from a continuous joint meeting to a series of private sessions with the parties never meeting. The norm is a mixture of both, but the balance needs to be judged according to the parties’ approach to the dispute and each other, and not because of a mediator’s own preferences or fears about working in one or other way.

Whilst retaining overall responsibility for the process, mediators should be prepared to give the parties choices. A party might be resistant to meeting an opponent in a joint meeting because of the difficult history of the dispute. The mediator might encourage the party that it might present an opportunity for progress, by promising tight chairing of the meeting and a clear purpose and structure. Ultimately, it is for the parties to agree to such a meeting, and not for the mediator to insist.

The IFC Mediator Handbook Page 36 of 110

© IFC 2011

**Joint meetings** allow everyone to see and hear what is happening and choose how to contribute,and the mediator’s neutrality is easily observed and accepted. For a mediator, joint meetings can seem risky; the unexpected will happen, calling for skilled management of the people and the process. Also, parties are unlikely to disclose weaknesses across a table, discussions can easily get stuck or break down, and frustration and tempers can rise. On the other hand, joint meetings are often an efficient use of time and an effective way of conveying information between parties and developing ideas.

The mediator might encourage parties to hold or to stay in a joint meeting for a range of purposes. Joint meetings provide opportunities for:

* everybody to work together and show commitment
* building relationships between parties
* seeing the impact on the others of a particular idea or topic
* saving time on information sharing
* dealing with technicalities or practicalities
* sharing a sense of progress
* clarifying what has been agreed and what is left to work on.

**Private meetings** give each party a chance to tackle sensitive and difficult issues freely with atrusted mediator. They allow the mediator to understand individual needs and interests through more in-depth conversations, and offer the parties time to:

* reflect on what is happening and what they have hard
* regroup as a team; consolidate their thinking
* recover from a difficult or disappointing open meeting; relax
* talk frankly with the mediator and each other about all aspects of the case, trusting that the mediator will not take any confidential content to the other party without permission
* plan, prepare, rehearse or receive the mediator’s assistance as a coach
* consult those outside the mediation
* save face by deciding to change stance in private.

However, it would be naïve for a mediator to expect parties to disclose a great deal of sensitive information in a first private meeting. Parties and their advisers are usually cautious at this stage, and will often continue to assert the strength of their opening position as set out in the joint meeting.

The mediator must earn the parties’ trust. Through appropriate language and conduct, the mediator has to reassure each party that it is safe to confer that trust. Later, parties will usually be increasingly open and candid, and sometimes even in the first private meeting.

In a first private meeting, the mediator might remind parties that it is confidential and then ask an open question to allow the party to talk about whatever they choose. In later meetings, it might be important for the mediator to have an idea about what to discuss, while always remaining open to what the party regards as urgent. The parties dictate the agenda, and mediators must be flexible in order to accommodate the needs of the parties. Aim for a conversation rather than an interview; a prepared list of questions is more likely to be an inhibitor than to help a mediator find out from the parties what really matters and what might work.

Time management is a consideration in private sessions, especially early in a mediation. One team will leave the joint meeting, at which the other team has usually made a robust statement of their case, and then have to spend time waiting while the mediator is with the other team. This can

The IFC Mediator Handbook Page 37 of 110

© IFC 2011

cause tension, and the mediator must try to manage this, perhaps by giving them an indication of how long they will be waiting, possibly identifying a constructive task for them or perhaps by taking the party to their room and explaining that time will be spent first with the other team, thus checking any immediate reaction.

Furthermore, when working privately with one party, the mediator risks being seen as that party’s ally, through empathetic remarks or behaviour, or being perceived as having taken the other side’s view as a reaction to raising uncomfortable topics or by reality testing.

**How to explore in private session**

When moving from room to room, take care with any notes you make. These may be confidential, and numbers especially can be read very easily, even upside down. Similarly, make sure that glass doors or windows in private rooms do not expose flipcharts to the others walking past.

* Reinforce confidentiality at the beginning of private meetings
* Use simple open questions and leave enough time and silence for the answers
* Try to sit near the party rather than the adviser, and prompt the party to speak freely, by putting them at ease
* Involve the lawyers, and yet try to prevent them from dominating the exchanges
* Listen attentively, observing content and delivery, words and body language. Any inconsistency between
* the two might be significant and merit gentle enquiry
* Make sure that the airtime balance allows the party to speak much more than the mediator
* Probe a few topics, but be prepared to leave some issues for later. Mediators occasionally succeed in parking the whole issue of liability without ever returning to it, enabling the parties to reach final agreement by discussing monetary and other outcomes only
* Watch time, and remember the other party – you have a responsibility to them too, and can explain that everyone needs to feel part of the process in order for settlement to be achieved
* Summarise towards the end of the session, and use the summary to reinforce confidentiality and check what, if anything, you may take to any other team
* If there is a useful and specific task for that party to do, ask them to do it, but not merely

I want you to think about your case some more which is unlikely to generate any progress

* Ask a final open question – What else you would like me to know at this stage? or similar. If it is urgent and important, pursue it a little further, but be prepared to agree to park it and move on to the other room, where an equally important conversation awaits you
* Perhaps estimate a time for your return.

**Ways of checking what is confidential**

Throughout the mediation, the safest route for less experienced mediators is to treat everything as confidential unless specifically told otherwise; however, this can be limiting. There may be occasions where parties will allow you to regard the whole conversation as able to be disclosed; the mediator needs to be alert to the risks of this approach, checking specifically any information that seems personal, sensitive or pre-mature. More frequently, it is useful for the mediator to treat everything as confidential, while also taking the initiative to identify information that may prompt progress – even if only a small step - and asking for permission and discretion to use that information when appropriate.

Exploration requires the mediator to be patient, perceptive and persistent. The exploration phase is unlikely to be concluded at the end of one private meeting with each party. Usually more needs

The IFC Mediator Handbook Page 38 of 110

© IFC 2011

to be unearthed and understood both by the mediator and between the parties before it is time to move into the bargaining phase.

**Bargaining phase of mediation**

In mediation, the parties work towards a negotiated agreement assisted by the mediator. In a sense the whole mediation is a negotiation, and negotiation takes place throughout the mediation process. The bargaining phase of a mediation starts when the parties are ready to discuss settlement terms in some detail. Broad ideas and structures turn into potential solutions and figures, and non-monetary outcomes are developed into practical arrangements. These detailed negotiations continue until the concluding phase, when the settlement is recorded in writing, or the next stage is planned if full agreement proves elusive that day.

It is not easy to give definitive guidance to the new mediator about when the bargaining phase begins or should begin. One or other party may wish to make some firm proposals; the general pace may feel quicker; all parties may say they have had enough discussion in principle; and risk assessments may have been adjusted. The mediator may feel that parties need to talk now in specific numbers, and a change of pace is required, with some extra energy injected into the discussions. Bargaining must start at some time, and progress can be frustrated as much by starting it too late as too early.

**Stages of the bargaining phase**

Working in principle: talking in general terms, or painting the big picture before starting to negotiate on the detail, can help parties overcome the early stages of reluctance to make a move. While is not easy to give guidance about when the bargaining can begin, it is possible to set out guidance on the different stages of the bargaining phase. These are generally as follows:

* formulating and communicating first offers
* managing subsequent offers and information exchange tactically
* handling apparent deadlock: deadlock may be unexpected, anticipated, or even triggered deliberately.

While some mediations seem to proceed fairly smoothly to settlement, far more enter a difficult stage of apparent deadlock. This needs to be normalised when it occurs, or perhaps in advance, even by acknowledging the possibility at the opening meeting. Unfortunately, when dealing with a situation of deadlock, the first move to break it may be seen as weakness by the others, or by the party making the move. The mediator can help by assisting parties to formulate and make a first move. The work done in the exploration phase to understand the people – motivations, personalities and pressures – will now pay dividends. As always, it is not only what you do as mediator but also how you do it that will be significant. During the bargaining phase there is a range of possible roles for the mediator, depending upon the needs of the parties. The mediator might need to be:

* an observer of effective inter-party negotiations
* a facilitator taking offers and counter-offers between rooms
* a coach on how bargaining might best be conducted and progressed
* an active deal maker who significantly influences the negotiations, although from an impartial stance.

The IFC Mediator Handbook Page 39 of 110

© IFC 2011

The use of effective negotiation skills by the mediator to assist the parties in the bargaining phase are set out in more detail in the later chapter on ‘Using negotiation skills as a mediator’.

**Use of private and joint meetings**

The same process choices are available to the mediator as in all other phases, and decisions must be made to suit the subject, the parties, their advisers and the inter-party relationships.

**Private meetings** are often the expected norm, and enable the mediator to work actively to helpeach party to focus on a settlement that will meet their interests. It is sometimes a painful struggle for parties to move from entrenchment to resolution. When positions have been firmly articulated prior to and during the early part of any mediation, there is often a sense of loss over abandoned positions and perceived loss of face, both as between parties and even within a team.

In private meetings during the bargaining phase, the mediator uses a range of techniques, which might include:

* lending perspective and shaping proposals that meet each party’s needs
* being a sounding board, while parties test out positions and begin to realise that they may not achieve all they had hoped for
* prioritising parties’ concerns and aspirations
* understanding and checking offers, testing how they might be received from what is known of the other party’s views, discussing presentation and giving advice on timing
* identifying items of different value: one party may place little value or face little cost on an item which may be considered very important to another party, such as an apology or explanation
* checking the BATNA: the best alternative to a negotiated agreement, as against the proposed settlement on offer
* confirming the cost of continued litigation or arbitration
* reality testing: holding up a mirror to a party’s position or proposal and asking how realistic it is
* managing responses to disappointing offers received and conveyed.

The mediator may be able to help the parties resolve their dispute without reality testing, but it is often a key to progress. Parties can become blinkered and fail to recognise the advantages of settling even on somewhat uncomfortable terms. A disinterested third party may be able to bring clarity of vision in an objective and non-judgemental way. It is not the job of the mediator to impose a solution or a particular view, and the parties are free to reject any new insight as they choose. However, by turning a one-dimensional and self-interested perspective into a picture containing risks and common interests, much can be accomplished by a skilled mediator.

There is a temptation to assume that parties only want to bargain through the mediator’s shuttle diplomacy, using private meetings. It feels safer and gives the mediator a sense of control, perhaps, especially as early offers frequently generate anger at the other party’s apparent unwillingness to be realistic. More experienced mediators often bring parties together during the bargaining phase, although not necessarily for the first offers. The potential disadvantages of working only through private sessions include:

* the parties and their advisers feel a loss of control over the negotiations
* bargaining may be more protracted than if conducted directly
* the mediator becomes merely the messenger, and can even be manipulated to convey offers that the parties would be unwilling to give direct to each other
* important messages lose their force when delivered by the mediator rather than the party

The IFC Mediator Handbook Page 40 of 110

© IFC 2011

* parties become frustrated at being kept apart, and lose any mutual willingness to work co-operatively engendered by the earlier stages of the mediation
* the mediator is tempted to take too much responsibility for a successful negotiation
* the mediator acts merely as an intermediary in a horse-trading exercise
* the opportunity for the parties to work together is missed – this is especially important where a future relationship is anticipated or essential; the parties may need to work together at the mediation to model the future and test whether it could work.

**Joint meetings** in the bargaining phase are a way of countering those disadvantages, but they mustbe prepared for and handled with care. The mediator is responsible for running the process, and should define with each team in advance the purpose of the joint meeting and who will attend, setting a clear and probably limited agenda, and giving time for any necessary preparation. Sometimes it is useful to agree that the parties can have time to consider what they hear at the joint meeting, without being required to give an immediate response. The mediator should get each party’s private agreement as to who will attend, and the purpose and shape of the proposed joint meeting.

Depending on the team dynamics, it might be right to bring together full teams, or working groups selected from members of each team, such as the lawyers, experts or the principal decision makers, or perhaps a mix of the best negotiators in each team. The mediator will chair the joint meeting, keep it running while it remains constructive, and end it when it has served its agreed purpose or if it is not going well enough.

Used properly, a joint session can:

* boost the momentum
* provide direct portrayal of each party‘s views, so avoiding the risk of inaccuracy or wrong emphasis
* overcome deadlock by enabling parties to explain specific issues or make statements directly on contentious points
* relieve the worry or frustration of time spent waiting for the mediator
* enable principals to negotiate direct, allowing them to experience each other’s reactions to proposals
* save time.

**The mediator’s contribution to the bargaining phase**

There are many ways in which a mediator can add value at the bargaining phase; you might:

* keep working ‘in principle’ on settlement terms and not rush to detailed figures
* use hypothetical ‘what if’ and ‘supposing’ questions to explore likely settlement terms, being careful
* to avoid giving any impression of expressing an opinion
* help the parties to look for ‘win-win’ possibilities, expanding the settlement ‘pie’ in order

to find a settlement which satisfies all sides - discussed further in ‘Using negotiation skills as a mediator’ . Where this is impossible, discuss the advantages of sharing the pain

* be wary of alleged bottom lines: these frequently change, so try not to let an offer be characterised as such, especially early in the bargaining phase. Do not ask for a bottom line yourself - discuss their strategy and just ask for what they want to propose next
* normalise disappointment or anger at an opening bid – first offers are often received with frustration and sometimes with expressions doubting the good faith of the other team

The IFC Mediator Handbook Page 41 of 110

© IFC 2011

* offer to receive proposals from each party in private without transferring them across yet, so that with both parties’ permission the mediator can characterise the gap without exchanging numbers (huge, bridgeable, etc.) – this may overcome first bid nerves
* help a party to consider how a proposed offer that you consider risky might be received by the other team. Check whether the offer accords with their strategy and sends the message that they intend. Test out the bidder by asking whether they would be prepared to make the offer direct and explain the reasoning behind it themselves. It is ultimately the party who must decide whether or not to start the bidding
* seek permission to use discretion about when to deliver a bid, so as to time it effectively
* be prepared to deliver ‘bad news’ as well as ‘good’, and not shield them from a serious gap where one exists
* help each party to revisit their risk analysis in the light of what they have learned at the mediation
* enable parties to exchange bids face to face, if they want to.

The same settlement figures can be calculated, and therefore justified, entirely differently by each of the parties. Damages to one may be an undesignated payment to another. An apology to one may be an expression of regret to the other. In claims with a number of heads of damage, parties may choose to calculate figures in different ways and, so long as the overall settlement works for them, may prefer to work globally rather than break the figures down in detail. The mediator can make use of these differences, creatively but honestly, to help parties view options positively.

Remember that parties may simply want to buy up settlement for peace of mind, certainty, and an escape from the prospect of litigation; only the lead negotiator can decide how much that is worth.

**Some potential problems and how to avoid them**

* One party may try to use the mediation process merely to find out how vulnerable the other party feels, then decline settlement at mediation and make a challenging formal offer shortly afterwards. If you suspect such motivation, suggest a joint session and let the party handle the negotiation themselves.
* Make sure the settlement is the parties’ own, even if you think you know what might be best for them; effective settlements are ones that the parties have arrived at themselves and chosen to agree. One purpose of mediation is to provide an alternative to having an outcome thrust upon the parties. The settlement needs to satisfy the parties, not the mediator, who may never be told why a certain settlement emerges as acceptable. Also, if the mediator pushes for a particular solution, there is a risk that a party who later regrets signing up to it will see the mediator as having been negotiating on behalf of the other side.
* Respect confidentiality; make sure that you have permission to disclose facts or offers. Parties will need to make disclosures in order for negotiations to develop, and if you feel that certain information ought to be shared to make progress, ask for express permission to do so, and respect their decision if they decline.
* A standard mediation agreement requires that those present have full authority to settle. Despite this, problems with levels of authority quite often emerge. Handle any such apparent breach of the mediation agreement with sensitivity, in private, as it may be seen as a challenge to the party’s credibility. Encourage telephone communication with someone with a higher authority level. However, you may need to be robust, for if the problem is not sorted out it may be seen as seriously disrespectful by the other party and may prevent any potential settlement.

The IFC Mediator Handbook Page 42 of 110

© IFC 2011

* Many mediations reach a point when it seems as though there is no way forward. The mediator might revert to a discussion about process, rather than pursuing progress on the content, saying – *What shall we do now?* or *What is tomorrow going to be like?* Keep focussed on the process and, whatever happens, maintain energy, creativity and a sense of momentum. Settlements often emerge when, only an hour or two earlier, progress seemed impossible.
* Settlement panic may occur towards the end of a mediation of a long-running dispute, just as settlement becomes a possibility. You may even need to work with a party on how they will deal with the gap that settlement will leave in their lives, helping them to create a picture of a tolerable future without the dispute.

**Concluding phase of mediation**

The goal in mediation is usually to achieve a negotiated agreement, but not at any cost, and certainly not for the benefit of the mediator. Mediation is not about keeping a mediator’s success rate intact. More than achieving a settlement, the mediator’s aim should be to ensure that there is significant improvement in understanding between the parties, and that any settlement proposed is practical and sustainable.

Every settlement should therefore meet the following criteria:

* it satisfies the parties
* it deals with all the issues in dispute, unless the parties agree to isolate some issues to be dealt with
* in another forum
* it is workable
* it minimises the possibility of future dispute.

In order to assist the parties through the process, the mediator needs to be as energetic, clear-headed and creative in the final hours of the mediation as at the start.

**Settlement terms**

Sometimes an agreement emerges to the surprise of the mediator, perhaps even on terms that seem unfair to one party. However, the mediator will never know the whole story, and will rarely discover everything that leads the parties to settle.

The mediator is not concerned with fairness or motivation for settlement, simply that the agreement satisfies the parties, is workable and will stick. However, where one party or more is unrepresented or is attending without advisers, or there is any sign of uncertainty on either side, the mediator should check with both sides that they are happy to complete the deal without a period for further reflection. Some further guidance on working with parties who are unrepresented is given in a later chapter, ‘The role of the mediator and others’, and in the section on ethics and imbalance of power in the final chapter.

Very rarely, a mediator may feel that an emerging deal is dishonest or illegal. This presents an ethical dilemma, quite different from questions of fairness. Ethical issues are discussed in the final chapter.

The IFC Mediator Handbook Page 43 of 110

© IFC 2011

**Practical and workable solutions**

Agreement over a figure to be paid from one party to another seems simple, but even then care must be taken to see that there are no hidden deductions or additions. Is the figure inclusive of interest or tax? When is it payable? What happens in the event of default? What about legal costs? Will the damages be taxable as income in the hands of the recipient? There might be other important practical questions, such as, if court proceedings have been started, how will they be ended? The mediator is not expected to answer these questions, but it is part of the mediator’s role to ask questions designed to encourage parties and advisers to ensure that everything necessary for a workable agreement is covered.

So when an agreement is close to being reached, it may be useful to:

* consider with the parties any possible obstacles to its being workable
* reflect on lessons learned from the dispute which might help to prevent future problems, especially for an on-going relationship
* summarise the terms, perhaps in a joint meeting with advisers, to ensure the terms are comprehensive and cover the topics discussed
* remain alert to timetabling, default, costs, court procedure, tax implications and other practical aspects, although the legal advisers should do all the work on these aspects
* plan for further mediation in the event of difficulty
* check if the mediator is needed to help with any post-agreement arrangements, although this is rarely necessary where agreement is reached, documented and signed.

**The purpose of the settlement agreement**

A settlement agreement should be a clear and reasonably comprehensive record of what has been agreed, signed by or on behalf of each of the parties (lawyers often sign as agent of the party they represent). If a further detailed agreement is contemplated (for example, a new franchise agreement), its broad shape should be set out, and reference made to any standard form agreement to be used as a template. Advisers will be careful to avoid drafting what is merely ‘an agreement to agree’, which is unenforceable in law.

Normally a settlement agreement has the status of a contract, which is enforceable in the event of breach. It may or may not entirely replace any previous contract, and parties need to decide their intention over this. Where court proceedings have started, these must be formally terminated, usually by consent order signed by all parties. In many jurisdictions the settlement agreement can immediately be made an order of the court by way of a consent order signed at the mediation. The effect of the consent order is to make it possible for parties to enforce the settlement terms in the event of breach without starting fresh proceedings.

In other jurisdictions, certain procedural steps will be necessary before this can happen, for example an agreement will need to be notarised, or it may be necessary for an agreement to go back to the court for the approval of a judge before it can be enforceable.

Where one party is a child or an adult without full capacity, agreement can only be provisional, and will require court approval before taking effect.

Sometimes, the parties do not intend the settlement terms to have legal force, in the sense of being enforceable by immediate court action. In some family, employment or partnership disputes, where the issue is about future behaviour and management of relationships, it is still important to record what is agreed as a reference point or action plan, even if not enforceable in law.

The IFC Mediator Handbook Page 44 of 110

© IFC 2011

Where intended to be enforceable, a settlement agreement can be produced to a court in later proceedings for breach even though it resulted from a process that was confidential and without prejudice.

**Contents of the settlement agreement**

Every settlement agreement is different and there is no safe checklist of what should be included. In addition, every country will have its own legal requirement as to the appropriate form of such agreement. The mediation agreement is not automatically superseded by the settlement agreement, so that provisions about not calling the mediator as a witness and about confidentiality will continue to bind the parties and the mediator, except insofar as varied by the subsequent settlement agreement. The parties may decide to repeat such provisions so as to have them conveniently in one document.

The following points may be relevant, but will not always apply:

* **The parties:** the names of the parties may need to be clarified – whether the parentcompany or a subsidiary will make payment, for example, or which names appear on any court papers. Confirmation of the status of a company representative may be needed, perhaps even including a warranty reinforcing that person’s authority to settle. An enforceable right to sue on such an agreement can be conferred on a third person who is not a party to the agreement; if intended, this needs to be spelt out clearly.
* **Recitals** specify the circumstances in which the agreement was reached, reciting thedispute, any court proceedings and the context of the mediation. They might also spell out facts upon which agreement is based, in effect warranting their truth and justifying reliance upon them, thus minimising any risk of alleged misrepresentation.
* **Heads of agreement** set out the terms at the heart of the settlement, such as ‘A agrees topay $y to B in 14 days’, or ‘C Ltd agrees to accept £z in final settlement of its claims brought in Action No 12345 in the High Court’. The terms may be simple or complex, depending on the dispute. Sometimes advisers insist that each paragraph is initialled for certainty of agreement, and it is standard for any amendment to be initialled.
* **Confidentiality:** sometimes parties agree an addition or variation to the confidentialitysigned up to in the mediation agreement, in an attempt to prevent disclosure in a market-sensitive or high profile case. Sometimes there is a positive agreement to publicise an outcome.
* **What has been agreed about the costs** of the litigation and, sometimes, the mediation(see below in this chapter for more on this topic).
* **Mediator not to be called as a witness:** this provision is in the mediation agreement. It isintended to prevent any party from calling the mediator to give evidence as to the terms of the settlement or as to what went on during the mediation.
* **The written document accurately reflects the terms agreed:** an assumption willnormally be made by the court that this is so, but it can be specifically reinforced if the advisers think it necessary. It can also be recorded that the settlement supersedes all previous agreements, if appropriate (remembering that this would include the terms of the mediation agreement, including confidentiality and mediator protection from giving evidence).
* **Future dispute resolution processes** can be specified, such as a return to mediation beforestarting any new action or enforcement proceedings, in the event of any difficulty in the performance of the agreed terms.
* **Signatures and date** should be added, with the capacity of signatory (e.g. CEO of X Ltd).

The IFC Mediator Handbook Page 45 of 110

© IFC 2011

**Drafting the settlement agreement**

The drafting of the settlement agreement is normally the responsibility of the lawyers for the parties. There is a role for the mediator to contribute and to check that all points are covered. New issues almost always arise at this stage. What seemed like a minor issue may suddenly acquire greater importance and difficulty. This may require further bargaining or even exploration, and thus further mediator activity, with parties separately or together. Writing up a settlement agreement can take several hours in more complex cases. Documenting, printing and photocopying facilities need to be available at the venue.

Broadly, nothing in law demands that a settlement agreement be in writing – but the standard mediation agreement requires this formality. A written agreement provides clarity about what has been agreed, and thus reinforces the safety of the mediation process. Drafting the settlement agreement can seem a daunting task at the end of a long day. It might be tempting to gloss over details and assume agreement on certain points, but the lawyers will know that generalisation and ambiguity can create difficulties later, and may even have been the cause of the earlier dispute. The mediator has a role in keeping momentum and energy going during this final stage.

The parties will probably just be waiting while the lawyers are working on drafting, as they will be needed when the final version is ready to be checked with them before signing off on it. Some attention should be paid to parties’ comfort during this time; refreshments, a break away from the venue, or a relaxed conversation between the parties or with the mediator might be useful to help pass the time. The parties will be needed from time to time to discuss terms of the agreement, and there may be some drafting that the parties can do with the mediator, for example a reference for an employment case or an agreed letter to clients where shareholders agree to part company.

In complex cases or where a particular form of agreement will be needed, the mediator might have suggested that the advisers prepare and even exchange before the day a draft settlement agreement, leaving the details to be included when agreed, or the advisers might suggest this themselves. This will save some time and make sure that difficult points are not overlooked when everyone is tired, as well as incidentally encouraging a settlement frame of mind in advance. Drafting tasks can also be assigned during the mediation day, separately or together.

**Litigation costs and funding**

Where court proceedings have started before the mediation, and costs of the legal action are relevant consideration in the jurisdiction, any settlement agreement must deal with the legal costs of those proceedings. Parties are usually asked to bring with them details of costs to date and estimated costs to trial, to inform their risk analysis and risk assessment at mediation.

**Where settlement is not reached**

Cases do not always settle. If the case does not settle, the mediator may feel deflated or disappointed, as well as tired after a long day. Remind yourself that:

* it is the parties who have the power and choice over whether to settle
* negotiations may continue after the mediation, and you should offer to assist
* a high proportion of mediations not settled on the day settle soon afterwards.

Depending on the strength of feelings at the end of a not-yet-settled mediation, it is often good to bring the parties together into a joint meeting to review progress, identify what has been achieved and what remains outstanding, and discuss next steps. Occasionally a concession or other movement will be made at such a meeting which leads to further discussion and settlement.

The IFC Mediator Handbook Page 46 of 110

© IFC 2011

It is important to keep the mediation going in some way, by suggesting any of the following:

* that the mediation is merely adjourned
* that the mediator will contact the parties after a few days to discuss how things look on reflection
* that separate meetings are arranged by appointment with each party
* that parties define a programme of action, request specific information or obtain specialist advice on areas of disagreement
* that negotiations continue on specified issues
* a further mediation, even with a change of mediator
* a different dispute resolution process, such as a neutral evaluation of a disputed aspect or principle.

Even if the parties agree to none of these options specifically, it is important to contact each party or their lawyer soon after the mediation. The mediator has an active role in supporting the parties in on-going negotiations and in finding new routes to settlement.

The IFC Mediator Handbook Page 47 of 110

© IFC 2011

**The role of the mediator and others**

**Aspects of the mediator’s role**

The mediator’s role is to assist the parties in a wide range of ways to make progress towards settlement. However, the use of the word ‘role’ in no way suggests that the mediator is or should be acting a role, either in the training course or in real mediation; it is important for mediators to be themselves.

The mediator has overall responsibility for the mediation, for participants’ comfort and for managing the process throughout. In order to be effective in this aspect of the role, mediators need to be fluent in describing the mediation process and in answering questions about what will happen and why. In addition, mediators will draw on their experience of hosting other events and running other types of business meeting.

Also, in most mediations there are some administrative tasks needed, and the mediator often assists in making arrangements for the practicalities before and during the mediation day, thus ensuring the smooth running of the process in terms of timing, paperwork, provision of information to participants, room allocation, equipment and refreshments.

The effective mediator is skilled at working with the relationships, with the process and with the content of the dispute. The mediator develops a positive tone for the mediation, establishing and maintaining good relations with all participants, as well as taking responsibility for the very significant job of process management. As manager of the process, the mediator provides firm but sensitive control, conveying confidence in the process, and maintaining a sense of purpose. Some of the important aspects of working with the content of the dispute are discussed below. In order to fulfil all these roles the mediator must gain the confidence of the parties, forming a relationship of trust that will encourage the parties to disclose information.

The roles include that of:

* someone who takes seriously and works with the parties’ feelings and frustrations, helping them to channel their energies into positive approaches
* an information gatherer, organising data, and identifying common ground and the scope for zones of agreement
* a coach, both before and during the mediation; this role is described further below
* a facilitator, helping the parties to overcome deadlock and to find a way of working co-operatively towards a mutually acceptable settlement
* an enabler, helping the parties re-evaluate their case through encouraging new perspectives
* a catalyst for problem solving, bringing a clear head and creative mind to help the parties construct an outcome that best meets their needs
* a negotiator, helping the parties to use effective strategies for making progress towards

settlement; this role is described further below in ‘Using negotiation skills as a mediator’

* a reality tester, helping parties privately to take a realistic view of the dispute and to reconsider their risks in the light of the alternatives to not reaching agreement
* an overseer for the drafting of the settlement agreement, checking with parties that all issues are covered and that the settlement is workable
* a prompter who, if no agreement is reached at the mediation, will help parties to keep the momentum towards settlement.

The IFC Mediator Handbook Page 48 of 110

© IFC 2011

**The mediator as coach**

**Coaching and modelling**

Throughout the mediation process, the mediator acts as a coach to the parties and their advisers, enabling them all to participate as fully and effectively as possible, while strictly preserving neutrality and confidentiality. The mediator coaches directly, through sharing experience, making process suggestions, and managing the parties’ expectations and, indirectly, by setting the tone, maintaining energy and purpose, and leading by example in terms of attitude and approach. This aspect of the mediator’s role is described below in relation to the five phases of mediation.

**Preparation phase**

Before the day, mediators will speak to the parties directly or, more usually, through their advisers. The mediator may need to assist the advisers in how to prepare their clients for the day, what documents to produce and in what form, the options they have about how to use the opening statements, and the format and possible shape of the day. Sensitivity and creativity are important at this early stage; in some cases, for example, it may be appropriate to enable parties and their advisers, especially those new to mediation, to visualise themselves in the process in order to prepare well; the party or adviser can be helped to imagine participating on the day. Visualising is a classic coaching technique that can be used by the mediator in depth or in a modified form.

Clients and their advisers need to feel capable and confident in order to make best use of the day. From the very first contact, the mediator has an opportunity to set the tone for the mediation. Flexibility and alertness are essential. The mediator needs to make participation as easy as possible, by minimising surprises and potential embarrassments and maximising the comfort zone for everyone. The mediator should model relaxation and confidence with the process, optimism, and collaborative, practical problem solving. Thus the mediator coaches by setting an example, by modelling a productive approach as well as more directly by giving information, feedback and process suggestions.

It can be useful to encourage the parties’ advisers to co-operate between themselves in the preparation for the day by agreeing a bundle of documents, the length of time for opening statements, arrangements for the day including timing, and even in drafting an outline settlement agreement in the form likely to be required. The coaching continues as the mediator greets the parties on the day of mediation and settles them into their private rooms prior to the (usual) opening joint meeting. By making process management suggestions, the mediator coaches the parties in how to use the day most productively.

**Opening phase**

The mediator is likely to have used initial telephone contact to discuss the purpose, the length and, perhaps, the tone of the parties’ openings, and who might make the opening statement. Some further guidance may be useful during the initial private meetings on the day, so that each party feels confident to join in fully with the initial joint meeting.

**Exploration phase**

During the exploration and the bargaining phases, the mediator will assist in the tactical exchange of information. The mediator should aim to provide appropriate opportunities for face-to-face dialogue, and also to take the initiative during private sessions to encourage timely exchange of information, whilst being scrupulous about preserving confidentiality where parties do not give

The IFC Mediator Handbook Page 49 of 110

© IFC 2011

permission for disclosure. In addition, the mediator, whilst remaining impartial, may coach the parties to communicate in ways most likely to have a positive impact.

**Bargaining phase**

The role of the mediator as coach in the bargaining phase is often critical. Mediators need to use their understanding of negotiation styles, techniques and tactics, to assist parties in shaping the framework of the agreement, and in presenting general and specific offers in a way most likely to be attractive to the other party, addressing their concerns and interests. Mediators must exercise their judgement about what to encourage the parties to exchange, and when and how to do it. The mediator should be alert to parties who wish to withhold information, at least for a while, and to control the timing of disclosures or offers in order to protect their negotiating position. Throughout, the mediator must preserve the parties’ confidences, and remain impartial as to the level of settlement and other outcomes, and in both cases must be seen to do so.

It is important for the mediator to be perceived always as acting in the interests of all parties equally when helping them negotiate towards settlement. The mediator is a neutral diplomat, enabling the parties to find a solution to their problem. Mediation is not a journey towards the mediator’s solution, and high-pressure selling of a mediator’s idea for settlement undermines the integrity of mediation. As in all negotiations, the harder the parties in mediation have worked, the greater their sense of achievement in reaching a settlement and the greater will be their commitment to making the settlement work.

The role of the mediator as a negotiation coach is covered in more detail in the later chapter, ‘Using negotiation skills as a mediator’.

**Concluding phase**

In the CEDR mediation model, nothing is binding until committed to writing and signed by the parties. Settlement terms should usually remain tentative and open until all parties agree the complete package, with the elements of a potential deal developed, often at differing speeds, ready for inclusion. Late adjustments are more likely to be tolerated if the mediator ensures that the deal is built gradually and seen as provisional until finalised. The mediator must be prepared for the unexpected to arise, even when recording the agreement. It may be necessary to return to bargaining or even exploration before finally concluding.

When settlement has been reached and the agreement is being drafted, the mediator needs to exercise particular caution, especially if skilled at legal drafting. It is important at all stages of the mediation to distinguish coaching, reviewing options and providing guidance about the process, from giving specific advice on the merits or what might be a suitable outcome.

**After the mediation**

If the parties do not settle on the day, the mediator has an important role in helping parties to leave the door ajar for further negotiations. Offering process suggestions and a structure for taking things forward can leave the parties with some hope and a sense of possibility. Sometimes this even triggers further settlement discussions on the day. On some occasions it will be enough to tell the parties that the mediator will telephone tomorrow or in a few days; at other times it will be appropriate to undertake some more formal planning, perhaps bringing the lawyers together before the mediation day is concluded to agree specific next steps.

**Skills and qualities of a good coach**

As in other coaching contexts, the mediator as coach needs to:

The IFC Mediator Handbook Page 50 of 110

© IFC 2011

* establish rapport and gain trust
* recognise effective behaviours
* ask useful questions
* give constructive feedback
* motivate behavioural change
* use care and courage – balancing support and challenge for the person
* apply theory to practice
* operate as a colleague with all participants, rather than as a performer or competitor.

**The mediator’s style and approach**

**Facilitative or evaluative - or both?**

Over the last two decades there has been much debate about two main approaches to mediation: facilitative and evaluative. These terms were used to describe two styles, one perceived to be less interventionist than the other. In current practice such a distinction is simplistic and ignores the breadth of the mediator’s role, and the range of techniques available to mediators, even within the same mediation. Facilitative and evaluative styles are best regarded as describing the two ends of a spectrum of intervention styles, rather than as defining separate models.

**Mediator impartiality**

Neutrality, impartiality – or, as sometimes characterised, multi-partiality - is a key component of a mediator’s role. All mediators know that they need to avoid:

* being judgemental
* taking sides
* jumping in too quickly
* giving advice.

Where a mediator is perceived to be judgemental about legal, technical, commercial or personal agendas, it is easy to recognise the potential threat to mediator neutrality, and to the mediator’s relationship with the parties.

The mediator’s expertise in the field or the area of law is often a topic for debate. It is essential that the mediator has the respect of the parties. Certainly, the mediator needs to understand the dispute; and it may be easier to probe the weaknesses of a party’s position if the mediator has knowledge of the technical aspects. However, there are dangers in using expertise of this kind without a full commitment to the mediator role. Good mediators have to be versatile and adept at picking up complex technical issues quickly; and it is excellent mediator skills and process competence that are the key to mediator effectiveness.

The role is neutral in that the mediator, with no stake in the outcome, supports progress towards a resolution created and owned by all parties. However, the mediator is not a detached observer.

The parties have appointed a mediator because they have recognised that they need help to resolve their differences, and they often have high expectations of the chosen neutral.

Mediation is hard work for everyone. The mediator needs to take time to absorb the emotion, the facts and the arguments, and to think through strategies. The mediator must also work to keep the

The IFC Mediator Handbook Page 51 of 110

© IFC 2011

relationships productive and the process safe, for example by maintaining confidentiality, and bringing energy to the process, appearing as fresh late in the day as at the start of the mediation.

For a range of reasons, the mediator may be tempted to offer an opinion on an issue or on the case overall, especially when:

* the parties seem difficult or intransigent
* the progress towards settlement seems very slow or stuck
* the mediator has run out of ideas
* the mediator has lost neutrality
* the mediator takes an active dislike to a party
* one or more of the parties asks the mediator for a view.

It is at these moments that you, the mediator, must hold your nerve and not take the easy way out. Avoid allowing your frustration to lead to you to be adjudicative – instead:

* explore more
* summarise, review or reframe
* find out the parties’ evaluations
* test their evaluations, robustly, in private
* ask the parties what they want to do.

**The process is flexible**

Mediation is a flexible process and can be adapted to suit different circumstances and parties. Individual mediators will, with experience, develop their own style and use of the process.

**The parties decide the outcome**

It is central to the philosophy of mediation that, unlike arbitration and litigation, a neutral third party does not impose a decision upon the parties. This can cause experienced arbitrators, judges and experts some difficulties as mediators, as they are used to giving their views and opinions and may assume that this is what parties require from them.

The mediator should ensure that parties come to mediation fully aware of the parameters of the mediator’s role, and of the responsibilities of the parties. In mediation, the parties must look to their own advisers for legal and other expert advice, rather than to the neutral third party.

Mediators need to exercise special care about their role when dealing with unrepresented parties, covered more fully in the final chapter of the handbook.

**The mediator has an active and proactive role**

Progress is made in most mediations through the parties’ reassessing their risks, and the mediator often has an active role in helping them to do so. Facilitating a re-evaluation of the issues that seem to be blocking agreement is a strenuous process. A mediator must use advanced interpersonal and communication skills, as well as those of process management and problem solving, and a willingness to enable rather than to dictate. The mediator has to be both patient and robust.

A robust approach will undoubtedly be needed when:

* handling multiple issues
* overcoming emotional deadlock
* re-examining options for co-operative solutions

The IFC Mediator Handbook Page 52 of 110

© IFC 2011

* offering reality testing
* reviewing the alternatives to reaching an agreement.

Timing is very important; such interventions are demanding of the parties and their advisers and they may be met with resistance, especially if reality testing is introduced too early in the process.

**Handling multiple issues**

Often the parties to a dispute have become swamped in the intricacies of their claim. It is often helpful to the parties to undertake the exercise of highlighting the key aspects of the dispute in a short case summary. In addition, a third party coming fresh to the dispute is in a good position to assist the parties to clarify the issues between them. Where there are a number of issues, the mediator can help the parties to develop an agenda in the early stages of the mediation. Later, the mediator can work alongside parties, or the parties and their advisers can work privately, to cluster claims, prioritise and give different weighting to different aspects, based on strength of argument and other criteria. This work might enable the mediator to identify some common ground.

**Overcoming emotional deadlock**

Either party may be so incensed by the dispute that they become irrational, and may not see the reality of their situation or hear the reasonable predictions of their advisers. A mediator who has built good rapport and trust with each party may be able to challenge them privately on their views, by careful questioning and other reality-testing techniques. Care should be taken to talk through each issue, including their adviser’s opinions and the other party’s position. A change of surroundings can sometimes help in these difficult situations, perhaps working in a different room or going outside for some fresh air.

**Re-examining options for co-operative solutions**

The mediator needs to be alert to cues, clues and hints from the parties, both verbal and non-verbal, so that all possibilities for settlement can be considered. It may be important to press the parties to take a further look at ideas or proposals, in order to maximise opportunities for finding a resolution. Sometimes it is appropriate for the mediator to join in the search for a workable solution by adding his or her own ideas to those of the parties.

The skilled mediator is one who helps the parties reach a settlement that they firmly recognise as their creation, avoiding over-persuasion, coercion or, more often, by taking too much ownership of the problem and its resolution.

**Offering reality testing**

A mediator will frequently need to work with the parties and their advisers on risk assessment and re- assessment; checking and re-evaluating with them their positions, presumptions and calculations.

One or more of the parties may have pursued an inflated position for so long that it becomes the party’s actual expectation or belief. In these circumstances, testing assumptions, good use of questioning, persistently exploring unexplained inconsistencies, and coaching parties to be realistic, are all an essential part of the mediator’s repertoire.

**Reviewing the alternatives to reaching agreement**

Parties will frequently tell the mediator that they intend to proceed to or continue litigation or arbitration. It can be very powerful to hold up a metaphorical mirror for the parties to see the

The IFC Mediator Handbook Page 53 of 110

© IFC 2011

effect of walking away from the negotiations and giving up on trying to find an acceptable settlement. The mediator can work with the parties and their advisers to ensure they have done a full appraisal of the implications of time, cost, management input, publicity, and all the other factors that will flow from continuing with the dispute

**Other processes can sometimes work well alongside mediation**

Occasionally, both parties genuinely believe they are in the right to the extent that this proves a total barrier to progress. In such circumstances, another process might be needed where a view expressed by an independent third party might assist.

Other processes that can work alongside mediation include:

* non-binding recommendations
* early neutral evaluation (ENE)
* non-binding expert determination (ED).

Once parties have received an indication as to the way a judge, arbitrator or expert would see their point of view, they can adjust their approach and, with the assistance of the mediator, they can then negotiate and work towards crafting a solution from their new starting point.

Mediators who over-evaluate or who engage in ENE or ED as part of a mediation risk the following:

* **Loss of neutrality :** the evaluator might be perceived as having a bias towards one party,and the other party’s co-operation and trust may be diminished in any on-going mediation.
* **Loss of party ownership and responsibility :** the essence of mediation is that themediator controls the process and the parties control the outcome. Making recommendations and giving views on the merits are likely to diminish the parties’ sense of control over the outcome.
* **Resumption of adversarial relationship :** the recommendation, ENE or ED will, or willappear to, favour one party and be seen as a vindication of their position, which may lead that party to become entrenched and approach the mediation in an adversarial way.
* **Confusion about use of information imparted confidentially :** if the change in mediator’srole comes after confidential information has been conveyed, the parties might feel at risk or exposed, and it might even seem like a breach of the trust hitherto established.
* **Loss of face :** the recommendation, ENE or ED might be hard to accept, and involvesignificant loss of personal or professional face from one or other party.
* **Damage to the client-lawyer relationship :** the opinion or recommendation may changethe dynamic between lawyer and party in ways that are destructive to their relationship and disruptive to the later mediation process.

**Requests for an evaluation or recommendation**

Occasionally, a mediator will be asked by one or more party formally to make a recommendation or to express an opinion about settlement. Also, especially as time-limited mediation becomes more common in some sectors, the mediator may be called upon more frequently to be a deal maker or quasi-adjudicator. This handbook provides a basic framework for mediation and a safe starting point for new mediators, and offers only the following guidance on how to respond to such a request:

* ensure that the parties understand the mediation process, their role, and the normal role of the mediator within it, then,
* if any issue requires evaluation, suggest that the parties agree to obtain the evaluation from another neutral before, during or after the mediation, as appropriate.

The IFC Mediator Handbook Page 54 of 110

© IFC 2011

Some parties, including those from government and public bodies, particularly in international disputes, may come to mediation with authority to settle subject to ratification by a senior authority or committee. A written or oral recommendation by a neutral third party may be important in obtaining that ratification.

In some large infrastructure projects or complex multiparty cases, or as a last resort to try to achieve settlement, the parties sometimes jointly request or agree to a non-binding mediator’s recommendation for settlement. A mediator recommendation can be an effective tool for settlement; but only with the full agreement of the parties, with clear ground rules set and agreed, and with the recommendation delivered privately to each party in a structured, planned and managed way. This is not something to be undertaken lightly, and it is not a technique recommended by CEDR for use by new mediators.

**Roles and responsibilities of parties, lawyers, experts, assistant mediator and co-mediator**

Some mediations take place with only parties and mediator present; many mediations include a number of others in attendance. The mediator should encourage, value and manage the participation of everyone attending. The following paragraphs draw out the common roles of the different participants and the mediator’s relationship with them.

**Parties**

Parties are required to:

* have authority to settle
* be well prepared to participate in the process.

Parties often do not come with full authority to settle, and there is a limit beyond which they must refer to another person. Lines of communication to that person need to be clear and open, particularly out of normal working hours, even though this is much less desirable than having a decision maker present and fully involved in the mediation process.

A lead negotiator often brings a team of advisers. The party must have final discretion about who is in the team, but the mediator may have a role in advising on the size of the team and who should attend. The mediator and all the other parties should be informed in advance about who is to attend in each team.

Large teams can be difficult to manage. In terms of seating at joint sessions, it is usually best to sit the decision makers and case presenters close to the mediator, with the remainder of the team seated beyond.

Other issues with large teams include:

* keeping everyone feeling involved, and avoiding disengagement for those not participating directly
* a party feeling threatened by imbalance of numbers.

The parties may choose to make their opening presentation themselves in the first joint meeting, or ask their advisers to do so, or share the presentation with their advisers or others in their team. The teams will usually spend some of the day working in private without the mediator, which is

The IFC Mediator Handbook Page 55 of 110

© IFC 2011

often a time when changes in position occur. It is worth alerting parties that there will be periods of waiting during the day, while the mediator holds meetings with parties individually or with selected team members only. Parties and their advisers should take some responsibility for keeping team members engaged, and for using the time when not with the mediator as productively as possible.

During the mediation the mediator will work with the parties to clarify the issues, to generate options and ideas for making progress, and to formulate settlement terms that are workable. The lead negotiator in each team will make the final decision about settlement. It may be important for the mediator to understand any pressures and constraints on the decision maker as the one who must take the final settlement back, justify it to colleagues and make it work.

**Lawyers**

Lawyers are present at most commercial mediations, and it is the lawyers who refer the majority of cases to mediation.

Before the mediation the lawyer will usually:

* assist in the selection of a mediator
* advise the client on the process of mediation
* be the main point of contact with the mediator
* help select the client’s team
* advise on whether there is a need for a pre-mediation meeting with the mediator
* brief and, perhaps, rehearse the client in making an opening presentation
* prepare the case summary to be sent to the mediator and the other parties
* prepare a bundle of documents or agree a bundle with the other party’s lawyer
* identify any documents which are confidential and for ‘the mediator’s eyes only’
* carry out a realistic appraisal of the strengths and weaknesses of the client’s case
* prepare costs estimates.

At the mediation the lawyer will usually:

* present the opening statement or support the client in making that presentation
* advise the client and, possibly, even lead in settlement negotiations
* contribute authoritatively to defining the party’s BATNA
* identify legal issues relevant to the emerging settlement
* draft, or assist in drafting, the settlement agreement.

Lawyers make a significant contribution to the process, and the mediator should ensure that they are involved and valued throughout the mediation. For example, they often stimulate flexibility and movement, especially while the mediator is not in the room. The lawyer can be an ally to the mediator, and the mediator to the lawyer; lawyers will sometimes welcome and encourage the mediator as an additional manager of their clients’ expectations.

**Experts and other advisers**

A party may feel it necessary to have financial advisers or other experts present, in addition to legal advisers, to contribute to non-legal technical aspects of settlement.

There are two possible roles for experts in mediations:

* as specialist adviser to a party, or
* as specialist adviser to the mediator (although this is much less common).

The IFC Mediator Handbook Page 56 of 110

© IFC 2011

In the former, the expert is a member of the party’s team; usually playing a limited role, as settlements are rarely based upon the detailed knowledge or opinion of an expert, whose main work has often been done earlier. It may be difficult for an expert to change his or her position, and there is a danger that such inflexibility will become a barrier to settlement. However, parties will often consider the prospects of one or other expert view being persuasive at trial, and discount settlement terms accordingly. Occasionally, the resolution of a dispute will involve agreeing technical practicalities, and the expert may be able to make a significant contribution to finalising the terms. Parties sometimes decide to have experts available by telephone rather than present at the mediation.

In highly specialised cases the parties occasionally ask or agree that the mediator works with an expert. The contribution of the expert needs to be carefully considered, and it is for the mediator to decide how much technical detail is used for reality testing or for discussion of settlement terms. More often in such cases, a specialist mediator is appointed who is experienced in the field; however, the mediator still needs to be skilled at building relationships of trust with the parties, at managing the process creatively, and at working with the content in a way that allows the parties to find their own workable solution.

**Assistant mediator**

Your first experience of a real mediation, other than perhaps as an adviser to a party, will probably be as an assistant mediator. This is an opportunity to learn and to develop your understanding of the process.

It is up to the mediator to agree on the assistant mediator’s role, which might include:

* note taking, so that the mediator is free to take fewer or no notes
* observing, and noting particularly the body language of those not engaged in conversation with the mediator
* taking messages about timing to the other party, to avoid the need to break off a meeting
* managing the practical and domestic aspects of the day – room temperature, refreshments and equipment
* acting as a sounding board, someone with whom the mediator can exchange ideas and share thinking during breaks between meetings
* asking questions, usually at the mediator’s invitation, perhaps towards the end of a meeting
* occasionally leading a private meeting, for example undertaking a task with experts from both sides whilst the mediator is with others, although any division of labour needs to be carefully managed by the mediator
* being a companion, providing encouragement and support to the mediator.

After the mediation, the mediator and assistant will often review the day together. It is an opportunity to release tension and discuss aspects of the day that cannot be discussed elsewhere because of the commitment to confidentiality. It is useful for the mediator to provide feedback to the assistant about his or her contribution, for the mediator to get feedback from the assistant, and for them to reflect together on what went well and why, and what could have been done differently.

On the MST course the role of the assistant in the role-plays is deliberately limited to that of an observer, to allow each participant the same amount of time to practise and to be assessed as a mediator.

**Co-mediator**

The IFC Mediator Handbook Page 57 of 110

© IFC 2011

Co-mediation is where two or more experienced mediators are working together in equal roles. It is commonly used in community mediation. In commercial mediation it is used mainly where:

* a dispute is particularly complex or a particular combination of skills and experience is required which cannot be provided by one mediator
* the number of parties, or geographical separation of the parties, is such that one mediator could not practically and efficiently meet with all parties
* the sensitivities between the parties require a gender, racial or other cultural mix in the mediator team.

Co-mediation demands sophisticated team-working skills, requiring that:

* the ground rules between the mediators are agreed before the start; who takes what role; how are the tasks to be shared; what communication systems will they use between themselves during the mediation
* the mediators develop ways of working together, based on the ground rules, which allow them to work flexibly with the parties
* there are regular exchanges and updates, in private, between the co-mediators
* any uncertainties or disagreements between mediators are resolved quickly and in private
* the mediators are seen consistently as a united, confident, competent and complementary team.

**Process Challenges**

**Dealing with status issues and power imbalance**

Often in mediation, one party will be perceived as stronger than the other. This strength can take a number of different forms, the most obvious of which is having access to greater financial resources. Other types of power imbalance could include dominant personalities, and perceived status within an organisation or society more generally.

In such circumstances, the mediator needs to ensure that as far as possible both sides – the stronger and the weaker – have equal opportunity to engage in the process in an effective way, and that the mediator, in turn, engages with them on similar equal footing. The primary tools at the mediator’s disposal to ensure this are invariably process interventions. Some examples could include:

* a decision not to hold a joint session;
* to break from joint into private sessions;
* not allowing one side to dominate through careful time management;
* ensuring that in joint meetings the conversation is controlled by you, the mediator, to ensure both have sufficient air-time; and
* allowing space for the weaker party to consider proposals before agreeing to anything;

In some circumstances, content interventions such as the mediator coaching the weaker party in how to frame information and offers will be appropriate. This is particularly so where a party is attending the mediation without legal representation, although the mediator will need to be careful here not to step into an advisory role.

A final word of warning, just as with all things in mediation, beware of assumptions. Often, you may in reading and preparing assume a party is a weaker one, when in fact personalities or

The IFC Mediator Handbook Page 58 of 110

© IFC 2011

circumstances change the power balance. A good example of this is in situations of impending bankruptcy or insolvency, where the financially weaker party often has more power because of the situation.

**Adjournments**

The nuances of accepted civil procedure in different jurisdictions mean that in some countries adjournments are very much part of the norm in the way negotiation and litigation is conducted. Whereas mediations are usually recommended to take place over one day or in one continuous period, focussing the parties and their advisors on working with the mediator to draw out possible solutions, the process is flexible enough to allow for adjournments at the agreed request of the parties.

Mediators, however, need to be careful that the break does not result in the parties reverting to earlier positional dialogue when the mediation is reconvened. To avoid this, mediators should resist parties who seek to adjourn the mediation prematurely and encourage them to trust the process and continue while the mediator feels progress is being made and settlement is still possible.

Where both the parties and the mediator have agreed an adjournment, the mediation should be reconvened as soon as possible after the initial session. It is advisable that the mediator should begin by drawing the parties together in a joint session to remind them of progress and to clarify what is likely to happen next. The process can then continue in the relevant phase.

However, where the adjournment is due to a need for further information identified at the first mediation session, it may be that the next session will not take place for a few days, weeks or even months. In this scenario, ideally a new date should be identified before the mediation is adjourned and the mediator is advised to stay in touch with the parties and/or their advisers regularly, asking for updates to ensure that the mediation stays on track. A word of caution here – parties will often request further information from each other, which may in fact not be needed to help achieve settlement. Remember this is not a court process and therefore evidence is not required. Therefore, wherever possible, the mediator should encourage parties to continue with the mediation.

Therefore, mediators should be alive to adjournment being used for tactical advantage by one or both of the parties and work with them to bring the process back on track.

**Corruption / Bribery**

Although very rare, there may be instances when mediators are approached by a party with a proposal for how they might *win* at mediation. Given the fact that mediators do not make decisions as to the outcome, any such attempt at corruption or bribery is likely to not have been considered fully. Nevertheless, a mediator enjoys a privileged position within the process. Not only is it essential that mediators be extremely careful to ensure they do not jeopardise their neutrality, any such attempt by a party should be strongly rejected on ethical grounds. The mediator/party confidentiality may be breached in the event of an ethical concern (further details below) and such an attempt may give rise to a mediator withdrawing from the mediation and informing the relevant authorities of the attempt.

The IFC Mediator Handbook Page 59 of 110

© IFC 2011

**Communication skills for effective mediation**

**The importance of communication skills in mediation**

Excellent communication is essential for an effective mediator. The term ‘communication’ covers a multitude of skills and processes. What follows is a broad survey of some of the important tools, with a focus on the fundamental skill of active listening.

The effective mediator enters the process with an open mind:

* about the case – with no rigid views on the merits, the weaknesses and strengths
* about the people - avoiding stereotyping people on the basis of gender, social or professional background, age, culture, race or otherwise
* about the parties’ priorities – without assumptions about what motivates and matters to the parties
* about the outcome – with no fixed idea of what the solution should be.

Developing the ability to work with others impartially is a skill in itself. All human beings try to make sense

of the world by relying on limited information, past experience, preconceptions and assumptions. As a mediator, it may be useful preparation, after reading the papers and speaking to the parties, to ask yourself what assumptions you have made and what views you have formed. By acknowledging some of the preconceptions and conclusions you have reached, you may be better able to set them aside and keep an open mind during the mediation.

The effective mediator must create an unthreatening and constructive environment that enables trust and understanding to be built - party with party, adviser with adviser, adviser with mediator, and party with mediator. Being sensitive to the significance of words and actions makes it possible to open or reopen blocked or broken lines of communication and help parties to talk. Many of the communication skills will be innate or already learned, and there may be other skills to learn or to use more fully. The skill descriptions that follow are intended to enable you to increase your awareness and your ability to use the skills well as a mediator.

**Active listening**

The capacity to be a good and understanding listener is the basis of effective communication. Parties come to mediation with varying degrees of distress, anger, fear and optimism. The knowledge that they are listened to and understood will help to build trust and enable parties to consider more openly the options for change, and to take their share of the responsibility for resolving the situation.

Listening is an active process that entails hearing the words, being sensitive to vocal clues, to tone and pitch and inflection, observing movement, taking into account the context, and communicating understanding. In this way, parties not only know they have been heard but can also hear their own messages more clearly.

The IFC Mediator Handbook Page 60 of 110

© IFC 2011

As a mediator it is important to aim for a conversation with the parties and their teams, and not to conduct an interview, investigation or interrogation. It is also important to distinguish listening in a social context. Social listening takes place within a conversation that is geared towards meeting the needs of both participants; and though hearing may take place, listening may not, with each interrupting, asserting, and taking little real interest in what the other says. It is a frequent complaint in relationships where communication has broken down (a common feature of parties who come to mediation) that the other no longer listens. By listening well, the mediator can convey respect and demonstrate interest in what is being said; modelling effective behaviours, and thus encouraging parties to talk openly and to communicate more constructively with each other. Later in the mediation active listening paves the way to settlement, enabling the mediator to assist with the negotiations, to get clarity and to handle the detail needed for a workable solution.

**Barriers to active listening**

Most people assume that they listen well, but listening with undivided attention and without interrupting is not easy; there are many things that can get in the way of attentive, active listening:

* **distractions -** external - noise, discomfort, interruptions; internal - tiredness, boredom,preoccupation with own problems, anxiety about being able to cope, over-eagerness to help, impatience, attraction to or dislike of the other
* **comparing -** this is nothing compared to what I’ve had to deal with
* **rehearsing -** preparing what you are going to say next rather than listening fully to theother person
* **filtering -** listening to some things and not others; listening only to what you want to hearor to what fits with your own values and beliefs
* **pre-judging -** the person as being, for example, foolish, unqualified or unreasonable
* **blaming** - assigning responsibility for what has happened to one party alone
* **dreaming -** half-listening and wandering off along a chain of private associations that havebeen triggered by something the person has said; this is more likely to happen if you are bored or anxious
* **identifying -** relating what the person says to your own experience - this can arousestrong sympathetic feelings or a feeling of being overwhelmed
* **hiding behind a façade -** trying to make yourself seem expert, for example, but in factbeing defensive
* **problem solving -** searching for solutions to problems rather than hearing andacknowledging what the person is saying and feeling; jumping ahead and assuming you know how best to resolve the dispute
* **placating -** trying to be nice, pleasant, supportive; wanting people to like you, thusagreeing with everything rather than examining what is being said
* **reassuring** - trying to make parties feel better, yet not really acknowledging their true

feelings; It will be all right- rather than You’re really worried about that

* **disagreeing -** immediately countering with an alternative view, so that the other persondoes not feel heard
* **being right -** being closed to the possibility that you might be wrong.

**Non-verbal communication**

The impact of what is said and the message received is dependent much less on the words used than on the non-verbal behaviours that accompany the words; far more than half of human communication is non-verbal. This means that it is impossible not to communicate; without saying a

The IFC Mediator Handbook Page 61 of 110

© IFC 2011

word, we reveal our feelings, thoughts and attitudes. For instance, a smile usually says, I’m happy , and looking at a watch may say, I’m impatient to move on. Even when we try to say nothing, our closed stance and refusal to speak might convey, I don’t want to talk about it; leave me alone. Despite our sophisticated language, we still communicate strongly without words, and this is a process that the mediator needs to understand.

For the most part, non-verbal communication reveals emotions and feelings rather than giving information about the external world. It is easy to lie using words, but other aspects of communication make it less easy to deceive. For example, facial expressions are directly controlled by the emotional centres of the brain and are thus hard to simulate. When you read the expression on another’s face, you are more likely to assess the true emotion being felt than when you merely listen to what is being said. If you ask someone “*What’s wrong?”* and they shrug their shoulders, frown, turn away from you and mutter “*Oh...nothing, I’m fine*”, you are unlikely to believe the words. You believe the dejected body language.

In mediation, as in other situations where you are trying to communicate with others, awareness of and understanding about non-verbal communication provides essential information beyond the content of what is being said. Awareness of non-verbal communication helps you to understand others better. Awareness of your own non-verbal communication makes you a more effective communicator and mediator.

**Components of non-verbal communication**

There are three main components of non-verbal communication:

* body movements - facial expressions, gestures, posture. These are largely learned from parents and other significant people in our lives. Some are universal, and others are culturally or ethnically specific, which can lead to confusion. For instance, eye contact in western European culture is a sign of respect, whereas in Puerto Rico it usually denotes the opposite. As individuals we each have idiosyncratic habits, and tuning into the other person’s way of expressing feelings and attitudes can assist communication
* use of voice - pitch, articulation, volume and speed. No matter what we say, the sound of how we say it reveals a great deal about what we feel and think
* spatial relationships - the distance between yourself and the other person. There seem to be four different zones that people unconsciously use as they interact with others:
  + intimate distance - less than one arm’s length
  + personal distance - one arm’s length
  + social distance - two arms’ length or more
  + public distance - 3-6 metres.

People will retreat, defend or attack if you enter their personal or intimate zone inappropriately; to lean over someone who is seated is to enter his or her intimate space and is potentially threatening - and you certainly need to be very confident that any touch would be welcome.

At most mediations, each party is provided with a private room. Even in otherwise non-contentious situations, there is a tendency for people to defend their territory. By knocking on the door and waiting for an invitation to enter a party’s room, or offering to leave to permit private consultation, a mediator can show respect for their privacy and increase their sense of security.

**Observing and understanding parties’ non-verbal behaviours**

Observation of parties’ body language provides important information. An open, relaxed posture suggests that is how they are feeling at that moment. Apparently uncomfortable shifting in the chair, speech hesitations or breathing changes, suggest that the issue being dealt with is distressing

The IFC Mediator Handbook Page 62 of 110

© IFC 2011

or potentially distressing. Facial behaviour is particularly significant in revealing information. Discrepant non-verbal behaviour is also important to note; where non-verbal communication does not agree with the meaning of the words which accompany it, or where non-verbal behaviours seem not to be congruent with each other - for example, the person who shakes your hand with a firm grip and smiles, but looks away. Awareness of incongruence in others can alert you to possible hidden agendas or a need for a change in your behaviour.

Often parties in a mediation - and sometimes their advisers - will display anxiety. Signs that a person is becoming anxious include:

* rapid or tight breathing
* backward movement
* tapping a hand on the leg; tapping feet
* averting eyes
* clenching fists; picking at fingers
* aggression displayed in voice or gestures.

As always with body language, these signs are indicators not certainties, and so need to be read alongside other information. Accurate observation of non-verbal communication also helps you to assess the impact you have on people. Are they receptive to what you say? Have you created rapport? Do the parties trust you enough to encourage them to take a risk or to allow you to do so?

**Positive behaviours and inhibiting behaviours**

The following are guidelines only and need to be adjusted when working cross-culturally.

You also need to be aware of your own non-verbal cues, as they provide information about your unconscious feelings and attitudes. In a difficult mediation you might notice, for example, your arms folded and fingers wrapped tightly round your biceps; you realise you are nervous and defensive. With this increased awareness you can take steps to reduce your tension, and free up the atmosphere of the mediation.

The letters SOLER offer a mnemonic for the key elements of non-verbal communication which indicate to the speaker that the listener is giving full attention:

**S** face party with S houlders square - shows full concentration on the speaker

**O** adopt an O pen posture - shows you are open to hear and accept what the party wants to say

**L** sometimes L ean gently towards the party - a sign of being involved

**E** maintain E ye contact - shows continuing attention and involvement

**R** be relatively R elaxed - because your attention is genuine.

**Rapport Building**

Central to the effectiveness of the mediator is the ability to establish relationships of confidence and trust with others. Developing rapport is an important skill.

The depth of rapport that you achieve impacts on:

* the extent to which the parties trust you and are willing to talk to you
* parties’ perception that you have been listening and understand them

The IFC Mediator Handbook Page 63 of 110

© IFC 2011

* the quality of information that the parties give you and the level of understanding of the parties that you achieve
* the degree of progress that parties and their advisers believe is possible with you as mediator
* how accurately you can identify parties’ priorities.

Some rapport arises naturally, some you have to create. The skill of creating rapport gives you an ability to relate quickly to a wide variety of people.

**Matching** is a way of establishing rapport; this skill involves accurate observation, openness andflexibility of behaviour. It is the process whereby you adjust your behaviour to be more similar to - and thus in tune with - the behaviour of others. That does not mean being a clone or a mimic, but rather being in harmony. By matching you are making tacit agreements, which build trust and increase receptiveness and responsiveness.

When developing the skill of matching, it is useful to concentrate on matching specific behaviours. Some examples of aspects of a person’s behaviour that you may be able to match are:

* body posture - head, upper and lower body; position of arms and legs; angle of body; relaxed or rigid; sitting or standing
* facial expressions – level of eye contact; smiling; frowning; tight or relaxed lips
* gestures - use of hands, arms, legs and feet
* language - particular words, phrases and sentence structure
* voice - tone, volume, pitch, speed and tempo
* breathing - location, rate and depth.

**Mismatching** - behaving in ways that do not reflect the behaviours of the other person might inhibitthe building of confidence and trust.

However, once rapport has been established, deliberate mismatching (called ‘pacing and leading’), can help change a person’s state: to increase energy, to relax them, to help them to behaviour more openly. The mediator can use this technique, of matching and then carefully mismatching, to enable a party to participate more fully, or to bring a private meeting or a discussion on a particular topic to an end without causing offence.

The need to create or recreate rapport may occur at any time in the mediation; a feeling of discomfort may arise, and deliberately matching the other person can retrieve a relationship that has become less than comfortable or re-establish productive participation.

**Use of silence and minimal verbal prompts**

A mediator needs to be able to cope with pauses and silences and to use their potential for triggering progress. Invariably there is a temptation, even a need, to fill the space, and it takes real discipline and some courage to use silence well. Time and again something important is revealed after a period of silence.

Silence can be helpful to the speaker because it:

* allows the speaker to dictate the pace of the conversation
* gives time for thinking before speaking
* enables the speaker to choose whether or not to go on.

Silence can be helpful to the listener because it:

* demonstrates interest, respect and patience

The IFC Mediator Handbook Page 64 of 110

© IFC 2011

* gives an opportunity to observe the speaker and pick up non-verbal clues
* places the initiative on the speaker.

Silences or pauses may occur because a party is confused, anxious or upset. In these circumstances, it is even more important to keep quiet and to give the party time and silence. Used with suitable non-verbal behaviours, silence shows that feelings are recognised, understood and accepted.

Especially in the early stages of a mediation, the mediator should ideally speak little, giving the parties a chance to speak much more. One tool to encourage this balance is the use of minimal verbal prompts; these invite the party to go on with what they are saying, by showing attention and involvement without halting the flow.

Minimal verbal prompts, such as *Yes* ... ; *Go on* ... ; *Mmm* ... ; *Uh-huh* ... ; *And then?* ... ; *I see* ...

; *Tell me more* ... , obviate the necessity for further comment or questioning from the mediator, allowing the party to continue uninterrupted.

**Reflecting, paraphrasing, reframing and summarising**

These are skills that consolidate and draw together, and demonstrate understanding of what has been said, establishing a foundation for moving forward.

The main distinctions between these skills are:

* reflecting is putting into words the impact of a situation on the other, including the underlying emotions
* paraphrasing is stating in a few of your own words the content of what someone has just said
* reframing is rewording a statement made by another for positive effect
* summarising provides an overview of the main thoughts, feelings, themes and issues expressed.

**Reflecting**

Reflecting is a term used to describe the technique of playing back to a person what that person has just conveyed to you. It can be likened to holding up a mirror. In many contexts, there is often considerable emphasis on the intellect and a relative denial of the importance of a person’s emotions and feelings, although in some cultures more than others. By noting and appropriately reflecting the emotions and feelings, you can convey to a party that you understand and appreciate the situation as they perceive it and recognise how they feel. So, reflecting is used to:

* acknowledge a person’s emotional response to a situation
* help that person clarify his or her feelings about a situation
* provide a means of checking your understanding of what you have heard or sensed about feelings or impact.

To pick up emotional cues effectively you need to observe carefully the party’s non- verbal behaviour as well as listening to the words used. A person’s body posture, facial expression, level of eye contact and vocal qualities, change with his or her emotional experience. In order to reflect back a full picture, you need to monitor the emotional tone while continuing to note the verbal content. It is often more difficult to find the words to reflect the feelings than the factual content.

Reflecting can be achieved by simple phrases such as:

The IFC Mediator Handbook Page 65 of 110

© IFC 2011

*You are saying that you are angry ...*

*It seems that you are worried ...*

*You are feeling ... about ...*

or sometimes by a question:

*So are you frightened that ... ?*

*Have I got this right, you’re feeling ... ?*

Sometimes it can be helpful to make a space for reflecting, by saying:

*May I stop you for a moment to check that I’ve understood ... ?*

Reflections, in whatever form, should be brief and focus entirely on what you have gleaned from the party rather than any thoughts or beliefs of your own.

**Paraphrasing**

Paraphrasing is briefly stating in your own words the essence of what you think someone has just said. Examples of phrases introducing a paraphrase include:

*So what you’re saying is ...*

*What happened was ...*

*You are telling me that ...*

A paraphrase should be non-judgemental, and should not introduce interpretations or your own thoughts, nor should it repeat parrot-fashion what the person has said.

Paraphrasing can be used to:

* demonstrate that you are listening attentively
* check that you have accurately understood what has been said - this helps to prevent miscommunication and false assumptions, which can then be corrected
* show that you recognise, acknowledge and accept the thoughts of the party without making a judgment about what you have heard
* help defuse anger and cool down a crisis
* help you to remember what has been said
* break through most listening blockages and enable the listener to refocus on what is being said
* provide an opportunity for the party to hear their own message more clearly. This can lead to further exploration and often the development of a fresh appreciation of the issue.

Paraphrasing should be used frequently during a mediation. A paraphrase should be based only on what you have heard or understood; it is often effective when delivered in a slightly tentative manner, to give the party the opportunity to correct you.

**Reframing**

Reframing is changing the words used or the way in which ideas are presented, so as to allow the situation to be viewed differently and more positively. Reframing can take several forms:

* taking the sting out of language, detoxifying or depersonalising it

The IFC Mediator Handbook Page 66 of 110

© IFC 2011

* interpreting actions from a different perspective – for example, focussing on what is needed for the future rather than what has not worked in the past
* presenting claims or proposals in a different way, so as to be more palatable
* rewording demands made by one party of another; for example, the idea of making an apology may be
* rejected in principle, whereas a party may be prepared to voice an expression of regret.

Examples of reframing include:

Party: *I want £50,000.*

Mediator: *So money is important to you?*

Party: *He’s a liar and a cheat.*

Mediator*: So you feel misled and it’s hard for you to trust him.*

Party: *I assess that I have a 75% chance of winning.*

Mediator: *So you have a 25% chance of losing?*

Party: *They write very poor reports.*

Mediator: *So you want the reports done differently in future?*

There is some risk that ownership of and responsibility for the reworded statement might shift inappropriately from the party to the mediator. The mediator should involve the party as fully as possible in the reframing, and certainly the mediator needs to check that the rewording is acceptable to that party before conveying it to the other party, if that is permitted.

Reframing is a technique that clears the path for progress. Enabling the parties to see things differently can encourage a shift in positions and some flexibility, often leading to a breakthrough to settlement – although such changes do not always take place instantly.

**Summarising**

A summary draws together the main threads of what a person has said. It is useful to clarify a lengthy or elaborate explanation, or to check progress before moving on, or to identify an underlying theme which can sometimes provide new insights. The summary should not be the mediator’s interpretation of what a party has said, but should draw on the party’s own words and be recognisable to the party as an accurate account. When summarising it is important to allow the party to correct or add to the summary.

The benefits of summarising include:

* it shows you have been listening attentively and are concerned to understand what the party thinks and feels about the situation
* it allows you to check your perception of the situation and clarify what you have heard
* it may link and bring some order to confused and fragmented thoughts and feelings
* it gives feedback to parties about what they have said, and can confront them with conflicting or contradictory thoughts, feelings and ideas
* it is a way of focusing on particular issues, and can help parties to begin making decisions about priorities, what needs to be tackled first, or what concessions or proposals they are prepared to make.

The IFC Mediator Handbook Page 67 of 110

© IFC 2011

It is particularly important to summarise at the end of each private meeting, as a safe way of enabling you to check what may be conveyed to the other party and what must be kept confidential. It can sometimes be helpful for party and mediator to make joint notes on paper or perhaps on a flipchart.

**Use of questions**

Appropriate use of questions is essential in mediation. However, questioning is a tool that must be used sensitively, and different forms of questions will be appropriate at different times. Open questions are particularly useful in the exploration phase, while closed questions are more appropriate when checking and summarising and in the later stages, and hypothetical questions are used at any stage for trying out ideas. Timing and context are very important and need to take account of the listener’s level of trust; for example, probing and challenging questions would not be appropriate before a party is ready to trust you with that level of information or exposure.

Careful framing of a question is important, for questions can:

* encourage a party to talk
* show empathy and support;

but questions can also:

* indicate partiality, judgment, criticism
* seem prying or irrelevant
* become an interrogation.

**Types of question that can be helpful include:**

**Open questions**, which are broad invitations to talk. Good open questions from the mediator allowthe party to control the direction of the discussion, to present views and ideas from their own perspective and to highlight concerns. Such questions encourage wider discussion of the current situation and facilitate ideas for change and options for action:

*How do you react to what they say?*

*What do you think are the likely consequences?*

*What suggestions do you have?*

*Why is that important?*

A well-formulated open question might elicit a very closed response. If this happens once, try again; if it becomes a pattern, then consider whether something is inhibiting effective communication and tackle that first. Perhaps you have missed an important non-verbal cue; perhaps the party has unmet physical or other needs or perhaps silence or some form of acknowledgement is more appropriate than a question.

**Hypothetical questions** allow parties to play with ideas and test out options without having tocommit themselves:

*What if the other party said they were unhappy about that?*

*Just supposing they offered that?*

*What would happen if ... ?*

The IFC Mediator Handbook Page 68 of 110

© IFC 2011

*What would it look like if you could ... ?*

**Closed questions** seek very specific and precise information or facts. The response will be either*‘Yes’* or *‘No’* or a very short response - some identification of fact such as time, place, number,person.

*Closed questions are useful for checking and clarifying:*

*What date did you agree for the delivery?*

*How long was it before they told you about that?*

*Where did you meet last time?*

*How much was the contract worth?*

However, if used inappropriately or too often, closed questions can limit progress. A series of closed questions can leave parties feeling bombarded and that their perception of the situation is not important. Of course, it is possible for a party to change a closed question into an open one by saying, for example, *“Yes, but ...”* and then giving a lengthy explanation.

When as a mediator you are dealing with information and facts, it is also important to acknowledge that there can be emotional consequences to the outcomes of legal and commercial disputes - concern about redundancy in the workforce, loss of face, disappointment in a personal crusade, or some other fear of or hope for the future.

**Other useful forms of questioning, which serve particular purposes, include:**

**Imperatives**, which are not strictly questions but have an interrogative effect because they inviteanswers:

*Tell me about the way in which that was decided.*

**Personal reaction** questions which encourage expression of thoughts and feelings:

*In what way has this situation affected you?*

*How do you react to the possibility of not getting what you hoped for?*

**Probing** questions ask a party to develop an answer further:

*Can you tell me a bit more about how that happened?*

*What makes you say that?*

*What exactly do you have in mind ... ?*

**Asking for examples** encourages the person to be specific:

I’m not clear about what you meant by that, could you give me an example?

Tell me about the last time that happened?

**Focusing** helps to keep the discussion on the party’s priorities:

*What would you like us to consider first?*

The IFC Mediator Handbook Page 69 of 110

© IFC 2011

*Which is the most important aspect of this for you?*

**Clarification** enables you to check that you have understood what has been said:

*Do you mean that ... ?*

*Can I check that I have got this right?*

**Prefacing the question with a paraphrase or reflection** allows you to acknowledge and checkwhat has just been said before moving on to new ground:

*You said that you would not be prepared to consider that option, so I wonder if ... ?*

*You have told me how angry you are about this, so is it realistic to think in terms of ... ?*

**Checking for meaning** - when the parties are together, this type of questioning enables each partyto hear that they have been understood:

*What did it mean to you when X said that?*

*Can you say what you understand by what X said?*

**Giving advance information** about what you are going to do gives the other person time toprepare:

*May I ask you a question?*

*It would help me to understand this if you told me ...*

**Rephrasing the question** when your first question has not been understood:

*Let me put it another way ... ?*

**Asking the other person to rephrase the question** for you can be encouraging. An apparentreluctance to answer may be because your question has not been understood, or there may be some other reason:

*Would you like to put it in your own words?*

*What do you think I’m really asking you?*

**Types of question that are probably unhelpful, include:**

**Leading questions**, which belong in cross-examination. They are less appropriate for mediationbecause they try to lead the party towards the mediator’s own answer. At best, you might be seen not to be taking account of the party; at worst, you will be seen to be taking sides.

*A right solution here is to do X, isn’t it?*

*Don’t you think it might be better to ... ?*

*You wouldn’t want any further delay, would you?*

Leading questions seek to impose the questioner’s view upon the recipient.

The IFC Mediator Handbook Page 70 of 110

© IFC 2011

**Multiple questions**, which pose more than one question at a time and can lead to confusion aboutwhich question to answer or, for the questioner, about which answer fits which question.

*What happened on Thursday and what did you think when she first ‘phoned you ?*

*Would you be able to get a job elsewhere and how would you feel about moving?*

These examples are multiples of two. It is not uncommon to ask three, four or five multiples in one question. Similarly, the questioner may ask one question and give some alternative answers - all of which come from the questioner’s perspective and take little account of the listener. Questions are often multiplied for fear of the following silence or in an attempt to improve on the first formulation. As in the use of silence, part of the skill, having asked a good question, is in knowing to wait and be quiet, allowing time for the answer.

**Some reminders and suggestions relating to questions:**

* Aim for a conversation rather than an interview or interrogation
* If open questions are being closed down by the party then something may have been missed and something else may be needed
* Have some ideas for question areas, perhaps, but avoid preparing a list of questions – this can be a distraction, and you may miss what is being said. A good mediator builds a conversation in response to what parties say
* It can be helpful to explain your reasons for following a particular line of questioning, rather than risk baffling or irritating the party
* Trust a good question, and leave an answer-sized gap for a response
* Whatever question you ask, listen and respond to the answer.

**Challenging**

A challenge, in the context of mediation, questions the validity of a statement or behaviour, asking for explanation or expansion, for example. It may be an invitation to a party to reassess their behaviour or reconsider their position. In an important relationship, such as that of the mediator and party, challenging can only be effective if it is used carefully and with good rapport. It is important when challenging to keep your role firmly in mind, and to check the appropriateness of your motives against your role. It may be inappropriate for the mediator to challenge a party at a particular time or on a particular issue and, in any case, the right to challenge has to be earned by demonstrating respect and empathy throughout the process.

Your may find it useful to explain, perhaps in your opening, that part of the mediator’s job is to challenge positions, assumptions and options, as this will help the parties to move towards a workable settlement. Your assurance that you will do this with all parties will allay fears that such challenges indicate that you are taking sides.

Challenging can enable parties to develop new understanding and awareness. It can help the mediator and the parties to:

* see things more clearly
* get a fuller picture
* gain alternative insights
* identify implications
* change perceptions; develop a new outlook
* see the situation from another’s point of view
* get a more objective view
* question their own assumptions

The IFC Mediator Handbook Page 71 of 110

© IFC 2011

* examine discrepancies and inconsistencies. Failure to challenge may:
* prevent progress
* falsely indicate agreement or acceptance of a position or point of view
* ignore discrepancies, evasions and inconsistencies
* be patronising, by assuming that someone is not able to hear an alternative view or countenance ideas for change
* compromise your own integrity.

Challenging a party or other participant in mediation is appropriate when there appears to be a block to progress. A challenge may be useful when parties display:

* discrepancies, evasions or inconsistencies

*You said ... now you seem to be saying ...*

*You seem unwilling to talk about ...*

* distorted interpretations of experiences, behaviour or feelings

*You’ve described ... as being ... ; could it be that ... ? You seem to be assuming that ... ; could you be wrong?*

* failure to recognise the consequences of behaviour

*Have you thought that having done that ... may happen?*

* unwillingness to modify behaviour or change

*You said ... so you seem to want to stay with the present situation ...*

A challenge is also an important tool for reality testing, discussed elsewhere in the handbook. Such a challenge may be in the form of a question:

*So what I am hearing is that you would rather go to court at an estimated cost of £y than apologise to X?*

*So let me get this clear ... You are no longer going to need the kind of expertise X has to offer?*

A challenge must be justifiable and carefully constructed. When challenging, you should:

* **be as specific as you can:** at best, it is difficult to respond to a vague challenge or ageneralisation; at worst it can cause offence and increase the block
* **use empathy:** I can see that you feel really strongly about this; do you have any ideasabout how to overcome the problem?

• **be tentative:** What thoughts do you have about why that is happening? rather than Don’t

you see it is because you are ...

* **offer the opportunity for a new perspective:** How do you think X would feel about ... ?What other ways are there to look at this?
* **avoid protecting** the parties (or yourself) from a challenge which needs to be made
* **build on strengths rather than emphasise weaknesses**: focusing on failures makes itmore difficult to change. A challenge that concentrates on the positive can enable parties

The IFC Mediator Handbook Page 72 of 110

© IFC 2011

to work on areas where the probability for success is relatively high. Look for personal and other resources on which to build

* **do not expect everything to change at once:** *Despite your disappointment, it sounds as**though you see some future in ... which worked well before; is that right?*
* **deal with defensiveness**: it is not surprising that people sometimes react strongly againstbeing challenged; it requires effort and courage to take a fresh approach and, sometimes, a degree of humility. It is helpful to give the person challenged some reason to reconsider and move: *I want to give you a chance to think through the possible implications of that,* *so that you can see if there is anything else we should be working on. What would happen if ... ?*
* **be open to being challenged yourself**: an open atmosphere, in which parties feel free tochallenge the mediator, will facilitate progress. You might, for example, invite parties to let you know if there is anything that confuses them about what you are doing.

**Other mediator skills and techniques**

Other important mediator techniques, which are dependent on the core communication skills outlined above, are covered in other chapters of this handbook. These include helping parties to develop wider perspectives, reality testing, coaching, problem solving and negotiation, and all from an impartial stance.

**Working with emotions**

It is important for a mediator to be able to work with emotions; to recognise, accept and acknowledge emotion in others, and to manage their own feelings.

**The parties**

There is emotion in every mediation; parties feel strongly about their case. Whether these feelings are controlled, suppressed or exploding to the surface, it is important that the mediator recognises, copes with and, where necessary, manages each party’s expression of emotion. This does not mean shutting out their feelings - far from it, for pent-up emotion can be a serious obstacle to progress. Mediation can offer parties a ‘day in court’ and provide catharsis for past grievances, which is sometimes an important element in the success of the process.

Emotion that is expressed sincerely can put new colour, meaning and depth to the spoken and written word, and the expression of strong feelings in mediation can be a positive force. Venting of emotion is often the precursor to progress. However, the challenge for the mediator is that emotions channelled or managed ineffectively can have a negative effect, particularly if expressed in joint meetings. The mediator may wish to pre-empt emotional outbursts, especially where the atmosphere is tense, by acknowledging that there are strong feelings around the table.

Any outbursts may just be posturing, an attempt by one party to influence or compel the other, or even to test how well the mediator copes with the outburst. The mediator as process manager will need to intervene if an exchange becomes destructive in a joint meeting, and yet should do so in a way that acknowledges the positive, when possible, and saves face for everyone. It is for the mediator to judge how far to allow free expression and off-loading, and to decide when to exercise control. In extreme cases, the mediator may have to talk to a party – in private - if their behaviour seems likely to damage the mediation; this should be done initially with empathy and a willingness to understand what underlies the behaviour, becoming firmer only if that approach does not work.

The IFC Mediator Handbook Page 73 of 110

© IFC 2011

The safest, although not always the most effective, place for an emotional outburst is in private. If the mediator plans, with the agreement of the parties, an opportunity for emotions to be expressed more publicly, it may be helpful for the mediator to coach a party in preparing what they need to say in a way that is likely to be productive. It may also be helpful to prepare the other party to listen calmly and respond respectfully. Fear of losing face is a powerful and driving emotion shared by human beings, and not restricted to particular cultures. Many of our family and work routines are structured, perhaps without our realising it, to prevent our losing face. For example, in the workplace, budgets tend to be pitched high so that final costs come within the forecast. Forecasts of results of legal cases tend to reflect this, too, although there is always the judge or jury to blame if the outcome is not as forecast. In the home, there is often a need for us to find ways out of situations for partners, parents or children, without loss of face for them or ourselves.

Parties in dispute frequently reach deadlock because they have become entrenched in a position from which they can see no escape without loss of face. The mediator needs to be sensitive to such dilemmas and to develop techniques for finding a face-saving solution, perhaps by:

* obtaining the other party’s understanding and co-operation
* preventing a party from crowing over victory
* the careful, natural use of wit or humour
* finding a ‘win’ to ease the pain
* focusing on the positive intention behind an individual’s behaviour
* showing how new information affects the situation
* restating or reframing the situation in different terms
* emphasising the opportunities an agreement opens up
* rehearsing a party through what will follow the mediation; how he or she will relay the outcome to board members, family or others
* leaving parties and their advisers alone to consider offers and counter-offers in private, returning later to discuss whether and how to convey the offer.

Occasionally, mediators may need to save face for themselves - an open acknowledgement of a mistake with an apology is usually a good option. The decision maker in the team usually needs the support and approval of the rest of the team. A party will probably be reluctant to settle if dissenting members of the team are likely to comment afterwards that it was a poor deal. The mediator needs to be sensitive to the mood and the dynamics within a team, and to work with the decision maker to achieve a solution through co-operation within, as well as between, teams.

**The lawyers, experts and advisers**

You might expect that lawyers, experts and other advisers come to the mediation without emotional involvement. Yet they, too, may be resistant or apprehensive for a range for reasons, and under significant pressure. For example, not all advisers are persuaded that mediation is a desirable method of settling disputes. A lawyer may have little experience of negotiating with their client present. A few see mediation as challenging their own negotiation style and competence. For others, settlement options may involve contradicting earlier advice to their client.

The person who initiated the mediation may have done so despite doubts from colleagues. That person may feel nervous, having a strong vested interest in the success of the mediation. There may also be other reputations at stake. Participants in mediation may feel more vulnerable and exposed than in court proceedings. Personalities used to leading a case will inevitably find themselves in a different role, as part of the team with clients present. There is little opportunity for great orators or cross-examiners at a mediation, so a participant’s pride or self-esteem may be challenged by the new role required of them.

The IFC Mediator Handbook Page 74 of 110

© IFC 2011

Occasionally, an adviser will have become emotionally involved in a case, either with the client or with the cause, perhaps believing a trial is needed to establish a precedent. Where client and adviser disagree, the mediator will need to handle that disagreement delicately.

**The mediator**

The mediator has feelings, too. We all have values, attitudes, beliefs and views, conditioned by our life experience. Working impartially requires that we accept the perceptions and feelings of others, putting aside our own, and this can be emotionally demanding. In order to interact in a way that is genuine and responsive, we need to recognise our own values and how they may affect our reaction to other people.

Mediators often experience impatience because parties seem intransigent, or because, being outside the problem and its contingent worries, the mediator may see a solution long before the parties, whether the solution is one that will eventually work for the parties or not. It is essential to allow the parties to reach a settlement at their own pace, and mediators must contain their own frustration, irritation or anxiety. Equally important is the ability of the mediator to stand back from any over-involvement in the difficulties, concerns or even tragedy that the dispute contains for the parties. Over-identifying with the situation makes it more difficult for the mediator to bring energy and skill to assist the parties in resolving matters.

Many mediators feel some apprehension before a mediation, and all experience varying degrees of satisfaction or self-doubt afterwards. It is important that you allow yourself time, whatever the outcome, to reflect constructively on the mediation.

**Some techniques and approaches for working with emotion:**

* **Recognise** emotions by observing behaviours and being open to the fact that feelings willalmost always be part of the content of the mediation. Heightened emotion may be demonstrated as much by silence and withdrawing as by words or overt behaviours.
* **Respect** the emotions displayed or hinted at. The emotion does not define the person; itmerely indicates how they feel at present. Labelling a party as an angry person, for example, can inhibit the mediator’s ability to build rapport.
* **Respond** to the emotion by, for example:
  + allowing silence; displaying patience and calm
  + acknowledging the emotion by reflecting back and naming it; developing and using an emotional vocabulary (angry, worried, sad)
  + match your body language, pace and voice to that of the party
  + show empathy, and acknowledge the situation and its difficulties, without sympathising and over - identifying with the emotion
  + ask what has triggered the feelings
  + use an open question to invite the party to tell you more
  + offer a break or refreshments, but don’t run away from emotion; it is more effective to stay with it, even if it is uncomfortable for you.

The IFC Mediator Handbook Page 75 of 110

© IFC 2011

**Using negotiation skills as a mediator**

**Aspects of negotiation**

The mediator brings his or her negotiation experience and skills into the mediation, and deploys them for the benefit of all parties. Skilled mediators use their understanding of three aspects of negotiation in particular to assist the parties during the bargaining phase:

* **Each party’s negotiating strategies and styles:** these embrace differences between teamsand any internal differences in negotiating approach within a team. Different approaches to negotiation were summarised in an earlier section, ‘Negotiation, litigation and mediation’. The mediator, as well as the parties, will have a preferred style which must be adapted to the needs of a particular dispute. Understanding that a party may be instinctively positional, or that a party may be more of a co-operative negotiator than that party’s lawyer, will enable the mediator to work with those differences, perhaps even bringing together those with matching styles from each team. One or more participant may need to be coaxed into a different approach for the purposes of the mediation. Sometimes it is useful for the mediator explicitly to give permission for such a change of approach, and this can lead to unexpectedly co-operative negotiations.
* **How the mediator’s own negotiating skills can be used** to further settlement. There aresurprisingly poor to moderate negotiating skills found amongst some parties and their advisers. Sometimes a clash of styles or a particular stance taken has caused the negotiations to stall before the mediation. Sometimes there is an unwillingness to think through the implications of holding to a position or making a particular offer, or an apparent inability to be creative with ideas or to use language well. The section below highlights what the mediator can add when parties find it difficult to begin or continue the bargaining process. The mediator might press the parties to assess or re-assess their risks, and might engage in robust reality testing. By this stage of the day, the mediator usually knows more than the parties about what will and will not work in terms of negotiating approach, and, subject always to confidentiality, should offer this appraisal as a service to the parties. Will an offer provoke a walkout? Will it bring a sense of reality to the other party? Will it set the zone of possible agreement?
* **Retaining clarity about the mediator’s role** during the negotiations. The mediator shouldnot take over the problem, nor press for a particular solution. The mediator might help parties over the hurdle of who makes the first offer, for example, perhaps by receiving each party’s first bid before those bids are exchanged, but always as a neutral and never with a personal agenda about settlement.

**Claiming and creating value**

To understand the role of the mediator in assisting the parties to negotiate, it is important to understand first the concepts of creating value and claiming value.

The hallmarks of positional negotiation were set out in an earlier section, ‘Negotiation, litigation and mediation’. One of the key elements of this form of negotiation is that it assumes that all value is on the table (for example, that parties are negotiating over £100,000), or to use another expression that there is a fixed ‘pie’; accordingly, positional negotiators attempt to claim as much of that value as they possibly can. In many commercial and civil mediations parties come into the process assuming a fixed pie and aiming only to claim value. This is particularly the case when legal proceedings have been instigated, as legal cases by definition need to be framed positionally

The IFC Mediator Handbook Page 76 of 110

© IFC 2011

to claim as much value as they can. For example, the claimant states there has been a breach of contract, therefore they are entitled to damages of £100,000; conversely, the defendants deny breach of contract and therefore say no amount of money is owed. This is classic positional negotiation.

The mediator’s role, through exploration, is to see if they can change the approach, at least for a while, and try to create value and incorporate more principled negotiation techniques into the mediation process. This concept assumes that the size of the pie is not necessarily fixed and that by exploring each party’s interests, other things of value may emerge for the parties, which can be added to the negotiation mix, expanding the scope of the negotiation and therefore the possibilities for settlement.

Once this is done, and the pie has been enlarged, the parties will negotiate during the bargaining phase on how the pie is to be divided and therefore will revert to claiming value. The mediator’s role here is to assist the parties to claim value effectively, by coaching them at key stages of the bargaining, including making first offers, conveying information tactically, and finding ways to break through apparent deadlock.

**Negotiating tactics and strategies**

Negotiation techniques and strategies can be adopted from both positional and principled schools of negotiation, to enable the mediator to assist the parties in moving through difficult negotiations towards settlement.

**Focusing on interests not rights**

The mediator may need to help the parties to focus on interests and what they need from the situation, rather than on their rights and what they think they are entitled to or wish for by way of outcome. This may enable parties to move away from a confrontational approach to one of co-operation and a shared goal.

It may be useful to spend some time finding out why parties have adopted their positions, and why they are making or resisting the claims. Even exploring why certain items are not at issue may be fruitful. Getting behind the presented case leads to better understanding of each party’s pressures and emotions, and may even reveal a hidden agenda.

It is worth remembering that almost everyone is answerable to someone else - senior management, the board, colleagues, spouse, even friends. Most people come to a mediation with a political need to ensure that any settlement can be justified to others. The mediator needs to be aware of this and explore it, as it may otherwise create a blockage to settlement.

Managing expectations is an important part of assisting parties through the negotiations. The mediator will be working on this even before the parties meet, and continue to do so right through to the last word of the settlement agreement.

**Where parties want to be, not where they are**

There may be a need to go over some history and to allow feelings to be vented, and if so the mediator must be patient. Eventually, the mediator will want to help the parties to focus on the future, on where the parties want to be, not on where they are or where they were. Identifying parties’ needs rather than their wants gives scope for movement. Getting to settlement may not be easy, but keeping the shared goal of settlement in sight provides a sense of direction and generates some co-operation.

The IFC Mediator Handbook Page 77 of 110

© IFC 2011

**Problem-solving techniques**

The parties often look to the mediator to solve the problem, not necessarily to give them the answer but to produce some options or possibilities that could lead to settlement. However, before serious problem solving begins, the mediator must open the route to resolution by:

* re-establishing communication between the parties; even if they are not talking to each other, they are talking to and through the mediator
* clarifying or defining the issues in dispute; so often, the real issues have been clouded by emotion or detail.

Once the discussions pass from the early stages of blame and demand into the solution-finding stage, the mediator’s problem-solving skills become important. The mediator is detached from the problem and can be a creative and active contributor to the problem-solving process.

Problem-solving activities fall into four categories:

* Problem exploration - what caused the original problem? How could it have been avoided? What are the problems in the current situation? What are the needs?
* Development of ideas - how can each party’s needs be met? How are they similar, and how diverse? Brainstorm possible solutions. Include all possibilities, making the settlement pie as big as possible. What if no settlement is reached?
* Action planning - how will each possible outcome work? What is the real benefit to each party? How can future problems be minimised? What are the terms for settlement?
* Implementation - timetable, responsibilities. Are there unresolved issues to be addressed? If so, when and how?

Brainstorming and reality testing are widely used and are valuable problem-solving techniques for the mediator. Also, the flipchart is a useful tool. It provides a specific focus for all those present and, used at the right time, it can defuse tension. The visual impact can also serve to clarify figures, to highlight the progress that has been made, or to confront parties with the reality of the gap between them or the level of potential on-going costs. Listing the issues on a flipchart can help parties to agree what needs to be tackled and provide a focus for discussion. When working in this way, it is more effective to encourage parties to make suggestions for what goes onto the flipchart, rather than to list the mediator’s ideas. However, the mediator may need to modify, neutralise or mutualise the language used, and may contribute some of her or his own ideas in a way that is supportive of the parties.

**Relationships and group dynamics**

In complex negotiations, part of the problem, and indeed the start of the solution, may be that within each party team there are several individuals with different perspectives and styles. The mediator needs to assess the relationships within and between parties. Which individuals carry most weight, how different individuals value different elements, and how individuals work together. This can be done by careful observation of non- verbal and verbal behaviours, by directing questions to a silent team member, and by opening up a discussion within or across teams.

As manager of the process, the mediator should be alert to opportunities to reconvene in a joint meeting, to speak informally to individuals during breaks, or to put people to work together as groups outside the joint and private meetings with the mediator. All sorts of combinations of meetings can be effective in moving the process forward. Sometimes, in order to progress the

The IFC Mediator Handbook Page 78 of 110

© IFC 2011

negotiations, the mediator needs to continue to shuttle between the parties. Sometimes the barriers fall away and people will come and go between what had been private rooms. It is also important that the decision maker in a party team has the support of the other team members, so that he or she can move matters forward confidently.

It can be productive for the parties to negotiate directly, with the mediator having a role in identifying the combination of negotiators likely to work best together. Such meetings can be with or without the mediator present. They can be informal, or carefully choreographed with agenda and ground rules set in advance. Usually, provided that the parties agree, it is helpful for the mediator to be present, perhaps to keep the meeting on track and to be able to pick up themes and developments after the meeting.

All negotiations have underlying human agendas such as emotion, dislike, status or reputation. The mediator should be alert to how these factors might inhibit movement, and can be used to create movement.

**Using information when appropriate**

In direct negotiations there are good moments and bad moments to use information. The same is true in mediation. An offer by one party that is so low that it could cause the other party to retrench, or even to walk out, is probably best retained by the mediator. Similarly, a concession may be stored and used to maximum effect when the right moment occurs. There is no obligation on a mediator to pass on information at all, or at a time when a party asks for this to happen, and it is useful to make this clear to the parties early in the process. The mediator, possessing an overview of the settlement discussions, can advise on the timing of communications and needs the parties to allow him or her to use discretion about what might be most effective and when. Bad news, as well as good news, can be the trigger for movement. There can be a temptation for the mediator to over-protect the parties, keeping from them the size of the gap at a time when it would be more effective to confront them with the scale of the problem they face.

**Value differentials**

Often, issues are of different importance and value to each party. The giving of an apology may be regarded as costing nothing, whereas the receipt of the apology may be fundamental to continuing negotiations. The phasing of payments or payment in kind, insurance-backed guarantees or offers of future work, are all examples of elements that may have greater value to one party than cost to the other. The mediator should explore each issue with each party to identify value differentials; something of positive value to one party and little cost to another could lead to movement, and may even be what clinches the deal.

**Bottom lines and magic numbers**

As a general rule the mediator should avoid using the term ‘bottom line’, and help the parties and their advisers to do likewise. The idea of setting a bottom line limits flexibility and reduces a party’s negotiating scope. The bottom line usually changes during the mediation. Some mediators prefer never to ask for a bottom line figure, as parties are then able to move far beyond those figures without losing face with the mediator. As an alternative, it can be useful for the mediator to understand the level at which parties might consider settling, at a particular stage, and what they need to persuade them to move or to move further.

Something else to bear in mind is the possible significance of ‘magic numbers’. These are the figures that parties have set their hearts and minds on; a party may have a practical or emotional need for a particular sum, perhaps having left a meeting with the words *I’m not going to settle for* *less than (or more than) £x* ... Breaking the barrier of such a number may require discussing it

The IFC Mediator Handbook Page 79 of 110

© IFC 2011

openly with a party in their private room, looking at the consequences of breaking through that barrier, and of not doing so.

**Global sums and numerical boundaries**

At some stage the parties are likely to move from working on the issues and the solution piecemeal to thinking in terms of a global sum. The mediator can assist in this transition, subject to the requirements of confidentiality, with observations such as *They need to hear a six-figure number*...

Moving to negotiating a global sum allows each party to frame the settlement in whatever way they wish in order to justify it to others afterwards. Each party will often have a quite different justification for the same figure.

Helping parties to frame or set offers in relation to numerical targets seen as significant to another party is an important area for discussion. A five-figure number can seem appreciably less than a six-figure number that is actually very little more, and the reverse is true. Helping parties to understand the power of such perceptions can stimulate progress.

**Helping parties to avoid losing face**

A skilled negotiator will always give the other party a way out. Backing a party into a corner will often result in deadlock, and even if later there is a deal it is unlikely that the party will wish to negotiate with that person again. In order to facilitate negotiations, the mediator needs to help the parties identify reasons to justify movement. Mediation quite often involves financial grief management. Victory by one side should not be overtly celebrated, the pain should be seen to be shared, and both parties should feel that they have had to work hard to achieve settlement.

The IFC Mediator Handbook Page 80 of 110

© IFC 2011

**The mediator as negotiation coach**

As seen in a previous chapter on the role of the mediator, the coaching role starts before the day and runs throughout the mediation. In the bargaining phase the role of mediator as negotiation coach becomes crucial.

Before embarking on the role of negotiation coach, it is essential that the mediator has gained the trust of the parties and earned the right to ask the parties to change their behaviour and approach. During this phase, offers are being framed and exchanged between the parties. Each offer from one party sends a signal to the other party, about their intentions, their negotiation strategy and tactics. However, it is often the case that the party formulating an offer has not thought through the impact of the message that the offer conveys, often sub-consciously, to the other party.

Through their understanding of negotiation, mediators should be able to help parties work through what message they are intending to send, and whether the offer suggested is likely to achieve that. In addition, having been working with both sides on their respective negotiation strategies, mediators can anticipate the likely reaction of the other party and explore that with the party formulating the offer, whilst carefully protecting any information given in confidence.

A mediator is not there to be merely a messenger for the parties. Rather, the parties have engaged a mediator to assist them to resolve their dispute and help them chart a path to settlement, through sometimes difficult negotiations. Once good rapport and trust have been built and maintained, the mediator can coach the parties in negotiating, as necessary, by:

* working hard to understand what drives the parties and the reasons for their positions
* focusing on where parties want to be, not where they are
* managing parties’ expectations and helping them through disappointments
* using creative problem-solving techniques to work up deals in principle
* understanding negotiation tactics being used by parties, and using suitable strategies for creating movement
* protecting the parties from loss of face, and assisting in overcoming other common problems that impede negotiations; see below for further detail
* recognising value differentials as a potential for settlement; what is of value to one party may be easy for another to provide
* communicating offers and exchanging information tactically
* helping the parties past the hurdle of making the first offer
* avoiding parties committing too early to a bottom line
* recognising ‘magic numbers’ and the psychology of numbers
* working with global sums or numerical boundaries
* assisting parties to work through apparent deadlock
* working on the basis that the deal is not done until written down and signed.

**The hurdle of the first offer**

When considering the making of offers, in particular the first one, it is useful to think of the range of possible offers in terms of their impact when received. This can be described on a continuum for both claimant and defendant, from insult zone to credible zone to the ‘Zone of Potential Agreement’ (ZOPA) or the area in which both parties can be satisfied and reach agreement.

On both extremes of the negotiation range, there is the ‘insult zone’. This is an offer, which is likely to be received as an insult by the other side; it sends the wrong signal to them that the side making the offer is either not engaged in the negotiation in good faith or is not prepared to ‘play to

The IFC Mediator Handbook Page 81 of 110

© IFC 2011

game’ properly. The risk of such an offer is either walkout by the other party, or if they do respond with a counter offer it is likely to be in the insult zone too. This would lock the parties into a positional negotiation, which will be difficult to break out of and will increase the likelihood of failing to reach settlement.

The next zone along the continuum is the ‘credible zone’. This is an offer that is not good enough to be accepted but that sends the right signal to the party receiving the offer. They will see it as a good first step, or that the other party is at least negotiating in good faith.

The final zone, ZOPA, is the range within which an agreement can be reached.

If a party wishes to convey a first offer which the mediator thinks is likely to be received as an insult by the other side, the mediator needs to:

* understand what that party is trying to achieve by making the offer
* discuss with the party the possible implications of conveying such an offer
* help the party to frame the offer in an effective way
* perhaps even help the party to decide not to make the offer at that time or at all.

To do this effectively the mediator will use a range of good questions:

*Can you explain to me the basis of or rationale for that offer?*

*How do you think they will react to that offer?*

*If you were them, how would you react to this offer?*

*What if they come back and say ... ?*

*What would happen if ... ?*

*Do you suppose you could ... ?*

In addition, and only if the mediator has good rapport with the party, they may go a step further and give their impression of the impact that conveying such an offer might have. Comments such as the following might be appropriate:

*The risk of making that offer is that they might walk out, or reciprocate in kind and counter with a low offer themselves …*

*Having worked with both sides, I think there is a risk that the others might react badly to such an offer …*

*I think they are going to need to hear something more encouraging than that …*

*My sense is that they are going to need …* (without, of course, breaching a confidence)

These are examples of the mediator being more direct in their interventions and giving guidance on what is happening with the negotiating dynamic. However, it must be stressed that it is not for the mediator to give their view on what number should be offered, or on the fairness or appropriateness of a proposed deal.

The parties may have negotiated over many components of a potential deal before getting to specific numbers. A party may need reassurance about being the first to mention a specific figure; there is research that shows that the first negotiator to make an offer tends to have the greater

The IFC Mediator Handbook Page 82 of 110

© IFC 2011

influence on the level of settlement – but only if the figure is in the ‘credible’ zone, rather than in the zone of insult or fantasy.

Ultimately when communicating first offers, the mediator needs to ensure as far as possible that these offers are in the credible zone, in order to avoid the parties starting too much at the extremes of the negotiation range and thus increasing the likelihood of the parties facing an unbridgeable gap. Conversely, parties should be discouraged from trying to pitch their first offer in the ZOPA and saying they are not prepared to negotiate further. Experience shows that parties expect to go through the negotiation dance of offers and counter offers. Therefore if one side pitches in the ZOPA straight away and the other side counter offers and expects to engage in the dance, then the side making the first offer may have nowhere to go and thus have backed themselves into a corner.

**Managing subsequent offers and conveying information tactically**

As mediator you need to anticipate the emotional slump, or eruption, that can occur when the first monetary offers are made. Parties sometimes want to give up at once, walk out or head for court. It might be helpful to indicate from your experience that this kind of reaction is common when first offers are made. If you have prepared the parties, by normalising a stage at which the gap between them will seem impossibly large, they will usually stay and work on, accepting this as a part of the ritual of negotiation.

Throughout, the mediator needs to be alert to the parties’ understandable wish to protect their negotiating position.

Experience shows that in an effective negotiation there will likely be about three offers and counter-offers. If there is no settlement by that stage, parties tend to lose faith or lose interest, fearing that the negotiations are turning into an unproductive game. Alternatively, if one party is unwilling to respond, and makes fewer than three offers, the other party may feel that there has not been a serious attempt to settle.

Throughout this stage of offers and counter-offers, the mediator will often help a party to reframe a proposal. Using different words, expressing an offer or an idea as a positive rather than a negative, or restructuring the arithmetic in a way that will be more likely to be taken seriously by the recipient, are all useful techniques and a valid use of the mediator’s negotiation and problem-solving skills. Before an offer is put to the other party, the mediator will usually find out the basis for the offer, knowing that the other side is likely to ask how such an offer can be justified or where the specific number comes from.

It is crucial for the mediator to be more than just a messenger. This involves working actively with the parties, making decisions about whether information is to be conveyed and if so, the best way to convey that information, and when; for example:

*You have said you want £100,000 and then you would consider a future relationship. Can I convey it in this way - that you would consider a future relationship as part of a deal that included a substantial cash payment?*

If a mediator judges that it is not the right time to convey information, a suggestion or an offer, then the mediator could ask to be given discretion; for example:

*I know you want me to take this offer, but now might not quite be the right time, so would you leave it to me to decide when to convey it?*

The IFC Mediator Handbook Page 83 of 110

© IFC 2011

**Breaking apparent deadlock**

Often, despite the mediator’s effective engagement in exploration, active coaching of parties during the bargaining phase and helping to frame offers, there will come a stage when the parties appear to be in dead- lock and it is difficult to see how the negotiation can progress. The most common reasons for deadlock are:

* parties become **entrenched in positions**, asserting that this is the furthest they will go. Advisers may encourage clients to adopt this approach, protecting them against making concessions in the hope that taking a firm position will give them a better result
* one party **exposes their bottom line** too early, leaving them nowhere to go. In many cultures, parties expect some give and take, and if responses dry up early from one side, even if they make a reasonable ‘first and last’ offer, the other side may regard this approach as unacceptable
* **emotional blockage**: all disputes have some emotional underlay, though usually nearer thesurface and more obvious in injury and employment claims than in commercial contract disputes. Parties and advisers all have pressures: a reputation to make or retain, internal competition, financial incentives, ambition, feelings of inadequacy, fear of perceived failure, or dislike or jealousy of their opponents or even their own team members
* **team dynamics** can inhibit progress: for some it is easier to play the hawk than the dove,and the temptation to act tough is powerful
* **tactical deadlock**: using delay to create pressure
* **the need to save face**: the significance of this is sometimes underestimated. Mediatorsmust be alert to an individual’s need to preserve credibility and dignity, and should try to find sensitive process solutions to save face and so to avoid the negotiations getting stuck. This may require giving parties space and time in private, without the mediator, especially after challenging or reality testing, to let them adjust to a necessary change of position
* One party has reached the **limit of their authority.**

When faced with apparent deadlock, the mediator needs to bring independence, energy, patience and imagination to helping the parties make progress. One or more of the following strategies may help:

* bringing the parties together to acknowledge the situation and talk it through openly
* summarising and reiterating progress made, rather than allowing parties to focus on the problem and the gap
* shifting the parties from positional to principled negotiation, so as to work co-operatively on a solution to a joint problem
* allowing emotion to emerge, and acknowledging its significance, where strong feelings seem to be blocking full participation in the process
* reviewing common ground and highlighting any areas of agreement
* finding an easy concession that is cheap to make but valuable to receive
* taking a break, so as to allow tempers to cool and give time for reassessment
* using a touch of humour can ease tension and relax the atmosphere
* breaking the problem down, dealing with smaller issues one by one, can create useful momentum
* parking some issues for later discussion can make room for progress in other areas
* introducing new information or reframing issues to test out a different perspective
* trying to create value, by changing focus away from monetary aspects to see if there are non-monetary elements available to improve the deal
* changing the negotiating teams can bring fresh ideas on the day; and, if negotiations break down, perhaps on a later occasion introducing more senior decision makers

The IFC Mediator Handbook Page 84 of 110

© IFC 2011

* altering the rhythm of the process by doing something different; changing the surroundings, even the seating positions, taking the parties for a walk, instigating working groups, using a flipchart to change the focus, holding a joint meeting to review progress
* reviewing the process and perhaps asking parties what they want to do next
* introducing a deadline for the day, or agreeing one for after the mediation so as to give a good reason to re-establish contact and re-open negotiations
* changing the balance of risk; one party finding a way to take a calculated risk, for example, by providing a warranty
* a shared lack of certainty about the outcome if the matter goes before a court can create a sense of partnership.

Helping each party to develop new perspectives, and reality testing each party’s stance, are both particularly important skills for a mediator to use when negotiations are getting difficult.

**Developing new perspectives**

The mediator often needs to help the parties see the situation from a different perspective in order to begin to make progress. Most of us are familiar with the benefits of perceiving a particular situation from different points of view; we reflect it in our language when we speak of:

*seeing both sides of the argument*

*looking at ourselves objectively*

*standing in another’s shoes.*

To achieve these changes of perspective, a party needs to use imagination and intellect to see the situation as another sees it. The ability to do so in a constructive way can be a powerful catalyst for change. The mediator can help a party to view the problem, or a possible solution, from the other’s point of view, and thus increase their understanding of the other’s needs and pressures, which can lead to more co-operative problem solving. Some mediators even use the technique of physically seating party A in the chair previously occupied by party B - and then asking party A to imagine:

*You are party B; how do you see party A?*

*What are the issues that concern you as B?*

*How do you as B interpret the events?*

*What will best persuade them to reassess their risk?*

Whilst not labouring this particular technique, there are frequent opportunities to help a party to see something from the other’s position:

*What do you see as their main needs that must be met if they are to settle today?*

*What is driving them? What are the pressures, the politics?*

*How will they react to that offer?*

One way of encouraging movement is to help a party to anticipate the other party’s bottom line. For example, asking party A:

*As party B, what is your break point where you would leave the mediation without a settlement?*

The IFC Mediator Handbook Page 85 of 110

© IFC 2011

Usually party A will respond realistically, to which the mediator might reply:

*If you are right, can you (party A) meet that?*

When the mediator has worked in this way with both parties, a potential for breakthrough may have been established. Of course, the party might deliberately name a wholly unrealistic figure in order to reassert their position, in which case the mediator will need to do some further exploration or some further reality testing.

For these techniques to be effective, good communication skills, good timing, intuition and good judgement are essential.

**Reality Testing**

Reality testing is a form of challenging; a technique discussed in the chapter on *‘Communication* *skills for effective mediation’*. Specifically, reality testing might involve the mediator in:

* playing back to a party their stated position and encouraging them to test and reappraise it
* reviewing an offer with a party and questioning how it is likely to be received by the other side, and whether it will assist progress or inhibit the negotiations
* discussing the practicalities of a proposed settlement with each party; its implications and whether it would be workable if agreed
* asking a party to make a full assessment of future risks – time, money or reputation, for instance – if the dispute is not resolved
* walking a party through alternatives to a negotiated settlement.

This requires particular sensitivity, for it could be misinterpreted as the mediator inappropriately expressing a view on a party’s case.

Parties may need encouragement to identify or revise their BATNA and WATNA (Worst Alternative to a Negotiated Agreement), which will help them to shape their offers and counter-offers and identify the level at which settlement makes sense.

Reality testing should never be used as a bullying tactic to force settlement. However, it is an important tool for helping parties to review their risks and become more flexible. A series of skilful open questions is an effective method of reality testing.

The degree to which the mediator will need to engage in full reality testing will vary. Often it is enough just to ask the questions and sow the seed of doubt, with no need for the mediator to engage in detailed reality testing. In some mediations the parties do their own reality testing and reassessment of risk in private without the mediator, and it would be a mistake to press those parties to spell out the weaknesses in their case and the unattractive alternatives to settlement.

**Drawing together a settlement package and doing the deal**

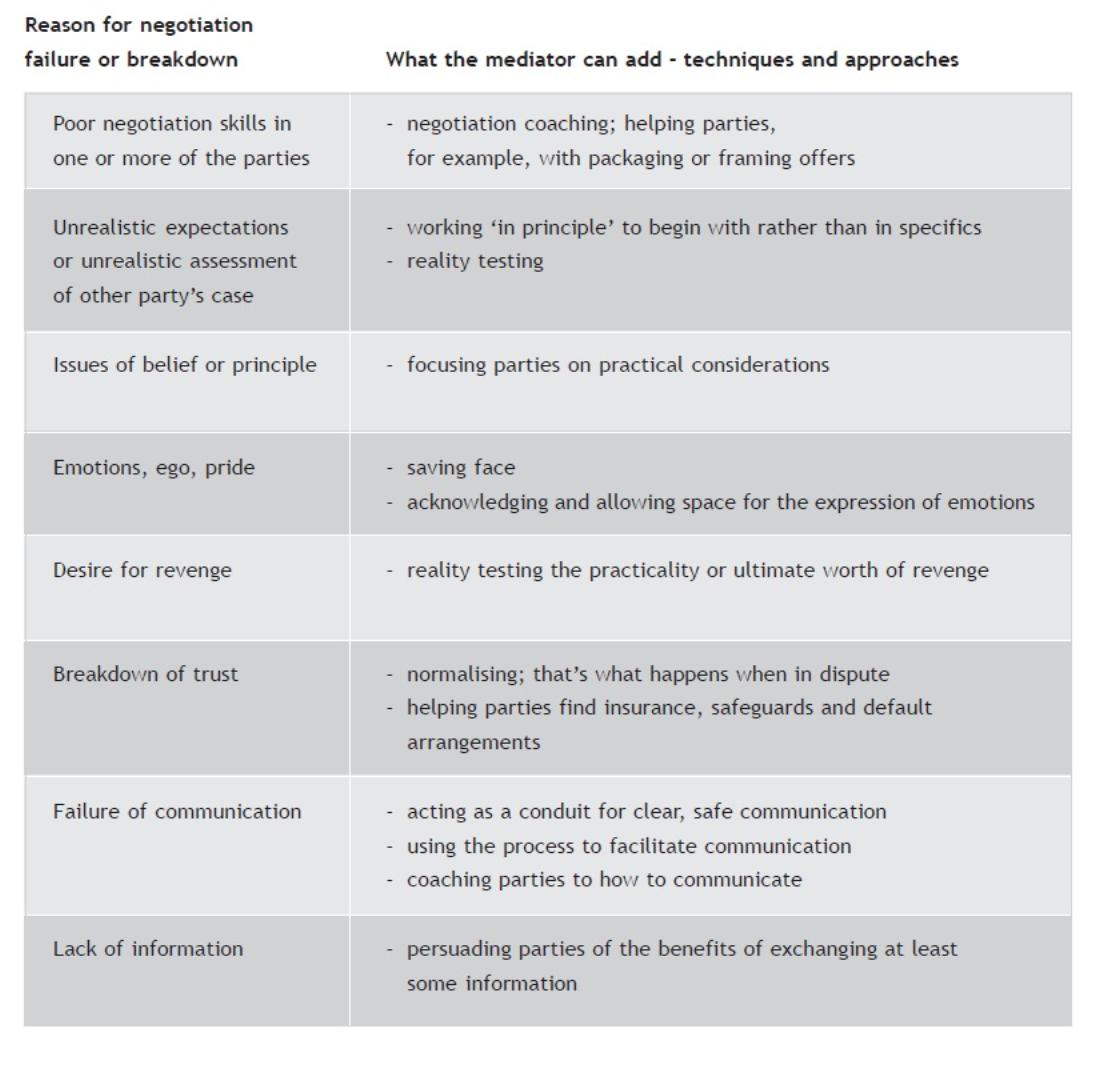
With nothing being binding until in writing and signed by the parties, the mediator must be prepared for difficulties to bubble up, even at the end of the mediation. The mediator may need to help the parties to return to bargaining, and even to exploration, before finality is achieved.

The IFC Mediator Handbook Page 86 of 110

© IFC 2011

**Overcoming common problems in negotiation**

The chart below highlights some of the common reasons why negotiations fail, and outlines some of the techniques a skilled mediator might use to overcome them.



The IFC Mediator Handbook Page 87 of 110

© IFC 2011

**Competence and good practice**

**Competencies for the effective mediator**

Throughout the process - before, during and after any mediation day - the mediator needs to pay active attention to the relationship with the parties, as well as to managing the process and working with all those present on the content of the dispute. These three aspects – relationship, process and content – encompass the core competencies required of a mediator.

**Preparation**

In preparation, the effective mediator:

**Begins to develop a relationship with the parties**

* meets or speaks to all parties, usually through their representatives
* listens to and acknowledges initial concerns
* clarifies the role of the mediator
* gives parties confidence in the process and the mediator
* supports the parties in making effective use of the mediation

**Ensures that the practical arrangements are in place**

* agrees the design of the process with the parties
* arranges date, time, venue, rooms, flipcharts and other facilities
* obtains agreement on the terms of the mediation agreement
* checks that someone with adequate authority will be present, or at least available, for each party
* discusses documentation and arranges document exchange between the parties
* makes contact with any assistant mediator to arrange arrival time and role

**Starts work on the issues and the content of the dispute**

* requests information about negotiation history
* reads case summaries and supporting documentation
* asks the parties about any schedules of claim, costs, litigation timetable and risk analysis
* discusses documentation that will be needed when settlement is reached.

**During the mediation**

There are six headline competencies that define the effective mediator at work, and it is against these that participants are assessed for CEDR accreditation. These headlines summarise the essence of each competency and are paired as: relationship skills, process skills and working with the people and the content. The mediator will use all these competencies throughout the mediation; they run through the whole process and are not sequential. Each pair contains a competence that focuses on the detail and another that relates to the overview or bigger picture.

Fuller descriptions and examples of what the mediator might be doing when demonstrating these competencies are listed below.

The IFC Mediator Handbook Page 88 of 110

© IFC 2011

**Creates an environment conducive to mediation**

***Sets the scene and sets the tone***

* conveys **energy, enthusiasm** and personal warmth
* appears **relaxed, alert** and assured
* makes good use of the **physical environment**
* attends to **participants’ comfort** and needs
* **motivates** parties and representatives to participate

***Builds confidence and trust***

* establishes the **mediator’s authority**
* **communicates** in an **assured, open manner**, verbally and non-verbally

• demonstrates **neutrality** through **equal treatment** of the parties and use of **non-judgemental language**

* has prepared well and appears **well-prepared**
* recognises issues of discrimination, equality and diversity and **manages** any perceived **power imbalance**
* **defuses unhelpful tension** and harnesses constructive tension
* is **sensitive to team dynamics** and manages intra-team relationships
* **adapts** to different individual and corporate **cultures**

**Develops communication and interaction with each individual participant**

* establishes **rapport** quickly with the parties and others present
* **encourages parties to talk** and to express what matters to them, by using open questionsand other communication skills
* **listens attentively**, prompts, paraphrases, and reflects back
* **demonstrates understanding** of each party’s situation, their perspective and their feelingsabout it
* **uses silence** positively, and maintains good balance of airtime between mediator andparticipants
* **allows parties to express emotion** in order to enable progress
* recognises, respects and **responds** to expressions of **emotion**
* uses awareness of **body language**, own and others’, to enhance communication
* **acknowledges** the significance to parties of problems and issues
* uses touches of **humour** effectively
* frames, reframes and **uses language flexibly** so as to influence participants positively

**Establishes and maintains a safe and effective working structure**

***Takes responsibility for the process: the principles***

* **explains roles**, responsibilities and **procedures** to the participants
* demonstrates familiarity with the procedure, **structure, ground rules** and **responsibilities** within the mediation process
* respects and preserves **confidentiality**
* **manages the process** with confidence
* remains **in charge** of the process throughout
* **handles challenges** to the process or the mediator calmly and with authority
* is alert to **ethical dilemmas** and handles them safely

The IFC Mediator Handbook Page 89 of 110

© IFC 2011

**Manages the process and works through the phases of mediation**

***Takes responsibility for the process: the practicalities***

* **opens** the mediation well
* **works through the process** fully
* adopts a **pace** which is **responsive to the needs** of the parties
* **summarises and checks** before moving on, especially at the end of private meetings
* **makes decisions** about the **order of events** and the use of private and joint meetingsconsistent with progress
* **chairs** any joint sessions in a manner **that encourages a productive conversation** to takeplace
* **manages transitions** between sessions
* **keeps all participants informed** regarding the process, and anticipates and flags uppossible process choices

• helps participants to **use the time productively** by setting tasks or creating working groups

* keeps **notes, as necessary**, unobtrusively
* manages **time** well
* uses any **visual aids** or flipchart **purposefully**
* manages **own pace**, energy level and emotions; takes time for reflection between meetings

**Facilitates the parties in creating workable solutions**

* **motivates parties** and representatives to take **responsibility** for the **outcome** of themediation and to make **their own decisions**
* allows **parties to determine the content**
* **keeps options open**, avoiding premature commitment to solutions
* generates an atmosphere of **creative problem solving** and keeps a **horizon of settlemen**t in view for everyone
* establishes any **common ground** and finds practical ways to interrelate parties’ goals
* remains alert to and picks up on areas for further attention – including **legal**, **commercial** and **personal** aspects
* helps parties to move from emphasis on rights to a **future focus on interests, priorities** and **options** for resolution
* guides parties to move between attention to **the detail** and awareness of the **bigger** **picture** to assist progress
* uses hypothetical questions and other techniques which **expand possibilities for** **settlement**, including non-financial elements
* takes account of any **previous settlement offers**
* highlights any **lessons to be drawn from the causes of the dispute** that may affect the proposed settlement terms
* uses strategies to **overcome deadlock**
* draws together options into a **coherent settlement** package
* helps parties to think through **details** and to test that a proposed solution is workable

**Enables momentum and progress through active engagement with the people and the content**

* identifies and **probes issues**

The IFC Mediator Handbook Page 90 of 110

© IFC 2011

* **explores positions** to gain an understanding of **underlying interests**, needs, beliefs andpriorities
* creates **opportunities for dialogue** and **flow of information** between the parties
* manages **information exchange** tactically to good effect
* uses a range of types of **questions** to work with the content – for **understanding, probing** and **challenging**
* enables parties to see the situation from a **broader perspective** including the other party’s point of view
* picks up on **verbal and non-verbal** cues to promote progress
* **manages parties’ expectations**
* works well with numbers, and helps parties to formulate **proposals** to have a positive impact
* helps participants to **save face** for themselves and each other
* recognises and works with different **negotiating styles** and tactics, and **coaches** parties to negotiate effectively
* encourages the parties to **re-evaluate** their own and each other’s position
* challenges and **tests reality** to encourage movement, whilst retaining the trust of the parties
* helps parties to **reassess risks and benefits** of particular outcomes, including failure to agree

**After the mediation**

If no settlement has yet been reached, the mediator should apply all of the above competencies in continuing to work with the parties; the effective mediator:

**Maintains a working relationship with the parties**

* makes follow-up contact with the parties
* encourages parties to keep in touch
* acknowledges the hard work of the parties and the progress made
* conveys energy, confidence and reasonable optimism

**Manages the process and provides structure**

* gets agreement that the mediation process will remain open
* reconvenes, if required, or speaks to the parties at an agreed date and time
* considers alternative dispute resolution processes for outstanding issues
* continues to work impartially and to maintain confidentiality

**Works further with the content of the dispute**

* summarises the current position
* agrees tasks or next steps with all parties
* offers creative ideas for bridging the gap
* assists with drafting arrangements, if needed.

The IFC Mediator Handbook Page 91 of 110

© IFC 2011

**Ethical and legal responsibilities for mediators**

This section draws together the ethical principles which underpin mediation. Some have been introduced elsewhere in the handbook and some are discussed here for the first time. There are many codes of conduct for mediators which govern mediator’s ethical and legal responsibilities, For example the IFC Code of Conduct for mediators and other third-party neutrals gives clear guidelines on the neutral’s role and responsibilities.

The role of a mediator is a privileged and sensitive one. A judge or arbitrator cannot speak privately to either party during their adjudicative process because of the rules of natural justice. A mediator usually spends time with each party separately and confidentially, on the telephone in advance and at the mediation in private rooms. Indeed this is often what makes it possible for the mediator to help the parties make progress. This requires parties to place a high level of trust in the mediator, who must at all times be scrupulous to respect confidentiality and to exercise impartial judgement and discretion in the way the process is run. Mediators who display anything but the very highest ethical responses are unlikely to find favour.

**Integrity and honesty**

Integrity is an essential quality for a mediator. While difficult to define in concrete terms, the parties will be very clear whether or not they think that a mediator is acting with integrity. Mediators must demonstrate integrity in all their dealings, rather than just assume that trust comes automatically with the role. Integrity is not something that is switched on consciously, but the mediator needs to be aware that parties’ trust in the mediator can be damaged or lost.

Honest dealing with the parties is also fundamental. Parties need to be able to trust that information given to the mediator in confidence will not be revealed in another room, and to believe the mediator who says that a confidence has not been breached. This will be especially important, for example, if the mediator has raised a possible weakness in party A’s case with A, and promises not to give it away to party B. If B later spots the weakness and asks the mediator to raise it with A, A must believe the mediator’s assurance that the point was not disclosed to B by the mediator.

The need to preserve confidential information will often be challenged directly, although perhaps unwittingly, by a party asking the mediator if the other party has raised a particular topic or would accept less than is currently being demanded. In response, the mediator must find a way of preserving the confidentiality of the discussions without lying to the asking party. The mediator should never lie to or knowingly mislead a party. If a party is aware that the mediator has misled another party, they are unlikely to be confident that the mediator will not mislead them, too. A mediator who is found to have lied or deceived a party is seriously undermined and may not be able to continue the mediation.

Mediators need to develop responses to such awkward situations. General responses, such as, Please do not press me, because I cannot tell you, or Just as I will respect your confidence, you would expect me to respect the other party’s confidences , or As soon as I can tell you anything further I will do so , are useful.

Another challenge for the mediator is the risk of appearing to collude with one party, perhaps through careless use of language, such as seeming to side or sympathise with one party, even through overuse of the word ‘we’ in an attempt to build rapport.

Finally, if a mediator conveys a material misrepresentation, even innocently, which induces the settlement deal, the usual rules of contract apply; the deal is at risk of being challenged if the

The IFC Mediator Handbook Page 92 of 110

© IFC 2011

misrepresentation emerges. In addition, the mediator’s credibility will have been compromised in the eyes of at least one party, and possibly both. This means that the mediator must be cautious about conveying what could be critical factual assertions leading a party to agree to terms. If in doubt, invite the party to make the representation direct, rather than risk a possible misrepresentation being clothed in respectability by the mediator’s neutrality. Any such important assertion of fact might also be included as a recital in the settlement agreement, so as to evidence the factual basis on which the settlement is founded to the parties and the court in case of controversy. The need for such measures is rare, and settlements reached at mediation are very seldom challenged and are usually implemented as agreed.

**Impartiality, neutrality and avoiding conflict of interest**

These related requirements are essential for a mediator, who must at all times remain impartial in relation to parties, process, content and outcomes. At the nomination stage, the mediator must immediately declare any possible conflict of interest that either party might perceive. A late disclosure which might jeopardise the mediation is unwelcome and embarrassing. Knowing a party personally or professionally should be disclosed, or having a business relationship with one of the law firms involved. In fact, parties rarely raise an objection after such a disclosure; however, the mediator should be prepared to withdraw if objection is made.

There are more subtle potential personal conflicts to be aware of: the possibility of prejudice about personality, race or gender. This reflects a wider requirement for mediators to possess a high degree of self-awareness, anticipating conflicts of this nature and adjusting to avoid any demonstration or impact of prejudice or bias.

At the mediation itself, the mediator needs to be seen to be entirely independent regarding the issues in dispute, and to treat the parties even-handedly. In terms of the process, the mediator must run the mediation in a way that allows equal opportunity to all parties to contribute and participate in the negotiations. In terms of outcomes, the mediator must have no interest in what is agreed – financial, personal or otherwise. The mediator should never offer professional services to either party following the mediation: the only appropriate involvement should be as mediator, offering mutually available assistance in progressing further negotiations or, if requested, in helping to implement the settlement terms.

Impartiality and neutrality also require that mediators separate their own interests, professional pride or wish for recognition from whether or not there is a settlement. It is inappropriate for a mediator to exert pressure on parties to settle because it might otherwise reflect badly on the mediator. In fact such an approach is quite likely to be counter-productive. The mediator needs to be energetic in encouraging parties to consider settlement, even exerting some pressure where they seem reluctant or stuck. However, this must always be from a neutral and respectful stance, which leaves the parties free to make their own choices, including a decision not to settle.

Neutrality may be endangered by over-enthusiastic reality testing, if a party perceives itself as being singled out and wrongly or harshly challenged. In order to minimise future discomfort or misunderstanding, some mediators tell all parties together at the opening meeting that mediator reality testing with each party in private is a usual part of the process.

To the extent that the mediator probes and challenges one party’s position on any issue, this must be undertaken impartially and for the benefit of that party in assessing or reassessing their risks. It is unethical for a mediator to play one party off against another, for instance, by attempting separately to convince both parties that they have no realistic prospect of winning the litigation.

**Dealing with power imbalance and status**

The IFC Mediator Handbook Page 93 of 110

© IFC 2011

A party will sometimes feel at a disadvantage, even when represented; for example, where an individual is suing a large corporation or an insured defendant (and thus, effectively, the insurer). The mediator needs to be alert to any party’s perception of power imbalance and work to encourage equal participation, remembering that the process itself, at which a large defendant takes on the guise of two or three people with authority to settle, will assist.

If a party attends the mediation without an adviser and the other party is represented, the mediator must remain alert to the risks to neutrality and conduct the mediation with great care. Where one party is unrepresented and is also not a sophisticated player in disputes, the absence of available advice could lead to an ‘unfair’ result. Furthermore, pressure may grow on the mediator to be drawn into an advice-giving role with the unrepresented party. This has to be resisted and pre-empted, if possible, by discussions with both parties prior to the mediation. The unrepresented party should be given strong encouragement to obtain representation, perhaps through a professional free representation scheme, or funding by the other party to the dispute, if expense is the problem. Perhaps an adviser can be available on the telephone. If a party is adamant about not having legal representation, the possible difficulties of attending the mediation alone should be highlighted.

The mediator will need to discuss these issues before the day with any party planning to attend unrepresented. All parties should know before the day who is to attend for each party, and the possible impact on them of the other party being unrepresented should also be discussed with the legal advisers; it will be unsatisfactory for them if a deal is signed and later challenged as oppressive by an aggrieved unrepresented party.

**Criminal activity and threats to safety**

On very rare occasions, a mediator may encounter proposals or activities giving rise to a suspicion of illegality or which might even amount to a breach of the law. Such an occurrence may affect a mediator’s obligations to the parties on confidentiality.

Initially, the mediator might challenge proposed potentially unlawful conduct by reality testing the wisdom of taking such steps, and seeking alternatives with the party or parties suggesting it. For instance, a suggested settlement framework might involve not merely tax avoidance but possible tax evasion. If really concerned, the mediator might consult the organisation under whose auspices the mediation is being conducted, or, if working individually, consult a mediation colleague or specialist adviser. As a last resort, the mediator might decide to withdraw from the mediation. Both the Model Mediation Procedure and the Code of Conduct have specific provisions dealing with withdrawal by a mediator. In certain circumstances these provisions relieve the mediator of the obligation to maintain confidentiality, such as in cases where matters of public safety and serious risk of danger to life or limb arise. Frank warnings of the mediator’s wider obligations need to be given by the mediator to a party or parties responsible for the possible outcome.

The mediator should always seek advice if such a situation arises. Fortunately such occasions are very rare.

**Compellability of mediators as witnesses**

Such protection afforded to a mediator from being compelled to give evidence derives from the mediation agreement itself, in which the parties normally agree not to call the mediator in any subsequent proceedings. To date no mediator has actually given evidence in any court in England and Wales about what happened at a mediation, though a judge has on one occasion allowed a witness summons to be issued, only for the claim to collapse. Judges are normally unwilling to contemplate allowing a mediator to be called as a witness, as this may risk perceptions of

The IFC Mediator Handbook Page 94 of 110

© IFC 2011

neutrality of both mediator and the process. They are, however, compelled to be witnesses in some other jurisdictions; in others, they enjoy statutory immunity from being called.

Certain authorities such as Revenue and Customs, duly appointed liquidators and trustees in bankruptcy, and the security services, can compel disclosure of information in certain circumstances. While the Model Mediation Agreement and Model Mediation Procedure protect mediators from alleged breach of contractual confidentiality when compelled by overriding law to make disclosure to such authorities, a mediator’s instinct should be to decline initially when asked, and then, as above, to seek advice from the organisation under whose auspices the mediation is being conducted, or, if working individually, consult a mediation colleague or specialist adviser.

**Mediator negligence and breach of contract**

There is nothing inherent in the mediator’s role that confers immunity from being sued. Although mediation agreements attempt to limit liability to matters where mediators act fraudulently or are guilty of wilful misconduct, there must be doubts as to whether such an exemption would be effective. Fortunately, the scope for such claims is far less than in professions where advice is given to a client. A mediator who acts negligently or breaks a term of the mediation agreement can, in theory, be sued, even though the claimant would have to demonstrate a quantifiable loss; in fact, in the UK to date, no mediator has been sued. Mediators who give advice, or take responsibility for the wording or content of a settlement agreement (both as to what it contains or what it omits) may expose themselves to the possibility of a claim, and it is the parties’ advisers who should take responsibility for such activities.

Mediators should always have current and adequate professional indemnity insurance.

**Withdrawing from a mediation**

Both the Model Mediation Procedure and the Code of Conduct specify when a mediator may or must withdraw from a mediation. Although it is rare for a mediator to consider withdrawing, if you and find yourself in that position, remember the following:

* explore alternatives that might defuse or answer the ethical issue
* keep the mediation going until you are sure that there is no alternative
* consult the organisation under whose auspices the mediation is being conducted, or a specialist adviser, especially regarding money-laundering
* explain to the parties your reasons for withdrawing, without breaking confidentiality

The IFC Mediator Handbook Page 95 of 110

© IFC 2011

**Some dos and don’ts for effective mediation**

The following lists of dos and don’ts provide a reminder, highlighting and reinforcing good practice guidelines from the handbook.

**Some dos**

* Trust in the process and respect the people, and convey this to all those with whom you are working
* Contact the parties or their lawyers before the mediation to start the relationship and the process on a firm footing
* Show that you have read the documents and are well prepared
* Develop a mediator’s opening statement that covers introductions, the role of the mediator, the
* principles of mediation that everyone has signed up to, and some sense of the process and how the day might be used. Be brief, confident, positive, and responsive to any questions and to the needs of the parties
* Show empathy, build rapport, reinforce neutrality, and do so equally with each party
* Encourage parties to make an effective opening statement. This is a chance to enhance the other party’s understanding and to begin to persuade them to change their perceptions
* Spend time clarifying the issues in dispute. This focuses parties on the key aspects and cuts through unnecessary detail
* Aim for a conversation with the parties rather than an interview, an interrogation or investigation
* Acknowledge emotions and allow feelings to be vented, even in joint sessions; although if this becomes destructive or abusive, move into private meetings
* Encourage all present to contribute, perhaps inviting comment from quieter participants
* Check if there have been previous settlement offers. This sometimes, but not always, provides a starting point for negotiations, and can avoid frustration and time wasting
* Have patience; let the parties own the problem and the solution. Give them time to adjust, re-evaluate and move
* Be flexible, vary the format, take time, follow up cues and clues, and discuss apparent inconsistencies
* Listen a lot
* Build and keep up momentum. Try to keep meetings short and purposeful, leave some matters for the next meeting and, if possible, task the parties to work in your absence
* Pace yourself and pace the parties
* Encourage the parties to talk to each other directly. You do not have to be a go-between, and you want to avoid being simply a messenger
* Challenge positions and proposals. Hiding behind the mediator may allow a party to adopt

an aggressive stance or make unreasonable demands or offers. Try asking Would you be prepared to ask the other party that question direct?

* Recognise that many mediations have a point of despair when settlement looks impossible; the mediator needs to help the parties to keep working and to try different ways of making progress
* Maintain your energy; take breaks, have some refreshment; look after yourself and the parties
* Devote time and patience to the drafting stage. There are usually issues that arise during the drafting that need to be resolved

The IFC Mediator Handbook Page 96 of 110

© IFC 2011

* Keep the door open if the mediation does not settle. Plan for next steps, offer another day, or agree to be in telephone contact.

You will probably have your own dos to add to the list.

**And some don’ts**

* Don’t be fazed, or if you are don’t let it show. A mediator needs to be accepting, flexible and responsive, coping with whatever happens, however unusual or unexpected
* Don’t get swamped by detail either in preparation or on the day
* Don’t appear to be a judge or arbitrator, or let the parties treat you as such. Do not cross-examine parties or advisers; don’t suggest, in what you say or what you do, that you will give an opinion or evaluation
* Don’t take lots of notes; you lose eye contact and can miss important communication
* Don’t make assumptions about parties, causes, merits or fairness
* Don’t criticise poor preparation, presentation or negotiation by parties
* Don’t interrupt
* Don’t ask questions that indicate favour to one party’s argument or position
* Don’t give away your prejudices and opinions by the way you behave or the way you ask questions. Be direct when challenging and reality testing
* Don’t impose your solution, even if you see it early and believe it will work
* Don’t ask for a ‘bottom line’ – and don’t be naïve in believing a stated ‘bottom line’
* Don’t push a party or allow them to back themselves into a corner with no exit
* Don’t give up. Persistence pays off, sometimes in the most unlikely circumstances
* Don’t press for settlement at any cost, particularly if the reason is to maintain your personal settlement record
* Don’t be too hard on yourself if the mediation does not settle.

You will probably have your own don’ts to add to the list.

The IFC Mediator Handbook Page 97 of 110

© IFC 2011

**Convincing parties to mediate**

**Once you have been trained as a mediator, hopefully you will be convinced about the benefits of the process in resolving disputes. However, often in countries where mediation is developing, mediators may become involved in talking to parties about whether mediation is suitable for their case and countering objections they may have. This chapter looks at some of these issues in order to assist mediators in having these conversations.**

**The Range of ADR experience and case suitability**

There are now very few areas of law and practice where mediation has not been used for dispute resolution. Mediators regularly deal with disputes in the following sectors:

|  |  |  |  |
| --- | --- | --- | --- |
| • | Agriculture | • | Intellectual property |
| • | Board conflicts | • | International/cross-border disputes |
| • | Charities sector | • | Maritime |
| • | Commercial contracts | • | Media and entertainment industry |
| • | Construction and engineering | • | Personal injury |
| • | Corporate acquisition | • | Planning |
| • | Employment disputes | • | Professional negligence |
| • | Energy/oil and gas | • | Regulators |
| • | Environment and planning | • | Shareholder and family business disputes |
| • | Financial services and insurance | • | Sports disputes |
| • | Food and retail | • | Supply and distribution contracts |
| • | Fraud | • | Transport |
| • | Government contracts | • | Venture capital |

* Information technology and telecommunications

Mediation has been successfully used to settle disputes:

* before issue of proceedings
* at any stage during proceedings
* during trial and between end of trial and judgment
* during the appeal process
* where there are evidential disputes of law, fact or opinion
* where liability and/or causation is in dispute
* where there are fraud allegations
* where one party of their legal team has opposed it
* where the interests of children or patients are involved
* in group litigation with multiple claimants or defendants
* involving multi-millions or no money at all
* where the parties started poles apart.

Cases sometimes said not to be suitable for mediation include:

* where **legal precedent** is required by one or both parties – though mediation may be used where parties seek to avoid an adverse precedent
* where a **peremptory court order** is required, such as search and freezing orders or injunctions – though mediation can help to settle the rest of the litigation and dispense with proceeding sin relation to the peremptory order

The IFC Mediator Handbook Page 98 of 110

© IFC 2011

* where **summary judgment** is likely – though mediation might help where it is unlikely to be granted or actually refused, or in rendering an application unnecessary
* where **negotiations are proceeding satisfactorily** – though mediation may speed up negotiations or enable a party to overcome a hurdle if it arises or give a party a guaranteed ‘day in court’
* where **publicity is actively sought** – though mediation can lead to a public outcome if the parties agree.

No easy assumption or assertions can be made over whether or not a case is unsuitable for mediation. It is wise to assume that **practically every case is likely to be suitable for mediation at** **some time in its life cycle** and that **the right question to ask is not *‘is it suitable?’* but *‘is it* *ready?’***

**Timing Mediation**

Ideally each party needs enough information by the end of a mediation to make an informed assessment as to whether the proposed terms of settlement are reasonable. However, this need not mean completion of all pre-trial stages before mediation is possible. One of its effects is to achieve efficient information exchange, both as to fact and opinion. In very complex cases it may not be possible to assess case risks adequately until after disclosure and exchange of evidence. But it involves considerable cost to complete those stages, and lawyers may be asked at an early stage whether a sound assessment is impossible before then.

Even if the mediation process cannot settle all issues early on, early intervention by a neutral or facilitator can lead to proper planning and agreed timing of a later mediation, or to narrowing issues, for mediation or any other ADR process. Process design is familiar territory for mediators and mediation providers in complex and multi-party cases, for which early referral is highly desirable.

When dealing with timing issues, judges might like to bear the following points in mind:

* Successful mediation should be considered and is often feasible before proceedings are issued. In the UK, and variably in other jurisdictions, such consideration is actually required by several pre-action protocols and the Practice Direction.
* Where an unsuccessful application for **summary judgment** or interim relief is sought, the time may be right when giving directions to raise the possibility of mediation.
* The use of ADR should normally be discussed at **case management stage**, when suitability of any contested case for mediation should be assumed unless the contrary is shown: the parties may assert that it is too early, but this is a matter of judgement, to be weighed against the proportionality of cost required to reach the point asserted by lawyers as necessary for a sound risk assessment.
* **Pre-trial review** may not be too late for mediation. Considerable costs can be saved bymediating a complex case before all the final trial preparations are made and briefs have been delivered. Court door settlement is extremely wasteful of resources. Any case setting there should have been capable of settlement at an earlier mediation, without that waste of cost and time.
* The **cost benefit of mediating** needs checking for proportionality, especially late on in litigation: a low value claim with substantial costs at stake needs to be mediated early, and a judge can properly criticise the parties for leaving it too late to propose mediation.

The IFC Mediator Handbook Page 99 of 110

© IFC 2011

* As to penalising a **court door settlement** instead of mediation, where court door settlement is reported to the judge but there is no agreement as to all or some of the costs leading up to trial, no order as to costs may well be the appropriate order.
* If there is a live issue on **appeal** when permission is sought (either from the trial judge or the appeal court), mediation may still be an option: many appeals are compromised without hearing, and mediation is well placed to facilitate such settlements.

**Countering objections and assessing suitability**

Some inadequate reasons for refusing mediation include:

* that one party considers it has a cast-iron case and the other’s case is without merit
* that a full refutation has already been delivered and ignored
* that a professional person’s reputation is involved
* that heavy costs have already been incurred.

Many precedents make clear that refusing to mediate can only be justified if, viewed objectively, mediation would have no reasonable prospect of success. Refusing to mediate is considered a high risk strategy in view of how mediation manages to settle intractable cases.

* **The case rests on a point of law**

Points of law (and procedure) feature in most litigation, 95 per cent of which settle. Commercial considerations underlie many cases and mediation can help focus on these and also help parties to review the litigation risk of winning or not on the legal (or factual) issues.

* **The parties are too far apart to be able to settle**

There is still a 95 per cent chance of pre-trial settlement. Mediation brings an early focus on those positions and makes earlier settlement possible. Mediators are used to closing apparently unbridgeable gaps.

* **It is a multi-party claim with a Group Litigation**

Mediation has a particularly strong record of dealing with multi-party cases. Early consultancy and design with an experienced mediator or mediation provider is a fundamental requirement for such cases.

* **The cases involves allegations of fraud**

Only a small number of cases involving fraud allegations go to trial – most settle, and trial of such allegations can be risky both for those making them and those facing them. Many such cases have been mediated successfully.

* **Mediation will generate unacceptable delay**

It can be set up very quickly, and a stay is not essential.

* **Mediation adds nothing to standard lawyer-to-lawyer negotiation**

Many successful mediations follow unsuccessful lawyer-to-lawyer negotiations, and if this point emerges before the court, it begs the question why they have not so far succeeded. Bringing the principals to the table is almost bound to be quicker and cheaper than negotiating through intermediaries, as well as giving centrality and control to the parties and the opportunity for direct interchange in a safe environment. If the parties have taken

The IFC Mediator Handbook Page 100 of 110

© IFC 2011

entrenched positions the detachment of the mediator may be essential for them to make an objective evaluation of where their best interests lie.

* **We did not suggest mediation because it is a sign of weakness**

If a judge proposes or recommends mediation, agreement to mediate cannot be a sign of weakness.

* **Mediation deprives parties of their ECHR Article 6 right to a public trial**

Continued engagement in mediation once commenced is entirely voluntary. If trial is preferred, any party can opt to return to the litigation process without fear of sanction. Complying with a mediation direction or recommendation is no more an infringement of Article 6 than compliance with a pre-action protocol.

* **Mediation will increase costs**

A mediation which does not settle a claim can increase costs. But when compared with the costs of a full trial, mediation costs are insignificant, particularly because case summaries tend to be concise, minimal core documents are used and small teams attend. For a court to consider proposing mediation, parties to an action are already likely to be entrenched, with the risk of substantial costs at stake. Most preparation work for the mediation will be required anyway to prepare for settlement discussions or trial. Unsettled mediations almost always narrow gaps and issues, saving time and costs later. Experience mediators and mediation providers can design processes which are economic and meet the specific needs of the parties.

**Convincing Corporate Parties**

**Background**

Traditionally when faced with a dispute, many executives are content, sometimes only too pleased to ‘hand it over to the lawyers’. Unfortunately, the legal system often fails to provide timely, cost-effective or even wise outcomes. In-house lawyers, pressed by many demands on their time, often participate in the game of ‘pass the parcel’, this time to external lawyers. Managers are also inadvertently dragged back into the conflict as it spirals procedurally into the legal system’s case management process.

This approach to managing conflict is no longer adequate for modern organisations. Businesses and managers are under a sharper spotlight in terms of being accountable for their effectiveness and efficiency in managing risks, relationships and in optimising the value generated out of all aspects of their business, including negotiation and conflict. Creative lawyers, alert to the inadequacies of their profession, have also urged reform of the legal system and professional practice around the globe.

Mediation properly used gives business a vital new tool for effective risk management – handling personal risk, organisational risk, reputational risk and economic risk by means of a more commercially flexible yet disciplined and structured process. When business negotiations break down, resolution can be achieved at a fraction of the cost, and within a fraction of the time of taking a case through the courts. In addition, rather than winning or losing, business can be move beyond disputes towards solutions that benefit their short- and long-term commercial interests, and with important corporate relationships and reputations intact.

The IFC Mediator Handbook Page 101 of 110

© IFC 2011

The real challenge for ADR is to make it part of regular conflict management practices, rather than an occasional ‘legal’ purchase. Taking the latter road means that disputes become extremely costly for all parties.

**ADR and good business practice**

The in-house legal team or corporate counsel may consider that involvement with litigation is ‘part of the job’. But for the line manager involved, litigation can be a major diversion. He or she will not only be taken away from management for the time involved in preparing for and participating at trial or in giving witness statements or disclosure. They will probably also be distracted from their day-to-day management role.

The fact that a company is involved in litigation can alter perceptions of that company and unlimited damage can flow from conflicts on Boards, with suppliers or business partners, in join ventures and alliances. Any of these may in some cases go on to have a negative impact on a company’s investors or share price.

Lawyers should therefore be alert to these potential wider costs and the favourable impact that mediation offers as a vehicle to help manage or limit such costs and risks. In an y age when good governance and broad concepts of ‘compliance’ are gaining increasing importance, the existence of a dispute resolution management programme itself can help to enhance the reputation and perception of a company.

ADR offers a new business tool for managing relations precisely at the point where relationships are vulnerable and at their most difficult. It is an active way of managing conflict or potential conflict, as compared to the reactive tradition of ‘let’s hand it over to the lawyers’ when relations become too difficult. That is one reason for adopting it in standard contracts or as corporate policy.

**International Activity**

This business tool is not only evident in Europe and North America, but is increasingly found across global jurisdictions. With good reason, the trend also matches international business needs, because complexities of relationships, greater challenges in ensuring effective communications and uncertainties of the effectiveness of domestic litigation or international arbitration all combine to make mediation a lower-risk, higher value process for the effective management of cross-border conflict.

International or cross-border disputes bring additional risk and costs. There is the risk that opponents will shop for a location where litigation may be more favourable to them. Some jurisdictions arrange trials quickly, but others may take years. In some locations, corruption may present a risk in the litigation process. By contract, parties can arrange mediation relatively speedily. The mediation process can be bespoke to the needs of the case and, of course, bribing mediators is a pointless exercise as the process leaves the decision with the parties.

Around the world, a number of important consultations and initiatives influencing the use and development of mediation internationally are currently in progress.

In May 2003, for example, the World Trade Organisation (WTO) began talks on revising its dispute settlement rules. These rules aim to allow trading nations to challenge each other regardless of size and economic influence. However, the WTO has acknowledged that problems do exist in the ability of developing countries to engage in costly legal battles and potential trade retaliation. The talks focus on looking to help the poorer countries in developing the legal capacity to use the WTO system and place a greater emphasis on using mediation.

The IFC Mediator Handbook Page 102 of 110

© IFC 2011

Additionally, the member states of the United Nations Commission on International Trade Law have voted to adopt a model law of International Commercial Conciliation, encouraging those countries with no mediation provision to use the model law as a foundation for reform.

**When to use ADR**

For business, the questions to ask to indicate whether a case is *especially* appropriate would include:

* *Do they want to preserve a commercial relationship or reputation?*
* *Do they want to minimise the costs / risks / stress of litigation (or arbitration)?*
* *Are there so many parties, locations, delicate issues or relationships, technical judgements or evidential uncertainties that it would be helpful to ask a neutral third-party to structure discussions / negotiations?*
* *Do they need to communicate more effective with the other party(ies)?*
* *Would a legal ruling be a very crude instrument in the case of the complexities of law, fact, evidence and emotional stress?*
* *Would they prefer to avoid a potentially damaging or unhelpful precedent?*
* *Are there significant issues of a non-financial nature which a court could not address?*
* *Would it be useful to find a way out of a current deadlock?*
* *Would it be useful to establish the merits of their case through an independent appraisal or forum at an earlier stage than in the courtroom?*
* *Is it important that the dispute gets resolved quickly for financial or economic reasons?*
* *Are there other aspects of the business that are being affected by this dispute?*
* *Might a court case damage reputation?*

It is important for managers to understand that ADR is essentially a more powerful form of negotiation – mediation can therefore be used **wherever** direct negotiations might ultimately settle a case, and this includes most cases even with legal implications.

However, some cases may not be suitable for mediation. For example, when:

* direct negotiations are clearly progressing satisfactorily and efficiently
* a legal or industry precedent is required
* a speedy injunction is required to preserve right/property
* matters are of a criminal nature, although cases involving allegations of fraud have been successfully mediated.

**Readiness for mediation**

Most cases are inherently suitable for mediation at some time in their life cycle. The question, therefore, is not usually whether the case is suitable but whether it is ready.

In asking is it ready:

* is enough information already available or likely to become available by the end of a mediation to enable them (and their client) to form a view as to the right level at which to settle the claim?
* will the extra information, evidence or opinion they believe they lack, and which they propose to obtain before embarking on mediation, make a material difference to their risk appraisal and be obtained at reasonable cost?

The IFC Mediator Handbook Page 103 of 110

© IFC 2011

* does the available evidence tend to suggest that the other side will use the mediation process constructively or merely as a stalling tactic?
* if a mediation were fixed today and to be held in, say, two months’ time, would anything prevent the mediation from being ready? Can any gaps in information be filled at the mediation?
* would they like to have a mediation in, say, two months and if so can they be ready by then?
* even if the mediation did not settle the dispute, would a process which could deliver a useful extra perspective and information on the claim, perhaps narrow the issues?
* would mediation be useful in other ways? For example, to put one’s position across more effectively and *directly* to a principal of the other party?

All these questions and considerations underline the point that mediation is not a ‘quick fix’ form of justice. The evaluation and preparation of a party’s case is as important for mediation as it is before a court trial. It is more a ‘quick test’ of whether settlement is really feasible, and a ‘best shot’ at achieving that settlement.

**Mediation as a management tool**

Mediation as a formal process has often been triggered for lawyers or managers only when a business faces the prospect of litigation or of further litigation cost. This is when a business dispute has become sufficiently serious to be taken out of the control of the managers negotiating directly. However, mediation also has significant potential for dispute avoidance and for conflict management **by managers** rather than lawyers. The key is to recognise that the process of introducing a skilled, independent third-party alters the dynamic of any negotiation - it adds discipline, communication value and problem-solving capacity whenever there is a difficult or sensitive negotiation or discussion required. And even in cases which might ultimately have gone to litigation, early use of mediation usually ensures optimal cost-saving and relationship maintenance. Managers should therefore be encouraged to consider mediation as a core management technique which can be adopted in situations where there are likely to be communication difficulties or ‘sensitivities’ even if not necessarily classified (yet) as a formal dispute. For example:

* handling employee or customer grievances (grievance mediation)
* intervening in cross-departmental or team rivalries or helping with restructuring of business units (organisational mediation)
* negotiating complex contracts (deal mediation)
* providing conflict prevention / management for the duration of a complex project, joint venture or strategic alliance or in setting up such a project (project or alliance mediation)

Different uses of mediation will emphasise different roles for the mediator and require mediators of a different background. Mediation as conflict prevention is also a reason to justify requirements to mediate in contracts or statements of policy about relations with suppliers or other business partners.

**The role of corporate counsel and external lawyers**

Corporate counsel can play a number of roles in managing ADR actively, depending on the extent of their company’s need, the value they can generate and the resources available internally or externally. In some cases, they may be able to engage without involving external lawyers but in

The IFC Mediator Handbook Page 104 of 110

© IFC 2011

practice many in-house legal departments may lack the time to take this on fully in an ADR process without external support of some kind. However, one advantage of ADR for in-house departments is that its brief and relatively informal nature means that they may be more able to assist the management decision-makers in the process. Equally, they can more easily determine and manage the limits and cost of external lawyer support through to conclusion of the mediation.

**Managing ad hoc cases**

Most serious disputes in a company do find their way to the legal department. In-house lawyers can make an early judgement on the commercial priority for settlement, and test the management’s judgement against a list of screening questions on ADR suitability (see above). Corporate counsel can also, in consultation with the client, gauge whether the other party can be approached directly or via an ADR provider or whether it is necessary to bring in external lawyers at an early stage for further advice and communication. Even in the latter case, good management of the external lawyers should require that they are also asked at an early stage for their judgements on suitability of ADR and any alternative, their predictions on costs and outcomes for ADR or litigation, and view of the likely progress of the case. Further monitoring of the case at regular intervals is also helpful to ensure that a dispute does not drift unnecessarily with added costs and time involvement.

**Learning from case experience**

Whether or not a particular case is referred to ADR, it is useful discipline to monitor the costs and outcomes of the case, measured against earlier predictions by mangers or internal/external lawyers. Another option that corporate counsel new to ADR should consider, is whether to build their experience of ADR by selecting a particular case and trying out ADR even if still uncertain as to its value. Clearly if such a strategy is adopted, it is better to choose a ‘standard’ case that does not threaten the company, and explain to management the rationale, that is, to test the value of ADR for more regular usage as a cost-saving measure.

**Managing a disputes portfolio**

Measuring the cost to a company of its annual caseload of disputes not only includes an audit of external costs, but also an estimate of internal management time. This gives a benchmark against which to test potential savings derived from (a) either using ADR more actively across the range of cases, or requiring external lawyers to do so, or (b) designing a special ADR procedure to tackle a range of cases.

**Improving management awareness**

Corporate counsel can also usually play an active role in educating managers, either directly or via external ADR providers. This can involve anything from awareness-raising seminars about ADR, to more dedicated courses to equip managers with greater conflict prevention and management skills either generally or for a particular partnership project or merger. Corporate counsel can also help to debrief managers on their experience of how a mediation worked and what lessons can be learned for the company or its external lawyers or other advisers on using the mediation process. It is also beneficial to extract business lessons from the issue mediated and, for example, what internal processes may need amending.

**Contracts and policies**

If ADR is seen as a valuable tool in managing supplier or other business partner relationships, the in-house lawyer can encourage the use of ADR clauses or policy statements which pledge use of ADR at an appropriate stage in the contract – either following an internal negotiation procedure, or by appointing a ‘project neutral’ at the outset of a complex project. Escalating dispute resolution

The IFC Mediator Handbook Page 105 of 110

© IFC 2011

clauses are now more common, involving negotiation steps, followed by mediation, then resort to arbitration or litigation if mediation is unsuccessful. Clauses can be drafted to encourage ADR without depriving the company of access to litigation if urgent or protective legal action is required before mediation.

**Key Messages**

**Lawyers**

Lawyers are generally the gate-keepers for mediation referrals. The vast majority of cases that come to mediation are likely to have already entered the litigation process, and clients are likely to be heavily influenced by the advice of their lawyers as regards both process and the organisation or neutral with which to engage.

Lawyers can also have a multiplier effect – if a single law firm can be persuaded to inform all of its key litigation clients about ADR, then a larger number of organisations can be reached more quickly than if they had to be approached individually.

In promoting ADR, the key message for lawyers is that the process is beneficial to their clients. Equally important, however, lawyers must be reassured that the introduction of newer, faster and lower cost techniques of dispute resolution will not threaten their own commercial interests. Hence, an additional key message to lawyers is that, rather than representing a threat to their future revenues, mediation can in fact provide an opportunity for increased business by increasing client satisfaction and confidence in lawyers’ abilities to achieve cost effective resolution of disputes.

**Courts and judiciary**

It is well established that lawyers are influenced by the attitudes of the judiciary, and persuading senior members of the judiciary of the benefits of ADR might well lead to improved lawyer engagement and experience of the process, which might in turn lead to a greater inclination to recommend mediation in disputes.

For the courts and judiciary, then, the key messages relate to the overall societal advantages of the processes. These can be supplemented by additional benefits of more personal interest to the judiciary – specifically use of mediation can lead to a reduction in the court’s workload, thereby improving its efficiency and enabling resolution of more cases in less time.

**Corporations**

As the principal parties in business disputes, corporate organisations are often the client in mediation.

Here, the key message is that the process brings significant commercial benefits. Specifically, that the use of mediation can result in significant savings in the time needed to resolve disputes – faster resolution leads to reduced uncertainty and, therefore, lower business risk. Moreover, there are also significant cost savings to be made, not only in terms of reducing legal fees but also by way of avoiding wasted management time caused by the distractions of long-term disputes. Finally, the

The IFC Mediator Handbook Page 106 of 110

© IFC 2011

mediation process also provides opportunities to maintain individual business relationships that might otherwise be significantly damaged by protracted litigation.

In the longer-term, an increased use of mediation by business has the potential to improve the overall business climate, not only by providing opportunities for improved dialogue and early resolution of disputes but also by freeing up the courts such that they can focus their resources on those few matters that do require their attention.

**Government**

As custodian of the civil justice system and the overall business environment, any government clearly has the potential to be a very significant influencer in the development of ADR, particularly if legislative or procedural changes might be beneficial. The Government is also a significant potential client in mediations as a party to commercial disputes.

In relation to a Government’s legislative and policy-making role, the key messages to be delivered are that the use of mediation can improve the overall business climate by providing better access to justice, and this in turn can improve overall societal confidence in the legal and judicial system. It can also lead to increased foreign direct investment and international trade by providing reassurance that the country has sound and effective dispute resolution systems.

The IFC Mediator Handbook Page 107 of 110

© IFC 2011

**Building a Mediation Practice**

Mediation derives from a need by those in dispute to attempt settlement. However, such need for mediation does not automatically translate into a demand for the service. In most jurisdictions where mediation is used regularly, it is clearly encouraged by statute, rules of court or government departments, or is a term in a contract. Developing a mediation practice, therefore, is largely dependent upon the individual mediators taking initiative and raising awareness, or working with organisations, such as mediation and ADR providers. Training qualifications do not in themselves guarantee practical experience. They are necessary but not sufficient conditions for starting a practice.

**Voluntary and community mediations**

A viable starting point to gaining practical mediation experience is through offering your services to any government funded or community ADR programmes that might exist in your jurisdiction.

**Assistantships**

Another way of developing experience is as an assistant to an experienced and active mediator. Assistantship programmes offered by local ADR centres are usually the best route as direct approaches may not lead to actual appointments. All assistantships are subject to approval by the mediation parties and bind the assistant to the terms of the mediation agreement.

**Observing mediations**

Some mediators may, again subject to the parties’ consent, permit you to observe them in practice. Although not a substitute for direct experience, this may provide greater familiarity with the process and techniques used by mediators.

**Panel membership**

Depending on the jurisdiction, mediators may be able to apply for appointments through a panel, either for a court-annexed mediation scheme or with a private mediation services provider. Such panel membership can result in regular appointments, although usually no guarantees are offered as to amount of work. Accordingly, mediators may wish to join a number of panels, if available and if possible.

**Reflective practice**

Where a mediator begins gaining practical experience, engaging in this practice in a reflective manner is encouraged to ensure further development of skills and expertise. Examples include, self debriefing, mutual debriefing with a lead or co-mediator or endeavouring to receive feedback from the parties to any given mediation.

**Informal experience**

As noted above, there may be limited options for gaining experience in formal mediation, especially where the process is not readily used in a particular jurisdiction or is in the early phase of development. In such circumstances, it is still possible to engage mediation skills informally in the normal course of business, for example in attending/chairing commercial meetings, teaching

The IFC Mediator Handbook Page 108 of 110

© IFC 2011

others about mediation, managing complaints and grievances or dealing with aggrieved individuals, or in fact dealing with groups in emergency or crisis situations.

**Networking**

New mediators can also develop their awareness and understanding of the process by engaging with others through membership of mediation associations, attending and speaking at dispute-resolution conferences, making contacts on the internet, writing for the local press, and speaking to voluntary associations and service organisations. Indeed, promoting yourself as a mediator within your own wider professional networks, particularly if you have a specialist or niche practice, could prove to be a valuable source of mediation referrals.

**Access to resources**

Mediators also need to develop their own resources, such as mediation agreements, terms and conditions of appointment and other standard documentation. Where the mediator is a member of a panel, either private or court-annexed, most of these resources are made available as a matter of course.

**Professional indemnity insurance**

Professional indemnity insurance may be required by the mediator code of practice in particular jurisdictions. Where this is necessary, some professionals, such as lawyers, are covered for their mediation work by their existing professional indemnity insurance policy, provided any mediations are carried out in their capacity as a member of their firm. Other mediators can obtain professional indemnity insurance commercially.

The IFC Mediator Handbook Page 109 of 110

© IFC 2011

**Beyond the training course**

This handbook is intended as a guide for those preparing for the IFC mediator skills training course, and also as a resource for reference and review for more experienced mediators.

In this dynamic and fast-developing field, it is essential for all mediators and dispute resolution professionals continue learning and strive to refresh their practice and skills.

The process of mediation is infinitely flexible, and, beyond formal dispute resolution, the skills and approaches are relevant and transferable to everyday business and personal life.

The IFC Mediator Handbook Page 110 of 110

© IFC 2011