Mediation

- An alternative dispute resolution (ADR)
- A mediated negotiation (to mediate = to negotiate through a third party)

The first principle

“Separate the people from the problem”

Impact of negative feelings such as being angered, humiliated, insulted. That does not help!

How to overcome this sensitive issue?

Working side by side (and not face to face) while facing the problem

How? By reframing and expressing appreciation

Repeating what either party says without forgetting to ask them for validation

Expressing appreciation

(in order not only to understand each other’s point of view, but also find merit in it and communicate your understanding through words and actions)
The second principle

"Focus on interests, not positions"

**Positions** = what can be formulated in terms of rights and figures (e.g. seeking damages)

**Interests** = subjective needs, concerns, fear, desire to play another part in the company, reputation, etc.

**How to do it?**

**Introduction**

**Ask:**

Why ?
Why do you have such position ? What do you claim such a right ? Etc

* e.g. The Camp David mediation (1978)

  **a) Historical context**
  - Yom Kippour war in October 1973.
  - Sadate’s trip to Jerusalem on 19 November 1977
  - The American mediation was conducted by President Carter

**b) The initial positions (the ownership over Sinai)**

- **Israeli position**: we will keep the Sinai !
- **Egyptian position**: we will recover the Sinai !

**c) The underlying interests**

- **Israel's real interest**: we will keep the Sinai for military security reasons
- **Egypt's real interest**: we will recover the Sinai for sovereignty reasons and honor

**d) The negotiation outcome**

- Egypt has reestablished its sovereignty over the Sinai
- this part of Egypt has become a demilitarized zone.

Both (true) interests are met

The third principle

"Generate a variety of possibilities before deciding what to do"

**Ask :**

- Why not ? (rather than why ?)
- What if ? (hypothesis)
- Suppose that …, does it mean anything to you ?
The fourth principle

*“Insist that the result be based on some objective standard”*

Two sorts of standard or criteria:
- **efficiency criterion** (previous experience, no matter how negative it is, precedents, statistics, etc.)
- **equity criterion** (not absolute justice, but *fairness* from each party standpoint under the influence of local culture)

To sum up:

*“Separate the people from the problem”*

*“Focus on interests, not positions”*

*“Generate a variety of possibilities before deciding what to do”*

*“Insist that the result be based on some objective standard”*

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**Four basic notions:** People, Interests, Options, Criteria

These notions are at work in any negotiation

In addition, mediated negotiation requires three specific rules:
- mediator’s impartiality
- confidentiality
- caucus sessions (if appropriate)

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**The Harvard method**

This method comprises three turning-points:

1. **entrenched positions** → complementary interests → possible options → solution
2. From (1) to (3), the mediator remains at the background, facilitating the process
3. Thanks to a cooperative atmosphere, parties leave a war-war zone to a win-win situation

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Outline

- Step (1) corresponds to the *understanding phase*
- Step (2) corresponds to the *negotiating phase*
- Step (3) corresponds to the *agreement phase*

Let us examine these three moments of the mediation process, knowing that

*the mediator is less a content expert than a process expert!*
The understanding phase

The opening statement

Two goals:

- The mediator introduces himself
- The parties present how they see facts

Mediator’s opening statement

At the outset, the mediator endeavours to inform parties how

- simple
- fast
- non-binding
- confidential
- free (to leave)
- unexpensive
- and fair

is the mediation process with regard to lawsuits,
or even other forms of ADR (e.g. arbitration)

Here an example of an opening statement:

Welcome! (with a smile)

I would like first to introduce myself. My name is Alain Laraby. Yours is…? and yours…? If you don’t mind, I will use your first name and you will use mine.

Thank you for choosing mediation as method of settling your dispute out of court

(I indicate my duties to be reassuring quickly)

As a mediator, I am neither a judge nor an arbitrator.

I am only a facilitator to help make a decision of your own

In order to be a facilitator, my duty is to be neutral, treating both of you on equal footing

I am not only neutral. I am independent. I have no special relationships with one of you and nor have I previous contact with any of you

In short, there is no potential conflict of interest whatsoever
I address the issue of lawyers in passing

Although both of you have not chosen to be accompanied with your lawyers, feel free to call them (or any expert such as engineer, surveyor, accountant, etc.) for advice and assistance if needed during the mediation.

I specify how mediation works

As I said, parties play the major part in mediation, but if you wish to terminate it anytime, it’s up to you. This is a voluntary process. However, I’d like you to discuss with me the reasons why you want to do so.

I continue to describe mediation characteristics

Mediation is a voluntary process. This is its primary interest. Its second interest is to be confidential. Any information and document specifically produced for this mediation is « privileged » (they can’t be used in any or subsequent proceedings).

After establishing the mediation framework, I then contemplate parties’ role and duties within it

As regards the actual procedure, each of you will be invited in turn to make an opening presentation during a joint session and/or private session (caucus) where necessary.

The expected outcome

If an agreement is reached, I will draw up a Settlement agreement (or at least for today Heads of Agreement) to be signed by both of you.
In order to facilitate such an outcome, please do not interrupt the other party whenever he/she speaks and avoid personal oral attacks.

We deal here with issues, not with persons.

(MEDIATION ADR The understanding phase)

(Transition to parties’ opening presentation)

One question before starting (in company case):

Do you have full authority to speak on behalf of… ?

Any question on your side? Any further explanation?

Parties’ presentation

Identifying common ground

Identifying the issues

Setting the agenda

Parties’ presentation

Purposes:

- allows each party the opportunity to clarify
  - its own perceptions and assumptions
  - the other’s perceptions and assumptions
- gives the opportunity for some venting of emotions

Remember the Titanic tragedy…

Don’t look for a fair - or objective – evaluation of the statement of facts!

The mediator is not a policeman making investigations even though people try to cover gaps of information.

Let the parties present their own perspective/present the issue from their own perspective.

Why is that so? Beware of the iceberg!
MEDIATION

Identifying common grounds

- As a mediator, you wish people to get to yes (building a positive agreement)
- The purpose of mediation is to set positive conciliatory mood, especially for highly conflicted parties
- Common grounds = common positive grounds (from the outset)
  They can say nothing but « yes », however they conflict with each other
- See the following mediation role play:

Smith and Jones are neighbours.
Their building is a duplex, with their units sharing a common wall.

Living room
  - Hall
  - Study
Living room
  - Hall
  - Study
Kitchen
  - Bedroom
Bedroom

Smith's Unit
  Bedroom
  Kitchen
Jones' Unit
  Bedroom
  Kitchen

Smith writes for a living and works at home during the day.
Jones is a musician. He works at night and practises his electric guitar at home during the day.
They have both lived in the building for approximately two years and have been in almost constant conflict the whole time.
Smith has called the police on numerous occasions with noise complaints against Jones.

Both tenants have complained to the landlord many times:
Smith regarding Jones's noise disturbance; Jones about Smith's harassment.
The landlord, tired of hearing from both of them, has given them the ultimatum "to work things out" between them.

or he will not renew either of their leases (which expire at the end of the month).
They both like the units and wish to stay.

What are the tenants’ common grounds?
- Both are creative
- Both need to work
- Both want to stay

Both agree on all these common interests. This is the 2nd agreement in the work in progress.

The mediator’s page

- During the parties’ opening statements, he jots down a few notes
- Then he encircles parties’ common ideas or feelings

Smith's Unit
  Bedroom
  Kitchen
Jones' Unit
  Bedroom
  Kitchen
Identifying the issues

What’s really going on?

The mediator needs to explore parties’ major issues, major concerns.

To this end, the mediator has to hone his reflective skills:

- active listening (with eyes and head nodding)
- summarizing (and not just repeating back)
- re-framing

By doing so, the mediator:

- he acknowledges with empathy
  (I understand why you feel that…
  (# sympathy, since you lose neutrality)
- he clarifies with open question
  Could you describe your relationship? Tell me more
  (# closed question: Your relationship were very bad, weren’t they?)

Reframing exercise

(On the side of the complaining party)

It’s just not fair. I’ve given so much to this partnership and now he has just decided to sell out.

(The mediator) So it’s important to you to have your role recognized. Is that right?

He’s always walked all over me in the business partnership. It’s not going to be any different today.

(The mediator) I understand that you would like the business partnership to be conducted on an equal footing. Is it correct?

(On the side of the reproaching party)

He has a far better memory for details than I do. I really don’t stand a chance once we start arguing.

(The mediator) What I understand, Philip, from your perspective, is that you need to get your point across in discussion with Robin even though you can’t remember the details. Is it what you feel?
Objectives of reframing on both sides:
- Shift from the negative perception to positive perception
- Mutualise concern

Back to Smith v Jones
In order to identify the issues, the mediator may use the whiteboard.
That helps:
- You objectify the issues and you separate people from issues.
In the pending case, the issues are:
- How to eliminate noise and disturbance?
- How to live and let live?
- How to renew the leases?

More explicitly:
- How to renew the leases?
- How to continue to work without disturbing the neighbour?
  - How to provide a quiet working environment?
  - How to provide an opportunity to practise guitar?
- How to build up neighbourly relationship?

Identifying issues = identifying common issues
- It is easier to address the issues together when common issues are gradually coming out.
- This is another level of agreement since the parties can work cooperatively.
- Check out not to have forgotten something before continuing.
- Then (logically) prioritize the issues while first asking parties to start and to be agreed on.

Setting the agenda
- In using sentences starting with "How?" instead of "Why?" and past tenses (Did...?/Was...?)
we have already shifted parties' thinking from the past and have focused their attention onto present and future.
- In prioritizing issues, we set an agenda to sort them out.

E.g. issues covered in agenda:
1. How to continue to work without disturbing the neighbour?
   - e) how to provide a quiet working environment?
   - f) how to provide an opportunity to practise guitar?
2. How to renew the leases?
3. How to build up neighbourly relationship?
The negotiation phase

Generating options
Options = possible solutions

How to come up with a host of options?
- encourage brain-storming open-ended solutions
  (without evaluating them: Oh that's ridiculous!)
- look again the agenda and link the issues
  (if... then...)

Recalling:

1st option: make the common wall thicker or sound-proofing?
2nd option: in Smith’s flat, swap Study with Hall?
3rd option: Smith moves out to live in Jones’ flat
   Jones moves out to live in Smith’s flat and conversely
Pb with 3rd option: flat’s exposure to the sunshine, flat overlooking a street or a garden, etc.
Testing options
(Recalling: two criteria: the efficiency criterion and the equity criterion)

- The mediator is just wondering whether...
- the 1st option (thicker or sound-proofing common wall) is realistic?
- 2nd option (swapping rooms in Smith's flat) is acceptable? since Smith is on the complaining side...
- 3rd option is viable? since other issues may come up in the near future

Impasses over one or two issues

Reasons for deadlock:
- the mediator may be inexperienced (e.g. the mediator is not seen as even-handed)
- the emotions of the parties are interfering ("getting in the way")
- parties are remaining or becoming too positional and entrenched/stuck (the claim is still massive and the other party feels having already made too many concessions, etc.)
- worse: one party is sabotaging the process...

Some mediator's strategies for resolving an impasse when it arises

(The mediator) We are making any progress at all.../Do you feel are we going somewhere?

- Make a break (Could we have a drink before moving on?)
- Organize a caucus session with one or the two parties
- Use a single negotiating text technique (e.g. Camp David)

Caucus session

- Separate - and private (confidential) - session (no revelation without party's expression permission)
- Goals:
  - to restrict unproductive communications between the parties
  - to test some options

Throughout the caucus,
the mediator promotes movement towards settlement out of court without bullying parties
- He is only in charge of the process.
- His role is to keep process on track and to invite parties to a joint session again thanks to a better understanding of the dispute.
- After a caucus session, he may find useful to reassure parties by saying: We have had a quite productive exchange...

Example of Mediator’s questions (in Smith v Jones case)

- Is there anything do you want to say now? to ask or specify for the moment?
- How do you think Jones or Smith will react? Is he likely to accept? Do you think it is achievable? What kind of settlement are looking for?
- I might be quite incorrect, it seems to me... / A serious question comes up to my mind: Are you aware of...? Have you considered your or his alternatives (Batna, or Watna)? Why That?
- Do you want me to communicate your question through to Smith or Jones?
The mediation technique was sketched in the framework of a mediation that had been taken place in America (at Camp David in 1978, with President Carter as a mediator).

Roger Fisher’s idea. This technique avoids pre-negotiating the starting point issue: where do we start?

An initial text was proposed by the Americans. Each party was invited to criticize and amend the text.

23 rounds of negotiation were necessary before reaching a text, satisfactory to both sides.

When everything else fails:
- Question experts (if both parties come to the mediation with grim reports from two experts witnesses) – questioning = just clarifying, not cross-examining the experts!
- Allow for another meeting (on second thoughts other solutions may come out to fix the pb)
- Allow for partial agreement (for lack of complete settlement) – better than a breakdown – perhaps a preliminary step before full resolution

The mediation settlement

The closing statement

After checking whether everything has been included, the mediator invites the parties to finalize their agreement

Both parties’ short and long term interests should be met

Each party should be better off with no adverse consequences

(both parties are maximizing with the lowest possible transaction costs - time, money, energy, emotion)

The agreement phase leads to the mediation settlement

Drafting the agreement
- avoid a tortuous language!
- use Lord Denning’s style (short and clear sentences)
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MEDIATION

ADR

Do not forget the 5 W, H:
- Who? (parties to Agreement, authority to sign)
- How? (circumstances of mediation)
- Where? (location) When? (date)
- What? (principal terms of statement, including binding or not binding clauses, default clause, confidential clauses, privilege clauses, future dispute resolution clause, etc.)

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MEDIATION

ADR

Heads of Agreement

(no need for lawyers)

1. Each party will take over the other party’s lease on the 12th of September 2009
2. Each party will pay its own moving cost
3. Both parties jointly will request the landlord to contribute to any decorating cost (via either a lump sum or in proportion of costs incurred)
4. If the landlord does not contribute to costs as defined in 3., each party will pay the cost to decorate the flat into which they will move

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MEDIATION

ADR

Formal Agreement

The Agreement is made the 12th of September 2009 between Mr John Smith and Ernest Jones...

Whereas (recitals)...

Now it is hereby agreed as flows

1. ....
2. ...
3. .... described in the first schedule hereto (“Schedule 1”)
4. .... and annexed hereto as he second schedule (“Schedule 2”)

In witness whereof the parties hereto have hereunto set their respective hands the day and year above written

The said John Smith in
The presence of Mr Alain Laraby, mediator

The said Ernest Jones in
The presence of Mr Alain Laraby, mediator

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MEDIATION

ADR

To sum up:
- the mediation process is made up of three moments:
  - the understanding phase
  - the negotiation phase
  - the agreement phase
- During the process, the mediator is neither a leader nor a manager but a facilitator
  creating an atmosphere conducive to settlement proposals to which the parties have become committed

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MEDIATION

ADR

The Closing statement

- commend the parties for attending
- thank the parties for effort and conduct (for having been courteous and positive)

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MEDIATION

ADR

If no agreement (or partial agreement)

- remind the parties of the benefit of the participation
- leave the door open to return
- refer to dispute resolution process
If full agreement
- acknowledge the parties’ effort and perseverance
- give credit for agreement to the parties
- encourage compliance

Post-mediation procedures
- filing any necessary paper work
- monitoring implementation of settlement terms (follow up reviews, through another mediation or coming back before the same mediator)

Watch out! The mediator cannot monitor / check the progress himself (no police role)

Mediator’s areas of intervention

Dispute between neighbours, family dispute, on-going business relationships affected by a mutual misunderstanding, international disputes whether between States or private companies, etc.

Different models of mediation coping with such a diversity of dispute
(in addition to interested-based Harvard approach, see the transformative mediation, the narrative mediation, the restorative mediation, and so on)

Mediation training centers in English:
Among the best ones, as far as I know:
- in America: Harvard Law School (in Spring and Fall)
- in Europe: The London Chartered Institute of Arbitrators

Both centers organize workshops offering drills for reframing, impasses exercises, etc.

The London Chartered delivers accreditation after examining how you practise mediation